# A RULE MUST ARISE FROM THE LAW AS IT IS – AND IT IS NOT CAST IN STONE

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### 1. Introduction

In Roman law, a rule had to arise from the law as it was, but as time went by and circumstances changed, the rule was often changed so that it reflected the new conditions. This article examines two of the original requirements for the contract of mandate, and the reasons why and manner in which they changed. Initially, mandate was a gratuitous contract and the mandatory was only liable for *dolus*. This was quite understandable, since the mandatory was not paid for his services. However, in time things changed and it became accepted practice to pay an honorarium to the mandatory. This led to stricter liability for the mandatory, because it was extended to *culpa levis*. Brief mention will also be made of the effect of the concept of *aequitas* on these requirements and the changes that were gradually introduced.

# 2. Regulae iuris

According to Stein, Roman law was not a fixed body of rules, but rather "rules" that were "recognised or found" to be appropriate in a specific case. Law was therefore not created but "discovered", which would imply that enacted law in Rome began as "recorded customary law".

- P Stein Regulae Iuris. From Juristic Rules to Legal Maxims (Edinburgh, 1966) at 4.
- 2 Idem at 5-7.
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The term *regula* was used to describe some definitions that were considered to be of general application.<sup>3</sup> Note that that a *regula* (rule) did not create law but arose from existing law;<sup>4</sup> it merely reflected the existing legal order.<sup>5</sup> A *regula* could consequently be accepted without hesitation as an accurate description of both the *ius civile* and the practice of the praetor at any specific time.<sup>6</sup>

#### 3. The contract of mandate

## 3.1 Mandate: What, why and how?

Mandate as a social institution existed for some time before it was recognised as a separate contract quite early in Rome's history. In the ancient world, social life was based on friendly relationships, and especially on *fides*, which embraced concepts such as faithfulness, trustworthiness and trust. Mandate was one of the four consensual contracts recognised by the civil law. This was probably because mandates were quite common and were of economic significance. In time, the economic importance of this contract increased dramatically and it eventually played a major part in commercial life.

Gaius describes *mandatum* as a contract in which one party (*mandatarius*) promised to gratuitously carry out the order of another party (*mandator*). It was a *bona fide negotium* and both parties had to act in good faith. The mandatory, gaining no benefit

- 3 See D 50 17 1, *Paulus libro sexto decimo ad Plautium*: "Regula est, quae rem quae est breviter enarrat" ("A rule is something which briefly describes how a thing is"). All texts from the Corpus iuris civilis are taken from *The Digest of Justinian* (Mommsen, Krueger & Watson edition). *Cf* Stein (n 1) at 72-73.
- 4 D 50 17 1, Paulus libro sexto decimo ad Plautium. See sv "regula" A Berger Encyclopedic Dictionary of Roman Law (Philadelphia, 1991) at 672.
- See Berger (n 4) at 672. Legal maxims coined in early law were at times criticised by the classical jurists because they were no longer applicable to the economic relations and daily lives of later times.
- 6 Stein (n 1) at 93.
- 7 A Watson Contract of Mandate in Roman Law (Oxford, 1961) at 1. See, also, F Schulz Classical Roman Law (Oxford, 1951) at 555-556.
- 8 D Nörr "Reflections on faith, friendship, mandate" (1990-1992) xxv-xxvii *The Irish Jurist* 302-310 at 302, 304-305.
- Sale, hire, partnership and mandate. See Gaius 3 135; D 17 1 1pr, Paulus, libro trigensimo secundo ad edictum. Further, J Declareuil Rome the Law-Giver (London, 1927) at 222-223. According to A Watson "Roman law" in M Grant & R Kitzinger (eds) Civilization of the Ancient Mediterranean. Greece and Rome vol 1 (New York, 1988) 607-629 at 625, the contract came into existence at some time in the second century BC.
- G 3 155ff; Inst 3 26; D 17 1 1 1-2, Paulus, libro trigensimo secundo ad edictum; D 44 7 52 10, Modestinus libro secundo regularum. See, also, HJ Roby Roman Private Law in the Times of Cicero and of the Antonines vol 2 (Cambridge, 1902) at 116. Further, Schulz (n 7) at 554; Watson (n 7) at 78; WW Buckland A Text-Book of Roman Law from Augustus to Justinian (Cambridge, 1963) at 514; P du Plessis Borkowski's Textbook on Roman Law 4 ed (Oxford, 2010) at 280; R Sohm A Textbook of the History and System of Roman Private Law 3 ed (tr JC Ledlie) (Oxford, 1935) at 407; HF Jolowicz & B Nicholas Historical Introduction to the Study of Roman Law 3 ed (Cambridge, 1972) at 297.

from the contract, was expected to display *omnis diligentia*.<sup>11</sup> He became the mandator's agent and it was he himself, not the mandator, who was bound by his actions. If the mandatory undertook to enter into a contract with a third party, any resulting contract was between himself and the third party. Thus the mandatory did not represent the mandator.<sup>12</sup> A person could also be given a mandate to do something in a case where no third party was involved.<sup>13</sup> The mandator was granted an *actio mandati* to sue for proper execution of the mandate, whilst the mandatory was granted an *actio mandati contraria* for expenses incurred or losses suffered.<sup>14</sup>

*Mandatum* was one of the moral duties that Romans, and later *peregrini* too, were expected to fulfil for the sake of their fellow human beings. <sup>15</sup> At first, it was merely a service performed for a friend, usually an equal, but gradually it started playing an important role in many branches of the law. <sup>16</sup> The most important reason for the existence of this contract was the idea of public duty (friendship). The obligations flowing from the mandate were based on *fides*, which was not limited to Roman citizens, but also extended to *peregrini*.

Why was it recognised as a contract by the republican lawyers? A mandate to do something for the mandator without reward initially lay outside the sphere of the law, since the parties usually did not wish to bind themselves legally.<sup>17</sup> However, in Rome, particularly in higher social echelons, certain customs and rules prevailed that validated this contract. Friendship (*amicitia*) gave rise to serious and substantial duties (*amicitiae officia*), because Roman friends expected much of each other.<sup>18</sup> An *officium* may be defined as a moral duty originating in a family relationship or friendship. A person who accepted a commission from a friend did not expect or demand remuneration since he

- See D 17 1 1 4, *Paulus, libro trigensimo secundo ad edictum*: "nam originem ex officio atque amicitia trahit" ("The reason is that its origins are in duty and friendship").
- 12 See D 50 17 123, *Ulpianus libro quarto decimo as edictum*: "Nemo alieno nomine lege agere potest" ("No one can legally act on behalf of another").
- 13 See, eg, G 3 162.
- 14 D 17 1 31, Julianus libro quarto decimo digestorum. See, also, JA Crook Law and Life of Rome (London, 1967) at 237.
- M Kaser & R Knütel Römisches Privatrecht. Ein Studienbuch 19 ed (München, 2008) at 252. See, also, D Konstan Friendship in the Classical World (Cambridge, 1997) at 130. Konstan states that Cicero (Pro Roscio Amerino 111) regards friendship and good faith as of great importance in human relationships: "In matters to which we cannot ourselves attend, the delegated trust (fides) of friends is substituted for our own labours ...." Cicero then continues: "For we are not able to do all things by ourselves: one is more useful in business, another in something else. Hence, friendships are acquired, so that a common advantage (commodum) may be driven by mutual services."
- 16 For example, all the following were normally mandatories: the intermediaries in adoption, emancipation and *coemptio fiduciae causa*; the *libera persona* through whom property could be acquired; and sureties, *cognitores* and procurators in litigation.
- 17 Schulz (n 7) at 555.
- Whilst Cicero was in exile, his family in Rome suffered financial difficulties. He then wrote to his wife (ad Fam 14 1 5), saying that "si erunt in officio amici, pecunia non deerit" (if our friends remain loyal, money will be forthcoming).

regarded it as his public duty and an important business transaction.<sup>19</sup> Thus mandate developed into a legal institution based on *bona fides*.

## 3.2 The mandate must be gratuitous

Mandate as a contract probably originated in the person of the procurator. He was usually a freedman who, in terms of *officia* owed to his *patronus*, received a mandate from his *patronus* to do something, which would promote the interests of the *patronus*. Later, however, it became an accepted social custom to ask a friend to perform a particular commission. Since it formed part of *officium*, with one friend morally obliged to do what the other asked him to, it was initially gratuitous.

Because of the importance of the custom of *amicitiae officia*, a Roman mandatory willingly undertook to perform a gratuitous service for his mandator.<sup>23</sup> It followed that he would only be held liable for *dolus*. He was also aware of the fact that the relationship between the parties was based on friendship and trust and he would be punished severely if he did not discharge his obligations. He would be found guilty of not performing as he should have, and would be punished by *infamia* (or *ignominia*).<sup>24</sup> The members of the higher classes of early Rome, who valued their reputation (*existimatio*) and worthiness (*dignitas*) dearly, feared losing these. The stigma attached to *infamia* formed part of legal and social sanctions for a long time.<sup>25</sup> The Romans regarded *fides* as one of the basic principles of life,<sup>26</sup> and it was an aspect of *constantia*, which they regarded highly. Faithlessness was therefore considered to be a stain on a person's character.<sup>27</sup>

- 19 Schulz (n 7) at 555-556.
- See AM Duff Freedmen in the Early Roman Empire (Cambridge, 1948) at 41.
- Crook (n 14) at 238. On reading Cicero, however, one finds many vague mandates, such as one to Atticus to see to his affairs in his absence (ad Att 16 2 2: "Sed amabo te, mi Attice (videsne, quam blande?), omnia nostra, quoad eris Romae, ita gerito, regito, gubernato, ut nihil a me expectes"), or to Tiro to make payments and collect moneys that were due (ad Fam 16 24 1: "Mihi prora et puppis, ut Graecorum proverbium est, fuit a me tui dimittendi, ut rationes nostras explicares"). In addition there are some very precise ones: Cicero commissioned Vettienus to act on his behalf in the purchase of a country lodge for himself (ad Att 10 5 3). Pliny's letters also contain mandates, such as the one to an architect about rebuilding a small temple on one of his estates (Pliny Epistulae 9 39).
- See D 17 1 1 4, Paulus libro trigensimo secundo ad edictum. Crook (n 14) at 237. People who most often appeared as mandatories in the Digest title dealing with mandate are sureties and procurators.
- 23 Buckland (n 10) at 516.
- See G 4 182: "Quibusdam iudiciis damnati ignominiosi fiunt, ueluti ... mandati ..." ("In some actions, such as on mandate, ... a defendant who is condemned becomes infamous"); D 3 2 1, *Julianus libro primo ad edictum*: "Praetoris verba dicunt: 'Infamia notatur ... : qui pro ... mandati ... damnatus erit" ("The praetor's words are: 'the following incur *infamia*: ... one who has been condemned in his own name ... in the case of ... mandate"). *Cf* Schulz (n 7) at 555; Crook (n 14) at 83; Watson (n 7) at 17. See, also, Du Plessis (n 10) at 281-282 where he states that this severe rule derived from early law in terms of which a mandatory could be given the punishment of *infamia* only if he had acted with *dolus*.
- 25 Cicero De Officiis 3 17.
- F Schulz *Principles of Roman Law* (tr M Wolff) (Oxford, 1936) at 223ff. See, also, Cicero *De Officiis* 17 23: "Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas" ("The foundation, moreover, is good faith that is, truth and fidelity to promises and agreements").
- 27 Cicero In Verrem 2 3 3 6: "fidem sanctissimam in vita qui putat". Schulz (n 26) at 224.

Paul stated that a mandate had to be gratuitous since it had its origins in duty and friendship, and payment for services would be incompatible with the duty.<sup>28</sup> According to the moral code of the Romans, the mandatory therefore delivered the service free of charge.<sup>29</sup> The mandatory prided himself on executing his public duties and did not expect any compensation. This was quite acceptable in the light of Roman customs of that time.<sup>30</sup> However, it had gradually become an accepted practice to pay the mandatory a fee (honorarium or salarium) for his unselfish services, which had by then evolved into professional services. Operae liberales were services rendered by persons exercising a profession worthy of a free man (liber); primarily intellectuals such as lawyers, physicians and architects.<sup>31</sup> The remuneration of "professional services" was a controversial issue in Roman law. Certain "professions" enjoyed a special status; their advice was supposed to be free and they were not allowed to sue for a reward.<sup>32</sup> Initially advocates, for example, acted not for personal gain, but through moral duty and as generous and altruistic friends, and the mandator was free to show his gratitude by way of a gift or honorarium. Under the Principate, therefore, an honorarium was a gift paid to persons exercising liberal professions.<sup>33</sup> It indicated compensation for higher, intellectual services. As from the time of the early Empire, the payment of an honorarium could be enforced through extraordinary proceedings (cognitio extra ordinem). This was not considered to be against the spirit of mandate since, as time went by, Romans of the higher classes practising the artes liberales came to be considered as professionals in certain specialised fields, who were entitled to some form of payment for their expert services.<sup>34</sup> The size of this honorarium was dependent upon the particular profession and expertise of the mandatory. Thus, theoretically, the mandate remained gratuitous: payment could not be sought through a normal action, but the mandatory nevertheless was rewarded for his services. In this way, the idea that there should be payment for "professional" services gradually gained recognition.

## 3.3 The liability of the mandatory

Initially, the mandatory was only liable for *dolus*: since he rendered services gratuitously, a low degree of liability was regarded as adequate.<sup>35</sup> In later classical law, however, he

- 28 D 17 1 1 4, Paulus libro trigensimo secundo ad edictum (see supra (n 11)).
- 29 D 17 1 1 4, Paulus libro trigensimo secundo ad edictum; G 3 162; Inst 3 26 13. See, also, G Mousourakis Fundamentals of Roman Private Law (Berlin, 2012) at 237.
- 30 See Crook (n 14) at 239-240 where he discusses the "social reality of the principle of gratuitous services" during the period under discussion.
- 31 Also known as "artes liberales". See sv "operae liberales" in Berger (n 4) at 609.
- 32 Crook (n 14) at 203-204.
- 33 See sv "honorarium" in Berger (n 4) at 488.
- See D 17 1 6pr, Ulpianus libro trigensimo primo ad edictum; D 17 1 7, Papinianus liber tertio responsorum. See, also, Mousourakis (n 29) at 237-238.
- See D 17 1 8 10, *Ulpianus libro trigensimo primo ad edictum*: "sed et si dolo emere neglexisti ... aut si lata culpa ... teneberis" ("Indeed, you will be liable, if you have neglected to make the purchase as a result of bad faith ... or ...through gross negligence"); D 17 1 10*pr*, *Ulpianus libro trigensimo primo ad edictum*; D 17 1 29*pr*, *Ulpianus libro septimo disputationum*. See Buckland (n 10) at 516. *Cf*, however, R Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, 1996) at 426-427; Mousourakis (n 29) at 238-239.

was held liable for *culpa levis*<sup>36</sup> and no longer liable only for positive damage, but also for damage resulting from neglecting to perform.<sup>37</sup> This change was probably because the mandate was then only nominally gratuitous; because of strong social pressure, the mandatory had been receiving an honorarium for some time. It follows that the mandatory, now being paid for his services, was subject to a stricter degree of liability. This was generally regarded as acceptable and "fair" by both parties: the mandator received expert services for which he rewarded the mandatory, who was quite willing to incur a stricter form of liability in exchange for an honorarium.

## 4. Aequitas

Aequitas is closely related to justice (*iustitia*, *iustum*). <sup>38</sup> It is a basic principle that guides the development of the law in order to create *ius aequum* (fair or equitable law). Aequitas is present in all human societies and is based on their customs as well as their social and ethical concepts, which could develop into law through custom or through legislation. It played an important role in the development of Roman law: as outdated legal norms became inappropriate in changed social and economic circumstances, the jurists applied this principle, thus influencing many legal decisions after the end of the Republic. <sup>39</sup> The old *ius civile* was corrected by the non-application of antiquated rules, many of which were no longer fair and just, and thus it gradually became less strict. In this way, the law was adapted – without the necessity of new legislation – to meet the requirements of the developing economy and of a refined legal instinct orientated towards the principles of good faith (bona fides) and equity (aequitas). <sup>40</sup>

Decisions and changes seem to have depended to a large extent on the social and ethical standards of behaviour of the time.<sup>41</sup> These standards were discernible in rules

- See D 17 1 10 1, Ulpianus libro trigensimo primo ad edictum; D 17 1 29pr, Ulpianus libro septimo disputationum; D 50 17 23, Ulpianus libro uicensimo nono ad Sabinum: "contractus quidam dolum malum dumtaxat recipiunt, quidam et dolum et culpam ... dolum et culpam mandatum ..." ("Some contracts only involve bad faith, some also culpability ... mandate ... involve(s) bad faith and culpability"). See, further, Zimmermann (n 35) at 426ff.
- 37 See D 17 1 5 1, Paulus libro trigensimo secundo ad edictum; D 17 1 8 10, Ulpianus libro trigensimo primo ad edictum; D 17 12 10, Ulpianus libro trigensimo primo ad edictum. Cf Buckland (n 10) at 516.
- 38 See *sv* "Aequitas" in Berger (n 4) at 355. Aequitas may be defined as "[j]ust or equitable conduct toward others, justice, equity, fairness ... (governed by benevolence), while *justitia* yields to another only what is strictly due". See, also, *sv* "aequitas" in CT Lewis & C Short A Latin Dictionary (Oxford, 1966) at 57.
- Legal maxims which are closely linked to it are, for example, "aequitas sequitur legem" (equity follows the law); "aequitas praefertur rigori" (equity is preferred to inflexibility); and "jus respicit aequitatem" (the law considers equity). Other expressions relevant to this theme are "bonum et aequum" (good and fair) which also appears in Celsus's definition of the law mentioned above; "aequum et bonum est lex legume" (that which is fair and good is the highest law); and "ex aequo et bono" (in accordance with fairness and goodness).
- 40 W Kunkel An Introduction to Roman Legal and Constitutional History 2 ed (tr JM Kelly) (Oxford, 1975) at 91.
- 41 G Mousourakis (n 29) at 30.

emphasising the importance of being fair and honest in commercial dealings. Note that mandate was not a commercial contract, but was only employed in the commercial sphere: it was strictly a contract between friends or relatives.

Aeguitas had two meanings in relation to the positive law, namely, it was firstly considered the essence and basic justification of existing legal norms; and, secondly, it was deemed to be an objective ideal that the law strove to realise. Thus new legal norms were created and others modified in order to make them conform to society's sense of justice. Whilst legal rules had to be general, the circumstances of every case differed, so that it was not possible for rules to make provision for all the possibilities that could arise in a specific situation. Laws had positive force and were not always just and fair. For that reason, the law had sometimes to be supplemented by equity. This resulted in decisions which, although probably in conflict with formally recognised law, were just and fair. 42 For that reason, a rule stayed in a pre-legal sphere until such time as it was declared a positive norm. The idea that equity constituted the standard of the norms of positive law seems to have inspired Cicero's definition of the ius civile as "the equity constituted for those who belong to the same state so that each may secure his own". 43 and Celsus' famous statement that "the ius is the art of promoting that which is good and equitable". 44 These rules, characterised by principles of fairness and justice, which became laws, therefore corrected what was unfair in the ius civile. The new legal norms then complied with the needs of a society that was constantly changing.<sup>45</sup>

## 5. Conclusion

From the above it follows that *aequitas* was relevant to most of the issues discussed in this article. The contract of *mandatum* was based on *bona fides*, and contributed to the maintenance of good relations between friends. The simple rule that a mandate had to be performed gratuitously created an equitable relationship between the mandator and the mandatory when they entered into the contract. The mandator was fully entitled to ask a friend to do something for him without mentioning a fee. The mandatory, by performing the mandate, only did something in the interests of his friend, thus performing a public duty that Roman friends expected of each other.

However, Roman lifestyles changed and society became more complicated. It was eventually accepted that highborn Romans could belong to certain professions, and these professionals delivered expert services, often to friends. It was soon realised that it was unfair that professional services not be rewarded. Gradually the custom developed of giving an honorarium to a mandatory who had executed his mandate satisfactorily.

This obviously introduced important changes to the contract of mandate, which constituted a significant move away from the accepted rule as defined by Paul, in terms of which the contract had to be performed gratuitously. As was to be expected, this led to

- 42 Ibid.
- 43 Topica 2 9.
- 44 D 1 1 1pr, Ulpianus libro primo institutionum.
- 45 Crook (n 14) at 2 opines that *aequitas*, amongst other concepts, constituted part of the learning and training Romans of the higher classes received.

another change, namely that the mandatory was no longer liable only for *dolus*, but also for *culpa levis*. This was understandable: once the mandatory was remunerated for his services (eg, by means of an honorarium) it was acceptable that he be subject to a stricter form of liability. Again, we find that *aequitas* introduced an equitable change: it was only fair that a mandatory who received an honorarium was subject to a stricter form of liability. This, too, was an effect of the concept of *aequitas* gradually making the existing law more just and fair.

### **Abstract**

In this article, two of the original requirements for a contract of mandate are discussed, namely that it be gratuitous and that the mandatory was only liable for dolus. The requirement that it had to be gratuitous was a rule that was generally applicable in practice and later accepted as law. Indeed, the mandatory initially performed the mandate gratuitously, but mandates gradually came to be performed by professional people who were often given an honorarium or some other form of payment for the services they had rendered. It was considered a matter of aeguitas that professionals, learned and experienced men, could not deliver such services without reward. This naturally influenced the mandatory's liability: at a time when he was not paid, he was only liable for dolus. However, once the mandatory started being remunerated, it was considered only fair that his liability should increase, and he was then also held liable for *culpa levis*. This was considered to be justifiable in the light of the concept of aequitas, which was not only a philosophical conviction, but a real legal principle that had a positive influence on Roman law. From the above it follows that the rules discussed in this article arose from the law as it was, and that it was the influence of aeguitas that caused it to change with the times so as to remain just and fair.