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Explaining the Relationship between Roman Civil Law and Praetorian Law

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ABSTRACT: Praetorian law and civil law are two closely related branches of Roman private law. Civil law is a set of legal norms, specific to the old era, when law was confused with religion and morality, legal relationships were simple and rare, and legal norms could not be modified or abrogated due to the conservatism of the Romans, who considered that they came from to the gods. Civil law was exclusivist, because it applied only to Roman citizens, and formalist, because civil law acts were concluded by performing some rituals and pronouncing some solemn words, the mistake of which led to the non-existence of the act. Because of this, ius civile delayed the evolution of Roman law. As the Romans gained legal experience, their practical spirit prompted them to resort to praetorian law. It appeared as a reaction to the conservatism of civil law norms and is a set of legal procedures, which contributed to the updating of civil law norms and the evolution of private law procedurally.

KEYWORDS: Civil Law, Praetorian Law, Roman Private Law

Introduction

Roman Civil Law and praetorian law are legal concepts used in ancient Rome. They capture the transformations that appeared in the long process of the evolution of Roman Private Law. The first phase of the evolution of Roman Private Law coincides with the emergence of Civil Law, which was a branch of Roman Private Law applicable since ancient times. Initially, Civil Law was derived only from legal custom and only regulated relations between Roman citizens. In the era of the Republic (509 BC – 27 BC), against the background of the evolution of legal ideas*, ius civile* also results from other more evolved sources of law, among which we mention the law. Law was a source of law expressed in written form. It was adopted by the People's Assemblies (Comitia centuriata, Comitia tributa). It was also expressed in the form of the plebiscite, which was initially adopted by the *Concilium Plebis* and applied only to the plebeians.

Praetorian Law also played an important role in the evolution of Roman Private Law. It originated from the edicts of the praetors and had a specific content, content that contributed both to the updating of civil law and to the individualization of praetorian law in relation to it.

In order to better understand the relationship between Civil and Praetorian Law, we must explain the specifics of each branch of law, as well as how Praetorian Law influenced the evolution of Private Law.

The specifics of Roman Civil Law

The sources of Civil Law appeared in different stages of the evolution of Roman Law. As I have already shown, the first form of expression of Civil Law was custom. Later, Civil Law resulted from other, more evolved sources, both from the point of view of the form and from the point of view of the adoption mechanisms. Although they differed from the point of view of the method of adoption, the sources of the Roman Civil Law had certain elements in common, such as the component elements, which in contemporary law form the internal structure of the legal norm, their application in time and the relationship between the norms of the old civil law with religious norms.

The science of law, as it was known to the Romans, differs from the contemporary one in certain respects. Being pragmatic, the Romans emphasized practical things, to the

detriment of theoretical ones. However, the theoretical aspects should not be neglected, because sometimes they contribute to a better understanding of some legal institutions, as will be seen when we analyze the role of Praetorian Law in the evolution of Roman Private Law. To highlight the importance of Praetorian Law, we will analyze the modern concept of the internal structure of the legal norm. The Romans also had the representation of the elements of the law, but in a slightly different way. From their point of view, the legal norm included 3 elements: *praescriptio, rogatio* and *sanctio. Praescriptio* was the first part of a Roman Law. It included the name of the magistrate who presented the proposal, the name of the assembly that voted the law, the date of the vote and the order of the vote. This seemingly unimportant information highlights the law's scope of applicability and confirms the fact that the people's assemblies had met on a feast day. *Rogatio* was the second part of the law and has its origin in the word *rogat*, which means proposal. Therefore, this component of the Roman Law included the text itself, that is, the proposal with which the magistrate notified the assembly of the people. *Sanctio* was the third part of the law. It included the measures taken in the event of a violation of the provisions of the law.

On the other hand, contemporary legal science sees the internal structure of the legal norm differently. In the opinion of contemporaries, the elements of the legal norm are: hypothesis, provision and sanction. The hypothesis is that part of the legal norm that presents the situations in which the provision or sanction of the legal norm comes into action. The provision is that part of the legal norm that refers to the conduct that must be followed by the subjects of legal relations. Comparing the Roman legal norm with the modern one, we find that the *rogatio* in Roman Law corresponds to the hypothesis and provision in the modern legal norm. The sanction is the last element of the legal norm, which establishes the consequences of the violation of the provision, which intervenes to ensure the legal order and to ensure the effectiveness of the legal norm.

The application of the rules of the Roman Civil Law over time can be more easily understood if the relationship between them and the religious rules is understood.

In the opinion of the ancient Romans, legal norms were of divine origin. Coming from the gods, they were immutable, in the sense that they could not be changed or abrogated. Moreover, in the era of pre-state royalty, as well as at the beginning of the ancient era, these norms were only known to the pontiffs (priests of the Roman pagan cult), who were recruited only from among the patricians. The patricians formed the privileged social class. Initially, they did not allow the representatives of the other social class, the plebeians, access to legal norms and participation in public life. Aware of the fact that law cannot be totally separated from religion and morals, after the publication of the Law of the XII Tables, and as the plebeians gained access to state institutions, the Romans did not allow the assemblies of the people, in the works of which the plebeians also participated, to intervene on law enforcement over time. In this regard, we will invoke certain objective reasons:

- the laws could not be modified even during the legislative process, because the proposal of the magistrate was adopted or rejected by the people according to the model of legal acts concluded by question and answer;
- the opinion of the people's assemblies could be influenced by the powerful of the day, as evidenced by the reality at the end of the Republic;
- the people's assemblies could not know all the imaginary situations that may occur during the application of a law in time;
- even the Senate, in its capacity as supervisor of the traditions and morals of the Roman people, could no longer intervene on the text of the law after it had been ratified and posted in the Forum.

However, Roman private law had to keep pace with reality. For this purpose, mechanisms had to be found to contribute to the updating of the legal norms in force. This was basically the role of Praetorian Law.

The specifics of Praetorian Law

As I have already shown, praetorian law springs from the praetor's edict. According to a text from the Institutes of Emperor Justinian, *"the edicts of the praetors have no less legal authority. Usually we call them honorary law, because those who exercise honors, that is, the magistrates, gave life to this branch of law" (praetorum quoque edicta non modicam iuris optinent auctoritatem. Haec etiam ius honorarium solemus appellare, quod qui honorem gerunt, id est magistratus, auctoritatem huic iuri dederunt).* This edict was published by each praetor at the time of taking office and contained the measures that he was to apply throughout his mandate.

What is meant by the measures that the praetor could take during his mandate? The praetor was a judicial magistrate, who dealt with the organization of private trials. In this capacity, whenever a dispute arose between two people, the praetor made to the parties legal instruments from the edict available. In the ancient era (ju), when the legislation procedure was applied, the praetor did not have a creative role, because he verified that the parties correctly pronounce the solemn formulas related to each type of process. However, the praetor could use certain administrative procedures to solve certain situations that were not regulated, such as the praetorian stipulations and *restitutio in integrum.* Through the praetorian stipulations, the praetor ordered the parties to conclude a contract through question and answer, which aimed to solve new situations arising in practice. Through *restitutio in integrum,* the praetor abolished the legal act harmful to the plaintiff, restoring the parties to the situation prior to the conclusion of the act. Practically, in this way, the praetor abolished the effects of an act concluded in accordance with a legal norm in force, opening the way for the plaintiff to initiate a legal action. In this way, through the procedures arising from the *imperium* - the praetor, private law allowed the judicial magistrates to solve the new cases brought into practice towards the end of the Republic, paving the way for innovations through which the praetor influenced the evolution of Roman private law procedurally.

Later, after the adoption of the formulation procedure through the Aebutia Law, the praetor acquires a creative role. From this moment, he can introduce new legal procedures (formulas, exceptions) in his edict. These procedures, which were not regulated by the existing legal norms, contributed to the sanctioning of new subjective rights. Other times, by means of other instruments from the edict (the fictions), the praetor adapted the content of other legal norms to reality, making it possible to apply them to situations other than those for which they were created. Under these conditions, the parties avoided using legal provisions considered by the praetor as "outdated", as they knew that the judicial magistrate could grant them a judicial procedure that would paralyze their claims.

The relationship between Roman Civil Law and Praetorian Law

These characteristics of praetorian law demonstrate that it was *"viva vox iuris civilis".* These aspects were also highlighted by the Papinian jurisconsult, who affirmed that the praetorian law is that which was established by the praetor to come to the aid of the civil law, to complement and improve it according to the public good *(Ius praetorium est quod praetores introductexerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam).*

The first measure taken by the praetor through the edict was to come to the aid of civil law *(adiuvandi iuris civilis gratia),* by introducing procedures in the edict that would contribute to the application of this legal system, which contained mandatory rules for all citizens. That's what happened when the heir called to the inheritance by the rules of *ius civile* was put in possession of the goods from the estate. In other situations, the praetor completes the provisions of civil law *(supplendi iuris civilis gratia).* For this purpose, he introduced new procedural principles or means, which had not been considered by the legislator at the time of adopting a law. This is what happened when the praetor created the *exceptio legis Plaetoriae,*

which he made available to the deceived young man and summoned to court in order to fulfill an obligation. Instead, when the norms of law were exceeded by reality, the praetor corrected the norms of civil law, proceeding *corrigendi iuris civilis gratia.* This is what happened to the emancipated son of the family. According to civil law, the emancipated family son could not inherit the pater familias, because he was not under his power at the time of the *pater's* death; based on the confirmation of the blood relationship, the praetor took into account that the emancipated son is a blood relative of the pater familias and allowed him to come to his inheritance, on the condition that he report to the succession table the assets he had acquired as a person *sui iuris*.

Once again, we emphasize the fact that the activity of the praetor influenced the rules of civil law, because the perpetual edict is a source of law in the formal sense that finds its own identity only in relation to the rules of civil law and that expresses the conservative spirit of the Romans.

Although it was said that *praetor ius facere non potest,* the praetor could create praetorian law, but he could not create civil law. In other words, not being able to create civil law, the praetor could not create what we call hypothesis, disposition and sanction. Instead, it could create the sanction of the legal norm, that is, precisely that part of the legal norm that made it effective, contributing to ensuring the legal order; the praetor did not create the hypothesis, respectively the disposition, because they were formed in practice. In this way, the praetor modifies the law in force whenever a new situation appears in practice, which could not have been imagined by the legislator at the time of adopting a legal norm. Here, **the internal structure of the praetor's edict differs fundamentally from the internal structure of a law.**

The praetor's edict also differs from the law in terms of its application in time. Thus, unlike the law, which applied indefinitely, the praetor's edict was valid for one year. By virtue of its exceptional character, any action, exception or procedure in the edict was valid as long as it appeared in a perpetual or occasional edict. Reality demonstrated that the provisions that proved useful were taken over by later praetors and introduced in their edicts. At the same time, it is checked whether the modification of the sanction of the legal norm is useful and is due to some objective factors or some subjective factors.

Conclusions

For a long time, Civil Law and Praetorian Law functioned as distinct branches of law. This distinction was clear at the end of the Republic and the beginning of the Principality. At one point, the two legal systems came close, in a first phase, then they merged before the drafting of the legislation of Emperor Justinian. This results from a text in Justinian's Institutes, according to which "but since little by little it began both according to the customs of the people and according to the corrections of the constitutions that the civil law was united with the praetorian law in one" *(Sed how paulatim tam ex usu hominum quam ex constitutionum emendationibus coepit in unam consonantiam ius civile et praetorium iungi, constitutum est).*

This completes a long process, started in the ancient era of Roman law, as a result of which Roman private law adapted to the requirements of a society in permanent evolution, based on private property and the exchange economy. The practical sense of the Romans helped them to understand that the praetor's edict is an instrument that provides solutions to problems at the moment of their appearance, not later, as when the law is adopted by the people's assembly or ratified by the Senate, or never, as happens in scenarios in which the law is rejected or not ratified.

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