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JURISPRUDENCE IN ANCIENT ROME*

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Abstract: Among the formal sources of law, jurisprudence occupies a central position, as, by its form and content, it brought expression to a system of law which would become the fundament of law in posthumous ages, thus creating a treasure of ancient civilizations in regard to universal cultural and scientific patrimony. Initially, jurisprudence was achieved by empirical means, by the so-called case interpretation which was unable to provide the necessary background in order to elaborate universal principles of law or systematized interpretation which would represent the fundament of future legal construction. In the classical age, jurisprudence will reach its highest level, thus giving new dimension to the greatness and glory of Roman law, as legal advisers of those times will phrase principles and rules of law by combining different legal cases; thus, they prove to be great exegetes with a real sense of enforcing laws, thus, the regulations of ius civiliae become abstract legal provisions. This is the reason why the most interesting source of law of this age is *responsa prudentium,* namely the consultations given by the legal advisers; during this age, these consultations are no longer simple opinions which do not oblige the judge, but special concessions form the emperor, thus becoming mandatory regulations. Although, in present times, this possibility of the judge to rule by considering the opinion of a legal adviser, which might tilt the balance of justice one way or another is no longer in effect, the legal advisers still maintain their influence over the rulings of courts even if by indirect means, as is the case of appeal in the interest of law.

Key words: *Public law, jurisprudence, social norm, legal norm, configuration factors of the law, society*.

Among the sources of Roman law, in the formal meaning of the term, jurisprudence has an important place as it has a special meaning on a national level, as opposed to the usual meaning of the term, in case of Roman legal culture, *juris prudentia* was the science of law, namely what we call today the doctrine of law; on the other hand, the obvious reality that all exegetes who have analyzed the legal phenomenon of ancient Rome have unanimously pointed out that *juris*

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prudentia was not a simple factor of configuring law, as it proved to be a true formal source of law during the 12 centuries of Roman civilization.

If, nowadays, jurisprudence is the ensemble of solutions by the courts of law in solving different cases, in ancient Rome, the legal term of *juris prudenţia* was in fact „the doctrine elaborated by Roman legal advisers by interpreting the legal regulations"[1].

Starting from this reality, the ones called upon to interpret the legal regulations and to enforce them in regard to different cases, sometimes by subtly completing or even changing them, by an obvious activity of creating law, were called *juris prudentes*, a term which derived from the Latin name of science of law, namely *juris prudentia*. It was stated in specialty literature that Roman legal advisers were not only scientists[2], who had thorough knowledge of the Roman system of law, but they also became creators of law through their entire activity; they participated in the complex process of creating Roman law, which subsequently became a huge treasure of the ancient civilization thus, influencing the subsequent European regulations.

This activity was extremely productive, as mentioned by a source of law of that time, and took place between the second century BC and the first decades of the third century AD, when the Roman legal advisers were allowed to contribute to the process of creating law[3].

Thus, even from the old age, the Roman legal advisers, along with the specific process of interpreting *jus civilae* by using the principle of judicial syllogism, have also created new legal institutions, by using the text of the 12 tables, as is adoption[4], emancipation, *in iure cessio*, *per aes et libram* will and so on.

When analyzing the evolution of Roman jurisprudence, several stages can be noticed.

A first stage, which in its turn, contains two phases, is represented by the old age jurisprudence, in which case we can distinguish between sacred jurisprudence and laic jurisprudence.

Sacred jurisprudence debuts at the time the Roman state was created, namely the fourth century BC and lasts until the year 304 BC, when Gnaeus Flavius, a freed slave of the Patrician Appius Claudius Caecus has divulged a series of tables by posting them in the forum of legal sanctions, along with the calendar of trial days – *dies fasti* – days when justice can be administered, namely complaints could

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[1] T. Sâmbrian, *Roman law institutions*, Craiova: Sitech, 2009, p. 40.

[2] A. Schiavone, *The legal adviser*, in „L'uomo romano", Roma-Bari, 1989, Romanian edition – Andrea Geardina (coordinator), *the Roman man*, translation by Dragoş Cojocaru, Iaşi Polirom Publishing House, 2001, p. 84.

[3] Cf. Gaius, 1.7.

[4] C.Şt. Tomulescu, *Private Roman law*, Bucharest: Ministry of Education press, 1956, p. 36.

be filed according to the will of the gods in the spirit or Roman tradition[5]. For his endeavor, as a reward from the people, he would later be appointed tribune and edili curuli.

By referencing this historical time, Titus Livius stated the following in regard to the deed of Gnaeus Flavius „he has divulged civil law hidden to a great extent by the pontiffs and has posted the calendar in the forum so anyone would know when he can file a complaint of law"[6].

During this time, jurisprudence is a of a primary character with obvious interference from the magical-religious practice administered by the pontiffs – the great priests – the only ones allowed to know and interpret the legal regulations and the only ones who were able to show the interested parties the formulas which would be used in order to valorize their subjective rights and interests.

The methods by which legal regulations were interpreted, as they were considered a gift of the gods given to the Roman people, as well as the means by which several cases were solved by interpreting these rules, was a mystical activity for the Roman people; thus, only priests which came from the great Patricians would know and administer these regulations, according to their own interests. The parties among which the litigation occurred would be forced to address the pontifical college in order to receive the formulas which needed to be fulfilled[7] within the legal endeavor.

The answers drafted by the pontiffs according to – *responsa* – didn't need to be motivated, as they usually derived from the sacred power they held in their capacity of intermediaries between the divinity and the people, thus showing that the traditions and ethics of the Roman society was respected[8].

During this historical age, the influence of the priests in the Roman society was overwhelming, as they were considered to be the wise men of the citadel[9], and had to provide solutions to a series of situations which occurred within the civil circuit, such as drafting a will, transferring a *res mancipi* or the consultation in regard to solving another legal relation of patrimonial content.

In the ancient times and most of the old age, the interference between the legal regulations, *jus* and the religious ones, *fas,* was obvious, as the priests were privileged within society because of their special status, thus being the only ones who were privy to the truth and scientific results in other areas, such as astronomy, medicine, geometry or science of nature, such as physics, chemistry and so on. Divulging the legal procedure by Gnaeus Flavius in the year 304 BC ended the monopoly of the pontiffs in the activity of administering justice, a fact for which, as

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[5] Tit Liviu, *Ab urbe condita*, 9.4.6.5., Plinius, *Naturalis Historia*, 33,(6), 17 şi 18 (translation from Latin by Ioana Costa, Iaşi, Polirom, 2001, p. 84).

[6] C.Şt. Tomulescu, *op.cit.*, p. 37.

[7] Pomponius, *Libri singulari enchiridii*, Dig.1.2.6, in Th.Sâmbrian, *op.cit.*, p. 40.

[8] Cf. A. Schiavone, *op.cit.*, p. 87 şi 89.

[9] *Ibidem*.

stated by the renowned Romanist Mommsen, this endeavor would represent a true social revolution[10], and *ius civilae*, thus divulged, was named *Ius civilae Flavianum* or *Ius Flavianum*[11].

Thus the second phase of the jurisprudence in the old age began, namely the laic jurisprudence, in which the activity of interpreting and enforcing law would be transferred to individuals who held a magistrate function in the Roman state.

The empirical jurisprudence of those times, achieved by the so called case interpretation was far from providing the necessary background in order to elaborate universal principles of law or a systematized interpretation which would represent the fundament for future legal constructions.

The activity of Roman legal advisers, along with the scientific analysis which they achieved, also had a practical dimension achieved by *respondere*, *agere* şi *cavere*. *Respondere was* the free legal consultation the legal advisers would provide for individuals in regard to their legal problems. *Cavere* was the support provided by the legal advisers in order to draft certain acts meant to valorize the interests of the people. The third activity, known as *agere* consisted of the advice given to the judges in regard to the way in which a trial had to be conducted[12].

All these caused these scientists to enjoy a special respect within the citadel, which determined Cicero to state that „*domus iuris consulti totius oraculum civitatis*".

By indirect means, by a fragment belonging to Pomponious listed in the Justinian Digests, we can find reference in regard to the activity of old age legal advisers, as well as those from the first decades of the classical age.

An important place in the line of the so called *veteres*, a title used for the legal advisers of the classical age, those of the old age, had the first *juris consultus* from the history of Roman law, Sextus Aelius Paetus Catus, author of the work called– Triperlito – a work which represents a comment of the Law of the XII Tables, subsequently known as the true foundation (*cunabula*) of law. All the provisions of law extracted from his work formed the so called Aelianum[13].

According to the above mentioned source of law, by quoting opinions by Sextus Pomponius, those who have founded Roman civil law are– Maniilius, Marcus Junius Brutus and Publius Mucius Scaevola whose son Quintus Mucius Scaevola would be the most illustrious representative of his generation (see the second century and the beginning of the first century BC). His works, called „*liber singularis*" and „*ius civilae*", were true models for the following generations of legal advisers. His work is remembered as he was the first to elaborate the first definitions and synthesis with a pronounced science character in the history of Roman jurisprudence.

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[10] Th. Mommsen, *Roman history*, Bucharest: Science and Encyclopedia Publishing House, 1987, p. 120 and following.

[11] Pomponius, *op.cit.*, Dig. 1.2.2.7.

[12] E. Molcuţ, D. Oancea, *Roman law*, Bucharest, Şansa SRL Publishing House, 1993, p. 48.

[13] T. Sâmbrian, *op.cit.*, p. 41.

One of his illustrious disciples would be the great speaker Cicero, who would later become a contemporary and a friend [14] of Aquilus Gallus, who created – *actio de dolo* – a complaint for the individual whose consent was affected by vice as a result of deceiving practice.

We must also notice the rigorous comments of the praetor's edict by Servius Sulpicius Rufus, author of a work which contained 40 books, called Digests.

In the classical age, jurisprudence will reach its highest point, thus giving new dimensions to the greatness and glory of Roman law, as legal advisers of this time would phrase principles and rules of law which derived from combining different cases; thus they prove to be great exegetes with an obvious sense for enforcing the law, thus the regulations of *ius civilae* become legal provisions with a high degree of abstract. It was stated that „the permanent relation between the principles of law and the social reality brought upon their crystallization depending on practical requirements"[15].

The legal constructions undertook in order to create rules of law were so rigorous and serious that they would led to abstract solutions for imaginary situations, thus causing real judicial axioms turned into principles of practical character which would apply to similar situations. A rule of law would become a rule only if it solved a large number of similar situations.

The two great schools of law are founded during this time, true centers of research which gave expression to legal orientations. From the early stages of the empire, two schools of legal advisers were founded, one led by C. Ateius Capito (a consul in the fourth year BC) and another one led by M. Antistius Labeo. These two rival schools last until the middle of the second century. The fundament of this division seems to be the following: on one hand, the school founded by Ateius Capito, also known as the Sabinian school, after the name of Massurius Sabinus, the successor of Capito as the head of the school, seems to be a traditionalist school, a conservative one; on the other hand, the school founded by Labeo, was progressive; it was also called the Proculian school after the name of one of the head of this school, Proculus. Also, the Sabinians would favor case solutions, whereas the Proculians would favor systematization

In regard to the material form of these schools, it is not known whether there were two establishments who taught law or rather two adversary currents of thinking, much like the philosophical currents of the Greek; nevertheless, it is certain that they were precisely organized, as each had a leader (*princeps scholae*); upon his death, a new leader would be chosen, thus leading to an uninterrupted series of legal advisers who would pass on their methods and ideas. As a result of the reorganization of the emperor council by Hadrian, who enlisted Salvius Iulianus and Celsus, the leaders of the two rival schools, in this council, the

[14] E. Molcuț, D. Oancea, *op.cit.*, p. 48.

[15] *Ibidem*.

division between the Sabinians and the Proculians disappears. Subsequently, we will describe the achievements of a few legal advisers who had a significant impact in the classical age[16].

Iuventius Celsus (second century) – a Proculian, an original legal adviser, extremely critical, is distinguished by the clarity of his language and the independence of his legal reasoning; an adversary of Iulian, who he never quotes, a member of the Imperial Council of -Hadrian (117-138), along with Iulian, was twice consul (the second time in 129). He provided the famous, but rustic, *responsum Celsinum* to the famous, but naive, *consultatio Domitiana*. Out of his numerous works, the Iustinian Digests have only borrowed fragments of hid Digests in his 39 books.

Salvius Iulianus (second century) – a Sabinian, contemporary and rival of Celsus, whom he never quotes. He is the most quoted legal adviser in the Iustinian Digests. His glory consists from the codification of the praetor's edict – *edictum perpetuum* – by request of Hadrian, probably between the years 134-138. Iulian has codified edicts of edili curuli, both drafts were regulated as mandatory for all praetors and future edili. Iulian is also the author of Digests grouped in 90 books which contain the ensemble of law. Although he was Sabinian, he made no rule of ever adopting a Proculian opinion; he has adopted both opinions, depending on how rigorous they were; thus, given his prestige, the division between the two rival schools will become less and less significant until it finally disappears.

Aemilius Papinianus (second-third century) – the most illustrious of the classical legal advisers, was one of the intimate friends of the emperor Septimius Severus (193-211); the most important function that he held was that of prefect of the praetor (205-212). His main works are *Quaestiones* in 37 books and *Responsa* in 19 books. Probably his greatest honor was the law of quotations of 426, by which Valentinian the third confirmed the authority of works by Papinian, Paul, Ulpian, Gaius, Modestin and, in case of divergent opinions (if two legal advisers had an identical opinion, two others offered a contrary solution and the fifth one abstained), the judge would be forced to follow Papinian's opinion. The authority he enjoyed is owed to his method of reducing any particular legal problem to the general rule of law which governs it. Along with his son, he was killed in the year 212 because he refused to write a speech for Caracalla in order for him to justify to the senate and the people Caracalla's murder of his brother Geta. After Papinian, the legal advisers will be preoccupied with arranging the materials left by their predecessors, in order to allow an easy use of his works.

Iulius Paulus (third century) – a member of the Imperial Council during the time of Septimius Severus and Caracalla. He wrote an impressive amount of works, additional to his notes on the works of other authors; his known work

[16] See C. Murzea, S.-D. Şchiopu, A. Bianov, *A collection of Latin legal texts* Brasov, Romprint Publishing House, 2006, p. 393-396.

consists of 86 works and 319 books (especially given the work of his ancestors who he commented and compiled); his reputation is consecrated by the work *Sententiae*. However, despite the materials he borrowed from previous legal advisers, Paul, in regard to his personal contribution, proves to be an excellent legal adviser, a fine critic with a vast culture, in many cases his opinions prove to be greatly independent, as his personal contribution is obvious. Extracts from his work represent a sixth of the Digests.

Ulpianus (third century) – from Tyr (Syria), a member of the Imperial Council under Severus Alexander (222-235) and prefect of the praetor (222-228), the favorite adviser of the emperor, who protected him on numerous occasions form the rage of the praetorians (Ulpian had attempted to reduce the influence of the military); however, in the year 228 he was assassinated by the praetorians. He was one of the greatest Roman legal advisers, although he was not a creative spirit, but more a clear and intelligent adviser who systematized the works of other legal advisers. His precision and clarity led to his work representing about a third of the Digests.

Herennius Modestinus (third century) – the last classical legal adviser, a disciple of Ulpian, a teacher of Maximilian the young (assassinated along with his father in the year 238), known for his manuals for students and practitioners of law. His work reveals the first symptoms of the decadence of the science of law, by the ignorance of legal studies in favor of the practice manuals, as well as by a tendency to return to the case method of law.

Thus, the most interesting source of law of this time is *responsa prudentium*, namely the consultation provided by legal advisers which, in this age, no longer represent simple opinions who do not hold the judge to respect it, but mandatory regulations by special concession from the emperor.

August, probably with the purpose of winning over some legal advisers, granted some of them *ius publice respondendi ex auctoritate principis* (the right to provide legal consultation in the name of the emperor), provided that these consultations were signed, namely invested with the seal of the legal advisor, in order to guarantee the authenticity of the consultation[17]. The consequence of this right was the fact that the judge who was brought such an opinion was tied to the opinion of the legal adviser (for that specific case); he was however free to appreciate the facts. Subsequent to the emperor Hadrian, the opinion of legal advisers would have power of law (also for similar cases) if they are unanimous; in case of divergent opinion, the judge was free to choose the opinion which he thought to be correct[18].

[17] D.1.2.2.47: „...August was the first who, in order to add more weight to these responses, ordered that legal advisers will only be able to provide legal advice if they were authorized by him...".

[18] Gaius 1.7: „*Responsa prudentium* are those opinions which were allowed to give foundation to all rights. If the opinions of all legal advisers converge toward the same solutions, what they believe

Although, nowadays, this possibility to appeal to the science of a legal adviser in order to force a certain opinion on the judge no longer exists, the legal advisers still maintain an influence over the rulings of most judges even if by indirect means, such as the case of the appeal in the interest of law.

According to article 516 sixth alignment of the Civil Procedure Code[19], the judge can request a written opinion from renowned specialists in regard to the problems of law which were solved in a different manner; the report will contain the different solutions and the reasoning for the solutions, the relevant jurisprudence of the Constitutional Court, the European Court of Human Rights, doctrine and any consulted specialists.

Conclusions

Although we may never be in the presence of such influence by the legal advisers over the configuration of law as was the one exercised by those who enjoyed *ius publice respondendi ex auctoritate principis*, the role of doctrine can't be underestimated in present times, especially since the court rulings often contains quotes from modern legal advisers.

becomes law; if they are in disagreement, the judge is allowed to follow the opinion which he thinks is correct; this was established by the divine rescript of Hadrian".

[19] *Law no 134 of July 1st, 2010* regarding the Civil Procedure Code, republished in the Official Bulletin no. 247 of 2015.