

Review of Gargely Deli, *Salus Rei Publicae Als Entscheidungsgrundlage des Römischen Privatrechts*

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Introductory comments

“The well-being of the people should be their highest law” (*ollis salus populi suprema lex esto*), Cicero tells us in his famous dissertation on the laws (*De legibus* 3 3 8). Commencing with this well-known text in his discussion of the salvation of the state or common weal as the basis or foundation of decision-making in Roman private law, the author uses *salus rei publicae* and *salus populi* as virtual synonyms. In his introductory observations (ch 1) he points out that these concepts in time acquired a particularly public-legal, and even more so a political, character. The question has, however, arisen whether the common weal was also an authoritative standard in disputes between individuals and was hence applicable in the sphere of private law. That is, indeed, the topic of this particularly interesting and informative contribution by an Hungarian academic writing in German.

The author makes use of numerous references, including, at the outset, the great Romanist, Max Kaser, whose contribution on “*ius publicum* and *ius privatum* (in *SZ* 103 (1986) 98) is particularly relevant in this regard. He relies also on sources specifically mentioned in the various decisions of courts and officials empowered to deal with the resolution of disputes and, likewise, on the possible theoretical and philosophical background of such decisions. To illustrate this further he focuses on the points of contact between private and public interests, with particular reference to a number of examples drawn from applicable sources occurring in the Digest (*Digesta*) of Justinian’s *Corpus Iuris Civilis*.

The examples discussed by the author cover six cases taken from procedural law (the *pactum de quota litis*); the law of things (*specificatio*); the law of contracts, more particularly the contract of purchase and sale (*lex commissoria*); the law of quasi-contract, more particularly unauthorised administration (*negotiorum gestio*); the law of delict in conjunction with marine law and an action for pilfering of cargo (*actio oneris aversi*); and the law of succession with reference to testamentary provisions in conflict with good morals (*contra bonos mores*).

Inasmuch as the said cases may be regarded as difficult or complicated, the author has relied on the debates set forth in the classical juristic writings appearing in the time of the Roman Republic (509-27 BC), particularly Marcus Tullius Cicero, and in the time of the Roman Principate (27 BC-284 AD), during which the schools of the Sabiniani and Proculiani played an important role. In discussing post-classical Roman law the author has relied strongly on the five leading jurists mentioned in the “law of citations” (*lex citationis*), namely Papinian, Paul, Gaius, Ulpian and Modestinus.

First case: *Pactum de quota litis*

The first of the above-mentioned six cases is dealt with in chapter 2. It comes from procedural law and deals with the problem of when a lawyer’s fees are permissible in accordance with the successful outcome of litigation (*ex eventu litis*) by virtue of an agreement to this effect (*pactum de quota litis*). In Roman and later law, such as cited by the French jurist, Jean Domat, such an agreement was regarded as iniquitous and was hence prohibited. This may still be the case in modern law, insofar as the recently promulgated *Code of Conduct for Lawyers in the European Union* (1988, as amended in 1998 and 2002) states: “A lawyer shall not be entitled to make a *pactum de quota litis*”.

The author is of the view, however (p 15 n 15), that such an agreement was not *per se* forbidden but was simply a form of transferred praetorian or honorary law which regarded the said *pactum* as immoral (*contra bonos mores*). He relies in this regard on a decision of the *praetor* Claudius Saturninus in the case of one Marius Paulus, as reported in Ulpian D 17 1 6 7 and critically evaluated and interpreted by Otto Behrends, Rolf Knütel and Berthold Kupisch (p 17 n 21) in their translation of this text. According to Kupisch, in a contribution to the Klaus Peter Berger *Festschrift* (2000), Kupisch states unequivocally that an agreement of this nature was not necessarily forbidden, but was in conflict with good morals (*contra bonos mores*).

A somewhat different interpretation is that of Thomas Rüffner, who appears to reject the *pactum de quota litis* on the basis that it constituted a form of “double remuneration” (*fructus duplio*). There follows a lengthy discussion which I do not propose to consider for present purposes. Generally speaking the author is inclined to the view of Kupisch rather than that of Rüffner. He sees the conduct *contra bonos mores* as being founded on the cunning (*calliditas*) and greed (*aviditas*) of the

creditor (Marius Paulus) rather than on an attempt to acquire double remuneration. At most he would be entitled to interest on the amount owing.

Second case: *Specificatio*

The next case (ch 3) deals with the creation or manufacture (*specificatio*) of a new thing (*res nova*) from the material of another. According to the author legal historians regarded this as a meaningful phenomenon. In this regard he refers to Theo Mayer-Maly's three grounds for what he calls an inspirational approach, namely the productivity of this problem for comprehending Roman legal thought, the fate of the history of private law in modern times (*Privatrechtsgeschichte der Neuzeit*) and the relationship between a legal institute and social uncertainty. In this regard he points out that many European legal codifications make reference to this institute as an ever-recurring actuality. In order to establish a novel interpretation of this early institute without harming the original thought process underlying it, the author directs his attention to a single question arising in a text from the *Institutes* of Gaius (Gai *Inst 2 79*), namely whether good faith (*bona fides*) was necessary for acquiring ownership to property by means of *specificatio*.

The author commences with a discussion of *bona fides* in manufacturing law. He points out that, among the older writers, there is a difference of opinion on this score. The question is frequently asked whether the existence of good faith is subjective and not clearly defined or whether it relates to the procedure used in the manufacturing system. In this regard the outside world may see the subjectivity of the manufacturer as being indicated by objective facts.

Later writers have rejected *specificatio* as a form of acquisition of ownership. Thus in a reconsideration of *specificatio* and *accessio* in 2006, A Plisecka (p 40 n 91) stated remarkably that the requirements of these two institutes give rise to the loss of ownership rather than the acquisition thereof. They in fact belong, according to Gaius (Gai *Inst 2 79*), to the category requiring natural reason (*naturalis ratio*), the good or bad faith of the manufacturer being irrelevant. The author points out (p 41 n 94) that Gaius rendered the concepts natural reason and natural law (*ius naturale*) as synonyms. Good faith in this context meant not a prerequisite for the accession of ownership but simply that the purchaser *bona fide* regarded the seller as owner or that the manufacturer was *bona fide* when he believed that the material in question belonged to him. The author agrees with this view.

The next part of the discussion deals with the natural law principles of *specificatio* with particular reference to Gaius (Gai *Inst 2 66-79*) and the schools of thought represented by the *Proculiani* and *Sabiniani*. Of note is that one of these principles is the general enrichment principle relating to unjustified enrichment, as set forth in Pomponian (D 12 6 14): *nam hoc natura aequum est neminem cum alterius detimento fieri locupletiorem*. For present purposes it is not necessary to give further consideration to this.

The author's personal view is that the question whether or not good faith should be a requirement for the acquisition of ownership by the manufacture of a new thing from existing material, is anachronistic and misleading. This arises from the issue of conflicting natural law principles and from the fact that good faith was regarded by many prominent jurists as irrelevant.

Third case: *Lex commissoria*

In the Roman law of contract, more specifically the contract of purchase and sale (*emptio venditio*), the parties could conclude an ancillary agreement (also known as a *clausula cassatoria*) that, if the purchaser should fail to pay the purchase price within the prescribed time, the seller would have the right to cancel the agreement. Where instalments were payable the already paid instalments would be forfeited.

The author points out that this Roman institution laid the foundation, in modern European law, for a general right of withdrawal from a contract on account of non-performance. He cites a number of examples, including from the German *Bürgerliches Gesetzbuch I* §360 and the French *Code Civil* Art 1184. In the latter the creditor is given a choice between compelling performance of the agreement, where it is possible, and claiming dissolution of the agreement with damages and interest.

It is not only in European law that this link between Roman and modern law is found, but also in legal systems such as that of the United States of America. To such an extent have these Roman legal principles continued to exist that it is indicative of a lengthy relationship between private and public interests.

A basic question in this discussion is whether the *lex commissoria* constitutes a suspensive or resolutive condition. In this regard, the author observes, the modern legal sources on the subject approach the question in a somewhat exaggeratedly dogmatic way. Some of the modern writers regard the *lex commissoria* as an agreement (*pactum*) with resolutive effect, while others see it as a right of withdrawal with suspensive effect or as a secondary agreement with a suspensive character. In this way the different approaches were not regarded as indissolubly in conflict, particularly with regard to whether, in the contract of purchase and sale (*emptio venditio*), the application of this condition was to the benefit of the purchaser or seller or of both parties. For present purposes an in-depth discussion of this issue is not required inasmuch as it will be dealt with in the author's summation below.

The author next gives consideration to the role of social relationships in the application of the *lex commissoria* in the sense of regarding the issue from a socio-economic, rather than a techno-legal, point of view. This may be illustrated by a text of Ulpian (D 18 3 4 1), citing the jurist Neratius, which suggests how socio-economic issues, with their dogmatic refinements, may best be countered in practice. Hence it would be humane if the purchaser should sometimes be entitled to fruits, in the form of interest, when he has lost part of the purchase price. In this way he

would not be worse off than he was before concluding the sale and would at least not lose the fruits of his labours. This would also reflect the interests of both parties prior to conclusion of the agreement in the sense of dividing the profits (*commoda*) and losses (*incommoda*) and accords, in the author's view, with the general principle regarding the division of profit and loss.

In this regard the author points out that Professor David Daube linked the balancing of interests in the contract of purchase and sale with that occurring in the contract of letting and hiring. In the contract of pledge, however, the *lex commissoria* was forbidden by post-classical Roman legislation and its applicability differed from case to case. This is illustrated with reference to a case cited by Paul in D 4 4 38^{pr} relating to the refusal to apply a *lex commissoria* in a property claim of a minor *pupilla* against her family head (*paterfamilias*) and the subsequent granting of a full restitution order (*in integrum restitutio*). The author compares this with the application of the unconscionability doctrine, in socio-economic context, in the Californian case of *Williams v Walker-Thomas Furniture Co* 350 F 2d 445 (C A D C 1965).

As a further step in his discussion the author turns to the right of withdrawal as a retroactive response in terms of the *lex commissoria*. He links this to the increasing tendency of legal dogma to become an end in itself, giving rise to the possible rejection of such response in similar fashion to the general prohibition existing in certain modern codifications. It likewise creates the impression that this rejection may be linked to an intrinsic and inseparable attribute of its inherent nature. In Roman law, with its particularly casuistic approach, there was no general principle in this regard but merely a case-to-case consideration in accordance with the facts and circumstances of each case.

The author opines that this has given rise to fruitless legal scientific debates among modern legal historians, much of which is based on the interpretation of two imperial rescripts as set forth in C 4 53 3 and C 4 53 4 respectively. In the first the Emperor Severus Alexander denies a seller, relying on a *lex commissoria*, a proprietary claim (*rei vindicatio*) against a purchaser who is in arrears with payments, but restricts the applicable legal right to a contractual action arising from the sale (*actio venditi* or *actio ex vendito*). In the other text the seller is denied the *rei vindicatio* when he chooses to claim interest on the purchase price. If he chooses not to do so it would appear that he would indeed be accorded the *rei vindicatio*. This distinction, the author suggests, should be understood in the context of market-related and socio-economic factors.

In his concluding comments on the *lex commissoria*, the author points out that the topic is complex and not always fully comprehensible. This may be attributable to the fact that the relevant classical Roman law was not dogmatically exclusive and homogeneous, but particularly casuistic in its focus on achieving a just and effective outcome. In more modern context it has led to fairly innovative methodology

sometimes described as “social engineering” in which judicial intuition is applied in socio-economic context. The author warns, on the one hand, against an exaggerated tendency to generalise and, on the other, against the danger of a dogmatic approach that becomes an end in itself and forgoes its role as a means to achieve a particular goal. Although legal institutes serve the purpose of preparing real life for human, artificial, intervention, they cannot present a complete picture since law as such cannot attain full reality. In any event that cannot be its purpose inasmuch as law, when approaching reality, finds support in socio-economic relationships.

Fourth case: Unauthorised management of affairs (*negotiorum gestio*)

I should mention at the outset that, in his initial footnote 251 at p 88, the author refers to my work on the topic (DH van Zyl *Negotiorum Gestio in South African Law: An Historical and Comparative Analysis*, Durban 1985) incorrectly under the name “Van Zeyl” (rendered as “Dries van Zyl” in the bibliography at p 201). Generally speaking, however, the sources are well-resourced and identified and I encountered no similar errors elsewhere in the publication.

In identifying the issue arising from the unauthorised management or administration of the affairs of another, the author distinguishes between *negotiorum gestio* in the sense of the legal representation of an absent person and the voluntary, amicable management of the affairs of another on a *bona fide* basis without being authorised or mandated to do so. The source of this institution was Roman law, in which complex questions arose, more particularly with regard to the direct and indirect action (*actio directa* and *actio indirecta* or *contraria*) which came to the fore in the post-classical law of Justinian.

The difficulty was that there was no unity in the individual aspects of *negotiorum gestio*, something which could be attributed to the absence of consensus between the unauthorised manager (*negotiorum gestor*) and the person whose affairs have been managed (*dominus negotii*). As a result the institution was what the author refers to as incomplete or “half-sided” (“halbseitig”), in the sense that it could not be wholly rectified by later approval or ratification by the *dominus negotii*. He regards this as a form of asymmetry which has substantially characterised *negotiorum gestio* during its still continuing historical development.

Because of its incomplete nature there was no clear basis on which the *gestor* could claim the costs or expenses of his *negotiorum gestio*. This appears to have been dependent on whether or not it had been to the benefit, or in the interest, of the *dominus negotii*. Inasmuch as the *gestor* would not, however, necessarily know who the *dominus* was at the time of the *gestio*, he could not be expected to know whether he had been acting in his interest or to his benefit. Nor was it clear whether the *gestio* had been in the public interest or in accordance with good (public) morals

(*boni mores*). The applicable principle appears to have been whether the *gestio* had, objectively speaking, been useful or reasonable at the time of its commencement (*utiliter coeptum*). It was this utility or reasonableness (*utilitas*), the author suggests, which linked public and private interests and served to resolve issues of great social significance.

Utility or reasonableness? Caught up in the net of varying interpretations

The author refers to the aspect of utility or reasonableness at the commencement of the *gestio* (*utiliter coeptum*) as a difficult issue of interpretation already confronting the classical Roman jurists. He refers in this regard to a text of Ulpian as set forth in D 3 5 9 1, in which it is held that a person who institutes an action for unauthorised management (*actio negotiorum gestorum*) may rely on that action not only if the *gestio* was successful, but also if it was unsuccessful, provided it was *utiliter coeptum*. This would, however, depend on the interpretation of the facts and circumstances of each particular case which the author describes, in the relevant sub-heading, as being “within the net of polysemantics”.

The author points out that it is the outcome (*effectum*) of the *gestio* which counts, and not the subjective will of the *gestor*. Of course the *gestor* may not institute an action if the *dominus* has expressly prohibited (*domino prohibente*) the *gestio*. In addition his claim is restricted to the unjustified enrichment of the *dominus* in the case of the *mala fide* management of the affairs of the *dominus* for the benefit of the *gestor* (D 3 5 5 5) or the management of such affairs in the *bona fide* belief that they are those of the *gestor* himself (D 3 5 48). In this regard it must also be borne in mind that the adverb *utiliter* has various meanings, including “usefully”, “practically” and “expeditiously”. To this may be added “reasonably”.

In what follows the author spends some time discussing the two examples given by Ulpian in the cited text (D 3 5 9 1), namely effecting improvements to a building which later burns down and taking care of a sick slave who later dies. For present purposes it is not necessary to deal with this discussion in any detail. Much emphasis is placed on the varying opinions of the Roman jurists Proculus and Celsus, both of whom render the concept *utiliter* as “usefully” or “beneficially”. Proculus, however, approaches it subjectively whereas Celsus applies an objective standard. This means that the *gestor* would be entitled to an action for expenses provided, objectively speaking, he acted reasonably, like a “diligent father of a family” (*diligens paterfamilias*), at the time of the *gestio*, even if it was unsuccessful (*effectus non habuit* or *eventus non sit secutus*).

Ulpian’s own opinion (D 3 5 9 1), the author suggests, is that the issue of subjectivity or objectivity of the usefulness or benefit of the *gestio* must be gauged not from the *ex post* point of view of the *dominus* but from the *ex ante* point of view

of the *gestor*. It was hence not a matter of establishing the objective interest of the *dominus* after the event, but of considering whether, at the commencement of the *gestio* (before the event – *ex ante*), it was reasonable and useful or beneficial.

The discussion then turns to what the author describes as the “Stoic cosmological” influence on the development of the institution of unauthorised management of the affairs of another. He refers in this regard to Seneca’s conception of the two basic Stoic principles of the universe (*cosmos*), namely active reason (*logos*) and passive spirituality (*pneuma*). The Stoics did not understand cause and effect as modern lawyers do, but rather as a chain of causes linked together in a harmonious whole like a string of pearls.

Similarly Roman jurists did not regard causal relationships as being linked in linear or chronological context, but as the effect of actions or conduct on physical matter or substance. Thus in the example of unauthorised management aimed at effecting improvements to a building, it was not the act of improvement as such, but the conduct of the *gestor*, which was relevant for purposes of establishing whether or not an action for expenses could be brought. It was the state of the building requiring improvement before being burnt down which moved the *gestor* to his said conduct.

In his summing up of this chapter the author attempts what he calls a normative consideration of Ulpian’s aim in further developing the criteria underlying *utiliter* conduct in the sphere of unauthorised management. Inasmuch as the *ex ante* perspective required this to be present at the commencement of the *gestio* (*debet utiliter esse coeptum*), it was clear that neither the *gestor* nor the *dominus* could have known beforehand whether or not the *gestio* would be successful. Ulpian hence created a test in terms of which recognition was given only to a *gestio* in respect of which the *gestor* in good faith (*bona fide*) believed that his envisaged *gestio* would be both useful (*utiliter*) and successful. He would then be entitled to remuneration to the extent of a balancing of his interests with those of the *dominus*.

Fifth case: *Actio oneris aversi*

The issue discussed in this section arises from a Digest text of Alfenus, epitomised by Paul in D 19 2 31 and relating to the loss of replaceable goods, such as grain, being transported by sea. The nature of the loss was considered in the context of relationships of economic interest and the possible applicability of what the author refers to as the mysterious *actio oneris aversi*, in the sense of an action arising from the diversion or misappropriation of cargo in the form of a load or burden. In this regard the Romans had regard to two aspects which were not easily linked, namely commercial security and economic effectiveness.

According to the author Paul divided the text (D 19 2 31) into six sections, namely (1) the factual aspect; (2) the legal issue; (3) the inclusion of analogous legal norms; (4) the decision, in two parts, rejecting relief; (5) the first part of the decision, being the basis of the transfer of rights, similar to property rights, of disposal of the

grain to a ship-owner (one Saufeius); and (6) the explanation of the second part of the decision relating to the correctness of the delivery-up or return (*recte datum*) of the grain and simultaneously elucidating the question of liability.

The relevant facts set forth at the commencement of the text were that several persons had poured their grain together in the ship of Saufeius, who succeeded only in returning the share of one of these persons before the ship sank. The question then arose whether the remaining persons could claim their respective shares from the ship-owner or mariner by means of the *actio oneris aversi*. This depended on whether exactly the same, or merely a similar, object was required to be returned. In the former case the object remained the property of the owner, who would have an action for theft (*actio furti*) if the object was not returned, in which event the *actio oneris aversi* would be superfluous. In the latter case, however, the object was regarded as having been loaned (by *locatio conductio*) to or deposited (by *depositum*) with the mariner, who forthwith became the owner of the object (in the present case the grain). He would then be liable (to the lender or depositor) to the extent of his fault (*culpa*), apparently once again without recourse being had to the *actio oneris aversi*. For in cases contracted in the interest of both parties liability for fault comes to the fore.

In what follows the author undertakes a detailed analysis of the text with reference to the six-fold division referred to above and with a view to resolving the apparent contradictions occurring in such text. I shall deal briefly with it.

In this regard it should be noted at the outset that the author seems to attribute the sinking or foundering of the ship to an act of God (*vis maior*), in the sense of circumstances beyond the control of the ship's captain or crew. This would absolve them from liability, but would nevertheless require their actions relating to the transport of the cargo to be executed with care. Should this not be done, fault (*culpa*) in some or other form, and its concomitant liability, may become prevalent.

Somewhat confusing are the references in the text to the contractual institute of lease (*locatio conductio*) and the proprietary institute of deposit (*depositum*), more specifically "irregular deposit" (*depositum irregulare*). This may be because the relevant maritime commercial law had developed differently from other forms of common law. It may also elucidate the mysterious *actio oneris aversi*, which has variously been regarded as obsolete or even supplanted by actions like the *actio locati* arising from loan or the *actio furti* arising from theft in criminal law. This leads to the inevitable conclusion that the *actio oneris aversi* required a contractual relationship but had a criminal function. The author suggests that it filled a legislative gap, as illustrated by the various actions which could be used in its place. This included, in the case of the transport of grain, the post-classical (Justinianic) *condictio triticaria* which was directed at reclaiming the grain.

In this regard the author expresses the view that the original function of the *actio oneris aversi* might in fact have been to prevent mariners transporting grain

from making a profit out of a resale of the grain and thus breaching their contractual obligations. Even though they might have felt justified in doing so because of the risk accompanying the transport of grain by sea, the contractor who had entrusted the grain to the mariner also required protection. This would accord with the mariner's duty of care and contractual obligations.

Sixth case: Testamentary provisions *contra bonos mores*

This final case is dealt with in the form of a question under the heading "Why is an act in conflict with good morals impossible? ('Warum ist eine sittenwidrige Handlung unmöglich?')". The author relies at the outset on research by Theo Mayer-Maly as contained in his article "The *boni mores* in historical perspective" (in *THRHR* 50 (1987) 60-77) with special reference (at 71-73 of such article) to a Digest text of Papinian (D 28 7 15).

This text provides that, where a son who was under parental power had been appointed in his father's will as an heir subject to a condition of which neither the senate (*senatus*) nor the emperor (*princeps*) approved, the son could have the will set aside on the basis that it was not within his (the son's) power to satisfy the condition. The reason for this was that conduct which offends against one's sense of duty (*pietas*), reputation (*existimatio*) or sense of shame (*verecundia*) or which, in general terms, is in conflict with good morals (*contra bonos mores*), was regarded as being impossible to execute. In other words that which was legally disapproved by senatorial resolution or imperial decree was equated with that which was legally impossible.

The author regards this text as puzzling in that it gives rise to two important questions, namely, in the first place, how the condition mentioned in the text can be characterised and, secondly, what significant relationship can be said to exist between the concepts of illegality, impossibility and immorality appearing from the text. In what follows the author attempts to provide new answers to these questions.

With reference to the opinions of a number of modern jurists on the formulation and interpretation of the said text, the author attempts, firstly, to identify the stylistic and structural detail of the text on the assumption that it does not contain interpolations. At the outset he finds it strange that the disapproving legislation of the senate or emperor is not specifically mentioned. He suggests that this might have been because it was intended as a text-book example in terms of which Papinian introduced a dogmatic innovation directed at equating illegality and impossibility.

Secondly, the verb *infirmet* used in the text for setting aside the will is, according to the author, seldom used in this sense in the Digest. It indicates that it may be based on the praetorian concept of equity as applied on a case to case basis and as such constitutes an innovation. The passive form *infirmetur* occurs in a text of Paul (D 50 17 112) which states that it does not matter whether he has by law no action (*ipso*

iure quis actionem non habeat) to set aside the will or whether it may be set aside by way of an exception (*per exceptionem*).

The third aspect raised by the author turns upon that section of the text relating to the words *ac si condicio non esse in eius potestate*. This indicates subjective impossibility of a condition not being within the power of the heir. The words *ac si*, he suggests, may in fact be indicative of a fiction in terms of which the *praetor* held a possible act to be impossible. This would then create a link between a finding of the *praetor* in terms of praetorian law (*ius praetorium* or *ius honorarium*) and legality of a legal document (*in casu* a will) in terms of civil law (*ius civile*). The *praetor* was enabled to overcome the legality of the civil law by finding the testamentary provision to be in conflict with good morals (*contra bonos mores*) and hence impossible to execute. In this way morality, based on the aforesaid values of *pietas*, *existimatio* and *verecundia*, led to an otherwise possible act becoming impossible.

The author then turns to what he calls “the possible circumstances” (*die möglichen Umstände*) surrounding the text in question. This relates to the position of other potential heirs and the situation should the testator die intestate. After discussing the opinions of various modern jurists, the author voices his disagreement with the view of Mayer-Maly, namely that the immoral can be equated with the impossible. In his view impossibility and immorality were situated on different levels in classical Roman law, impossibility falling into a dogmatic category while immorality played a foundational role. It was only during the post-classical, Justinianic, development phase that they grew closer together. The text, he says, distinguished clearly between illegality, impossibility and immorality. It was on moral grounds that the illegal provision was declared impossible. In this sense the concept of *boni mores* was not derived from religious or philosophical doctrines, but from grounds of dogma and justice. The fact that Papinian held the illegal provision to be impossible does not mean that he equated illegal provisions with immoral and impossible provisions.

The author concludes this topic with a brief discussion of the confusion existing between the concepts of impossibility, immorality and illegality. He makes it clear that the interpretation of these concepts is not based on considerations of philosophy or legal theory. In this regard he refers to the views of a number of modern Roman and Roman-Dutch (or Roman-European) jurists like JW Wessels and RW Lee. Going back to the Roman origins it is clear that, in the cited text, Papinian regarded the act or conduct in question, and not the provision as such, as illegal. That is the basis on which the *praetor* could set aside the will only to the extent that he declared the testamentary provision, with its immoral basis, to be impossible.

Yet, the author observes, Papinian did not wish to transplant any moral principles into law. His approach was “ethically hued” (*ethisch gefärbt*) only in the sense that he based a “technical resolution” (*technische Lösung*) on a “moral execution” (*einer moralischen Ausführung*). This did not, however, mean that he equated illegal provisions with immoral provisions. His legal genius came to the fore in the brilliant

manner in which he held an illegal provision to be impossible in order to ensure the total invalidation of the will.

Concluding observations

The author points out at the outset that the six cases dealt with above are drawn from a variety of fields, but have in common that they are generally regarded as constituting relatively complex examples. There was no magical formula which provided answers to all the relevant problems, but from ancient to modern times several jurists have attempted to approach these problems in as objective a way as possible by making use of a definable value system. This was preferable to seeking to draw rational conclusions from relatively unstructured material.

For the rest the author summarises his discussion of the six cases and concludes that they illustrate the intersection between private and public interests, giving rise to an exemplification of state well-being (*salus reipublicae*). Although it is somewhat restricted in content, it deals with important aspects of private law in historical context and, I believe, achieves its aim of illustrating that the well-being of the state or community is indeed the basis of decision-making in Roman private law.

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