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Introduction

The Roman law is oftentimes considered as a prototypical legal system when it comes to considering inequality. The most prominent example of inequality in Roman law is the institutionalization of slavery. Another often-raised example of an institution, which promotes inequality, is the power of husband over wife. This stereotype has to be put, however, in a historical and social context. Roman law becomes an interesting case because it did not interfere with many of the social institutions; it merely regulated infringements of social order; in other words, many of the legal rules were mirror images of the social institutions. The question I want to pose in this article is whether the rules of Roman substantive law, and the Roman style of lawmaking was a force, which promoted equality in the Napoleonic Code and other codes, which were clearly influenced by it. Equality here is meant in both formal and economic sense. Equality is a concept, which is usually thought of as a state of affairs in a given point in time. In historical research it is more useful to think of equality not only as a state of affairs, but also as a process of becoming more egalitarian through legal and social change. Clearly Roman law did not guarantee equality in a modern sense, but this is not an interesting question. Roman law has to be viewed as an element of an ancient world. A very interesting element, as it continued evolving in later centuries, beyond the existence of the state, which created it.

This paper is concentrating on the, so-called, pillars of the Napoleonic Code[1], i.e. concept of property, freedom of contract, and the general clause of

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[1] J. Gordley, *Myths of the French Civil Code*, "American Journal of Comparative Law" 1994, no. 42, p. 459.

liability in delict. It is therefore useful to analyze the originality of those concepts, and the amount of influence Roman law had in their creation. By this indirect means it is possible to assess whether the Roman law was promoting equality. The text does not analyze the institution of marriage, or the other aspects of family law. Law of property, law of contract and the law of delict are also interesting for the questions they answer are simple, yet the answers are complex. Just like in mathematics the most beautiful problems are simply stated but difficult to solve. Famous Fermat's Last Theorem could be written in one line[2], but proof of it eluded mathematicians for centuries. Likewise, property, contract and tort ask similarly simple questions but the answers elude lawyers for millennia. Property law is there to answer: What resources should be private and what resources should be public? What are the limits of exclusive and public use of resources? Contract law strives to answer questions such as: What promises between individuals deserve enforcement by the state? Law of delict is concerned with the question: How to minimize the social cost of accidents and intentional injuries to body, mind, and resources? Those questions while simple in wording are extremely difficult to answer.

1. Some historical remarks

It is often said, that every lawyer looks at the law by the prism of the first legal system he learns. This problem was not alien to the drafters of the Napoleonic Code. Should they gone the way of recreating the institutions from the beginning they would, most probably, still end up translating the revolutionary concepts into the dogmatic of ius commune. If they were to create the system of private law from completely ex nihilo, then some of the answers Roman law gave to the questions above. Some of the answers were incompatible with the revolutionary spirit, but most of the were valuable, one would be tempted to say true, solutions to the problems of interactions between actors of society.

The Code Civil did not share the spirit of French Revolution for the above reasons. At the time of the drafting of the Code the territory of France was divided among various legal systems. The law in the south of France was based largely on the reception of Roman law. Roman law was therefore not an alien element in the drafting process. The north of France used a variety of customary laws, with the Common Law of Paris as a most prominent example[3].

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[2] It states that no three positive integers a, b, and c can satisfy the equation $a^n + b^n = cn$ for $n > 2$.

[3] E. Stankovic, *Influence of Roman Law on Napoleon's Code Civil*, "Fundamina" 2005, no. 11, p. 310.

This division between two parts of France created a perceived need for unification. The French Revolution proved to be a historical moment when unification was possible. Equality, liberty and fraternity were the values aimed to provide an individual with a framework to pursue happiness in any manner, restrained only by negatively stated principles of society. The revolutionary values were supposed to make it into the Code, as it is difficult to imagine the revolutionary values come to life without a private law, which would enshrine and protect them.

2. Object and limits of property rights

The Roman law of property cannot be easily divided to the property of people and the property of things. The division serves only to clarify the problem from the modern perspective. On the other hands, Romans were perfectly aware that slaves are people. For Roman law slavery did not mean the reduction of slaves to inanimate objects, or their treatment as animals. For Roman law slaves remained humans, and it shows in the legal sources, e.g. the Institutions of Gaius mentions slaves in the chapter about persons.

2.1. Slavery

The Romans did not invent the concept of slave ownership. Many ancient civilizations relied on slavery as an important part of an economic system. Some argue, that while humans are not subject to property rights in modern system, economically many of the social classes still play the role of slaves, having minimal wages and not being owners of the housing they occupy. This opinions show, that the concept of slavery has a normative layer and an economic layer. It is therefore necessary to examine both aspects while thinking about Roman slavery.

Firstly it is necessary to examine the source of slaves in the ancient Rome. As in many ancient societies slaves were captured during war[4]. Only in later period a substantial part of slaves were the descendants of other slaves. The owner could free a slave, and usually he would not need any permit from the authorities. This stands completely in contradiction with more modern systems of slavery. This is usually caused by the connection made between race and social status. This association made it necessary to limit manumissions in legal systems such as Louisiana. The connection between race and slave status was even pronounced by a presumption. The Superior Court of the territory of Orleans decided in Adele v. Beauregard (1809) that

[4] J. Kelleher Schafer, *Roman Roots of the Louisiana Law of Slavery: Emancipation in American Louisiana, 1803–1857*, “Louisiana Law Review” 1996–1995, no. 56, p. 410.

Mulattoes were presumed to be free and Negroes were presumed to be slaves[5]. This presumption makes the then American law much harsher than the Roman law, where the presumption of freedom was the rule.

Another important difference was the kind of works done by the slaves in Rome vs. the slavery of the recent centuries. Roman slaves often worked as artisans, teachers, musicians etc. This implied, that the status of slave was not necessarily indicative of mental deficits. Again, quite contrary to the laws of North America, where slavery was based on the assumption that race indicates mental capacity, to the point where some states enacted legislation prohibiting education of the slaves[6].

It is therefore justified to say, that Roman law was not a justification for moderns systems of slavery. The Roman system of slavery was just indicative of the ancient economy; they just did not develop the understanding of the economics of labor, which allowed for the development of ethical framework flowing from the realization that slavery is not an economic necessity.

2.2. Property of things

Art. 544 of Code Civil is one of the most often cited definitions of property in the whole of legal history. It expresses an individualistic approach, which enables the owner to do whatever he pleases with a thing, unless it is contrary to laws or regulations[7]. This approach is a generalization of the rules, which formed the law of things in the ancient Roman law, and was already fully developed in the definition of Bartolus, *domunium est ius de re corporali perfecte disponendi nisi lege prohibeatur*. The works of Bartolus are just a development of Roman law feel for property, a conjecture on a probable definition of the concept in antiquity. It is often said Romans did not develop the definition of property but it is more precise to say, that the scarce sources of law that remain do not contain such a definition.

The Roman law of property laid base to the modern thinking about it. In the classical Roman law there existed two kinds of property, one "true" property, and the other "in bonum" property. The division disappeared in the later law and the resulting singular property is the sort, which is intuitively understood by us. Different kinds of property are not alien to recent legal systems. Although we think of property as unitary concept there exist many similarities to the Roman dual property. For example, the ability of foreign nationals in Poland to acquire land is greatly limited. The rules which govern the process of such acquisition belong to the realm of administrative law, however, functionally it is hard to reduce property rights to a single definition.

[5] Ibidem.

[6] Ibidem, p. 411.

[7] J. Gordley, op. cit., p. 462.

The main development of Roman law was to separate property from possession, a non-obvious trick, which made it possible to think of property as a right and not as a thing. Another abstraction was the concept of restricted property rights, and in consequence – improved economic flexibility of the concept of property. This flexibility is often underappreciated in the discussions about freedom and equality. Roman law understood property as a technical concept, not as a political statement. Being a technical (legal) concept, property could be adopted to the conceptual net of the Age of Enlightenment.

3. Boundaries of the law of delict

The law of delict in the Napoleonic Code is most famous for its art. 1382[8]. It is a general clause of liability in delict, and it imposes liability based on three pillars: fault, causality and harm. The norm of the art. 1382 is a generalization of lex Aquilia. Romans used words delictum and maleficium to signify an illicit act. The most important category of delict was contained in lex Aquilia, which regulated destruction and harm done to a thing, including slaves and animals. Lex Aquilia developed the concept of connecting the amount of damages with the extent of harm. According to Zimmermann, it was at the time, the most important law in the ancient Rome[9].

The first chapter of lex Aqulia provided action for killing of a slave or an animal: G. 3.210. *Damni iniuriae actio constituitur per legem Aquiliam, cuius primo capite cautum est, ut si quis hominem alienum alienamv. quadrupedem quae pecudum numero sit iniuria occiderit, quanti ea res in eo anno plurimi fuerit, tantum domino dare damnetur*. It provides a rule for assessing value of the destroyed thing, which guarantees that the owner can buy a similar thing for the damages.

The third chapter of lex Aquilia is even more important historically, it allowed for further generalizations, and finally formation of the general clause of the art. 1382: D. 9.2.27.5 Ulpianus 18 ad ed. *Tertio autem capite ait eadem lex aquilia: "ceterarum rerum praeter hominem et pecudem occisos si quis alteri damnum faxit, quod usserit fregerit ruperit iniuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto"*. The third chapter was subject to later interpretation and allowed for creation of new types of liability. Already in the classical period, lex Aqulia was used to

[8] Article 1382: Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.

[9] R. Zimmermann, *The Law of Obligations*, Oxford University Press, New York 1996, p. 953.

create liability for what we call today pure economic loss. In the fragment of Ulpian an action is given to an owner of a flat, who suffers loss because of a third party committing a delict for which he is liable: D. 9.3.5.4 Ulpianus 23 ad ed. *Cum autem legis aquiliae actione propter hoc quis condemnatus est, merito ei, qui ob hoc, quod hospes vel quis alius de cenaculo deiecit, in factum dandam esse labeo dicit adversus deiectorem, quod verum est. plane si locaverat deiectori, etiam ex locato habebit actionem.*

The contemporary law of delict, greatly influenced by the lex Aquilia, developed along the lines of Roman cases. Although other cultures must have had the same cases, it was the method of thinking developed by the jurists, which led to the elaboration of modern law of delict. Romans understood that the purpose of the law of delict is not only to punish the tortfeasor, but also to encourage precaution at an appropriate level. The precaution element allows for the development of the doctrines of objective and subjective liability form harm. Understanding of the necessity to stimulate precaution is a key feature of the law of delict. This feature allows us to live in a society where accidents happen but, supposedly, the cost of accidents is minimized.

4. Freedom of contract

The general clause of freedom of contract is an interesting institution. At the time of the enactment of the Napoleonic Code it was a new institution. On the other hand, it was seen by many as a generalization of the Roman system of contracts. Despite the very broad wording of the art. 1134[10], the concept of contract was constrained by the requirement of causa. This basically means, that the parties to the contract need to have compatible economic goals. But still, freedom of contract allowed for further generalizations two hundred years later, when the drafters of the Draft Common Frame of Reference decided that the requirement of causa is not necessary, it would be sufficient to ascertain that the parties agreed on a certain content of the contract and that they want to, or can reasonably be expected to want to enter into a legally binding relationship.

Despite a new way of thinking about contracts, which came from the school of natural law, it is difficult to overlook the influence Roman law had at the system of contracts contained in the Napoleonic Code. The main argument is, that the freedom of contract is not necessary for a system of

[10] Article 1134: Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.

contracts to promote freedom and equality. Freedom of contract means the legal systems accepts atypical promises as valid contracts. This has not really much to do with freedom and its positive associations. In fact, freedom of contract does not need to be explicit. It can be hidden in a different dogmatic. The Romans from a very early stage had a unilateral contract called stipulation. Under this contract an obligation to perform any consideration could be created. Most of the economic results of later contracts could be achieved by two contrary stipulations, e.g. one party stipulates to give a certain amount of money, another party stipulates to give a certain thing. This, of course, did not solve all the problems related to the details of such transaction, however, stipulation provided a lot of elasticity to the Roman law of contract. Another development of in Roman law was the gradual institutionalization of pacts, i.e. informal agreements.

Conclusions

It is difficult to conclude whether the Roman law promoted equality in historical perspective, however, I think the generalizations of Roman institutions where not promoting equality to the same extent the original did. Many indicate the Age of Enlightenment as the most influential period when it comes to promoting equality but still, the equality came at great price. The bloody revolution allegedly led to two world wars. Roman law is blamed for not abolishing slavery but its defenders claim, that it was unthinkable in Antiquity. This defense is not convincing because it is easy to say after the fact that the intellectual climate forbade the change to happen. If the French revolution failed, some would come to the same conclusion as they did with the Roman law. This is purely tautological. The defense of Roman law should be based on the relevant issues. Those relevant institutions are those, which create the conceptual basis for a stable economic system.

One feature of Roman law which was not retained by the codification movement, and I think it is a most regrettable fact, is the juristic method which allowed for creation of the wonderful rules of Roman substantive law. The juristic method was developed by elimination of moral and personal arguments from legal discourse[11]. This omission is one of the most influential factors shaping the legal systems of continental Europe and other legal system under their influence.

[11] T. Giaro, *Knowledge of Law as Knowledge of Facts. The Roman Experience*, [in:] T. Giaro (ed.), *Roman Law and Legal Knowledge. Studies in Memory of Henryk Kupiszewski*, University of Warsaw, Warszawa 2011, p. 215.

Resumen

Derecho Romano como herramienta para la promocion de ugualdad en el Codigo de Napoleon

Palabras clave: Derecho Romano, la igualdad, el código napoleónico, la economía del derecho privado.

El Código Napoleónico fue preparado en un período de cambio social tumultuosa. Nuevos conceptos y radical de la sociedad se transforman en realidad, entre otros, los medios de la reforma legislativa. Curiosamente, en la época de la Revolución Francesa hubo un "jugador" que no encaja en la imagen: el derecho romano. Era antigua, una palabra despreciado por los revolucionarios. Permitió mantener los esclavos. ¿Cómo es entonces que la ley de los romanos sobrevivió en las normas del Código de Napoleón? El papel del derecho romano derivado de sus instituciones, en especial de la ley de propiedad y el derecho de las obligaciones. Los conceptos de posesión, propiedad, derechos reales limitados, el contrato, la solidaridad, la responsabilidad en materia delictual etc. resultaron tan útil que sería muy poco práctico para reinventar los conceptos de cumplir un capricho.

Streszczenie

Prawo rzymskie jako narzędzie propagowania równości w Kodeksie Napoleona

S³owa kluczowe: prawo rzymskie, Kodeks Napoleona, ekonomia prawa prywatnego.

Kodeks Napoleona powstawał w okresie burzliwych zmian społecznych. Nowe i radykalne koncepcje społeczeństwa zostały wprowadzone w życie za pomocą m.in. reform prawnych. Co ciekawe, w okresie rewolucji francuskiej istniał jeden czynnik, który nie wpisywał się w ogólny obraz sytuacji – prawo rzymskie, zezwalające np. na posiadanie niewolników. Było ono „antyczne", a samym tym słowem rewolucjoniści pogardzali. Jak zatem doszło do tego, że przetrwało w normach Kodeksu Napoleońskiego? Siła prawa rzymskiego bierze się z jego instytucji, zwłaszcza tych wykształconych na gruncie prawa rzeczowego i prawa zobowiązań. Koncepcje posiadania, własności, ograniczonych praw rzeczowych, kontraktów, solidarności, odpowiedzialności deliktowej itp. okazały się tak użyteczne, że byłoby skrajnie niepraktyczne opisywanie ich na nowo tylko w tym celu, aby zaspokoić kaprysy ideologii.