THE RIGHT TO LEGAL PROTECTION IN ROMAN LAW

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Abstract

Roman law never studied the legal nature of the right to legal protection in civil proceedings. The ratio for this is the fact that in Roman law there is no distinction between substantive and procedural law, nor between the substantive-legal categories of subjective and objective law. Roman law is built casuistically as a "system of lawsuits" that will cause a situation in the form to be drawn into the content of legal protection.
This unity of the lawsuit (actio) and the law (ius) show its peculiarities in 1) legislative, 2) formulaic, 3) extraordinary and 4) Roman-canonical procedure and everywhere leads, although in different ways, to the same solution - the legal nature of the right to legal protection to be monistic.
The aim of this paper is to explain the evolution of legal protection in Roman law and the legal nature of the right to legal protection in Roman civil procedure.

Keywords: roman law; right to legal protection; civil procedure.

Introduction

The first polemics about the legal nature of the right to legal protection find their beginnings in Roman law. This is because Roman law is the first private law that will create its own concept for seeking and obtaining legal protection from the state. The right to legal protection shows its peculiarities in the legislative, formal and extraordinary procedure. Although in fact Roman law did not study the right to legal protection in civil procedure, the study of this right will begin in the period of reception of Roman civil procedure in national laws. Namely, all modern concepts of the right to legal protection in civil procedure seek their inspiration in the Roman system of lawsuits. It is for this reason that the subject of analysis of this paper is an explanation of the legal nature of the right to legal protection in Roman civil procedure from the aspect of the modern science of civil procedural law.

1. Legal nature of the right to legal protection in the Roman legislative procedure

In archaic Rome, civil (legislative) procedure and private law would exist in the shadow of Roman lawsuits (ius quod ad actiones pertinet). This is because the lawsuit (actio) as a strict form would incorporate both procedure (procedural law) and law (substantive law).
The lawsuit will be identified with the legislative procedure because the term actio in the oldest Roman law means activity or a set of actions while the term legis actio denotes the activity of the plaintiff from one (initial) to another (final) point in a strictly regulated form by law, but also the form with which the dispute is initiated. It is for this reason that the different types of lawsuits per legem are the basis for speaking about the non-uniformity of legislative procedures in the procedure in iure. Hence, some modern proceduralists rightly speak of legally provided lawsuits as "special modus agendi".
The primacy of the claim will not only blur the distinctive boundaries between the claim and the procedure but also between the claim and private law. The real proof of this is the fact that the Romans thought through the prism of claims, and not through the prism of rights. This is because the protection of rights will not be guaranteed in apstracto (there is no uniform concept of a claim) but it will be possible only if there are specific legally provided claim limits and forms that the Law of the XII Tables determines - nulla actio sine lege. The ratio for this is that the Roman Monarchy was not powerful enough at the beginning to be able to completely

supplant self-help as crimen vis, and therefore only casuistically and quite limitedly through the five legally provided lawsuits (sacramentum, iudicis postulatio, condictio, manus injecto and pignoris capio) tried to put it under legal control. Precisely for this reason, the lawsuit will involve the law, and the form will have primacy over the content. This will happen because each lawsuit will have a precise form and limited scope and will protect a whole series of certain private legal relations. Hence, law will have no meaning without the lawsuit, and through the various types of lawsuits and the approval of these lawsuits by the magistrate, the private rights of the ius civile in the procedure apud iudicem will be protected. This is because the form of the lawsuit will be the one that will dictate what needs to be done to remove the violation of the law. Undoubtedly, the meaning of the Law of the XII Tables is to determine the types of claims and relationships for which legal protection can be obtained, whereby when the nature of a relationship needs to be determined, the question does not arise which (private) right is in question, but which lawsuit should be activated.

The right to legal protection in the Roman legislative procedure is an activity of the plaintiff consisting of symbolic acts and solemn verbal formulas (certi verbis) with which the dispute is initiated. The purpose of this right is for the magistrate to allow the lawsuit (dare actionem) because the possibility of conducting the dispute directly depends on this decision of the magistrate, and indirectly the exercise of the plaintiff's private right. The right to legal protection in the Roman legislative procedure is exhausted with the occurrence of litis contestation, after which the specific dispute cannot be re-conducted (actio consumitur). It is a content-limited (with the Law of the XII Tables), personal (applicable only to Roman citizens) and temporal (dies festi) limited right trapped in brutal formality.

Due to the primacy of actio vis-à-vis ius in the form of Roman lawsuits, the content for which legal protection will be sought will be fully incorporated. This is because the specific form will be a condicio sine qua non for the admissibility of protection of a specific private right of the plaintiff. Hence, the legal nature of the right to legal protection in the Roman legislative procedure from the point of view of modern (non) specialized scientific proceduralism is monistic.

2. Legal nature of the right to legal protection in the Roman formal procedure

The extreme "subtlety" of the legis actiones, the excessive formalism that would lead to the nullity of the procedure, the slowing down of legal transactions, but also the danger for the parties due to the still noticeable influence of self-help would cause the legis actiones to become quite hated by the people. Because of this, with the Lex Aebutia they began to be avoided, and with the Lex Iuliae they were abolished.

Thus, was introduced the formulary process system that would mark and exist in the golden age of Roman jurisprudence from Cicero to Diocletian. A basic characteristic of the formulary process system is the abandonment of symbolic acts and solemn verbal formulas (certi verbis) of the parties in the in iure procedure and their written redaction into a formula by the praetor depending on the particularities of the case after informal presentation of the claims and demands of the plaintiff, and most often the objections and demands of the defendant (concepta verba). Thus, the in iure procedure of the formulary procedure turned into a "fight for a formula", and the procedure apud iudicem, just like in the legislative and in the formulary procedure, remained a "fight for a decision". As a reflection of these developments, the right to legal protection (actio) in the Roman formulary procedure shifted from an activity of the plaintiff consisting of symbolic acts and solemn verbal formulas (certi verbis) with which the dispute was initiated to an activity of the plaintiff for the issuance of a formula by the praetor (postulatio actionis, editto actionis) and a legal remedy by which the plaintiff requests from the praetor judicial realization of the private legal claim that recognizes him in the legal order

according to ius civile or ius honorarium. In this way, the right to legal protection in the formulary procedure continued to be considered primarily from a procedural legal aspect and unilaterally from the perspective of the plaintiff (because the lawsuit was a power of the plaintiff as a person whose right was violated), and private law and procedure remained trapped in the forms of Roman lawsuits.

In the formulary, just like in the legislative procedure, there will be no general form (claim in abstracto) for the protection of every private right. However, unlike the procedural regime of legis actiones where each of the five legally provided lawsuits protected a whole series of certain private legal relations, in the formulary procedural regime more typical and specific lawsuits will arise casuistically that will protect typical and specific rights. This will happen due to the differences in the content of the content of the intentio, as the most important part of the formula, the part that contains the plaintiff's legal claim for which the judge must decide. In doing so, depending on the legal foundation of the intentio, the legal nature of the lawsuit will begin to be deciphered from a private legal aspect, and subjective rights will be reflexively created. In this way, the procedural protection will crystallize into a series of lawsuits and the famous "system of lawsuits of classical Roman private law" will arise. In doing so, each lawsuit will become an expression of the specific right that it involves. Hence, in classical Roman law, it will not be important for the titular to have a subjective right but the power to act because the lawsuit will precede the right and only if there is a lawsuit will the protection of the right be possible (Ubi remedium ibi ius). Because of this, as an equivalent to the "system of lawsuits", the "system of judicable rights in the trial" will begin to be created and private law will enter a new era but trapped in the form of the lawsuit because the right will be contained and found on the lawsuit. Because of this, the lawsuit will begin to be identified with the individual right itself and explained as an individual right endowed with procedural capacity. In this way, for the first time, the right to legal protection as a power that belongs to the plaintiff will begin to be defined in a private (material) legal sense as a right that requires the defendant to fulfill what was promised in the formula. It is precisely for this reason that Rosenberg seems right to consider that the "system of lawsuits" in classical Roman law is "a typical private legal system dressed in procedural garb". A real example of this is the division of lawsuits depending on the modalities of intentio into personal lawsuits (actiones in personam) and real lawsuits (actiones in rem) as well as the names of some actiones in rem (reivindicatio and actio negatoria which correspond to the right of ownership, vindicatio filii in potestatem which corresponds to family law, hereditatis petitio which refers to the right of inheritance, etc.) or actiones in personam (actio venditi, etc.).

The system of lawsuits of classical Roman law will be an evolution vis-à-vis the procedural system of legis actiones. That this is so evidenced not only by the minimization of formalities in the procedure in iure and the recognition of the legal protection of foreigners, but also by the possibility for the plaintiff to seek legal protection even when there is no actio according to ius civile. This is largely a consequence of the praetor's special powers to create and introduce into his edict's new formulas (actionesutiles, actiones ficticae, actionesper transpositionem, actiones in factum) and to grant legal protection even in those relations for which there is no procedural remedy in advance. In this way, the praetor will not only approve or deny the right to sue but will also create new lawsuits and allow them if certain substantive and procedural legal assumptions are met. Through the creation of new lawsuits by the praetor, Roman (private) law will be enriched, and the exercise of the right to legal protection will become increasingly flexible.

However, due to the unity of ius and actio, i.e. the law and the sanction, the impossibility of seeking legal protection and exercising private law without a lawsuit in a formal sense, but also the fact that the praetor will simultaneously have a judicial and law-making function, the legal nature of the right to legal protection in the Roman formulary procedure will remain monistic.

However, unlike the legislative procedure, where the right to legal protection is an activity of the plaintiff in a purely procedural legal sense trapped in extreme formality, in the formulary procedure it is a much more elastic right-power that more clearly acquires a substantive legal meaning.

3. Legal nature of the right to legal protection in the Roman extraordinary procedure

As a result of the strengthening of the imperial dictatorship and the weakening of republicanism, imperial law will suppress the ius civile and ius honorarium and a new procedural regime will begin to be created - the extraordinary procedure.
The extraordinary procedure, although initially an exception, will impose overtime as a rule and will completely triumph over the formal procedure.
On a procedural level, this will reflect: the abolition of the two-part ordo iudicium privatorum, the disappearance of formulas, the minimization of the imperium of the praetor and the prohibition of the election of the judge by "procedural agreement" by the parties.
These procedural shifts will culminate in the princeps becoming the supreme bearer of judicial power, and the protection of private rights will be transformed into an administrative-legal state category.
Because of this, the procedural and material legal significance of the right to legal protection from the legislative and formal procedure will be cast into the shadows. This situation will persist until the zenith of the classical extraordinary and the emergence of the Justinian extraordinary procedure when the right to legal protection will be reincarnated again, but this time restrictively identified with the substantive right to sue (actio).
The reincarnated right to legal protection in the extraordinary procedure will be totally different from the right to legal protection in the legislative and formal procedure. Namely, in the extraordinary procedure, although the editio actionis will be retained, this institute will lose its original meaning due to the termination of the connection between the edictal formulas and the formulas as a means by which litiscontestation is carried out.
With this very fact, lawsuits will begin to differ in their material legal meaning and purpose (natura actionis) denoting the typified claim of material law. Thus, the lawsuit will become an art of subjective law, and the "system of Roman lawsuits" will give way to the "system of subjective rights". That this is so concluded from Celso's famous definition of the Roman lawsuit in personam according to which: "the lawsuit is the right to demand in court what is owed to us (ius quod sibi debeatur iudicio persequendi)". In this way, in Justinian's law, the dependence of subjective law on the existence of the corresponding lawsuit will cease, and the lawsuit will be equated with the typical material legal claim and seemingly distanced from its original procedural legal meaning. The lawsuit in the substantive legal sense will thus begin to be equated with the substantive right to demand a certain act or omission from the defendant (actio in personam), and its procedural legal meaning will be reduced to the libellus contradictionis as a uniform written document with which each extraordinary procedure is initiated. In this way, the focus of the dogmatic interest will be redirected to the substantive legal meaning of the right to sue, and procedural law will move from private to public law.
However, although in the extraordinary procedure the right to legal protection will evolve from a power to a right of the plaintiff, the legal nature of the right to legal protection will remain monistic. This will happen because the procedural right to sue will be drawn into the substantive right to sue, that is, because only the one who has the right (ius) will have the power (potestas) to act. Hence, in the extraordinary procedure, ius and actio are a unity, unlike the legislative and formulary procedure where ius arises from actio, i.e. where ius is posterius, a actio primus, in the extraordinary procedure, actio arises from ius, i.e. ius e primus, a actio posterius.

4. Legal nature of the right to legal protection in Roman canonical procedure

The dogmatic legal confusion about the legal nature of the right to legal protection from Roman law will be transferred to the glossatory and post-glossatory schools.
In the glossatory school, due to the still noticeable influence of Justinian's law, the substantive right to legal protection will be revalued and the topic of the right to legal protection will be introduced into the field of obligations and later expanded to real rights. This is because medieval jurists started from the position that every lawsuit has its own cause, whereby in actio in personam the cause can be recognized in the obligation, while in actio in rem in ius in re. Hence, it should not be surprising that Piacentinus will identify ius and actio with each other or that Aza will consider that "obligation is mater actionis".
The situation will begin to shift significantly after Acurssius makes a distinction between the ius proper quod persequimur and the ius quo persequimur, a distinction that will be the basis for separating the substantive law and the right to legal protection from the plaintiff's perspective.
Against this confusion regarding the substantive law of legal protection, medieval legal schools under the influence of classical Roman law will reopen the issue of the right to legal protection in a procedural legal sense. Thus, it will become debatable whether the right to legal protection in a procedural legal sense is a legitima facultas, facultas iure tributa, facultas iure civilis competens, potestas, factum, ius agendi…, whether it arises from ius civile or ius gentium.
Because of these different legal understandings, French legal proceduralism and German pandectism, when they begin to study the legal nature of the right to legal protection, will remain "confused" and will transfer the Roman doctrinal-philosophical confusion and the monism of the lawsuit and subjective law to modern civil and procedural law.

Conclusion

Roman monistic theories of the legal nature of the right to legal protection in civil proceedings arisen in the period of the innocent naive pre-trial age in which the difference between civil substantive and civil procedural law is completely unthinkable. They are also known as substantive-legal, classical or private-law theories because they completely deny the procedural-legal elements of the right to legal protection and/or the existence of an independent procedural right to legal protection in civil proceedings. In them, the right to legal protection is considered exclusively from the perspective of civil substantive law. Hence, monism, or the unity of the lawsuit and the law, is present in Roman law. The Roman monistic understanding of the legal nature of the right to legal protection is also present in modern civil procedural law.

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