

IUS ROMANUM

II/2018

IUS &
HUMANITAS



IVSTITIA ET CLEMENTIA

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LECTORIS SALUTATIO

С брой II за 2018 г. на електронното списание на Юридическия факултет на Софийския университет „Св. Климент Охридски“ IUS ROMANUM за трети път се реализира решението на Общото събрание на Балканската асоциация по римско право и римскоправна традиция „*Societas pro iure romano*“ (S.I.R.) то да бъде съставено от докладите и статиите на участниците в ежегодната международна конференция на Асоциацията. На 25 и 26 октомври 2018 г. в Скопие, под егидата на Юридическия факултет „Юстиниан Първи“ на Скопския университет „Св.св. Кирил и Методий“, Италианското посолство в Македония, Представителството на Фондация „Конрад Аденауер“ и с подкрепата на Юридическия факултет на Софийския университет беше проведен този престижен научен форум, затвърждаващ сътрудничеството между романистите от балканските държави и техните колеги от водещите университети на Западна Европа. В Конференцията участваха повече от 50 романисти от България, Испания, Италия, Македония, Румъния, Сърбия, Унгария, Хърватия и Черна гора (страните са изброени по азбучен ред, а не според броя на участниците).

Темата на конференцията „IUS & HUMANITAS“, определена от Управителния съвет на Балканската асоциация съвместно с организаторите, е свързана с предстоящото на 10 декември 2018 г. честване на 70 години от приемането на Всеобщата декларация за правата на човека и основните свободи от Общото събрание на ООН. Несъмнено Декларацията е първото значимо постижение на Световната организация в тази област и първото записване на световно ниво на правата, присъщи на всички човешки същества. Нейните разпоредби са доразвити в последващи международни споразумения за защита на човешките права, в национални конституции и закони, и за изминатите седем десетилетия е установена трайна и обширна практика по прилагането им.

Тази тема дава големи възможности за научни изследвания и на Конференцията беше представена богата палитра от концепции и позиции по основните проблеми, свързани със защитата на човешките права и в по-общ план – хуманните аспекти на правото. В този контекст беше и своеобразното честване (макар и с малко закъснение) на 80-годишния юбилей на един от инициаторите и най-активен участник в Балканската асоциация и нейните конференции – почетният ѝ член проф. Себастиано Тафаро. Неговата книга „*Ius hominum causa constitutum. Un diritto a misura d'uomo*“, издадена от италианското издателство Edizioni Scientifiche Italiane точно преди 10 години, не само е забележителен научен труд, посветен на защитата на човека и на основните ценности в неговия живот – тя представлява и своеобразен научен мост между античното и съвременното право, фундамент за сравнителноправни и догматични изследвания, в които римското право заема значима позиция. В предговора проф. Тафаро пише: „Считам че е

полезно да обединя в едно някои от моите разсъждения относно централната роля на човека в римското право [...] с цел да се изясни това, което римските юристи възприемат като основна характеристика на IUS. Значимата традиция, възплътена в изработената през II в. сл.Хр. структура на Институциите на Гай, и следвана почти дословно в Институциите на Юстиниан, невинно разкрива централната роля на човека. Римското право е разглеждано в три дяла (хора, вещи и средства за защита), с риск да не се възприеме насочването му към основната цел за положението на хората, без която обаче то би изглеждало без съдържание, и следователно да се обезсмисли значението и интересът към цялото право (IUS)“.

Така като своеобразно мото на Конференцията се утвърди именно становището на римския юрист от края на III в. Хермогениан, запазено в Дигестите и поставено в началото на титулите, посветени на личното право:

D. 1.5.2 (Hermogenianus libro primo iuris epitomarum) Cum igitur hominum causa omne ius constitutum sit...

На Третата международна конференция на Балканската асоциация се потвърди основната насока за научните изследвания, определена в нейния Устав – представяне не само на римскоправните институти и принципи, но и на развитието на римскоправната традиция през вековете, непреходните стойности от Античността, възплътени в съвременното право. Наред с изследванията на членовете на Асоциацията от Балканските страни са включени и статии на романисти от най-престижните европейски университети, които приветстват целите на нашата организация, превръщаща се постепенно в едно от авторитетните международни правни сдружения в Европа.

Решението на Общото събрание на Балканската асоциация списанието да се превърне в трибуна на балканското сътрудничество се потвърждава и от настоящото издание. Запазена е традицията да се включват статии, обединени в определена тема. *Universum iuris romani*, както е озаглавено, може да означава и „вселената на римското право“ – един необятен свят, завещан ни от античните юристи, който има неподозирана жизненост и принципност. При по-задълбочено проучване той често изненадва с модерността на възгледите, тълкуванията и правните разрешения, създадени преди почти две хилядолетия.

Статиите са подредени по реда на представянето на съответните доклади на Международната конференция в Ниш. Те са разделени на две основни групи – публично и частно право, с изведени пред тях основни доклади, така както са провеждани и паралелните сесии на Конференцията. Включени са и встъпителните слова на учредителите и организаторите на Конференцията.

Включени са изследвания на трите езика на Балканската асоциация – английски, френски и италиански. По изричното желание на някои автори статиите им са преведени на български език, а има и написани на българс-

ки специално за този номер. С индексирването на списанието в три различни база данни – CEEOL, HeinOnline и ERIH PLUS се дава една доста широка възможност не само за изява на повече автори, които публикуват своите научни изследвания на тези езици, но и за достъп на по-широка международна аудитория до списанието, съответно за утвърждаването му като авторитетно научно издание извън пределите на България.

Традицията, възприета от предходните броеве, е да се публикуват статии както на изявени и авторитетни романисти, така и много интересни разработки на млади колеги, които представят романистичната традиция по един нов начин – осмислен и интерпретиран от новото поколение юристи в Европа.

В списанието се следва утвърденият стандарт във връзка с предоставянето му в горепосочените база данни, като се въвежда нова форма с пагинация и съответно цялостното му поставяне в интернет, а също и на предходните номера на сайта на IUS ROMANUM, което значително улеснява както запознаването с общото му съдържание, така и цитирането на съответните публикации. Поради различните изисквания за цитиране и невъзможността всичко да се съобрази с международния стандарт, редакторската намеса е само в българските статии, а в публикациите на други езици само най-обща – съгласно модела, възприет в списанието. Там където авторът настоява да се запази този в оригинала, това е указано.

Надяваме се, че с този номер на списанието IUS ROMANUM ще привлечем вниманието на юридическата общност към особено актуалната тема през 2018 г. – за хуманизма и правата на човека, за достойно отбелязване на знаменателната 70-годишнина от приемането на Всеобщата декларация за правата на човека и основните свободи, както и на 10 години от влизането в сила на 1 декември 2009 г. заедно с Лисабонския договор и на Хартата на основните права на Европейския съюз, приета от Европейския парламент на 7 декември 2000 г.

С публикуването на статиите и докладите от Третата международна конференция на Балканската асоциация по Римско право и римскоправна традиция отново се потвърждават възможностите за разгръщане на едно още по-широко сътрудничество в духа на основните принципи за правно развитие, завещани ни от древните римляни в рамките на вече утвърденото научно списание IUS ROMANUM, което е на прага на своята пета годишнина.

LECTORIS SALUTATIO

It is for the third time in a row now that with Issue 3 of 2018 of the electronic journal of the Law Department at Sofia University “St. Kliment Ohridski”, IUS ROMANUM, the decision of the General Assembly of the Balkan Association for Roman Law and Roman Legal Tradition “Societas pro iure romano” (S.I.R.), has been realized, i.e. for it to include conference reports and papers by participants in the annual International Conference of the Association. On 25th and 26th in Skopje under the auspices of the Faculty of Law “Justinian the First” at Skopje University “Ss. Cyril and Methodius”, the Italian Embassy in Macedonia and the representation of Konrad Adenauer Foundation together with the support of the Faculty of Law at Sofia University “St. Kliment Ohridski”, this prestige academic forum took place confirming the cooperation among Romanists of the Balkan countries and their colleagues from leading universities in Western Europe. More than 50 Romanists took part in the conference from Bulgaria, Spain, Italy, Macedonia, Romania, Serbia, Hungary, Croatia and Montenegro (countries are listed in alphabetical order, not in terms of the number of delegates).

The conference topic “IUS & HUMANITAS”, determined by the Administrative Council of the Balkan Association and the organizers, relates to the forthcoming celebration on the 10th December 2018 of the 70th anniversary from the adoption by the UN General Assembly of the Universal Declaration of Human Rights. Undoubtedly the Declaration has been the first important achievement of the world organization in this field and the first worldwide recording of the rights inherent to all human beings. Its provisions have been developed in subsequent international treaties providing for the protection of human rights, national constitutions and legislations, while for the past seven decades consistent and extensive case-law has been established concerning their implementation.

As this topic provides ample research opportunities, the conference presented a great variety of concepts and positions on the main issues concerning the protection of human rights and in general, the humane aspects of law. In this light the event was also a form of celebration (though with some delay) of the 80th anniversary of one of the initiators and most active participants in the Balkan Association and its conferences, its honorary member, Professor Sebastiano Taffaro. His book “Ius hominum causa constitutum. Un diritto a misura d'uomo”, issued by the Italian publishing house – Edizioni Scientifiche Italiane – exactly 10 years ago, is not merely a remarkable scientific work dedicated to the defence of the human being and the fundamental values in a human life. It also represents an academic bridge between the law of the Antiquity and contemporary law, a basis for comparative legal and dogmatic research where Roman law holds a central position. In its introduction Professor Taffaro wrote: “I find it useful to solidify some of my reflections into one [concept] about the central role of the human being in Roman Law [...] for the purposes of explaining what Roman theo-

rists perceive as a basic characteristic of the IUS. The significant tradition embodied in the structure of the Institutes of Gaius elaborated during the 2nd century A.D., followed almost word for word in the Institutes of Justinian, does not always reveal the pivotal role of the human being. Roman Law is examined into three divisions (people, things and remedies) taking the risk that the direction towards its main goal about the human position will not be perceived, without which, however, it will seem void of content and, therefore, this would divest of meaning and interest the entire law.”

Thus, it was namely the Roman jurist's opinion from the end of the third century, Hermogenian, preserved in the Digests and placed in the beginning of titles, dedicated to the personal right, that formed a distinct motto for the conference:

D. 1.5.2 (Hermogenianus libro primo iuris epitomarum) Cum igitur hominum causa omne ius constitutum sit [...]

The Third International Conference of the Balkan Association affirmed the main guideline for academic research, set out in the Statutes of the association, i.e. the presentation of not only the Roman legal institutes and principles but also of the developments within the Roman legal tradition in the centuries and the timeless values of the Antiquity incorporated in modern law. The agenda, and respectively the current issue of the journal divides the studies into two main groups – a public and private law one with key reports coming first. Along with research studies of the members of the Association from the Balkan countries, papers have been included by Romanists from some of the most prestigious universities in Europe welcoming the goals of our association as it is gradually becoming one of the authoritative international legal associations in Europe.

The decision of the General Assembly of the Balkan Association for the journal to become the tribune of Balkan collaboration is reaffirmed by the current issue of the journal. It preserves the tradition for the inclusion of papers united under a specific topic. *Universum iuris romani*, as the issue is entitled, can also mean “the Roman Law universe” – one ubiquitous world left to us by Roman jurists characterized by an unsuspected vivacity and integrity. On closer examination, it would often surprise with a modernity of its views, interpretations and legal resolutions created more than two millennia ago.

Papers follow the order of reports presentations at the International Conference in Nis. Key note speeches and reports by the conference founders and organizers are included as well. In addition, two main sections are formed – on private and public law, in accordance with the way parallel sessions took place at the conference.

Papers in this issue continue to be published in the three languages of the Balkan Association – English, French and Italian, whereas along with them upon the authors' explicit requests there are papers translated in Bulgarian as well as papers written in Bulgarian especially for the current issue. The fact that the journal is indexed in three different indexing databases – CEEOL, HeinOnline and ERIH PLUS provides not only a great publishing opportunity for more au-

thors who publish their academic studies in those languages but also an opportunity for greater readership access on an international level and respectively for its acclaim as an authoritative academic edition outside Bulgarian borders.

The tradition adopted in previous issues is that of publishing papers by prominent and authoritative Romanists together with papers by a significant number of young colleagues with very interesting developments presenting the Romanist tradition in a new way – analyzed and interpreted by the new generation of jurists in Europe.

The journal complies with the approved indexation standard in the abovementioned databases, introducing a new form of pagination and appearance of the issue on the Internet as well as of previous issues on the IUS ROMANUM website, which will further facilitate both the access to the entire contents of the issue and the citations of the corresponding publications. Due to citing requirements differences, the impossibility of adapting everything according to Bulgarian standard and the fact that papers are published in foreign languages, the editor's intervention is only with regard to Bulgarian papers while as far as papers in other languages are concerned it is general, only in terms of format, titles, authorship and abstracts.

We hope that this issue of the IUS ROMANUM journal will draw the attention of the legal community to the particularly topical theme in 2018, that of humanism and human rights and the worthy celebration of the remarkable 70th anniversary from the adoption of the Universal Declaration of Human Rights as well as 10 years since the coming into force along with the Lisbon Treaty on 01.12.2009, of the Charter of Fundamental Rights of the European Union, adopted by the European Parliament on 07.12.2000. The papers and reports published at the Third International Conference of the Balkan Association for Roman Law and Roman Legal Tradition have once again confirmed the opportunities for a more extensive collaboration in the spirit of the basic principles of legal development, inherited from the ancient Romans, within the already established academic journal IUS ROMANUM which is already looking forward to its 5th anniversary.

ОБЩИ ИЗСЛЕДВАНИЯ

GENERAL STUDIES

HOMO↔PERSONA (НА ИТАЛИАНСКИ ЕЗИК)

Проф. д-р Себастиано Тафаро

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Резюме: В статията е разгледано съотношението *homo↔persona*, което е в основата на съвременната доктрина за правосубектността и правоспособността на физическите лица (правните субекти), но което има различна интерпретация в римското право и в становищата на римските юристи от това в съвременното право.

Човекът, определян с термина „*persona*“, заема централно място в римското право. Той е изцяло дело на римската юриспруденция, която изрично определя, че цялото право е създадено от човека и той е неговото основание и цел. Впрочем, човекът държи сметка за признатите му неотменими и неизменими прерогативи в организацията на *Civitas*. Но той трябва да ги запази, осъзнавайки своята правна значимост за самия себе си, която в никакъв случай не може да се абсорбира и да зависи от признаването ѝ от някаква отделена от него обществена организация (каквато е за нас държавата). Чрез едно сложно развитие, на „*persona*“ се приписва смисъл, свързан не само с историческия план, но и с признаването в по-голяма или по-малка степен на определени или предполагаеми ценности. Това води до откъсването на понятието за субект на правото от самия човек и е причина за много грешки и противоречия.

Разграничението между *homo* и *persona* достига своята кулминация в създаването на понятие за правен субект – физическо или юридическо лице. Продукт на този процес са съвременните понятия за правосубектност, съответно конкретизирани в понятията за правен субект, правоспособност, дееспособност.

Изправени пред тази правна действителност и пред изкуствено създадените понятия, добре е да се обърнем отново към понятието за *persona* в римското право, което изглежда ползотворно и може да бъде отправна точка за правото на утрешния ден и бъдещите поколения.

Ключови думи: Homo; persona; правоспособност; дееспособност; правен субект; *Ius hominum causa constitutum*; *Persona iuris civilis vocabulum*.

HOMO↔PERSONA (ITALIAN LANGUAGE)**L'UOMO↔PERSONA****Prof. Sebastiano Tafaro, PhD**

University of Bari „Aldo Moro“, Italy

Abstract: The article examines the relation between homo (the human being) and person in general sense, which is the basis of the modern doctrine on the legal capacity of individuals (physical persons) but which has different interpretations in Roman law and in the opinions of Roman jurists than in the modern law. Man is at the center of Roman law, defined by the term "persona". This term is an entirely product of Roman jurisprudence, which explicitly states that the whole law is created by man, and that he is its cause and purpose. Moreover, the man takes into account his inalienable and indispensable prerogatives in the organization of Civitas. But he has to keep them for himself as he can realize his legal significance which can by no means be absorbed and depend on recognition by a separate social organization (as is the state for example). Through a complex development, to the "persona" is attributed a meaning not only related to the historical plan but also to the recognition of more or less certain or supposed values. This leads to the detachment of the notion of a subject of the law by the man himself and is the cause of many mistakes and contradictions. The distinction between homo and persona reaches its culmination in creating a concept of a subject of law – a physical person or a legal personality. The product of this process is the contemporary concepts of legal personality, respectively specified in the notions of legal entity, legal capacity, legal capacity to act. Faced with this legal reality and artificially created concepts, it is worth reverting to the concept of persona in Roman law, which seems beneficial and may be the starting point for the law of tomorrow and future generations.

Keywords: Homo; persona; legal capacity; legal capacity to act; subject of law; *Ius hominum causa constitutum*; *Persona iuris civilis vocabulum*.



Volendo esaminare la considerazione e la collocazione dell'uomo nell'esperienza e nel diritto romano, mi sembra doveroso fare i conti con la differenza di ottiche esistenti tra noi ed i Romani.

Soprattutto un punto mi pare che si debba evidenziare e assumere in via primaria nell'analisi e nell'eventuale comparazione: **l'assenza di qualsiasi traccia nel diritto romano delle categorie concernenti la *personalità giuridica* ed i *diritti soggettivi***, dipendenti dal riconoscimento (di norma contenuto nei Codici) e dalla tutela accordati dall'*ordinamento giuridico* (di norma nazional-statuale).

Ritengo invero fonte di equivoci l'esame della realtà romana alla luce, ad esempio, della *capacità giuridica* o della *capacità di agire*, come però spesso avviene, da parte dei romanisti, i quali, pur evidenziando l'inesistenza di quei concetti presso i romani, tuttavia li ritengono utili a capire il diritto romano, perché comunque utili a cogliere la realtà giuridica romana, nella quale essi mostrerebbero concreta operatività.

Lo stesso vale per il concetto di *soggetto di diritto*, usato per indicare chi abbia la *capacità giuridica* e spesso divenuto sinonimo di *persona*.

In realtà non persuade proprio la configurabilità di un *diritto soggettivo*: sebbene diffusa e corrispondente all'aspirazione a dare risalto agli uomini, non è giustificata e in nessun caso mi appare applicabile al diritto romano.

Qui, attraverso un breve (e per necessità parziale) riesame tenterà di ricostruire la posizione degli *uomini* nel diritto romano.

Punto di partenza mi sembra la rivisitazione della nozione di *persona*, poiché “è *persona*-(*homo*) la parola che dà l'ordine al sistema giuridico: da Gaio (e forse già prima) a Giustiniano e, in certo modo, fino ad oggi”.

Parto dal richiamo della nota affermazione di Ermogeniano: “pertanto tutto il diritto è stato forgiato per gli uomini”:

D. 1.5.2 (Hermog. 1 iuris epit.): Cum igitur hominum causa omne ius constitutum sit, primo de personarum statu ac post de ceteris, ordinem edicti perpetui secuti et his proximos atque coniunctos applicantes titulus ut res patitur, decemus.

Poiché Ermogeniano con la sua “sintesi” si collocava alla fine dell'esperienza giuridica romana, con la sua enunciazione esponeva il “succo”

della pregressa elaborazione giurisprudenziale, si è indotti a ritenere che la sua affermazione sia stata frutto di una succosa sintesi del pensiero dei giuristi che l'avevano preceduto; pertanto essa costituisce la fotografia della concezione dei giuristi classici.

Tant'è che se ne possono rintracciare i precedenti; ad esempio in Gaio, nel di cui manuale *persona* era l'architrave che reggeva tutta la disciplina degli uomini:

Gai. 1.8: Et prius videamus de personis.

A loro volta le *Institutiones* di Giustiniano, rifacendosi al passo gaiano, proclamavano la centralità della *persona* a chiare lettere:

I. 1.2.12: Ac prius de personis videamus. Nam parum est ius nosse, si personae, quarum causa statutum est, ignorentur.

L'affermazione, autorevole vuoi per la natura della Fonte vuoi perché posta all'inizio del trattato destinato all'esposizione delle linee fondamentali concernenti lo *ius*, sembra riassumere, cogliendone il fulcro, lo sviluppo del diritto romano fino al VI secolo (d.C.). Essa lascia supporre che i redattori delle *Institutiones* abbiano riflettuto sul diritto romano e sul suo sviluppo arrivando alla conclusione che tutto lo *ius* era stato caratterizzato dalla massima considerazione delle persone, tanto da potersi dire creato in funzione di loro.

Ne scaturisce la consapevolezza della significativa centralità della *persona*, affermata progressivamente durante il lungo percorso di formazione ed articolazione del diritto romano. Essa si rifletté anche nelle sistematiche dei giuristi, alcuni dei quali, durante il Principato ed in particolare dal 2. secolo d.C., iniziavano le loro opere, partendo proprio dalle *personae*, come paradigmaticamente si è visto nel manuale istituzionale di Gaio, che, sul punto, era la fonte delle Istituzioni giustinianee.

In conclusione, vi è una continuità, che partendo dalle sistematiche dei giuristi del Principato arrivava sino a Giustiniano nel considerare la *persona* centrale e prioritaria in tutto il diritto.

Consapevole della necessità di ben più ampi e penetranti approfondimenti, qui vorrei chiedermi in che si caratterizzava un diritto che dichiarava di essere in funzione delle persone.

Il primo punto fermo deve essere la consapevolezza del distacco temporale e terminologico con il passato, per evitare che nozioni per noi abituali e frequenti condizionino la percezione del passato e finiscano per trasformarsi in “pregiudizi” rispetto alla realtà romana.

La quale era variegata e molto meno semplificata di quanto pensiamo oggi.

È per questo motivo che vorrei soffermarmi su quello che in realtà il termine *persona* ha rappresentato per i giuristi romani, il cui contributo è stato ed è (mi si consenta l'affermazione) penetrante ed elevatissimo; per loro (come spero di chiarire) la persona si identificava con l'uomo.

Sono persuaso dell'impossibilità di cogliere il significato di *persona* senza collocarla nella visione del *ius*, presente ai giuristi romani.

Vorrei, perciò, partire dal pensiero di Ulpiano, il quale seppe raccogliere l'eredità dei giureconsulti romani del Principato e divulgarla in forma incisiva, sicché il suo pensiero più di ogni altro ha contrassegnato il diritto dall'età romana ai giorni nostri. Il giurista era polemico nel rivendicare al diritto il primato nelle scienze umane, perché esso, a suo dire, era matrice della **vera filosofia**, ed aveva un valore così profondo da far considerare i suoi cultori (i giuristi) dei veri e propri *sacerdoti*. Il diritto cui guardava Ulpiano è quello più elevato della giustizia, equità e razionalità, sintetizzato da lui in tre (celebri) precetti fondamentali, a ragione ritenuti simbolo ed fondamento della civiltà giuridica:

D. 1.1.10.1. Ulp. 1 reg.: Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.

Come ognuno vede sono qui enunciati da Ulpiano tre pilastri sui quali deve poggiare il rispetto e la tutela della *persona umana*. Sono essi tre principi che riassumevano il cammino secolare della filosofia greca, rivisitata dai Romani e che, specie attraverso la mediazione del Cristianesimo, si sono proposti come riferimento del diritto sino ai nostri giorni. Del quale si avverte ancora l'opportunità in un periodo, qual è quello attuale, nel quale l'onestà, il rispetto della persona umana, il riconoscimento dei diritti fondamentali di ciascun popolo e di ciascun uomo appaiono messi in discussione o calpestati.

È per questo motivo che oggi appare necessario far partire il discorso sulla *persona umana* e sui suoi diritti fondamentali dalle radici del pensiero moderno, che nel diritto risiedono nelle fonti romane. In esse Ulpiano faceva

discendere *ius* da *iustitia*, insegnandoci che **il diritto è la giustizia** e risiede nello sforzo perenne di dare a ciascuno ciò che gli spetta, di non negare a nessun uomo ciò che la natura gli ha destinato e che la sua condizione esige.

La visione alla quale Ulpiano ci introduce era dunque quella che poneva un'equazione di **corrispondenza totale tra diritto e giustizia**, miranti al rispetto della dignità umana. Il che è ancora più evidente se si considerino le fonti, al cui insegnamento Ulpiano doveva ispirarsi, e che possiamo cogliere anche nelle affermazioni di retori e filosofi; tra i quali significative testimonianze sono offerte dall'autore della Retorica ad Erennio e da Gregorio Taumaturgico:

Ret. ad Herenn. 3.2.3: (iustitia est) aequitas ius unicuique rei tribuens pro dignitate cuiusque.

Greg. Thaum. In Origenem oratio panegyrica – MIGNE, Patr. Gr. 10 c. 9, p. 1079 B: dikaiosyne, hè tà axia hekàstois aponèmei.

Ecco dunque stabilito un legame indissolubile tra diritto e giustizia e tra diritto *equitas* e salvaguardia della dignità umana, *tèlos* (scopo) della vera *philosophia*, vero cardine del vivere civile: sono questi presupposti concettuali che spinsero Giustiniano ad affermare che tutto il diritto è finalizzato all'uomo.

Questa consapevolezza, lungi dal circoscriversi all'esperienza romana, è utile anche ad un momento, come l'attuale, di crisi di *valore* e di crisi del diritto, nel quale mi pare opportuno tornare ai fondamenti della nostra civiltà giuridica, per scoprire quale è l'essenza della nostra *civiltà giuridica*. Si vedrà così che essa risiede nella custodia e difesa della dignità del singolo uomo, nella consapevolezza che tutto il diritto è stato creato per le *personae*.

A questo risultato dette un apporto significativo il pensiero greco, ma la base fu la peculiare esperienza giuridica dei Romani, che dedicarono gelosa attenzione alle prerogative dell'uomo *in quanto autore del diritto*.

Tale caratteristica, certamente, era per antonomasia quella del *civis* e non dell'uomo *tout court*, ma fu suscettibile di allargamento e, dopo il 212, a seguito della concessione della cittadinanza a tutti i sudditi dell'Impero (ad opera di Antonino Caracalla), riguardò gran parte dell'orbe conosciuto e certamente tutto il Mediterraneo.

È questa la ragione per la quale la concezione della *persona* affonda le radici nelle specificità del retaggio che l'esperienza romana si portava dietro sin dall'età repubblicana e proto-imperiale, quando il diritto pervenne alle forme

passate nella giurisprudenza severiana e nel *Corpus iuris*, proiettandosi nel diritto canonico, nelle esperienze medievali e moderne, sino agli attuali diritti vigenti.

I Romani concepirono la persona come un centro di prerogative legato a determinate situazioni e finalizzato alla crescita della *Civitas*, all'interno della quale tuttavia l'uomo **manteneva sempre la propria specificità**, senza mai annullarsi nella collettività né perdere le prerogative personali dinanzi all'organizzazione cittadina.

Deriva da ciò la peculiare concezione di "popolo", che ha affascinato non pochi dei pensatori moderni e contemporanei. Scaturisce anche da ciò la connessa singolarità dell'acquisto dell'autonomia negoziale non al raggiungimento della maturità intellettuale o quanto meno psico-fisica, come è negli ordinamenti giuridici contemporanei e anche in molti dell'antichità, bensì al sopraggiungere della *pubertà*.

Sono questi due punti che visti da vicino mostrano quanto penetranti siano stati i principî romani nella costruzione di una giuridicità attenta alle istanze dei singoli, purtroppo spesso persi nel corso delle successive esperienze.

La *pubertà* nelle società in formazione assume un significato sacrale ed è legata alle visioni più profonde del destino dell'uomo e delle fasi della sua evoluzione; in altre parole è una delle tappe più significative del *ciclo della vita* umana. Solo tenendo presente questa premessa si comprende la *singolarità* della scelta romana, in base alla quale il fanciullo, divenuto pubere, avrebbe potuto (in astratto) percorrere la carriera politica sino alle più alte cariche e poteva diventare *pater familias*, avendo sotto di sé la madre e le sorelle. Ora tutto ciò si può spiegare solo avendo presente il vincolo, che si nutrì di nesi e di antagonismo, esistente tra le *familiae* e la *Civitas*. In esso si inseriva il singolo quale componente delle une e dell'altra; ma mentre nelle prime era assorbente la figura del "capo", nella seconda fu determinante l'apporto di "tutti i componenti": perciò nella *Civitas* l'individuo trovò la sua affermazione più piena. La quale caratterizzò definitivamente il "diritto", perché alla lunga la *Civitas* prevalse. Essa, infatti, era contraddistinta da un'idea di "crescita" costante, che ne segnò tutta l'evoluzione. Invero "l'intreccio indissolubile nel quale queste concezioni inserivano il rapporto tra persona, famiglia e *civitas* creava una

situazione di perpetuità ricca di tendenze positive e portatrici di idee universali. Tutto ciò non ha nulla a che spartire con il particolarismo giuridico degli stati nazionali e della sua frammentazione negli individualismi che oggi “quasi annullano le possibilità di crescita” della comunità e, con essa, delle persone.

L'idea di *civitas augescens* non è mai venuta meno in tutto il corso dell'esperienza e del pensiero romano e del diritto romano ed ha avuto l'effetto di finalizzare alla crescita le forme di società e tra esse, in primo luogo il matrimonio, fonte di crescita attraverso la filiazione e perciò alla base ed al centro della crescita”.

In essa si collocò e trovò giustificazione il ricorso alla *pubertas*: essa, con l'acquisizione della capacità a generare, consentiva al singolo di “far crescere” la collettività e, in quanto autore della crescita, gli dava titolo per entrare nell'organizzazione cittadina. Inoltre, poiché con la pubertà si passava ad una nuova fase della vita, nella quale un nuovo organismo veniva a sostituire il precedente, si poté affermare che vi era una nuova nascita e che essa, a differenza della prima, che avveniva nella famiglia, avveniva nella e per la *Civitas*. Nella struttura cittadina il “pubere”, dunque, entrava con titolo suo specifico e con attribuzioni connesse ai *cicli della vita* insopprimibili ed inalienabili, perché scaturenti da un ordine universale, che reggeva l'intero creato e del quale l'individuo era parte, ma anche depositario.

Perciò i Romani fissarono la pubertà al compimento del 14 anno, che nella visione cosmogonica della vita umana si presentava come multiplo del numero “sette”, ritenuto il numero intorno al quale si era costruito l'Universo (sette erano i pianeti, sette le note musicali, le fasi lunari etc.) ed era articolata la vita degli uomini e delle città. La scelta della pubertà denota quanto si fosse radicata nella cultura romana la concezione che vedeva la vita dell'uomo, di ogni uomo, legata allo svolgersi di sequenze aventi carattere insopprimibile e universale. Essa contribuì alla consapevolezza della necessità che anche il *ius* ne dovesse tenere conto, poiché a nessuno era consentito, senza andare contro le leggi profonde della *vita stessa*, dimenticare ciò.

Proprio per questi motivi fu colta dai Romani l'insostituibilità e la non coercibilità della realtà cosmico-terrestre "uomo", che si manifestava sin dal concepimento, ed implicava la cura dei nascituri, di *qui in utero sunt*.

Progressivamente questa realtà dell'uomo vivente, portatore di prerogative proprie ed espressione di leggi generali (per taluni autori antichi, cosmiche) venne sussunta nel termine *persona*, indicativo dell'uomo *autore del diritto*, secondo un'articolazione variegata, che andava dagli schiavi ai liberi, dalle *personae alieni iuris* a quelle *sui iuris*, dai *cives* ai *peregrini*.

Esemplare mi sembra proprio la disciplina, già segnalata, dei nascituri. Per essi si discuteva se fossero o meno *homines*, considerandoli alcuni giuristi solo parte del ventre materno, che non si potevano riconoscere come figli, così come non si poteva chiedere alla madre di esibirli o di consegnarli, tuttavia fu ugualmente considerato centro di imputazioni giuridiche, concedendo la *missio in possessionem ventris nomine*, facendolo oggetto di lasciti e di designazione di erede etc., tanto che il giurista Salvio Giuliano, nel 2. secolo d.C. poté generalizzare affermando:

D. 1.5.26 (Iul. 69 dig.): Qui in utero sunt, in toto paene iure civili intelleguntur in rerum natura esse [...]

Ciò è la conferma che la vita del singolo, pur se confluyente nell'organizzazione cittadina, era un *proprium* che gli apparteneva e che si completava senza scomparire nella *Respublica*.

Ne scaturì anche una stretta compenetrazione di pubblico e privato che è difficile riscontrare in altre esperienze e che segnò una felice armonizzazione delle esigenze del singolo con quelle della collettività.

Non a caso è stato notato che *publicus* mentre "fonctionne comme dérivé de *populus*, c'est à *pubes* qu'il se rattache pour la forme. *Publicus* est ainsi un hybride de *populus* et de *pubes*". E *pubes* indica sia il singolo sia la collettività, come nella locuzione *Pube praesenti in contione, omni poplo* ovvero in quelle che parlavano della *Dardana pubes* o della *Albana pubes* o della *Italica pubes* o *Romana pubes* e similari.

Della persistenza nel *civis* di una sua originaria autonomia sono testimonianza la concezione primigenia dell'*exilium* e la concezione del *ius domi*,

i quali rendono bene il contrappunto privato-pubblico, mai venuto meno, almeno nell'esperienza della *Respublica*.

L'*exilium* nacque come prerogativa pre-civica della persona, che poteva decidere di non far parte più della *Civitas Romae* e per lungo tempo rimase come prerogativa volontaria di allontanarsi dalla città, per scopi innocui (come quello di andare a fondare una *colonia*) o per sottrarsi ad una condanna. Era spesso previsto dal *foedus* con le comunità italiche ed extra-italiche; verosimilmente ebbe origine all'interno della lega Latina. Nella disciplina dell'età repubblicana sull'esilio si pronunziava il comizio, il quale poteva stabilire una sanzione, in particolare la *interdictio aquae et igni*, per rendere irreversibile la scelta secessionista. Di conseguenza, l'*exilium* o meglio lo *ius exilii* si configurava come un istituto a vantaggio di *ciascun cittadino*, all'interno della *Civitas*.

Quasi uguali impostazioni si riscontrano nella disciplina del rapporto della persona con la sua *domus*. Essa costituiva all'interno della *Civitas* il referente di appartenenza, così come verso l'estero era la *patria*. Assistiamo, perciò, ad una continua equiparazione tra *domus patria*, tra *domus* e *res publica*. Emblematicamente Quintiliano asseriva:

Quint. Inst. Orat. 3.6.25: An exulaverit, qui domi latuit.

Si stabiliva una somiglianza tra il regime della *domus* ed il regime dell'*exilium* rispetto ai problemi pratici che tendono a risolvere.

Tra i molti significati che le fonti attribuiscono alla *domus* vi erano anche, per analogia e contrapposizione, delle situazioni che rientravano nell'ordine di idee dell'*exilium*.

Riguardo alle conseguenze sociali e giuridiche, si identificava la tutela inerente all'idea di *domus* e quella che nasceva dalla relazione d'appartenenza ad una comunità organizzata: si affermava esplicitamente l'idea che, come ogni rapporto politico prevedeva una tutela giuridica, sia pure imperfetta ed embrionale, così il trovarsi nella casa determinava una protezione rispetto al più ampio ambito della comunità organizzata della *Civitas*.

La distinzione concettuale che i Romani facevano dell'attività individuale e della tutela offerta a questa attività era fondata sull'autonomia riconosciuta a ciascuno di tali ambiti: si può anzi dire che la storia costituzionale romana si è

svolta in parte per le reciproche influenze e reazioni che ognuno di tali ambiti ha esercitato sull'altro.

La *domus* si proponeva come luogo inviolabile e l'allontanamento da essa non aveva sapore diverso dall'esilio. La sua protezione era conseguenza immediata dell'autonomia familiare: la sua sicurezza e quiete venivano garantite non solamente contro vie di fatto e turbamenti illegittimi, ma anche contro taluni atti legalmente validi e che tuttavia non trovavano applicazione se comportavano una lesione del diritto all'invulnerabilità della *domus*. Perché si basava su un profondo motivo religioso, di cui si faceva portavoce Cicerone, testimone di un'antica consapevolezza:

Cic. Pro dom. 41.109: Quid est sanctius, quid omni religioni munitius quam domus unius cuiusque civium? Hic arae sunt, hic di penates, hic sacra, religiones, caerimoniae continentur, hoc perfugium est ita sanctum omnibus ut inde abripi nemo fas sit.

Vi erano istituti in cui il diritto all'invulnerabilità della casa appariva superiore alla legge della *civitas*. Così Gaio affermava l'illiceità della *vocatio in ius* di chicchessia *de domo sua* e anzi affermava che una siffatta *vocatio* sarebbe dovuta essere considerata un caso di *vis*:

D. 2.4.18 (Gai 1 ad l. XII tab.): Plerique putaverunt nullum de domo sua in ius vocari licere, quia domus tutissimum cuique refugium atque receptaculum sit, eumque qui inde in ius vocaret vim inferre videri.

Più tardi dovette intervenire un'attenuazione del principio *neminem de domo sua extrahi posse* e si ammise che potesse esercitarsi la *in ius vocatio* anche di chi era *in domo sua*, ma non si concesse la possibilità di trarlo con la forza, come appare da un frammento di Paolo:

D. 2.4.21 (Paul. 1 ad ed.): Sed etsi is qui domi est interdum vocari in ius potest, tamen de domo sua nemo extrahi debet.

Stando a Gaio, perciò, l'*in ius vocatio* sembrerebbe stata possibile solo nei confronti di chi venisse trovato fuori della propria casa, secondo un principio di invulnerabilità e di asilo presso la propria *domus*, fatto risalire alle XII tavole:

Quint. Inst. orat. 7.8: Lex statuit: ex domo in ius educere non liceat.

Su questa base si comprende il significato di esilio riconosciuto da Quintiliano, nel brano riportato di *inst. Orat. 3.6.25*. Era l'invulnerabilità della *domus* con quanto ne conseguiva a dettare l'accostamento tra la perdita della casa e l'esilio.

E doveva essere questo l'ordine di idee in cui si muoveva anche Cicerone, quando parificava la perdita della città alla perdita della casa, subite da Bibulo:

Cic. in Vat. 9.22: M. Bibulum foro, curia, templis, locis publicis omnibus expulisses, inclusum domi contineres; cumque non maiestate imperil, non iure legum, sed ianuae praesidio; et parietum custodiis consulis vita tegetur: miserisne viatorem, qui (Bibulum) domi vi extraheret, ut, quod in privatis semper est servatum, id, te tribuno plebis, consuli domus exilium esse non potest.

Insomma la casa era parificata alla città e così come si poteva cercare rifugio presso una comunità straniera, esercitando il *ius migrandi* ed invocando il diritto di asilo, per sottrarsi al potere degli organi della città, lo stesso diritto poteva essere esercitato verso la *domus*.

Il fatto è che l'esperienza romana offre un intreccio significativo nel quale l'individuo era nella collettività ma nello stesso tempo **era** la collettività e, pertanto, non scomparivano la sua specificità e la sua preesistenza alle leggi della Città.

Ciò è evidente nella concezione e della *Respublica* e del suo substrato personale, il *Populus Romanus Quirites*, vissuto come entità concreta intesa come "tutti i cittadini" e non come entità ideale e astratta, quale è nelle concezioni moderne. In siffatta concezione "certi diritti sono acquistati e difesi dal singolo cittadino" e pone in evidenza, di volta in volta, "l'aspetto della 'unione' (o della 'riunione') e quello della pluralità", la quale "ha implicazioni normative ben precise negli *iura populi Romani*".

Queste radici sono, a mio avviso, importanti, perché disposero, come si è detto, all'accoglimento delle concezioni elaborate dai filosofi e retori greci; le quali, nelle loro più significative espressioni, avevano posto l'uomo al centro delle proprie costruzioni sulla realtà del mondo e dell'universo.

Vi era, di conseguenza, matrici culturali profonde perché la *persona* venisse considerata come portatrice di istanze e diritti propri. Certo essa concerneva i *cives* e non gli uomini in quanto tali, ma bisogna tenere presente che le elaborazioni giuridiche furono fatte per i cittadini e poi vennero estese agli "uomini" sotto la spinta dell'allargamento dei confini dell'Impero e, più tardi, della concessione della cittadinanza a gran parte dei sudditi. A quel punto si era

affermata nella terminologia l'uso di *persona* per indicare gli uomini in quanto relazionanti con il diritto.

Significativo, al riguardo, fu l'atteggiamento e il diritto elaborato per gli schiavi.

Sempre più gli approfondimenti dimostrano quanto sia erronea l'opinione che vuole mantenere i *servi* nello stretto ambito delle *res*, come meri oggetti del diritto e non referenti di situazioni e forme di tutela. Si scopre, invece, che la loro condizione di "uomini" penetrò in modo significativo anche nella normativa giuridica e, soprattutto, nelle enunciazioni dei giuristi del Principato, suggerendo soluzioni che oserei definire di "soggettività" o che comunque, quanto meno, riconoscevano il *servus* come "un soggetto portatore di una dignità, di un valore in sé, proprio dell'uomo in quanto tale", con implicazioni profonde sia nel diritto privato che in quello pubblico.

Molti sono gli aspetti specifici posti in luce dagli studi più recenti, i quali hanno evidenziato l'esistenza di una vera e propria capacità patrimoniale degli schiavi, con proiezioni persino manageriali, ed hanno suggerito al Robleda di rivendicare l'esistenza di un *diritto degli schiavi*. Il quale parte anche dal rilievo avuto dalla *religio*, la quale spesso non poneva differenze tra *servi* e *liberi*, come appare evidente dai *punti evidenziati dall'autore iberico*:

- I. Era riconosciuta la validità dei "voti" fatti dal *servus* alle divinità, allo stesso modo di quelli formulati dai *fili familias*: in proposito vi è la testimonianza di Ulpiano (in D. 50.12.1.1) e quella di numerose epigrafi recanti una significativa dovizia di siffatti voti.
- II. Sul piano religioso il giuramento prestato dallo schiavo aveva la stessa validità di quello dell'uomo libero, sebbene di norma il giuramento del *servus* non fosse ritenuto valido nel *ius civile*.
- III. Gli schiavi, con il consenso del padrone, potevano far parte di collegi professionali e dei *collegia tenuiorum*, nella stessa posizione e con gli stessi diritti e doveri dei membri "liberi"; potendo persino "arrivare ad avere pure la carica di presidente".
- IV. Infine, il luogo dove fosse seppellito uno schiavo diventava *locus religiosus*, non diversamente dal luogo dove fosse stato seppellito un "libero", sicché per gli schiavi si doveva riconoscere il diritto a

“iusta funebria, con delle possibili azioni inde emergenti”. L’a ricordando l’opinione dello Schulz, concludeva affermando il riconoscimento della “personalità” dello schiavo, poiché “le norme p.es., versanti sul ius sepulchri affettano i servi – cioè difendono ed obbligano i servi – ugualmente che i liberi”.

Gaio ci dice che l’uccisione dello schiavo poteva essere perseguita anche attraverso un *iudicium publicum*: quello previsto dalla *lex Cornelia de sicariis*:

Gai. 3.213: Cuius autem servus occisus est, is liberum arbitrium habet vel capitali crimine reum facere eum qui occiderit, vel hac lege – Aquilia - damnum persequi.

Coll. 1.3.2 (Ulp. VII de officio proconsulis sub titulo de sicariis et veneficiis): Relatis verbis legis modo ipse loquitur Ulpianus: Haec lex non omnem, qui cum telo ambulaverit, punit, sed eum tantum, qui hominis necandi furtive faciendi dausa telum gerit, coercet. Compescit item eum, qui hominem occidit, nec adiecit cuius condicionis hominem, ut et ad servum et peregrinum pertinere haec lex videatur.

Giustamente è stato posto in risalto il fatto che l’inclusione dello schiavo tra le persone tutelate con giudizio pubblico costituisce un vero salto di qualità nella concezione della condizione servile. La *lex Cornelia de sicariis* era rivolta alla punizione di chi avesse ucciso dolosamente un cittadino; pertanto l’estensione di essa al caso dell’uccisione dello schiavo doveva essere conseguenza di “una revisione radicale della mentalità”, che “segna una svolta, un deciso mutamento di rotta nella considerazione sociale e giuridica dello schiavo”.

Mi pare che l’estensione della punizione per omicidio anche allo schiavo sia di grande rilievo e dimostri a chiare lettere come operasse l’intreccio pubblico-privato nella considerazione e tutela delle persone, la quale al tempo di Antonino Pio arrivò a prevedere anche la punizione di chi avesse ucciso il proprio schiavo. È ancora Gaio a darcene notizia:

Gai. 1. 53: nam ex constitutione imperatoris Antonini qui sine causa servum suum occiderit, non minus teneri iubetur, quam qui alienum servum occiderit.

La punizione, che doveva essere affidata anche qui ad un *iudicium publicum*, probabilmente lo stesso previsto dalla legge sillana *de sicariis*, supera nettamente la concezione dello schiavo come *res* e riconosce in modo palese il *diritto alla vita* dello schiavo.

Qui vorrei ricordare quella accordata ad un'altra categoria di persone particolarmente "*deboli*", nella società del tempo: le donne ed i fanciulli.

La proiezione naturale per le donne era il matrimonio. Con esso, infatti, la donna si realizzava e realizzava la sua posizione giuridico-sociale all'interno della società romana. In conseguenza di ciò il matrimonio era nell'interesse della donna, ma anche della sua *familia* e della *Respublica*. Ma per arrivare al matrimonio la donna aveva bisogno di avere la *dote*, che era diventata essenziale nella struttura del matrimonio romano. Questa esigenza era molto antica nell'esperienza romana ed era tanto avvertita che Plauto metteva l'accento sulla difficoltà di sposarsi per le donne senza dote, arrivando addirittura ad accostare il matrimonio senza dote al concubinato.

Orbene per assicurare alla donna l'effettiva possibilità di contrarre matrimonio i giuristi affermarono la necessità dell'intervento pubblico, sottraendo quindi la tutela della donna alle sole forme previste dal diritto privato, anche nel caso in cui il matrimonio non fosse ancora valido, come quello della minore di 12 anni, che restava nella casa del marito in attesa del compimento dell'età matrimoniale:

D. 23.3.2 (Paul. 60 ad ed.): rei publicae interest mulieres dotes salvas habere, propter quas nubere possunt.

D. 42.5.18 (Paul. 60 ad ed.): interest enim reipublicae et hanc solidum consequi, ut aetate permittente nubere possit.

Altro esempio significativo fu quello della trasformazione in *munus* (cioè in obbligo di assistenza) della tutela degli impuberi.

La protezione dei fanciulli era affidata alla famiglia e, per essa, al *pater*. La stessa famiglia o il gruppo cui essa apparteneva avevano il dovere di occuparsi degli impuberi e del loro patrimonio: a questo provvedevano le forme della *tutela legittima* e della *tutela testamentaria*. Esse realizzavano la successione nell'esercizio del potere spettante al padre e restavano nell'ambito dell'organizzazione privata della *familia* o della *gens*.

Ma ecco che quando, probabilmente per conseguenza delle guerre che avevano decimato la popolazione maschile, si constatò che vi erano molti fanciulli senza un maschio che potesse provvedere alle loro necessità, si emanò un plebiscito (*lex Atilia* anteriore al 186 a. C.) con il quale si dette incarico al pretore di nominare un tutore a chi ne era privo. Si verificò così un intreccio tra

privato e pubblico, nel quale la *Respublica* si fece carico, attraverso un suo magistrato, di quello che fino ad allora era parso un interesse meramente privato. E ne risultò un cambiamento radicale, perché l'istituto fu modificato profondamente diventando una forma di *protezione* dei deboli (quali erano i pupilli) e non più l'esercizio di un potere. L'intreccio privato-pubblico che ne conseguì fu rivoluzionario e si tradusse in una forma efficace di protezione dei fanciulli, ritenuti deboli sino alla pubertà; ciò perché la pubertà e non un'età più congrua segnava la maturazione dell'uomo e la sua capacità di ingresso nella vita pubblica.

Analogo discorso vale per la cura dei minori di 25 anni. Lì, a partire dall'antica legge *Laetoria* del 3° secolo a. C., si verificò un incisivo intreccio tra negoziazione privata ed intervento pubblico, attraverso il pretore che poteva concedere un'*exceptio legis Laetoriae* o una *restitutio in integrum*, sempre basandosi sui presupposti adombrati dalla legge, che portò alla nascita della *cura minorum*. La quale costituì una forma abbastanza efficace di protezione dei giovani inesperti contro gli usurai, che solo per un'ottica fuorviante, dovuta alle distorsioni conseguenti all'adozione del concetto di *capacità*, viene classificata dalla manualistica contemporanea tra le forme *minorartici della capacità* e non, come dovrebbe, tra le forme di difesa dei deboli. Difesa peraltro incisiva contro gli speculatori, che potevano perdere ciò che avevano dato ai minori, se non avessero agito con estrema onestà o, comunque, oggettivamente dal prestito avessero tratto profitti immotivati.

A questo punto credo che gli esempi sarebbero ancora molti. Mi limito ai casi indicati, i quali confermano l'attenzione dei Romani, e per essi della loro giurisprudenza, ai problemi reali dell'uomo, cui il diritto accorda riconoscimento e protezione, di là da sue predeterminazioni o riconoscimenti, bensì solo perché **sono**. Dando vita ad un diritto che è per l'uomo-persona in tutte le sue articolazioni, anche commerciali.

E qui vorrei dire che anche nel campo delle obbligazioni la proiezione verso l'uomo si manifestò in modo incisivo. Vi è in proposito l'esigenza di superare la convinzione che il contratto romano non era incentrato sul "consenso" e sull'assetto degli interessi dei contraenti, bensì sul vincolo che scaturiva "oggettivamente" da una determinata situazione; in quest'ordine di idee

la dottrina del primo novecento aveva inteso il *contractus* “non quale struttura giuridica implicante il *consensus*, ma in termini oggettivi, come “vincolo, affare”. Da tempo, tuttavia, ci si sta accorgendo che quella definizione non corrisponde al contratto romano; essa è solo la conseguenza della sussunzione del *contractus* nella (allora imperante) teoria del negozio giuridico. La quale, però, ha influenzato gran parte della romanistica, giunta a sostenere che il consenso-accordo sarebbe stato essenziale e costitutivo solo nei contratti dello *ius gentium*, che, secondo lo schema di Gaio, appaiono i soli che *contrahuntur consensu*; mentre il consenso, pur necessariamente presente, sarebbe irrilevante negli altri contratti, nei quali appare sostituito o assorbito da altri elementi, cioè dal *dare*, dalla pronuncia di particolari *verba*, dalla redazione di documenti (*litterae*).

A fronte di tali posizioni c'è, invece, da domandarsi in che modo un diritto, come quello romano, dichiarato in funzione degli uomini si atteggiava ed in che misura incideva nelle materie comportanti la regolamentazione di interessi contrapposti.

Vorrei qui, per tentare una prima approssimativa risposta, ricordare il pensiero di Giuliano su una questione molto complessa, perché investente temi ereditari e contrattuali. Il nocciolo concerneva l'interrogativo su quanto dovesse dare il venditore al compratore per l'evizione di uno schiavo: in particolare, in che misura doveva rifondere le spese fatte per l'educazione dello schiavo. La risposta del giurista adrianeo, riferita dal giurista severiano Paolo, è illuminante: bisognava sì pagare le spese sostenute per l'istruzione dello schiavo, ma non tutte, bensì solo quelle che potevano essere ipotizzate già al momento della vendita:

D. 19.1.43 (Paul. 5 quaest.): De sumptibus vero, quos in erudiendum hominem emptor fecit, videndum est: nam empti iudicium ad eam quoque speciem sufficere existimo: non enim pretium continet tantum, sed omne quo interest emptoris servum non evinci. Plane si in tantum pretium excedisse proponas, ut non sit cogitatum a venditore de tanta summa, veluti si ponas agitorem postea factum vel pantomimum evictum esse eum, qui minimo venit pretio, iniquum videtur in magnam quantitatem obligari venditorem.

In altra sede mi sono occupato della questione, arrivando alla conclusione che la posizione di Giuliano era di estrema attenzione all'assetto concreto degli interessi delle parti. Per fare ciò il giurista si avvaleva del riferimento a quanto *cogitatum* dai contraenti, il cui risultato si potrebbe riassumere in questi termini.

Ogni contratto si poggia non solo sul consenso espresso, ma anche sulle implicazioni di esso, però solo riguardo a quanto il contraente, se ne fosse consapevole, accetterebbe ugualmente di includere nel contratto. Sicché appare conseguente intervenire sul contenuto del contratto per mantenerlo nei limiti dell'accettabile, in considerazione di un bilanciamento ponderato degli interessi da esso coinvolti.

Tra *consensus* e bilanciamento dell'assetto degli interessi, ispirato dal sinallagma, sui quali, come si è detto, la dottrina assa la concezione romana del *contractus* mi sembra che Giuliano ipotizzasse la considerazione di un ulteriore riferimento: quello dell'aggancio della *conventio*, che disciplinava il *contractus*, con ciò che, se immaginato, si sarebbe ugualmente accolto in essa, ma che non era presente ai contraenti al momento della conclusione del contratto. In tal modo non si dichiarava la nullità del contratto, ma si stabiliva la proporzionale riduzione delle conseguenze che, *a rigori*, sarebbero dovute scaturire dal *consensus* prestato. Il ridimensionamento, che poteva operare a favore tanto dell'una quanto dell'altra parte, mi sembra un più avanzato sviluppo della linea di pensiero, sopra ricordata, espressa da Aristone ed iniziata da Labeone; con la differenza che le dottrine espresse da quei giuristi concernevano la conclusione del *contractus*, mentre la costruzione di Giuliano era diretta a regolare le conseguenze di esso: le prime guardavano al momento genetico del vincolo obbligatorio, mentre la disciplina giuliana mirava a fissare criteri per l'esecuzione del *contractus*, ivi compreso quello dell'eventuale dissoluzione di esso, per responsabilità di una delle parti.

In qualche misura Giuliano perfezionava ed andava oltre l'opinione già espressa da Sesto Pedio, il quale aveva fondato il contratto sulla *conventio* ("*nullum esse contractum, nullam obligationem, quae non habeat in se conventionem*"). Pedio dichiarava l'essenzialità della *conventio* per qualsiasi contratto od obbligazione, ma poi sembrava riferire la *conventio* stessa al *consensus*; infatti egli, dopo avere affermato che non vi poteva essere vincolo senza la *conventio*, precisava che anche nella stipulazione, la quale pareva nascere solo dalla pronuncia di determinate parole, era necessario il consenso, operando, a mio avviso, una identificazione della *conventio* con il *consensus*: *nam et stipulatio, quae verbis fit, nisi habeat consensum, nulla est*.

Giuliano, almeno per i contratti sinallagmatici, invece parrebbe far rientrare nella *conventio* non solo il *consensus*, ma anche i termini nei quali si sarebbe potuto concludere l'accordo, se si fossero verificate circostanze o situazioni che in realtà non furono ipotizzate dai contraenti; sempre che esse avessero comportato uno squilibrio apprezzabile negli obblighi assunti dalle parti.

Con Giuliano la disciplina del *contractus* veniva così ad essere integrata da un nuovo principio, il quale ancorava gli effetti del *contractus* ad un criterio di prefigurazione di essi, al momento dell'intesa contrattuale. In tal modo si escludevano le conseguenze non previste, quando fossero risultate fuori dal normale svolgimento degli eventi disciplinati nel contratto; sempre che avessero potuto incidere in maniera apprezzabile sull'assetto dato dalle parti ai propri interessi. In ultima analisi, vi era una più penetrante attenzione alla *voluntas* nel senso che si cercava di stabilire, di là da quanto esplicitato nell'accordo, cosa in realtà si era voluto o, meglio, quello che si sarebbe potuto volere. È per questo che la decisione di Giuliano si traduceva in una valorizzazione della volontà effettiva posta a base del negozio, la quale, anche se non esplicitata, era ricavabile dall'insieme della negoziazione e non solo dal *consensus* espresso.

L'analisi del brano mi induce ad ipotizzare che, attraverso il riferimento a *quod sit cogitatum*, Giuliano aveva inteso richiamare proprio le circostanze non previste e, direi, impensabili, quando si fosse potuto ritenere che esse, se note, avrebbero portato ad un diverso accordo. Questa lettura mi pare anche confermata da un esame dell'uso del verbo *cogitare* in altri contesti.

Per tale via il giurista adrianeo aveva introdotto anche nella materia contrattuale, che poteva prestarsi ad una visione formale, l'attenzione all'uomo storico e alla specificità del suo "concreto" operare.

È questa un'articolazione del diritto in funzione della *persona*.

Al termine di questa rivisitazione, vorrei tentare di capire perché i capisaldi del diritto romano sono, successivamente, andati dispersi, smarrendo il nesso inscindibile tra uomo e diritto, pervenendo non di rado a pensare che sia il diritto a creare la *persona*, attraverso la concessione della *personalità giuridica*.

Richiamo quanto ho già avuto modo di specificare in altra sede, mettendo in evidenza il cammino del termine e del concetto di *persona*: da quando viene

impiegato in riferimento alla SS. Trinità, dove il Padre si mostra attraverso il Figlio, che, in tal senso, è “**persona**”. Di qui si compie un ulteriore passo, che consiste nell’uso del termine con significato analogo anche per gli uomini, visti come “persone” viventi un’esperienza propria storicamente contrassegnata nell’ambito del messaggio salvifico dell’*Incarnazione*.

In altre parole, partendo dall’uso romano, *persona* cominciò un cammino complesso ed avventuroso, intorno al quale si intrecciarono idee e vicende varie e non sempre limpide, per le quali il Cotta ha efficacemente parlato di *avventura semantica*.

A conclusione di questo *iter* cultural-semanticò si perviene ad attribuire definitivamente al termine il significato “di persona individuale e individuata”. Non c’è più motivo di ricordare l’origine teatrale, ma talora essa appare utile a far risaltare il contenuto di “*valore*” del termine, a sottolinearne l’attinenza con la dignità delle persone, come farà, ad esempio, S. Tommaso d’Aquino, che spiega: *maxime Deo convenit quia enim in coemediis et tragoediis rapraesentabantur aliqui homines famosi, impositum est hoc nomen, persona, ad significandos aliquos dignitatem habentes*.

Come che sia, si può dire che la situazione non cambia per lungo tempo e che la nozione di persona non è oggetto di particolari determinazioni fino al XVI secolo, ma progressivamente si avvia ad una specificazione che finirà per alterarne i connotati. Pur se importanti discussioni non si registrano, si assiste ad una precisazione graduale nel linguaggio giuridico.

Il termine, pervenuto già con Gaio a denotare l’uomo, dà vita a progressive specificazioni tecnico-giuridiche.

La prima porta a puntualizzare che *persona* nel diritto è diverso da *homo*, in quanto la sua qualifica passa attraverso un riconoscimento del diritto, che prescinde dalla situazione naturale. Ad esempio, dirà Hugues Doneau:

Donellus, Commentaria iuris civilis, II, 9: homo naturae, persona iuris civilis vocabulum.

Il cammino in questa direzione l’iniziano i Canonisti medievali, i quali usano *persona* per qualsiasi *ente* cui sia imputabile l’agire. Essi partono da un’assimilazione metaforica (quasi una «finzione»), per includere tra le *personae* anche le *personae fictae*, (le *universitates*), dando inizio alla figura dogmatica delle cosiddette «persone giuridiche», distinte, con brutta formulazione, dalle

cosiddette “persone fisiche”. Su questa nuova concezione si innestano due spinte che conducono da un lato alla “patrimonializzazione” dall’altro all’astrazione del concetto di *persona*.

Considerando che uomo è colui che, potendo disporre pienamente di sé, acquisisce il *dominium rerum externarum*, la seconda Scolastica e le correnti di pensiero, di cui punta d’avanguardia fu il Locke, posero le premesse per l’assunzione di un contenuto economico nel concetto di *persona*, che, specie nel XIX secolo, viene a realizzarsi nella figura del *proprietario*.

Per altro verso, si costruisce una nozione formale ed unitaria di persona, riferibile tanto agli uomini quanto alle collettività, come centro d’imputazione di doveri e diritti fissati e riconosciuti dall’ordinamento giuridico, che il Kelsen indicava in questi termini: “La persona fisica o giuridica che “ha” (come titolare dei medesimi) doveri giuridici e diritti soggettivi, è questi doveri giuridici e questi diritti soggettivi, è cioè un complesso di doveri giuridici e di diritti soggettivi, la cui unità si esprime in modo figurato nel concetto di persona”. In conseguenza di ciò viene considerata *persona* qualsiasi *ente* cui sia imputabile il compimento di atti.

A conclusione di questo processo si perviene alla specificazione del termine, che perde il suo significato generale, frutto della concettualizzazione filosofica che aveva portato all’identificazione tra *persona* e *uomo* (inteso come realtà razionale da Boezio e da pensatori moderni, tra i quali spicca Kant). Esso si particularizza. Su di lui premono le esigenze sempre più “esclusive” dell’economia, che ancora oggi condizionano il diritto vigente.

Vi è una più vigorosa esigenza di adeguare “il giuridico” alla realtà giornaliera, di concretizzarlo nello specifico del contesto socio-economico difendendo la facoltà di scelta dell’*Ordinamento*, unico arbitro della giuridicità e della soggettività. Questa “ricerca di una adeguazione giuridica alla realtà dell’agire e degli interessi, sempre meno imputabili in via prevalente al singolo, cade nell’astrattezza d’un concettualismo formale, per cui non ogni persona (in senso giuridico) è uomo. Codesta duplice ma opposta valenza semantica (restrittiva l’una, estensiva l’altra) viene divulgata da ideologie, recepite anche dalla scienza giuridica, e resa operante dal completo monopolio d’una invadente normazione giuridica che lo Stato moderno-contemporaneo si è attribuita. Persona viene perciò a significare, da un lato, il concretissimo proprietario, dall’altro l’astratto e quasi disumanato “attore” giuridico. Si determina, pertanto,

ai giorni nostri una diffusa reazione filosofica, che nega al primo la capacità di risolvere in sé l'integralità della persona, poiché ne rileva la dipendenza ultima dalle cose, l'eteronomia. E critica il secondo, perché privo di consistenza esistenziale, mera apparenza artificiale, come aveva già rilevato Hegel nella sua dura critica al *Rechtszustand*, di nuovo maschera come in antico: e la maschera può nascondere il duro volto del proprietario, dell'uomo "dell'avere".

Si arriva ad una costruzione, attuale ancora ai nostri giorni, nella quale ogni posizione giuridica dell'uomo dipende dal riconoscimento dell'ordinamento giuridico (per lo più statuale) ed è oggetto di astrazioni che spesso sono dettate da interessi economici, più che dalla considerazione della dignità umana. L'uomo è schiacciato nell'ordinamento, esso stesso dichiaratosi *persona* (come Stato o altro) dove è accerchiato da altre *persone*, che sempre più e più di lui contano: le *persone giuridiche*, le grandi società, le multinazionali.

Contro questa deriva occorre reagire per "liberare" l'uomo.

Ecco perché i filosofi si sono impegnati a riscoprire il valore della *persona-uomo* e ad avocare a sé la competenza di indicare i "valori" della *persona*. Ma le costruzioni che ne sono scaturite sono state spesso impennate sulla dualità tra uomo isolato e uomo inserito nel contesto sociale, che ha finito paradossalmente per rinforzare l'assorbimento dell'uomo nella collettività.

Ciò perché la via scelta è stata quella dell'opposizione tra *individuo* e *persona*, come espressione di diverse "esistenze" riconducibili alle categorie di autenticità (definente la *persona*) e di inautenticità (definente l'*individuo*). Sul punto si è significativamente inoltrato l'esistenzialismo filosofico, dando vita al cosiddetto «personalismo» e ad un'accezione entrata nell'uso corrente, almeno in dottrina. La distinzione si basa per alcuni sulla prevalenza di un criterio che possiamo indicare come "valutativo", sul quale si installerebbe la *persona*, rispetto al criterio "conoscitivo", proprio dell'*individuo*. Oppure si è fatto leva sulla distinzione tra l'*agire* e l'*essere*: Maritain, Renouvier, Gentile, Berdiaev insistono nel sottolineare che mentre si è *individuo*, ci si fa *persona* e che criterio discriminativo è il valore, che appartiene esclusivamente al farsi della *persona*. Maritain osservava: "in quanto individui, siamo sottomessi agli astri". A questa posizione di supino abbandono al proprio destino l'uomo può contrapporre la propria iniziativa, che gli fa perseguire fini superiori, che lo trasforma in persona.

Egli, in tal modo passa dalla posizione “statica” a quella “dinamica”; ossia, come incisivamente diceva il Renouvier, l'uomo può: “fare e, facendo, farsi”, secondo una formula condivisa da Giovanni Gentile e ripresa da enunciazioni successive. Così Marcel sosteneva che la migliore indicazione della persona “non è sum, ma sursum” e Berdiaev rilevava che essa “non è mai un dato tutto già fatto: è [...] l'ideale dell'uomo”, insomma è “attività creativa”. In sintesi: si “è” individuo, “ci si fa” persona.

In tal modo, si ripropone con forza la problematica del nesso tra *persona* e *valore*: l'uomo in sé non significa molto, è mera espressione biologica; invece si valorizza attraverso l'azione, purché indirizzi il suo comportamento verso i *valori*. Egli realizza il suo destino, cioè se stesso, attraverso l'*agire*, ma l'azione da sola non dice ancora nulla sulla teleologia del suo divenire, occorre che sia rivolta al raggiungimento di contenuti positivi, vale a dire *bisogna che persegua dei valori*.

Vi è qui però un evidente vizio, che si risolve in una contraddizione *in obiecto*: se la persona, infatti, è valore in quanto “si fa” come si può sostenere che tuttavia il farsi debba essere rivolto alla realizzazione di valori, sicché, *non ogni farsi è valore?*

Più appropriatamente i pensatori di ispirazione cristiana difendono, all'opposto, l'identità tra *individuo* e *persona*, in quanto è l'uomo, ad un tempo *individuo* e *persona*, ad essere stato fatto ad immagine e somiglianza di Dio, avente dignità propria risiedente tanto nella ragione, come voleva Kant, quanto nel sentire ed agire etico, come viene evidenziato da Scheler, Hartmann, Kierkegaard, sino ad Heidegger, secondo una proiezione che rende attuali la prima e la seconda Scolastica e le introspezioni esistenziali di S. Agostino.

Ma, nel complesso, si può dire che la contrapposizione *individualismo* e *socialità*, spesso ricondotta a quella tra egoismo e apertura verso gli altri, impernia costantemente le tematiche della *persona* e porta a situazioni che, talora di fatto, annullano il singolo e le sue istanze fondamentali. È ovvio che posta in termini di egoismo o di perseguimento del Bene Comune la questione sembri di facile decisione; ma è pura illusione.

In realtà (ove si prescinda dall'*ipotesi convenzionale* dell'uomo secondo *natura* del Rousseau, che supponeva lo sviluppo dell'uomo da una origine di vita isolata e autosufficiente), si può affermare che nessuno ha mai pensato ad un

individualismo del tutto isolante. Gli stessi giusnaturalisti moderni, sostenitori dello *stato di natura*, hanno sempre pensato ad una vita di relazione, anche quando l'hanno ritenuta fondata sugli impulsi passionali o dominata dai rapporti di forza (Hobbes, Spinoza), piuttosto che regolata dalla ragione naturale (Locke). Ma tale relazione è stata vissuta o in forma esasperata, come nel caso dell'*individualismo* o in forme che annullano il singolo nella collettività.

I danni (gli orrori!) causati da queste posizioni sono noti e catastrofici, dal massacro degli Indiani d'America alle visioni razziali o di esclusione dei "non cittadini".

Si è reagito tornando alla rivalutazione dei *valori* come obiettivo del *farsi* e mettendo in evidenza "l'insopprimibile relazionalità delle persone: vita da vita, vita con vita", dove l'esistenza stessa è una co-esistenza (il *Das Sein* è un *Mit-Sein*, affermava Heidegger), e la riflessione su di sé implica il riconoscimento degli altri uguali a sé stessi. Viene, pertanto, rilanciata la centralità della persona, "colta nella sua intrinseca sintesi di unicità e relazionalità", poiché: "di contro alle considerazioni fenomeniche della persona e della sua socialità – che o considerano la società una costruzione volontaria o risolvono la persona nella società storica, fino a farne dipendere l'esistenza da questa, o collocano la persona in una indefinibile comunità – emerge la realtà "strutturale" della persona. Essa è unica e irripetibile".

Ma sono i termini di tale centralità e di tale relazionalità a dover essere profondamente ridiscussi.

In nome della centralità della persona oggi stiamo per arrivare ad un punto di non ritorno per la vita del pianeta, che vuol dire anche ad una compromissione irrimediabile per la sopravvivenza stessa dell'umanità.

In nome della relazionalità, dell'uomo con l'altro uomo ma in un rapporto legato ai valori universali, si sta tornando ad una coartazione dei diritti fondamentali – magari in nome della Religione o dell'Etica (vedasi l'insorgenza dei *fondamentalismi* di varia matrice). Inoltre i *valori* vengono sempre più inclusi in contesti specifici (quali, la nazionalità, la razza etc.) e conflitti supportati da spinte anche *ideali* diventano sempre più sanguinosi. Per di più i condizionamenti economici stanno minando le possibilità di sviluppo e sopravvivenza di intere popolazioni.

In tutto questo drammatico contesto, paradossalmente, è costante il richiamo alla *persona* ed ai *valori*.

A che serve l'enunciazione e la rivendicazione di un diritto, di principi, sui quali tutti concordano, perché paiono connotati di una accentuata positività, ma che spesso per risultato mostrano la sopraffazione e la distruzione?

Credo proprio che sia da chiedersi se forse non sia giunto il momento di abbandonare vecchi percorsi, anche prestigiosi (quale è quello legato al termine *persona* ed alle sue implicazioni e suggestioni) e tentare vie nuove, se non ci si voglia rassegnare al fallimento del diritto.

Punto di partenza non può non essere la piena consapevolezza del fatto che il tempo presente si svolge in una situazione profondamente mutata rispetto all'intera *Storia* dell'Umanità. Perché oggi è in forse la stessa possibilità di sopravvivenza dell'uomo. Oggi, infatti, lo "sviluppo" sta compromettendo il futuro della sua specie e forse del Pianeta, o quanto meno della *Vita evoluta*. Le questioni dell'aumento dell'anidride carbonica nell'aria, del buco nella fascia dell'ozono, della deforestazione selvaggia, dell'affollamento delle zone costiere, soprattutto nelle zone rivierasche del Mediterraneo (mare, per giunta, dal lento e faticoso ricambio), sono di tale entità che non possono essere inquadrare e risolte nell'alveo dei concetti giuridici tradizionali.

Occorre farsi carico di ciò fino in fondo. Per la verità i problemi sono diffusamente affrontati in più aspetti e con provvedimenti o elaborazioni persino sovrabbondanti. Manca però la consapevolezza profonda che essi non possono venire risolti negli schemi tradizionali del diritto e che, al contrario, richiedono un'ottica nuova, che *non può non essere* quella della centralità di Gea (della Terra).

A ciò si suole obiettare che, comunque, non pare concepibile un diritto che non nasca e non sia finalizzato all'uomo, perché l'uomo è solo l'uomo ne è l'artefice. Ma mi pare falso illudersi che il diritto, pur se rimesso all'uomo per la sua esecuzione, non abbia fondamenti che lo trascendono.

Invece mi pare che solo abbandonando le costruzioni *antropocentriche*, oggi dominanti, si può ridefinire il *ius* in funzione della Terra e delle generazioni future. Una siffatta nuova ottica comporta la individuazione delle situazioni nelle quali l'azione dell'uomo può essere ritenuta giuridicamente giustificabile e

impone una rivoluzione nel diritto. Non più gli Stati, le persone giuridiche confessionali o economiche, possono essere arbitri dei *valori* e decidere il diritto degli *uomini*. Vi è necessità di definire gli standards minimi che in qualsiasi condizione vanno garantiti e (cosa più e molto difficile) va individuata l'*Autorità* che abbia il potere di imporli o quanto meno di esigerne il rispetto. Questa *Autorità* dovrà essere necessità *sovrnazionale* e deve muoversi in consonanza con l'esigenza della salvaguardia dell'Ambiente e dei Suoi *abitanti*, rispettandone la *dignità*.

Mi sembra che questa sia la via più diretta per intervenire imponendo innanzitutto la pace, e con essa politiche di perequazione dei redditi contro la fame derivante dalla diffusa indigenza dei cosiddetti Paesi in via di sviluppo. Si dovrà in questa ottica altresì rivedere i rapporti economici tra i Paesi e nei confronti delle grandi Società (le persone giuridiche multinazionali), con particolare riferimento al debito internazionale, che in ogni caso non dovrà comportare oneri che (come oggi avviene) compromettano la sopravvivenza dei Paesi stessi e dei suoi abitanti.

Ne deriverà l'accrescimento di quegli strumenti (azioni popolari, ricorso a Corti sovranazionali etc.) che già oggi, in alcuni Stati o in alcune aggregazioni regionali dovrebbero garantire l'uomo.

Il termine *persona*, nel diritto, deve essere rivitalizzato e proiettato in una visione planetaria. Solo così l'Uomo, la Sua dignità, il Suo futuro, potranno essere salvaguardati, uscendo dalle mistificazioni di un linguaggio ambiguo, che in nome dei valori, in nome della *persona*, oggi spesso soffoca l'uomo.

La prospettiva non è semplice da realizzare. Fin dalla filosofia greca l'*Uomo* moderno si è abituato a ragionare in nome di un antropocentrismo che finiva per divenire particolarismo o utilitarismo o isolazionismo; ma l'idea della *persona* centro del *tutto* era ed è radicata.

La sfida che ci attende è quella di uscire da essa per porci in una prospettiva geocentrica, volta alla difesa delle prospettive, del futuro.

Essa non vuole essere un utopistico ritorno ad irrealizzabili stati di natura, bensì un concreto porsi come questione centrale quella del superamento dei "valori" di qualsiasi natura (economici in primo luogo, ma anche nazionali, di religione, di razza), anche se affermati nella *Storia*, a favore di una prospettiva che salvaguardi le specificità ambientali e culturali. In essa l'uomo, anche se non

più referente esclusivo, verrebbe ugualmente e forse meglio valorizzato, in quanto essenziale al contesto, ma non come l'unico detentore del potere di decidere di esso. In tal modo ognuno vedrebbe riconosciuto e tutelato il diritto a popolare la Terra, con tutte le sue *specificità*.

Mi pare che, anche se a prima vista può non apparire evidente, la nuova impostazione comporterà una revisione di tutto il diritto a tutti i livelli (nazionali e sovranazionali), con articolazioni anch'esse tutte da specificare ed elaborare.

Su di esse occorre iniziare da subito la riflessione e la costruzione.

In conclusione, può affermarsi che sulla *persona* non solo il dibattito e le conseguenti riflessioni sono aperte, ma devono ripartire da una matrice forte e chiara. Per la quale la base più solida sembra offerta dalle fonti del diritto romano, incentrato sull'uomo-*persona* e sul suo essere nella *Storia*.

In questo alveo va incanalato anche il dibattito sui *diritti umani*, nel quale, riterrei che il diritto romano possa esplicitare un ruolo fondamentale per la corretta considerazione dell'Uomo, di là dalle sovrastrutture e travisamenti delle società, delle culture e degli assetti istituzionali contemporanei.

Da ultimo in esso va inserito il futuro.

Un Autore ha osservato che l'uomo ha superato Dio, perché ha creato una creatura potenzialmente **immortale**, la *persona giuridica*: "Iddio creò l'uomo a propria immagine e somiglianza, ma l'uomo non volle essergli da meno: creò, a immagine e somiglianza propria, la persona giuridica. [...] L'uomo è mortale, la persona giuridica può essere immortale. Le basta, per assicurarsi l'immortalità, che ad ogni scadenza del termine di durata l'assemblea ne deliberi la proroga, e così all'infinito. E c'è ben altro: le persone giuridiche possono fondersi. Di due o più persone giuridiche se ne può fare una sola, sia che una incorpori le altre, sia che tutte si fondano in una nuova persona giuridica. Nulla di simile è dato all'uomo".

Oggi l'Uomo sta andando oltre. Attraverso le intelligenze artificiale è alla soglia di distruggere se stesso.

Il tutto in un contesto riguardo al quale Anthony Giddens, a suo tempo ideatore della *Terza Via*, "Viviamo in un'era completamente differente da ogni civiltà precedente, quasi ai confini della storia umana, tanto da indurre appunto a chiederci se l'umanità sopravviverà [...]".

Questa è la sfida del domani. Questa è la sfida che il Diritto romano è chiamato a fronteggiare e governare, così come ha fatto dinanzi ai cambiamenti dei secoli passati.

НОВ ПРОЧИТ НА ИЗТОЧНИЦИТЕ. ПРИМЕР ЗА
ДИСКУСИЯ ВЪЗ ОСНОВА НА
ПРЕДОСТАВЯНЕТО НА ПРЕДСТАВИТЕЛНА
ВЛАСТ В РИМСКОТО ПРАВО (НА ИТАЛИАНСКИ
ЕЗИК)

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Резюме: Статията е резултат на научните ми търсения и убеждения в рамките на един романистичен проект в Сасари във връзка с изследването на представителството. При приключването преди няколко години на първата фаза на изследването относно съществуването на представителството и алтернативите му, и с оглед на втората му, заключителна фаза, бих искал да проверя хипотезата (или хипотезите), че съществуват алтернативи на представителството и те се откриват именно в римското право.

Ключови думи: източници; представителна власт; Римско право.

NEW PERSUAL OF THE SOURCES. EXAMPLE
FOR A DISCUSSION ABOUT REPRESENTATION
IN ROMAN LAW (ITALIAN LANGUAGE)

APPUNTI PER LA LETTURA DELLE FONTI.
L'ESEMPIO – DA NON SEGUIRE –
DELLA ATTRIBUZIONE
DELLA “RAPPRESENTANZA”
AL DIRITTO ROMANO

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Abstract: The article is a result of my scientific research and convictions in the frames of one Romanist project in Sassari in connection with the study of representation. At the conclusion of the first phase of the study a few years ago on the existence of the representation and its alternatives, and in view of its second, final phase, I would like to examine the hypothesis (or hypotheses) that there are alternatives to representation and they are found in Roman law.

Keywords: sources; representative power; Roman law.

PREMESSA

Questo scritto è la registrazione della riflessione interna a un piccolo laboratorio romanistico sassarese; formulata: a conclusione della prima fase di una ricerca, avviata alcuni anni or sono, sulla questione della rappresentanza o, meglio, sulla questione della esistenza o meno di alternativa alla rappresentanza, e in vista e in funzione della sua seconda e conclusiva fase, la verifica della ipotesi (o “ipotesi”) così formulata¹, che tale alternativa esiste e si trova nelle Diritto romano.

I. “STATO DELLA DOTTRINA” GIURIDICA:
IL RAPPORTO – INSODDISFACENTE – CON LA PANDETTISTICA

1. Affermata alterità nel metodo e oggettivo appiattimento nel merito

Oggetto necessario di ogni ricerca romanistica è lo studio delle fonti.

Principio inaggirabile di ogni ricerca scientifica è, però, il ‘punto’ sullo “stato della dottrina”.

Lo “stato della dottrina” giuridica novecentesca (nel cui ambito noi, oggi, continuiamo a restare) è dato dal rapporto che questa ha stabilito con la dottrina giuridica ottocentesca, in particolare con la Pandettistica².

¹ Vedi LOBRANO, G. La alternativa attuale tra i binomi istituzionali: “persona giuridica e rappresentanza” e “società e articolazione dell’iter di formazione della volontà”. Una ipo-tesi (mendeleeviana). – In: *Diritto@Storia*, Vol. 10, 2011-2012; ONIDA, P. P. In tema di natura del *mandatum*. – In: *Diritto@Storia*, Vol. 13, 2015; LOBRANO, G. e ONIDA, P. P. Rappresentanza o/e partecipazione. Formazione della volontà «per» o/e «per mezzo di» altri. Nei rapporti individuali e collettivi, di diritto privato e pubblico, romano e positivo. – In: *Diritto@Storia*, Vol. 14, 2016 (quindi, tradotta in spagnolo: “Representación o participación. Formación de la voluntad «por» o por medio de» otros en relaciones individuales y colectivas, de derecho privado y público, romano y positivo. – In: *Roma e América*, Vol. 38, 2017, p. 149–190); ONIDA, P. P. Concretezza giuridica del mandato. Il problema della formazione e articolazione della volontà. – In: *D’orsogna, D., Lobrano, G. e Onida, P. P. Città e diritto. Studi per la partecipazione civica. Un «Codice» per Curitiba*. Napoli, 2017, p. 139–206; SEAZZU, G. C. A proposito della formazione complessa della volontà: appunti in tema di *iussum* e negozi con il terzo. – ibidem, p. 287–322; PIRAS, Vanni. Sui processi di formazione della volontà collettiva: appunti in tema di “decodificazione” e “giudice re”. – ibidem, p. 323–374; ONIDA, P. P. “Agire per altri” o “agire per mezzo di altri”? appunti romanistici sulla “rappresentanza”. I. Ipotesi di lavoro e stato della dottrina. Napoli, 2018; SEAZZU, G. C. *Iussum e mandatum. Alla origine delle acciones adiecticiae qualitates*, I. Ipotesi di lavoro e stato della dottrina. Cagliari, 2018.

² Per una sorta di “storia esterna” della Pandettistica, comprensiva della “Scuola storica”, vedi l’ampio saggio di PUGLIESE, G. I pandettisti fra tradizione romanistica e moderna scienza del diritto. – In: *RISG*, serie III, anno XXVII, Vol. 17, 1973, p. 89–132. Ivi le sottolineature: della convergenza tra Scuola storica e pandettisti (p. 94) e della complessiva funzionalità “all’emergere della borghesia produttiva, all’espandersi dell’industria, al formarsi del capitalismo nei Paesi tedeschi durante la seconda metà dell’Ottocento” (p. 124).

Tale “rapporto” combina:

– la affermata alterità nel metodo della interpretazione delle fonti del Diritto romano

e

– l’obiettivo appiattimento nel merito della medesima interpretazione.

La alterità è affermata nella contrapposizione tra il ricorso alle “categorie generali”, per natura “astratte”, imputato alla Pandettistica, e il ricorso ai “casi”, per natura “concreti”, attribuito al Diritto romano e, oggi, preferito³.

L’appiattimento è rilevabile nella coincidenza sulla assolutizzazione storica e dogmatica del “diritto odierno”, i cui singoli istituti sono attribuiti, dai romanisti del Novecento come dai romanisti dell’Ottocento, già al Diritto romano, quanto meno in un loro stadio incipiente.

La lettura delle fonti romane si colloca tra i due termini del rapporto.

Secondo un giudizio che proviamo, ora, ad argomentare “*per exemplum*”⁴, tale ‘rapporto / stato della dottrina’ appare insoddisfacente: determinato da una opzione di metodo opinabile e giungente a conclusioni di merito tutt’altro che convincenti, precedenti la lettura delle fonti.

Per evidenti ragioni di competenza per materia, nella costruzione di tale – insoddisfacente – “rapporto = stato della dottrina”, ha avuto e continua ad avere un ruolo essenziale e una responsabilità conseguente la dottrina romanistica⁵.

³ Nella relazione di apertura del XX Congreso Latinoamericano de Derecho romano (Sassari, 21–22 e Roma 24–25 settembre 2018) il romanista della UNAM di Città del Messico, Jorge Adame Goddard, ha puntualmente osservato la coincidenza di tre autori (Max Kaser, Álvaro d’Ors, Franz Wieacker) sulla tesi che il Diritto romano «no fue organizado como un sistema conceptual dialéctico, o sistema “cerrado”, sino como un conjunto de conocimientos, o un saber, para decidir lo que es “ecuo y bueno”, o lo que es justo, en casos concretos» (GODDARD, A. El derecho es arte y ciencia., ove sono esaminati KASER, M. En torno al método de los juristas romanos. Valladolid, 1964; D’ORS, Á. Roma ante Grecia: educación helenística y jurisprudencia romana. – In: *Cuadernos de la Fundación Pastor*, Vol. 2, 1961, p. 83 ss., Id., Singularidad intelectual del jurista y ‘cosmos casuístico’ en el estudio actual del Derecho Romano. – In: *Parerga Histórica*, 1997, p. 85 ss; WIEACKER, F. Fundamentos de la formación del sistema en la jurisprudencia Romana. – In: *Seminarios Complutenses de Derecho Romano*, Vol. 3, 1991, p. 11 ss.)

Ricordiamo nella stessa linea dottrinale GARCÍA GARRIDO, M. J. Casuismo y Jurisprudencia romana. Madrid, 1973; VACCA, Letizia. Contributo allo studio del metodo casistico nel diritto romano. Milano, 1976.

⁴ Sul ricorso all’*exemplum* come strumento di argomentazione vedi: ZORZETTI, N. Dimostrare e convincere: l’*exemplum* nel ragionamento induttivo e nella comunicazione. – In: *Mélanges de l’école française de Rome*, 1980, Vol. 92.1, p. 33 ss.; Cfr. DELCORNIO, C. La predicazione nell’età comunale. Sansoni (Scuola Aperta). Firenze, 1974, § 8. L’*«exemplum»*.

⁵ Di cui la italiana è divenuta, particolarmente nella seconda metà del 900, parte specialmente consistente.

2. L'esempio della "rappresentanza": "principio cardine dell'intero sistema"

Esempio probante, per rilevanza ed evidenza, di tale "rapporto" sono le trattazioni di un istituto definito "principio cardine dell'intero sistema"⁶: l'istituto della rappresentanza.

Citiamo qui, come loro *specimen*, una monografia italiana, recente e di buona chiarezza espositiva⁷.

Nella parte iniziale si afferma:

"La considerazione autonoma ed astratta della rappresentanza è dovuta principalmente alla scuola tedesca del XIX sec., ed in particolare a Savigny⁸, il quale, per la prima volta nella storia giuridica, assegna alla rappresentanza una posizione autonoma, soprattutto dal punto di vista sistematico, inserendola nell'ambito delle dottrine generali, e abbandonando decisamente, secondo una tendenza che diventerà sempre più imperante, la configurazione della rappresentanza nel mondo romano, in cui essa era, invece, strettamente connessa al mandato, alla rappresentanza processuale, alle *actiones adiecticiae qualitatis*"⁹.

Nella parte conclusiva si afferma:

"[...] il diritto romano, anche alla fine dell'età classica, non conosce e realizza un concetto generale ed unitario di rappresentanza. Tuttavia [...] i giuristi romani procedono alla teorizzazione e alla disciplina della

⁶ MICELI, Maria. Studi sulla «rappresentanza» nel diritto romano. Vol. 1. Milano, 2008, p. 11. Ernst Rabel, nel 1934, ha definito la rappresentanza un "miracolo giuridico" (Die Stellvertretung in den hellenistischen Rechten und in Rom. – In: *Atti del Congresso Internazionale di diritto romano*. Bologna–Roma, aprile 1933. Vol. 1. Pavia, 1934, p. 238: "juridisches Wunder") e Karl Löwenstein, nel 1957, la ha definita (insieme alla divisione dei poteri) "una invenzione o scoperta decisiva per l'evoluzione politica dell'Occidente e, attraverso di essa, del mondo, come la invenzione meccanica – vapore, elettricità, motore a combustione, potenza atomica – lo sono stati per l'evoluzione tecnologica dell'uomo" (Political Power and the Governmental Process. Chicago, 1957, p. 40: "the invention or discovery of the representative technique was as decisive for the political evolution of the West and, through it of the world as the mechanical inventions – steam, electricity, the combustion engine, atomic power – have been for man's technological evolution"). Da ultimo, con un interesse – però – circoscritto alla sola "logica giuridica", si può vedere GAZZOLO, Tomasso. Il caso giuridico. Una ricostruzione giusfilosofica. Torino, 2018, in part. il § III.6. Regola e precedente.

⁷ MICELI, Maria. Studi sulla "rappresentanza" nel diritto romano, cit.

⁸ SAVIGNY, Friedrich Carl von. System des heutigen römischen Rechts. Vol. 3. Berlin, 1840, S. 90–98

⁹ MICELI, Maria. Op. cit., p. 13, nt. 24. La espressione "nuclei problematici" è, dichiaratamente, tolta da CAPPELLINI, P. voce "Rappresentanza" (Diritto intermedio). – In: *Enciclopedia del diritto*, Vol. 38, Milano, 1987, p. 442.

rappresentanza per 'nuclei problematici'] perché operano in un sistema casistico, e non certo perché sono incapaci di realizzare fenomeni di astrazione giuridica, o di concepire un concetto compiuto di rappresentanza [...] Infatti, sebbene il diritto romano abbia espresso e disciplinato un sistema della sostituzione negoziale per certi versi profondamente diverso da quella odierna, la teoria moderna della rappresentanza è stata costruita certamente sulle fonti romane e sulla tradizione romanistica"¹⁰.

Dobbiamo qui anche osservare – seppure soltanto incidentalmente – che esempio altrettanto rilevante ed evidente del medesimo, insoddisfacente “rapporto / stato della dottrina” è quell'altra “meraviglia” del diritto costituita, insieme alla rappresentanza, dall'istituto della “persona giuridica”¹¹. La persona giuridica ha, infatti, una decisiva funzione ancillare nei confronti della rappresentanza, essendone la giustificazione teoretica della prima e decisiva manifestazione: la attribuzione del potere della collettività ai ‘propri’ delegati.

¹⁰ MICELI, Maria. Op. cit., p. 274.

¹¹ La “persona giuridica” è stata definita “immenso fenomeno” e “stupenda creazione umana” da SATTA, Salvatore. Quaderni del diritto e del processo civile. Vol. 1. Padova, 1969, cit. in Galgano, F. Tutto il rovescio del diritto. Milano, 2007, p. 25, nonché “password di accesso alla dimensione del giuridico” da FERRARA, Gianni. Il diritto come storia. – In: *Diritto pubblico*, Vol. 1, 2005, p. 1 ss. Cfr., supra, nt. 6, gli elogi della rappresentanza. Anche per la nozione di persona giuridica troviamo, presso la dottrina novecentesca, la critica nel metodo e la dipendenza nel merito rispetto alla dottrina ottocentesca. Alla formazione della *communis opinio* novecentesca nella specifica materia della “persona giuridica” nel Diritto romano ha autorevolmente contribuito Riccardo Orestano, il quale (come abbiamo visto supra, nt. 3) considera segno dell'essere “«sulla buona strada” della liberazione dalla “pesante ipoteca del dommatismo tedesco” la rinuncia alla ricerca della “visione unitaria dei problemi della personalità giuridica, perseguita sino a Kelsen”. Dopo mezzo secolo continua a regnare la medesima *communis opinio*. Vedi BRUTTI, Massimo. Il diritto privato nell'antica. 2. ed. Roma ; Torino, 2011, Cap. VII. Il problema delle persone giuridiche, p. 235–256, in part. p. 237 s.: “Dobbiamo verificare [...] se – e in quali termini – l'esperienza romana, nel concettualizzare centri di riferimento di relazioni, diversi dalle persone fisiche, consideri qualcuno di essi come un *quid* astratto e separato dagli elementi che lo compongono. Senza alcun dubbio, il lavoro dei giuristi romani, così legato alla casistica e riluttante alle definizioni generali – è ben lontano dalle immagini attuali; tuttavia, a tratti essi giungono non soltanto a costruire entità unitarie titolari di relazioni, ma anche ad applicare ad alcune di queste la nozione (cara ai moderni) di una perfetta autonomia patrimoniale, con aspettative ed obblighi separati da quelli degli individui che le costituiscono”. Si noti che Brutti già aveva espressamente elogiato la critica metodologica di Orestano alla Pandettistica in “Storiografia e critica del sistema pandettistico”. – In: *Quaderni fiorentini per la storia del pensiero giuridico moderno (QF)*, Vol. 8, 1979, p. 328–332.

3. Ragioni di insoddisfazione nel metodo e nel merito

L'esempio fornito dalle trattazioni della "rappresentanza"¹² ci consente di sostanziare e precisare i termini del "rapporto con la Pandettistica / stato della dottrina" e, quindi, di argomentarne il nostro giudizio.

Nel metodo, la critica della interpretazione pandettista è, già di per sé, per varie ragioni, opinabile¹³. In particolare, la prescrittiva contrapposizione della

¹² E quello assolutamente omologo della "persona giuridica" (vedi la nt. precedente).

¹³ La tesi metodologica della astrazione ottocentesca opposta al "casuismo" antico, oltre che non necessariamente condivisibile, è, comunque, decisamente meno nitida di come può apparire; per almeno tre ragioni.

La prima "ragione" è che "astrazione" e "caso" convivono nella romanistica contemporanea sia ottocentesca sia novecentesca e vengono fatti risalire entrambi al Diritto romano. Infatti, come ricorda lo stesso García Garrido, Friedrich von Savigny (SAVIGNY, Friedrich Carl von. *Von Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*. Heidelberg, 1814) scrive, nel § 4. *Römisches Recht*, p. 30, "Es ist nun, als ob dieser Fall der Ausgangspunkt der ganzen Wissenschaft wäre" e Fritz Schulz (SCHULZ, Fritz. *Prinzipien des Römischen Rechts*. Berlin, 1934) inizia il § "Abstraktion", p. 27, scrivendo «Am Anfang war der ‚Fall‘». Non è da meno Riccardo Orestano, il quale: ne ORESTANO, Riccardo. *Il problema delle fondazioni in diritto romano*. Torino, 1959, p. 166, scrive del "lento e faticoso processo di astrazione e di unificazione che porta all'idea di una personalità corporativa" già presso il Diritto romano e, ne *Il "problema delle persone giuridiche" – In: Diritto romano*. Vol. 1. Torino, 1968, p. 69 ss., considera segno dell'essere "sulla buona strada" della liberazione dalla "pesante ipoteca del dommatismo tedesco" la rinuncia alla ricerca della "visione unitaria dei problemi della personalità giuridica, perseguita sino a Kelsen", per descrivere, quindi, la "progressiva smaterializzazione" del "*corpus*" operata dai giuristi romani (p. 174) in un processo che va "Dal concreto all'astratto" in quattro successive tappe – concezione materiale; – concezione totalistica; – concezione corporalistica; – concezione astratta" (§ 25, p. 178). Cfr. ancora ORESTANO, R. *Rappresentanza*. Diritto romano. – In: *Novissimo Digesto Italiano*, Vol. 14. Torino, 1967, p. 796 a proposito "della progressiva attuazione [sempre nel Diritto romano] del principio della rappresentanza diretta". Si deve qui, infine, osservare la diversità della "concretezza" attribuita da Pierangelo Catalano al Popolo romano dei Quiriti contro la "astrazione" dello "Staat" mommseniano (*Populus Romanus Quirites*. Torino, 1974, in part. 42, citazione di Mommsen «*Populus ist der Staat*»). Catalano, infatti, coniuga la "concretezza" non con la "casistica" ma proprio con il "sistema" (*Linee del sistema sovranazionale romano*. Vol. 1. Torino, 1965) in ciò, infatti, differenziandosi se non contrapponendosi (p. 37, nt. 75) proprio (tra gli altri) a Orestano (I fatti di produzione normativa nell'esperienza giuridica romana. Torino, 1962, p. 24; Cfr. Id., *Concetto di ordinamento giuridico e studio storico del diritto romano*. – In: *Jus*, Vol. 13, 1962, p. 35 ss.; Id., *Le nozioni di ordinamento giuridico e di esperienza giuridica nella scienza del diritto*. – In: *Rivista trimestrale di Diritto Pubblico*, Vol. 4, 1985, p. 964 ss.).

La seconda ragione è che la contrapposizione del metodo casistico a quello sistematico è (anche?) la contrapposizione della "common law" alla "civil law" (ZWEIGERT, K. e KOTZ, H. *Introduzione al diritto comparato*. Vol. 1. *Principi fondamentali*. Ed. ital. A cura di A. Di Majo e A. Gambero. Trad. di B. Pozzo. Milano, 1998, p. 221; GARCÍA PELAYO, M. *Derecho constitucional comparado*. Madrid, 1999, p. 353; FALCÓN Y TELLA, María José. *La jurisprudencia en los Derechos romano, anglosajón y continental*. Madrid, 2010, p. 37; etc.) La terza ragione è che tra i giuristi del Novecento non manca chi saluta "il superamento del metodo casistico, seguito per molti secoli nella riflessione giuridica privatistica, a favore di quell'approccio concettuale il cui precipitato più maturo, in termini di approdo decisivo, è da rinvenirsi proprio nella moderne codificazioni civili, ha conosciuto il suo avvio dal momento in cui i giuristi, superata la stagione della glossa e dell'analisi casistica, hanno avvertito sempre di più l'esigenza di organizzare il sapere giuridico sulla base di regole generali e di principi" (JANNARELLI, A. *I principi nell'elaborazione del diritto privato moderno: un approccio storico*. – In: *R/SG*, 2014, p. 33 ss.).

interpretazione per “casi” alla interpretazione per “categorie generali” ci appare addirittura contraria a quella seccamente formulata nel Titolo conclusivo del *Digesto* (Paul. D. 50.17.1. *Non ex regula ius sumatur, sed ex iure quod est regula fiat*) la quale ultima è, inoltre, perfettamente in linea con l'*incipit* giusnaturalista della stessa opera (Ulp. D. 1.1.1).

Dalla monografia che abbiamo citato a *specimen* delle trattazioni romanistiche della rappresentanza appare, inoltre, che la – persino puntigliosa – affermazione iniziale della alterità nel metodo della interpretazione della rappresentanza (cioè per mezzo dello studio dei «nuclei problematici in un sistema casistico» anzi che per mezzo dello studio dei “concetti generali”) contiene già la conclusione dell’obiettivo appiattimento nel merito della interpretazione della “rappresentanza / sostituzione negoziale”, quale istituto già del Diritto romano. Anzi, la tesi della esistenza della rappresentanza nel Diritto romano appare formulata addirittura già nel titolo della monografia, secondo una prassi – appunto – dominante in dottrina¹⁴.

Così, con una risposta positiva iniziale, implicita e *a priori*, è elusa la domanda che i ricercatori dovrebbero porsi nel merito; ovvero: se, al di là della diversità nel metodo, l’istituto della rappresentanza fosse o meno sostanzialmente presente nella teoria e nella prassi gius-romane.

La “elusione / risposta positiva” di tale domanda ci appare doppiamente discutibile in quanto noi crediamo, invece, che la domanda deve essere posta e che la risposta deve essere negativa.

A nostro giudizio, infatti, l’istituto della rappresentanza è costruito su fonti e tradizione “feudali” medievali-moderne, assolutamente altre rispetto alle fonti e alla tradizione romane antiche.

¹⁴ Limitatamente agli scritti citati in questo contributo, troviamo la attribuzione della “rappresentanza” al Diritto romano già nel titolo dei lavori per i quali tale attribuzione dovrebbe essere il “problema”: in RABEL, Ernst. *Die Stellvertretung in den hellenistischen Rechten und in Rom*, cit., 1933, in HOFMANN, Hans. *Repräsentation: Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert*. Berlin, 1974; in WACKE, Andreas. *Alle origini della rappresentanza diretta*. – In: *Nozione, formazione e interpretazione del diritto: dall'età romana alle esperienze moderne*. Ricerche Dedicare a F. Gallo. Vol. 2. Napoli, 1997; in BISAZZA, Giovanna Coppola. *Lo iussum domini e la sostituzione negoziale nella esperienza romana*. Vol. 1. Milano, 2003, e Id., *Dallo iussum domini alla contemplatio domini. Contributo allo studio della storia della Rappresentanza, Corso di diritto romano*. Milano, 2008. Tale impostazione è presente anche nella trattazione romanistica della “persona giuridica”: vedi, *supra*, nt. 6 e 10.

Pertanto, in attesa di verificare sulle fonti romane la eventuale *convergenza tra i due universi istituzionali*, la ipotesi da cui partire per la lettura di queste fonti è – esattamente al contrario della dottrina dominante – la estraneità ad esse di quell'istituto, il quale appare innestato, per la prima volta da Savigny, nel “sistema del Diritto romano”, con effetto stravolgente di questo “sistema”.

Il nostro giudizio nel merito è fondato su una serie ampia di dati storici-dogmatici, che evochiamo schematicamente.

II. PER CONOSCERE LA CATEGORIA MEDIEVALE-MODERNA “RAPPRESENTANZA”

1. Corrente percezione del dibattito ottocentesco sulla natura della rappresentanza

La scienza giuridica odierna conserva diffusamente la memoria di un dibattito, svoltosi nel proprio seno essenzialmente durante la seconda metà dell'Ottocento, sul merito della interpretazione della rappresentanza.

Il dibattito, oggi essenzialmente concluso, ha investito – si afferma – la natura della rappresentanza: la quale è stata, alternativamente, definita “cooperativa” oppure “sostitutiva”¹⁵.

Questo stesso dibattito è stato reso, nella dottrina di lingua tedesca, come tra “Geschäftsherrntheorie” e “Repräsentationstheorie”¹⁶.

¹⁵ D'AMICO, P. Rappresentanza. I. Diritto civile. – In: *Enciclopedia giuridica Treccani*. Vol. 29. Roma, 1991, § 1. “Nozione, struttura, funzione”, rileva che, in dottrina, alla “rappresentanza” è riconosciuta in maniera “prevalente” natura di “sostituzione”, *in contrapposizione* con la natura di “cooperazione” o “collaborazione”: “Il rappresentante piuttosto che come collaboratore, viene [...] qualificato come un “sostituto” del rappresentato”. Tale contrapposizione dipende, secondo D'Amico, dal valore attribuito al «rapporto di gestione», cioè al mandato, il quale risulta particolarmente svalutato dalla dottrina che interpreta la “rappresentanza” come “sostituzione”. Cfr., nello stesso senso, CAMPOBASSO, M. Il potere di rappresentanza degli amministratori di società di capitali nella prospettiva dell'unità concettuale delle forme di rappresentanza negoziale e organica. – In: *Amministrazione e controllo nel diritto delle società*. Liber amicorum Antonio Piras. Torino, 2010, p. 452 ss., il quale descrive così il “processo evolutivo comune alle varie forme di rappresentanza di cui la rappresentanza delle società costituisce il punto più avanzato. Si tratta della progressiva affermazione dell'autonomia del potere di rappresentanza dal contenuto di potere gestorio che lega il rappresentante al rappresentato. Uno sviluppo di cui si possono rintracciare le lontane origini fin dal XIX secolo, nell'insegnamento del Laband secondo cui la procura è negozio autonomo dal mandato.”

¹⁶ Vedi, per tutti, Werner Flume, il quale nella più significativa delle sue opere (la parte generale del trattato di diritto civile) articola la vicenda della dottrina sulla rappresentanza in una contrapposizione dottrinarica tra “Geschäftsherrntheorie” e “Repräsentationstheorie” sulla base delle opposte valutazioni del rapporto gestorio: importante per la prima “Theorie” e svalutato dalla seconda (Allgemeiner Teil des Bürgerlichen Rechts. Bd. II. Das Rechtsge-

I due sistemi linguistici, l'italiano (il quale sottolinea la presenza o assenza della cooperazione del rappresentante con il rappresentato) e il tedesco (il quale sottolinea la presenza o assenza del comando del rappresentato al rappresentante) si illuminano reciprocamente.

La conclusione del "dibattito" è la natura "sostitutiva" della rappresentanza¹⁷ ovvero il prevalere della "Repräsentationstheorie"¹⁸.

2. In realtà: scontro tra rappresentanza e partecipazione

Abbiamo ragioni per credere di trovarci dinanzi a un equivoco.

Abbiamo, cioè, ragioni per credere che nell'Ottocento si è svolto:

– **non** un dibattito tra due interpretazioni di un unico istituto, il quale attraversa le epoche (antica e medievale-moderna),

– **ma** lo scontro tra due istituti affatto diversi, costruiti – in epoche altrettanto diverse – come due più che diverse, opposte soluzioni di un unico problema.

L'unico problema è quello "di base e complesso"¹⁹ formulabile come "volizione²⁰ con l'intervento [usiamo, qui, una espressione il più possibile neutrale] di un'altra persona".

Il "problema" concerne la volizione collettiva e individuale, pubblica e privata ma esso si pone con particolare forza e lo 'scontro' tra le due soluzioni/istituti avviene inizialmente a proposito della volizione collettiva (in

schäft [1. Aufl. 1965; 4. Aufl. 1992] 2. Aufl. Berlin ; Heidelberg ; New York, 1975, Kap. X. "Stellvertretung und Vollmacht", 1. Abschn. "Die Stellvertretung", § 43 "Grundsätzliches zur Rechtsfigur der Stellvertretung", § 2 "Zur Geschichte der Stellvertretung", in part. 752, nt. 7; seguito, per ultimo, da LEENEN, D. BGB Allgemeiner Teil: Rechtsgeschäftslehre. 2. Aufl. Berlin ; Boston, 2015, § "Die Repräsentationstheorie als Grundlage der Gesetzlichen Regelung des Handelns in fremden Namen". In proposito, vedi ora, SEAZZU, G. C. Iussum e mandatum. Alla origine delle actiones adiecticiae qualitatis. Vol. I, cit., p. 62, nt. 77.

¹⁷ Vedi, supra nt. 14.

¹⁸ Vedi, supra nt. 15.

¹⁹ Vedi LOBRANO, G. La alternativa attuale tra i binomi istituzionali: "persona giuridica e rappresentanza" e "società e articolazione dell'iter di formazione della volontà". Una ipo-tesi (mendeleeviana). – In: *Diritto@storia*, Vol. 10, 2011-2012, § 3. "Un'altra prospettiva: due soluzioni opposte, medievale-moderna (binomio 'persona giuridica e rappresentanza') e romana (binomio 'società e articolazione dell'iter di formazione della volontà'), per la soluzione del problema della concezione e del regime unitari dell'agire volontario di una pluralità di uomini".

²⁰ Sul negozio / *nec otium*, come manifestazione di volontà vedi KELSEN, H. La dottrina pura del diritto. 1. ed. 1934; 2. ed. 1960. Trad. ital. di M. G. Losano. 3. ed. Torino, 1975, p. 287, oppure – più semplicemente – VOCI, P. Istituzioni di diritto romano. 3. ed. Milano, 1954, p. 138: "Negozio giuridico è una manifestazione di volontà".

particolare pubblica) per estendersi, quindi e necessariamente, alla volizione individuale (e privata).

In ordine a questa formulazione del “problema di base e complesso”, dobbiamo effettuare subito due precisazioni/avvertenze, prodromiche allo sviluppo di questo nostro “discorso”.

La prima ‘precisazione/avvertenza’ è che non fanno parte del nostro “problema” e sono – dunque – “problemi” a sé: la *tutela* (la quale, per definizione, concerne chi è incapace di [intendere e] volere) e, specularmente, il ricorso al *nuncius* (il quale, per definizione, non ha funzione volitiva). Hanno, inoltre, rispetto sempre al nostro ‘problema’, caratteristiche di specificità, che ne consigliano una considerazione altrettanto specifica: la *negotiorum gestio* (cui, per definizione, manca l’“input” volitivo del *dominus negotii*)²¹ e, specularmente, l’acquisto del possesso (per definizione *res facti*)²².

La seconda ‘precisazione/avvertenza’ è che scrivere di “*altra persona*” rispetto al *dominus negotii* collettivo può porre problemi al lettore. Infatti, la applicazione della categoria di *persona* alle collettività è materia di rilevante dibattito²³. Limitatamente alle esigenze del nostro “discorso”, ci limitiamo, però, a osservare che la collettività, la quale si costituisce in unità e – *come tale* – vuole mettere in opera relazioni giuridiche, deve “avere [come dice Gaio] un *corpus*” (D. 3.4.1.1)²⁴, sulla cui materialità si esprime lo stesso Gaio (IG. 2.12)²⁵ e per la cui esemplificazione vedi Pomp. D. 41.3.30.pr. (cfr. Paul. D. 6.1.23.5; Inst. Just., 2.18 e anche Ulp. D. 7.1.70.3). Tale osservazione ci consente di non turbarci per l’uso ciceroniano (off. 1.124) di *persona* a proposito della *civitas*, così come non ci turba l’uso corrente di *persona* (oltre che di *corpus* [IG. 2.13]) a proposito

²¹ Per le fonti: CENDERELLI, A. La negotiorum gestio. Corso esegetico di diritto romano. Vol. 1. Struttura, origini, azioni. Torino, 1997.

²² Per le fonti: BRIGUGLIO, F. Studi sul procurator. Vol. 1. L’acquisto del possesso e della proprietà. Milano, 2007, in part. p. 443, nt. 405.

²³ Vedi ONIDA, P. P. La responsabilità penale degli enti collettivi fra diritto romano e diritto moderno. – In: Solidoro, Laura. A cura di. Regole e garanzie nel processo criminale romano. Torino, 2016, § 3 “Superamento del filtro della persona giuridica e impostazione del problema della responsabilità degli enti collettivi”, p. 68 ss. Onida (nt. 21) ricorda il contributo di CATALANO, P. Linee del sistema sovranazionale romano, cit., *passim*; Id., Populus Romanus Quirites, cit., p. 1. ss.; Id., Diritto e persone. Studi su origine e attualità del sistema romano. Torino, 1990, p. 169 ss. Cfr. supra, nt. 10.

²⁴ Citato, *infra*, § III.2.

²⁵ Vedi FALCONE, G. Osservazioni su Gai 2.14 e le *res incorporales*. – In: AUPA, Vol. 4, 2012, p. 136 s. Cfr., supra, nt. 3, il richiamo alla dottrina di Orestano sulla “progressiva smaterializzazione” del “*corpus*” operata dai giuristi romani (Il “problema delle persone giuridiche” in diritto romano, cit., p. 174).

dell'uomo²⁶. Gli usi romani di *persona* non pongono in discussione il *corpus* né della *civitas* né dell'uomo.

Ciò precisato, dobbiamo subito dire che: del nostro “problema di base e complesso”, la “rappresentanza” è soltanto *una* delle due soluzioni/istituti. Questo è il punto. Sottoposta a esame storico, la rappresentanza si rivela provenire (sulla base della – peraltro arcinota – invenzione gius-canonistica della “*persona ficta et / vel repraesentata*”)²⁷: interamente dalle teorie e prassi giuridiche medievali e moderne; precisamente dalla loro componente “feudale”, la quale è non romana per definizione²⁸; essenzialmente dal “Model Parliament” del 1295 e dai suoi sviluppi, teoretico (il *Leviathan* del 1651) e di regime (il “*Federalist/federalism*” del 1787–1788). Sottoposta a esame dogmatico, la rappresentanza rivela assegnare all’“altra persona”, da sempre e soltanto, una funzione “sostitutiva” e una posizione signorile. Infatti: della prassi

²⁶ Su questo ultimo punto, vedi, per una prima colletta di fonti, PADOVAN, Miriam. Lo statuto giuridico del corpo tra 'res' e 'persona'. Nascita e forma umana – leggibile 'on-line' in http://www.academia.edu/13122260/Lo_statuto_giuridico_del_corpo_tra_res_e_persona_Nascita_e_forma_umana, 16 giugno 2015; Cfr. Id., Medicina e corpo tra privato e pubblico. – In: Garofalo, L. A cura di. Il corpo in Roma antica, Ricerche giuridiche. Vol. 1. Pisa, 2015, p. 129–168.

²⁷ Ci riferiamo alla nota apparizione della categoria della *persona ficta et / vel repraesentata* a partire dalla dottrina del canonista genovese Sinibaldo dei Fieschi, alla epoca già Papa Innocenzo IV. Per la espressione “*persona ficta et repraesentata*” vedi HOFMANN, H. Rappresentanza-rappresentazione, cit., p. 152–169. Per la variante “*persona ficta vel repraesentata*”, vedi WALTHER, H. G. Die Gegner Ockhams: zur Korpurationslehre der mittelalterlichen Legisten. – In: Göhler, G. et alii, Hrsg., Politische Institutionen im gesellschaftlichen Umbruch: Ideengeschichtliche Beiträge zur Theorie politischer Institutionen. Opladen, 1990, S. 129 (che rinvia a CANNING, J. The political thought of Baldus de Ubaldis. Cambridge, 1987); per la variante “*persona ficta seu repraesentata*” vedi BUENO SALINAS, S. La noción de persona jurídica en el derecho canónico: su evolución desde Inocencio IV hasta el C.I.C. de 1983. Barcelona, 1985, p. 22; 59 y 126.

In proposito, da ultimo: ONIDA, P. P. Agire per altri” o “agire per mezzo di altri”? appunti romanistici sulla “rappresentanza”, cit., Cap. II “Contesti storici e contenuti dogmatici della categoria-istituto “rappresentanza”: formulazione, applicazione e teorizzazione”, § 1 “Formulazione in uno con la categoria “persona ficta” per le esigenze teocratiche della scienza giuridica canonistica ma in parallelo con la formulazione del “principio [democratico] di sussidiarietà”, p. 69 ss. Come nota puntualmente Onida, nel pensiero cristiano/cattolico la sostituzione volitiva vale per l'ordinamento ecclesiale (il cui fine è fare non la volontà dei propri membri ma quella di Dio) ma non per quello laico (il cui fine di fare la volontà dei propri membri è perseguito mediante la coeva teorizzazione [San Tommaso d'Aquino. Summa Theologiae, IIa–IIae, q. 58, a.5, 1265–1274]) dell'opposto “principio di sussidiarietà”).

²⁸ Come non ricordare la ben nota e fulminante osservazione di ROUSSEAU, Jean-Jacques. CS, 1764, 3.15 “Des Députés ou Représentants”: “L'idée des représentants est moderne: elle nous vient du Gouvernement féodal, de cet inique & absurde Gouvernement dans lequel l'espèce humaine est dégradée, & où le nom d'homme est en déshonneur. Dans les anciennes républiques & même dans les monarchies, jamais le peuple n'eut des représentants”. Cfr. *infra*, nt. 34 s.

Su origini e natura del ‘feudalesimo’ vedi, ora, la sintesi di L. GATTO, *Il feudalesimo*, Roma 2012.

del “Model Parliament” è caratteristica la novità (rispetto alla precedente esperienza parlamentare) della sottrazione, ai “Comuni” deleganti, del potere di indirizzare la volizione dei loro delegati, i quali ne diventano – così – i signori²⁹; della dottrina del *Leviathan* è caratteristico lo sviluppo (rispetto alla pregressa esperienza del “Model Parliament”) della nozione di persona fittizia (anzi “artificiale”)³⁰ come giustificazione teoretica della “sostituzione” volitiva della collettività da parte dei suoi “rappresentanti”³¹; della costituzione “federale” statunitense è caratteristico lo sviluppo (rispetto alla stessa esperienza) del regime sostitutivo, il quale è reso “seriale”³².

L’*altra* soluzione/istituto del nostro “problema di base e complesso” è – pertanto – quella nella quale l’“altra persona” ha, invece, una funzione “cooperativa” e una posizione subalterna. Per questa *altra* soluzione/istituto, nella dottrina contemporanea, neppure esiste un *nomen*. Tuttavia e inoltre, già prima della lettura delle fonti romane e in attesa della verifica su di esse, possiamo formulare la ipotesi che questa *altra* soluzione/istituto provenga dalla teoria e dalla prassi del Diritto romano³³.

²⁹ Vedi ancora ONIDA, P. P. “*Agire per altri*” o “*agire per mezzo di altri*”? cit., Cap. II, § 2 “Applicazione laica: istituzione del ‘Model Parliament’ *cum plena potestas*”, p. 74 ss.

³⁰ Già nella “Introduction”: “that great LEVIATHAN called a COMMON-WEALTH, or STATE, (in latine CIVITAS) which is but an Artificiall Man”; vedi anche i Capp. XVI: “Persons Artificiall”, XIX: “Artificiall Man”, XXI: “Artificiall Man”, XXVI: “Artificiall Man” etc.

³¹ “Chez Hobbes [...] la représentation est bel et bien une substitution» (FERRY, J-M. Histoire de la pensée politique. Syllabus de complément [testo del corso omonimo presso l’UFR Droit et Sciences Politiques – Faculté de Droit de Nantes, senza data ma non prima del 2003 – consultabile ‘on line’ in <https://docplayer.fr/41500324-Histoire-de-la-pensee-politique-jean-marc-ferry-syllabus-de-complement.html>, p. 28]). Cfr. ancora ONIDA, P. P. “*Agire per altri*” o “*agire per mezzo di altri*”? cit., Cap. II, § 3 “Teorizzazione post-westphaliana: origine nella astrazione statale anti-societaria, paradigma nella tutela dell’incapace e funzione di “sostituzione” del “rappresentato” con il rappresentante”, p. 77 ss.

³² “Il *Federalist* [...] appare una nota a piè di pagina alla teoria della sovranità di Hobbes [...] Il *Federalist* è centralista” (KING, P. *Federalism and federation*. London, 1982, Part One § 3 “Centralist Federalism”, p. 24 e 26; citato da BASSANI, M. Gli avversari della Costituzione americana: “antifederalisti” o federalisti autentici? – In: KING, P. e GIORDANO, A. A cura di. *Gli Antifederalisti. I nemici della centralizzazione in America (1787–1788)*. Torino, 2011, p. 42). Ancora BASSANI, M. Op. cit., scrive, (p. 31 e 45, citando Robert Nagel e Christopher Duncan) che con la trasformazione degli Stati federati in “unità amministrative del governo centrale”, «Private dell’elemento autenticamente partecipativo, la *politica locale* [il corsivo è mio], “le persone, gradualmente, ma inesorabilmente, furono spinte nella *privacy* delle loro case perché erano state svuotate di un ruolo pubblico in una vita collettiva condivisa.” La creazione dell’individuo *deraciné*, privo di legami comunitari, soggetto solo alla legge, ossia la costruzione del materiale umano più adatto allo Stato moderno, va anche in America di pari passo con il tentativo di creare un unico centro di potere» (NAGEL, R. F. *The Implosion of American Federalism*. New York, 2002, p. 51; DUNCAN, Ch. M. *The Anti-federalists and Early American Political Thought*. DeKalb, 1995, p. 177 s.)

³³ Seppure, eventualmente, “postclassico”. In un ampio e – relativamente – recente lavoro che si colloca in quella *communis opinio* cui stiamo cercando di prendere le misure

La duplicità di soluzioni/istituti tra loro opposti e la ascendenza antica (romana) della soluzione/istituto nel quale l'“altra persona” ha una funzione “cooperativa” e una posizione subalterna, sono affermate da non poche e non poco autorevoli ‘voci’, risuonate a monte e a valle del percorso giuridico (scientifico e normativo) ottocentesco: “a monte” (in maniera addirittura macroscopica) con il secolare scontro settecentesco tra opposti “modelli costituzionali”, rispettivamente: quello antico/romano (democratico) e quello medievale/moderno inglese (rappresentativo); “a valle” con la riflessione costituzionale e sociologica proto-novecentesca sul “potere”.

Lo scontro settecentesco, inizialmente scientifico, tra Montesquieu, teorico e propositore del modello inglese rappresentativo³⁴, e Rousseau, teorico e propositore del modello romano democratico ovvero – più finemente – “repubblicano”³⁵, diventa conclusivamente, durante la “Grande Révolution”,

(BRIGUGLIO, F. Studi sul procurator, cit., p. 530–535) la tesi contraria a quella di Paul Laband (‘rappresentativista’ e quindi, per dichiarazione di quest’ultimo, non-romanista: vedi il § seguente) è definita (p. 531) “elaborazione postclassica dell’istituto” del mandato.

³⁴ Esprit des lois. XI 8: “Les anciens ne connoissoient point le gouvernement fondé sur un corps de noblesse, & encore moins le gouvernement fondé sur un corps législatif formé par les représentants d'une nation”.

³⁵ ROUSSEAU, Jean-Jacques. Discours sur l'inégalité parmi les hommes. 1755, “Dédicace” «Le peuple romain [...] ce modèle de tous les peuples libres»; Cfr., supra, nt. 27. In proposito: LOBRANO, G. Contratto sociale contro rappresentanza: lo straordinario schema giusromanistico di J.-J. Rousseau. – In: *Rousseau, le droit et l'histoire des institutions* [Actes du Colloque international pour le tricentenaire de la naissance de Jean-Jacques Rousseau (1712–1778), organisé à Genève le 12, 13 et 14 septembre 2012]. Ed. par Alfred Dufour, François Quastana et Victor Monnier. Aix-Marseille, 2013, p. 81–116; Id., “Introduzione” a LOBRANO, G. e ONIDA, P. P. A cura di. Il principio della democrazia. Jean-Jacques Rousseau. Du Contrat social (1762). Napoli, 2012, p. vii ss., e Id., Per la comprensione del pensiero costituzionale di Jean-Jacques Rousseau e del Diritto romano [testo presentato anche, con il titolo “*Du contrat social*, 1762: il ‘principio’ della democrazia e la invenzione della repubblica”, al Seminario *La sovversione dei soggetti*. Jean-Jacques Rousseau 300 anni dopo. Roma, Biblioteca nazionale centrale 7 ottobre 2011] in LOBRANO, G. e ONIDA, P. P. A cura di. Il principio della democrazia, cit., p. 39 ss.

Sul passaggio dalla democrazia alla repubblica come perfezionamento, vedi, in ROUSSEAU, Jean-Jacques. CS, 2.6 “De la Loi” la definizione di “repubblica” e 3.3 “Division des Gouvernemens”; Cfr. LOBRANO, G. Res publica. Sui libri 21–45 di Tito Livio. – In: *Roma e America*, Vol. 36, 2015, p. 37–78 (versione italiana della introduzione, in lingua cinese, a Id., A cura di. Tito Livio. Ab urbe condita. Antologia dalla prima decade 2015, p. 1–42). La opposizione di Rousseau a Montesquieu è preceduto da quella, diversa ma omologa, dell'abate DUBOS, Jean-Baptiste. Histoire critique de l'établissement de la monarchie française dans les Gaules. 1734, al marchese Anne Gabriel Henri Bernard di Boulainvilliers (Histoire de l'ancien gouvernement de la France, État de la France, avec des mémoires sur l'ancien gouvernement, Histoire de la pairie de France, tutti stampati dopo la morte dell'autore [1722] ma noti già prima di essa).

normativo: tra costituzioni, quella rappresentativa del 1791 e quella “democratica”³⁶ del 1793.

La iniziale riflessione socio-giuridica novecentesca si pone ancora tra gli stessi termini. Hans Kelsen (Vom Wesen und Wert der Demokratie, 1920) distingue chiaramente la “moderna finzione della rappresentanza” dal “modo di pensare democratico dei Romani”³⁷. Max Weber (Wirtschaft und Gesellschaft, 1921 [postumo]) coglie il fulcro dello “scontro tra istituti” nella opposta titolarità della posizione signorile o dominante e li attribuisce, rispettivamente, alla antichità e alla modernità. In un passaggio molto importante della propria dottrina, Weber osserva il vero e proprio rovesciamento potestativo dall’antico rapporto tra *dominus negotii* e *servus* al moderno rapporto tra rappresentato e rappresentante, ove *dominus*/Herr è il rappresentante³⁸.

³⁶ Sulla contrapposizione (scientifica e normativa, oltre fisica/militare) vedi CATALANO, P. Tribunato e resistenza. Torino, 1971, e *Populus Romanus Quirites*, cit.; adde LOBRANO, G. Res publica res populi. La legge e la limitazione del potere. Torino, 1996 – Parte B. Alle origini del diritto pubblico contemporaneo. Sistemi giuridici, Cap. 1. Il sistema giuspubblicistico romano della «sovranità» del popolo e sue deformazioni medievali e moderne, Cap. 2. La via inglese del «sistema rappresentativo» e i suoi sviluppi continentali. Sulla assoluta specificità “democratica” della costituzione del '93, vedi CARRÉ de MALBERG, R. La Loi, expression de la volonté générale. Étude sur le concept de la loi dans la constitution de 1875. Paris, 1931, rist. Paris, 1984, p. 215.

³⁷ KELSEN, H. Vom Wesen und Wert der Demokratie. 1920, p. 37 s.: “Pilatus [...] – als Römer – gewohnt ist demokratisch zu denken”.

Non appare affatto un caso che l'Orestano della “persona giuridica” senta il bisogno di polemizzare, nel metodo, proprio con Kelsen (vedi, supra, nt. 3 e 10).

³⁸ WEBER, M. Wirtschaft und Gesellschaft: Grundriß der Verstehenden Soziologie. 5. Aufl. Tübingen, 1980, p. 172 ss.: Cap. 3.4: «Der Repräsentant, in aller Regel gewählt (eventuell formell oder faktisch durch Turnus bestimmt), ist an keine Instruktion gebunden, sondern Eigenherr über sein Verhalten. Er ist pflichtmäßig nur an sachliche eigene Überzeugungen, nicht an die Wahrnehmung von Interessen seiner Delegaten gewiesen [...] der von den Wählern gekorene Herr derselben, nicht: ihr “Diener”, ist. Diesen Charakter haben insbesondere die modernen parlamentarischen Repräsentationen angenommen [...] Repräsentativ-Körperschaften sind nicht etwa notwendig “demokratisch” [...]. Im geraden Gegenteil wird sich zeigen, daß der klassische Boden für den Bestand der parlamentarischen Herrschaft eine Aristokratie oder Plutokratie zu sein pflegte (so in England)».

Nella “Introduzione” alla traduzione italiana della 4. ed. tedesca (2003) del saggio di Hasso Hofmann sulla *Repräsentation*, cit. (Rappresentanza-rappresentazione: parola e concetto dall'antichità all'Ottocento. Trad. ital. di C. Tommasi. Milano, 2007, p. 1 s.) Giuseppe Duso individua tra le caratteristiche salienti della rappresentanza il fenomeno per cui «“rappresentare” diviene quasi sinonimo di “dominare” e, in nota (5), precisa che “Il primo ad aver definito come relazioni di potere tutte le relazioni di rappresentanza (almeno a proposito del potere di un gruppo) è stato Max Weber, allorché [...] ha definito la situazione “nella quale l'agire di alcuni rappresentanti appartenenti al gruppo viene imputato a tutti i rimanenti, o deve da questi essere considerato – e di fatto lo è – come “legittimo” e “vincolante” nei loro riguardi” (Cfr. WEBER, M. Economia e società. A cura di P. Rossi. Vol. 1. Milano, 1980, p. 290).» Duso rinvia anche a «Kimminich in VVDStRL, XXV, 1967, p. 255» (= KIMMINICH, O. et al. Das Staatsoberhaupt in der parlamentarischen Demokratie in Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer. Autoren: O. Kimminich, P. Pernthaler, H. Peter, H. F. Zacher. Heft 25. Berlin, 1967).

La riflessione storica-dogmatica di Kelsen e Weber è preceduta dal famoso discorso sull'ordinamento costituzionale (noto come *Speech to the Electors of Bristol*) con il quale il 3 novembre 1774 Edmund Burke sostiene la piena autonomia volitiva, nel Parlamento, dei rappresentanti rispetto ai Cittadini, ed è affiancata dal noto apologo sull'ordinamento economico-giuridico (noto come *I battelli del Reno*) con il quale il contemporaneo di Weber, Walther Rathenau, sostiene la piena autonomia volitiva, nelle società azionarie, dei rappresentanti rispetto ai soci; autonomia volitiva che, in Germania, sarà formalizzata con la legge del 1937³⁹.

La primissima caratteristica dell'istituto “*altro*” e, in ipotesi, antico è, dunque, la capacità della volontà del *dominus negotii* di determinare gli elementi quadro del negozio che sarà concluso dal *servus* o dal *mandatarius*, lasciando a quest'ultimo la determinazione degli elementi individualizzanti.

Tale primissima caratteristica (specialmente in riferimento alla volizione collettiva e ancor più specialmente in riferimento a quella pubblica) può essere definita “partecipazione”⁴⁰.

La conclusione tardo-ottocentesca dello ‘scontro’ tra i due istituti è: la occupazione di tutta la scena giuridica da parte dell'istituto della rappresentanza/sostituzione e – letteralmente – la scomparsa dell'istituto della partecipazione-cooperazione.

3. Innesto pandettistico della rappresentanza nel Diritto romano: momenti e fasi

La “memoria” novecentesca di una progressiva messa a fuoco scientifica (in un unico percorso logico che va dal Diritto romano a quello odierno) del solo istituto della rappresentanza⁴¹ (dalla “cooperazione” alla “sostituzione” ovverosia

³⁹ Ci riferiamo all’“Aktiengesetz” su cui vedi LOBRANO, G. e ONIDA, P. P. Rappresentanza o/e partecipazione. Formazione della volontà «per» o/e «per mezzo di» altri. nei rapporti individuali e collettivi, di diritto privato e pubblico, romano e positivo, cit., Vol. 14, 2016, nt. 22.

⁴⁰ Per alcuni approcci (romanistico, costituzionale, filosofico) alla questione, si possono vedere AMARELLI, F. A cura di. Politica e partecipazione nelle città dell'impero romano. Roma, 2005; DELLA MORTE, M. Rappresentanza vs. partecipazione? L'equilibrio costituzionale e la sua crisi. Milano, 2012; FODDAI, Maria Antonietta. Dalla decisione alla partecipazione. Giustizia, conflitti, diritti. Napoli, 2017.

⁴¹ Esemplare – anche egli già nel titolo, vedi, supra, nt. 13 – HOFMANN, H. Repräsentation. Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert, cit.

dalla “Geschäftsherrntheorie” alla “Repräsentationstheorie”⁴²⁾ appare, dunque, un errore e un errore di grande portata sistematica.

Se così è (e noi crediamo che così sia) tale errore è in parte scientemente e in parte involontariamente propiziato dalla Pandettistica con l’innesto – avviato da Savigny – dell’istituto medievale-moderno della rappresentanza/sostituzione sul tronco del Diritto romano. Tale “innesto”, infatti:

α) è non dichiarato ma presentato come rinvenimento ovvero è operato non accanto all’originale ‘istituto cooperativo’ ma in luogo di questo, come una cancellazione per sovra-scrittura⁴³⁾;

β) avviene in due momenti successivi, divisi da un preciso intervallo cronologico.

Secondo la dottrina dominante, nella “storia della rappresentanza” si deve a Savigny la “fondazione della Geschäftsherrntheorie” e a Windscheid quella della “Repräsentationstheorie”⁴⁴⁾.

A noi, la rappresentanza innestata da Savigny nel Diritto romano appare immediatamente e chiaramente “Repräsentationstheorie”, cioè immediatamente e chiaramente “sostitutiva”. La operazione savignyana dell’innesto rappresentativo nel tronco del Diritto romano è, infatti, scandita in tre diverse fasi logiche, ciascuna delle quali è una (piccola?) rivoluzione. La prima “fase” è la assunzione della tutela romana (cioè dell’istituto [*potestas in capite libero*: Paul./Serv. D. 26.1.1] con il quale è data una volontà a chi è incapace di volere) come modello, archetipo o prototipo – che dir si voglia – della rappresentanza medievale-moderna ovvero, potremmo dire, come suo “cavallo di Troia”. La seconda “fase” è la trasformazione della collettività (Personenmehrheit) in un incapace di volere mediante la sua trasformazione in “persona giuridica”. La terza – conseguente – “fase” è la trasformazione del delegato della collettività nel suo tutore⁴⁵⁾. Riuscire a vedere in ciò la “Geschäftsherrntheorie” ovvero sia la cooperazione (volitiva) di un subalterno ci appare una sfida alla logica.

⁴²⁾ Vedi, supra, nt. 14 s.

⁴³⁾ Dalla scrittura su pergamene a quella elettronica, la sovra-scrittura è la cancellazione più efficace; tuttavia – fortunatamente – neppure essa è definitiva.

⁴⁴⁾ FLUME, W. Allgemeiner Teil des Bürgerlichen Rechts. Band II. Das Rechtsgeschäft, cit., supra, nt. 15.

⁴⁵⁾ SAVIGNY, Friedrich Carl von. System des heutigen römischen Rechts. Vol. 3. Berlin, 1840, S. 89–90. Sulla “Fiktionstheorie” in Savigny, vedi LEHMANN, M. Der Begriff der Rechtsfähigkeit. – In: *Archiv für die civilistische Praxis*, 2007, Band 207, H. 2 Teilband, § 1.2, § 1.a

Piuttosto, interpretare il *Populus Romanus Quirites* come un *minus habens* sotto tutela⁴⁶ è operazione prometeica ma non sufficiente ad assicurare il buon esito dell'“innesto rappresentativo”. Per conseguire tale esito, Savigny deve ancora estendere la “Vertretung” dall'ambito della “volizione collettiva con l'intervento di un'altra persona” all'ambito della “volizione individuale con l'intervento di un'altra persona”. Per ciò, Savigny deve liberarsi di ulteriori fonti romane, con un ulteriore sforzo, cui, però, egli appare non ancora pronto. Le “ulteriori fonti” gli dicono (forse troppo espressamente) ed egli ripete (correttamente) di “comando a contrarre dato dal signore al servo”:⁴⁷ cioè di istituto completamente diverso dalla rappresentanza; cioè di istituto che *non* annulla la volontà del rappresentato, sostituendola con quella del rappresentante/Herr, *ma* potenzia la volontà del *dominus negotii*, integrandola con quella cooperante del *servus* o del *mandatarius*. La formazione savignyana

“Notwendigkeit der Zuerkennung der Rechtsfähigkeit – Bei Personenmehrheiten”, p. 229 s. che rinvia a SAVIGNY, Friedrich Carl von. System des heutigen Römischen Rechts. Band 2, 1840, S. 278. Cfr., supra, nt. 27.

⁴⁶ Sulla concezione del “popolo”. – Savigny, vedi BOCCHINI, Claudia. La teoria schmittiana della democrazia. Il pensiero politico e la teoria costituzionale di Carl Schmitt nel contesto dell'interpretazione delle costituzioni moderne dall'età della Rivoluzione francese alla Repubblica di Weimar. [Ph.D. thesis]. Padova, 2008, p. 94–103.

Mommsen, applicando puntualmente la novità savignyana, mette direttamente il popolo sotto tutela (MOMMSEN, Theodor. Abriss des römischen Staatsrechts. Leipzig, 1893, p. 82 “Der Gesamtwille ist an sich, wenn es gestattet ist einen Ausdruck des römischen Privatrechts darauf anzuwenden, eine staatsrechtliche Fiction. Tatsächlich wird dafür Vertretung erfordert, ähnlich wie im Privatrecht für den nicht handlungsfähigen Mündel. Wie für diesen der Vormund eintritt, so gilt staatsrechtlich als Willenshandlung der Gesamtheit diejenige eines in dem bestimmten Fall für sie eintretenden Mannes. Indess geht die Gemeindevertretung insofern weiter als die vormundschaftliche, als der Vormund die physisch vorhandene, aber unvollkommene Handlungsfähigkeit ergänzt, der Gemeindevertreter eine physisch nicht vorhandene ausübt.”).

Sulla “formazione pandettistica” di Mommsen, vedi ORMANNI, A. Il “regolamento interno” del Senato romano nel pensiero degli storici moderni sino a Theodor Mommsen: contributo ad una storia della storiografia sul diritto pubblico romano. Napoli, 1990, p. 113, nt. 291.

La affermazione di Giustiniano (IG. 4.1.pr. *cum olim in usu fuisset alterius nomine agere non posse nisi pro populo, pro libertate, pro tutela*) non comporta la equiparazione volitiva del popolo alla condizione del sottoposto a tutela. Che il popolo sia capacissimo di volizione, attestano, a tacere d'altro, fonti celeberrime, le quali vanno dal precetto delle *XII Tabulae* (*XII tab. 12.5 quodcumque postremum populus iussisset ius ratum esto* [V sec. a.C.]) alla definizioni capitoniana e gaiana della legge (Gell. n.A. 10.20.2. *generale iussum populi*; Gai. 1.3. *quod populus iubet atque consistit*) al passo giuliano/giustiniano sulla consuetudine (D. 1.3.32.1 [...] *quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis?* [...]). Così come va letto *cum grano salis* l'accostamento del popolo al gregge in Pomp. D. 41.3.30.

⁴⁷ SAVIGNY, Friedrich Carl von. System des heutigen römischen Rechts. Band 3. Berlin, 1840, p. 93 “Wenn also der Herr dem Sklaven befahl, für ihn eine Schuld zu kontrahieren, so wurde dennoch der Herr altem Recht nicht Schuldner; deswegen führte hier der Prätor eine eigene Klage ein, quod iussu. Eben so verhält es sich mit den anderen, allmächtig eingeführten, indirekten Verpflichtungen durch Kinder und Sklaven: actio de peculio, tributoria, de in rem verso” (Cfr. SEAZZU, G. C. Iussum e mandatum, cit., p. 68).

della dottrina della rappresentanza tramite sovra-scrittura su questo *altro* istituto antico è, dunque, incompleta e, in definitiva, internamente contraddittoria.

Devono trascorrere 26 anni prima che la scienza giuridica ottocentesca riesca a liquidare pienamente le fonti sull'istituto antico, ancora determinanti per Savigny, e completare – così – la dottrina della rappresentanza. In tale ulteriore operazione, la Pandettistica appare aiutata in modo significativo dalla scienza giuridica positiva. Gli autori di questa operazione sono, in particolare, il pandettista Bernard Windscheid e il giurista positivo Paul Laband, i quali scrivono entrambi nel 1866.

Windscheid non si fa più scrupolo di affermare seccamente che lo *iussum* (in questione) “è non un comando ma una autorizzazione”⁴⁸.

L'intervento correttivo-integrativo di Windscheid sullo *iussum*, pur essendo una operazione di microchirurgia storico-giuridica⁴⁹, completa nella materia della volizione individuale l'“innesto” operato da Savigny nella materia della volizione collettiva. Tuttavia, vi è ancora spazio per l'intervento esplicativo-integrativo di Laband.

Laband afferma (questa volta con una certa dovizia di argomentazione) che l'istituto della rappresentanza (a suo avviso, non esistente nel Diritto romano ma presente nel diritto a sé contemporaneo)⁵⁰ è potere (non servizio) del rappresentante; potere il quale non può tollerare né tollera comandi e, pertanto, non può essere fondato sul mandato (Auftrag) ma deve essere fondato sulla

⁴⁸ WINDSCHEID, B. Lehrbuch des Pandektenrechts, 2.2. Berlin, 1866, § 482, p. 391, nt. 6: “Das Wort *iussus* hat hier den technischen Sinn, welcher in § 412 Note 8a bezeichnet worden ist; es bedeutet nicht Befehl, sondern Verweisung, Anweisung. Indem man diese technische Bedeutung von *iussus* verkannte und zu gleicher Zeit in's Auge faßte, daß die *actio quod iussu* auf den Fall berechnet ist, wo Jemand durch gewaltunterworfenen Personen verpflichtet werden will (Note 10), hat man die Behauptung aufgestellt, daß der *iussus* an den Gewaltunterworfenen gerichtet werden müsse, oder doch, daß dieß der Normalfall der *actio quod iussu* sei. Die Quelle sprechen fast allein von einem *iussus* an der Dritten [...] und die einzige Stelle [...] in welcher der *iussus* unzweifelhaft auf den Gewaltunterworfenen bezogen wird [...] hat nicht die Absicht, die Voraussetzungen gerade der *actio quod iussu* anzugeben.”

⁴⁹ Tale intervento è racchiuso dentro una nota a piè di pagina ma anche tutta la “dottrina generale” di Savigny sulla rappresentanza è racchiusa in 9 pagine.

⁵⁰ LABAND, P. Die Stellvertretung bei dem Abschluss von Rechtsgeschäften nach dem allgemeinen deutschen Handelsgesetzbuch. – In: *Zeitschrift für das gesamte Handelsrecht*, Zehnter Band, 1866, S. 209 “Daß [...] das Rom. Recht keine besonderen Bevollmächtigungs-Vertrag kannte, ist eine nothwendige Consequenz der Unzulässigkeit der echten Stellvertretung. Das moderne Recht dagegen, welches die echte Stellvertretung kennt [etc.]”; vedi anche S. 183 f. e Cfr. S. 174 f., 203 f.

procura (Vollmacht)⁵¹. Ovviamente, il giurista positivo tedesco del XIX secolo non si interessa all'istituto dello *iussum* al *servus*.

L'anno successivo (1867) Windscheid scrive (citando Laband) che lo *iussum* è il nome romano della procura/Vollmacht⁵².

Il cerchio è chiuso.

III. PER LEGGERE LE FONTI ROMANE

1. Conoscenza della = presa di distanza dalla categoria generale “rappresentanza”

La costruzione ottocentesca della “rappresentanza / sostituzione negoziale” appare, dunque, non il prodotto dello studio delle fonti romane ma la loro sistematica forzatura a un significato eterogeneo: feudale medievale-moderno⁵³.

⁵¹ LABAND, P. Die Stellvertretung bei dem Abschluss von Rechtsgeschäften nach dem allgemeinen deutschen Handelsgesetzbuch, cit., S. 203 ff. “Nichts ist für den wahren Begriff der Stellvertretung und die juristische Durchbildung dieses Instituts nachtheiliger gewesen, als die Zusammenwerfung der Stellvertretung mit dem Mandat, zu welcher das Rom. Recht den Anlaß gab. [etc.]”.

Flume scriverà direttamente di “Vertretungsmacht” (Op. cit., § 45 “Die Vertretungsmacht”, S. 780 ff.; Cfr. § 47 “Vertretung ohne Vertretungsmacht”).

⁵² WINDSCHEID, B. Lehrbuch des Pandektenrechts. Erster Band. 2. Auflage. Düsseldorf, 1867, § 74, S. 74 s., nt. 1.

Sulla sequenza Savigny, Windscheid, Laband, vedi SEAZZU, G. C. *Iussum* e *mandatum*., cit., parte B. “Percorso di formazione della dottrina nell'Ottocento”, Capp. I. “Persona giuridica, *iussum* e *mandatum* secondo Friedrich von Savigny” e Capp. II. “Persona giuridica, *iussum* e *mandatum* secondo Bernhard Windscheid e Paul Laband”.

⁵³ Su questi presupposti si è alimentata la inerziale discussione romanistica sul destinatario dello *iussum* e cui corrisponde la discussione gius-positiva sul destinatario della procura. È, infatti, evidente che il problema è la natura (di comando o di autorizzazione) non il destinatario (*filius/servus* o terzo) dello *iussum*. La discussione sul destinatario dello *iussum* è giustamente abbandonata da alcuni romanisti. Ad esempio, nel saggio “Alle origini della rappresentanza diretta”, cit., il quale, come già indica il titolo (vedi, supra, nt. 14) è una sintesi (ottima) della dottrina dominante, Andreas Wacke, scrive (p. 588): «L'*actio quod iussu* (azione di “incarico” o, meglio, di “autorizzazione”) realizza in via più generale l'esigenza della rappresentanza diretta: colui che, consapevole che vi è autorizzazione dell'avente potestà *contrae* con un sottoposto, *contrae*, contemporaneamente, con l'avente potestà». Il problema si apre e si chiude con la definizione di *iussum* come autorizzazione in funzione della sua riduzione allo schema rappresentativo. La questione del destinatario non è neppure evocata. Il testo italiano di Wacke è la sintesi del suo saggio “Die adjektivischen Klagen im Überblick. Erster Teil: Von der Reeder- und der Betriebsleiterklage zur direkten Stellvertretung”. – In: ZSS, Vol. 111, 1994, p. 280–362.

Per quanto concerne il destinatario della procura, nella, voce “Rappresentanza (Diritto Civile)” del *Novissimo digesto italiano* (1980) Walter D'Avanzo scrive: “occorre [...] individuare se il destinatario della procura sia da ritenersi il rappresentante o il terzo con il quale questi contratta [...] il rappresentante [...] non va considerato quale destinatario della procura. Non si può negare che la dottrina, la quale ritiene destinatario il rappresentante, abbia, dalla propria parte, un rilievo a prima vista decisivo: quello, cioè, dell'impossibilità di

La scelta novecentesca di concentrarsi sui “casi” (perché “concreti”) anziché studiare la “categoria generale” (perché “astratta”) della “rappresentanza / sostituzione negoziale” è, quindi, servita e serve a non revocarne in discussione e, anzi, a consolidarne le – così affermate – assolutizzazione logica e temporale.

È, invece, la scelta di studiare la “categoria generale” della «rappresentanza / sostituzione negoziale» che permette di capire essere questa ultima soltanto *una* soluzione e non (come, pregiudizialmente, viene dato per scontato) *la* soluzione del “problema giuridico di base e complesso della volizione collettiva e individuale, pubblica e privata *con l'intervento* di un'altra persona”. Permette, conseguentemente e inoltre, di capire che, nelle fonti romane, la “rappresentanza / sostituzione negoziale” manca non soltanto nel metodo, come «intuizione organica» o – più semplicemente – come «nome» generale⁵⁴, ma manca o, quanto meno, può mancare anche e soprattutto nel merito, come “istituto”⁵⁵.

Pertanto, il nostro compito è:

– **non** «trovare innanzi tutto una terminologia volta ad identificarlo [“l'istituto della rappresentanza”] il più possibile in maniera aderente alle testimonianze romane»⁵⁶,

configurarsi come destinatario della procura un soggetto che non è determinato. È vero, però, che l'indeterminatezza del destinatario non si rileva in senso assoluto, perché il terzo, cui è rivolta la procura risulterà individuato appena il rappresentante avrà incominciato a trattare con lui”.

Da ultimo, vedi ancora SEAZZU, G. C. *Iussum* e *mandatum*, cit., §§ A.I.2 “Interpretazione dello *iussum*: non comando alla persona in *potestate* ma autorizzazione al terzo” e “Osservazioni conclusive”, 2. “Una questione ancora aperta: a chi è indirizzata la procura?”.

⁵⁴ COPPOLA BISAZZA, Giovanna. Dallo *iussum domini* alla *contemplatio domini*. Contributo allo studio della storia della Rappresentanza, Corso di diritto romano. Milano, 2008, p. 10 ss., la quale cita, come autore della espressione “organica intuizione”, GUARINO, A. *Diritto privato romano*. 12. ed. Napoli, 2001, p. 403 ss.

⁵⁵ Già nella riflessione socratico-platonica “conoscere è distinguere e, inoltre, il distinguere non è mai soltanto conoscere un solo termine. È necessario anche conoscere l'altro termine, che il primo termine non è. L'essere è anche non essere” (GADAMER, Hans. *Mathematik und Dialektik bei Plato*, 1982; Id. – In: *Gesammelte Werke*, Bd. 7. Tübingen, 1991, S. 311. Trad. ital. *Matematica e dialettica in Platone*. – In: Id., *L'anima alle soglie del pensiero nella filosofia greca*. Napoli, 1988, p. 60).

⁵⁶ COPPOLA BISAZZA, Giovanna. Dallo *iussum domini* alla *contemplatio domini*. Contributo allo studio della storia della Rappresentanza, cit., “Introduzione”, § 2 “Da una concettualizzazione anti-romanistica alla regolazione romana del fenomeno rappresentativo”, in part. p. 12; Cfr. Id., *Lo iussum domini e la sostituzione negoziale nell'esperienza romana*, cit., e Id., *Aspetti della sostituzione negoziale nell'esperienza giuridica romana*. – In: *Rivista di Diritto romano*, Vol. 3, 2003, in part. l'*incipit* «Il fenomeno al quale si vuole qui alludere con l'espressione “sostituzione negoziale” corrisponde all'odierna figura della rappresentanza etc.»

– **ma** «trovare innanzi tutto una terminologia volta ad identificare il più possibile in maniera aderente alle testimonianze romane l'istituto con il quale i Romani risolvono il “problema di base e complesso”».

2. Lo schema istituzionale e linguistico di Cicerone e di Gaio, non di Savigny: “agire per mezzo di altri”, non “agire per altri”

La ricerca dell'istituto antico deve essere intrapresa con socratica ignoranza.

Come abbiamo detto e schematicamente argomentato, ciò significa – innanzi tutto – farsi carico di comprendere l'istituto della rappresentanza nella sua specificità storica e dogmatica, abbandonando la presunzione della sua sostanziale continuità dal mondo antico a quello odierno. Possiamo così osservare che l'istituto (il quale, nella elaborazione pandettistica, appare sacrificato all'istituto della “rappresentanza / sostituzione volitiva” e per il quale vale la ipotesi – come abbiamo visto, già ampiamente e autorevolmente sostenuta – di pregressa romanità)⁵⁷ è l'istituto della “partecipazione – cooperazione volitiva”: cooperazione, cioè, tra il comando o il mandato da parte del *dominus negotii* e la sua esecuzione (sempre con una necessaria dose di discrezionalità) da parte del servo o mandatario.

Ciò premesso e per la ragione più volte richiamata⁵⁸, anche noi dobbiamo (come ha fatto Savigny) iniziare il nostro esame dalla “volizione *collettiva* pubblica e privata con l'intervento di un'altra persona” (ma senza transitare dalla tutela!).

Su *questa* volizione, ci forniscono immediatamente, a favore dell'“indizio”, lumi chiarissimi e reciprocamente integrantisi Cicerone e Gaio/Giustiniano: con una continuità che va dal secolo I a.C. ai secoli II e VI d.C.

Di Cicerone è stata già osservata la attestazione della competenza della “assemblea generale” delle *societates* (in particolare *publicanorum*) ad assumere le “decisioni più importanti” (le quali faranno, quindi, oggetto della esecuzione in dettaglio da parte degli amministratori): *de domo* 28.74 *publicorum societates [...] decreta fecerunt*; in *L. Calp. Pis.* 18.41 *decreta publicanorum*; *pro Sest.* 14.32 *societas vectigalium [...] decrevisset*; in *P. Vat.* 3.8 *societatum [...]*

⁵⁷ Vedi, supra, nt. 32–38.

⁵⁸ Che, cioè, l'istituto della rappresentanza nasce in funzione della volizione collettiva (vedi, supra, § II.2).

decreta e specialmente *sec. in Verr.* 2.71.173 s., dove la “assemblea generale” è indicata con la locuzione “*multitudo sociorum*”⁵⁹.

Non potrebbe essere più rotonda la smentita alla dottrina savignyana, secondo cui «sind alle juristische Personen ihrer Natur nach, und für immer, handlungsunfähig [...], weil jede Handlung die menschliche Thätigkeit des Denkens und Wollens voraussetzt, welche in der juristischen Person, als einer bloßen Fiction, nicht gedacht werden kann.»⁶⁰.

Sulla relazione tra soci e amministratori delle società è, quindi, notissimo il testo gaiano riprodotto in D. 3.4.1.1:

Quibus autem permissum est corpus habere collegii societatis sive cuiusque alterius eorum nomine, proprium est ad exemplum rei publicae habere res communes, arcam communem et actorem sive syndicum, per quem tamquam in re publica, quod communiter agi fierique oporteat, agatur fiat.

La costruzione giuridica di Gaio è espressa puntualmente nella sua costruzione sintattica. L'*actor* o il *syndicus* sono non “complementi d’agente” ma “complementi di mezzo”. Il “mezzo”, a differenza dell’“agente”, non “sostituisce” il soggetto nell’agire ma “coopera” servilmente con esso, integrandone la azione, in particolare nell’impatto di questa con la sua destinazione ovvero con il suo destinatario. La sintassi latina conosce due complementi di mezzo, i quali sono espressi in forme ben diverse: se il mezzo è inanimato o è un animale non umano, la forma è l’ablativo; se il mezzo è un uomo la forma è *per* con

⁵⁹ Premesso che colpisce l’uso di questa ultima espressione proprio da parte dell’autore della più famosa definizione di *res publica* e, quindi, di *populus* come *coetus multitudinis iuris consensu et utilitatis communione sociatus* (*rep.* 1.39) l’autore contemporaneo cui si deve la osservazione è NICOLET, Claude. *Réflexions sur les sociétés de publicains: Deux remarques sur l’organisation des sociétés des publicains à la fin de la république romaine.* – In: *Effenterre, H. van.*, Ed. *Points de vue sur la fiscalité antique.* Paris, 1979, p. 76 s.; ripreso testualmente da MALMENDIER, Ulrike, *Societas publicanorum. Staatliche Wirtschaftsaktivitäten in den Händen privater Unternehmer.* Köln ; Weimar ; Wien 2002, p. 267: «Jedenfalls gab es eine “Generalversammlung” der Gesellschafter, die sich mit den wichtigen Entscheidungen für die Gesellschaft befaßte und die so groß sein konnte, daß Cicero sie als multitudo bezeichnet».

Per una visione più ampia, vedi LOBRANO, G. *Libertas, qui in legibus consistit* (Cic. agr. 2. 100). Pour se lieberer de l’“heutiges römisches Recht” [trad. della relazione al XVII Convegno Internazionale *Libertà ed abuso nel diritto privato romano*, Copanello, 1–4 giugno 2014] – In: *Bouineau, J.* (sous la dir. de) *Kasparian* (tex. réunis par). *Hommages à Marie-Luce Pavia. L’homme méditerranéen face à son destin.* Paris, 2016, p. 256 ss. e, in lingua orig., *La Libertas che in legibus consistit.* – In: *Diritto@Storia*, Vol. 16, 2017 – Quaderno no. 15.

⁶⁰ SAVIGNY, F. C. von. *System des heutigen römischen Rechts*, Band 3, cit., p. 89–90; Cfr. ONIDA, “Agire per altri” o “agire per mezzo di altri”?, cit, p. 84.

l'accusativo. La differenza tra i due "mezzi" risiede nella capacità intellettuale/volitiva, esclusivamente propria dell'uomo. Ciò significa la capacità del "mezzo umano" di cooperare con l'agire del soggetto precisamente nella attività *volitiva*, ovvero nella formazione della volizione.

Dunque, Cicerone attesta l'espresso comando da parte dei soci agli amministratori della società e Gaio ci fornisce la «terminologia volta ad identificare il più possibile in maniera aderente alle testimonianze romane l'istituto con il quale i Romani risolvono il "problema di base e complesso": il ricorso a un "mezzo". La "terminologia" gaiana, perfettamente in linea con la attestazione ciceroniana, evoca il soggetto dell'agire giuridico totalmente cancellato dalla dottrina dominante, il *dominus negotii*. Questa "terminologia" è "concludere negozi per mezzo di altri"; non (come, invece, vuole la "terminologia" dominante) "gestire negozi per conto di altri": *aliena negotia gerere*⁶¹, reso correntemente con "agire per altri"⁶².

La "terminologia" gaiana non è certamente isolata. Essa è, anzi, diffusa nelle fonti giuridiche romane. La troviamo nel titolo 27 del libro IV del *Codice* (*Per quas personas nobis acquiritur*), nel titolo 9 del libro II (*Per quas personas nobis acquiritur*) e nel titolo 28 del libro III (*Per quas personas nobis obligatio acquiritur*) delle *Istituzioni* di Giustiniano, la cui origine è nelle *Istituzioni* di Gaio. "Passi" dei giuristi e del legislatore, nei quali (escludendo, per le ragioni dette, quelli riferiti alla acquisizione a favore di incapaci e alla acquisizione del solo possesso) ricorre la proposizione *per quas personas nobis acquiritur*, o una sua stretta variante, sono: Gai. 1.52. *quodcumque per servum acquiritur, id domino acquiritur*; 2.95. *per liberos homines [...] nulla ex causa nobis adquiri posse*;

⁶¹ COPPOLA BISAZZA, Ancora Giovanna. Luoghi ultimi citati.
A fronte del supporto presso le fonti della "terminologia" che abbiamo definito gaiana e che riteniamo di dovere adottare, per cercare l'istituto romano mediante il quale è risolto il problema della "volizione collettiva e individuale pubblica e privata con l'intervento di un'altra persona", appare tutt'altro che monopolistico il ricorso presso le fonti della "terminologia" del «*negotia aliena gerere*» e tradotta nell'"agire per altri", con la quale si cerca nel Diritto romano la «"sostituzione negoziale" [che] corrisponde all'odierna figura della rappresentanza». Inoltre, in un importante testo romano in cui appare una espressione equivalente, Ulp. D. 3.3.1.pr. *Procurator est qui aliena negotia mandatu domini administrat*, la attività del *procurator* così evocata è contestualmente, espressamente subordinata al *mandatum domini*.

⁶² Vedi PADOA SCHIOPPA, A. A cura di. *Agire per altri. La rappresentanza negoziale processuale amministrativa nella prospettiva storica*. Napoli, 2010, dove la tesi della continuità rappresentatività tra antichi e medievali-moderni è sintetizzata, già nel titolo, con la formula "agire per altri", la quale esprime perfettamente il ruolo dominante del "rappresentante" a fronte del quale l'inoperoso rappresentato è relegato nel generico pronome "altri".

3.163. *adquiri nobis [...] per eas personas, quae in nostra potestate, manu mancipioe sunt*; 1.164 s.; cfr. 167a *nostri praeceptores proinde ei, qui iusserit, soli adquiri existimant*; Paul. Sent. 5.2.2. *Per liberas personas, [...] adquiri nobis nihil potest*; I. 2.9.4–5. *passim*; D. 13.7.11.6. *Per liberam autem personam pignoris obligatio nobis non acquiritur*; C. 4.27.1.pr. *Excepta possessionis causa per liberam personam, quae alterius iuri non est subdita, nihil adquiri posse indubii iuris est*.

Vi sono, inoltre, “passi” nei quali questa proposizione è costruita con il verbo all’attivo e, allora, il soggetto sia grammaticale sia sostanziale ne è – noi diremmo: “ovviamente” – il *dominus negotii*, sia collettivo sia individuale: lav. D. 31.40. *per alterum servum adquire*; Ulp. D. 38.3.pr. *per alium possunt petita bonorum possessione ipsi acquirere*; Paul. D. 41.2.1.18. *Idem dicendum est, si servum communem iussero adire hereditatem, quia propter partem meam adquire*; Paul. D. 45.1.126.2. *per liberam personam [...] obligationem nullam acquirere possumus*; I. 2.9.4. *ex omnibus causis per eum sibi acquirere potest*.

Troviamo una variante della versione originale latina della proposizione “agire per mezzo di altri” ancora persino nella formula sinibaldiana, la quale, da un lato, costituisce l’*incipit* della nuova dottrina della “rappresentanza/sostituzione” ma, dall’altro lato, testimonia lo stato della dottrina dalla quale si sta distaccando.

Questa altra variante è “*per alium iurare*”, dove il soggetto giurante è la collettività, la quale opera “per mezzo” dell’“altra persona”: “*hodie licitum est omnibus collegiis per alium iurare*”⁶³.

La – ovvia – subordinazione del “mezzo” (sia pure umano) alla volontà di chi lo adopera è puntualmente espressa nelle fonti. In attesa di approfondimenti e verifiche sistematici, già nelle fonti citate troviamo la frequente negazione – ribadita nel *CJC* e oltre⁶⁴ – della possibilità di acquisire diritti e obblighi per

⁶³ Vedi RUFFINI, F. La classificazione delle persone giuridiche in Sinibaldo dei Fieschi (Innocenzo IV) ed in Federico Carlo di Savigny. – In: *Scritti in onore di Francesco Schupfer*, Vol. 2. Torino, 1898, p. 313 ss. (= Id., *Scritti giuridici minori*, Vol. 2, Milano, 1936, p. 5 ss.); per ulteriori riferimenti vedi ONIDA, P. P. “Agire per altri” o “agire per mezzo di altri”?, cit., nt. 139.

⁶⁴ Ancora secondo il commento dello scoliasta “bizantino”, che (come osserva Siro Solazzi) “racchiude in sintesi tutta la storia della rappresentanza nel diritto romano”, colui il quale opera in nome altrui mai si intende “totalmente libero” (“πάντη ἐλεύθερος”). SOLAZZI, Siro. Errore e rappresentanza. – In: *Rivista italiana per le scienze giuridiche*, Vol. 50, 1911,

mezzo di persona libera o estranea. Resta a noi da capire che tale negazione non è il residuo cicatriziale di “un divieto in linea di principio [...] poi messo in crisi e rovesciato nel suo contrario, o nello sviluppo che conduce a Giustiniano, o nella stessa epoca classica”⁶⁵, ma è la formulazione *del* criterio fulcro, che caratterizza in maniera persino straordinariamente costante l’istituto romano soluzione del “problema di base e complesso della volizione collettiva e individuale pubblica e privata con l’intervento di un’altra persona”. Questo criterio sarà sì “rovesciato” ma non nel corso dello sviluppo del Diritto romano sebbene in quella applicazione del diritto feudale che è l’ordinamento parlamentare inglese del 1295, fondato – per la prima volta nella storia – sul “divieto del mandato imperativo”, cioè sulla “rappresentanza/sostituzione”⁶⁶.

Alcuni anni or sono questo ‘criterio’ è stato evocato e insieme oscurato con il ricorso allo schema interpretativo del “modo di produzione schiavistico”.

Più recentemente, è stato proposto, per rendere il pensiero dei giuristi romani, di abbandonare la corrente espressione italiana “agire per altri” per ricorrere a un’altra espressione italiana “agire per mezzo di altri”⁶⁷. Ci sembra questa la strada giusta.

3. Il principium: iussum e mandatum

In ultima analisi, la nostra ipotesi è che lo scontro ottocentesco tra le due soluzioni (culturali, politiche ed economiche oltre che giuridiche) storicamente trovate al “problema di base e complesso della volizione collettiva e individuale pubblica e privata con l’intervento di altra persona” (la soluzione antica partecipativa-cooperativa e la soluzione medievale-moderna rappresentativa/sostitutiva) si concentra nello- può essere ridotto allo scontro

p. 229 ss. (ora in Id., *Scritti di diritto romano*. Vol. I. Napoli, 1955, p. 294, da cui si cita), ripreso da QUADRATO, R. Rappresentanza. Diritto romano. – In: *Enciclopedia del diritto*, Vol. 38, Milano, 1987, p. 417 ss.

⁶⁵ COPPOLA BISAZZA, Giovanna. Dallo iussum domini alla contemplatio domini, cit., p. 10 s., la quale cita, per la tesi dello sviluppo giustiniano, BONFANTE, P. Corso di diritto romano. Vol. 4. Roma, 1918/19; 1919/20, rist. Milano 1979, p. 373) “questo ordinamento è così confuso e contraddittorio che, tenuto conto delle interpolazioni operate da Giustiniano, si può ben ritenere che egli abbia sancito in ogni caso la rappresentanza attiva e passiva, attribuendo unicamente valore storico alle testimonianze contrarie e al sistema classico” [sic!] e, per la tesi dello sviluppo già ‘classico’, un decisamente più misurato CORBINO, A. La legittimazione a ‘mancipare’ per incarico del proprietario. – In: *Iura*, Vol. 27, 1876, p. 70.

⁶⁶ Vedi, supra, § II.1, nt. 15–18 e § II.2, nt. 28–33.

⁶⁷ ONIDA, P. P. “Agire per altri” o “agire per mezzo di altri”?, cit.

sulla rilevanza o meno del comando iniziale, cioè sulla rilevanza o meno dello *iussum* o del *mandatum*.

La soluzione rappresentativa/sostitutiva, di genesi medievale-moderna, scelta e fatta trionfare dalla Pandettistica, è – come abbiamo visto – quella della eliminazione dello *iussum* e del *mandatum* dell'antico *dominus*. Dello *iussum* (già negato al popolo in quanto questo sarebbe una persona giuridica incapace di volere)⁶⁸ si nega (quindi) sia un comando (Befehl) e si afferma sia un incarico/autorizzazione (Anweisung/Verweisung) quando impartito da un individuo⁶⁹. Il *mandatum* (Auftrag) è sostituito con la procura (Vollmacht)⁷⁰. Lo *iussum* diventa esso stesso una procura *ante litteram*⁷¹.

La sequenza volitiva partecipativa e cooperativa, fatta di comando + esecuzione (con quota di discrezionalità) deve essere ri-costruita nell'interesse non soltanto della verità storica antica ma anche della domanda giuridica attuale, le quali, su questo tema, sono persino straordinariamente convergenti. Pensiamo alle denunce, da un lato, della crisi odierna della rappresentanza⁷² (e della sua ancella, la persona giuridica)⁷³ e, da altro lato, della dimenticanza “moderna” della democrazia⁷⁴, con il conseguente “blocco teorico del pensiero politico”⁷⁵.

⁶⁸ Vedi, supra, nt. 44.

⁶⁹ Vedi, supra, nt. 47.

⁷⁰ Vedi, supra, nt. 50.

⁷¹ Vedi, supra, nt. 51.

⁷² Vedi LOBRANO, G. Dottrine della ‘inesistenza’ della costituzione e “modello” del diritto pubblico romano. – In: *Tradizione romanistica e costituzione*. Tomo primo – tomo secondo. Dir. L. Labruna. A cura di Maria Pia Baccari e C. Cascione [Collana: Cinquanta anni della Corte costituzionale della Repubblica italiana]. Napoli, 2006. Tomo primo, § 2.b. Constatazione della inesistenza dell'istituto costituzionale ‘inglese’ della rappresentanza politica per la formazione della volontà pubblica, leggibile ‘on-line’ in *Diritto@Storia*, 5 2006.

⁷³ Vedi CORRÊA de OLIVEIRA, J. L. A Dupla Crise da Pessoa Jurídica. São Paulo, 1979 (Cfr. Id., *Conceito de pessoa jurídica*. Curitiba, 1962); più recentemente: BARUCHEL, Natalie. La personnalité morale en droit privé. Paris, 2004 – Première partie. La crise de la notion de personnalité morale; SERRA, A. Regressione evolutiva degli istituti giuridici: brevi riflessioni sulla nozione di persona giuridica. – In: *Diritto@Storia*, 2005, Vol. 4 – leggibile ‘on-line’ in <http://www.dirittoestoria.it/4/Contributi/Serra-Regressione-evolutiva-degli-istituti-giuridici.htm>.

⁷⁴ FINLEY, Moses. *Democracy ancient and modern*. London, 1973, osserva che all'odierno consenso generale sulla parola ‘democrazia’ corrisponde una tale inconsistenza del concetto da renderne inutile qualsiasi tentativo di analisi (la citazione è presa dalla edizione italiana – *La democrazia degli antichi e dei moderni*. Transl. Francesco de Martino e Gianni di Benedetto. Carmine Ampolo, Contributor. Bari, 1982, p. 11).

⁷⁵ LENOBLE, J. et MAESSCHALCK, M. *L'Action des normes. Éléments pour une théorie de la gouvernance*. Sherbrooke, 2009 [version française, enrichie d'une nouvelle introduction et d'une préface, de l'ouvrage *Towards a Theory of governance, The Action of Norms*. Hague ; London ; New York, 2003], p. xxvii – “La philosophie politique récente n'est pas restée prisonnière de cette approche ‘représentative’ de la démocratie. [...] L'idée émerge, tant dans les transformations qui affectent la réalité de nos sociétés que dans la pensée

Il *potissimus* punto di partenza della sequenza è, evidentemente, il comando del *dominus negotii* (collettivo o individuale, pubblico e privato), nelle due forme (diversamente ma entrambe potestative) dello *iussum* e del *mandatum*.

Per questa ri-costruzione dobbiamo studiare le fonti, veramente⁷⁶.

politique de la démocratie, d'un nécessaire renforcement des formes de participation des citoyens à l'exercice du pouvoir. Mais le terme reste souvent vague. De plus, même là où l'analyse se fait plus fine, l'exigence que ce terme dénote reste plus de l'ordre de la boîte noire que d'une opération théoriquement construite. Ce défaut de construction théorique explique ce que nous identifions comme un blocage"; Cfr. ibidem, p. xviii, e Id., *Democracy, Law and Governance*. Padstow, 2010.

Per un esempio di applicazione della riflessione gius-romanistica al problema attuale evocato da Lenoble e Maesschlck, vedi LOBRANO, G. «Federalismo» o «confederazione»? ripensare e riformare federalismo e autonomia, rileggendo Emilio Lussu, in corso di pubblicazione, ora leggibile in <https://www.sinistra-autonomista-federalista-euromediterranea.it/federalismo-o-confederazione-ripensare-e-riformare-federalismo-e-autonomia-rileggendo-emilio-lussu-a-cura-di-g-lobrano/>.

⁷⁶ La ipotesi di lavoro è che lo *iussum* è il comando a persona strutturalmente e generalmente nel potere dello iubente e il *mandatum* è il comando a persona per ciò funzionalmente e parzialmente posta nel potere del mandante.

Per essa rinviamo a LOBRANO, G. Esiste un "pensiero politico-giuridico latino-americano"? Caratteristiche e attualità del pensiero democratico: federalismo vero contro federalismo falso tra Europa e America. – In: *Giménez Chornet, V. e Colomer Viadel, A.*, Eds. I Congreso Internacional América-Europa, Europa-América (27–29 de julio de 2015). Libro de Actas, Valencia, 2015, § 2.b.β.β. "Il mandato: contratto e comando"; ONIDA, P. P. In tema di natura del *mandatum*", cit.; SEAZZU, G. C. *Iussum e mandatum. Alla origine delle actiones adiecticiae qualitatis*. Vol. 1. Ipotesi di lavoro e stato della dottrina, cit., *passim*.

***IUS VITAE – SPES VITAE. РИМСКОПРАВНИ
АСПЕКТИ В СЪВРЕМЕНОТО ПРАВО (НА
ИТАЛИАНСКИ ЕЗИК)***

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Резюме: През 2015 г. Европейският съд за правата на човека в Старсбург, в разширен състав от 17 съдии, се произнася с решение по делото *Parrillo срещу Италия* (Жалба № 46470/11). То се отнася до забраната, въведена с един италиански закон (№ 40/2004), за дарения на ембриони, създадени чрез асистирана репродукция, дори за целите на научни изследвания. Тази разпоредба според жалбоподателката е несъвместима с правото ѝ на зачитане на личния ѝ живот и спокойното ползване от нейното имущество, гарантирани съответно от чл. 8 от Европейската конвенция за правата на човека и основните свободи, и чл. 1 от Протокол № 1 към Конвенцията. Съдът решава, че ембрионът не е имущество, принадлежащо на родителите, и жалбоподателката не може да дари оплодените си ембриони за научни цели, а е длъжна да ги запази в състояние на криоконсервация до тяхната естествена смърт. Представен е нов аргумент по проблема за статуса на човешкия зародиш и неговите „права“, който дава една широкомащабна проекция на римските принципи за *ius vitae* и *spes vitae*. Този казус е в основата на разсъждения за конфликта между правата на лицата в общ план, защитата на личния живот, публичния интерес и пр. във връзка с прилагането на римскоправните институти на *curator ventris*, наказателната отговорност за предизвикан аборт, *ius vitae necisque* на *pater familias* и становищата на класическата римска юриспруденция

Ключови думи: *ius vitae*; *spes vitae*; *nasciturus*; човешки ембрион; Европейски съд за правата на човека.

*IUS VITAE – SPES VITAE. ROMAN
PROSPECTIVES IN THE CONTEMPORARY LAW
(ITALIAN LANGUAGE)*

*IUS VITAE – SPES VITAE. PROSPETTIVE
ROMANE NELLA LEGISLAZIONE
CONTEMPORANEA*

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Abstract: In 2015 the European Court of Human Rights in Strasbourg, meeting in a Grand Chamber, composed of 17 judges, pronounces the judgment on the case *Parrillo v. Italy* (Application No. 46470/11). On the case of the prohibition of an Italian law (No. 40/2004) of donation for the purposes of scientific research of embryos conceived through medically assisted reproduction, the applicant finds it incompatible with her right to respect for her private life and the peaceful enjoyment of her assets guaranteed respectively by Article 8 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention. The court decides that the embryo is not a good just for parents and the petitioner can't donate her embryos for scientific purposes, but she is obliged to keep them in a state of cryopreservation until their death. A new argument is presented on the problem of the status of human embryo and its "rights" and a far-reaching projection of the Roman principles of *ius vitae* and *spes vitae*. This position of court gives the basis of the reflections about the human rights in general and the protection of privacy, the public interest etc. in relation with the Roman rules for *nasciturus*, *curator ventris*, the criminal responsibility for the deliberate abortion, *ius vitae necisque* of the *pater familias* and the opinions of the classical Roman jurisprudence.

Keywords: *ius vitae*; *spes vitae*; *nasciturus*; human embryo; European Court of Human Rights.

1. INTRODUZIONE

Il tema dell'attuale Terza Conferenza Internazionale dell'Associazione balcanica di Diritto Romano e Tradizione Romana riguarda l'umanesimo nel diritto, percepito come espressione dell'interesse fondamentale per la persona umana come essere individuale e sociale e la creazione di regole e di misure per la sua protezione.

In questo senso, la frase d'Ermogeniano¹, che è al inizio del titolo V di Libro I di Digesto, può apparire come un motto di ricerca scientifica e di discussione:

D. 1.5.2 (Hermogenianus libro primo iuris epitomarum) Cum igitur hominum causa omne ius constitutum sit [...]

Una brillante interpretazione di questa sentenza si trova nel libro del Prof. Sebastiano Tafaro “Ius causa hominem constitutum: un diritto a misura d'uomo”². Moltissimi sono gli studi di prof. Tafaro sulla centralità dell'uomo. Lui afferma, che all'inizio del trattato destinato all'esposizione delle linee fondamentali concernenti lo ius, i redattori della Compilazione Giustinea abbiano riflettuto sul diritto romano e sul suo sviluppo, e arriva alla conclusione che tutto lo ius era stato caratterizzato dalla massima considerazione delle persone, tanto da potersi dire creato in funzione di loro. Tale centralità si rifletté anche nelle sistematiche dei giuristi, alcuni dei quali, durante il Principato ed in particolare dal II° secolo d.C., iniziavano le loro opere, partendo proprio dalle *personae*³.

¹ Aurelio Ermogeniano è un eminente giurista romano dal fine di III – inizio di IV secolo, funzionario nella Cancelleria imperiale di Diocleziano. Nelle fonti è nominato autore di una raccolta di 6 libri, *Iuris epitomae*. Si presume anche compilatore del c.d. codice Ermogeniano – una raccolta non ufficiale con rescritti del biennio 293–294, che erano il nucleo originario al quale si aggiungevano le costituzioni posteriori. Vd. SCHERILLO, G. v. “Codex Hermogenianus”. – In: *NNDI*, Vol. 3, Torino, 1959, p. 380; CENDERELLI, A. Ricerche sul Codex Hermogenianus. Milano, 1965.

² Vd. TAFARO, S. *Ius causa hominem constitutum: un diritto a misura d'uomo*. Edizioni Scientifiche Italiane. Napoli, 2009. Prefazione.

³ Vd. TAFARO, S. *Diritto e persona: centralità dell'uomo*. – In: *Diritto@Storia*, Rivista internazionale di Scienze Giuridiche e Tradizione Romana, Vol. 5, 2006 – disponibile su <http://www.dirittoestoria.it/5/Tradizione-Romana/Tafaro-Diritto-persona-centralita-uomo.htm>, visto l'ultima volta su 15 gennaio 2019, così come tutto quanto sopra.

Tuttavia, quando si presenta il tema dell'umanesimo nel diritto, non possiamo ignorare un aspetto meno familiare dell'interpretazione del termine “*humanitas*”, noto nelle *Noctes Atticae* di Aulo Gellio:

XIII.17. [XVII. “Humanitatem” non significare id, quod volgus putat, sed eo vocabulo, qui sinceriter locuti sunt, magis proprie esse usos. Qui verba Latina fecerunt quique his probe usi sunt, “humanitatem” non id esse voluerunt, quod volgus existimat quodque a Graecis “philanthropia” dicitur et significat dexteritatem quandam benivolentiamque erga omnis homines promiscam, sed “humanitatem” appellaverunt id propemodum, quod Graeci “paideian” vocant, nos eruditionem institutionemque in bonas artis dicimus. Quas qui sinceriter cupiunt adpetuntque, hi sunt vel maxime humanissimi. Huius enim scientiae cura et disciplina ex universis animantibus uni homini datast idcircoque “humanitas” appellata est [...]

Secondo Gellio umanesimo non è solo l'amore e l'attenzione per l'esistenza dell'uomo, l'assistenza e la benevolenza per tutti, senza far distinzione, ma illuminismo, educazione e formazione nella scienza e nelle arti (*eruditionem institutionemque in bonas artis dicimus*). Se questa visione è precepta, il diritto a misura d' uomo non è solo legato alla persona umana, alla registrazione del suo stato e dei suoi problemi, ma allo studio più approfondito di tutti gli aspetti della vita umana, alla scoperta di nuove prospettive nella scienza e la sua interpretazione. Da lì il significato della parola “*ars*” in latino , che non sempre significa “arte”, ma un' alta abilità, elevata specializzazione, esercizio abile di una particolare attività, ecc. In questo senso è la definizione di Celso per il diritto come “*ars aequi et boni*”⁴.

2. LA PROTEZIONE DELLA VITA UMANA IN DIRITTO INTERNAZIONALE

Da questo punto di vista i temi che presentano una parte importante negli scritti di prof. Tafaro, ma che sono anche oggetto di notevole interesse scientifico sia in studi romanistici sia in tutta la scienza moderna, sono al primo riguardo **la vita umana e la sua protezione**. Come una replica dello studio di prof. Tafaro, vorrei dedicare questo articolo a lui e ringraziarlo dell'ispirazione e la profondità, con cui lui ha delineato la prospettiva delle nostre ulteriori ricerche.

E nel momento in cui il mondo sta per festeggiare il **70 anniversario della Dichiarazione universale dei diritti umani**, vorrei iniziare la nostra conferenza

⁴ Vd. VOICI, P. *Ars boni et aequi*. – In: *INDEX*, Vol. 27, 1999, In memoria di Giambattista Impallomeni, Vol. 2, p. 1–22.

proprio con questo **argomento di diritto primordiale, diritto del Inizio, diritto-fondamento di tutti diritti umani- diritto alla vita**. Questo incarna non solo la comprensione della relazione fra diritto e l'uomo, ma anche la protezione dei valori fondamentali della vita umana e dell'esistenza.

Il diritto alla vita è discusso dai differenti punti di vista - filosofiche, teologiche, socio economiche, psicologiche, etiche, biologiche, mediche ecc. Quando si tratta, tuttavia del quadro giuridico del diritto alla vita, l'interesse è principalmente focalizzato sulla sua proclamazione e la tutela generale in connessione ad un sola esclusione: la privazione di una vita che è permessa solo come la pena di morte imposta dal tribunale competente. In Preambolo della Dichiarazione universale si parla di atti barbariche contro la vita e l'umanità pensando alla Seconda guerra mondiale e il disastro sociale dopo la guerra. Così nell'articolo 3 della Dichiarazione universale si legge: "Ogni individuo ha diritto alla vita, alla libertà ed alla sicurezza della propria persona."

Più concretata in questo senso è la Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali o Convenzione Europea per diritti umani (CEDU), redatta e adottata nell'ambito del Consiglio d'Europa ma con importanza internazionale e universale.

La CEDU è considerata come il testo centrale in materia di protezione dei diritti fondamentali dell'uomo perché è l'unico dotato di un meccanismo giurisdizionale permanente che consenta a ogni individuo di richiedere la tutela dei diritti ivi garantiti, attraverso il ricorso alla Corte europea dei diritti dell'uomo, con sede a Strasburgo. Subito dopo, l'obbligo di rispettare i diritti dell'uomo secondo art. 1, segue

"ARTICOLO 2. Diritto alla vita

1. Il diritto alla vita di ogni persona è protetto dalla legge. Nessuno può essere intenzionalmente privato della vita, salvo che in esecuzione di una sentenza capitale pronunciata da un tribunale, nel caso in cui il reato sia punito dalla legge con tale pena.
2. La morte non si considera cagionata in violazione del presente articolo se è il risultato di un ricorso alla forza resosi assolutamente necessario: (a) per garantire la difesa di ogni persona contro la violenza illegale; (b) per eseguire un arresto regolare o per impedire l'evasione di una persona regolarmente detenuta; (c) per reprimere, in modo conforme alla legge, una sommossa o un'insurrezione."

In questo contesto appare che il diritto alla vita è in stretta relazione con le nozioni astratti della persona, diritto soggettivo, soggetto di diritto, personalità giuridica, capacità giuridica, cittadinanza, nazionalità ecc. Questi nozioni sono

fondamentali nel diritto civile, diritto costituzionale, diritto internazionale. Nella scienza sempre si fa un riferimento ai termini e nozioni di diritto romano e la nozione di base “persona”⁵. Ma i giuristi romani usano concetti concreti e non mere astrazioni concettuali, introdotti nella dommatica moderna da Pandettisti. Nelle fonti giuridiche romane non c’è identità fra termini e concetti di persona come soggetto di diritto, almeno che non si trova tale grande importanza dal momento della nascita per far creare la personalità giuridica. Come osserva P. Catalano “Il concetto giuridico ‘naturale’ di persona-homo, che include liberi e servi, nati e nascituri, è fondamentale nella sistematica ed ha rilevanti conseguenze normative”⁶. Secondo lui l’autoproiezione del concetto contemporaneo di “soggetto di diritto” può trarre “seco assurdità dogmatiche” secondo il diritto romano, che non fa la distinzione fra nato e nascituro (qui in utero est, *partus*, *foetus*), fra uomo libero o servo – tutti sono percepiti come “homines”.

In tale senso Francesco Donatto Busnelli afferma che “tra uomo e persona si introduce uno schermo [...] lo schermo della capacità giuridica (*Rechtsfähigkeit*). L’uomo-persona cessa di essere tale per diventare soggetto giuridico, soggetto ad una norma che può anche disconoscerlo”⁷.

Ma il problema non ha solo dimensioni dogmatiche cercando l’origine della personalità giuridica nel diritto romano. La ricerca del significato della soggettività personale si vede collocata in un sistema di tensioni che possono essere inserite in una ragnatela di termini e concetti che inquietano la nostra esistenza odierna – non solo per la posizione del embrione umano, ma per lo stato del corpo umano tale oggetto di diritto, per la differenza fra individuo e soggetto, persona fisica ecc. E se facciamo riferimento al patrimonio dei giuristi

⁵ Vd. SACCHI, O. Persona e diritto romano. Elementi per un’archeologia giuridica del concetto. – In: *Atti dell’Accademia Romanistica Costantiniana (AARC)*, XVII Convegno Internazionale in onore di Giuliano Crifò, Vol. 2, 2010, p. 1189–1263, KOFANOV, L. L. Origini e sviluppi del concetto di persona nella Roma repubblicana. – In: *Diritto@Storia*. Rivista internazionale di Scienze Giuridiche e Tradizione Romana, Vol. 9, 2010 – disponibile su <http://www.dirittoestoria.it/9/Tradizione-Romana/Kofanov-Persona-Roma-repubblicana.htm>; BRAMANTE, M. V. Forme e modi dell’identificazione della persona nei linguaggi tecnici antichi. Le testimonianze formulari di epoca romana. – In: *SDHI*, Vol. 82, 2016, p. 327–359.

⁶ CATALANO, P. Diritto e persone. Studi su origine e attualità del sistema romano. Vol. 1. Torino, 1990, p. 167 ss., p. 196 ss.

⁷ Vedi l’argomentazione in BUSNELLI, F. D. “Persona” e sistemi giuridici contemporanei. – In: *Roma e America*. Diritto romano comune. Rivista di diritto dell’integrazione e unificazione del diritto in Europa e in America Latina, Vol. 1, 1996, p. 137 ss.

romani non è per una ricerca di “diritto per diritto stesso”, ma con la consapevolezza che i modelli di pensiero romano possono toccare direttamente la nostra esistenza. I concetti antichi con la loro lontananza in tempo che sono pervenuti a noi, presentano un modello di relazione e una garanzia di imparzialità per l'immagine attuale dell'uomo. Allora se prendiamo questi concetti come un filo di Arianna possiamo trovare un valido strumento per mettere a confronto idee moderni e risolvere la problematica complessa della regolamentazione della vita umana, il suo inizio e la relazione con la personalità giuridica.

3. LA PRATICA DELLA CORTE EUROPEA PER DIRITTI UMANI

Ritornando alla CEDU e la pratica della Corte europea per diritti umani, vediamo che le disposizioni della Convenzione sono interpretati sempre per la vita postnatale dell'uomo, ma non per il periodo prenatale. Questo è in relazione al concetto dominante che il soggetto di diritto, la persona, l'uomo esiste dopo il momento della nascita. Nella sentenza della Corte di Strasburgo di 10 aprile 2007 per la *causa Evans contro Regno Unito* (ricorso n. 6339/05) riconosce che gli embrioni non possono beneficiare del diritto alla vita protetto dall'articolo 2 della Convenzione e non vi è alcuna violazione di tale disposizione (“Grant Chambre estime que les embryons créés par la requérante et J. non peuvent pas prévaloir du droit à la vie protégé per l'article 2 et qu'il n'y a pas donc la violation de cet article”).

Con questa posizione esplicitamente espressa non si dà la risoluzione del grande problema dello statuto e la protezione di embrione umano. Il tema è dibattuto largamente nella dottrina⁸. Alcune posteriori sentenze della Grande Camera della Corte europea dei diritti dell'uomo, possono essere trattate come

⁸ Ci sono moltissimi studi per il problema secondo la legislazione nazionale o di punto di vista comparativo. Vd. gli autori citati nel libro di BACCARI, M.P. Curator ventris. Il concepito, la donna e la res publica tra storia e attualità. Torino, 2012. Vd. anche FERNANDEZ BAQUERO, M. E. Nacimiento de la persona: pasado y presente. – In: *FORO. Revista de Ciencias Jurídicas y Sociales, Nueva época*, Vol. 16, 2013, no. 2, p. 139–172; PALMA, A. Il nascituro come problema “continuo”: diritto romano e diritto privato italiano alla luce di recenti asseriti giurisprudenziali. – In: *Revista Europea de Historia de las Ideas Políticas y de las Instituciones Públicas*, Vol. 8, 2014, p. 45–78; ALVARADO CHACON, J. R. La persona en el derecho romano y su influencia en el sistema jurídico de la América Latina. – In: *Anuario del Instituto de Derecho Comparado*, Vol. 25, 2002 – disponibile su <http://servicio.bc.uc.edu.ve/derecho/revista/idc26/26-1.pdf>

“ice cracking” in questa direzione. Sebbene la maggior parte di esse sia stata pronunciata in relazione all'attuazione dell'articolo 8 della Convenzione (Diritto al rispetto della vita privata e familiare) e l'articolo 4 della Carta dei diritti fondamentali dell'Unione europea (Interdizione della tortura e le pene o trattamenti inumani o degradanti), più di 19 sentenze trattano questioni relative allo sviluppo embrionale umano. Nella maggior parte dei casi, le decisioni sono legate ai diritti della madre o dei due genitori, ma in realtà vengono commentate sul danno o sulla morte dell'embrione⁹. Ecco alcuni di questi casi:

- Per la causa di un'erronea diagnosi di gestazione gemellare provocato dalla scomparsa di un possibile secondo neonato – ciò che colpisce i diritti di entrambi genitori, ma anche il diritto alla vita di uno degli embrioni;
- Le richiedenti, che sono cittadine etniche Rom, durante le loro gravidanze e le loro consegne, sospettavano che il personale medico li avesse sottoposti, attuando un parto cesareo, ad un procedimento di sterilizzazione che sarebbe stato la causa della loro infertilità futura e respinge qualsiasi speranza di essere genitori di nuovo e la crescita delle loro famiglie.
- Una donna è stata sterilizzata dando alla luce in parto cesareo al suo secondo figlio. Secondo lei ha firmato la forma del consenso alla sterilizzazione sotto il dolore e la paura della morte durante una futura gravidanza, ma non ha capito in quel momento il significato della sterilizzazione, la natura e le conseguenze del processo, e in particolare la sua natura irreversibile. Non è stata informata di altri metodi di contraccezione e non voleva essere privata della speranza di maternità;
- A seguito di una confusione derivante dall'omonimia tra i due pazienti, il medico esaminò il richiedente e provocò una rottura della sacca

⁹ Vd. analisi della pratica del Corte europeo per diritti umani sul art. 8 della Convenzione in mio articolo “Una prospettiva diversa sul diritto alla vita” nel libro della Conferenza Internazionale “Diritti umani – 70 anni dopo l'adozione della Dichiarazione Universale dei Diritti Umani” nella Facoltà di giurisprudenza della Università di Sofia, 10 dicembre 2018 [Международна научна конференция „Правата на човека – 70 години след приемането на Всеобщата декларация за правата на човека от ООН“], in corso di edizione.

d'acqua, rendendo necessario un aborto terapeutico e di tale modo ha privato una donna e una famiglia di avere un bambino molto desiderato;

- Incinta con il suo primo figlio, una giovane donna e suo marito non vengono informati dei risultati dell'amniocentesi, che rivela un'anomalia nello sviluppo del feto. Il bambino che era nato presentava malformazioni cerebrali molto gravi, una grave infermità e un'invalidità totale e definitiva che richiedeva in particolare cure specialistiche permanenti. È stato riconosciuto che era stata fatta una diagnosi errata e che l'anomalia cromosomica del bambino era rilevabile al momento dell'amniocentesi;
- La trascrizione del certificato di nascita sugli archivi del registro consolare francese a Miami di un bambino nato negli Stati Uniti di genitori francesi è stata rifiutata considerando le indicazioni che avevano fatto ricorso a una convenzione maternità surrogata senza accettare prove dell'esperienza genetica. Si tocca il grande problema della difesa della maternità surrogata in molti paesi, ma la Corte dà la preferenza alla legislazione nazionale nemmeno è contro la speranza di molte famiglie di avere i bambini a parte con relazione genetica con uno o i due genitori;
- La ricorrente lamentava una violazione degli articoli 3, 8, 12, 13 e 14 della Convenzione a causa della sua sterilizzazione in un ospedale pubblico e la sua successiva incapacità di ottenere un risarcimento adeguato dalle autorità sanitarie. Essa sosteneva che i fallimenti nel suo trattamento avevano portato a complicazioni mediche che mettevano in pericolo la sua vita e la lasciavano permanentemente incapace di generare figli che è contro la sua speranza di maternità.

Particolarmente interessante in questa direzione è una sentenza del 27 agosto 2015 della Grande Camera della Corte europea dei diritti dell'uomo che ha stabilito che il divieto di donare embrioni alla scienza, ricavabile dall'art. 13 della L. 40/2004, non viola i diritti tutelati dagli articolo 8 della Convenzione europea dei diritti dell'uomo e l'articolo 1 del Protocollo 1¹⁰.

¹⁰ Vd. la Sentenza della Corte Europea dei Diritti dell'Uomo del 27 agosto 2015 – Ricorso n. 46470/11 – *Parrillo c. Italia*, disponibile su https://www.giustizia.it/giustizia/it/mg_1_20_1.page?contentId=SDU1192478&previousPage=mg_1_20

La ricorrente, Adelina Parrillo, ed il suo compagno, il regista Stefano Rollo, avevano fatto ricorso ad un trattamento di procreazione medicalmente assistita nel 2002, dunque prima dell'adozione della Legge 40/2004. Gli embrioni fecondati non erano stati impiantati, ma erano stati sottoposti a crioconservazione. Dopo la morte del compagno (che ha perso la vita durante l'attentato di Nassiriya in Iraq, il 12 novembre 2003), la ricorrente Parrillo decideva di non procedere all'impianto e manifestava l'intenzione di donare gli embrioni alla ricerca scientifica per contribuire in tal modo al progresso delle cure di malattie difficilmente curabili. La donna otteneva però il rifiuto da parte della struttura sanitaria presso la quale gli embrioni erano conservati. Articolo 13 della stessa legge di 2004, che nel frattempo era entrata in vigore, contiene divieto di ogni sperimentazione sugli embrioni, disponendo, a titolo di sanzione penale, la reclusione da due a sei anni e la multa da 50 000 a 150 000 euro. Solo la ricerca clinica e sperimentale "con finalità terapeutiche e diagnostiche volte alla tutela della salute e allo sviluppo dell'embrione" è consentita dal dettato normativo, a condizione che, per perseguire i medesimi scopi, non siano disponibili metodologie alternative.

La causa è sottoposta anche al livello nazionale e costituzionale in Italia. Si apre un vasta discussione scientifica e nel ambito sociale per i limiti della vita privata, diritto alla vita del embrione, le ricerche scientifiche con consentimento dei genitori ecc. Di nuovo è posto il problema dello status del embrione, se esso ha il diritto alla vita contro la volontà dei suoi genitori, se si tratta e appartiene come bene ai genitori o solo alla madre, se si può parlare di atti di donazione ecc.

L'argomentazione della sentenza anche è molto ampia, ma troppo controversa. Per la Corte europea, l'impossibilità di donare gli embrioni alla scienza non violerebbe il diritto alla vita privata della ricorrente (art. 8 di CEDU) e si deve rispettare la legislazione nazionale vigente in momento della manifestazione della volontà della ricorrente. Il più importante considerazione è che non c'è una violazione del diritto di cui all'art. 1 del Protocollo 1, in quanto l'embrione non può essere ricondotto alla nozione di "bene", di cui a tale disposizione che notoriamente implica un significato patrimoniale.

La lettura del testo della sentenza del 27 agosto 2015 rivela gli sforzi con cui la maggioranza dei giudici ha tentato di mantenere una posizione neutra sulla controversa e sensibile questione di bioetica che si pone alla base del caso: lo status dell'embrione e suo diritto alla vita. Come in altri casi, infatti, per il divieto del aborto in alcuni paesi (causa A., B. e C. contro Irlanda)¹¹ da una parte che si pretenda di conservare la vita del embrione e la speranza di genitori, e d'altra parte la negazione di diritto alla vita del embrione, protetto dal art. 2 di CEDU (causa *Vo contro Francia*)¹², la Grande Camera ha accuratamente sorvolato sulla questione di quando la vita abbia inizio, rispettivamente se l'embrione ha un diritto alla vita dal concepimento o più tardi. Si è trattato, come confermano le opinioni dei giudici Pinto de Albuquerque e Dedov, che hanno sentito l'esigenza di assumere posizioni più nette sul tema nonostante che la ricorrente non pretende violazione di art. 2 di CEDU. Si vede un confronto fra i giudici solo nel non applicazione dell'art. 8 di CEDU nel caso di specie, non essendo in discussione il desiderio di genitorialità della ricorrente.

La maggioranza dei giudici ha stabilito che il diritto di decidere della sorte dei propri embrioni è senza dubbio compreso nel concetto di vita privata, che di per sé è molto ampio ed include il diritto all'autodeterminazione. I giudici chiariscono il legame esistente tra la persona che si sottopone al trattamento di fecondazione assistita e gli embrioni così concepiti. In particolare, tale legame si concretizza nel fatto che "gli embrioni contengono il materiale genetico della persona interessata e costituiscono quindi una parte costitutiva di tale materiale genetico e identità biologica". Con questo la Corte sembra in qualche modo ricondurre ad unità il genitore biologico e l'embrione, rappresentando quest'ultimo, appunto, parte integrante del materiale genetico e dell'identità biologica del primo. Ma poi prevale un'opinione tutta al contrario. Grande Camera dà la priorità del divieto di donare "suoi" embrioni alla scienza, previsto nella legge italiana, con lo scopo di tutelare la morale e i diritti e le libertà di altri: ovvero, la protezione dell'"**il potenziale embrionale per la vita (embryo's potential for life)**" (§ 123 della Sentenza). **La posizione della Corte è in due**

¹¹ Vd. la sentenza in francese in <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-102335&filename=001-102335.pdf>

¹² Vd. <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-1047783-1084371&filename=003-1047783-1084371.pdf>

sensi opposti: da una parte riconosce l' "appartenenza" che segue del legame tra il genitore e l'embrione, dall'altra, stabilite la particolare condizione del embrione che merita di tutela. E se si prende la centralità del diritto di decidere della sorte dei propri embrioni nell'alveo delle posizioni giuridiche soggettive tutelate dall'art. 8 di CEDU, si afferma la ragione di riduzione della libertà di disposizione con "suoi" embrioni per ragione del interesse pubblico e morale.

Le tesi sostenute dalle parti della causa erano diametralmente opposte. La ricorrente sosteneva che gli embrioni non potessero considerarsi "individui", poiché, non essendo stati impiantati, non erano destinati a divenire feti e quindi a nascere. Lei insiste al suo diritto di appartenenza e di libera decisione sul destino del embrioni. Il governo italiano quasi afferma implicitamente che gli embrioni non potessero identificarsi come "cose, beni", non sono oggetti della proprietà; ma possono essere considerati secondo l'ordinamento italiano come i soggetti di diritto, meritevoli del rispetto della dignità umana.

Tuttavia essi hanno avuto cura di giungere ad una posizione così netta, preannunciando di non volersi esprimere sulla problematica questione di quando la vita abbia inizio, anche considerato il fatto che nel caso di specie non era in discussione l'applicazione dell'art. 2 di CEDU. La Corte ha dunque tentato di assumere una posizione la più neutra possibile rispetto alla questione di fondo per lo stato del embrione con ragione formale di mancanza di ricorso per art. 2 di CEDU. Questo si può spiegare in senso che la pratica sul questo articolo non da ancora la possibilità di avere una posizione definitiva in due ragioni completamente contraddittori – la necessità di dare la precedenza alla tutela della vita 'potenziale' di un embrione come soggetto di diritto o, viceversa, alla speranza di cura delle grave malattie con la qualificazione dell'embrione quale "bene", oggetto di diritto, proprietà di altri, e dunque oggetto di atti di donazione¹³.

¹³ Vd. commenti in Italia della Sentenza disponibile su <http://www.sidiblog.org/2015/09/22/la-sentenza-parrillo-c-italia-e-quello-che-la-corte-non-dice-sullo-status-dellembriane/>; <https://www.penalecontemporaneo.it/d/4158-divieto-di-sperimentazione-sugli-embrioni-umani-e-convenzione-europea-dei-diritti-dell-uomo>; <https://www.ilfattoquotidiano.it/2014/04/22/legge-40-la-guerra-di-adele-parrillo-contro-italia/953943/>;

La questione per lo stato del embrione umano, rispettivamente suo diritto alla vita, rimane ancora aperta e sicuramente la pratica della Corte europea lascia insoddisfatti tutti coloro che rivestono grandi speranze nella ricerca scientifica per la cura di malattie molto gravi, ma anche coloro che difendano le posizioni della bioetica in relazione alla medicina, religione ecc, secondo quali la vita e diritto alla vita cominciano del concepimento. E' evidente la necessità di trovare un bilancio tra un "potenziale" diritto alla vita e allo sviluppo dell'embrione con il diritto alla ricerca scientifica collegato alla tutela della salute individuale e collettiva.

4. DIRITTO ROMANO E LA PROTEZIONE DELLA VITA DEL NASCITURUS

Allora in questo momento mi pare utile mettere lo sguardo alle regole e nozioni sviluppati dei iurisconsultes romani. Anche per loro era importantissimo il grande tema della vita umana e del suo inizio, dell'interesse singolare della madre, del *pater familias* o del interesse comune. Nell'antica Roma cercano di trovare il compromesso fra *utilitas privata* e *utilitas pubblica* nell'alveo degli argomenti sul tema. Si possono delineare due aspetti molto vicini – diritto alla vita (*ius vitae*) del embrione umano e la speranza della vita (*spes vitae*) per i genitore, sempre per *pater familias*, ma anche per il *populus*. Nell'ambito di quest'articolo non posso presentare il concetto romano sul tema, troppo variabile nel tempo dal età reggia al *Corpus iuris*. Presento in breve solo alcuni considerazioni e principi romani:

4.1. Per il diritto romano, l'embrione umano detto "foetus, partus, nasciturus" ecc. esiste. Secondo Giuliano quasi tutto il diritto civile riconosce la sua esistenza perché è in accordo con il diritto naturale (*in rerum natura esse*) che è in basi al *ius civile* e *ius gentium*:

D. 1.5.26 (Iulianus libro 69 digestorum) Qui in utero sunt, in toto paene iure civili intelleguntur in rerum natura esse.

Sebbene il dibattito nella dottrina risalente continui sullo status dell'embrione secondo opinioni differenti della giurisprudenza romana classica, è innegabile percepirlo come un essere vivente che oggettivamente esiste nel utero della madre (*qui in utero est*). Per questo motivo, l'espressione principale, che è intesa dal pronome "qui" – usato sempre per una persona e non "quo" che

è per un oggetto¹⁴. E questo concetto è stato sviluppato non solo per la donna libera ma anche per la schiava¹⁵.

Nella dottrina romana sono introdotte alcune idee dalla filosofia greca di Aristotele e Plato sull'esistenza dell'uomo e la sua anima dopo il concepimento. Per Aristotele, l'anima è la causa e il principio del corpo vivente; determina l'essenza del corpo dentro quale si trova. L'anima vegetativa che anima l'embrione umano all'inizio, è sostituita poi nel corso del suo sviluppo da un'anima sensibile e dopo la nascita da un'anima intellettuale. L'embrione umano contiene potenzialmente tutti e tre tipi di anima e la loro attualizzazione determina l' homo che diventerà¹⁶.

I Romani però non si preoccupano dei problemi tanto astratti e questo si vede nella religione romana e la tradizione. L'esistenza del nascituro è tutelata non solo dal diritto ma anche di una guardia di dei e dee associati al concepimento, la gravidanza e la nascita. Pertanto, anche a livello religioso consuetudinario, l'esistenza dell'embrione è riconosciuta e va pensata come un soggetto con necessità di particolari cure e protezione. Moltissimi dei e dee – Iugatinus, Cinxia, Subigus, Prema, Inuus, Mutunus Tutunus, Pertunda promuovono le relazioni coniugali e la procreazione in concordo con Consevius. Fluvionia e Junona aiutano il normale sviluppo del bambino nell'utero, assistiti da Alemona, che si occupa di “nutrire” il bambino nel utero materno. Vitumus mantiene la vita dell'embrione. Di particolare importanza sono i parchi - tre dee che definiscono il destino dell'uomo. Nona e Decima determinano il tempo

¹⁴ In tema c'è una letteratura vastissima. Vd. le citazioni nel FERRETTI, P. *In rerum natura esse / in rebus humanis nondum esse*. L'identità del concepito nel pensiero giurisprudenziale classico. Milano, 2008; BIANCHI, E. *Per un'indagine sul principio "conceptus pro iam nato habetur"*. Milano, Giuffrè, 2009; BACCARI, M. P. *Riscoperta dei principi romanistici di fronte all'involuzione contemporanea*. – In: *Revista General de Derecho Romano*, Vol. 27, 2016, disponibile su https://www.iustel.com/v2/revistas/detalle_revista.asp?id_noticia=418129

¹⁵ Vd. *pro partus ancillae* secondo Gaio, D. 22.1.28.1 = IG 2.1.37: *Partus vero ancillae in fructu non est, itaque ad dominum proprietatis pertinet: absurdum enim videbatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparaverit* e Ulpiano nel *commendo* sul *ius civile*, D. 7.1.68 pr.: *vetus fuit quaestio, an partus, sc. ancillae) ad fructuarium pertineret: red Bruti sententia optinuit fructuarium in eo locum non habere: neque enim in fructu hominis homo esse potest hac ratione nec usum fructum in eo fructuarium habebit*. Vd. Di NISIO, V. *Partus vel fructus*. Aspetti giuridici della filiazione ex ancilla. Napoli, 2017.

¹⁶ Vd. più precisamente in LE STATUT de l'embryon humain dans l'Antiquité gréco-romaine. Auteurs: C. Bernard, É. Deleury, F. Dion, P. Gaudette. – In: *Laval théologique et philosophique*, Vol. 45, 1989, no. 2, p. 180 ss.

necessario per il parto e la cura dei bambini negli ultimi due mesi di gravidanza. Vagitanus, Vaticanus, Levana, Rumina, Fata Scribunda, Partula, Lucina, Dietispher sono presenti al parto per aiutare la donna e proteggere il nascituro nei primi momenti della sua vita.

4.2. Il concepito è sempre considerato come se fosse nato (*in rebus humanis esse*) quando si tratti del suo vantaggio:

D. 1.5.7 (Paul. L.singul. de portionibus, quae liberis damnatorum conceduntur) [...] Qui in utero est, perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur.

D. 1.5.26 (Iul. L.69 dig.) Qui in utero sunt, in toto paene iure civili intelleguntur in rerum natura esse. Nam et legitimae hereditates his restituuntur [...]

La regola che esiste come una finzione nella legislazione moderna di molti paesi: “Nasciturus pro iam nato habetur quotiens de commodis eius agitur”, non esiste nei testi giuridici romani¹⁷. Ma la comodità è assicurata non solo per diritto ereditario, ma più largamente anche per il possesso e la proprietà, per lo status e i privilegi (per es de rango di senatore o di decurione), le donazioni, la tutela e in tutti diritti soggettivi che avranno l'importanza per nascituro. Di questo è la grande differenza da diritto moderno dov'è sono riservati solo diritti ereditari¹⁸. Sebbene questi diritti siano realizzati solo dopo la nascita, il fatto stesso della loro determinazione, così come il criterio generale di *commoditas* indubbiamente tengono conto del fatto della esistenza del embrione¹⁹.

4.3. *Spes vitae o spes nascendi o spes animantis*. Ci sono molte regole che sono in protezione della vita del embrione per lui stesso e si

¹⁷ Vd. mio articolo “Nasciturus pro iam nato habetur quotiens de commodis eius agitur”. The roman rule and its contemporary application” [in bulgaro “Nasciturus pro iam nato habetur quotiens de commodis eius agitur”. Римскоправното правило и съвременното му приложение]. – In: *Ius romanum* [on line], 2017, no. 2, p. 20–30, disponibile su <https://www.cceol.com/search/journal-detail?id=2235=https://iusromanum.eu/documents/985691/3819843/%D0%9C%D0%B0%D0%BB%D0%B8%D0%BD%D0%B0%20%D0%9D%D0%BE%D0%B2%D0%BA%D0%B8%D1%80%D0%B8%D1%88%D0%BA%D0%B0.pdf/6f2de8a1-cf6e-4f5c-a68e-7a9da21c9cbd>

¹⁸ Vd. BACCARI, M. Pia. La difesa del concepito nel Diritto romano. Dai Digesta dell'imperatore Giustiniano. Torino, 2006; Id., Alcuni principi del diritto romano per la difesa dell'uomo nella globalizzazione. – In: *Teoria del diritto e dello Stato*. Rivista europea di cultura e scienza giuridica, 2005, no. 1, p. 1–26, disponibile su <http://www.aracneeditrice.it/pdf/9788854801745.pdf>

¹⁹ D. 50.16.231, Paul. l. sing. ad sc. Tert.) *Quod dicimus eum, qui nasci speratur, pro superstite esse, tunc verum est, cum de ipsius iure quaeritur: aliis autem non prodest nisi natus.*

prendono dei provvedimenti per consentirgli di nascere, per salvaguardare la *spes animantis*, che sembra da intendere come *spes vitae* per il nascituro:

- Un frammento del Digesto citato jurisconsulto Marcello riferisce che secondo una *lex regia* (probabilmente riferita a Numa) era vietato seppellire una donna incinta senza estrarre prima dal suo corpo il nascituro.

D. 11.8.2 (Marc. L. 28 dig.): Negat lex regia mulierem, quae praegnas mortua sit, humari, antequam partus ei excidatur; qui contra fecerit, spem animantis cum gravida peremisse videtur)

L'estrazione del feto veniva, dunque, praticata con un cesareo che, per poter salvare la vita del figlio, doveva avvenire subito dopo la morte della madre. La dottrina recente trova una prova della considerazione del concepito sin dall'età arcaica come un'entità distinta dalla madre, e non solo una *portio mulieris*, come la speranza di nascita propria di un essere già esistente²⁰.

- L'esecuzione sulla *donna praegnas* condannata a morte e anche la tortura dovevano essere differite sino al parto:

D. 1.5.18 (Ulp. L. 27 ad Sab.) Imperator Hadrianus publicio Marcello rescripsit liberam, quae praegnas ultimo supplicio damnata est, liberum parere et solitum esse servari eam, dum partum ederet. Sed si ei, quae ex iustis nuptiis concepit, aqua et igni interdictum est, civem Romanum parit et in potestate patris.

D. 48.19.3 (Ulp. L.14 ad Sab.) Praegnatis mulieris consumendae damnatae poena differtur quoad pariat. Ego quidem et ne quaestio de ea habeatur, scio observari, quamdiu praegnas est.

Paul. Sent. 1.12.4. Praeognantes neque torqueri neque damnari nisi post editum partum possunt.

Ulpiano riferisce un rescritto di imperatore Adriano che non sembra innovazione. Senza dubbio l'interesse tutelato col differimento dell'esecuzione della condanna capitale e della tortura sulla donna incinta (libera o schiava, anche serva poenae) è, come in D. 11.8.2, quello del nascituro per la salvaguardia della *spes vitae* – come per la dottrina risalente si parla di un diritto “della vita, alla vita”. In caso se la donna libera è in giusto matrimonio, condannata al *aquae et ignis interdictio*, il concepito nasce *cives romanus* e sarà

²⁰ Vd. SANNA, M. V. *Spes nascendi – spes patris*. – In: *AUPA*, Vol. 55, 2012, p. 519 ss.; PÉTER O. M., *Il parto cesareo nelle fonti letterarie e giuridiche in Roma antica*. – In: *Le radici del nostro futuro*. Temi di storia della medicina. A cura di D. Tramontano e G. Villone. Bologna, 1977, p. 60 ss.

sub potestate patris familiae – cioè di nuovo è la protezione del interesse del nascituro e del suo status. Si pensa che la prima parte della regola stabilita in D. 1.5.18 e in D. 48.19.3 (in modo più generale) potesse essere applicata anche alle schiave, perché tutte le donne dal momento della condanna alla pena capitale divenivano ugualmente *servae poenae*. L'interesse tutelato dalla norma allora non potrebbe essere identificato con quello del *pater familias* alla legittima discendenza perché si vede solo in fine del frammento e solo in caso di condanna di esilio di una donna sposata²¹.

4.4. *Spes patris* è considerato in relazione della *spes nascendi* ma non in tutti i casi l'interesse del padre prevale al diritto alla vita del nascituro. In oltre il caso di D. 1.5.18 già presentato, quando si riserva lo stato del cittadino romano possiamo anche rilevare altri regolamenti per:

4.4.1. Aborto

Ci sono posizioni differenti nella dottrina risalente. Si afferma che una prova della considerazione del concepito nel diritto classico come *portio mulieris* è che l'aborto non sarebbe stato represso prima di un rescritto di Severo e Caracalla del 211 d.C., e, anche in tal caso non si prende come una lesione dei diritti del *pater*²². Ma secondo Plutarco per le donne sposate l'aborto era già sanzionato in una lex regia di Romolo, che parla della possibilità di ripudiare la moglie esclusivamente in caso di adulterio o di aborto-veneficio²³. Veramente il ripudio, pur non essendo una sanzione penale, ha le conseguenze gravi perché la moglie *sub mano* perde il suo *status familiae*. Non deve dimenticare che il *pater familias* ha per tutti *alieni iuris*, anche per la moglie *sub mano* c.D. “diritto alla vita e alla morte” (*ius vitae necisque*). Un aborto contro il volere del marito è una lesione del suo proprio interesse di avere un figlio, ma anche della famiglia e si può considerare come una condotta colpevole che merita più grave punizione²⁴.

²¹ Vd. SANNA, M. V. Op. cit., p. 525 ss

²² Vd. SANNA, M. V. Op. cit., cit., p. 530 ss.

²³ Plut., Vita Romuli 22.3.

²⁴ Vd. SANNA, M. V. Dal *ius vitae ac necis* di una lex regia al *ius occidendi* della Lex Iulia de adulteriis. Note e interrogativi. – In: *Iuris antiqui historia*. An International Journal on Ancient Law. [Un diario annuale] Vol. 6, 2014, p. 11–35.

Molti secoli più tardi Cicerone, nella difesa di Cluenzio²⁵ racconta un caso di una donna di Mileto condannata a morte perché aveva abortito sollecitata dagli altri eredi di suo marito con un abbondante somma. Ma la pena è stata applicata secondo il diritto vigente in Asia e Cicerone ha usato questo argomento solo per la sua orazione accettando l'aborto come un'infrazione del interesse familiare e eredità del *pater familias*.

Secondo alcuni autori il divieto di aborto al inizio del III secolo ha lo stessa ratio che il divieto di seppellire la donna incinta prima dell'estrazione del figlio dal suo corpo e del differimento dell'esecuzione della condanna capitale e della tortura a dopo il parto: l'interesse supremo del padre di non venisse privato del figlio. Ma se in primi due casi questo non è indubitato, l'aborto si può trovare come un'offesa arrecata al marito, a cui si impediva di avere un discendente – ma solo in riferimento di una donna sposata²⁶. Si aggiunge la ragione che il matrimonio esiste *liberorum quaerundorum causa*. Di questo punto di vista si afferma che col rescritto di Severo e Caracalla l'aborto cominciò ad essere considerato un crimine. Ma se non si fa la distinzione fra le donne sposate o le donne *sui iuris*, liberi o libertini, allora non si può determinare unicamente la tutela dei diritti del padre. Mi pare che un divieto totale del aborto è con la motivazione di proteggere anche la vita del feto come futuro cittadino e per ragioni demografici.

Il testo del rescritto è rimasto nella Compilazione Giustiniana anche per ragioni della religione cristiana. Si può aggiungere un passo d'Ulpiano dal suo commento *Ad edictum*, secondo quale si ritiene applicabile la pena dell'esilio. Ulpiano parla delle donne in generale in D. 48.8.8 senza fare cenno alla necessità che si tratti di una donna sposata, e senza alcun accenno alla lesione degli interessi di un marito o ex marito:

²⁵ Cic., Pro Cluent. 11.32 ; D. 48.19.39, Tryph.L. 10 disp.) Cicero in oratione pro Cluentio Habito scripsit Milesiam quandam mulierem, cum esset in Asia, quod ab heredibus secundis accepta pecunia partum sibi medicamentis ipsa abegisset, rei capitalis esse damnatam. sed et si qua visceribus suis post divortium, quod praegnas fuit, vim intulerit, ne iam inimico marito filium procrearet, ut temporali exilio coerceatur, ab optimis imperatoribus nostris rescriptum est. Vd. commento e la letteratura in SANNA, M. V. Spes nascendi..., cit., p. 533 ss.

²⁶ Vd. MENTXAKA, R. El aborto en el Derecho Romano Clásico. – In: *Estudios de Deusto*, Vol. 31, 1983, p. 307 ss., NARDI, E. Procurato aborto nel mondo greco-romano. Milano, 1971, p. 45 ss.

D. 48.8.8 (Ulp. L.33 ad ed.): Si mulierem visceribus suis vim intulisse quo partum abigerit, constiterit, eam in exilium praeses provinciae exiget.

Un po' più chiara è l'opinione del Marciano al inizio del III s.D.C. che riferisce un rescritto d'imperatore Alessandro Severo e suo figlio, che prevede una sanzione più leggera – una espulsione temporanea (*in temporale exilium*) della donna sposata (anche se non menzionata esplicitamente nel testo), che abortisce. Esplicitamente è mostrata la causa di tale punizione- danneggiare la speranza del marito d'avere gli eredi:

D. 47.11.4 (Marcian.L.1 regularum) Divus Severus et Antoninus rescripserunt eam, quae data opera abegit, a praeside in temporale exilium dandam: indignum enim videri potest impune eam maritum liberis fraudasse.

4.4.2. Accusa in adulterium

Alcuni autori trovano la ratio di tutela dell'interesse del padre anche nel rescritto con cui imperatore Adriano stabilì il differimento dell'accusa di adulterio per una *mulier ventris nomine missa in possessionem*:

D. 37.9.8 (Paul. L.1 de Adult.) Si ventris nomine mulier missa sit in possessionem, divus Hadrianus Calpurnio Flacco differendam accusationem adulterii rescripsit, ne quod praeiudicium fieret nato.

Una parte della dottrina trova anche D. 37.9.8, come D. 11.8.2 e D. 1.5.18, come una norma posta a difesa della vita del concepito²⁷. Si vede la *ratio* di riservare i diritti che acquisterà il nascituro dopo la nascita, che potrebbero essere pregiudicati da un'eventuale condanna della madre per adulterio prima del parto. Ma si può anche vedere una tutela del interesse del padre che spera avere un bambino che è suo e non frutto dell' adulterio. Ci sono norme speciali solo per questo crimen neanche l'accusatio adulterii venne concessa dalla lex Iulia de adulteriis (emanata da Augusto intorno al 18 A.C.). La sanzione secondo la legge e non solo per reprimere l'adulterio propriamente detto come la relazione sessuale di una donna sposata, ma anche lo *stuprum*, cioè la relazione sessuale di una virgo o una *vidua* di onorata condizione. Allora l'*accusatio adulterii* in caso di *stuprum* si presenta in una assenza di marito o dopo la morte del marito e non si può rinviare alla tutela del interesse del *pater familias*. Si può pertanto in caso di adulterio stesso anche affermare una protezione più ferma del interesse immediato del nascituro – non solo in tempo

²⁷ SANNA, M. V. Spes nascendi..., cit., p. 544 ss. e gli autori citati.

in utero, ma anche dopo la nascita perché la madre ottiene la *missio in possessionem ventris nomine* per i beni che lui sta ricevere come *suus heres*. Allora l'interesse del padre morto si presenta di modo più astratto con la possibilità d'eredità per un bambino nato del *iustum matrimonium*. La madre può essere accusata di adulterio non solo da un *quivis ex populo*, ma spesso un'*accusatio iure viri et patris* da parte degli altri eredi e dei parenti del padre. Un'eventuale condanna della madre prima del parto priverebbe il nascituro stesso dei suoi diritti come erede legittimo del suo padre, allora il suo interesse prevale anche in quest'caso.

4.5. *Spes publicus o spes populi romani si considera in relazione della nominazione di curator ventris* dal pretore, così è un intervento del potere pubblico che ha suoi ragioni in due direzioni: protezione della madre che darà la luce a un erede del suo marito, ma anche a un nuovo cittadino romano. Si parla in entrambi i casi della ragione di *spes vitae*. Grazie al intervento pretorio si prevede per il nascituro istituito erede o beneficiario di un legato un curatore speciale, con il compito di conservare i beni che sarebbero spettati al nascituro:

D. 37.9.1 pr. (Ulp. L.41 ad ed.) Sicuti liberorum eorum, qui iam in rebus humanis sunt, curam praetor habuit, ita etiam eos, qui nondum nati sint, propter spem nascendi non neglexit. Nam et hac parte edicti eos tuitus est, dum ventrem mittit in possessionem vice contra tabulas bonorum possessionis.

L'indagine principale del *curator ventris* è d'assicurare l'adempiendo ai debiti inerenti a penalità e pegni e stabilendo gli alimenti, vestiti e domicilio per la futura madre e non importa se la sua dote è sufficiente per una vita normale o no. E sottolineata anche la protezione della dignità della donna stessa fino al parto e in tempo dopo:

D. 37.9. 5 (Gai. L.14 ad eD. prov.) pr. Curator ventris alimenta mulieri statuere debet. Nec ad rem pertinet, an dotem habeat, unde sustentare se possit, quia videntur quae ita praestantur ipsi praestari qui in utero est. 1. Curator ventri datus solvendi debiti rationem habere debet, utique eius, quod sub poena aut pignoribus pretiosis debetur.

D. 37.9.1.19 (Ulp. L.41 ad ed.) Mulier autem in possessionem missa ea sola, sine quibus fetus sustineri et ad partum usque produci non possit, sumere ex bonis debet: et in hanc rem curator constituendus est, qui cibum potum vestitum tectum mulieri praestet pro facultatibus defuncti et pro dignitate eius atque mulieris.

I giuristi romani spiegano anche i motivi per tale tutela straordinaria-concernenti non solo la famiglia e i *parentes* (genitori) del nascituro ma anche e soprattutto la *res publica*. Si afferma che «non dubitiamo che il pretore debba venire in aiuto anche del concepito, tanto più che la sua causa è più da favorirsi che quella del fanciullo: il concepito infatti è favorito affinché venga alla luce, il fanciullo affinché sia introdotto nella famiglia; questo concepito infatti si deve alimentare perché nasce non solo per il genitore, cui si dice appartenere, ma anche per la *res publica*»:

D. 37.9.1.15 (Ulp. L.41 ad ed.) Et generaliter ex quibus causis Carbonianam bonorum possessionem puero praetor dare solitus est, ex hisdem causis ventri quoque subvenire praetorem debere non dubitamus, eo facilius, quod favorabilior est causa partus quam pueri: partui enim in hoc favetur, ut in lucem producat, puero, ut in familiam inducatur: partus enim iste alendus est, qui et si non tantum parenti, cuius esse dicitur, verum etiam rei publicae nascitur.

La stessa *ratio* si legge in Cicerone nel' Orazio Pro Cluentio dove si parla che l'interesse del padre (che al momento dell'aborto è vivo o morto) è anche l'interesse stesso della *res publica* alla tutela del matrimonio e della *civitas*. L'aborto procurato non solo distrugge la speranza di un padre di avere sua famiglia con bambini, la continuazione di suo nome, e suoi eredi che continuano il culto e la memoria familiare. Per i romani la tutela della famiglia e delle tradizioni gentilizi è uguale alla vita stessa dello Stato e ogni *civis* è di grande importanza per il suo futuro.

Il caso è ripreso da Trifonino come base di *disputatio* per aborto di una donna incinta e divorziata che è spinta all'aborto non da ragioni economiche, come nel caso ricordato da Cicerone, ma esclusivamente dal desiderio di non avere un figlio dal marito divorziato e ormai nemico²⁸.

D. 48.19.39 (Tryph. L10 disp.) Cicero in oratione pro cluentio habito scripsit milesiam quandam mulierem, cum esset in asia, quod ab heredibus secundis accepta pecunia partum sibi medicamentis ipsa abegisset, rei capitalis esse damnatam. Sed et si qua visceribus suis post divortium, quod praegnas fuit, vim intulerit, ne iam inimico marito filium procrearet, ut temporali exilio coerceatur, ab optimis imperatoribus nostris rescriptum est.

La punizione di tale comportamento è in totalmente conforme con le ragioni della religione cristiana che stabilisce il divieto dell'aborto per tutte le donne. Secondo Ulpiano nel suo commento per l'editto in D. 48.8.8 la pena

²⁸ Vd. MENTAXA, R. Op. cit., p. 314 ss.

dell'esilio (non più temporaneo) si applica a qualunque donna avesse abortito e non si riferisce più alla lesione degli interessi di un marito o ex marito. Si vede la ragione delle idee del Cristianesimo, per cui l'aborto sarebbe un omicidio e si pensa però di un'interpolazione dai Compilatori nel testo genuino d'Ulpiano. Il frammento fa parte del titolo VIII del libro 48 "Ad legem Corneliam de siccariis et veneficis" e quindi l'aborto è considerato come delitto pubblico (*crimen*) contro la vita e lo Stato.

5. CONCLUSIONE

Per diritto romano il *nasciturus*, *conceptus*, *partus* ecc. non è e non può essere una persona in senso proprio come faccia. Nessuno ha l'idea della sua faccia – anche con la più precisa tecnica moderna e lo studio della gravidanza ad ultrasuoni, la faccia dell'embrione non può essere chiaramente distinta. Ma in diritto non dobbiamo avere costruzioni così rigide e immutabili che invariabilmente collegano ai concetti di soggetto di diritto e la persona. Se ci rivolgiamo all'esperienza giuridica romana, se si considera lo sviluppo attuale della tecnologia, la biologia, la medicina, l'etica, il diritto, anche della religione, non possiamo negare l'esistenza del uomo nel periodo embrionale dello suo sviluppo. Poi la dottrina giuridica dovrebbe probabilmente cercare un'altra terminologia per il soggetto di diritto. I Romani presentano un modello di regolamento non tanto per lo stato astratto dell'embrione, ma per il suo vantaggio (*commodum eius*) e una protezione totale del interesse della madre, del nascituro, del padre e della società. E se si parla di umanesimo nel diritto, di *praecepta iuris*, di diritto naturale, perché non usare una parola così semplice ma piena di contenuti a tanti livelli –HOMO.

ЧАСТНО ПРАВО

PRIVATE LAW

**ИДЕЯТА ЗА *IUS*, *AEQUITAS* И *IUSTITIA*,
АСОЦИИРАНА С ИДЕЯТА ЗА ПОЛЕЗНОТО И
ПОДХОДЯЩОТО: ОБЩАТА ПОЛЗА (НА
АНГЛИЙСКИ ЕЗИК)**

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Резюме: *Iustitia* според Цицерон е изключителна ценност, която е начело на ценностната система на римляните. Справедливостта задължава човешкия дух да спазва правилата, които са от обща полза. Римските представи от времето на Цицерон отразяват в значителна степен основните принципи, които се прилагат най-често: обективност на правния ред, справедливост, равенство, честност, законност и т.н., и които отразяват една ясна идея за полезността на правото. В този смисъл в настоящото изследване са анализирани съотношенията *utilitas omnium* ↔ *rei publicae causae*; *utilitas publica* ↔ *utilitas omnium*. *Utilitas publica* се схваща от гледна точка на приоритетните интереси, които благоприятстват съществуването и развитието на самата държава. Представени са и възстановените в Юстиниановото право концепции за *utilitas publica* ↔ *utilitas communis*, както и имуществените аспекти на *utilitas publica*, определени чрез интердиктната практика, при които най-ясно се проявява съчетаването на публичния и частния интерес.

Ключови думи: обществена полза; обществено имущество; *ius*; *ratio*; *iustitia*; *aequitas*; *utilitas publica*; *utilitas omnium*; *utilitas communis*; *utilitas rei publica*.

THE IDEA
OF *IUS*, *AEQUITAS* AND *IUSTITIA*
ASSOCIATED WITH THE IDEA
OF THE USEFUL AND THE CONVENIENT:
COMMON UTILITY* (ENGLISH LANGUAGE)

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Abstract: The *iustitia*, as Cicero affirmed, unique virtue, lady and queen of the virtues; Justice as a disposition of the spirit that respects the common utility. The Roman conceptions in Cicero's time reflect a good part of the basic principles that prevail with more frequency: objectivity of the legal order, justice, utility, equity, honesty, lawfulness, etc., authentic reference to a clear idea of *utilitas*. In this sense, it is analyzed in the present study: *Utilitas omnium* ↔ *rei publicae causae*; *Utilitas publica* ↔ *utilitas omnium*; *Utilitas publica*, from the perspective of priority interest that favors the State itself; Justinian and the pretended and possible return to the utilitarian conceptions *publica* ↔ *utilitas communis*; *Utilitas publishes*: and a peculiar assumption, among others, extracted from the interdictal context in which public interest, common interest and private interest are combined.

Keywords: Common utility; common good; *ius*; ratio; *iustitia*; *aequitas*; *Utilitas publica*; *utilitas omnium*; *utilitas communis*; *utilitas rei publica*.

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I. INTRODUCTION

Utilitas publica is a term that designates diverse realities – excessively pluriséxico – and that can assume different applications and justifications in the Roman legal proceedings, and very especially in the Roman administrative experience.

The idea of public or common interest is verified or can be framed in most of the notions about *public utilitas*, *utilitas omnium* and *utilitas universorum*. In general, we can affirm with A. Fernández de Buján,¹ and part of the majority doctrine, that “until the classical period the meaning of the expressions coincides *utilitas publica*, *utilitas omnium* y *utilitas universorum*”².

¹ FERNÁNDEZ de BUJÁN, A. Hacia un Tratado de Derecho Administrativo y Fiscal Romano. – In: *Hacia un Derecho Administrativo y Fiscal Romano*, Madrid ; Valencia, 2011, p. 48 ss.

² See STAGL, J. F. Die Funktionen der utilitas publica. – In: ZSS, Vol. 134, 2017, S. 214; in internet: <https://doi.org/10.7767/zrgra-2017-0115>; GAUDEMET, J. Utilitas publica. – In: RHD, Vol. 29, 1951, p. 473 ss., p. 485 (=Études de droit romain, Vol. 2, Camerino, 1979, p. 174 ss.); LONGO, G. Utilitas Publica. – In: *Labeo*, Vol. 18, 1972, p. 7 ss. (= Atti del Seminario Romanistico Internazionale. Perugia 1972, p. 155 ss.); Rec. WITTMANS, R. – In: ZSS, Vol. 93, 1976, S. 485 ff.; STEINWENTER, A. Utilitas publica – utilitas singulorum. – In: *Festschrift Paul Koschaker*, Vol. I. Weimar, 1939, S. 84 ff.; LEVY, E. West Roman vulgar law: The law of property. Filadelfia, 1951, especially cap. II – Dominium and Public Interest; JOSSA, G. L'utilitas rei publicae nel pensiero imperiale dell'epoca classica. – In: *Studi romani*, 1963, p. 387 ss.; ARIAS BONET, J. A. Dominio y utilidad pública en derecho romano. – In: *Homenaje A D. Nicolas Perez Serrano*. 2 Vols. Vol. 1. Madrid, 1959, p. 30 ss.; LEPTIEN, U. Utilitatis causa. Zweckmässigkeitsentscheidungen im römischen Recht. Freiburg, 1967, S. 220 ff.; HONSELL, T. Gemeinwohl und öffentliches Interesse im Klassischen römischen Recht. – In: ZSS, Vol. 95, 1978, S. 94 ff.; ROSTOVZEV, M. Histoire économique et sociale de l'Empire romain. [Trad. Ital. Storia economica e sociale dell'Impero romano. Firenze, 1976, p. 431]; NAVARRA, Marialuisa. Utilitas publica – utilitas singulorum tra IV e V sec. d.C. Alcune osservazioni. – In: *Studia et documenta historiae et iuris* (SDHI), Vol. 63, Roma, 1997, p. 269 ss. See recently the comprehensive and well-documented study of SCEVOLA, R. Utilitas publica. – In: *L'arte del diritto*. Collana diretta da Luigi Garofalo. Vol. 23, Padova, 2012, Tomo I-II, p. 11–392 and p. 9–382. Experiencia Administrativa romana: See RUIZ PINO, S., Algunos precedentes históricos de protección o defensa de los recursos naturales y de la “salubritas” en Roma. – In: *Hacia un derecho administrativo medioambiental romano*. Revista Digital de Derecho Administrativo, Universidad Externado de Colombia, Vol. 17, 2017; Id., La protección de los recursos naturales y de la “salubritas” en Roma: posibles precedentes históricos del derecho administrativo medioambiental. – In: *Hacia un derecho administrativo y fiscal romano*. Vol. II. Madrid, Dykinson, 2013, p. 413 ss.; RUIZ PINO, S. y ALBURQUERQUE, J. M. Algunas notas referentes a la experiencia administrativa romana de la protección de los recursos naturales. – In: *Hacia un Derecho Administrativo y Fiscal Romano*, p. 409 ss.; PIQUER MARI, J. M. y RUIZ PINO, S. Tres aproximaciones al derecho de aguas, medio ambiente y derecho administrativo romano. – In: *Revista General de Derecho Romano*, Vol. 21, 2013; PONTE, V. Régimen jurídico de las vías públicas en Derecho Romano. Madrid, Dykinson, 2005; Id., La regulación de las vías públicas en el seno del Derecho Administrativo Romano. – In: *Hacia un Derecho Administrativo y Fiscal Romano*, cit., p. 369 ss.; JIMÉNEZ SALCEDO, María del Carmen. Initiatives of the roman administration and urban

The opposition of private and public interests produces the result, in general, of subordination of private interests, but understanding that this is done for the benefit of the people as a whole, not of a state or abstract entity such as the Roman State. From the classical period and especially in the post-classic era, the idea of utility of the State or the Treasury is clearly introduced in the texts, coming to consider that what is of public utility, that is to say, of the State as an entity abstract or other public entities, such as purely financial or collecting interests³, it may not be of interest or not coincide, at least in the first instance, with the interests of individuals or even the community as such. The idea is that the best interests of the State should prevail, since it is understood that, ultimately, it constitutes the common interest in the end. "It seems obvious and this is shown by the sources that in this last phase the explicit coincidence between the *utilitas omnium* and the *utilitas publica* is not sought, although, with Justiniano, the trend and the proclivity to endorse and expressly express, at least, are intensified the possible traditional convergences with the *utilitas omnium*⁴.

environment. – In: *Ius Romanum*, 2018, no. 1 – [http:// iusromanum.eu/bg/](http://iusromanum.eu/bg/); Id., *Actio Noxalis*. (Pending pulication), no. 1, 2019; Id., *Perspectivas en torno al medioambiente urbano: especial referencia a las ruinas de edificios, incendios, basuras, inmisiones, etc.* – In: *European Journal of Legal History*, Vol. 14, 2017; Id., *El régimen jurídico de las relaciones de vecindad en derecho romano*. Córdoba, 1999, p. 36 ss.; Id., *Algunas observaciones a propósito de la responsabilidad por daños causados por ruinas de edificios*. – In: *RGDR*, Vol. 9, 2007; Id., *Notas sobre urbanismo*. – In: *RGDR*, Vol. 8, 2007; Id., *Limitaciones urbanísticas al derecho de la propiedad privada: una reflexión sobre la responsabilidad por daños causados por ruinas de edificios*. – In: *RGDR*, Vol. 17, 2011; ALBURQUERQUE, J. M. *La protección o defensa del uso colectivo de las cosas de dominio público. Especial referencia a los interdictos de publicis locis (loca, itinere, viae, flumina, ripae)*. Madrid, 2002, reimpr., Madrid 2010; Id., *Concentración y ordenación urbanística del territorio romano: colonias, conventos y municipios de la bética*. – In: *Hacia un Derecho Administrativo y Fiscal Romano*, cit., p. 77 ss.; Id., *Reflexiones sobre la política jurídico-social Flavia y la consolidación urbanística municipal en la Hispania romana*. – In: *Hacia un Derecho Administrativo y Fiscal Romano* *Hacia un Derecho Administrativo y Fiscal Romano* II, cit., p.179 ss.; Id., *La interrelación de interés público, interés común e interés privado en la noción de utilitas publica*. – In: *Hacia un Derecho Administrativo, Fiscal y medioambiental romano* III, p. 131 ss.; MASTINO, I. *Utilitas valuit propter honestatem: Cicerone e il principio giuridico dell'utilitas*. – *Diritto @ Storia*, Anno XII, 2013, Quaderno 11 – <http://www.dirittoestoria.it/11/D&Innovazione/Mastino-Cicerone-Principio-giuridico-utilitas.htm>.

³ See Nov. Theod. 3.6 (a. 438); C. 12.57.13 (A. 442?); CTh. 11.16.7 (a.356); CTh. 5.15.17 (a.364); CTh. 1.15.6 (a.372); CTh. 7.13.7.3 (a.375); CTh. 7.13.12 (a. 397); CTh. 11.26.2 = C. 10.30.2 (a. 400); CTh. 1.10.7 = C. 1.32.1.1 (a.401); CTh. 8.2.5 = C. 10.71.3.1 (a.401); CTh. 13.11.11 (a.406); CTh. 15.5.49 (a.410); C. 12.37.15 = CTh. 7.4.35 (a.423); C. 10.71.4 (a. 440-441); Nov. Th. 5.3.pr.–1 (a.441); Novv. Valent. 6.2.1 (a.443); 15.pr (a.444/5). CTh. 6.22.3 (A.340); CTh. 12.1.34 (A.342); CTh. 16.2.11 (A.354) [342], CTh. 12.1.76 = C. 10.32.31 (A.371); CTh. 12.1.91 (A.382); CTh. 12.1.109 (A.385); CTh. 12.6.31 = C. 10.72.14.pr. (A.412); CTh. 8.4.29 (A.428).

⁴ See LONGO, G. Op. cit., p. 7 ss., FERNÁNDEZ DE BUJÁN, A. *Hacia un Tratado de Derecho Administrativo y Fiscal Romano*, cit., p. 13 ss., 48 ss.

What we have summarized above about the substrate of the *utilitas* is still immersed in a myriad of divergent nuances that needs to be remembered. In this sense, even from sideways, we will highlight some evolutionary aspects and punctual oscillations of the notion. Starting from general premises, it can be seen or understood as a search for the legitimate interest of individuals; respect for the citizen – the essence of the Republic; possible axis on which the Roman political and legal doctrine gravitates; public utility of the people with preferential character; or the community of citizens; or utility of the State as a group of citizens; utility of the State or its public services as an autonomous entity; citizens as beneficiaries without a prevalent character but sometimes with partners; the common utility – the utility of the republic gathers the common utility; the common utility that is not in opposition to the interests of each one of the individuals, that is to say, that is of each one and of all: common utility and private interest; public utility as common utility; the utility of public administration; the common good of the community; common utility as a preferred interest of the community; public utility as common utility; fairness or social utility. *Res publicae* equivalent to *res populi*, and *utilitas*, for Cicero and Seneca consists in the achievement of the common good⁵. Likewise, we share with I. Mastino, his conclusions about the use of Cicero's work (*utilitas e ius naturale; utilitas, aequitas, honestas*) and especially the Ciceronian perspectives on *utilitas e iustitia*: As our author rightly concludes, “In Cicerone, sembra emergere una costante compenetrazione di *utilitas, aequitas e honestas*, poiché soltanto del contemperamento di tali concetti può essere realmente perseguita la *iustitia*, della quale l'*utilitas*, per Cicerone, costituisce addirittura uno dei fondamenti”. In summary, the needed interrelation between *iustitia, utilitas communis, aequitas* and *honestas*, is clear, and specially the *utilitas* as a righteous principle that fundaments the *iustitia*⁶.

II. UTILITAS OMNIUM

The common utility – the utility of the republic gathers the common utility, without stopping at this moment to highlight the idea of the sophists⁷ about what

⁵ See FERNÁNDEZ DE BUJÁN, A. Ibidem.

⁶ See MASTINO, I. *Utilitas valuit propter honestatem*: Cicerone e il principio giuridico dell'*utilitas*, cit. See Cic., de Inv. 2.160; Cic., de Off., 1.31; Cic., de Off. 3.19.

⁷ See SCEVOLA, R. *Utilitas publica*, coll. L'arte del Diritto, cit.

is useful and what is just, is the most invoked – although not the only one – in the initial historical section of the notion of *utilitas publica*. It is, according to some writers, the most humane conception of utility. And it is not surprising, therefore, that until the classical period the expressions *utilitas rei publicae* coincide in the sense highlighted by G. Jossa⁸, *rei publicae causae, cura et tutela rei publicae*, projected at this time as an extension of the republican principles to follow, although it is no longer the expression of an external will of the community, but as the community itself (in this sense, *utilitas rei publicae* also means *ratio, iustitia* and *aequitas*); *utilitas publica, utilitas omnium* and *utilitas universorum*, with an analogous meaning, as we have indicated in preceding paragraphs. Until the times of the severe ones, according to G. Jossa, among others, the Roman State is like the republican State, not a monarchy in which the *princeps* is the *dominus*, but *res publica*, in which the emperor is a magistrate. Therefore, Augustus does not understand the State as a separate entity from the collectivity, but as the collective itself, it is not an abstraction or juridical person, but the community of the people: the *utilitas rei publicae* is, therefore, *utilitas communis*, interest of the collectivity, and does not represent the interest of an abstract entity other than the community⁹. The imperial thought of the classical period about the *utilitas rei publica - utilitas communis* (endowed with *iustitia* and *aequitas*) is according to this author, a thought and an approach endowed with clues in a moral key – seemingly superior, which is not a contrast with the legal results: “In realtà è nell’essenza della politica e della legge, in quanto appunto dirette all’*utilitas communis*, di essere buone e giuste, di realizzare anzi tutto il bene e tutto il giusto”¹⁰.

III. UTILITAS PUBLICA ↔ UTILITAS OMNIUM

A retouched conception of the *utilitas publica* – which does not seem to distance itself at the beginning too much from the *utilitas omnium* more authentic

⁸ JOSSA, G. L'*utilitas rei publicae* nel pensiero imperiale dell'epoca classica, cit., p. 388 ss.

⁹ ALBERTARIO, E. *Corpus e universitas nella designazione della persona giuridica*. Studi di diritto Romano. Vol. 1–6. Vol. 1, p. 99 ss.; ORESTANO, R. *Il problema delle persone giuridiche in diritto romano*. Vol. I. Torino, 1968, p. 185 ss.

¹⁰ JOSSA, G. L'*utilitas rei publicae* nel pensiero imperiale dell'epoca classica, cit., p. 389 ss.

and replete with humanistic and moral connotation¹¹, it is opening a path with certain differentiating nuances: that is, the profiles between the contrast of private and public interests are accentuated and openly reaching a possible subordination of the interests of individuals; although, justifying the administrative action for understanding that it is done in function of a clear utility for the town in its entirety, and not of an autonomous and abstract entity. Remember some coincident points pointed out by some scholars about this topic – with very assessable opinions (Longo, Jossa, Gaudemet, Steinwenter), for example, that Augusto assumes the *cura legum et morum*¹², Adrian considers himself the administrator of the public thing¹³, Trajan, in the taken oath inserts the formula “*si bene rem publicam et ex utilitate omnium rexit*”¹⁴, Marco Aurelio at the end of the second century, says he faces all the hardships and dangers for the community¹⁵, likewise, he affirms that he would have always operated according to justice and according to common utility. However, it must be borne in mind that regardless of whether the points mentioned coincide, the conclusions are different (p.e., for Longo¹⁶, these last confirmations show nothing). It seems reasonable to think that although the projection, with analogical overtones of *rei publicae*, in the principality was not as exhaustive as Jossa intended to emphasize, *utilitas communis* – interest of the collectivity, at least, as a republic reformed by the *novus ordo* maintained some essential principles for the community (*ratio, aequitas, iustitia, utilitas*), which allow us to affirm with the majority of the scholars – we also include Longo at this point¹⁷, that under the Principality – until the times of the severe, the *res publica* is the town, so it can be deduced that the *utilitas publica* is equivalent to the *utilities omnium*, as an interest related to the whole community and carried out in any case with the purpose of justice. Recall the Roman conceptions in Cicero's time: objectivity of the legal system, justice,

¹¹ See HANKINS, J. Rethoric, history and ideology: the civic panegyrics Leonardo Bruni. – In: *Renaissance Civic Humanism*. Cambridge University Press, 2000, p. 143–178; 2003, p. 257 ss.

¹² Res. Gestae, 6.1; Suet., Aug. 27.5.

¹³ Historia Augusta, Hadr. 8.3.

¹⁴ Plin. Paneg. 67.4.8.

¹⁵ Dio, 71.24.4.

¹⁶ LONGO, G. Op. cit., p. 8.

¹⁷ LONGO, G. Op. cit., p. 10.

*utilidad, honestum, ratio, virtus, benignitas, libertas, concordia*¹⁸, lawful. In short, a series of contents and sufficient evidence from which a clear idea of *utilitas*¹⁹, in which the possible profiles of moral and legal cut converge or underlie each other.

It is worth recalling now the Ciceronian conception of *populus*, we refer to the one that defines the *populus* as a multitude of men united by the *consensus iuris* and *utilitas publica*²⁰. It follows, therefore, the intimate link that exists between the *utilitas publica* and *consensus iuris* as the essential axes that permeate, or should impregnate, most of the actions in the juridical-social plane. The cohesive element of the binomial is undoubtedly the consensual right, good, fair, equitable and utility for the community or society of law that makes up the *civitas – utilitatis communione societatis*.

Of particular relief I find Betancourt's observations when analyzing the Ciceronian concept of *iuris consensus* and *utilitas publica*²¹: "In the first expression, the *genitive iuris* is not objective, but subjective: it is not about men agreeing on a right, but about a common right: a "consent" right for all the people, and from which it can be commonly served. And this availability of the right is precisely the *utilitas* "the lending oneself to be "used" – whose communion Cicero demands so that one can speak of *populus*. A common right to the service of all." We can share here the successful conclusion of Betancourt, when he states that the idea underlying the preceding statements, in short, the most important

¹⁸ See TELLERÍA SEBASTIÁN, J. C. "Utilitas rei publicae": la "libertas" en el "Agricola" de Tácito – Universidad de Málaga, Baetica. Estudios de Arte, Geografía e Historia, Vol. 29, 2007 (<http://riuma.uma.es/xmlui/handle/10630/6618#sthash.Uclfi42S.dpuf>); Id., Concordia nostra: la libertas en la Germania de Tácito. Universidad de Málaga, Baetica. Estudios de Arte, Geografía e Historia, Vol. 32, 2010, p. 177–185; BUIGUES OLIVER, G. y BERNAD SEGARRA, L. Las ideas jurídico-políticas de Roma y la formación del pensamiento jurídico europeo. Valencia, 2008; MARTIN, G. Meorum periculorum rationes utilitas rei publicae vincat. Zur Historizität der vierten Catilinaria. – In: *Philologus*. Zeitschrift für antike Literatur und ihre Rezeption / A Journal for Ancient Literature and its Reception, Vol. 155, 2011, no. 2, S. 307–325; LEVELEUX-TEIXEIRA, C. L'utilitas publica des canonistes: Un outil de régulation de l'ordre juridique. – In: *RFHIP*, Vol. 32, 2002, p. 259 ss.; MICELI, P. Consuetudines/malae consuetudines: del terrorismo de clase a la utilitas publica. – In: *Scielo, Temas medieval*, Vol. 20, no. 1, jun. 2012.

¹⁹ See Cic. de Ofic. 3.7. La utilitas publica como criterio interpretativo, Cic. de Leg. 1.15.42.

²⁰ Cic. de rep. 1.25.39: *Est igitur...res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus*.

²¹ BETANCOUR, F. Derecho Romano Clásico. 3. ed. Sevilla, 2007, p. 61 ss.

thing is not the form of government, but the personal human base, i.e. the personal morals of citizens.

Indeed, it can be said that it is the personal morals of citizens, with their correlative projection to all convergent areas in the social fabric, that permeates popular morality, covered by numerous particular influences – philosophical, stoical, moral, humanistic, social, traditional or customary and legal, etc., and, without great reservations, it could be added that the Moral is the true protagonist and the true precursor of the lines of action in the organizational framework of the community of the people, with the pretension to reach always a balance of interests that is fully supported by the cardinal principles of justice, equity and utility. We refer, therefore, to the *utilitas publica* mixed by the guiding principle that we have already remembered with Betancourt: *consensus iuris* (for all the people, a common right to the service of the people). In short, a *consensus iuris* that constitutes, the nexus of union or natural channel in which the programmatic foundations of the *populus* are inserted – coincidences and convergences of the social Moral, of the juridical, philosophical, traditionalist perspectives and the different emergent reasoning's of the right natural, etc., with the purpose of obtaining the necessary common utility, that is, the public utility of the people with a preferential character, or, in the same sense, the utility of the community of citizens. The phrase *utilitas publica*, can be seen as the best argument for producing social peace.

In response to the reflections presented, which are intended to be a simple reminder of the many aspects and conditioning factors involved in shaping the most widespread popular and social consciousness in this historical moment, we must clarify that when we refer to philosophical perspectives, we do in analogous terms to those referred by F. Stella Maranca, in her study on *Seneca giureconsulto*²²: That is to say, we also allude to the intense penetration of Hellenistic philosophical currents, the Stoic positions on natural law, and legal philoso-

²² STELLA-MARANCA, F. *Seneca Giureconsulto*. Roma, 1966, p. 7 ss. See DÜLL, R. *Seneca iurisconsultus*. – In: *Aufstieg und Niedergang der römischen Welt* (ANRW), Teil 2. Principat. Vol. 15. Berlin ; New York, 1976, S. 34–380; D'ORS, Á. *Séneca ante el tribunal de jurisprudencia*. – In: *Octava semana española de filosofía*. Estudios sobre Séneca. Madrid, 1966, p. 105–119; DUCOS, M. *La cultura juridique dans le "De Beneficiis" de Sénèque*. – In: *Cultura letteraria e diritto nei primi due secoli del Principato*. "Acta Concordium", no. 8, (Suplemento a "Concordi" – no. 3, Julio 2008). Ferrara, 2008, p. 17 ss.

phy, preferably to the conceptions that are more in line with Cicero's assertions when he emphasizes that the philosophical thought of the Greek school coordinates trends, feelings, precepts and specifically Roman needs; adapts the theoretical notions to the national genius with a practical sense; it conforms the unity of the diverse Greek doctrines that, in turn, were applied and reflected in the different legal relations. The philosophical influence in the investigation of juridical relations seems evident. Stella Maranca, rightly synthesizes, in my opinion, the idea of true philosophy – legal – adding and paralleling some examples of legal sources in which several notions are combined with Cicero and Seneca foundations (*ratio, iustitia, aequitas, ius*): “nel testo ulpiano, primo frammento delle Pandette – D. 1.1. – leggiamo che <<sacerdoti di giustizia>> son chiamati i giuristi <<*veran nisi fallor, philosophiam non simulatam affectantes*>>. Vera filosofia, e cioè quella che, discostandosi dalla astrazioni contraria al genio dei Romani, aveva applicazione immediata e concreta nella vita individuale e collettiva; vera non simulata filosofia che, allontanandosi da qualsiasi esagerazione, costituiva quell’<<*amplissima omnium artium bene vivendii disciplina*>>(come diceva Cicerone – *Tuscul. disp. 4.3.5*)²³ dalla quale emanava l’<<*animi affectio suum cuique tribuens*>>²⁴ ossia l’<<*habitus animi commune utilitate conservata suam cuique tribuens dignitatem*>>²⁵: l’<<*praeceptum iuris*>> insomma, nel quale è più propriamente la idea del diritto:... *suum cuique tribuere*>> (come scriveva Ulpiano en D. 1.1) o <<*suum cuique reddere*>> (come Seneca aveva ammonito). Seneca pronounces himself in the following state: *Reddere est id, quod debeas, ei, cuius est, volenti dare*²⁶.

²³ “[...] *hac amplissiman omnium artium, bene vivendi disciplinam*”. See Cic. de Orat. 2.37.55.

²⁴ Cic. de finib. 5.23.65: “*caritas generis humani, quae nata...serpit sensin foras [...] totius complexu gentis humanae quae animi affectio suum cuique tribuens [...]*”.

²⁵ Cic. de Invent. 2.53.65: “*iustitia est habitus animi [...]; eius initium est ab natura profectum. See de officiis 1.14.42: [...] ut pro dignitate cuique tribuatur; id enim est iustitiae fundamentum, ad quam haec referenda sunt omnia*”.

²⁶ Seneca, de benef. 7.19: “*Reddere est id, quod debeas, ei, cuius est, volenti dare. Hoc unum mihi praestandum est. Ut quidem habeat, quod a me accipit, iam ulterioris est curae; non tutelam illi, sed fidem debeo, multoque satius est illum non habere, quam me non reddere.*” GRIFFIN, M.T. Seneca on Society: A Guide to De Beneficiis. Oxford, 2013, p. 335 ss., especially the differentiating comments between what is returned or reimbursed to the person who belongs to him, or who is willing to be returned (VII.19.1; VII.19.2). Libro VII, 19.2: “*Reddere est id, quod debeas, ei, cuius est, volenti dare.*” (To repay something is to give back what you owe to the persons it belongs to if that persons what it). Seneca refines the interlocutors definition at 19.1 in two respects: (a) he spells out that the thing is repaid to the persons to whom it belong; (b) he replaces the idea that it goes to a person's who will receive it, with the idea that it goes to person who is willing to have it returned; Id., Seneca,

The *utilitas publica* in Cicero and Seneca's time²⁷ it is one of the fundamental keys to achieve the so-called social consensus. The Roman version provided by the authors cited, on *utilitas publica*, demonstrates a clear tendency to give priority, or the utmost importance, to those conceptions coming from the legal philosophy framework, which would allow more immediate application and adjusted to the own rules of conduct, to the various legal relationships and those that best respond to the real needs of the Roman people. It must be said that the analysis and concurrence of the behaviors, of the ethical, moral and philosophical values, contributes to outline a true practical guide of coexistence, sustained and gestated by the guiding principles of law – *ius*, *ratio*, *iustitia*, *utilitas*, counter-signed preferably by the citizen Moral. Remember that for Seneca, Moral is the coordinator of political and legal power.

IV. UTILITAS PUBLICA – FROM THE PERSPECTIVE OF PRIORITY INTEREST THAT FAVORS THE STATE ITSELF

In the context of the late classical and especially post-classical period, as it is known, in a certain way, it seems that the State is seeking, or is particularly interested in, the salvation and benefit of one's own State, even at the expense of the community and of the individuals belonging to it, sacrificing common interests more frequently and more frequently. In this sense Rostovzev is highlighted²⁸, the predominance of the interests of the State since the end of the second century and the consideration as one of the decisive factors of the decline of the Empire. What seems especially marked in the age of the Severes²⁹ and the protagonism of absolutism, in whose juridical expositions it is observed that the predominant and most invoked expression is that of *utilitas publica*. The Constitutions of the III – VI centuries, also confirm the considerable development of the

philosopher in politic. London ; New York, 1976. See D'ORS, Á. Séneca ante el tribunal de la jurisprudencia, cit., p. 105–129; [Lucius Annaeus] Seneca. Moral Essays. With an English translation by John W. Basore, Ph.D. Princeton University. In three volumes. London ; New York. Heinemann, 1935 – <https://ryanfb.github.io/loebolus-data/L214.pdf>; See FIORELLI, P. 'Ragione' come 'diritto' tra latino e volgare. – In: *Id.*, Intorno alle parole del diritto. Milano, 2008 [Per la storia del pensiero giuridico moderno, 69], p. 144 ss. (reddere, rationem reddere, ratio, omne ius et rationem, de iuribus et rationibus, etc.).

²⁷ See MASTINO, I. *Utilitas valuit propter honestatem: Cicerone e il principio giuridico dell'utilitas*, cit., p. 1 ss.

²⁸ ROSTOVZEV, M. *Histoire économique et sociale de l'Empire romain*, cit., p. 431.

²⁹ See SCEVOLA, R. *Utilitas publica*, cit., Vol. II, p. 9–382.

utilitas publishes from the low empire, while the *utilitas communis* remains as something exceptional³⁰, which continues to imply an increasingly accentuated difference in the classical doctrine on the notion. The idea is to prevail more clearly, and above all, the superior interest of the State as an autonomous entity, although it does not seem, in principle, that a too drastic rupture is also intended, since it is interpreted that, to a certain extent, it is even it is ultimately protecting the common interest. An interest of the State, especially since Constantine, more exclusive, is what seems to predominate³¹. However, in my opinion, a point of particular importance should be given to the observations of M. Navarra³², in his study on the utility published between the fourth and fifth centuries. The following could be summarized for this purpose: The emperor and his entire bureaucratic apparatus assumed the task of protecting the common good and the public interest, and as is well known the emperor was also submitted to *us commune*³³, what would come to suppose limits to the arbitrariness and to the exercise of power and to sharpen the fine selection between the public interest and the guarantee of the individuals. In short, the emperor was not above the law but would have to balance the limits imposed by the common law itself, and distance itself from mere arbitration. The problem arises when there is a despotic attitude by the emperor, or abusive by officials (both aspects too frequent), which finds some welcome in the constitutional texts cracking the purest evidence of the true *utilitas*³⁴. With regard to the search for a balance between public interest and private interest, the author concludes by stating that the law has the function of protecting interests “che di volta in volta sono ritenuti comò meritevoli di tutela e che attraverso esso sia possibile pervenire al soddisfacimento dell’*utilitas* sia essa *publica* sia *privata*”.

It could be thought that if the emperor had restricted or limited the arbitrariness to grant absolute preference to the interest of the State, depending on the submission to the *ius commune*, the meaning and application of the *utilitas*

³⁰ See GAUDEMET, J. Op. cit., p. 480.

³¹ LEVY, E. West roman vulgar law. Dominion and public interest, cit., p. 111 (on the subject of expropriation).

³² NAVARRA, Marialuisa. *Utilitas publica – utilitas singulorum...*, cit., p. 289.

³³ See GIGLIO, S. Il tardo Impero d'Occidente e il suo senato: privilegi fiscali, patrocinio, giurisdizione penale. Pubblicazioni della Facoltà di giurisprudenza dell'Università degli studi di Perugia, 1990, p. 245 ss.

³⁴ See NAVARRA, Marialuisa. *Utilitas publica – utilitas singulorum...*, cit., p. 290–291.

commune should not be understood as something so exceptional, as has been said previously³⁵. An *ius commune*, which exercises its function by reasonably linking the great principles, values and rules that we have been considering and which suppresses the deactivation of the essence and virtues of the *iustitia* and the *utilitas*. We must not forget that the problem that prevents achieving the difficult balance between the *utilitas publica* and the *utilitas commune* in this era is played out by imperial despotism and the frequent and numerous abusive behavior of officials.

Another revealing appreciation of the difficulty in extracting the most complex meanings from the evolutionary context of *utilitas publica*, and which in turn simplifies the issue, may be the perspective of Longo³⁶ exposed in his conclusions: “Publica utilitas, è nozione che si collega, indissolubilmente, in ciascuna epoca storica, con la nozione de res publica, di atteggiamenti del potere statale di fronte ai cives, di nozione dei poteri di questi ultimi, in sé e per sé considerati di fronte allo Stato”.

V. JUSTINIAN AND THE PRETENDED AND POSSIBLE RETURN TO THE CONCEPTIONS OF *UTILITAS PUBLICA* ↔ *UTILITAS COMMUNIS*

While the influence of Christianity on issues so close to the guarantees of citizens is evident, the complexity that exists when extracting the most characteristic profiles of *utilitas publica*, in the different stages does not allow – in my opinion – to advance criteria too conclusive. However, I think the following questioning of Gaudemet³⁷, about Justinian thought in this respect, when it induces us to think that Justinian again gives preference to some extent to the private interests that were being forgotten. Although, as the author points out, this does not represent an absolute novelty because there were already previous indications of emperors who highlighted the *utilitas communis* with preference (Julian, Diocletian, Valentinian, Theodosius I, Trajan, among others)³⁸. In this sense, the question that is formulated Gaudemet finds a point of substantial reflection very sug-

³⁵ See GAUDEMET, J. Op. cit., p. 480.

³⁶ LONGO, G. Op. cit., p. 71.

³⁷ See GAUDEMET, J. Op. cit., p. 497 ss.

³⁸ See GAUDEMET, J. Ibidem.

gestive: “Is it here a change of style of the chancellery, a literary fashion that did not correspond to any transformation in the contents? Such a question reveals a more important concern about the true meaning and content of the idea of *utilitas publica*. A *utilitas publica* in which they would return in part to shine the most essential elements of it (*ratio, iustitia, aequitas, honestum, useful, legal, utilitas publica, utilitas omnium*, that is, more authentic and full of humanistic connotations: remember the term *humanitas*, frequently used in the Justinian law-). As has been highlighted on numerous occasions, the doctrines of Christianity also influenced, very remarkably, many theories of this stage and, with great repercussion on issues such as the one before us. Steinwenter³⁹ highlights the presence and relevance of the Christian perspective prone to consider the *utilitas* as *utilitas communis* (e.g. Lactancius, S. Jeronimus and S. Augustinus, among others), often highlighting the Ciceronian reminiscences for this purpose. To a certain extent it seems that the fact of subtracting rigor and authoritarian sense to the *utilitas* publishes, with the intention of granting a purpose more beneficial for the common interest of the subjects, would induce to reflect with Gaudemet⁴⁰ on the restoration of the Justinian Empire and the concern to locate the private interests closest to the original ideas; although these tendencies, as we have seen in other stages already mentioned, also appeared occasionally or punctually, and were precisely recommended by emperors contrary to Christian presuppositions (e.g., among others, Diocletian).

We can not now classify the various meanings hidden behind this expression *utilitas* publishes, according to the data offered by the extra-legal sources, pre-Justinian, Justinian and of various kinds, because as Branca correctly pointed out⁴¹, the different applications can be subsumed in the term. One might think that it is a too ambiguous and comfortable term that can favor and justify, too often, the direct application of hidden and masked interests under the abstract idea of obtaining common fruits: common utility. Even, as Cicero pointed out⁴², in the name of the *publica utilitas*, unfair acts can be made in counted occasions.

³⁹ STEINWENTER, A. *Utilitas publica-utilitas singulorum*, cit., p. 84 ss. In this sense see GAUDEMET, J. Op. cit., cit. p. 498.

⁴⁰ See GAUDEMET, J. Op. cit., loc.cit.

⁴¹ BRANCA, G. *Le cose extra patrimonium humani iuris*. Univ. di Trieste, 1941, Cap. II, n. 36, p. 204.

⁴² Cic. de off. 3.47.

In this summary statement, it seems to me opportune to make an attempt of framing as the one made by Longo⁴³: (1) Fragments and laws where the *publica utilitas* reflects references to an express or generic rule in relation to the behavior of a subject or the performance of different acts – homogeneous in general; (2) Texts, fragments and constitutions concerning institutions of private law (marriage, dowry, guardianship, etc.); (3) Numerous statements regarding the criterion of the public use as a motive of protection of interests more in line with the pre-established order, either with respect to the essence itself, or about the form of action to achieve its own purposes⁴⁴. And finally, the framework that best fits the interdictal interest and will be subject to timely treatment below: (4) Fragments in which the *utilitas publica* appears referred to procedural matters, where the most important and interesting sector is the texts concerning the protection or interdictal defense, or as a basis for the application of a specific injunction, or as a generic or proemial characterization of a certain category of similar legal remedies. However, it should be remembered, as Longo himself⁴⁵ recognizes that each of the categories referred to above presents pure affirmations, and also more suspicious or altered statements, delimiting a marked post-classical tendency.

It should be remembered that *publicam utilitatem pertinentia*, was one of the causes for which interdicts also belong, as Paulo states in D. 43.1.2.1, *publicae utilitatis causa competit interdictum*, and although the examples cited in the fragment are very brief, it can be stated that in the cases related to interdicts on public matters, the *utilitas publica* finds fully backup. I quote some specific examples below: *ut via publica uti liceat et flumine publico, et ne quid fiat in via publica...*; Ulpian⁴⁶, in D. 43.1.1, when it is proposed why interdicts compete, *videamus, quibus rebus interdicta competunt*, when dealing with public affairs, highlights some examples that presuppose analogous conclusions, that is, mentions as examples: the places public, roads and public rivers – *publica: de locis publicis, de viis, deque fluminibus publicis*.

⁴³ LONGO, G. Op. cit., p. 17 ss.

⁴⁴ See LONGO, G. Op. cit., p. 18 ss.

⁴⁵ LONGO, G. Op. cit., p. 18.

⁴⁶ See HONORÉ, T. Domicio Ulpiano. Juristas Universales. Vol. 1. Madrid, 2004 (ca. 170–223/224), p. 208 ss.

VI. *UTILITAS PUBLICA*: A PECULIAR ASSUMPTION EXTRACTED
FROM THE INTERDICTAL CONTEXT, IN WHICH GENERAL INTEREST
AND PRIVATE INTEREST ARE COMBINED

For this purpose, the analysis of the interdict of *loco publico fruendo* (D. 43.9.1.1)⁴⁷, one of the pretoria forecasts in which it can be observed that the public utility is usually applied, in certain occasions, to justify jointly the guarantees of the individuals and the general interest.

Utilitas publishes and its evolution, has also been in each historical stage associated with the notion of *res publicae*⁴⁸, and, although there was not a general law that contemplated all the peculiarities of the *res publicae*, there are at least numerous testimonies in the sources from which it is inferred that they had a special consideration, and in which the prevalence, expressly or tacitly, underlies. *Utilitas publica* as a guiding principle in many of the actions of the Roman legal-administrative experience.

In this intense administrative experience developed by the Roman wisdom in its didactic, doctrinal and moral aspects, it seems appropriate to mention one of the injunctions that, based on public utility – *utilitas publica*, directly recognizes the interdictal protection of all those individuals who have leased a public place. Some injunctions openly protect the faculty of general use, but at other times it is the particular utility that seems to prevail. The jurisprudential reflections on the injunctions related to *res publicae* testify in a singular way, highlighting in most of the occasions the protection granted to the general use of public

⁴⁷ D. 43.9.1 (Ulp. LXVIII ad ed.). See LENEL, O. Das Edictum perpetuum. 3. ed. Leipzig, 1927, S. 239; UBBELOHDE, August von. Die Interdikte zum Schutze des Gemeingebrauchs. Erlangen, 1893, S. 284 ss.; Id., Commentario alle pandette. Milano, 1888-1909, p. 43, 139, 144, 625; ALBURQUERQUE, J. M. Reflexiones sobre el arrendamiento y disfrute de un lugar de dominio público en Derecho Romano. – In: *Revista Iuris Tantum*. Facultad de Derecho Universidad Anáhuac, México, 2001, p. 3 ss.; Id., Experiencia administrativa romana: Algunas manifestaciones de los magistrados romanos en relación al uso público de los bienes de dominio público. – In: *El poder estatal y local: Problemas jurídicos*. [Russia-España: Сб. науч. трудов. Воронеж. гос. ун-т и др.]. Воронеж, Изд-во Воронеж. гос. ун-та, 2000. 311 с. Москва, Юстицинформ, 2001, p. 296 ss. (Russian transl. p. 144 ss.); Id., La protección o defensa del uso colectivo de las cosas de dominio público, cit., p. 151 ss.; Id., Juristas Universales, cit., 3.693 p. – In: *RGDR*, Vol. 3, 2004, p. 1 ss.

⁴⁸ See LONGO, G. Op. cit., p. 71 ss.; SCEVOLA, R. Utilitas publica, cit.; STEINWENER, A. Utilitas publica – utilitas singulorum, cit. p. 90 ss.; GAUDEMET, J. Op. cit., p. 473 ss.; JOSSA, G. L'utilitas rei publicae nel pensiero imperiale dell'epoca classica, cit., p. 387 ss.; NAVARRA, Marialuisa. Utilitas publica – utilitas singulorum, cit., p. 269 ss.; ANKUM, H. Utilitatis causa receptum. Sur la méthode pragmatique des juristes romains classiques. – In: *RIDA*, Vol. 15, 1968, p. 1–31; BRANCA, G. Le cose extra patrimonium humani iuris, cit., p. 204; SCHERILLO, G. Lezioni di Diritto Romano. Le cose. Giuffrè, 1945, p. 123.

goods. However, by examining carefully the legal text of the interdict before us, it can be verified in a sufficiently explicit manner that its approach contrasts significantly with the principles that seem to inform the different injunctions on public matters; although its possible justification could be evident.

Indeed, the use in several revised texts of the expression public utility, makes us corroborate our initial thinking in which it is emphasized that the referred interdictal guardianship and the application diversity of the same, would fit without a doubt in this concept that could be considered excessively pluralist, but that is returned without great difficulties to the cause that justifies the applicability of these injunctions: *utilitas publica*.

The legal recognition of this transcendental idea, to which we refer, we can also extract from the following example:

D. 43.9.1.1 (Ulpianus, libro LXVIII ad edictum): Interdictum hoc publicae utilitatis causa proponi palam est: tuetur enim vectigalia publica, dum prohibetur quis vim facere ei, qui id fruendum conduxit.

It is evident, Ulpian affirms, that this interdict is proposed for the sake of public utility, since it protects public leases by prohibiting anyone from opposing violence to those who took a lease to enjoy it.

An argument of Ulpian that has to do with the cause that justifies the exordability of the *interdictum de usu publico fruendo* but also – in the framework of the different applications that can include the idea of public utility – with the possibility of enjoyment of a public place by the legitimate tenant or his partner (D. 43.9.1.pr. (Ulp., LXVIII ad ed.)). We can add, in our view, that the Romans felt a great proclivity to convert *utilitas publica* and common use of the public things in the axis on which the interdictal guardianship frequently gravitates in relation to the things of public domain. Also, we can remember the wide scope of the legitimate concessions, supported by the affirmations of Ulpian (D. 43.8.2.2) on public conveniences, which has probably determined the literal meaning of this injunction relative to the enjoyment of a public place, using *utilitas publica* as the cause for which it is proposed. This interdiction in order to extract an economic enjoyment in relation to a good for public use (thus, protects itself in public taxes – *tuetur enim vectigalia publica*). This is the legislator's mobile by which preference is given to the tenant of a *locus publicus* (guarantee public revenues).

Aspect that, without specific mention to the *utilitas publica*, but as a consequence of its long projection and without framing it particularly in the field of concessions, it can be seen in the same sense – with the justification *ne ruinis urbs deformatur* – in a text by Ulpian (D. 43.82.27) in which a solarium (tribute) was imposed on the builder of a building -without permission or opposition- in a public place (affirmation that favors public income and that was perfectly accepted by the competent authorities in these cases).

What used to happen when the magistrate, based on his discretionary power, did not decide to demolish it. Obviously, the payment of the solarium is incompatible with the private property of the work⁴⁹.

As we have seen, although it is the *utilitas publica* that seems to support the interdictal virtuality, the basis of interdictal protection seems different: in D. 43.8.2.2 (Ulp. 68 ad ed.), “And with him (it refers to the interdiction *ne quid in loco publico fiat*) attention is paid to public conveniences, as well as to private ones, not as their own, but from the city; and we have as much right to obtain it, as each one of the people has to prevent it”. In D. 43.9.1.1 (Ulp. 68 ad ed.), “It is evident that this injunction is proposed (*de loco publico fruendo*) for the use of *utilitas publica*: because it protects public tributes by prohibiting anyone oppose the tenant with violence.” So, as Capogrossi Colognesi writes⁵⁰, “I loca publica di D. 43,8, e I loca publica di D. 43,9 (solo formalmente individuati in modo identico), il fondamento stesso della tutela interdettale varia profondamente. Basti confrontare la giustificazione adotta dallo stesso Ulpiano a proposito dei relativi interdetti. In D. 43,9,1,1, egli infatti si limita a sostenere che si proteggono I *vectigalia publica* e quindi il pubblico interesse ad essi collegato, *dum prohibetur quis vim facere ei, qui id fruendum conduxit*, mentre invece, in D. 43,8,2,2, la pubblica utilità appare direttamente connessa alla fruizione da parte di tutti di tali loca”. Nuances that, in our opinion, corroborate the extensive concept of *utilitas publica* maintained by the Romans.

⁴⁹ See SCHERILLO, G. Ibidem; ROBBE, U. La differenza sostanziale fra 'res nullius' e 'res nullius in bonis' e la distinzione delle 'res' pseudo-marciane. Messina, Giuffrè, 1979, p. 900.

⁵⁰ CAPOGROSSI COLOGNESI, L. La struttura della proprietà e la formazione dei iura praediorum nell'età repubblicana. Vol. 1. Milano, 1969, p. 4, n. 3.

VII. OBSERVATIONS

It has been said, and rightly so, that it is a too ambiguous and comfortable term that can favor and justify, too often, the direct application of hidden and masked interests under the abstract idea of obtaining common fruits: common utility. Although, it is necessary to demonstrate the persistent and manifest proclivity of the original notion to recover or maintain to a large extent the most traditional and essential profiles of the *utilitas publica* throughout the historical context analyzed, because, in my opinion, if we observe its use or application in each of the periods referred to we find justifications that are in full consonance with the primitive postulates, that is, as a preferred guide to obtain the greatest social consensus, the common good, justice and utility. The differences between the different periods analyzed are completely circumstantial and adjust to the socio-political realities of each stage; However, as we have seen, even in moments of maximum imperial despotism or abuse of the administration, there are imperial assessments that confirm, attest or attest the pristine sense of the concept, which can ultimately lead us to think that the meaning of the term *utilitas publica* could be configured, or represent a guiding principle whose prevalence framed in the *iustitia*, *equitas*, *ratio*, good and common utility, has prevented, throughout its long history, completely deactivate the republican and classical essence.

In effect, the analysis and evolution of the transcendental idea or *utilitas publica* confirms that the notion had become a guide and a preferential support for the set of Roman social and legal regulations and solutions. It can be affirmed that the term, in most of the normative assumptions, subsumes the most recognized essential principles in the actions of the Roman public administration, and in the different areas of application – political, legal and administrative. In the review and analysis of the initial historical section – republican context – although the expression *utilitas publica* does not appear in the Roman legislation of this stage, nor in the edictal forecasts, one can observe a proclivity and a clear tendency to equalize and unification in the framework of the community, the republican essence and respect for the Roman people: the utility of the republic represents in turn the common utility (*utilitas reipublicae*). It is a more equitable, egalitarian and replete conception, in terms of the sophists, of justice and utility.

As I have already pointed out, for many scholars it constitutes the most human affirmation of what should be understood as usefulness (*iustitia, aequitas*). The Roman conceptions in Cicero's time reflect a good part of the basic principles that prevail more frequently: objectivity of the legal system, justice, utility, equity, honesty, lawful, authentic reference to a clear idea of *utilitas*.

The republican ideas maintain their extensive influence until the classical era, with similar postulates in which are combined nuances that I will summarily recall: In the first phase of the classical stage, the Roman emperors do not conceive the State as a differentiated entity of the collectivity, that is, they do not consider it as an abstract entity. What is equivalent to saying that it is the interest of the community of the people that shapes the new perspective: The *utilitas rei publicae* comes to mean *utilitas communis*. In this sense, it should be understood, therefore, that the State is the community itself, and represents exclusively the interest of the same. If it is kept in mind that the essential lines seem to have remained substantially identical, the more humanistic connotations that represent the idea of public utilitas at this time (*iustitia, aequitas*, common utility, law, etc.) could be included in the same context. However, as is well known, there are many scholars who have highlighted, with arguments worthy of reflection, that the coincident, convergent or analogical points to which I have referred in previous paragraphs, do not correspond with exhaustivity to the conceptions of the Principality. Although, in my opinion, although there may be specific differences, we can think that many of the republican criteria applicable to the community subsist. From the idea that the res publishes as the people themselves, it can be deduced that the utilitas publishes is equivalent to the *utilitas omnium* (of each and of all). In any case, it is prone to maintain the essence of justice and the interests that affect the community. (In this sense, it would be possible to compile again some probably latent principles: Objectivity of the legal system, *iustitia, utilitas, equity, ratio*, honesty, common good, etc.). In this period, the opposition of private and public interests begins to take shape, sometimes subordinating the interests of individuals, and the justification must be sought in the clear and evident utility that it represents for the people in general, so that the conceptions coming from of the framework of legal philosophy that we analyzed

at the time, allow an immediate application and adjusted to the rules of conduct and the diversity of the legal needs and relationships of the Roman people.

In the post-classic period, the expression *utilitas publica* is more prone to safeguard the interests of the State itself, to the detriment of the guarantees of individuals and more frequently damaging common interests. The distancing of the traditional perspective of the *utilitas communis*, is accentuated from the time of the severe until the sixth century⁵¹. The new meaning that is given in this period to the expression *utilitas publica*, suggests that the traditional conception of *utilitas communis* survives with exceptional character⁵². However, as we explained in previous paragraphs sharing the observations of M. Navarro⁵³, In his study of *utilitas publica* between the fourth and fifth centuries, the emperor and his entire bureaucratic apparatus assumed the task of protecting the common good and the public interest, and as is well known, the emperor was also subject to *ius commune*⁵⁴, that would come to suppose limits to the arbitrariness and to the exercise of power and to sharpen the fine selection between the public interest and the guarantee of the individuals. If we assume that the emperor had cut or limited the arbitrariness to grant absolute preference to the interest of the State, to be subject to the *ius commune*, it seems logical to think that the more traditional sense of *utilitas commune* should not be understood as something so exceptional. We know that the essential mission of the *ius commune*, exercises its function reasonably linking the great principles, values and rules that we have been considering and that supposes a brake to the deactivation of the essence and virtues of the *iustitia* and the *utilitas*. An apparent confrontation or prevalence between *utilitas publica* and *utilitas commune*, which, in principle, should not imply too abrupt changes in the substance. Although, we should not forget, as we have already warned⁵⁵, that the problems preventing to obtain the difficult balance between the *public utilitas* and the *utilitas commune* in this epoch, it car-

⁵¹ In this sense, see ROSTOVZEV, M. Histoire économique et sociale de l'Empire romain, cit., p. 431 ss.

⁵² GAUDEMET, J. Ibidem.

⁵³ NAVARRA, Marialuisa. Ibidem.

⁵⁴ The author endorses this consideration (p. 209) based on the study by GIGLIO, S. Il tardo Impero d'Occidente e il suo senato: privilegi fiscali, patrocinio, giurisdizione penale, cit., p. 245 ss.

⁵⁵ NAVARRA, Marialuisa. Ibidem.

ries out the imperial despotism and the frequent and numerous abusive conducts of the civil servants who, too often, modify and denaturalize the true classic essence of *utilitas*.

The most obvious return to the classic postulates of the *utilitas publica* ↔ *utilitas communis*, Justinian advocates. Although we can not advance decisive or excessively conclusive criteria, if we can share with Gaudemet⁵⁶, that the Justinian thought again gives preference, to a certain extent, to the private interests that were being forgotten, although, as our author points out, this did not represent an absolute novelty because, as we have highlighted, there were numerous previous indications of emperors who they also emphasized the *utilitas communis* with express preference (Julian, Diocletian, Valentinian, Theodosius I, Trajan, etc.). In short, a *utilitas* publishes in which they would return in part to shine the most essential elements (*ratio, iustitia, aequitas, honestum*, useful, lawful, *utilitas publica, utilitas omnium*, that is, more authentic and full of the original humanistic connotations. Recall the intimate link that exists between *iustitia* and *utilitas* “Just to be useful, and useful to the extent that it is fair”.

⁵⁶ GAUDEMET, J. Ibidem; See STAGL, J. F. Die Funktionen der *utilitas publica*. – In: ZSS, Vol. 134, S. 214 ff.; MASTINO, I. *Utilitas valuit propter honestatem*, cit., p. 1 ss.

**ПЪРВО ФОРМУЛИРАНЕ НА ТЕОРИЯТА ЗА
НОРМАЛНОТО ПОЛЗВАНЕ:
СПАНГЕНБЕРГ И НЕГОВАТА РИМСКОПРАВНА
ТЕОРИЯ
ЗА ТЪРПИМОСТТА. ГЛЕДНАТА ТОЧКА НА
ЙЕРИНГ
И НЕГОВАТА НОВА КОНЦЕПЦИЯ ЗА
ТЪРПИМОСТТА (НА АНГЛИЙСКИ ЕЗИК)**

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Резюме: Забраните за определено поведение, с които собствениците на недвижими имоти трябва да се съобразяват при упражняването на своето право поради възможността да засегнат интересите на собствениците или ползвателите на съседни имоти, не трябва да бъдат разбирани в тесен смисъл. Въпреки че в своите становища римските юристи обикновено споделят схващането за обща забрана на каквато и да е търпимост, смята се за доказано че в някои случаи стриктното прилагане на подобно правило води до абсолютно отричане на правомощия, предоставени на собственика. При наличието на толерантност и предоставянето на определени възможности радикалната забрана за каквато и да било търпимост не би била допустима. Изработването на общи критерии, които да разрешат проблема за легалността или не на търпимите действия, не са приоритет в работата на римските юрисконсулти, които се ограничават до разрешаването на отделни частноправни казуси. Истинските протагонисти в търсенето на генерални решения в тази насока са юристите от деветнадесети век, водени от нуждите на своето време, в което развитието на индустрията става причина за нарастването на конфликтите и проблемите в отделните имоти. Появила се в този климат на технологически и индустриален прогрес, теорията за нормалното ползване се основава предимно на обективната концепция за търпимостта и, разбира се, на отговорите на юриспруденцията, съдържащи се в римскоправните източници.

Ключови думи: упражняване на права; собственост; търпимост; търпимост на шум; търпимост на миризма; мирно съвместно съществуване; публична защита.

FIRST FORMULATION
OF THE THEORY OF NORMAL USE:
SPANGENBERG AND HIS ROMAN THEORY
OF THE EMISSION.
THE MOST ADVANCED VISION
OF IHERING AND HIS NEW EMISSION CONCEPT*
(ENGLISH LANGUAGE)

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Abstract: The prohibition of the behaviors carried out by the owners in the exercise of their respective rights by the mere fact that their effects spread towards adjoining or nearby properties could not be understood in a sense too strict. Even though the Roman jurists used to emit their judgments on the basis of general prohibition of any emission, it was proved that on some occasions the rigorous application of such a rule would imply an absolute denial of some of the powers granted to the owner. Without abandoning the reciprocal behavior of concessions and tolerance, the radical prohibition of all emission would not be permissible. The elaboration of a general criteria that solved the problem of the legality or illegality of the emissions were not the work of the Roman juriconsults, who limited themselves to resolving the specific cases. The real protagonists in the search for general solutions were the jurists of the nineteenth century, driven by the needs of their time in which the development of the industry led to an increase in conflicts and problems in neighborhoods. Immersed in this climate of technological and industrial progress, the theory of normal use based primarily on the objective concept of emission and, of course, on the jurisprudential answers collected in Roman sources.

Keywords: rights exercises; property; material emissions; acoustic emissions; odor emissions; peaceful coexistence; public protection.

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1. THE FIRST FORMULATION OF THE THEORY OF NORMAL USE: SPANGENBERG AND HIS ROMAN THEORY OF INMISSIONS

Peaceful coexistence is a sign of an advanced society in which respect for the rights of others and the resolution of conflicts through mediation in situations of containment have become essential elements. In the area of neighborhood relations, one can guess that there is a panorama of constants, confrontations and struggles among the youngest when it comes to obtaining answers to others, the recognition of the faculties that grant them the right to property and its contiguous effects or nearby properties causing discomfort sometimes intolerable¹. Finding the right measure of prohibition or permission in a positive sense of these behaviors is the goal of the Roman jurists who, although they used to issue their judgments based on the general prohibition of everything imposed on alien, verification that in some cases the rigorous application of said rule would imply an absolute denial of some of the prerogatives granted to the owner in the exercise of his right². However, on the other hand, it would not be permissible to

¹ See FERNÁNDEZ de BUJÁN, A. *Derecho Público Romano*. 19. ed. Madrid, 2016, p. 100 ss.; Id., *Derecho Privado Romano*. 19. ed. Madrid, 2016, p. 182 ss.; ALBURQUERQUE, J. M. La protección o defensa del uso colectivo de las cosas de dominio público: Especial referencia a los interdictos de publicis locis (loca, itinere, viae, flumina, ripae). Madrid, 2002; id., Concentración y ordenación urbanística del territorio romano: colonias, conventos y municipios de la Bética. – In: *RGDR*, Vol. 13, 2009; Id., Reconocimiento pretorio y jurisprudencial de la función social de los bienes destinados al uso público – Res publicae in publico usu. – In: *Revista Digital de Derecho Administrativo* (RDDA, Universidad Externado de Colombia), Vol. 17, p. 141–161; Id., Правната сделка: въведение, научен и теоретичен преглед със специална препратка към съчиненията на Emilio Betti [исп. Negocio jurídico: introducción, revisión científica y doctrinal]. – In: *Ius Romanum*, 2016, no. 1, *Commercium*, c. 36–52.; Id., Размисли относно *iurisdictio irinitana* (англ. Reflection on the irinitana iurisdictio. – In: *Ius Romanum*, 2015, no. 2; RUIZ PINO, S. Algunos precedentes históricos de protección o defensa de los recursos naturales y de la salubritas en Roma: hacia un derecho administrativo medioambiental romano. – In: *Revista Digital de Derecho Administrativo*, 2017, no. 17, p. 91–109; JIMÉNEZ SALCEDO, M^a Carmen. El régimen jurídico de las relaciones de vecindad en Derecho Romano. Córdoba, 1999. p. 54 ss.; PONTE, V. Régimen jurídico de las vías públicas en Derecho Romano. Dikynson, 2007; Id., Bases jurídico romanas del ordenamiento jurídico moderno en sede de vías públicas: financiación, construcción y mantenimiento. – In: *RGDR*, Vol. 20, 2013; MALAVÉ OSUNA, B. La preceptiva intervención del Emperador en la ejecución de obras públicas de nueva planta, según el Código Teodosiano. – In: *RGDR*, Vol. 24, 2015; Id., El abandono de las obras ya comenzadas y su regularización en el Derecho urbanístico romano. – In: *Revista Estudios Jurídicos*, Vol. 30, 2008.

² CUGUSI, G. *Teoria della proprietà*. Napoli, 1907, p. 240. DI MARZO, S. *Manuale elementare di Diritto Romano*. Torino, 1954, p. 128; SCIALOJA, V. *Diritto romano. La proprietà*. Lezioni compilate dal Dottor Guido Storch. Università di Roma. Anno 1908-1909, p. 454; BIONDI, B. *Istituzioni di Diritto Romano*. 5. ed. Milano, 1972, p. 273. DUSI, B. *Sulle immissioni immateriali*. – In: *Rivista diritto commerciale*, Vol. 6, 1908, no. 2, p. 518.

consider all immissions lawful. This solution would cause a situation of chaos difficult to solve.

The elaboration of a general criterion that solved the problem of legality or illegality of the immissions was not the work of the Roman jurists. They simply limited themselves to resolving the different specific cases that were being brought to them in response to their particular circumstances. The real protagonists in the search for general solutions were the jurists of the nineteenth century driven by the needs of their time in which the development of the industry led to an increase in conflicts and neighborhood problems. As Bonfante stresses, “born in England in the late eighteenth century and extended throughout the continent during the nineteenth century, the large modern industry with the factory regime and the use of machines and steam, has altered the terms of the problem, now what we had to react against was the excessive but not reprehensible advances of the modern economy.”³

Immersed in this climate of technological and industrial progress in which there is an increase in activities that due to their effects can cause discomfort and therefore, disagreements between neighbors, the theory of normal use arises, based above all on the objective concept of immission and assumed in the jurisprudential answers collected in Roman sources. This doctrinal construction, although it has been mostly reported by Ihering, has its origins in a previous theory called *immissio* theory or Roman theory of immission, whose creator was also Spangenberg – who reveals his views on tolerance of the immissions, taking as support D. 8.5.8.5–7 (Ulp. Lib. XVII ad ed.)⁴.

First, Spangenberg raises the question of whether is it possible to apply the solutions given in the aforementioned paragraph on the immissions of smoke, water and stone fragments, to other types of similar immissions. The answer is affirmative. According to Spangenberg, it is evident that the prohibition contained in the passage of Ulpian is also extendable to other disturbing disturbances; this is demonstrated by the statement “*in suo enim hactenus facere licet quatenus nihil in alienum immittat*”. The water, smoke and stone fragments that

³ BONFANTE, P. Las relaciones de vecindad. Traducción al español, prólogo, concordancias ... por A. García Valdecasas. Madrid, 1932, p. 29.

⁴ SPANGENBERG, E. P. J. Einige Bemerkungen über das Nachbarrecht. – In: *Archiv für die civilistische Praxis* (ACP), Vol. 9, 1826, S. 265 ss.

are mentioned in the text are mere examples of prohibited immissions. In this sense, Spangenberg equates the emission of smoke to dust, stating that both have the same properties. The two elements dust and smoke rise and fall, damage health and produce deterioration and dirt in the things that are exposed to them. The same comparison could be made with the fragments of stone and any other material object⁵.

Spangenberg limits the content of the immission to objects or bodily substances. According to this author, we can not extend the prohibition of immissions beyond the elements that, like water, smoke or fragments of stone, manifest themselves in a material, tangible or corporeal way. This is the common characteristic of all immission assumptions. Negative influences for the senses such as smell can not be considered as such, in the case of bad odors or hearing, as a consequence, for example, of strident noises⁶. In his opinion, some fragments of the sources corroborate his thesis: for example, Ulpian expresses himself when, taking the opinion of Nerva, he affirms that if a public place is infected only with bad odors, it is only possible to resort to public legal protection, to police measures⁷. Equally it would be possible to mention, according to the creator of the immissio theory, the fact that so that a private person can exercise some private means of protection against the neighbor that places next to its wall a dunghill, it is not enough that this one gives off bad odors, but it is also necessary to moisten the wall threatening ruin: D. 8.5.17.2 (Alf. Lib. II Digestorum). Finally, in C. XI.18 it is established that artisans can not be forced to move because their activities are noisy⁸.

Ultimately, in the opinion of this author, the passage of Ulpian which includes that the general prohibition of immissions must be applied by analogy to any case in which a problem of material immissions arises, intact immissions remain marginal. As Spangenberg himself states: "If the owner has to put up with a tinsmith, a leather tanner, etc., they should be installed next to him or the neighbor cover his house with a dazzling coat of paint, although his ears, his

⁵ SPANGENBERG, E. P. J. Op. cit., S. 269–270.

⁶ SPANGENBERG, E. P. J. Op. cit., S. 271 ss.

⁷ D. 43.8.2.29 (Ulp. Lib. LXVIII ad ed.): "*Idem ait, si odore solo locus pestilentiosus fiat, non esse ab re, interdicto uti*". See BONFANTE, P. Corso di Diritto Romano. Vol. 2. La proprietà. Roma, 1926, reimpr. Milano, 1966, p. 365.

⁸ SPANGENBERG, E. P. J. Ibidem.

nose or his eyes are damaged because of it, however, he does not have to tolerate it when the industrialist installed next to him places necessary equipment for the exercise of his industry so that the waste, impurities, smoke and dust or any other Corporeal substance penetrates into your house and bothers you.”⁹

Regarding the permissiveness or not of the immissions, Spangenberg shows that according to the fragments corresponding to D. 8.5.8.5–7 (Ulp. Lib. XVII ad ed.), each one can act in his property as he pleases as long as there is not an immission in the property of another that he or the neighbor is a nuisance. However, discomfort, from the legal point of view, sufficient to substantiate the exercise of a procedural action, can not be considered those that occur as a result of the development of normal activities and commonly necessary in ordinary life, such as smoke with a cooking food, or lifting dust in the cleaning of a house; however, they must be considered sufficient to support a judicial claim, the inconvenience caused as a result of activities or extraordinary uses, for example the establishment of devices for a special purpose such as the installation of a grain cleaning equipment that produces a large quantity of dust. In the event of such an inconvenience, the aggrieved owner will only have the duty to tolerate it when his neighbor has constituted an easement to perform said activity.

Therefore, it must be considered extraordinary use the realization of a certain industry that produces negative influences on neighboring properties, even though these influences are only a normal consequence of the industry.¹⁰ Now, according to the doctrinal conception of Spangenberg, it is only possible to claim against those disturbances which are embodied corporally. Thus, it is possible to exercise a certain industrial activity whose harmful effects are limited to noise or odors¹¹. It is evident that this first approach to what later would be constituted as a theory of normal use, offers us a partial solution to the problem of neighborhood conflicts due to annoying immissions because the immaterial immissions that can sometimes cause a discomfort even greater than those that manifest bodily. In this sense, the criticisms of Ihering arise to the Spangenberg theory and with its new criteria, it tries to perfect the incipient theory of normal use, offering global solutions applicable to all types of immissions.

⁹ SPANGENBERG, E. P. J. Op. cit., S. 272.

¹⁰ SPANGENBERG, E. P. J. Op. cit., S. 270; BONFANTE, P. Op. cit., p. 31.

¹¹ SPANGENBERG, E. P. J. Op. cit., S. 271.

2. IHERING AND ITS CONSTRUCTION OF THE MOST ADVANCED THEORY OF NORMAL USE

On the basis of the Roman legal sources, Ihering¹² constructs a broader concept of content immission than that formulated by Spangenberg, which includes not only the interference of bodily substances, but also immaterial disturbances, which are annoying for the person of the neighboring owner. For Ihering, the property and the owner are two linked and inseparable concepts; therefore, all harmful influences must be considered as immissions regardless of whether they have a bodily nature or not¹³. This new concept of immission is described by Ihering with the term “Eingriff” which means influx or influence, with which it clearly expresses a more extensive and extensive conception than the figure of the immission sustained by Spangenberg¹⁴. For the formulation of his theory on the prohibition of immissions, Ihering takes as its starting point the distinction between influences harmful to things and annoying for people on the one hand¹⁵, and direct and indirect influences on the other.¹⁶ In relation to harmful influences for things, Ihering establishes the criterion of normality of use. That is, just as Spangenberg considers prohibited not only direct immissions, but also those that, although indirect, derive from an extraordinary use of property that exceeds the normal needs of daily life¹⁷. If by events that take place in normal life there is any invasion in the neighboring farm, it must be tolerated (as is the case, for example, with the smoke coming from the chimney, from the heating or from the kitchen of a house). However, no neighbor has the obligation to tolerate uses that exceed the sphere of normality inherent in the exercise of the property right (for example, it is not imperative to withstand the smoke produced by a cheese factory or anything else)¹⁸.

¹² JHERING, Rudolf von. Zur Lehre von den Beschränkungen des Grundeigenthümers im Interesse der Nachbarn. – In: *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, Vol. 6, 1863, S. 81 ff. – <https://babel.hathitrust.org/cgi/pt?id=hvd.hl0ehs;view=1up;seq=89>; *Gesammelte Aufsätze aus den Jahrbüchern für die Dogmatik des heutigen römischen und deutschen Privatrechts*. Jena, 1882, Vol. 2, S. 50.

¹³ JHERING, R. Op. cit., S. 49.

¹⁴ JHERING, R. Op. cit., S. 41 ff.

¹⁵ JHERING, R. Op. cit., S. 51, 55.

¹⁶ JHERING, R. Op. cit., S. 46.

¹⁷ JHERING, R. Op. cit., S. 53.

¹⁸ This does not mean that abnormal uses must necessarily be qualified as criminal. In this sense, see SCIALOJA, V. Op. cit., p. 454 ss.

This is the so-called theory of normal use that is completed with the theory of normal tolerance also of Ihering, with which this author refers this time to the immissions or influences, if you want to use the broader concept of its creator, annoying for the people. In this case, in order to determine when a nuisance is considered intolerable, an individual criterion or a judgment away from the particular sensitivity of the persons should not be used; this is to prevent the same immission can be prohibited because a particular person is excessively annoying while for others it is only a slight discomfort.

Taking advantage of such a legal arrangement would mean leaving everything in the hands of the owners, running the risk of preventing necessary and everyday activities in normal life¹⁹. Therefore, when there is a situation of negative influences for people, the permissiveness or otherwise of the immissions must be concretized in response to judgments presided over by the objective rule of the sensitivity of individuals in general. All this without prejudice to the fact that the special circumstances of each specific case are also taken into account in the estimation of the influx²⁰.

In short, whether referring to the annoying influences for people (Theory of normal tolerance) or harmful to things (Theory of normal use), the doctrine promoted by Ihering has had a great reception and has exerted a notable influence on the German, French and Italian doctrine. However, it has not been exempt from criticism, focusing mainly on manifesting its lack of logical demonstration and highlighting the ambiguity of its terms that, according to the doctrine reluctant to accept this method, pose a serious danger of exterminating the just meaning of the domain, insofar as the limit of normality of use is not determined with certainty, there is a risk of preventing in some cases and out of respect for third parties, the exercise of property more in accordance with its essence.

Specifically, the theory of Ihering has been fiercely attacked by Bonfante who, among other comments, has stated that “the criterion of normal use and normal tolerance is neither happy nor logical.”²¹. Apart from its arbitrary nature, we do not even know how this normal measure of activity and influence must be

¹⁹ JHERING, R. *Op. cit.*, S. 51–53.

²⁰ JHERING, R. *Op. cit.*, S. 53; CARAVELLA, R. *Le limitazioni del dominio per ragioni di vicinanza in Diritto Romano*. Milano, 1966, p. 76–77; CUGUSI, G. *Op. cit.*, p. 240.

²¹ BONFANTE, P. *Op. cit.*, p. 65.

established: if it is to be done on the basis of the most frequent forms of men in a given society or on the basis of the normal requirements of a certain activity or of a certain industry. Comfortable and elastic formula to excess, lends itself to all the misunderstandings²².

On the other hand, continues this author, "We could ask what logic can authorize the restriction of the useful exercise of my right to an average measure that may prevent me from enjoying the most natural thing, or vice versa, on what basis can be imposed the tolerance of annoying repercussions, so color that for the generality of men, annoying are not and that the measure of sensitivity and tolerance that must be taken into account is the intermediate and currently events."

In our opinion, the doctrine of Ihering stands as a more complete theoretical-juridical construction, conciliatory in turn of the two antithetical positions that at first can be adopted in the face of an immission. That is, the permissiveness of all of them in consideration of the freedom in the exercise of their powers by the owners, and that has its maximum support in the Roman legal axiom "qui suo iure utitur neminem laedit"; or, the denial and prohibition of any conduct that has the effect of a disturbing interference in the property of the neighbor, based on the also Roman postulate "in suo enim alii hactenus facere licet quatenus nihil in alienum immittat". In addition, we consider that the doctrine of Ihering represented a notable advance in the study of the legal treatment of immissions, in that with it the most complete and open concept of immission of the ones elaborated up to that moment was introduced.

2.1. A fragment of Ulpian, key to support the principles of Spangenberg and Ihering

Since the exordium of this study we have insisted that both Spangenberg and Ihering took as a starting point in the legal construction of their respective thesis the answers of some Roman jurisconsults to certain cases raised in relation to neighborhood problems. In fact, despite the opinion of some modern ju-

²² BONFANTE, Op. cit., p. 34. See LONGO, G. Diritto Romano. Vol. 4. Diritti reali. Roma, 1941, p. 137; ALBERTARIO, E. Il Diritto Romano. Milano, 1940, p. 158; BETTI, E. Istituzioni di Diritto Romano. Vol. 1. Padova, 1947, p. 379; MARTIN BERNAL, J. M. El abuso de derecho. Madrid 1982, p. 35. ALGARRA PRATS, E. La defensa jurídico civil frente a humos olores, ruidos y oras agresiones a la propiedad y a las personas. Madrid, 1995, p. 216.

rist, both authors – above all Ihering – verified how it was possible to draw from the Roman sources a single guideline to follow in the solution of the conflicts derived from neighborly relations in Rome. It was a manifest propensity to prohibit the immissions in the properties of others caused by an abusive, extraordinary and abnormal use of the right of the owners. Even the most effective denier of this theory, Bonfante, has no doubt at the time of affirming that this method is inspired by Roman legal sources and of course its approach to the genuine thought of the Romans is evident²³.

There are numerous and sometimes very enlightening examples of such inspiration in the responsa of jurists as the same Ulpian, Paul or Pomponius, we can point out among others the following fragments: D. 8.2.19 (Paulo, Lib.VI ad Sabinum), D. 8.2.18 (Pomponius, Lib. X ad Sabinum), D. 9.2.27.10 (Ulp. Lib. XVIII ad ed.), D. 8.5.17.pr. (Alfen, Lib.II Digestorum), D. 39.3.3.pr. (Ulp. Lib. LIII ad ed.) referred to the waters and D. 43.27.1.7 (Ulp. Lib. LXXI ad ed.) in relation to the invasion of the branches of the trees in the alien farm.

We agree that although it is impossible to collect in a work of this extensive measure, a complete exegesis of all these fragments from which the theory of normal use is based, we have considered stopping only in the study and interpretation of the qualified text as the main and necessary for to be able to draw a conclusion of its own on the validity or not in the time of the Roman jurists of the criterion formulated by Ihering and previously in a more concise way by Spangenberg. We refer to D. 8.5.8.5–7 (Ulp. Lib. XVII ad ed.).

In this fragment of Ulpian the general prohibition of all conduct that entails an immission, whatever the type, in the property of others is established. This prohibition appears specifically expressed in a sentence that, as has also been repeated several times throughout our study, has come to acquire the value of a general principle in the field of the regulation of neighbor relations in Roman law. It is the legal axiom “*in suo enim alii hactenus facere licet, quatenus nihil in alienum immittat*”. However, this regulation is nuanced in numerous cases, the most immediate of which is found in the following fragment, D. 8.5.8.6–7 (Ulp. Lib. XVII ad ed.). Let's see the & 6 in the first place:

²³ BONFANTE, P. Op. cit., p. 33.

D. 8.5.8.6: Apud Pomponium dubitatur book quadragesimo cousin Lectionum, an quis possit ita agere, licere fumum non gravem, whose ex focus, in suo facere, aut non licere, et ait, magis non posse agi, sicut agi non potest, ius esse in suo ignem facere, aut sedere, aut lavare.

In this passage, a doubt raised by Pomponius is exposed regarding the possibility or not of exercising an action to enforce the right to smoke, not serious, such as the one that comes from the fire lit in the house itself. On the other hand, the jurist also asks if it is possible to interpose any action to prevent someone from making smoke in his estate even if it is not fumum gravem. The jurisconsult makes the decision to give a negative answer in both cases. Neither can be claimed against the person who emits a mild smoke demanding that it cease its activity, nor to make it recognize the right to smoke from the fire of the home, nor can it be claimed, says the jurist, the recognition of the right that They have the owners to sit or wash on their estates.

The text constitutes an essential piece in the legal basis of the theory of normal use insofar as it restricts the field of application of the absolute prohibition of all immittere in alienum, excluding from it the non-serious smoke emissions, consequence of the work of the home; that is, derived from an ordinary use of the property.

The Pomponius responsum collected by Ulpian may seem paradoxical at first sight, since it clearly deduces a norm that prohibits claiming recognition of the right to carry out activities that are in accordance with the normal exercise of the property. It would be absurd in principle, because these acts in themselves are no more than the exercise of the domain itself, without actually giving rise to any kind of relationship with neighbors. These are activities that do not affect the owners of contiguous estates at all. For example, and as you read at the end of the fragment, a landlord could never claim to make others recognize his right to sit in his chair and on the other hand, neighbors can not prevent him from feeling. The fact of sitting, as well as washing or making a non-serious smoke derived from habitual and necessary tasks for the home, are inherent to the content of the domain and therefore can not be conceived as possible rights of servitude. Therefore, neither the owner would have in his favor a confession to assert his right, nor could the neighbor have any negative activity to prevent him from de-

veloping such activities²⁴. In this respect, it has been made clear by the doctrine that a little smoke, although it inevitably invades the neighboring farm, is a need like sitting or washing, irremediably necessary manifestations of the exercise of one's own Sunday power²⁵. The importance of the expression "*fumum non gravem*" is evident in the overall meaning of the passage. Its immission is allowed insofar as it is considered as a consequence of the daily and normal exercise of the property right; Therefore, it can not be denied the development of activities that, carried out within the own legal sphere, necessarily entail the propagation of this smoke towards the neighboring properties. For all this, we could say that we are before a clear exception to the general rule of prohibition of all *immittere in alienum*, which in this case comes softened under the profile of tolerance when it comes to a *fumum non gravis*.

We can not say the same about the smoke derived from a casuaria tavern (the manufacture of cheeses is not normal)²⁶. It can be affirmed that among the different uses to which a tavern given in lease can be used, that can be judged as peculiar and infrequent, that is why the prohibition of the smoke emission from it in the previous fragment is established (D. 8.5.8.5 Ulp Lib. XVII ad ed.). However, it would be for the judge and the interpreter to decide when an immission should be prohibited in each specific case according to a criterion that tries to reconcile diverse, often opposing, demands in the name of social coexistence. Such conciliation is considered possible by distinguishing the normality of the act and the use of its exceptionality; the normal immission of the extraordinary²⁷. It is interesting to highlight the opinion of De Martino who emphasizes that when Pomponius denies an action for this case, it is because it can not tend to the simple recognition of a right and because the existence of the content of a right of servitude is lacking. In this specific case, the jurist would be thinking of the *actio negatoria* as demonstrated by the following fragment (D. 8.5.8.7 Ulp Lib.

²⁴ See SCIALOJA, V. Op. cit., p. 450; Id., Teoria della proprietà nell Diritto Romano. Lezioni ordinate curate edite da Pietro Bonfante. Vol. 1. Roma, 1928, p. 423.

²⁵ BRASIELLO, U. La proprietà nella sua estensione. Studi in onore di Arangio Ruiz nel XLV anno del suo insegnamento IV. Milano, 1953, p. 121.

²⁶ LONGO, G. Corso di Diritto Romano. Vol. 1. Diritti Reali. Padova, 1962, p. 55. In this sense see Den DERGH, Govaert van. Cheese or lavender? *Elegantiae circa D 8.5.8.5.* – In: *Acta Juridica*, Vol. 185, 1978 = *Essays in honour of Ben Beinart: jura legesque antiquiores necnon recentiores*. Vol. 3, 1979, p. 188.

²⁷ LONGO, G. Ibidem.

XVII ad ed.), whose exegesis shows that Pomponius excludes this action for a different case with the words "*idem in diversum probat*"²⁸. When considering Pomponius possible the immission of the *fumum non gravem ex focus*; that is, derived from domestic fire – if the owner were prevented in such a case from doing this, not having the negative action, he would have to resort to the *actio iniuriarium*²⁹.

Regarding whether the fragment has been interpolated, Longo affirms that the text is genuine in almost its entirety excluding the words *ex-focus* where, according to his opinion, were added by the compilers, which shows us the importance that the passage had, in how much it deserved the attention of the members of the Justinian commission³⁰.

Regarding the & 6 fragment of Ulpian, we must also stop at the analysis of D. 8.5.8.7 of the same jurist in which a similar assumption of vapor immission is presented:

Idem in diversum probat, nam et in balneis, inquit vaporibus quum Quintilla cuniculum pergentem in Urso Iulii instruxisset, placuit, potuisse such servitutes imponi

Ulpian presents us with a situation in which a lady called Quintilla, by means of a tube, emitted vapors detached from her bathroom towards the farm of another man named *Urso Iulius*. He wonders if a servitude of this nature can be imposed in this case and the jurist answers yes, which means that if such servitude did not exist, *Urso Iulius* could have exercised the negative action to prevent the immission of those vapors. This is, in the & 7 the idea is gathered that it is possible to constitute an easement to immit the vapors derived from the bath in the property of others, therefore, if such easement had not been constituted there would be no right to invade with those vapors the neighbor's estate, who, to prevent said immission, could exercise the *actio negatoria*. This is a different assumption than the one proposed in & 6. While in & 7 the need to establish a servitude to admit vapors is noticed, in the previous fragment the possibility was denied that contents of a right of servitude could be considered as inmis-

²⁸ De MARTINO, E. D. 8.5.8.5: I rapporti di vicinato e la tipicità delle servitù. – In: *SDHI*, 1942, Vol. 8, p. 139.

²⁹ De MARTINO, E. Op. cit., p. 141.

³⁰ LONGO, G. Osservazioni sul contenuto della proprietà e suoi limiti. – In: *Annali della Facoltà di giurisprudenza*, Università di Macerata, Vol. 26. Milano, 1963, p. 13, 39. See also BIONDI, B. *Il Diritto Romano Cristiano*. Vol. 3. La famiglia, rapporti patrimoniali, diritto pubblico. Milano, 1954, p. 313.

sions of smoke not serious, qualified as normal acts and inherent to the exercise of the property³¹.

On the genuineness of the fragment has been pronounced Brasiello who has pointed out that the verb *placuit* demonstrates a controversy between jurists, later solved, and that therefore is a determining test of the classicity of the text³². Also Longo seems to confirm the genuineness of the passage when commenting on it, that already the Roman jurists were attentive to the fact of assessing the hypothesis and conditions in order to an idea of reconciliation of the different requirements in contrast³³. However, De Martino warns in the opposite direction that what Pomponius meant at the time was "*placuit servitutem non videri*" or something similar, but the Byzantines could not accept such motivation because of their greater breadth in the recognition of servitudes, and they resort to the expression "*placuit potuisse such servitutem imponi*"³⁴.

Another question is related to the typicity or not of the servitude that according to Pomponius it is necessary to constitute to immit vapors of the bath in the ground of others. In the opinion of Brasiello, the jurist did not at any time propose that such activity necessarily be the object of a typical servitude; it was simply raised whether it could be included in the category of "*servitudes*"³⁵.

In any case, and as a conclusion to the study and interpretation of these fragments, we could affirm that the opinion of Ulpian contained in D. 8.5.8.6–7, analyzed as a whole, is configured as the true axis of the theory of normal use. Indeed, in this fragment the obligation to support ordinary immissions justified by the normal needs of everyday life (such as *fumus non gravis*, consequence of a normal activity derived from the use of the right of ownership) is clearly affirmed. This criterion shows a significant advance in the legal regulation of neighborly relations in Roman Law, which is presented in this way immersed in the recognition of the necessary solidarity and tolerance in the field of interveinal relations³⁶.

³¹ See in this sense SCIALOJA, V. *Diritto Romano. La proprietà*, cit., p. 453.

³² BRASIELLO, U. *Op. cit.*, p. 109.

³³ LONGO, G. *Osservazioni sul contenuto della proprietà*, cit., p. 15.

³⁴ De MARTINO, E. *Op. cit.*, p. 140.

³⁵ BRASIELLO, U. *Ibidem*.

³⁶ See PALMA, A. *Jura vicinitatis: solidarietà e limitazioni nel rapporto di vicinato in diritto romano dell'età classica*. Torino, 1988, p. 187; CUGUSI, G. *Op. cit.*, p. 243; WINDSCHEID, B. *Diritto delle Pandette*. Trad. dei Professori Carlo Fadda e Paolo Emilio Bensa con note e

So serve the exegesis of these texts as a further indication that although the Romans did not come to theorize on the permissiveness or not of inmissions and in general of conducts that being legal cause injury to others, they have granted the keys to support modern theories keys in the subsequent legislative development in Europe as it was the Theory of Normal use of the illustrious jurist and German pandectist.

riferimenti al Diritto Civile Italiano. Volume Primo. Rist. stereot. Vol. 1. Parte 2. Torino, 1925, p. 121; De MARTINO, E. Op. cit., p. 141; Id., Individualismo y Derecho Romano Privado. Trad. Fernando Hinestrosa. Colombia, 1978, p. 64; SCIALOJA, V. Op. cit., p. 456, 458.

НЯКОИ ВЪПРОСИ, СВЪРЗАНИ С ПРИЕМАНЕТО НА НАСЛЕДСТВО В РИМСКОТО ПРАВО (НА АНГЛИЙСКИ ЕЗИК)

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Резюме: Основният интерес в тази статия е съсредоточен в разглеждането на някои правни хипотези, които могат да бъдат налице, когато някой упражнява своите субективни наследствени права. Именно римското право е това, което ни дава ясна картина за няколко различни правни ситуации, които могат да възникнат преди окончателното прехвърляне на наследствените права от наследодателя на наследника.

Имайки предвид че римскоправните изследвания често пъти са посветени на общите проблеми на наследяването, на класовете наследници, на завещанията или задължителното приемане на наследството, авторите на тази статия смятат, че поради тази причина внимателно трябва да бъдат изследвани някои особени хипотези на наследяване. Поради това анализът е посветен на *transmissio delationis*, *ius accrescendi collatio bonorum*, *aditio bonorum*, *beneficium abstinendi*, *beneficium inventarii* и *beneficium separationis*, което ще послужи да намерят място значенията на споменатите понятия, като бъдат разгледани през призмата на процедурите за получаване на наследство и възможните последици, които могат да се породят като резултат от отделните процеси.

Ключови думи: *transmissio delationis*; *ius accrescendi collatio bonorum*; *aditio bonorum*; *beneficium abstinendi*; *beneficium inventarii*; *beneficium separationis*.

CERTAIN ISSUES RELATING TO RECEIVING INHERITANCE IN ROMAN LAW (ENGLISH LANGUAGE)

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Abstract: The core interest of this paper comprises of elaborating on several legal postulates which may occur while exercising one's subjective inheritance rights. Namely, the Roman law, judging from the primary sources, provides us with a clear picture of several legal situations, which are probable to ensue, prior to the final transfer of the inheritance rights from the testator to the inheritor. Taking into consideration the fact that the Roman law research frequently dwells on the basis for inheritance, lines of hereditary succession, wills or compulsory share of inheritance, the authors of this paper believe that due diligence must be exercised to these seldom studied legal inheritance postulates. Therefore, on this occasion an analysis will be made of: *transmissio delationis*, *ius accrescendi collatio bonorum*, *aditio bonorum*, *beneficium abstinendi*, *beneficium inventarii* and *beneficium separationis*, which will serve to find the place and the meaning of the aforementioned notions as seen through the prism of the procedure for receiving inheritance and possible consequences which may occur as a result of separate processes.

Keywords: *transmissio delationis*; *ius accrescendi collatio bonorum*; *aditio bonorum*; *beneficium abstinendi*; *beneficium inventarii*; *beneficium separationis*.

INTRODUCTION

TRANSMISSIO DELATIONIS

With the term *transmissio* at the beginning it signified the transfer of rights and obligations which incorporated the inheritance, from the heir. But, technically *transmissio delationis* signifies the possibility for the named heir to transfer his right to giving a hereditary statement to his heir.

The fact that the right to accept the inheritance was treated as a strictly personal right, the old *ius civile* did not allow for the possibility for it to be transferred¹ to another subject², nor to the heir of the named heir³.

When it came to inheritance through testament the non-statement of the named heir in relation to the inheritance could create two consequences. Inheritance *ab intestato*, if he was the sole heir by testament, or incriminations of his part to the rest of the heirs by testament, if two or more were named.

This view related to the ban for transfer of the right to accept inheritance remained unchanged even in accordance with the roles of pretoral law which allowed *restitutio in integrum* for the heirs of the called upon heir who, not by his fault, did not accept the inheritance before death.

Further on, *transmissio Theodosiana*⁴, caused the possibility of the closest descendant to the called upon heir, in all cases to be able to accept the inheritance if his predecessor died before the opening of the testament *apertura testamenti*⁵.

In an even wider scale this was allowed with the so called *transmissio Iustiniana*, in accordance to which the right to accept inheritance was the right of the heirs of the heir (who was called upon as a heir by testament or non-testament) if he died before accepting the inheritance in the time-frame given to

¹ Except when in intestate succession in form of in *iure cessio hereditatis*. Then, the inheritor already transmitted his right on his own successor in order to be an inheritor of the *defunctus*.

² The right to accept the inheritance was not given to the inheritors who were receiving the inheritance *ipso iure*, at the moment of *delatio*.

³ When it comes for an intestate succession the inheritance becomes *bona vacantia* of *bonorum possessio*, if the successor did not accept the inheritance until his death. In that case the inheritance was given to his relatives.

⁴ *Transmissio ex iure sanguinis*.

⁵ See BERGER, Adolf. Encyclopedic Dictionary of Roman Law. New Series, Vol. 43. Part 2. Philadelphia, The American Philosophical Society, 1953 (Reprinted 1980 and 1991, p. 741.

him to think (*spatio deliberandi*) or a time period of one year from the delation. In such cases, the heirs could accept the inheritance in the time-frame remaining. If he died without knowing he was called upon these time frames fully (one year or *tempus deliberandi*) were considered from the beginning for the heirs of the called upon or a named heir⁶.

1. IUS ACCRESCENDI

In accordance with roman inheritance law the principle for incrementation of the part for inheritance which for any reason fell in the hands of one of the co-inheritors, is properly applied and it always takes into consideration the rule *nemo pro parte rata testatus pro parte intestatus decedere potest*.

The reasons which could lead to the falling apart of the inheritance for some heirs could be different. Namely, the called upon heir could reject the inheritance *repudiatio*, or reject the inheritance until death (and a transmission did not occur).

Ius accrescendi is a direct consequence of the concept of universal succession. The existence of any type of hurdle on the basis of which the co-inheritor could not realize the right to inheritance mean a widening of the right of other heirs over his part. This occurred *ipso iure* without the need for the co-heir specifically to point out a claim for this⁷.

The rules for how large the parts incremented to the co-inheritors would be depended on their positioning in the testimonial provisions. If the testator named the co-inheritors without precisely pointing out who should have what size part then proportional parts were incremented to every co-inheritor. If the testator named the inheritors in accordance with the rule *coniunctio* then the incrementation depended on the ways of connected naming.

The rules for incrementation were considered in the same measure when it came to non- testimonial inheritance.

⁶ Ibid.

⁷ It is a historical fact the presence of so called: *caducorum vindicatio*, which was used by the relatives of orbi or by the state in order to receive the *caduca*. But this solution was prohibited in law of Justinian. ROMAC, Ante. Rimsko pravo. Biblioteka Udžbenici i skripta. Zagreb, Pravni fakultet, Centar za stručno usavršavanje i suradnju s udruženim radom, 1981, p. 387.

2. COLLATIO BONORUM

The genesis of this inheritance law institute is connected to the principle of non-testimony inheritance. The need for adequate respect of the principle of the magistrates law *quod aequum et bonum est* in the field of inheritance law will have its effect in the correction of the rules of inheritance which put the called up heirs in unequal positioning.

Collatio bonorum was in fact the obligation of the emancipated sons in the property mass of the inheritance to insert the part which they independently acquired after they were emancipated *collatio emancipati*, and in this way to ensure equality with the inheritors which were still under *patria potestas* and whose earned assets went to the *pater familias*.

The same obligation counted for the daughters of the leaver of inheritance who upon marriage received *dos profecticia*, *collatio dotis*. In analogy, counting that this property belonged to the common leaver of inheritance it should have been inserted in the property mass of the inheritance, in the interest of all the co-inheritors. Emancipated sons and daughters which should conducted to colation gave *cautio de bonis (dotibus) conferendis*, through which they promised to undertake their obligation⁸.

At the beginning, colation could have been undertaken with a real insertion of property in the inheritance or with a proportional lowering of the part received by the co-inheritor who should have undertaken to colation.

Yet, the changed relations within the family and with that the changed position of the persons *alieni iuris*, the institute *collatio bonorum*, turned into *collatio descenditium*. Established as an obligation for the heirs/co-inheritors in the property of the inheritance mass to insert everything they received from the leaver of the inheritance for various purposes, Iustinianus' legislation makes it applicable even when the basis for inheritance is a testament.

In accordance with this, the descendants of the leaver of inheritance which appear as non-testimonial or testimonial inheritors had the obligation before the division in the inheritance within it to insert everything which the leaver of inheritance gave them in his lifetime (gifts, miraz, and so forth), through which they would secure equality of the co-inheritors when vying for part of the inher-

⁸ See BERGER, Adolf. Op. cit., p. 384.

itance. Colation in this sense was undertaken through a proportional lowering of part of the inheritance that belonged to the co-inheritor to the value which they previously received from the leaver of the inheritance.

3. ADITIO BONORUM

The principle of universal succession on which inheritance on the basis of testament founds itself upon⁹ in roman law, after the moment of accresceni, mean the connection of inheritance (inheritance mass consisting of rights and obligations to the inheritance, with an exclusion when it came to personal) with the property of the inheritor came to the occurrence of *aditio (confusio) bonorum*. In such a situation all the possible in-between rights and obligations between the inheritor and leaver of inheritance ceased to exist¹⁰.

Considering that the old law established unlimited liability of the inheritor for the obligations of the inheritance, this mean that a situation could occur where the inheritor could find himself in a difficulty position created by the over-debt of the inheritance on one side¹¹, and the creditors of the inheritance on the other side who should have requested parts for their assets, together with the inheritors creditors, from the now single property mass of the inheritor.

Such conflicting situations were solved with the creation of certain legal tools for the protection of the rights of the inheritors, or the creditors of the inheritance.

An obligation of roman citizens who were heirs to inheritances larger then 200 000 sestrics, there was an obligation to pay *vicesima hereditatium*. The inheritance tax was established as five percent and it was taxed by special civil *servents procuratores hereditatium*¹².

4. BENEFICIUM ABSTINENDI

Previously we mentioned the difference between *heredes sui et inecessarii* and *heredes voluntarii*. The possibility for not accepting the inher-

⁹ The same for testamentary succession.

¹⁰ Inheritor steps on the place of the testator.

¹¹ This solution actually ment an obligation for the inheritor to realize the debts for the creditors from his own property.

¹² See BERGER, Adolf. Op. cit., p. 764.

itance was allowed in every case only to inheritors who were part of the second group¹³.

Heredes sui et necessarii was an inheritance usually received *ipso iure* without the right to expression for it. Still, honorary law foresaw a possibility for *heredes sui* which consisted of the right to reject inheritance *beneficium(ius)abstinendi*, usually in cases of over-indebted inheritances. The only condition which should have been fulfilled was the restraint of the inheritor to the inheritance as it was his own *pro herede gestio*.

Namely, if it was established that the inheritor prior to expressing whether he would accept the inheritance used, disposed, or anything similar with the property of the inheritance, and if so it was considered *se immiscere hereditati*, or he lost *ius abstinendi*.

This right was not foreseen in the same extent for *heredes necessarii*. For them there was a possibility to recognize the limited liability towards creditors of the inheritance. As so, they were not liable with the inherited property after freedom under then condition that with them there was no existence *pro herede gestio*.

5. BENEFICIUM INVENTARII

Iustinianus' legislation foresaw one more legal tool which could be used by inheritors with the aim of taking their unlimited liability towards the creditors of the inheritance to liability only to the extent of inherited property. Here we are referring to *beneficium inventarii*, according to which liability was limited *intra vires hereditatis*, if inventory was undertaken on the inheritance. Inventory should have been undertaken 30 days from the opening of the testament and should be finalized in 60 days¹⁴.

This possibility was given to inheritors because of the fact that they could not have known beforehand in the acceptance of the inheritance would bring forward damage or use for them¹⁵. As so, the inventory of the inheritance mean

¹³ At the beginning, *beneficium abstinendi* was reserved for the intestate successors.

¹⁴ It was necessary the presence of the witnesses and the *tabularius* during undertaking the inventory.

¹⁵ The inheritor who used the *spatio deliberandi*, could not ask for another undertake of the inventory.

a real picture of what they would receive and what they would lose with the decision of accepting the inheritance.

The costs for undertaking the inventory and the costs for burial fell upon the inheritor who requested *beneficium inventarii*.

This intervention in the hereditary system together with *transmissio Iustiniana*, is considered one of the most important reforms in this field, because of which inheritance in Rome from an "honor" and obligation towards the deceased and the state became a subjective property right through which the inheritor increased their property¹⁶.

6. BENEFICIUM SEPARATIONIS

The pretorian protective tool which arised in the interest of creditors of the inheritance known as *beneficium separationis*, was actually related to the possibility for these creditors to ask for a clearing of the inheritance from the property of the inheritor (after *aditio bonorum*), *separatio bonorum*, so that from they property mass of the inheritance they could receive and advantage in the realization of their debt. This mean that they secured the right of the creditor to the inheritance so that they didn't compete with the creditors of the inheritor. Namely, the creditors of the inheritance had the right to *beneficium separationis* in a period of five years from the acquisition of the inheritance through which they received an advantage in the settlement. The potential residue from the inheritance again was compiled with the property of the inheritor, from where his creditors would be setteled¹⁷.

CONCLUSION

Having in mind the covered time frame, it seems inevitably to establish that it is practically impossible to talk about their inalterability, speaking about the Roman law institutions in generally. Once again noting the fact of "unlimited duration" of the Roman Law, and in order to obtain clearer picture on the specific issues, we should have in mind the fact that under the influence of a large num-

¹⁶ See BORAS, Mile i MARGETIĆ, Lujo. Rimsko pravo. 3. dop. Izd. Rijeka, Pravni fakultet u Rijeci, 1998.

¹⁷ There were different opinion about this situation. Anyway, this opportunity was given only when all of the creditors received their debts.

ber of factors which have determined the social development in general, the legal norms have undergone certain changes, first of all as something that has been practically realized in certain period of time. Hence, it cannot be expected the institutes and the legal norms to be given once for all and to remain unmodified.

When examining the Roman Succession Law, it cannot be established that it had really interesting and dynamical road of development, which was a result of the modified social relations and situations. Large number of authors considering this issue think that the Roman succession law passed three main stages, starting from *Lex II Tabularum*, through the praetorian system which amended the succession according to *ius civile*, to the final regulation of the succession law within the frames of the Justinian's legislation.¹⁸

However, looking from historical point of view, it seems that the succession law is an area which underwent most modification and derivations of the Roman law rules compared to the rest *ius privatum*.

This is mainly due to the influence of the tradition and the customary law, from which it can be deviated in practice very slowly and difficult. Sometimes (even the statistics shows it¹⁹) besides the different legal regulation of the succession rights, the successors find valid way to distribute the bequest without breaking the established tradition.

On the other hand, we should not neglect the influences and the modern tendencies in the area of family law, new quality of the family relations conditioned by the extremely rapid development of all life areas which have a tendency completely opposite of the traditional ones so far known to us.

Therefore, we think that, *de lege ferenda*, the influence of the tradition will be more and more neglected, and the modern notion of the interpersonal relations will more and more come to the fore, which will inevitably have influence in the future regulation of the succession law.

¹⁸ Namely, according to Romac, the development of the Roman succession law can be examined in four stages, the third one of which (referring to the reforms conducted by the tsar legislation before Justinian) usually lacks in the periodisation of most of the Romanists. See ROMAC, Ante. Rimsko pravo. Biblioteka Udžbenici i skripta. Zagreb, Pravni fakultet, Centar za stručno usavršavanje i suradnju s udruženim radom, 1981, p. 361.

¹⁹ Characteristic especially for our region.

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APERTURA TESTAMENTI
И НЕЙНИТЕ ПРАВНИ ПОСЛЕДИЦИ
В РИМСКОТО ПРАВО (НА АНГЛИЙСКИ ЕЗИК)

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Резюме: Въпросите, засягащи наследяването и неговото уреждане в римската правна система, са изключително актуални в световната романистична правна литература. Още повече че сред решенията, които ясно се открояват в първичните и вторичните източници на римското право, можем да открием „вдъхновението“, от което произлиза съвременното наследствено право.

Анализът в тази статия е фокусиран върху някои от основните правни последици от прочитането на завещанието (*apertura testamenti*), крайната цел на което е приемането на наследството. В тази връзка основната ни цел тук е да представим в хронологическа последователност очакваните правни последици, известни на древните римляни като: *delatio hereditatis*, *apertura testamenti*, *hereditas iacens*, and *acquisitio hereditatis*. В текста е включен кратък критичен преглед на споменатите понятия с поглед към съвременните системи на наследяване.

Заклучителните наблюдения във връзка с основния предмет на изследването осветляват безспорния принос на римското право към наследственоправните концепции в съвременността, като същевременно обясняват и факта, че наследственото право претърпява значителни промени, обусловени от различни социално-икономически причини. Това обяснява защо понякога това право изглежда напълно различно от онова, което сме наследили от Древен Рим.

Ключови думи: Римско право; наследяване; *testamentum*; промени.

APERTURA TESTAMENTI
AND THE LEGAL CONSEQUENCES THEREOF
IN THE ROMAN LAW (ENGLISH LANGUAGE)

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Abstract: The issues concerning legal inheritance relations and their arrangement within the Roman legal system are quite topical in the world's Roman law literature. Even more so that amongst the solutions, clearly standing out in the primary and secondary Roman law sources, what can be found is an "inspiration" wherefrom the modern inheritance law has originated.

The analysis displayed in this paper is focused on some of the basic legal consequences of reading the will or *apertura testamenti*, the final aim of which is to receive an inheritance. In this regard, the fundamental objective of this paper is to present the chronological order of the expected legal consequences and to provide a detailed elaboration thereof, known to ancient Romans as: *delatio hereditatis*, *apertura testamenti*, *hereditas iacens*, and *acquisitio hereditatis*. A short critical review has been intertwined within the text, accompanied by the presence of the aforementioned concepts in the modern legal inheritance systems.

The concluding observations relating to the basic subject of interest, shed light on the indubitable contribution of the Roman law to the legal inheritance concepts over their modern counterparts, but simultaneously, it also explains the fact that inheritance law, in modern times, has undergone significant changes, conditioned by various socio-economic contexts, which explain why, at times, this law seems a bit different than the one we have inherited from ancient Rome.

Keywords: Roman law; inheritance; testamentum; changes.

INTRODUCTION

A special hallmark of the legal inheritance relations is the act of *mortis causa*¹, which in turn, is the main feature separating them from contractual relations and property law relations. Therefore, the first of the propositions which entails an application of the legal norms in the area of inheritance law is the occurrence of death of the testator². Furthermore, there must be a legacy which can be inherited, as well as inheritors who are alive when the death of the testator occurs.

The cumulative coinciding of the aforementioned requirements, pursuant to the Roman law, meant there was an opportunity for the inheritors to exercise their subjective inheritance rights, based upon three legal grounds: testate, intestate succession and obligatory inheritance. In that context, precedence was given to the testate, while the intestate succession appeared subsidiary, nevertheless never could they both serve as a basis for granting inheritance in regard to one legacy: *nemo pro parte testatus pro parte intestatus decedere potest*.

1. DELATIO HEREDITATIS

The moment of granting inheritance³ on any grounds was called *delatio hereditatis deffere hereditatem*⁴ and, as a matter of fact, this moment coincided

¹ *Hereditas viventis non datur.*

² The ancient Roman jurists were perplexed by the question of what is implied by the term death and which moment should be considered as the moment when death occurred. Due to the fact that this paper regards the testate succession, we will only take into consideration the occurrence of death solely of physical persons (because only they can compose a will). Anyhow, the physical death, pursuant to the Roman law, was interlaced with the moment when the vital functions of the human organism are irreversibly shut down, a moment when their legal subjectivity ceases to be. However, the Roman law recognizes a so called 'civil death', which in line with precisely defined facts could take away the legal subjectivity of the person (loss of status because of *capitis deminutio* maxima or media), which is not a basis for granting inheritance and leads to an invalid will as a result of active *testamenti factio* – the ceremony of making a will (a close-up will follow in the part about nullity and voidness of the will. However, hereby the legal fiction used by the ancient Romans is worth mentioning, considering that legal subjectivity of the deceased person continues up to the moment of accepting the inheritance (that is how the postulate of *hereditas iacens* was created). The inability to determine the exact time of death of persons inheriting each other, comorientes, imposed adherence to certain rules in such events. The classical law considered the comorientes as deceased in the same time, leading to their inability to inherit each other. Still, the Justinian legislation recognizes the legal presumption that the older have died before the younger and the children have died before the adults. Proof of death of a certain physical person in the ancient Rome, was provided for each case separately, because no public books for registration of birth and death of persons existed.

³ *Hereditas defertur.*

⁴ *Deferro, deferre* meaning handing over, transferring.

with the time of death of the testator, under the assumption that all other requirements had been met. Ascribable to the fact that this was a moment when “someone could get something (inheritance) by accepting it”⁵, the *delatio* sometimes could not coincide with the time of death if the provisions of the will stipulated a certain requirement that had to be met, or an order that had to be followed⁶.

Nonetheless, the inheritors assigned in such a manner, were also obliged to formally accept the inheritance, and only thus could they be considered to have become the rightful inheritors to the legacy. Point at issue is about a so called accepting inheritance or *acquisitio*, which was different for different categories of inheritors, depending on whether it was *heredes necessarii* or *heredes voluntarii*.

Heredes sui et necessarii were the inheritors who did not have the right to give a negative statement of inheritance, i.e., regardless of their personal judgment, they became inheritors at the moment of *delatio* (in this case it regularly overlapped with acquisition).

Here we can include *sui heredes*⁷, which is in fact comprised of all persons, who until the moment of death of the testator, are under his or her *patria potestas* or *manus*, which implies: born, adopted or foster children, those who have been conceived and are still unborn children, who following the birth would come under his or her “power”⁸, family members, grandchildren of early deceased or emancipated male descendants, if they remained under the “power” of the testator, as well as a wife under *manus* in marriage. This rule originated from the then understanding of inheritance as a basis for continuing the family cult and tradition, therefore a much more important part was the collective interest

⁵ See BERGER, Adolf. Encyclopedic Dictionary of Roman Law. New Series. Vol. 43, Part 2. Philadelphia, The American Philosophical Society, 1953 (Reprinted 1980 and 1991, p. 428.

⁶ Logically speaking, for the inheritance to be inherited by the inheritor, after he or she accepts it, the suspensive condition had to be met or an order to be followed. That is why the moment of *delatio* was postponed. Ibid.

⁷ Self-inheritors, since it was conditioned by the relation which they had with the testator prior to his or her death, in some regards had already possessed what they were about to inherit as legacy. To make a distinction in this case the term *heres suus* was used because *suus heres* referred to an inheritor to a previously defined testator.

⁸ *Nasciturus iam pro nato habetur*.

and the survival of the family community, than the special wishes and interests of the members⁹.

Hredes necessarii, on the other hand, were the slaves, assigned as inheritors in a will, whereby their *manu*-mission was explicitly established or it was implied by the mere act of assigning them as inheritors¹⁰.

The strict definition of *ius civile*, implying that this category could, in no case, deny inheritance, revised the *ius honorarium*, allowing them *ius abstinendi*, referring to the right to not accept an insolvent (over-indebted) legacy¹¹.

Gai. 2.158. Sed his praetor permitit abstinere se ab hereditate, ut potius parentis bona veneant.

The praetor endorses them to renounce their inheritance, if they find the sale of the parental belongings to be more preferable.

All other assigned inheritors were part of the group *heredes voluntarii* (*extranei*) becoming subject to acquisition exclusively following a given positive statement of inheritance.

2. APERTURA TESTAMENTI – READING A WILL

The existence of a will, as previously mentioned, derogated from the rules of intestate succession. Hence, the existence of a will could possibly mean that the *delatio* could, in fact, overlap with the moment of reading of a will or *apertura testamenti*.

The act of reading a will was interlinked with meeting certain conditions, serving as a guarantee for the validity of the last will of the testator.

First and foremost, the will had to be read before an authorised official. Since the reign of Hadrian that official was the *statio vicesimae*. Along these lines, it was first the stamps and the signatures of the witnesses that were verified, then followed the reading of the will, *aperire*.

⁹ *Sive velint, sive nolint.*

¹⁰ See more about this part in the rendition about *heredis institutio*, where we deliberate much on the consequences of assigning one's own or someone else's slave as a testate successor.

¹¹ Whereby, a condition of *heredes sui* was to refrain from managing the legacy *immixtio*, while the slaves had the option of *beneficium separationis*: to separate the part of the legacy, they could receive at the moment of becoming free and thus, they no longer were held responsible for the debts incurred by the legacy.

The provisions referred to in the will were read in a loud and clear manner before the attendees, *recitatio testamenti*. After the content was familiar, the read will, accompanied by minutes from the inheritance proceedings wherein the will was read, was deposited in an archive.

Upon a request by interested parties an inspection of the deposited will was allowed, *inspicere*, and the parties were also allowed to make a copy thereof, *describere*¹².

3. HEREDITAS IACENS – VACANT SUCCESSION

The ancient Roman jurists had different viewpoints in regard to one disputable issue, the legal nature of legacy that arises as a result of the fact that between the moment of *delatio* and the moment of acquisition, sometimes there was a time distance. Such an opportunity at the beginning was excluded in cases when inheritance was received by *heredes sui et necessarii*, because as witnessed, they became inheritors without the possibility to refuse the inheritance, at the moment of *delatio*¹³. Nevertheless, in all other cases there was almost invariably a time period that passed until the final reception of legacy. Despite the real existence in that time period, the legacy could undergo changes. Namely, it could increase or decrease in value.¹⁴

The remedies in terms of this contentious legal phenomenon, were ranging from the idea that the inheritance should be considered “nobody’s thing”, *res nullius*, all the way to the belief that legal fiction shall apply by believing that the life of the testator continues up to the moment of acquisition (according to Salvius Julianus) or that the inheritor obtains its role at the moment of death of the testator (Cassius was of such an opinion).

Gai. D. 45.3.28.4. Illud quaesitum est, an heredi futuro servus hereditarius stipulari possit. Proculus negavit, quia is eo tempore extraneus est. Cassius respondit posse, quia qui postea heres extiterit, videretur ex mortis tempore defuncto successisse.

This question revolves around whether the slave, to whom the inheritance belongs, by way of a stipulation, shall become obliged in favour of the future in-

¹² More on the procedure of reading a will, see BERGER, Adolf. Op. cit., p. 364.

¹³ The praetorian law intervened in this case as well. Namely, these inheritors were given *tempus deliberandi*, a hundred-day period during which the inheritor had the time to reflect prior to giving a statement of inheritance.

¹⁴ Due to fruits of nature or manmade product that are subject to decomposition or wear and tear, which changed the content of the legacy.

heritor. Proculus negates this, because the slave at that time was an extraneus. Cassius, on the other hand, was of an opinion that the slave could be obliged, owing to the fact that those who are to become heirs, shall be considered heirs as of the time of death of the testator.

For the sake of truth, all provided alternatives had their own shortcomings making them seriously questionable. Thus, the danger in treating legacy as 'nobody's thing, lies in the open opportunity for anybody to obtain the right to receiving inheritance by way of *ususcapio*¹⁵.

When considering the act of giving inheritance to an inheritor, in retrospect, up to the moment of death of the testator, it was difficult to determine the inheritor, having in mind that sometimes it was not entirely clear who is to become an inheritor. In parallel, it was complicated to provide arguments that the testator "was alive" up to the moment of the legacy transfer.

The ancient Roman legal thought did not come across convincing arguments for none of the opinions accepted in the post-classical period. Namely, it was believed that since the moment of death until the moment when the inheritor received the inheritance, the legacy was supposed to be considered a separate legal matter, a vacant succession or *hereditas iacens*, which, on the other hand, was directly opposed to the principle of universal succession, as per the introduction of a third party between the testator and the legacy.

Still, regardless of the disputable legal concept, until the moment of accepting the pool of assets of the legacy by all persons assigned for inheritance, the legacy was considered *hereditas iacens*.

4. AQCUISITIO HEREDITATIS – ACCEPTING INHERITANCE

The next phase of the final acquisition of the legacy was accepting the inheritance, whereby the inheritor was considered to have acquired the right to receive the legacy.

The act of accepting inheritance was definitive. The positive statement regarding the accepting of inheritance could not be withdrawn¹⁶ nor could it be

¹⁵ Out of those reasons the ancient law prescribed that in such a case the rules for nobody's things, that by way of occupation and expired deadline for sustenance could be ascribed to someone, would not apply, instead a special *ususcapio pro herede* was foreseen.

¹⁶ *Semel heres semper heres*.

conditioned and postponed. Simultaneously, the statement on accepting inheritance adhered to the principle of universal succession, therefore even if the inheritor accepted only certain things or rights arising from the legacy, the inheritance was considered accepted as a whole. Accepting inheritance, in principle, was not given a deadline during which the inheritor was obliged to do so. Because this solution negatively reflected upon the rights of the legacy trustees, who could ask the inheritor to give a statement of inheritance. However, the inheritor could be granted by the praetor, a reflection period, *tempus (spatium) deliberandi*, lasting 100 days almost invariably, during which he or she was supposed to accept or refuse the inheritance¹⁷.

Refusing the inheritance, on the other hand, could be done in any manner; By means of implied actions or explicit statements on refusing inheritance or *repudiatio*. Similarly like the statement on accepting the inheritance, the refusal was irrevocable¹⁸.

Although the sources of Roman law do not clearly state a strictly prescribed form which was supposed to be used for expressing the acceptance of inheritance, the most frequent forms popular in practice were the *cretio* and the *pro herede gestio*, as well as the *aditio nuda voluntate*.

Cretio, as a solemn formalist manner of giving a positive statement of inheritance was obligatory only when the testator requested, in his or her own will, explicitly for that to be done by the assigned inheritor. It was a kind of formula, whereby the inheritor, stating that the testator assigned him or her as an inheritor, accepted the inheritance he or she was assigned for. Usually, the testator denoted a period in which the inheritor was supposed to articulate his or her stance, normally a 100-day period, after which the inheritor would lose his or her right to inheritance¹⁹.

Such formalism was abandoned within the course of time. The statement on accepting inheritance could be given in any other form. Because of an ever more frequent missing *cretio*, it became obsolete in Justinian law.

¹⁷ The classical law, considered the lack of statement on accepting inheritance for a refusal, while in Justinian legislation it implied acceptance.

¹⁸ Except in cases of *restitutio in integrum ob aetatem*.

¹⁹ For a period defined as *tempus utile*, *cretio vulgaris* was foreseen while for a period defined as *tempus continuu*, *cretio continua*. For a failure to meet the deadline *exhereditatio* followed.

The implied actions taken by the inheritor, which undoubtedly and clearly indicated that he or she intended to accept the inheritance, were also considered an act of *acquisitio*, the so called *pro herede gestio*; although in such cases it was necessary to take into account the possibility for it to be a quasi-contract²⁰.

Nonetheless, if the inheritor acted as an owner, this undoubtedly implied to the conclusion that he or she accepted the inheritance.

The classical law recognizes another manner of accepting inheritance, typical even for Justinian time. This manner is known as *aditio nuda voluntate*, or informal unambiguous acceptance, which does not foresee an obligation to utter a precisely defined formula, instead what was sufficient was just a plain unambiguous statement wherefrom it could be concluded that the inheritor accepted the inheritance.

Ius honorarium stipulated a bit different manner leading to coming into inheritance. Namely, if there were no successors, *ius civile*, upon a request of an inheritor, the praetor granted *bonorum possessio*, based on the grounds stated in the specified findings. This could be performed in a 100-day period as of the moment of *delatio*, and the inheritor acquired an ownership over the inheritance received in such a manner, upon expiry of the stipulated one-year period²¹, whereby it transformed into an inheritance right in accordance with *ius civile*.

The official request of an inheritor pursuant to the praetorian law was made redundant in the post-classical period. What sufficed was a statement by the inheritor before a competent state authority which was a guarantee that he or she accepted the inheritance. On the contrary, failing to give a statement would imply that he or she refused the inheritance.

In the event of having an inheritance the inheritor of which passed away prior to accepting thereof, pursuant to the classical Roman law, *ius adcrescendi* was practiced for his or her possible co-inheritors.

PS. 4.8.24. Ex pluribus heredibus isdemque legitimis si qui omiserint hereditatem vel in adeundo aliqua ratione fuerint impediti, his qui adierunt vel eorum heredibus omittentium portiones adcrescunt

²⁰ Namely, the potential inheritor could undertake actions such as *negotiorum gestor*.

²¹ *Usucapio pro herede* is a special case of sustenance of the estate for the sake of the insistence upon resolving the status of the legacy as soon as possible. Read the text hereinafter.

If one of several inheritors had given up his or her inheritance or was prevented from receiving it for some reason, his or her shares were allocated to those who received the inheritance or to their successors.

This practice was abolished and replaced by the already mentioned *transmissio iustiniana*.²²

The legacy comprised of both rights and liabilities of the testator could come across a situation of “uncertainty” if none of the assigned inheritors accepted the inheritance, or there was no will, and neither testate nor intestate successors who could be assigned for inheritance. Then the legacy in a way was considered a *res nullius*, due to the fact that, by way of occupying the legacy anyone, meeting the requirements for *usucapio pro herede*, could acquire the right to ownership.

In that case, there was supposed to be a special kind of sustenance which as a postulate, was created for a faster resolving of that ‘uncertain situation’ the legacy is in. Unlike the regular *usucapio*, the period that should pass amounted to a year (similarly like the period for *res mobiles* and for *res immobiles*)²³. In addition, *bona fides* or *iusta causa*²⁴ were not required in *usucapio*. An inheritor could acquire the legacy (or the things from the legacy) although he or she knew that they belonged to the inheritors. Such privileged *usucapio*, in fact, presented direct pressure on potential inheritors to accept or refuse the inheritance as soon as possible, because the ancient Romans were especially concerned about carrying out the family *sacra* of the testator, but also due to timely settlement of debts towards the trustees²⁵.

Be that as it may, *usucapio pro herede*, was losing its meaning in the course of time. Firstly, it was recognised only for sustenance of certain items of the legacy²⁶, while a *Senatus consultata* introduced in Hadrian's time, foresaw an opportunity for the inheritor to file a suit and claim the items which were part of the legacy from the *usucapio*, and during the reign of Marcus Aurelius it was

²² C. 6.30.19.1.

²³ Because legacy was considered *res ceterae*, and for these cases there was a one-year period.

²⁴ Ancient law does not have such kind of provisions even for regular *usucapio*.

²⁵ BERGER, Adolf. Op. cit., p. 752–753.

²⁶ In classical law known as *improba et lucrativa*.

sanctioned as a criminal act²⁷. Justinian legislation fully abolished *usucapio pro herede*.

Thus, the legacy that failed to belong to someone in one of the aforementioned manners would belong to the state. Such legacy without an inheritor was known as *bona vacantia* and afterwards it was handed over to the *fiscus*²⁸, and if insolvent it was handed over to the trustees, if no, then the trustees were supposed to be paid and the legate provisions to be implemented.

CONCLUSION

The general conclusion which can be easily made from this partial analysis of the Roman laws succession system is that the influence of the Roman legal mind upon the creation of the modern succession systems is significantly striking in comparison to the modern tendencies for this area. Of course, this conclusion refers to the general principles and foundations which are taken into account.

However, looking from historical point of view, it seems that the succession law is an area which underwent most modification and derivations of the Roman law rules compared to the rest *ius privatum*.

This is mainly due to the influence of the tradition and the customary law, from which it can be deviated in practice very slowly and difficult. Sometimes, even the statistics shows it, besides the different legal regulation of the succession rights, the successors find valid way to distribute the bequest without breaking the established tradition.

On the other hand, we should not neglect the influences and the modern tendencies in the area of family law, new quality of the family relations conditioned by the extremely rapid development of all life areas which have a tendency completely opposite of the traditional ones so far known to us.

Therefore, we think that, *de lege ferenda*, the influence of the tradition will be more and more neglected, and the modern notion of the interpersonal rela-

²⁷ Dishonest occupation of someone else's *crimen expilae hereditatis*.

²⁸ The state treasury (*aerarium*), considered *iustus* successor, and replacing the inheritor, *heredis loco*, because it could legally be considered a successor. See ROMAC, Ante. Rimsko pravo. Zagreb, Biblioteka "Udžbenici i skripta", 1981, p. 385.

tions will more and more come to the fore, which will inevitably have influence in the future regulation of the intestate succession.

At the end, it is probably unnecessary to explain the meaning of the succession law, first of all as a law providing the subject a right to ownership. "During a man's life, it is possible for him never to be affected by the rules of usucapion or the accession for example, but of course he could not avoid the rules of succession law."²⁹

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²⁹ Andrew BORKOWSKI, Paul du Plessis. Textbook on Roman Law. Transl. Elena Vitanova. 3. ed. Skopje, Prosvetno delo, 2009, p. 208.

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КОНКРЕТНОСТТА НА SOCIETAS И АБСТРАКТНОСТТА НА ЮРИДИЧЕСКОТО ЛИЦЕ: ПРОТИВОПОСТАВЯНЕ НА ПРАВНИ ТЕРМИНИ (НА ИТАЛИАНСКИ ЕЗИК)

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Резюме: В статията се разглежда как в историята на правото дружеството (*societas*) и юридическото лице като два противоположни модела се използват за решаване на големия проблем за правната дейност, осъществявана от колективи от физически лица (*personae*). Дружеството не предполага създаването на абстрактна организация и е основано на изискванията за сътрудничество, присъщи на човешката природа, а организирането на съдружниците е насочено към частната полза чрез постигането и на общата полза. При юридическото лице чрез свързаната с него категория на представителството се създава абстрактна структура, различна от физическите лица, които съставляват колектива, и е основана на идеята за конфликтността на човешката природа. Предназначението на дружеството да влиза като една единна общност в контакт с външния свят е ключ към един значим прочит на източниците, за да се разберат разликите и дори идеологията на правната техника при този вид договор спрямо юридическото лице.

Ключови думи: *societas*; *persona*; *utilitas privata*; *utilitas commune*; юридическо лице; представителство.

THE MATERIAL SENSE OF THE NOTION SOCIETAS
AND THE ABSTRACTNESS OF THE LEGAL ENTITY:
CONTRADICTION OF LEGAL TERMS (ITALIAN
LANGUAGE)

CONCRETEZZA DELLA SOCIETAS
E ASTRAZIONE DELLA PERSONA GIURIDICA:
I TERMINI GIURIDICI
DELLA CONTRAPPOSIZIONE

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Abstract: The article examines how the corporation (*societas*) and the legal entity as two opposing models in the history of law are used to solve the general problem of the legal activity carried out by group of individuals (*personae*). The corporation does not imply the creation of an abstract organization and it is based on the requirements of cooperation, typical for the human nature. The organization of the partners is directed to the private benefit through the common benefit. Through its associated category of representation, the legal entity creates an abstract structure, different from the physical entities that make up the collective body and it is based on the idea of the conflict human nature. The pre-appointment of the corporation to enter as a single community in contact with the outside world is the key to a meaningful reading of the sources in order to understand the differences and the ideology of the legal technique in this type of contract concluded with the legal entity.

Keywords: *societas*; *persona*; *utilitas privata*; *utilitas commune*; legal entities; representation.

PREMESSA

Il carattere particolare della causa della *societas*, in cui le parti si prefiggono il raggiungimento di uno scopo comune attraverso la sintesi delle utilità individuali, giustifica nella storia la adozione di tale contratto come modello per la costruzione delle relazioni umane: si può ricordare a tale proposito come nella esperienza giuridica romana siano evidenti le affinità fra le *societates* e i *collegia*¹ e come le nozioni di *populus*² e di *res publica*³, e poi ancora di *civitas*⁴ e di *coniugium*⁵, si richi amino a una comune base societaria⁶.

Da tempo in dottrina sono stati posti in risalto i caratteri particolari del contratto di *societas* rispetto alle altre forme contrattuali⁷. Non si è, invece, prestata adeguata attenzione in merito alle ragioni ideologiche alla base di tali particolarità. Di recente, però, Giovanni Lobrano, nell'analizzare le profonde divergenze tra *societas* e persona giuridica, le quali del problema della considerazione della attività giuridica compiuta da una pluralità di persone costituiscono, la prima (la *societas*) per l'età antica, e la seconda (la persona giuridica) per l'età medievale e moderna, le due differenti soluzioni, ha messo in

¹ Sul fenomeno associativo e le corporazioni professionali, per una lettura di sintesi, si veda WALTZING, J. P. *Étude historique sur les corporations professionnelles chez les Romains*. Vol. I–IV. Louvain, 1895–1900 (rist. an. Hildesheim ; New York, 1970); COLI, U. *Collegia e sodalitates*. Contributo allo studio dei collegi nel diritto romano. Bologna, 1913 (= Id., *Scritti di diritto romano*, Vol. I. Milano, 1973, p. 1 ss.); De VISSCHER, F. *La notion du 'corpus' et le régime des associations privées à Rome*. – In: *Scritti in onore di Contardo Ferrini*, Vol. IV. Milano, 1949, p. 43 ss. (= Id., *Études de droit romain public et privé, troisième série*. Milano, 1966, p. 171 ss.); De ROBERTIS, F. M. *Storia delle corporazioni e del regime associativo nel mondo romano*. Vol. I–II. Bari, 1971; Id., *Il fenomeno associativo nel mondo romano*. Dai collegi della repubblica alle corporazioni del basso impero. Napoli, 1955, rist. Roma, 1981; ONIDA, P. P. “Agire per altri” o “agire per mezzo di altri”. Appunti romanistici sulla “rappresentanza”. Vol. I. Ipotesi di lavoro e stato della dottrina. Napoli, 2018, p. 43 ss.

² Cic., rep. 1.25.39. Sulla “concezione concreta” sottesa alla definizione ciceroniana del *populus* come *coetus multitudinis iuris consensu et utilitatis comunione sociatus* si veda CATALANO, P. *Populus Romanus Quirites*. Torino, 1974, p. 155 ss.

³ Sulla “essenziale interrelazione tra la nozione di *populus* (-*societas*) e la nozione di *civitas*” si veda LOBRANO, G. *Res publica res populi*. La legge e la limitazione del potere. Torino, 1996, p. 113 ss.

⁴ Cic., rep. 1.32.49; 6.13.13.

⁵ Cic., off. 1.17.53. Sulla *societas coniugalis* si veda LOBRANO, G. “*Uxor quodammodo domina*”: riflessioni su Paul. D. 25,2,1. Sassari, 1989, p. 54 ss.

⁶ Considera il valore della *societas*, all'interno della *civitas*, come base di una “catena societaria” LOBRANO, G. *Dell'homo artificialis – deus mortalis dei Moderni comparato alla societas degli Antichi*. – In: *Giovanni Paolo II. Le vie della giustizia*. Itinerari per il terzo millennio. A cura di A. Loiodice-M. Vari. Roma, 2003, p. 161 ss.

⁷ Si veda per tutti ARANGIO-RUIZ, V. *La società in diritto romano*. Napoli, 1950, rist. an. 1988, p. 72 ss.

luce come alla loro base vi sia un modo antitetico di concepire le relazioni tra gli uomini. La soluzione della persona giuridica, con la connessa categoria di rappresentanza, comporta la creazione di un ente astratto e quindi 'altro' dalle persone fisiche che costituiscono la collettività e si fonda su di una "idea essenzialmente conflittuale della natura umana", con una organizzazione del gruppo caratterizzata dall'assoggettamento a un "capo". La *societas*, al contrario, non presuppone la creazione di un ente astratto e si basa su "una idea essenzialmente cooperativa della natura umana", con una organizzazione del gruppo in cui i soci possono perseguire la propria utilità attraverso la individuazione e il perseguimento della utilità comune senza essere costretti alla perdita della propria libertà⁸.

Il superamento dell'obiettivo della utilità singolare da parte di ciascun socio si spiega con la volontà di dare sostanza giuridica a un rapporto costruito attorno a quella *fraternitas*, che le fonti richiamano per dare un senso di continuità dall'antico *consortium ercto non cito* alla *societas* consensuale⁹. Rispetto al *consortium*, il rapporto fondato sulla *fraternitas* nella *societas* non si caratterizza evidentemente come vincolo di sangue, ma come un vincolo altrettanto forte rispetto al primo, in quanto perseguito volontariamente e fondato sul *consensus*, il quale spinge appunto gli uomini a considerare se stessi come fratelli nel perseguimento di uno scopo comune¹⁰.

In questa dimensione, la *societas* presenta una vocazione naturale a entrare unitariamente in contatto col mondo esterno. La dottrina romanistica, però, salvo autorevolissime eccezioni, si è accontentata di mettere in rilievo il dogma della sua irrilevanza esterna, limitandosi a torto a rilevare come la unità

⁸ Così LOBRANO, G. La alternativa attuale tra i binomi istituzionali: 'persona giuridica e rappresentanza' e 'società e articolazione dell'iter di formazione della volontà'. Una ipotesi (mendeleeviana). – In: *Diritto@Storia*, Vol. 10, 2011-2012.

⁹ Il legame tra la *societas* e l'antico *consortium*, sul piano della *fraternitas*, si ricava nelle fonti anzitutto da Gai. 3.154 e da D. 17.2.63.pr. (Ulp. 31 ad ed.). Sulla rilevanza della *fraternitas*, nella linea di continuità tra *consortium* e *societas*, si rinvia a ONIDA, P. P. *Fraternitas e societas: i termini di un connubio*. – In: *Diritto@Storia*, Vol. 6, 2007.

¹⁰ Cfr. BETTI, E. *Istituzioni di diritto romano*. Vol. 1. 2. ed. Padova, 1942, p. 426 ss., per il quale "Il vincolo personale di fraternità fra consorti, che giustifica e governa la comunione, rende ragione, nella concezione romana, della pienezza di poteri riconosciuti a ciascuno nei rapporti esterni, allorché si tratta di disporre di una cosa comune, o di assumerne la difesa in giudizio [...] La concezione romana è probabilmente [...] che il fratello non può tradire il fratello, come il tutore non può tradire il pupillo [...], ma deve apprezzare e sentire l'interesse comune od altrui come interesse suo proprio e assumere verso l'altro la responsabilità dell'apprezzamento fatto [...] Il vincolo di fraternità fra consorti, come legittima tanto estesi poteri d'iniziativa, così giustifica una piena fiducia reciproca".

del gruppo rispetto all'esterno presupponga necessariamente l'astrazione e dunque la idea di persona giuridica¹¹.

È invece singolare che la dottrina commercialistica degli ultimi anni, criticando l'innesto infruttuoso della categoria di persona giuridica sulla *societas*, abbia ritenuto necessario richiamarne il carattere contrattuale per reagire alla sempre più diffusa tendenza del legislatore nazionale e comunitario a costruire vere e proprie aberrazioni giuridiche¹² (basti pensare alla figura della *societas* unipersonale per volontà di un solo costituente) e per negare la esistenza di un interesse della società distinto da quello dei soci¹³.

Per comprendere i caratteri della *societas* romana, soprattutto nelle sue relazioni esterne, è necessario sottrarsi alla prospettiva falsante derivante dall'impiego della moderna e antitetica categoria di persona giuridica. Se ci si libera da tale prospettiva, nel momento in cui si mettono in risalto le differenze anche ideologiche connesse ai due modelli sopra richiamati (*societas* e persona giuridica) relativi alla considerazione della attività giuridica compiuta da una pluralità di persone, è anche possibile comprendere meglio la importanza di quella dimensione contrattuale della *societas*, sulla quale oggi a ragione insiste la dottrina commercialista.

1. IL PROBLEMA DELLA RILEVANZA ESTERNA DELLA SOCIETAS

Per lungo tempo la dottrina romanistica ha ritenuto, pressoché pacificamente, che il contratto di *societas* producesse effetti soltanto nei rapporti fra i soci¹⁴. L'esclusione della rilevanza della *societas* nei confronti dei terzi non

¹¹ Si veda infra sub § 1.

¹² Sulla importanza della dimensione contrattuale della *societas* si rinvia a COTTINO, G. e WEIGMANN, R. Le società di persone. – In: *Trattato di Diritto commerciale*. Dir. da G. Cottino. Vol. 3. Società di persone e consorzi. Padova, 2004, p. 4 ss.

¹³ Si veda con, riferimento a Cass., sez. I, 26 ottobre 1995, n. 11151, in cui si è esclusa la possibilità di riconoscere un interesse della società (s.r.l.) in quanto persona giuridica, distinto da quello dei soci. CASSAZIONE e contrattualismo societario: un incontro? [Authors: P. G. Jaeger, C. Angelici, A. Gambino, R. Costi e F. Corsi]. – In: *Giurisprudenza Commerciale*, Vol. 2, p. 334 ss.

¹⁴ Si veda, nella vasta letteratura, SANFILIPPO, C. Sulla irrilevanza del rapporto sociale nei confronti dei terzi. – In: *Iura* (1951), p. 159 ss.; ARANGIO-RUIZ, V. La società in diritto romano, cit., p. 78 ss.; CANCELLI, F. 'Società' (Diritto romano). – In: *Novissimo Digesto Italiano*, Vol. 17, Torino, 1970, p. 509; MONTANARI, M. Impresa e responsabilità. Sviluppo storico e disciplina positiva. Milano, 1990, p. 1 ss.; TALAMANCA, M. Società. (Diritto romano). – In: *Enciclopedia del diritto*. Vol. 42. Milano, 1990, p. 827 ss. La tesi della irrilevanza esterna della *societas* è stata messa in discussione in un saggio ormai classico

era però ricondotta alla sua natura contrattuale, ma alla applicabilità ad essa della categoria di persona giuridica. Applicabilità che normalmente esclusa era invece riconosciuta in particolare per la *societas publicanorum*¹⁵.

La questione della rilevanza esterna della *societas*, a causa della sovrapposizione della categoria di persona giuridica, appariva così fortemente condizionata da opzioni ideologiche estranee alla esperienza romana. In tal senso, sono esemplari le analisi di due studiosi, nel secolo scorso, quali Claudio Arnò e Vincenzo Arangio-Ruiz. Il primo da un lato rilevava che “non solo di fronte ai socii la società non costituisce una persona giuridica da essi distinta, ma neppure di fronte ai terzi”, dall’altro concludeva che “Con tutto ciò, forse la parte più importante dello studio del contratto di società è questa concernente le relazioni dei socii con i terzi estranei alla società, giacché la vita della società ben più si svolge, in generale, nel rapporto esterno, che non in quello interno”¹⁶. Il secondo riassumeva e liquidava la questione della rilevanza esterna della *societas* dedicando ad essa, nel suo celebre Corso sulla società in diritto romano, un paragrafo intitolato significativamente “Esclusione di ogni riflesso nei riguardi dei terzi”¹⁷, nel quale dapprima osservava che “la società romana crea un rapporto esclusivamente *interno*, avente cioè effetti solo fra i soci, senza riflessi all’esterno. Di ciò i romanisti non soltanto sono oggi tutti convinti, ma lo sono stati in ogni tempo”, per poi rilevare che “L’idea che anche la *societas* romana, nata da contratto consensuale, si presentasse di fronte ai terzi come un soggetto autonomo di diritti e di obblighi (persona giuridica), è stata solo eccezionalmente sostenuta da scrittori estranei alla più genuina tradizione scientifica degli studii nostri”. Si finiva così per fondare una sorta di equazione tra la nozione di *societas* e quella di persona giuridica trascurando le differenze

di SERRAO, F. Sulla rilevanza esterna del rapporto di società in diritto romano. – In: *Studi in onore di Edoardo Volterra*. Vol. 5. Milano, 1971, p. 743 ss. (=Id., *Impresa e responsabilità a Roma nell’età commerciale*. Ospedaletto [Pisa] 1989, p. 67 ss.). La impostazione del Serrao ha trovato adesione in CERAMI, P. *Impresa e societas nei primi due secoli dell’impero*. – In: *Affari, finanza e diritto nei primi due secoli dell’impero*. Atti del convegno internazionale di diritto romano, Copanello, 5–8 giugno 2004. A cura di F. Milazzo. Milano, 2012, p. 163 ss.

¹⁵ Si veda per tutti TALAMANCA, M. Società. (Diritto romano), cit., p. 831 ss.

¹⁶ ARNÒ, C. Il contratto di società. Lezioni raccolte dagli studenti F. Palieri e G. Berto. Torino, 1938, p. 325 ss.

¹⁷ ARANGIO-RUIZ, V. La società in diritto romano, cit., p. 78.

fra i due diversi modelli di soluzione del problema della considerazione unitaria degli atti compiuti da una “pluralità di uomini”¹⁸.

Per analizzare la possibilità che la *societas* si presenti di fronte ai terzi anche come unità e non solo come pluralità di contraenti non è necessario, ma anzi direi dannoso, riferirsi alla categoria di persona giuridica e quindi ragionare in termini di astrazione. Così non possono essere considerati condivisibili i risultati delle ricerche di coloro che, richiamandosi più o meno espressamente agli studi fondamentali di Riccardo Orestano¹⁹, ritengono di poter superare l’assimilazione tra persona giuridica e *societas* attraverso l’impiego di una terminologia ancora incerta e condizionata dalla equazione sopra richiamata²⁰. Il vero problema non è se la *societas* sia o non sia persona giuridica, ma cosa sia la *societas* e cosa sia la persona giuridica, quando tali modelli siano impiegati per risolvere il problema fondamentale di come un gruppo organizzato di persone possa realizzare una attività giuridica che la pone in contatto con l’esterno.

È necessario allora cercare di chiarire preliminarmente cosa si intenda in dottrina con la espressione “rilevanza esterna della *societas*”. Al riguardo, mi sembra che la espressione sia impiegata in due accezioni diverse. Secondo una prima accezione, assai diffusa, con tale espressione si vuole alludere alla rilevanza esterna delle relazioni tra i soci, vale a dire al rilievo che tali relazioni assumono all’esterno per i terzi. Secondo una altra accezione, meno comune,

¹⁸ Si veda LOBRANO, G. La alternativa attuale tra i binomi istituzionali: ‘persona giuridica e rappresentanza’ e ‘società e articolazione dell’iter di formazione della volontà’. Una ipo-tesi (mendeleeviana), cit., il quale, a proposito delle categorie di persona giuridica e rappresentanza parla di un “binomio” che costituisce “soltanto una soluzione storica-dogmatica del problema di base e complesso del diritto che è la concezione e il regime (cioè la “struttura” e la “dinamica”) unitari dell’agire volontario di una pluralità di uomini”, mentre “soluzione storica-dogmatica altra è (è stata e resta) l’antitetico ‘binomio’ istituzionale che definiamo “società e articolazione dell’iter di formazione della volontà””.

¹⁹ Si veda ORESTANO, R. Il problema delle fondazioni in diritto romano. Parte prima. Torino, 1959; Id., Il “problema delle persone giuridiche” in diritto romano. Vol. 1. Torino, 1968.

²⁰ Non mi sembra sufficiente, ai fini di un ripensamento della questione della rilevanza esterna della *societas*, osservare, come fa CIMMA, M. R. Ricerche sulle società di publicani. Milano, 1981, p. 163 ss.; spec. p. 193 ss., che “non si può negare che il processo di astrazione avesse già consentito di identificare nei collegia e nelle societates di cui parla Gaio”, il riferimento è a D. 3.4.1.pr.–1 (Gai. 3 ad ed. prov.), “entità diverse e distinte da quelle dei soggetti che la componevano”, per poi concludere ricorrendo alla categoria della “imitata capacità giuridica”. Si veda in senso critico TALAMANCA, M. Società. (Diritto romano), cit., p. 832, nt. 198, secondo il quale il ricorso a tale categoria corrisponde ad una impostazione troppo tradizionale.

con siffatta espressione ci si vuole riferire alla rilevanza della *societas* di fronte ai terzi anche come unità e non solo come mera pluralità di contraenti.

Le due accezioni sono spesso confuse una con l'altra, ma devono essere tenute distinte se si vuole evitare di analizzare il problema della rilevanza esterna della *societas* attraverso la astrazione della persona giuridica. Tale confusione è, ad esempio, presente nella riflessione del già citato Arnò, il quale sulla base dell'assunto che di fronte ai terzi non si possa parlare di diritti e obbligazioni della società, ma soltanto dei soci concludeva osservando che "di fronte ai terzi non vi è società, ma vi sono solo degli individui; di fronte ai terzi la società non è che la somma dei singoli socii che la compongono"²¹. La tesi, secondo cui la *societas* altro non sia che la somma dei singoli soci, mortifica la funzione del contratto e non tiene conto proprio del momento più rilevante per la *societas* che è quello in cui essa permette ai soci come unità di entrare in relazione esterna.

Evitare l'astrazione connessa alla persona giuridica consente anche di superare il dilemma in cui si dibatte la dottrina quando da un lato riconosce la regola generale e assoluta della assenza di rilevanza esterna della *societas*, e, dall'altro, individua un insieme di eccezioni a tale regola generale ammettendo che taluni tipi di *societates* abbiano in varia misura rilevanza esterna²². Contro la dottrina dominante, che per lungo tempo ha finito per riconoscere una rilevanza esterna alla *societas* solo come eccezione alla regola generale, Feliciano Serrao, in un contributo ormai classico, specificamente dedicato al tema della "rilevanza esterna del rapporto di società", ha ritenuto di potere individuare un esempio di rilevanza esterna di *societates* non solo per le società di pubblicani e le società di banchieri, ma anche per le società di mercanti di schiavi e le società di armatori. Eccezioni che sono così importanti e frequenti da indurre a ritenere

²¹ ARNÒ, C. Il contratto di società. Lezioni raccolte dagli studenti F. Palieri e G. Berto., cit., p. 327.

²² Si veda, per tutti, TALAMANCA, M. Società. (Diritto romano), cit., p. 827, il quale dopo avere osservato che "In accordo all'efficacia meramente obbligatoria dei contratti romani, la *societas* crea fra i soci solo reciproche obbligazioni e non ha rilevanza esterna nei confronti dei terzi", scrive che "L'irrilevanza esterna del rapporto sociale è una regola generale, che soffre di talune – reali od apparenti – eccezioni".

che il dogma della irrilevanza esterna della *societas* vada profondamente rimesso in discussione²³.

2. LA REGOLA NAM SOCII MEI SOCIUS MEUS SOCIUS NON EST

La irrilevanza sul piano esterno della *societas* è di solito ricondotta in dottrina alla regola formulata da Ulpiano in D. 17.2.20 (Ulp. 31 *ad. ed.*): *nam socii mei socius meus socius non est*²⁴. In essa è noto che l'Arangio-Ruiz ha

²³ Secondo SERRAO, F. *Impresa e responsabilità a Roma nell'età commerciale*, cit., p. 87 ss., tali società ricoprivano una importanza così grande nella economia antica, da poter affermare che il "campo in cui la regola della non rilevanza esterna del rapporto sociale si applicava incontrastata" fosse più o meno corrispondente al "campo in cui l'applicazione del principio veniva esclusa o fortemente limitata dalle diverse eccezioni".

²⁴ Per la manualistica, con espresso riferimento a D. 17.2.20, si vedano: BURDESE, A. *Diritto privato romano*. 3. ed. Torino, 1987, p. 476, nt. 31, il quale nota che "La società produce effetti solo tra i soci, non essendo riconosciuta, fatta eccezione per la *societas publicanorum*, quale corporazione avente una qualche capacità giuridica; i negozi conclusi con i terzi da un socio producono effetti esclusivamente nella sua sfera giuridica"; VOLTERRA, E. *Istituzioni di diritto romano*. Roma, 1988, p. 527: "Il contratto di società non pone in essere una persona giuridica distinta da quelle dei soci. Pertanto non possono configurarsi rapporti obbligatori fra la società e terzi (cioè crediti e debiti della società) ma solo crediti e debiti dei singoli soci con terzi"; PUGLIESE, G. *Istituzioni di diritto romano* (con la collaborazione di F. Sitzia e L. Vacca). Torino, 1991, p. 574 ss.: "Dal contratto di società non nasce, come invece talvolta avviene nel nostro diritto, una persona giuridica autonoma; ciò significa che la società non ha verso i terzi rilevanza giuridica autonoma rispetto a quella delle persone dei singoli soci [...] rimase comunque fermo il principio che il contratto di società, concluso da uno dei soci con i terzi, non coinvolgeva ovviamente i soci della prima società". Non si richiamano espressamente alla regola enunciata nel frammento ulpiano: GIRARD, P. F. *Manuale elementare di diritto romano*. Trad. ital. di C. Longo. Roma ; Milano ; Napoli, 1909, p. 590 ss., il quale rileva che "A torto si è talora affermato che il contratto di società abbia l'effetto di creare una persona giuridica distinta dalle persone dei soci, con un patrimonio, un attivo ed un passivo distinto da quelli dei soci". E ancora, a p. 591, nt. 3, parlare di "effetti rispetto ai terzi, e specialmente in materia di obbligazioni, di crediti e debiti prodotti dalla società fra i soci ed i terzi corrisponde ad un "linguaggio abusivo"; BETTI, E. *Istituzioni di diritto romano*. Vol. 2. Parte Prima. Padova, 1962, p. 265 ss., per il quale "la struttura della *societas* in diritto classico è quella di un rapporto di obbligazione [...] quindi produttivo di obblighi reciproci fra i partecipanti; un rapporto, dunque, con meri effetti interni, non esterni di fonte ai terzi. Di fonte ai terzi, la *societas* non costituisce una unità, un soggetto di diritti e obblighi autonomo: questo non avviene se non in via eccezionale: così per esempio per le *societates publicanorum*. In generale la *societas* non assurge a persona giuridica": BIONDI, B. *Istituzioni di diritto romano*. Rist. 4. ed. Milano, 1972, p. 507, si limita ad osservare che "La società romana ha netta impostazione individualistica ed importa esclusivamente rapporti interni tra soci, esulando qualsiasi elemento sociale, se non nell'ambito dei soci". SANFILIPPO, C. *Istituzioni di diritto romano*. 10. ed., curata e aggiornata da S. Corbino e A. Metro. Soveria Mannelli, 2002, p. 305 ss., nota: "La società romana non ha personalità giuridica; i diritti ed obblighi verso i terzi non sono dunque della società, ma dei singoli soci. Inoltre poiché il *ius civile* non ammette la rappresentanza diretta (*nemo alteri stipulari potest*) ne consegue che se un negozio nell'interesse della società non fu concluso con l'intervento di tutti i soci, ma da taluni o da uno soltanto di essi, i diritti ed obblighi che da tale negozio sorgono verso i terzi ricadono unicamente sulla persona dei soci o del socio che lo hanno stipulato"; VOGLI, P. *Istituzioni di diritto romano*. 6. ed. Milano, 2004, p. 456: "La società non è persona giuridica" coll'aggiunta però alla nt. 2: "Meno qualche figura che ha aspetti pubblicistici, come la *societas publicanorum*". E ancora, a p. 457: "La società non ha rilievo giuridico per i terzi".

voluto vedere un “corollario” del principio secondo il quale i rapporti fra uno o più soci e i terzi riguardano solo coloro che siano parte dell’atto stesso. E ciò, sempre secondo l’illustre romanista, anche quando l’attività sia stata compiuta dal socio con il terzo in adempimento di un obbligo sociale. Applicazione di questo principio si avrebbe così nel caso ricordato in D. 17.2.67.pr.–1 (Paul. 32 *ad. ed.*), in cui è stipulato da uno dei soci con terzi un contratto di compravendita o di mutuo, con la conseguente “estraneità” degli altri soci rispetto al vincolo instaurato coi terzi²⁵. Più recentemente, nella medesima linea, il Talamanca ha ribadito che la irrilevanza esterna della *societas* è attestata nel principio ulpiano, rilevando, inoltre, che esso è, a sua volta, parte di una discussione più estesa riportata in D. 17.2.19: “dove esso è fondato sul carattere di *obligatio consensu contracta* della *societas*”. Entrambi tali frammenti, poi, “sono l’inizio di una catena, che prosegue con” D. 17.2.21, 23 e 31 (Ulp. 30 *ad Sab.*), D. 17.2.24 (Ulp. 31 *ad ed.*) e quindi con D. 17.2.22 (Gai. 10 *ad ed. prov.*)²⁶.

Così intesa, la regola relativa alla irrilevanza esterna del contratto di *societas*, nel senso della irrilevanza esterna degli obblighi contratti dai soci nei loro reciproci rapporti, corrisponde più alla struttura del contratto in generale che a un carattere proprio ed esclusivo della sola *societas*. In questa ottica, il richiamo al principio enunciato da Ulpiano non pare potersi invocare per fondare la specifica irrilevanza esterna del contratto di *societas*. Decisiva in tal senso mi sembra l’osservazione di Serrao, secondo il quale Ulpiano sembra qui limitarsi a rilevare che la stipulazione da parte di un socio di un secondo contratto di società con altri soggetti, come pure l’ipotesi di una associazione a sé di un terzo nelle perdite e profitti che il primo contratto dovesse produrre, non vincola il socio del primo contratto, poiché egli è estraneo ad una attività che è stata compiuta al di fuori della prima società²⁷. In tal senso, sembra poi deporre lo svolgimento stesso del principio, come esso si presenta nella catena di passi sopra richiamati, e, in particolare, in D. 17.2.19 (Ulp. 30 *ad Sab.*), in cui il criterio espresso rimane sempre quello del consenso, e quindi di per sé non esclusivo

²⁵ ARANGIO-RUIZ, V. La società in diritto romano, cit., p. 84 ss.

²⁶ TALAMANCA, M. Società (Diritto romano), cit., p. 827, nt. 139.

²⁷ SERRAO, F. Sulla rilevanza esterna del rapporto di società in diritto romano, cit., p. 67, nt. 1.

della *societas*²⁸: *cum enim societas consensu contrahatur, socius mihi esse non potest quem ego socium esse nolui*. Certamente l'attività realizzata a titolo personale da uno dei soci con terzi, sia essa un ulteriore contratto di *societas*, sia essa un altro contratto, un mutuo o una compravendita ad esempio²⁹, non vincola per forza anche gli altri soci del primo contratto di *societas*³⁰. La regola ulpiana enunciata in D. 17.2.20, nel delineare una progressione societaria – dal mio socio al socio del mio socio – non costituisce, quindi, una attestazione di una chiusura della *societas* verso l'esterno, ma è essa stessa espressione di una apertura della *societas* verso l'esterno.

Quanto al frammento di Papiniano, in D. 17.2.82, in cui si afferma il criterio della estraneità della generalità dei soci di fronte ai terzi, nel caso di attività compiuta da uno dei soci, salvo il caso che costui abbia messo in comune con gli altri soci i vantaggi derivanti della attività realizzata, senza entrare nel merito della genuinità di esso, la cui valutazione positiva è ormai data per assodata nella più recente letteratura³¹, è da respingere la ipotesi, prospettata soprattutto nella dottrina più risalente, che si facesse qui riferimento ad una applicazione della *actio de in rem verso*, alla quale i terzi contraenti il

²⁸ D. 17.2.19 (Ulp. 30 ad Sab.): "Qui admittitur socius, ei tantum socius est qui admisit, et recte: cum enim societas consensu contrahatur, socius mihi esse non potest quem ego socium esse nolui. Quid ergo si socius meus eum admisit? Ei soli socius est." Si veda per l'esame della dottrina KNÜTEL, R. Die Haftung für Hilfspersonen im römischen Recht. – In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (Rom. Abt.), Vol. 100, 1983, p. 423 ss.

²⁹ Come ad esempio si ipotizza in D. 17.2.67 (Paul. 32 ad ed.), su cui si veda ARANGIO-RUIZ, V. La società in diritto romano, cit., p. 85 ss.

³⁰ Cfr. ARANGIO-RUIZ, V. La società in diritto romano, cit., p. 92, il quale rileva che "Come infatti i soci non intervenuti nel contratto di mutuo, o di vendita, o quel che sia, sono estranei al rapporto obbligatorio che si crea fra il socio agente e il mutuatario o compratore o simile, così essi restano estranei in confronto al nuovo contratto di società".

³¹ Per lo stato della dottrina meno recente sulla genuinità o meno del frammento si rinvia a CIMMA, M. R. Ricerche sulle società di publicani, cit., p. 204 ss. e nt. 120, la quale sembra propendere con qualche dubbio per la interpolazione. I sospetti relativi al passo sono stati però risolti definitivamente in senso negativo da SERRAO, F. Sulla rilevanza esterna del rapporto di società in diritto romano, cit., p. 71, nt. 5, con l'osservare, da un lato, che il termine pecunia, che al plurale ricorre in numerosi frammenti del Digesto, starebbe ad indicare il fatto che il denaro versato nella cassa comune dal socio contraente sarebbe potuto derivare da più mutui e non da una unica operazione, e, dall'altro, che la espressione arca *communis* non necessariamente debba essere ricondotta ad una persona giuridica, poiché anche i soci di una società contrattuale non avente personalità giuridica avrebbero potuto disporre di una cassa per la gestione della attività sociale. Propendono ora per la genuinità del frammento: MAGANZANI, L. Publicani e debitori d'imposta. Ricerche sul titolo editale *De publicanis*. Torino, 2002, p. 251 ss. e nt. 109; CERAMI, P. Impresa e *societas* nei primi due secoli dell'impero, cit., p. 196 ss.

mutuo avrebbero potuto fare ricorso per far valere la responsabilità dei soci estranei al contratto:

D. 17.2.82 (Pap. 3 resp.): Iure societatis per socium aere alieno socius non obligatur, nisi in communem arcam pecuniae versae sunt.

Il Serrao ha dimostrato che la questione in rilievo è qui quella di un socio il quale abbia contratto, anche a nome degli altri soci, un mutuo e quindi versato il denaro nella *arca communis* della *societas*, mentre più generale era l'ambito di applicazione dell'*actio de in rem verso*³². Non pare, invece, che si possa scorgere nel frammento una distinzione, che sarebbe propria del diritto societario della fine della età classica, fra "regola generale" e "correlata eccezione", come vorrebbe il Cerami³³, poiché la espressione *nisi in communem arcam pecuniae versae sunt* costituisce una esplicitazione del medesimo principio della estraneità della attività compiuta da terzi, quando essa non abbia assunto i caratteri di quella sociale per avere il socio agente evitato di farne confluire i risultati nella società³⁴.

Secondo la dottrina, la quale appare fortemente condizionata dalla applicazione della categoria della persona giuridica, il frammento papiniano conduce al problema della rappresentanza della *societas*³⁵. In realtà, contro l'astrazione richiamata dalla applicazione della categoria di persona giuridica e di quella connessa di rappresentanza, il riferimento alla *arca communis* nel frammento papiniano è un esplicito riferimento alla concreta struttura organizzativa della *societas*.

³² Sulla questione si veda SERRAO, F. Sulla rilevanza esterna del rapporto di società in diritto romano, cit., p. 70 ss., nt. 5, che la riconduce alla sua nota lettura circa il "carattere strettamente reale del mutuo", dal quale dipende "l'obbligazione alla restituzione nei limiti in cui il mutuatario è divenuto proprietario della somma ricevuta a mutuo", sui cui però si vedano le riserve critiche di TALAMANCA, M. Società (Diritto romano), cit., p. 833, nt. 206; e di MONTANARI, M. Impresa e responsabilità. Sviluppo storico e disciplina positiva, cit., p. 7, nt. 9.

³³ CERAMI, P. Impresa e *societas* nei primi due secoli dell'impero, cit., p. 195 ss.

³⁴ Si superano in tal modo le riserve espresse da ARANGIO-RUIZ, V. La società in diritto romano, cit., p. 84 ss., sulla possibilità di conciliare quanto previsto nel passo di Papiniano con il principio emergente in D. 17.2.67.pr.—1 (Paul. 32 ad. ed.) sopra richiamato.

³⁵ Così, ad esempio, TALAMANCA, M. Società (Diritto romano), cit., p. 833, il quale, con riguardo alla *societas vectigalium*, vede nella rappresentanza "il terzo elemento caratteristico del *corpus habere*".

Quanto al celebre frammento di Gaio, il quale costituisce una sorta di manifesto riassuntivo del diritto associativo nella età degli Antonini, esso ci offre una chiave di lettura generale della organizzazione delle società³⁶:

D. 3.4.1.pr.–1 (Gaius 3 ad ed. prov.): Neque societas neque collegium neque huiusmodi corpus passim omnibus habere conceditur: nam et legibus et senatus consultis et principalibus constitutionibus ea res coercetur. Paucis admodum in causis concessa sunt huiusmodi corpora: ut ecce vectigalium publicorum sociis permissum est corpus habere vel aurifodinarum vel argentifodinarum et salinarum. Item collegia Romae certa sunt, quorum corpus senatus consultis atque constitutionibus principalibus confirmatum est, veluti pistorum et quorundam aliorum, et naviculariorum, qui et in provinciis sunt. 1. Quibus autem permissum est corpus habere collegii societatis sive cuiusque alterius eorum nomine, proprium est ad exemplum rei publicae habere res communes, arcam communem et actorem sive syndicum, per quem tamquam in re publica, quod communiter agi fierique oporteat, agatur fiat.

Il frammento è stato senz'altro rimaneggiato, soprattutto in quel *societas* iniziale da correggere con ogni probabilità, come voleva fra gli altri l'Arangio-Ruiz, in *societatem*³⁷. Ma il significato complessivo del discorso di Gaio è chiaro: il giurista osserva, per prima cosa, che non a tutti è permesso di costituire una società o un collegio che abbia *corpus*, poiché si tratta di una materia sottoposta a limiti in forza di leggi, senatoconsulti e costituzioni. Quindi, dopo avere rilevato che i casi in cui è ammessa la costituzione di tali *corpora* sono pochi, elenca, fra di essi, da un lato, le *societates vectigalium, aurifodinarum, argentifodinarum e salinarum*, e dall'altro, i *collegia pistorum* e altri simili, e i *naviculariorum*. Dallo sviluppo del discorso emerge che il tratto essenziale delle società e dei collegi menzionati, consistente nell'*habere corpus ad exemplum rei publicae*³⁸, si

³⁶ Si vedano in questo senso De ROBERTIS, F. M. Storia delle corporazioni e del regime associativo nel mondo romano. Vol. 2, cit., p. 386 ss.; CERAMI, P. Impresa e societas nei primi due secoli dell'impero, cit., p. 194 ss.

³⁷ ARANGIO-RUIZ, V. La società in diritto romano, cit., p. 80 ss. Lo stato della dottrina, che propende per un originario riferimento nel passo gaiano al termine *sodalitium*, si trova in CIMMA, M. R. Ricerche sulle società di publicani, cit., p. 181, nt. 49, la quale ritiene che "il passo possa essere correttamente interpretato proprio lasciando inalterato nella sostanza il riferimento alla *societas*". Si veda, invece, nel senso di *societas* come riferimento alla generica forma associativa, la traduzione del passo gaiano proposta in IUSTINIANI Augusti Digesta seu Pandectae-Digesti o Pandette dell'imperatore Giustiniano. Vols 1–4. Vol. 1. Testo e traduzione. A cura di S. Schipani. Milano, 2005, p. 250: "Non è concesso a tutti senza distinzione costituire un'associazione, un collegio o un siffatto corpo".

³⁸ Cfr. TALAMANCA, M. Società (Diritto romano), cit., p. 832, il quale mette in evidenza il fatto che "l'accostamento fra una generica *societas* e corporazioni a carattere pubblicistico è anche in Florent. 8 inst., D. 46, 1, 22".

esprime nell'avere essi *res communes*, una *arca communis* e quindi nel poter agire o essere convenuti attraverso un *actor sive syndicus*³⁹.

Se ci si libera dalla logica rappresentativa, la riflessione gaiana appare allora caratterizzarsi per un riferimento concreto alla pluralità delle persone fisiche, gli *omnes*, nello sviluppo del passo denominati, insieme alla concessione della *permissio*, tecnicamente *socii*, i quali associandosi danno vita ad una *societas* o ad un *collegium*. E qui riesce agevole intravedere il piano visuale della pluralità degli *omnes-socii* e quello congiunto della unità nel *corpus*⁴⁰. Siffatta unità è concreta e non astratta, come emerge nello sviluppo successivo del passo: la *permissio*, infatti, non produce l'effetto di costituire enti astratti diversi dagli *omnes-socii*, ma ha l'effetto di consentire a questi ultimi di presentarsi come un unico *corpus*.

Espressioni quali quelle di persona giuridica, soggetto di diritto, con le connesse categorie di capacità giuridica o di personalità, e quindi, secondo una linea che solo apparentemente si distacca dall'atteggiamento scientifico sotteso all'uso di tali categorie, di "centro di imputazioni" o di "situazioni unificate" o peggio di "ente"⁴¹, non solo non corrispondono ad una linea di pensiero dei giuristi romani attenti alla valutazione concreta dell'agire umano all'interno del gruppo, ma neppure si mostrano oggi di reale utilità nella comprensione della esperienza antica.

³⁹ Ciò anche quando si voglia aderire alla tesi prospettata da MOMMSEN, Th., p. 84 ss., secondo il quale, mentre alle *societates* sarebbe stato concesso in generale il privilegio di *habere corpus*, ai *collegia* esso sarebbe stato concesso di volta in volta. Ritiene interpolata la espressione *sive syndicum* ALBERTARIO, E. *Corpus e universitas nella designazione della persona giuridica*. – In: Id., *Studi di diritto romano*. Vol. 1. Milano, 1933, p. 87 ss. Sui problemi connessi alla legittimazione ad agire delle *societates* e dei *collegia* si veda per tutti TALAMANCA, M. *Società (Diritto romano)*, cit., p. 832; BISCARDI, A. *Rappresentanza sostanziale e processuale dei 'collegia' in diritto romano*. – In: *Iura*, Vol. 31, 1980, p. 12 ss.; MAGANZANI, L. *Pubblicani e debitori d'imposta. Ricerche sul titolo editale De publicanis*, cit., p. 217 ss.

⁴⁰ Così LOBRANO, G. *La alternativa attuale tra i binomi istituzionali: 'persona giuridica e rappresentanza' e 'società e articolazione dell'iter di formazione della volontà'*. Una ipo-tesi (mendeleeviana), cit. Si veda invece CIMMA, M. R. *Ricerche sulle società di publicani*, cit., p. 185, la quale rileva che, se si potesse parlare di "personalità giuridica nella sua completezza", bisognerebbe arrivare alla conclusione che ai "soggetti in esame" dovevano essere ricondotti "tutti i rapporti e i diritto compatibili con la loro natura", cosa che invece è da escludere, come attestato in D. 40.3.1 (Ulp. 5 ad Sab.) per la *manomissio* e in D. 34.5.20 (Paul. 12 ad Plaut.) per il *legato*.

⁴¹ Così TALAMANCA, M. *Società (Diritto romano)*, cit., p. 832.

3. UNITÀ CONCRETA DELLA SOCIETAS E ASTRAZIONE DELLA PERSONA GIURIDICA

Si deve invece cercare di comprendere in cosa consista la concretezza della unità quale emerge soprattutto nella nozione del *corpus*.

Non pare possa accogliersi la vecchia impostazione risalente all'Albertario, secondo cui in età classica il termine *corpus* (come anche il termine *universitas*) non sarebbe stato utilizzato "a indicare una persona fittizia, cioè un soggetto giuridico diverso e indipendente dai membri che lo compongono", ma avrebbe individuato la "collettività" dei componenti il gruppo, mentre solo in età postclassica e giustiniana esso avrebbe indicato "l'unità dell'ente stesso", la quale "non ha più un riferimento materiale, concreto, ma ideale astratto; non è l'espressione di una collettività reale, ma di un'unità figurativamente rappresentata"⁴². Siffatta impostazione, che in passato suscitò larghi consensi in dottrina, nel contrapporre un movimento da una concezione concreta della collettività ad una concezione astratta della unità, risente di un grave "preconcetto evoluzionistico"⁴³. E bene ha osservato l'Eliachevitch, come è stato più volte ricordato in dottrina⁴⁴, che "Dans la conception romaine, le collègue restait une pluralité, comme auparavant. Aucun être supérieur mystique ne remplaçait la pluralité vivante des membres"⁴⁵.

Anche la tesi di chi ha assunto una posizione di netto rifiuto per certi eccessi della tesi dell'Albertario, indicativi di quel "preconcetto evoluzionistico" di cui si è detto, ha però spesso finito per essere fortemente condizionata dal presupposto della equivalenza tra unità e astrazione. Così, ad esempio, il De Visscher ha sostenuto che il termine *corpus* in età classica sarebbe stato usato per indicare l'unità, mentre solo alla fine della età classica, sulla base della influenza derivante da un uso popolare del termine *corpus*, si sarebbe giunti,

⁴² ALBERTARIO, E. *Corpus e universitas nella designazione della persona giuridica*, cit., p. 99 ss., il quale, conseguentemente alla sua impostazione, sostiene la interpolazione del passo gaiano e dei frammenti in cui si impiega il termine *corpus* per denotare la unità del gruppo.

⁴³ Traggo la espressione fra virgolette da CATALANO, P. *Diritto e persone. Studi su origine e attualità del sistema romano*. Torino, 1990, p. 166, il quale, pur non riferendosi a un autore determinato, attribuisce il "preconcetto evoluzionistico" a quegli orientamenti volti a "proiettare in antico 'progressivi' passaggi dal concreto all'astratto".

⁴⁴ Si vedano ORESTANO, R. *Il problema delle fondazioni in diritto romano*, cit., p. 129 ss.; CATALANO, P. *Diritto e persone. Studi su origine e attualità del sistema romano*, cit., p. 174 ss.

⁴⁵ ELIACHEVITCH, B. *La personnalité juridique en droit privé romain*. Paris, 1942, p. 292.

anche fra i giuristi, a un impiego del termine in senso collettivo per poi finire di uso corrente in età postclassica⁴⁶. Ancora: l'Orestano critica la tesi dell'Albertario, in quanto essa presenta il difetto di fondarsi su di una "netta linea di demarcazione fra un'asserita concezione classica – uniformemente seguita in ogni caso – e un'asserita concezione postclassica e giustiniana, altrettanto uniformemente seguita in ogni caso". Una linea di demarcazione, la quale per l'Orestano non esisterebbe in quanto "né i classici in ogni caso seguono la concezione "collettiva", né i postclassici e i giustiniani seguono in ogni caso la concezione "corporativa", in modo che "già in età classica si era pervenuti, per astrazione, al concetto di *corpus* come unità ideale e astratta"⁴⁷. Egli conclude l'esame della tesi dell'Albertario enunciando il "proposito" "di mettere in evidenza come ancora nello stesso diritto giustiniano non manchino testimonianze precise di una certa oscillazione fra le due concezioni: la "collettiva" e la "astratta". Occorre liberarsi dalla influenza della contrapposizione condizionata da pregiudizi evolucionistici, quali quella astratto-concreto, pregiudizi che ancora pervadono soprattutto le ricostruzioni dell'Albertario⁴⁸ e parzialmente quelle dell'Orestano⁴⁹. Si deve più precisamente respingere la tesi che una collettività possa presentarsi come unità solo attraverso l'artificio della astrazione e quindi attraverso la nozione di persona giuridica e di quella connessa di rappresentanza.

Punto di partenza per una riconsiderazione della *societas* come fenomeno organizzativo nuovo rispetto alla considerazione meramente aritmetica dei soci mi sembra che si possano ritenere, al riguardo, gli studi fondamentali di Pierangelo Catalano, il quale ha sostenuto vigorosamente,

⁴⁶ De VISSCHER, F. La notion de 'corpus' et le régime des associations privées à Rome, cit., p. 43 ss. (=Id., *Études de droit romain public et privé*, cit., p. 171 ss.).

⁴⁷ ORESTANO, R. Il problema delle fondazioni in diritto romano, cit., p. 137 ss.

⁴⁸ ALBERTARIO, E. Corpus e universitas nella designazione della persona giuridica, cit., p. 97 ss., il quale contrappone una concezione concreta di collettività, propria dei classici, alla concezione astratta, di unità, dei postclassici e giustiniani, su cui si vedano i rilievi critici di CATALANO, P. Diritto e persone. Studi su origine e attualità del sistema romano, cit., p. 173.

⁴⁹ Una critica in tal senso alle tesi di ORESTANO, R. Il "problema delle persone giuridiche" in diritto romano, cit., p. 178 ss., il quale con riferimento al "rapporto che nell'esperienza romana corre fra "situazioni unificate" e taluni fenomeni di imputazione", ipotizza un passaggio da una concezione "totalistica" a una concezione "corporalistica" e quindi a una concezione "astratta", si trova in CATALANO, P. *Populus Romanus Quirites*. Torino, 1974, p. 105, nt. 33.

richiamando l'ammonimento di Giorgio La Pira⁵⁰ ripreso da Jacques Maritain⁵¹, la necessità di evitare la confusione, sconosciuta ai giuristi romani, tra il "tutto sostanziale dell'organismo biologico e il tutto collettivo, composto anch'esso di persone, della società"⁵². E devono qui essere richiamati i risultati, a cui il Catalano giunge, evidenziando che la nozione concreta e direi societaria, secondo la definizione ciceroniana (Cicero, *De republica*, 1,25,39: ... *populus* ... *non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus*), di *populus Romanus Quirites* esprime non un 'ente ideale', ma una "pluralità di uomini 'riuniti' o 'uniti' (e in quanto tali *populus* e *Quirites*)"⁵³. Ciò che non impedisce che il *populus* possa essere considerato come un insieme, un "tutto indipendente da ciascun singolo" e che quindi i giuristi romani, senza dovere ricorrere alla astrazione della persona giuridica, possano riconoscere situazioni giuridiche per gruppi umani⁵⁴. Tale studioso ritiene che al significato concreto di *populus* "il potere imperiale e, in modo diverso, quello senatorio" siano poi giunti a "sovrapporre una concezione astratta", concezione che avrebbe riguardato anche i termini *corpus* e *universitas*. Astrazione che non è mai, comunque, completa né per il *populus*, né per i *municipia* e i *collegia*⁵⁵.

Molto ci sarebbe da osservare ancora a proposito della tesi di Catalano a cominciare dal suo rifiuto per la categoria di persona giuridica, la cui "eliminazione" per l'illustre studioso, il quale in proposito riprende una tesi del Von Lübtow⁵⁶, non avrebbe alcuna conseguenza negativa; per proseguire con i rilievi in tema di crisi della persona giuridica e di crisi dello Stato; e poi ancora, in merito alla necessità di superare la distinzione corrente tra diritto pubblico e

⁵⁰ Il riferimento è allo scritto di LA PIRA, G. I problemi della persona umana. – In: *Acta Pontificiae Academiae Romanae S. Thomae Aq. et Religionis Catholicae*, n.s. Vol. VIII, 1943, p. 49 ss., su cui si veda CATALANO, P. Alcuni concetti e principi giuridici romani secondo Giorgio La Pira. – In: *Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea*. Atti del Convegno internazionale di studi in onore di Alberto Burdese. A cura di L. Garofalo. Padova, 2003, p. 105.

⁵¹ MARITAIN, J. La persona e il bene comune. Brescia, 1978, p. 18.

⁵² Si veda CATALANO, P. Diritto e persone. Studi su origine e attualità del sistema romano, cit., p. 165, nt. 7, a cui si rinvia per le citazioni di Maritain e La Pira.

⁵³ CATALANO, P. Diritto e persone. Studi su origine e attualità del sistema romano, cit., p. 166 ss.

⁵⁴ CATALANO, P. Diritto e persone, cit., p. 182 e nt. 55.

⁵⁵ CATALANO, P. Diritto e persone, cit., p. 166; 174.

⁵⁶ LÜBTOW, U. Von. Bemerkungen zum Problem der juristischen Person. – In: *Studi in memoria di Paolo Koschaker*. Vol. 2. Milano, 1954, p. 510.

diritto privato e la pretesa separazione fra i membri di una 'corporazione' e la 'corporazione' stessa, resa accentuata dal ricorso alla categoria di persona giuridica. Qui è importante soprattutto mettere in rilievo il salto in avanti che le tesi del Catalano consentono di fare in relazione alla identificazione della unità del gruppo nei suoi rapporti con la pluralità di persone che lo compongono. Alle tesi di coloro che in dottrina hanno costruito il presupposto indimostrabile di un passaggio dalla pluralità alla unità percepibile solo attraverso il prisma deformante della astrazione (connessa all'impiego della categoria di persona giuridica), il Catalano ribatte il valore permanente della concretezza sul piano storico. L'opposizione astratto-concreto che ancora è presente nella tesi dell'illustre studioso si libera da ogni involucro evoluzionistico contro le note tesi dello Schulz sulla presunta incapacità della scienza giuridica romana alla formulazione di concetti astratti⁵⁷.

Una ulteriore messa a punto, in tal senso, è quella ora realizzata da Giovanni Lobrano, il quale ha sostenuto la inammissibilità della contrapposizione, dominante nella romanistica contemporanea, fra i due concetti di "unità", "intesa come astrazione", e di "collettività". Alla base di tale contrapposizione vi è, da un lato, il rifiuto della idea di una "unità che supera e fa sintesi nuova della 'semplice' pluralità di uomini", e, dall'altro, la fondazione di un "giudizio" secondo cui la "concretezza" e la "unità" siano inconciliabili ovvero la "concretezza" degli *universi cives* escluda la "unità" della loro organizzazione in *societas*. Contro una "unità astratta di persona giuridica" è possibile invece parlare di una "unità collettiva concreta della *societas*". Concretezza e unità non sono affatto "inconciliabili", come mostrano i concetti di *populus*, di *collegia* e di *corpora*, che si presentano come unità concrete e dunque come sintesi nuove della pluralità di uomini. Nell'operare della *societas*, sul modello della quale sono costruiti gli altri raggruppamenti collettivi, si evidenzia una logica affatto diversa da quella della persona giuridica: nella *societas* l'atto giuridico è "scomposto" e "ricomposto" nella "articolazione del processo di formazione della volontà" e in quello della sua "manifestazione", mentre la persona giuridica, in quanto "ente astratto", opera attraverso la "rappresentanza/sostituzione" della volontà, ciò che

⁵⁷ SCHULZ, F. I principii del diritto romano, cit., p. 34 ss.

presuppone la sua alterità rispetto a quella degli uomini che compongono la collettività⁵⁸.

Per comprendere come questa unità concreta si presenti di fronte ai terzi e quindi pure intendere la identità della *societas*, la quale permane nel rapporto con la pluralità dei *socii* anche quando muti la identità di un singolo, si può richiamare lo sviluppo storico che dal *corpus* conduce alla *universitas*⁵⁹. Ha osservato di recente Pietro Cerami che la “locuzione gaiana “*corpus habere ad exemplum rei publicae*” è “espressione denotativa dell’unità concettuale del “*corpus*”. Tali “strutture corporative”, egli osserva citando Alfeno, in D. 5.1.76, a proposito della *universitas*, “conservano la loro identità giuridica, nonostante il mutare dei singoli componenti” e quindi “fungono, appunto in quanto unità-molteplicità di individui, da centri d’imputazione di rapporti giuridici”⁶⁰. L’identificazione della *societas*, secondo quella che si è definita una “concezione collettiva”⁶¹, con la pluralità dei *socii* è perfettamente compatibile con la nuova sintesi che attraverso la volontà di questi ultimi si crea, in modo che la unità esce

⁵⁸ Si veda LOBRANO, G. La alternativa attuale tra i binomi istituzionali: ‘persona giuridica e rappresentanza’ e ‘società e articolazione dell’iter di formazione della volontà’. Una ipo-tesi (mendeleeviana), cit., spec. il cap. 4.

⁵⁹ La identificazione della unità coll’astrazione è anche presente nella dottrina che si è occupata della *universitas*: si veda, ad esempio, PUGLIATTI, S. Riflessioni in tema di ‘universitas’. – In: *Congresso giuridico nazionale in memoria di Carlo Fadda* (Cagliari–Sassari 23–26 maggio 1955). Milano, 1968, p. 87, il quale, con riferimento alla unità del gregge, dalla cui analisi egli parte per la sua indagine sulla *universitas*, rileva che “Non è precisato né attualmente è precisabile, il tempo in cui il nomen indicativo del tipo concettuale cominciò ad essere adoperato a caratterizzare il gregge come tale, e quindi a designare, in concreto, gli animali dai quali è costituito, e in astratto, il complesso unitario che se n’era dedotto”; GROSSO, G. Problemi sistematici nel diritto romano. Cose – contratti. A cura di L. Lantella. Torino, 1974, p. 88 ss., il quale osserva che “anche nel riferimento della parola *universitas* ad indicare una collettività di persone cui si riferisce la titolarità di diritti o rapporti (municipii, ecc.), il che rientra nella storia delle persone giuridiche, si può scorgere come da un generico riferimento alla collettività più materialmente intesa (come p. es. in Gai II, 11 [...]) si sia passati all’astrattizzazione dell’ente corporativo (come p. es. nell’affermazione di Ulpiano, D. 3.4.7.1, che i crediti e debiti dell’*universitas* non sono crediti e debiti dei singoli: si quid *universitati* debetur, *singulis* non debetur: nec quod debet *universitas* *singuli* debent). Sul problema del rapporto fra la parte e il tutto, con riferimento a D. 5.1.76 (Alf. 6 dig.), si veda anche BIONDI, B. La dottrina giuridica della ‘universitas’ nelle fonti romane. – In: *Congresso giuridico nazionale in memoria di Carlo Fadda*. Cagliari ; Sassari 23–26 maggio 1955. Milano, 1968, p. 29 ss., il quale mette in luce che la “*universitas personarum* è entità che trascende la somma delle singole persone” e che in Alfeno i iudices, la legio, il *populus* “queste entità sono sempre tali ancorché mutino i singoli componenti”.

⁶⁰ CERAMI, P. Impresa e *societas* nei primi due secoli dell’impero, cit., p. 197.

⁶¹ CATALANO, P. Diritto e persone. Studi su origine e attualità del sistema romano, cit., p. 167.

rafforzata dal fatto che le vicende dei singoli non incidano in maniera determinante sulla identità del gruppo⁶².

Considerare la vocazione della *societas*, nella sua dimensione concreta, a porsi in contatto con l'esterno significa rimettere al centro della analisi giuridica le modalità di formazione e di manifestazione della volontà nelle relazioni fra gli uomini. Mi sembra questo il compito fondamentale al quale è oggi chiamato il giurista.

⁶² Si veda FADDA, C. L'azione popolare. Studio di diritto romano ed attuale. Vol. 1. Parte storica – diritto romano. Torino, 1894, rist. an. Roma, 1972, p. 310 ss., il quale osserva che non è di “ostacolo” alla concezione ora richiamata il fatto che il *populus* sia “un tutto organico, indipendentemente dagli individui onde consta. Sarebbe lo stesso come chi dicesse, che un gregge non si compone delle singole pecore solo perché malgrado del mutamento di queste resta sempre lo stesso gregge”. La frase del Fadda, ora riportata, è citata già da CATALANO, P. Diritto e persone. Studi su origine e attualità del sistema romano, cit., p. 167, il quale rileva corrispondentemente: “Alla permanente identificazione del *populus Romanus* con l'insieme dei *cives Romani* non fa ostacolo la considerazione del *populus* come un tutto indipendente da ciascun singolo”.

**ФИЛОСОФИЯТА НА РИМСКИЯ ПРАВЕН
ХУМАНИЗЪМ
ЧРЕЗ УПОВАВАНЕ НА РАЗУМА. ЗАВРЪЩАНЕТО
НА МИНЕРВА (НА ФРЕНСКИ ЕЗИК)**

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Резюме: В класическото римско право можем да намерим едно херменевтично пространство между принципа че договорите трябва да се изпълняват (*Pacta sunt servanda*) и този на по-хуманното и рационално тълкуване на волята на страните, отразяващ колебанията на договорната „екосистема“ (*Clausula rebus sic stantibus*). Това пространство е подхранило стремението на римските юристи към утвърждаване на хуманистичните правни ценности (преди създаването тази терминология), като например *bona fides*, *aequitas*, или по-скоро те са разбирали капризите на живота чрез една възбращаема Немезида.

Всичко това е предопределило все по-разпространената непредвидимост, за разлика отпреди (що се отнася до древната епоха, която е значително по-формалистична и свързана със закона). Чрез силата на разума, под щита на една невидима Минерва, съдията е можел да изпробва хуманистичния характер на принципа на Корнелий Гал: *Plus ratio quam vis valere solet*, приспособявайки го към юридическата херменевтиката на договарянето.

Ключови думи: класическо римско право; хуманизъм; правни принципи; правни ценности.

PHILOSOPHY OF ROMAN LEGAL HUMANISM BY
RELYING ON REASON. THE RETURN OF
MINERVA (FRENCH LANGUAGE)

LA PHILOSOPHIE DE L'HUMANISME
JURIDIQUE ROMAIN (AVANT LA LETTRE)
PAR L'INVOCATION DE LA RAISON.
LE RETOUR DE LA MINERVE*

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Abstract: In classical Roman law we can find a hermeneutic space between the principle that treaties must be fulfilled (*Pacta sunt servanda*), and that of a more humane and rational interpretation of the will of the parties, reflecting the fluctuations of the contractual "ecosystem" (*Clausula rebus sic stantibus*). This space has fueled the pursuit of Roman lawyers to humanistic legal values (before the creation of the term), such as *bona fides*, *aequitas*, or rather they understood the whims of life through an imaginary Nemesis.

All this has predetermined the ever-increasing unpredictability, unlike the ancient age, which is significantly more formal and law-related. Through the power of reason, under the shield of an imaginary Minerva, the judge was able to experiment with the humanistic nature of Cornelius Gallus' principle "*Plus ratio quam vis valere solet*", adapting it to the legal hermeneutics of contracts.

Keywords: Classical Roman law; Humanism; Legal Principles; Legal Values.

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Motto: *Plus valet favor in iudice quam lex in codice.*¹



Il m'a fallu beaucoup de temps pour comprendre le sens des paroles d'André Malraux de *Les Conquérants* (1928): "(...) Juger, c'est évidemment ne pas comprendre, puisque, si l'on comprenait, on ne pourrait plus juger..." Pas autant que j'ai été sollicité par la métaphore de Umberto Eco qui s'est transformée dans le titre d'une rubrique sur la dernière page (les travaux valeureux doivent être lus jusqu'à la fin [...]) de l'hebdomadaire italien "L'Espresso", *La bustina di Minerva* ("Le petit sachet de Minerve") [...]

La matière, si fascinante, de l'exécution des obligations dans l'Époque classique romaine est, il me semble maintenant, parfaitement adaptable à la pensée de Malraux, parce qu'elle illustre comment le contrat a pénétré non seulement dans le vestibule du *prytaneum* d'un *iudex* curieux, mais même dans son *forum internum*, dans la *Très sainte des saintes* judiciaires, c'est-à-dire dans la petite chambre inexpugnable des délibérations secrètes.

L'Époque classique romaine enregistre la plus importante révolution juridique dans l'histoire du droit. Nous assistons, pratiquement, à une anthropomorphisation des règles de droit, en concordance avec celui de quelques religions universalistes, ce qui a impliqué une psychologisation non seulement des rapports obligationnels, mais aussi l'apparition d'une nouvelle herméneutique contractuelle, dont l'acteur principal n'a plus été la formule (*formula*) vétuste vague, inexpressive, matérialiste, injuste et inéquitable par sa propre nature ultrapositiviste (*avant la lettre*). L'acteur principal est devenu le préteur lui-même et, ensuite, naturellement, le juge.

La quintessence du contrat, le consentement (plus tard répudié par *common law*), a été conservée, bien sûr, mais les nombreuses adaptations ultérieures qui se sont développées sur le schéma fondamental du sauvetage de l'intention primaire des parties, la convention (*cum venire, conventio*) d'un bon rapport juridique nouveau, un rapport qui porte avantage à toutes les deux

¹ D'OXENSTIRN, Comte. Pensées de Monsieur le Comte d'Oxenstirn sur divers sujets. Avec les réflexions morales du même auteur. Nouvelle édition revue et corrigée, soit pour le style, soit pour les citations par Monsieur D. L. M. 2 tomes complet. Tome premier. Haye, Chez Jean van Duren, 1757, chapitre "Des Lois", p. 313: "Mieux vaille la grâce du juge que le code du législateur."

parties, même avec des rectifications reconnues de principe ou, ultérieurement, ad hoc, juste pour le sauvetage, pour leur “pacification” (pactum, pacisci), eh bien, ça nous confirme le changement fondamental du paradigme herméneutique. On avait accepté dans les cas complexes, la flexibilité, l’adaptabilité, le renouvellement (tout comme D. Alexandresco² le montre, dans le Code Calimach, c’était le nom de la novation, “le renouvellement”, comprenant expromissio, à la différence de la cession de créance - cessio -, une simple translation de devoir, concordat, subrogation, fidéjusion³, cautio⁴, la confirmation de la donation⁵). On avait accepté l’interprétation mobile et organique, prismatique. C’est à dire, on avait accepté toute une nouvelle interprétation judiciaire, celle “du tout par le tout”, non seulement par la partie, non seulement de façon analytique, ce qui a favorisé la synthèse des intérêts légitimes et des possibilités pratiques mises à jour. C’est, métaphoriquement, comme dans un univers de sagesse de la Minerve, et tout ça a éliminé les obsolètes réponses verdictales des légisactions (*legisactio*) ultra-légalistes, ultra-formalistes, en faveur des formules prétoriennes et des sentences (encadrements, *sententia*) judiciaires. Ces nouvelles *sententiae* ouvrent largement les portes de l’humanisme juridique par deux valeurs impressionnantes: *aequitas* et *bona fides*, sous l’empreinte tutélaire de Minerve (*ratio*, la raison sive la bonne séparation – *ratio*, portion – des choses, l’esprit analytique, classifiant – *classis* –, esprit scientifique et psychologique, en utilisant le *genus proximum* et

² ALEXANDRESCO, Dimitrie. Explication théorique et pratique du droit civil roumain, en comparaison avec les anciennes lois et les principales législations étrangères. Vol. 6. Iasi, Tipographie nationale, 1900; Bucarest, Editions Universul Juridic, 2017, p. 662 ss.: “La novation (de novation, renouveler), le renouvellement, selon le Code Calimach, Neuerungsvertrag, selon le Code autrichien (art. 1378), est la substitution d’une dette à la place de celle ancienne (Pothier, Oblig., II, 581). L’ancienne dette est éteinte avec tous les accessoires qui la garantissaient, privilèges, hypothèques, gages, fidéjusion etc. (art. 1134) et remplacée par celle nouvelle, contractée à sa place; ainsi, elle figure à juste titre parmi les façons d’extinction des obligations. Ulpian disait dans le même sens (L. 1, Pr., Di., 46, 2, *De novationibus et delegationibus*).”

³ D. 1.8. *De obligationibus et actionibus*; 44.7: *Qui alieno nomine obligatur, fidejutor vocatu*, avec correspondant, ensuite dans l’art. 2011, Code civile napoléonien et dans l’art. 1652, Code civil roumain originaire: Celui qui garantit une obligation s’oblige envers le créateur d’accomplir lui-même l’obligation que le débiteur n’accomplit pas (avec référence aux art. 944, 946, 1662 et les suivants du Code civile), selon ALEXANDRESCO, Dimitrie. Op. cit., Vol. 10, p. 116.

⁴ Cavere, caution, accord, assurance.

⁵ ALEXANDRESCO, Dimitrie. Op. cit., Vol. 7, p. 43.

differentia specifica,⁶ *genus et species*, dans un mot, le bon sens et le sens commun en *common law*). De cette façon, est apparue la première forme d'un courant philosophique juridique qu'aujourd'hui, nous l'appelons *transformisme judiciaire*.

La position de la justice en tant que valeur sociale s'améliore, et celle des rapports contractuels, notamment dans le cadre des relations commerciales, de grande envergure et avec une certaine constance au fil du temps, on offre des supports de sauvegarde dans les moments d'impasse entre le créancier (*reus credendi*) et le débiteur (*reus debendi*), dans leur postures de requérant (*actor, petitor*) et, voire, accusé (*reus*).

Tout d'abord, la transformation des obligations positives, civiles, en obligations naturelles, en témoignent, en certaines conditions. La plus intéressante sous l'aspect de la philosophie juridique européenne est cette duale caractéristique d'une obligation primaire: le droit subjectif du créancier ne périclète que par sa réalisation, mais le paiement est prescrit dans un temps prédéterminé par la loi. Autrement dit, l'État romain nous assiste dans la réalisation de l'obligation à condition qu'on respecte l'obligation en tant que citoyen d'être diligent, vigilant, non *ad vitam aeternam*: *Vigilantibus, non dormientibus jura scripta sunt*; c'est pour les vigilants et pas pour les endormis que ces lois ont été écrites...

Même ainsi, le débiteur reste débiteur et, il aura, dans le futur, une étincelle de conscience et va porter sa dette par paiement volontaire, nous allons accorder à vous aussi, créanciers indolents, l'exception de non-réversibilité du paiement volontairement fait. C'est une perspective transformiste intéressante en double sens. De plus, tout comme Reinhard Zimmermann⁷ et

⁶ Pour cela, j'utilise souvent la métaphore du Dieux qui, à l'occasion de la première rencontre d'Adam, lui établit par un commandement, la première obligation, celle de devenir pas seulement un homme ordinaire, mais un homme de science, un scientifique, par l'accomplissement d'un gigantesque fardeau, celui de dénommer tout être vivant, plantes et animaux trouvables dans le jardin paradisiaque d'Éden... C'est l'opération scientifique primaire et ultime à la fois: définir les entités et les phénomènes, par *genus proximum et differentia specifica*... (Voir, Genesis, 2:20: bbe And Adam gave names to all cattle, and to the fowl of the air, and to every beast of the field; but for Adam there was not found an help meet for him. / Isg Et l'homme donna des noms à tout le bétail, et aux oiseaux des cieux, et à toutes les bêtes des champs. Mais pour Adam, il ne trouva pas d'aide qui lui correspondit.). – In: *English French Bible No 1*. Trad. Louis Segond. Maxi-livres, 1910, 2002, p. 12).

⁷ ZIMMERMANN, Reinhard. La loi des obligations. Fondements romains de la tradition civil, Jura, Le Cap, Wetton, Johannesburg, 1992, p. 7: En outre, un naturalis obligatio pourrait

Garsonnet et les instances civiles modernes le retiennent, dans la tradition du droit romain classique, les obligations naturelles peuvent aussi être renouvelées parce qu'elles aussi peuvent changer de nature et ne peuvent pas être garanties par la "fidéjussion, hypothèque, gage etc, et non plus confirmées ou ratifiées, parce que la ratification ou la confirmation ne change pas la nature de la dette", comme D. Alexandresco le disait, en accord avec les normes justiniennes[...] ⁸; de moins encore, dans le Pays Roumains du début du XIXème siècle, même si le problème est controversé, les obligations née des jeux d'argent ou paris, "tractiruri" ou de hasard ("le jeu de cartes qui "rend nu", comme la blague, *ghiordumul*, *otusbirul*, *albitfeiul*, toute sorte de "jeu qui rend nu" avec des gros montants") auraient pu être novées ⁹.

De cette manière, la matière si rigide autrefois, de l'extinction des obligations, notamment, à travers les paiements (*De solutionibus*) a connu une expansion qui ne cesse aujourd'hui non plus à agrandir ses frontières, jusqu'à ce que, par amour envers le jeu économique, essentiellement contractuel, les états

faire l'objet d'une novation, il pourrait être utilisé pour compenser une réclamation d'un débiteur (Ulpian, D. 16, 2, 6, mais voir Buckland / Stein, p. 552; *Fensham v. Jacobson* 1951, 2, SA 136, T, à 137H–138F) et pour garantir son exécution, une caution peut être donnée ou une caution peut être fournie (cf. par exemple Gaius, 111, 119a; BURGE, William. Commentaries on the Law of Suretyship: and the Rights and Obligations of the Parties Thereto: and Herein of Obligations in Solido, Under the Laws of England, Scotland, and Other States of Europe, the British Colonies, and United States of America, and on the Conflict of Those Laws. London, William Benning, 1849, p. 7).

⁸ Justinian, *Digesta*, Liber XLVI, Titulus secundus, De novationibus et delegationibus, 1, Definitio atque aetymologia novationis, Domitius Ulpianus, *lib. 46 ad Sabinum*, pr.: *Novatio est prioris debiti in aliam obligationem vel civilem vel naturalem transfusio atque translatio: hoc est, cum ex praecedenti causa ita nova constituitur, ut prior perimatur. Novatio enim a novo nomen accepit, et a nova obligatione.* ("La novation est la transfusion et la translation d'une première dette en une autre obligation ou civile ou naturelle, c'est-à-dire lorsque d'une cause précédente on en établit une nouvelle, tellement que la première soit anéantie. Car novation se dérive de nouveau et de nouvelle obligation."), apud LES CINQUANTE livres du Digeste ou Des Pandectes de l'empereur Justinien. Traduit en français M. Hulot. Metz, Behmer et Lamort ; Paris, Rondonneau, 1804. Tome VII. (*Nota bene!*, l'année de la promulgation du *Code civil des français*, le soi-disant *Code Napoléon...*), p. 113.

⁹ ALEXANDRESCO, Dimitrie. Op. cit., Vol. 10, p. 83 ss.: "Telles obligations ne peuvent pas être l'objet d'une transaction ou d'un compromis (Baudry et Wahl, Jeu et pari, 133, 134 et Transaction, 1267). Vu qu'elles ne peuvent pas être cédées, le débiteur n'est pas obligé à payer sa dette au cessionnaire, et ce dernier, en manque de pouvoir agir contre le débiteur, n'a aucun recours contre le cédant. L'exception que l'accusé peut opposer à l'action fondée sur une obligation née du jeu ou pari, étant relative au fond de l'affaire, peut être opposée dans n'importe quel état le procès se trouve. Elle peut donc être opposée pour la première fois en appel, et même devant la Cour de Cassation, elle portant intérêt, selon quelques uns, à l'opinion publique, vu que par des raisons d'ordre public ils ont déterminé le législateur à arrêter les jeux ou les paris (Abry et Rau, IV, § 386, p. 575, ed. A 4-a). Il ressort de tout ce qui précède que les juges peuvent et ils sont même obligés à enlever cette exception d'office, si l'accusé ne l'enlève pas lui-même (Laurent, XXVII, 201, Planiol, II, 340 și 2332 etc.)."

et leurs contribuables, les clients des banques, aident les banquiers, en leur prêtant dans l'évidence de l'insolvence (*insolvere*), pour qu'il n'arrivent pas à la faillite...

Toutes ces formes novatrices, adaptatives, "flexibles", d'exécution des obligations par des paiements impropres, c'est justement comme ça qu'elles ont été dénommées dès le début: *solutio impropria*, pour rester dans un cadre contractuel, ou néo-contractuel, avec des nouveaux arrangements, sans recourir aux effets primaires radicaux, concentrés dans le paiement général pure et simple – *solutio propria*. Entre celles-ci, se trouvent: les novations, les acceptilations, les litis-contestations, *confusio*, *concursus causarum* (le concours entre les titres, la dation en paiement – *datio in solutum* etc. etc.)¹⁰

Sur le canevas du même principe de nature "interventionniste" dans le contrat, dans le sillage de la philosophie juridique née du principe *Impossibilium nulla obligatio est, nulla tenetur*¹¹, si visible dans le cas de force majeure et dans celui fortuit¹², comme un palliatif nécessaire, et malgré le fait que souvent a été considérée immorale à cause de la propension vers des rapports usuraires, est apparue à Rome pendant l'Époque classique l'antichrèse (*antichresis*, *antixrysin*), en qualité de garantie réelle (en fait, droit réel accessoire, de garantie, sur le bien d'autrui, *jura in re aliena*, mais ça c'est un autre thème de recherche[...] ¹³), à côté de *pignus* (gage), *fiducia* (fiducie ou garantie

¹⁰ ZIMMERMANN, Reinhard. Op. cit., p. 758: "*Solutio propria, in praecisa forma et specie obligationis* (Coing, p. 431), to use the terminology of the European *jus commune*, has always been, and still is, the most important way of terminating obligations. *Datio in solutum* and release have been mentioned as two forms of what was usually referred to as *solutio impropria*. But there was a whole variety of further situations which entailed the extinction of an existing obligation. *Novatio* was one of them: the old *obligatio* was translated into a new one (always a stipulation), with the effect that the former fell away *ipso jure* (Ulpian, *Dig.* XLVI, 2, 1; also, Gaius, *Inst.* II, 176).

¹¹ Justinian, *Digesta*, Libro L, Titulus XVII *De diversis regulis juris antiqui*, 185, Celsus: *De impossibilibus: Impossibilium nulla obligatio est* (On ne s'oblige pas par la promesse de choses impossibles).

¹² *Casum fortuitum definimus omne quod humano coepto praevideri non potest, nec cui praevisio potest resisti.*

¹³ CIUCĂ, Valerius M. Drept roman. Lecțiuni. Vol. I. Editura Universității "Alexandru Ioan Cuza". Iași, 2014, p. 550–551: "On procède de cette façon grâce aussi à la façon où l'institution des assurances réelles ont évolué. Ainsi, si au début on l'imaginait comme un véritable transfert assureur de la propriété sur la caution (la propriété étant un droit réel total), à la fin de l'Époque Classique et dans l'Époque Postclassique, déjà son image s'était modifiée radicalement: sur la caution le créancier n'avait qu'un droit limité de disposition dans le sens de la possibilité de vendre le bien pour se satisfaire avec la couverture de la créance du prix obtenu (la différence de prix appartient au propriétaire *de jure*, c'est-à-dire au débiteur. / De plus, il a été possible d'imaginer une caution sans la dépossession du

proprement-dite) et *hypotheca* (hypothèque). Les *Digestes* de Justinien la mentionne, avec le traitement juridique afférent, dans le XIII^e Livre¹⁴.

Cet usage ou “fructification” réciproque (conformément au sens original, grec, du terme antichrèse) statué par un pacte *post factum* (*antichresis pactio*), ajouté au rapport de créance initial, permettait à un créancier hypothécaire de conserver ce rapport de créance là, en obtenant du débiteur en difficulté en ce qui concerne le paiement des intérêts afférents au crédit obtenu un droit d'exploitation du bien hypothéqué de façon qu'il opère une juste compensation conventionnelle (*compensatio*), comme si le débiteur *quasi-insolvable*, aurait transmis au créancier hypothécaire, *post festum*, la possession du bien hypothéqué (*usus et fructi perceptio*). Ce n'est pas une véritable *acceptilatio* ancienne avec son afférent paiement imaginaire (*veluti imaginaria solutio*) des contrats conclus sur la base de stipulations prétoriennes (*stipulatio*), novatrices elles-mêmes et très utiles (pour vaincre l'ancien principe formaliste *Ex nudo pacto actio non nascitur, non oritur*),¹⁵ de l'arsenal de créativité d'Aquilius C. Gallus (l'auteur de la formule de l'acceptilation¹⁶, dans sa qualité de prêteur en 66 *ante Christum*, et bon ami de Cicéron).

débiteur. Il s'agit de *hypotheca*, mais (*Nota bene!*), une caution ayant pour objet des biens (généralement) très valeureux.”

¹⁴ Justinien, *Digestorum seu Pandectarum*, XIII, VII, 33, *De antichresi*: “Marcianus I.S. ad form. hypoth. / Si pecuniam debitor solverit, potest pigneraticia actione uti ad recipiendam *antixrysin*: nam cum pignus sit hoc verbo poterit uti.” (Si le débiteur a payé, il pourra intenter l'action du gage contre son créancier, à l'effet de se faire rendre un gage dont il lui avait donné la possession et l'usage. Car, comme c'est un véritable gage, il n'aura pas besoin d'une action différente de celle-ci); LES CINQUANTE livres du Digeste, cit., p. 305 (Voir aussi supra n. 8).

¹⁵ ZIMMERMANN, Reinhard. Op. cit., p. 90: “Ainsi, des stipulations ont été régulièrement utilisées pour renforcer un prêt (et ajouter certaines clauses accessoires à une nouvelle (*novatio*), faire un don ou promettre une aube, acheter une quantité spécifique de biens non identifiés (...)) ou de donner des garanties spécifiques (...): la *cautio usufructuaria*, les avertissements *rei uxoriae* ou *rem salvamavant*, le *stipulatio duplae*, le *cautio damni infecti* ou le *cautio judicatum solvi*, pour n'en citer que quelques-uns.

¹⁶ Justinien, Dig., Liber XLVI, Titulus IV (*De acceptilatione*), 18.1: “*Eius rei stipulatio, quam acceptio sequatur, a Gallo Aquilio talis exposita est: " quidquid te mihi ex quacumque causa dare facere oportet oportebit praesens in diemve, quarumque rerum mihi tecum actio quaeque adversus te petitio vel adversus te persecutio est eritve, quodque tu meum habes tenes possides: quanti quaeque earum rerum res erit, tantam pecuniam dari stipulatus est Aulus Agerius, spondit Numerius Negidius. Quod Numerius Negidius Aulo Agerio promisit spondit, id haberetne a se acceptum, Numerius Negidius Aulum Agerium rogavit, Aulus Agerius Numerio Negidio acceptum fecit.”* Voir LES CINQUANTE livres...cit. Tome septième, p. 165: “Telle est l'exposition de la formule imaginée par Aquilius Gallus, pour une stipulation suivie d'une acceptilation: “Tout ce que vous devez ou devrez me donner ou me faire pour une cause quelconque, soit maintenant, soit à partir d'un certain jour, pour lesquelles choses j'ai ou j'aurai contre vous à diriger une action, une demande, une poursuite, ou bien ce qui est mien, et que vous avez, tenez, possédez, tout le prix que vaut

L'idée centrale, non-encouragée dans l'ancien droit formaliste et légaliste, c'était la suivante: le contrat est un acte juridique flexible; ce qui est fait par les hommes, c'est toujours par eux qui peut être transformé [...] Voilà, ainsi, en faisant son apparition, même dans l'état auroral de l'Époque Classique romaine, dans le premier siècle a. Cr. une nouvelle philosophie juridique, irrévérencieuse envers le formalisme et, bien sûr, plus anthropocentriste, plus "humaniste" *avant la lettre*.

Certes, tout comme le professeur de Iași de droit romain le montrait, membre de l'Académie Roumaine, Ștefan G. Longinescu, grâce à l'acquisition de la possession concernant le bien hypothéqué, le propriétaire-débiteur, étant désavoué par son bien, avait des difficultés plus grandes pour obtenir des ressources afin d'élever sa dette, tandis que le créancier, d'habitude, bancaire, voyait son patrimoine renforcé par la fructification de la garantie.¹⁷

Malgré le caractère discutable de cet accord postcontractuel, par un pacte spécial, l'antichrèse, en tant que forme de mobilité obligationnelle a été acculturée, sur le canevas du modèle européen féodal (*vivum vadium*, c'est-à-dire vivante, promis désistement), même dans le jeune système anglo-saxon de droit de l'époque médiévale. Sous les dénominations telles que *mortgage*, ou, plus expressif encore, *live pledge*, l'herméneute des principes du droit romain en connexion avec les formules judiciaires du droit anglo-américain, dans la personne du romaniste William Burdick (*There may be at the same time upon the same piece of land a mortgage (hypotheca) in favor of one creditor, and an agreement of antichrists in favor of another creditor*)¹⁸, sont hébergées plusieurs règles qui sanctionnent les volontés post-contractuelles des parties, telle que l'acceptilation ou l'antichrèse, "en humanisant", ainsi, le droit.

Dans le droit roumain, l'antichrèse a été sanctionnée même par notre Code civil originaire, celui du 1864 (l'art. 1697-1703). Plus tard, en pleine

chacune de ces choses, Aulus Agérius a stipulé qu'on lui donnerait cette valeur: Numérius Nigidius la promis. Et ce que Numérius Nigidius a promis à Aulus Agérius, Numérius Negidius a demandé à Aulus Agérius s'il le tenait pour reçu, et Aulus Agérius a consenti l'acceptilation à Numérius Negidius."

¹⁷ LONGINESCU, Ștefan G. Elemente de drept roman. Vol. 2. Bucarest, Librăriei Socec, 1922, p. 272.

¹⁸ Pickersill v. Brown, 7, La. Ann. 297, 314, apud BURDICK, William L. Les principes du droit romain et leur relation avec le droit moderne. Rochester ; New York, The Coat Co-Operative Publishing, 1938, p. 383: "[...] les hypothèques ont priorité les unes sur les autres selon l'ordre dans lequel elles sont déposées".

époque de la monarchie constitutionnelle interbélifique, par la force d'une loi spéciale (en fait, par l'art. 4 de la *Loi contre l'outrage*, du 2.IV.1931), l'antichrèse a été supprimée pour des raisons d'immoralité, grâce à la tendance de devenir un instrument outrageant, préjudiciable pour le système bancaire [...] Aujourd'hui non plus, tout comme on affirmait dans un autre contexte, l'antichrèse n'a pas le "droit de cité" dans la législation roumaine.

Ce n'est pas de même dans le système du droit civil français où, modernisé, à cet instrument adaptatif du contrat on a trouvé un rôle utile dans "l'écosystème" des réglementations normatives de droit privé, sur la bonne tradition romaine. Par l'art. 2085-2091 du Code civil français, on établit:

"1) les formes acceptables sous l'acception de *instrumentum* (seulement par un inscrit authentique ou par des actes ou signature privée);

2) le contenu juridique, sous l'acception de *negotium* (les droits et les obligations du créancier antichrésiste);

3) les effets des pactes d'antichrèse entre les parties;

4) les effets des pactes envers les tiers;

5) l'interdiction du pacte commissaire en cas d'impossibilité de paiement par le propriétaire débiteur des montants dus à l'échéance (autrement dit, le créancier antichrésiste peut désirer l'expropriation du débiteur seulement par les voies prévues par la loi) ce qui, dans la vision argumentée de l'instance suprême française, ne peut pas, par analogie, être extrapolé à d'autres causes ou figures juridiques similaires à l'antichrèse¹⁹."

Mais, la plupart des nouvelles figures juridiques ou, mieux dit, des techniques de "flexibilité contractuelle", *avant la lettre*, ont été importées dans le droit romain classique sur la voie "royale" des novations, terme aussi révélateur que possible; *novatio*, *novationis*, rénovation, renouvellement, mise à jour, modification, changement conformément aux nouvelles circonstances, adaptation, désir de renouveler, *animus novandi* etc.

¹⁹ La dépossession du débiteur est de l'essence du contrat d'antichrèse. Ne peut ainsi être qualifiée l'opération comportant un prêt et une promesse de vente souscrite le même jour au profit du prêteur qui, dans l'hypothèse où la dette ne serait pas payée à l'échéance, avait la faculté d'acquérir pour un prix équivalent au montant du prêt, les promettants s'interdisant de donner leurs immeubles en location, pendant la durée de la promesse: en effet, les promettants demeurent en possession de leurs immeubles et continuent à en percevoir les fruits (Civ. 1-re, 22 mars 1966, Bull. civ. I, n° 201. Dans le même sens – même affaire: Civ. 1-re, 22 mars 1966, Bull. civ. I, n° 203; 26 déc. 1961, D.1962, 381, note Voirin), apud Code civil. Dalloz, 1991–1992, p. 1490.

Ulpien définit la novation comme “la transfusion et le transfert d’une dette antérieure”. Ce transfert a un double effet: il crée d’abord une obligation nouvelle, et c’est de là que vient le mot novation: il éteint ensuite l’obligation antérieure.²⁰ (...) Partout ailleurs l’effet extinctif peut se produire sans l’effet créateur; ici, au contraire, il en est la conséquence nécessaire et c’est le trait essentiel de la novation.

Cette double singularité s’explique historiquement (anciennement, un créancier ne pouvait se faire promettre par son débiteur ou par un tiers ce qui lui était déjà dû: *Bis de eadem re ne sit debitum* – Pomponius, Dig. XLV, 1, 18; *Qui bis idem promittit ipso jure amplius quam semel non tenetur* – Pomponius, Dig. XLV, 1, 25). (...) pour faire une novation, il faut soit un changement de créancier ou de débiteur, soit, si les parties restent les mêmes, quelque chose de nouveau).

La novation remonte à une époque où la forme des obligations avait une importance décisive: elle a eu forcément une portée limitée qui n’a guère été élargie avant la fin de l’époque classique (c’est en se plaçant au point de vue de la conception antique que l’on s’explique le rapprochement fait par Gaius – Inst. III, 180 – entre la novation et la *litis contestatio*)²¹. Alors, seulement on voit poindre l’idée que la novation est un mode de satisfaction analogue à la dation en paiement, et que l’on peut promettre *aliud pro alio*.²²

Sur la voie des pactes, les règles strictes de l’interprétation des contrats, si limitatives dans leurs formes originales, ont été élucidées au bénéfice, mis à jour, des parties contractantes.

Deux grands principes nous attirent l’attention.

²⁰ Ulpien, D., XLVI, 2.1.pr.: “*Novatio enim a nova nomen accipit, et a nova obligatione; ibidem: Cum ex praecedenti causa ita nova constituatur ut prior perimatur [...]*”

²¹ Ici on devrait, peut-être, expliquer que, dans le droit ancien et classique formulaire, le procès en soi était une *quasi novatio*, puisque la décision répondait à l’obligation, pas à la loi et, comme telle, elle était constitutive et pas déclarative de droits, tout comme elle est consacrée dans le procès moderne civil; autrement dit, jus civile était plus “privatiste” que le légaliste-formaliste droit civil moderne, ce dernier étant plus proche de “l’esprit étatiste que des rapports privés, contractualisés (fait visible, d’ailleurs, aussi dans la matière des délits *acquiliens*, mais aussi de ceux civils). Voir aussi ALEXANDRESCO, Dimitrie. Op. cit., Vol. 6, p. 663, où il cite aussi Garçonnet, Procédure civile, II, p. 262 ss.

²² GIDE, Paul. Études sur la novation et le transport des créances en droit romain. Paris, L. Larose, 1879; CUQ, Edouard. Les institutions juridiques des Romains. Vol. 2. Le Droit Classique Et Le Droit Du Bas-Empire. Paris, Librairie Plon, 1902, p. 520–521, avec les notes 4, 5 et 2.

Tout d'abord, sur le plan des exceptions, non des actions, *Ex nuda pacta actio non nascitur, non oritur*²³; mais, exceptionnellement, au nom de "l'équité naturelle", comme Ulpianus²⁴ le disait, et avec la prévoyance en tant que formes conventionnelles dans le cadre des contrats innommés, ce passage (*transit*), cette assimilation des contrats, des conventions génériques, théoriquement, aurait pu avoir lieu, mais, en réalité, ni le droit de Justinien n'a pas procédé à cette assimilation non plus (*transit in nomen contractus*); cependant, en certaines conditions, les pactes ont subsisté et on produit leurs effets "pacifiques" et "novateurs" ou de "transfert", de cession (*cessio*) d'une obligation vers un autre créancier ou un autre débiteur que ceux originaires, au nom d'un principe bipolaire, sauveur du consentement primaire: *Pretius ut valeat quam ut pereat contractus* principe repris, à côté de ceux préférés en cas de doute pour celui qui s'oblige, aussi, dans les législations modernes²⁵; c'est un principe herméneutique, supporteur de l'application immédiate de la loi nouvelle, qui a été extrapolé aussi à la *legem inter partes* (contrats) – *Ut res magis valeat quam pereat*; c'est un principe acculturé aussi en *common law*, *Equity follows the Law*, mais ici, *Nota bene!*, avec l'observation du principe de l'équité: les lois ne se conçoivent pas pour tricher... *Equity does not allow a statute to be made*

²³ Justinien, *Digestorum seu Pandectarum*, Liber secundus, ad edictum, Titulus XIV, *De pactis*, § 4, Effectus pactorum. Domitius Ulpianus: *Sed cum nulla subest causa propter conventionem, hic constat non posse constitui obligationem. Igitur nuda pactio obligationem non parit, sed parit exceptionem* ("Mais, lorsque la convention n'a pas encore eu d'exécution d'aucun côté, il est constant qu'il n'y a point d'obligation. Ainsi le simple pacte ne produit point d'obligation civile, il donne seulement une exception", apud LES CINQUANTE livres du Digeste ou des Pandectes de l'empereur Justinien, cit., Vol. 1, 1803, p. 158.

²⁴ Justinien, *Digestorum seu Pandectarum*, Liber secundus, ad Edictum Titulus XIV, *De pactis*, pr., Domitius Ulpianus: *Hujus edicti aequitas naturalis est. Quid enim tam congruum fidei humanae, quam ea, quae inter eos placuerunt, servare?* § 1. *Pactum autem a pactione dicitur: inde etiam pacis nomen appellatum est.* § 2. *Et est pactio, duorum pluriumve in idem placitum consensus...*, apud LES CINQUANTE livres du Digeste ou des Pandectes de l'empereur Justinien, cit., p. 151 ss.: "Cet édit est très-conforme à l'équité naturelle: car il n'y a rien de plus convenable à la bonne foi qui doit régner parmi les hommes, que d'observer ce dont on est convenu. 1. Le mot pacte tire son origine de *paction*. Le mot paix a aussi la même étymologie. 2. La *paction* est le consentement de deux ou plusieurs personnes sur le même objet.)"

²⁵ *Exempli gratia*: art. 1157 du Code civil Napoléon: "Lorsqu'une clause est susceptible de deux sens, on doit plutôt l'entendre dans celui avec lequel elle peut avoir quelque effet, que dans le sens avec lequel n'en pourrait produire aucun" et l'art. 1162 du même code déclare: "Dans le doute, la convention s'interprète contre celui qui a stipulé et en faveur de celui qui a contracté l'obligation." Le code civil roumain originaire, celui du 1864, les a reprises par l'acculturation des dispositions françaises. Voilà l'art. 978: "Lorsque une clause a deux sens, elle s'interprète dans le sens qui peut avoir un effet, et pas dans celui qui n'en pourrait produire aucun"; voire l'art. 983: "Quand on a un doute, la convention s'interprète en faveur de celui qui s'oblige". Les principes sont conservés aussi dans l'actuel Code civil roumain.

*an instrument of fraud [...]*²⁶; *exempli gratia*: “**Règles d’interprétation** dans la **common law** américaine: COUP (principe, n.m., VMC) 1. Une loi ne peut pas être interprétée en dehors de son texte. / RIPOSTE PROMPTE (exception, n.m.) / 1. Pour atteindre son but, une loi peut être étendue au delà de son texte (la méthode téléologique, n.m. VMC). / Coup (principe): 3. Les lois doivent être interprétées dans les limites du *common law*, et une loi qui confirme une norme de *common law* sera interprétée en concordance avec celui-ci. / Riposte (exception): 3. Quand une loi est en conflit avec les normes de *common law*, la loi prévaut, et dans le cas où une loi veut modifier toute une série de règles applicables à un certain sujet, la loi prévaut aussi par rapport au *common law*. (...) Coup (principe): 28. Quand la norme qui précède la condition qui la qualifie est formulée en termes généraux, la condition doit être interprétée strictement. Riposte (exception): 28. Non pas lorsque, par des raisons d’équité, il est nécessaire d’étendre la condition à des personnes ou à des situations, autres que celles auxquelles porterait une interprétation stricte de la condition.”²⁷

Deuxièmement, *Res inter alios acta aliis nec nocet, nec prodest, neque prodesse potest* (“Un acte conclu entre deux personnes ne peut ni porter fruit, ni nuire à un tiers qui est absent”), principe relativisé, à son tour, par la force de la cession, mais aussi par un autre principe, cette fois-ci, de la matière de la

²⁶ CIUCĂ, Valerius M. *Lecții de drept privat comparat: o introducere în hermeneutica organică a dreptului privat comparat. Argumente pentru o școală organică a dreptului sau hermeneutica organică a dreptului privat comparat. Izvoarele istorice și formale ale dreptului privat în registru comparativ. Vol. I. 2. ed., addenda, corrigenda et incrementa. Iași, Editura Fundației Academice AXIS, 2005, p. 267–268*: “Equity does not allow a statute to be made an instrument of fraud (le système d’équité ne conçoit pas qu’à travers la loi soit commise une fraude); la non instrumentalisation de la loi dans le sens de la fraude des intérêts d’une personne représente un constant de toutes les familles de droit civil; c’est une interdiction similaire à celle qui vise l’abus de droit; par l’extrapolation de ce principe aux conséquences de la prescription extinctive, par ex. le créancier auquel on a opposé l’exception de la prescription extinctive pouvait répliquer par une exception à l’exception (*exceptio exceptionis causa*) dans le sens que le dépassement du terme raisonnable de prescription est dû aux manœuvres dolosives, de tergiversation (par ex., promissions verbales ou actes faux), frauduleux, utilisés contre lui par le débiteur ou par un son délégué”, apud ZLĂTESCU, Victor Dan. *Drept privat comparat: teoria generală a comparației drepturilor. Geografia juridică. București, Oscar Print, 1997, p. 256 ss.*

²⁷ LLEWELLYN, Karl N. „Remarci asupra teoriei deciziilor în apel și a regulilor sau canoanelor conform cărora sunt interpretate legile”, fragment en *Vanderbilt Law Review*, Vol. 3, 1950, p. 401–406, apud Valentin Constantin (l’ami permissif de la reproduction de ces fragments en CIUCĂ, Valerius M. *Lecții de drept privat comparat*, cit., p. 272–276), Prof. dr. hab. auprès de Universitatea de Vest de Timișoara qui, aimablement et avec amitié, nous a permis de reproduire intégralement l’article de Llewellyn, comme il a été traduit et intégré dans le volume *Doctrină și jurisprudență internațională*, publié par l’auteur en 2004, Timișoara, Universității de Vest, p. 171–177.

transmission *mortis causa* du patrimoine: *Hereditas jacens sustinet personam defuncti*²⁸ (dans le miroir de la similarité, *similia similibus*, avec *Infans conceptus*²⁹...); en tout cas, ces dernières “hérésies” de principe portent atteinte à la définition dogmatique des obligations, prises sur la ligne historique: Gaius³⁰→Iulius Paulus³¹→Justinien³²; Julius Paulus lui-même accepte, par la voie d’une stipulation pour un autre, ou d’une promesse pour un autre, une relativisation du principe rigide *Res inter alios acta*... et, par celle-ci, il introduit aussi, dans la “cité du droit”, une forme d’assouplissement du contrat, d’adaptation, de transformation de cette figure juridique plutôt dans un cadre d’action et comportementaliste, que dans une “uniforme militaire” en pleine “marche”; chez lui, la prémisse reste la même, *Res inter alios acta*..., exprimée sous la forme *Verborum obligatio inter praesentes, non etiam inter absentes contrahitur*, mais, dans un paragraphe (*De obligationibus*³³) de ses *Sentences*,

²⁸ Domitius Ulpianus, D. 41.1.34.

²⁹ *Infans conceptus pro iam nata habetur, quotiens de ejus commodis agitur.*

³⁰ IG. 4.3: *In personam actio est qua agimus cum aliquo qui nobis vel ex contractu vel ex delicto obligatus est, id est cum intendimus dare, facere, praestare, oportere* (“L’action personnelle est celle par laquelle on agit contre quelqu’un qui a une obligation envers nous, c’est-à-dire, par lequel on entend de lui imposer de donner, de faire, d’exécuter quelque chose.”)

³¹ Julius Paulus, D. 44.7.3.pr.: *Obligationum substantia in quo consistit: Obligationum substantia non in eo consisiit, ut in quod corpus nostrum, aut servitutem nostram faciat: sed ut alium nobis obstringat ad dandum aliquid, vel faciendum, vel praestandum.* “La nature des obligations ne consiste pas à nous faire acquérir la propriété d’un effet ou d’un droit, mais à obliger quelqu’un à nous donner, à nous faire ou à nous répondre de quelque chose”, apud LES CINQUANTE livres du Digeste, cit. Vol. 6, p. 604.

³² Justinian, *Institutionum sev elementorum*, Liber tertius, Titulus XIV, De obligationibus, Obligationis definitio: *Nunc transeamus ad obligationes. Obligatio est juris vinculum quo necessitate adstringimur alicujus rei solvendae, secundum nostrae civitatis jura* (“Maintenant on doit traiter les obligations. L’obligation est un lien de droit qui nous impose la nécessité de payer quelque chose conformément aux droits statués par notre patrie.”)

³³ Julii Pauli, *Sententiarum receptarum ad filium*, Liber quintus, Titulus VII, De obligationibus, 2: *Verborum obligatio inter praesentiaes, non etiam inter absentes contrahitur. Quod si scriptum fuerit instrumento pomisisse aliquem, perinde habetur, atque si interrogatione praecedente reponsum sit. Interpretatio: Verborum obligatio ideo inter praesentes constare videtur, quia necesse est, ut is, qui aliquid redditurum se promittit, ad creditoris interrogatus fuerit “Istud dabis”? Ille respondet: “Dabo”. Si interrogatus fuerit: “Promittis”? Ille respondet: “Promitto”. Sed si scribat aliquis, se quamcumque summam redditurum, ita habetur, quasi ad interrogata responderit. Ideo ad redhibitionem secundum scripturae ordinem retinetur* (“Obligation par paroles ne se contracte qu’entre présents; mais si l’on a souscrit une promesse d’obligation à quelqu’un, ce titre vaudra comme si ayant été interrogé on avait répondu. – Interprétation: “Entre présents, pour qu’une obligation ait eu lieu, il faut absolument qu’elle résulte d’une certaine solennité de paroles, telles que le débiteur interrogé par son créancier, lui ait promis ce qu’il lui doit. Ainsi que lorsque le créancier a dit à son débiteur, vous me donnerez cela, et que le débiteur a répondu, je vous le donnerai; ou vous me promettez telle chose: je vous le promets. Si au contraire on écrit à un autre qu’on lui rendra une certaine somme, c’est comme si celui-là avait été interrogé et avait

introduit une somme d'exceptions à caractère stipulateur pour un autre; d'ici jusqu'à la consécration de l'assouplissement contractuel par des nombreuses autres figures juridiques du domaine des novations ce ne fut pas un grand chemin; la forteresse sacrosainte du contrat rigide d'autrefois et de la légis-actio attachée à chaque prétention, ou d'une formule stricte, est tombée sous l'avalanche des idées jus naturalistes, sous l'enseigne de l'équité (*aequitas*) et de la bonne foi (*bona fides*); le contrat, tout comme l'entier ensemble du droit romain classique, s'est vu psychologisé, subjectivisé, anthropomorphisé... c'est-à-dire, il a acquis un visage humain; plusieurs pactes transitoires ont compris des conventions modifiant les contrats de base ou même innovantes, conventions de transformation, soit grâce à des clauses contemporaines au moment de la conclusion du contrat – *in continenti* –, soit par des clauses ultérieures, ajoutées par les parties, suite à des nouvelles négociations – *ex intervallo* –); ici on se rappelle de certains pactes prétoriens, comme le pacte d'arbitrage (*receptum arbitrii*, une convention à travers laquelle les parties sollicitaient un *arbiter*, *bonus vir* renommé, incorruptible, pour trancher par la force de la sagacité leur litige), le pacte de conservation des biens par les transporteurs, les hôteliers, aubergistes (*receptum nautarum, stabulariorum, cauponum*), surtout selon *Legem Rhodiam de jactu*³⁴, le pacte bancaire (*receptum argentarii*, devenue, aujourd'hui, une opération en aval, de paiement par le dépositaire, à l'ordre du déposant, vers un tiers dans la nécessité du titre du paiement), le pacte à constituer (*constitutum debiti proprii* ou, par contre, *constitutum debiti alieni*³⁵, à la demande des parties impliquées dans un rapport

répond; il doit ce qu'il s'est engagé par écrit à payer”) apud LE TRÉSOR de l'ancienne jurisprudence romaine, ou Collection des fragments qui nous restent du droit romain, antérieur à Justinien; contenant 1^{er} les fragments de la Loi des Douze Tables, 2^{es} les fragments de Gaïus, traduits en français par P. A. Tissot, membre de la société académique des sciences de Paris, de l'Athénée de Vaucluse, de la société agricole et littéraire de Carpentras, etc.; suivis 3^{es} des codes grégorien et hermogénien, 4^{es} des fragments d'Ulpien, 5^{es} des sentences de Paul, aussi traduits en français par A. G. Daubanton, ex-juge de paix, avocat à la Cour impériale à Paris, auteur des Dictionnaires de tous les nouveaux codes, du Formulaire général des actes ministériels et de procédure, du Traité pratique du code d'instruction criminelle, etc. Aussi traduits en français par A. G. Daubanton. Metz, Lamort, MDCCCXI (1811), p. 253-254.

³⁴ *Julii Pauli Sententiarum receptarum ad filium*, Liber secundus, Titulus septimus, Ad legem Rhodiam, § 1: *Levandae navis gratia jactus commercium factus, omnium intributione sarciatur, quod pro omnibus datum est.*

³⁵ ZIMMERMANN, Reinhard. Op. cit., p. 512: “*Constitutum debiti* était similaire à *novatio* en ce sens que les parties *procédaient* à un changement assez significatif de leur obligation initiale; il n'a toutefois pas eu l'effet d'une novation, puisque l'action arising de l'obligation

conflictuel), le pacte de serment, pour éviter un procès compliqué (à travers *actio sive exceptio in factum ex jure jurando*), voire, par des conventions accessoires (*pacta adjecta*), mais avec validité déterminée par la sort du contrat principal.³⁶

Et, maintenant, nous allons nous concentrer sur les novations, parce que celles-ci nous apparaissent comme des véritables vecteurs des deux valeurs de l'humanisme juridique qui traverse notre travail comme un fil rouge: *aequitas et bona fides* sous l'égide tutélaire de la *Raison (Minerve)*. En même temps, les novations romaines anticipent le champ large des préoccupations juridiques d'aujourd'hui en ce que nous appelons génériquement le thème de "l'assouplissement", de "l'adaptabilité", de "l'incomplétude" ou de "l'imprévisibilité" dans la grande odyssée du contrat, notamment dans les rapports juridiques complexes et durables entre les partenaires contractuels traditionnels.

J'ai déjà mentionné le fait que, dans le droit romain classique, la cristallisation et la structuration des modes généraux (*ipso jure et per exceptionem*) et de ceux indirects (la cession du rapport obligationnel), à travers *procuratio in rem suam* (forme simplifiée de novation, mais limitative³⁷, à travers

initiale a continué d'exister (cf. Ulpian, *Dig.* XIII, 5, 18, 3), mais pourrait être atteint avec un *exceptio* aussi longtemps que la nouvelle date d'échéance n'était pas arrivée. Le fait que l'obligation initiale n'ait pas été éteinte revêtait une importance particulière pour le *constitutum debiti alieni*."

³⁶ Justinian, *Digesta*, Liber secundus, Titulus XIV, 7, Domitius Ulpianus, *Efectus pactorum*, § 5: *...Idem Marcellus scribit, et si in tutelae actione convenit, ut maiores, quam statuta sunt, usurae prastentur, locum non habebit, ne ex pacto nascatur actio: ea enim pacta insunt, quae legem contractui dant, id est, que in ingressu contractus facta sunt. Idem responsum scio à Papiniano, et si post emptionem ex intervallo aliquid extra naturam contractus conveniat, ob hanc causam agi ex empto non posse: propter eandem regulam, ne ex pacto actio nascatur: quod et in omnibus bonae fidei judiciis erit dicendum. Sed ex parte rei locum habebit pactum: quia solent et ea pacta, quae postea interponuntur, parere exceptiones....* ("Marcellus dit de même, que si durant la gestion de la tutelle, on convient de payer les intérêts au delà de ce qu'ils sont fixés, cette clause ne donne point lieu à une action ; parce que l'action n'est produite que par les pactes qui ont été compris dans le contrat. Papinien pense aussi que si après la vente, on convient d'une chose qui ne fasse pas partie du contrat, il n'en résultera pas une action provenant de la vente ; par la même raison qu'un simple pacte ne produit point d'action. On peut en dire autant de toutes les actions de bonne foi. Cependant le pacte aura en partie son effet, parce que les pactes ajoutés par la suite à un contrat donnent des exceptions."), apud LE TRÉSOR de l'ancienne jurisprudence romaine..., cit, p. 187–188.

³⁷ ZIMMERMANN, Reinhard. Op. cit., p. 60-61: "Cela s'appelait une *delegatio obligandi* et avait un effet novateur dans la mesure où la nouvelle obligation remplaçait l'ancienne. "*Quod Titio* (Titius étant l'ancien créancier) *debet, mihi dari spondesne?*" Serait la question du nouveau créancier, et avec la réponse du débiteur, ~ *spondeo* ~, la transaction a été conclue. La nouvelle obligation avait exactement le même contenu que l'ancienne (*idem debitum*), mais contenait un nouvel élément (*novum*), à savoir le changement de créancier. (...) désavantages: la forme de *stipulatio* (...), la coopération du débiteur (...) toutes les sûretés accessoires (...) caduques (...) / Ces inconvénients pourraient être évités si le (vieux) créancier désignait une personne pour qu'il voulait transférer la créance en sa

la *quasi*-tradition de la créance et à travers des novations –de créateur ou de débiteur–), comme modalités effectives d’extinction des obligations. Ici, ce n’est pas l’espace opportun pour nous occuper de tout ça. La synthèse serait trop large. Nous allons nous concentrer sur les novations, parce que celles-ci nous apparaissent comme des véritables vecteurs des deux valeurs de l’humanisme juridique qui traverse notre travail comme un fil rouge: *aequitas et bona fides* sous l’égide tutélaire de la *Raison* (Minerve). En même temps, les novations romaines anticipent le champ large des préoccupations juridiques d’aujourd’hui en ce que nous appelons génériquement le thème de “l’assouplissement”, de “l’adaptabilité”, de “l’incomplétude” ou de “l’imprévisibilité” dans la grande odyssée du contrat, notamment dans les rapports juridiques complexes et durables entre les partenaires contractuels traditionnels.

La cession de créance et, implicitement, ses formes de novation, compromettait le principe de la relativité du contrat (*Res inter alios acta, aliis nec nocet, nec prodest*). Mais, étant des formes consensuelles, conventionnelles d’adaptation du contrat de base, tout au long de l’Époque Classique romaine, celles-ci ont été acceptées, par des sources formelles prétoriennes et, plus tard, par des constitutions impériales aussi.

“Dans le droit de Justinien, le cédant permettait au cessionnaire, seulement un mandat dans son propre intérêt (*procuratio in rem suam*) qui, comme tout mandat, souffrait d’un manque essentiel; le professeur Jean Carbonnier, un de mes maîtres que je vénère, affirme: le cessionnaire restait à la disposition du cédant³⁸, à la différence de la notification moderne par laquelle le cessionnaire est investi avec la mise en possession sur le titre contre le débiteur cédé.”³⁹ Pratiquement, le professeur Carbonnier reprend une partie de la démonstration qu’il a fait, à l’aube des années 30 du dernier siècle, Paul Huvelin qui, en essence, indique huit éléments de différenciation entre ce protomodèle de cession (*procuratio in rem suam*) et la future novation de créateur, comme:

qualité de cogneur ou procureur in rem suam (cf. Gaius, IV, 83), c’est-à-dire qu’il autorisait le cessionnaire à poursuivre le débiteur en son propre nom (*Sine vero hac novatione non poteris tu o nomine agere, sed, ex persona mea quasi cognitor aut procurator meus experiri*: Gaius, II, 39) et de garder tout ce qu’il a reçu. Ainsi, le cessionnaire a agi in rem suam “Pour son propre bénéfice.”

³⁸ Voir, en ce sens, CARBONNIER, Jean. Droit civil. Tome IV. Les obligations. Thémis, Droit privé. Collection dirigée par Maurice Duverger. 20. éd., mise à jour. Presses Universitaires de France, 1995, p. 521.

³⁹ CIUCĂ, Valerius M. Drept roman, cit., Vol. 2, p. 602.

procuratio in rem suam concernait les créances exigibles (agrandissant les émotions du procureur si elles étaient sous la modalité de la condition, ou du terme, grâce à la volatilité du cédent), fait pas trouvé dans la novatio; la *litis-contestation* après l'étape *in jure* rendait difficile le procès à la *procuratio*, à la différence de *novatio*, plus simple; de même l'obligativité de la présence du magistrat judiciaire, dans le premier cas; mais toutes les deux ont un rôle transformatif, adaptant (chez la *procuratio*, l'objet réel en droit de créance, la novatio, éventuellement, une action temporaire en une indescriptible, une intransmissible en une autre transmissible etc.); l'abolition de l'accord direct du débiteur dans le cas du mandat, avec sa mention chez la novation (c'est un sens de l'équité ici, d'ailleurs: "À qui est-ce que tu me remets?", "Qui sera mon nouveau créancier – maître?"...; ce fait a été corrigé dans le droit moderne⁴⁰); la novation était plus exigeante avec les conditions de la capacité juridique imposée par *jus civile*, tandis que le mandat, plus allégé (les interdictions expresses concernant les militaires, les femmes, certains estropiés sont devenues obsolètes aussi); dans le mandat judiciaire, le créancier avait une situation meilleure que le créancier nové, étant donné que l'objet du mandat n'était pas purgé par des préjudices-intérêts et des garanties personnelles ou réelles (*e.g.*, *pignus*, *fiducia*, *hypotheca*); enfin, pour équilibrer la balance, le débiteur cédé par *procuratio* conservait les exceptions originales, invocables contre le cessionnaire, fait non trouvé chez la novation de créancier.⁴¹

Un codicille naturel du mandat judiciaire (*procuratio in rem suam*), plus simplifié, raison pour laquelle, dans le temps, on a substitué, en l'envoyant en dessuétude, il a été la quasi-tradition de la créance, créée sur une formule possessoire (s'il avait été consacré, par la tradition de la propriété, *nudum dominium*, *mutatis mutandis*, il a été consacré aussi *nudum jus*). C'est une formule juridique toujours d'ordre administratif, ce qui avait généré toute une série d'actes juridiques valables aujourd'hui aussi, comme, par ex., le titre au

⁴⁰ *Exempli gratia*, apud CIUCĂ, Valerius M. Droit romain, cit., p. 611: L'Art. 1690, Code civil napoléonien: *Le cessionnaire n'est saisi à l'égard des tiers que par la signification du transport faite au débiteur; le deuxième paragraphe du même texte, le modèle de celui roumain, prévoit aussi: Néanmoins le cessionnaire peut être également saisi par l'acceptation du transport faite par le débiteur dans un acte authentique.*

⁴¹ HUVELIN, Paul. Cours élémentaire de droit romain. Publié et mis au courant par les soins de Raymond Monier. Paris, Librairie du Recueil Sirey, 1929, p. 316–317, apud CIUCĂ, Valerius M. Droit romain, cit., p. 607–612.

porteur, le titre nominatif, le titre à l'ordre, ce dernier, sousdivisé dans le billet d'ordre, la lettre d'échange et le chèque⁴², en tout ça étant plus dominant, pour l'assouplissement, plutôt le fond, la négociation, que la forme, la sécurité⁴³.

En cas de litige, la *quasi*-tradition de la créance était sanctionnée par des actions prétorienne utiles (*actio utilis*), non par des actions de droit stricte (*actio stricti juris*), ou par ceux de bonne foi (*actio ex fide bona*). Mais, tout comme Ulpianus mentionne, si le cessionnaire non avait pas acquis la créance qu'on lui avait promise par le cédent, il aurait pu, à côté de l'exception de dol (*exceptio doli*), à exercer le droit de créance par l'effet de la *quasi*-tradition instantanée et de la mauvaise foi du cédent débiteur (*quasi traditio*).⁴⁴

La littérature juridique enregistre plusieurs cas de quasitradition des créances, sanctionnées, surtout, par des constitutions impériales (des empereurs, comme, par ex: Antoninus Pius, Licinius Valerianus et Gallienus etc.)⁴⁵.

Enfin, la novation à travers le changement du débiteur, constituait, à son tour, "une forme indirecte de cession, ce qui exigeait l'existence d'un accord préalable de la part du créancier cédé, parce que celui-ci était directement intéressé par la personne du nouveau débiteur et de son degré de solvabilité"⁴⁶ Cette forme de malléabilité obligationnelle post-contractuelle a été acculturée,

⁴² L'art. 1689, Code civil napoléonien: *Dans le transport d'une créance, d'un droit ou d'une action sur un tiers, la délivrance d'opère entre le cédant et le cessionnaire par la remise du titre. En même sens*, l'art. 1391 du Code civile roumain originaire: "Au rétablissement d'une créance, d'un droit ou d'une action, la remise entre les cédentes et le cessionnaire se fait par la remise du titre", avec référence aussi aux art. 1132, 1318, 1393 sq. du même code, voire l'art. 1316 du Code civile actuel: la forme de la cession. "La cession du contrat et son acceptation par le contracteur cédé doivent être conclues dans la forme prévue par la loi pour la validité du contrat cédé."

⁴³ MACOVEI, Ioan. Dreptul comerțului internațional. Vol. I–II. București, C. H. Beck, 2006–2009, in integrum.

⁴⁴ Justinian, *Digestorum seu Pandectarum*, Liber secundus, De pactis, Titulus XIV, 16, proemium, De pacto emptoris hereditatis: *Si cum emptore hereditatis pactum sit factum, et venditor hereditatis petat, doli exceptio nocet: nam ex quo rescriptum est a divo Pio, utiles actiones emptori hereditatis dandas; merito adversus venditorem hereditatis exceptione doli debitor hereditarius uti potest.* ("Si l'héritier a vendu ses droits successifs, et qu'après avoir fait son arrangement avec l'acheteur, il veuille demander une dette de la succession, le débiteur pourra se servir contre lui d'une exception tirée de sa mauvaise foi. En effet, depuis le rescrit de l'empereur Antonin, les actions utiles passent à l'acheteur de la succession; ainsi le débiteur peut avec raison opposer au vendeur l'exception de la mauvaise foi."), apud LES CINQUANTE livres..., cit., p. 193.

⁴⁵ HUVELIN, Paul. Op. cit., p. 319–320.

⁴⁶ CIUCĂ, Valerius M. Drept roman, cit., p. 616, en se référant à HUVELIN, Paul. Op. cit., p. 322.

sur la ligne verticale de l'histoire par les systèmes de droit civile dans la modernité, en *BGB (Bürgerliches Gesetzbuch)*, mais de moins et seulement par une variété jurisprudentielle, dans les autres sous-familles de droit continentales-européennes.

Voilà comment, jetant du magma d'un « volcanique » droit romain classique, sur le canevas de la mutabilité, de l'assouplissement du contrat, nous sommes arrivés à accréditer, aujourd'hui, beaucoup de nouvelles figures juridiques à la court de la reine "*Legem inter partes*", soit qu'on parle de l'assouplissement du contrat de travail⁴⁷, ou qu'on parle de la nécessité du pliage flexible du juge sur la dernière volonté concordante des parties dans un contrat plus ancien, soit qu'on discute naturellement sur les clauses de *hardship*, des contrats commerciaux internationaux, qui sont devenus évidemment communs, soit qu'on aborde les si-dites "pratiques courantes", ou les "techniques modernes" de mutabilité ou adaptabilité, par des clauses expresses de modification, par des "indications fournies par les parties ou pour les parties" sans que le contrat soit affecté, soit qu'on invoque les clauses expresses de comportement contractuel en cas de changement radical des circonstances de contractations, et tout cela, sans tenir compte seulement du cas de force majeure ou de cas fortuite, soit qu'on parle de la rescision pour la lésion, soit qu'on introduit les tarifs et les barèmes flexibles⁴⁸, etc. etc.

Toutes ces formes modernes se sont nourries du relativisme de la philosophie juridique romaine de l'Époque Classique. Aujourd'hui, on appelle tout ça "clauses et clausules modernes, européennes". Autrefois, on les appelait, tout simplement, des stipulations légitimes, en vertu de l'esprit humaniste, conventionnaliste, libertaire, individualiste... *avant la lettre*...

⁴⁷ MERCKLING, Odile. Immigration et marché du travail: le développement de la flexibilité en France. Collection "Migrations et changements", no. 51. Paris ; Montréal, L'Harmattan & CIEI, 1998, in integrum.

⁴⁸ C'est bien de nous rappeler, ici, de cet ouvrage fondamental pour un juriste moderne, CARBONNIER, Jean. Flexible droit: pour une sociologie du droit sans rigueur. Paris, LGDJ, 1969, écrit avec tant de sagacité par le professeur français Jean Carbonnier, un véritable vadémécum et maître spirituel pour moi.

**ЗА ПРАВИЛАТА МАНДЕЛА –
РЕЗОЛЮЦИЯ № 70/175 НА ОБЩОТО СЪБРАНИЕ
НА ООН (A/RES 70/175)
И ГЕНЕЗИСА НА ТЕХНИТЕ ПРИНЦИПИ
ОТ РОМАНИСТИЧНА ГЛЕДНА ТОЧКА* (НА
БЪЛГАРСКИ ЕЗИК)**

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Резюме: Правилата за третиране на лишените от свобода са всеобщо признати минимални стандарти за управление на пенитенциарните учреждения и третиране на лишените от свобода. Те са от изключително значение и оказват огромно влияние върху развитието на пенитенциарните закони, политики и практики в държавите членки на ООН и в целия свят. През 2015 г. бяха преразгледани и публикувани под наименованието „Правила Мандела“. В статията ще анализирам някои от залегалите в тях принципи, чийто произход може да се открие още в римското право във връзка с подобряване на условията в затворите.

Ключови думи: Правила Мандела; човешки права; човешко достойнство; soft law.

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ABOUT THE MANDELA RULES OF THE UNITED NATIONS (A/RES 70/175) AND THE ORIGIN OF ITS PRINCIPLES IN THE ROMANISTIC PERSPECTIVE (BULGARIAN LANGUAGE)

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Abstract: The Standard Minimum Rules for the Treatment of Prisoners constitute the universally recognized minimum standards for the management of prisons and the treatment of persons deprived of their liberty and have had immense value and influence in the development of prison laws, policies and practices. In Member States around the world, in 2015 it was promulgated under the name Mandela Rules. In this study, we will analyze how some of its principles are already beginning to be glimpsed in Roman law in relation to improvement of the conditions of the confinement's place.

Keywords: Mandela Rules; human rights; human dignity; soft law.

1. УВОД

Правата на човека са онези свободи, имунитети, претенции и правомощия, които съответстват на всяко човешко същество като необходимо условие да се реализира като морален субект и чието удовлетворение е необходимо и достатъчно условие за оправдаване на съществуването, произхода и съдържанието на правната система. Обичайно е да се установи, че всички човешки права имат разумна основа в необходимите условия или нужди на човешкото действие, така че никой да не може да ги отрече или да ги наруши под страх от противоречие със самия себе си.

Ще започна от идеята за човешкото достойнство, в което се коренят основните човешки права. Признаването и гарантирането на човешкото достойнство е ядрото на съвременния конституционализъм, изхождащ от централното място на гражданите спрямо държавата. В какво се състои човешкото достойнство? Според García Manrique¹ то е вътрешно присъща ценност на всяко човешко същество, която трябва да съдържа:

- (1) абсолютна или относителна способност за самостоятелност² като нещо присъщо на човешките същества, и особената стойност и утвърждаване, която придаваме на тази особеност;
- (2) утвърждаване на *telos* – цел или същност на всичко човешко, въз основа на което се определя какво е добрият или достоен човешки живот;
- (3) база за дефиниране на конкретните права като основни. Тази база трябва да произтича от *telos* – целта или същността, определящи условията, в които протича човешкият живот;
- (4) установяване на критерии за вземане на решения относно проблеми, които надхвърлят пределите на самостоятелността/автономността на индивида.

Причината, поради която трябва да се защитават правата на лишените от свобода, е обстоятелството че, макар и лишени от свобода, те са

¹ GARCÍA MANRIQUE, R. ¿Es útil el concepto de dignidad humana? – In: *El Cronista del Estado social y democrático de Derecho*, Vol. 61-62, Madrid, 2016, p. 19.

² GEWIRTH, A. The Constitution of rights: human dignity and American values. – In: MEYER, Michael J. and PARENT, William A., Eds. *The Constitution of Rights*. Ithaca, 1992, p. 12.

човешки същества и се намират в положение, което ги прави уязвими. Иначе казано, правата на лишените от свобода им гарантират сигурност спрямо трети лица – спрямо съдията, спрямо полицаия или спрямо служителя на затвора. Защитата на лишения от свобода съдейства за постигане целта на наложеното му наказание – неговата социална реинтеграция.

От наша гледна точка – тази на човешките права, наказателната правна уредба се ръководи от общите стандарти за надлежен процес и от принципите, предвидени в испанското национално законодателство и в международните договори, по които Испания е страна – както произтичащи от ООН (норми и решения на ООН), така и от европейската регионална система³. Част от тези стандарти са правилата на новоразвиващото се международно право, наречени *soft law*⁴, които не попадат в категорията договори и декларации, но са препоръки, издадени от международни органи за човешките права и придобиват все повече силата на препоръки с висока степен на легитимност. Такива норми са резолюциите на ООН, в частност приетата на 17 декември 2015 г. Резолюция за Правилата за минималните стандарти за отношението към затворниците⁵, наричани още „Правила Нелсън Мандела“ (A/RES/70/175)⁶. Тази резолюция съдържа един

³ Пенитенциарни правила на Съвета на Европа – Препоръка REC(2006)2 на Комитета на министрите на държавите членки относно Европейските пенитенциарни правила, приети от Комитета на министрите на 11 януари 2006 г. на 952-то заседание на делегати на министрите. Към тях трябва да прибавим Препоръка CM/Rec (2012)5 на Комитета на министрите към държавите членки относно Европейският деонтологичен кодекс (приет от Комитета на министрите на 12 април 2012 г.).

⁴ Изразът *soft law* описва юридически явления, които са правни актове, чието изпълнение не е задължително, но които имат правни последиствия или най-малкото известна юридическа значимост. Това предполага наличие на една относителна правна уредба в международната система и съответно противопоставяне на традиционния дихотомичен модел. Вж. TORO HUERTA, M. El fenómeno del soft law y las nuevas perspectivas en el derecho internacional. – In: *Anuario Mexicano de Derecho Internacional (AMD)*, Vol. 6, 2006, p. 518.

⁵ Първите са приети от Първия конгрес на ООН, посветен на превенцията на престъпността и отношението към престъпниците, проведен в Женева през 1955, и одобрени от Икономическия и социален съвет с Резолюция 663C (XXIV) от 31 юли 1957 г. и 2076 (LXII) от 13 май 1977 г. По-късно те са ревизирана с Резолюция 67/188 от 20 декември 2012 г., 68/190 от 18 декември 2013 г. и 69/192 от 18 декември 2014 г., озаглавени „Минимални стандарти за третиране на лишените от свобода“, в частност Резолюция 68/190, която оценява положително работата, извършена от Експертната група за Правилата за минималните стандарти за отношението към затворниците, и Резолюция 69/192, в която се подчертава, че трябва да бъде финализиран процесът на преразглеждане, който доведе до Правилата Мандела.

⁶ Тези правила отдават почит на покойния президент на Южна Африка Нелсън Ролихлахла Мандела, борецът за човешки права, равенство, демокрация и утвърждаване на културата на световен мир, който прекара 27 години в затвора.

начален параграф, който определя необходимостта да се гарантират основните човешки права: „Ръководена от главната цел на Организацията на обединените нации, изложена в преамбюла на Хартата на Организацията на обединените нации и Всеобщата декларация за правата на човека, и движена от намерението да затвърди вярата в основните права на човека, в достойнството и ценността на човешката личност без каквито и да било различия, в еднаквите права на мъжете и жените и на големите и малките нации, да създаде условия, при които да се съблюдают справедливостта и изпълнението на задълженията, произтичащи от международните договори и други източници на международното право, и да способства за социалния прогрес и подобряването на условията за живот при едно по-широко схващане за свободата [...]“.

Текстът показва съществуващия стремеж да се хуманизира наказателното правораздаване, да се закрилят правата на човека в ежедневно въздаване на наказателно правосъдие и да се засили превенцията на престъпността. Така резолюцията на ООН изтъква редица принципи и практики, признати днес за адекватни в отношението към затворниците и работата на пенитенциарната администрация.

2. ИСТОРИЧЕСКИ БЕЛЕЖКИ ЗА ХУМАНИЗИРАНЕТО НА ЗАТВОРИТЕ В РИМСКОТО ПРАВО

Искам да направя кратък, но детайлен анализ на източниците от римската правна уредба и да очертая значителното влияние, което тези норми и техните принципи са изиграли в хода на историята.

Преди всичко трябва да имаме предвид, че римската затворна система се характеризирала с нечовешки условия, при които според множество свидетелства, които откриваме в източниците, практиката била лишени от свобода да се подлагат на бавно мъчение, водещо до смърт. Ос-

Беше решено Международният ден на Нелсън Мандела (18 юли) да бъде използван, за да се подобрят условията в местата за лишаване от свобода, да се утвърди съзнанието че лишението от свобода са част от обществото, и да се отдаде дължимото на пенитенциарните служители за това, че извършват една особено важна социална услуга. В системата на ООН Службата на ООН по наркотиците и престъпността (UNODC) следи за спазването на международните норми и стандарти в областта на превенцията на престъпността и наказателното правораздаване, включително на Правилата за минималните стандарти за отношението към затворниците.

новна функция на затвора в света на римляните⁷ е охраната на обвиняемите, или, с други думи, предохранителна мярка под формата на задържане под стража или в очакване на екзекуцията. Истината обаче е, че предохранителната мярка често *sine die*, се превръщала *de facto* в истинска наказателна мярка⁸.

Така че в Древния Рим затворът играе ролята на превантивно средство за *custodia* (пазене, охрана), а не за наказание, както е видно от правните текстове на Улпиан, включени в 9 off. Proc. D. 48.19.8.9⁹: *Solent praesides in carcere continendos damnare aut¹⁰ ut in vinculis contineantur: sed*

⁷ Най-старият затвор в света е Mamertina, който се помещавал на хълма Капитолий и е имал подземна тъмница от около три метра и половина дълбочина, наричана *Tullianum*, а понякога и *Lautumiae*. Идеята да се построи карцер, който по-късно се превръща в държавен затвор, тръгва от Анк Марций, както ни съобщава Тит Ливий I. 33.8. Сервий Тулий го разширява, като добавя едно подземие или тъмница. Поради липса на адекватна затворническа инфраструктура *Lautumiae* често е служел и за решаване на проблема с пренаселеността. По време на Републиката били използвани други сгради, като например Храма на Сатурн, *Atrium libertatis*, военните постройки на Марсово поле, *navalia*, където се съхранявали военни кораби и оръжие, включително църковни животни, и още една военна сграда – *Villa publica*. Съществуват множество литературни, епиграфски и археологически препратки за затвори извън Рим – в *Alba Fucens*, *Ardea*, *Cales*, *Cosa*, *Carseoli*, *Ephesus*, *Ferentum*, *Fregellae*, *Genua*, *Iguvium*, *Minturnae*, *Norba*, *Paestum*, *Praeneste*, *Regium*, *Setia*, *Signia*, *Spoletium*, *Syracusa*, *Teanum Sidicinum* и *Tibur*, *Cosa u Paesum*. Това са хипотези въз основа на археологически доказателства. Останалите се споменават в литературните източници като места за задържане и охрана на затворници, често картагенски военни и заложници, които са били затваряни дори във военните лагери. Археологически анализ и анализ на литературни източници вж. у PAVÓN TORREJÓN, P. *La cárcel y el encarcelamiento en el mundo romano*. – In: *Anejos del Archivo Español de Arqueología*, Vol. 17. Madrid, 2003, p. 113–120. Обширно проучване и библиографски списък вж. у ZAMORA MANZANO, J. L. *La Administración penitenciaria en el Derecho romano: gestión, tratamiento de los reclusos y mejora de la custodia carcelaria*. Madrid, 2015.

⁸ В обществото затворът е бил смятан за връх на мизерията поради загубата на свободата между стените му или поради налагания принудителен труд, а най-вече поради нечовешките условия, при които са били държани лишените от свобода или *damnati*. Вж. SALERNO, F. *Aspetti della marginalità sul finire di un mondo*. Napoli, 2009, p. 29 ss.

⁹ Текстът е дословно предаване на *communis opinio* на много автори, които ще цитирам, въз основа на което Theodor Mommsen (*Römisches Strafrecht*. Leipzig, 1899, S. 962) счита, че в римското право лишаването от свобода никога не е било смятано за юридическо наказание. Според BALZARINI, M. *La pena de encarcelamiento hasta Ulpiano*. – In: *Seminarios Complutenses de Derecho Romano*, 1989, p. 222 (= *Studi Economico-giuridici*. Att. Philosophie Penale, Vol. 54, 1991-1992, Napoli, p. 374–375) не е чудно че реконструкцията на Mommsen страда до голяма степен от силно идеологическа тенденция – да се дава предимство на принципа за законност: *nullum crimen sine lege* – *nulla poena sine lege*, характерен само за системата на *quaestiones perpetuae*, придържайки се по този въпрос към мнението на VENTURINI, C. “*Quaestiones*” non permanenti: problema di definizione e di tipologia. – In: *Burdese, A. A cura di... Idee vecchie e nuove sul diritto criminale romano*. Padova, 1985, p. 85 ss.

¹⁰ LOVATO, A. *Il carcere nel diritto penale romano dai Severi a Giustiniano*. Bari, 1994, p. 133, и в частност p. 223 ss., предлага да се махне *aut* и да остане пасажът “*Solent praesides in carcere continendos damnare ut in vinculis perpetuis contineantur*”. Наречието

id eos facere non oportet. Nam huiusmodi poenae interdictae sunt: carcer enim ad continendos homines, non ad puniendos haberi debet.

Следователно *a priori*, според традиционното буквално тълкуване, римската правна уредба никога не е разглеждала затвора като наказание за извършено престъпление, приложимо към свободни хора чрез съдебно решение. Затова затворът се приемал като средство за полицейска или административна принуда, налагана от магистратите.

От друга страна, в римските затвори условията са били непоносими¹¹, тъй като се характеризирали с тъмнина извън *vestibulum carceris*, и оскъдно осветление в останалите помещения – влажни, задушни и мрачни килии, както пише Либаний¹². Инструментите за изтезание и веригите¹³ не отговаряли на философската моралност на наказанието¹⁴; но трябвало да

perpetuis се интерпретира в неговото изследване въз основа на Sch. 11 и 12 на Bas. 60.51.8.

¹¹ Срецаме референции в творбата на Тохарис [Τόχαρις] de Λουκιανὸς ὁ Σαμοσατεύς, който описва условията, в които се намират двама приятели в затвора – Деметрий и Антифил. Вж. Тох, 29: καὶ μὴν καὶ τοῦ οἰκῆματος ἡ δυσσομία καὶ τὸ πνίγος ἐν ταύτῳ πολλῶν δεδεμένων καὶ ἐστενοχωρημένων καὶ μόλις ἀναπνεόντων, καὶ τοῦ σιδήρου ὁ ψόφος καὶ ὕπνος ταῦτα χαλεπὰ ἦν καὶ ἀφόρητα οἷω ἀνδρὶ ἐκείνων ἀήθει καὶ ἀμελετήτῳ πρὸς οὕτω σκληρὰν τὴν διαίταν.

¹² Lib. Or.45.10: [...] ἀλλὰ καὶ ὅσα δεῖ παρ' ἐκάστου γενέσθαι τῷ τῆς θύρας κυρίῳ τῷ λύχνον μὲν ἓνα πᾶσι παρεχομένῳ.

¹³ В *captiviti* на Плавт се коментират тези инструменти – Plauto, *Cap.* 129, 204, 254, 356 и др. От друга страна, в източниците терминът *vincula* обозначава средствата за физическо усмиряване на престъпника – в случая той е лишен от свобода чрез оковаване, за да се предотврати опит за бягство по време на задържането му под стража или преди екзекуцията, ако бъде осъден на смърт, но присъдата би могла да бъде и принудителен труд. Виждаме множество средства за обездвижване, които причиняват истинско изтезание – например *catenae* или белезници на ръцете на затворника, както и *compedes* или *pedicae*, които обездвижват краката (окови, букай). Имало и *nervus* – забити в пода железни пръти, към които били привързвани глезените на робите, и *numellae*, използвани първоначално за обездвижване на животните – кожена броня, придържаща главата, и *boiae* – своеобразен дървен или железен ярем на ръцете и/или краката. В гръцкото право се използва като генерически терминът ξύλον. Вж. етимология и описание на *vincula* у DIRKSEN, v. *vinculum* – In: *Manuale Latinitatis Fontium Juris Civilis Romanorum*. Thesauri Latinitatis. Duncker & Humblot, 1837, p. 1003 – *vincula in carcer in quo noxii detinentur*; NIERMEYER, v. *vinculum* – In: *Niermeyer, J. F. and Kief, C. Van de. Mediae Latinitatis Lexicon Minus*. 2 Vols. (Multilingual Edition). Leiden ; Boston, 2002, p. 1443; POTTIER, E. v. *vinculum* – In: *Dictionnaire des antiquités Grecques et romaines*. Vol. V. Paris, 1904, p. 897 ss.; v. *compes* – In: *Dictionnaire...*, Vol. I.2, p. 1429; v. *numellae, nervus, boiae* – In: *Dictionnaire...*, Vol. IV.1, p. 116–117.

¹⁴ ROBINSON, O. F. *Penal Practice and Pen al Policy in Ancient Rome*. London, 2007, p. 180 ss. Вж. също Seneca, *Clem.* 1.21.1–2.

се даде отговор на постепенно нарастващите, особено от III в. насетне, проблеми на престъпността.¹⁵

По време на Късната империя забелязваме някои промени, въведени в римската система, за да се подобрят условията чрез хуманизирането им. То започва по времето на Константин. В конституция от 320 г. с редица разпоредби се прави опит да се очовечи отношението към затворниците. Нека видим един фрагмент:

CTh. 9.3.1.pr: In quacumque causa reo exhibito, sive accusator exsistat sive eum publicae sollicitudinis cura perduxerit, statim debet quaestio fieri, ut noxius puniatur, innocens absolvatur. quod si accusator aberit ad tempus aut sociorum praesentia necessaria videatur, id quidem debet quam celerrime procurari. Interea vero exhibito non ferreas manicas et inhaerentes ossibus mitti oportet, sed prolixiores catenas, ut et cruciatio desit et permaneat fida custodia. Nec vero sedis intimae tenebras pati debebit inclusus, sed usurpata luce vegetari et, ubi nox geminaverit custodiam, vestibulis carcerum et salubribus locis recipi ac revertente iterum die ad primum solis ortum ilico ad publicum lumen educi, ne poenis carceris perimatur, quod innocentibus miserum, noxiis non satis severum esse cognoscitur.

На пръв поглед с този текст се прави опит да се подобрят условията за затворниците, като императорът приема мерки за по-хуманно отношение към лишените от свобода. Ако се взрем в *inscriptio* на получателя (*ad florentium rationalem*), виждаме че става дума за конституция, касаеща данъчните престъпления, но смятам че тези норми са се прилагали и във всички останали случаи. Едно от важните изисквания при определяне на охраната и оковаването на престъпници – в случая с разхлабени вериги, а не със стегнати белезници, *non ferreas manicas et inhaerentes ossibus mitti oportet, sed prolixiores catenas*, е да се положи старание и по-бързо да се определи дали лицето е виновно, а ако се докаже, че е невинно – да бъде освободено.

В тази норма се усеща осезаемо християнски отпечатък, който цели да се облекчат условията в затворите, като най-добрият начин да се осигури функционирането им е изграждане на строг репресивен апарат¹⁶.

¹⁵ KRAUSE, J-U. Prisons et crimes dans l'Empire romain. – In: *Carcer: prison et privation de liberté dans l'antiquité classique*. Paris, 1999, p. 118 ss.

¹⁶ LOVATO, A. Il carcere nel diritto romano dai Severi a Giustiniano. Bari, 1994, p. 182–182. Вж. и DUPONT, C .L. Le Droit criminel dans les Constitutions de Constantin. Les infractions. Lille, 1953, p. 121.

Текстът от Юстиниановата компилация въвежда една новост¹⁷ при строгото прилагане на веригите, като казва “*si criminis qualitas etiam catenarum acerbitem postulerint*”. Този израз не се съдържа в Теодосиевия кодекс и въвежда изискването степента на оковаване да е в зависимост от тежестта на престъплението, за да бъде гарантирана охраната. Това според мен означава, че оковаването¹⁸ се запазва за тежките според съдебния орган престъпления.

В този фрагмент виждаме също и загриженост за местата, в които се държат лишените от свобода. Затворниците трябва да получават естествена светлина и да бъдат държани в здравословни помещения. Това означава те да са построени така, че да позволяват проветряване и да осигуряват нужните хигиенни условия – *vestibulis carcerum et salubribus locis*, за да се избегне възможността затворникът да умре поради лошите условия в затвора – *ne poenis carceris perimatur*.

Друг важен въпрос, свързан с управлението на пенитенциарните учреждения, е разпределянето по категории и класификацията. Да видим фрагментите, касаещи тази норма.

Преди всичко мъжете трябва да бъдат затваряни в отделни пенитенциарни заведения, различни от тези на жените. Това произтича от консти-

¹⁷ CJ. 9.4.1.pr.: *In quacumque causa reo exhibito, sive accusator existat sive eum publicae sollicitudinis cura produxerit, statim debet quaestio fieri, ut noxius puniatur, innocens absolvatur. Quod si accusator aberit ad tempus aut sociorum praesentia necessaria videatur, id quidem debet quam celerrime procurari. Interea vero exhibito non ferreas manicas et inhaerentes ossibus mitti oportet, sed prolixiores catenas, si criminis qualitas etiam catenarum acerbitem postulaverit, ut et cruciatio desit et permaneat fida custodia. Nec vero sedis intimae tenebras pati debebit inclusus, sed usurpata luce vegetari et, ubi nox geminaverit custodiam, vestibulis carcerum et salubribus locis recipi ac revertente iterum die ad primum solis ortum ilico ad publicum lumen educi, ne poenis carceris perimatur, quod innocentibus miserum, noxiis non satis severum esse dignoscitur. Illud etiam observabitur, ut neque his qui stratorum funguntur officio neque ministris eorum liceat crudelitatem suam accusatoribus vendere et innocentes intra carcerum saepta leto dare aut subtractos audientiae longa tabe consumere. Non enim existimationis tantum, sed etiam periculi metus iudici imminet, si aliquem ultra debitum tempus inedia aut quocumque modo aliquis stratorum exhausserit, et non statim eum penes quem officium custodiae est atque eius ministros capitali poena subiecerit.* BONINI, R. Ricerche di Diritto Giustiniano. Milano, 1968, p. 143: “cosa secondo a. [...] si sottraggono evidentemente gli accusati dei crimini meno gravi ad una restrizione pur sempre notevole [...]”. Вж. и MOMMSEN, Th. Römischen Strafrecht. Leipzig, 1899, p. 304, n. 4–5.

¹⁸ Оковаването с вериги като мярка за сигурност вероятно е било често явление при *confesus*, както може да се заключи от някои фрагменти на Улпиан, 9 of. Proc. D. 48.3.5 и Scevola 4 reg., D. 48.4.4, ако обвиняемият признаел вината си.

туцията Констанций от 340 г. до Ацидин, CTh. 9.3.3,¹⁹ и е прецедент за съвременното пенитенциарно право:

Quoniam unum carceris conclave permixtos secum criminosos includit, hac lege sancimus, ut, etiamsi poenae qualitas permixtione iungenda est, sexum tamen disparem diversa claustrorum habere tutamina iubeatur.

От началото на този фрагмент разбираме, че не е имало индивидуални килии или стаи, тъй като се говори за няколко затворника в едно помещение. Очевидно тези помещения са били пренаселени.

От друга страна, *commentariensis*²⁰ като началници на затворите²¹ упражнявали контрол върху лишените от свобода и върху класификацията им, като на всеки тридесет дни се извършвала обстойна проверка на броя затворници, името, категорията на извършеното престъпление и възрастта на всеки, както е видно от конституцията на императорите Грациан, Валентиниан и Теодосий от 380 г. По отношение на Константинопол и *comentarienses* в CTh. 9.3.6=C. 9.4.5 се посочва:

De his quos tenet carcer id aperta definitione sancimus, ut aut convictum velox poena subducat aut liberandum custodia diuturna non maceret. temperari autem ab innoxiiis austera praeceptione sancimus et praedandi omnem segetem de negligentia iudicum provinciarum ministris feralibus amputamus. nam nisi intra tricensimum diem semper commentariensis ingesserit numerum personarum, varietatem delictorum, clausorum ordinem aetatemque victorum, officium viginti auri libras aerario nostro iubemus inferre, iudicem desidem ac resupina cervice tantum titulum gerentem extorrem impetrata fortuna decem auri libris multandum esse censem.

Фрагментът гласи и че задържаните трябва да бъдат съдени бързо, *velox poena*, така че онези, които трябва да бъдат освободени, да не бъдат охранявани твърде дълго.

Освен това конституцията указва че нарушенията, произтекли от небрежност при упражняване на контрола върху затворниците, се наказват

¹⁹ CJ. 9.4.3.

²⁰ Вж. CHASTAGNOL, A. La préfecture urbaine a Rome sous le Bas-Empire Paris, 1960, p. 235 ss.

²¹ El *scrinium* на *commentariensis* е съставен от полицейски служители, тъй като тяхната компетентност включвала обвиненията, мъченията, наказанията, екзекуциите и, естествено, охраната на затворите. Те изпълнявали нарежданията на *praefectus urbi*, подготвяли досиетата и чрез своите помощници – *carnifices* и *spiculatores*, измъчвали затворника при разследването, давали го на съд и се уверявали в екзекутирането или предаването на виновния на съответния отговарящ; имало и отговорници за архива, за регистрирането на документите и за охраната на килиите – *instrumentarius*, *applicitarii*, *charularii* и *clavicularii*.

с глоба от двадесет златни лири в полза на фиска. Съдията, гледал делото, се глобява с десет лири и се освобождава от длъжност.

Достойнството и човешкият характер на индивида²² са ключът към промените, въведени в законодателството по време на Късната империя с цел да се облекчат и подобрят тежките условия в затворите. В този контекст се вписва конституцията от Codex в титула *De episcopali audientia, et de diversis capitulis quae ad ius curamque et reverentiam pontificalem pertinent*, CJ. 1.4.9 на императорите Хонорий и Теодосий, издадена в Равена и изпратена през 409 г. до Цецилиан – претор и префект. Тя предвижда „хуманността“ като важен елемент в отношението към затворниците:

Iudices dominicis diebus productos reos e custodia carcerali videant interrogent, ne his humanitas clausis per corruptos carcerum custodes negetur: victualem substantiam non habentibus faciant ministrare libellis duobus aut tribus diurnis vel quot existimaverint commentarienses decretis, quorum sumptibus proficiant alimoniae pauperum: quos ad lavacrum sub fida custodia duci oportet. Multa iudicibus viginti librarum auri et officiis eorum eiusdem ponderis constituta, ordinibus quoque trium librarum auri multa proposita, si saluberrima statuta contempserint. nec deerit antistitum Christianae religionis cura laudabilis, quae ad observationem constituti iudicis hanc ingerat monitionem.

Преди всичко трябва да изтъкнем в този пасаж специалното упоменаване на неделята. Теодосий I освещава официално *dies dominicus*, след като Константин обявява неделята за неработен ден, през който се прекъсва съдебната и търговската дейност.

Фрагментът добавя и едно оправдание за намесата на императора, като посочва необходимостта да се избегне корупцията и използва израза *ne his humanitas clausis per corruptos carcerum custodes negetur*, отнасящ се за хуманността в отношението към затворниците. Благодарение на влиянието на религията виждаме, че намесата има за цел да даде не само духовна, но и материална утеха. Затова конституцията въвежда задължението затворниците да бъдат извеждани от килиите, за да бъдат разпитани, да им се дава необходимата храна *libellis duobus aut tribus diurnis* и да бъдат къпани – очевидно от хигиенни съображения предвид условията в затворите.

²² HONIG, R. M. *Humanitas und Rhetorik im spätrömischen Kaisergesetzen*. Göttingen, 1960, p. 77.

Конституцията се съсредоточава върху три основни аспекта:

- (1) да се види съществуват ли наистина мотиви за задържането на индивида и как се прилагат мерките за охрана;
- (2) да се осигури достатъчно храна под надзора на *commetarienses*;
- (3) да се гарантират хигиената и личната чистота – вероятно за да се поддържат затворниците в приличен вид.

За да се утвърдят тези практики, вдъхновени от хуманността²³, се въвеждат санкции, които стигат до двадесет златни лири глоба за съдиите и техните помощници и три лири за прислугата им, а епископите са овластени да контролират и гарантират изпълнението на императорската разпоредба. С други думи, въвежда се надзор, упражняван от църковната власт, която сътрудничи с администрацията на затворите²⁴.

Има една конституция от 419 г. на Хонорий и Теодосий в *Constitutiones Sirmondianas* (Сборника на Жак Сирмон) – XIII конституция²⁵, която се придържа към същата линия. Ето този текст:

Convenit, nostris praescita temporibus ut iustitiam inflectat humanitas. Nam cum plerique vim fortunae saevientis aufugerint adque ecclesiasticae defensionis munimen elegerint, patiuntur inclusi non minorem quam vitavere custodiam: nullis enim temporibus in luce vestibuli eis aperitur egressus. Adque ideo quinquaginta passibus ultra basilicae fores ecclesiasticae venerationis sanctitas inhaerebit. Ex quo loco quisque tenuerit exeuntem, sacrilegii crimen incurrat. Nihil enim confugientibus miserationis impenditur, si aura Liberior negatur adflictis. Eam quoque sacerdoti concedimus facultatem, ut carceris ope miserationis aulas introeat, medicetur aegros, alat pauperes, consoletur insontes et cum singulorum causas scrutatus agnoverit, interventiones suas apud iudicem competentem pro iure moderetur. Scimus enim idque

²³ Доброто отношение към задържаните е повод за благодарности, както информира Амброзий в своите епистоли до император Теодосий за това, че е освободил много задържани *Ep. Var. 74.25: Haec ego, Imperator, amore et studio tui in hunc sermonem contuli. Debeo enim beneficiis tuis, quibus me petente, liberasti plurimos de exsiliis, de carceribus, de ultimae necis poenis.*

²⁴ BIANCHINI, M. Per la storia dei rapporti fra cristianesimo e imperio da Costantino a Teodosio I. – In: *Serta historica antiqua*, Vol. II. Roma, 1989, p. 239–257, Id., *Temî e tecniche della legislazione tardoimperiale*. Torino, 2000, p. 232 – авторката счита, че отношенията между Църквата и Империята укрепват благодарение на сътрудничеството между двете институции и в резултат се стига до подчинение на Империята на Църквата. Вж. GAUDEMET, J. *La formation du droit séculier et du droit de l'Église aux IV^e et V^e siècles*. Paris, 1979, p. 221 ss.

²⁵ Тази разпоредба показва постепенното засилване на властта и влиянието на Църквата и нейните представители предвид недостатъчността/непълноценността на държавния апарат. Показва също, че намесата на клира е израз на християнското човеколюбие и помощ за затворниците като контролна функция, упражнявана от епископите.

crebris additionibus supplicatum frequenter ideo plerosque in custodiam detrudi, ut adeundi iudicis libertate priventur et, cum semel coeperit humilior persona pati custodiam, antequam causa sciatur, iniuriae poneam sustinere compellitur. Confestim duas auri libras fisco nostro contumax solvet officium, si sacerdotem negotia tam sancta curantem ianitor feralis excluserit.

Като продължение на конституцията от 409 г., текстът въвежда същия мотив за хуманност и справедливост и позволява на клира – не само на епископите, но и на свещениците, да влизат в затворническите помещения, за да помагат и дават не само храна, но и лекарства, и да утешават невинните, да проверяват в какво състояние са затворниците и да разглеждат техните дела, като предупреждава че надзирателите, които препятстват дейността на водените от хуманност свещеници, ще се наказват с глоба от две златни лири. Според мен, макар в текста да се говори за даване на лекарства, вероятно се има предвид и оказването на медицинска помощ или съдействието за такава с цел опазване на здравето на затворниците.

В този контекст срещаме и друг фрагмент, който говори за това, че местните епископи трябва периодично да посещават затворите. За целта в конституция до Мена от 529 г. Юстиниан включва тази нова компетентност и някои други аспекти, които ще анализирам. CJ. 1.4.22.1²⁶:

De his autem, quicunque coniecti sunt aut coniiciuntur, dei amantissimos locorum episcopos iubemus una cuiusque hebdomadis die, quarta aut sexta, eos qui in custodia habentur, visitare et diligenter inquirere causam ob quam detinentur et sive servi sint, sive liberi, sive ob pecunias, sive ob alias criminationes, sive ob homicidia coniecti, illustrissimos et spectabiles et clarissimos magistratus admonere, tam eos, qui sunt in hac felicissima urbe, quam qui sunt in provinciis, ut ea exequantur circa ipsos, quae divalis nostra constitutio ad illustres praefectos ea de re emissa praecipit; licentia data Deo carissimis pro tempore episcopis si quam negligentiam admissam cognoverit ab illustrissimis et magnificentissimis atque clarissimis pro tempore magistratibus, vel iis, quae illis parent officiis, eam indicandi, ut conveniens adversus negligentes animi nostri motus insurgat.

По волята на императора тази конституция засилва в духа на цитираните фрагменти гражданските функции на епископите в управлението на затворите. Говори за посещения на епископите в затворите веднъж седмично – на четвъртия или на шестия ден от седмицата, за да изискат дело-

²⁶ Оригиналният текст е написан на гръцки език и създава затруднения при предаването му и от там необходимостта от *restitutiones* чрез византийските източници – вж. BONINI, R. Ricerche di Diritto Giustiniano..., cit., p. 192, n. 61.

то или основанието за задържането, да се запознаят със *status*-а на затворника и да следят за дисциплината на магистратите при изпълнението на възложените им функции, особено що се отнася до продължителността на превантивното задържане под стража и до гарантирането на личната свобода на индивида.²⁷ Затова те трябва да следят за евентуална небрежност и злоупотреба от страна на магистратите и техните подчинени.

Църковните органи били задължени да следят и за нарушения на магистратите, свързани със сроковете за задържане под стража, за да дадат по-големи гаранции на задържаните. За да се опазят човешкото достойнство и личната свобода²⁸ било важно да се определят точни времеви граници²⁹. Относно контрола, упражняван от епископите, да видим фрагментите 8–9 от С. 9.4.6 на епитома на гръцката конституция на Юстиниан до префекта Мена, взета от Василиките (Βασιλική):

²⁷ BIONDI, B. *Il Diritto romano cristiano*. 3 vols. Vol. 2. Milano, 1953, p. 349. Свободата и човешкото достойнство присъстват в новите императорски конституции, които целят да ограничат във времето продължителността на престоя в затвора.

²⁸ Дори се въвежда изискването за зачитане на религиозната свобода – Tertul. *ad Scap* 2.2: *Tamen humani iuris et naturalis potestatis est unicuique quod putaverit colere; nec alii obest aut prodest alterius religio. Sed nec religionis est cogere religionem, quae sponte suscipi debeat, non ui, cum et hostiae ab animo libenti expostulentur*.

²⁹ Времето, което робът можел да прекара в ареста, в случая е двадесет дни; можел да бъде наказан или върнат на неговия собственик, а ако той не се яви – да бъде освободен. Говори се и за продължителността на престоя под стража на свободните граждани в зависимост от това дали извършеното престъпление се наказва със смърт, *propter pecuniariam causa* или не – в такъв случай трябва да бъде освободен, ако представи гаранции. В противен случай решението е трябвало да бъде постановено в срок от тридесет дни, като при необходимост да се поиска *cautio iuratoria*, допълнително време. Ако обвинението било за престъпление, наказвано със смърт, обвиняемият можел да престои в затвора шест месеца; в случай на частно обвинение срокът можел да стигне до една година – това може да се заключи от обстоятелствата разпоредба в С. 9.4.6.2–6 в епитома на Гръцката конституция на Юстиниан: *Et si servi sunt, intra XX dies propellantur aut castigati aut dominis redditi aut, si domini non apparent, dimittantur*. 3. *Si liber homo propter pecuniariam causam in carcerem coniectus fuerit, fideiussoribus praestitis liberetur: si fideiussores non habet, intra XXX dies causa decidatur et ipse liberetur. Sin autem apliore tempore opus sit, tunc iuratoriae cautioni committatur usque ad litis exitum: qui si iuramento praestito ante litem decidam afuerit, bonis suis excidat*. 4. *Si liber homo criminis accusatus in custodiam coniectus sit, fideiussoribus praestitis liberentur: si fideiussores non habet, usque ad sex tantummodo menses in custodia maneat, intra quos causa decidatur, nisi capitalis criminis reus factus est*. 5. *Talis enim nec fideiussoribus committitur si a publicis personis accusatus est: sed rursus intra sex menses iudicium ad finem perducendum est. Quod si non a publicis personis sed a private accusatore conventus fuerit, admittitur fideiussio. Si vero fideiussores dare non potest, per unum annum tantummodo in custodia teneatur, intra quem omnimodo causam decidi oportet*. 6. *cum autem praesumptio extiterit eos obnoxiosus essem, in custodiam remaneant, donec causa terminetur [...]*

Episcopis admonentibus magistratus haud ignaros se ipsos et officia sua decem libras illaturos. 9. Licentia data religiosissimis pro tempore episcopis, si quid praetermitti viderint ab illustribus clarissimis spectabilibus pro tempore magistratibus vel ab officiis quae eis parent, hoc denuntiandi, ut congruens motus in negligentes dirigatur.

Текстът предупреждава, че епископите може да наложат глоба от десет лири на магистратите и техните служители при неспазване на императорската разпореда, и да уведомят императора за допуснатите нарушения поради мудност и небрежност на магистратите. Видно е, че се въвежда църковен контрол предвид бездействието на светската администрация в някои случаи при управлението на затворите и гаранциите за затворниците.

3. ПРИНЦИПИ И ПРАКТИКИ, СВЪРЗАНИ С МИНИМАЛНИТЕ СТАНДАРТНИ ПРАВИЛА НА ОРГАНИЗАЦИЯТА НА ОБЕДИНЕНИТЕ НАЦИИ

След този преглед на най-значимите римски правни източници относно пенитенциарната система е очевидно наличието на някои принципи, които *mutatis mutandi* са се съхранили през вековете и присъстват и в съвременното законодателство, касаещо управлението на местата за лишаване от свобода.

Испанският Общ пенитенциарен закон LO 1/1979 от 26 септември³⁰, който е доста остарял и се нуждае от спешна реформа, съдържа редица принципи. Член 6 определя, че никой затворник не може да бъде малтретиран с думи или действия, а пенитенциарният правилник³¹ указва в чл. 4.2 (а) като право на затворниците „*пенитенциарната администрация да се грижи за техния живот, неприкосновеност и здраве, като те в никакъв случай не могат да бъдат изтезавани, малтретирани с думи или с действия или да бъдат обект на прекомерна строгост в прилагането на нормите*“.

Това е хуманен принцип, който видяхме залегнал в конституциите на император Константин, включени в CTh. 9.3.1.pr.= C. 9.4.1.pr., или на Хонорий и Теодосий, съдържащи се в C. 1.4.9. В този смисъл Правилата Нелсън Мандела (A/Res 70/175), които ще наричам по-нататък ПНМ, определят в

³⁰ [Достъпен на <https://www.boe.es/eli/es/lo/1979/09/26/1/con> – бел.ред.]

³¹ Приет с Кралски указ RD 190/1996 от 9 февруари.

пр. 1 следното: *„Всички затворници трябва да се ползват с уважително отношение вследствие на присъщото им достойнство и ценност като човешки същества. Никой затворник не трябва да бъде подлаган на изтезания или друго жестоко, нечовешко и унижаващо достойнството им отношение или наказание, от каквито всички затворници трябва да бъдат защитени. Никакви обстоятелства не могат да служат за оправдание за такова отношение. Трябва да бъде осигурена постоянната охрана и безопасност на затворниците, персонала, доставчиците на услуги и посетителите.“*

В същия дух правило 5 определя необходимостта пенитенциарният режим да разполага с необходимите средства, за да осигурява нужното отношение към затворниците, и гласи: *„Затворническият режим трябва да се стреми да сведе до минимум разликите между живота в затвора и живота на свобода, които отслабват чувството за отговорност на затворниците или уважението на достойнството им като човешки същества“.*

По отношение на разбивката по категории, ПНМ определят следното в Правило 11: *Различните категории затворници се държат в различни учреждения или в различни части на едно и също учреждение според пола, възрастта, предишната им съдимост, юридическите причини за затварянето им и предписания вид режим; следователно а) мъжете и жените следва по възможност да бъдат държани в отделни учреждения; ако мъжете и жените се държат в едно и също учреждение, то жените следва да бъдат настанявани в напълно отделени участъци; б) следствените затворници следва да бъдат настанявани отделно от осъдените; в) лицата, осъдени за дългове или по други граждански дела следва да бъдат настанени отделно от лицата, извършили углавно престъпление; г) Малолетните следва да бъдат настанявани отделно от възрастните.“*

Тези критерии в някои случаи съществуват още в Римската империя. В юридическите източници срещаме отделянето на мъжете от жените въз основа на разпоредби като например тази на император Констанций от

340 г. CTh. 9.3.3³², очевидно от морални съображения. Днес този принцип е запазен в чл. 16 на Общия пенитенциарен закон: „В което и заведение да бъде извършено въдворяването, незабавно се прави отделяне в зависимост от пола, емоционалността, възрастта, съдебното минало, физическото и умственото състояние, а по отношение на осъдените лица – от наложения им режим“, а в ал. а) указва: „мъжете и жените трябва да бъдат разделени освен в някои случаи по изключение, определени в правилник“³³.

Що се отнася до класифицирането на затворниците, в Рим откриваме един протокол за контрол и регистрация от страна на администрацията. *Commentariensis* като началници на затворите изпълнявали функции по охраната и затварянето на затворниците, както и функции, свързани с пенитенциарните архиви, в които било вписвано името, категорията на извършеното престъпление³⁴ и възрастта на затворника, както е видно от една разпоредба на Грациан, Валентиан и Теодосий от 380 г. в CTh. 9.3.6 = CJ. 9.4.5³⁵. Анализиранията разпоредба определя как да се разделят затворниците съгласно познатите ни днес критерии. Това тълкуване има основание доколкото дава смисъл на ежемесечното задължение на *commentariensis*. В нашия пенитенциарен правилник чл. 99 определя разделянето по категории да се извършва въз основа на критериите възраст и съдебно минало, като за всеки затворник от открива досие³⁶. Обяснението

³² *Quoniam unum carceris conclave permixtos secum criminosos includit, hac lege sancimus, ut, etiamsi poenae qualitas permixtione iungenda est, sexum tamen disparem diversa claustrorum habere tutamina iubeatur.*

³³ Вж. art. 99 RP.

³⁴ Тежестта на престъплението оказва влияние върху охраната – вж. Ulpian, 2 off. proc., D. 48.3.1: *De custodia reorum proconsul aestimare solet, utrum in carcerem recipienda sit persona an militi tradenda vel fideiussoribus committenda vel etiam sibi. hoc autem vel pro criminis quod obicitur qualitate vel propter honorem aut propter amplissimas facultates vel pro innocentia personae vel pro dignitate eius qui accusatur facere solet.*

³⁵ Тази информация се е проверявала на 30 дни и се е подавала на съдиите на провинцията. При неизпълнение се въвежда възможността за освобождаване от длъжност на съдията и парична глоба в размер на 20 златни лири.

³⁶ Art. 15.2 LOGP: На всеки затворник се открива лично досие за неговия процесуален и пенитенциарен статус, за което има право да бъде информиран. За всеки затворник се съставя здравен картон.

за това обстоятелство е необходимостта затворниците да бъдат разделени по степени³⁷.

Що се отнася до килиите, макар ПНМ да правят разлика между индивидуални килии и колективни спални помещения (правило 12), истината е, че те трябва да отговарят на „*всички хигиенни норми, особено що се отнася до климатичните условия и в частност обема въздух, минималната площ, осветлението, отоплението и проветрението*“.

Във всички случаи се гарантира естествена светлина³⁸, тоалетна/баня³⁹ и чистота⁴⁰.

В римското право също има загриженост по отношение на затворническите помещения, както видяхме в CTh. 9.3.1.pr: *“sed usurpata luce vegetari et, ubi nox geminaverit custodiam, vestibulis carcerum et salubribus locis recipi ac revertente iterum die ad primum solis ortum ilico ad publicum lumen educi”*.

В същия смисъл, както видяхме в С. 1.4.9, императорите Хонорий и Теодосий, водени от хуманни подбуди, въвеждат задължението веднъж седмично затворниците да се къпят, за да се гарантира хигиената им: *quos ad lavacrum sub fida custodia duci oportet*.

Освен хигиената, ПНМ гарантират храненето. Правило 22: „Всеки затворник получава от управата на пенитенциарното заведение в обичайните часове храна с добро качество, добре приготвена и сервирана, чиято хра-

³⁷ В случая класификацията е свързана с третирането на затворника и дейностите. Този въпрос е от компетентността на науките за поведението – вж. TAMARIT SUMALLA, J. – In: *Curso de Derecho penitenciario*. Valencia, 2001, p. 251; CAMACHO BRINDIS, M. C. *Psiquiatría y prisión*. – In: *ADPCP*, 1993-II, p. 731 ss.

³⁸ Разпоредба 14 (AGNU 70/175) „Всяко помещение, в което живеят или работят затворници: а) трябва да има достатъчно големи прозорци, за да могат затворниците да четат и работят на естествена светлина. Прозорците трябва така да са конструирани, че да позволяват да влиза свеж въздух, независимо дали има или няма изкуствено проветрение; б) изкуственото осветление трябва да е достатъчно, за да могат да четат и работят без да увреждат зрението си“.

³⁹ Разпоредба 16 (AGNU 70/175): „Баните и душовете трябва да са подходящи, така че всеки затворник да може да се къпе или да взема душ, включително да може да бъде принуждаван да прави това, при температура, съобразена с климата, и с честотата, която изисква общата хигиена според сезона и географския район, но поне веднъж седмично при умерен климат.“

⁴⁰ Законът гарантира тези аспекти в чл. 19, ал. 2: „Както спалните, така и общите помещения трябва да отговарят на хигиенните нужди и да са направени така, че обемът пространство, проветрение, вода, осветеност и отопление да отговарят на климатичните условия на района“, а според ал. 3. от затворниците се изисква старателно да поддържат личната си хигиена; като им се осигуряват необходимите средства за това, както и подходяща храна съгласно чл. 21.2 LOGP.

нителна стойност е достатъчна за запазването на здравето и силите му“. Съгласно по същество същия текст – CJ. 1.4.9, тази гаранция подлежи на контрол от църквата, която играе важна роля в римското право и която въвежда в голяма степен принципа за хуманност в цялото законодателство на късната Римска империя в тази материя: *faciant ministrare libellis duobus aut tribus diurnis vel quot existimaverint commentarienses decretis, quorum sumptibus proficiant alimoniae pauperum*. Това задължение произтича от Конституция XIII на Хонорий и Теодосий, която вече разгледахме: *ut carceris ope miserationis aulas introeat, medicetur aegros, alat pauperes, consoletur insontes et cum singulorum causas scrutatus agnoverit, interventiones suas apud iudicem competentem pro iure moderetur*.

В Рим отбелязахме също смекчаване на инструментите за физическо усмиряване – CTh. 9.3.1.pr: *non ferreas manicas et inhaerentes ossibus mitti oportet, sed prolixiores catenas*, където се говори за по-разхлабени вериги и белезници, които ПНМ нарича „средства за принуда“ и чиято цел е да се предотврати бягство при пътуване или преместване, причиняване на наранявания на трети лица или самонараняване от затворника⁴¹. В случай че такива средства са необходими – когато никоя друга форма на контрол не е ефикасна, трябва да се използва най-щадящото от тях, а при необходимост да се използват по-сурови средства – да се намали тяхната жестокост, както сочи правило 49. В Рим виждаме първоначално жестока и деградираща употреба на такива средства, което предизвиква издаването на тази разпоредба с цел да се причиняват по-малко наранявания, но до забраната им не се стига.

⁴¹ Разпоредба 47 (AGNU 70/175) „Забранява се използването на вериги, белезници и други средства за физическа принуда, които поради естеството си са унизителни или причиняват болка. 2. Други средства за физическа принуда може да се използват само когато законът позволява това и в следните случаи: а) като превантивна мярка срещу бягство при пътуване/преместване, при условие, че бъдат свалени в момента, в който затворникът се яви пред съдебен или административен орган; б) по заповед на директора на пенитенциарното заведение, ако останалите методи за контрол не са дали резултат, за да се предотврати възможността затворникът да се самонарани или да нарани трети лица или да причини материални щети, в който случай директорът трябва да предупреди незабавно лекаря или други компетентни здравни специалисти и да информира вишестоящия административен ръководител.“

4. ЗАКЛЮЧИТЕЛНИ БЕЛЕЖКИ

A priori, съществува съответствие между някои от принципите, залегнали в Правилата на ООН и европейските норми⁴², и принципите, които открити са в някои римски източници. Промените, въведени под влияние на църквата, целят да утвърдят достойнството и ценността на човешките индивиди предвид необходимостта да се подобрят принципите и практиките в отношението към затворниците.

Трябва обаче да се мисли за едно по-осезаемо модернизиране на пенитенциарната система, тъй като понастоящем се изискват нови инструменти, алтернативни на затвора, като например дистанционния контрол с телематични средства, обусловен от големия брой на лицата, въдворени в местата за лишаване от свобода⁴³. По мое мнение е необходимо в затворите да се засили медиацията и другите алтернативни механизми за решаване на споровете, за да се избегнат дисциплинарните нарушения, към които е насочено и правило 38 на ПНМ⁴⁴.

⁴² Зачитането на достойнството и хуманността произтичат също и от Европейските пенитенциарни правила на Комитета на министрите на страните членки и от две препоръки. Първата е от 11 януари 2006 г., а последното изменение беше адаптирано с Препоръка CM/Res 2012 на Петия комитет на министрите към държаните членки относно Европейския деонтологичен кодекс за пенитенциарните служители от 12 април 2012 г. Правило 11 гласи: „При изпълнение на ежедневните си задължения пенитенциарните служители зачитат и следят другите да зачитат човешкото достойнство и спазват човешките права на всички хора.“, а Правило 12: „Пенитенциарните служители не нарушават, не подтикват към и не толерират изтезанията или друго унижително третиране или наказване при никакви обстоятелства, дори то да е наредено от висшестоящ служител.“. Тук също виждаме принципите, които коментирах във връзка с Минималните стандартни правила. Основни принципи са: Правило 1: „При третирането на всяко лишено от свобода лице се зачитат човешките права.“. От друга страна, при условията на въдворяване се подчертава необходимостта затворникът да бъде приет с валидна заповед за лишаване от свобода (част 2 на Правило 14), регистрация на затворника с неговите данни (правила 15 и 16), отделяне на мъжете от жените (правило 8.b), поддържане на здравословни и хигиенични условия (правила 18 и 19), храна (правило 22) и др. с цел гарантиране на минималните условия в местата за лишаване от свобода.

⁴³ Като говорим за криза на пенитенциарните системи няма как да не споменем телематичните средства като алтернатива на наказанието лишаване от свобода. Това се определя до голяма степен от пренаселеността на пенитенциарните заведения и от самата цел за социална реинтеграция на затворниците. Телематичната охрана, позволяваща дистанционен контрол, е основна алтернатива на наказанията лишаване от свобода. Тя е по-евтина и изисква по-малко персонал. Вж. REVIRIEGO PICÓN, F. La crisis de los sistemas penitenciarios europeos. – In: *Revista de la Unión Europea*, no. 16, 2009, p. 241 ss.

⁴⁴ Пенитенциарните заведения се насърчават да използват доколкото е възможно превенцията на конфликти, както и медиация и всеки друг алтернативен механизъм за решаване на спорове, за да се избегнат дисциплинарните нарушения и да се разрешават конфликтите.

От изложеното по-горе е видно, че по време на изпълнението на наказанието „лишаване от свобода“ и на охраната на затворниците съществуват изисквания за сигурност и дисциплина във вътрешния ред на пенитенциарното учреждение, които трябва да гарантират оптимални условия за въдворяването и добра пенитенциарна организация. Първите проявления на тези изисквания възникват в Древния Рим, където откриваме правните основи на много принципи, действащи в наши дни, и залегнали в Правилата Нелсън Мандела, чиято цел е да стимулират непрестанните усилия да се превъзмогнат практическите трудности на международно ниво, породени от съпротивата за тяхното прилагане, съзнавайки че тези принципи като цяло са минималните допустими условия според Организацията на обединените нации.

**ДОГОВОРЪТ ЗА ПРЕНАСЯНЕ НА СТОКИ ПО
МОРЕ –
РИМСКОПРАВНИ И СЪВРЕМЕННОПРАВНИ
АСПЕКТИ (НА АНГЛИЙСКИ ЕЗИК)**

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Резюме: Пренасянето на стоки по море е един от най-старите видове транспорт, който се появява със зараждането на древните цивилизации. Той се запазва до ден днешен точно благодарение на факта, че успява да осъществи и все още осъществява връзката между високо развитите и развиващите се икономики чрез многобройните предимства, които морската навигация е предлагала и предлага. Важно е преди всичко, че чрез малка инвестиция транспортирането на стоки с определени размери може да бъде организирано до най-отдалечени местоназначения единствено по море. От друга страна е необходимо да се има предвид, че този начин на транспортиране е много по-бавен от останалите възможни (въздушен транспорт, пренасяне по суша) не толкова поради изпълнението му чрез кораб, а по-скоро заради метеорологичните условия в открито море. Поради тази причина за този тип транспорт е характерен рискът от големи загуби както за екипажа, така и за стоките. Това предполага необходимостта за правна регулация, която да уреди въпросите, свързани с обезщетенията за вреди в случай на обща авария по време на пренасянето на стоки по море. Тези правила, създадени от древните народи, и развити и систематизирани в римското право, са възприети от съвременното право. Считаме за нужно да изясним въпроса както от римскоправна, така и от съвременна гледна точка.

Ключови думи: пренасяне на стоки по море; обща авария; *vis maior*; Римско право; съвременно право.

**CONTRACT OF CARRIAGE OF GOODS BY SEA
FROM THE ASPECT OF ROMAN
AND CONTEMPORARY LAW (ENGLISH
LANGUAGE)**

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Abstract: Carriage of goods by sea is one of the oldest modes of transportation, which originated with the emergence of the first ancient civilizations. This mode of transportation has been maintained to the present day precisely because of the fact that it enabled, and it still does, the connection of highly developed economies with developing economies. This is supported by the numerous advantages that maritime navigation offered and that it offers even today. First of all, with little investment, transport of goods of different dimensions can be arranged (due to their dimensions, the only way to transport certain things is precisely by sea) to the farthest places. On the other hand, it is necessary to take into account that this mode of transportation is much slower than other available modes of transportation (air transport, road transport), not so much because of the ship's performance, but because of the weather conditions that may occur on the open sea. That is why this type of transport of goods comes with the possibility of big losses, both for the crew and the items received for transport, which is why, since the earliest days, there has been a need for the introduction of certain legal rules that would regulate the issues of the occurrence and compensation of damages in case of general average during carriage of goods by sea. These rules created by the ancient peoples and supplemented and systematized in Roman law are accepted by contemporary law, hence the need for defining this issue both from the aspect of Roman and contemporary law.

Keywords: carriage of goods by sea; general average; vis maior; Roman law; contemporary law.

INTRODUCTION

Carriage of goods by sea is first mentioned in Roman law at the time of the expansion of the Roman State. It was the time when Rome became a strong and territorially large state, due to frequent wars and expanding trade.¹ At this time, Rome was no longer a small monolithic community that spread over the seven hills (*septimontium*), but it already encompassed the entire Apennine peninsula (which was inhabited by a heterogeneous population),² and after the victory over Carthage, it encompassed even the whole Mediterranean.³ Also, the first provinces (Sicily and Sardinia) were created in this period.

The world was connected through the Mediterranean as never before. Sea journey developed, primarily due to the need for trade. Roman ships sailed all over the Mediterranean, the Black and the Red Sea, to India, along the coast of present-day Morocco in the west, and all the way to Britain in the north-west.⁴ People travelled the most from spring to autumn, mostly during the day. *Ostia* was the port of Rome at the mouth of the Tiber River, and *Brundisium*, present-day Brindisi, was the port from where ships sailed to Greece and further east.

¹ See: ŠARAC, M. i MILETIĆ, T. Odgovornost brodara u rimskom pravu. – In: *Zbornik radova sa međunarodne naučne konferencije "Suvremeni izazovi pomorske plovidbe"*, Split, 29–30 septembar, 2017, p. 421–431; CASSON, L. *Ancient Mariners*. London, 1960, p. 225–233; STARR Ch. G. *History of the Ancient World*. New York, 1974, p. 504.

² "Some of the conquered peoples in this period were at a far higher cultural level than the Romans. This was particularly the case with the Etruscans. They were already familiar with the developed slavery relations and high technical culture, especially in metalworking [...] The Greeks who inhabited towns in the south of the peninsula were the masters of overseas trade. Crafts were highly developed in Campania [...] By conquering these peoples, the Romans did not destroy their culture. They were only stopped in their development and then incorporated into the Roman military and state machinery. That [...] productive forces of the Romans and their general cultural level." See: IGNJATOVIĆ, M. *Zaštita ljudskih i manjinskih prava u doba rimske republike*. – In: *Zbornik radova Pravnog fakulteta Univerziteta u Nišu*, tematski broj: "Zaštita ljudskih i manjinskih prava u evropskom pravnom prostoru". Pravni fakultet (Protection of human and minority rights in the era of the Roman Republic. – In: *Collection of papers of the Faculty of Law*, University of Nis, thematic issue: "Protection of Human and Minority Rights in the European Legal Area", Faculty of Law) Niš, 2002, no. 62, p. 328.

³ More details: IGNJATOVIĆ, M. *Actio furti et damni adversus nautas kao oblik osiguranja putnika na brodu*. – In: *Zbornik radova sa međunarodne naučne konferencije "Suvremeni izazovi pomorske plovidbe"*, Split, 29–30 septembar, (Actio furti et damni adversus nautas as a form of passenger insurance on board. – In: *Collection of papers from the international scientific conference "Contemporary Challenges of Maritime Navigation"*. Split, 29–30 September), 2017, p. 186.

⁴ With a favorable wind, 70 to 90 miles could be covered per day. For example, one could get from Rhodes to Alexandria in three days and from Brundisi to Corfu in nine hours.

The famous ports in Greece were the Greek cities of Piraeus (in Attica) and Efes (in Asia Minor), the islands of Delos, Rhodes, and Cyprus. The largest port on the Mediterranean was Alexandria in Egypt, from where large cargo ships, loaded with grain, sailed to Rome.

The occupation of the surrounding nations, in addition to geographic expansion, made contact with different cultures possible, by using a variety of goods. This caused the emergence of the need to create a new law that would suit the new circumstances,⁵ in order to regulate, primarily, contractual relations and the development of maritime trade with the most remote parts of the Empire.

The most important trade exchange took place between Rome and the provinces. Rome had to import certain products that it lacked, and the surplus of some products from Rome and the surrounding area was sold in the provinces.⁶ Bigger towns by the sea developed into large and well-known trade centres, some of which were specialized in a particular type of trade.⁷ The period after the Punic Wars, pushing the pirates from the sea, and the use of military roads exclusively for commercial purposes were particularly conducive to the overall development of trade.⁸ Most items were produced for the needs of the local population, but there were also certain regions of the Empire that were specialized only for certain products, for which traders used to travel very far, sometimes even beyond the borders of the Empire.

⁵ "In the first stage of development, maritime law was similar in all countries of the world, because it was based on custom law, and maritime customs are all very similar, given that sailing conditions and techniques are almost the same everywhere. So, the maritime law first developed as the custom law of traders and shippers. Specific maritime law institutes were formed very early from these customs. More details: NIKČEVIĆ-GRDINIĆ, J. Razvoj i unifikacija pomorskog prava. – In: *Godišnjak Pravnog fakulteta u Banjoj Luci*, (Development and unification of maritime law. – In: *Yearbook of the Faculty of Law in Banja Luka*), 2007, no. 30, p. 263.

⁶ Olive oil was particularly demanded, then wine, which was eventually suppressed by Greek wines that was well sold in the East. See: MAŠKIN, A. *Istorija Starog Rima*. Beograd (History of Ancient Rome. Belgrade), 1997.

⁷ In Puteoli, the Bay of Naples, a huge amount of metal products for export was made. On the other hand, by conquering Sicily, the entire province was turned into a large barn that was supposed to feed millions of people in Rome and Italy. Ore was imported from Spain, and luxury goods from the East.

⁸ At the same time, the other two trade "helpers" developed: money and loan. More details: STOJČEVIĆ, D. *Rimsko pravo. I deo. Društveno-ekonomski uslovi pod kojima se razvijalo rimsko pravo, statusno, porodično, stvarno, nasledno i krivično pravo*. Beograd (Roman Law. Part I (socio-economic conditions under which Roman law, statutory, family, property, hereditary and criminal law developed. Belgrade), 1947, p. 47.

With the maritime trade flourishing, there appeared the need for the existence of legislation, which would help solve problems that occurred in parallel with its development. Although the Romans were known for their legal imagination, legal logic, the interpretation of the law and creation of rights in accordance with the needs of the practice,⁹ it is unlikely that they were the ones who created the rules of maritime trade, since they were not historically known as a maritime nation, but that was the Hellenic people, long before them, whose maritime law was developed already in the IX century BC (*lex Rhodia de iactu*).¹⁰ Thanks to the reception of maritime law from the island of Rhodes, the Romans were ready for the development of maritime trade.

The existence of the basics of maritime law provided the opportunity to further develop this area of law, not only through the adopted provisions on general average, risk taking and sharing in accidents during carriage of goods by sea, but also through the introduction of new institutes, primarily in the form of maritime loan (*feonus nauticum*), contract of carriage of goods by sea (a specific form of the *locatio-conductio* contract), as well as through the creation of new procedural means that would protect the interests of maritime service users (passengers).

On the basis of the analysis of relevant legal sources, this paper will, based on the broader explanations given above, address two issues related to the carriage of goods by sea. Thus, in the first part of the paper, the contract of carriage of goods by sea in Roman law will be analyzed. In the second part of

⁹ See: IGNJATOVIĆ, M. Da mihi facto, dabo tibi ius (stvaranje, kreiranje, tumačenje i primena prava u starom Rimu). – In: *Zbornik na trudovi*, Treta međunarodna konferencija “Opštествeni promeni vo globalniot svet”, Praven fakultet (*Da mihi facto, dabo tibi ius* (establishing, creating, interpreting and applying rights in ancient Rome). Collection of papers, Third International Conference “General Changes in the Global World”). Štip, Faculty of Law, 2016, p. 325–338.

¹⁰ This legislation was developed under the strong influence of Phoenicians. The influence of the Phoenicians, the most important traders of the ancient times, was present in Rhodes, since it was their colony for a long time.
The Rhodes Maritime Code (*lex Rhodia de iactu*), was never physically found, but according to the works of Roman historians, it dates back to the seventh century BC. If it was necessary for the part of goods carried in a ship to be cast into the sea, in order to make the ship lighter, the captain of the ship was exempt of liability, and all participants in the joint venture would be liable for such sacrifice of goods. So, the concept of risk-taking by all participants in maritime trade was present.
This legislation was later incorporated into the Roman legislation, from which it passed into the Byzantine legislation. More details: IGNJATOVIĆ, M. *Actio furti et damni adversus nautas...*, cit., p. 186.

the paper, this contract will be analyzed from the aspect of contemporary law. In this way, the importance of this type of transport will be pointed out, as well as the great influence of Roman law on the formation of certain rules regarding this type of transport in contemporary law.

1. CONTRACT OF CARRIAGE OF GOODS BY SEA AS A SPECIAL FORM OF THE *LOCATIO-CONDUCTIO* CONTRACT

Contract of carriage of goods by sea, a special form of the *locatio-conductio* contract, was first mentioned in the period of the Republic, with the geographical expansion of the Roman state, and especially with the development of maritime trade.

By occupying the neighbouring nations, the Romans came into contact with the oriental culture, which was at a much higher level than the Roman culture. That was a period of "fascination with everything that was Greek".¹¹ However, the basis of the overall changes in the period of the republic was not only the encounter with Greek culture, but the intensive development of trade, which caused a new division in the social structure. The farmer was replaced by the trader.¹² The change in the social structure and contact with Greece influenced the change in the social consciousness, and thus the change in understanding of the essence of legal relations, as well as the adoption of new legal rules under the pressure of trade needs.

The formalism of the old law, which was considered to be the basis of legal effect, was increasingly abandoned and emphasis was placed on *consensus*, the agreement of the contracting parties, as well as on the wishes of the contracting parties when concluding a legal transaction.¹³

¹¹ Greek comedies are translated, educated people find it necessary to travel to Greece, the education of children is entrusted to Greek slaves or children are sent to Greece for education. See: STOJČEVIĆ, D. STOJČEVIĆ, D. Rimsko pravo. I deo, cit., p. 51.

¹² The trader never has the same perception as the farmer; he represents individuality because his personal ambitions, initiative and methods, which are his personal secret, bring him wealth; he tends to increase the number of legal entities in order to enhance his activity; he is an anti-radicalist, an opponent of every complicated formalism, and eager to receive recruits, foreigners and foreign ideas. In this period, the Romans embraced all that is foreign, or more precisely, everything Greek. Ibidem.

¹³ Legal life was no longer a secret and the effect of mystical religious or sorcery, but a conscious arrangement of mutual relations dictated by the needs caused by the common life. See: STOJČEVIĆ, D. Rimsko pravo. I deo, cit., p. 52.

By conquering the Greek islands, especially the island of Rhodes, the Romans came into contact with the existing rules governing maritime trade.¹⁴ Hence, the contract of carriage of goods by sea was defined in accordance with the adopted provisions of the maritime law of the island of Rhodes,¹⁵ which the Romans called *Lex Rhodia de iactu*,¹⁶ so the contract of carriage of goods by sea itself was so named. So, even though the carriage of goods by sea flourished during the Phoenician civilization, its legal foundation was formed much later, only in the early years of the Roman Republic.

“*Lex Rhodia de iactu* (“Rhodian law about jettison”) is a typical example of what we would call a successful legal transplant, and not some kind of imposed solution, but a rule that the recipient system (Roman law) willingly and efficiently implemented from the donor system (Rhodian maritime law)”.¹⁷

The contract of carriage of goods by sea was a specific form of the *locatio-conductio* contract in Roman law, namely *locatio-conductio operis faciendi*, and accordingly, all the rules that applied to this contract also applied to its specific form (sub-category) – contract of carriage of goods by sea.

¹⁴ Rhodes was a strong, independent, maritime and merchant island, south of present-day Greece. Between 1000–600 BC, people from the island of Rhodes developed a strong merchant fleet, which was the first in the Mediterranean. This further influenced the development of trading fleets along the west coast of Italy, France and Spain. At the same time, the population of Rhodes developed legal rules to solve a number of problems related to the carriage of goods by sea, including the adoption of probably the first law in the field of maritime law, which is known as *Lex Rhodia de iactu* in contemporary law. More about this: MOMSEN, T. und KRUGER, P. *Lex Rhodia de iactu*. Digesta XIV, 2.

¹⁵ In accordance with these provisions, in the event of an accident at sea, the captain of the ship was entitled to unload the ship by throwing part of the cargo into the sea. The damage was borne proportionately by all owners of rescued goods. Read more: BOLANČA, D., AMIDŽIĆ, P. and PEZELJ, V. General average – an ancient institution of maritime law. – In: *Ius Romanum*, 2017, no. 2, p. 1–11, available at <https://iusromanum.eu/documents/985691/3819843/Dragan+Bolan%25U010Da.pdf/216c3b7d-21a6-42b2-a448-ffb90c41f42d>

¹⁶ The original text of the law, which the Romans called *Lex Rhodia de iactu*, and which has its origins in the ancient Greek or Hellenistic legal solutions, has never been found; therefore, it is not possible to talk about the period (year) of its adoption. However, it can be said that it certainly existed and that it was accepted by Roman law, as evidenced in the works of Paulus, Cicero and Iustinianus, who in their legal texts explicitly refer to it. Thus Paulus in “The Opinions of Julius Paulus”, in Book II, titulus 7, Cicero in “Rhetorical Art” and Iustinianus in Digest Book XIV, titulus 2, directly refer to this law. Read more: SIMONOVIĆ, Z. Pomorsko osiguranje prema vizantijskom *nomos rhodian nautikos* u slučajevima potapanja broda, gusarskog napada ili oluje (Maritime insurance according to the Byzantine *Nomos Rhodian nautikos* in the case of ship sinking, pirate attack or storm). – In: *Teme*, Niš, Vol. XXXIII, 2009, no. 3, p. 905–915.

¹⁷ See: ĐORĐEVIĆ, M. M. Strukture i posebne vrste *locatio-conductio operis faciendi*. – In: *Strani pravni život*, Beograd (Structures and specific types of *locatio-conductio operis faciendi*. – In: *Foreign legal life*, 2014, no. 3, Belgrade), 2014, p. 262.

Thus, the contract of carriage of goods by sea, as a specific form of *locatio-conductio operis faciendi*, was a consensual, double-binding, cargo, bona fides contract, as defined in the era of the Roman Republic and protected by *actio conducti* and *actio locati*, according to which one party would oblige to perform a certain activity (*conductor*) within the agreed time, and the other to pay in return a certain sum of money (*locator*).¹⁸ The subject of this contract was not work itself or workforce, but the final result of work (*opus*), i.e. to transport goods from one place to another, and a fee (*merces*) paid for such services.¹⁹

In order for a contract of carriage of goods by sea to have a legal effect, it was necessary that the contracting parties agreed on the following two essential elements of the contract, i.e. on the goods given for carriage and the fee paid for the performed carriage of goods by sea.

The contract was concluded between the owner of the goods and the captain of the ship, who, as a rule, was also the owner of the ship in ancient times (*dominus navis*),²⁰ and therefore commanded the ship and collected the fee for the performed service. Exceptionally, the validity of the contract could also depend on a third party. This came later, when the functions of the ship owner and captain were not fused in a single person. Thus, apart from *execitor navis*, a third person, authorized by the owner of the ship as his proxy (*magister navis*) and representing him and technically navigating the ship, could command the ship.²¹

¹⁸ Apart from sea carriers, this specific type of contract was used by masons, craftsmen, painters, artists, musicians and others. Read more: ĐORĐEVIĆ, M. *Strukture i posebne vrste locatio-conductio operis faciendi*, cit., p. 251.

¹⁹ In the history of maritime navigation, the contract of carriage of goods by sea also appeared in the following forms: Entega (Greek ἐνθήκη: stake), is a maritime contract of Greek origin, which was applied in medieval Mediterranean trade. Capital owners and shippers joined in certain associations in order to transport certain types of goods, with the aim of gaining profit. Colegantia originated in the Adriatic area and it was of particular importance to the inhabitants of Dubrovnik, who could not travel and trade independently. Rogantia was a contract by which one of the contracting parties entrusts the other party to transfer a particular item and hand it over to a third party. See: BLAGOJEVIĆ, M. *Trgovačka udruženja i poslovi u srednjovekovnom Dubrovniku*. – In: *Bankarstvo* (Trade associations and jobs in medieval Dubrovnik. – In: *Banking*), 2014, no. 3, p. 170.

²⁰ Most often, the captain of the ship was also the shipowner, when he was called “patronus”. Over time, other names for the captain of the ship were lost, and the “patronus” remained as the only name, unless some of the important characteristics of the captain were intended to be pointed out, in which case the name “*nauclerius*” was used. See: PEZELJ, V. *Patronus navis u dalmatinskom statutaru prava*. – In: *Zbornik radova sa međunarodne naučne konferencije “Suvremeni izazovi pomorske plovidbe”* (Patronus navis in Dalmatian statutory law. – In: *Collection of papers from the international scientific conference “Contemporary Challenges of Maritime Navigation”*, Split, 29–30 September, 2017, p. 311–335.

²¹ See IGNJATOVIĆ, M. *Actio furti et damni adversus nautas...*, cit., p. 190.

Exercitor navis was a shipper or a carrier, i.e. the party that organized the sailing venture, and he bore all the benefits and damages from giving the ship; *magister navis* was the captain of the ship.²²

For the formation and validity of this contract, in addition to the achieved agreement of the contracting parties, it was necessary to fulfil the conditions regarding the ordered delivery of goods. All loaded goods had to be entered in the log book and listed in detail – “*in scriptis*”. The document, which contained a detailed list of goods, could not be available to traders. This primitive form of bill of lading had to contain the name of the cargo owner, the inventory of goods, its tags, weight and quantity.

The *locator* (contracting authority) was directly responsible for the loading of goods, which was necessary for this form of *locatio-conductio operis faciendi*. In addition, from the very nature of this contract, it could be concluded that goods comprised all movable things, whether consumable or not by nature. When it came to movable but non-consumable things, the *conductor* had a detention on them, as a rule. However, if it was a movable consumable item (in case of carriage of wine or grain by sea), then, at the time of receipt of goods, the *conductor* became its owner, with the obligation to return the same amount of the same kind of goods after transport. Another obligation of the *locatora* was to pay the price for the performed transport of goods. As a rule, the price was expressed in cash, but it could have been otherwise.²³

Finally, the *locator* was obliged to ensure both loading and unloading of goods when the ship arrived safely at the port. In order to protect his rights, the *locator* had *actio locate* at his disposal, and in case of theft of goods or damage to goods during carriage by sea, he could use *actio furti et damni adversus nautas* and general *actio in factum*.²⁴ Most often, the ship transported goods of several different owners. It was rare that the goods of only one owner were carried by sea.

²² More details: PEZELJ, V. Op. cit., p. 317.

²³ See: Gai Inst. III, 147. Transl. O. Stanojević, Belgrade, 2009, p. 249, 251.

²⁴ According to the rules of Roman law, if the owner of the ship used the ship alone, then the contract had the characteristics of the *locatio-conducti operis faciendi* contract. If, however, the ship owner rented his vessel without the crew, that was *locatio-conductio rei*. If the ship was leased with the crew, the problems arising during the carriage of goods by sea could not be resolved successfully, given the complex nature of this type of contract. In that case, the application of general lawsuit – *actio in factum* – was allowed. See: PEZELJ, V. Op. cit., p. 318.

Since the goods carried by sea had several owners (contracting authorities), in case of throwing the goods off board (accidents at sea, pirate attacks, storms...), it happened that the owners were unevenly damaged. Therefore, the question was asked of whether it was in the spirit of the law that in such circumstances, when the goods of one owner were sacrificed for the common good of other owners, only the victim bore the final loss. The solution to this situation was precisely contained in *Lex Rhodia de iactu*, which provided that in the case of “general average”, all locators, as well as the owner of the ship (*conductor*) are jointly liable for damages in proportion to the value of their salvaged goods.

*Paul. D. 14.2.1. Lege Rhodia cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*²⁵

The obligation of the *conductora* was to carry out the ordered task (carriage of goods by sea). Therefore, the subject of his obligation (*opus*) was the result of the task – performed carriage of goods by sea. This was necessarily related to the price, which he was entitled to receive only when the entrusted job was done. In addition, he was obliged to ensure safe transportation of goods, and to handle the goods with the utmost care as *bonus pater familias*. That is why his responsibility was not *omnis culpa*, but in some cases he was responsible for the expertise of his crew members and his assistants, and in some cases even for *custodia*.

This form of responsibility, in addition, made the position of the *conductor* more difficult, because their liability was already stricter and became objective responsibility in the era of the Republic (*culpa in custodiendo*). The introduction of this type of liability was inevitable, because it was the basis of the relationship of trust between the service provider and user. On the other hand, the absence of this type of liability led to general uncertainty, so shippers had “bad reputation” during one period because it was considered that they often worked with thieves with the intention of acquiring unlawful material gain.²⁶

²⁵ The law of Rhodes stipulates that, if the goods were thrown in order to make the ship lighter, the contribution of all compensates for what has been done for the benefit of all. See: BORAS, M. and MARGETIĆ, L. *Rimsko pravo* (Roman Law). Zagreb, 1980, p. 166; BOLANČA, D., AMIDŽIĆ, P. and PEZELJ, V. *Op. cit.*

²⁶ The legal texts point out that shippers had bad reputation because they associated with the robbers and then shared profits. See: BUJUKLIĆ, Ž. *Rimsko privatno pravo*. Beograd (Roman Private Law. Belgrade), 2013, p. 432.

2. CONTRACT OF CARRIAGE OF GOODS BY SEA IN CONTEMPORARY LAW

In contemporary law, the contract of carriage of goods (things) by sea binds the shipper to carry certain goods (things) on a particular transport route (port of embarkation - port of disembarkation), and the contracting authority undertakes to pay a certain freight rate as the transportation cost.

By analyzing the definition of the concept of contract of carriage of goods by sea, at first glance, the foundations of this definition can be seen in Roman law, as well as the essential elements and characteristics of this contract. The subject of the contract is the goods that need to be carried. The goods to be carried can be determined or determinable, inside or outside commerce. If the shipper estimates that the carriage of a particular type of goods could cause danger to persons, other goods or the ship itself due to the very nature of the goods or messy packaging, he has discretion to reject such goods.

The relationship, as one of the *essentialia negotii* of this contract, can also be determined or determinable; in addition, the contract may stipulate which contracting party has the obligation to determine the waterway. During transportation, the shipper carries the goods along the most convenient route, which does not have to be the shortest, but which is the safest way to carry out the organized transport without any risks or losses. The contract or legal provisions allow the deviation from the usual transport route, when it comes to rescuing people and property at sea, when it is necessary to supply the ship with fuel, oil and other supplies.

The third essential element is at the same time a controversial issue in the legal theory. The contract on the carriage of goods by ship, in practice, regularly determines the freight rate, but the contract is valid even if the freight rate is not determined in it,²⁷ which is unacceptable from the aspect of Roman law. The lack of this element in the contract would mean the nullity of the contract in Roman law. This is explained in the legal theory by the fact that the freight rate is always determinable, that is, it can always be determined when it is not determined by the contract.²⁸

²⁷ MILENOVIĆ, D. Poslovno pravo. Niš (Business Law. Nis), 2011, p. 244.

²⁸ KAPOR, V. and CARIĆ, S. Ugovori robnog prometa. Beograd (Trade Contracts. Belgrade), 1979, p. 383.

In accordance with the provisions of Roman law, in contemporary law, this contract is defined as binding for both parties, obligatory, and, as a rule, informal, while according to the conclusion technique, it belongs to the so-called formal or standard contracts.

From the above-mentioned definition of the contract, it is clear that the contracting parties in this type of transport are the shipper and the ordering party.

The shipper is a natural or legal person who, as the owner of the ship, is the holder of the sailing venture, whereas it is presumed, until proven otherwise, that the shipper is a person registered in the register of ships as a ship owner (there was the same rule in Roman law). We can see from the legal definition that only the actual authority on board is essential for the status of the shipper, that is, as the law stipulates, that the shipper is the owner of the ship used for a particular sailing venture.²⁹

The other contracting party is the ordering party, and that can be any natural or legal person who wants to transport certain goods from the port of embarkation to the port of disembarkation.

In the execution of this contract, there are other persons undertaking certain actions in order to organize a sailing venture smoothly. Thus, there is the shipper who represents a consignor. Then, there is the stevedore (dockworker) who delivers goods for transportation at the order of the shipper (loading, storage of goods inside the ship). When concluding a maritime business contract, parties may also hire a maritime agent. Also, in this complex legal relationship, the consignee has an important role, whose name is entered in the bill of lading or waybill.

In order to transport certain goods at all, the first in a series of obligations of the shippers is to sail into the so-called safe harbor³⁰ and set the ship for boarding. Also, the shipper must make available to the ordering party such vessel that has certain contractual or common properties. In this respect, the ship must have certain abilities.³¹ Certain clauses may be added to the contract, stat-

²⁹ Law on Maritime Navigation. – *Official Gazette*, 104/13, Art. 4, paragraph 1, p. 4.

³⁰ Port without political and natural risks.

³¹ General capacity (ship capable of sailing), special capacity (navigation capacity), specific capacity (capacity to transport the contracted cargo).

ing the time period from the conclusion of the contract when the ship must be ready for boarding. We thus identify the “promptly loading” clause (the ship ready for boarding in eight days from the conclusion of the contract) and the “spot clause” (the ship ready for boarding in 48 hours from the conclusion of the contract). According to our law on maritime and inland navigation, there is also the obligation of the shipper to deliver “a notice of readiness” stipulated in Article 509, paragraph 1.

When it comes to the obligations of loading and unloading goods, comparative law offers different solutions, but it has become clear over time and it is considered to be the basic rule that this obligation is generally regulated by the contract, and if there is no contract, the user has the loading and unloading obligation in the shipping agreements, while that obligation is transferred to the shipper in the contracts of carriage. In the contract, the issue of loading and unloading is solved by adding appropriate loading clauses. Thus, it can be agreed: that the shipper is exempted from the obligation to load cargo (FIO clause); that the cargo loader shall not only load the cargo on board, but also stack it (in case of packaged goods, the FIOS clause applied; and in case of goods in bulk, the FIOT clause applies); that the cargo loader shall load the cargo when the weight of goods per cargo unit exceeds two tonnes (heavylift clause). Loading and unloading costs shall be borne by the shipper and they are included in the freight rate.

When the shipper receives goods for transport, he is obliged to issue certain documents to the cargo loader on the basis of the contract of carriage. These documents serve as proof that goods are duly received and they can be in the form of a bill of lading or waybill, which are the counterpart of the document issued by the shipper to the transport user in Roman law, and whose contents for the most part coincide with the contents of its follower in contemporary law. The bill of lading is a security that is shown to the shipper when receiving goods in the port of disembarkation, so that the recipient of goods can exercise the right that is incorporated into it. The waybill is not a security but a standard transport document.

When it comes to the obligation of the shipper to act upon the orders of the contracting authority, it can be seen that it is particularly pronounced in the shipping contract on time. The contracting authority in such contract may request

the change of the recipient, the change of the transport route, etc., assuming that certain conditions have been met. First, subsequent orders can not be contrary to the purpose of the ship. Other, subsequent orders and instructions must be within the scope of the contract of carriage of goods.³² Under certain circumstances, the shipper has an obligation to request an order.

When the ship docks in the port of disembarkation, the shipper is obliged to deliver the goods to the legal holder of the bill of lading or waybill. When delivering the goods, the shipper issues a document entitled "No interference" and gives the authority to the recipient of goods to take the goods from the ship.

In practice, it may happen that the recipient does not want to receive goods or simply does not appear in the port of disembarkation. Then only the shipper can hand over the goods for storage whose costs are borne by the recipient. If the stored goods get damaged, the shipper shall not be liable for that; he is only responsible for the selection of warehouse.

When it comes to the obligations of transport users, that is, the obligations regarding loading and unloading of cargo, there can occur lay days, demurrage, extraordinary demurrage and reversible lay days. Lay days are regular time stipulated in the contract or common practices or loading or unloading of cargo.³³ Lay days start at the beginning of the morning working hours, or afternoon working hours, provided that the notice of readiness is submitted no later than two hours before the expiration of the morning or afternoon working hours.³⁴ Upon the expiration of lay days, demurrage starts without interruption, regardless of whether it is a working or non-working day. Demurrage is additional time given by the shipper to the loader to load the cargo on board. Extraordinary demurrage is additional time after demurrage given to the loader. In order to prevent delay in boarding, the legislator prescribes the fee for extraordinary demurrage, which is twice as high as for demurrage. Reversible lay days can only be provided for in the contract and their purpose is to use the time saved during loading for slower unloading of goods from the ship or vice versa. This obligation does not apply to liner shipping.

³² MILENOVIĆ, D. Op. cit., p. 254.

³³ Ibid. p. 256.

³⁴ LAW on Maritime and Inland Navigation. – *Official Gazette of FRY*, 1999, no. 74, Art. 524. paragraph 1.

Although the issue of freight is controversial in theory, it is still one of the basic obligations of the transport user. The freight rate can be determined in the lump sum, per unit of cargo, time, etc. As a rule, the freight rate is determined by the amount of goods whose transport is arranged. However, as already mentioned in the paper, there is one deviation, when the “full for empty” clause is activated. In cases prescribed by law, the amount of freight to be increased or reduced.³⁵

The obligation to bear certain costs occurs in shipping contracts at a time when the transport user agrees to supply the ship and crew with all the necessary ingredients and to bear the costs related to the purchase of fuel, lubricants and other necessary things for smooth carriage.

If the user gives the goods of suspicious origin not packaged in the prescribed manner for transport, and damage occurs precisely for these reasons, either on board or if one of the crew members is injured, such damage will be borne by the transport user.

When loading goods on board, the transport user is obliged to submit all the necessary documents that the shipper requires. If he fails to comply with the orders of the shipper, the shipper has the right to unload the whole cargo. In this case, the shipper reserves the right to full freight and compensation for demurrage and extraordinary demurrage, or to compensation for keeping the liner and the compensation of any other damages.³⁶

3. LIABILITY OF THE SHIPPER FOR DAMAGE TO CARGO

There are two types of liability of the shipper for damage, contractual and non-contractual. Contractual liability, as the name suggests, has its foundation in the contract concluded by the shipper and the contracting authority. If it does not fulfill the obligations stipulated in the contract, the contracting authority has the power to hold the shipper accountable. However, it often happens in practice that the contracting authority that is a contracting party is not the consignee at the same time. Then, in order to protect the consignee, he has the right to hold

³⁵ Ibid., Art. 620, 621.

³⁶ Ibid., Art. 533, paragraph 3.

the shipper accountable on the basis of the bill of lading, because their relationship is not based on the contract, but on a non-contractual basis (bill of lading).

Presumed guilt occurs as a basis for the liability of the shipper, which means that the shipper will be exempted from liability only if he proves that the damage caused could not be prevented or remedied by taking all reasonable measures. Until the adoption of the Hamburg Rules in 1978, the shipper was held accountable only for trading, but not the nautical errors of the crew. By adopting these rules and introducing the "all reasonable measures" legal standard, the shipper's liability has been extended to include nautical errors. These rules also provide for certain cases of limitation of liability in case of fire on board, when live animals are transported, or when people and property have to be rescued during a sailing venture.

There are two ways of limiting the liability of the shipper: per unit of cargo and the size of the ship.

When it comes to the limitation of liability per unit of cargo, which can occur when goods are lost or damaged during transport, as a rule, the liability for damages cannot exceed \$ 900 per unit of cargo, in dinars at the middle exchange rate on the day of payment. However, in exceptional cases, the shipper cannot rely on this type of restrictions. These are the cases when the shipper personally lost or damaged goods, or when the declaration of the value of the consignment is entered into the contract. Then the shipper is responsible for the actual damage.

Limitation of liability according to the size of the ship is maximum liability over which the shipper cannot be held accountable. This type of liability is stipulated by our law in Article 419 in which the norm-maker prescribes the following:

- a) the shipper shall be liable in the amount of 650 \$ in dinars at the exchange rate on the day of conclusion of the contract per tonne of vessel tonnage, if the claim arose due to material damage;
- b) the shipper shall be liable in the amount of 2000 \$ in dinars at the exchange rate on the day of conclusion of the contract per tonne of vessel tonnage, if only the claim from physical damage arose;
- c) the shipper shall be liable in the amount of 2000 \$ in dinars at the exchange rate on the day of conclusion of the contract per tonne of vessel tonnage, if they arose from a single claim from physical damage

and from material damage. In addition, the amount of 1 350 \$ is intended only for the settlement of physical damages, while the amount of 650 \$ is intended for the settlement of material damages.

In order for the shipper to be able to use this type of restriction, he is obliged to establish a so-called limited-liability fund in extrajudicial proceedings, and that fund shall serve solely for the settlement of those claims arising from the situations for which it was formed.

CONCLUSION

Based on the above stated, through a comparative review of the contract of carriage of goods by sea, it is evident that Roman law had an undeniable and comprehensive impact in terms of the development of this type of contract. By analyzing the contemporary definition of the concept of the contract of carriage of goods by sea, it can be noted that the foundations of this definition are laid down in Roman law, as well as the essential elements and features of this contract.

The legal nature of the contract of carriage of goods by sea has remained the same. In accordance with the solutions of Roman law, in contemporary law too, this contract is defined as binding for both parties, obligatory, and, as a rule, informal, while according to the conclusion technique, it belongs to the so-called formal or standard contracts.

By comparing the solutions offered by Roman and contemporary law, it is clear that the goods, relation and freight were and still are the integral elements of the definition of this contract, while they differ in certain segments with respect to the third mentioned element. Today's practice, in terms of the obligation to define freight in the contract itself, corresponds to the Roman legal regulations. This is the result of an effort to avoid possible disputes, although the definition of freight in contemporary law is not *essentialia negotii* of this contract.

The Roman legal framework of the contract of carriage of goods by sea affected the contemporary legal norms concerning commodity documents that accompany this contract. The existence of the document with the name of the cargo owner, a detailed list of goods, its tags, weight and quantity was necessary for the formation and validity of the contract in Roman law. This primitive form of

waybill today occurs in the form of a bill of lading, as a document which proves that the goods have been duly received.

Perhaps the most obvious evidence of the influence of Roman law in this area is the resolution of the disputable issue of inflicting deliberate and justified damage through the concept of general average. The aim of the existence of this institute in Roman law, as it is today, was to provide safety to participants in maritime venture, by giving authority to carry out certain actions, in order to prevent losses that could affect the crew, as well as the cargo accepted for carriage.

After concrete conclusions, it is necessary to briefly reflect on the maritime law as a whole. With the beginning of the development of the first slave-owning societies, as a set of legal rules governing the relations of natural and legal persons regarding navigation and maritime affairs in general, today it includes norms concerning the transport of passengers, goods, as well as provisions on marine insurance, removal of sunken objects, but it also regulates navigation accidents and interventions, collision of ships, as well as general average.

The specificity of the maritime law, with respect to its foundations, is reflected in traditionalism and free development, and with respect to the legal connection of geographically distant territories, the most important feature of this branch of law is its universal character.

Therefore, when considering the issues of maritime law at the global level, the issue of its harmonization and unification is raised, with the aim of closer trade cooperation and safe navigation. It is necessary that state borders do not stand in the way of cooperation in this area, regardless of whether it comes to legal or factual actions, because they are interrelated and mutually dependent, and only in their entirety, they can ensure the realization and protection of interests of participants in a legal matter.

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СПАСЯВАНЕТО ПО МОРЕ – ОТ РИМСКОТО ПРАВО ДО НАШИ ДНИ (НА АНГЛИЙСКИ ЕЗИК)

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Резюме: Правото на спасяване по море е принцип на морското право, при който всяко лице, което помага за възстановяването на кораб или товар в опасност по, има право на възнаграждение, съизмеримо със стойността на спасеното имущество. Правната концепция за правото на възнаграждение за спасяване на застрашената собственост в морето може да бъде проследена в Античността от около 3 000 години. Започвайки с Родоските едикти (*Nomos Rhodion Nauticos*), през римските закони до съвременната правна система, в различните епохи е било признато че онзи, който доброволно рискува себе си и собственото си имущество, за да спаси от опасност в морето собствеността на друго, трябва да бъде възнаграден от собственика на запазеното имущество. Днес правото на спасяване по море е относително унифицирано международно, тъй като много от морските нации са приели текста на Конвенцията за уеднаквяване на някои правила относно оказване на помощ и спасяване на море, подписана в Брюксел на 23 септември 1910 г., (подписана в Брюксел през 1910 г.) и отговарящата на необходимостта от преразглеждане на международните правила Международна конвенция по спасяване (1989 г.), която запазва общите принципи на Конвенцията от 1910 г.

Ключови думи: спасяване по море; Римско право; морско право.

SALVAGE AT SEA – FROM ROMAN LAW TO MODERN TIME (ENGLISH LANGUAGE)

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Abstract: The law of salvage is a principle of maritime law whereby any person who helps recover another person's ship or cargo in peril at sea is entitled to a reward commensurate with the value of the property saved. The legal concept of an entitlement to reward for saving imperiled marine property can be traced back into antiquity for some 3 000 years. Beginning with the Edicts of Rhodes (*Nomos Rhodion Nauticos*), through the laws of the Romans into modern legal system, it has been recognised through the ages that an individual who risk himself and his own property voluntarily to successfully rescue to property of another from peril at sea should be rewarded by the owner of the property saved. Today, salvage law is relatively international and uniform, because many of the world's maritime nations have adopted the text of the International Convention for the Unification of Certain Rules Relating to Assistance and Salvage at Sea (signed in Brussels in 1910) or International Convention on Salvage (signed in London in 1989) which is based on the same general principles as the 1910 Convention.

Keywords: salvage at sea; Roman law; maritime law.

1. HISTORICAL INTRODUCTION

On land the person who rushes in to save another's property from danger is an officious intermeddler, the volunteer whom even equity will not aid. He has no right to a reward, although he may incur liability if he damages the property in the course of saving it. The person who saves life on land is similarly treated.

At sea the person who saves property receives a reward which is generously computed in the light of "*the fundamental public policy at basis of awards of salvage – the encouragement of seamen to render prompt service in future emergencies*".¹ The reward, it has often been said, is not a mere recompense for work and labor done, not a *quantum meruit*.

Historically, the saving of life was regarded as fulfilling a moral duty but not as entitling the salvor to a reward. Life salvors now have by statute a right to a fair share of the award made to salvors that have saved property on the same occasion. Life salvage, unaccompanied by property salvage, still goes unrewarded.²

The major dangers that jeopardized maritime navigation are the reason why- through maritime practice and legal regulations – special relationships have been built between the one who needs assistance and the one who provides it. In spite of certain conceptions trying to submit salvage under the classic institute of civil law, salvage should be considered special institute of maritime law, has specific characteristics of its own and is influenced by the idea of solidarity

¹ See GILMORE, Grant and BLACK, Charles L. Jr. The Law of Admiralty. Mineola. 2. ed. New York, 1975, p. 532.

² The true origins of salvage are unknown, while a detailed history of the law of salvage has yet to be written. BROWN, Arthur. A compendious view of the Civil law and of the law of the Admiralty. Vol. 2. London, 1802, p. 122) calls salvage a "quasi contract", thus no doubt referring by implication to the civil law concept of *negotiorum gestio*. More recently, certain scholars have seen salvage as part of the law of restitution for unjust enrichment (KENNEDY, William Rann at all. Law of Salvage. 5. ed. Authors: William Rann Kennedy, David W. Steel, F. D. Rose and Richard A. A. Shaw. London, Stevens, 1985, p. 16–18). "The law of salvage is sometimes said to be part of the *jus gentium* and the statement reflects a judicial awareness that the perils of the sea are not confined by national boundaries and a n acceptance of the principle that international uniformity is in such a context peculiarly desirable" – so GILMORE, Grant and BLACK, Charles L. J. R., Op. cit., p. 533.

among people involved in the maritime venture.³ Salvage at sea has become such a special institute of maritime law.

According to the stipulations of the oldest known rescue and salvage regulation which refers to the Rhodes Maritime Law (*Νόμος Ροδίων Ναυτικός*, from the VII–IX century), the sailors were mutually obliged to assist each other. The usurper of someone else's property during a rescue and salvage operation was punished, and the rescuer was awarded a prize only if his action was successful.⁴

During the later centuries, the continuity of the development of rescue and salvage at sea was hampered by the recognition of the so-called right of shipwreck (*ius naufragii*) or the maritime accident whether it is on the surface, on the seabed, or on the coast, thereby legalizing the robbery of all remains of ship and cargo after the shipwreck.⁵

Prize law and the right to wrecks and wrecked cargo date back before Roman times,⁶ but salvage of a ship at sea is much later. There is a reference to

³ Common venture is a basic theme in maritime law, reflecting the understanding of maritime commerce as a joint undertaking on the part of shippers, carriers and consignees; ship owners and charterers; and their respective insurers, who (directly and indirectly) confront the perils of the sea together, and who should therefore share both the profits and the risks attendant upon their combined operation. The common venture principle is evident in fields such as carriage of goods, as well as in general average and marine insurance – see TETLEY, William. *Glosary of Maritime Terms*. 2. ed. Montreal, 2004, p. 36.

⁴ PEZELJ, Vilma. Pomorske havarije u dalmatinskom statutarnom pravu. – In: *Zbornik radova Pravnog fakulteta u Splitu*. Vol. 1, 2006, p. 97–98.

⁵ See in details BONOLIS, Guido. *Il diritto marittimo medievale dell'Adriatico*. Pisa, 1921, p. 591–594.

⁶ So TETLEY, William. *Maritime Liens and Claims*. 2. ed. Montreal, 1998, p. 331. Civil law has its origin in Roman law, as codified in the *Corpus Iuris Civilis* of Justinian. The *Corpus Iuris Civilis* is the name given to a four-part compilation of Roman law prepared between 528 and 534 A.D. by a commission appointed by Emperor Justinian and headed by the jurist Tribonian. The *Corpus* includes the *Code* (a compilation of Roman imperial decrees issued prior to Justinian's time and still in force, arranged systematically to subject-matter); the *Digest* (or *Pandects*) (fragments of classical texts of Roman law by well-known Roman authors such as Ulpian and Paul, composed from the I to the IV centuries A.D., arranged in 50 books subdivided into titles); the *Institutes* (a coherent, explanatory text serving as an introduction to the *Digest*, based on a similar and earlier work by the jurist Gaius); and the *Novellae* (a compilation of new imperial decrees issued by Justinian himself) – see HORVAT, Marijan. *Rimsko pravo*. Zagreb, 1974, p. 33–36; CLAPP, James E. *Civil law*. – In: *Dictionary of the Law*. New York, 2000, p. 83; COLLIN, Peter H. *Civil law*. – In: *Dictionary of the Law*. London, 2001, p. 59; STEWART, W. J. *Civil law*. – In: *Dictionary of the Law*. Glasgow, 2001, p. 67; BOLANČA, Dragan. Pomorsko pravo u eri globalizacije – univerzalno pravo ili mješoviti pravni sustav? (Maritime Law in the Era of Globalisation – Universal Law or a Mixed Legal System?). – In: *Zbornik radova Pravnog fakulteta u Splitu*, 2002, no. 3-4, p. 334.

a remuneration for a successful salvor in the medieval sea codes,⁷ in the *Rules of Oleron* (1160) at art. 4⁸ and in the *Consolat de Mar* (art. CCVII and art. CCXLV) a compilation of maritime law customs applied by consuls in the Western Mediterranean in the last medieval (14. century) and early modern period (second half of XVII century).⁹ Later on, the provisions on salvage at sea entered into the French *Ordonnance de la Marine Marchande* (1681).¹⁰

Medieval Maritime Law accepts the Roman principle of respect and retention of property rights in sunken and lost things in the case of shipwreck. Novelty is the right to the salvage reward, the duty of reporting the found items, and the involvement of public authorities in these matters. Only if the owner is not found within the legally prescribed period of time, the occupation of the things comes in favour of the persons who have found them or cities, since then the dereliction and proclamation of things as *res nullius* are assumed.¹¹

2. SALVAGE AT SEA IN MODERN LEGAL SYSTEM

Today, salvage law is relatively international and uniform, because many of the world's maritime nations have adopted the text of the International Convention for the Unification of Certain Rules Relating to Assistance and Salvage

⁷ One of the oldest rules is the Marine Ordinances of Trani (1063) – TETLEY, William. *International Maritime and Admiralty Law*. Montreal, 2002, p. 322.

⁸ The salvage provisions of art. 4 of the Rules of Oleron do not, however, appear in the earliest versions of the Rules, but seem to have been added in versions dating from the late fifteenth or early sixteenth centuries – see TETLEY, William. *Maritime Liens and Claims*. 2. ed. Montreal, 1998, p. 331.

⁹ See ŠKARICA, Vjekoslav *Osnova Trgovačkog pomorskog zakona za jugoslavensku državu*. Split, 1919. p. 3, VERONA, Ante. *Pomorsko pravo*. Zagreb, 1924, p. 14, VLAŠIĆ, Ivan. *Consolat de Mar*. – In: *Pomorska enciklopedija*. Vol. 2. Zagreb, 1981, p. 40, GRABOVAC, Ivo. *Enciklopedija pomorskog prava*. Split, 1991, p. 37.

¹⁰ The *Ordonnance de la Marine Marchande* is an important piece of French maritime legislation, dating from 1681, codifying much of the French maritime law and practice. The *Ordonnance* of Louis XIV codified several rules on cargo salvage in the event of shipwreck – see TETLEY, William. *Glossary of Maritime Terms*. 2. ed. Montreal, 2004, p. 95–96, HUDSON, N. Geoffrey and HARVEY, Michael D. *The York-Antwerp Rules*. 3. ed. London, 2010, p. 5, JAKAŠA, Branko. *Ordonnance de la Marine Marchande*. – In: *Pomorska enciklopedija*. Vol. 5. Zagreb, 1981, p. 600–601, ŠPEHAR, Milan. *Savremeni smjerovi pomorskog prava s obzirom na našu kodifikaciju*. Zagreb, 1937, p. 6.

¹¹ See JAKAŠA, Branko. *Sistem plovidbenog prava Jugoslavije*. Knjiga IV. *Plovidbene nezgode*. Svezak 2. *Sudar brodova, spašavanje, vađenje potonulih stvari, ostali slučajevi vanugovorne odgovornosti*. Zagreb, 1990, p. 265–266; HORVAT, Marijan. *Iz historije sudara, brodoloma, spasavanja i pomaganja*. – In: *Zbornik za pomorsko pravo*. Zagreb, 1967, p. 13–16.

at Sea (signed in Brussels in 1910)¹² or International Convention on Salvage (signed in London in 1989)¹³ which is based on the same general principles as the 1910 Convention.

The modern international law of marine salvage is primarily concerned with (1) property salvage. Other types of salvage in which distinctive considerations arise are (2) life of salvage and (3) “treasure” salvage (principally the salvage of ancient wrecks). The law also distinguishes between instances of “pure” salvage, where the salvor is a volunteer and contract salvage, where parties have entered into an agreement concerning the salvage efforts.¹⁴

The formal elements of a valid salvage claim under the general maritime law (mentioned international conventions) are well-known:

1. there must be a marine peril placing the property at risk of loss, destruction, or deterioration;¹⁵
2. the salvage service must be voluntarily rendered and not required by an existing duty or by special contract;¹⁶
3. the salvage efforts must be successful, in whole or in part.¹⁷

¹² Salvage Convention 1910 adopted by Comité Maritime International (CMI) at Brussels on September 23, 1910 and in force as of March 1, 1913. See also the Protocol, adopted at Brussels on May 27, 1967 and in force as of August 15, 1977 – TETLEY, William. *Glossary of Maritime Terms*. 2. ed. Montreal, 2004, p. 110. See also STANKOVIĆ, Predrag. *Pomorske havarije*. Zagreb, 1988, p. 63–77; D'OVIDIO, Antonio Lefebvre. *Studi per il Codice della navigazione*. Milano, 1951, p. 285–300.

¹³ Salvage Convention 1989 adopted by International Maritime Organization (IMO) at London on April 28, 1989 and in force as of July 14, 1996 – *ibid*, p. 110–111. See also MUDRIĆ, Mišo. *The professional salvor's liability in the law of negligence and the doctrine of affirmative damages*. Hamburg, 2013, p. 61–87.

¹⁴ SCHOENBAUM, Thomas J. *Admiralty and Maritime Law*. Minnesota, 1973, p. 502.

¹⁵ An essential element of salvage is danger. If the property is not in danger, the service provided is not salvage. The nature of danger is open to interpretation. To constitute a marine peril, the danger need not be imminent or actual, all that is necessary is a reasonable apprehension of peril. Danger needs to be real but not necessarily immediate or absolute. The subject of salvage must be in real danger, which means the property is exposed to damage or destruction. The burden of proof lies on the salvor and he needs to prove real danger existed when the performance of service commenced – see in details D'OVIDIO, Antonio Lefebvre e PESCATORE, Gabriele. *Manuale di diritto della navigazione*. Milano, 1960, p. 396–398, PAVIĆ, Drago. *Pomorske havarije i osiguranje*. Split, 2003, p. 62, KENNEDY, William Rann at all. *Op. cit.*, p. 301–317, JAKAŠA, *Op. cit.*, p. 291–294.

¹⁶ Voluntary means that the services are not rendered under a pre-existing contract agreement or under official duty or purely for the self-preservation interests of the salvor. Because of this, there is no limitation to the class of persons that can be considered as volunteers see KENNEDY, William Rann at all. *Op. cit.*, p. 361–412, SCHOENBAUM, *Op. cit.*, p. 503, BRUNETTI, Antonio. *Il diritto marittimo italiano*. Vol. 3. Torino, 1931, p. 308.

¹⁷ The requirement for the service to be successful can be summed up from the English maritime law principle “no cure, no pay”. However, success need not be total. Partial

As recognized subject matter, traditionally, salvage only recognizes a ship or craft ("vessel"), cargo on board, freight payable and bunkers carried on board as the subject of property in danger. The salvor has a claim of salvage reward¹⁸ if he has successfully and voluntarily salvaged maritime property in danger.¹⁹ As noted early, historically a salvor of a derelict vessel was entitled to half the value of the property saved. But, modern salvage rewards are not based as they once were on any fixed percentage of a vessel's value. *Salvage Convention 1989* sets out a number of factors which a court is required to have regard to in fixing a salvage reward.

These include:

- a) the salvaged value of the vessel and other property,
- b) the skill and efforts of the salvors in preventing or minimising damage to the environment,
- c) the measures of success obtained by the salvor,
- d) the nature and degree of the danger,
- e) the skill and efforts of the salvors in salvaging the vessel, other property and life,
- f) the risk of liability and other risks run by the salvors or their equipment,
- g) the time used and expenses and losses incurred by the salvors,
- h) the promptness of the services rendered,
- i) the availability and use of vessels or other equipment intended for salvage operations and the state of readiness and efficiency of the salvor's equipment and the value of that equipment.²⁰

Salvage Convention 1910 provides for no direct remuneration by rescued persons to their salvors, but on the other hand, life salvors have a right to a fair

success, provided that there is some measure of preservation to the owners, is sufficient. This principle distinguishes marine salvage from contract salvage, where the service is performed for a fixed compensation often without regard to success – PAVIĆ, Op. cit., p. 71–89.

¹⁸ Salvage reward is a typical feature of salvage. A successful salvage is the essential condition and the value of the salvaged property is the absolute limit of a salvage reward – see BRAJKOVIĆ, Vladislav. Nagrada za pružanje pomoći ili spasavanje na moru. – In: *Zbornik za pomorsko pravo*. Vol. 6. Zagreb, 1967, p. 55, MANCA, Plinio. *Commento alle Convenzioni Internazionali Maritime*, volume terzo, Milano, 1975, p. 235–267, TETLEY, William. *Glossary of Maritime Terms*. 2. ed. Montreal, 2004, p. 110.

¹⁹ See supra footnote 15.

²⁰ See PAVIĆ, Drago. *Pomorsko imovinsko pravo*. Split, 2006, p. 369–371.

share of the award paid to property salvors of the vessel.²¹ The criteria by which the life salvage reward is determined are the same as those applied in property salvage.

The scope of salvage has been expanded by the *Salvage Convention 1989* and protection of the environment is part of salvage. Oil pollution can cause damage to the environment. If the salvor prevents oil pollution from happening, he indeed performs a valuable service to the community.²² Therefore, the salvor will be rewarded with special compensation,²³ even if neither the ship nor cargo nor any other property has actually been salvaged by his operations. The special compensation is only payable if the salvor failed to earn a salvage reward.

3. THE HISTORY OF SALVAGE AT SEA ON THE CROATIAN COAST

The history of salvage at sea on the Croatian coast was very much the same as described above.²⁴ The medieval statutes of many cities and ports on the Croatian coast (Dubrovnik, Korčula, Hvar, Brač, Split, Trogir, Senj, etc.) were under the obvious influence of the East Mediterranean customs and tradition. The Rhodian principle of remuneration for salvors was repeated in mentioned statutes.²⁵ The statutes of the littoral towns situated on the Croatian coast of the salvage matters as far back as the 12. century. Among them to be distinguished as the most progressive stand out the provisions of the Korčula Statute, 1265.²⁶

²¹ See RODIERE, Rene et PONTAVICE, Emmanuel du. *Droit Maritime*. 12. ed. Paris, 1997, at para. 469, GOUILLOUD, Martin Remond. *Droit Maritime*, 2. ed. Paris, 1993, at para 365.

²² It is the civil law principle of "assistance" for the pollution. An important element of historic, civilian "assistance" has thus been inserted into modern international salvage law damage – TETLEY, William. *Maritime Liens and Claims*. 2. ed. Montreal, 1998, p. 340.

²³ *Salvage Convention 1989* allows expenses in respect of efforts to prevent or minimize damage to the environment, even if the services are not successful, or are only partially successful, or if the salvor is prevented from completing his work. The expenses plus a "fair rate for equipment and personnel actually and reasonably used" in the salvage operation, provide some compensation in difficult salvage cases involving environmental damage. The salvor whose efforts are successful in preventing or minimizing environmental damage may also have this special compensation increased by up to 30%, or even (where the tribunal deems just) up to 100%, of his expenses – *ibid*, p. 333.

²⁴ See part. 1. (Historical Introduction).

²⁵ BRAJKOVIC, Vladislav. *Étude historique sur le Droit Maritime Privé du Littoral Yugoslave*. Marseille, 1933, p. 216–225.

²⁶ See PEZELJ, Op. cit., p. 98–99; CVITANIĆ, Antun. *Statut grada i otoka Korčule*. Korčula, 2002, cap. 10, 85. See also: BURMAS, Frano. *Institut pružanja pomoći i spašavanja na*

After the French occupation during the Napoleonic wars, the French law (*Code de Commerce*, 1807) was extended to all parts of the Croatian coast and stayed in force until recently. The first modern national regulations on salvage at sea were adopted as late as 1977 (such regulations were part of the former Yugoslavia's Maritime and Inland Navigation Act, 1977).²⁷ After promulgating the *Constitution* in 1990 ("Narodne novine", 56/90) and after declaring its independence by the *Dissolution Act* of 8 October 1991 ("Narodne novine", 31/91), the Republic of Croatia embarked upon the task of regulating numerous issues, thus creating a genuine legal constellation and legal system. Part of the above is the rules which govern the field of maritime navigation. The *Croatian Maritime Code* (hereafter – CMC '94) was passed on February 2, 1994 and came into force on March 22, 1994 ("Narodne novine", 17/94). In Part IX of CMC '94 the legislator analyses incidents of navigation including salvage at sea (art. 774 – 800).²⁸ The existing provisions on salvage in the CMC '94 were based upon the text *Salvage Convention 1910*.²⁹ However, some provisions of the new *Salvage Convention 1989*, were inserted in the text of CMC '94 (for example, article 789, on special compensation), although Croatia was not party to the new convention at the time. After 10 years the new *Croatian Maritime Code* (hereafter – CMC '04) was passed on December 21, 2004 and came into force on December 29 ("Narodne novine", 181/2004). New CMC '04 deals with salvage in Part VIII (art. 760 – 788) and adopts the newly accepted principles of the *Salvage Convention 1989* (in the meantime Croatia has become the party of this convention).³⁰

moru u odredbama Korčulanskog statuta iz 1214. g. – In: *Zbornik radova znanstvenog skupa Statut grada i otoka Korčule iz 1214. g.* Zagreb, Samobor, 1989.

²⁷ STANKOVIĆ, Predrag and STANKOVIĆ, Gordan. Croatia. – In: *International Encyclopaedia of Laws. Transport Law*. Haag, 2000, p. 106. New act derogated old Act of salvage at sea, 1966, which was applied in all Yugoslav navigable waters – see STANKOVIĆ, Predrag. *Spasavanje u plovidbenom pravu Jugoslavije*. Rijeka, 1976, p. 11–153.

²⁸ See BOLANČA, Dragan and LUTTENBERGER, Axel. Some Views on the New Croatian Maritime Code. – In: *Zbornik radova Pravnog fakulteta u Splitu*, 1995, no 1-2, p. 116; BOLANČA, Dragan. The New Croatian Maritime Code. – In: *Acta Juridica Hungarica*, Budapest, 1994, no. 1-2, p. 234.

²⁹ GRABOVAC, Ivo. *Plovidbeno pravo Republike Hrvatske*. Split, 2003, p. 338–346.

³⁰ GRABOVAC, Ivo. *Suvremeno hrvatsko pomorsko pravo i Pomorski zakonik*. Split, 2005, p. 215–228, BOLANČA, Dragan. *Prometno pravo Republike Hrvatske*. Split, 2016, p. 225–227.

4. CONCLUSION

The major dangers that jeopardized maritime navigation are the reason why - through maritime practice and legal regulations - special relationships have been built between the one who needs assistance and the one who provides it. In spite of certain conceptions trying to submit salvage under the classic institute of civil law, salvage should be considered special institute of maritime law, has specific characteristics of its own and is influenced by the idea of solidarity among people involved in the maritime venture. Salvage at sea has become such a special institute of maritime law.³¹

The law of marine salvage is of ancient vintage. In contrast to the common law, which does not grant a volunteer who preserves or saves the property of another any right to a reward, a salvor of imperiled property of navigable waters gains a right of compensation from the owner. The origins of this right can be traced in Byzantine law (*Νόμος Ροδίων Ναυτικός*, from the VII–IX century). There is a reference to a remuneration for a successful salvor in the *Rules of Oleron* (1160) at art. 4 and in the *Consolat de Mar* (art. CCXLV and art. CCXLV) a compilation of maritime law customs applied by consuls in the Western Mediterranean in the last medieval (14. century) and early modern period (second half of XVII century). Later on, the provisions on salvage at sea entered into the French *Ordonnance de la Marine Marchande* (1681). The law of marine salvage developed in response to important social policies, to encourage efforts to save property from destruction and to discourage embezzlement by salvors.

Today, salvage law is relatively international and uniform, because many of the world's maritime nations have adopted the text of the *International Convention for the Unification of Certain Rules Relating to Assistance and Salvage at Sea* (signed in Brussels in 1910) or *International Convention on Salvage* (signed in London in 1989) which is based on the same general principles as the 1910 Convention. *Salvage Convention 1910* as recognized subject matter, traditionally, only recognizes a ship or craft ("vessel"), cargo on board, freight payable and bunkers carried on board as the subject of property in danger. The salvor

³¹ Salvage at sea is similar to general average – see BOLANČA, Dragan, AMIŽIĆ JELOVČIĆ, Petra and PEZELJ, Vilma. General Average – an Ancient Institution of Maritime Law. – In: *Ius Romanum*, 2017, no. 2, p. 1–11, available at <https://iusromanum.eu/documents/985691/3819843/Dragan+Bolan%25U010Da.pdf/216c3b7d-21a6-42b2-a448-ffb90c41f42d>; RADOVIĆ, Zoran. Osiguranje spasavanja na moru. Beograd, 1980, p. 64–92.

has a claim of salvage reward if he has successfully and voluntarily salvaged maritime property in danger (principle *no cure, no pay*). The reward is a typical feature of salvage. A successful salvage is the essential condition and value of the salvaged property is the absolute limit of a salvage reward. The scope of salvage has been expanded by the *Salvage Convention 1989* and protection of the environment is part of salvage. Oil pollution can cause damage to the environment. If the salvor prevents oil pollution from happening, he indeed performs a valuable service to the community. Therefore, the salvor will be rewarded with special compensation.³² But, the salvor does not necessarily have to achieve success in preventing and minimizing damage to the environment in obtaining special compensation (civil law principle of “*assistance*”). *Salvage Convention 1989* remains the principle of “*no cure, no pay*” for property damage as basic rule governing the payment of salvage rewards.³³ So the two historic principles have been reconciled. The good news for ship owners is that salvage rewards and special compensations are covered by standard ship insurance policies.³⁴

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³² See supra footnotes 22 and 23.

³³ See supra footnotes 17 and 18.

³⁴ The payment of the salvage reward and special compensation are the underwriter's liability under the standard insurance policies and essential condition of an insurance procured for the ship, cargo and freight. About marine hull policy see PADOVAN, Adriana Vincenza. *Uloga pomorskog osiguranja u zaštiti morskog okoliša od onečišćenja s broda*. Zagreb, 2012, p. 217–285, and BOLANČA, Dragan. *Pravo osiguranja Republike Hrvatske*. Split, 2017, p. 68–70.

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ЗАВИСИМО СЕЛЯЧЕСТВО В ОБЛАСТТА КОТОР ПРЕЗ XIV ВЕК (НА АНГЛИЙСКИ ЕЗИК)

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Резюме: В тази статия авторката прави нормативен анализ на разпоредбите на средновековния Которски статут от XIV в., отнасящ се до положението на зависимото селячество (наречено *posadnicus*) в областта Котор. За целта се обясняват и социалните условия, в които са приети тези правила, като се вземат предвид възможностите и животът в Котор, който е бил в рамките на Статута на сръбската средновековна държава като автономен град на върха на своето развитие.

Разпоредбите на Статута практически са обработени чрез анализиране на архивния материал от този период. За да се обяснят основните правни влияния върху положението на зависимите селяни в Котор е направено сравнение между тази уредба и правилата на римския закон за положението на зависимите хора (колони) в периода на Късната Римска империя.

Ключови думи: колон; *glebae adscriptus*; *posadnicus*; *Statuta et lege civitatis*; 14 в.; Средновековна Сърбия; римско право; Късна Римска империя.

**DEPENDENT PEASANTS
IN THE DISTRICT OF KOTOR
IN THE 14TH CENTURY (ENGLISH LANGUAGE)**

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Abstract: In this paper, the author performs a normative analysis of the provisions of the Mediaeval Kotor statute from the 14th century relating to the position of the dependent population (called *posadnicus*) in Kotor District. To this end, it also explains the social miles in which these provisions were adopted taking into account the opportunities and life in Kotor, which was within the time of the statute of the Serbian mediaeval state as an autonomous city at the peak of its development.

The rules of Statute in practice have been processed by analyzing the archive material from that period. In order to explain the priority legal influences on the position of the dependent peasants in the Kotor District, the comparison of this regulation with the rules of the Roman Law on the position of the dependent people (*colonus*) in the period of the Late Roman Empire is done.

Keywords: kolon; glebae adscriptus; posadnicus; Statuta et leges civitatis Cathari; 14th century; Medieval Serbia; Roman law; Late Roman Empire.

1. INTRODUCTION

A legal position of dependent people in the Medieval coastal towns, especially in Kotor, was of interest to legal historians, older generation particularly. There were different views as for the character and duration of the dependent, landless position of people based on equal legal and other sources.

Medini made this dependent relation in Medieval Kotor, with no detailed explanations, equal to the one enjoyed by landless peasants.¹ Petranovic found these landless peasants to be what were free peasants in Medieval Serbia², whereas Sindik thought this landless position to be only a temporary *glebae adscriptus*³. A real giving of landless peasant is, according to his opinion only a temporary job meaning a transition of the obligations of landless peasants' obligations from the original master to a new one, and was valid only for the course of the duration of an agreement. Stjepcevic thought these landless peasants-*glebae adscripti* to be tied to land and their position didn't differ from the one possessed by free peasants in Serbian State⁴. Stjepcevic's attitude is that a landless peasant, really, *glebae adscriptus* may be accepted as a correct one. However, we think that this opinion is to be somewhat corrected, as the position of all dependent people, called landless peasants in Medieval Kotor may not be generalized and equalized with the position of all dependent people in Medieval Serbia.

The position of dependent people in the district of Kotor (near urban environment) differs from the one of those in Grbalj, Bijela, Krusevice, and Ledenici, places that Kotor obtained by Serbia by the beginning and in the 30-ies of the 14th century. Their position may not be considered to be the same as the position of either free peasants or dependent people marked as "*homines de Zoppa*". This difference is thought to be conditioned by a special legal regime established

¹ MEDINI, M. O postanku i razvitku kmetskih i tezakih odnosa u Dalmaciji (On origin and development of peasant and farm laborer relations in Dalmatia). Zadar, 1920, p. 93.

² PETRANOVIC, B. O robstvu po srpskim spomenicima i statutima dalmatinskih gradova (On slavery according to Serbian monuments and statutes of Dalmatian towns). Jugoslavenska akademija znanosti i umjetnosti (JAZU), RAD, 1871, Vol. XVI, p. 64.

³ SINDIK, I. Komunalno uredjenje Kotora od druge polovine XII do XIV stoljeca (Commune structure of Kotor from second half of XII to the middle of XV centuries). SANU, special edition. Book 27. Beograd, 1957, p. 49.

⁴ STJEPCEVIC, J. Kotor i Grbalj (Kotor and Grbalj). Split, 1941, p. 39.

by the municipality of Kotor for the regions obtained by Serbia which, as a fief of Kotor, with all population found on it, are divided among citizens according to feudal norms⁵.

The distinction made in relation to present investigations on the position of the dependent peasants in Medieval Kotor necessarily demands a more precise analysis of some questions especially on position of dependent peasants in Kotor's district. This question has so far been, it could be almost said, in the meeting of consideration of the position of dependent people in Grbalj and other regions obtained by Serbia. Beside this, due to equal terminology of the term dependent man in this and all other parts of Kotor, a legal position of dependent population on the whole territory of Medieval Kotor is unjustifiedly equalized.

The aim of further presentation is to enlighten the position of dependent peasants as dependent categories of people in Kotor district by using, although rare norms on these issues, the Statute of Kotor and archive materials from the 14th century. There will be considered the questions of becoming dependent peasant, rights and duties of dependent peasants originating from the contract on becoming a dependent peasant, duration of that relation and legal status of a dependent peasant. Parallels on legal position of this category of dependent people in the environment of Kotor will be sought not only, as done so far, in the position of dependent peasants in other parts of Medieval Kotor, but also in Roman law, namely in feudalised relations in late Roman law Empire which, in fact are a forerunner of later classical Medieval feudal-property relations.

2. BECOMING A DEPENDENT PEASANT

Judging to the oldest preserved Medieval notary material of Kotor and its Statute, becoming a dependent peasant was usually frequent in the 14th century. By time there were established certain rules on becoming a dependent peasant which were marked in the notary documents of the 14th century as "*usum et consuetudinem posanicorum civitatis Cathari*".

What was meant to be by "*usum et consuetudinem*" in relation to becoming a dependent peasant is difficult to state based on only two recorded cases in

⁵ BOGOJEVIĆ-GLUŠČEVIĆ, N. Svojinski odnosi u Kotoru u XIV vijeku (Property relations in Kotor in 14th century). Nikšić, 1992, p. 165–205.

the notary books of the 14th century. Beside that, these two documents, one from the beginning the other from the end of the 14th century offer only poor data on becoming a dependent peasant.

The first recorded case on becoming a dependent peasant dates back to 1335. Drago Bogdanov from Gacko became a dependent peasant of Domanja as a son of Basa Salvina, a reputable and very rich citizen of Kotor. Drago became a dependent peasant (*"recommend se in posanicum"*) due to the custom and way done by other dependent peasants in Kotor. A part from these poor and usual phrases there are no other data or explanations in the document, based on which it may be said about *"usum et consuetudinem posanicorum civitatis Cathari"*⁶.

A somewhat more detailed and rich in data is another document on becoming a dependent peasant, recorded on 2 March, 1399. Radelja and Dobric Bjelojevic from Lustica became *"nostra bona voluntatem"* dependent peasants of Tripun Petrov Buce. The brothers Bjelojevic, as dependent peasants and people (*"homines et villanos domini Triphoni"*) obliged themselves to serve their patron due to customs (*"cum consuetudinibus consuetis"*), as done by other peasants to their master according to existing customs.⁷ Neither this document nor the first one give an explanation what *"usum et consuetis alli posanicis"* consist of when becoming a dependent peasant.

Though the data given in these two documents are poor, yet some conclusions on how to become a dependent peasant may be brought. Above all, this is a dependent position of peasants as they become the people of patrons with whom they entered such a position. Then, entering a dependent position is voluntary. Such a position is entered *"ex bona voluntatem"*. Third, dependent peasants were among domestic peasant population or immigrants from other towns,

⁶ MAYER, A. Kotorski spomenici, Prva knjiga kotorskih notara od godine 1321–1327 (Kotor monuments. The first book of Kotor notary public from 1321 to 1327). Zagreb, 1951 (further in the text Monumenta Catarensia I): doc. 1277 (*"Ego Draghe Bogdani de Ghecha recomendo me in posanicum Domagne filium base de Salve, ad usum et consuetudinem aliorum posanicorum civitatis Cathari"*).

⁷ Acta notaria, III, (1392–1401). Sudsko notarski spisi Arhiva u Kotoru (Court-notary documents of the Archives in Kotor). SNIII (1392–1401), unpublished material (further in the text SN III), p. 649. doc. 1, 02.03.1399 (*"Nos Redeglia et Dobrich fratres Bielovich de Lustica [...] Et sibi recomandamis persones nostras promitentes sibi esse fideles et servire bene et legaliter sucit faciunt allij rustici patronibus suis cum consuetudinibus consuetis [...]"*).

and fourth, they were obliged, no matter whether they were domestic population or foreigners, to serve their master according to the customs of the town (*"usum et consuetudinem civitatis"*).

A little number of documents and poor data on entering a dependent position, on one side, and on the other hand, an undisputable fact that dependent peasants appeared as contractual parties and there very much more of them than recorded in the documents, make us think that there were entering such a position not recorded and the way of doing so was known and regulated by a custom. There were no difficulties in connection with this, thus there was no need for statutory regulations of the way of entering a dependent position. Thus notary card on entering a dependent position was not necessarily made and the cited examples are exceptions from the habitual way of entering a dependent position, with no notary card.

There remains an open question why only these two cases were cited in notary books. Perhaps a notary card was obligatory, and due to a difficult position of a dependent peasant there were few such cases, this being untenable thesis at the very beginning as such a supposition is denied by the data from the documents on different legal jobs of dependent peasants. Also untenable is the attitude that a notary document on entering a dependent position was made when it had to deal with a dependent peasant coming from other places and entered such a position, as the second cited document showed that the contract on entering a dependent position referred to domestic peasant population. These atypical things may be explained by the documents about jobs concluded by dependent peasants in the part explaining legal position of dependent peasants.

3. OBLIGATIONS OF DEPENDENT PEASANTS

In the Statute there are no specially regulated obligations of dependent peasants in the district toward a patron personally and in relation to the properties they settled down. This, as for the habitual practice of entering a dependent position, is not to be sought in statutory rules. In the two cited documents on entering a dependent position, obligations of dependent peasants are marked as obligations *"usum et consuetudinem aliarum possanicorum civitatis Cathari"*, this supporting our hypothesis in connection with habitual regulations on entering a

dependent position. The obligations of dependent peasants were so known in practice that it was not necessary to record them in the Statute as an obligation. Apart from the obligation of loyalty (*promitens esse fideles*), traditional rules prescribed, as recorded in the contract from 1399, that patron should be served well, according to law, and in the way done by other peasants to their patrons (*"bene et legaliter servire sicut faciunt alij rustici patronus suis cum consuetudinibus consuetis"*)⁸. This obligation probably implied working on the land, but based on the notary material available it is not possible to determine what sort of work.

Such ambiguity of sources as for obligations of dependent peasants is partly eliminated by the data from the two documents from the 14th century; first one, in which a dependent peasant appeared as an object of legal business, and the second one about an eternal lease of land (*"affictum inperpetuum"*) from the first half of the 15th century.

The first document about pledge was concluded on 24.02.1335. Based on it, it is evident that Jovan from Crni Plat was a dependent peasant of Sergije Pribov, that this patron pledged him on the contractual day to Tripun Buce, a famous landowner of Kotor. According to this contract patron gave his dependent peasant who was obliged to work for the pledge Tripun for 33 days a year, till he settled his obligation toward Triphon Buce. He had probably such an obligation toward his mother, a pledgor Sergije before the patron pledged it to settle a debt⁹.

There are very important data in the document on lease in *perpetuum* explaining obligations of a dependent peasant toward his master, though it was concluded in the first half of the 15th century. This document is especially important as at determining obligations contractors cited customarily established

⁸ SN III, p. 649, doc. 1, 02.03.1399 (*"Nos Redeglia et Dobrich fratres Bielovich de Lustica nostra bona voluntatem confitemur esse homines et villanos domini Triphonis Petri de Buchia protovestiarii. Et sibi recomendamis personas nostras promittentes sibi esse fideles et servire bene et legaliter sicut faciunt alij rustici patronibus suis cum consuetudinibus consuetis [...]"*).

⁹ Monumenta Catarena I, doc. 1184 (*"Ego Sergius, filius condam Triphonis de Pribi, apigno Triphoni Buchie hominem meum Iohannem de Carniplat cum domo, horto et cosciart pro perperis triginta tali conditione, quod numquam possim eum scomparare nisi pro me tantum possidendum, et quod si aliis personis appareret, ad dictum Triphonem libere reuertatur cum omnibus denariis supradictis; quod si vellem scomparare pro me non possim ante tres annos proxime venturos, sed tantum postea pena non obstante. Qui homo teneatur sibi laborare annuatim triginta tribus diebus cum suo pane [...]"*).

obligations of dependent peasants. A contract was concluded between Drago Lukin de Drago et Bojan Medonic from Ljesevici. The lease was concluded for the term in *perpetuum*, eternal lease, and Bojan's obligation as a lease holder was to build a house on the leased land at his own expenses to live there with his family as done by other dependent peasants of Kotor environment.¹⁰ From this citation it may surely be concluded that a dependent peasant at entering a dependent position was obliged to live on the patron's land, so it may further be supposed that the dependent peasant was tied to land and could not leave it freely. A loyal service to the patron, mentioned already in the document dating from 20.03.1399, does not mean anything else but a confirmation of a dependent peasant on such a binding to land and patron respectively.¹¹

Another proof that dependent peasants were bound to the land is a document dating back to 25.11.1399. In that document it was stated that Tripko Pasquali as a pledge obtained some lands in Kotor district on which dependent people of Marko Dragonis were living, he being a pledgor and their patron (*"homines Marco Dragonis"*). The lands and people on the pledged lands should belong to Tripko Pasquali, under the condition that the debt of 100 perper for which the lands and people are pledged was returned¹².

Only exceptionally, in accordance with patron, the obligation of being bound to land of the patron could be changed. Beside the cited document on pledging a dependent peasant Jovan¹³, on such allowance of patron there is preserved again only one document from the first half of the 14th century. The dependent peasants of the late Pavle Tome from Kavac, "now Micha Buchie from Kotor", could leave their house in Kotor district where they lived as dependent peasants whenever they wanted. The contract was concluded on 07.02.1334

¹⁰ SN VI, p. 140, 24.VI.1431; 5 cit. by STJEPCEVIC, J. Kotor i Grbalj, p. 37.

¹¹ SN III, p. 649, doc. 1, 02.03.1399; See footnote 7.

¹² MAYER, A. Kotorski spomenici. Druga knjiga kotorskih notara, 1329, 1332–1337. Kotor monuments (The second book of Kotor notary public, 1329, 1332–1337). CANU and JAZU. Podgorica, 1981 (further in the text Monumenta Catarensia II), doc. 441 (*"Ego Marchus Dragonis appigno Tripe Pascalis villam meam et castagnetum cum omnibus terris et villanis dicte ville, que villa est in loco, qui dicitur sanctus Teodori Guimanoy et castagnetum Triphonis Buchie pro perperis centum de cruce. Quod si non rescatauero usque ad festum sancii Petri proxime venturum, dictus Tripe possit possidere et usufructare terras et homines dicte ville. Et quando predictus Marcus restitueret perperos supradictos, dictus Tripe teneatur restituere dictam villam, castagnetum et terras cum omnibus hominibus, pena non obstante [...]"*).

¹³ Monumenta Catarensia I, doc. 1184; See footnote 9.

between Miho Buce, patron and the mentioned dependent peasants of the late Pavla Tome, this indicating that the dependent peasants were equal contract subjects¹⁴. It may not be explained why such liberal conditions were allowed to dependent peasant in this concrete case. Miha was, as shown by two another documents from 1334, very generous toward his dependent peasants. We consider that he deliberated them from dependent position in such a way. Thus Bratan and Milovan Ratikovic from Kavac, on 24.02.1334, were given as a gift "*cum facio de gratia speciali*" vineyards and dependent peasants out of the property of the late Pavle Tomin, now in property of Miho Bu}e. The dependent peasants could, at their own will, do whatever they wanted with vineyards and orchards ("*possit de dictis vineis et calametis suam facere voluntatem*")¹⁵, thus it may be concluded that dependent peasants could even be private proprietors of the lands in Kotor district.

From the cited, though poor data, it may be confirmed that by entering a dependent position, dependent peasants belonged to their patrons, they were obliged to serve them, namely to work for them, to live on the patron's land and not to have right, except it allowed by patron, to leave that land. These are, we think, obligations of dependent peasants established by custom, which were mentioned in the two documents on entering a dependent relation as obligations dependent peasants had towards their masters ("*usum consuetis consuetudinibus posanicis*"). It is possible that in everyday practice there were on peasant properties some more traditional and very expected dependent obligations toward patrons and that the listed obligations were not the only obligations of dependent peasants in Kotor district in the 13th and 14th centuries.

¹⁴ Monumenta Catarensia II, doc. 723 ("*Nos posanici condam Pauli Thome de Cauic de bona omnium nostra voluntate concordamur cum Micho Buchie ire ad habitandum in domibus olim predicti Pauli et nunc Micho predicti de Cauice, taliconditione, quod omni hora, quod nobis placuerit possimus de dictis dominus recedere ad nostram voluntatem [...]*").

¹⁵ Monumenta Catarensia II, isp. 740 ("*Ego Micho Buchie facio de gratia speciali Miloslauo de Rattecho de Cauice, olim homini Pauli Tome et nunc meo, quod illas vineas et calamata, que sunt extra possessionem olim Pauli Tome et tis suam facere voluntatem [...]*"); Similary in SN II, doc. 741, 24.II.1334.

4. DURATION OF DEPENDENT POSITION

In the Statute and notary books there are data about bounds of dependent peasants to their patron in Kotor district in 14th century, namely about duration of dependent position and possibilities of changing such a position in the course of the 14th century.

Two statutory provisions from the beginning of the 14th century regulate the issue of transferring dependent peasants to new masters, it is better to say that they prescribe prohibitions and punishments in case of transferring a dependent peasant to new masters. The first provisions date back to 1316.¹⁶ It arose, as cited in motivation of the provision, due to a frequent taking over of somebody else's dependent peasants. Namely, patrons overtook dependent peasants and made notary cards on that (it probably refers to notary cards on land lease). Thus there continue a confusion in practice as a dependent peasant worked for new patrons due to what previous patrons of dependent peasants had damages. Notary books were good for dependent peasants as working on land of new patrons by lease, being no bound to the land, enabled them a more suitable living and other conditions. With this were also satisfied the patrons of the lands in district, as they enabled work organization by making cards. Due to these reasons a legislator regulated that each card on dependent peasants made with another patron with no will of the patron in whose power dependent peasant was (*"inventa absque voluntate sui patroni"*), was legally invalid. This practically meant that on the will on the first patron of a dependent peasant there depended whether a dependent peasant could make a deal with other patrons. A dependent peasant is in the patron's power and only by his allowance could he work for another patron.

The provision from 1316 had a little effect in everyday practice. There arose a need for a more severe legal regulations to prohibit overtaking else's dependent peasants. A greater need for working organization in the town and

¹⁶ Statuta et leges civitatis Cathari, apud Robertum Mietum, Venetiis, 1616 (in further text signed as Stat. Cath.), cap. 224. (*"Quia multi nostri concives cum inferio volentes extrahere Possanicus unus alteri, faciebant fieri cartas super Possancos, ideo volumus, et statuimus, quod de cetero nulla carta super Possanicum inventa absque voluntate sui patroni, valeat, nec teneat, sed pro nihilo, et vacua habeatur"*).

the lack of working people in the village¹⁷, on one side, and a difficult life of dependent peasants, on the other side, made it possible for both patrons and dependent peasants to evade statutory provisions from 1316. By the provision "*Quod nullus audeat recipere Possanicum alienum vel tenere*", it was forbidden, threatened by a punishment of 50 perper in favour of the municipality, to overtake else's dependent peasant. A patron acting opposite to such a prohibition was obliged, apart from the punishment in favour of the municipality, to compensate to a previous patron all the lost working days during which his dependent peasant was with another patron ("*componat patrono primo hominem cum omnibus diebus*"). Without a will of the previous proprietor it was not possible to accept or keep any dependent peasant who run away from Sloven land¹⁸.

The cited provisions show that dependent peasants belonged to their masters and could work for others only if allowed. Entering a dependent position meant to be bound to a master and his land and depend on such a bound. Although a voluntary entering a dependent position meant that once one entered such a position and acquired the epithet of "*homo alicui*" meant maintaining such a status for life, which could be changed only by the master's will. A dependent position is durable and meant being bound to a master for the whole life. Even after the death of a dependent peasant, his descendants even though being free people were marked as sons and daughters of a dependent peasant, once someone's man.

In the course of the 14th century, as shown by some clauses from the contract, dependent peasants left their patron's land on their own will. Important is the question whether in those cases there stopped dependent position or if not,

¹⁷ On influence of village on the town Kotor in Middle Ages, and on such influence in Medieval coastal towns, see in more details at LUCIC, J. Prozimanje sela i grada u dalmatinskom pojasu u srednjem vijeku (s posebnim osvrtom na dubrovačke teritorije). Imbuement of village and town in Dalmatian region in Middle Ages (with special reference to Dubrovnik territory). Radovi instituta Jugoslavenske Akademije znanosti i umjetnosti u Zadru. The papers of the institute of Yugoslav Academy of Science and Arts in Zadar. Sv. XX. Zadar 1972, p. 221–235.

¹⁸ Stat. Cath., cap. 227 ("*Volumus quod nullus noster civis sit ausus recipere, vel tenere aliquem Rossanicum alicuius nostri eius, sub poena yperperorum quinquaginta solverum nostrae vivitatis, patrono suo primo, componat hominem cum omnibus diebus; et si aliquis ex Possanicis fugerit ad terram Sclavorum, vel alio et postmodum venerit sub aliquo alio patrono, nema possit eum recipere sine voluntatem sui primi patroni. Quod si aliquis contrafecerit, subiaceat poenae praedictae*").

what procedure was for returning a dependent peasant. In other words, whether statutory provision on secrecy of dependent position were applied in everyday practice. We think they were, though the mentioned clauses in the documents do not confirm implicitly a statutory regulation, but only show the consequences for the case of possible leaving the patron's land.

Thus in the document on pledge from 1334 it was cited that together with some houses and land, for the amount of 40 perpers of debt, for the period of time of two years, it was pledged Jovan from Crni Plat, a man of Sergije Pribov. The contract contains a clause by which is established a way of performing obligation in case that a dependent peasant who was pledged for paying debt for the determined term ran away from the pledged land¹⁹.

On procedure of returning a dependent peasant who ran away we get to know on the basis of a document of dowry from 1337, concluded at marriage between Rada, a daughter of the late Basilije Matov and Domanja, a son of Baso Salvin. The mother and brothers of Rada made a contract with Domanja that in case of running away of dependent peasants from some lands in the district Rada got as a dowry. Domanja could ask them according to the custom of Kotor, and they, as their former proprietors were not obliged to return them. The right to seek for the dependent peasants had Domanja as their new patron, in the way established by the town custom²⁰, at which, probably, it was thought a mentioned statutory regulation on returning dependent peasants (*"petere eos cum conditionibus civitatis"*).

¹⁹ Monumenta Catarensia II, doc. 685 (*"Triphonis de Pribi apigno Sergio Triphonis Iacobi hominem meum de Cerni plat nomine Johannem cum: domo, horto, cosciarta et omnibus, que tenet idem homo, pro perperis quadraginta usque at duos annos proxime venturos, tali conditione quod ego alter pro me usque ad dictum terminum ipsum non possim rescattare; et interim denarii non habeant lucrum nec homo laborerium et si fugeret homo predictus, Sergius Triphonis Iacobi predictus non teneatur, set resteneat supredictas, ut dictum est. Quo termino transacto duorum annorum, si infra duos dies tunc secuturos non rescattauero hominem cum rebus predictis, sint sue finite, secure et scalumpniate super me et omnia bona mea [...]"*).

²⁰ Monumenta Catarensia II, doc. 1516 (*"Ego Dome, uxor condum Basilii Mathei, una cum filiis meis Mathe et Dragone, contraho matrimonium cum Domagna Base de Salve, dans sibi filiam meam nomine Rade in suam legitimam uxorem, cum qua do sibi pro dote perperos mile et ducentos de cruce in quibus do sibi totum factum nostrum olim Pauli Bollie, quod est in Cerniplatto...item homines, qui sunt in dicta sella, tali condicione, quod si dicti homines recederent ab inde, quod dictus Domagna possit petere eos cum consuetudinibus ciuitatis, et nos non teneamur ad restitutionem eorumdem, verumtamen quod non appareant nobis"*).

There has been preserved a document on return of a dependent peasant who, it seems, left the patron's land on his own will. Cirinja, a son of Dusko from Bijela left the land of the patron Domanja Salvin and went to Bijela. His return to Domanja's village for the holiday of St. Luca was guaranteed by Milkan Radovanovic. If the dependent peasant didn't return till the time contracted, Milkan was to pay three perpers and had to bring Cirinja, and in case even this was not done he had to pay yearly for ever, *in perpetuum*, three perpers to the patron of the dependent peasant²¹. It is not clear why, first of all, Milkan guaranteed and, second, why he paid three perpers for a year for which he had to return the dependent peasant or three perpers for ever if the dependent peasant didn't come back. It might be a new Cirinja's patron, namely a man who accepted him and who, on demand of the first patron was obliged to return dependent peasant, at paying according to the Statute a foreseen lost working effect of a dependent peasant while he was with another patron. This is indicated by a clause in the contract stating that if the dependent peasant didn't return Milkan would have to pay for ever three perpers a year.

The statutory provisions and documents show that a dependent position, however, was durable, and it meant that a dependent peasant was bound and belonged to a patron for life, and only exceptionally, by patron's allowance could such a status be changed.

What sort of bound of a dependent peasant to his patron was and what it meant could be seen, as cited above, from notary documents, where, even after a dependent peasant's death, though his descendents were free people they were marked as sons and daughters of a dependent peasant XY, once someone's man. Besides, such marking of a descendent when concluding different legal business meant that a dependent position in the district was, mainly, hereditary.

²¹ Monumenta Catarensia, II, doc. 1245 (*"Ego Milcam Radouanich de Bela sum fideiussor et principalis pagator Domagne, filio Bose de Salve, facere et curare taliter, quod Cirigna, filius Deschi de Bela, homo suis, hinc ad festum sancti Luce proxime venturum debeat ire et stare in villa dicti Domagne, ubi preceperit Domagna supradictus. Quod si non iret, ego Milcam predictus teneat eidem Domagne soluere pro presenti anno perperos III et nihilominus dare ipsum Cirignam infra dictum terminum in manu sua. Quod si non darem, perpetuo obligor sibi soluere annuatim perperos tres sub pena de quinque in sex per annum super me et omnia bona mea."*).

Poor documents in the first half of the 14th century in which dependent peasant's descendents were mentioned as free people in some legal transactions, show that dependent peasants, if given any valid legal bases or good will of their patron, tried to change the status of their descendents. A dependent peasant primarily tried to deliberate his descendents of hard way of life of a dependent peasant bound to land. He most frequently sent them to the town to learn their trade and do servise activities. Thus, for example, Markula, a daughter of the late Marko Arbanas, a dependent peasant of Ivan Basilijev, gave her son Nikola with a goldsmith Dragos Medonjic for the period of 10 years. For that time Nikola had to serve loyally, not to steal (*"serviendum fideliter sine fraude in arte"*) a goldsmith Dragos, who was obliged to give Nikola food, clothes, to teach him the trade and finally give him a proper tool. Apprentice activities in the town were, of course, more suitable from those done by Markula, as a dependent peasant, in the district²².

In the second half of the 14th century the duration of a dependent position could be stopped even without the patron's allowance. The possibility for liberation, namely for leaving the village and master, was statutorily allowed by already mentioned and analyzed statutory provisions from 1352 and 1359. Motivated by the wish to fill the town devastated by the plague with needed population, the citizens of Kotor, as cited in the provision from 1352, enabled dependent peasants, who came to the town, to become free citizens and inhabitants of Kotor²³. In the course of half a year time since coming to the town a dependent peasant could be returned to a village if demanded by a patron. After that period

²² Monumenta Catarensia I, doc. 1271 (*"Ego Marculla, filia condam Marchi Arbanensis, posanica Iohannus Basilii, loco et concedo Medossio Dragonich aurifici filium meum Nycolam, presentem et consentientem, ad serviendum sibi fideliter sine fraude in arte sua usque ad decem annos proxime venturos..tali conditione, quod infra dictum tempus sibi tribuant victum et vestitum condecenter, docendo eum artem memoratam, et in fine dicti temporis sibi tradat ferramenta dicte artis, ut est moris."*).

²³ Stat. Cath., cap. 225 (*"Nos communitatis Catharensis....ordinamus: Quod quicumque homo de foris a habitandum in civitatem Cathari, et promiserit esse Catharinus, faciat se scribi ad Notario, et ab illo de in antea sit liber ad date et ad custodia civitatis, usque ad duos annos, autem si scribi non fecerit, faciat angariam ut ceteri homines de Catharo, et si in posterum exire voluerit de Catharo, nullus sit ausus eum recipere in villa, nec etiam suos patronus, cuius fuit prius, sub poena yperperorum quinquaginta, qui sunt nostrae communitatis, salvo tamen, si ille talis qui venerit ad habitandum., acciperet aliquam possessionem in dotibus, quae fuit primo sub angaria communis, non sit liber, sed angariam facere teneatur, quam faciebat primo ille, qui dotes dedit, si non remanserit aliquis, qui ipsam angariam faciat ex parte illius, qui primo habuit possessionem praedictam"*).

of time a patron did not have further possibilities to do that.²⁴ Sometimes there was deliberation from dependent position by the will of the very patron, for example, in the document from 1397. Thus, a dependent peasant Nikola, a son of Radusa, once a man of Jakov Trifuna Pasquali, a famous patrician of Kotor, became an inhabitant (*"habitor"*) of Kotor on 30.09.1397 and got by as a present by Marko Crni from Venetia, a merchant in Kotor, a larger vineyard in the environment of the town.²⁵ We suppose that Marko Niger got the vineyard in the environment of the town by legal proceedings, namely that vineyard was given by a farmer proprietor as a pledge for a trade debt and, not fulfilling the obligation, he lost the vineyard. Such a way of paying debts was, anyhow, frequent and usual in that time among Venetian merchant in Kotor and the very citizens of Kotor.²⁶

5. LEGAL STATUS OF DEPENDENT PEASANTS

A legal position of dependent peasants as dependent and special category of inhabitants may be more completely explained, apart from the cited data and analysis of the Statute provisions and notary documents, on the basis of several documents on legal business in connection with land on which dependent peasants lived and private-legal business done by dependent peasants. A series of contracts made by the patrons of dependent peasants in Kotor district

²⁴ Stat. Cath., cap 229 (*"Intendentes nostram civitatem ad hominibus facere inhabitari, et de bono in melius augmentare, ut nullus nisi sola civitas, vel ipsius Communis officiales in dicta civitate super aliquem dominium habeat aliquale, pro meliori statu, et reformatione civitatis praedictae, statuimus de cetero perpetuo observandum, I quod omnes homines, aut villani, seu possanici alicuius, qui venerunt, et sunt in civitate, et faciat angarias eiusdem, et habeat partem metochiae, patronus suos nullo modo possit dictum hominem de civitate extrahere, nec habuit aliquid facere cum ipso cum cartis, vel sine occasione servitutis, sub poena, que in alio capitulo continentur. Qui homines villani, aut Possanici tamquam liberi, volumus quod sint nostri cives, ut alij. Item, volumus, quod omnes alij Possanici, seu villani nostrorum civium qui sunt in civitate, et non habent partem metochiae, et non faciunt angarias civitate, quod sui patroni possint eos extrahere de civitate, hinc ad sex menses proxime venturos, si autem eos non extraherent, usque ad dictum terminum, liberi remaneant...cives nostri, modo et firmo, sub poena praedictis"*).

²⁵ SN III, p. 467, doc. 1, 30.IX.1397 (*"Ego Marcho Niger de Venetis mercator in Catharo do et dono donatis meos vineas per perpetuale revocarij Nicholao genere Raduse olim homini Ser Jacobi Triphonis Pasqualis, nunc habitator Cathari [...]"*).

²⁶ More about it in BOGOJEVIĆ-GLUŠČEVIĆ, N. Sredstva obezbjeđenja ispunjenja ugovornih obligacija u srednjevjekovnom Kotoru (The means of Providing Fulfillment of the Contracted Obligations in Medieval Kotor). Okrugli sto "Srednjevjekovna istorija Crne Gore kao polje istraživanja" (Round table a Medieval History of Montenegro as a field of research). Istorijski institut Crne Gore (Historical Institute of Montenegro). Podgorica, 1997, p. 115–135. Comp: Stat. Cath., cap. 268, *De rebus ad certum terminum remanentibus in venditione, qua sunt alijs obligata*.

shows that dependent peasants belonged to land on which patron placed them. All disposals of land inhabited by dependent peasants referred even to dependent peasants.

Above all this is shown in the documents on pledge and realization of pledge. Thus, for example, Jovan from Crni Plat, a man of Sergije Tripun Pribov was pledged for the period of three years, together with his house, garden and a basket he had, for 30 perpers to a Kotor nobleman Tripun Buce. The pledgor was obliged by this contract that the object of the pledge, a dependent peasant Jovan, in case a debt is not fulfilled in foreseen period of time, would belong to the pledge.

On the other side, the pledgor could sell dependent peasant Jovan to no other person but to the pledgor, though, a pledgor could freely sell the pledged things.²⁷ The dependent peasant Jovan was also given in pledge in December of 1334, for a debt of 40 perpers for the period of time of two years, together with the garden, house and whatever else *“he held”*. He was pledged to Sergije Tripuna Jakovljević. The things pledged and Jovan belonged to the pledge, for the case that in two days after expiration of contracted term for payment of debt, it is not done.²⁸ Petar from Crni Plat, a man of Jakov Tripuna Rebronja²⁹ was pledged for thirteen perpers till paying off a debt to Marin Meksa, a reputable nobleman of Kotor. Marko Dragov as a debtor from one contract to guarantee the payment of a debt, concluded on 25.09.1333 a contract on a pledge with a creditor Tripun Paskov, by which for 100 perpers of debt he obliged himself to give him in pledge his hamlet in District. The contract was concluded along with an additional favourable situation for the creditor, namely the pledged debtor, who had the possibility, in case of not fulfilling the debtor's obligation in the con-

²⁷ Monumenta Catarsia I, doc. 1184 (*“Ego Sergius, filius condam Triphonis de Pribi, apigno Triphoni Buchie hominem meum Iohannem de Carniplat cum domo, horto et cosciart pro perperis triginta tali conditione, quod numquam possim eum scomparare nisi pro me tantum possidendum, et quod si aliis personis appareret, ad dictum Triphonem libere reuertatur cum omnibus denariis supradictis; quod si vellem scomparare pro me non possim ante tres annos proxime venturos, sed tantum postea pena non obstante. Qui homo teneatur sibi laborare annuatim triginta tribus diebus cum suo pane [...]”*); Stat. Cath., cap. 264, De venditione pignorum; Stat. Cath., cap.81, *De rebus pignoratis*.

²⁸ Monumenta Catarsia I, doc. 1277; see footnote 6.

²⁹ Monumenta Catarsia II, doc. 640 (*“Ego Iacobus, filius condam Triphonis de Rebrojna, spigno Marino Mesce hominem meum Petrum de Cerniplato, quem sibi apigno pro perperis XIII, tali conditione, quod omni hora, quod sibi restituero perperos predictos, michi teneatur reddere hominem predictum [...]”*).

tracted term, to keep, use and collect the fruits of the pledged lands, as well as the people who inhabited those lands, till the complete fulfilment of obligation (*“tenere et usufructuare terrenos et homines dicte ville”*).³⁰ A hamlet Mrcevac with all its people, gardens and terrains (*“cum hominibus, hortis et terries”*) was pledged by Sergije Tripunov for a debt of five hundred perpers to a creditor Miho Buce. Till paying the debt, money did not bring profit, nor was given the right to take rent out of the pledged lands.³¹ The owner of the hamlet pledged the mentioned lands and people on them once again next year for twelve years, for the amount of debt of five hundred perpers. Not-fulfilling obligation according to a concluded contract enabled the pledge to sell the pledged things, this meaning even the lands given in pledge and people on these lands after expiration of the contracted term according to the Statute.³²

The land and people on them were given as a gift together with land. This, by the beginning of the 1335 Junije Basilijev gave as a gift all peasants (*“omnes villanos”*) with houses, basket and vineyards to Deja Medosev, obliging them to serve her the same way they did him (*serviant ut mihi servire tenebantur*)³³.

Dependent peasants were sold to the district together with the selling of land on which they lived. Such a practice continued in the 15th century. Thus, on 28/11/1420 Tomusa, a widow of Mihailo Tripuna Buce, sold to Mihailo's son Ivan her property in Kavac for 180 perpers, together with a dependent man Drusoje, who lived on those lands. A buyer disposed of the land sold and dependent peasant on his own will³⁴. At dividing hereditary property of Luca Basilijev, one of the richer citizen of Kotor, which could be noticed from the will by which distribu-

³⁰ Monumenta Catarensia II, doc. 441; see footnote 12.

³¹ Monumenta Catarensia II, doc. 110 (*“Ego Sergius quondam Triphonis Jacobi apigno Micho Buchie villam meam de Mercoues cum hominibus, hortis et terris ibidem pro perperis quingentis denariorum venetorum grossorum securam et scaluniatam super me et omnia bona mea, quosque sibi rescatauero perperos supradictis pena non obstante, hoc adiecto, quod interim denarii non habeant lucrum nec villa afflictum.”*).

³² Monumenta Catarensia II, doc. 168 (*“Ego Sergius quondam Triphonis Jacobi appigno Micho Buchie villas meas de Mercoues sum omnibus hominibus, terrenis et hortis [...] quas omnes apigno sibi hino ad douodecim annos proxime venturos pro perperis quingentis [...] quod usque ad dictum terminum demarii non habeant lucrum nec ville fructus; Quod si ad dictum terminum usque non rescatauero, sint sue in venditione [...]”*).

³³ Monumenta Catarensia II, doc. 1288 (*“Ego Iunius Basilli de bona mea voluntate dono et concede Deie Medossii omnes villanos meos, quod de cetero sibi seruiant, ut michi seruire tenebantur; quos sibi dono cum omnibus domibus, cosciartis et hortis eorum [...]”*).

³⁴ SN IV, p. 467, 28.11.1420; Comp: STJEPCEVIC, J. Op. cit, p. 41; KOVIJANIC, R. Kotorški knezevi u doba samostalnosti (Kotor dukes in the period of independence). Istorijski zapisi. Historical note observations. Vol. XIII. Sv. 1–2. Cetinje, 1958, p. 147.

tion of movable and immovable property was made, his wife Slava got a large vineyard in Korves along with a vineyard in Mulu with all the people who came from Kavac and were dependent peasants (*“de hominibus de Cavesi sive posanicis venit eis”*). The dependent peasants are listed according to their names: Jan Primilovic, Djuro, his brother, Bogoje Braksovic and Milos Bosnic. In Luka's will a certain Palma is mentioned as legatee, who, together with same lands in Kavca, got two houses of the dependent peasants from Kavca, Ratko Primilovic with his son Miloje Primilovic and Kolan, a son of Bratislavi (*“duobus dominibus posanicis usque ad pedem montes et hominibus sive posanicis de Caveze Patco Primilovich cum filius Milone Primilovich et Colan, gener Bratislavi”*).³⁵

Apart from the cited documents supporting this point of view that a dependent peasant was in patron's power and bounded to land, in notary books there is a series of documents on basis of which it is possible to speak on a different authorities of dependent peasants, though belonging to dependent category of people in the district of Kotor. Thus, there could be found documents out of which it could be immediately noticed that dependent peasants in Kotor had obligations not only toward their patron, under whose power they were, but also toward other proprietors of the lands in the district. They contracted deals independently or with an agreement of their patron, they were debtors or creditors. Out of an agreement to give, concluded on 14/5/1396, there arose that a dependent peasant Tripun of the late Grupsa from Stoliv, a man of Dzivo Bista, had the lands in the district of Kotor and disposed of them completely freely. He gave as a gift to Radoslav and Brajko from Kotor the land in Stoliv, with a full right of disposing of it, with no charges.³⁶

Immovable property and money that a dependent peasant acquired in different way, as shown in the documents on contracted business, was given as dowry in the same way as done by other owners of things in private property.

³⁵ Monumenta Catarsensia I, doc. 328 (*“Dicte Slaue venit de vinea magna de Coruesce [...] et medietas omnium calametorum eorum de Coruesce et de hominibus de Caueci siue posanicis [...] Palme venit vinea eorum de Mulo cum duabus domibus posanicorum usque ad pedem montis, quic quid pertinet eidem, et medietas calametorum omnium eorum de Coruesce [...] et de hominibus siue posanicis de aueci [...]”*).

³⁶ SN III, p. 304, doc. 2, 14.V.1396 (*“Ego Triphon filius quondam Grupse de Stalivo de districtum Cathari, homo Zive Biste, do et dono Radoslauo et Braicho caligariis, fratribus et filijs quondam Radoste de Catharo, unam peciam tere positam in dicta contrata Stolivi [...]”*).

Thus a dependent peasant of the late Vale Berislavov, Hranisa Obradovic, gave as a dowry to his daughter a vineyard which his wife had also got as a dowry at getting married.³⁷ Cuira, a wife of the late Busat, a man of Basa Besanti gave to her daughter Bosa, getting married to Rados, a servant of Tripun on 10.06.1396, a dowry consisting of various clothes and ninety perpers.³⁸

As shown by some documents a dependent peasant concluded, apart from the cited one, some other legal business. They concluded contracts with no agreement or presence of their master. In the example that follows, dependent peasants, that did not belong to the same master, were independent to divide lands acquired in lease from the third party. Jurije Dzivonja a man of Tripo Buce and Bratan Radonic, a man of Miho Buce from Kavce, divided between themselves freely vineyards that they acquired in lease from their patron, the late Pavle Tomin.³⁹ A dependent peasant of Sergej Trifuna Jakovljević concluded on 02.10.1334 completely independently a contract on land lease in Mutina hills. The land was taken to be cultivated "*ad agraticum*"⁴⁰ and the lease holder obliged himself to give to the lessor the tenth part of income from the land "*decimam partem fructus eiusdem*".⁴¹

There were contracts in which dependent peasants appeared as lease holders of eternal lease ("*ad afflictum inperpetuum*"). The conditions under which

³⁷ Monumenta Catarensia I, doc. 1306 ("*Ego Granisca Obradcuich de Mercoues, homo condam Vali de Berislauo, confiteor me vendidisse pro factis meis vineam filie mee, quam habui cum Bolia uxore clim mea, pro qua vinea eidem filie mee assigno et do libere et secure super me et bona mea omnia quinque quadragnolos vinea mee plantate*").

³⁸ SN III, p. 317, doc. 1, 10.VI.1396 ("*Ego Cuira, uxor quondam Busat, homines quondam Base de Boganich de Cathare canonici contrahe matrimonium cum Radosso alias familias dompnus Triphonis per quod dans sibi filia mea nomen Bogna in suam legitimam uxorem cum qua do sibi per dote et dictorum vestimenti et alius sibi omnibus perperos nonaginte grossos qui ad presens in Catharo sint*"). More detailed on this document in BOGOJEVIĆ-GLUŠČEVIĆ, N. Iz pravne prošlosti Kotora (A legal past of Kotor). Podgorica, 1998, p. 327, 354.

³⁹ Monumenta Catarensia II, doc. 563 ("*Nos Iuroe Giugne, homo Triphonis Buchie, et Bratan Rattonich, homo Micho Buchie de Cauice, per fidem et sacramentum diuidimus inter nos vineam, quam habemus ad plantandum in Cauice a Paulo condam Thome [...]*").

⁴⁰ Cultivation "*ad agraticum*" means cultivation of uncultivated land which should be by a lease holder, as his obligation, planted by the plant wanted, and the tenth part of the incomes should be given a pledgor. For more details about it see: BOGOJEVIĆ-GLUŠČEVIĆ, N. Svojinški odnosi u Kotoru u XIV vijeku, p. 129–146.

⁴¹ Monumenta Catarensia II, doc. 595 ("*Ego Bratoslauus Chictunouic de Passiglaua, homo episcopi sancti Michaelis, do et concedo in perpetuum Micoylo Iuancuic, homini Sergii Triphonis Iacobi, terras meas in Mutino Berda [...] ad plantandum vineam ad agraticum secundum usum terre [...]*").

dependent peasants made contracts were the same as when lease holders are free peasants. The only difference was that such conclusions needed an agreement of a patron. Some lands in Crni Plat were given in eternal lease at an agreement of a patron to a dependent peasant for one perper of lease. The lease holder acquired the right to do with land whatever he wanted (*“possit facere in ea, quicquid sibi placuerit”*).⁴² The data on giving land in eternal lease to peasants may be found in one court dispute carried out in 1333. The accused dependent peasant in his defence at court invoked the card on eternal lease he had got when concluding a contract on lease with Marin Vrakjen, a rich nobleman of Kotor (*“unam cartam notarij, et commodo Marini Vrachien, filius dicte Catene, sibi dederat in perpetuum ipsum territorium pro uno grano sibi annuatim solvendo”*)⁴³.

It is important to point out that the lands taken in lease by dependent peasants were, in fact, leased lands and the dependent peasants were their lease holders. There were fewer cases that dependent peasants took in lease the lands that were in private property of the lessor. This is proved by many documents. Thus in the document dating back to 11.11.1334 it was stated that there was a contract on lease concluded in which a dependent peasant was given the land in lease at half (*“ad medietatem”*), for the period of five years. The lands were taken by the church in eternal lease at a tenth *“ad plantandum ad decimam partem”*⁴⁴. A similar contract was made by this dependent peasant on 15.08.1335.⁴⁵ There has been preserved one independently concluded contract on land cultivation for the period of *“the life of the lease holder-dependent peasant”*. The right of the lease holder could be transferred to his successors under a condition that the contracted way of cultivation of the land and conditions pre-

⁴² SN I, p. 138, doc. 375, 9.VIII.1327 (*“Ego Petrus Catene do. loco et concedo ad afflictum in perpetuum Elie, filio Stanisce de Carniplat, homini Nycole Belloglauri, quandam terram meam in Cerniplat [...] pro uno perpero [...]”*).

⁴³ Monumenta Catarensia II, doc. 1048.

⁴⁴ Monumenta Catarensia II, doc. 643 (*“Ego dompnus Vita rector ecclesie sancte Marie de Gurgite, do Triphoni Buchie terram dicte ecclesie [...] ad plantandum ad decimam partem secundum usum terre [...]”*); Monumenta Catarensia II, doc. 644 (*“Ego Triphon Buchie do Nence, homini Petri Cathene, terram quam accepi ad dompno Vita, [...] ad plantandum ad medietatem usque ad quinque annos proxime venturos [...]”*).

⁴⁵ Monumenta Catarensia II, doc. 1194 (*“Ego Marcus Symonis afficto Nenado de dabrato, homini petri Cathene, et filio suo Georgio terram meam ad sanctum Stadium [...]”*).

scribed for the way of land cultivation be preserved.⁴⁶ By the end of the 14th century contracts on eternal lease were made between a dependent peasant and his patron, this showing an improvement of the position of a dependent peasant in Kotor district and changes of the patron's relation toward dependent peasants.⁴⁷

A dependent peasant could dispose of the acquired rights to land, this arising from the contracted lease or on other bases concluded contracts. Thus Milatik, a dependent peasant of Nucije Gile, the rights acquired on vineyard that he cultivated in Kostanjica, this means out of his patron's property, pledged to his patron for the amount of obligation he had toward the same and which consisted in paying two perpers a year eternally "*perpetua liter*".⁴⁸ If a dependent peasant renounced the acquired rights to third persons, agreement of patron was needed. Thus, with an agreement of his master, a peasant Hranisa Obradovic gave his vineyard in Kasestra, which was also out of his master's property, to his daughter in exchange for a vineyard he had sold before.⁴⁹ Anyway, at court dispute carried out for the contract made, dependent peasants acted independently. The cited dispute of Katena Vrakjen and Bratoslava, a peasant of Petar Bugonov is led with no presence of the patron.⁵⁰

6. CONCLUSION

Based on all the cited data from Kotor Statute and notary documents on dependent peasants, it may be concluded that a dependent position in Kotor, in principle, meant a permanent state of being bound to land. A dependent peasant could not leave the patron's land. A dependent peasant who ran away could be

⁴⁶ Monumenta Catrensia, I, doc. 683 ("*Ego Rade, uxor condam Triphonis Bisti, do vineam meam, que est sub Levagno [...] Bratosclauo, filio condam steprod, homini Michaelis Buchie, quod teneat eam per totam vitam suam ad medietatem, et post mortem suam dicta vinea redeat in minus dicte Rade, saluo quod si filli dicti Bratosclai posent et valent laborare dictam vineam, ipsi possint ipsam laborare sub supradicta forma [...]*").

⁴⁷ SN III, p. 649, doc.1, 2.III.1399; see footnote 7; SN III, p. 355, doc. 1, 30.IX.1396 ("*Ego Palma Slavi de Catharo do et imperpetuum afficto Radich, filio luani de Staliuo, homini meo terrenum et castagnicam meam positam in Staliuo [...], cum hoc pacto et conditione quod ipse radich teneatur totam terram illam trapire [...] bene te fideliter laborare et cultivare secundum modum et consuetudinem et formam statutorum civitatis Cathari*" [...]).

⁴⁸ Monumenta Catarsensia I, doc. 690 ("*Ego Milaticus posadenicus olim Nucii Goni, obligor me [...] Dome, et [...] suis heredibus [...] perperos duos, [...] vineam meam [...] in [...] Castagnica*").

⁴⁹ Monumenta Catarsensia I, doc. 1306; see footnote 37.

⁵⁰ Monumenta Catarsensia II, doc. 1048.

returned to land by force, or else, someone had to guarantee for his return to the patron's property. The right and obligations contained in contracts in which the object of business is land, referred also to people being dependent peasants on those lands.

Apart from such a relation of being bound to land, namely to its patron, a dependent peasant enjoyed some personal and property rights. A dependent peasant was personally free. He could acquire a property, make contracts, leave heredity, be appointed a successor, go to the court and acquire certain rights of real legal character on the land he took in lease. He could rarely use these rights as he was bound to land. A dependent peasant could have property, but the patron's approval was needed for its alienation. A dependent peasant was formally a free lease holder, and in real life he was in a very difficult position as he had, apart from patron's land to which he was bound, to work on another land. Shortly, a dependent peasant was personally free, bound to the patron's land, but also had the possibility to cultivate the land of other patrons, to acquire property, and dispose of it if patron agreed with it, though it was not always necessary.

Did the fact that homo "*alicui*", a dependent peasant, though personally free, was sold together with the land on which he worked, have any influence on property legal-regime on the lands in Kotor district? We think it did and also that the property in Kotor district didn't have classical, private or feudal characteristics. A dependent peasant in Kotor district is basically *glebae adscriptus* and he could not change such a position, except by the patron's will, or exceptionally by a statutory regulation. A change of such a status could be done by the patron's will, in case the patron gave the land to a dependent peasant in free property, or by a will. The fact that a dependent peasant entered a dependent position voluntarily was not of importance for the change of the position of a dependent peasant. A dependent peasant from Kotor district could, in the course of the 14th century, change his status and become free, as Kotor municipality, to solve concrete urban difficulties due to a lack of working population, allowed this by a statutory regulation.

Such a position of dependent people in Kotor district differed from the position of dependent peasants in Grbalj, dependent *homines de Zoppa de Gherbili*. This category of dependent peasants had three kinds of feudal obligations: toward municipality, patron of the lands and Serbian court. The obligations to-

ward Serbian court were fulfilled through Kotor municipality, and they consisted in giving one perper a year per male head, for the fish that people from Grbalj were obliged to give to the king. The obligations toward the municipality consisted in paying “*angary*” and giving food to the directors coming to the places obtained by Serbia to maintain work and collect taxes. Toward patrons they had an obligation of giving a determined part of income from the land and they were obliged to bring it to the town, especially in the second half of the 14th century. The dependent peasants of Grbalj were bound to land, namely to the land of patron who obtained the land by the municipality to use it permanently. A patron could dispose land and people on it with all the works *inter vivos* and *mortis causa*. It was only allowed to give lands and people on them in dowry or leave it in heredity by will.

Dependent peasants had by statute guaranteed right not to be expelled from the properties and houses they found themselves at the moment of division of those places by Kotor municipality to land patrons.⁵¹ All cited above can illustrate that the position of this dependent category of people called dependent peasants differed considerably both in formal and content sense from the position of the dependent peasants in Kotor district.

A dependent position in Kotor district in the 14th century, especially in its first half, reminds in many its characteristics of the institute of colonate in late Roman Empire.⁵² Like a colon in Roman state, a dependent peasant in Kotor district was *glebae adscriptus* personally free. As a difference from colon, all Kotor dependent peasants in the district were not bound to land by heredity, but their legal position in the course of the 14th century, especially in its second half,

⁵¹ On position of dependent peasant in Grbalj and other regions obtained by Serbia, in details with BOGOJEVIĆ-GLUŠČEVIĆ, N. Svojinški odnosi u Kotoru u XIV vijeku, p. 165–205.

⁵² Corpus iuris civilis. Krueger, Paul, 1840–1926; Mommsen, Theodor, 1817–1903; Schoell, Rudolf, 1844–1893; Kroll, Wilhelm, 1869–1939. Vol. I. Codex Iustinianus, 11.48.21. Codex Theodosianus, 1877, XIV, VII, 1. De collegiatis. More detailed about it with BOGOJEVIĆ-GLUŠČEVIĆ, N. Teodosijev kodeks o kolonima (Codex Theodosianus de colonis). Podgorica, 2000, p. 110. On colonat in Roman state, more detailed in foreign literature with: КОПТЕВ, А. В. Législation romaine des IV^e et V^e siècles sur les mariages d'esclaves et de colons. – In: *Mactoux, M. M. et Geny, E. (Eds.). Esclavage et dépendance dans l'historiographie soviétique récente*. Paris, 1995, available at https://www.persee.fr/doc/ista_0000-0000_1995_ant_577_1_2387 [editor's note]; JONES, A. H. M. The Roman Colonnate. – In: *The Roman economy*. Studies on Ancient Economy and administrative History. Oxford, 1974; SIRKS, B. Characteristics of the Late Roman Empire. – In: *Atti dell'Accademia Romanistica Costantiniana*, Perugia, 1994; ORESTANO, R. Introduzione allo studi del diritto Romano. Bologna, 1987.

changed. In Roman state, starting from Iustinian, children of a colon became colon⁵³ (C. 11.48.21) and could not be deliberated⁵⁴ from such a status, whereas Kotor dependent peasants had such a possibility, though of short duration, established by the statute by the half of the 14th century. It should be emphasized that, independently of this municipal regulation, dependent peasants in Kotor district tried by themselves to deliberate their successors of such a position, and they did succeed in doing so.⁵⁵

⁵³ Corpus iuris civilis, Vol. I. Codex Iustinianus, 11,48,21 (*"Imp. Iustinianus A. ad senatum. Ne diutius dubitetur, si quis ex adscripticia et servo vel adscripticio et ancilla fuisset editus, cuius status sit, vel quae peior fortuna sit, utrumne adscripticia an servilis, sancimus ea quidem, quae in anterioribus legibus cauta sunt pro tali progenie, quae mulieribus adscriptiis et viris liberis progenita sit, in suo stato relinqui, et sit adscripticia proles ex tali copulatione procreata. Si quis autem vel ex servo ad adscripticia, vel ancilla et adscripticio fuerit editus, matris suae ventrem sequatur et talis sit condicionis, qualis et genetrix fuit, sive ancilla sive adscripticia: quod hactenus in liberis tantum et servis observatur. Quae etenim differentia inter servos et adscriptios intellegatur, cum uterque in domini sui positus est potestate, et possit servum cum peculio manumittere et adscripticium cum terra suo dominio expellere?"*), year 530.

⁵⁴ Codex Theodosianus, XIV, VII 1, *Imp. Arcad. et Honor. AA. Gracho consulari Campaniae, Interpretatio* (*"Collegiati, si de civitatibus suis forte discesserint, ad civitatis suae officia cum rebus suis vel ad loca, unde discesserunt, revocentur: de quorum filiis haec servanda condicio est, ut, si de colona vel ancilla nascuntur, mater sequatur agnatio; si vero de ingenua et collegiato, collegiati nascuntur"*); comp: BOGOJEVIĆ-GLUŠČEVIĆ, N. Codex Theodosianus. Theodosius codex on colonis, p. 92 and further on.

⁵⁵ Monumenta Catarsensia I, doc. 1271; see footnote 22.

**НАСТАНЯВАНЕТО НА ДЕТЕ
ИЗВЪН СЕМЕЙСТВОТО
ПОРАДИ БЕЗВЕСТНО ОТСЪСТВИЕ (НА
БЪЛГАРСКИ ЕЗИК)**

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Резюме: Статията анализира безвестното отсъствие на лице, което на законово основание трябва да полага грижи за дете и последиците от това, а именно – настаняване на детето извън семейството или промяна на вече взета мярка за закрила. Обосновани са предпоставките за извършване на тези действия.

Ключови думи: дете; закрила; родител; настойник; попечител; приемно семейство; роднина; близък; отсъстващ.

PLACEMENT OF A CHILD OUTSIDE THE FAMILY DUE TO UNKNOWING ABSENCE (BULGARIAN LANGUAGE)

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Abstract: The article analyzes the unknowingly absence of a person legally required to take care of the child and its consequences for the child, namely: placement of a child out of the family or change of a protection measure already taken. The prerequisites for doing so are justified.

Keywords: child; protection; parent; guardian; foster family; relative; close; absent.

1. ОБЩИ ПОЛОЖЕНИЯ

1.1. Закрилата на децата е основен принцип в правото и има първостепенно значение във всяко цивилизовано общество. Нейната действеност се постига посредством механизми и мерки, предназначени да осигурят грижи за нуждаещото се от тях дете. Интересът на последното стои в основата на правната регламентация на системата от мерки за закрила. Отглеждането на детето трябва да стане от неговите родители, но когато това е невъзможно, са предвидени специални мерки за закрила – настаняване извън семейството – чрез които друг субект поема грижите за детето. С помощта на част от тези мерки детето се отглежда в среда близка до семейната. Държавата е създавала и институции, в които да се отглеждат деца, останали без грижите на своите близки.

1.2. Идеята че лице, различно от родителите, може да полага грижи за децата, не е била чужда на римското право. В древната римска фамилия правата и задълженията на родителите към техните деца били в голяма степен засенчени от онази абсолютна власт, наречена *patria potestas*, която домовладелецът *pater familias* имал по отношение на низходящите, включени в неговата фамилия¹. *Pater familias* може да бъде не само бащата, но и дядото на детето. Ако е починал, ненавършилото четиринадесет години дете, което вследствие на това е станало неподвластно, се е поставяло под настойничество. Настойникът е бил определян от *pater familias* със заповед. Ако това не е било сторено, законът определял настойника – най-близкият законен наследник на *pater familias* от мъжки пол. Ако такъв не е имало, тогава магистратът е назначавал настойник.

1.3. Съвременното българско законодателство съдържа богат набор от способности, чиято цел е да се осигурят грижи за деца, лишени от такива. Според чл. 47, ал. 4 от Конституцията на Република България децата, останали без грижата на близките си, се намират под особена закрила на държавата и обществото.

¹ АНДРЕЕВ, М. Римско частно право. София, Софи-Р, 1992, с. 196.

Причините, поради които децата са останали без грижа, могат да бъдат много и различни по своя характер. Те са практически неизброими – дезинтересиране, болест, поставяне под пълно запрещение, продължителна командировка на лицето, което на законно основание трябва да полага грижи за детето, и други. Причина може да бъде и безвестното отсъствие. Безвестно може да отсъства както родителят, така и настойникът или попечителят, приемното семейство или семейството на роднини или близки, в което детето е настанено, а така също и физическо лице от персонала на специализираната институция или социалната услуга от резидентен тип.

Трябва да се отбележи, че правната теория винаги е отделяла много повече внимание на задълженията на родителите, отколкото на настаняването на дете извън семейството, на задълженията и изпълнението на задълженията на лицата, които полагат грижи за дете, лишено от родителски грижи, въпреки че надлежното изпълнение на задълженията на тези лица е необходимо за осъществяване на правата и свободите на детето. Обаче въпросите за безвестно отсъствие не само на родителите, а и на други лица, полагащи грижи за детето на законно основание, на мерките за закрила, които са приложени или следва да се приложат или да се променят, не са изследвани в достатъчна степен, макар да притежават интересна специфика.

Законът за лицата и семейството (ЗЛС), Семейният кодекс (СК) и Законът за закрила на детето (ЗЗакрД) не съдържат нарочни правила, не предвиждат специални последици относно положението на детето при безвестно отсъствие на лицето, което има задължение за грижи спрямо него. Приложима е общата правна уредба, намираща се в цитираните нормативни актове: Законът за лицата и семейството – относно белезите на безвестното отсъствие, Семейният кодекс – за родителските права, настойничеството и попечителството, отделни въпроси на настаняването на дете извън семейството, а в Закона за закрила на детето са уредени основанията и процедурата по настаняване и прекратяване на настаняването извън семейството.

1.4. Най-напред трябва да се посочат, макар и накратко, особеностите на безвестното отсъствие.

Безвестното отсъствие е регламентирано в чл. 8–19 от ЗЛС. Физическо лице е безвестно отсъстващо, когато е „изчезнало“, т.е. не се намира в мястото на обичайното си пребиваване. Необходимо е да не се знаят причините за отсъствието, къде се намира лицето, дали е живо². Разпоредбата на чл. 8 изисква да няма сведения за лицето – от него и за него от други лица. Това налага да се потърсят сведения от компетентни институции в страната и чужбина. Ако лицето е живо, макар да не е известен адресът му, то не може да се третира за безвестно отсъстващо³. Законът за лицата и семейството предвижда, че на безвестно отсъстващия може да се назначи представител. Последният обаче има твърде ограничени функции – представлява отсъстващия, овластен е да извършва само правни действия на управление и да предприема мерки за запазване интересите на отсъстващия. Очевидно той няма правомощия по полагане на грижи за дете, спрямо което е имал задължение отсъстващият. Дори и отсъствието да бъде обявено от съда, неговите последици са твърде ограничени и касаят имуществената сфера на отсъстващия – въвод във владение на евентуалните наследници, спиране на изпълнението на задължения спрямо отсъстващия, които се погасяват в момента на смъртта му, и др. (чл. 10–12), а не се отнасят до децата, спрямо които е имал задължение за грижи.

1.5. За да се задействат защитните механизми за закрила на детето, съдържащи се в СК и в ЗЗакрД, е необходимо да се установи че детето е останало без грижи. Грижата по смисъла на § 1, т. 6 от ДР на ЗЗакрД е съвкупност от всички действия, произтичащи от правата и задълженията на родителите, настойниците или попечителите и лицата, при които детето живее по силата на друго законно основание, за гарантиране на неговите права и защита на неговите интереси.

Когато лицето, което има задължение за грижи, е безвестно отсъстващо – изчезнало е, няма сведения от и за него, не е ясно дали е живо – то очевидно не може да изпълнява това си задължение, затова се налага предприемането на действия по закрила спрямо детето. От белезите на

² ПАВЛОВА, М. Гражданско право. Обща част. София, Софи-Р, 1995, с. 225.

³ ПАВЛОВА, М. Цит. съч., с. 226.

безвестното отсъствие (т. 1.4) е видно че родителите, настойниците или попечителите, които са безвестно отсъстващи, се намират в трайна невъзможност да отглеждат детето (чл. 25, ал. 1, т. 3 от ЗЗакрД). Разпоредбата на чл. 25, ал. 1, т. 3 от ЗЗакрД се отнася до наличието на **обективни** пречки за изпълнение на родителските, настойническите и попечителските задължения – виж в същия смисъл Решение № 34 от 10.11.2015 г. по гр.д. № 798/2015 г. на Районен съд – Ивайловград⁴. Аргумент в подкрепа на изложената теза се извлича от систематичното тълкуване на чл. 25, ал. 1, т. 2 и 3 от ЗЗакрД. Член 25, ал. 1, т. 2 има предвид укоримо поведение на родители, настойници или попечители, които *без основателна причина* трайно не полагат грижи за детето. Тъй като не са известни причините за отсъствието, няма данни за укоримо поведение и тази разпоредба не може да намери приложение.

2. БЕЗВЕСТНО ОТСЪСТВИЕ НА РОДИТЕЛЯ

2.1. Когато родителят е безвестно отсъстващ, той не губи родителските си права, макар да не ги упражнява. В такава ситуация другият родител ще полага грижи за детето или то ще бъде настанено извън семейството. От правната уредба в СК и в ЗЗакрД могат да се извлекат **три предпоставки**⁵ за настаняване извън семейството.

Първата е отрицателна – детето да *не* е поставено под настойничество или попечителство. Защото, ако му е назначен настойнически съвет или попечител и заместник-попечител, настойникът, съответно попечителят, ще полага грижи за него, така че настаняването извън семейството по реда на чл. 26 и сл. от ЗЗакрД се явява безпредметно и би могло да се осъществи само по *изключение* (виж т. 3).

Втората е – да има *основание* за настаняване на детето извън семейството (чл. 25, ал. 1 от ЗЗакрД), като основанийето трябва да съществува спрямо двамата родители. Ако то е налице само за един от родителите, детето не може да се настани извън семейството, тъй като, както вече спо-

⁴ Всички съдебни решения в настоящото изследване са цитирани по ПИС „Сиела“.

⁵ Виж за предпоставките по повод настаняването на дете извън семейството когато един от родителите е лишен от родителски права МАТЕЕВА, Е. Семейно право на Република България. Варна, ВСУ „Черноризец Храбър“, 2009, с. 467.

менах, другият родител ще полага грижи за него. Основанията могат да бъдат различни за двамата родители – например единият е безвестно отсъстващ, т.е. намира се в трайна невъзможност да полага грижи, а другият е неизвестен, обаче могат да бъдат еднакви и за двамата родители – намират се в трайна невъзможност да отглеждат детето поради безвестно отсъствие.

Третата предпоставка – необходимо е да са *изчерпани всички възможности* за закрила на детето в семейството (чл. 25, ал. 2 от ЗЗакрД). Закрилата на детето в семейството се постига чрез прилагане на мерки по чл. 23 от ЗЗакрД или по Наредбата за условията и реда за осъществяване на мерки за предотвратяване изоставянето на деца и настаняването им в институции, както и за тяхната реинтеграция (по-нататък НУРОМПИД)⁶, според която предотвратяването на изоставянето на деца се осъществява чрез мерки за закрила в семейна среда и социални услуги. Да са изчерпани всички възможности за закрила в семейството означава да са приложени мерки, насочени към детето и родителя, които целят да предотвратят настаняване извън семейството – например съдействие за подобряване на социално-битовите условия, педагогическа, психологическа, правна помощ и др. (чл. 23 от ЗЗакрД). Възможно е настаняване и без прилагане на такива мерки, когато се налага спешното извеждане на детето извън семейството – арг. от чл. 25, ал. 2, *in fine* от ЗЗакрД. Извън този случай, макар законът изрично да не сочи това, има редица други, в които мерки за закрила в семейна среда не могат да се приложат (те ще бъдат разгледани в т. 2.1.1–2.1.4) и тогава с настаняването извън семейството се постига своевременна и адекватна закрила на детето.

Трябва да се отбележи, че обявяването на отсъствието от съда, което може да стане след изтичане на една година от последното известие за изчезналия, не е предпоставка за настаняване на детето извън семейството. Това е така по две причини. Първата е, защото не може да се изчака толкова дълъг период от време – една година, за да се предприемат мерки за закрила – всяко забавяне само би застрашило интересите на ненавър-

⁶ Нейният подробен анализ надхвърля рамките на настоящото изследване и може да бъде предмет на самостоятелна разработка.

шилия пълнолетие. Втората е, че обявяването на отсъствието е само възможност, но не е задължително.

Наличието или отсъствието на посочените три предпоставки трябва да се изследва при разглеждането на различни хипотези.

2.1.1. Ако детето има друг родител – **жив, известен, непоставен** под пълно запрещение и **нелишен** от родителски права, спрямо детето не може да се учреди настойничество или попечителство, защото не са налице основанията за това (чл. 153 от СК). Този родител би поел всички грижи за детето, което означава че настаняването извън семейството би се оказало излишно. Мярката може да се приложи само ако и този родител не полага грижи за детето – чл. 25, ал. 1, т. 2–6 от ЗЗакрД. Тогава детето ще бъде „дете в риск“ по смисъла на § 1, т. 11, б. „а“ от ДР на ЗЗакрД (по този въпрос виж по-нататък в изложението т. 2.2).

2.1.2. Ако само единият родител се намира в **безвестно** отсъствие, а другият е **починал/неизвестен/лишен от родителски права** (чл. 25, ал. 1, т. 1 от ЗЗакрД) или е **поставен под пълно запрещение**⁷ (арг. от т. 3 – намира се в трайна невъзможност да упражнява родителски права), пак по правило не могат да намерят приложение мерките по чл. 23 от ЗЗакрД и НУРОМПД. Абсурдно би било приложението им спрямо някои от изброените лица – починали, неизвестни. А дори и да допуснем теоретично, че могат да се приложат по отношение на лишен от родителски права или пълно запретен, такива родители не биха могли да упражняват родителски права – първият защото са му отнети, а вторият поради състоянието, в което се намира – тъй като самият той се нуждае от грижи, не би могъл да полага такива за своето дете.

В една частна хипотеза обаче има място за прилагане на мерки по чл. 23 от ЗЗакрД. Тя е налице, когато лишеният от родителски права е променил своето поведение, потърсил е съдействие от Дирекция „Социално подпомагане“ например за улесняване на връзките между родител и дете⁸, за подобряване на социално-битовите условия, консултиране и съдействие

⁷ Под пълно запрещение се поставят пълнолетни и непълнолетни лица, които поради душевна болест или слабоумие не могат да се грижат за своите работи (чл. 5, ал. 1 от ЗЛС).

⁸ При лишаване от родителски права съдът определя мерки за личните отношения между родителя и детето, ако са в интерес на детето (чл. 134, т. 2 от СК).

по въпроси на социалното подпомагане и социалните услуги и др. (чл. 23, т. 4, 5 и 6 от ЗЗакрД). Тази родителска инициатива би могла да бъде важна стъпка по пътя към възстановяване на родителските права (чл. 135, ал. 2 от СК). Докато обаче няма влязло в сила решение в този смисъл, детето ще бъде настанено извън семейството. Едва след като основанието по чл. 25, ал. 1, т. 1 от ЗЗакрД е отпаднало, макар и само спрямо лишения от родителски права родител (чл. 29, т. 6 от ЗЗакрД) и родителските му права са възстановени, настаняването извън семейството ще бъде прекратено. Прилагането на мерки по чл. 23, т. 4, 5 и 6 от ЗЗакрД е възможно и спрямо поставения под пълно запрещение, ако междувременно се е излекувал и предстои производство по вдигане на запрещението. Може да се мисли обаче, че ако пълно запретеният родител се е излекувал, е отпаднала трайната невъзможност да полага грижи за детето си, дори запрещението все още да не е вдигнато. Щом детето получава надлежни грижи от този родител, макар другият да е в безвестно отсъствие, то не следва да остава извън семейството. Пълното запрещение проявява своя правен ефект до вдигането му и касае правни действия, които пълно запретеният не може да извършва валидно – вместо него действа настойникът му. Така че този родител би могъл да осъществява фактически грижи за детето, а правните действия по гарантиране на правата на детето ще бъдат извършвани от настойника на пълно запретения. Разбира се, Дирекция „Социално подпомагане“ трябва да направи проучване на възможностите на пълно запретения да се грижи за своето дете – обстоятелството че се е излекувал, което е установено от медицински специалисти, и предстои (или е иницирано) производство по вдигане на запрещението, е показателно за способността му да осъществява родителски грижи.

Ако единият родител е **безвестно** отсъстващ, а другият е с **ограничени родителски права** (чл. 25, ал. 1, т. 1 от ЗЗакрД), е възможно прилагането на мерки по чл. 23 от ЗЗакрД или при условията на НУРОМПИД и само след безрезултатното им прилагане детето може да бъде настанено извън семейството. Но в случая решението зависи и от вида на ограничените родителски права – ако това са правата на съвместно живеене, отглеждане и възпитание, ще се приложи мярката настаняване на детето извън семейството.

В разгледаните дотук хипотези детето не може да се постави под настойничество или попечителство, защото обстоятелствата по чл. 153 от СК са налице само за един от родителите, а разпоредбата изисква те да се отнасят и за двамата – ако единият от родителите е с ограничени родителски права, очевидно няма основание спрямо нито един от родителите по чл. 153 от СК. Учредяване на настойничество или попечителство ще бъде възможно едва когато бъде обявена смъртта, т.е. пет години след последното известие за отсъстващия⁹, ако другият родител е починал, неизвестен, лишен от родителски права или пък е поставен под пълно запрещение.

В светлината на казаното може да се обобщи следното – ако единият родител е безвестно отсъстващ, а другият – починал, неизвестен, лишен от родителски права, пълно запретен или са ограничени родителските му права на съвместно живеене, отглеждане и възпитание, детето може да се настани извън семейството, тъй като има основания за това – чл. 25, ал. 1, т. 1 и 3 от ЗЗакрД.

2.1.3. Ако и **двамата** родители са **безвестно** отсъстващи, детето ще бъде настанено извън семейството.

Самò по себе си безвестното отсъствие на родителите не е основание за назначаване на настойнически съвет или попечител и заместник-попечител. Основание за поставяне под настойничество или попечителство ще има, ако и когато бъде обявена смъртта, а това, както споменах, може да се извърши най-рано пет години (при особените обстоятелства, посочени в бел. 9 – две) след последното известие за отсъстващия.

В разглеждания случай очевидно няма място за приложение на мерки за закрила от типа на предвидените в чл. 23 от ЗЗакрД и НУРОМПИД, тъй като родителите са безвестно отсъстващи. Детето ще бъде настанено извън семейството, защото е налице основанието по чл. 25, ал. 1, т. 3 от ЗЗакрД.

⁹ Законът за лицата и семейството позволява обявяване на смъртта и в по-кратък период – две години, когато безвестното отсъствие се свързва с военни действия или друго събитие, което дава основание да се предполага че лицето е загинало. Смъртта може да бъде обявена, ако са изтекли две години от прекратяване на военните действия или от събитието (чл. 15 от ЗЛС).

2.1.4. Последната хипотеза, която ще бъде разгледана, е тази, в която единият родител е **безизвестно отсъстващ**, а спрямо другия съществува някое от останалите основания (извън разгледаните в т. 2.1.1–2.1.3) за настаняване на дете извън семейството по чл. 25, ал. 1, т. 2–6 от ЗЗакрД – намира се в трайна невъзможност¹⁰ да отглежда детето или без основателна причина трайно не полага грижи за детето; последното е жертва на насилие или участва в предаване по смисъла на Закона за радиото и телевизията, където съществува сериозна опасност от увреждане на неговото физическо, психическо, нравствено, интелектуално и/или социално развитие и родителят отказва да прекрати участието му в това предаване (чл. 25, ал. 1, т. 6); в случаите по чл. 11 от Конвенцията за компетентността, приложимото право, признаването, изпълнението и сътрудничеството във връзка с родителската отговорност и мерките за закрила на децата (от 1996 г.).

При наличието на някое от изброените основания е мислимо прилагането на мерки за закрила в семейна среда. В такава ситуация само тяхното безрезултатно прилагане ще позволи настаняване на детето извън семейството. В някои случаи обаче мерките по чл. 23 от ЗЗакрД са излишни, тъй като се налага спешно извеждане на детето извън семейството – арг. от чл. 25, ал. 2 *in fine* от ЗЗакрД, например при насилие върху детето.

В посочените случаи няма основание за учредяване на настойничество или попечителство, следователно детето ще бъде настанено извън семейството.

Анализът на горните хипотези позволява да се направят няколко **извода**.

При безизвестно отсъствие на единия родител дали детето ще се настави извън семейството или не, зависи от това дали спрямо другия родител има основание по чл. 25, ал. 1, т. 1–6 от ЗЗакрД, т.е. детето може да се отглежда от другия родител, или да бъде настанено извън семейството при наличие на основанията за това спрямо двамата родители. Щом единият родител е безизвестно отсъстващ, детето не може да се постави под настой-

¹⁰ Тук се имат предвид всички случаи на трайна невъзможност да упражнява родителски права извън пълното запрещение, което беше разгледано в т. 2.1.2.

ничество или попечителство, дори за другия да са налице основанията по чл. 153 от СК. Поставяне под настойничество или попечителство е възможно след обявяване на смъртта на отсъстващия, ако и за другия родител има основание по същата разпоредба.

2.2. Както беше споменато по-горе, безвестното отсъствие поставя родителя в невъзможност да полага грижи за детето. За да се приложи мярката за закрила настаняване извън семейството, ЗЗакрД изисква тази невъзможност да е **трайна** (чл. 25, ал. 1, т. 3). Семейното ни законодателство не определя коя невъзможност е трайна. Този въпрос обаче е пряко свързан с ефективната закрилата на детето. Очевидно невъзможността не трябва да има кратковременен характер. Макар законът да не сочи срок, трайната невъзможност, за която говори чл. 25, ал. 1, т. 3, насочва към продължителен период.

Терминът „трайна“ по смисъла на чл. 25, ал. 1, т. 3 от ЗЗакрД може да бъде тълкуван двояко.

Той може да означава изтекъл дълъг *период от време*, в който родителят не е могъл и не е полагал грижи за детето, тоест, трябва да се изчакат поне няколко месеца, за да се приеме че родителят се намира в трайна невъзможност да изпълнява родителските си задължения. В последна сметка означава и че ако родителят отсъства от няколко дни, не може да се приложи мярката за закрила настаняване извън семейството. Едно такова тълкуване обаче не е в съзвучие с принципа за закрила, защото несъмнено биха се увредили правата и интересите на детето, което всеки ден има нужда от закрила и грижи, каквито са необходими за неговото благосъстояние.

Решаващ трябва да бъде фактът, че детето остава без родителска грижа. Считам че в трайна невъзможност да отглежда детето си се намира родител, който не може да полага грижи, макар и за толкова кратко, поради обективна причина, когато е видно че тази невъзможност ще трае дълъг период от време. С други думи, трябва да се изследва *причината за невъзможността*. Нейното естество трябва да е такова, че да води до невъзможност за полагане на грижи задълго, без да е необходимо към мо-

мента на вземане на мярката за закрила родителските грижи да не са осъществявани в продължителен период от време.

Направеният извод се подкрепя и от систематичното тълкуване на чл. 25, ал. 1, т. 3 от ЗЗакрД и разпоредбите на чл. 93, ал. 1, предложение първо от СК и чл. 132, ал. 1, т. 2 от СК, които съдържат изрично изискване родителят трайно да не полага грижи за детето. Според чл. 93, ал. 1, предложение първо, детето може да бъде осиновено без съгласието на родителя, когато той трайно не полага грижи за него и не дава издръжка или го отглежда и възпитава по вреден за развитието му начин. Член 132, ал. 1, т. 2 предвижда, че родителят може да бъде лишен от родителски права, когато без основателна причина трайно не полага грижи за детето и не му дава издръжка. Следователно, основание е трайното неизпълнение на родителските задължения, макар цитираните текстове също да не определят точно продължителността на периода. Съдът преценява всеки отделен случай с оглед всички негови особености. Безспорно, тези разпоредби не могат да намерят приложение ако, както вече споменах, периодът на липса на грижи е само няколко дни. Иначе казано, акцентът при тях се поставя върху проявило се продължително неполагане на грижи, а, както вече беше отбелязано, според чл. 25, ал. 1, т. 3 от ЗЗакрД основание е трайната невъзможност, в която се намира родителят, и която може сега да започва. Това е оправдано, защото посредством тази разпоредба законодателят цели да осигури своевременни грижи за детето. За разлика от нея, чл. 93, ал. 1, предложение първо от СК и чл. 132, ал. 1, т. 2 от СК предвиждат тежки санкции за родителя – осиновяване без родителско съгласие, съответно лишаване от родителски права – и затова е необходимо към момента на прилагането им да е изтекъл продължителен период от време на родителска дезинтересираност, който обаче, отново отбелязвам, не е точно фиксиран.

Допълнителен аргумент в подкрепа на изложеното тълкуване може да се извлече от редица разпоредби на ЗЗакрД. На основание § 1, т. 11, б. „а“ от ДР на ЗЗакрД дете, което е останало без родителска грижа, е дете в риск, като законът и тук не определя периода на липсата на грижи. Но в чл. 3, т. 4 и чл. 5, ал. 1 от ЗЗакрД се предвижда, че на дете в риск се осигурява специална закрила. Това означава и че тя трябва да бъде навремен-

на, да се осигури веднага щом се установи че за детето не се полагат грижи. Този извод хармонира с прокламирания от чл. 3, т. 8 от ЗЗакрД принцип за незабавност на действията по закрила на детето.

Аргумент в защита на изложената теза може да се почерпи и от чл. 5, т. 3 от НУРОМПИД. Според тази разпоредба мерките за предотвратяване изоставянето на деца и настаняването им в специализирани институции се предприемат спешно, когато има непосредствен риск от изоставяне на дете или настаняването му в специализирана институция, когато например дете, настанено в лечебно заведение, не е потърсено от родителите си в 7-дневен срок от деня, в който е трябвало да бъде изписано. С други думи, седмодневният срок е достатъчен, за да се предприемат мерки за закрила по цитираната наредба. Ако в тази хипотеза родителят е безвестно отсъстващ, управителят на лечебното заведение трябва „незабавно, но не по-късно от 24 часа“ да уведоми Дирекция „Социално подпомагане“, която да направи проверка (чл. 9, ал. 1 и чл. 10 от НУРОМПИД). Щом родителите са безвестно отсъстващи, няма как да се предприемат мерки за предотвратяване изоставянето на детето и то ще бъде настанено извън семейството по реда на ЗЗакрД. Няма основание за по-различен извод, ако детето не е настанено в лечебно заведение, а родителите са безвестно отсъстващи.

2.3. При безвестно отсъствие на родителите фактически грижите за детето вероятно би поел роднина или близък. Това обаче не би могло да защити адекватно интереса на ненавършилия пълнолетие, защото, за разлика от лицата, при които детето е настанено по съдебен ред, фактически отглеждащият детето не разполага с правомощията по чл. 137, ал. 3 от СК, а именно – да иска връщането му при неоснователно отклонение; да извършва определени правни действия при условията на чл. 137, ал. 4 във вр. с чл. 137, ал. 3 от СК за защита на някои лични права на детето, както и за издаването на документи за самоличност¹¹. Фактически поелият грижите трябва да уведоми незабавно Дирекция „Социално подпомагане“. Законодателят е предвидил широка възможност за уведомяване. Уведомление

¹¹ При настаняване по административен ред правомощията по чл. 137, ал. 4 от СК се осъществяват от Дирекция „Социално подпомагане“ (чл. 137, ал. 5 от СК).

може да направи и всяко трето лице, на което е станало известно, че детето е останало без родителски грижи (чл. 7, ал. 1 от ЗЗакрД).

Дирекция „Социално подпомагане“ трябва да направи проверка дали наистина родителят го няма на мястото, където обичайно пребивава, и няма сведения от него и за него – в такъв случай следва временно да настани детето извън семейството, макар и отсъствието да е с продължителност само от няколко дни. Както беше аргументирано в т. 2.2, в такъв случай има основание за настаняване извън семейството по чл. 25, ал. 1, т. 3 от ЗЗакрД. Дирекция „Социално подпомагане“ трябва да проучи всички особености на конкретния случай. Събраните доказателства за безвестно отсъствие на родителя трябва да представи пред съда. Окончателната преценка се прави от съда. Ако безвестното отсъствие на родителя продължава и по време на съдебното производство по настаняване извън семейството, детето ще бъде настанено извън семейството.

3. БЕЗВЕСТНО ОТСЪСТВИЕ НА НАСТОЙНИКА ИЛИ ПОПЕЧИТЕЛЯ

При безвестно отсъствие на настойника или попечителя детето може да бъде настанено в приемно семейство (чл. 25, ал. 1, т. 3 от ЗЗакрД, чл. 164, ал. 2 и чл. 168, ал. 2 от СК). Това обаче представлява една възможност, която би могла да се осъществи при наличието на допълнителна предпоставка – заместник-настойникът, съответно заместник-попечителят, да не може да поеме, макар и временно, функциите на настойника/попечителя. Това е така, тъй като при невъзможност на титуляря да изпълнява настойнически или попечителски функции той трябва да бъде заместен от заместник-настойника/заместник-попечителя. На основание чл. 169, ал. 1, ал. 3 от СК заместник-настойникът, както е видно от изрази, замества настойника, а заместник-попечителят – попечителя, когато са възпрепятствани да изпълняват задълженията си или когато възникне противоречие между техните интереси и интересите на поставения под настойничество или попечителство. Затова по правило няма да възникне необходимост детето да се настани в приемно семейство, тъй като грижи за него ще полага заместникът на настойника/попечителя. Нещо повече, при опасност от увреждане интересите на поставения под настойничество

во/попечителство, каквато е налице при безвестно отсъствие на титуляря, заместникът му може да поеме незабавно фактическото изпълнение на настойническата/попечителската функция¹². Ако обаче и заместникът е възпрепятстван (например той също е безвестно отсъстващ) или съществува противоречие между неговите интереси и тези на детето, то може временно, докато се преодолее тази ситуация, да бъде настанено в приемно семейство. Следователно, за да се настани дете под настойничество или попечителство в приемно семейство при безвестно отсъствие на настойника или попечителя, е нужно заместник-настойникът/заместник-попечителят да е възпрепятстван да изпълнява тези функции. Необходимо е едно уточнение – когато възпрепятстването е трайно и продължително, а такова е налице при безвестно отсъствие (например настойник и заместник-настойник са двама съпрузи, които са изчезнали), също може да се приложи мярката за закрила по чл. 4, ал. 1, т. 4 от ЗЗакрД до назначаването на нов настойник и заместник-настойник, съответно попечител и заместник-попечител (чл. 160, ал. 1 и ал. 2 от СК). В този случай органът по настойничество и попечителство трябва да отстрани от длъжност настойника и заместник-настойника, съответно попечителя и заместник-попечителя. Ако той откаже да стори това, отказът може да се обжалва пред районния съд по реда на чл. 161 от СК.

Дирекция „Социално подпомагане“, с цел закрила правата на детето, трябва да сезира органа по настойничество и попечителство за безвестното отсъствие на настойника/попечителя и да настани временно детето в приемно семейство – арг. от чл. 27 от ЗЗакрД, до определяне на нов настойник/попечител, ако функциите не могат да се изпълняват от заместника му. Органът по настойничество и попечителство също може да поиска настаняване в приемно семейството. В разгледаните дотук случаи детето не трябва да се настанява по съдебен ред в приемно семейство докато органът по настойничество и попечителство не му определи нов настойник/попечител, когато назначеният е в безвестно отсъствие, защото интересите на детето налагат тази промяна (чл. 160, ал. 1 и 2 от СК). На осно-

¹² Вж. в този смисъл за функциите на заместник-настойника и заместник-попечителя въобще у НЕНОВА, Л. Семейно право на Република България. Книга втора. Нова редакция проф. д-р Методи Марков по новия Семейен кодекс от 2009 г. [3. осн. прераб. и доп. изд.]. София, Софи-Р, 2010, с. 590.

вание чл. 27, ал. 2 от ЗЗакрД в срок един месец от настаняването по административен ред на дете в семейство на роднини или близки, в приемно семейство, социална услуга от резидентен тип или в специализирана институция Дирекция „Социално подпомагане“ трябва да направи искане до районния съд за настаняване на детето по съдебен ред в приемно семейство. Обаче в този период органът по настойничество и попечителство трябва да определи нов настойник/попечител. Щом срокът за назначаването му е едномесечен, с аргумент за по-силното основание срокът за промени в настойническия съвет (съответно на попечителя и заместник-попечителя) също трябва да бъде един месец. При определяне на нов настойник/попечител отпада необходимостта от настаняване по съдебен ред в приемно семейство, защото детето вече не е лишено от грижи¹³.

Въз основа на казаното може да се направи **извод**, че при безвестно отсъствие на настойника/попечителя детето може да бъде настанено в приемно семейство само **временно** – до назначаването на нов настойник/попечител, ако заместник-настойникът/заместник-попечителят не може да поеме грижите в този период.

4. БЕЗВЕСТНО ОТСЪСТВИЕ НА ПРИЕМНОТО СЕМЕЙСТВО ИЛИ СЕМЕЙСТВОТО НА РОДНИНИ ИЛИ БЛИЗКИ, В КОЕТО ДЕТЕТО Е НАСТАНЕНО

Приемно семейство са двама съпрузи или отделно лице (чл. 31, ал. 1 от ЗЗакрД). Семейството на роднини или близки също може да бъде отделно лице или двама съпрузи. Когато един от двамата съпрузи е безвестно отсъстващ, другият ще полага грижи за детето. В такава ситуация няма да се наложи промяна на мярката за закрила, ако детето получава в пълна мяра надлежни грижи. Когато обаче в безвестно отсъствие са и двамата съпрузи или съответното лице, при което детето е настанено, приложената мярка за закрила трябва да се прекрати и да се вземе друга.

При безвестно отсъствие на приемното семейство или на семейството на роднини или близки детето ще бъде настанено в ново приемно семейство или ново семейство на роднини или близки. Това понякога е не-

¹³ ДИМИТРОВА, Г. Настойничество и попечителство. София, Нова звезда, 2016, с. 139 и сл.

възможно – например детето е било настанено в професионално приемно семейство и друго подходящо няма, никой друг роднина или близък не желае да поеме грижите за него и др. В такава ситуация очевидно закрилата на детето ще се постигне чрез промяна на мярката за закрила. При това съдът трябва да съобрази правилото на чл. 28, ал. 4, изречение последно от ЗЗакрД, който препраща към чл. 26, ал. 1 от ЗЗакрД, т.е. първо трябва да опита да настани детето в семейство на роднини или близки, ако това тава не е възможно – в приемно семейство, ако и тази възможност не може да се реализира, тогава – социална услуга от резидентен тип, а при изчерпване на всички предходни възможности – в специализирана институция. Редът, който предписва чл. 26, ал. 1 от ЗЗакрД, трябва да се спази не само при първоначално настаняване извън семейството, но и при промяна на мярката за закрила – арг. от чл. 30а от ЗЗакрД.

За да приложи нова мярка за закрила – настаняване извън семейството, съдът трябва да прекрати предходната. Основанията за прекратяване на настаняването извън семейството са изчерпателно изброени в чл. 29 от ЗЗакрД в единадесет точки. Нито една от тях обаче не посочва безвестното отсъствие като прекратително основание.

Не могат да се използват основанията по чл. 29, т. 7 и 10 от ЗЗакрД – смърт на съпрузите или на лицето от приемното семейство, смърт на лицето/лицата от семейството на роднини или близки, защото обявяването на смъртта може да стане след изтичане на пет години от последното известие за отсъстващия (най-малко две – вж. бел. 9 под линия) – очевидно твърде дълъг период от време, през който сериозно биха се увредили правата и интересите на ненавършилия пълнолетие.

Настаняването в приемно семейство или в семейство на роднини или близки може да се прекрати при промяна на мярката за закрила (чл. 29, т. 8 от ЗЗакрД). Мерките за закрила имат временен характер. Те се променят при изменение в обстоятелствата. Тази **промяна се извършва чрез прекратяване на досегашната мярка за закрила и предприемането на нова**, която може да бъде същата или различна по вид от досегашната. Когато се прекратява взетата мярка, а основанията за настаняване извън семейството продължават да съществуват, е необходимо, както споменах, съдът да настани детето в ново приемно семейство или в друго семейство

на роднини или близки. До произнасяне на съда тази дейност се извършва от Дирекция „Социално подпомагане“. Директорът трябва да издаде заповед за временно прекратяване на настаняването по административен ред и временно настаняване по административен ред – до произнасянето на съда. Това е възможно както ако се прекратява настаняването в едно приемно семейство и детето се настанява в друго, така и ако се прекратява настаняването в приемно семейство и детето се настанява в семейство на роднини или близки, а също така и когато се прекратява настаняването в семейство на роднини или близки и детето се настанява в приемно семейство, или се прекратява настаняването в едно семейство на роднини или близки и детето се настанява в друго семейство на роднини или близки, но и при прилагане на социална услуга от резидентен тип или настаняване в специализирана институция. С други думи, **компетентният орган прекратява настаняването извън семейството** не само когато се предприема нова мярка за закрила, различна от предходната, но и когато се поставя същата мярка за закрила, а детето се настанява в друго приемно семейство или семейство на роднини или близки, различно от досегашното, което е безвестно отсъстващо. В този смисъл е и съдебната практика – виж например Решение от 12.03.2013 г. по гр.д. № 59/2013 г. на Районен съд – Чирпан¹⁴, Решение № 24 от 25.01.2013 г. по гр.д. № 984/2012 г. на Районен съд – Нови пазар¹⁵, Решение № 121 от 19.03.2013 г. по гр.д. № 52/2013 на Районен съд – Търговище, Решение № 893 от 10.06.2014 г. по гр.д. № 2263/2014 г. на Районен съд – Плевен, Решение № 127 от 12.10.2015 г. по гр.д. № 654/2015 г. на Районен съд – Свищов, Решение № 827 от 02.06.2014 г. по гр.д. № 2095/2014 г. на Районен съд – Плевен, и много други.

За да се промени мярката за закрила е безусловно необходимо да се установи че промяната е в интерес на детето – арг. от чл. 3, т. 3 от ЗЗакрД, който прокламира осигуряването на най-добрия интерес на детето като ос-

¹⁴ Решението постановява: „Прекратява настаняването в професионално приемно семейство, а именно на [...], и изменя по отношение на детето мярка за закрила „настаняване в приемно семейство“, като го настанява в професионално приемно семейство, а именно това на [...]“.

¹⁵ Решението постановява: „Прекратява настаняването в професионално приемно семейство на [...] Настанява детето в професионално приемно семейство на [...]“.

новен принцип за закрила. Съдебната практика е в същия смисъл – виж например Определение № 15550 от 25.11.2013 г. по адм. д. № 9522/2013 г., IV отд. на ВАС, Решение № 33 от 24.06.2013 г. по гр.д. № 225/2013 г. на Районен съд – Чирпан, Решение № 489 от 28.03.2014 г. по в.гр.д. № 363/2014 г. на Окръжен съд – Варна и много други. Може да се приеме, че промяна в мярката за закрила се извършва, когато **интересите на детето са засегнати или могат да бъдат засегнати неблагоприятно**. Това е така, когато приемното семейство или семейството на роднини или близки **не осъществява своите функции поради безвестно отсъствие**. На Дирекция „Социално подпомагане“ и съда се предоставя възможност за конкретна преценка предвид желанията и чувствата на детето, неговите физически, психически и емоционални потребности, възрастта, здравословното му състояние, опасността или вредата, която му е причинена или вероятността за причиняването ѝ от безвестното отсъствие, последиците, които ще настъпят за детето при промяна на обстоятелствата – промяна на мярката за закрила, смяна на приемното семейство, семейството на роднини или близки – арг. от § 1, т. 5 от ДР на ЗЗакрД.

5. СОЦИАЛНАТА УСЛУГА ОТ РЕЗИДЕНТЕН ТИП ИЛИ НАСТАНЯВАНЕ В СПЕЦИАЛИЗИРАНА ИНСТИТУЦИЯ И БЕЗВЕСТНО ОТСЪСТВИЕ НА ЧЛЕН ОТ ПЕРСОНАЛА

Особеност съществува, когато детето е настанено в специализирана институция или ползва социална услуга резидентен тип¹⁶, а физическо лице от персонала е безвестно отсъстващо. Неговото безвестно отсъствие няма същото значение както безвестното отсъствие на родителя или настойника.

Когато член на персонала е в безвестно отсъствие, друго физическо лице ще поеме неговите функции. При социална услуга от резидентен тип е възможно да отсъства безвестно представител на персонала, отговарящ лично за детето съгласно чл. 30, ал. 1 от Наредбата за критериите и стан-

¹⁶ Социални услуги в общността от резидентен тип са услуги, които предоставят възможност за живот в среда, близка до семейната – § 1, т. 6 от ДР на Закона за социалното подпомагане.

дартите за социални услуги за деца. Дори и тогава ще се определи друг, който да го замести. Това означава че въпрос за промяна на мярката за закрила по правило не трябва да се поставя, тъй като са осигурени грижи за детето.

Безвестното отсъствие обаче и тук има своеобразно проявление. Напълно е възможно детето дълбоко да се е привързало към член на персонала, например този, който отговаря лично за него при социална услуга от резидентен тип, между тях може да е изградена здрава връзка. Ако това физическо лице е в безвестно отсъствие, а детето получава необходимите му грижи, няма нужда от промяна на мярката за закрила. Споменатите институции разполагат с психолози, педагози, които биха подпомогнали детето с цел то да установи връзка с друг представител на персонала, който ще отговаря лично за него при социална услуга от резидентен тип. Трудно бихме могли да си представим, че след помощта на специалисти детето не би се приспособило към новата обстановка. Ако теоретично допуснем това, би трябвало да се прецени какви възможности предоставя тогава българското право с цел закрила на ненавършилия пълнолетие и, по-специално – може ли да се промени мярката за закрила и на какво основание? За отговора на поставените въпроси следва да се имат предвид конкретните обстоятелства.

Интересите на детето са приоритет. На основание чл. 10, ал. 1 от ЗЗакрД всяко дете има право на закрила за нормалното му физическо, умствено и социално развитие и за защита на неговите права и интереси. Затова, ако детето не може да се адаптира към променената обстановка и не е в негов интерес да се запази настоящата мярка за закрила, тя може да се прекрати и да се приложи друга при следване на поредността, установена от чл. 26, ал. 1 във връзка с чл. 28, ал. 4, изречение последно от ЗЗакрД, във връзка с чл. 30а от ЗЗакрД.

Член 29, т. 9 от ЗЗакрД позволява мярката за закрила да се прекрати при промяна на обстоятелствата, свързани с детето, ако е в негов интерес. За да се приложи това прекратително основание са необходими две кумулативно дадени предпоставки – установена промяна в обстоятелствата, свързани с детето, и констатация, че промяната на мярката за закрила от-

говоря на интереса на детето. Промяната в обстоятелствата¹⁷ може да се изразява и в невъзможността на детето да се адаптира към новата обстановка след безвестно отсъствие на член от персонала. Обаче чл. 29, т. 8 от ЗЗакрД предвижда, че настаняването извън семейството се прекратява и при промяна на мярката за закрила. На пръв поглед в разглежданата хипотеза могат да се използват две основания за прекратяване на настаняването – тези по чл. 29, т. 8 и по чл. 29, т. 9 от ЗЗакрД. И двете основания нямат автоматичен прекратителен ефект. Те се прилагат след преценка на компетентен орган – Дирекция „Социално подпомагане“, която временно може да прекрати настаняването по административен ред и временно по същия ред да настани детето извън семейството, но окончателното решение на лице ли са основанията по чл. 29, т. 8 и 9 от ЗЗакрД, принадлежи на съда. Кое от двете следва да се използва, е въпрос на правилна правна квалификация. Струва ми се, че в разглеждания случай основаниято за прекратяване на настаняването – промяна на обстоятелствата, свързани с детето, ако е в негов интерес (чл. 29, т. 9) – е специално спрямо това по чл. 29, т. 8 – промяна на мярката за закрила¹⁸. Необходимостта от такава промяна може да се дължи на много и различни обстоятелства, например свързани с членовете на приемното семейство или на семейството на роднини или

¹⁷ Промяната на обстоятелствата, свързани с детето, може да има много проявления – например: промени в здравословното състояние на детето, които изискват специализирани медицински грижи, влошаване на отношенията със семейството на роднини или близки или приемното семейство, в което детето е настанено, и нежеланието му да бъде отглеждано от тях и др. Част от съдебната практика приема, че при подобряване на социално-битовите условия на биологичното семейство, установено желание и готовност на родителите да полагат грижи за детето си (Решение № 68 от 20.05.2015 г. по гр.д. № 123/2015 г. на Районен съд – Свищов, Решение № от 31.10.2014 г. по гр.д. № 488/2014 г. на Районен съд – Кнежа и др.) е налице основаниято за прекратяване на настаняването извън семейството по чл. 29, т. 9 от ЗЗакрД – промяна в обстоятелствата, свързани с детето. Струва ми се, че това е неправилна правна квалификация. Основание за прекратяване има, но това по чл. 29, т. 6 от ЗЗакрД – отпадане на основанията по чл. 25, ал. 1 от ЗЗакрД.

¹⁸ Това основание е общо и спрямо основанията по чл. 29, т. 7 и 10 от ЗЗакрД – смърт на лицето/лицата от приемното семейство или от семейството на роднини или близки, които се явяват специални по отношение на основаниято по чл. 29, т. 8. При смърт на лицето/лицата от приемното семейство или от семейството на роднини или близки също следва да се промени мярката за закрила, но прекратяването на приложената мярка става автоматично, на основание чл. 29, т. 7 и 10, докато основаниято по чл. 29, т. 8 изисква преценка на Дирекция „Социално подпомагане“, която може временно да прекрати настаняването по административен ред, а окончателното решение е на съда. От своя страна основаниято по чл. 29, т. 9 пък е общо спрямо основанията за прекратяване – осиновяване на детето – чл. 29, т. 4, навършване на пълнолетие от детето – чл. 29, т. 5.

близки – влошаване на здравословното им състояние, на материално-битовите условия, нежеланието им вече да полагат грижи за детето и др. За промени в обстоятелствата, свързани с детето, законодателят е предвидил нарочно основание, подчертавайки водещото значение на интереса на детето.

Дирекция „Социално подпомагане“ трябва да извърши проверка и много внимателно да прецени интересите на ненавършилия пълнолетие, като вземе предвид, освен чувствата и желанията на детето, и други възможности за настаняване извън семейството – арг. от § 1, т. 5, б. „е“ от ДР на ЗЗакрД – „последниците, които ще настъпят за детето при промяна на обстоятелствата“. Иначе казано, да се отчете дали детето може да бъде настанено в семейство на роднини или близки, в приемно семейство, или да ползва друга социална услуга от резидентен тип. Още повече че настаняването в специализирана институция се извършва само след изчерпване на възможностите за закрила в семейна среда (чл. 35, ал. 2 от ЗЗакрД)¹⁹. Но ако единствената алтернатива след прекратяване на настаняването в социална услуга от резидентен тип е настаняването в специализирана институция²⁰, трябва да се прецени дали прекратяването на настаняването в център от семеен тип и настаняването в специализирана институция са в интерес на детето. Разглежданата хипотеза поражда много трудно решим въпрос, тъй като очевидно в повечето случаи по-благоприятно за детето е ползването на социална услуга от резидентен тип, отколкото настаняване в специализирана институция²¹. Освен това всяка промяна в мярката за закрила изисква и приспособяване на детето към нова обстановка, което зависи от неговите потребности, психически, физически, емоционални особености и др. Едва след съвкупна преценка на тези обстоятелства Дирекция

¹⁹ На основание § 1, т. 7 от ДР на ЗЗакрД „Семейна среда“ е биологичното семейство на детето или семейството на осиновителите, бабата и дядото или близките на детето, или приемно семейство, при което то се настанява по реда на чл. 26“.

²⁰ Трябва да се отбележи, че в практиката има случаи, в които се прекратява настаняването на дете в приемно семейство и то се настанява в специализирана институция, защото няма друга възможност. Виж например: Решение № 34 от 11.02.2014 г. по гр.д. № 796/2013 г. на Районен съд – Нова Загора; Решение № 1708 от 13.10.2017 г. на Районен съд – Плевен и др.

²¹ Най-често такава се прилага при заболяване на детето и необходимост от медицински грижи, които могат да му бъдат осигурени в домовете за медико-социални грижи за деца.

„Социално подпомагане“ трябва да изготви социален доклад, в който да посочи с коя мярка интересът на детето ще бъде най-добре защитен. Струва ми се, че настаняване в специализирана институция следва да се предприеме в краен случай и само след неуспешно прилагане на други мерки за закрила – психологически, педагогически консултации, социална работа за улесняване връзките на детето с персонала на социална услуга от резидентен тип и др., по подобие на предвидените в чл. 23 от ЗЗакрД – арг. от чл. 23, т. 11 от ЗЗакрД, и то ако за детето са възникнали или има голяма вероятност да настъпят неблагоприятни последици. Съдебната практика е в същия смисъл – изготвеният социален доклад трябва да съдържа констатации за съществуването на опасност от увреждане на физическото, психическото, нравственото, интелектуалното и социалното развитие на детето, паралелно с установеното наличие на промяна в обстоятелствата – виж Решение № 84 от 27.05.2013 г. по адм.д. № 54/2013 г. на Административен съд – Добрич. Ако чрез промяна в мярката за закрила детето ще получава надлежни грижи, които да **способстват** за нормалното му физическо, психическо, социално развитие, тогава промяната на мярката **отговаря** на неговия интерес. Установи ли че е налице основанието на чл. 29, т. 9 от ЗЗакрД, Дирекцията ще прекрати временно настаняването в специализирана институция или социална услуга от резидентен тип и ще настани временно детето извън семейството, като съобрази поредността, която предписва чл. 26, ал. 1 от ЗЗакрД във връзка с чл. 28, ал. 4, изречение последно от ЗЗакрД, във връзка с чл. 30а от ЗЗакрД. Събраните доказателства и изготвения социален доклад трябва да представи пред съда, който да направи окончателна преценка.

БРАКЪТ СПОРЕД ЮСТИНИАНОВИЯ КОДЕКС И КАНУНА НА ЛЕКА ДУКАГИНИ (НА АНГЛИЙСКИ ЕЗИК)

Доц. д-р Берат Акифи

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Резюме: Юстиниановата кодификация е основен закон за повече от 1 000 години почти навсякъде в Европа, а Кодексът на Лека Дукагини (на албански Kanuni i Lekë Dukagjinit) бележи духовната и същностна карта на албанците. Кодификацията на Юстиниан не оставя сфера на обществения живот, необхваната от правото. Приемането на кодификацията има широко отражение, като например реорганизация на Империята, храмови конструкции, укрепления, изобретения, градско строителство, пътища и т.н. Накратко, компилацията на Юстиниан, най-значителната реформа, позната от времето на Късната античност и Ранното средновековие, задължава гражданите да се хомогенизират и изпълнят гражданските си задължения. Кодексът на Юстиниан е известен с датата на съставянето и обнародването си, но това не е така при Кодекса на Лека Дукагини, защото той няма дата на компилация. Едно е сигурно – такъв закон е бил приет от арборите преди поне 1 000 години. Исторически Кодексът на Юстиниан е светски, а Кодексът на Лека Дукагини е сакрален.

Ключови думи: брак; Юстинианова кодификация; Кодекс на Лека Дукагини; авторитарен.

**MARRIAGE
ACCORDING TO THE CODE OF JUSTINIAN
AND THE CODE OF LEKË DUKAGJINI (ENGLISH
LANGUAGE)**

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Abstract: The Codification of Justinian was the main source of law for 1000 years across Europe, while on the other hand the Code of Lekë Dukagjini (Albanian: Kanuni i Lekë Dukagjinit) marked the spiritual and identity map of Albanians to a great extent. The Codification of Justinian did not leave a domain of social life that was not covered by law. The adoption of that law had a wide reflection across the Empire, such as reorganization of the empire, temple constructions, fortifications, inventions, new invasions, city construction, roads, etc. In a word, Justinian's *Corpus* made the citizens homogenize and carry out their civic duties as well as the biggest reform ever known during the late Antiquity and early medieval times. The Codification of Justinian is known for the date and year of compilation and proclamation, but this is not the case with the Code of Lekë Dukagjini, because this canon has no date of compilation or proclamation, but one thing is certain – that kind of canon had been constituted at least 1000 years ago among the Arbore people. The Codification of Justinian is solemn by its roots, while the Code of Lekë Dukagjini is sacral.

Keywords: Marriage; Codification of Justinian; Code of Lekë Dukagjini; Authoritarian.

1. THE MAIN LAWS ON THE ESTABLISHMENT OF CIVILIZED MARRIAGES

There are three main laws that have laid the foundations of civilization marriage. Historically, the oldest laws of the world that have been codified on marriage begin from the 13th century. XVIII BC with the laws of the first emperor of Babylon Hammurabi, otherwise known as Code of Hammurabi. The other code, second ranked according to the science of jurisprudence, is the Law of Moses in the sixteenth century, also known as Torah (heb.), νόμος Μωυσῆ/Pentateuch (Septuagint Ancient Greek), Fifteen (Euro), Taurat (Arabic) etc. The third law in the world is known as the Code of Justinian (Latin *Codex Justinianus/Corpus Iuris Civilis*). The common of these three codes on marriage is to forbid marriage between family relatives¹. Point 3 of the prediction of the *Corpus Iuris Civilis* explains what the law is². It contains three maxims: to live honestly; do not hurt anyone; to give anyone the obligation³. In the absence of the rule of law in our country, it would at least be enough to hear each postulate on the philosophy of the law. There is also a definition of what justice is: justice is a constant and eternal desire to reward each one in his revenge⁴.

The legal standards about marriage express the best relevance of what the individual, family, society, and state morals are, so we have chosen this issue to see how it is codified in the Code of Justinian, comparing it with the codex The Code of Lekë Dukagjini. The first and most impressive thing in the Code of Justinian is to define what marriage is: marriage or marriage is a common affiliation between a man and a woman to live in an inseparable union (section 6 of marriage)⁵. In fact here nothing has any new speculation, except that the primary marriage unit is sanctioned by a man – a woman. Where is the weight of this definition in the actual constellations especially in the Western world. Some constitutions in the world, e.g. America, Brazil, Germany, Great Britain, Spain and even recently in Kosovo marriage is defined as a union of two individuals in mar-

¹ ALBANIAN Dictionary of Encyclopedias. Tirana, Academy of Sciences of RPSSH, 1985, p. 341.

² Ibid.

³ ÇABEJ, Eqrem. Albanians between the West and the East. Tirana, MÇM, 1994, p. 43.

⁴ Ibid.

⁵ NOPÇA, Franc. The Tribes of Albania: History, Society and Culture. London, 2013, p. 404.

riage, and so today many unicorn pairs are benefiting their marital status precisely because of the lack of precision of the sexes of individuals involved in marriage. Marriage a man – a woman is not an invention of this code, nor of Christianity, since it had been deposited since the law of Moses. Monogamy is an old concept, but according to what is said in the natural law and civil law, Judaism and Christianity have been the main propagators of monogamy. For monogamy, Christ speaks the apostles, the church fathers, etc. Let us mention here St. Augustine and his letter “A Good Wedding” about 420⁶. It is said that this paper has had a major impact on the Justinian Code on marriage.

2. MARRIAGE ACCORDING TO THE DEFINITION OF THE CODE OF LEKË DUKAGJINI

Let's see now how defining the married relationship Code of Lekë Dukagjini: I married me the canon would say to me; he added to me more than a slave, besides the work, to add to the boys. Marriage with whales, liked Lekë's Religion. The man has been subjected to a woman who did not leave me complaining about this need (paragraphs 28 and 32).⁷

Just Code of Justinian does not find religiousism in any case, since these laws dominate secular or civilian principles or institutes, and this is a great paradox or high value when it is known that the Roman Empire of the East, Byzantium, has been one the emperor who has stood on these three pillars: Latinism, Christianity, and Hellenism. There are more church records in the Code of Lekë Dukagjini, and this fact leaves a mark that such concepts of marriage in this canon were introduced not earlier than the XI and not later than the XVII century.

Marriage, concretely marriages, once had no significance or manifestation of rituals or ceremonies. Families have agreed or announced that this will now be a man and a woman and so, and this role will later become the first tribal organization. Emperor Justinian himself married Teodora without being accompanied by any ceremony, even he had had objections from the clerics as this woman was a circus worker, backward, even for the prostitute. The church historically only from the IX century initiates to initially initiate only a prayer for those mar-

⁶ Kanuni i Skënderbeut. Tirana, 2005, p. 56.

⁷ Ibid.

ried, but then gradually and especially with the Council of Trent's decision in 1564, after the start of the Protestant Reformation, the Catholic Church decides that no one can connect to marriage without celebration, without coronation, without oath, and without the presence of the clergy. This is so from then on to this day. In other words, we see that the Church has taken on the role of social life more than truly biblical data, but here again is the positive role of the Church in organizing civil life.

The Code of Lekë Dukagjini gives a lot of importance to the coronation: "The one who takes the woman without the moons of the moon tied to religion even to the canyon. The non-herd dog has no husband's home" (§ 57, 13). Even the canon was foretold the punishment for those who did not commit the crown: "The canon gives these punishments to the man, he takes unmarried women: the burning is burned and the earth is fallen; he is drawn out of the land, and cannot cast off his land until he keeps the coffin"; in the present, with an infernal woman, are known to be unlawful and therefore can never be treated (hereditary), § 57, 13th⁸. In the books of Moses, over 2 000 years before the Code of Justinian, the couple's divorce note is mentioned, and this argument proves that the Jews had previously arranged marriage with an official document, but in the Law of Moses there is no textual mention of the coronation, neither oath, nor ceremony, nor prayer, nor much greatness; and even in the New Testament, these things cannot be found, which can be said again that neither the Temple, nor the synagogue nor the church have been involved in celebration of couples. Authority over marriage and Jewish marriages has been judge, king, state etc. Another argument that marriage was a non-church issue, but the state, namely the family (family is also the issue of celibacy – deprivation of marriage) that the Christian church has not implemented until the XI century when it comes into force through Gregorian reform. Celibacy is not really mentioned in the Code of Justinian, but this is mentioned in the Code of Lekë Dukagjini and it is a question of feminine celibacy that is virginity among Albanian women, foreseen according to the four aruninal canons. The Albanian virgin (Albanian celebrant) according to Code of Lekë Dukagjini when a woman becomes a man, and today it is said

⁸ ELISE, Robert. *Albanian Folktales and Legends: Selected and translated from the Albanian (Albanian Studies)*. London, 2015, p. 75.

that in Albania there are up to 40 such cases. We have not seen this fact in other codes. The Code of Justinian and The Code of Lekë Dukagjini follow a patriarchal marriage system: all the children born to you, the husband, and the children of your children are under the authority of the father, but not the children born to your daughter, because they are under the authority of their father. Patriarchal system is also proven in the case of who to whom to marry.

Code of Justinian allows marriage between brothers and sisters coming from the second marriage of their father or mother, but allows marriage with the daughter adopted by her father if the boy's father legally abolishes her adoption. This act according to the Code of Justinian is called emancipation, in terms of liberation from dependence and free revelation from parental mentorship. Even the daughter of the adopted father's wife is free to marry any of her father's children, and this is also approved by the civil and natural code. Otherwise, it is not allowed to marry up to the fourth generation according to the blood connection. In Code of Justinian it is further stated that a man can not marry an aunt or his father's thesis, whether adopted or adopted; not with your son's bride; not with the niece; not a woman of two men, nor a man of two women; not with the shepherd; not with her mother-in-law; not with stepfather, etc. If you marry people in family proximity is a criminal offense and incest. This codification is completely different from the ancient biblical world from Adam to Moses, mentioned in the Bible, when the brother took the sister as a wife, and today in the oriental world marriages are also made in a wider family circle. Anyone who will marry outside of these rules will not know who for man or woman nor children will be in the authority of father or mother but will be called *spurii* (lat.), μπάσταρδος (greek), casual or with any other Albanian expression it will fall as much as a bastard (child – roman).

The Code of Lekë Dukagjini affirms marriage outside the tribe, i.e. exogamy. How is this saved? Elders once knew the genealogy of the family, something like the Jews, and thus the tribes. By developing this reminder, they have promoted a moral that is very rare in the world. The Albanians according to Code of Lekë Dukagjini are forbidden to marry someone within the tribe even if they were 400 generations ago, according to the “line of blood” and up to 100 genera-

tions according to the “tamblit line” (§ 39).⁹ Albanians, therefore, our tribes, though often forget or confuse their national and tribal genealogy again to be the principle: there is no marriage within the tribe, and even in the case of the calf of two men from different tribes because they were proclaimed in a ceremony as brothers. If the Code of Justinian was adoption, and this was not foreseen in this rank at the Code of Lekë Dukagjini, then the Code of Lekë Dukagjini HCJ had the gloom, which is also something unique in the world.

Through this Albanian social superstructure, often in the midst of Albanian civilization, the friendship, the ties and in many instances as we know from history, like Skanderbeg, once the enemies and ready to be killed, through the swamp, became the ritual of blood-drinking of each other, as a sign of dedication, that they will live, those people are fellowship.

With Code of Justinian marriage was forbidden in this case: not to be blood and gender; not be a tribe; not be among the tribe of the boy whom he loves me; Do not be a woman who is left out; do not have gambling (point 39). The Code of Justinian was inaugurated somewhere more than 500 years after the emergence of Christianity, and nearly 100 years before the emergence of Islam. Since the Code of Justinian and the Code of Lekë Dukagjini between these two major events, regardless of them, regarding marriage, these definitive values are no doubt: The legal schematic marriage: a man – a woman! Prohibition of marriage in any blood relation to the fourth generation (there is a difference between blood bonding and family ties). Prohibition of marriage with persons, specifically women, who are under the age of 12. Codex of Justinianum + Code of Lekë Dukagjini have defended a moral of our people as well as avoided incest and continued Albanian national tradition over marriage despite the cultural pressure of the oriental, especially after the fall of the Constantinople. The Code of Lekë Dukagjini so much protects the spouse, so much emphasizes the obligations of the man to the Crown, so that when we read the Code, it seems to me as a single voice of the desert for the issue of marriage, marriage and a strong and happy marriage¹⁰

⁹ GJEÇOVI, Shtjefën. Kanuni i Lekë Dukagjinit. Tirane, Botimtex, 2014, p. 67.

¹⁰ ACQUES, Edwin E. The Albanians: An Ethnic History from Prehistoric Times to the Present. London, British Library, 2009, p. 45.

In the 6th century, Emperor Justinian I (born 482 AD in Tauresium near Skopje), proclaimed a new system of laws, included in the *Corpus Iuris Civilis* (Body of Civil Law) which constituted the legal base of the Byzantine Empire. Justinian's laws were introduced in two codes, the first being *Codex Iustinianus primus* of the year 529 AD, which has lost and is not exactly known content, and the second *Codex Iustinianus Repetitae Praelectionis*, of 534 AD, was fortunate to well preserved yet complete. This legislation was in force and active in Illyrian holdings. The scholars consider Jus Justinianum, made up of laws and judgments based on Roman law, which had given life to centuries of Roman jurisprudence and then Byzantine law.

The Codex Iustinianus of 534 BC is divided into 12 books, each of which contains a number of consecutive titles or nodes, which are over 1600 constituents altogether. In the row, the books of the Codex Iustinianus are: Book I: the right ecclesiastical; Book II up to Book VIII: Private Law; Book IX: Criminal Law; Book X, XI, XII: Administrative and financial law.

CONCLUSION

Even the Code of Lekë Dukagjini has the same structure, made up of 12 books, with almost the same number of laws and with impressive similarity. Knowing these facts, the question arises: This is a coincidence of the case, or constitutes an important historical fact that confirms the ancient origins of the Canon, which expresses the continuity of Roman-Illyrian-Byzantine, or more precisely, the synthesis of the Code of Justinian, applied to the territories of the Illyrians?

Just as the Code of Justinian and the Code of Lekë Dukagjini, in his book deals with the ecclesiastical right (the rights of the church and the Christian faith), but the church excludes the right to political power. II and VIII lawsuits contain the laws and rules of private law, and the other books continue to have the criminal law, with administrative law, financial law ends with the right of criminal procedure. Not only the structure, but as we have previously emphasized and the content of the laws in the Code of Lekë Dukagjini, is similar to those of the Code of Justinian.

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**ВЗАИМОДЕЙСТВИЕТО МЕЖДУ *HUMANITAS* И
IUS –
ЛЮБОПИТНИЯТ СЛУЧАЙ НА ЮСТИНИАНОВИТЕ
ДИГЕСТИ.
ПРОЧИТ МЕЖДУ РЕДОВЕТЕ НА ИСТОРИЯТА
(НА АНГЛИЙСКИ ЕЗИК)**

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Резюме: Общество в упадък, император, който има амбицията да задържи Империята на върха на цивилизования свят, и правна система, която скоро ще изгуби единството си. Това са накратко условията, при които се появява шедьовърът, наречен Дигести. Информацията, която имаме, е впечатляваща, макар и не достатъчно, за да разпръсне неяснотата: 2 000 книги с общо 3 милиарда редове, прегледани от съставителите – това е двойният обем на Дигестите след като са били издадени. Петнадесет известни професори по право под ръководството на Трибониан, *“quaestor sacri palati”* подбират от оригиналните произведения на римските юристи голям брой практически случаи, отразяващи превъплъщенията (аватарите) на Римския свят. И всичко това е осъществено само за три години. Сложността на работата им и неяснотата относно някои аспекти на процеса на създаването на Дигестите пораждат спорове между учените. Ако се интересуваме от изучаването на Дигестите, не можем да пренебрегнем някои противоречия като например теориите за съществуването на т.нар. Преддигести и различните причини за създаването им. Нещо повече, практическите случаи, които юристите дават като примери, за да оправдаят решенията по тях (както и самите решения), са източник на принципите, използвани в правната система и днес. Освен това двата начина, по които оригиналните откъси на класическите автори са преработени от съставителите – интерполациите и глосите – също представляват особен интерес в общия анализ на текста. Като се има предвид всичко това, може да се каже че Дигестите представляват едно от ключовите постижения на Юстиниан, творба, която е от решаващо значение за развитието на човечеството. Извън практическата полза, те остават символ на духа на един народ, който живеел със земята, но и с принципите си, уповавал се не само на меча, но и на дълбочината на своя дух и на величието на своята културата.

Ключови думи: Дигести; Юстиниан; интерполация; римско общество; компилатори; Трибониан.

**HUMANITAS IMPACTING IUS –
THE CURIOUS CASE OF JUSTINIAN’S DIGEST.
A LECTURE BETWEEN THE LINES OF HISTORY
(ENGLISH LANGUAGE)**

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Abstract: A society in decline, an emperor who has the ambition to maintain the Empire on the top of the civilized world and a legal system that seems to lose its unity soon. These are, in an over – synthetized presentation, the conditions where the masterpiece arises. The information we have regarding this work are impressive, although not enough to scatter all the fog that surrounds it: 2 000 books (with a total of 3 billion lines) studied by the compilers – that is twice the volume of the Digest after it has been edited, 15 famous Law professors (under the guidance of Tribonian, “quaestor sacri palati”) that excerpted the original works, a large amount of practical cases, mirroring the avatars of the Roman world – and all these in only three years. The complexity of the work, as well as the obscurity that surrounds some aspects of the process of its creation have given birth to various controversies between scholars. Consequently, should we be interested in the study of the Digest, we cannot ignore controversial issues as the theories regarding the existence of the so – called Predigests, and the different reasons that lay at their foundation. Moreover, the practical cases that the jurists give as examples to justify their sentences (and the sentences in themselves) are a source for the principles used nowadays in the legal system. Furthermore, the two ways in which the original excerpts of the classical authors were modified by the compilers – the interpolations and the glosses – also present a particular interest in the global analysis of the text. All things considered, it can be stated that the Digest represent one of Justinian’s key achievements, one of the works that crucially influenced the evolution of the humanity. But beyond their practical utility, they remain the symbol of the collective soul of a people that concurred not only land, but principles, not only by sword, but by the depth of spirit and by the greatness of culture.

Keywords: Digest; Justinian; Interpolations; Roman society; Compilers; Tribonian.

*“Written law is like a forest – if we leave the weed, the bushes to grow,
then forest becomes impossible to penetrate.”*

Henry John Roby

I. HUMANITAS IN CONTEXT

1. Justinian and the human effigies of ius

It happens often and not only to laymen of roman law and roman history, but also to scholars that are to dedicated to analyze the trees in the legal garden of the Corpus Iuris Civilis, that they skip to see the forest, to manifest a peculiar lack of interest in the personality of Justinian in the global context of its rise as an Emperor.

Without intending to develop within this paper a biography of Justinian, we shall make some very brief precisions regarding his origins, life and mentality, as without these, a proper *mise en scene* of the Digest would be incomplete. Who was in fact, the last Latin speaking emperor from the riversides of Bosporous¹ as Bonfante names him and how did he raise? And particularly, what in his background, education or external influences gave birth to that strong desire to unify the law system and to create in terms of legal construction, an edifice that can be described with the famous verses of Horace without erring too much – *“exegit monumentum, aere perennius, regalique situ pyramidum altius”*.²

We should underline firstly that, at least according several sources, Justinian was Roman by education, and not by blood. This hypothesis is strengthened by the fact that he was born in Tauresium, Dardania, on the territory of nowadays Macedonia, upon all probabilities, near Skopje.

However, the sources we have regarding his origins are scarce and not at all trustworthy.

It is known that his uncle, who reigned under the name of Justin Ist, was a peasant who enrolled in the Roman army, rose until he became commandant of

¹ BONFANTE, Pietro. Storia del diritto romano. Vol. II, cap. XXVIII. Milano, Societa Editrice Libreria, 1923, p. 46.

² “I have reared a memorial more enduring than brass, and loftier than the regal structure of the pyramids, which neither the corroding shower nor the powerless north wind can destroy; no, not even unending years nor the flight of time itself. I shall not entirely die. The greater part of me shall escape oblivion”. Horace, Carmina, III. 30.1. – See also <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0025%3Abook%3D3%3Apoem%3D30>

the praetorian guards, and when Anastasios died, was proclaimed Emperor by the guards.³

As stated by Bryce⁴ and cited by Girard⁵ the biography of Justinian written by a certain Theophilus is apocryphal. Therefore, we cannot rely very much on the information provided there, although most of the details regarding his life come from that biography.

He ruled between 527–565, but between 527–528 he reigned on behalf of his uncle Justin, so he drove the Empire for about half a century. As for his origins, Theophilus, his preceptor, left a manuscript (which came to light through a XVII century copy, whose authenticity was especially questioned by the German scholars) showing that Justinian originated from Northern Macedonia, its name being Upravda at first.

It is even unclear what culture and education he had – as he was definitely not a gifted philosopher as Marcus Aurelius, nor a *patronus* of arts such as Augustus. But what we can clearly deduce from he has left behind is that he was “perceived of the spirit of the roman culture as no emperor has previously been”.⁶

He is also known to have chosen effective yet unpopular counsellors, tendency which was on the verge of costing him the throne, as he had to face during his reign, the Nika rebellion: the rebels had proclaimed emperor a certain Hepatius, the grandson of the former emperor Anastasios Ist, Justinian being forced to withdraw from the capital. It was his wife, Empress Teodora, a significant figure of Justinian's reign, who opposed surrendering – Teodora was almost as resolute and determined as Livia, but without being conceited and bigot, she had very humble origins, but this did not drive her to becoming vain and fierce. Justinian finally succeeded, encouraged by her and supported by his generals, Nerses, Belisarius and Mundus, to stifle the rebellion, having to remove Tribonianus from his public office.

³ We can see there is almost a tradition in proclaiming emperors the chiefs of the Guards – the most famous example is the general Galba, who succeeded to Nero, after the latter was assassinated by the guards themselves.

⁴ BRYCE, M. J. English Historical Review, 1888, p. 657–686 [Cit. by GIRARD, Paul Frédéric].

⁵ GIRARD, Paul Frédéric. Manuel élémentaire de Droit Romain. 7. éd. Paris, Librairie Nouvelle de Droit et de Jurisprudence Arthur Rousseau et Cie, 1924, p. 79.

⁶ BONFANTE, Pietro. Ibidem.

A question arises in terms of paternity, if not of the Digest itself, at least of the idea of reforming the law of the Empire and rethinking the notion of *ferre legem*. As Justinian, through the Corpus Juris Civilis, not only that transforms the *ius*, that is the classical jurisprudence into law⁷, but reshapes the notion of the *legislator*, without being neither a lawyer, nor a scholar.

He takes the role of the *magistratus* and brings before the people a set of rules with the value of a law. Nevertheless, he seemed to understand, better than any other ruler in the Ancient history of the Romans that “*laws are not sudden creations, but the slow growth of time.*”⁸

2. Eminence grise or princeps compilatorum. The avatars of Tribonian

If Justinian was perceived by the history as a wise emperor, Tribonian's personality gave rise to controversial discussions among the scholars. Despite being a brilliant mind, he seemed to be the prototype of the Byzantine clerk. Pereterskii reunites some of the less favorable views of the illustrious character – “*he was selling for money sentences and law, being willing to interpret laws in any sense if paid for it.*”⁹ On the other hand, these statements might be suspected by subjectivism and political bias, if we analyze the context where they were issued – Soviet Russia, amid the class struggle leitmotif, so that Tribonian appeared as a representative of the suppressor class. It is a fact that irrespective of his immorality his inclinations towards corruption, his merits in the drafting of Digest remained untouched.

Tribonian chose as members of his commission Constantinus, a high official of the Empire, two reputed professors from Constantinople, Cratinus and Theophilus and two others from Beirut, Dorotheus and Anatolius and eleven lawyers from the empire's capital city, namely: Stephanus, Menas, Prosdocius, Eutholmius, Thimoteus, Leonides, Leontius, Plato, Jacobus, Constantinus et Johannes.¹⁰ With the help of this specialists, he crafted one of the greatest legal

⁷ JOHNSTON, David. Justinian's Digest: The interpretation of interpolation. – In: *Oxford Journal of Legal Studies*, Vol. 9, 1989, no. 2, p. 149–166, see in particular p. 152.

⁸ Ibidem.

⁹ PERETERSKII, Ivan Sergeevic. Digestele lui Iustinian. București, Editura Științifică, 1958, p. 31–33

¹⁰ ROBY, Henry James. An introduction to the study of Justinian's Digest. Cambridge University Press, 1886, p. XXIV.

monuments of Antiquity, comprising the essence of Roman law as developed by the classical jurists and still applicable in his times.

Consequently, are we to discuss the paternity of the Digest, we humbly assert, without minimizing, at any point, Justinian's tremendous influence not only on the architecture of the Digest, but even on their actual birth, we are of the opinion that Justinian should be regarded more as the spiritual father, the godfather of the Digest or even the adoptive father of this work, whilst its biologic paternity should be recognized to Tribonian.

II. THE DIGEST *AS ADEQUATIO INTELLECTUS ET REI*

1. The birth of the Digest – A philosophy of interrogation

The law in force in Byzantium at the beginning of the sixth century had begun to distance from the form and spirit of classical Roman law, thus reflecting the metamorphoses that were happening inside it, especially from an economic point of view, but at the same time being influenced by some conceptions belonging to the various peoples of the Empire (especially the Greeks). As long as the Roman law was the national law of Rome, applicable only to Roman citizens, the pilgrims, for example, were following their norms – *the leges moresque peregrinorum* – obviously, if they were not contrary to Roman law.¹¹

With the generalization of Roman citizenship, through the edict of Caracalla in 212, Roman law also began to be applied in the provinces.

However, some elements of local law have survived, albeit exceptionally, mainly in the provinces' internal affairs. The "Syrian-Roman Book" constitutes such an example of the survival of local law. Set up in the last quarter of the 5th century and widely spread in the Orient, it reproduces some imperial constitutions and fragments of the jurists' writings, including rules applied at the court of the Patriarch of Antioch and bringing together principles both from private law and from local law. Thus, a legislative unit would have been able to strengthen

¹¹ CUCIUREANU, Ionela. Digestele lui Justinian – Animus liber In consulendo agendoque, p. 5, available at <https://drept.unibuc.ro/Digestele-lui-Justinian-Animus-liber-in-consulendo-agendoque-Cuciureanu-Ionela-s289-a530-en.htm>

the economic links between the provinces and the Roman Empire, which were relatively weak.¹²

The Digest in itself is placed under the auspices of interrogation, because there are few unquestionable issues, from its creation to some of the solutions or the interpolations.

The ability of the compilers to sail through such an ocean of materials, gave rise to another series of questions: did the compilers used some preexisting compilations? Has all the compilation work has been done from scratch or some earlier compilations have been used?

The second hypothesis seems appealing form a practical point of view, as it is difficult to imagine how several scholars could have analyzed a total of 3 billion lines. 20 times the final version of the Digest in only three years.

According to some opinions, the authors of Digest used previously used materials, notably the comments of Ulpianus *ad edictum* and *ad Sabinum*, works such as the *Fragmenta Vaticana* and *Collatio Legum* or the Theodosian Code. Finally, other authors consider that the Predigest had been drawn up in Beirut.¹³ There is also the theory put forward by Arangio Ruiz, who asserts that he first 36 books of the Digest (except books 20–22) were not assembled by the Tribonian commission, which are older compilations made in law schools, so that the proper work of jurists is reduced to writing books 20–22 and 37–50.¹⁴

However, none of these opinions provide concrete evidence of the existence and use of the Predigest hypothesis. However, it cannot be denied that the members of the commission used not only the manuscripts of the works of the jurists, but also various compilations made in the legal schools, this being necessary for the best synthesis of the studied works.¹⁵

According to the *Constitutio Tanta* 2 000 books have been used at the creation of the Digest (although the Digest only refer to 1625), of which the committee had to select the essential. Thus, it has been established that in the Digest there are fragments of the works of 38 jurists, most of them in the Principatus era, especially from the sec. II–III. More detailed research has led to

¹² Ibidem.

¹³ TOMULESCU, Constantin. On the activity of Justinian's compilers. – In: *Quaderni camerti di studi romanistici*. International Survey of Roman Law, 1971, no. 2, p. 139–144.

¹⁴ Ibidem.

¹⁵ CUCIUREANU, Ionela. Idem, p. 4.

the conclusion that 7069 (78%) of the total number of fragments are extracted from the works of some well-known jurists such as Iulianus, Pomponius, Gaius, Papinianus, Ulpianus, Paulus or Modestinus, with a preference for Ulpianus and Paulus. This is explained not by a disregard for the works of older scholars, but by the fact that classical jurists have taken over the essential ideas of predecessors, synthesizing them in a clearer, more current and easier way to apply in postclassical society.¹⁶

The passages extracted from these three series of writings were placed one after the other in each title, thus gaining the work if not a systematic internal structure, at least one external one. From the edict comes a division of the Digest in 7 parts: *πρώτα* (books 1–4), *De iudiciis* (5–11), *De rebus* (12–19), *Umbilicus* (20–27), *De testamentis* (28–36), then Part VI (37–43) and Part VII (44–50), without a specific name, made for didactic purposes.

However, despite Justinian was not part of the commission he was the one who decided on the number of the books that would comprise the Digest, in the Constitution *Deo auctore*. Also, in the *Constitutio Tanta* Justinian states that “*et in septem partes eos digessimus, non perperam neque sine ratione, sed in numerorum naturam et artem rescipientes et consentaneam eis divisionem partes conficientes. Igitur prima quidem pars totius contextus, quae Graeco vocabulo [...] nuncupatur, in quattuor libros seposita est.*”

A series of theories, many of them based on a pretended mysticism of either Justinian, or the compilers, has also been promoted – between the scholars was circulated and the idea that Justinian would have split Digesters in 7 because 7 was a cabalistic number.¹⁷ In this respect, Roby, in his monography dedicated to the Digest, supports the opinion of Hoffman and states that the number 7 was chosen because it is the nearest root of 50. He then continues, explaining that “*Justinian makes 7 parts, not as might have been expected, 6 parts of seven books each and one of 8 books for the middle, but he commences with a first part of 4 books, as 4 (tetractys) is the mother of the perfect number 10*”¹⁸, being “*the root of all things and the source of nature*”.¹⁹ He continues

¹⁶ CUCIUREANU, Ionela. Ibidem.

¹⁷ LONGINESCU, Șt. Gh. Istoria dreptului roman. Stenografiat și editat de Traian Simian. București, 1927.

¹⁸ ROBY, Henry James. Idem, p. XIX.

explain from this Phytagorean point of view other elements of the Digest structure, but in the end, the conclusion he reaches, taking a certain distance from Hofman, is a more balanced one, that we support, namely that “*in truth, neither parts, nor books, have in whole a natural justification*”.²⁰

2. Interpolations – the borders of reverentia or the *je ne sais quoi* of the Digest

Before proceeding to any assertions, regarding the proven or potential interpolations from the Digest, we should identify the meaning of the term. The meaning of the word interpolation comes from the verb *interpollo*, *interpollare*, which has the primary significance of renewing and comprises those changes, additions or omissions that Tribonian's commission has operated on the original texts in order to adapt their original meaning, and go in the direction desired by Justinian – known as the “*emblemata Tribonian*”.

The advantages of this completely unorthodox procedure, if it is to judge it according to the modern law (and even according to the rules of its time, has many advantages: it was fast (it lasted only three years), gave practitioners the right they already had, were common, with only a few alterations (generally those they themselves wanted and expressed, as we would say nowadays, as *de lege ferenda*).

It is not just about suppressing words or introducing others, but interfering with genuine dissertations, as Appleton remarks. And, as the same scholar remarks, not only their extent was significant, but (above all) the effects they had.²¹

The criteria general used for detecting interpolations (the so-called *leges fugitivae* – fragments inserted into a title with which they are unrelated, opposing solutions to the same legal problem, words that are not characteristic of a particular jurist or a certain age, institutions that did not exist during the classical period etc.) cannot be considered to be sufficiently precise to eliminate any doubt, as they are found empirically and often materialize, if applied with too much scrupulousness and using a template, in a general mistrust in the text of the Digest and doubting the originality of each and every fragment.

¹⁹ Ibidem.

²⁰ Idem, p. XX.

²¹ APPLETON, Henri. Interpolations dans les Pandectes. Paris, 1891, p. 7.

Also, once an interpolation has been identified, it is necessary to investigate the reason behind it and the comparative interpretation of the original text with the (supposedly) interpolated.

The hunt for interpolations, as named by Lenel, was a linguistic, Sherlock Holmes alike effort that started from the literal interpretation of the text, from linguistics, and tried to identify each flaw of grammar, style or turn of phrase that may have suggested that a particular text does not belong to its pretended author.

However, interpolations may consist even of interpretation of the text, with only slight alterations, in order to obtain a favorable interpretation. As David Johnston states in its study, “*there are changes to classical works which do not consist in verbal modifications, but in the transpositions of the text*”²². This is what Betti used to call *interpretation in duplex*.

Justinian mentions in its *Constitutio Tanta* of the *reverentia* owed to the classical jurists²³. And it was argued that this is a two edge sword and though we should not suspect the Emperor of hypocrisy, at least a certain degree of practicality has definitely overcome the *reverentia* in terms of purpose – as Justinian’s purpose was not to wipe out the dust from the classical jurists writings, but rather to use them to achieve their political purposes.

As stated by Johnston, “*Justinian’s compilers were not tempted to carry their reverence too far*”²⁴ as “*the passages excerpted are no longer to be treated as the work of the classical jurists but as Justinian’s own*”²⁵. However, we agree only partially with this theory: whilst of course, the fragments excerpted might have been altered for the sake of utility or for giving authority to post- classical rules of law, we cannot deny the fact that in the case of some of the classical jurists and works, the Digest is the only remaining source. From this point of view, even for a layman in the field of law, the Digest proves to be a living museum.

But despite his statement, the author cited above goes further and explains himself, stating that their *non-reverence*, translated into the alterations

²² JOHNSTON, David. Idem.

²³ *Constitutio Tanta*, 10 – available at https://www.researchgate.net/publication/258203934_Constitutio_Tanta_Mommsen

²⁴ JOHNSTON, David. Idem, p. 151.

²⁵ Ibidem.

they have operated finds always a reason and a justification, therefore is not placed under the sign of arbitrariness.

In fact, what Justinian wanted to obtain was authority – and enhancing a recent legal rule with the authority of a classical roman jurist seemed the ideal recipe for the result sought. It was argued that of course, he could have obtained that authority by different means – e.g. the mere coercion conferred by a *Constitutio principis* – but he preferred instead to use the authority of the roman scholars in order to consolidate some law principles or practices²⁶.

The method was considered to be “*by all means unorthodox and non scientific, but practical*”²⁷.

A fairly clear case of interpolation in the matter of sale is found in a text in title 4 of the XVIII book, extracted from Paul's Questions. The text begins at the third person, goes to the second person and ends with the third person. It is obvious that such a grammatical and semantic error could not have been made by a magistrate such as Paul, as it is clear that part of the text does not belong to him and has been interpolated by the compilers.

Another much known fragment that rises suspicions, and that was extensively analyzed by professor Longchamps de Bérrier in a dedicated study²⁸ is the famous maxim “*nemo plus iuris transferre potest quam ipse habet*”.

A question that the author puts forward about *nemo plus iuris* but which can be extended to the whole ensemble of principles in the Digest is what their significance and legal effects were at the moment when they were enunciated by the classical jurist and what value they had they in sec. VI, when they get under the scrutiny of Justinian's compilers. Was there or not a migration of the original meaning to another area? Has the meaning of these principles expanded, or has it narrowed down?

As for the aspect of grammatical interpretation, the “*haberet*” form of the principle in question is, according to Schulz²⁹, a rephrase of the compilers who

²⁶ BURDICK, William L. The principles of Roman law and their relation to modern law. Rochester ; New York, The Rochester co-operative publishing, 1938.

²⁷ ROBY, Henry James. Idem, p. XVI.

²⁸ LONGCHAMPS de BÉRIER, Franciszek. Remarks on the methodology of private law studies: The use of Latin maxims as exemplified by *nemo plus iuris*. – *UNISA, Fundamina*, Vol. 21, 2015, no. 1, available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-545X2015000100004

²⁹ SCHULZ, Fritz. Classical Roman Law. Oxford, Clarendon Press, 1951, p. 352.

forgot to change the verb mode from “*haberet*” to “*habet*” because if in the original text the hypothetical form that is specific to the subjunctive mode is justified, in the text of the Digest, that enunciates a rule, the logic of this mode disappears. On the other hand, Professor Longchamps de Bérrier refuting this assertion, arguing that if it were true, it would mean giving the compilers a serious negligence, such as finishing the text included in such a chapter as DLXVII. The author’s thesis, that we embrace, is that in the case of *nemo plus iuris*, there are two meanings – one thought by Ulpian – a primary sense we could say, valid at the moment of conceiving this idea and one adapted, rethought, embroidered by compilers to cope to the requirements of Justinian's Roman society³⁰.

Another sign of interpolation may be the opposite solutions given to the same problem. In such case, it is obvious that one of the two contradicting fragments is interpolated, remaining to determine which one of the two. In D. 1.10.1.2, the following rule is made regarding the right of conscience of the consul who is under 20 years of age (since, according to the law of *Aelia Sentia*, for the *manumissio* to be valid, the master had to be at least 20 years old, and the slave at least 30³¹): And if it happened that a consul had not reached the age of 20, then he does not have the power to set free (a slave).³² Thus there is an obvious contradiction between this fragment and that in D. 40.2.20.4, where it is clearly stated that the consular with a lower age than the 20-year age can still make a valid legal *manumissio*³³.

We should also mention that Justinian firmly forbids any commentary on the margins of his juridical *ars poetica*. It seems rather peculiar that the emperor who has permitted the compilers to adjust, modify or even remove texts from the classical jurists, decided to put an end to the *organic* life of their opinions, preserved (intact or altered) in the Digest. From this point of view, Justinian forbade what he himself did, in an attempt of obtaining a certain stability of the *lex*. In fact, it may be asserted that it was not a proof of imperial vanity, but an attempt to build a bridge between classical *ius* and contemporary social needs.

³⁰ LONGCHAMPS de BÉRIER, Franciszek. Op. cit., p. 74.

³¹ *Sed si evenerit, ut minor vigginti annis consul sit, apud se manumittere non poterit.*

³² *Consul apud se potest manumittere, etiamsi evenerit, ut minor annis viginti sit.*

³³ LONGINESCU, St. Gh. Istoria dreptului roman. Stenografiat și editat de Traian Simian. București, 1927.

3. The heritage of the Digest

The Digest contains, that is certain, a florilegium from the experience of classical jurists and the advice they had to give when confronted with various legal situation. These form most of the Digest's corpus. There are however, some fragments with a rather anecdotal perfume, that are selected and presented by Constantin Tomulescu in his work "Le Digeste fantaisiste"³⁴.

What we can notice is that in some places, an interesting merging of the poetic and the pragmatic spirit arises. If Modestinus defines marriage as a communion of divine and human right ("*Nuptiae est coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio*")³⁵, in Titles III and IV of the same books are regulated actions related to the dot, taking measures so that the father-in-law does not deceive the son-in-law.³⁶

Other excerpts, although offering fair solutions, seem quite unreasonable. In D. 9.2.51.2, Iulianus states that if more people have stolen a beam so large that no one can raise it alone, they answer jointly for the theft. In order to attenuate the unreasonable tendency of the solution offered, he shows that, following rigorous reasoning, one might conclude that, since none has raised the beam alone, none is responsible.³⁷

However, in addition to cases of the type presented, with some practical utility, there are also fanciful cases, the applicability of which is at least doubtful. For example, Proculus³⁸ presents the following case: a boar is caught in a trap. Someone frees him and takes him with him. The question is what action will be taken by the one who puts the trap against the wild boar.³⁹ Equally bizarre seems Marcellus's case⁴⁰ – a woman does not know at the time of the establishment of the dowry which of the two contenders will be her husband, so she is a donation for both. The case seems fanciful to the jurist himself, who is trying to

³⁴ TOMULESCU, Constantin. Le Digeste Fantaisiste. – In: *Atti materiali per una palingenesi delle costituzioni del tardo impero romano quaderni di lavoro*. Vol. IV. Perugia, Libreria Universitaria, 1981.

³⁵ D. 23.2.1.

³⁶ CUCIUREANU, Ionela. Idem, p. 7.

³⁷ CUCIUREANU, Ionela. Idem, p. 9.

³⁸ D. 41.1.55.

³⁹ "*In laqueum, quem venandi causa posueras, per incidit, cum eo haererit, exemptum eum abstuli; [...] eum in silvam dimisississem [...] et quam actionem mecum haberes*".

⁴⁰ D. 23.3. 59.

find a realistic interpretation: “*non enim existimabimus illam ita promississe, cum vel de Titi nupti cogitaret.*”

The Digest can be read nowadays in various manners. It can be read with the eyes of the modern lawyer in search of the roots of modern civil law, it can be read with the eyes of the legal historian, that is interested on the evolution of law or it can be read with the eyes of the “*homme de lettres*”, interested in style and interpretation.

Whilst we cannot deny the value of the Digest from the point of view of the law, it often passes unnoticed their value as far as their impact on the *humanitas* is concerned. And when talking about the importance of the Digest, we should also stress the importance of the compilers also.

In this respect, we reproduce here the opinion of Henry John Roby, not only for the beauty of both reasoning and phrase, but also for it represents a sample of *humanitas* that acts as a filter in the modern interpretation of the compilers’ activity: “It is common enough to visit them with scorn and blame them for what they have destroyed than praise what they have preserved, reproach them with the alterations and interpolations; and in fact to treat them more like slaves who have plundered their masters’ treasures and not know how to use them, than as guardians who have saved what was possible from a general conflagration”.⁴¹

Thus, the Digest is one of the most important achievements of Justinian but also one of the works without which the course of humanity would certainly have been another – an example of their usefulness in time is that the Germans, by renouncing their national, barbarian and outdated law, have adopted the principles of Roman law, as they were formulated in Digest, the newly formed law system being named “*usus modernus pandectarum*”.

But beyond their practical utility, they are an edifice of the legal thinking of a people that conquered not only territories but principles, not only through the sword, but also through the depth of the spirit and the greatness of culture.

⁴¹ ROBY, Henry James. *Idem*, p. XVII.

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PROPRIETAS ET HUMANITAS (НА АНГЛИЙСКИ ЕЗИК)

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Резюме: Римските юристи познават различни видове собственост. Вероятно това е една от причините да няма единно определение на понятието собственост до Средновековието и Модерните времена въз основа на творби на видни римски юристи. Освен различните видове собственост, съществуват различни възможни обекти на собствеността. Сред тях са хора и животни. В съвременното право човек не може да бъде обект на собственост. Що се отнася до животните, понастоящем има значителни дебати дали те са обекти или правни субекти. В международното право робството и принудителният труд са забранени. Въпреки това те все още съществуват под различни форми. Поради тези причини въпросът за хуманизма на правото на собственост е отворен – особено сега, когато изглежда че римската цивилизация е отхвърлена в тази ѝ част, която днес се смята за тъмна, изостанала и нечовешка.

Ключови думи: *proprietas*; собственост; робство; животни; правни обекти.

***PROPRIETAS ET HUMANITAS** (ENGLISH
LANGUAGE)**

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Abstract: Roman lawyers knew about various forms of ownership. That is, probably, one of the reasons for the fact that we didn't have a unique definition of the notion of ownership until Middle Ages and Modern Age, on the basis of works of eminent Roman lawyers. Besides various forms of ownership, there was a variety of possible objects of it. Among them, were humans and animals. In modern law, a human can not be an object of the ownership. As for animals, there are, nowadays, significant debates of whether they are legal objects or legal subjects. In international law, slavery and forced labour are forbidden. However, different forms of it still exist. For these reasons, a question of "humanity" of the right of ownership is open, specially now, when it seems that the Roman Civilization had been superseded in those segments which are nowadays considered as dark, backward and inhuman.

Keywords: proprietas; ownership; slavery; animals; legal objects.

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INTRODUCTION

The ownership is usually defined like the widest and infinite power over a thing (*plena in re potestas*). Such are definitions in the vast majority of modern civil codifications which have its foundations in the Roman legal tradition. It is believed, on the basis of scientific researches on the first European universities, that this definition has its origins in Roman law. It hasn't been found enough evidence for opposite assertion, and certain number of indexes that demonstrates the infinity and plentitude of proprietary power lies in the phenomenon of classical slavery.

On the example of slavery, one can also see a tendency towards limitations of ownership on things which are, in fact, humans. But, for what reasons? Was that reason really *humanitas* of Roman Law or that reason was pure economic interest? In what extent ownership hadn't really been humanised, one can also see on the example of modern forms of slavery, where ironical and brutal truth is being brought to light – that what is “re-humanised” is only the object of ownership.

Animals have always been important for humans. As means for production, as fruitful things, as friends and as means of prestige. Human society has shown a great amount of *humanitas* in the field of legal protection of animals.

1. SLAVERY IN ROMAN AND IN MODERN LAW

1.1. Slavery in Roman law

For Roman lawyers, every human is a person (*persona*), whose legal statuses can be various¹. Slave was both person and a thing, and in that sense, they had been talking about two categories of persons – *personae servilis* and *personae servi*². In classifications of things, slaves were *res Mancipi*, which testifies to the great importance of slaves for the economy of Roman state³.

¹ SCHULTZ, F. Classical Roman Law. Oxford, Oxford University Press, 1961, p. 71.

² Ibidem.

³ NICHOLSON, B. An Introduction to Roman Law. Oxford, Clarendon Press, 1975, p. 105–106.

Slavery was outstanding and permanent mark of the ancient roman society, which was standing on the foundations of slave work force⁴. A slave could have been put to various purposes, so they could have performed various tasks. In that sense, the commonest distinction of slaves was to the city slaves (*familia urbana*) and country slaves (*familia rustica*). A position of *familia urbana* was better than the position of *familia rustica*, not only because they had been performing easier tasks in the city, but also because they had very often had close relations with their owners. Besides that, city slaves had to the great extent served to the prestige of their owners. A number of slaves in city houses and diversity of their tasks and performances had been a mirror of social prestige of their owners⁵. In case of a sale, a price of a slave could also depend on the fact whether he or she had, before the sale, been *familia urbana* or *familia rustica*.

The sale of slaves, which had been performed through the *mancipatio*, was specially regulated. Every slave ment for sale, had been made standing on the podium with a wooden board (*titulus*), which was hanging from his or her neck. On the board were written important data about that slave, which were prescribed in the edict of magistrates which were in charge of supervision over the market place. These edicts had for their dominant purpose a protection of bona fide buyers from mala fide sellers of slaves⁶. According to Digest, one of these edicts had been proscribing that a buyer had to be well informed about every psycho-somatic shortcoming or illness or disease, about potential inclination towards escaping from the owner, about whether he or she has been a convict, whether he or she had ever tried suicide, or whether he was fighting with animals etc.⁷. Potential buyers had had a possibility to take a closer and detailed look of a slave being put to the sale⁸.

The owner of a slave could perform on him or her every proprietary right. Ownership power over the slave was, at him beginning, almost unlimited. The owner could regain abducted or the slave who escaped to the another owner,

⁴ BRADLEY, K. Slavery and Society at Rome. Cambridge, Cambridge University Press, 1994, p. 12–13.

⁵ ĐARDINA, A. (Ed.). Likovi starog Rima. Beograd, Clio, 2006, p. 171–177, BUJUKLIĆ, Ž. Forum Romanum. Beograd, Pravni fakultet Univerziteta u Beogradu, 2009, p. 681.

⁶ BRADLEY, K. Op. cit., p. 51.

⁷ Ibidem.

⁸ Ibidem, p. 52–53.

but using *actio rei vindicatio* or *actio Publiciana*⁹. On the slave without the owner, who had left him, and so he or she had become *res nullius*, as in other cases when all proscribed conditions had been met, one could have acquire the ownership by prescription (*usucapio*).

A slave could also had been an object of *usufructus*. When it comes to the fruits of a slave, a general rule had been that their children weren't considered to be their fruits. But, there were also exceptions to that rule. For example, in the case of giving slave woman like *pignus*, if she had been pregnant in that period and had given a birth to the child, according to the rule of the extensivity, a child had also been in *pignus*¹⁰. But, in the case of acquiring the ownership on the pregnant slave woman by *usucapio*, her child had to be a separate object of acquisition¹¹.

In the case of the unlawful injury or a murder of a slave, his or her owner could use *actio Aquilia*¹².

In the period of Empire, there had been certain limitations of the ownership on slaves¹³. According to the *Lex Petronia*, punishing of slaves by sending them to the arena, to fight with animals, had been forbidden. Torturing and killing of slaves had also been forbidden, so had been a castration of a slave for commercial purposes¹⁴.

Even if it looks like the roman *humanitas* was of the influence in the field of improvement of the legal position of slaves, there are also opinions that economic reasons were of much greater influence. It was a goal to achieve maximum profit by rational use of slaves¹⁵.

1.2. Modern slavery

UN Slavery Convention (1926), in the 1st article, defines slavery as “the status or condition of a person over whom any or all of the powers attaching to

⁹ BUCKLAND, W. W. *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian*. Cambridge, Cambridge University Press, 1908, p. 12.

¹⁰ Ibidem, p. 21–22.

¹¹ Ibidem, p. 24.

¹² Ibidem, p. 29.

¹³ BUJUKLIĆ, Ž. Op. cit., p. 683.

¹⁴ BUCKLAND, W. W. Op. cit., p. 36–37.

¹⁵ ĐARDINA, A. (Ed.) Op. cit., p. 195–197.

the right of ownership are exercised.”¹⁶ The Universal Declaration of Human Rights (1948.), declared, in the 4th article, that “no one shall be held in slavery or servitude and that the slave trade shall be prohibited in all forms.”¹⁷ The European Convention on Human Rights had also prohibited slavery, in art. 4: “No one shall be held in slavery or servitude.”¹⁸

Nevertheless, about 40.3 million people in the world are held in modern slavery (of that, 10 mil. children, 24.9 mil. people in forced labour condition, 15.4 mil. people in forced marriage, 4.8 mil. people in forced sexual exploitation)¹⁹.

In modern type of slavery, the ownership of a human is not of primarily importance, having in mind that modern slaves, due to their greater number in comparison with the need for them, are much “cheaper” and easily attainable, so, in that sense they are some kind of “consumer goods”²⁰.

Modern slavery means complete control and exploitation of a human by another human, without possibility to exit that relation by will²¹.

2. A LEGAL POSITION OF AN ANIMAL IN ROMAN AND IN MODERN LAW

In Roman Law, animals had legal position similar to that of a slave. Animal was *res Mancipi* if its purpose was to carry a burden or to serve for a traction – *quae collo dorsove domari solent* (oxes, horses, mules and asses) or *res nec Mancipi*, if it was a beast or domestic animal not of purpose to serve for carrying burdens or for traction (dogs, pigs, goats and sheeps)²².

During the 1970-is, a new legal branch and discipline has emerged – The Law of Animals, whose goal is a wellbeing of animals by means of creation and studying of rules of acting of humans towards animals²³. Protection of animals in

¹⁶ <https://www.ohchr.org/en/professionalinterest/pages/slaveryconvention.aspx>, visited on the 28.09.2018.

¹⁷ <http://www.un.org/en/universal-declaration-human-rights>, visited on the 28.09.2018.

¹⁸ https://www.echr.coe.int/Documents/Convention_ENG.pdf, visited on the 28.09.2018.

¹⁹ <https://www.antislavery.org/slavery-today/modern-slavery>, visited on the 28.09.2018.

²⁰ BALES, K. Expendable People: Slavery in the Age of Globalisation. – In: *Journal of International Affairs*, Vol. 35, 2000, no. 2, p. 462.

²¹ <https://www.antislavery.org/slavery-today/modern-slavery>, visited on the 28.09.2018.

²² SCHULTZ, F. Op. cit., p. 346–347.

²³ STOJANOVIĆ, N. Pravo životinja. Niš, Pravni fakultet Univerziteta u Nišu, 2017, p. 7.

modern law is based on several basic legal principles: principle of universality of pain, which means acknowledgement of the emotional life of animals²⁴, principle of taking care of animals, which means existence of duties of people towards animals, principle of integrality, which means inclusion of care for animal wellbeing in all politics of a state and harmonised actions of all relevant subjects, principle of giving attention to the wellbeing of animals, principle of prevention and principle of responsibility, which means duties of animal owners to provide for them, and if he or she has no possibility to take care of the animal personally, there is a duty to make sure that the animal is being taken care of by another person²⁵.

Exceptional vulnerability of animals and the need for their protection has been acknowledged on international level, as well as in national legal systems of many countries. Constitution of Germany, for example says, in art. 20a: "Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals (...)"²⁶. French civil code (Code civil) regulates that animals are emotional and sensible living beings, and that they shall be considered things only according to the laws on their protection²⁷. Civil code of Quebec regulates, in art. 898.1: "Animals are not things. They are sentient beings and have biological needs. In addition to the provisions of special Acts which protect animals, the provisions of this Code and of any other Act concerning property nonetheless apply to animals."²⁸

Biological needs or imperatives of animals would, amongst others, be: that the animal has enough food and water of certain quality, that animal lives in clean, comfortable, wide and light space, that it has possibility to move around as much as it is needed for their wellbeing, that it has special protection from excessive heat or cold, that it is being provided with comfortable transport in ap-

²⁴ MASSARO, A. and TONUTTI, S. The Emotional Lives of Animals: A Comparison between Researches and Disciplines. Introduction. – In: *Relations*, Vol. 1, 2013, no. 1, visited on the <http://www.ledonline.it/index.php/Relations/>, p. 17–20.

²⁵ STOJANOVIĆ, N. Op. cit., p. 10–11.

²⁶ <https://www.btg-bestellservice.de/pdf/80201000.pdf>, visited on the 29.09.2018.

²⁷ See Art. 515-14, available at <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20180929>, visited on the 29.09.2018.

²⁸ <http://www.legisquebec.gouv.qc.ca/en/showdoc/cs/CCQ-1991>, visited on the 29.09.2018.

appropriate vehicle, that it is being provided for in case of gravidity, sickness or suffering and that it is not being abused or tortured²⁹.

The Act on Animal Wellbeing of the Republic of Serbia³⁰ regulates that the care for the animal wellbeing is especially being provided for animals which can feel pain, suffering, fear and stress, such as animals used in productional, scientific, biomedical and educational purposes, for exhibitions, competitions, performances and other forms of public presentations, pets, abandoned animals, wild animals in zoos etc.³¹

CONCLUSION

While, on the one side, animals has being recognized as especially vulnerable category of living beings, which could not be considered as things in classical meaning of that word, human, on the other side, although he can not be considered a thing for centuries now, and an object of any right, seem like it never stopped to be one. That could mean that barbarity represents a universal mark of people, deeply rooted into human society and in collective unconscious, and that roman *humanitas* is nothing more than individual mark of a person, a group or society, to consider oneself and the others as worthy and dignified beings.

In the ancient Rome a slave had had a certain hope for state intervention and protection, while modern slaves have little such hope, since all states an the international community as a whole, forbid slavery, but seems like they don't recognize it and don't know who to apply antislavery laws and to put an end to it. When it comes to an animals, ownership right exercised over them are being more and more humanised.

²⁹ GAUVREAU, C. Un être sensible, <https://www.actualites.uqam.ca/2015/quebec-animal-plus-une-chose-mais-etre-sensible>, visited on the 28.09.2018.

³⁰ Official Gazette of the Republic of Serbia no. 41/2009.

³¹ Article 2 of the Act on Animal Wellbeing of the Republic of Serbia.

ВЪЗХОД И ПАДЕНИЕ НА „РИМСКОТО
ДРУЖЕСТВО“.
SOCIETAS PUBLICANORUM
В КОНТЕКСТА НА СЪВРЕМЕННОТО
ДРУЖЕСТВЕНО ПРАВО (НА АНГЛИЙСКИ ЕЗИК)

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Резюме: Исторически доказателства от римскоправни източници за съществуването на публиканите и техните капиталови структури могат да бъдат открити по времето на Републиката, когато тяхното съществуване достига най-високо ниво на развитие и продължава през целия период на Империята. Върхът на развитието на *societas publicanorum* са последните два века пр.Хр. Като се имат предвид съвременните стандарти, може да се отбележи че чрез този институт римската правна система успява да развие сложна капиталова структура, характерна и за съвременното дружествено право.

В тази статия се анализират правните, политическите, социалните и икономическите условия, които водят до възхода на *societas publicanorum* като институт в римската правна система. Тези процеси се изследват в контекста на съвременното дружествено право. Финансовите кризи често водят до призови за правни реформи в тази сфера.

Ключови думи: *Societas publicanorum*; дружествено право; юридически лица.

THE RISE AND FALL OF THE “ROMAN CORPORATION”.
SOCIETAS PUBLICANORUM
IN THE CONTEXT OF CONTEMPORARY CORPORATE
LAW (ENGLISH LANGUAGE)

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Abstract: Historical evidence from Roman-legal sources on the existence of the publicans and their capital structures finds basis in the Republic, where their existence reached the highest level of development, and continues all the way throughout the historical development of the Empire. The height of the development of *societas publicanorum* is that last two centuries B.C., where it can be noted that through this institute the Roman legal system managed to develop a, considering modern standards, sophisticated capital structure with characteristics typical for a contemporary legal corporation.

This paper will analyze the legal, political, social and economic conditions that lead to the rise and fall of *societas publicanorum* as an institute within the Roman legal system, and will put these developmental processes within the context of contemporary corporate law, where in a post-financial crisis world there are often calls for the re-structuring of how corporate law is structuralized.

Keywords: Societas publicanorum; Corporate Law; Legal Entities.

1. HISTORICAL, ECONOMIC AND LEGAL ASPECTS RELATED TO THE ROMAN CAPITAL STRUCTURE *SOCIETAS PUBLICANORUM*

Historical evidence which points to the existence of the publicans and their capital structures finds its basis in the Republic – the period when their existence was at its height – and goes all the way through certain phases of the empire. The height of their existence from both a legal and economic functional perspective can be noted in the last two centuries BC. In this context, special attention should be paid to the fact that the institute *societas publicanorum* managed, through the roman legal system, to develop a sophisticated capital structure. In his research *Temin* notes that employment contracts, grain markets, the manumission of slaves as well as loan contracts in the early Empire were more market oriented than examples that existed in the middle-age economies many centuries later.

From a historical context, from the third to the first centuries BC Rome grew from a rural community to a colonial state structure with huge geographical span and width. With this geographical and territorial expansion came strongly developed and dynamic commercial relations and strong industrial and financial sectors. All in all, this resulted with more trade especially through sea passages.

The wide geographical expansion of Rome as a single political entity and subject created ideal conditions for the establishment of a single market of products. *Temin* and *Kessler*¹ note that there was an integrated market of grain that spread throughout the entire Mediterranean. Through their analysis of historical information related to the price of grain in Rome, Northern Italy, Sicily, Spain, Turkey, Palestine and Egypt they establish a strong linear connection between the prices and distances from location of production – a logical reflection of the costs of transport which denotes functional market mechanisms. In a similar manner *Hopkins*² analyses the spread of silver monetary units which were made in Rome throughout all the regions of the geographical expansion of the Rome state. Such research leads to the conclusion that there was an integration of a

¹ TEMIN, P. and KESSLER, D. The Organization of The Grain Trade in the Early Roman Empire. – In: *The Economic History Review*, Vol. 60, 2005, no. 2, p. 144.

² HOPKINS, K. Taxes and Trade in the Roman Empire. – In: *The Journal of Roman Studies*, Cambridge University Press, Vol. 70, 1980, p. 72.

single monetary economy. Hopkins establishes numerous Roman monetary units found in Southern Germany, Northern Italy, the United Kingdom, France as well as the Balkan Peninsula from a period between 50 and 200 A.C. The positive correlation of the time-trends across regions points to an uninterrupted flow of monetary units through the Empire. What is especially notable is that this correlation is consistent with the viewpoint that Rome was the center of the Western World in the first century B.C. Additionally, this flow of monetary units also confirms the existence of other (additional) trade markets within the geographical borders of the entire Roman Empire³.

The development of technology also gave additional support to the development of the economic system of Rome. An example noted by Temin⁴ in his research is the widespread use of water powered devices which has a notable and noteworthy effect on the economic development of Rome. According to Wilson, the usage of mining technology powered by water had a strong correlation with the volume of mined metal. Wilson's research on the volume of metals mined is based on analysis of ice cores in Greenland through which there can be an interpretation of atmospheric pollution based on the mining of silver, tin and copper in different historical periods. An analysis of the concentration of tin between 962 B.C. and 1532 A.C. shows a significant height in the first century B.C., a slight drop in the first century A.C., a further drop in the second century A.C., and a proportional fall all the way to the fifth century A.C. Additional research also shows similar indicators of tin pollution from the first century B.C. to the second century A.C. with falling pollution statistics all the way until the rise of the Industrial Revolution many years later. Such statistics lead to the logical conclusion that the advancement in technology for mining in Rome lead to a significant rise in the mining of metals, while on the other hand the decline of mining had an almost proportional relationship with the fall and later non-usage of the institute *societas publicanorum*.

At the same time, there are indications through various sources of the existence of developed financial systems such as financial proxies who accumulated and distributed funds and assets in effective manners within the entire Roman

³ TEMIN, P. A Market economy in the Early Roman Empire. – In: *Journal of Roman Studies*, Cambridge University Press, Vol. 91, 2001, p. 169–181.

⁴ Ibid.

economy⁵. Notable examples of institutes include *argentarii* and *proxenetae*, as well as Muziris Papyrus for large shipping debts and catalogs of debts in Roman Egypt. The mentioned sources represent only part of the evidence of the existence of developed debt practices, the creation of banking activities, the transfer of debt as well as other developed types of borrowing activities conducted by temples and local authorities. In relation to the research within this paper it is important to note that the publicans functioned as de facto deposit institutions for the Roman authorities and provided income from interest through the income they acquire from the authorities⁶. Exactly these specifics of the Roman economy are proof of the rapid economic development which existed and was especially important during the later phases of the Republic, and the early Empire. Furthermore, this was the period that was key for the rapid development of the roman capital structure *societas publicanorum*.

The specifics of Roman law in the period before the Punic wars (middle of the third century B.C.) are limited to the Law of Twelve Tables, which are essentially viewed as the basis for Roman law. From the available insight from its remnants that are available to contemporary classicists they were not a detailed and full codification of the overall legal rules, but rather defined different private-law and procedural rules which aimed to establish economic and political rules for *plebians* in their struggle for power with *patricians*.

From the perspective of sources of Roman law a key time-historical role relevant for this paper is found in the period which includes the last two pre-Christian centuries i.e. the pre-classic period and the work of lawyers who developed legal science with legal institutes, concepts and adequate systematization. According to Kaser⁷ this development had a deep connection rooted in the established awareness of notable lawyers with Greek philosophy. This period represents a time-historical framework in which the activities of the publicans and the status development of the institute *societas publicanorum* had its most developed legal-economic influence and expansion.

⁵ TEMIN, P. Financial Intermediation in the Early Roman Empire. – In: *Journal of Economic History*, Vol. 34, 2004, no. 4, p. 122.

⁶ Ibid.

⁷ KASER, M. Roman Private Law. 3. ed. Durban, Butterworths, 1980.

One of the most important periods in the development of Roman law is of course the classical period i.e. the first 250 years A.C. This is a result of the fact that the law created in this period has that largest amount of influence on the global development of law over time. The arguments related to the Roman-legal foundations of contemporary law on capital structures (corporate law) is just one of the examples.

2. BASIC LEGAL ASPECTS RELATED TO THE PUBLICANS AND *SOCIETAS PUBLICANORUM* AS A CAPITAL STRUCTURE

The institute *societas publicanorum* likely owes its creation and significant growth in terms of usage and legal relevance to the overall system of governance that existed during the Roman Republic. As in the social-legal functioning of ancient Greece the Romans had an innate mistrust in the continuity of power which was deeply rooted in the existence of bureaucratic state machinery. As a result of the mentioned mistrust, public services were given to external entities that were granted contracts by the state, as well as the right to procure taxes on behalf of the state. These entities functioned in an entrepreneurial manner, and as private contractors of contractual relations were known as publicans. In Digestae Ulpian refers to them:

(Digesta 39.4.1.1) Publicani [...] sunt qui publico fruuntur, nam inde nomen habet.

(Digesta 39.4.12.3) Publicani autem dicuntur, qui pub conduct lica vectigalia habent conducta.

The earliest documented sources which mentions the publicans are from the fifth century B.C. Historians such as Dionisious from Halikaranus and Livy refer to religious and ceremonial services as well as construction activities which were undertaken by private entrepreneurs through contractual relations. Another well-known examples that exists in Roman sources is the feeding of white geese in Rome, a period (around 390 B.C.) where geese were used to warn Romans of attacks during the Galic Wars. During this period and later as well the geese received rations which were paid for by the state and Pliny refers to a feeding program for geese which was contracted by publicans.

During the Republic the heightened dynamic and number of activities related to public works and the public sphere lead to a contracting-out of works to external entities, thus essentially creating a *sui generis* form of public outsourc-

ing. The scope of these activities was widened to such an extent that in certain periods during the Republic there was almost no public activity where the publicans didn't have some form of business participation⁸.

What is notable and important for this research is the ***three spheres (groups of contracts) which were of vital importance and relevance for their business activities***:

- (1) Providing goods and services for the public;
- (2) Usage of public property; and
- (3) Collection of public revenues (taxes).

The **first group** of contracts included providing reserves and necessary tools for the Roman Army, which foresaw timely and consistent provisions of reserves and equipment to fixed and stationary garrisons. A difficult part of such contracts included providing tools and equipment during wars. According to existing evidence within sources the revenues from such activities was so high that in the second century B.C. it sometimes lead to revenues which were equivalent to the salary of 10 000 soldiers when larger reserves had to be provided⁹. Further on, this group of contracts included renovation and maintenance of public buildings and properties including streets, city walls, markets, theaters, aqueducts, public sewers and so forth. Also, the construction of public buildings and public objects was another very profitable activity for publicans within this first group. According to research done by Badian¹⁰ the contract for the construction of the Martzian Aqueduct in the middle of the second century B.C. was worth as much as the entire fortune of M. Krasus who was considered to be the richest man in Rome during the first century B.C. A final example which we can give is the making of coins (monetary units) – an activity which the state also contracted to private entities (publicans).

The **second group** includes the usage of public property including *ager publicus* and fisheries in public lakes.

⁸ CUNNINGHAM, W. An Essay on Western Civilization in its Economic Aspects. (Ancients Times). Cambridge, Cambridge University Press, 1898.

⁹ Livy, Ab urbe condita 44.16.

¹⁰ BADIAN, E. Publicans and Sinners: Private Enterprise in the Service of the Roman Republic. Ithaca, Cornell University Press, 1983.

The **third group** can be classified as being the most well-known and most relevant, and it is of course in the sphere of collecting taxes especially property and other forms of taxes in the provinces. Rome, similar to the ancient Greek polis, did not have a developed system of direct taxation, but conquered peoples outside of Italy paid a special form of tax towards the state in the form of direct taxation. Also, the basic method by which the state collected revenues was the war tax. The sole tax obligation of the Roman citizen was *tributum* – a form of tax paid in irregular intervals aimed at financing the wages of soldiers¹¹. The tax itself was made necessary when military activities were being undertaken and the state budget had been depleted. Even at the moments when the taxation process was being undertaken it wasn't considered direct taxation, but much rather as a *sui generis* form of loan, which was later returned to citizens through the benefits and fruits of wars which led to the conquering of new territories. As Rome expanded in territory this tax began to disappear on the burden of the provinces which received a heavier taxation treatment.

A natural and fluid process of tax revenues became the factual situation during only in the Principate, which at that time took over the official fiscal administration and removed the publicans from collecting tax revenues in the name of the state.

Apart from this, the collection of direct taxes and taxes on goods and services was one of the most important activities of the publicans. Such forms of taxes were mandated upon non-Romans. Here we are referring to traders and businessmen who arrived at Roman markets, the doors of cities and ports. Cicero in *De Imperio Cn. Pompei* 6.15 mentions three forms of taxes which were collected by publicans: *portorium*, *decuma* and *scriptura*. *Vicesima hereditarium* was also mandated to the publicans for collection, but it had a significantly smaller role¹².

All three groups of contracts were given during public auctions (*sub hasta*) i.e. public bids, and the process itself is very similar to contemporary licensing procedures and biddings. Livy first mentions these public auctions which took

¹¹ LAUM, B. Geschichte der Öffentlichen Finanzwirtschaft im Altertum und im Mittelalter. Handbuch der Finanzwissenschaft. Tübingen, Vol. 1. 1926.

¹² MALMENDIER, U. Law and Finance "at the Origin". – In: *American Economic Association Journal of Economic Literature*, Vol. 47, 2008, no. 4, p. 12.

place as of 200 B.C.¹³. The sources bring light to the fact that these public auctions were regular occurrences and brought together many entrepreneurs who were closely specialized in such contractual relations with the state. In *Ab urbe condita* 24.18.10–11 Livy mentions entrepreneurs who often took part in such auctions: *frequentes qui hastae huius generis adsueverant*. The Roman Censor who served as a form of finance minister was the individual responsible for the register for the granting of rights for collecting taxes to those who would offer the highest bid. Contracts were always granted to those who would offer the highest bid. In these processes the *societas publicaonrum* was represented by the *manceps*¹⁴ who was the most well known partner in the “corporate entity”.

Auctions took place in the central market *Forum Romanum*. Exclusions were certain auctions which took place within the borders of the provinces. Cicero writes:

(De Lege Agraria contra Rullum) censoribus vectigalia locare nisi in conspectu populi Romani non licet

The logical assumption for the existence and representation of the principles of publicity and transparency in the granting of this type of wished for contractual agreement is that it was for undertaken measures which would increase competitiveness and would prevent the granting of agreements only to “well-know” and “close” entrepreneurs. The typical time-frame for this contractual relationship was five years, and the time-frame itself was considered to be connected to the mandate of the Censor, which was also five years (*lustrum*). The specific aspects of the contractual relations and conditions were established in *leges locationum* or *lex censoria*. The content of the contract included payment schemes, guarantees as well as other vital legal aspects.

It is significant to note that the scope of this type of business activity, in the most part, was rooted in the expansion of Rome, and even though the contracts did not undergo significant changes during the Republic the economic activities proportionally raised with the geographical and territorial expansion of Rome. The fall of the Republic and the beginning of the Principate, sadly as al-

¹³ *Ab urbe condita* 39.44.5–8.

¹⁴ Cicero mentions this in *Pro Plancio* 13.31: *manceps princeps inter suos as*; *Caecilium* 33: *Pseudo-Asconius, Divinatio*.

ready noted, was the beginning of the end for the successful story of the Publicans.

The publicans were subject to systematic bans and prohibitions during the last century B.C. as a result of the power struggle with the senatorial aristocracy. These bans were made effective through legal reforms which limited their business activities. First, they were limited in the collection of taxes and debts¹⁵. Further on, August transferred the process of tax collection in Gaul, Asia and the other provinces of the Empire to his proxies which were part of his bureaucratic system. The Julio-Cladustic emperors who governed between 14–68 A.C. over time began to reduce the scope of contracts with the publicans. Towards the end, in the second century A.C. the Emperor Trajan reduced the possibilities for the publicans by limiting them only to work within the scope of collecting specific taxes, such as the hereditary tax. On the basis of this type of relation towards the publicans, their large in scope business activities and capital structures began to evolve into small business structures which were known as *conductores*. Thus, the publicans were brought, organizationally and financially, to their initial development phase in the very early periods of the Republic.

Together with the political and institutionally forced upon death of the *societas publicanorum* there was economic decline in roman society in all sectors and industries. An example is the mining industry which had previously been witness to a rapid boom in production related with the above-mentioned technological developments which were implemented by the capital structures of the publicans. There is a vast amount of research that points to the fact the modern technology which was based on water-pumps in mines saw a decline in usage in the first century A.C. – closely coinciding with the period when emperors took over the process of managing the mines.

In other sectors where the publicans were contracting authorities it is sometimes difficult, even through the most extensive research, to attempt to find a correlation between undertaken results and perspective declines. For example, the collection of taxes, when undertaken by the state authorities, might have been easier and economically efficient irregardless of the fact that the state authorities weren't as efficient and economically organized in a manner as the capi-

¹⁵ CIMMA, M. R. Ricerche sulle società di Publicani. Milano, Giuffrè, 1981.

tal structures *societas publicanorum*. Of course, a large effect over these processes was the fact that there were certain changes to the tax legislation. It is also noteworthy to point out that the construction industry remained fairly active during the empire as well. Although, this should not serve as a surprise. Namely, the process of consistent and active geographical and territorial expansion lead to a larger demand from the emperors for building various temples, palaces and other buildings which were related to the political and social cultures of the specific historical periods.

For the continuous research in this area it would be relevant to uncover specific sources and various empirical information related to issue of whether the costs of production (e.g. the costs of building a street, constructing a sewage network, etc...) changed with the transition of these contractual undertakings from the *societas publicanorum*, and the publicans, to the state. Considering the limited scope and breadth of sources available at this current moment it is necessary to note and conclude that such statistics and information are at this moment difficult (impossible) to acquire.

The fact that the institute *societas publicanorum* stopped being used in practice as well as some of its legal limitations is one of the reasons why this institute hasn't gathered a high level of attention and research from contemporary romanists.

An important reason for this trend is something which we previously mentioned – the fact that the largest amount of knowledge and sources related to our contemporary understanding of Roman law stems from the *Corpus Iuris Civilis* which was a legal codex compiled between the first and sixth century A.C., and not the pre-classical period. Coincidentally, the period of the compilation of the *Corpus Iuris Civilis* is when the *societas publicanorum* was scarcely or no longer used in practice. Lawyers cited in the *Corpus Iuris Civilis* mention publicans only in the context of them being small collectors of taxes.

The lack of available sources is most likely one of the biggest reasons why the *societas publicanorum* is not a well-known institute in the historical analysis of corporatism¹⁶.

¹⁶ MALMENDIER, U. Law and Finance “at the Origin”, cit., p. 9.

3. CONCLUDING THOUGHTS ON *SOCIETAS PUBLICANORUM* AS A CAPITAL STRUCTURE (CORPORATION)

There are theoretical viewpoints which lead to the conclusion that in a basic lack of entities in roman trade relations, outside of the family, the *societas publicanorum* as an institute presented an important exclusion¹⁷. As noted, the *societas publicanorum* represented a consortium of investors known as the *publicani* who were brought together to bid for the undertaking of state contracts. From a contemporary legal aspect this practice was a legal-institutional relationship similar to contemporary public procurements, public-private partnerships, and even had certain characteristics similar to what contemporary administrative law recognizes as administrative contracts.

At this moment, we lack the existence of sources which would point us to the specifics related to the rules of governance of these entities, especially from an organizational perspective. The entities that functioned through the institute *societas publicanorum* were numerous and highly developed during the Republic, and later had the relevance and usage diminished during the Empire. Yet, an interesting fact is that through correspondences and non-legal sources from the later periods of the Empire we have the most available sourced information related to the *societas publicanorum*.

During the Republic the state contracted-out much of its activities to private entities. Most often this was related to the construction of public works such as roads, bridges and sewers, but also included the maintenance and work with state mines, and of course the collection of taxes¹⁸.

Available sources lead to the conclusion that the *societas publicanorum*, as a capital structure, had similar characteristics with contemporary limited partnerships with shares. The main investor in the group (*manceps*) gave his property as security for the realization of the contractual relationship¹⁹. The contracts were granted through public bids, and the consortia which did the bidding was

¹⁷ FLECKNER, A. Antike Kapitalvereinigungen: Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft. Köln ; Weimar ; Wien, Böhlau, 2010.

¹⁸ BADIEN, E. Publicans and Sinners..., cit.

¹⁹ MALMENDIER, U. Roman Shares. – In: Goetzmann, W. and Rouwenhorst, G. The Origins of Value. The Financial Innovations that Created Modern Capital Markets. Oxford, Oxford University Press, 2005, p. 45.

organized as the *societas publicanorum* in accordance with legal criteria. Similar forms were used in other types of private trade activities such as overseas trade, banking and trade with slaves²⁰.

The logical presumption is that there were many *societas publicanorum*²¹, yet to date only one contract for “incorporation”, or bringing together of the *manceps* and *socii*, has been found²². Investors could be general partners (*socii*) who had control and were liable with the entirety of their assets for the debts of the capital structure, or limited partners (*adfinēs* and *particeps*) who had no control, limited liability i.e. liability only to the extent of the specific assets transferred to the capital structure as a stake within it.²³

Societas publicanorum as with the contemporary limited partnership was a hybrid capital structure – a strong capital structure for limited partners, and a weak capital structure for the general partners. As a capital structure form *societas publicanorum* reached its developmental height in the first century B.C., but to date it is still not fully clear how many partners were members (shareholders) within the largest *societas publicanorum*. Certain sources point to the conclusion that the increased volume of investments between Romans in this form of capital structure brought forward vast membership in certain entities that used this legal-organizational form. According to research done by Andreas Fleckner, usable and reliable sources point to evidence of a large *societas publicanorum* with 19 members who had the legal status of *socii*. This same research done by Fleckner a dilemma is opened whether these statistics are related to one or rather the cumulative number of partners in three capital structures with the same form. As so, according to Fleckner, what can be established is the existence of a *societas publicanorum* with at least seven members with the status *socii*²⁴.

Research done by Malmandier²⁵ points to a vast array of evidence that proves the existence of stocks belonging to limited partners in the *societas*

²⁰ DUFOUR, G. Les societates publicanorum de la République romaine: des ancêtres des sociétés par actions modernes? Montreal, Themis, 2012. Available at <http://local.droit.ulg.ac.be/sa/rida/file/2010/11.Dufour.pdf>

²¹ Ibid.

²² BADIAN, E. Publicans and Sinners..., cit.

²³ MALMENDIER, U. Roman Shares, cit.

²⁴ FLECKNER, A. Antike Kapitalvereinigungen..., cit.

²⁵ MALMENDIER, U. Law and Finance “at the Origin”, cit., p. 9.

publicanorum which were tradable. At the same time Poitras and Fleckner²⁶ argue that there is very little likelihood of finding proof of existing institutionalized markets for trading stocks. Even though there is no concrete evidence of entity shielding of the capital structure *societas publicanorum* as an entity, the fact that there is proof of the existence of stocks which were traded (regardless of whether this was done via institutionalized markets or other means) implies that there was strong entity shielding when it came to limited partners.

It is necessary to ascertain the following: the trading of stocks is, from a legal and practical aspect, unsustainable without strong entity shielding of the capital structure, which at the same time secures liquidity and strongly shields the entity which rejects the shareholders in the capital structure thus removing the possibility of them pulling back the assets and funds invested in the entity before it falls apart.

Additional proof of the existence of strong entity shielding is the essential difference between *societas* and *societas publicanorum*. The second outlived the lives of the partners i.e. the general partners. Fleckner even notes that the *societas publicanorum* could outlive even the main investor, who was the signatory on contracts with the state²⁷. When a member of the *manceps* died his heir took over the rights and responsibilities, but only became a full member if this was previously contractually established²⁸.

Further proof of the existence of strong entity shielding is the fact that *societas publicanorum* could have owned property and assets and undertake transactions on behalf of the entity. Proof in this direction points to the existence of this possibility in legal transactions which was most often used by larger entities²⁹. Within the scope of such research, additionally, there is no proof as to the existence of any form of limitation as to how many limited partners could be part of a larger *societas publicanorum*³⁰.

It is necessary to conclude that there is good reason to believe that in the last days of the Roman Republic there was a developed and widespread use of

²⁶ FLECKNER, A. Antike Kapitalvereinigungen..., cit.

²⁷ Ibidem.

²⁸ MALMENDIER, U. Roman Shares, cit.

²⁹ BADIAN, E. Publicans and Sinners..., cit..

³⁰ NICOLET, C. Censeurs et Publicains: Économie et Fiscalité dans a Rome Antique. Paris, Librairie Artheme Fayard, 2000.

a capital structure (entity) very similar to the contemporary limited partnership. This capital structure what characterized by strong entity shielding and limited liability (shielding of the owners), as well as weak shielding of the general partners. This hybrid form of capital structure, which represents a mixture of personal and capital companies, in the contemporary sense, has a close legal proximity with contemporary business corporations, and is closely aligned with a corporate form sued in France during the IX and XX century for large-scale entrepreneurial activities such as railways. What of course must be considered is that the last days of the Republic were also the beginning of the end for the *societas publicanorum*. A few centuries later, when it became evident that even the Empire would fall apart, the *societas publicanorum* had disappeared from roman law, as well as roman business and trade practice³¹.

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³¹ MALMENDIER, U. Law and Finance “at the Origin”, cit..

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ПУБЛИЧНО ПРАВО

PUBLIC LAW

***HUMANITAS* И ЗАЩИТАТА НА ЧОВЕШКИТЕ ПОТРЕБНОСТИ В ТЕОДОСИЕВИЯ КОДЕКС (НА ИТАЛИАНСКИ ЕЗИК)**

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Резюме: През 1960 г. Richard M. Honig, професор в Университета в Гьотинген, написа една интересна книга (*Humanitas und Rhetorik in Spättrömischen Kaisergesetzen*), в която илюстрира различното съдържание на концепцията за *humanitas* в законодателството на Късната римска империя. Сред тези различни аспекти авторът отделя някои закони от периода 340–409 г. сл.Хр., включени в Теодосиевия кодекс, и някои Новели, издадени след съставянето на Кодекса, в които се разкрива грижата за хора, които по някаква причина се намират в трудни ситуации (*Humanitas als Fürsorge*). Статията поема по пътя, набелязан от Honig, всъщност отбелязан от един коментар на Дионисий Готофред, за да покаже, че не само в тази среда може да се открие морално-психологическата стойност на термина *humanitas*, използван от римския законодател и по-общоупотребим в съвременната наука. *Humanitas* изглежда съдържа ясно обвързване с грижата за жизнените потребности на човека и по-специално на необходимостта от издръжка, както може да се види в CTh. 9.3.7 по отношение на затворниците. В други случаи *humanitas* придобива значение, по-близко до *aequitas*, *pietas* и *iustitia*.

Ключови думи: Теодосиев кодекс; лишаване от свобода; *hospitalitas*; *aequitas*; *pietas*; *iustitia*.

HUMANITAS AND CARE FOR HUMAN NEEDS IN THE THEODOSIAN CODE* (ITALIAN LANGUAGE)

HUMANITAS E CURA DELLE ESIGENZE UMANE NEL CODICE TEODOSIANO

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Abstract: In 1960, Richard M. Honig, professor at the University of Göttingen, wrote an interesting book (*Humanitas und Rhetorik in Spättrömischen KaiserGesetzen*) where he illustrated the different contents of the concept of *humanitas* in late Roman imperial legislation. Among these contents, the author identified – in some *leges* between 340 and 409 AD, included in the Theodosian Code, and in some *novellae* following this code – assistance, help for people for some reason in a situation of difficulty (*Humanitas als Fürsorge*).

This paper retreads on the path walked by Honig, a path that was already followed by the commentary of Gothofredus, to highlight that a moral-psychological value of the term, which is perhaps more familiar to the modern interpreter, cannot always be found in this field. *Humanitas* sometimes seems to recall satisfaction of the vital needs of man, especially food, as it can be seen in CTh. 9.3.7 in relation to the prisoner. Therefore, it is possible to see other meanings that approach *humanitas* to *aequitas*, *pietas*, and *iustitia*.

Keywords: Theodosian Code; imprisonment; hospitalitas; *aequitas*; *pietas*; *iustitia*.

* Text of the report presented on the occasion of the Third International Scientific Conference on “Ius & Humanitas”, well organized by the Balkan Association of Roman Law and Roman Legal Tradition in Skopje, Republic of Macedonia, on October 25–27, 2018.

I) Il termine *humanitas* – si è già notato¹ – non ha un corrispondente nella lingua greca. Può significare sì complessivamente il genere umano, tutti gli uomini, ma anche quella virtù, avvicinabile² alla carità cristiana (come emerge, per esempio, in Sant'Ambrogio), che si concretizza nell'aiuto materiale fornito a chi condivide l'appartenenza al genere umano e le difficoltà che la vita presenta. *Humanitas* è dunque anche l'atteggiamento di chi avverte una spinta morale-religiosa a sostenere, aiutare gli altri uomini. Isidoro di Siviglia (*Etym.* 10.H.116), ripreso da San Tommaso (S.Th. II.II. qu. 80 ad. 2), coglie l'essenza dell'*humanitas* nel modo seguente: "*humanitas dicta est, qua nos invicem tuemur*", evidenziandone il profilo causale rispetto al soccorso, al prendersi cura, dell'altro³.

Questa condivisione della dolorosa appartenenza al genere umano, che dovrebbe spingere all'aiuto reciproco tra uomini, è assunta in verità a motivo ispiratore nella legislazione romana, soprattutto in quella più tarda (IV–V secolo d.C.) oramai fortemente influenzata dal Cristianesimo, nella quale il legislatore si identifica con l'imperatore; lo stesso, per altro, non manca nelle stesse leggi di attribuirsi la virtù di cui stiamo trattando⁴.

II) Vorrei soffermarmi in questa sede sull'*humanitas* considerata come criterio ispiratore del legislatore romano, privilegiando tra le fonti le *leges* del Teodosiano nelle quali, a parere dell'Honig (professore di Göttingen attivo negli anni '60 del secolo scorso), si può scorgere una propensione dell'imperatore alla

¹ Cfr. SCHULZ, F. I principii del diritto romano. Trad. a cura di V. Arangio Ruiz. Firenze, Sansoni, 1946, p. 164 ss.; GAROFALO, L. L'*humanitas* tra diritto romano e totalitarismo hitleriano. – In: *Fondamenti e svolgimenti della scienza giuridica. Nuovi saggi*. Torino, Giappichelli, 2015, p. 41.

² E non sovrapponibile secondo MASCHI, C. A. *Humanitas* romana e *caritas* cristiana come motivi giuridici. – In: *Jus*, Vol. 1, 1950, p. 272 ss.

³ Cfr. specialmente GAUDEMET, J. La personne. Droit et morale au Bas-Empire. – In: *Atti Dell'accademia romanistica Costantiniana* (AARC). Vol. VIII. Convegno internazionale. Perugia, Università Perugia, 1990, p. 70 s. (Français, Reimp.: *Melanges J. Gaudemet. Droit et societe aux derniers siecles de l'empire romain*. 1992 Napoli, Jovene, 1992. (il testo di Isidoro accoglie un "*qua*" e non un "*quos*", come trascrive erroneamente l'autore francese).

⁴ Cfr. le fonti (ove figura l'espressione "*nostra humanitas*") citate da KRÜGER, H. Die *humanitas* und die *pietas* nach den Quellen des römischen Rechtes. – In: *ZSS RA*, Vol. 19, 1898, S. 11 f.; GAUDEMET, J. Op. cit., o. 67 s. Si veda altresì CRIFÒ, G. A proposito di *humanitas*. – In: *Ars boni et aequi. Festschrift für W. Waldstein zum 65. Geburtstag* (Herausg. M. J. Schermaier und Z. Végh). Stuttgart, Franz Steiner Verlag, 1993, S. 90.

cura, alla sollecitudine rivolta a persone che per qualche motivo si trovassero in una situazione di difficoltà ⁵. Sono poche costituzioni comprese fra il 340 e il 409 d.C. (C.Th. 4.4.2; 6.29.5; 7.9.1; 9.3.7; 9.40.16; 12.6.21), a cui l'Honig aggiungeva talune Novelle post-teodosiane (Nov.Theod. 8.pr.; Nov.Val. 1.3.4; Nov.Val. 27.pr.; Nov.Marc. 1.3).

III) Nel non facile tentativo di cogliere il significato di *humanitas* nelle menzionate disposizioni muoverò dai diversi bisogni dell'uomo che l'imperatore riteneva ivi (secondo appunto umanità) meritevoli della sua attenzione, per verificare se tali umane necessità fossero solamente quelle primarie, di sussistenza (il mangiare, il riscaldarsi, il lavarsi, il riposare, etc.), oppure se ve ne fossero anche di secondarie, spirituali, in rapporto alle quali l'*humanitas* potrebbe anche coincidere con altri principi informativi dell'esperienza giuridica romana, quali l'*aequitas*, la *pietas* e la *iustitia*. Il compito, come si diceva, non è privo di difficoltà. Lo dimostra, tra l'altro, la critica mossa dall'Honig ⁶ al Gotofredo: quest'ultimo, nelle sue annotazioni ad alcune delle *leges* sopra citate (C.Th. 9.3.7; C.Th. 6.29.5), aveva offerto un'interpretazione materialistica del segno "*humanitas*", riferendolo a cose in grado di soddisfare certi bisogni umani, laddove il primo ha evidenziato il ricorrente contenuto psicologico che rimanda ad una doverosità morale, *causa movens* del legislatore tardoimperiale.

IV) E' indubbio che l'imperatore romano, valorizzando la *humanitas* nella legge, tiene spesso in considerazione i bisogni primari dell'uomo. In una costituzione emanata a Ravenna nel 409⁷, Onorio, imperatore d'Occidente,

⁵ Cfr. HONIG, R. M. *Humanitas und Rhetorik in spätrömischen Kaisergesetzen* (Studien zur Gesinnungsgrundlage des Dominats). Göttingen, Otto Schwartz, 1960, S. 77 ff., dove l'A. si occupa dell'*humanitas* imperiale intesa come "Fürsorge", all'interno del § 3.III dedicato a: "Humanitas-Begriff im Theodosianus" (S. 70 ff.). Ha recensito l'opera dell'Honig, con acute osservazioni, CRIFÒ, G. – In: *Latomus*, Vol. 22, 1963, p. 558 ss.

⁶ HONIG, R. M. Op. cit., p. 77.

⁷ C.Th. 9.3.7 (= C. 1.4.9): "*Post alia: Iudices omnibus dominicis diebus productos reos e custodia carcerali videant interrogant, ne his humanitas clausis per corruptos carcerum custodes negetur. Victualem substantiam non habentibus faciant ministrari, libellis duobus aut tribus diurnis vel quot existimaverint commentarienses decretis, quorum sumptibus proficiant alimoniae pauperum. Quos ad lavacrum sub fida custodia duci oportet, multa iudicibus viginti librarum auri et officiis eorum eiusdem ponderis constituta, ordinibus quoque trium librarum auri multa proposita, si saluberrime statuta contempserint. Nec deerit antistitum christianae religionis cura laudabilis, quae ad observationem constituti iudicis hanc ingerat monitionem*"; su tale *lex* cfr. recentemente ZAMORA, J. L. Algunas particularidades en torno a la influencia de la misericordia y la humanidad en las fuentes romanas. – In: *Vergentis*, Vol. 4, 2017, p. 309 s.; TRISCIUOGGIO, A. La condizione dei detenuti nella

dispone che ogni domenica, nel *dies domini*, i reclusi dovranno essere condotti al cospetto del giudice (il governatore provinciale) che li interrogherà su come sono trattati in carcere, per verificare in particolare se i carcerieri (i *commentarienses*) non li privino di quell'*humanitas* che lo stesso imperatore vuole assicurata da parte dei suoi funzionari. Il significato di *humanitas* mi sembra chiarito invero dal seguito della costituzione dove si richiamano i fondamentali bisogni umani, non solo quelli alimentari (in particolare dei carcerati indigenti) ma anche quelli igienici. Nella visione imperiale dunque è “umana”, oserei dire modernamente “dignitosa”, quella condizione di vita nella quale l'uomo si possa quanto meno nutrire e lavare. L'amministrazione imperiale carceraria deve verificare il rispetto di tale minimo livello qualitativo della vita umana; né potrà mancare il controllo extra-amministrativo dei vescovi.

V) In un altro caso particolarmente interessante l'*humanitas* non è pretesa dall'imperatore nell'intento di trasfondere una sua virtù all'interno degli apparati amministrativi imperiali, ma è permessa come atteggiamento che un privato potrebbe tenere nei confronti di un suo simile che versa in uno stato di disagio. Mi riferisco ad una costituzione *ad provinciales*, attribuibile a Costante, del 340⁸, la quale menziona una *humanitas* manifestata spontaneamente, dunque liberamente, al militare in transito che necessita di alloggio provvisorio (e non invece del vitto che viene coperto dall'annona militare⁹). L'ospitante provinciale può (non deve!) fornire olio (per l'illuminazione), legno (per cucinare, per riscaldarsi) e altre cose necessarie per una breve permanenza, fra cui il

legislazione tardoimperiale romana. – In: A Pierluigi Zannini. Scritti di diritto romano e giusantichisti. A cura di F. Zuccotti e M. A. Fenocchio. Milano, 2018, p. 317; ivi (nt. 14) altra lett.

⁸ C.Th. 7.9.1 (*sub titulo: De salgamo hospitibus non praebendo*): “*Quicumque propria voluntate eum, quem domum receperit, necessariis rebus, oleo et ligno aliisve huiusmodi voluerit adiuvare, facultatem sibi istius rei sciat esse concessam. Quod si quis contra interdictum nostrum eadem ipsa a vobis violenter voluerit usurpare, interpellandi praepositum habebitis copiam deque iniuria conquerendi liberam facultatem, ut nec spontanea in vobis humanitas retardetur nec contra voluntatem vestram ac patronorum vestrorum familiaris res adteratur*”.

⁹ Cfr., con riferimento al *cenaticum*, ma del 364 d.C., C.Th. 7.4.12 (= C. 12.37.3): “[...] *ut milites recordentur commoda sua, quae in annonarum perceptione adipiscuntur, extrinsecus detrimentis provincialium non esse cumulanda*”. Per la dottrina v. *praecipue* RODA, S. *Militaris impressio e proprietà senatoria nel tardo impero*. – In: *Studi Tardoantichi*, Vol. 4, 1987, Messina, Sicania, 1987, p. 235 s. e nt. 49.

materasso (*culcita*)¹⁰; mentre l'appropriazione violenta di tali cose da parte del militare ospitato giustifica l'interpello del preposto, responsabile della truppa in transito, per il danno patrimoniale subito dall'ospitante. L'*humanitas*, questa volta, si concretizza nella soddisfazione di esigenze primarie dell'uomo non specificatamente di carattere alimentare: vi rientrano il vedere di notte, il riscaldarsi, il dormire più comodamente. Ma il militare nel caso di specie non può pretendere tale *humanitas* dal provinciale che lo ospita; l'*humanitas* può qui solamente essere un atteggiamento spontaneo, semplicemente apprezzato dall'imperatore. In simili casi di *hospitalitas*, tuttavia, è assai difficile che l'*humanitas* possa esprimersi in modo spontaneo e non coartato. Se ne rende conto ben presto la stessa autorità imperiale che vieta ogni prestazione supplementare, financo volontaria, a favore del militare¹¹.

VI) In altri casi i bisogni umani che sono presupposti rispetto all'intervento "umanitario" dell'imperatore-legislatore non sono così agevolmente individuabili dall'interprete. In una legge di Costanzo II del 359¹² si richiede che i funzionari (i *curiosi*) incaricati dell'esazione di tasse dovute per l'uso del *cursus publicus* (ossia il servizio di gestione della rete viaria pubblica romana), ed in particolare per l'uso del *cursus clavularis*¹³, manifestino l'*humanitas* auspicata dall'imperatore nei confronti dei viaggiatori, riservando a loro, esente dal tributo,

¹⁰ Che fa parte del *salgatum*: v. C.Th. 7.9.3. Su tale ultimo termine cfr. CANGE, C. F. Du. *Glossarium mediae et infimae latinitatis*. Vol.6, v. '*salgama*'. Parisiis, F. Didot, 1846, p. 38: "*Quod nomen traductum postea a militibus ad rerum ad victum necessarium praebitiones quas ab hospitibus suis exigebant*".

¹¹ Cfr., ma di Costanzo II, C.Th. 7.9.2; VOGLI, P. Note sull'efficacia delle costituzioni imperiali. I. Dal principato alla fine del IV secolo. – In: *Studi di diritto romano*. Vol. 2. Padova, Cedam, 1985, p. 335.

¹² Cfr. C.Th. 6.29.5: "[...] *In his dumtaxat provinciis, in quibus cursus a provincialibus exhibetur, quoniam avaritiae occurri paene [i]am non potest, singulos solidos per singulas raedas, id [es]t quas quadrigas vel flagella appellant, percipiatis per id tempus, quo curarum et cursus tuendi sollicitudinem sustinebitis. E cursu vero clavulari singu[ll]as angarias, in his scilicet stationibus, in quibus cursus est conlocatus, ad exhibendam humanitatem venientibus excusetis*"; su tale costituzione cfr. FORMIGONI, W. *Codex Theodosianus*, lib. VI, titulus XXIX, de curiosis: "*Costantius curiosorum insolentiae, ambitioni, avaritiae modum ponit: officiumque eorum circa cursum publicum et curas agendas instruit*". – In: *Annali Università di Ferrara. Scritti giuridici*, Vol. 13, 1999, p. 57 s.

¹³ Il *cursus clavularis* era il servizio di trasporto pesante, tramite buoi, di derrate o di equipaggiamenti militari: cfr. PAOLA, Lucietta Di. Viaggi, trasporti e istituzioni. Studi sul *cursus publicus*. Di.Sc.A.M., 1999, p. 47, nt. 48; adde ONIDA, P. P. Per lo studio delle costituzioni imperiali in Sardegna: *cursus publicus* e *humanitas* costantiniana. – In: *Diritto&Storia*, Vol. 10, 2011-2012, § 4.b.

un singolo carro trainato da buoi (*angaria*)¹⁴, qualora si ravvisino non meglio precisate ragioni di carattere umanitario, rispetto alle quali è possibile solamente avanzare congetture. Si è pensato in proposito al trasporto dei militari malati o feriti¹⁵, oppure al trasporto di suppellettili o di familiari al seguito¹⁶. L'*humanitas* che evoca il legislatore, e che i *curiosi* devono attuare nella gestione del servizio pubblico viario, potrebbe dunque essere collegata sia ad esigenze primarie dell'uomo che si trova in una situazione di disagio, qual è quella del viaggiatore, sia ad esigenze secondarie, di carattere spirituale, non strettamente connesse con la sopravvivenza.

VII) L'*humanitas* è poi menzionata in due costituzioni di Teodosio I, ancora richiamate dall'Honig sotto il titolo "Humanitas als Fürsorge", nelle quali tuttavia non è di immediata evidenza una correlazione con i bisogni umani, siano essi materiali o spirituali, meritevoli di soddisfazione. Nella prima di tali disposizioni¹⁷ l'*humanitas* imperiale indirizza verso un regime speciale, favorevole agli esattori (*susceptores*) dell'Armenia¹⁸, per quanto riguarda l'aggio

¹⁴ Sul significato di *angaria* cfr. PAOLA, Lucietta Di. Per la storia degli "occhi del re". I servizi ispettivi nella Tarda Antichità. Messina, Di.Sc.A.M., 2005, p. 35, nt. 44 e lett. ivi citata. Il termine pare indicare nella *lex* in esame il mezzo di trasporto, sottratto dal servizio a pagamento (arg. ex "*E cursu vero clavulari*"), piuttosto che il tributo corrispondente; in tal senso v. anche FORMIGONI, W. Op. cit., p. 58, la quale, per altri aspetti, offre un'esegesi del testo difforme da quella qui da me proposta. Sui limiti posti ai prelievi degli avidi *curiosi* cfr. GONZÁLEZ SALINERO, R. Investigadores de la corrupción, corruptos: la degradación moral de los agentes in rebus. – In: *La corrupción en el mundo romano*. G. Bravo e R. González Salinero, Eds. Madrid, Signifer Libros, 2008, p. 204 s. Più in generale sul *cursus publicus* v. il recente contributo di ESCUTIA-ROMERO, R. Contribución al estudio del servicio estatal de transportes en la administración romana. – In: *Revista digital de Derecho Administrativo*, Vol. 17, 2017, p. 39 ss.

¹⁵ Cfr. PHARR, C. The Theodosian Code and Novels and the Sirmondian Constitutions: A Translation with Commentary, Glossary, and Bibliography. Princeton, Princeton University Press, 1952, p. 146, nt. 20; seguito da VÖGLER, C. Constance II et l'administration impériale. Strasbourg, AECR, 1979, p. 206; contra HONIG, R. M. Op. cit., p. 77, nt. 14.

¹⁶ Cfr. GOTHOFREDUS, J. Codex Theodosianus cum Perpetuis Commentariis. Vol. 2. Hildesheim ; Zürich ; New York (rist. ed. Leipzig, 1736), 1975, ad h. l., S. 198: "[...] quae [scil. *humanitas*] videlicet summa erat in huius clavularis cursus seu angariarum exhibitione: utpote quo et supellex, et familia, et charitates [...] imponi trahique poterat [...]".

¹⁷ Cfr. C.Th. 12.6.21.1 (a. 386) = C. 10.72.9.1: "*Et submotis, quae contra utilitatem populorum omnium hactenus gesta sunt, frumenti quinquagensimas, hordei quadragensimas, vini et laridi vicensimas susceptoribus dari praecipimus. Humanitatis autem necessitate commoniti susceptoribus in Armeniae susceptionibus longinquitatis causa frumenti et hordei quadragensimas, vini et laridi quintas decimas dari praecipimus*"; annotata da CALDERONE, S. Enchiridion fontium ad res romanas saec. IIII inlustrandas. Napoli, Libreria Scientifica Editrice, 1970, p. 62 s.; v. anche TENGSTRÖM, E. Bread for the people. Studies of the corn-supply of Rome during the late empire, Stockholm, P. Aströms Förlag, 1974, 28 s.

¹⁸ Si ritiene per lo più concluso un anno dopo (a. 387) rispetto alla *lex* in esame il trattato di pace tra Teodosio e il re persiano (il sassanide Sapore III), con cui si definì il controllo

che gli stessi potevano trattenere sulle riscossioni dei prodotti agricoli. Se ai *susceptores* non operanti in Armenia si riconosce un 2% sul grano, un 2.5% sull'orzo e un 5% sul vino e sul lardo, a quelli attivi in Armenia, viceversa, si riconosce un 2.5% tanto sul grano quanto sull'orzo e un consistente aumento, fino al 6.66 %, sul vino e sul lardo. La causa che giustifica il trattamento di favore è chiarita dalla stessa cancelleria teodosiana: è la *longinquitas*, la lontananza dell'Armenia, che rende prevedibili difficoltà e rischi nel raggiungerla. Allora, mi pare, l'*humanitas*, più chiaramente *causa movens* del legislatore ("*Humanitatis autem necessitate commoniti [...] praecipimus*"), assorbe qui istanze compensative, induce l'imperatore a trattare in modo differente situazioni differenti. Come in altre numerose fonti¹⁹ quasi si confonde con l'*aequitas*.

In una seconda costituzione di pochi anni successiva (a. 389)²⁰ Teodosio il Grande si occupa dei lasciti *mortis causa* a favore dell'imperatore e della famiglia imperiale e dispone che *codicilli* ed *epistulae* non potranno più contenere valide istituzioni di erede; l'imperatore e i suoi familiari potranno sì essere beneficiati come eredi, ma solamente in testamenti (scritti o orali che fossero). L'imperatore fonda la sua decisione sull'*humanitas* "*iudicii nostri*", sull'umanità del suo discernimento che lo spinge in prima battuta a privilegiare, nella successione *mortis causa*, le relazioni familiari strette rispetto agli interessi della casa imperiale; correttamente il Krüger²¹ ha richiamato l'*intuitus pietatis*. Qui dunque l'*humanitas* induce il legislatore a fissare una gerarchia dei diritti tutelabili in ordine al patrimonio del *de cuius*: prima vengono quelli dei suoi parenti stretti e dopo quelli dell'imperatore; ma è una gerarchia debole, posto che è sufficiente una *heredis institutio* testamentaria a favore dell'imperatore per capovolgerla. L'*humanitas*, che per la sensibilità alle relazioni parentali quasi coincide con la *pietas*, non è dunque un valore che si afferma in termini assoluti,

romano su di una parte minore dell'Armenia; cfr., tra gli altri, ZIOLKOWSKI, A. Storia di Roma. Trad. D. Facca. Milano, Bruno Mondadori, 2000, p. 434; adde ZECCHINI, G. Il bipolarismo romano-iranico. – In: *L'equilibrio internazionale dagli antichi ai moderni*. A cura di C. Bearzot, F. Landucci, G. Zecchini. Milano, Vita e Pensiero, 2005, p. 81.

¹⁹ Vedile in CRIFÒ, G. Op. cit., (nt. 4), p.79 ss.

²⁰ C.Th. 4.4.2 (= C. 9.22.24): "*Ceterum quod ad nos nostrosque adinet, codicillos et epistulas adeo refutamus, ut ex illis [...] quidquid nobis relictum nostrisve constiterit, ad liberos defuncti vel, si hi non sint, ad proximum quemque iudicii nostri humanitate pertineat. Testamenti vero scripturam legitimam vel nuncupationem, quae in nomen nostrum forte processerit, iure capiemus [...]*".

²¹ Cfr. KRÜGER, H. Op. cit., (nt. 4), p. 13.

ma cede il passo ove siano rispettate precise forme della *successio mortis causa* da cui risulti acclarata in modo più affidabile la *voluntas* del *de cuius*²². Nel conflitto tra principi il rispetto per l'effettiva *voluntas testantis* prevale su di una *humanitas* così declinata.

VIII) Rimane ancora da valutare una *lex* di Arcadio del 398 in materia di appello nel processo penale²³. In essa l'imperatore d'Oriente vieta agli ecclesiastici (clerici, monaci, cenobiti²⁴) di sottrarre i condannati all'esecuzione della pena capitale comminata con sentenza, ma lascia agli stessi ecclesiastici²⁵ la possibilità di interporre l'appello (*rectius*, la *supplicatio*)²⁶ "*humanitatis consideratione*". I contenuti dell'*humanitas* mi paiono chiaramente desumibili dal seguito del testo, dove Arcadio giustifica il riesame di un giudice d'appello con l'eventualità che il primo giudice sia caduto in errore o non sia stato imparziale; ne verrebbe pregiudicata in simili ipotesi la *iustitia* con gravi conseguenze sulla *salus* del condannato. L'*humanitas*, che già precedentemente abbiamo visto assumere un senso molto prossimo ad altri valori, quali l'*aequitas* e la *pietas*, mostra qui una vicinanza alla *iustitia* da coltivare in un giudizio di secondo grado

²² Si ritiene comunemente, sulla base di Symm., Ep. 2.13.2, che Teodosio avesse adottato il provvedimento in esame in considerazione del fatto che i *codicilli* e le *epistulae* erano più facilmente falsificabili rispetto ai testamenti. Cfr. al riguardo VOGLI, P. Il diritto ereditario romano nell'età del tardo impero I. Le costituzioni del IV secolo. – In: *Studi di diritto romano*, Vol. 2, cit. (nt. 11), p. 160; SCHIAVO, S. Il falso documentale tra prevenzione e repressione. Impositio fidei, criminaliter agere, civiliter agere. Milano, Giuffrè, 2007, p. 188 e nt. 206. Sulla citata lettera di Simmaco v. il commento di CECCONI, G. A. Commento storico al libro II dell'Epistolario di Q. Aurelio Simmaco. Pisa, Giardini, 2002, p. 182 s.

²³ Cfr. C.Th. 9.40.16.pr. (= C.Th. 11.30.57): "*Post alia: addictos supplicio et pro criminum immanitate damnatos nulli clericorum vel monachorum, eorum etiam, quos synoditas vocant, per vim adque usurpationem vindicare liceat ac tenere. Quibus in causa criminali humanitatis consideratione, si tempora suffragantur, interponendae provocationis copiam non negamus, ut ibi diligentius examinetur, ubi contra hominis salutem vel errore vel gratia cognitoris obpressa putatur esse iustitia: ea condicione, ut, sive pro consule, comes Orientis, praefectus augustalis, vicarii fuerint cognitores, non tam ad clementiam nostram quam ad amplissimas potestates sciant esse referendum. Eorum enim de his plenum volumus esse iudicium, qui, si ita res est et crimen exegerit, rectius possint punire damnatos*", tradotta e annotata da J. Rougé, R. Delmaire et alii – LES LOIS religieuses des empereurs romains de Constantin à Théodose II (312–438). Vol. II. Code Théodosien I–XV, Code Justinien, Constitutions Sirmondienes. Paris, Les Éditions du Cerf, 2009, p. 202 ss.; commentata da BARONE ADESI, G. Monachesimo ortodosso d'Oriente e diritto romano nel tardo antico. Milano, Giuffrè, 1990, p. 244 ss.

²⁴ Oppure i "membri di comunità ascetiche", nella resa di "*synoditae*" proposta da BARONE ADESI, G. Op. cit., p. 24, nt. 137.

²⁵ Così interpreta il "*Quibus*" BIONDI, B. Il diritto romano cristiano. Vol. III. Milano, Giuffrè, 1954, p. 517; esprime incertezza al riguardo PERGAMI, F. L'appello nella legislazione del tardo impero. Milano, Giuffrè, 2000, p. 286.

²⁶ Cfr. LES LOIS religieuses des empereurs romains de Constantin à Théodose II (312–438). Vol. II, cit., p. 202, nt. 4.

non richiesto dal condannato a morte, giudizio che già Ulpiano fondava sulla *ratio humanitatis* (v. D. 49.1.6: “*credo enim humanitatis ratione omnem provocantem audiri debere*”).

IX) Osservazioni conclusive. L'analisi qui condotta di un piccolo campione di fonti tardoantiche in cui compare il segno *humanitas*, conferma una volta di più quell'elevata polisemia del termine ancora recentemente evidenziata dalla dottrina²⁷. Abbiamo voluto ricercare il senso del vocabolo muovendo dalle esigenze umane menzionate espressamente, oppure presunte, come meritevoli di attenzione da parte dell'imperatore-legislatore. È un percorso ricostruttivo che permette altresì di far emergere quei tratti della vita umana che concorrono a qualificarla “dignitosa” secondo l'ideologia imperiale, entro un'esperienza storico-giuridica nella quale non è per nulla agevole ritrovare un “catalogo dei diritti umani”, eventualmente desumibile dai significati di “*humanitas*”²⁸.

Tale *virtus*, coltivata dallo stesso imperatore-legislatore fortemente influenzato dalla ideologia cristiana nell'età tardoantica, da un lato deve permeare gli apparati amministrativi che entrano in relazione con uomini che versano in una situazione di disagio (carcerati, viaggiatori), d'altro lato viene incoraggiata nelle libere relazioni tra privati (come nel caso dell'*hospitalitas*).

In altre *leges* del Teodosiano qui considerate, tuttavia, il legame con bisogni concreti da soddisfare con immediatezza non è più riscontrabile. L'*humanitas* sembra acquistare connotazioni tipiche di altri principî, quali l'*aequitas*, la *pietas*, la *iustitia*²⁹, per le quali entrano in gioco esigenze umane senz'altro più spirituali che materiali.

²⁷ Cfr. PURPURA, G. Brevi riflessioni sull'*humanitas*. – In: *AUPA*, Vol. 53, 2009, p. 289 s.

²⁸ Sul punto cfr. recentemente, con ampia disamina delle diverse opinioni dottrinarie, BICCARI, M. L. Diritti fondamentali dell'uomo e diritto romano: tra valori di civiltà e ius naturale. – In: *Jus-Online. Rivista di Scienze Giuridiche*, Vol. 2, 2017, p. 127 ss. (<https://jusvitaepensiero.mediabiblos.it/news/allegati/Biccari%20Maria%20Luisa.pdf>); v. anche TRISCIUOGGIO, A. Diritti umani e *principî* del diritto amministrativo e fiscale. Tra Roma antica e l'attualità. – In: *Urbe et Ius*, Vol. 14, 2015, p. 57 s. (<https://iris.unito.it/retrieve/handle/2318/1550306/110047/urbe%20et%20ius%20Trisciuoglio%202015%20.pdf>).

²⁹ Sulle relazioni tra l'*humanitas* e i menzionati principî (specialmente l'*aequitas*) nella legislazione tardoimperiale di ispirazione cristiana, cfr. in particolare DAZA MARTÍNEZ, Jesús. *Aequitas et humanitas*. – In: *Estudios en homenaje al Profesor Juan Iglesias*. Seminario de Derecho Romano “Ursicino Alvarez”. Vol. 3. Madrid, – Universidad Complutense de Madrid, 1988, p. 1226 ss.

РИМСКИЯТ ОПИТ ЗА СЪЧЕТАВАНЕ НА *IUS* И *HUMANITAS* (НА АНГЛИЙСКИ ЕЗИК)

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Резюме: Настоящата работа представлява изследване на термините *ius* и *humanitas*, проследявайки идеята и концепцията, които са имали и двата термина в Древна Гърция и най-вече в Древен Рим. Правото (*ius*) според класическото определение на юриста Целз (*ius est ars boni et aequi*), е изкуството за доброто и справедливото. Терминът “*directum*” (право) приема морално и религиозно съдържание с философията на стоиците и с християнството. *Humanitas*, от друга страна, е поведението според човешката природа, което се проявява в доброжелателно или внимателно отношение към другите. Терминът *humanitas* от своя страна се появява в съчиненията на юристите и в императорските конституции. Използването на термина е обобщено от християнските императори, които, когато говорят за себе си, използват израза “*humanitas nostra*”. След някои терминологични уточнения се разглежда доколко идеята за *humanitas* е присъствала в римското право и доколко съдържа реални приложения, които невинаги се вписват в тяхното съвременното значение. Ако римското право наистина е било повлияно от *humanitas*, в кои институти това е най-забележимо?

Ключови думи: *ius*; *humanitas*; *naturae*; *officia*; *iustitia*; *directum*.

THE ROMAN EXPERIENCE IN THE CONCILIATION BETWEEN *IUS* AND *HUMANITAS* (ENGLISH LANGUAGE)

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Abstract: The present work covers a study about the terms *ius* and *humanitas*, going through the idea and concept that both terms had in Greece and, fundamentally, in Rome. The *ius* or right, appealing to a classic definition of the jurist (*ius est ars boni et aequi*), is the art or skill of the good and the fair. *Directum* (law) assumes a moral and religious content with the Stoic philosophy and with the Christianity. *Humanitas*, on the other hand, is the conduct according to human nature, which manifests itself in benevolent or considerate treatment towards the others. The expression (*humanitas*) appears in the jurists and in the *constituta*. The use of the term was generalized by the Christian emperors, who used the expression “*humanitas nostra*” to speak of themselves. After terminological clarifications, the question is whether the idea of *humanitas* was present in the Roman law, whose notion in Rome contains many realities that do not fit in all cases with their current meaning. If *the ius romanum* was really influenced by *humanitas*, in which institutions it would be more present or evident?

Keywords: *Ius*; *humanitas*; nature; officia; iustitia; *directum*.

1. INTRODUCTION

Romans are the people of the Law: it is something of which there is no doubt and it is more than admitted¹. About what is the Law in the Roman conception there are many texts or sources that clarify it. The term “*ius*”, therefore, is a word that refers to a well-identified reality among the Romans.

Regarding the word “*humanitas*”, it is a polyvalent word which can also be found in certain legal texts and which may well refer to several realities.

Therefore, to begin this study, I think it is best to leave the constancy of the meaning of both terms in order to reach a conclusion about whether there is some kind of relationship or reconciliation between the self and humanity in the Roman civilization, title who carries this work.

2. IUS

In D. 1.1.1.pr. The Digest begins with the definition of the jurist Celsus of “*ius*” as an art and technique of the good and the just. Ulpianu's text focuses on the moral and religious foundations of the legal, and thus “*ius*” means “fairness” according to the conceptions and decisions of the experts in justice. Originally refers to what the community considers fair and made the function of the judge is to declare on the concrete self (*ius dicere, iudicium*). The Law is carried out in trials based on the criteria of justice formulated by the jurists. The pragmatism of the Romans makes the ego have a solution to give solutions and not problems, just solutions and not in perpetuity unjust solutions. In short, the law is justice and justice moves among men, among their problems and imperfections.

There are different kinds of *ius* and, in this way, the *ius divinum* appears, which has as its object the fair or licit religious. It also considers the *fas*, which is considered according to the will of the gods, and the *nefas*. Also, we discovered the Roman differentiation between *ius publicum et ius privatum*. But it is not the objective of this work to enter into these different branches of Law. Undoubtedly, the Roman *ius* is impregnated with *iustitia*, as previously announced:

¹ *Aeneid, VI, 851-853: tu regere imperio populos, Romane, memento hae tibi erunt artes; pacisque imponere morem, parcere subiectis et debellare superbos.*

D. 1.1.10.pr. (Ulp.1 reg.): Iustitia est constans et perpetua voluntas ius suum cuique tribuendi.

Justice concentrates in placing the exterior actions of conformity with the Law's mandates. With the called *tria iura praecepta*, also from *Ulpianus*, "*honeste vivere, alterum non laedere, suum cuique tribuere*" we situate ourselves in a system of perfect Right where it is very clear what must be the "good and fair art" ("*Ius est ars boni et aequi*").

The *tria iura praecepta* in reality are a common idea of the thought of the ancient philosophers, who later adopt jurists. To end the meaning of "*ius*" we must not forget something that should always be present in the application of the *ius*: the *aequitas*. The *aequitas* or *aequum* is the model or ideal of justice and also an inspiring principle of law. As an abstract ideal model, *aequitas* is opposed, synonymous with justice, to *ius* or positive law. As the social conceptions that closely follow the new economic and social circumstances are changing, the legal sense inspired by equity must modify the *ius* or established right. Equity, inspiring magistrates and jurists, thus influences the evolution of legal rules and institutions. In the process and in judicial practice, the function of the *praetor* and the *ius honorarium* is inspired by the *aequitas*.

*D. 4.1.7.pr. (Marcellus, 3 dig.): Divus Antoninus Marcio Avito praetori de succurrendo ei, qui absens rem amiserat, in hanc sententiam rescripsit: "Etsi nihil facile mutandum est ex sollemnibus, tamen ubi aequitas evidens poscit, subveniendum est. Itaque si citatus non respondit et ob hoc more pronuntiatum est, confestim autem pro tribunali te sedente adiit: existimari potest non sua culpa sed parum exaudita voce praeconis defuisse, ideoque restitui potest."*²

In a few lines above, *Celsus* is mentioned using the word "*aequi*" to define what the Law should be (D. 1.1.1.pr.). If one pays attention to *Cicero*, the Law is the established equity, that is, *aequitas constituta*. Continuing in time, in the classical conceptions the *aequitas* is related to the *naturalis ratio* and to the *ius naturale*. In the decisions of the jurists, the criterion of equity is followed and it is precisely *Papinianus* who stands out in the application of these criteria of justice and fair equality. The new Christian conceptions of the Law of the Low Empire decisively influence the imperial constitutions and the classic *aequitas* are now

² In this text of *Marcellus* is clearly seen through a *rescriptum* of *Antoninus Pius*, on the way to help the one who, having been absent, had lost a *litigation* said: "Although the judicial solemnities should not be easily altered, it is necessary to remedy when the obvious equity advises it."

joined references to *caritas*, *benignitas*, *humanitas*, *pietas* or *clementia*. In Justinian law the principle of the *rescriptum* of Antoninus Pius is generalized, making it a general rule³.

In the languages that derive from Latin, *ius* is translated as “derecho” (in Spanish), “droit” (in French), “diritto” (in Italian), “drept” (Romanian), “direito” (Portuguese), etc. This translation retains its origin in the Latin term “*directum*”, which was used in the vulgar language of the Lower Empire. “*Directum*” refers to the Roman symbol of the goddess *Iustitia*, always represented with a scale in her hands, taken from Greek mythology. *Derectum* is concretely when the balance is straight, that is in the middle, meaning the balance of the right.

However, once settled Christianity and previously with the Stoic philosophy, *directum* assumes a moral and religious content apart from the sixth century AD. when the *ius novum* refers to the imperial constitutions (main source of law); if these were fair, they were called *direct iura* or *ius directum*. Finally, the judges will introduce in the vulgar language the expression “*directum*”, to refer to the law that conforms to religious and normal norms.

3. HUMANITAS

Unlike the term “*ius*”, the word “*humanitas*” has different meanings, it is a polysemic word. Let's see what they are currently and in Latin (they certainly differ).

*Humanitas*⁴ can be understood as humanity or behaviour according to human nature, which manifests itself in benevolent or considerate treatment with

³ See D. 50.17.183 or D. 4.3.18.3.

⁴ HEINEMANN, I. v. *Humanitas*. – In: *PWRE*, Suppl. V, 1931, coll. 282–310; HARDER, R. Nachträgliches zu *humanitas*. – In: *Hermes*, 1934, Vol. 69, S. 64–74; SCHULTZ, F. I principii del diritto romano, rist. 1995 (trad. ital. V. Arangio Ruiz. Firenze, 1946), p. 164 ss.; MASCHI, C. A. *Humanitas* come motivo giuridico. – In: *Scritti in memoria di Luigi Cosattini*. Annali Triestini, Vol. 18.1, 1948, p. 263–362; BECKMANN, F. *Humanitas: Ursprung und Idee*. Münster, 1952; BOYANCÉ, P. *Études sur l'humanisme cicéronien*. Brussels, 1950; RICCOBONO, S. L'idea di *humanitas* come fonte di progresso del diritto. – In: *Studi in onore di Biondo Biondi*, Vol. 2. Milano, 1965, p. 583–614; BÜCHNER, K. *Humanitas*. – In: *Klein. Paul.*, Vol. 2, 1967, 1241–4; CASAVOLA, F. L'*Humanitas* insieme a *philantropia* e *paideia*, come crescita civile della condizione umana tra Adriano e Marco Aurelio. – In: *ANRW*, Teil II. The Principate, Vol. 15, p. 157–160; OWEN, D. *Human rights*. London, 1978; DAVIES, P. *Human rights*. London, 1988; DONNELLY, J. *The concept of human rights*. London, 1985; GAUDEMET, J. *Utilitas Publica*. – In: *RHDEF*, Vol. 29, p. 465–499; VEYNE, P. *Humanitas: romans and non romans*. – In: *Giardina, A. The romans*. Chicago, 1993, p. 342–369; LABRUNA, L. *Diritti dell'uomo, tradizione romanistica e humanitas del diritto*. – In: *Iurisprudentia universalis*. Festschrift Theo Mayer-Maly. Köln ; Weimar ; Wien ; 2002,

others. It can also be translated as humanity, knowledge, culture⁵, finesse, courtesy or human nature. It even means currently a group of people, fragility or weakness of the human being, sensitivity, compassion for the misfortunes of other people, kindness, meekness, affability, body of a person ...

Humanism must be conceived as a set of disciplines that revolve around the human being, such as Literature, classical languages, Geography, Philosophy, Art, Law or History. As you can see, there are many meanings that this rich Latin term has. Which of them, then, is it better to choose? Are some of them related or applied to the reality previously studied in the previous point of this work: the *ius*, perhaps?

Cicero gives us the answer in his *Noctes Atticae*, 13.17:

'Humanitatem' non significare id, quod uolgus putat, sed eo uocabulo, qui sinceriter locuti sunt, magis proprie esse usos.

[1] *Qui uerba Latina fecerunt quique his probe usi sunt, 'humanitatem' non id esse uoluerunt, quod uolgus existimat quodque a Graecis φιανθρωπία dicitur et significat dexteritatem quandam beniuolentiamque erga omnis homines promiscam, sed 'humanitatem' appellauerunt id propemodum, quod Graeci παιδείαν uocant, nos eruditionem institutionemque in bonas artis dicimus. Quas qui sinceriter cupiunt adpetuntque, hi sunt uel maxime humanissimi. Huius enim scientiae cura et disciplina ex uniueris animantibus uni homini datast idcircoque 'humanitas' appellata est.*

[2] *Sic igitur eo uerbo ueteres esse usos et cumprimis M. Varronem Marcumque Tullium omnes ferme libri declarant. Quamobrem satis habui unum interim exemplum promere.*

[3] *Itaque uerba posui Varronise libro rerum humanarum primo, cuius principium hoc est: 'Praxiteles, qui propter artificium egregium nemini est paulum modo humaniori ignotus.'*

[4] *'Humaniori' inquit non ita, ut uulgo dicitur, facili et tractabili et beniuolo, tametsi rudis litterarum sit – hoc enim cum sententia nequaquam conuenit –, sed eruditori doctiorique, qui Praxitelem, quid fuerit, et ex libris et ex historia cognouerit.*

It is quite clear: Those who created the Latin language and those who have used it properly did not want *humanitas* to be what we vulgarly believe it is and that among the Greeks is called “philanthropy”, with the meaning of a certain virtue that leads to benevolence towards men. On the contrary, they called *humanitas* practically what the Greeks call παιδεία (paideia), that is, what in our language refers to training and instruction in the liberal arts. Those who feel

S. 379–382; WUBBE, F. B. J. *L'humanitas de Justinien*, *Ius vigilantibus scriptum*. Ausgewählte Schriften, Freiburg, Schweiz, 2003, S. 441–459 and bibliographical citations of these works.

⁵ A study that relates *ius* and *humanitas* in the sense of culture the latter, for example, is that of OBARRIO MORENO, A. *Iura et Humanitas. Diálogos entre el derecho y la literatura*. 2017.

frank interest and desire for such disciplines, these are properly the most humanistic. The cultivation and learning of these disciplines was called *humanitas* because among all living beings it was only given to humans.

Cicero will be given more attention in the following pages. Now is the time to ask ourselves whether the *humanitas* of antiquity really has anything to do with what is often related to it – perhaps by the least experts – the so-called “human rights”.

Currently, “human rights” is understood as the recognition of the inalienable dignity of human beings. Free of discrimination, inequality or distinctions of any kind, human dignity is universal, equal and inalienable⁶: “All human beings are born free and equal in dignity and rights” (Article 1).

4. GREECE

The contributions of the ancient Hellenic world to the Western world are extraordinarily important; one could almost say that they are innumerable in the various areas of knowledge. Watching back three thousand years ago in time we find Greek historians, such as Herodotus, considered the father of History, or Thucydides. Mathematics and Medical Science stand out Pythagoras and Hippocrates respectively. It is important to mention Philosophy (one of the three pillars that make up the Western world) with geniuses such as Thales of Miletus, Socrates or Plato; and the art of politics with the contribution of that model of government called democracy (consolidated in Pericles, V century BC) along with other forms of government (classified as straight and unfair) made known by the Greeks as the Monarchy, the Aristocracy, the Democracy, the Tyranny, the Oligarchy and the Demagogy. It would be a mistake to forget Architecture and Sculpture (the sensation of movement and the idealization of the body and face appears). And of course, the Theater (tragedies and comedies), Sports and the Lexicon.

Would a people as wise and creative as the Greek be able to elaborate a theory of human rights or, at least, establish some basis? First of all it must be said that φιλανθρωπία (philantropy) does not fit the concept of human rights.

⁶ In 1948 the General Assembly of the United Nations adopted the Universal Declaration of Human Rights, which was called to represent a common standard to be achieved by all peoples and nations.

Philanthropy is a term used in many contexts that means good will of superiors towards inferiors, or friendship / affection of one person towards another; we also see it as a way to conclude treaties or as a brake on brutality.

Love, friendship presided by the love and respect (φιλία – *philia*) of humans (άνθρωπος – *anthropos*) is not what is now understood by human rights. These refer to a concept related to a particular kind of possession, namely, moral claims and rights that all humans have for the mere fact of being human. Philanthropy, on the other hand, is any act or possession and even as a possession it is in a very different situation in relation to that of human rights. And philanthropy, as a possession, is a personal virtue that as such does not require or imply the possession of human rights by those who benefit from philanthropic acts.

Some people might think that the fact that Athens was during a certain period of time a democracy implies that its citizens had human rights. It is not like this. Athenian democracy was extremely limited, extending only to adult male citizens of a certain status; women, children, and slaves were seen basically as servants; the barbarians (not Greeks) were simply taken as inferior.

Neither in theory nor in practice did the Greek people have a concept of human rights, which is normal given that their psychological presuppositions did not extend reason and dignity equally to the entire human species.

In my opinion, neither Aristotle nor Plato included in their works realities similar to what we understand by human rights, and the scholars who mention them as exponents of the origin of those rights do not take into account that what both philosophers do is simply explain the tradition of natural law. Plato did not settle the equality between men and women, could not believe that the female sex was able to philosophize because the ability to think and know inherited by women in relation to men are different. Even worse, for Plato, women suppose the greatest stage of man's degeneration (physically and mentally) and this thought was reflected in his theory of reproduction: "they -men- sow the seed in the ploughed field of her mob"⁷. In fact, there are many texts by Plato in which the inferiority of the women in comparison to men is well appreciated: the female can not govern like the male; the first bodies that were created were those of

⁷ Republic, V.

men; the man when dying can not reincarnate in a woman but in an animal of his category, etc. One could summarize the thought of Plato in these words: never give up the principle of assigning different types of life to different natures⁸.

Are there more texts by Plato that imply an absolute denial of human rights? Of course. Here are some more examples:

- * Its ideal state is a censorship, including its application to religion, painting, poetry and music.
- * The propaganda is the most remarkable “noble lie”.
- * Each person is born of four different metals, therefore reinforces the division of work according to each subject.
- * The State must be controlled by the philosopher-kings, by those with the necessary knowledge and wisdom based on eternal truths. The philosopher-kings are extracted from the military caste, which receives a special education and select diet and, in this way, they will control the masses, the workers, better than anyone else.
- * Explicit defense of slavery⁹. I think these cases are enough to understand the distance between Aristotle's disciple and human rights.

So far Plato has been paid attention, but what did his teacher Aristotle think? With Aristotle¹⁰ you can already anticipate that nothing changes. Among the unquestionable principles for this philosopher we must pay attention to his conception of man. “Man is by nature a political animal”, “the man in the only animal who has the gift of speech”¹¹; that “man alone has any sense of good and evil” and that “man has reason [...] and man only”. At this precise moment Aristotle's idea that revolves around the theory of nature and its hierarchy has to be remembered: the weak (lower) exists for the powerful's sake (higher)¹². After the birth of animals, plants exist for their benefit, and animals exist for the benefit of man¹³. And he makes it very clear by saying that, in nature, the inferior only and

⁸ Republic, 454 b.

⁹ Republic, 433 d. Laws, 777 b–778 a, 966 b.

¹⁰ See OBARRIO MORENO, J. A. Un estudio sobre la Antigüedad: La apología de Sócrates. 2018, if you want to read a thorough analysis of what was the trial of Socrates that culminated in his death sentence.

¹¹ Politics, 1253a3, 1253a16.

¹² Ideas that expand in Darwin's time.

¹³ Politics, 1256b15.

always exists for the benefit of the superior¹⁴. Evidently, not all humans are the same at the Aristotelian starting point, neither psychologically nor morally, although we all belong to the same species. Some are masters by nature while others are slaves by nature from the moment of their birth and have no power to deliberate. Thus, the superiors are better thanks to the slaves, and the slaves are also better because they have masters. In this way they benefit both because the work necessary to have a good life is provided by slaves. Slaves are incapable of being masters of themselves. It is nature that requires the slave to be governed because he is no better than a tame animal.

The famous philosopher of the Kingdom of Macedonia believes, in addition, that women are in a natural intermediate stage between masters and slaves: she has deliberative powers but has no authority. Children (males) do have deliberative powers and authority, but they are immature. In conclusion, Aristotle recalls that nothing that is contrary to nature is good¹⁵. In words of the same, “the weaker are always asking for equality and justice, but the stronger care for non of these things”.

One could add more Aristotelian thoughts that are absolutely contrary to human rights, such as considering the barbarian peoples slaves, without entering into a distinction between women or men: they are also slaves by nature.

4. ROME

The concept of *humanitas*, for a certain doctrinal position, is usually related to universalism and natural law. Starting from this premise, the Latin expression *ius humanum* was the closest thing to the modern concept of “human rights”¹⁶. This position, above all, finds its basis in the philosopher and jurist Cicero.

According to Bauman, the term *humanitas* denotes an attribute of the human race which, though it was an umbrella term, included meanings such as *clementia*, *moderatio* and *pietas*.

Cicero is one of the first to employ the term in approximately one hundred and fifty occasions in his works, and he believed that *humanitas* can only exist

¹⁴ Politics. 1333a22.

¹⁵ Politics, 1325b10

¹⁶ BAUMAN, R. Human Rights in Ancient Rome. 2000.

once the law has been created (*ius hominum causa constitutum*). However, a problem with this definition of *humanitas* arises: according to Francese¹⁷, *humanitas* is referred to a moral virtue, a disposition towards compassion and empathy towards others. Cicero added to the concept the modern idea of a liberal education with which the philosopher thought that the virtue of *humanitas* was promoted, as it was traditionally understood (and hence our modern concept of “humanities” in the branches of knowledge, in colleges and universities, the idea of a generous education in humanities makes us better people and citizens).

The Roman *humanitas*, like the Greek παιδεία (*paideia*), is an ideal of life and education elaborated through generations and enriched with the sedimentation of several currents of thought. The *humanitas* voice does not have an exact translation in Greek. The *humanitas* of Cicero come to be synonymous with the highest wisdom. In this sense, *humanitas* is, above all, beauty of expression, cultivation of form, contemplation, thought, speculation. The originality of Cicero consists in integrating wisdom into human perfection. Philosophy is thought by him according to the demands of the Roman mentality and therefore, conceived above all as practical philosophy, ethics, politics, religion, element of moral elevation rather than contemplation and guidance of behavior. A concept of moral, *humanitas*, which includes the cultivation of letters, cultivation of the mind, discipline of the passions and conquest of self. The good of human society becomes the supreme law of this political *humanitas*. He also affirms that of all the human duties, the principal ones are the duties to the State. Finally, the concept of political *humanitas* would be incomplete if it were not presented based on human nature.

The *humanitas* most probably did not have, in my opinion, the same meaning of “human rights” for a very simple reason: a virtue is not much the same as a right. If, by way of example, I have the virtue of generosity, it does not mean that you or someone has the right to benefit from my generosity. Or, from another point of view, someone can have rights but not virtues but rather vices. What marks and seals the big difference is that *humanitas* was used to refer to the treatment or disposition towards not only people but also animals.

¹⁷ FRANCESE, C. Ancient Rome in so many words. 2007.

The *ius gentium* can not be used either to prove the existence of a *humanitas* understood as human rights in Rome. As is known there was a *ius civile* (“civil law”) that was applicable to Roman citizens and, on the other hand, a *ius gentium* (“law of nations”) that was universal, as legal practices common to all men; there was also a *ius naturalis* (“natural law”) that was granted to nature, including human nature, by the gods. It is inappropriate to think that the *ius gentium* in Roman law was virtually synonymous with natural law and that the latter gave coverage to human rights.

If we look at Cicero's use of the *ius gentium*, we see how he combines *humanitas* with natural law but is not likely to include the idea of human rights. One of Cicero's most complete writings on natural law takes place in Book I of his *De legibus*. According to the same, the gods gave humans the gift of thinking and reasoning, including a “soul”, all of which created a family relationship between us and the gods. The famous jurist and politician of Arpinum adds that virtue is the same in man and god, with which there are common links between human beings. What is the relationship between this universalism and justice? The relationship is the *ius gentium*. All those who share reason share the “right reason” and this means that we humans must be considered close allies to the gods by right. In conclusion, Cicero defines the *ius gentium* as the right reason in commands and prohibitions; the right is the most right reason, based on nature, that sends things that must be done and forbids the opposite.

In the Book III of *De Republica* Cicero states: “True law is right reason, consonant with nature, spread through all people. It is constant and eternal; it summons to duty by its orders, it deters from crime by its prohibitions” (§ 33). With all that has been mentioned, it can be said that mandates and prohibitions, together with duties and orders, are not the same concepts as rights, and even less so than universal human rights. And to close this issue it is convenient to remember another text of Cicero, in his critique of democracy – Book I, *De Republica* – in which he states that “when everything is done by the people itself, no matter how just and moderate it may be, that very equality is itself, inequitable, in that it recognizes no degrees of status”.

Consequently, the concept of equal dignity was never contemplated in Antiquity. Justice, for this jurist (*De inventione*), is a habit of mind that gives to each his *dignitas* while preserving the common good. It should not surprise us as

the *Pax Romana* of the Republic of Rome requires hierarchy, and hence an inequality in dignity and privileges.

In Book III of his *De Officiis*, which deals with the duties of the human being with respect to natural law, Cicero points out that by respecting those rights, the benefit of the common good is achieved. A clear example is read in (§ 31): in the case of starvation “the necessities of life should be transferred from an inactive and useless person to someone who is wise, good and brave, who, if he were to die, would greatly detract from the common benefit”.

There is no more to remember those sacrificed in the games and the few (or none) citizens who oppose them. It is clear that Cicero did not rise as a staunch defender of the rights of slaves: slaves were both a human being and an object of property. The absence of citizen or political movements that promote the abolition of slavery or the famous games is an obvious reason that inevitably leads us to affirm that the Romans, Cicero among them, did not know or raise the concept of human rights. The reconstruction of the Ciceronian *humanitas* revolves around nature, *ius* and *ratio*. The access to the Ciceronian *humanitas* is manifested in its two aspects: the *honestum* and the *officia*.

If anything Cicero's thought shows us how Romanity, given its eminent practical aspect, far superior to the Hellenic, was exceptionally aware of the practical fruits of theoretical thought, and that distance the notion of *humanitas* against the Greek *paideia*. The notion of *humanitas* corresponds to a quality that emanates from the global computation of a set of metaphysical, anthropological and ethical dimensions. Thus, the aspect of the formation of individuals in the *bonae litterae* is only one of the instruments that help to transform the life of man in human or humanized life, but never *humanitas* itself.

Ulpianus has once mentioned¹⁸ as the jurist “pioneer of human rights”. Obviously, pioneer can mean many things: the pioneer of a concept can only have contributed to the eventual formation of the concept, but without concluding it; or have contributed parts of the concept, but not the concept in its entirety. *Ulpianus* believed in a natural right, but this belief does not imply that the jurist

¹⁸ In the case of Tony Honoré (Ulpian. Pioneer of Human Rights. 2002), Emeritus Regius Professor of Civil Law (Oxford University): “The values of equality, freedom, and dignity, to which human rights give effect, formed the basis of Ulpian’s exposition of Roman law as the law of a cosmopolis”.

adviser to Emperor *Septimius Severus* should be considered the creator of human rights.

Freedom, equality and dignity are essential elements of what is known as human rights. *Ulpianus*, who produces the majority of his legal work under Caracalla¹⁹, presents a Roman law based – according to some authors, such as Honoré – on the belief that all people are born free and equal and all have dignity. Did *Ulpianus* really profess those values? Let's see him attending to each one separately.

* All people are equal.

For reasons that the reader will easily understand, the principle that “all people are equal” was not assumed in ancient Rome either.

Ulpianus states: “*quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt*”. In his conception, by natural right all men are equal, but for civil law slaves are considered as if they did not exist. But what is “equality”, “*aequal*”, “*aequeales*”? It can contain many meanings if something else is not specified and thus equality can be understood as all human beings are equal in species, equal in being sentient, equal in moral worth, or in the mathematical sense of counting as one, etc.

Perhaps *Ulpianus* referred to the second option by saying that “if someone acts unjustly against a slave, but without intending to offend or insult his owner, the magistrate must not leave the offender without punishment, especially if the offender has beaten or tortured the slave. Obviously even an enslavee feels that.” Thus, there is no evidence that *Ulpianus* referred to an equality as a moral value. A clear proof of this assertion is that, however, when referring to the husband and wife, the jurist makes clear equality by not embodying the man to a master and the woman to a slave.

* All people are born free.

Honoré remembers us: “Slavery is the prime example of an institution contrary to nature but recognized by the *ius gentium*, which ‘encroached on’ (*invasit*) the law of nature”.

¹⁹ It is important to remember the granting of Roman citizenship to all the inhabitants of the Empire in 242 AD.

This statement is merely descriptive, not prescriptive. At the time of *Ulpianus* it was thought that slaves were by convention, by bad luck we could say, and not by a bad or inferior genetics as today we could say. Slavery is an institution, therefore, contrary to nature but recognized by the *ius gentium*. The *ius gentium* invades natural law, in effect, and *Ulpianus* does not really believe that all human beings have a natural right not to be enslaved, in line with the Universal Declaration of Human Rights (art. 4), or that even immorality is not freedom. Like Cicero, *Ulpianus* would think that slavery was necessary (I repeat, like all Romans) for the good of Rome. To affirm that every person is born free has to be interpreted in this jurist as that the institution of slavery “attacks” or invades (*invasit*) the natural reason of the slaves, as it happens with the animals to which *Ulpianus* includes as participants within the natural order.

To end with this section it could be added that the right to human freedom, at present, is not something simple since it harbors a set of rights such as freedom of expression, religion or belief, etc. I do not think *Ulpianus* had these notions in mind, honestly. As Tafaro writes²⁰, “[...] los romanos [...] no tuvieron una concepción absoluta de la libertad, ni la concibieron como un don de Dios inalienable. Entendieron, en cambio, que la *libertas* era un valor que debía relativizarse en relación con el contexto histórico de la vida del hombre y la concibieron como una condición del hombre”

* All people possess dignity.

We face the third fundamental value that gives meaning to the field of human rights. *Ulpianus* recognizes degrees in dignity: men have more than women; married women more than concubines; the slaves have it very small or do not have it. In all these examples dignity is present, of course, but it is easy to understand that not all of them reach the same degree of dignity. Currently, dignity is the same in humans and there is no differentiation between more or less. One could say even more about dignity and that it is established prescriptively: “*maior dignitas est in sexu virili*”. Here, *dignitas* can be understood as a moral virtue, reputation, prestige or honor. Roman dignity is not a personal concept that is inalienable to a subject -as it is understood today – but a social construc-

²⁰ TAFARO, S. *Ius hominum causa constitutum. Un derecho a la medida del hombre*. Trad. De J. M. Piquer Marí. 2014, p. 216.

tion that not only extends to an individual in relation to society, but also encompasses, by way of example, a lion in the animal kingdom. To be more clear, a lion would lose its *dignitas* if a lower animal would do something considered unworthy. Even one thing, like a building could have *dignitas* or lose it. In conclusion, it seems to me that it is quite clear that this Roman *dignitas* does not have much to do with the concept elaborated in the area of human rights in the world at the moment according to which all people have equal dignity by the mere fact of being human beings.

6. ROMAN INSTITUTIONS
INFLUENCED BY THE CONCEPT OF *HUMANITAS*
UNDERSTOOD AS A TREATMENT CONSIDERED WITH OTHERS,
BENEVOLENCE, COMPASSION TO OTHER PEOPLE, BENIGNITY.
THE POINT OF DEPARTURE IN THE NATURAL RIGHT

It is obvious that the Roman institutions that mostly received in their regulation the inspiration of *humanitas* understood as seen in the title of this section or as an exponent of the *utilitas* and *benignitas* were those related to the person or to the conflicting interests between them. Actually the *ius* would be something banal, unnecessary without the person. According to Tafaro²¹, “el Derecho Romano supo, en concreto, poner al hombre en el centro de sus intereses y de la regulación jurídica”.

Obviously, an in-depth study on the regulation of each of the institutions that follow is not the purpose of this exhibition because it would become extraordinarily broad. For that reason, I only mention them.

The institutions in which this special attention or care can be seen starting from certain times are some of the ones mentioned below: the *nasciturus*²² (it is considered to be born for all the effects that are favorable²³ to it); the condition of the woman (progresses better over time); the condition of the slaves²⁴; the con-

²¹ TAFARO, S. Op. cit.

²² CATALANO, P. Diritto e persone. Studi sul origine e attualità del sistema romano. Vol. I. 1990. FONTANA, G. Qui in utero sujnt. Concetti antichi e condizione giuridica del nasciturus nella codificazione de Giustiniano. 1994.

²³ See D. 1.5.26.

²⁴ CAVALLINI, E. Legge di natura e condizione dell schiavo. – In: *Labeo*, Vol. 40, 1994. De MARTINO, F. Intorno al origine della schiavitù a Roma. – In: *Labeo*, Vol. 20, 1974. Catón gives us news about food according to slaves (*De Re rustica* 25; 56; 57; 104). Plinius, Nat. Hist. 18.3.7.

dition of the *fili familiae* (the protection of childhood, the passage to puberty²⁵ and the consequent growth, civil or criminal liability²⁶ according to age or the granting of *peculium*); the *matromonium* (its end is procreation); the *divortium*; the *adoptio*; the *familia*²⁷ in collective terms as a group of individuals and the first form of organization of society; the granting of legal capacity and to act (so called at present); the protection of the *furiosus* or other types of subjects with mental problems; the attribution of paternity²⁸, etc.

In the field of obligations is the constant balance between benefits, respect for *conventiones* and *pacta*, the omnipotent presence of the *bona fides* or the shift from personal to patrimonial responsibility, among other regulations.

7. CONCLUSION

The origin of the concept of human rights goes back very vaguely to the recognition of natural right by the Romans, based on rational ideas derived from the nature of things. The acceptance and incorporation of Christianity as the official religion of the Roman State is a clear symptom of the radical transformation of the classical ideology of Roman imperialism, an ideology that had been the basis of its greatness and its long survival. Christianity, which had as universal ideas universalism and individual salvation, was radically opposed to the cult of the emperor as well as other Roman pillars and begins to settle the Christian philosophy in later centuries, philosophy that announces the arrival of certain universal values that should be respected in the laws.

Although the belief in human rights activates the principle of equality, freedom and dignity, this does not mean in any way that the three values mentioned above provide a belief in human rights. In more recent times, documents affirming individual rights were drafted and applied, such as the Magna Carta (1215), the Petition of Rights (1628) and the Habeas Corpus Act (1679).

²⁵ CANTARELLA, E. Famiglia e parentela in Diritto privato romano. Un profilo storico. A cura di A. Schiavone. 2003.

²⁶ BURDESE, A. Sulla capacità intellettuale degli 'impuberes' in diritto romano. – *Archivio Giuridico*, Vol. 150, 1956, p. 31; La ROSA, V. La repressione del furtum in età arcaica. Manus iniectio e dupliane damnum decidere. 1990.

²⁷ FRANCIOSI, V. G. Clan Gentilizio e strutture monogamiche (http://misc.bibl.u-szeged.hu/23262/1/87524_001-119.pdf); PUGLIESE, G. Op. cit.; CATALANO, P. Populus romanus Quirites. 1974.

²⁸ D. 25.3.1.pr.; CAPOGROSSI, L. C. Tollere liberos. – In: *Mélanges de l'école française de Rome*. Antiquité, Vol. 102, 1990, no. 1.

The modern version of human rights has its origin in Western culture and takes shape in the late eighteenth century almost simultaneously in the thirteen English colonies of America, which would soon become an independent federation, the United States, and in the Kingdom of France, which becomes a Republic after the revolution that ended the monarchical regime.

The Declaration of Independence of the United States (Philadelphia, July 4, 1776), contained an enumeration quite close to the modern notion of the Declaration of the Rights of Man and the Citizen: equality of all men, separation of powers, power to the people and their representatives, freedom of the press, military power subordinated to the civil, right to justice or freedom of religious worship.

The translation of this Declaration into the French language had an influence on the elaboration of the Declaration of the Rights of Man and of the Citizen (Paris, 1789) made in the middle of the French Revolution, in such a way that the beginning of its first article is since then a point of reference for the beginning of any declaration regarding human rights: Men are born and remain free and equal in rights.

The contemporary concept of “human rights” can not be found in Greek, Roman or medieval sources.

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ПРАВИЛОТО “*LIBERUM CORPUS NULLAM
RECIPIT AESTIMATIONEM*”
В ЕВРОПЕЙСКАТА ПРАВНА ИСТОРИЯ (НА
АНГЛИЙСКИ ЕЗИК)

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Резюме: Правилото “*Liberum corpus nullam recipit aestimationem*” (тялото на свободния човек не подлежи на оценяване – в паричен смисъл) неколкратно е използвано в Дигестите на Юстиниан (D. 9.1.3, D. 9.3.7). Формулировката е на известния римски юрист Гай. Появява се като отговор на въпроса дали тялото на свободния човек може да бъде предмет на иск за обезщетение. То се различава от тялото на роба, което несъмнено може да бъде обект на парична оценка. Това правило играе важна роля при формирането на разпоредбите за гражданска отговорност за вреди, дори и след като древното робство е престанало да съществува. Много учени юристи го споменават: глосаторите, моралните теолози, естественоправниците, немските пандектисти. Влиянието на това правило се проявява и в съвременното гражданско право.

Ключови думи: тялото на свободния човек; вреди; правни норми; Аквилев закон; глосатори; Leonardus Lessius; Hugo Grotius; Samuel Pufendorf; Samuel Stryk.

THE LEGAL RULE
*LIBERUM CORPUS NULLAM RECIPIT
AESTIMATIONEM*
IN THE EUROPEAN LEGAL HISTORY (ENGLISH
LANGUAGE)

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Abstract: The legal rule *liberum corpus nullam recipit aestimationem* – the body of a free man does not admit of valuation (in monetary terms), is referred to in the Digest of Justinian several times (D. 9.1.3, D. 9.3.7). It is formulated by the famous Roman lawyer Gaius. It emerged as a response to the question of whether the body of a free man may be the subject of a claim for damages. The body of a free man is contrasted to the body of slaves whose value may certainly be subject to monetary valuation. This rule played an important role in the formation of provisions about civil liability for damage even after ancient slavery had ceased to exist. Many legal thinkers have been referring to it; the glossators, moral theologians, natural lawyers, the German *usus modernus Pandectarum*. The influence of this rule is evident also in the contemporary civil legislations.

Keywords: body of a freeman; damages; legal rule; Aquilian statute; glossators; Leonardus Lessius; Hugo Grotius; Samuel Pufendorf; Samuel Stryk.

INTRODUCTION

The legal rule *liberum corpus nullam recipit aestimationem*, no valuation of a freeman's body (in money), obviously has its origins in a society that recognized slavery. The body of a free man is contrasted to the body of a slave whose value may certainly be the subject of monetary valuation. The surprising fact is that the rule had a very great impact also later on, throughout the whole period of European legal history. Its impact is recognizable even nowadays in contemporary positive law.

The casuistic Roman jurisprudence gradually started to formulate more general rules, *regulae*. The famous Roman jurist Paul stressed the inductive character of the rules, emphasizing how the *regulae* were extrapolated from the concrete discussion of particular cases: *Non ex regula ius sumatur, sed ex iure, quod est, regula fiat* (The fragment is found in the Digest book fifty, under title 17, *De diversis regulis iuris antiqui*). The law may not be derived from a rule, but a rule must arise from the law. A *regula* was to be extracted from the law as it is, not the other way round.

In the Middle Ages the new *regulae* were formatted by the mediaeval jurists and canonists. In the process of synthesis and generalization a new deductive phase was embarked upon. The exact scope of the *regula* had to be fixed. This was achieved by listing the cases where the *regula* did not apply. In other words, its application was defined by formulating the exceptions to its application.¹

LIBERUM CORPUS AESTIMATIONEM NON RECIPIT
IN THE DIGEST OF JUSTINIAN

The title in the Digest *De diversis regulis iuris* (D. 50.17.1) contains 211 old Roman legal rules. The rule *liberum corpus aestimationem non recipit* or *liberum corpus nullam recipit aestimationem* is not among them. It was formulated by Gaius and it has survived in several fragments incorporated in the Digest.

¹ STEIN, Peter. *Regulae Iuris: From Juristic Rules to Legal Maxims.*, Cambridge, 1966, p. 131–152; BEZEMER, Kees. The Infrastructure of the Early *Ius Commune*: The Formation of *Regulae* or its Failure. – In: *The Creation of the Ius Commune, From Casus to Regula*. John W. Cairns, Paul J. du Plessis, Ed. Edinburgh, 2012.

All the texts are situated in the context of delicts and quasidelicts. The first fragment refers to *actio de pauperie*. The question was whether this action could be applied when a *pater familias* or a son in his potestas was wounded by a four-footed animal:

D. 9.1.3. Gaius libro septimo ad edictum provinciale

Ex hac lege iam non dubitatur etiam liberarum personarum nomine agi posse, forte si patrem familias aut filium familias vulneraverit quadrupes: scilicet ut non deformitatis ratio habeatur, cum liberum corpus aestimationem non recipiat, sed impensarum in curationem factarum et operarum amissarum quasque amissurus quis esset inutilis factus. [emphasis mine – M. P.]

There is now no doubt that under this law an action can be brought even in the name of free persons if, for example, a quadruped animal wounds the head of a household or a son in power, but that is not to say that disfigurement can be taken into account, **because the body of a free person is not susceptible of valuation.** Nevertheless, account can be taken of the expenses of medical treatment and the loss of employment and of the opportunity of taking a job which were caused by the party being disabled.

The answer is positive (*non dubitatur etiam liberarum personarum nomine agi posse*). The wounded person may claim the medical expenses and the loss of income which he did not earn because of his being disabled. He cannot claim the damage for disfigurement (scars, limbs etc.) because the body of a freeman is not susceptible of valuation².

Another Gaius' text refers to the case where a freeman was injured by an object thrown down or poured out of the building. The legal question was what the injured person could claim by the *actio de effusis vel deiectionis*. The answer is the same as in the previous case:

D. 9.3.7 Gaius libro sexto ad edictum provinciale:

Cum liberi hominis corpus ex eo, quod When a freeman sustains bodily injury by

² However, in Gaius' text from the Digest (D. 41.3.9), *homo liber (bona fide serviens)* is considered to be *res corporalis*. Andrea Triscuoglio argues: „Gaio abbia voluto semplicemente richiamare la circostanza che il corpo umano è ontologicamente un'entità materiale, una *res corporalis*, senza l'intenzione di conferire a tale sintagma particolari connotazioni giuridiche. Il corpo dell'uomo vivente è eventualmente qualificabile, dal punto di vista ontologico, come una *res materiale*; dal punto di vista giuridico, per contro, non è collocabile in alcuna categoria di *res*, menche meno nella categoria delle *res extra commercium*.” – TRISCIUOGGIO, Andrea. Il corpo umano vivente dopo la nascita: osservazioni storico-comparatistiche. – In: *Modelli teorici e metodologici nella storia del diritto privato*. Vol. 2, Napoli, Jovene, 2006, p. 391. Available at <https://iris.unito.it/retrieve/handle/2318/101641/1853/Corpoumano2006.pdf>

deiectum effusumve quid erit, laesum fuerit, iudex computat mercedes medicis praestitas ceteraque impendia, quae in curatione facta sunt, praeterea operarum, quibus caruit aut cariturus est ob id, quod inutilis factus est. Cicatricium autem aut deformitatis nulla fit aestimatio, quia liberum corpus nullam recipit aestimationem. [emphasis mine – M.P.]

something which is thrown down or poured out, the judge takes into account the cost of medical attendance and other expenses incurred in his recovery as well as the value of any employment which he lost or will have to lose because of his disability. However, no account is taken of scars or disfigurement, **because the body of a free man is not susceptible of valuation.**

In the next fragment, a freeman was killed by something which was thrown down or poured out of the building. There is again no *aestimatio corporis* in the case of killing a freeman. The condemnation of fifty aurei is a fine, poena, composition. It can be claimed by the closest relatives of the man killed or even by any citizen (*actio popularis*).

D. 9.3.1.5. Ulp. 23 ad edictum

Sed cum homo liber periit, damni aestimatio non fit in duplum, quia in homine libero nulla corporis aestimatio fieri potest, sed quinquaginta aureorum condemnatio fit. [emphasis mine – M. P.]

(When a freeman is killed, there is no doubling of the amount of loss, **because in the case of a freeman no valuation of his body is possible**, but the condemnation will be for fifty aurei).

LEX AQUILIA ON WOUNDING OF A FREE PERSON

In the context of the lex Aquilia, the rule *liberum corpus aestimationem non recipit* is not mentioned directly. The famous early Roman statute sanctioned mainly the killing and wounding of slaves, however, not the killing or wounding of free persons. Protection is provided for the owner for his most valuable assets, his slaves and *pecora*. The first chapter deals with the killing of slaves and fourfooted beasts of pasture – *pecora*,³ and the third chapter with their wounding, *inter alia*.

Roman jurists commented a great deal on the estimation of *damnum* suffered by the owner (*erus*) as a result of the killing or wounding of his slaves or animals of pasture. However, the question of wounding of a freeman was raised in the following situation.

³ *Gaius, D. 9.2.2.pr.–1. Si quis servum servamve alienum alienamve quadrupedemve pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes ero dare damnas esto.*

A son in power is wounded. His eye was damaged.⁴ Can his father sue with *actio legis Aquiliae*? What can he claim?

D. 9.2.7.pr. Ulp. libro 18 ad edictum

Qua actione patrem consecuturum ait, quod minus ex operis filii sui propter vitiatum oculum sit habiturus, et impendia, quae pro eius curatione fecerit.

And in this action the father will recover the amount of his loss of prospective profit from his son's services, of which he is deprived through the eye being damaged, and also the expenses incurred for medical attention.)

If a son in power is wounded, his father can sue with *actio legis Aquiliae* claiming the amount of salaries his son will lose and the medical expenses. It can be concluded *a contrario* that he cannot sue for the disfigurement of the body (eye) because this is not *damnum*, material loss of the father.

Now, a freeman (*sui iuris*) is wounded:

D. 9.2.13.pr. (Ulp. libro octavo decimo ad edictum)

Liber homo suo nomine utilem Aquiliae habet actionem: directam enim non habet, quoniam dominus membrorum suorum nemo videtur.

For an injury to himself a freeman has on his own account an *actio utilis* after the manner of the Aquilian action. He cannot have the direct action under the *lex* because no one is deemed to be the owner of his own limbs.

The freeman can bring the *actio legis Aquiliae utilis* and not a direct one. The main obstacle was the word *erus* in the Aquilian statute, that is to say, *dominus*. The injured free man cannot be considered the owner of his body – *quoniam dominus membrorum suorum nemo videtur*. That is why the Aquilian action *stricto sensu* cannot be applied.

⁴ Compare also D. 9.2.5.3 (Ulpianus 18 ad edictum): Si magister in disciplina vulneraverit servum vel occiderit, an Aquilia teneatur, quasi damnum iniuria dederit? Et Iulianus scribit Aquilia teneri eum, qui eluscaverat discipulum in disciplina: multo magis igitur in occiso idem erit dicendum. Proponitur autem apud eum species talis: sutor, inquit, puero discenti ingenuo filio familias, parum bene facienti quod demonstraverit, forma calcei cervicem percussit, ut oculus puero perfunderetur. Dicit igitur Iulianus iniuriarum quidem actionem non competere, quia non faciendae iniuriae causa percusserit, sed monendi et docendi causa: an ex locato, dubitat, quia levis dumtaxat castigatio concessa est docenti: sed lege Aquilia posse agi non dubito. About this text see Die VERLETZUNG Freier und die "lex Aquilia". – In: *Studia et Documenta Historiae et Juris* (SDHI), Vol. 28, 1962, S. 1–13; SCHUBERT, Max. Der Schlag des Schusters. – In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* (ZSS), Vol. 92, 1975.

GLOSSATORS AND THE GLOSS *GLORIAE CAUSA*

Lex Aquilia was not applied in the case of killing a freeman in classical Roman law.⁵ The glossators started to examine the possibility of its application even in the case of killing a freeman.⁶ The Accursian gloss *Gloriae causa* is a commentary of the famous Digest text D. 9.2.7.4 which is about the case of killing a freeman in a public contest⁷:

*Accursius, gloss Glorae causa, lex Qua
actione § Si quis in collucatione,
(D. 9.2.7.4)*

*Item si in publico certamine aliquo libero
occiso cessat Aquilia, ut hic dicit, an si alibi
occidatur vel vulneretur, habet locum pro
libero homine? Bul. Quod non: et pro eo
infra, eodem, l. Huic, § si. (D. 9.2.15.1) et
infra, de edil. edic., l. Qua vulgo
(D. 21.1.42), quibus dicitur **non fieri
hominis liberi mortui estimationem**,
secundum R. et Az. dicit quod habet locum
etiam libero homine mortuo et vulnerato
utilis Aquilia, ut infra, eodem, l. Liber
homo, in princi (D. 9.2.13.pr.). Et hic
sumitur argumentum a contrario sensu. Et
supra, titulo I, l. Ex hac (D. 9.1.3). Et quod
in legibus a Bul. inductis dicitur, intelligas
**pro estimatione ipsius corporis liberi
hominis, pro qua non agitur lege
Aquilia, sed ad cetera damna sic.**
[emphasis mine – M. P.]*

If a freeman is killed in a public contest, lex Aquilia will not apply. The glossators went one step further formulating a hypothetical question using the *argumentum a contrario*. If a freeman is killed or wounded in another place, would the solution be the same (*an si alibi occidatur vel vulneretur, habet locum pro libero homine*)? As Accursius informs us, this was a matter of controversy between Bulgarus, on the one hand, and Rofredus and Azo, on the other. Bulgarus gave a negative answer, while Rofredus and Azo allowed *actio legis Aquiliae utilis* in the same case, not for the *aestimatio corporis*, in view of our rule – *non fieri hominis liberi mortui estimationem*, but for *cetera damna*. It was Azo's view that prevailed in the long run.

⁵ FEENSTRA, Robert. L'application de la loi Aquilia en cas d'homicide d'un homme libre, de l'époque classique à celle de Justinien. – In: *Mélanges Felix Wubbe*, Fribourg, 1993, p. 144; WITTMANN, Roland. Die Körperverletzung an Freien im klassischen römischen Recht. München, 1972 (= Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte, Vol. 63), S. 98 etc.

⁶ FEENSTRA, Robert. L'actio legis Aquiliae utilis en cas d'homicide chez les glossateurs. – In: *Maior viginti quinque annis. Essays in commemoration of the sixth lustrum of the Institute for legal history of the University of Utrecht*. J. E. Spruit, Ed. Assen, 1979, p. 45–65. In the *Glossa ordinaria* freeman is an example of a *res extra commercium* by nature. See TRISCIUOGGIO, Andrea. Op. cit., p. 399.

⁷ D. 9.2.7.4. *Si quis in collucatione vel in pancratio, vel pugiles dum inter se exercentur alius alium occiderit, si quidem in publico certamine alius alium occiderit, cessat Aquilia, quia gloriae causa et virtutis, non iniuriae gratia videtur damnum datum. Hoc autem in servo non procedit, quoniam ingenui solent certare: in filio familias vulnerato procedit. Plane si cedentem vulneraverit, erit Aquiliae locus, aut si non in certamine servum occidit, nisi si domino committente hoc factum sit: tunc enim Aquilia cessat.*

Leonardus Lessius (1554–1623) and the moral theology

The moral theologians from Salamanca⁸, the followers of Thomas Aquinas, developed the doctrine on restitution.⁹ Leonardus Lessius is one of the most famous theologians from the Low Countries, Jesuit from Antwerp, professor of theology at the University of Louvain. In Lessius' great work entitled *On Justice and Right (De iustitia et iure)* he discussed moral and legal problems within the framework of a systematic exposition on property, torts and contracts.¹⁰ For moral theologians, restitution is a moral, not a legal obligation¹¹. It is an emanation of commutative justice (*restitutionem esse opus externum iustitiae commutativae*)¹². It is an obligation in the court of conscience, so called *forum internum* or *forum conscientiae*. Restitution leads to the forgiveness of sins and to the salvation of the soul. Discussing the question whether restitution is necessary in the case of the death or wounding of a free person, Lessius argues:

And even if it is necessary to give money in restitution for the life of a slave or an animal; **in the court of conscience** (*forum conscientiae, forum internum*) **nothing has to be paid for the life, limb or scar of a freeman**, Because the life of a slave or an animal is estimated in terms of a price, and can be compensated for in accordance with equity: therefore, for the life (of a slave or an animal) we pay only the highest amount for which they can be sold; for mutilation or scarring, the highest price for which they could have been sold had they not been injured.

De iustitia et iure, lib.2. cap. 9. dubit. 23. num. 141–142

⁸ The founder was Francisco de Vitoria (1492–1546). The most famous members were Domingo de Soto (1494–1546), Martín de Azpilcueta alias doctor Navarrus (1492–1586), Luís de Molina (1535–1600), Gabriel Vázquez (1549–1604), Diego de Covarruvias y Leyva (1512–1577), Francisco Suárez (1548–1617) – Jan Hallabek (met medewerking van Harry Dandorp en Hylkje de Jong. See HALLEBEEK, Jan. Lijf ende Goedt. De juridische bescherming van de menselijke persoon en diens vermogen. Een schets van de westerse rechtsgeschiedenis. Amsterdam, VU University Press, 2014, p. 138.

⁹ POLOJAC, Milena. Akviljev zakon i pravna kultura. Beograd, 2015, p. 196–220.

¹⁰ *De iustitia et iure ceterisque Virtutibus Cardinalibus, Libri Quatuor, Ad 2.2. D. Thomae a quaest. 47. usque ad q. 171. Auctore, Leonardo Lessio e Societate Iesu. S. Th. In Academia Louaniensi Professore. Editio quarta, auctior et castigatior. Antverpiae, M.DC.XVII. (1617). Ad 2.2. D. Thomae a quaest. 47. usque ad q. 171.*

¹¹ DOLEZALEK, Gero. Moral Theologians' Doctrine of Restitution and Its Juridification in the Sixteenth and Seventeenth Centuries. – In: *Acta Juridica/Unjustified Enrichment*, University of Cape Town, Vol. 104, 1992, 104, p. – 104–114.

¹² *De iustitia et iure, lib. 2. cap.7. dubit. 4. num. 16.*

Etsi pro vita servi, vel animalis necessario restitutio pecuniaria sit facienda; tamen pro vita, membro, vel cicatrice hominis liberi, nihil in conscientia necessario deberi. Quia vita servi & animalis pretio aestimantur, quod ad aequalitatem rependi potest: unde pro horum vita tantum soluendum, quanti plurimi vendi poterant: pro mutilatione & cicatrice, quanti pluris venderentur, si illaesa fuissent.)

Proceeding with his arguments why restitution is not necessary for the life, limb or scars of a freeman, he says:

Ratio est, quia haec damna nullo pretio sunt aestimabilia; sunt enim in bonis, quae supremum locum inter bona humana tenet; nec quidquam est in hominum potestate, quod his censeatur aequivalens: unde per pecuniam non potest fieri compensatio. Itaque pro his satis est poenitentia coram Deo...

The reason is, that those losses cannot be evaluated in terms of a price; these are goods, that have the highest place among human goods and it is not in the human power to decide what would be the equivalent (for such goods). Therefore it is not possible to provide for monetary compensation. Penitence before God would be enough in this case, with a request for indulgence because of the misdeed.

Hugo Grotius (1583–1645)

The famous Dutch jurist Hugo Grotius was a humanist whose philosophy of natural law had a major impact on the development of seventeenth century legal and political thought.

Hugo Grotius was certainly the most famous student of the University of Leiden. He entered the Leiden Law Faculty at the age of eleven. He completed his studies at Orleans and received his doctoral degree at the University of Orleans at the age of fifteen. He was largely influenced by French humanist Hugo Donellus¹³ and by the Spanish natural law school and the moral theologians from Salamanca.

He published his most famous work *De Jure Belli ac Pacis* (The Law of War and Peace) in Paris, in 1625, which is considered to be the basis of international law. However, the book is important also for the private law. Chapter 17 of the 2nd book is entitled *De damno per iniuriam dato et obligatione quae inde oritur*. The title strongly refers to the famous Roman private delict *damnum iniuria*

¹³ „Although not taught directly by Donellus, he was certainly influenced by his teaching.“ – STEIN, Peter. Roman law in European history. Cambridge, 1999, p. 98.

datum based on the *lex Aquilia*.¹⁴ In this chapter Hugo Grotius defined the *maleficium*¹⁵ as a private delict in general, which is considered to be one of his great contributions to the development of private law concepts. He also defined *damnum*¹⁶. In the case of an unlawfull and unjust killing of a freeman, it is obvious that the murderer is criminally liable. However, the question is whether the murderer should pay damages on the grounds of his *maleficium i.e. obligatio ex maleficio*:

De iure belli ac pacis 2.17.13

Homicida iniustus tenetur solvere impensas si quae factae sunt in medicos, et iis quos occisus alere ex officio solebat, puta parentibus, uxoribus, liberis, dare tantu, quantum illa spes alimentorum, ratione habita aetatis occis, valebat. Vitae autem in libero homine aestimatio non fit; secus in servo qui vendi potuit. [emphasis mine – M. P.]

A murderer is obliged to pay the medical expenses, and the costs of alimentation to persons who are entitled by the law to be supported by the deceased, like for instance parents, wife, children. It shall not be higher than the amount which would have been received by the supported persons from the deceased if he were alive. **For the life of a freeman, however, there is no estimation, like in the case of a slave that can be sold.**

The costs of alimentation were not discussed by the Roman jurists. It was a new development achieved in the period of the *ius commune*.¹⁷

In the case of wounding of a free person he can claim the medical expenses and the loss of income which he failed to earn because of being disa-

¹⁴ POLOJAC, Milena. Škola prirodnog prava, Hugo Grocije i Akvilijev zakon – De iure belli ac pacis 2.17. – In: *Perspektive implementacije evropskih standarda u pravni sistem Srbije*. Zbornik radova, knjiga III (priredio prof. dr Stevan Lilić). Beograd, 2013, p. 143–153. POLOJAC, Milena. Akvilijev zakon i pravna kultura, cit., p. 221–237.

¹⁵ *De iure belli ac pacis*, 2.17.1: *Maleficium hic appellamus culpam omnem, sive in faciendo, sive in non faciendo, pugnantly cum eo quod aut homines comuniter, aut pro ratione certae qualitatis facere debent. Ex tali culpa obligatio naturaliter oritur si damnum datum est, nempe ut id resarciatur.*

¹⁶ *De iure belli ac pacis*, 2.17.2: *Damnum forte a demendo dictum, est το ἐλαττον, cum quis minus habet suo, sive illud suum ipsi competit ex mera natura, sive accedente facto humano, puta dominio, aut pacto, sive ex lege. Natura homini suum est vita, non quidem ad perdendum, sed ad custodiendum, corpus, membra, fama, honor, actiones proprie.*

The strong influence of Hugo Donellus is evident in the list of „goods“ which belong to every man by nature – *vita, corpus, membra, fama, honor, actiones proprie*. *Hugonis Donelli Opera omnia. Commentariorum de iure civili, tomus quartus, cum notis Osualdi Hilligeri*, Florentiae, MDCCCXLII (1842). STEIN, Peter. Donellus and the origins of the modern civil law. – In: *Mélanges Felix Wubbe*, Fribourg, 1993, p. 146; FEENSTRA, Robert. Grotius' doctrine of liability for negligence: its origin and its influence in Civil Law countries until modern codification. – *Negligence. The Comparative Legal History of the Law of Torts*. Eltjo J. H. Schrage, Ed. Berlin, 2001, p. 130 ss.

¹⁷ Kaufmann, Horst, *Rezeption und usus modernus der actio legis aquiliae*. Köln ; Graz, 1958 (= *Forschungen zur neueren Privatrechtsgeschichte*, Bd. 5). Köln ; Graz, 1958, S. 34 ff.

bled. He cannot claim the damage for disfigurement, because the body of a freeman is not susceptible of valuation:

De iure belli ac pacis, 2.17.14

Qui mutilavit, similiter tenebitur ad impensas & ad aestimationem ejus quod jam, qui mutilatus est, minus poterit lucrari. Sed sicut ibi vitae, ita & hic cicatricis in libero homine aestimatio non fit. De conjectione in carcerem idem dicendum.

Samuel Pufendorf (1632–1694)

Famous German *jus naturalist* was strongly inspired by Hugo Grotius¹⁸. He used the same example of a murderer and his obligation *ex maleficio* to pay the medical expenses, and the costs of alimentation. The text is very similar in terms of its content and wording to that of Grotius:

*De iure naturae et gentium, 3.1.7 (De reparatione exemplum in homicida)*¹⁹

Homicida injustus tenetur solvere impensas, si quae factae sunt in medicos; & iis, quos occisus alere ex officio, obligationis perfectae vim habente, solebat, puta parentibus, uxori, liberis, (non si quos ex misericordia alebat, egenis) tantum dare, quantum valebat illa spes alimentorum habita ratione non tantum facultatum occisi, sed & aetatis tam hujus quam alumnorum. Modum computandi alimenta docet l. 68. D. ad L. Falcidiam.

Pufendorf explained the rule *liberi hominis vita aestimationem non habet*²⁰ comparing the body of a freeman with that of a slave. Unlike free persons, slaves belong to their master, they are *res in commercium*, they have their monetary price, like cattle, admitting, though, that this is not in accordance with *humanitas* (*ab humanitate alienum, servum ad pecoris modum aestimari*).

In the case of wounding of a free person, the delinquent is obliged to pay the costs of medical attendance and other expenses incurred in his recovery, as well as the value of any employment which he lost or will have to lose because of his disability. (*Qui mutilavit, similiter tenebitur ad impensas in vulnus curandum factas, & ad aestimationem ejus, quod jam, qui mutilatus est, minus lucrari potest*). However, he adds that, in the case of an unmarried female virgin

¹⁸ WIEACKER, Franz. *Privatrechtsgeschichte der Neuzeit*. Göttingen, 1952; WIEACKER, Franz. *A History of Private Law in Europe*. Transl. Tony Weir. New York, 1995, repr. 2003, p. 244; POLOJAC, Milena. *Akvilijev zakon i pravna kultura*, cit., p. 238–250.

¹⁹ PUFENDORF, Samuel. *Samuelis Puffendorffii De iure naturae et gentium libri octo*. Vol. 1. Oxford, London, 1934, the photographic reproduction of the edition from 1688.

²⁰ *De iure naturae et gentium 3.1.7: Caeterum liberi hominis vita aestimationem non habet; & si haberet; non est, cui illa exsolvi posit. Nam ad propinquos ejus vita non pertinet, sed interest tantum ipsorum, ut iste vivat; adeoque eo quod interest praestito, aestimationem vitae postulare hi nequeunt.*

who was wounded, scars or disfigurement are, notwithstanding, taken into account, because her beauty is a kind of dowry, and scars and deformities diminish her prospects of a good marriage. (3.1.8: *Imo & recte aestimatur deformitas illata per vulnus faciei virginis, innuptaeque foeminae, cui saepe dotis instar est oris gratia.*)

Samuel Stryk (1640–1710)

The whole lengthy period in the European legal history called *Usus modernus Pandectarum* was named after the book by German jurist Samuel Stryk.²¹ His approach to law was practical rather than theoretical. He compares Roman law with the *ius commune* of his time which was applied in German courts. It was a specific mixture of German customs and Roman legal rules. The controversial question was whether one could also claim the so called Schmerzengeld in addition to the medical expenses and lost salaries in case of wounding. A new development, compared to antique Roman law, was that in German courts one could claim so called *pecunia doloris* in the case of wounding. Samuel Stryk is not prepared to grant so called *pecunia doloris*, especially not on the grounds of the *lex Aquilia*. He referred to the judges who relied on it, as ignorants, *indoctos Rabulas forenses*.

Usus modernus pandectarum, 9.2.10

*De pecunia doloris § X: Hoc quoque ad usum fori pertinet, quod is, qui alterum vulneravit, non tantum ad impensas Medicorum, & mercedem operarum, quibus caruit & cariturus est, teneatur, sed simul in certam pecuniam pro pensando dolore zu einem gewissen Schmerzengelde condemnetur, (vid. Struv., Carpz.) de cujus iustitia merito dubitari poterat. Certe doloris aestimationem per se nullam esse posse, unusquisque fatebitur? **Cum enim vulnera ipsa aestimationem in libero homine non recipiant, nec dolor ex vulneribus ortus aestimari poterit.** Unde errare indoctos Rabulas forenses, quando in libello actionis L. Aquiliae für empfangene Schmerzen und Schaden einen Ubtrag begehren. [emphasis mine – M. P.]²²*

FINAL REMARKS

The article highlights the fact that law is a cultural phenomenon and emphasises the importance of historical heritage in the creation of patterns of legal

²¹ POLOJAC, Milena. Akvilijev zakon i pravna kultura, cit., p. 251–266.

²² SAMUELIS Strykii Specimen usus moderni Pandectarum (ad libros V. Priores). Tom I. 8. ed., revisa et emendata. Halae Magdeburgicae, 1738.

reasoning. The legal rule *liberum corpus nullam recipit aestimationem* – the body of a free man does not admit of valuation (in monetary terms), is referred to in the Justinian Digest several times (D. 9.1.3, D. 9.3.7). It was formulated by the famous Roman lawyer Gaius. It emerged in response to the question of whether the body of a free man may be the subject of a claim for damages. The body of a free man is contrasted to the body of slaves whose value may certainly be subject to monetary valuation. This rule played an important role in the formation of provisions about civil liability for damage even after ancient slavery had ceased to exist. Many legal thinkers have been referring to it, the glossators, moral theologians, natural lawyers, the German *usus modernus Pandectarum*. The influence of this rule is evident also in contemporary civil legislations, for example, in the Serbian Law of Contracts and Tort, Articles 193–195.²³

²³ “III. PARTICULAR PROVISIONS ON REDRESSING PROPERTY DAMAGE IN CASE OF DEATH, BODILY INJURY AND HARM TO HEALTH
Article 193 Salary Lost and Expenses of Medical Treatment and Funeral
(1) Whoever causes another person's death shall be liable to reimburse the usual expenses of that person's funeral
(2) He shall be also liable to reimburse expenses of that person's medical treatment for injuries inflicted, as well as other expenses relating to medical treatment, including the salary lost due to disability for work.
Article 194 Right of a Dependent of the Deceased
(1) A person who was supported or regularly assisted by the deceased, as well as the one entitled by law to request maintenance from the deceased, shall be entitled to damages for loss sustained by the loss of support, or assistance.
(2) Such loss shall be redressed by paying annuities the amount of which shall be established by taking in consideration all the circumstances of the case, but which shall not be higher than the amount which would have been received by the person sustaining damage from the deceased if he were alive.
Article 195 Redressing Damage In Case of Bodily Injury or Damage to Health.
(1) One who inflicts to another bodily injury or impairs his health, shall be liable to reimburse his medical expenses, as well as other related necessary expenses, including recovery of the salary lost due to inability to work during medical treatment.
(2) Should the injured person due to total or partial disability lose his salary, or should his needs become permanently increased, or should possibilities of his further development and advancement be destroyed or reduced, the person liable shall pay to the injured one specific annuities as damages for such loss.”

**МОТИВИТЕ
НА ЕВРОПЕЙСКИЯ СЪД
ПО ПРАВАТА НА ЧОВЕКА
ПО ДЕЛОТО *VOUYID V. BELGIUM*
И ТЕХНИТЕ КОРЕНИ
В РИМСКАТА
И В ЮДЕО-ХРИСТИЯНСКАТА ТРАДИЦИЯ (НА
БЪЛГАРСКИ ЕЗИК)**

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Резюме: През 2015 г. ЕСПЧ постанови решение по делото *Vouyid v. Belgium*, което до известна степен бе изненадващо за мнозина. Съдът прие, че шамарите по лицето, причинени на две лица по време на полицейско задържане, представляват нарушение на чл. 3 от Конвенцията за правата на човека и основните свободи. Преди това решение можеше да се предполага, че подобни леки посегателства няма да успеят да преминат минималния праг на суровост, за да бъдат квалифицирани като нарушения на Конвенцията. Според Съда обаче човешкото лице изразява индивидуалността на човека и неговата социална идентичност и всяко посегателство срещу него, което не е било безусловно необходимо, трябва да бъде третирано като унижително. Мотивите на Съда почиват на съвременното разбиране за човешкото достойнство. Тази статия обаче се обръща към по-далечните корени на разбирането за човешкото достойнство, които могат да се проследят до древноримската концепция за *humanitas* и юдео-християнското виждане за човека, създаден по Божия образ и подобие. Въпреки че в тези далечни времена насилието и жестокостта спрямо друго човешко същество са били чести явления, именно тогава се появяват идеите, които стоят в основата на съвременното разбиране за човешкото достойнство.

Ключови думи: права на човека; унижително отношение; човешко достойнство; Европейска конвенция за защита на правата на човека и основните свободи; римско право; *humanitas*; юдео-християнска традиция.

THE EUROPEAN COURT OF HUMAN RIGHTS 'S
REASONING
IN THE CASE OF *BOUYID V. BELGIUM*
AND ITS ROOTS IN THE ROMAN
AND JUDEO-CHRISTIAN TRADITIONS
(BULGARIAN LANGUAGE)

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Abstract: In 2015, the ECHR made a decision in *Bouyid v. Belgium* case that was, to a certain extent, surprising. The Court accepted that the slapping on the faces of two detainees by police officers was a violation of Art. 3 ECHR as it constitutes degrading treatment. Until then, it could be speculated that such minor offenses would not reach the threshold of severity to qualify as a violation of the Convention. However, according to the Court, the person's face expresses his individuality and when an assault on him is not strictly necessary, it constitutes a degrading treatment. This reasoning is based on the modern understanding of human dignity. This report, however, turns to its more distant roots, which can be found in the Roman concept of *Humanitas* and in the Judeo-Christian understanding of man created in the image of God. Although in these remote times violence against another human being is far more likely to be justified, it was then when the ideas emerged which are the key to a contemporary understanding of human dignity.

Keywords: European Convention on Human Rights; degrading treatment; human rights; *Humanitas*; human dignity.



Френският философ Реймон Арон отбелязва като предупреждение към изследователите на миналото: „Ако [изследователят] използва своята собствена концептуална схема, той ще схване чуждото общество по друг начин, по какъвто самото то не се е схващало, същевременно с това ще изопачи значението му (най-малкото защото той не го разбира по-добре, отколкото то самото се е разбирало)“²⁴. Действително, за изследователя е трудно да излезе от собствената си концептуална рамка и затова несъмнено има риск съвременните правни разбирания да изкривят правния анализ на миналото. Още повече това важи за минало, което е толкова отдалечено от днес, колкото е Древният Рим. Затова, въпреки че авторитетът на римското право често провокира изследователите да търсят в него аналози на съвременни правни институти и понятия, към това трябва да се подхожда внимателно и да се удържат римскоправните концепции в техния правилен контекст и епоха. С тази предварителна уговорка в статията са изложени някои, провокирани от едно скорошно решение на Европейския съд по правата на човека (ЕСПЧ), виждания за древните корени на съвременното разбиране за човешкото достойнство.

През 2015 г. ЕСПЧ постанови до известна степен изненадващо решение по делото *Bouyid v. Belgium*²⁵. Голямата камера на Съда в Страсбург трябваше да отговори на въпроса дали шамарите по лицето на двама души, единият от които непълнолетен, по време на полицейско задържане, са в нарушение на чл. 3 от Конвенцията за защита на правата на човека и основните свободи (известна с абривиатурата ЕКПЧ), който предвижда, че „Никой не може да бъде подложен на изтезания или нечовешко или унижително отнасяне или наказание.“. Отменяйки произнесеното по-рано решение на Камарата, което бе в обратен смисъл, Голямата камера реши с 14 гласа срещу 3, че е допуснато нарушение на чл. 3 от ЕКПЧ, изразяващо се

²⁴ АРОН, Р. Въведение. – В: *Макс Вебер*. Ученият и политикът. София, 2000, с. 30.

²⁵ *Bouyid v. Belgium* (2015), GC, App. No 23380/09, достъпно на <https://www.legal-tools.org/doc/12587a/pdf/>, последно посетен на 21 ноември 2018 г.

в унизително отношение спрямо жалбоподателите от страна на представители на белгийската полиция.

Ключовият въпрос, по който се разминаха мненията на двете инстанции на Европейския съд, се отнасяше до т.нар. тест за „минимално ниво на суровост“. Това е критерият, възприет от Европейския съд, чрез който той оценява дали определено деяние представлява нарушение на чл. 3 от ЕКПЧ. Тази оценка зависи от обстоятелствата по делото, като например продължителността на малтретирането, физическите и психическите му последици у пострадалия, а в някои случаи зависи от пола, възрастта и здравословното му състояние²⁶. Други фактори, които повлияват оценката на този въпрос, са целта на малтретирането и мотивите за извършването му²⁷ (липсата на цел да се унижи пострадалият обаче не е достатъчна, за да изключи нарушение на чл. 3 от ЕКПЧ²⁸). От значение са и обстоятелствата, при които е извършено малтретирането, като например атмосфера на повишено напрежение и емоции²⁹. Малтретирането, което достига изискуемия праг на суровост, обикновено включва телесна повреда и силни физически или психически страдания. Дори при липсата им обаче е възможно да се оценят като унизително отнасяне и съответно да попаднат в кръга на забраната по чл. 3 от ЕКПЧ деянията, които унижават личността, показват липса на уважение към човешкото достойнство или предизвикват чувства на страх, мъчителни усещания или чувство на малоценност, способни да сломят моралната и физическа съпротива на лицето³⁰. Трябва да се подчертае, че за Съда може да се окаже достатъчно пострадалият да се е почувствал унижен в собствените си очи, дори това да не е изглеждало така в очите на другите³¹.

²⁶ *Ireland v. the United Kingdom* (1978), par. 162; *Jalloh v. Germany* (2006), GC, par. 67; *Gäfgen v. Germany* (2010), GC, par. 88; *El-Masri v. FYROM* (2012), GC, par. 196; *Svinarenko and Slyadnev v. Russia* (2014), GC, par. 114.

²⁷ *Aksoy v. Turke* (1996) par. 64; *Egmez v. Cyprus* (2000), par. 78; *Krastanov v. Bulgaria* (2004) par. 53; *Gäfgen v. Germany*, *Ibid.*, par. 88; *El-Masri*, *Op.cit.* par. 196.

²⁸ *V. v. the United Kingdom* (1999), GC, par.71; *Svinarenko and Slyadnev v. Russia*, *Ibid.*, par. 114.

²⁹ *Selmouni v. France* (1999), GC, par. 104; *Egmez v. Cyprus*, *Ibid.*, par. 78; *Gäfgen v. Germany*, *Ibid.*, par. 88.

³⁰ *Vasyukov v. Russia* (2011), par. 59; *Gäfgen v. Germany*, *Ibid.*, par. 89; *Svinarenko and Slyadnev v. Russia*, *Ibid.*, par. 114; *Georgia v. Russia* (2014), GC, par. 192.

³¹ *Tyrer v. the United Kingdom*, (1978), par. 32; *M.S.S. v. Belgium and Greece* (2011), GC, par. 220.

Въпросът трябва да бъде разглеждан и в светлината на обстоятелството, че забраната за изтезания, нечовешко и унижително отнасяне или наказание по чл. 3 от ЕКПЧ въплъщава една от най-важните ценности на демократичното общество и по тази причина, за разлика от други права по Конвенцията, забраната е абсолютна – не е поставена в зависимост от доброто поведение на пострадалото лице и не са предвидени изключения при прилагането ѝ дори в борбата с тероризма или организираната престъпност. Този характер на правата по чл. 3 от ЕКПЧ ги отличава от други права като например правото на живот, свободата на изразяване и пр., за които Конвенцията допуска да бъдат ограничавани при определени условия.

По-конкретно, в решението си по делото *Bouyid срещу Белгия* Голямата камера изтъква, че „във всеки случай шамарът, нанесен от представител на правоохранителен орган, на лице, което е под негов контрол, е сериозна атака срещу достойнството на личността“³² и унижителният му характер е особено явен, защото подчертава превъзходството на нанасящия шамара и малоценността на получаващия го³³.

Интерес представляват разсъжденията, с които Съдът обосновава особеното значение на човешкото лице. Според Съда шамарът има значително въздействие върху пострадалия, защото чрез него се засяга именно тази част от човека, която изразява индивидуалността му и представлява център на неговите сетива – зрението, речта и слуха, които се използват при взаимодействие с околните³⁴. Според Съда дори един непредумишлен шамар, без сериозни или дългосрочни последици за лицето, на което е нанесен, може да се възприема като унижителен. Голямата камера намира, че всяка намеса в човешкото достойнство нанася удари по самата същност на Конвенцията. По тази причина всяко деяние на служителите на правоохранителните органи, което унижава неговото човешкото достойнство по отношение на което и да е лице, представлява нарушение на чл. 3 от ЕКПЧ. Това важи особено за използването на физическа сила, когато не е строго необходимо с оглед поведението на лицето, спрямо което е приложена.

³² *Bouyid v. Belgium*, Ibid., par. 103.

³³ Ibidem, par. 106.

³⁴ Ibidem, par. 104.

Концепцията за човешкото достойнство е централна в случая. Тя може да бъде дефинирана най-общо като принцип за третиране на лицата по начин, който да ги отличава от предметите или животните³⁵. Когато едно лице е подложено на малтретиране без това да е наложено от неговите собствени действия, то на практика е третирано като предмет, без минималното уважение, изисквано от неговата човешка природа. В делото *Bouyid v. Belgium* Съдът постановява, че жалбоподателите са били третирани като предмети, намиращи се под контрола на властите: предмети, поставени под контрола на емоционалните изблици на полицейските служители. Вярно е, че на полицейското задържане е неизбежно присъщо неравнопоставено положение между задържаните лица и представителите на правоохранителните органи, но ако задържаните не бъдат третирани с минимално дължимото им уважение, това ги прави особено уязвими от злоупотреба с власт от страна на полицейските служители³⁶.

Изглежда трудно, ако не и невъзможно, да се търсят паралели между такова напредничащо разбиране за правата на човека и човешкото достойнство, което виждаме днес в практиката на Европейския съд по правата на човека, и римското право – особено като се вземе предвид широкото разпространение на робството в Древността, което брутално отрича равностойна човешка природа на част от хората. Ако се спрем само на един аспект – малтретирането при разпити на робите например, трябва да се припомни, че в древноримски времена не се е приемало, че робът е в състояние да каже истината, освен под въздействието на изтезания. Освен това, макар показанията на роба за неговия собственик да са били недопустими, те са били разрешени в случаите на предателство, прелюбодеяние и данъчни измами³⁷.

³⁵ Вж. КЪОСЕВ, Ив. Защитата от дискриминация в правовата и демократична държава – принципи, правнонормативна база и основни проблеми. – В: *Защита от дискриминация в България и Европа*. Сборник доклади от научна конференция. София, 10.12.2015, Академия на МВР. София, БАН, 2016, с. 183–184.

³⁶ MAVRONICOLA, Natasa. *Bouyid v Belgium*: the 'minimum level of severity' and human dignity's role in article 3 ECHR. *Cyprus Human Rights Law Review*, p. 13. Достъпна на https://pure.qub.ac.uk/portal/files/30410604/Bouyid_Comment_CYHRLR_1_.pdf, последно посетена, както и всички по-долу посочени връзки, на 22 ноември 2018 г.

³⁷ BAUMAN, Richard. *Human rights in ancient Rome*. London ; New York, Routledge, 2012, p. 116.

Следователно трудно може да се твърди, че идеята за универсалния характер на човешките права е съществувала в Античността. Ако погледнем обаче на съвременното разбиране за правата на човека не само като на система от права, но и като на система от ценности, можем да проследим някои от тях назад във времето до древните времена, когато римляните са се опитали да комбинират идеите на гръцката *φιλανθρωπία* с типичните римски ценности. В резултат се появява концепцията за *humanitas*, разработена от мислители като Цицерон и Сенека. Това философско понятие прониква и в римските закони и съдебни процеси. Първоначално концепцията за *humanitas* е като за цивилизовано и културно поведение, което се възпитава у хората чрез образование и обучение. След това значението ѝ се разширява до разбирането ѝ като мяра за поведение – стремеж да се постъпи правилно. С *humanitas* се аргументира нуждата да се избягва дивашкото и жестоко поведение към други членове на човешката раса – както към отделни хора, така и към цели групи. Според Бауман терминът *humanitas* означава „присъщо качество на човешката раса“³⁸ и включва в себе си концепции като *clementia*, *moderatio* и *pietas*. Цицерон, казва той, е един от най-ранните автори, употребявали термина *humanitas*, и го използва около 150 пъти в творбите си, като вярва че тя може да съществува само когато е основана на закона.³⁹

Редица автори, сред които и Ричард Бауман, намират че Цицерон съчетава концепцията за *humanitas* с естественото право, заимствано от своя страна от стоицизма. Римското *ius gentium* вклне само писаните закони (*lex*), но и неписаното право, моралните норми, и законите, предоставени на човека от боговете. Едно от най-пълните изявления на Цицерон относно естественото право се среща в неговото произведение „*De legibus*“ (За законите). Според Цицерон боговете са дали на хората, но не и на животните, „дял в разума и мисълта“, включително и „душа“, и така се е създала „семейна връзка между хората и боговете“. Освен това, „добродетелта е една и съща в човека и в бога“ и това е общо за човешките същества⁴⁰.

³⁸ BAUMAN, Richard. Op. cit., p. 9.

³⁹ Ibid., p. 47.

⁴⁰ STAMOS, David N. Myth of Universal Human Rights: Its Origin, History, and Explanation, Along with a More Humane Way. London, Routledge, 2015, p. 121.

В съчинението си *De Officiis* (За задълженията) наред с други идеи, които разглежда като принципи на справедливото поведение, Цицерон посочва, че всички хора трябва да спазват общото благо и „нито едно лице не трябва да търпи вреди от ръцете на друго, освен ако не е агресор“. И също така: „Задълженията ни към индивидите са двойни: ние трябва да се въздържаваме пряко да им вредим и не трябва да оставаме безучастни, когато другите ги увреждат.“⁴¹.

Ако се обърнем към Сенека, ще открием подобни идеи. Той декларира единството на човечеството и стойността на човешкото същество по следния начин: „Има едно кратко правило, което трябва да регулира човешките взаимоотношения. Всичко, което виждате, както божествено, така и човешко, е едно цяло. Ние сме части от едно велико тяло. Природата ни е създала от един и същ източник и с една и съща цел. Тя ни насища с взаимна любов и съпричастност, тя ни учи да бъдем честни и справедливи, да понасяме наранявания, а не да ги причиняваме. Тя ни подканва да протегнем ръцете си към всички, които се нуждаят от помощ.“ Нека тази добре позната мисъл е в сърцата ни и на устите ни: *Homo sum, humani nihil a me alienum puto* (Аз съм човек и нищо човешко не ми е чуждо).⁴².

Редица съвременни романисти търсят корените на понятието за човешки права в Античността. Възгледите им далеч не са безспорни и срещат сериозни възражения от други специалисти в областта. Интерес представляват тезите на Джулиано Крифо, който също изтъква значителните правни и обществени различия между Древния Рим в съвременността, но оспорва като твърде опростенческо виждането, че правата на човека за пръв път са възникнали едва през XVIII век. Според него точно защото липсва модерният контекст, става интересен въпросът дали всъщност други правни институти, познати на римското право, не са имали функции, сходни с тези, които днес имат правата на човека⁴³. Въпреки че римляните не са

⁴¹ CICERO, M. T. On obligations. Oxford University Press, USA, 2001, p. xix.

⁴² BAUMAN, Richard. Op. cit., p.1.

⁴³ CRIFO, G. Per una prospettiva romanistica dei diritti dell'uomo. – In: *Girardet, Klaus M. and Nortmann, Ulrich. Menschenrechte und europäische Identität. Die antiken Grundlagen. Gebundenes Buch 27. Stuttgart, Steiner, 2005, S. 245–247. Цит. по: Slotte, P. and Halme, M. (Eds.) Revisiting the origins of human rights. Cambridge University Press, 2015, p. 52.*

имали „права“ в модерния смисъл на думата, деликтите са се отнасяли за нарушения, сходни с нарушенията на правата в съвременния правен ред, особено в случаите, когато са били разглеждани заедно с някои процесуални и „конституционни“ норми на римското право, обвързващи магистратите – например осигуряването на справедлив процес⁴⁴. Това според цитирания автор ги доближава до различни права, гарантирани с Всеобщата декларация за правата на човека (ВДПЧ) и ЕКПЧ, каквито са забраната за жестоко и унижително отнасяне или наказание по чл. 5 от ВДПЧ и правото на справедлив процес по чл. 6 от ЕКПЧ. При всички случаи обаче остава проблемът че тези „права“ са се отнасяли само до римските граждани, а не са били универсално приложими.

Въпреки присъствието на хуманни идеи, концепцията за равно човешко достойнство никога не е съществувала в Древния свят. Достойнството е варирано в различни степени за различните хора. Значението на римското *dignitas* се свежда до общественото положение или състояние на лицето, а не до достойнството на човека като такъв. В този смисъл е трудно да се съгласим с тезата на Тони Оноре, че разсъжденията на Улпиан съдържат идеята за универсалното човешко достойнство: „Макар че в гражданското право робите се смятат за несъществуващи, по-различно е положението в естественото право. Що се отнася до естественото право, всички хора са равни.“⁴⁵.

Докато в римското право достойнството на човека няма универсален характер, обратно е виждането в юдео-християнската традиция. Според християнското разбиране за човешката природа всеки човек е обичан от Твореца, създаден е по Негов образ и подобие и е предназначен за вечно приятелство и общение с Него. Следвайки стъпките на юдаизма, християнството превръща човешкото достойнство в понятие с универсално приложение.

„И Бог каза: Да създадем човека по Нашия образ, по Наше подобие; и нека владее над морските риби, над небесните птици, над добитъка, над цялата земя и над всяко животно, което пълзи по земята. И Бог създаде

⁴⁴ Ibid., S. 253–257 (p. 52)

⁴⁵ HONORÉ, Tony. Ulpian: pioneer of human rights. Oxford University Press UK, 2002, p. 88.

човека по Своя образ; по Божия образ го създаде; мъж и жена ги създаде. (Бит. 1, 26–27)“.

В неканоничната книга от Стария завет „Премъдрост на Иисуса, син Сирахов“ се открива текст с близки паралели с идеите на Цицерон, разгледани по-горе: „Господ създаде човека от пръст и пак го връща в нея. Той даде на човеците определено число дни и време, и даде им власт над всичко, що е на нея. Според природата им, облече ги в сила и ги сътвори по Свой образ, и вложи във всяка плът страх към тях, за да владеят над зверове и птици. Той им даде разум, език и очи, уши и сърца за разсъждаване, изпълни ги с проникателност на разума и им показва доброто и злото. (Сир. 17, 1–6)“.

В Битие се открива следното разсъждение относно насилието спрямо друго човешко същество: „Който пролее човешка кръв, и неговата кръв от човек ще се пролее; защото по Своя образ направи Бог човека. (Бит. 9, 6).

Един от ранните отци на Църквата – св. Йоан Златоуст, говори за универсалното човешко достойнство по следния начин „Известно е, че мнозина от патриарсите били родени от робини, но все пак различието между тези, които родили, не причинило различие между родените. Всички те били еднакво и патриарси, и родоначалници на колена. В това именно се състои предимството на Църквата; в това е и отличието на нашето благородство, предобразовано още във Ветхия завет. Макар ти и да си роб, макар и свободен, за тебе от това няма ни полза, ни вреда; едно е само потребно – мъдрост и нравствено съвършенство на душата.“⁴⁶

Св. Григорий Богослов също свързва понятието за човешко достойнство с акта на Божественото сътворение, като пише; „Да последваме най-високия и пръв закон на Самия Бог, Който праща дъжд на праведни и грешни и заповядва на слънцето да изгрява еднакво над всички (Мат. 5:45), Който без никакво ограничение е предоставил на всички обитатели на сущата земя, извори, реки, и гори, на птиците – въздух, на живеещите във водата – вода; който е дарил в изобилие на всички човеци, първото по-

⁴⁶ Св. Йоан Златоуст, Цариградски архиепископ. Тълкувание на Евангелието от Матей. Беседи 1–44. София, Захарий Стоянов, 2007, с. 48–49. Достъпна на https://rado76.files.wordpress.com/2010/02/yoan_1.pdf

требно за живота, което не зависи от властите, не се ограничава от закони, нито се прегражда от държавни граници, а е предложено на всеки и на всички в богата мяра и същевременно ни най-малко не намалява. Бог е надарил толкова щедро всички хора, разбира се, за да покаже, с равното раздаване на даровете Си и *еднаквото достойнство на нашата природа*, и богатството на благостта Си.⁴⁷ (курсивът мой – З.Кр.).

Достойнството на човека като универсално качество на всяко човешко същество според разбирането, което се открива и в творбите на св. Игнатий Брянчанинов, не зависи от „възраст, пол, съсловие“, нито от това дали другият е християнин – „лишените от християнска слава не са лишени от другата слава, получена при сътворението: те са образ Божий“⁴⁸. „И на слепия, – продължава православният мислител – и на прокажения, и на този с повреден разсъдък, и на младенеца, който още сучи от майка си, и на криминалния престъпник, и на езичника окажи почит като на образ Божий.“

В християнския дискурс достойнството е изключително качество на човека измежду всички твари – то е свързано с това, че именно хората от всички земни творения са създадени по образа на Бог. И понеже е така, да се оскърбява ближният, дори най-нисшият и презрян според човешките разбирания, е оскърбление към Бога. Това е казано съвсем директно в Свещеното писание: „Който се присмива на сиромаша, нанася позор на Създателя му“ (Притчи.17:5).

Християнската вяра в човешкото достойнство е не толкова обърната към себе си и към осъзнаването на собственото достойнство, колкото към другите и особено към тези, които са възприемани като чужди, неприятни и лоши, защото всички хора са изкупени с кръвта на Спасителя. По думите на съвременния руски богослов Сергей Худиев „в очите на християнина

⁴⁷ ТВОРЕНИЯ на Светителя Григорий Богослов. Том 1 (част 2). Слово 14. За любовта към бедните. Славянобългарския манастир „Св. Вмчк Георги Зограф“, Света Гора, Атон. Достъпно на http://sveta-gora-zograph.com/books/SvGrigoriiBogoslov_t1-2/book.html#d0e243.

⁴⁸ СВЯТИТЕЛЪ Игнатий Брянчанинов. Собрание творений. В 7 томах. Том I. Жизнеописание. Аскетические опыты. Книга первая. Москва, 2017.

всеки враг на Църквата е потенциален апостол Павел, всяка блудница – потенциална Мария Египетска⁴⁹.

От своя страна Папа Йоан Павел II аргументира универсалното достойнство на всеки човек по следния начин: „Човекът е получил висше достойнство, основано на интимната връзка, която го обединява с неговия Създател: в човека се проявява отражението на самия Бог.“ И по-нататък отбелязва, че „Исус има уникална връзка с всеки човек, което позволява да видим в лицето на всеки човек лицето на Христос.“⁵⁰

Християнската идея за особеното значение на човешкото лице, без да е буквално аналогична, се открива и в разсъжденията на Цицерон. Негова е мисълта, че „лицето е картина на ума, а очите са негови изразители“⁵¹. Далечни следи и влияния на тези идеи, макар и не изрично посочени, могат да бъдат разпознати в аргументацията на Европейския съд по правата на човека в решението по делото *Bouyid v. Belgium*, в което той обосновава защо иначе толкова леко и нетрайно като физически последици посегателство срещу човека, каквото е шамарът по лицето, представлява нарушение на забраната за изтезания, нечовешко и унижително отношение и наказание (чл. 3 от ЕКЧП).



От казаното дотук става ясно, че в своята ранна история разбирането за универсалния характер на човешките права бива обосновавано главно чрез аргументи на теологията. Означава ли това, че човешките права имат своите религиозни основания? Сред изследователите този въпрос получава обикновено два диаметрално противоположни отговора. Някои настояват за твърда граница между светските и религиозни аргументи на доктрината за правата на човека. Други твърдят че самото понятие за достойнство е неизбежно религиозно. В конституционното право човешките права са разглеждани от някои автори като надконституционни и предсъ-

⁴⁹ ХУДИЕВ, Сергей. Достоинство другого. Достъпна на <http://pravoslavie.ru/69094.html>

⁵⁰ POPE JOHN PAUL II. The Gospel of Life: Evangelium Vitae. New York, Random House, 1995, p. 77.

⁵¹ SPEAKE, Jennifer (Ed.). Oxford Dictionary of Proverbs. 6. ed. Oxford, 2015, p. 102.

ществувачи спрямо конституциите⁵² заради разбирането за естествените права, които съществуват „преди нацията и над нацията“⁵³. Тези възгледи имат своите видими допирни точки с римската концепция за *humanitas* и естественото право, както и с юдео-християнските възгледи за естествено присъщото достойнство на човека поради сътворението му по образ Божий.

Ако приемем че корените на човешките права стигат едва до XVII–XVIII в. и са продукт на новата глобална етика, която произтича от Всеобщата декларация за правата на човека през XX в. (10 декември 1948 г.), то възраженията срещу тяхната универсална валидност поради сравнително скорошния им произход стават неизбежни⁵⁴. По-оправдан намирам възгледа, че макар в съвременното си разгърнато съдържание доктрината за правата на човека действително да е ново явление, тя представлява модерна интерпретация на теориите на естественото право, чийто произход можем да проследим поне до стоиците, римските философи и юдео-християнските източници на европейската култура⁵⁵.

⁵² БЛИЗНАШКИ, Георги. Учредителната власт на народа. София, Унив. издат. „Св. Климент Охридски“, 2017, с. 238.

⁵³ СИЙЕС, Еманюел-Жозеф. Що е това Третото съсловие. София, Сиела, 2012, с. 78, цитиран по Б л и з н а ш к и, Г. Цит. съч., с. 238.

⁵⁴ В този правно-исторически контекст е безспорен приносът на дейците на Просвещението Жан-Жак Русо, Шарл Монтескьо и Джон Лок. Вж. КЪОСЕВ, Иван. Политико-правните концепции и идеи на Джон Лок и Шарл Монтескьо за правовата и за демократичната държава. – В: *Съременно право*, 2015, № 5, с. 32–33.

⁵⁵ Вж. и КЪОСЕВ, Иван. Теория за рационалното и хуманното законодателство. София, Унив. издат. „Св. Климент Охридски“, 2018, с. 18–24, 46–47.

HUMANITAS В ИМПЕРАТОРСКОТО ЗАКОНОДАТЕЛСТВО ОТНОСНО СЪПРУГИТЕ (НА АНГЛИЙСКИ ЕЗИК)

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Резюме: Управленската дейност на Юстиниан и усилията му в религиозен план са с решаващо значение за развитието на човешката история. За Юстиниан понятието за Римска империя е смесено с това за християнската вселенска общност (*oikumene*) и за него тържеството на вярата е не по-малко важно от възстановяването на римската власт и единство. Въвеждането на *humanitas* в законодателната му дейност и последиците от това са подкрепени от религиозните убеждения на императора. От правна гледна точка бенефициери на *humanitas* по времето на Юстиниан са жени, деца, роби, болни, неграмотни. Правните текстове на Юстиниан дават приоритет, от гледна точка на *humanitas*, на правното положение на жената. Под влиянието на християнската църква законодателството на Византийската империя относно брака става изключително жестоко. Това законодателство е строго и доминира в цялото Средновековие на Изток, като утежнява условията, необходими за развод между римски граждани. Забранява се разводът по взаимно съгласие с изключение на случаите, при които двамата съпрузи искат да живеят в целомъдрие. От гледна точка на правното правоприемство в следващите епохи не се пропускат много от нововъведенията в тази материя, направени от Юстиниан. В същото време Теодора като съпруга на Юстиниан трябва да е повлияла на неговото законодателство по отношение на статуса на жената.

Ключови думи: Юстиниан; Теодора; християнство; *humanitas*; жена; брак; развод; наследяване; зестра.

HUMANITAS
IN EMPEROR UXORIOUS' LEGISLATION (ENGLISH
LANGUAGE)

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Abstract: Justinian's administrative work and his religious efforts have been decisive for the development of human history. For Justinian, the notion of a Roman Empire was confused with that of Christian oikumene, and the victory of faith was not any less important to him than the restoration of Roman power and unity. His introduction of *humanitas* in his legislative work and the consequences that this entails was supported by the emperor's religious convictions. From a legal standpoint, the beneficiaries of the term *humanitas* in Justinian's time were women, children, slaves, the ill, the illiterate. Justinian's legal texts promoted, from a *humanitas* point of view, the woman's legal position. Under the influence of the Christian Church, the legislation of the Byzantine Empire concerning marriage became increasingly severe. His legislation was strict and dominated the entire eastern Middle Age by aggravating the conditions required for two Roman citizens to divorce, disallowing divorce through mutual agreement, excepting situations in which both spouses wished to live in chastity. Not even the legal succession field was omitted from the stock of legal innovations brought about by Justinian. In the same time, as Justinian's wife, Theodora must have influenced Justinian's legislation with regards to the female status.

Keywords: Justinian; Theodora; Christianity; *humanitas*; women; marriage; family; divorce; succession; dowry.



According to Felix B. J. Wubbe¹, humanism came about as a by-product of the meeting between the two greatest pillars that laid the groundwork for the formation of the European civilization, the Church – beginning with the time of Emperor Constantine the Great – and Roman Law. *Humanitas* qualifies behaviour, human conduct, a way of relating to others as a result of human nature. In its primary meaning, it may be translated as “human character,” but when granting it an ethical connotation, it turns into “the character of a good human”. Seeing as it is a notion that involves ethics, the Romans perceived *humanitas* as an ideal way of life².

This paper shall present the link between Emperor Justinian’s religious convictions and his legislative standards with the aim of demonstrating the humanising of the latter through the influence of the former. In fact, Asterios Gerostergios³ claims that Justinian’s administrative work and his religious efforts have been decisive for the development of human history and the life of the Christian Church. Justinian often invoked the notion of *humanitas* when he addressed a legal regime which opposes that of the classical legal counsels⁴. As such, in 35 out of 46 cases⁵, this word carries a moral weight in the *Codex Justinianus*, contrary to the constitutions existing up until that point in which, a mere 20 out of 74 cases present themselves in this way⁶. From a legal standpoint, the beneficiaries of the term *humanitas* in Justinian’s time were women,

¹ WUBBE, Felix B. J. Humanisme et humanité, une méditation. – In: *Wubbe, Felix B. J. et Pichonnaz, Pascal. Ius vigilantibus scriptum. Arbeiten aus dem Juristischen Seminar der Universität Freiburg Schweiz*, 215. Herausgegeben von Pascal Pichonnaz. (deutsch/französisch). Freiburg, Universität Verlag, 2003, p. 544.

² WUBBE, Felix B. J. Op. cit., p. 443.

³ GEROSTERGIOS, Asterios. *Iustinian cel Mare, Sfânt și Împărat*. Transl. from English by Ovidiu Ioan, p. 4. Available at <http://www.sufletortodox.ro/arhiva/carti-documente/Asterios%20Gerostergios%20-%20Iustinian%20cel%20Mare,%20Sfant%20si%20Imparat.pdf>

⁴ WUBBE, Felix B. J. Op. cit., p. 441.

⁵ C. 1.17.2, 2.40.5, 3.28.36, 3.31.12, 3.33.12-13, 3.33.15, 4.11.pr., 5.12.30, 5.13.pr., 5.16.27, 5.27.8, 5.35.3, 6.23.31, 6.25.7, 6.26.9, 6.27.5, 6.27.6, 6.30.22, 6.37.23, 6.38.5, 6.43.2, 7.2.15, 7.4.14, 7.6.pr., 7.7.2, 7.54.3, 7.71.8, 8.21.2, 8.33.3, 8.37.14, 8.39.45, 8.53.34. Pentru detalii și comentarii a se vedea WUBBE, Felix B. J. Op. cit., p. 444–453.

⁶ Idem, p. 442.

children, slaves, the ill, the illiterate; in broad terms, we are addressing *favor matrimonii, favor libertatis, favor testamentii*, etc.⁷

In its asserted and assumed capacity of legitimate beneficiary to the ancient Roman Cesars and successor to their political traditions, Justinian's reign led to the evolution, in a religious framework, of New Rome. Contemporaries would designate Constantinople, the capital of the new Empire, as New Jerusalem, and the state declared to be "under God's protection"⁸. At the same time, its "victorious and pacifist" emperor was not merely the successor of the Roman imperators, but considered himself Christ's delegate on Earth, a holy principle making him one with the apostles as a supreme leader of the Christian faith⁹.

Incontestable proponent of the universal empire, "few historical figures are as difficult to judge as the Emperor Justinian [...] there are a lot of positives and a lot of negatives to be said of him and the proof seems to amass in justifying both the positive and the negative"¹⁰. As historian Valentin Al. Georgescu remarks, this is due to the fact that Justinian has just as many enthusiastic or reserved admirers as severe critics or merely lucid ones¹¹. The Emperor's perseverance during endless working hours, as well as the deprivations he imposed upon himself, is astonishing. He lived akin to a hermit in his grandiose palace. A few hours of sleep sufficed for bodily rest, which is why he also went after the "sleepless one". He ate little and worked a great deal¹². The palace doors were open to all. According to the *Secret History* by Procopius, the emperor's home was the most accessible place in the world. He was a true Roman emperor not

⁷ Idem, p. 459.

⁸ MĂRCULEȚ, Vasile. Justinianus I – Caesar roman și suveran creștin. Mediaș, Samuel, 2007, p. 6.

⁹ DIEHL, Ch. Bizanțul. Mărire și decădere. București, p. 34–35, Cit. by Mărculeț, Vasile, Op. cit.

¹⁰ DIEHL, Ch. Împăratul Justinian. București, 1992, p. 181, Cit. by Mărculeț, Vasile, Op. cit., p. 10–11.

¹¹ GEORGESCU, Valentin Al. Le XIV^e centenaire de la mort de Justinien I^{er}. – In: Resee, V. 1967, 3, Cit. by Mărculeț, Vasile, Op. cit., p. 12.

¹² Idem, p. 16.

only through words, but through deeds¹³. His nobility was such that he served as an example in treating the challenges faced by the imperial administration¹⁴.

Justinian I had an exceptional personality that embodied, as nobody else's in the Roman-Byzantine Empire had before his time, two fundamental ideas: the Roman imperial idea and the Christian idea¹⁵. "What is greater, holier, than imperial power?", "Who might have the audacity and the pride to despise the emperor's judgement when the founders of the old law themselves declared openly and distinctly that the traditions resulting from imperial decisions have legal value?"¹⁶, "God subordinated the laws to the Emperor, sending him to the people as a living embodiment of the law [...] who else would be capable of resolving the law's enigmas and reveal them to the people, if he who has sole right to lawmaking?"¹⁷. Justinian unreservedly affirms and proclaims himself as Christ's representative on Earth in the introductory wording of the documents he released: "In the name of our Lord, Jesus Christ"¹⁸. For Justinian, the notion of a Roman Empire was confused with that of Christian *oikumene*, and the victory of faith was not any less important to him than the restoration of Roman power and unity. From this approach, the former *Pax Romana* was to be replaced by the *Pax Christiana*, with the supreme idea of centralizing and expanding the Empire¹⁹.

¹³ DAȘKOV, S. B. Dicționar de împărați bizantini. București, 1999, p. 90, Cit. by Mărculeț, Vasile, Op. cit., p. 14.

¹⁴ A concrete example demonstrating this particular trait in Justinian's character is the method employed in resolving a succession case. For instance, a woman named Gregoria addressed the emperor by calling upon the verdict emitted by the magistrate of the first court relative to the establishment of her inheritance with regard to her daughter's. The daughter had gone before the first court, soliciting and obtaining, the entire fortune of her deceased father. In her argument, she referred to two constitutional texts dating from a legislative era prior to Justinian's. Once called before the emperor, the mother invoked the cruelty and the injustice enacted through the application of the former legal texts; at the same time, she invoked the impossibility of taking them into consideration during a reign as mild as the emperor's and demanded that they be subordinated to the new legal provisions. As a rebuttal, the daughter argued the lack of new elements in this legal domain, even if her mother interpreted the legal text in a different way. Placed in this situation, Justinian decided to enact a new constitution so that the mother would prevail in the proceedings, who probably influenced the emperor when she appealed to the mild way in which he governed his empire.

¹⁵ DIEHL, Ch. Op. cit., p. 12, Cit. by Mărculeț, Vasile, Op. cit., p. 15.

¹⁶ CJ. 1.14.12.

¹⁷ Nov. 154, 18 72, 137.

¹⁸ See Novella texts.

¹⁹ MĂRCULEȚ, Vasile. Op. cit., p. 21.

The fact that the entire Church and State community in Byzantium was an integrated whole needed to be established through an agreement between Church and State. It was unimaginable for two opposing authorities to function simultaneously in a single community²⁰. The Church embodied the soul, and the State represented the body. The healthy union of these two systems was seen by Justinian as a necessary implication because it was the only way that a harmonious collaboration could take place between them: The Sacerdotus and the Empire are two precious gifts that God bestowed upon humanity out of His boundless love. The Sacerdotus represents divinity whereas the Empire leads and governs all that is mortal; both originate in the same principle, directing the course of human life²¹. Since the principle of harmony made impossible an inconsistency between laws and canons, the Emperor declared the following in his Novella 81: “[...] the holy commandments of the church [...] are to be perceived as laws²²” and in his Code he said: “We ordain that all practical punishments that contradict a Church canon and that were obtained through favours or through political connivances be stripped of their validity and authority”²³. Justinian accepted the distinction between the imperial and the spiritual authority, admitting that the Empire and the Sacerdotus have differing functions, but that everything is subordinated to the good of the Empire, to power, and to state prosperity as an ultimate and absolute value. “The well-being of the Church makes up the strength of the empire” – is the key to the Emperor’s theory²⁴.

If somebody carefully studied the contents of Justinian's entire work, they would come to the firm conclusion that his theological writings are the expression, interpretation, and rational defence of the laws which, in turn, are the codi-

²⁰ The Byzantinian model of separating State and Church implicated the fact that every institution had specific responsibilities within the public sphere. According to the symphony principle, the Church was entrusted with the spiritual redemption of the community and the State was entrusted with its financial welfare, including internal politics and external defense. As a result, seeing as the Church made no decision relating to war, theologians approached it from an advisory perspective.

²¹ Nov. 6.

²² Consequently, we cannot speak of Cesaropapism on the part of Justinian, since he did not issue laws for the Church, but elevated the existing canons to civil law status..

²³ C. 1.2.12.

²⁴ SCHMEMENN, Alexander. *Le chemin historique de l'Orthodoxie*. Paris, YMCA, 1995, p. 176, Cit. by Băbuș, Emanoil. *Bizantul. Istorie si spiritualitate*. București, Sophia, 2010, p. 228.

fication and the summation of the central ideas emerging in theological writings²⁵. On the one hand, many laws have a likeness to the sermons of a Church writer, and the canons of the Church are presented to its subordinates as laws to be upheld throughout the entire Empire²⁶. "If we work so assiduously at strengthening civil law, whose strength God, in his goodness, confided to us so that we could protect our subordinates, we should work even more assiduously at strengthening the canons and godly laws granted to us so that our souls may be saved!"²⁷. Moreover, his legal code began with a veritable confession of his faith in Christ and the Holy Trinity²⁸, with Justinian attributing the success of his legal works to "divine inspiration and the aid of the Holy Trinity". We cannot comprehend Justinian's relevance in history without recognizing that he was the first ideologist of the Christian Empire.

In what follows, we shall present a part of Justinian's legal texts which promoted, from a *humanitas* point of view, the woman's legal position. To this purpose, we shall scrupulously address two legal institutions that are founded upon marriage, namely divorce and successions. Firstly elaborating on legal aspects concerning the woman seeking divorce or the widowed woman, we will then address the Empress Theodora's influence upon the promulgation of certain pro-feminine legal texts.

Under the influence of the Christian Church, the legislation of the Byzantine Empire concerning marriage became increasingly severe. As such, incestuous marriages were punished through death, the seizure of assets, and exile. At the same time, marriages between godparents and godchildren were forbidden because baptism gave rise to a paternal spirituality²⁹.

²⁵ GEROSTERGIOS, Asterios. Op. cit., p. 21.

²⁶ C. 1.3.44.

²⁷ Nov. 137.

²⁸ MEESTER, Placide de. Les origines et le développement du texte grec de la liturgie de St Jean Chrysostome. Roma, 1908, p. 340 [Available et <https://books.google.bg/books?id=uPkKAwAAQBAJ&pg=PA1143&lpg=PA1143&dq=Les+origines+et+le+d%C3%A9veloppement+du+texte+grec+de+la+liturgie+de+S.+Jean.&source=bl&ots=g70nJhWx3S&sig=KGISPgjSHLNwbAdeZ6MIFI9oPNY&hl=bg&sa=X&ved=2ahUKEwia9PHb8PbeAhWwiKYKHaf3BT oQ6AEwAHoECAYQAQ#v=onepage&q=Les%20origines%20et%20le%20d%C3%A9veloppement%20du%20texte%20grec%20de%20la%20liturgie%20de%20S.%20Jean.&f=false> – Editor's note], Cit. by Băbuș, Emanoil. Op. cit, p. 223.

²⁹ C. 5.4.26.2.

Justinian “envisaged launching a revolution in this field in the VIth century through the restoration of the authority of classical right and its conciliation with the contributions of the post-classical period”³⁰. His legislation was strict and dominated the entire eastern Middle Age³¹ by aggravating the conditions required for two Roman citizens to divorce, disallowing divorce through mutual agreement, excepting situations in which both spouses wished to live in chastity. As a result, Justinian introduced four types of divorce: divorce through mutual consent³², divorce justified by an action not attributable to the other spouse, namely *bona gratia* (the wife’s sterility or the husband’s impotence, mental illness in one of the spouses, a husband who was away at war for a period exceeding 5 years, and entry into the monastery), a divorce imputed to the fault of one of the spouses (*iusta cause*) and divorce for any other reason that did not enter into the *bona gratia*³³ category.

It should be mentioned right from the start that in divorce cases, Justinian found it wrong to apply distinct sanctions for men and women³⁴. As such, in the year 528, Justinian introduces the husband’s impotence spanning over two years after the beginning of the marriage as a unilateral reason for divorce. In this situation, the wife would have only regained the dowry which she had put forward at the wedding. In the year 533 the list of causes justifying a divorce was extended to include the carrying out of an abortion by the woman, her bathing with another man, and her acceptance of bigamy. The same law established the punishment for divorce without just cause or without grounds, in which case the dowry was not returned. In these circumstances, the guilty party was obligated to transmit a fourth of his fortune to the innocent party, the maximum sum being 50 pounds of gold. If there were children or grandchildren in the family of the divorcees, the share of assets was left intact for the benefit of the descendants³⁵.

³⁰ BOB, Mircea Dan. Obligația contractuală în dreptul roman cu trimiteri comparative la Codul civil. București, Universul Juridic, 2015, p. 22.

³¹ FOTINO, George. Pagini din istoria dreptului românesc. București, Academiei Republicii Socialiste România, 1972, 152.

³² Which he also forbade through Novella 117, excepting cases in which both spouses wished to dedicate their lives to God. It was reintroduced by Justin in the year 556.

³³ According to HANGA, Vladimir și BOB, Mircea Dan. Curs de drept privat roman. 5. ed., rev. și ext. București, Universul Juridic, 2013, p. 142, these forms of divorce were declared unlawful. Nevertheless, the marriage remained disbanded.

³⁴ C. 6.58.14.5 (the year 531) and Nov. 127.4 (the year 548).

³⁵ C. 5.17.10–11.

The preamble to Novella 22 contains an explanation from Justinian referring to the evolution of divorce as follows: the ancients were not deeply concerned with the issue of divorce and ulterior marriages and it is for this reason that women and men could remarry without any sort of punishment; at the same time, Justinian makes note of the fact that the Emperors Theodosius II and Leon I had extended legislation in this domain, just as he had. Moreover, he concluded as of that moment that the laws concerning divorce were to be extended and improved.

In the year 536 Justinian extended the period after which the wife could rightfully divorce her husband due to impotence with three years and allowed unilateral divorce only when the party requesting a divorce devoted himself to the monachal life (the Romanics believe that this law was drawn up between 533 and 536)³⁶. The party who adopted the monachal life was considered dead from a legal standpoint, and any disposition upon death drawn up by this party would go into effect. If the husband was the one who requested the divorce, the wife did not have the right to remarry for a year (*tempus lugendi*), akin to the widow³⁷.

The year 542 brought about changes concerning the reasons and punishments for divorce³⁸. Further below, we shall elaborate on these aspects with the purpose of better understanding the role of Christianity within the legal institution that we are addressing.

According to the Constitution from that same year, a husband was allowed to divorce his wife if she was aware of a plotting scheme against the Emperor and did not notify her husband, if she was convicted by a court as an adulteress, if she tried to murder her husband or did not notify him that other persons desired to murder him, if she had stepped outside the conjugal home without obtaining her husband's approval and, finally, if she had participated in public spectacles without notifying him or against his will. In such circumstances, the husband kept the wedding gifts and the wife's dowry. Moreover, if the wife had been convicted of adultery, the husband would retain the fortune in its entirety if children had resulted from the marriage and a share equal to 1/3 of the wife's

³⁶ Nov. 22.5–6.

³⁷ REYNOLDS, P. L. *Marriage in the Western Church: the Christianization of marriage during the patristic and early medieval periods*. Leiden ; New York, Brill, 1994, p. 54.

³⁸ Nov. 117.8, 9, 12–14.

dowry if there were no children. A man with no grounds to divorce his wife had to return the wedding gifts and dowry to his wife; he was additionally obligated to recompense his former wife with 1/3 of the value of those gifts. As a new component, the impoverished, repudiated *sine causa legibus agnita* wife had the right to claim full ownership of 1/4 of her husband's assets, the value of which could not exceed one hundred pounds of gold³⁹.

Likewise, the dispositions of the same document stated that a wife could divorce on the following terms: if her husband had been involved in a conspiracy against the emperor or if he knew that others were about to commit such a crime and did not denounce them, if her husband had attempted to murder her or did not divulge that certain third parties wished to do so, if he tried to violate her virtuosity, in that he forced her to have sexual relations with another man in the aim of accusing her of adultery, if he had accused her of adultery but could not provide evidence and, finally, if he housed another woman in the conjugal home or even in the same city. In these cases, the former wife would keep the wedding gifts and regained her dowry, and if the husband had not proved the adultery, the wife stood to gain her husband's entire fortune (if the marriage had produced children) and a share equal to 1/3 of the gifts received at the wedding if they did not have children. Supporting a mistress cost the former husband, aside from the dowry and the wedding gifts, a maximum of 1/3 of the worth of the gifts offered upon the occasion of the marriage.

Seen from another perspective, a wife who wished to divorce her husband without solid grounds was obligated to return the wedding gifts to him, lose her dowry, and spend the rest of her life in a monastery. When such a woman had children, two thirds of her wealth was retained for them, and the other portion was awarded to the monastery to which she was sent. If no children resulted from the marriage, two thirds of the former wife's wealth was distributed to the monastery, while the rest of her assets were transferred to her parents. If she had no children and her parents were deceased, all her properties came under the monastery's possession.

³⁹ Nov. 117.5. The same would occur in the case of the surviving wife (see Nov. 53.6), which brings us to the idea of fairness in terms of putting the repudiated wife on an equal footing with the widow.

Mutually consented divorce was prohibited in that same year, 542, with the exception of cases in which one of the spouses went into a monastery⁴⁰. According to the teachings of the canonists, Monastic vows had, in any situation, the effect of dissolving a marriage. Justinian law was also offset by this premise. The abandoned wife had no choice but to enter into the monastery herself, which often occurred, either because she was ashamed of having been abandoned or because her material needs could be met in this way⁴¹.

In the year 548 Justinian also modified the punishment for the husband who wanted to divorce his wife without any grounds. The Emperor established that, as in the woman's case, they would be sent to the monastery for the remainder of their lives.

Starting with the year 556, divorce through mutual consent for any reason other than the ones mentioned above led to the isolation of both spouses in the monastery. The fate of the assets was the following: if children existed and the parents of the former spouses lived, the wealth was divided amongst them and the monastery. In the absence of descendants or ascendants, the entirety of the wealth would be attributed to the monastery⁴².

As we described, Justinian's grand opera represents a peak of achievements that no other succeeding emperors could ever live up to. During his time, *Imperium Romanum*, he unfurled the all of his political, spiritual, cultural, and legislative strengths and capacities one last time; ultimately, these were all external reflections and materializations of imperial Christian ideas⁴³. Not even the legal succession field was omitted from the stock of legal innovations brought about by Justinian.

Subsequently, in his Novella 22 from the year 535 Justinian granted 1/4 of her husband's wealth to the wife who had married without a dowry and who had been repudiated with no legal basis. Over the succeeding years, the emperor

⁴⁰ Nov. 117.10.

⁴¹ HANS-GEORG, Beck. Op. cit., p. 58.

⁴² Nov. 134.11.

⁴³ MĂRCULEȚ, Vasile. Op. cit., 24. As regards inheritance rights, the law stipulated that the property of a heterodox without Orthodox heirs was to be reclaimed by the state (C. 1.5.15). Heterodox parents were prohibited from treating their children with violence and they did not have the right to disinherit them upon the grounds that their children had converted to orthodoxy (C. 1.5.12). On the other hand, orthodox parents needed to ensure that their children were raised according to the orthodox faith and could be excluded from bequest if they turned their back on orthodoxy (Nov. 65).

also intervened within the framework of the legal inheritance, lending a helping hand to the surviving, impoverished spouse. As such, the foundation of this right is marriage, to which a series of conditions are added as we shall discuss further below.

First and foremost, Justinian annulled *bonorum possessiones unde decem personae, unde patronus patronaque and unde agnati manumissori*⁴⁴. If the surviving husband was still last to come into the inheritance as *bonorum possessor*, he would henceforward always find himself in IVth position and in a more favourable state. In his Novellas, the emperor took matters even further. Observing that the position of the surviving spouse had gone from one extreme to another through the status offered by the two forms of marriage (*cum manu* and *sine manu*), he decided to address the situation of the impoverished woman who had married without a dowry and who did not receive an antenuptial donation from her husband. Up until Justinian, the relatives of the deceased spouse were preferred to the surviving spouse; if the surviving spouse was necessitous, the inequality generated through this exclusion was even greater.

Through his Novella 53 Justinian created the impoverished husband's quarter⁴⁵. As such, the surviving wife who had no dowry and who did not receive any *propter nuptias* donation had the right to receive $\frac{1}{4}$ of the deceased husband's fortune, regardless of the number of children that their marriage had produced (*habeant quartam partem in substantia viri ipse vir in substantia uxoris quando inops sit*). If *deuius* left part of his assets to his wife as inheritance through testament and this inheritance was inferior to $\frac{1}{4}$ of the defunct's property, the amount referred to by the testator would be increased to reach the $\frac{1}{4}$ share. The right recognized through this Novella was that of full ownership: *quartam partem ejus substantiae accipere eam [...] quartam partem substantiae habere mulierem*.

However, it was necessary to fulfill certain conditions in order to benefit from the dispositions of the novellas.

⁴⁴ C. 6.4.

⁴⁵ RĂDULESCU, Andrei. Dreptul de moștenire al soțului supraviețuitor, Ed. Cultura Națională, București, 1925, 56.

The first condition called for a legitimate marriage between the two parties. In other words, the wife should have been in *in statu legitimae conjugis*⁴⁶. This condition was supplemented by the fact that the marriage would have to last until the death of one of the spouses: *si perduraverint semper cum eis*. As regards this second requirement, two opinions crop up in published literature: the first maintaining that it would have been necessary for the spouses to have lived together continually and uninterruptedly⁴⁷ and the second limiting itself to the letter of the law, without adding to it⁴⁸. As such, the wife was granted the stipulated right *si semper apud eos maneant* (if they had always been together) implying not only that the two spouses hadn't been separated but that they had also lived together for an extended period of time. At this juncture, we raise the following question: what would have happened if one of the spouses had passed away shortly following the wedding? Finding nothing to impute to the surviving spouse, we share the second viewpoint and consider that it is sufficient for the marriage to not have ended through divorce even if the husband and wife had in fact lived separately at a certain period of their marriage. Although if the word *semper* appears in the legal text, Novella 117 also tells us what this continuity implies: *usque ad mortem*, which is to say until death.

Moreover, certain parties claim⁴⁹ that assuming the emperor had relied upon the continuity of the *affectus nuptialis/ affectio maritalis*⁵⁰ principle, it is self-evident that this principle existed upon the founding of the family, thus making it an additional cause to argue the possibility of inheritance by a spouse who was widowed shortly following the marriage. "It is possible, verily, that the basis of the law of affection, contribution, aid also exist within a short-lived marriage and that the surviving spouse be gravely affected by the misfortune of having been mar-

⁴⁶ Nov. 53.6.

⁴⁷ DERNBURG, H. Pandekten. III Band. Berlin, 1897, p. 280, and WINDSCHEID, B. Lehrbuch des Pandetenrechts. III Band. Frankfurt am Main, 1906, p. 360, Cit. by Dumitru, George. Dreptul de moștenire al soțului supraviețuitor la romani. București, 1931, p. 55.

⁴⁸ DUMITRU, George. Op. cit.

⁴⁹ MERLIN, Ph. A. Répertoire universel et raisonné de jurisprudence. Tome 5 / ... Merlin, Philippe-Antoine (1754-1838). Auteur du texte de jurisprudence. 5. ed. Vol. XIII, Paris, 1828, p. 695, Cit. by Dumitru, George. Op. cit., p. 56.

⁵⁰ We also come across this expression in other subject matters: *affectus furandi* (to designate the element of intent in case of theft) or *affectus societatis* (referring to the common intention of setting up a legal person).

ried for a period of time that was too short to comply with the law”⁵¹. Through the exclusive implementation of cognation, Justinian certainly based his law of succession upon the same sentiment of affection for the deceased’s blood relations. Andrei Rădulescu also concludes: “by recognizing this right, the rights of the other heirs were touched, on grounds of humanity, of goodwill, and it was unfitting to reduce others’ rights unless the surviving spouse deserved this act of goodwill”⁵².

A second condition required by the legal text is that the surviving wife be poor, *inopia/pauper*, that she be married without a dowry, that is to say the attribute of *indotatae* non-reception of *donatio ante nuptias*. Although this fragment of the Novella gave rise to legal discussions as well⁵³, we consider that Justinian’s guiding principle was poverty, and not the value of the dowry. Our affirmation is supported by a few points. Firstly, in Digest 48.2.10 an indigent is labelled as someone whose income is under 50 *nomisma*⁵⁴. The lawmaker formally recognized that a personal fortune of insignificant value was no reason to impede the woman from succeeding her husband⁵⁵. Secondly, Justinian promoted both the husband and the wife’s legal equality. That the absence of a dowry most often indicated the wife’s poverty is self-evident. It is precisely the reason why the emperor established this presumption as a criterion for assessment. For that matter, other passages of the Novella indicate that poverty, and not the absence of a dowry, led to inheritance: *nam si aliunde forsan habeat, non offerentem dotem aut non dantem propter nuptias donationem non erit justum gravare filios per successionem*⁵⁶ [...] *inops aut vir aut mulier inveniatur* [...] *ille vero vel illa superstes pauper existat*.

⁵¹ RĂDULESCU, Andrei. Op. cit., p. 79.

⁵² Idem, p. 86.

⁵³ CUJAS, J. Recitationes solemnes ad lib. VI Codicis, Unde vir et uxor, ed. Fabrot, col. 630, 1781, and POTHIER, R. J. Pandectes de Justinien. Paris, 1822, p. 480 – Cit. by Dumitru, George. Op. cit., p. 60.

⁵⁴ Gold coin, in Latin. *solidus*; it usually refers to the coin from the late Roman period, the 72nd part of a Roman gold pound, equivalent to 12 miliaresia (silver coins) or 288 folles (copper coins).

⁵⁵ *Si vero quasdam res proprias mulier in domo viri aut alibi rapositas habuit, harum actionem et retentionem habeat omnibus modis imminutam.*

⁵⁶ It goes without saying that the surviving wife’s possession of another considerable fortune excluded her from succeeding the deceased.

The final provision arising from the legal text analysed is that the surviving widowed husband could not receive his part of the bequest (quarter) through any legal document *mortis causa*. The wife whose husband left a smaller share than a quarter of his estate had the right to inherit: *si tamen legatum aliquod reliquerit ei vir quarta parte, compleri hoc*.

Five years following the issue of Novella 53, Justinian considered that succession legislation, among others, required certain modifications. As such, in the year 543, the emperor remedied the texts of Novellas 22 and 53 in his Novella 117, as we shall illustrate in the following pages. The Preamble of Novella 117 summarises the main provisions included in the two previous Novellas and its projected item of study, namely the poor wife's situation in two separate cases. In the first case, if the husband repudiates the woman *sine causa*, she has the right to inherit a quarter of her husband's wealth⁵⁷. The second case represents the necessitous wife whose husband dies and who is likewise entitled, *similiter*, to a quarter of the husband's property, granted in full ownership.

In the latter circumstance we come across an innovation⁵⁸, namely that the bequest of the widowed woman could not exceed the value of 100 pounds of gold. In other words, if the wealth of *decuius* was so considerable that the wife's quarter exceeded the value of 100 pounds of gold, her share would not have exceeded this sum.

Whereas under the previous legal regime the surviving wife's share was not limited by the number of children, we notice here that a distinction is made according to the number and provenience of these children. We consider the emperor's provision a fair one, especially since he strove to include and grant every member of the family a share of the deceased's property: the surviving spouse, the biological children of *decuius*, the wife's biological children, and the joint children. Restrictions upon the woman's share were made only in favour of

⁵⁷ Here we recall that the text of this novella does not grant the abused woman a right to divorce; the man, however, has the right to request a separation if his wife had eaten in the presence of another man unbeknownst to him, if she went to the theatre or to the public baths. See also HANS-GEORG, Beck. Op. cit., p. 50.

⁵⁸ Momentarily setting aside the matter of abolishing the surviving husband's right, Justinian did not alter the conditions necessary for granting the surviving wife her rights.

those individuals for whom it was assumed that the husband and the wife harboured the greatest of affections⁵⁹.

What is common to both Novellas regarding the surviving wife is that she was not legally obligated to refrain from remarrying⁶⁰.

Justinian also improves the economic situation of the mother whose descendant predeceased her. As such, in the CJ. 6.56.7, he allows for the woman to inherit the equivalent of a child's share regardless of the sex of the living children. "Through our constitution, published in our Code, we found it right to help the mother, considering her natural weakness and the danger she undergoes in childbirth. Why should a woman be punished for not bearing the required number of children? Here is why I have granted mothers – whether they were born free or released at a later time – full succesoral right within a legal successoral class, even if they had no children apart from the one making up the object of the succession.

Former constitutions partially benefitted and partially disadvantaged the mother, reducing her successoral share to 1/3 in favour of a few agnate relatives. Nonetheless, we have decided to help her in the simplest possible way by putting her before all those who claimed her children's inheritance, without any retainment of the successoral property. Exempted from this clause are the brothers and sisters who, if linked to the deceased person by agnate or cognate relations (the deceased person is first in line for the legal succession within our legislation), are called to succession along with the mother; if the relations are made up of sisters only, the mother receives one half and the sisters divide the second half amongst themselves; if the deceased person has one or more surviving brothers, with or without sisters, the inheritance is split amongst them and their mother. Just as we considered the mothers in our decision making process, we also have to bear the children's interests in mind; mothers must be aware that in case due care and attention have been exercised in naming guardians for their children or in replacing a guardian who was sent away or who has exempt-

⁵⁹ Competing with other relations apart from the children, the widow shall inherit full ownership of the quarta, with the imposed 100-pound limit.

⁶⁰ It is only in the stipulation of Novella 127 and only in the event of propter nuptias donations that a woman who did not remarry had the right to ownership over a part of the donation that was equal to a child's share. This rule also applied to the man and to other descendants.

ed himself, she will be justifiably excluded from inheriting any of her children who die before puberty.”⁶¹

In the Byzantine Empire, the emperor was theoretically the one in power. Nonetheless, a number of empresses had an important governing role to play and even took control of the Empire in certain circumstances⁶². The principle of good fellowship was such that the empresses were seen as associates to the commander. The role of the imperial wife is also explained through the axiological articulation used in the time of Augustus.

The public status of these women and its external markings proceed from the ideological argumentation of the sovereign's power⁶³.

One of the most prominent female byzantine personalities, known even to nonspecialists, was Theodora (527–548).

As Justinian's wife, she was associated to the imperial throne and was a real *consors imperii* (party to power). Truly the writings of Procopius⁶⁴ with regard to her activities in the hippodrome⁶⁵ have served as some of the most famous regal family scandals in current history. Theodora had been an actress, with all the ramifications of sexual immorality and vulgar diversions that this occupation⁶⁶ implied. The writer reproaches the emperor for his choice of a wife seeing as he had the entire Roman Empire at his disposal to choose a beautiful virgin from a good family, raised in the intimacy of a home, with a sense of shame; instead, he selected Theodora, whose immoral ways had brought renown to her name.

⁶¹ Institutions 3.3.

⁶² See the lives of the empresses Sophia (wife of Justin II), Irina Ducas (wife of Alexius I Comnen), Theodora, the last Macedonian, Zoe Porphyrogenita (wife of Romanus III, Constantine IX, and Michael IV) etc.

⁶³ SPATH, Th. Les femmes ont-elles gouverné Rome? – In: *Histoire*, Vol. 183, 1994, p. 30–34, Cit. by B o h î l ȕ e a, Florica MiHuț. Condiția feminină la Roma în secolul I a. Chr. București, Universității din București, 2010, p. 18.

⁶⁴ PROCOPIUS din Cesarea. Istoria secretă. București, Gramar, 2006.

⁶⁵ An enclosure fit out for chariot races and public amusement. In Constantinople, the hippodrome is found next to the Grand Imperial Palace, and the emperor had his own loge through which he entered the palace.

⁶⁶ Although Michael the Syrian, known today as the author of the largest medieval Chronicle, which he composed in Syriac, states in all seriousness that Theodora was the daughter of a priest and led a godly and chaste life up until her marriage to the emperor.

Despite the obstacles set up by the figures of the imperial court, Theodora triumphed over all obstacles: she became Empress⁶⁷, set up advantageous marriages for her family members, and had a word in state issues thanks to the influence she exercised over her husband. We would like to assess this final aspect more closely so as to demonstrate that by courageously marrying a woman with loose morals, Justinian offered the Byzantine empire a wise and skillful empress with a dominating spirit and an attentiveness to the difficulties of her sub-servients, especially women: "She had certain essential qualities justifying the desire for supreme authority: proud energy, a man's will, calm courage, the strong and lucid intelligence of a statesman who lived up to the most difficult of surrounding circumstances."⁶⁸

It was often assumed that, due to her past, Theodora must have influenced Justinian's legislation with regards to the female status. As a general rule, however, we should not automatically conclude that Justinian's legislation in favour of improving the female situation was issued under Theodora's influence, but we must approach it within the entire context of his legal reforms.

The *Secret History* of Procopius cannot be construed as incontestable proof of their association in governing, but the author repeatedly laments their collegiality: "neither of them ever did anything without the other up until the end of their lives... the emperor confided in his wife during decisive moments and implemented their common plans."⁶⁹ It appears that this historian's aim was to defame Justinian, just as J. Bury emphasizes in his work *A History of the Later Roman Empire, from Arcadius to Irene*⁷⁰. What Procopius recounts about Theodora's stagelife could very well be an unfair projection of some general phenomena about a single representative of this craft. His caustic recountings are, above all, part of his polemic with the imperial family. Even when he contradicts himself, which happens often, he does so with hate⁷¹.

⁶⁷ Theodora insisted that the same worship be granted to her, to be called *despina* (mistress), and even to receive ambassadors from other countries as if she were the ruler of the Empire.

⁶⁸ DIEHL, Ch. Op. cit., p. 228.

⁶⁹ PROCOPIUS de Cesarea, Op. cit., 10.13, 14.7.

⁷⁰ GEROSTERGIOS, Asterios. Op. cit., p. 7.

⁷¹ HANS-GEORG, Beck. Op. cit., p. 84, 123.

Bypassing the caustic details of his personal life, Justinian's legislation demonstrates that he made the "decision to improve the female situation and women's marriage rights"⁷². From what we bespoke formerly, we know that in the year 530, the emperor established a legislative reform program that dealt primarily with marriage and the family. Over many lines, he insists upon gender equality, declaring: "In God's service there is no man and wife, nor slave or free man."⁷³ Again, through his Novella 43, he asserts that "our subordinates represent our constant care, whether they are alive or dead". From a Christian point of view, historians believe that the rehabilitation of the Roman world promotes the female potential⁷⁴.

As such, in his Code, Justinian decreed that the validity of marriage between a free citizen and a liberated woman remained intact, even if the husband became senator⁷⁵. A decree that introduced a similar reform, namely Novella 117⁷⁶ (542) overruled the restrictions imposed by CTh. I6.6.3 (Constantine, year 336) and allowed senators to marry the daughters of innkeepers or brothel owners. If the famous law referring to marriage allowed senators to marry former actresses, theatre was seen as something reprehensible in Justinian's legislation: Novella 51 (537) allowed actresses to give up their profession and imposed fines upon those who tried to retain them through oaths or other commitments⁷⁷, whereas three years beforehand the law stipulated that no woman, free or enslaved, could be obligated to go on stage, and a free woman who was a former actress had the right to marry a man of any rank without having to address a request to the emperor in this regard⁷⁸.

⁷² GARLAND, Lynda. *Împărătesele Bizanțului*. Transl. from English by Maria Yvonne Băncilă și Damian Alexandru Anfile. București, Nemira, 2014, p. 38.

⁷³ Nov. 5.2.

⁷⁴ Monique Alexandre, *De l'annonce du royaume a l'eglise*, in *Histoire de Femmes*, vol. I, 439–471, Cit. by B o h î l ț e a, Florica Mihaș. Op. cit.. p. 20.

⁷⁵ C. 5.4.28.

⁷⁶ It is also in this novella that the emperor decrees that wives of the military are to be supported by the state during the absence of their spouses, even if they had no news of them; if a woman found out that her husband was deceased and was contemplating another marriage, the imperial command was that she as well as the one intending to marry her should be punished for adultery.

⁷⁷ Conform C. 5.4.29, if they still wanted to return to the theatre stage after the marriage, their rights were annulled.

⁷⁸ C. 5.4.33.

The Emperor Justinian did not avoid offences of a sexual nature either. Marked by a past of frequent abuse, Theodora used her influence in this legislative aspect as well. As a result, provisions⁷⁹ were issued in the year 528 covering rape, kidnapping or seduction of any woman. Capital punishment was invoked in the case of a *raptus*, even if it concerned the kidnapping of a slave (up until then, the accusation of *stuprum* for women who served in inns or in categories inferior to this one did not exist). Evagri⁸⁰, who generally criticized Justinian, accentuated how severely men who were accused of rape were treated. The *Ecclesiastical History* of this writer entails six books and recounts the events between the years 431-593. Evagri particularly emphasizes religious problems and is appreciated for his critical faculties.

The preoccupation with keeping prostitution under control in the capital is demonstrated by Novella 14.1 (535) which condemned proxenetists to corporal punishment and exile and explicitly declared that Justinian's aim was to clear out the city of these kinds of individuals. The law was brought against those who forced females to lead an unclean life against their will. It appears that girls aged ten or even younger were forced into prostitution after being tempted away from their families with the promise of clothing or food⁸¹. Prostitution was a reality in Constantinople. Seeing as many emperors had tried to control it by law⁸² before Justinian's time, we should not automatically assume that Theodora led Justinian to issue this particular legislation. In any case, the empress had first-hand experience of the kind of suffering that lower-class women had to face and demonstrated a personal interest in these matters. As Malalas demonstrates⁸³, in the year 528 Theodora was already involved in the actions directed against the proxenetists and the brothel owners who, under the pretext that they hired young girls with a contract, transformed them into public prostitutes. She commanded

⁷⁹ C. 9.13.

⁸⁰ Evagrii the Scholastic is a Christian Greek-language Syrian historian who was born in the year 536 in Epiphany (in present-day Syria) and died little after the year 594. Together with Eusebius of Caesarea, Theodoret of Cyprus, and Socrates the Scholastic, Evagrii the Scholastic is one of the main church historians of the Late Antiquity.

⁸¹ GARLAND, Lynda. Op. cit., p. 39.

⁸² Like the Emperor Leon I, who attempted to outlaw prostitution in the year 460.

⁸³ MALALAS, John. *Cronografia*. Ed. L. Dindorf, CSHB, Bonn, 1831, p. 440–441. Cit. by GARLAND, Lynda. Op. cit., p. 41. In this work, the writer includes events from the beginning of time until the year 550 in a popularising manner. It is written in such a way as to stir up the interest of the public to whom it is addressed. Oftentimes, the author presents historical facts alongside natural phenomena such as earthquakes, floods, and various legends.

that all of these brothel owners be arrested and outlawed, and that the girls receive a change of clothes and one *nomisma* each upon liberation.

There is also other existing proof that Teodora took an interest in women struck by misfortune. In his *History*, Procopius tells us about a certain Praeiecta, the emperor's niece, who was in love with the Armenian Artabanes, married at that time. The empress helped this man's wife by stopping their divorce, especially since Praeiecta was at that time married to Ioan, related to the former emperor Anastasie; Artabanes could only divorce after Teodora's death. Another incident is recounted by Malalas, who states that in the year 528, Eurlios, a *comes domesticorum*⁸⁴ who had fallen into destitute, asked in his testament that his daughters remain in the emperor's care despite not having the means to assure the carrying out of his testamentary dispositions. Justinian ordered the curator Makedonios to pay all the debts to creditors and the three daughters were brought into Augusta Theodora's imperial chambers and left into her care⁸⁵. Likewise, Novella 134.9 (559) stipulates that women could not be imprisoned for debts. If a woman was gravely accused, she would either be sent to a monastery or placed under the supervision of trustworthy women for her own protection.

Justinian's legislation also consists of provisions regarding property. In the year 530, Justinian confirmed that the principle of inalienability of dowry goods was still in force. As such, during his reign, this legal provision established by Augustus included all properties constituting the dowry. Moreover, these assets could not be sold even with the wife's agreement. Justinian intervened on this decision from 530 in the year 537 when he authorized the sale of land and buildings provided that the wife gave her consent – a consent which had to be renewed once every two years⁸⁶. Naturally, the husband remained responsible for the way he managed the dowry assets. He was obligated to act as he would in his own affairs (*diligentia quam suis*), providing guarantees to the woman with regard to his behaviour. If the husband did not manage the dowry accordingly or

⁸⁴ Commander of a military body attached to the Imperial Court.

⁸⁵ MALALAS, John. Op. cit., p. 439–440.

⁸⁶ GAUDEMET, Jean. Droit prive romain. Paris, Montchrestien, 1998, p. 205.

if he became insolvent, the woman could request the advanced restitution of the dowry or its seizure⁸⁷.

The emperor did not stop here with the legal innovations concerning the legal status of the woman's dowry. As such, the emperor unified the two dowry regimes of classic origin, transforming them into an action of good faith *ex stipulatu* which he named *actio de dote*, precisely in view of avoiding its confusion with the other *actiones ex stipulatu*⁸⁸. At the same time, he introduced the obligation to return the dowry even in the event of the woman's predecease, with her descendants inheriting her. In cases in which the deceased woman did not have children, the dowry was returned to the one who had composed it, even if it was a third party. On the other hand, the wife could cumulate, in the event of her husband's decease, the dowry and the assets he left as bequest; thus, the *edictum de alterutro* was dissolved. As concerns the dowry's restitution, the moveable assets had to be returned within one year and the immovable assets had to be returned immediately.

Justinian also addressed the guarantee to return the dowry. Consequently, the wife had recourse to personal action to claim her dowry. It appears that his claim was associated to a legal tacit mortgage (*tacita hypotheca*) established on the wedding day. In the year 531 the emperor went even further by affording the orthodox⁸⁹ woman a privileged right to mortgage with regards to all the other mortgages held by the husband even before the wedding⁹⁰. This privilege encumbered all of the husband's assets but especially the dotal ones which had become his property. It seems that the woman could only give up the mortgage when she encumbered the husband's personal assets or the moveable assets that were part of the dowry⁹¹. This exorbitant privilege in the woman's favour,

⁸⁷ C. 5.12.29, MURRAY, John. A dictionary of Greek and Roman Antiquities. London, 1875; available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Dos.html.

⁸⁸ C. 5.13.1, LONGINESCU, S. G. Elemente de drept roman. 2 vols. Vol. II. Tipografia Soc. Anonime Curierul Judiciar. București, 1929, p. 633.

⁸⁹ LONGINESCU, S. G. Op. cit., p. 638.

⁹⁰ GAUDEMET, Jean. Op. cit., p. 206.

⁹¹ Basilescu, Nicolae. Dota în dreptul roman și român, Teză pentru licență, Facultatea de Drept București, Tipografia Curierului român, 1881, 12.

introduced by *Lex Assiduisi*, gained Justinian the qualifying epithet of *uxorius* (slave to his woman)⁹².

Of considerable importance is C. 8.17.12 (the year 531) which gave women the right to claim the return of their dowry: “(the law up until then) did not take the woman’s weakness into account nor the fact that the husband enjoyed her body, her vitality and her entire life... and who does not pity them for their service to their husbands and for the dangers of childbirth?”⁹³. In Novella 22.3 (535) it is affirmed that reciprocal affection lies at the root of the marriage, and that the dowry was not necessary at all, followed by Novella 22.18 which prohibited the repudiation of the woman who married without a dowry for this very reason. Before the husband could repay a debt using his wife’s dowry, the wife had to give her consent twice: this is because the first time she could be persuaded, to her detriment, by her husband’s devious caresses and she might later change her mind and regret her consent⁹⁴. Once again, in these legal dispositions we come across a likeness to Theodora, who had married Justinian without a fortune and who was favoured by the laws issued.

Without assuming that Theodora had influenced Justinian’s legislation regarding women, we consider that she was interested in eliminating some of the disadvantages faced by lower-class women. In this regard, the empress’ past seems to have played a role in altering social conditions. As any wife of a head of state, Theodora had no official personal power, but her influence helped her successfully carry out her innovative ideas concerning women.

By trying to construct a historical legal approach, this declamation also outlines the private-public binomial as regards the woman’s role in VIth century society. It does not come as a surprise that the public space, belonging more so to the men, confines the fair sex within precise clichés. Apart from all the writings that have been left for us to utilise as research sources, we join our voice with Georgeta Fodor who states: “there are [...] in any society, two distinct feminine representations [...]: the theoretical profile reflected through formal texts on the one hand – legal codes, decrees, documents – and, on the other hand, the por-

⁹² VASILESCU, Paul. *Regimuri matrimoniale*. 2. ed. București, Universul Juridic, 2009, p. 125.

⁹³ *Nec ad fragilitatem muliebrem respicientes nec quod et corpore et substantia et omni vita sua marito fungitur.*

⁹⁴ Nov. 61.1.2 (year 537).

trait of the real woman, in the way she manifested herself in both the public and the private sphere.”⁹⁵

Through our portrayal of Justinian’s activity, we conclude that his introduction of *humanitas* in his legislative work and the consequences that this entails was supported by the emperor’s religious convictions. At the same time, his concern for the woman’s legal situation led some Romanists to attribute him the surname “emperor *uxorius*”⁹⁶; moreover, he perceived his entire reign as a duty to God. The emperor had studied theology and made sure to proffer a decidedly orthodox character to his entire body of laws. “The fact that canonical texts can be rediscovered in the Code as well, including the matter of divorce, brings us to the conclusion that there are no contradictions between the canons and the legal provisions.”⁹⁷ With all the congruences that may exist between the canons and the legal text, it must be appreciated that, in his wisdom, Justinian succeeded to clothe the Church’s teachings in a legal tone and to raise the institution of marriage to the highest moral standard, turning it into a sacrament, that is to say *sacramentum*. “[...] Justinian’s empire would later disintegrate [...] Only two of his established enactments, the first upon a religious idea – Saint Sophia – and the second upon the idea of righteousness – *Corpus Iuris* – have stood the tests of time to, pleading the emperor’s great cause to eternal posterity.”⁹⁸ Edward Gibbon draws the same conclusion, stating that the most important inheritance of Justinian’s era, but also of the emperor himself, is represented by the matters which went down to posterity within the legal field⁹⁹.

⁹⁵ FODOR, Georgeta. Destine comune: viața femeilor între public și privat: Țara Românească, Moldova și Transilvania: (secolele XV-XVII). Argonaut, 2011, p. 18.

⁹⁶ GAUDEMET, Jean. Op. cit., p. 194.

⁹⁷ BASSET, W. The Bond of Marriage. University of Notre Dame, 1968, p. 94, Cit. by Reynolds, P. L. Op. cit., p. 64.

⁹⁸ DIEHL, Ch. Justinien et la civilisation byzantine au VI^e siècle. Paris, 1901, p. 32, Cit. by Fotino, George. Op. cit., p. 156.

⁹⁹ GIBBON, Edward. The decline and Fall of the Roman Empire, chap. 44, Cit. by Humfress, Caroline. Law and legal practice in the age of Justinian. The Cambridge Companion to the Age of Justinian. Cambridge University Press, 2005, p. 161.

**ОПРЕДЕЛЕНИЕТО НА ФЛОРЕНТИН ЗА
ЧОВЕШКА СВОБОДА.
IUS КАТО ЧАСТ ОТ *LIBERTAS* (НА ИТАЛИАНСКИ
ЕЗИК)**

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Резюме: Определението на римския юрист Флорентин за човешката свобода е повлияно от естественото право (*ius naturale*). Това определение се отнася за свободата на човека. С течение на времето понятието за право (*ius*) в определението за свободата е превеждано и тълкувано по различни начини. Правото (*ius*) като ограничител на човека е въведено в римското понятие за свобода (*libertas*).

Ключови думи: *libertas*; *ius naturale*; *naturalis libertas*; *ius*.

FLORENTINUS' DEFINITION
OF HUMAN FREEDOM.
IUS AS PART OF LIBERTAS (ITALIAN LANGUAGE)

LA DEFINIZIONE DELLA LIBERTÀ UMANA
DI FIORENTINO.
IUS COME PARTE DELLA LIBERTAS

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Abstract: The definition of freedom as given by the Roman jurist Florentinus is influenced by natural law (*ius naturale*). This definition refers to human freedom. Along time, the concept of *ius* in the definition of freedom was translated / interpreted in various ways. The law (*ius*) as a limit of human will is included in the notion of Roman freedom (*libertas*).

Keywords: *libertas*; *ius naturale*; *naturalis libertas*; *ius*.

1. LA DEFINIZIONE DELLA LIBERTÀ

La definizione della libertà del giurista romano Fiorentino è conservata nei Digesta Iustiniani 1.5.4.pr.: “*Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur*”¹.

In questo frammento estratto dalle Istituzioni di Fiorentino si trova la prima definizione di libertà che ci è pervenuta. La nozione è costruita partendo dal diritto naturale romano (*ius naturale*).

Ulpiano spiega cos'è il diritto naturale:

Ulp. 1. institutionum (D. 1.1.1.3): “*Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censi*”².

Esiste nelle fonti antiche l'espressione *naturalis libertas*³, alla quale rinvia l'aggettivo *naturalis* della definizione di Fiorentino.

Tuttavia, la definizione di libertà di Fiorentino si riferisce solo alla libertà umana. L'espressione *naturalis facultas* e il termine *ius* della definizione indicano che si tratta solo di esseri umani⁴.

¹ Testo e traduzione di Dell'Oro, A. – In: Schipani, Sandro. A cura di. Digesti o Pandette dell'imperatore Giustiniano. Milano, Giuffrè, 2005, p. 99: “La libertà è la facoltà naturale di fare ciò che ciascuno aggrada, tranne ciò che sia impedito dalla forza o dal diritto”. Cfr. il simile passo delle Istituzioni di Giustiniano 1.3.1: “*Et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas eius quod cuique facere libet, nisi si quid aut vi aut iure prohibetur*”.

² Testo e traduzione di DELL'ORO, A. Op. cit., p. 77: “Il diritto naturale è quello che la natura ha insegnato a tutti gli esseri animati: infatti, questo diritto non è proprio del genere umano, ma è comune a tutti gli esseri animati che nascono in terra, in mare, ed è comune anche agli uccelli. Da qui deriva l'unione del maschio e della femmina, la quale unione noi chiamiamo matrimonio; da qui deriva la procreazione dei figli; da qui l'educazione. Vediamo, infatti, che anche tutti gli altri esseri animati, comprese le fiere, sono valutati in base alla esperienza “che abbiano” di questo diritto”.

³ IG., *commentarius secundus* (II, 66–67) e PAUL. 54 *ad edictum* (D. 41.2.3.14). In questi testi si tratta della libertà degli animali. Vedi anche BRAN, P. G. voce Libertà. Parte giuridica. Concetti e principi, in Enciclopedia di Bioetica e Scienza giuridica, VII, diretta dal cardinale Elio Sgreccia e dal professor Antonio Tarantino, Edizioni Scientifiche Italiane, Napoli, 2014, p. 1041; BRAN, P. G. Libertatea naturală (naturalis libertas) potrivit dreptului roman. – In: *Pandectele Române*, 2015, no. 2, p. 138 e 140.

⁴ BRAN, P. G. voce Libertà, cit., p. 1049, n. 29.

2. LA TRADUZIONE DI *IUS*

2.1. *Ius* inteso come “sanzione penale”

Nella traduzione effettuata dal Fabrotus della definizione di libertà di Fiorentino, ripresa nella Parafrasi di Teofilo, si attribuisce al termine *ius* del binomio ‘*vi aut iure*’ il significato di “sanzione penale” (*ius* come *poena*): “*Ius autem, veluti cum poenarum minis cohibeor, ne quidquid animo collibitum est, faciam*”⁵.

La traduzione del Manuale di Armenopulo eseguita dallo Heimbach riporterà la stessa interpretazione al termine *ius* del binomio ‘*vi aut iure*’ effettuata dal Fabrotus (*ius* come *poena*): “*lex autem, quando poenarum minis inhiheor facere quae volo*”⁶.

2.2. *Ius* inteso come “diritto civile”

Irnerio interpreta il passo D. 1.5.4.pr. di Fiorentino valutando che la *libertas* faccia parte dello *ius* naturale, perché, secondo il diritto naturale, ciascuno è dotato di libero arbitrio, a condizione che la *vis* – considerata come “diritto delle genti” – oppure lo *ius* – inteso come “diritto civile” – non lo proibiscano: “*Dixit Yr.: Describitur hic libertas iuris naturalis, nam iure nature unusquisque habet liberum arbitrium, ita nec vi, id est iure gentium, aut iure, scilicet civili, prohibetur*...”⁷.

⁵ ΘΕΟΦΙΛΟΥ του ἀντικίνησορος ἱνστιτούτων βιβλία 4. = Theophili antecessoris Institutionum libri IV. Autoresse: Theophilus; Charles Annibal Fabrot; Jacobus Curtius. Parisiis, sumptibus Mathurini du Puis, 1638, p. 31. Vedi anche THEOPHILI Antecessoris Paraphrasis graeca Institutionum caesarearum. Autores: Théophile Antecessor; Charles-Annibal Fabrot; Pierre Nanninck; Jacques Corte; Denys Godefroy; Wilhelm Otto Reitz; Otto Thollius; Pierre Thollius. Hagae Comitum, Apud fratres Ottonem et Petrum Thollios, 1751, p. 44: “*Lex autem, quando poenarum minis cohibeor facere quae volo*”.

⁶ CONST. Harmenopuli Manuale legum sive hexabiblos: cum appendicibus et legibus agrariis / ad fidem antiquorum librorum Mss. editionum recensuit, scholiis nondum editis locupletavit, latinam Reitzii translationem correxit, notis criticis, locis parallelis, glossario, illustravit Gustavus Ernestus Heimbach. Constantinus Harmenopulus; Heimbach, Gustav Ernst (Eds.). Lipsiae, Weigel, 1851, p. 189. Cfr. CRIFÒ, G. Semitae et vestigia libertatis. – In: *Studi per Giovanni Nicosia*. Vol. 3. Milano, 2007, p. 61: “Non mi fermo sui significati di volta in volta assegnati ai termini limitativi della libertà, ma ricordo che ad es. nel Manuale di Armenopulo per *vis* si intende la forza maggiore e per *ius* la sanzione penale (n. 79: *Prochiron* I 18.2.)”.

⁷ Irnerio, citato da Odofredo, apud SCHRAGE, E. J. H. *Libertas est facultas naturalis: Menselijke vrijheid in een tekst van de Romeinse jurist Florentinus* (Leidse juridische reeks). Universitaire Pers, Leiden, 1975, p. 70 s. Cfr. CASTELLO, C. Il pensiero giustiniano sull'origine degli *status hominum*. – In: *Studi in memoria di Emilio Albertario*. Vol. 2. Milano,

Accursio, interpretando il passo I. 1.3.1 delle Institutiones di Giustiniano, a proposito della definizione di *libertas*, evidenzia la stessa idea di Irnerio (*ius* è inteso come “diritto civile”):

“Hec diffinitio tribus modis intelligitur: primo, secundum Irnerium ut loquatur etiam de servis qui etiam liberi sunt iure naturali inspecto; secundo dic quod hec verba ‘ex qua etiam liberi vocantur’ etc. sunt de diffinitione; tertio dic quod libertas contraria servituti hic diffinitur, et quod dicit ‘vi’, expone. id est iure gentium, quod necessario et per violentiam est inductum ut supra, titulo I, § Ius autem; et ‘iure’, scilicet civili [ns. sottolineatura], quando maior XX annis vendidit se ad pretium participandum, ut infra § Servi; quod verius est, ut patet ex continuatione huius §, ad proximum superius responsum. Et hec verba ‘ex quia liberi’ etc., non sunt de diffinitione, sed effectum quemdam libertatis demonstrant. Ac”⁸.

2.3. L’interpretazione positivistica di *ius*

1) *Ius* come “diritto positivo”

Il Danielopolu, nella traduzione del frammento D. 1.5.4.pr., dà al termine *ius* il senso di “prescrizione del diritto”, ma dal commento che fa al frammento di Fiorentino, lo studioso mostra chiaramente che lo intende come “diritto positivo”. Egli rileva che secondo la ragione naturale tutti gli uomini sono liberi, e cioè hanno il diritto di esercitare le facoltà di cui la natura li ha dotati. Le sole restrizioni che il “diritto sociale” – inteso dall’Autore come “diritto positivo” – deve porre all’esercizio della volontà umana sono, tramite l’esercizio della libertà, di non dover nuocere al prossimo, di non fare ad altri ciò che non si vorrebbe subire⁹.

2) La traduzione di *ius* con “legge”

1953, p. 214, nt. 2: “I glossatori [...] osservano [...] prendendo in esame D. 1, 5, 4 che la limitazione alla libertà dell’uomo *iure naturali* avveniva [...] *civili* [...]”.

⁸ Accursio, apud SCHRAGE, E. J. H. *Libertas est facultas naturalis*, cit., p. 89.

⁹ DANIELOPOLU, G. Explicațiunea Instituțiunilor lui Justinian. Vol. 1. București, 1899, p. 115 (*ius* = “prescripțiune a dreptului”), e p. 116: “Singurele restricțiuni ce dreptul social trebuie să pună la exercițiul voinței omului, este ca prin exercițiul libertății sale să nu vatăme pe aproapele său, să nu facă altuia ceea ce n’ar vrea să’i facă lui altul. Câte o-dată însă dreptul pozitiv al unui popor trece peste aceste limite și impune omului și alte restricțiuni, cum este, în Statele despotice, restricțiunea de a nu se aduna, de a nu tipări nimic fără censura prealabilă a guvernului. Aceste restricțiuni de și legale, adică conforme dreptului pozitiv, sunt însă antilegale, rațional vorbind, căci sunt condamnate de rațiunea naturală, de dreptul natural. În dreptul roman ca și în orî-ce drept pozitiv sunt restricțiuni, și ele au variat după starea politică și de cultură a populusului roman, în decursul ascensiunii și decadenței sale”».

Il Dumitrescu traduce il vocabolo *ius*, nel passo I. 1.3.1, con il termine “legge”¹⁰.

Lo Hulot interpreta il termine *ius* del passo D. 1.5.4.pr. traducendolo con il plurale “les lois”: “La liberté est la faculté naturelle de faire ce qui plaît, abstraction faite de ce qui nous est défendu par les lois, ou des empêchements qui surviennent par la violence”¹¹.

2.4. *Ius interpretato come “diritto oggettivo”*

Il Levy traduce la parola *ius* del frammento di Fiorentino D. 1.5.4.pr. con il vocabolo “law”: “Freedom is a man’s natural capacity of doing what he pleases, unless he is prevented by force or law”¹². Nel sistema romano-germanico il termine “law” è inteso come diritto oggettivo¹³.

¹⁰ DUMITRESCU, M. A. Manual de drept roman. Anul I. București, 1920, 29 (*ius* = «lege»). Vedi, nello stesso senso, TOMULESCU, C. ST. Drept privat roman. București, Universitatea din București, Facultatea de Drept, 1973, p. 125 (*ius* = «legea»).

¹¹ CORPS de droit civil romain: en latin et en français. Tome I. Les cinquante livres du Digeste ou des Pandectes de l’Empereur Justinien. Trad. en fr. Henri Hulot. Réimpr. de l’édition de Metz, 1803. Aalen, Scientia, 1979, p. 63. Vedi, nello stesso senso, CUERPO del derecho civil romano: a doble texto, traducido al castellano del latino / publicado por los hermanos Kriegel, Hermann y Osenbrüggen; con las variantes de las principales ediciones antiguas y modernas y con notas de referencias por Ildefonso L. García del Corral. T. I: Instituta; Digesto. Parte 1, 2, 3; T. II: Digesto. Parte 4, 5; T. III: Digesto. Parte 6, 7; T. IV: Código. Libros 1, 2, 3, 4; T. V: Código. Libros 6 a 12; T. VI: Novelas; Constituciones. Barcelona, Universidad de Sevilla. Fondo antiguo, 1889–1898. T. I: Instituta; Digesto, p. 213 (*ius* = «ley»); BIONDI, B. Il diritto romano propagatore di libertà. – In: *Jus*. Nuova Serie, Vol. 3, Fasc. 2. 1952, p. 270 (*ius* = «legge dello Stato» e «legge»); El DIGESTO de Justiniano. Tomo I. Constituciones Preliminares y Libros 1–19. version castellana. Pamplona, Editorial Aranzadi, 1968, p. 59 (*ius* = «ley»); TORRENT RUIZ, A. Diccionario de derecho romano. Madrid, 2005, p. 638 (*ius* = «ley»).

¹² LEVY, E. Natural Law in Roman Thought. – In: *Studia et Documenta Historiae et Iuris*, Vol. 15, 1949, p. 13 (*ius* = «law»). Vedi, nello stesso senso, WATSON, A. The Digest of Justinian. Vol. 1. English Translation. Philadelphia, Pennsylvania, 1985, 15 (*ius* = «law»); PLESCIA, J. The Development of the Doctrine of *Boni Mores* in Roman Law. – In: *Revue Internationale des Droits de l’Antiquité*, Vol. 34, 1987, p. 269, nt. 13 (lo *ius* viene interpretato come «law»; anche il commento dello studioso va in questa direzione: “To the discipline and law oriented Romans the “natural right of freedom” was under *necessitas* of law and order, imposed by the State as Public Policy”); BISCARDI, A. La crisi della repubblica romana. – In: *Labeo*. Rassegna di diritto romano, Vol. 5, 1959, p. 92: “[...] vi è una libertà giuridica, che è il potere di agire in un modo piuttosto che in un altro nella sfera dei rapporti pubblici e privati, riconosciuto ad ogni persona libera dal diritto obiettivo (nota 3: Gai. 1.9: “*et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi*”; D. 1.5.4.pr. (Flor. 9 [?] inst.): “*libertas est [naturalis] facultas eius quod cuique facere libet, nisi si quid [...] iure prohibeatur*”. Cfr. I.1.3.pr. e §1.)”.

¹³ BOBOȘ, Gh. Teoria generală a dreptului. Cluj-Napoca, 1994, 5: «În limba engleză există doi termeni diferiți pentru a desemna cele două sensuri ale termenului “drept”. Astfel sunt: LAW pentru dreptul obiectiv și RIGHT pentru dreptul subiectiv». Vedi lo stesso testo in BOBOȘ, Gh. i BUZDUGAN, C. Teoria generală a dreptului. Cluj-Napoca, 2005, p. 5. Cfr. anche CATALANO, P. Diritto, soggetti, oggetti: un contributo alla pulizia concettuale sulla base di D. 1, 1, 12. – In: *Iuris Vincula*. Studi in onore di Mario Talamanca. Vol. 2. Napoli, 2001, p.

L'interpretazione dell'antico *ius* come "diritto oggettivo" corrisponde alla concezione dei giuristi Romani, per i quali lo *ius* aveva però un significato più complesso: di diritto soggettivo e oggettivo nello stesso tempo, di vantaggio e anche di vincolo¹⁴.

2.5. *Ius* tradotto semplicemente come "diritto"

Il du Caurroy de la Croix, nella traduzione del passo I. 1.3.1 delle *Institutiones* di Giustiniano, dà al termine *ius* il significato di "diritto": "Et la liberté (d'où vient aussi le nom de libre) est la faculté naturelle de faire chacun ce qui lui plaît, excepté ce d'où on est empêché par la force ou le droit"¹⁵.

Il Crifò, nell'interpretazione del frammento D. 1.5.4.pr. di Fiorentino, attribuisce al vocabolo *ius* il significato di "diritto": "Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur." – Riconoscere genuina nella sua integrità tale formula vorrebbe dire che la definizione qui data di *libertas* si riferisce non già alla libertà giuridica, bensì proprio a quella libertà materiale, di fatto, cui finora si è accennato. Un tale senso sembra essere dimostrato dalla limitazione che a tale libertà viene fatta 'o dalla violenza o dal diritto'¹⁶.

98: «[...] la distinzione tra 'Law' e 'Right', che sembra corrispondere a quella tra 'diritto oggettivo' e 'diritto soggettivo', risulta intrinseca e spontanea nel moderno linguaggio giuridico angloamericano (nota 9: Vedi A. KIRALFY, *Law and right in english legal history*, in AA. VV., *La formazione storica del diritto moderno in Europa* (Atti del III Congresso internazionale della Società italiana di storia del diritto), III, Firenze, 1977, 1069 ss. (part. 1082 ss.)).»

¹⁴ Vedi anche BRAN, P. G. Libertatea naturală, cit., p. 141.

¹⁵ CAURROY de la CROIX, A. M. Du. *Institutes de l'Empereur Justinien*, nouvellement traduites. 2. éd. Paris, 1821, p. 19 (*ius* = «droit»); CAURROY de la CROIX, A. M. Du. *Institutes de l'Empereur Justinien*, traduites sur le texte de Cujas, Cinquième Édition. Bruxelles, 1834, p. 11 (*ius* = «droit»). Vedi, nello stesso senso, anche ACCARIAS, C. *Précis de droit romain, le texte, la traduction et l'explication des Institutes de Justinien*. 3. éd. Tome Premier. Paris, 1882, p. 84 (*ius* = «droit»).

¹⁶ CRIFÒ, G. Su alcuni aspetti della libertà in Roma. Modena, 1958, p. 66 s. Vedi, nello stesso senso, CRIFÒ, G. Libertà e cittadinanza. – In: *Diritto romano attuale*. Storia, metodo, cultura nella scienza giuridica. Vol. 8, 2002, p. 31 (*ius* = «diritto»); J. MIQUEL, *Derecho privado romano*. Madrid, 1992, p. 166 (*ius* = «Derecho»); CORPUS Iuris Civilis II. Text und Übersetzung. Digesten 1–10. Heidelberg, Müller, 1995, S. 118 (*ius* = «Recht»); BARBERIS, M. Libertà. Bologna, 1999, p. 16: *ius* = «diritto»; Digeste lui Iustinian. Prima Carte. Trad. T. Sâmbrian. Craiova, 2002, p. 100 (con una certa sfumatura, *ius* = «(norma de) drept»); SCHIPANI, Sandro, Op. cit. (nt. 1), p. 99 (*ius* = «diritto»).

3. IUS COME CONDIZIONE INTRINSECA DELLA *LIBERTAS*

Il Danielopolu interpreta la definizione di *libertas* in questa maniera: la libertà è la facoltà naturale di qualcuno di fare ciò che vuole, a meno che non ne sia impedito da una violenza di fatto o da una prescrizione del diritto¹⁷. Ed egli commenta nel senso seguente: la libertà è la condizione naturale dell'uomo, quella che tutti gli uomini devono avere secondo il diritto, secondo la ragione naturale, e contro la quale solo il disegno umano ha regolamentato lo stato di servitù. Secondo la ragione naturale, tutti gli uomini sono liberi, ossia hanno il diritto di esercitare le facoltà di cui la natura li ha dotati. L'Autore rileva che questo è affermato da tutti i giuristi romani. Ulpiano, per esempio, nei *Digesta Iustiniani* 1.1.4 e 50.17.32, e anche Giustiniano nelle sue *Institutiones* 1.3.2, nella definizione che dà della servitù. Secondo il Danielopolu, se a volte tramite la violenza, per esempio dei pirati, presso i Romani c'erano uomini di fatto impossibilitati a esercitare come volevano le loro facoltà, questa è una situazione di fatto e non di diritto¹⁸. Quindi, secondo lo studioso, la *vis* tradotta come "violenza" cancella la libertà degli uomini.

Il Danielopolu continua il proprio commento sulla definizione di *libertas* di Fiorentino in questo senso: gli uomini presi con violenza dai pirati in diritto rimanevano liberi. Secondo l'Autore la sola restrizione che il "diritto sociale" deve porre all'esercizio della volontà umana è che tramite l'esercizio della propria libertà non deve nuocere al suo prossimo e non fare ad altri ciò che non vorrebbe subire. A volte però – continua il romanista – il diritto positivo di un popolo oltrepassa questi limiti e impone agli uomini anche altre restrizioni, com'è, negli stati dispotici, la restrizione di fare assemblee o di stampare senza il previo accordo del governo. Queste restrizioni, anche se legali, e cioè conformi

¹⁷ DANIELOPOLU, G. Explicațiunea Instituțiunilor lui Justinian. Vol. 1, cit., p. 115: "Libertatea este facultatea naturală de a face cine-va ce vrea, fără numai că pôte fi împiedicat întru acésta de o violență de fapt sau de o prescripțiune a dreptului".

¹⁸ Ibidem, p. 115–116: "Libertatea este condițiunea naturală a omului, aceea pe care toți ómenii trebuie s'o aibă după dreptul, după rațiunea naturală, și contra căreia numai întocmirile omenesci au rânduít starea de servitute. După rațiunea naturală, toți ómenii sunt liberi, adică au dreptul de a-și exercita cum vor voi facultățile cu cari 'i-au dotat natura. Acésta o recunosc toți jurisconsulții Romani, Ulpian, de exemplu, în legea 4 *De justitia et jure* (l, 1) și în legea 32 *De regulis juris*, și d'impreună cu dênșii Justinian, chiar în definițiunea ce dă despre servitute în § 2 al titlului nostru din Instituțiuni. [...]. Dacă câte o-dată prin violență, de exemplu a Piraților, la Romani erau ómeni în stare de fapt de imposibilitate a-și exercita cum vrea facultățile lor, acésta era o stare de fapt, iar nu de drept [...]"

al diritto positivo, sono antilegali, razionalmente parlando, perché sono condannate dalla ragione naturale, dal diritto naturale. Nel diritto romano, come in qualsiasi diritto positivo – afferma il Danielopolu – esistono restrizioni, ed esse sono state cambiate a seconda della situazione politica e culturale del popolo romano nel percorso della sua ascesa e discesa¹⁹. Ad ogni modo, si può osservare che il “limite” *ius*, inteso come “diritto positivo”²⁰, rimane condizione intrinseca della *libertas* soltanto fino a un certo punto.

Secondo il Mayer-Maly le parole ‘*vi aut*’ sono da attribuire a un redattore delle *Institutiones* di Fiorentino, perché vi sarebbe tuttavia una grande differenza se la libertà fosse limitata soltanto attraverso il diritto o anche attraverso l’“arbitrio” (“*Willkür*”): “Aber ob Freiheit nur durch Recht oder auch durch Willkür beschränkt wird, ist doch ein großer Unterschied: Daher sind die Worte “*vi aut*” einem Bearbeiter der Florentinus-Institutionen zuzuschreiben”²¹. La traduzione del termine *vis* con il vocabolo “*Willkür*” porta alla negazione di libertà.

Tuttavia, per il Mayer-Maly, il limite *ius* fa parte dal concetto di libertà romana: “[...] Der ciceronianische, Aristoteles entlehnte Freiheitsbegriff (*potestas vivendi ut velis*) erfährt durch die Worte “*nisi iure prohibetur*” eine entscheidende Einschränkung: Auch der Freie ist ans Recht gebunden. [...] *Rechtszwang ist derart begrifflich keine Beschränkung der Freiheit, da es nur in einer Rechtsordnung Freiheit geben kann. Erst aus der Zugehörigkeit zur Rechtsgemeinschaft ist ja die Freiheit des einzelnen erwachsen!*”²². L’autore si ricollega alle posizioni

¹⁹ Ibidem, p. 116: “[...] în drept rămânea liberă. Singurele restricțiuni ce dreptul social trebuie să pună la exercițiul voinței omului, este ca prin exercițiul libertății sale să nu vatăme pe alții, să nu facă altuia ceea ce n’ar vrea să-i facă lui altul. Câte o dată însă dreptul pozitiv al unui popor trece peste aceste limite și impune omului și alte restricțiuni, cum este, în Statele despotice, restricțiunea de a nu se aduna, de a nu tipări nimic fără cenzura prealabilă a guvernului. Aceste restricțiuni de și legale, adică conforme dreptului pozitiv, sunt însă antilegale, rațional vorbind, căci sunt condamnate de rațiunea naturală, de dreptul natural. În dreptul roman ca și în orice drept pozitiv sunt restricțiuni, și ele au variat după starea politică și de cultură a populusului roman, în decursul ascensiunii și decadenței sale”. Per un pensiero simile cfr. PLESCIA, J. The Development of the Doctrine of *Boni Mores* in Roman Law, cit., p. 269, nt. 13: «Florentinus, D. 1, 5, 4 pr. To the discipline and law oriented Romans the “natural right of freedom” was under *necessitas* of law and order, imposed by the State as Public Policy». Comunque, mentre il Danielopolu fa riferimento al popolo romano, il Plescia usa il termine moderno “Stato”.

²⁰ DANIELOPOLU, G. Explicațiunea Instituțiunilor lui Justinian. I, cit., 116.

²¹ MAYER-MALY, Theo. Zur Rechtsgeschichte der Freiheitsidee in Antike und Mittelalter. – In: *Österreichische Zeitschrift für öffentliches Recht*, Vol. 6, 1954, S. 409.

²² Ibidem.

di Jhering e di Schulz e cita al riguardo il passo di Cic., *pro Cluentio* 146: “*legum id circo omnes servi sumus ut liberi esse possumus.*”

4. CONCLUSIONE

In conclusione risulta necessario effettuare alcune precisazioni, perché la nozione romana di *libertas* non è bene intesa da alcuni autori ancora attualmente.

Alcune traduzioni/interpretazioni del termine *ius* proposte da diversi studiosi della definizione di libertà non sono in grado di restituire il contenuto concettuale di questa parola. La traduzione corretta è quella di “diritto”²³.

Inoltre occorre riconoscere che nella definizione di libertà di Fiorentino lo *ius* è condizione intrinseca della libertà romana, così come risulta anche dallo studio di altre fonti antiche, per esempio da Cic., *pro Cluentio* 146, che indica chiaramente questa concezione dell’ambito giuridico romano antico²⁴.

Un contributo di questo scritto vuole essere proprio quello di chiarire il significato del termine giuridico romano *ius* presente nella definizione della libertà. In secondo luogo, si è tentato di rilevare il fatto che non è la libertà che viene limitata dallo *ius*, ma la volontà umana.

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**ЦЪРКВАТА И ДЪРЖАВАТА ВЪВ
ВИЗАНТИЙСКАТА ИМПЕРИЯ:
СВЕЩЕНОТО И СВЕТСКОТО В ОБЩЕСТВОТО
(НА АНГЛИЙСКИ ЕЗИК)**

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Резюме: Историческата и структурната обвързаност между Църквата и Византийската империя създава една важна традиция. Темата е колкото традиционна, толкова и актуална, особено в Европа. Тя включва в себе си един особено сложен проблем – за елементите на отношението между Църквата и Византийската империя. В статията са анализирани историческите, културните, правните, политическите и идеологическите аспекти на тези елементи. В съвременното състояние на нашето познание византийският живот се разглежда като белязан от постоянни промени, макар че в същото време има лоялна обвързаност с традиции, определящи възгледите както на Църквата, така и на Империята. Във Византийската империя е характерна специфична връзка между Църквата и Държавата, като владетелят е избраник на самия Господ Бог, а ролята на религиозния водач е ограничена до духовните функции, т.е. до запазването на чистотата на вярата в Църквата. Въпреки този характер на взаимоотношенията императорът заема и специално място в църковната служба. Тази позиция на византийския император по-късно ще стане известна под термина „цезаропапизъм“. Той обхваща в себе си целия православен свят, който послушно го приема.

Ключови думи: Византийска империя; Източноправославна църква; цезаропапизъм.

**THE CHURCH AND THE STATE
IN THE BYZANTINE EMPIRE:
THE HOLY AND THE PROFANE WITHIN SOCIETY
(ENGLISH LANGUAGE)**

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Abstract. The historical and structural relationship between the Church and the Byzantine Empire form an important tradition. However, this topic is equally traditional, as it is current, especially in Europe. It addresses a particularly complex problem which contains in itself the elements of the relation between the Church and the Byzantine Empire. Specifically, we analyze the historical, cultural, legal, political and ideological aspects of these elements. In the present state of our knowledge, the byzantine life is seen as marked by constant change, although at the same time there was loyal adherence to certain traditions governing the outlook of both Church and Empire. As regards the Byzantine Empire, a specific relationship between Church and State is characteristic, so apart from the ruler who was chosen by the Lord himself, the role of the religious head was limited to the spiritual functions i.e. to the preservation of the purity of faith within the Church. Despite of this character of the relationships, the Emperor also occupied a special place in the church service. This mode of action of the Byzantine Emperor would later become known under the term of caesaropapism. It encompassed in itself the entire Orthodox ecumene which obediently received it.

Keywords: Byzantine Empire; Orthodox Church; caesaropapism.



The historical and structural relationship between the Church and the Byzantine Empire form an important tradition. However, this topic is equally traditional, as it is current, especially in Europe. It addresses a particularly complex problem which contains in itself the elements of the relation between the Church and the Byzantine Empire. Specifically, we analyze the historical, cultural, legal, political and ideological aspects of these elements. The Byzantium Empire was based on a clear religious conviction: that it was the earthly copy of the Kingdom of Heaven.

At the present state of our knowledge, the Byzantine life is seen as marked by constant change, although at the same time there was loyal adherence to certain traditions governing the outlook of both Church and Empire. It has also become increasingly clear that the Church was not a department of State. The Byzantines had a strong feeling for dignified ceremony and symbolism and this left its mark on the ecclesiastical, as well as on the imperial developments. What mattered were the liturgical life and the faithful adherence to the traditions of the Church.¹

It is well known that wherever monarchy has been established the monarch was always in the beginning either an emanation of God or a descendant of God, or at least His High Priest, the man appointed by God to look after the people. But the Empire which we call for convenience Byzantine maintained a larger conception.² According to one of the fathers of the Byzantine political thought, Pseudo-Dionysius Areopagit: "Hierarchy is a divine and holy order, which the order that rules with the world aspires to reach."³ Hence, the ideological premise of duality of Church-State in the Byzantine Empire was constituted in the idea that the entire human order becomes a reflection of its own archetype, i.e. of the heavenly order that is the only perfect one in the full sense of the word. In this

¹ HUSSEY, J. M. *The Orthodox Church in the Byzantine Empire* (Oxford History of the Christian Church). Oxford University Press, 1986, p. XVI.

² RUNCIMAN, Steven. *The Byzantine Theocracy*. London ; New York ; Melbourne ; Cambridge University Press, 1977, p. 1.

³ PSEUDO-DIONYSIUS: *The Complete Works* (Classics of Western Spirituality (Paperback). English and Ancient Greek Edition. The Areopagite. New Jersey, Paulist Press, 1987, p. 193.

way, the concept of social organization undoubtedly comes to the fore. According to it, the entire Byzantine society was built and tended to be organized in line with the heavenly order, or as its perfect reflection on Earth. Thus, each individual or group in the Byzantine world had a strictly specified or envisaged position in the pyramid at whose top stood the Emperor himself, just as at the top of the heavenly hierarchy stood God. From there, we arrive to the picture of the place of the Emperor in the Byzantine world: "as God's representative on Earth, i.e. as a Jesus' deputy".⁴ The maxim "God's kingdom on Earth" represented the true reflection of the conception which Rhomios i.e. Byzantines had for themselves.⁵ Hence, it is especially important to emphasize that such vertical organization of the Byzantine society remained present during the entire existence of the Byzantine Empire.

Here, it is undoubtedly necessary to point out that the capital of the Empire, the imperial city of Constantinople had a huge role in the social hierarchy; it took up the position of the "city over the cities", just as it was thought that the Byzantine emperor had the highest rank in the world, and as the Ecumenical Patriarch had the highest rank in the church hierarchy (on 11 May 330 AD on the shores of the Bosphorus, the Emperor Constantine consecrated his new capital, Constantinople). Hence, Constantinople was "the queen of the cities", while the Emperor was a *κοσμοκράτωρ*/cosmocrator (master of the world and the universe) and Ecumenical Patriarch i.e. spiritual leader of the world inhabited by civilized peoples.⁶ All of the above mentioned constituted the foundations on which the understanding of the indisputable authority of the Byzantine world over the universe was based.

The unconditional respect for the order was treated as a kind of imperative. Therefore, the understanding of the Byzantines that the disorder (*αταξία*/ataxiu – mess) is a condition in which the soul is lost (*Ψυχολεθρος*/psycholethros – loss of soul, cavern) and in political terms "democracy" is an usurpation of authority by the people, the biggest heresy against the

⁴ Konstantin VII Porfirogenit, Poretku Carstva, Beograd.

⁵ RUNCIMAN, Steven. The Byzantine Theocracy, cit., p. 161.

⁶ FERJANCIC, B. Porfirogenit Konstantin VII. – In: *Vizantijski izvori za istoriju naroda Jugoslavije*. Vol II. Beograd, Vizantološki institute SANU, 2007.

Emperor who is the only true representative of God and of the legislative authority on Earth, does not come as a surprise.

For example, Constantine the Great himself often intervened in the Church issues. For example, he convened the Council of Nicaea in 325 AD which brought together many bishops and church leaders to consider the position of Arian Christians.⁷ Thus built, the Byzantine ideology had its initial roots in the state – church idea which was formulated by *Eusebius of Caesarea*, the court theologian of Emperor Constantine. This idea of interdependence of church and secular authorities, or more precisely, the idea of the Christian empire in whose center was not the spiritual head of the Church but the Christian Emperor had been formulated since Constantine's founding of Constantinople. The Christian Emperor was shaped on the model of Constantine who appears as God's representative on Earth and to whom God gave “the representation of his omnipotent government”. This system lies in the foundation of Eusebius' political theology. The Emperor's power had the highest God's mercy as its source and the relationship between God and the Christian Emperor was of a personal nature. Thus, God's will did not govern the Emperor's will through intermediaries i.e. through church dignitaries, but directly. Accordingly, Eusebius of Caesarea says: “So the Lord himself, the greatest ruler of the whole world, chose Constantine as his ruler and leader of all and therefore no man can boast that he had appointed him to that position.”⁸ Constantine's idea was to reformulate the imperial authority into an absolutistic one, completed by the divine law. This idea, at the beginning of IV century AD and under an immediate influence of the Middle East, represented a completion of the new tendencies which varied significantly from those of the old Western Roman Empire.⁹

For all of these reasons, a specific relationship between church and state is characteristic for the Byzantine Empire. Thus, aside from the ruler who was chosen by the Lord, the role of the religious head was limited to the spiritual functions, that is, to the preservation of the purity of faith within the church. In

⁷ See more Arianism – In: *Encyclopædia Britannica*. 32 vols. 15. ed. Chicago, Encyclopædia Britannica, 2007.

⁸ MacMULLEN, R. *Christianizing the Roman Empire: A.D. 100–400*. Yale University Press, 1984, p. 10.

⁹ VASILYEV, Alexander A. *History of the Byzantine Empire*. Vol. 2. London, Madison and Milwaukee, 1971.

spite of this proportion of relations, the Emperor also took a special part in the church service. Namely, the Byzantine Emperor was the only laic who was allowed to attend the Eucharist behind the altar. In that way, God's grace was confirmed and the Emperor was made equal to a clerical person. The relationship between the Christian Emperor and the head of the church was perceived as harmonious, which implicated that the church accepted the Emperor as its protector and a guardian of the unity of faith, while the church voluntarily limited itself to the purely spiritual field.

This concept would later become known as *Caesaropapism*, a concept of the unlimited power of the Emperor over the church, spread throughout the Orthodox ecumene. It is important to be notified that of all Byzantine dynasties, the Comneni came closest to realizing the Caesaropapist ideal. This dynasty control over the Orthodox church was both deceptive and damaging. The church found itself with the strength but not the will to assert itself against an imperial establishment that was in rapid decline by 1180; and neither side was in a position to provide Byzantine society with a sense of purpose.¹⁰

Perhaps the most lasting monument of Justinian's reign was his codification of Roman law. By this time, it became necessary to rewrite many of the laws, as they had become obsolete since their last codification by Theodosius in 348. In the absolute monarchy the people ceased to be the source of the laws. It was now the monarch, by virtue of his office, that was responsible for putting into effect a new law, as well as the way in which it was interpreted and enforced. The heritage of Roman law represented an unbroken tradition that continued to the time of Justinian. Preservation and renewal of the laws, Justinian felt, offered the possibility of emphasizing one of major roots of the Empire's strength. This immense accomplishment by far outlasted the Byzantine Empire and survived to form the basis of European jurisprudence. On February 13, 528, Justinian appointed ten jurists to compile a new codification of the Statute law. This commission, comprised of ten jurists, was appointed to the task of compiling the new code. It included two persons of particular significance. The first was Tribonian, a jurist in the civil service and Theophilus, a professor of law at the University of Constantinople. Under their diligent supervision, the new "Codex Iustinianus"

¹⁰ MAGDALINO, P. The Anglo-Hellenic Review.

was published in a little over one year, April 7, 529 AD. With the writing of this Codex, the administration of the law was put on a new basis. However, even before the completion of this work, an even more ambitious undertaking was begun. This was the compilation of a Digest of the jurisprudence of the great Roman lawyers of the second and third centuries AD, an undertaking that had never before been attempted on such a scale. The order to begin the work on the Digest was given on December 15, 530 AD. In December, 533 AD the Digest, called "*Digesta Iustiniani Augusti*" was completed. It was expected that the work on it would take ten years, but it was finished in less than three. Its writing had involved, among other things, reading of 2000 books, representing 39 authors, and it included 3 million lines. The final code was reduced to 150 thousand lines. Most of the authors' reading came from Tribonian's private library. With both law and jurisprudence now established, any further commentary on the law was forbidden. The Code and the Digest represented the whole of the valid law, along with its interpretation – with the exception of such imperial legislation as might subsequently be issued.

The old teaching manuals, now obsolete, were replaced by new ones. While the Digest was being compiled Tribonian began working on an introductory manual, the "*Institutes*", which was to take the place of the classic manual of Gaius. The new manual was published on November 21, 533 AD and it came into effect on the same day as the Digest, December 30, 533 AD. The teaching of law was also overhauled. To ensure better control of instruction, the teaching of law was allowed only at the universities in Constantinople and Beyrouth; the schools at Alexandria and Caesarea were closed down as their teaching of law was found to be unsatisfactory.

By the end of 533 AD, it had become apparent that the original Code of April 533 AD had already been rendered obsolete by the publication of a large amount of legislation. As a result, Tribonian and his colleagues, due to their remarkable skill and competence, were once again summoned to compile a new Code. This work was to be done by Tribonian, Dorotheus of Beyrouth and three other lawyers, all of whom had been engaged to work on the Digest. The work was published on November 16, 534 AD and went into effect on December 30th of the same year. This edition of the Code, which is extant, is divided into twelve books. Book I deals with ecclesiastical law, the sources of the law, and the du-

ties of higher officials. It should be noted here that the ecclesiastical law has a place of honor in this Code, which it did not have in the Code of Theodosius. Books II–VIII deal with private law. Book IX concerned the criminal law, and Books X–XII the administrative law. There is a total of 4652 laws in this collection. Any new legislation, when needed, from that point onward was issued in the form of “New Constitutions”, known as “*Novels*”. These dealt with such issues as ecclesiastical and public affairs, as well as private law. In particular, one very long Novel constitutes a code of Christian marriage law.

A sign of departing from the traditions of the old Roman Empire and the rise of the Eastern Roman Empire at the time of Justinian was the fact that all Novels were now written in Greek. While the Codes were in Latin, the traditional language of the law, this was not the natural language of judges, lawyers, litigants and the general population in the Eastern Roman Empire. Also, while Justinian was guided by the old tradition in the re-codifying of the law, he also noticed that he could not automatically perpetuate all laws of the old Roman Empire. Many Roman laws had never been popular in the Greek East, and local preferences, both Hellenic and oriental in origin, were now brought within the new legal system to replace the old Roman doctrines. The influence of Greek philosophical thought, which was at the heart of the educational system, was manifest in many of the classifications and reasoning of Justinian's legislation. A definite Hellenic and oriental shade in the new legislation can also be seen in the laws concerning family, inheritance and dowry. The power of the father, traditional in the old Roman thought, was now considerably weakened. Also attesting to the difference in the times was the fact that the new laws revealed a definite Christian spirit. There was a desire to make the laws more humane in some ways, in line with the Emperor's current emphasis on the concept of *φιλανθρωπία*/pPhilanthropia, or love of mankind. There was a marked increase in laws aiming to protect persons of weaker social position against persons whose position gave them increased power. Justinian's law, for instance, favored the slave against the master, the debtor against the creditor and the wife against her husband. Of course, there still existed laws that seem to be, by today's standards, quite cruel, and there were still laws that differentiated between different classes of society, but it was a definite advance in the legal system in comparison with the days of the old Roman Empire.

The most divisive policy adopted by the Byzantine Emperors was that of *Iconoclasm*. The Empire had a long tradition of producing icons which depicted paintings of Jesus and other religious personages. They were considered useful, as they inspired the popular imagination and encouraged reverence for the figures depicted in the icons. The Emperor Leo III (17–741) took issue with this as he considered the icons to violate the Second Commandment (“graven images”). In 726 AD he began the policy of iconoclasm, literally “breaking idols” by means of which religious images were destroyed and their use within the church prohibited. This caused protests and riots within the Empire as the laity were very fond of Icons. The debate raged for over a century and iconoclasm was abandoned in 843 AD.¹¹

Byzantine nomocanons or sources of church and secular law, such as the *Νομοκάνων of Ιωάννης ο Σχολαστικός*, and the *Νομοκάνων of 14 titles* are also well known.

The Nomocanon of John the Scholastic (John the Scholastic was originally a lawyer, then a presbyter in Antioch, and finally a Constantinople patriarch) was created in the middle of the VI century. Thus, in his function of Patriarch of Constantinople, John the Scholastic published two collections of law: in the first one he collected all of the generally recognized church canons, while in the second one he collected the articles of the Justinian’s novels about various religious issues. At the beginning of the VII century, they were collected in one anthology under the name Nomocanon. This Nomocanon was widely used in the regulation of various questions of church and secular law and it was translated by St. Methodius on the old Slavic language.

The Nomocanon of 14 titles was created in the second half of the VII century, but it is considered that it entered into force in the first half of the VIII century. It is also known as Fotie’s Nomocanon, after the Patriarch of Constantinople Fotie, who had reworked and supplemented it at the end of the IX century. During the great Constantinople’s church gathering, held in year 920, it was declared as mandatory in the whole Christian church.

¹¹ KNOWLES, David and OBOLENSKY, Dimitri. *The Christian Centuries*. Vol. 2. *The Middle Ages*. Darton, Longman and Todd, 1969, p. 108–109.

In favor of this, here we shall take the example of Επαναγωγή/*Epanagoge*, which represented a legal act defining the relationship between church and state and in which the specific place of the Emperor and the position of Patriarch were determined, by which the independent functioning of the Patriarch was restricted, unlike that of the Roman Pope. Although the *Epanagoge* did not put the Patriarch entirely under the supervision of the Emperor, it was stipulated that *the Patriarch was allowed to stand for the truth and defense of the sacred science before the Emperor without fear*. We may conclude that the political freedom was not actually guaranteed to him, but only the spiritual freedom in relation to the Emperor. So, it is quite understandable why for the Byzantine political history the political tension between the Kingdom and the Church was not typical, and if it existed, it was a result of the relationship in which the Empire abused its absolutism in terms of spiritual freedom of the Church and of the resistance of the Church which emphasized the spiritual freedom in relationship to the absolutistic Empire.

The *Epanagoge* was passed during the reign of Emperor Basil I after 879 and it largely relied on the *Prochiron*. “The *Prochiron* was passed between 870 and 879 and it was conceived as a legal collection of works which should replace the *Ecloga* in the work of courts. It contained 40 titles in the field of private and public law and it mostly relied on *Institutes of Justinian*. In addition, although Basil I, when he spoke about the legislation of king’s iconoclasts, held that it was “contrary to the divine dogmas” and was passed “in order to destroy the life-saving laws,” the *Ecloga* had great influence on the *Prochiron*, especially in the public and in hereditary law.¹² Because of that some authors believe that it is an enlarged and revised edition of this Code. It is also uncertain whether the *Epanagoge* was an official collection of laws or only a draft which never entered into force. Regarding the first question, although the *Epanagoge* relied on the *Prochiron*, it also contained other legal provisions, including: The Novels of Emperor Basil I (Βασίλειος Α΄ ο Μακεδών), the provisions on the relations and the rights and duties of the Emperor and the Patriarch and the provisions on marriage right taken from the *Ecloga*.¹³ The most significant new provisions ad-

¹² POPOVSKA, B. *Drzavno-pravna istorija na Makedonija VII–XX vek*. Skopje, 2010, p. 43.

¹³ GIBBON, E. *History of the decline and fall of the Roman Empire*. Vol. V. London, 1854, p. 316.

addressed the relationship between Church and State, i.e. between the Emperor and the Patriarch. The Emperor was determined as a “lawful authority, the common good of all citizens”, and his objective was “with his virtues, to maintain and preserve the existing goods; to recover the lost goods; to obtain with his zeal and righteous victories the needed goods. The duties of the Patriarch were to preserve the purity and piety of the lives of those that God had entrusted to him and to convert the heretics, the impious and those who had separated from the Ecumenical church to orthodoxy and unity with the Church. Hence, the ruler cared for the material welfare of his subjects, while the Patriarch observed the spiritual – a relationship that is formulated as a theory of the symphony, according to which the ecclesiastical and secular authorities are the greatest gifts that God’s kindness gave to people.¹⁴

Furthermore, the *Basilicæ* or *Imperial laws* were published as a collection of laws by Leo VI at the end of IX century (887 AD) and they represented a further renewal of Justinian’s law, relying mainly on the Digests and the Codex, though also on the Institutes and Novels of Justinian, as well as on the novels of Justinian II and of Tiberius II.¹⁵ In addition, some materials were taken from the Prochiron. They contain provisions of the civil, church and public law divided into 60 books and they represent the greatest codification of the law according to Justinian. For their preparation, the commission lead by the protospatharius Simvatio used the Greek texts and comments of the already mentioned sources. Otherwise, the *Basilicæ* were widely used in Byzantium as a source of law, since they greatly facilitated the application of law to specific cases by abandoning the outdated and previously abolished norms of the Justinian’s law and by allotting the norms concerning the determined legal issues to the same place, which was not the case with Justinian’s codification. After the *Basilicæ* had been passed, between X and XIII century they were amended with annotations, so called *scholia*, which were also a formal source of law in Byzantium. Thus, this relationship found a legal sanction in the legal acts as well.

¹⁴ NIKOLIĆ, D. Fragmenti pravne istorije, quoted work, p. 206–207.

¹⁵ An universal history, from the earliest accounts to the present time. Compiled from Original authors. Vol. XV. Taylor Institution, Balliol College, University of Oxford, London, MDCCLXXX, p. 74.

In the complex and strictly hierarchized social order of the Byzantine Empire, the head of the Church could not easily fall into temptation to claim the right to political and legal authority through his spiritual authority. The conflict within the so perceived order and hierarchy was possible only where the Emperor himself would breach the teachings of the Church, and the head of the Church could use only his religious beliefs to warn the Emperor. Therefore, the danger of disruption of the harmony could happen only when the Emperor would break his authority and would interfere with the internal freedom of the Church and with the spiritual matters.

It is exactly this idea of the Christian Emperor and the Christian State to which the ideal of the Hellenistic philosopher – Emperor, or the Christian monarch and God's anointer, who is God's deputy on earth, was connected, which the eastern Slavs accepted and it became the foundation of the structure of their State from the very beginning. It is also found in Southern Slavs in the ideological structure of relations between the Emperor and the Church in medieval Dushan's State.

The understanding of its own *world order* in the Byzantine society imposed the belief which under no circumstances tolerated any contest, either inside or outside, because it was deemed that the Byzantine order was under the utmost – the divine protection. For this reason, any disputing of the order in Byzantium was regarded not only as opposed to the State principles and interests, but also as something that was against God's will and it was treated as heresy and as an act of God's enemies and opponents of the "true faith". Taking all this into account, we can understand much better why the Byzantine State almost never made any substantial reforms of its institutions. It always acted according to the principle of gradual adjustment to new situations. This lack of direction lay at the heart of the malaise that afflicted Byzantium at the time of the fourth crusade. The impasse was resolved after 1204, when in exile the Orthodox church took the lead in reconstructing Byzantine society. These adjustments never interrupted radically the old patterns, i.e. substantial changes and reforms, which somehow turned Byzantium into a prisoner of the past. In highly turbulent historical periods when it tried to sustain itself and to survive, the Empire did not end

the tradition, which became the basis and essence of its existence, until its very end.

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COGITATIO
В ИМПЕРАТОРСКИТЕ КОНСТИТУЦИИ
ОТ ДВАТА КОДЕКСА (НА БЪЛГАРСКИ ЕЗИК)

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Резюме: Лексемата *cogitatio* се споменава в различни текстове на юристите от класическата епоха (Юлиан – D. 32.59, Сцевола – D. 34.1.13.1, Паул – D. 47.2.1.1, 48.10.22, Улпиан – D. 48.19.18 и т.н.), както и в много източници на следкласическото право: от Антонин Пий до Юстиниан. Императорските закони в това отношение са по-многобройни от текстовете на класическите юристи. Очевидно е, че във фразеологията на императорската канцелария това понятие е важно за имперското законодателство. В статията се изследва приемствеността и различията в употребата му в сравнение с *iurisprudentes veteres*.

Ключови думи: *cogitatio*; *legatus*; *Codex Theodosianus*; *Codex Iustinianus*; императорска канцелария; *leges imperiales*; *iurisprudentes veteres*.

THE CONCEPT OF *COGITATIO* IN THE IMPERIAL CONSTITUTIONS OF THE TWO CODES (BULGARIAN LANGUAGE)

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Abstract: The lexeme of *cogitatio* is mentioned in the various texts of the jurists to the classical era (Giulian – D. 32.59, Scaevola – D. 34.1.13.1, Paul – D. 47.2.1.1, 48.10.22, Ulpian – D. 48.19.18 etc.). There are many sources of post-classical law for the notion of cogitation: from Antonin Pius to Justinian. The *leges imperiales* on cogitation are more numerous than the *iura* of classical jurists. It is obvious that for imperial legislation the notion of cogitation is important in the phraseology of the imperial chancery. The article explores the continuity and discontinuity of the imperial notion with this of the *iurisprudentes veteres*.

Keywords: cogitatio; legatus; Codex Theodosianus; Codex Iustinianus; imperial chancery; *leges imperiales*; *iurisprudentes veteres*.



В доктрината често се отправя упрек към императорските законодателни актове през следкласическия период от историята на римското право за изоставяне на класическите разрешения на римските юристи с тяхната логически и езиково издържана аргументация, за вулгаризиране на правото и на езика и стила на законодателните актове.¹ При тези неласкави оценки логично е вниманието при изследването на аргументативните похвати и езиковите особености да е концентрирано върху съчиненията на юристите от класическата епоха – не само в общите изследвания върху юриспруденцията², но и в проучвания върху стила и езика на римските юристи³. Не липсват и конкретни терминологични изследвания⁴. За следкласическото право такова изследователско внимание е по-скоро изключение⁵.

Настоящото кратко изследване целй да провери изводите за тези различия между класическото и следкласическото право въз основа на употребата на конкретен термин – *cogitatio*.

Като общоупотребима дума в латинския език за лексемата *cogitatio* се сочи значението мисъл, размишление, план, намерение⁶.

Като нейно значение в правните текстове се сочи „мисъл, воля, намерение, желание, съображение, мнение“⁷. Очевидно е, че и като правен термин *cogitatio* няма свое особено значение, различно от общоезиковото –

¹ За упадък и вулгаризирането на правото в следкласическата епоха не е загубило нищо от своята актуалност класическо изследване на LEVY, E. *West Roman Vulgar law*. Philadelphia, 1951, в което тези заключения се срещат при почти всеки анализiran от автора правен институт.

² SCHULZ, F. *History of roman Legal Science*. Oxford, 1946.

³ Вж. например докладите, публикувани в сборника *IL LINGUAGGIO dei giuristi romani. Atti del convegno internazionale di studi*. Lecce, 5–6 dicembre 1994. Congedo, 2000.

⁴ Например КОСТОВА, М. Лингвистически анализ на *contractus* като *terminus technicus* в езика на римското класическо право. – В: *Год. на СУ*, Том 78, год. 84, с. 53–67.

⁵ Такива са например статиите за стила на конституциите на император Валентиниан I и за употребата на прилагателното *profanes* в Книга XVI на Теодосиевия кодекс, публикувани в сборника *EMPIRE chrétien et Église aux IVe et Ve siècles*. Paris, 2008, p. 299.

⁶ ВОЙНОВ, М. и МИЛЕВ, Ал. *Латинско-български речник*. София, 1990, с. 121.

⁷ *VOCABULARIUM Iurisprudentiae Romanae*. Tomus I. A-C. Berolini, 1903; BERGER, A. *Encyclopedic dictionary of Roman Law*. Philadelphia, 1953, p. 393; ДЫДЫНСКИЙ, Ф. *Латинско-русский словарь к источникам римского права*. 2. изд. Варшава, 1896, с. 73.

единствено в значението си на „воля“ тя може да има специфично правен характер. В съвременната правна романистика се среща и пример за употребата на *cogitatio* като научно разсъждение, анализ⁸.

В класическите текстове лексемата се среща във всички посочени значения. Най-известният фрагмент е този на Улпиан от III книга на неговия коментар към едикта: D. 48.19.18. *Cogitationis poenam nemo patitur* (Никой не може да бъде наказан заради намерения). Приложимостта на изразеното становище не може да бъде отречена и днес. Със сходно съдържание е и становището на Паул относно кражбата в D. 47.2.1.1. *Inde sola cogitatio furti faciendi non facit furem* (Затова простото намерение да се извърши кражба не прави крадеца). И в останалите фрагменти, където се среща този термин и негови производни⁹, значението му е на субективен психичен елемент от човешкото поведение. Така например в D. 48.10.22 изразът *cogitationem animi* е със значение на намерение.

В императорските конституции, достигнали¹⁰ до нас в Теодосиевия¹¹ и Юстиниановия кодекс, обсъжданият термин и негови производни се срещат в 13 акта¹² с различно време на издаване.

Най-старият в хронологично отношение е един рескрипт на император Антонин Пий, който всъщност представлява текст от класическата епо-

⁸ TAFARO, S. *Ius hominum causa constitutum*. Napoli, ESI, 2009, p. 197–204, където така е озаглавен раздел, посветен на подробна екзегеза само на един фрагмент от Дигестите – D. 19.1.43.

⁹ D. 32.59; D. 34.1.13.1, D. 48.10.22 etc.

¹⁰ Извън обхвата на изследването са Новелите на Юстиниан (някои от които са на гръцки език), запазените императорски актове в неюридически източници, както и тези в правни актове, различни от тези два кодекса.

¹¹ За изследването на Теодосиевия кодекс и днес не е изгубил научното си значение коментарът на IACOBUS GOTHOFREDUS. *Codex Theodosianus cum perpetuis commentariis Jacobi Gothofredi*. Tomus I–VI. Leipzig, 1736–1743. Подробни обобщаващи съвременни студии са тези на ARCHI, G. G. *Teodosio II e la sua codificazione*. Napoli, ESI, 1976; SIRKS, A. J. B. *The Theodosian Code: A study*. Tortuga, Friedrichsdorf, 2007; КОПТЕВ, А. В. Кодификация Феодосия и её предпосылки. – In: *Ius Antiquum/Древнее право*, 1996, № 1, с. 247–262. За кодификациите в римското право вж. НОВКИРИШКА-СТОЯНОВА, М. Римско право и кодификации. – В: *Римско право и съвременни кодификации*. [Сборник статии от научната конференция, проведена в София на 10 май 2007 г.]. София, 2008, с. 47–75.

¹² Резултатите са по търсене в базата данни ACTI. *Auxilium in Codices Theodosianum Iustinianumque investigandos*. A cura di Iole Fargnoli, 2009, която дава по-големи възможности за търсене и съпоставка в текстовете на двата кодекса в сравнение не само с класическите им книжни издания, но и с поместените в мрежата техни текстове.

ха и дори е възпроизведен не само в Юстиниановия кодекс, но и в един от фрагментите на Дигестите.

Cl. 6.37.1

IMP. ANTONINUS A. PIUS LIBERTIS
SEXTIAE BASILIAE

Quamvis verbis his: “ut quoad cum claudio iusto morati essetis”, alimenta vobis et vestiarius legatum sit, tamen hanc fuisse defuncti **cogitationem** interpretor, ut et post mortem iusti eadem vobis praestari voluerit [тук и нататък в латинските текстове и преводите им акцентът е мой – M.T.]

A SINE DIE ET CONSULE¹³

Cl. 6.37.1

Император Антонин Пий до освободенците на Секстия Базилия

Въпреки следните думи в легата „докато оставате заедно с Клавдий Юст“, с който са ви завещани прехрана и облекло, все пак аз тълкувам **волята** на починалия¹⁴ така: искал е и след смъртта на Юст да ви се предоставя същото.

Без [посочена] дата и консулат

В този текст терминът е употребен в специфичното му правно значение на воля на наследодателя, подложена на тълкуване в отговора на императора до адресатите на рескрипта.

Следващият по време текст е конституция на императорите Валериан и Галиен от 258 г. – тук лексемата в глаголна форма обозначава преценка на действието на правни норми и съобразяване при вземане на решение с фактите (включително субективни), като например намерението на лицето, извършило определено деяние.

Cl. 9.9.18 (a. 258)

Imperatores Valerianus, Gallienus

Eum qui duas simul habuit uxores sine dubitatione comitatur infamia. in ea

Cl. 9.9.18

Императорите Валериан и Галиен

Този, който по едно и също време е имал две съпруги, без съмнение е зак-

¹³ Тази формулировка в текста сочи, че още комисията, съставила кодекса, не е разполагала с информация относно датировката на тази конституция – дали защото такава не е запазена или защото комисията е ползвала съхранено в архива копие на конституцията, което е повредено в тази част, може само да предполагаме. Единствената възможност за датироване на конституцията е по периода на управление на нейния издател – император Антонин Пий (138–161 г.). Тъй като рескриптът е запазен и в Дигестите като цитат от съчинение на Сцевола, възможно е комисията да е ползвала него като източник, доколкото в съчиненията на класическите юристи императорските актове се цитират без посочване на дата и място на издаване.

¹⁴ Така е в текста на Юстиниановия кодекс. От по-пълния вариант на рескрипта, съхранен в Дигестите (D. 34.1.13.1), става ясно че се касае за завещанието на починалата Секстия Базилия.

namque re non iuris effectus, quo cives nostri matrimonia contrahere plura prohibentur, sed animi destinatio **cogitatur**

[...]

ACCEPTA ID. MAI. ANTIOCHIAE TUSCO ET BASSO CONSS.

леймен с безчестие. Но в този случай следва **да се съобразява** не действието на правото, което забранява на нашите граждани да сключват повече от един брак, а тяхното намерение.

[...]

Приета в Антиохия през майските иди в консулата на Туск и Бас (1 май 258 г.).

Най-многобройни сред императорските актове, при които е налице употреба на обсъждания термин, са издадените от император Диоклециан – общо 4 рескрипта, датирани от 294 г.

Cl. 3.29.8 (a. 294)

IDEM <IMPP. DIOCLETIANUS ET MAXIMIANUS> AA. AUXANONI

*Si liqueat matrem tuam intervertendae quaestionis inofficiosi causa patrimonium suum donationibus in unum filium collatis exhausisse, cum adversus eorum **cogitationes**, qui consiliis supremum iudicium anticipare contendunt et actiones filiorum exhauriunt, aditum querellae ratio deponat, quod donatum est pro ratione quartae ad instar inofficiosi testamenti convicti deminuetur*

PP. III ID. SEPT. CC. CONSS.

Cl. 3.29.8

Същите (императори Диоклециан и Максимиан) августи, до Авксанон

Ако се установи че твоята майка, за да пречатства иск за отмяна на нейното завещание, е изчерпала имуществото си чрез дарения, извършени в полза само на един от своите синове, то разумът изисква да ти се предостави иск за намаляване на дареното до една четвърт, както е при опороченото завещание-против **замислите** на тези, които се опитват да нарушат установените от върховната власт правила и да погасят исковете на своите деца.

Дадена на III ден от септемврийските иди в консулата на цезарите [11 септември 294 г.]

Тук терминът отново е използван в общото му значение – мисъл, замисъл, намерение, както и в другите рескрипти на този владетел: Cl. 3.36.21 относно делбата, извършена от бащата приживе *cogitatione futurae successionis* (с мисълта за бъдещо наследяване); Cl. 5.12.25 относно завещание на съпругата с предмет нейната зестра: *cogitatio mortis antedecens tempus* (с мисълта за предшестваща смърт)¹⁵; в Cl. 8.50.17:

¹⁵ Има се предвид смъртта на съпругата завещател преди нейния съпруг.

cogitatio cum optabili condicione filium (с мисълта за най-желаното положение на децата).

Аналогична е словоупотребата и в императорските актове през следващите периоди от историята на Римската империя.

В конституция на император Константин I от 29 август 321 (или 324 г.), посветена на делбата на имущество (CTh. 2.24.1 [=brev. 2.24.1]), се дават указания за тълкуване волята на починалия, изразена в завещанието, в което *talis defunctorum fuisse mens invenitur, ut de testamento intellegatur tantummodo **cogitatum**, etsi repugnare ius videatur* (да се разкрива желанието на починалите, като завещанието бъде **тълкувано** само в съответствие с нея, дори и да изглежда че тя не е съобразена с правото). Тук под *cogitatum* се има предвид такова тълкуване на завещанието, което установява реалната воля на завещателя, без да се извежда презумпция, че тази воля винаги е израз на правомерни намерения.

Следващата в хронологично отношение употреба на проследяваното понятие в императорското законодателство е от 399 г., когато с конституция, възпроизведена в Теодосиевия кодекс (CTh. 9.40.17), императорите Аркадий и Хонорий в края на текста разпореждат на адресата на конституцията – преторианският префект Аврелиан, да вземе мерки за охрана чрез верни стражи, така че *nequeat suarum **cogitationum** rabie cuncta miscere* (да не може да смеси със своите **мисли** насъбрания у него бяс).

В 466 г. император Лъв в своя конституция (CI. 1.12.6) регламентира правото на убежище в църквите, като предвижда за нарушителите му смъртно наказание (*capitali et ultima supplicii*), а за нарушение обявява всяко противоречащо на този закон действие или дори *nuda saltim **cogitatione*** (голо **намерение** да се наруши правото на убежище).

В Юстиниановото законодателство в Кодекса терминът се среща четири пъти. С конституция от 521 г. (CI. 6.22.8) са регламентирани правила относно завещанията на слепи лица, за чиято валидност е била достатъчна и устна форма, ако волята е заявена пред седем свидетели и табуларий. При определени условия се допускат и завещания в писмена форма, напи-

сани от друго лице, но продиктувани му от слепия завещател, защото *humana fragilitas mortis praecipue **cogitatione** turbata minus memoria possit res plures consequi* (човешката слабост преди всичко е обезпокоена от **мисълта** за смъртта и паметта не може да помни много неща едновременно).

През 529 г. император Юстиниан издава конституция относно тези, които изоставят новородените си деца и тези, които приемат такива за отглеждане, като на последните се забранява да променят статуса на тези деца и да ги превръщат в роби, защото *licet ab initio huiusmodi **cogitationem** habentes ad hoc prosiluerint, ne videantur quasi mercimonio contracto ita pietatis officium gerere* (е следвало още в началото да **размислят** за това, без да бързат, за да не изглежда че благочестивата постъпка се превръща в договор за обикновена стока).

В сходен смисъл е употребен терминът и в конституция от 530 г. (Cl. 8.56.4.3), с която е постановен еднакъв правен режим за даренията *mortis causa*, независимо дали те са *iuxta mortem facientis fuerint celebratae sive longiore **cogitatione** mortis subsequatae sunt* (извършени непосредствено преди смъртта или преди това – след дълъг **размисъл**).

В друга конституция от 530 г. (Cl. 6.2.21.3) относно това дали роб, който е владян добросъвестно, може да извърши кражба спрямо друго лице, сред обосноваването на въведените норми се сочи, че добросъвестният владеец владее този крадец **със съзнанието**, че е негов собственик – *bona fide possessor domini **cogitatione** furem possidet*.



От направения кратък преглед на употребата на *cogitatio* и производните форми на тази лексема в императорското законодателство се установява, че няма изменение в значенията, които терминът е имал както в класическите текстове на римските юристи, така и в тези, които са продукт на дейността на императорската канцелария от епохата на Домината и до управлението на Юстиниан. Във всички случаи терминът обозначава явления от психичния живот (мисли, намерения, замисли и т.н.), за които в конкрет-

ни хипотези е прието, че наличието или липсата им има правно значение или се нуждае от правна регламентация. Тази група значения в правните текстове не се различава от общото значение на лексемата и в неюридическия латински език. В отделни случаи терминът се използва за обозначаване на волята на лицето при сключване на договори или извършване на сделки – главно завещания. В тази хипотеза се касае за специфично правно значение на термина, защото в значението му на правно значима воля той не се среща извън юридическите текстове.

Налице е пълна приемственост между значенията на термина *cogitatio* в класическите текстове и тези от следкласическата и Юстиниановата епоха, поради което този термин не може да служи като обосноваване на тезата за упадък на римското право в епохата на Домината и след това. От приведените текстове е видно, че императорската канцелария разбира напълно значенията на този термин, с които той е познат на класическите юристи, и го ползва в своята дейност в същия смисъл, без да внася промени в него. Липсват изменения в словоупотребата, дължащи се на неразбиране на вложения в термина смисъл или на съзнателното изменение на неговото значение, както това се предполага в други случаи¹⁶.

В тази насока следва да се преосмислят изводите относно скъсването с класическата традиция в следкласическото право, или поне наличието на такова да се преценява конкретно, като обосновано се заключава дали е налице такова отдалечаване от класическото право или просто се касае за неговото необходимо развитие и еволюционно изменение, постановено от императора като единствен законодател и тълкувател на правото през тази епоха.

Немалка роля за твърде радикалните заключения относно разрива между класическото и следкласическото право играе обстоятелството, че в доктрината често не се държи сметка, че императорското законодателство (*leges*) не се прилага *вместо*, а *наред* с правото от класическия период на

¹⁶ Какъвто е например случаят с измененото значение и частичното сливане в следкласическото право между термините *possessio*, *dominium*, *proprietas* – срв. изложението на LEVY, E. *West Roman Vulgar law*. Philadelphia, 1951, и на CANNATA, C. A. *Possessio* 'Possessor' 'Possidere' nelle fonti giuridiche del basso impero romano. Contributo allo studio del sistema dei rapporti reali nell'epoca postclassica. Milano, Giuffrè, 1962.

римското право (*iura*)¹⁷. В това отношение императорското законодателство може да се сравни с преторското право във функциите му спрямо цивилното – *adiuvandi vel supplendi vel corrigendi* (да подпомага, да допълва и да поправя), според известния израз на Папиниан в D. 1.1.7.1. Същата роля играе и императорското законодателство по отношение на класическото право, а това води не до отделното, а до съвместното им прилагане в следкласическия период. Показателен в това отношение е и респектът на императорската канцелария към класическите юристи както в следкласическия период, така и по времето на Юстиниан, справедливо характеризирани в доктрината като почителност (*reverentia*)¹⁸.

¹⁷ За съотношението между *leges* и *iura* и значението им за правната система в следкласическия период вж. BIANCHI, P. *Iura-leges: un'apparente questione terminologica della tarda antichità: storiografia e storia*. Milano, Giuffrè, 2007.

¹⁸ Така Di MARIA, S. *La cancelleria imperiale e i giuristi classici: "reverentia antiquitatis" e nuove prospettive nella legislazione Giustiniana del Codice*. Bologna, 2010.

ИМУНИТЕТИ И ПРИВИЛЕГИИ НА *COLLEGIA* И
CORPORA
ЗА ПУБЛИЧНА ПОЛЗА СПОРЕД КАЛИСТРАТ В
“*DE COGNITIONIBUS*” (D.50.6.6.1) (НА
АНГЛИЙСКИ ЕЗИК)

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Резюме: Римското право разработва изключително сложна правна уредба по отношение на социалните общности, които могат да се разглеждат като различни корпоративни правни субекти, съставени от физически лица. Организацията, създадена в публичен интерес, които се запазват през цялото съществуване на римската държава, са типичен пример за един от специфичните аспекти на концепцията за *humanitas*, реализирана с правни средства. Римският юрист Калистрат счита че имунитетът във връзка с този термин означава освобождаване от поемане на определени функции или извършване на конкретни дейности от социалните общности и се предоставя на тези сдружения, които терминологично са разделени на *collegia* и *corpora*. Създаването на тези организации е позволено от закона. Това са професионални сдружения или такива, които се създават за задоволяване на определени потребности на римляните. Иmunитетите и привилегиите не са признати еднакво за всички членове, а само за онези, които са действително действащи. В това число могат да влязат хора на всякаква възраст, тъй като император Антонин Пий отхвърля дискриминационните критерии – твърде стари или незрели хора да не могат да участват. Освен това е установено че онези, които са станали богати и могат да осъществяват публична повинност (*munera*), наложена им от държавата, не могат да се възползват от привилегиите, които са дадени на бедните хора в колегията.

Ключови думи: *collegia*; *corpora*; *humanitas*; *publica utilitas*; правосубектност; асоциация; лице.

IMMUNITIES AND PRIVILEGES
OF *COLLEGIA* AND *CORPORA*
FOR PUBLIC UTILITY ACCORDING
TO CALLISTRATUS “*DE COGNITIONIBUS*”
(D. 50.6.6.12) (ENGLISH LANGUAGE)

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Abstract: The Roman law developed extremely sophisticated legal regulation regarding the social entities which can be considered as different corporative legal personalities consisted by physical persons. The organizations for public utility which subsisted during the entire existence of the Roman state are typical example for one of the particular aspects of the concept of *humanitas* realized with legal remedies. The Roman jurist Callistratus considers the immunity perceiving this term as an exemption from assuming functions or performing specific activities by the social entities. The immunity was granted to these associations divided terminologically in *collegia* and *corpora*. The foundation of these organizations was authorized by the Law. They were professional associations or such which were instituted to provide necessary service to Roman People. The immunity and the privileges were not conceded indifferently to all members but only to those who were actually active ones. In this number can enter persons of every age as the Emperor Antoninus Pius disapproved the discriminatory criteria that too old or immature people could not be inserted. Furthermore it was established that those who became rich and could stand *munera*, which the State imposed to them, could not take advantage of the privileges which the poor people had in the *collegia*.

Keywords: *collegia*; *corpora*; *humanitas*; *publica utilitas*; legal personality; association; person.

1. THE TEXT OF CALLISTRATUS IN D. 50.6.6.12

In the field of the special treatment in the Principate of the legal entities with public utility (*utilitas publica*) very important information we can deduct from the famous fragment by Callistratus book 1 *de cognitionibus*, later included in the D. 50.6.6.12. This text presents a significant testimony for the privileges and immunities granted to legal bodies in the Classical period in Ancient Rome:

D. 50.6.6.12 (Callistratus 1 de cogn.)

Quibusdam collegiis vel corporibus, quibus ius coeundi lege permissum est, immunitas tribuitur: scilicet eis collegiis vel corporibus, in quibus artificii sui causa unusquisque adsumitur, ut fabrorum corpus est et si qua eandem rationem originis habent, id est idcirco instituta sunt, ut necessariam operam publicis utilitatibus exhiberent. nec omnibus promiscue, qui adsumpti sunt in his collegiis, immunitas datur, sed artificibus dumtaxat. nec ab omni aetate allegi possunt, ut divo pio placuit, qui reprobavit prolixae vel inbecillae admodum aetatis homines. sed ne quidem eos, qui augeant facultates et munera civitatum sustinere possunt, privilegiis, quae tenuioribus per collegia distributis concessa sunt, uti posse plurifariam constitutum est.

D. 50.6.6.12¹ (Callistratus, On Judicial Inquiries, Book I)

Immunity is conceded to certain associations or corporate bodies, to which the right of assembly has been granted by law; that is to say, to associations or corporate bodies to which each person is admitted on account of his occupation, as, for instance, the Society of Artisans, provided they have the same origin; for instance, if they have been organized in order to perform labor necessary for the public welfare. Immunity is not indiscriminately granted to all those who are admitted to these associations, but only to artisans, for it was decided by the Divine Pius that persons of every age could not be chosen; and he disapproved of the admission of those of an advanced or decrepit age. And, in order that individuals who had become wealthy might not avoid the responsibility attaching to civil office, it was decided in many places that persons could avail themselves of the privileges which had been granted by such associations to anyone in reduced circumstances.

As we can see Callistratus treats the immunity perceiving this notion as an exemption from assuming functions or performing specific activities by the social entities. The immunity was granted to these associations divided terminologically in *collegia* and *corpora*. The foundation of these organizations was authorized by the Law. These were different kind of professional organizations as corporations of craftsmen and artisans or all kind of bodies *publicis utilitatibus*.

¹ For the English translation is used the text, translated by SCOTT, S. P. The Civil Law. Vol. XI. Cincinnati, 1932, which is online available on the website: https://droitromain.univ-grenoble-alpes.fr/Anglica/D50_Scott.htm, last visited on November 10th 2018.

They were professional associations or such which were instituted to provide necessary service to Roman People. The immunities and the privileges were not conceded indifferently to all members but only to those who were actually active ones. It was established that those who became rich and could stand *munera*, which the State imposed to them, could not take advantage of the privileges which the poor people had in the *collegia*.

It is most probable that this text has not any external intervention and interpolations and its content could be divided in three thematic sections. The specific expression *utilitas publica* appears only in the first initial segment of § 6. By means of such argumentative sections the Roman jurist from the Severan era, who composed his labors during the reign of Septimius Severus and Anoninus Caracalla illustrates in a way of resuming the general principles on which base the associations and their members could use the immunities and privileges. In this case we are talking about *collegium* or *corpus* to which the right of association was recognized by the law. This kind of bodies must have regarding their legal qualification professional activity practiced by their members. This is the reason that in the text are mentioned exactly the associations of artisans who have specific goals and targets to achieve. The public interest in the period of the Principate requires that some corporative bodies and their members are excluded from the civil duties because at the same time they are furnishing to the society important services.

In the second segment of the fragment we found that the right to associate consists in the individual liberty. This logics and functional projection are remote from the modern conception and the result is that the imperial regulation excludes the possibility immunities to be granted to members of the body which are not active in the professional field. In the other hand the qualification of corporate body members cannot be given to people unable because of their age (in this sense were the provisions of Antoninus Pius and confirmed by his successors). It is observed that the members who initially have had access to the college who firstly had worked for the common goal and later for some reasons had stopped their activity were not expelled immediately and that this step must be made after their cancelation from the list of the recorded members. On the other hand the imperial interventions by II century AD disposed preclusions in the inscriptions as far as it was not authorized to delete easy members of the body

that temporary did not provide their activities for reaching the common goal². The remark of Callistratus would confirm that in the period of the Severans in Rome there was one tendency affirmed during the Principate in the light of which the grant or the recognition of *ius coeundi* (the right to associate) were not determined by the very importance for the Roman state of the professional typology but for the advantages that one corporative body from organized subjects practicing a specific craft or profession can provide in specific moments and during extraordinary circumstances which have very considerable collective importance. In accordance with this concept the benefits granted by the imperial authorities must correspond to the logics according to which should be benefited only this one who had shown that merits something more on the base of his potential disposal and material responsibility in relation to the performance of the public works according to the agreement with the Roman authorities.

In the third thematic section corresponding with the completion of the fragment emerge two aspects with fundamental importance. The first one obvious and the second one explicit and drawn during the careful interpretation of the text. It is outlined that some of the members of the legal entity had made bigger their fortunes and we should understand that they could continue to make profit from their activities. The simple membership in the corporative body does not mean automatically that the members are able to take advantage from their position and to be excluded from the *munera civitatum*³ (the civil duties that everyone has to perform for the Roman state). Describing the situation in that period and explaining the legal measures taken by the Roman emperors, Callistratus tried to reinforce the concept about the people who are associate in a corporation working with the public authorities in a specific field have bigger advantages in comparison with those who are dedicated only to their private interests and welfare when this can be an object of their free choice. In the conclusion of the text of Callistratus there is an attempt for social balancing mentioning the privileges and immunities of the members of *collegia tenuiorum* founded mostly for public utility goals and because of the fact that in general in this type of associa-

² For more details see: De ROBERTIS, Francesco Maria. Storia delle corporazioni e del regime associative nel mondo romano. Vol. 2. Bari, 1971, p. 414.

³ D. 50.6.1.pr.: *Qui ob hoc tantum in navibus sunt, ut in his agendi causa operarentur, nulla constitutione immunitatem a muneribus civilibus habent.*

tions the members belong to the most low social layers. This formulation seems to compensate harsh discrimination between *honestiores* and *humiliores* in the field of the criminal persecution, trying to recover the social balance.

2. THE LEGAL REQUIREMENTS FOR THE ASSOCIATIONS ACCORDING TO GAIUS IN D. 3.4.1

We must return at the beginning of the examined text by Callistratus and to focus on the phrase *ut necessariam operam publicis utilitatibus exhiberent* which is a result of one already adopted concept in Roman classical law and jurisprudence in its general idea but which needs to be specified in every particular case and appropriate interpretation to be given by the Roman jurists. Callistratus had the purpose to identify the sense of providing the immunities a *muneribus civilibus*. The Roman jurist remarks the structure of the entities to which the privileges would be given so that he can make the conclusion that despite the different fields of their activities all these corporations are unified because of the public utility and the collaboration with the State authorities. If the result from the point of view is clear in the time of Callistratus for us like scholars studying the Roman law with the comparative and historical legal methods would be interesting to present the process that formed this legal regulation regarding the subjects of law different from the physical persons. We need to begin from the assumption that the benefits for which the text mentions will be granted only to *corpora* and *collegia* which foundation is authorized by the law (... *ius coeundi permissum est*, in the words of Callistratus). The base of this statement we can deduct from the period before the Severans as we can understand from Gaius:

D. 3.4.1pr. – 1 (Gaius 3 ad ed. provinc.)

Neque societas neque collegium neque huiusmodi corpus passim omnibus habere conceditur: nam et legibus et senatus consultis et principalibus constitutionibus ea res coercetur. paucis admodum in causis concessa sunt huiusmodi corpora: ut ecce vectigalium publicorum sociis permissum est corpus habere vel aurifodinarum vel

D. 3.4.1pr⁴. – 1 (Gaius, Provincial edict, book 3)

Partnerships, *collegia* and bodies of this sort may not be formed by anybody at will; for this right is restricted by statutes, *senatus consulta* and imperial constitutions. In a few cases only are bodies of this permitted. For example, partners in tax farming, gold mines, silver mines, and saltworks are allowed to form corporations. Likewise, there are certain *collegia* at Rome whose

⁴ For the English translation is used the text, translated by SCOTT, S. P. The Civil Law, cit.

argentifodinarum et salinarum. item collegia romae certa sunt, quorum corpus senatus consultis atque constitutionibus principalibus confirmatum est, veluti pistorum et quorundam aliorum, et naviculariorum, qui et in provinciis sunt. Quibus autem permissum est corpus habere collegii societatis sive cuiusque alterius eorum nomine, proprium est ad exemplum rei publicae habere res communes, arcam communem et actorem sive syndicum, per quem tamquam in re publica, quod communiter agi fierique oporteat, agatur fiat.

corporate status has been established by *senatus consulta* and imperial *constitutiones* for example, those of the bakers and certain others and the shipowners, who are found in the provinces too. Those permitted to form a corporate body consisting of a collegium or partnership or specially one or the other of these have the right on the pattern of the state to have common property, a common treasury, and an attorney or syndic through whom, as in a state, what should be transacted and done in common is transacted and done.

In the commentary of the provincial edict and therefore in the context of treatment which is particularly sensible about the potential dangerousness from circles and associations with seditious purposes secretly organized to disturb the public discipline the Roman jurist renounced that the corporate association of people in Rome in that time is based on the free individual initiative. On the contrary the possibility to create *societas vel collegia vel corpora* is not granted to all without any distinction but it is mentioned that this matter is regulated by the *leges, senatusconsulta* and *constitutiones principum*. The illustration of Gaius describes the typology of the acts of authorization subsequently of which the entity comes forward. It is clear that the foundation of every corporative body must have its legislative basis or on *lex* or on *senatusconsultum* which had acquired normative effectiveness. It is plausible that the enumeration of Late Republican laws or Augustan ones has retrospective relevance in that matter, outlining the current situation and the regime, subordinating of senatorial intervention or imperial decision the act of the birth of the association.

The terminology designating the entity focuses on two general terms with the use of which were not deducted specific peculiarities such that help us to be distinguished their structure and targets. With *corpora* in the text are mentioned *societates publicanorum* created to collect *vectigalia* and to perform for the State the public works and with *collegia* are marked the activity of *pistores* and *navicularii* working in Rome and in the provinces. The existence of similar associations qualified with terms that *corpus habere* (to have legal personality) is permitted by senatorial decisions or imperial constitutions and it seems to disap-

pear the initial reference of the *lex* like source of the authorization. The fact that the moment of the emergence of the corporation is not described with the passive voice of the verb “*constituere*” but with “*permittere*” and “*confirmare*” provokes perplexity regarding the initiative of the foundation of the entity. Actually there is a hypothesis that the imperial authorities just recognized associations which already operated assuming that they had existed before and were made by the will of private subjects but they missed the legal personality that only the public authority can confer to them. But this prospective does not seem to go in the same direction shown by Cezar’s legislation and the posterior intervention of Augustus. Independently of the form assumed from the first Roman Emperor in 22 BC one law established or just confirmed the dissolution of all *collegia* which weren’t *antiqua et legitima* because a lot of their members made plenty of maneuvers in service of the struggles finished with the failure of the Republican system introduced by the *Leges Liciniae-Sextiae*. Therefore seemed that remained the reasons to cease all *collegia* because of the lack of the control of the targets that they pursued.

The restrictive tendency could also be found in the fragment of Gaius according to who the institution is granted to *paucis admodum in causis* or when are presented well defined motives about their amenability with the public interest. There is one presumption of lawfulness like a form of silent tolerance of the associations different of these who had religious or funeral purposes to which there was a comprehension was persisted since the late Severan era⁵. The repression of the regime of associations conducted in II century AD reveals certain gentleness in comparison with the maintenance of the political situation favorable to the Emperor is an important element which should be considered in the general study of the problem. But the decline and the trend of bigger centralization in the political and legal life is translated in one latent prospective well disguised by Marcianus in the moment when he qualifies like illegitimate all associations without imperial authorization⁶.

⁵ D. 47.22.4.

⁶ D. 47.22.3.1: *collegia si qua fuerint illicita mandatis et constitutionibus et senatus consultis dissolvuntur: sed permittitur eis, cum dissolvuntur, pecunias communes si quas habent dividere pecuniamque inter se partiri.* (Marcianus, Public Prosecutions, Book II: If associations are illegal, they will be dissolved by the terms of Imperial Mandates and Constitutions, and Decrees of the Senate. When they are dissolved, the members are

De Robertis outlines⁷ that the initiative was assumed by imperial authorities and or local magistrates in the cities who determined the time and the condition of the foundation of the associations and namely they established legal relations with these entities in connection with the public interest. Regarding one intermediate solution displaying the derivation of professional *corpora* from *collegia tenuiorum* was not rejected by the doctrine because in abstract way are valorized types of associations in which the members are from the lowest social classes with religious or funeral purposes. Trough one transformation of the legal statute facilitated by the communality of the craft can be explained the original presence of subjects unfit for the technical tasks in the association and the fact that once entered in quiescence the members were not expelled. This should be considered as an incentive to resurrect the interrupted activity we should realize the interventions of the emperors directed to preserve the purity of the associations under the profile of the commitment divided amongst all of the members to perform the activity necessary for the public welfare. However it is difficult to reconcile this thesis with the fact that performance of the service requires in some moments the presence of large amounts of money like it is testified in the case of the *navicularii* or the *publicani*. Publicans belonged to the rich equestrian class as they needed money to take part in the public auction and to give to the State guarantees which the people from the low social classes could not afford. And the *navicularii* also did not derive from the lower classes because they needed serious amounts of money to transport the goods or if they used ships provided by the imperial authorities. Also there is another argument that makes this reconstruction less probable. The professional corporations appeared before the *collegia tenuiorum* so it is difficult to believe that there is a transition from second to the first ones.

After one *Lex Iulia de collegiis* introduced probably by Cezar and the intervention of Augustus the public initiative acquired much greater preeminence so that the associations being serious factor in the social activity and life in Rome started to operate according to public interest all in legal way. The most strict element in the evaluation of the necessary requisites of obtaining *permissio*

permitted to divide among themselves the money or property owned in common, if there is any of this kind.) For the English translation is used: SCOTT, S. P. The Civil Law, cit.

⁷ De ROBERTIS, Francesco Maria. Il diritto associativo romano. Dai collegi della repubblica alle corporazioni del basso impero. Bari, 1938, p. 390.

was the configuration *ad exemplum rei publicae* (like the Roman state) of the internal structure of the corporations. This specific internal structure can consent a separation between the works of the entity and its members. In this prospective is situated and the remark of Gaius for the common things, the cash desk and the existence of one *actor sive syndicus* through whom the choices of the members can be realized *tamquam in re publica*. The configuration of the association was shaped according to uniform lines which retrieve one model of State structure. This presents an argument in support of the thesis that the imperial authorities wanted to frame the functioning of the corporation in the default outlines easily put under control. It could be guaranteed only by a strict and hierarchical organization.

Therefore not only general purposes and the reason for the foundation of the association were determined by one evaluation external of the initiative belonged to the members of the emerging *corpus* or *collegium* but also the determination of the internal articulations was not devolved by the will of the affiliated. It was established according to a functional paradigm of the necessities of the public power which authorization was needed⁸. On this point could not be proposed rigid models if it is true that the external interventions must not be so frequent. On the other hand they subsisted acts of authorization foreordained to regulate aspects inherent to the extension of the legal capacity of the association which is already founded⁹.

We cannot consider in details the problem of the legal personality of the associations in this matter but we can make the conclusion that in the beginning of the III century AD the imperial administration through specific legal regulation took one course to legal individualization of them. This measure was helpful for the simplification of the legal relations, between the corporations and the Roman state, which before that were placed of the free will of the single members. At the moment when the imperial power retained like its priority to assure stability to the benefits produced from the collaboration of the private corporations with the Roman state in some determined sectors the attitude was changed. As far it is concerned the associations started to prevail a binding formulation for which the jus-

⁸ See De ROBERTIS, Storia, cit., p. 247.

⁹ See COLLI, Ugo, Collegia e sodalitates, Contributo allo studio dei college nel diritto romano. Bologna, 1913, p. 87.

tification provided from the *utilitas publica* established fruitful cooperation with the Roman state, facilitated from the detailed legal regulation regarding these entities. In the same time the public utility and the satisfaction of the public interest was the teleological fundament of the necessity to be guaranteed the effective service as the legal rules in the Classical Roman law for the corporative entities were enough sophisticated to create in their face *de iure* and *de facto* subjects of the law different from their members.

**ПРЕГЛЕД НА НЕМСКАТА УРЕДБА
НА СПИРАНЕТО
НА ИСКОВОТО ПРОИЗВОДСТВО
ПО РАЗПОРЕЖДАНЕ НА СЪДА (НА БЪЛГАРСКИ
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Резюме: В статията се предлага анализ на разбирането на немския процесуален закон (Zivilprozessordnung) относно спирането на исковия процес в хипотезите на § 148 и 149, много сходни на чл. 229, ал. 1, т. 4–5 от българския ГПК. Тръгвайки от историята на приемането на тези разпоредби и тяхната явна връзка с римското разбиране за *praeiudicium*, авторът извежда принципните положения в немската съдебна практика, като част от тях биха могли да бъдат приложени и в български контекст, а други да послужат за съответни изменения на закона – по-конкретно по отношение на момента, към който се преценява основанието за спиране, дискрецията на съда, факторите, които трябва да бъдат взети предвид, както и принципите, чието зачитане трябва да се съобрази при преценката за спирането.

Ключови думи: спиране на исково производство; преюдициалност; паралелни производства; ZPO.

A REVIEW OF THE GERMAN LEGAL
FRAMEWORK
ON STAY OF PROCEEDINGS ORDERED BY THE
COURT (BULGARIAN LANGUAGE)

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Abstract: The article analyses the German Procedural Code (Zivilprozessordnung)'s understanding of the stay of proceedings in the cases of § 148 and 149 which draw similarities to Art. 229 (1), p. 4–5 of the Bulgarian Procedural Code. Departing from the legislative history of these rules and their clear reference to the Roman law notion of *praeiudicium*, the author draws the principles in the German case law, as part of them can be applied in Bulgarian procedural context as well, while others can serve for respective amendments to the law. These include, inter alia, the moment at which the court shall decide whether to stay the proceedings, its discretion, the criteria that shall be taken into account, as well as the principles which shall be respected when ordering a stay.

Keywords: stay of proceedings; conditionality of proceedings; parallel proceedings; ZPO.

СПИРАНЕТО И ЧОВЕШКИТЕ ПРАВА

Разглеждането на делата в разумен срок е неизменна част от правото на достъп до съд най-късно – от 1215 г., когато в чл. 40 от Магна Харта намират място думите “To no one will we sell, to no one will we **refuse or delay**, right or justice” (акцентът мой – А.П.). Забавеното правосъдие е липса на правосъдие, а една от възможностите за забавяне, при това често напълно законосъобразно, е спирането на производството. В особена степен то проявява своята роля да забавя производството до ръба на засягането на правото на достъп до правосъдие, когато става дума за спиране поради висящо друго дело или поради престъпни обстоятелства, чието разкриване гражданският съд трябва да предостави на наказателния – чл. 229, ал. 1, т. 4–5 ГПК.

Формалистичното разглеждане на въпроса единствено през наличието или не на определени предпоставки за спиране, но не и през принципите, на които се основава институтът на спирането, налага обръщане на поглед към чуждата традиция. Настоящата статия представя виждането на немския *Zivilprozessordnung (ZPO)* за основанията за спиране на исковото производство в хипотези, сходни на българските – чл. 229, ал. 1, т. 4–5 от ГПК, тоест при необходимост от зачитане на определени фактически положения и след изрично разпореждане за спиране, постановено от съда.

Прегледът на историческото развитие и съдебната практика, а и на дискусиите в доктрината, има за цел както да почерпи опит и идеи от една близка до българската, но по-добре развита процесуална традиция, но и да помогне за осмислянето на института на спирането на исковия процес в посочените хипотези, доколкото в неговата основа могат да бъдат открити много общи черти между българското и немското разбиране.

Обща уредба и систематично място на разпоредбите на § 148 и 149 от ZPO

В немския закон спирането на исковото производство (*Stillstand*) е родово понятие, което обхваща три групи случаи, всяка от тях – предмет на

отделно понятие – *Unterbrechung, Aussetzung*, както и *Ruhen*¹. Извън тази изрична законодателна уредба се посочва че е възможно да се говори и за фактическо спиране (*tatsächlicher Stillstand*), при което производството бива осуетено от липсата на определено действие на страните². Забавянето на процеса обаче не може да бъде приравнено на фактическо спиране, тъй като в този случай се касае за дейност изцяло от компетентността на съда и неговото бездействие не дава повод да се говори за спиране на процеса.

Обстоятелството, че се налага едно явление със сходни последици да носи три напълно различни имена, се е отбелязвало в немската теория. Така още от най-старите изследвания по темата³ разликата между трите се дефинира основно през предпоставките за тяхното прилагане и начина за релевирането им – докато при *Unterbrechung* (§ 239 и сл. от ZPO) спирането настъпва по силата на закона, независимо от волята и знанието на страните и съда, то при *Aussetzung* (§ 148 и сл. от ZPO) и *Ruhen* (§ 251 от ZPO) е необходимо постановяване на съдебен акт. Разликата между последните две се съдържа в това, че при *Ruhen* се изисква едносторонна воля на съда и страните, каквато не изглежда да е необходима при *Aussetzung*. В хипотезите на § 251 от ZPO става дума за частен случай на *Aussetzung* – спиране по волята на страните. От своя страна понятието за *Aussetzung* също се приема в известен смисъл за родово, защото не се свежда само до случаите на спиране на исковото производство, а се отнася например и за спирането на изпълнителния процес⁴.

Интересно е, че уредбата на тези институти се намира на различно систематично място. Докато § 239 и сл. се намират в отделен раздел от дела в ZPO, свързан с производството по делото, озаглавен *Unterbrechung und Aussetzung* (акцентът мой – А.П.), то § 148 и сл. се намират в раздела за провеждане на откритото съдебно заседание, непосредствено след раз-

¹ Вж. ROSENBERG, Leo, SCHWAB, Karl Heinz und GOTTWALD, Peter. Zivilprozessrecht, 17., neubearbeitete Auflage. München, C. H. Beck, 2010, S. 712 ff.; MITTENZWEI, I. Die Aussetzung des Prozesses zur Klärung von Vorfragen: eine Untersuchung der Funktion von Aussetzung, Rechtshängigkeit und Rechtskraft bei Verfahrenskonkurrenzen. Berlin, Duncker & Humblot, 1971, S. 15.

² Вж. BADER, H. Die Aussetzung des Zivilprozeßverfahrens bis zur Entscheidung eines anderen Verfahrens. Berlin, Damboldt, 1932, S. 1.

³ Ibid., S. 2.

⁴ Вж. MITTENZWEI, I. Op. cit., S. 11–12.

поредбите за разделяне и служебно съединяване на делата (§ 145 и § 147). Ето защо разликата в институтите може да си проличи не толкова в наименованието им, колкото в тяхното предназначение. Докато § 239 и сл. са свързани с усложнения в рамките на вече образувания процес, то § 148 и сл., също както въпросите за служебното съединяване и разделянето на дела, касаят съотношението между две отделни производства⁵. Поради това и изходната точка на немския законодател, заради която спирането не е уредено като еднозначен институт, е че въпросът за обвързаността на един процес от друг трябва да се решава по правила, различни от тези за основанията за спиране поради причини, които са вътрешни за процеса.

***Разпоредбата на § 148 от ZPO –
историческо развитие
и принципни положения***

При създаването на ZPO определящо е било влиянието на римскоправното разбиране за *praeiudicium*. Първоначално римските юристи са разбирали под това понятие решение, което съдията, решаващ последващо дело, може да зачете при преценката си на определени въпроси, без обаче по никакъв начин да е обвързан да го направи – с други думи, не силата на пресъдено нещо е била решаващият фактор за прилагането на *praeiudicium*. Обвързващи са били по-скоро моралният авторитет и възгледите на съдията, решил първото дело, както и желанието за еднозначна и непротиворечива съдебна практика, а не концепция за *res judicata*.

В този смисъл *praeiudicium* е бил доказателствено средство (*probatio*), което обаче не е служело за доказване на *res judicata* на първото решение, ами напротив, било е алтернатива на нейното прилагане. Думата *preiudicare* е обозначавала единствено постановяването на решение, което може да се ползва като доказателствено средство в един следващ процес.

Така дефинирана, обвързаността от първия процес понякога не се е приемала безпроблемно от съдията по второто дело. Ако той например е считал че делото, което разглежда, е по-важно от предходното, той не би желал да бъде обвързан против волята си от изводите на съдията по по-

⁵ Ibid., S. 13.

маловажния предходен процес, особено ако за съдията по второто дело е било очевидно, че събирането на доказателства в първия процес е било извършено немарливо. Друг съществен риск е, че когато едно правоотношение е било предмет на първото дело единствено като предварителен въпрос за крайния акт, а във второто е изчерпвал предмета на делото, то е можело да се очаква, че обсъждането му е било „претупвано“ в първия процес, без да се държи сметка за важността му за все още несъществуващия втори процес. Още по-голяма е била опасността, когато в първия процес са се разрешавали въпроси, чиито последици са били с осезаемо по-слабо значение.

Така постепенно се стига до закрепването на принципа, че малозначителните въпроси трябва да изчакат разрешаването на по-важните: *per minorem causam maiori cognitioni praeiudicium fieri non oportet*⁶. Целта е била да се избегне възможността едно преюдициално решение, макар и да не се ползва със сила на пресъдено нещо спрямо втория процес, да обвърже „по случайност“ съдията по втория процес⁷. За разлика от *exceptio rei in iudicium deductae* това възражение е трябвало да бъде взето предвид и служебно от съда, а не само по искане на ответника. Паралелното протичане на двете производства при наличието на *praeiudicium* обаче не е водело до порочност на „малозначителното“ производство. Единствената санкция е била обвинение в нецелесъобразност⁸.

Римското право не е давало дефиниция кои точно въпроси са *maiori cognitio*, но е съществувала обилна казуистична практика по темата – например процеси за наследство са били по-важни от други процеси с предмет обекти от наследствената маса; въпроси от обществен интерес са били по-важни от такива от изцяло частен интерес; наказателните производства са били по-важни от гражданските, засягащи в свои части отделни въпроси на наказателното право и т.н. Трябва обаче да се отбележи, че разликата между *causa maior* и *causa minor* се е свеждала предимно до това, че първото е касало по-обща въпроси, а второто – по-специални, което до голяма степен противоречи на съвременното разбиране. Преведено на днешен

6 I. 54 D. de iud 5.1.

7 Вж. BADER, H. Op. cit., S. 5.

8 Ibid., S. 10.

език, римското разбиране би довело до извод, че не инцидентният иск, засягащ една отделна част от правоотношението, ще е важният, „обуславящият“, а този, във връзка с който той се предявява, тъй като е по-общ и с по-далечно значение. Разбирането на повечето съвременни законодателства е в обратния смисъл⁹. В римското право основание за спиране при създаването на института е било обуславящото значение на процеса, който е спирал, а не на онзи, който е продължавал, докато в днешни дни е точно обратното.

Всичко това обаче не бива да оставя съмнението, че единствено значимостта на дадени спорове е обуславяла съдбата на делото в случай на паралелни процеси. Постепенно се налага понятието за обусловеност, тоест важното дело е било обуславящото, от което пряко е зависела съдбата на другото, обусловеното¹⁰. Наличието на подобна връзка е било достатъчно, за да се разреши въпросът за съотношението между двата процеса. Ако едно правоотношение или един факт са били в основата на няколко процеса, именно те са били определяни за по-значими и решението, свързано с тях, е трябвало да бъде постановено преди всички останали – така е било например при процеси относно статуса на лицето. Друг фактор от значение за римските юристи е бил дали делото се развива между същите страни, без обаче това да е било изцяло определящо.

В епохата на Юстиниан принципните положения се развиват все повече в процеса по правоприлагане: преюдициалният спор губи връзка с понятието за *praeiudicium* и се въвежда друго правило: *res inter alios iudicatas aliis non preiudicare* или *nullum aliis praeiudicium facere* – решението между две лица не може да обвърже предварително със сила на пресъдено нещо съдията по втория процес. В класическата епоха се затвърждава обусловеността като основен критерий за *praeiudicium*, тъй като изходът на преюдициалното дело е обуславял изхода на обуславящото. Чисто терминологично не решението, а обвързаността от решението започва да се нарича *praeiudicium*, макар правилото за *per minorem* да се запазва в същия смисъл. Освен това разбирането за обусловеност се променя поради конюн-

9 Вж. MITTENZWEI, I. Op. cit., S. 40.

10 Вж. BADER, H. Op. cit., S. 7.

турни фактори: от една страна, преценката за малозначителност все по-често се сблъсква с личното достойнство на магистрата, който приема че не може дело, разглеждано от него, да се смята за по-малко значимо от друго, а освен това забавянето на делата поради спирането им се превръща във все по-голям проблем. Така обективната обусловеност постепенно измества субективната преценка за значимост на конкретното дело. В Юстиниановия кодекс това виждане е изрично закрепено – обуславящият спор трябва да бъде разрешен преди обусловения. Именно налагането на това по-обективно разбиране води римското право до едно по-силно зачитане на възможната сила на пресъдено нещо на единия процес от другия.

При създаването на § 148 от ZPO законодателят до голяма степен се е водил именно от гледната точка на запазването на тези достижения на римското право чрез идеите на Planck. В тон с римското право той обозначава *praeiudicium* като всяко разбиране на предходен съдебен състав, решил същия въпрос, което може да има и негативен ефект за правото, предмет на второто дело¹¹. За да се обхванат и позитивните, и негативните страни на правилото обаче, *praeiudicium* е дефинирано като „предварително решение“ (*Vorentscheidung*), а разгледано от негативна страна, това води до извод, че решения със сила на пресъдено нещо между трети лица не служат като предварителни решения за другото. Единствената възможност за обвързаност от друго решение е била чрез силата на пресъдено нещо.

За Planck традицията на римското право е трябвало да се запази, защото е изцяло въпрос на преценка на съдията по второто дело да анализира значението и последиците на евентуалното обуславящо решение, с оглед на бързината, сигурността и правилността на производството пред него, съответно съдията трябва да разполага със свободата да прецени дали да спре делото или да разгледа сам въпросите, които са поставени пред него, или пък да изчака решението по другото дело, за да го вземе предвид. Преценката следва да е индивидуална за всеки отделен случай, а не да се търсят общи принципи, които в крайна сметка се менят според спецификите на случая. Така Planck защитава римската традиция

11 Вж. PLANCK, J. W. Die Mehrheit der Rechtsstreitigkeiten im Prozeßrecht: Entwicklung der prozessualischen Erscheinungen, die durch den Einfluß mehrerer Rechtsstreitigkeiten auf einander hervorgerufen werden. Aalen, Scientia, 1973, S. 478.

praeiudicium да не се обвързва с *res judicata* и последица от неговата борба е критикуване на идеята за спирането като изчакване на постановяването на обвързващо за втория съд решение.

Нормативният резултат от тези изводи е, че немският закон например урежда възражението за висящ процес (*exceptio litis pendentis*), но така и не закрепя преюдициалната сила на пресъдено нещо. Това според критиците на Planck се дължи именно на застъпването на изначалното понятие от римското право, без да се държи сметка за развитието му след това. Твърди се, че телеологическата връзка между висящността, силата на пресъдено нещо и спирането е твърде очевидна, за да бъде подценявана при преценката на въпроса за съотношението им. В противен случай, ако преценката по тези въпроси се остави изцяло на съдиите, те биха могли да накърнят правото на ищеца на разглеждане на иска му в разумен срок, защото всяко дело както може да не бъде спряно, така и може да се спре само заради преценката на съдията, каквото и да се разбира под нея. Именно затова от края на XIX в. в Германия се развива идеята за преюдициална сила на пресъдено нещо. Тази дискусия се е запазила до известна степен и до днес и все още е източник на някои спорове по въпросите на спирането.

В актуалния си вид правилото на § 148 от ZPO гласи, че съдът може да спре делото, ако решението на правния спор зависи частично или в цялост от съществуването или несъществуването на правоотношение, което е предмет на друг висящ правен спор или на административно производство, като спирането продължава до приключването на другото производство. Правилото на § 148 намира идентично приложение и в други процесуални закони – в този смисъл са разпоредбите на административния (§ 94 от VwGO), финансовия (§ 74 от FGO), осигурителния (§ 114 от SGG) и дори наказателния процес (§ 262, ал. 2 от StPO).

Разликите спрямо разпоредбата на чл. 229, ал. 1, т. 4 от ГПК се забелязват в няколко посоки: първо, обуславящото дело е дефинирано като такова, по което предмет е съществуването или несъществуването на определено правоотношение, тоест има по-прецизна формулировка на връзката между двата процеса; второ, изрично е записано, че обусловеността

може да не е пълна, но и частична; освен това е посочено, че обуславящото правоотношение може да е предмет и на административно, а не само на съдебно производство. Основната разлика обаче е, че съдът не е задължен да спре делото, а следва да прецени дали да го направи¹². Така проблемът за спирането се поставя в няколко отделни и независими един от друг аспекта.

Единият от тях е от какви фактори трябва да тръгне съдът, за да стигне до идеята, че делото трябва да бъде спряно. Традиционно се приема, че двете основни цели на спирането са следните: процесуална икономия, която се търси изцяло в обществен интерес и се състои предимно в избягването на повторна работа от два различни съдебни състава; както и избягване на противоречиви решения, което пък се прави едновременно в обществен интерес и в частен интерес на страните по делото¹³. В същото време една от другите проявни форми на процесуалната икономия е бързината на производството, която често може да влезе в конфликт със спирането. Подобен конфликт не може да бъде разрешен веднъж завинаги, а се решава според конкретния случай, на което се основава и дискрецията на съда. Изрично се набляга на обстоятелството, че спирането не бива да води до поощряване на забавянето на процеса, както и че прекалено дългото спиране може да се тълкува като нарушение на чл. 6, ал. 1 от Конвенцията за защита на правата на човека и основните свободи¹⁴. В тази връзка е предвидена и разпоредбата на § 155 от ZPO, според която едно валидно спиране може да бъде отменено от съда впоследствие, ако обуславящото производство се забави твърде много.

Като допълнителна част от задачата на спирането се разкрива и опасността съдията по спряното дело да не обърне достатъчно внимание на правоотношението, което иначе е предмет на другото дело¹⁵, тоест спирането има значение и за доверието на обществото в правосъдието. Тази

12 Още за характеристиките на това правомощие вж. у BADER, H. Op. cit., S. 30, и ZÖLLER, R. Zivilprozessordnung. 32. neubearbeitete Auflage. Köln, Otto Schmidt, 2017, S. 663.

13 Вж. FICHTNER, H. Grenzen des richterlichen Ermessens bei Aussetzung und Ruhen des Verfahrens in der ZPO: Entwicklung einer Systematik für Ermessensgrenzen. Frankfurt am Main [u.a.], Lang, 1996, S. 62.

14 ЕКЗПЧОС, по-известна като ЕКПЧ. Вж. ZÖLLER, R. Op. cit., S. 663.

15 Вж. BADER, H. Op. cit., S. 12.

цел обаче се приема за второстепенна, в противен случай би излязло, че съдията по едно дело не е задължен да взима отношение по въпроси, които са само от предварително значение спрямо предмета на делото¹⁶.

Във връзка с конкуренцията на различните цели в гражданския процес се твърди, че при спирането се поставя въпросът за баланса между три различни, но взаимно допълващи се цели на всяко производство: правилността на решението; ефективността на решението; справедливото разпределение на разноските¹⁷.

Фактически състав на разпоредбата на § 148 от ZPO и преглед на практиката

Централно за дискусиите в немската доктрина по отношение на § 148 е понятието за „зависимост“ (*Abhängigkeit*) и неговото съотношение с другия термин – „преюдициалност“ (*Präjudizialität*). Тази терминологична разлика носи със себе си съществения въпрос за вида на зависимостта между двата процеса – дали тя е обвързана със силата на пресъдено нещо или не, както и дали освен от правно, може да бъде и от фактическо естество.

Според преобладаващото мнение не би могло да става дума за съотношение на зависимост между два процеса, ако същото не е скрепено с някакво обвързващо действие на обуславящото решение (*Bindungswirkung*), като това действие традиционно се извежда пряко от разпоредбата за пределите на силата на пресъдено нещо – § 322¹⁸. Прави се сравнение на използваните термини в § 148 и 149, като § 149 говори за „влияние“ (*Einfluss*), тоест едно по-слабо обвързващо понятие, следователно използването на думата „зависимост“ значи, че тя е по-обвързваща за съда. Аргумент за горното езиково тълкуване дава и уредбата на инцидентния установителен иск в § 256, ал. 2 от ZPO, като посочената разпоредба използва идентичен на използвания в § 148 изказ – „съществуването или несъществуването на правоотношение, от което зависи изхода на делото“, тоест щом в хипотезата на инцидентен установителен иск последицата от

16 Вж. FICHTNER, H. Op. cit., S. 62.

17 Вж. MITTENZWEI, I. Op. cit., S. 63.

18 Вж. BAUMBACH, A. Zivilprozessordnung: mit FamFG, GVG und anderen Nebengesetzen, München, C. H. Beck, 2017, S. 726.

решението на съда е разпростирание на сила на пресъдено нещо спрямо инцидентното правоотношение, не би следвало да има разлики с хипотезата, когато същото правоотношение е било предмет на отделно производство. Аргумент се черпи и от сравнението с уредбата на висящността в § 261, доколкото институтът на висящността и на спирането по § 148 исторически и функционално са близки и няма логика в единия случай релевантна да е силата на пресъдено нещо, докато в другия – не¹⁹. Логиката на това сравнение се основава и на обстоятелството, че предварителните въпроси, които съдията преценява при разглеждането на делото, са многобройни, поради което § 148 би се обезсмислил без една предварителна селекция – съобразно нея се включват само въпросите, които могат да образуват част от предмета на друго дело²⁰. Ако значението на думата „въпрос“, използвано в тази разпоредба, се разглежда спрямо всекидневното ѝ значение, това би включвало всякакво твърдение на страната за някакъв факт, тоест практически всеки въпрос може да се нуждае от изясняване и затова се налага разграничение на случаите, когато един въпрос не просто съществува като обективно обуславящ за производството, но неговото решение трябва да бъде оставено на друг съдебен състав, вместо да му бъде отговорено от състава, пред който е поставено обусловеното дело.

Въз основа на анализа на римското право и неговото влияние върху ZPO се развива тезата, че между понятията за сила на пресъдено нещо, висящност, изменение на иска и съединяване на иска съществува взаимна зависимост²¹. Необходимостта да се избегнат противоречия между тези институти идва от обстоятелството, че всички боравят с едно сходно понятие за предмет на спора – той определя както границите на силата на пресъдено нещо, така и състоянието на висящност; служи като отправна точка както за изменението на иска, така и за субективното и обективно съединяване. Всички тези институти са предназначени за една обща цел – съдът следва да се занимава само веднъж с едно и също нещо²². Като извод се

19 Вж. FICHTNER, H. Op. cit., S. 70.

20 Вж. MITTENZWEI, I. Op. cit., S. 24.

21 Вж. MITTENZWEI, I. Op. cit., S. 44, както и FICHTNER, H. Op. cit., S. 61.

22 Вж. MITTENZWEI, I. Op. cit., S. 70.

налага, че спирането има същата цел спрямо „преюдициалната сила на пресъдено нещо“, каквато има отводът за висящ процес спрямо директната такава.

В същото време анализът на § 322 от ZPO показва че терминът, релевантен за формиране на силата на пресъдено нещо на решението, е „претенция“ (*Anspruch*), а в материалноправен смисъл претенцията може да съвпада с предмета на делото единствено при осъдителни иски, но никога при конститутивни и рядко при установителни²³. Тъй като става дума за твърдяни, а не за съществуващи права, в § 148 се говори за „съществуване или несъществуване на правоотношение“. Тази формулировка обаче не адресира проблема за гражданскоправната конкуренция на притезания.

Поради горното се налага едно по-скоро материалноправно виждане за термина „предмет на делото“, според което предмет на делото е правното твърдение на ищеца, насочено срещу ответника, за чиято истинност страните спорят помежду си. Така, ако ищецът иска от ответника нещо определено, това искане следва да бъде предмет на делото, независимо от квалификацията на източника на дължимото, включително дали е на договорно или извъндоговорно основание. Поради това и правната преценка на съдията, който ще постанови спирането, а не субсумирането от страна на ищеца на претенцията му, ще има значение за решението дали делото да се спре.

Горното становище се подкрепя от съдебната практика, според която ако ищецът заведе ново дело, което не е идентично на първото, но касае въпроси, обхванати като преюдициални от първото решение, съдията по второто дело не е обвързан от първото решение, но за ищеца е преклудирана възможността да навежда наново възражения, за които вече е имал възможност в първото производство²⁴. В тази връзка се твърди, че по отношение на една фактическа обстановка, за която вече е отсъдено, не може да се поставя наново въпросът за пререшаването ѝ. Ето защо се приема, че силата на пресъдено нещо не може да реализира своя пълен потенциал, ако е възможно да се допусне че факти, които е можело, а не са били

23 Ibid., S. 45.

24 Ibid., S. 53.

релевирани в първия процес, биха могли да бъдат релевирани в един втори процес. Това би довело до преодоляване на силата на пресъдено нещо на първия процес. От своя страна, за да може изходът на обусловеното дело да е различен, би следвало обуславящото да е обвързващо за него.

В обратния смисъл съществува теза, че трябва да се търси по-широкото значение на думата „зависимост“ в текста на § 148. Първо, това се налага защото немският закон, за разлика от австрийския процесуален закон (§ 190 и 191 от австрийския ZPO), не ползва понятието *rechtskräftig* при описание на зависимостта между двата процеса²⁵. Според същата теза позоваването на § 256, ал. 2 от ZPO по отношение на силата на пресъдено нещо е некоректно, защото целта на разпоредбата е да закрепи едно специфично усложнение на предявяването на установителен иск, докато § 148 от ZPO има съвсем различна цел – да олекоти и улесни производството, видно и от различното систематично място на двете разпоредби.

Като допълнение трябва да се има предвид, че хармонията между решенията не се свързва само с избягването на противоречиви решения – това се аргументира именно с разпоредбата за висящността в § 261 от ZPO, която в този случай предвижда прекратяване на по-късно заведеното дело. Докато прилагането на § 261 е абсолютно задължително, то при спирането има елемент на дискреция, който не позволява двете да бъдат сравнявани, напротив – това идва да покаже различната им цел. Рискът от противоречиви решения не важи само при две решения, които са взаимно обвързани. Ето защо и използването на думата „преюдициалност“ не се предпочита от автори, които смятат че спиране се допуска и в по-широк кръг случаи, защото преюдициалността идва да покаже, че става дума за ефект от силата на пресъдено нещо²⁶. В същото време зависимост е всякакъв вид правна и фактическа обусловеност, предоставяща възможност на съда да прецени дали да бъде обвързан от паралелния процес или не.

В тази логика връзката между двата процеса се приема като връзка на конкуренция в най-широкия смисъл на думата²⁷. Не се изисква априори

25 Вж. KRALIK, W. Die Vorfrage im Verfahrensrecht. Wien, Manzsche, 1953, S. 152.

26 Вж. FICHTNER, H. Op. cit., S. 74.

27 Вж. WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Zivilprozessordnung und Nebengesetze. Bd. 3: §§ 128–252. Berlin [u.a.], De Gruyter, 2013, S. 261.

нито обуславящото отношение да е между същите страни, нито то да е пряко обвързано със силата на пресъдено нещо, тъй като по-генералната цел да се избегнат противоречиви решения не означава само противоречие в диспозитивите, а изобщо по отношение на въпроси от значение за изхода на делото²⁸. Ако става дума за пълен идентитет на двете дела, то тогава по-късно заведеното се прекратява и служебно – на основание § 261, ал. 3 от ZPO – разпоредба, много подобна на чл. 126 от ГПК.

Целта на § 148 от ZPO съответно не е да се зачете определено материално право, което е предмет на друго висящо дело, а да вземе под внимание един предварителен въпрос, който ще бъде разрешен в другия процес. Едва с крайното решение по делото процесуалният му предмет придобива материалноправен аспект и материалноправни последици²⁹. Затова допреди да има влязло в сила решение, критериите за преценка се извличат от процесуалното право – това са процесуалната икономия и избягването на противоречиви решения в широк смисъл. Решаващо за това мнение е, че дали един въпрос ще е предмет на някое дело, не е идентично на това този въпрос да се ползва със сила на пресъдено нещо, тъй като второто следва от нарочна разпоредба на закона, която не се занимава с обусловеността на делото от преценката на даден въпрос, а само с последицата на решението³⁰. Когато законодателят е създавал ZPO, той не е разграничавал ефектите на материалното и процесуалното право – за него всеки материалноправен въпрос от значение за изхода на делото е представлявал в някакъв смисъл предмет на делото³¹ – ето защо не бива да бъде надценяван фактът, че § 148 говори за „правоотношение“, което е материалноправен термин.

Силата на пресъдено нещо безспорно е фактор, който се взема предвид, но не изчерпва възможностите за спиране. Така, ако обуславящото дело ще обвързва със собствената си сила на пресъдено нещо обусловеното, това е сигурен белег на преюдициалност и съответно – възможен

28 Ibidem.

29 Вж. MITTENZWEI, I. Op. cit., S.109.

30 Ibid., S. 36.

31 Ibid, S. 38.

критерий за спиране, но в същото време не и единственият възможен³². Едно решение може да няма пряко отношение към предмета на делото на втория процес, но да има отношение към предварителен въпрос от значение за решаването на второто дело. Тогава няма да се говори за зачитане на силата на пресъдено нещо на първото решение, но въпреки това обусловеност ще има. Ако силата на пресъдено нещо няма предопределящо значение на единствен фактор за спирането, то спиране следва да се допусне и в случаи на спор между различни страни³³. В съдебната практика трайно се приема, че спирането не следва да се допуска единствено между едни и същи страни³⁴.

Сходен проблем е този дали фактическото въздействие на едно производство върху някое друго също може да доведе до прилагане на § 148 от ZPO. В тази връзка се предлага разширително тълкуване на § 149 и спрямо съседната му разпоредба³⁵, което се налага по причина, че в много случаи едно производство би повлияло на друго, без обаче да е правно обвързващо за него – това касае най-вече събирането и преценката на едни и същи доказателства, преценка на конкретен факт, който обаче не е част от предмета на делото, както и други проявни форми на процесуалната икономия.

В случай че чисто фактическото въздействие се приеме за фактор, това би навлязло в свободната преценка на двата съдебни състава, тъй като всеки от тях в крайна сметка има правомощието да изкаже мнение по всеки от фактическите въпроси, дори и те да са идентични в двата процеса³⁶. Още повече че за подобен род взаимоотношения между процесите има други процесуални възможности – например доказателствата от единия процес могат да бъдат приложени по другия, независимо от въпроса с каква доказателствена стойност ще се ползват. Подобно е например правилото на § 411a от ZPO, което предвижда възможността да се използва

32 Вж. BADER, H. Op. cit., S. 26; WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Op. cit., S. 269.

33 Вж. BADER, H. Op. cit., S. 27; MÜNCHENER Kommentar zur Zivilprozessordnung [MüKo ZPO]: mit Gerichtsverfassungsgesetz und Nebengesetzen. Band 1: §§ 1–354. München, C. H. Beck, 2016, S. 1180.

34 Вж. WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Op. cit., S. 274.

35 Вж. MüKo ZPO, S. 1182.

36 Ibidem. Вж. и WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Op. cit., S. 272.

експертно заключение, изготвено в рамките на друг процес, без да се поставя въпросът за спирането. Затова по-скоро се приема, че за да се стигне до спиране, трябва да се претегли интересът от процесуална икономия, както и опасността един въпрос да не бъде проучен достатъчно добре от съда. Ето защо, ако например двата въпроса се намират в еднакво отношение спрямо предмета на делото, основание за спиране на едното за сметка на другото липсва³⁷.

Поставя се и въпросът на кой стадий от производството се преценява обусловеността. От гледна точка на предявената искова молба всяка предпоставка за уважаване на иска е обуславящ въпрос, но след подаването на отговора на исковата молба към тези въпроси се добавят и въпросите, обуславящи всички възражения на ответника. От позицията на съда това на какъв етап се намира производството определя колко и какви въпроси са обуславящи за крайния изход на делото³⁸.

В тази посока трябва да бъдат отбелязани няколко неща. Първото е, че в течение на висящия процес въпросите по спора могат да се променят, като някои от тях да придобият релевантност, а други – да я загубят; всеки факт може да попада в различни хипотези на закона и съответно да води до различни последици, тъй като различни предпоставки трябва да бъдат взети предвид. Този въпрос има отношение и към момента, в който се преценява допустимостта на иска, като преобладаващото схващане е, че релевантен е моментът след като ответникът е имал възможност да отправи възражения. Ето защо се приема, че съдът би трябвало да изчака поне възраженията на ответната страна, за да може да обсъжда и въпроса за спирането на делото – ако не за друго, то защото тогава се оформя фактическата обстановка по делото, включително се отделя спорното от безспорното³⁹. Така, ако в един спор за наследствено имущество ответникът навежда възражения, че ищецът не е наследник, но заедно с това и че той самият не притежава никаква част от наследството, делото не бива да бъде спирано поради преюдициален спор за качеството наследник, тъй като, ако се установи че ответникът не притежава част от наследството, няма

37 Вж. WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Ibid.

38 Вж. MITTENZWEI, I. Op. cit., S. 26.

39 Вж. MITTENZWEI, I. Op. cit., S. 28.

смисъл да се задълбава във въпроса за това дали ищецът е наследник⁴⁰. Тази ситуация е променлива – ако съдът вече е спрял делото и някоя страна направи волеизявление със значение за крайния изход на делото, тогава е възможно да се приложи § 150 от ZPO и производството да бъде възобновено – например ако един спорен въпрос се окаже безспорен между страните – в този случай зависимостта остава без значение.

Горното налага извода, че аргументите и на двете страни са от значение за решението на съда по въпроса за спирането, както и че не съществува абстрактна зависимост на един процес от друг, без оглед на конкретните твърдения, изложени във всеки един от тях.

Въпреки привидно широката свобода на преценката съдебната практика и доктрината са установили случаи на недопустимост на спирането. Налага се разбирането, че не може да се говори за „допустимо“ спиране по принцип⁴¹, а за две отделни категории допустимост (*Zulässigkeit / Zumutbarkeit*) – докато при първото не са налице изобщо предпоставките за спиране, при второто те са налице, но съдът е прекрачил допустимите граници на дискрецията си при упражняване на възможността по § 148 от ZPO, която е само и единствено право, но не и задължение.

Към първата група недопустимост влизат например случаите, когато е приключило съдебното дирене, защото в този момент съдът вече няма как да вземе предвид фактите, които са предмет на обуславящото дело. Същото важи и за касационното производство в общия случай, тъй като касационният съд е обвързан да приеме фактическото положение такова, каквото то е констатирано от въззивния съд. Спиране е недопустимо и когато исковата молба по което и да е от двете дела – обусловено и обуславящо – е недопустима. Спирането не може да бъде основано на обуславящи процесуални въпроси – видно от използването на термина „правоотношение“ и независимо от разбиранията за предмета на делото, един чисто процесуален въпрос няма как да бъде приравнен на въпрос за съществуването или несъществуването на правоотношение.

40 Ibid., S. 29.

41 Вж. FICHTNER, H. Op. cit., S. 76.

От изключителна важност и за българския граждански процес е трайното становище на немските съдии, че когато пред съда е налице възможност да съедини служебно делата по реда на § 147 от ZPO, спирането не е допустимо⁴². Това е лесно обяснимо, тъй като в тези случаи чрез служебното съединяване се постига благоприятен резултат по отношение на конфликтните цели на спирането – няма как да има противоречиво разрешаване на въпросите, но също така няма да се допусне и необосновано забавяне на разглеждането на делото. Подобен резултат се наблюдава и при възможността за частично решение⁴³. Необходимо е обуславящото дело да е друго, тоест не може да има подобно съотношение между искова молба и насрещен иск например⁴⁴. За забрана за спиране се говори и когато ищецът има особено спешна нужда от съдебно решение – например ако се очаква скорошна ликвидация на неговия ответник – юридическо лице⁴⁵, макар че срещу горното се отправят възражения, че е трудно да бъде извършена преценка в такива случаи.

Изглежда безспорно в практиката, че при висящ изпълнителен процес спиране не се допуска. Такова спиране би имало за последица осуetyаване на реда на кредиторите, а така също изпълнителният процес не е насочен към постановяването на решение по начина, по който § 148 от ZPO го изисква⁴⁶. Ако обаче се касае за иски производства в рамките на изпълнителния процес, спирането на производството е допустимо. В останалите случаи защитата се осъществява по пътя на възраженията – § 776 или 769 от ZPO.

Към втората група недопустимост е по-трудно да се подходи с общи принципни положения, защото преценката, която прави съдът, до голяма степен зависи от много конкретни фактори по съответното дело. Съдът обаче не може да ползва спирането за собствена изгода с единствената цел да се освободи от работа или временно да не се занимава с конкретното дело. Той също така не може да спира делото, ако обусловеността

42 Вж. FICHTNER, H. Op. cit., S. 97.

43 Ibid., S. 98.

44 Вж. STEIN, F. und JONAS, M. Kommentar zur Zivilprozessordnung. Band 3: §§ 148–270. Tübingen, Mohr Siebeck, S. 12.

45 Вж. FICHTNER, H. Op. cit., S. 100.

46 Вж. WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Op. cit., S. 264.

между двата процеса е изключително ниска с оглед на фактите, които ще бъдат преценявани. Изрично се поставя и въпросът за злоупотребата с права – ако една от страните цели само забавяне на процеса, то дори и искането ѝ да е формално допустимо, съдът не следва да спира делото⁴⁷.

Ако вече е постановено спиране по едно дело, принципно това обвързва другия съд, тоест, ако той реши че трябва да спре делото пред себе си, това би блокирало процеса и се смята за злоупотреба с правомощията му (*ermessensfehlerhaft*)⁴⁸. По същия начин съдът е обявявал за съществено процесуално нарушение постановяването на спиране без да е било направено нарочно искане, когато съответният съд не е взел предвид възможния конфликт със забавянето на висияция пред него процес⁴⁹.

Други хипотези, за които съдебната практика се е произнесла, че влекат недопустимост на спирането, са случаите на всякакви искове по съществуването на спора спрямо производствата по признаване и допускане на чуждестранни решения⁵⁰; в случаите на пряк иск срещу застраховател на делинквента, ако има и иск срещу делинквента, както и при иск срещу застраховател, покриващ правните разноски (т.нар. *Deckungsprozess*), докато е висящ основният процес, заради който те се извършват. Принципно не е допустимо спиране при паралелни процеси срещу главния длъжник и поръчителя, освен ако няма някаква взаимна зависимост между двата⁵¹.

За спиране не може да се говори, когато се касае за общи факти по два процеса, чийто предмет са две различни правоотношения. Така например процес по иск за недостатък на купена вещ между купувач и продавач не би следвало да е обуславящ за процес за недостатък на вещ, която купувачът по този процес е продал след това на трето лице и то претендира също недостатък. В случая има две различни правоотношения с общи фак-

47 Вж. FICHTNER, H. Op. cit., S. 102.

48 Вж. WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Op. cit., S. 262; BAUMBACH, A. Op. cit., S. 728.

49 Вж. WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Ibidem.

50 Вж. ZIMMERMANN, W. Zivilprozessordnung: mit FamFG (Allgemeiner Teil sowie Verfahren in Familiensachen), GVG, EGGVG, EGZPO, EU-Zivilverfahrensrecht. Münster, ZAP-Verl., 2011, S. 283.

51 Ibidem.

ти⁵². Възможно е правоотношението да бъде предмет на делото и в двата процеса, или и в двата процеса да бъде преюдициално спрямо предмета. В последната хипотеза § 148 от ZPO не може да се приложи, макар да се правят предложения *de lege ferenda* за това⁵³. Аргументът е, че целта на разпоредбата е едното дело да бъде спряно, за да може при крайното решение да се вземе предвид състоянието, до което първият съд е стигнал. Въпреки това съществува и схващане, че ако един въпрос е преюдициален спрямо двата процеса, това пак трябва да доведе до спиране⁵⁴.

Освен че от приемането на ZPO досега се развива виждането, че спирането в някои случаи е недопустимо, постепенно се върви и в другата посока – че понякога то е не просто допустимо, а задължително. Това разделение на първо място може да се срещне в самия закон, като в § 152–154 са посочени няколко хипотези на задължително спиране на производството. Всички те са частни случаи на § 148, но засягат особени отношения от личен и семейноправен характер – в хипотезата на § 152 това са спорове, обусловени от оспорването на брак тогава, когато е подадена молба за оспорване на брака; при § 153 се касае за оспорване на бащинство в случаите на зависимост на правния спор от установяването на бащинството на едно лице; при § 154 става дума за съществуване на брак или фактическо съжителство, а по ал. 2 – дали има родителски отношения между страните или дали страните са натоварени с упражняване на родителските права.

Друго подобно задължително основание за спиране е, когато решението по предварителния въпрос ще има обратно действие и ще преуреди евентуалното решение по обусловеното дело – например когато спор за законността на разрешението за строеж би преуредил с обратна сила спора между продавач и купувач за строителство в процесния имот. Друг подобен пример за задължително спиране е, когато съдът по обусловеното дело няма компетентността да решава предварителния въпрос: например ако се отнася за въпрос, който засяга спор между други две лица⁵⁵. Ако едно вземане има привилегия спрямо друго срещу същия длъжник, вторият

52 Вж. BADER, H. Op. cit., S. 17.

53 Вж. BADER, H. Op. cit., S. 23.

54 Вж. ZIMMERMANN, W. Op. cit., S. 285.

55 Вж. FICHTNER, H. Op. cit., S. 86–88.

процес може да бъде спрян⁵⁶. Обаче правото на задържане, когато е предмет на друг процес, не се приема за основание за спиране, щом се заяви в процес срещу друго вземане.

По отношение на конститутивните искиве принципното положение е, че целта на спирането в гражданския процес не е да променя материалноправното положение, а единствено да улесни работата по обуславящия процес. Гражданският съд преценява правото съобразно материалноправното положение, а не цели да го промени, така че то да обслужи конкретен изход на делото⁵⁷. Това обаче не се потвърждава напълно от самия закон – например в хипотезата на § 151 от ZPO. Ето защо се налага диференциран подход. При отпадане с обратна сила на действието на едно решение заради ефекта от друго решение, ситуацията наподобява § 151 и спиране трябва да се допусне – като пример се дава искът на поръчителя срещу главния длъжник на основание § 775, т. 4 от BGB, а именно – когато кредиторът се е снабдил с изпълнително основание срещу него. В този случай искът на поръчителя зависи от това дали ще има титул, издаден в полза на кредитора срещу него, и спиране е допустимо именно за да се изчака евентуалното сбъждане на хипотезата, посочена в текста на BGB.

В същото време спецификите на съответния правен отрасъл също се взимат предвид при преценката за наличието на предпоставките за спиране. В трудовото право например съществува принцип за бързо разглеждане на делата (*Beschleunigungsgebot*), съгласно който в много случаи, когато има основание за спиране, такова все пак не се постановява. Например ако страната е възразила срещу определено основание за уволнение, позоваването на същото основание в друг процес води до недопустимост на спирането⁵⁸. По същия начин, ако единият процес касае защита от уволнение, в другия не може да се претендира заплащане, зависимо от уволнението.

Съществува и обратното мнение, според което именно заради принципа за по-бързо разглеждане на делата спиране трябва да се допуска във

56 Вж. WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Op. cit., S. 270.

57 Вж. MITTENZWEI, I. Op. cit., S. 126.

58 Вж. BAUMBACH, A. Op. cit., S. 726.

всички случаи от трудовото право⁵⁹. Причината е, че при спор за трудово възнаграждение например, ако в същото време има спор за законността на уволнението, наличието на трудово правоотношение е обуславящо за изхода на спора за възнаграждението. В същото време, ако не бъде спряно делото, съдът, разглеждащ иска за възнаграждение, не може да се произнесе инцидентно за уволнението – ето защо в този случай по-бързото разглеждане налага да се спре делото за изплащане на възнаграждението. Неяснотата на правното положение не може да се оправдава с идеята за бързина на разглеждане на делото.

Съществуват разнопосочни мнения за спирането във връзка с наведено възражение за прихващане. Възможно е вземане, предмет на отделно дело, да бъде въведено в друг процес с възражение за прихващане или с предявяване на насрещен иск, като спорният въпрос е дали се налага да бъде спирано разглеждането на делото, по което възражението за прихващане, съответно насрещният иск, са били предявени, до постановяване на решението по делото, по което вземането е предмет на иска. Твърди се, че нито предметът на възражението за прихващане, нито предметът на насрещния иск са предмет на правния спор, по който вземането е предмет на иска, заради което, ако те биват разглеждани паралелно в друг процес като искове, би следвало да не се допуска спиране⁶⁰. В по-новата практика също се приема за недопустимо едно вземане, което е предмет на искова молба, да бъде в същото време и предмет на възражение за прихващане в друг процес и това да води до спиране.

Има обаче и становище, според което, ако вече е предявено с иск вземането, неговото предявяване с възражение за прихващане е допустимо, но в този случай спирането може да настъпи едва в момента на решаване на спора за съществуването на главното вземане. Ако то не съществува, възражението за прихващане няма да бъде разгледано и тогава няма да има основание за спиране⁶¹.

59 Вж. FICHTNER, H. Op. cit., S. 92–93.

60 Вж. BADER, H. Op. cit., S. 20.

61 Вж. ZIMMERMANN, W. Op. cit., S. 283.

Като заключение може да се каже, че немският съд е по-скоро консервативен в прилагането на института на спирането – преди всичко заради възможното забавяне, което той се опитва максимално да избягва, когато е възможно. Друга причина за това отношение е, че част от страховете за неблагоприятни последици, когато делото не е спряно, са твърде хипотетични: например може да се стигне до противоречиви решения, но това съвсем не е задължително⁶², а освен това при преценка на интересите на страните може да се окаже по-накърняващо делото да се спре, отколкото да не се спре. Това дава повод на Zimmermann да говори за постановяването на спиране като за изключение⁶³, а на Wieczorek – като за нещо, което трябва да се решава на първо място по целесъобразност⁶⁴. Традиционно се приема, че спирането е изключение от принципа на правораздаване (*Rechtspflege*), който изисква съдът максимално бързо да разгледа спора пред себе си.

Спиране на делото

поради съмнения за извършено престъпление

В § 149 от ZPO се урежда друга хипотеза на спиране поради обуславящи фактически обстоятелства – когато съдът има съмнение, че е извършено престъпление, което би могло да има влияние върху процеса пред него, той може да спре делото до приключване на наказателното производство. В ал. 2 се уточнява, че съдът възобновява производството по молба на една от страните, ако е изминала една година от спирането, освен когато важни причини налагат продължаването му.

Разпоредбата има известна прилика с чл. 229, ал. 1, т. 5 от ГПК, но и тук се забелязват някои значителни разлики. От изключителна важност при тълкуването на § 149 от ZPO е, че гражданският съд в Германия, за разлика от българския, не е обвързан от присъдата на наказателния съд в нито един случай. Тази липса на обвързаност е била законодателно закрепена със Закона за въвеждане на ZPO – § 14, ал. 2, т. 1 от EGZPO (отм.), според който са лишени от действие правилата на отделните провинции, съгласно

62 Вж. BADER, H. Op. cit., S. 30.

63 Вж. ZIMMERMANN, W. Op. cit., S. 282.

64 Вж. WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Op. cit., S. 262.

които присъдата обвързва гражданските съдилища. Макар разпоредбата да е отменена, нейното прилагане не подлежи на съмнение в практиката⁶⁵. Също така гражданският съд винаги упражнява собствена преценка на събраните доказателства, независимо как и от кого са събрани – § 286 от ZPO, ето защо няма значение дали определени доказателства са били обсъждани в наказателното производство – гражданският съд продължава да не е обвързан с мнението на наказателния съд дори и по идентичен въпрос⁶⁶.

Поради горното влиянието на извършеното престъпление може да е само и единствено фактическо, но не и правно⁶⁷. То е свързано най-често и се използва на практика при събирането и преценката на доказателствата. Целта на § 149 от ZPO също е да предотврати противоречиви разрешения в широкия смисъл на думата, както и да предостави на наказателните органи възможност да проучат въпрос, свързан и с тяхната компетентност, по начин, който да улесни и подпомогне гражданския съд. Това би могло да обясни и защо липсва задължение за съда да спре делото в тези случаи, както и защо е необходимо съдът да претегли необходимостта от установяване на истината в наказателното производство спрямо възможността за забавяне на производството⁶⁸. Преценката е винаги конкретна за случая и трябва да се основава на баланса между по-доброто разкриване на конкретно обстоятелство в наказателния процес и противостоящото забавяне на гражданския процес, тоест преценява се кои са спорните факти в гражданския процес, както и как точно те могат да бъдат установени по-ефективно в рамките на наказателното производство⁶⁹. Ето защо при преценка на правни въпроси спиране на това основание не може да има.

Престъплението може да бъде извършено от всеки участник в процеса – страна, свидетел, вещо лице или дори от трето, неучастващо в процеса лице, стига обаче съдът да е направил преценка за въздействието на това престъпление върху гражданското производство. Самообвиняването

65 Вж. WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Op. cit., S. 266.

66 Ibid., S. 284.

67 Ibid., S. 286.

68 Вж. ZÖLLER, R. Op. cit., S. 666.

69 Вж. ZIMMERMANN, W. Op. cit., S. 288.

обаче не е основание за спиране на производството, също както и образуването на наказателно производство срещу някоя от страните само по себе си.

Също така, ако например бъде образувано наказателно производство за лъжесвидетелстване срещу някоя от страните, но тази страна бъде принудена да изложи пред съда същите обстоятелства поради задължението ѝ да говори истината, няма смисъл делото да се спира⁷⁰.

Съгласно § 203 от StPO, за да се започне наказателно производство, е необходимо да има съмнение за извършено престъпление, като съществува спор дали думата „съмнение“ (*Verdacht*), ползвана в двата случая, се ползва с еднакво значение. Все пак се приема, че между двата термина има определена съгласуваност, която не бива да се подценява⁷¹. Това е необходимо, за да се прецени как се прилага нормата темпорално, тоест дали се допуска спиране, ако има извършено престъпление или дори е приключило наказателното производство или има висящо такова. Буквалното тълкуване би следвало да значи, че във всички тези случаи § 149 от ZPO не намира приложение, но срещу това се отправят логични възражения⁷².

Също както и при § 148, и тук се поставят въпросите за допустимата намеса на съда, а също и за предпоставките на § 149, сравнени с тези по § 148⁷³.

И в двете разпоредби става дума за едно дискреционно правомощие на съда, тоест той не е длъжен да спира. Когато има идентичност или сходство на фактическите състави на двете производства, би било нормално да се говори за спиране по § 149, но това се отрича от повечето автори с аргумент от § 286 от ZPO. В действителност именно § 286 е доказателство, че спирането в тези случаи трябва да се допуска, защото целта на § 149 е реализиране на процесуална икономия, а често в споменатите случаи се повторят множество сходни фактически състави. Типичен пример за това

70 Вж. WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Op. cit., S. 286.

71 За обратното мнение вж. FICHTNER, H. Op. cit., S. 108.

72 Ibid., S. 112–113.

73 Ibid., S. 107.

са застрахователните измами, които са предмет и на двете производства и сходството помежду им е допълнителен аргумент за спиране.

В същото време, макар приложното поле на § 149 от ZPO да изглежда по-широко от § 148, в действителност е обратното, защото при преценката на интересите съдиите по-рядко биха избирали да спират, вместо сами да вземат отношение по поставените проблеми⁷⁴. Докато при § 148 е възможно да има случаи, когато забавянето е оправдано заради фактори от по-висш порядък, то при § 149 не изглежда да има такива, защото се касае за чисто фактическо влияние. Случаи на изключения са например, когато един определящ за наказателния съд въпрос би се оказал второстепенен за гражданския и се предполага, че ще бъдат положени несъразмерни усилия за неговото разрешаване от гражданския съд, както и ако вече са били събрани определени доказателства в наказателния процес, преди гражданският да е започнал.

Фактът, че спирането по този текст не е обусловено от обвързаността на гражданския съд от присъдата, идва да покаже нещо важно за съотношението между § 148 и § 149 от ZPO. Не е случайно, че в част от немската съдебна практика се твърди, че дори да има образувано наказателно производство, в което да се обсъждат важни за гражданския процес въпроси, това само по себе си не влече основание за спиране, тъй като без да има обвързаност от присъдата на наказателния съд, липсва и преюдициалност като предпоставка, така както § 148 изисква. Ето защо за случаи на наказателноправен факт, важен за развитието на гражданското производство, по-скоро следва да се приложи § 149, тоест не преюдициалността, а още по-широката, но поради това и по-рядко приложима, преценка на гражданския съд ще е релевантна за спирането.

Съществува интересна дискусия по отношение на това как трябва да се процедира, когато определено престъпление е част от фактическия състав на гражданскоправното материално право. Тя следва от обстоятелството, че макар присъдата да няма обвързваща сила за гражданския съд, разпоредбата на § 580, т. 4 от ZPO визира до голяма степен идентична

74 Вж. FICHTNER, H. Op. cit., S. 133.

идея на разпоредбата на чл. 303, ал. 1, т. 2 от ГПК, поради което угрозата от повторно разглеждане на гражданското дело поради извършено престъпление от значение за изхода на делото е валидна и в немския процесуален контекст.

По отношение на прилагането на разпоредбата на § 580, т. 4 от ZPO теорията и практиката е разединена⁷⁵. В този случай присъдата, а не фактът на извършено престъпление, респективно образуваното наказателно производство са основание за уважаване на молбата за отмяна. Според едното мнение § 149 от ZPO не се прилага в случая, макар молбата за отмяна да трябва да се уважи⁷⁶. Причина за горното е, че в тези случаи гражданският иск е изначално недопустим, защото липсва предпоставка за валидното му предявяване. Горното представлява проблем за случаите, когато гражданският иск е ограничен със срок, а не е ясно кога ще бъде приключено наказателното производство. Затова и някои съдилища биха допуснали предявяването на подобен иск, ако има угроза от изтичане на срока. Според обратното мнение § 149 намира съответно приложение в случая.

ВЪЗМОЖНИ ИЗВОДИ ЗА БЪЛГАРСКИЯ ГРАЖДАНСКИ ПРОЦЕС

Директното позоваване на чуждестранен законодателен опит е наивно и неподходящо. Въпреки това извършеният анализ на немското разбиране за спиране на исковото производство дава повод за няколко показателни извода.

На първо място, в немския граждански процес на спирането се гледа по систематичен начин – не просто като отклонение на обичайното развитие на процеса, а като въплъщение на конкурентни принципи, а така също и на свързани помежду си правни институти. Макар у нас анализирането на спирането през принципи да не е толкова наложително, тъй като свободата на съдията е ограничена спрямо тази на немския съдия, принципите са оп-

75 Вж. WIECZOREK, B., SCHÜTZE, R. und GERKEN, U. Op. cit., S. 287.

76 Вж. MüKo ZPO, S. 1187; FICHTNER, H. Op. cit., S. 115.

ределящи и за начина на прилагане на спирането – обстоятелство, което сякаш се подценява от българската съдебна практика.

Така например в множество съдебни актове може да се прочете, че спиране следва да се допусне само между същите страни и само тогава, когато силата на пресъдено нещо на обуславящия процес ще се разпростре спрямо обусловения. Анализът на § 148 от ZPO и неговото позоваване на римското разбиране за *praeiudicium* идва да покаже, че подобна взаимна зависимост липсва или най-малкото е спорна. Действително някои немски автори виждат в силата на пресъдено нещо, висящността и спирането поради обусловеност единен институт, но дори и когато приемат че обуславящото правоотношение трябва да е част от предмета на делото на обусловеното дело, те не го обвързват еднозначно с това, че страните следва да са идентични, респективно че съдът по обусловения процес ще е обвързан със силата на пресъдено нещо на обуславящия. Когато става дума за действието на първия процес се тръгва от по-различно понятие от съчинската сила на пресъдено нещо – независимо дали ще се нарече обвързващо действие или преюдициална сила на пресъдено нещо. И това е обяснимо, тъй като подобен формален белег много често ще игнорира някои от най-важните причини за спирането поради обусловеност – процесуалната икономия и избягването на противоречиви решения, което не може да се разбира само като противоречие между диспозитивите на два съдебни акта, а е по-общ проблем на процеса.

От друга страна, забавянето като последица от спирането така и не се е коментирало изрично в съдебната ни практика. Българският съд понякога предпочита да игнорира очевидна обусловеност между два процеса, за да вземе предвид възможно забавяне на делото пред него, но такъв перфиден подход не може да бъде окуражен. Много по-правилно би било съдът изрично да се мотивира защо би имало забавяне на делото, ако се постанови спирането, и това да бъде аргументът за отказ от спиране, вместо да се търсят заобиколни начини, които имат за последица създаване на противоречива съдебна практика. Същото се отнася и за злоупотребата с правото да се иска спиране. Въпреки текста на чл. 3 от ГПК се случва съдилищата да предпочитат да се мотивират с липсата на обусловеност (ма-

кар такава да има), защото са наясно, че установяването на субективната страна на злоупотребата е трудно. Въпреки това позоваването на чл. 3 от ГПК в тези случаи трябва също да бъде окуражено.

Не на последно място, немската уредба на спирането по разпореждане на съда дава няколко интересни отделни идеи за съответно прилагане или тълкуване на българския ГПК, които заслужават внимание. Такава е възможността за отказ от спиране в случаите когато е възможно служебно съединяване на делата по чл. 213 от ГПК. Този институт брани същата цел като спирането на делото, без обаче да е свързан с двата най-големи риска: противоречиво и бавно разрешаване на делата. Поради това прилагането на чл. 213 следва да стане задължително за случаите, когато предпоставките за това са налице, а чл. 229, ал. 1, т. 4 от ГПК да се тълкува в унисон с него.

В същото време акцентирането при анализа на § 149 от ZPO на обстоятелството, че присъдата на наказателния съд не обвързва гражданския, много ясно сочи, че при аналогичния анализ на чл. 229, ал. 1, т. 5 от ГПК трябва да се държи сметка за чл. 300 от ГПК и двете разпоредби да се тълкуват систематично – спирането ще се наложи само за онези обстоятелства, спрямо които чл. 300 проявява действие.

В по-общ план отчетливата разлика между българската и немската уредба по отношение на факта, че спирането в § 148–149 от ZPO е уредено като дискреционно правомощие на съда, но законът и съдебната практика са развили критерии кога то следва да бъде задължително, може да бъде взето предвид и от българския ГПК. Може да се предвидят хипотези на незадължително спиране, които да бъдат противопоставени на посочените в чл. 229, ал. 1, т. 4–5 от ГПК, така че да се обхванат хипотези на възможна процесуална икономия – например когато едни и същи доказателства ще се събират в два процеса, за които иначе липсват основания да бъде спряно делото, а още повече, когато събирането ще се извършва от специално натоварени органи в наказателния процес. Независимо от тълкуването на чл. 229, ал. 1, т. 4, в много случаи единствената връзка между две дела ще е събирането и преценката на едни и същи доказателства, а повтарянето на подобни процесуални действия често може да бъде сложно и затруднено.

Друго разбиране на немския закон, за което може да бъде помислено *de lege ferenda*, е спиране на съдебното производство до разрешаване не само на обуславящ съдебен спор, но и на спор пред администрацията, тоест моментът, спрямо който се преценява обусловеността при въпрос, предмет на административно производство, да е моментът, в който има висящо административно производство. Административното производство би могло да прелее в съдебно и двете фази на обжалване не се различават съществено една от друга, още повече когато обжалването по административен ред е предпоставка за съдебното обжалване. В тези случаи разликата между административното и съдебното обжалване е чисто формална, но последиците за обусловеното гражданско дело биха били напълно противоположни.

Възможно е административни органи, които не са част от съдебната система, да разрешават спорове от значение за гражданското дело, особено след като част от администрацията действа на границата на правораздавателната система, например така наречените особени юрисдикции – на практика споровете, които те решават, не се различават съществено от гражданските и биха могли да имат значение за гражданския спор, включително да са предпоставка за започване на такъв спор – например Комисия за защита от дискриминация, Комисия за защита на конкуренцията и така нататък. Немската доктрина и практика е предвидила възможността за спиране в тези случаи, защото администрацията и административният съд исторически са възникнали заедно⁷⁷ – една предпоставка, която няма защо да бъде игнорирана в българския процесуален контекст.

77 Вж. MITTENZWEI, I. Op. cit., S. 148.