The Utility of the Forms of Expressing Juridical Procedures in Roman Private Law

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The main topic of this research study is the manner in which juridical procedures were expressed in private Roman law. In ancient Rome these technical procedures used to formally satisfy the interests of the Roman citizens—irrespective of their social class—because the principles concerning equity and good faith that lay at the basis of a stable society were highly taken into account. Fortunately, the common-law system has taken over the spirit of the Roman law, a thing that had never happened before in the continental system. In the context of the unprecedented development experienced by the contemporary age, the Romans' juridical experience—based on a similar evolution insofar as the inter-human relationships were concerned—offers simple and viable procedures able to help prevent the decline the society has been experiencing[1] and contribute to its revitalization.

The present research study raises fundamental questions, such as: why the concept of "form of expression" is necessary to express juridical procedures, how can it contribute to the revitalization and development of society, and who will finally benefit from this?

The analysis of the abovementioned objectives will be performed within the 4 parts of this study.

The first part will be about those objective factors which lead to the necessity of creating an equilibrium between the interests of the members of society and their material aspects. The second part will deal with separating the notion of juridical operation from that of juridical procedure, so as to better understand the sphere contained by those notions. The third part will be dedicated to explaining the features of certain juridical procedures and their form of expression—as they were used towards the end of the ancient era and in the classical era of private Roman law. It stands to reason that the fourth part will underline the close connection between the forms of expressing juridical norms and those expressing juridical procedures, as this latter aspect ensured—between the 2nd century BC and the 2nd century AD—legislative stability and, implicitly, the safety of juridical relations.

The novelty brought about by the present study consists in underlining the possibility of revitalizing the juridical component, which plays a very significant role in the process

of acknowledging and capitalizing the claims of the subjects concerning juridical relations. The moment these materializations no longer have an arbitrary character, the obtained harmony will be extended to the other elements of the system and will contribute to the revitalization and evolution of contemporary society.

1. Society is the first place where the contradictory interests of its members appear. How will these interests be expressed? Is there any representation of this process? The answers are simple. Social relations are practically the result of our attitudes, in the form of some actions or inactions, determined by certain internal or external factors. In other words, all our actions or inactions are generated by certain needs and manifest themselves in various domains—among which the juridical domain, as well—that influence and are influenced by the other elements of society (economy, politics, justice, etc.).

A viable system is characterized by an equilibrium that should exist among these components and by the harmony linking all these needs and procedures by which they are achieved, as a stable society ensures—at least from a formal point of view—the necessary mechanisms meant to materialize the antagonistic interests of the members belonging to different social categories. This is the reason why Roman private law stands out and is an example to be followed, as the flexible character of those mechanisms allowed it to be applied to all present or future situations. It left its mark over all other components of society and led to a perfect cooperation among the parts of the whole.

Here is how, with the help of certain apparently simple yet very efficient means, the Romans succeeded in building up a strong society, anchored in reality and able to adapt to it—that is, to all the inner and exterior factors which could, at the given time, determine its organization and operating systems. Consequently, this study will very minutely render the physiognomy of certain forms of expressing the juridical operations used in late antiquity and during the classical era, and underline their usefulness alongside the process of creating and developing a functional example.

2. In order to better understand the usefulness of the forms of expressing juridical operations, this study will first analyze their physiognomy and the close connection between them and the concept of juridical operation. This because the internal and external factors produce certain reactions from the part of the members of any community, reactions that can take various forms and aspects.

Consequently, the process of achieving the juridical operations can be assumed to possess two elements: volitional and material. The first stands for the will of those involved in this relationship and whose will was the result of a series of complex psychological processes determined by the appearance and satisfaction of a certain necessity. The second involves the way the participants' will is exteriorized as against the juridical aspect. By virtue of these reasons, the volitional element will be called juridical operation and the material element will be considered the form of expressing the juridical operation.

The Romans were keen experts in juridical techniques. Their talent was especially proven by the simplicity and the efficiency of the forms they employed in juridical operations, forms that contributed to the maximum satisfaction of everybody's legal interests. These instruments were applied not only to real situations but they could also be used in establishing new juridical operations—as in the case of adoption[2]—as they

used to have a flexible character allowing them to fulfill several functions in the context of the unprecedented development of society. What might have happened if the Roman juridical system had offered inflexible juridical procedures? This answer is very simple. It would not have had that extraordinary vitality and would have collapsed together with the society that created it. In order to support these statements the physiognomy of the juridical operations concerning novation, purchase agreement and adoption[3]—which are mentioned in the *litteris* contract, stipulation, mancipation, *in iure cessio* and the consensual contract—will be analyzed one by one.

3. Novation is the way in which an obligation is extinguished and involves the replacement of an old obligation with a new one through the agency of the *litteris* contract or of stipulation.[4] This juridical operation was generated by certain material conditions in use, which were identical to the interests of a certain social category. However, it had practical importance as well, as otherwise there would have been two distinct obligations; this fact might have complicated the juridical relationship between the creditor and the debtor. In order to avoid this obstacle, and implicitly the existence of two distinct juridical rapports, the parties consolidated the existing the juridical relation so that the appearance of a new obligation could extinguish the old one. Subjective reasons were added to these objective ones because novation used the forms of expression belonging to other juridical operations, in order to better protect the interests of the creditors: stipulation and the *litteris* contract.

Stipulation is a verbal contract concluded by means of questions and answers and is the simplest and most efficient form of contract.[5] This is the reason why it could serve to achieve several juridical operations, including novation, irrespective of the fact that it had been concluded between the same or between different persons, as results from the texts of Gaius' *Institutions*. In the first case, a stipulation was concluded which specified that Primus would give me whatever Tertius owed to me,[6] while in the second case a new verbal contract was concluded through the agency of which a term or a condition could be repressed.[7] In both situations one can notice that the intended aim was that of increasing the creditor's certainty that he would satisfy his debt.

The appearance of the *litteris* contract responded to the need for more efficient tests than those given by testimonies. As the society evolved, some Roman citizens started to use a book in which they kept the accounts of returns and payments, so that in practice some operations were to be found in the debtor's as well as in the creditor' books.[8] As this juridical operation contributed to satisfy the creditor's debts, it goes without saying that the mention included in his book was sufficient enough. This time, too, Gaius—the classical jurist—offers a precious piece of advice whereby one of the functions of the *litteris* contract was that of replacing one debtor with another. What was the practical utility of that procedure supposed to be? For example, Primus owes 100 as to Secundus and Tertius owes 100 as to Primus. In order to extinguish both obligations, two payments had to be done; yet, the Romans imagined a procedure according to which both juridical operations could be extinguished by one single payment. To reach this aim, the change of the debtor was done by recording two mentions in Secundus' book. The latter agrees with Primus that Tertius is to pay in his place. For this action to become possible, Secundus mentions in the payments column of his book that he gave

Tertius 100 as and Tertius subscribes. At the same time he mentions in the returns column of his book that he received 100 as from Primus, although in reality he received nothing.

Except for the practical considerations, the creditors were careful to create other safety measures, so that those forms of expressing the juridical instruments should become efficient juridical instruments meant to capitalize the right to debts. This is the reason why the *litteris* contract and stipulation generated strict law obligations, as they were applications of the rigorous formalism that characterized the acts of ancient civil law. During that period of evolution of the Roman society, the juridical acts were quite rare and quite primitive, as the society they were applied to, and in case of a possible litigation the judge interpreted the juridical act according to the letter of the law, without any intention to take into account the real will of the parties. Taking into consideration that contracts generated obligations, the judge pronounced a sentence whenever he noticed that the obligation appeared and the creditors really wanted to use those forms of expressing the juridical operations in their favor, as they could much easier turn their claims to account.

With the Romans, the juridical operation of a sale involved a quiet transmission of an thing in exchange for a price.[9] By a careful examination of its physiognomy, one can notice that it represents a much more advanced form of exchange, as the seller transmits an thing in exchange for a sum of money he would receive from the buyer.[10] Because this procedure had been applied since olden times, the juridical Roman texts provide information referring to the way in which the forms of mancipation, stipulation and the consensual contract came into being.

Originally, mancipation was used with a view to transmit the property right to the *mancipi* things, in exchange for a quantity of copper.[11] In olden times, the sale could be done in such a way, as the price was not considered to have been paid the moment of the delivery of money but the moment the weighed copper bars represented its proper equivalent. This is a real fact, because the old *as* weighed 327 grams of copper, but at the moment the act was created the weighing of the copper bars by the *libripens* was required as well.[12] Later, after the introduction of coins,[13] mancipation suffered certain transformations which bestowed upon it other functions (the drawing up of certain testamentary forms[14] or the submission of the woman to the authority of the husband by *coemptio*[15]) which would inclusively be reflected in its physiognomy, as the price was no longer weighed but counted. Under the given conditions, the presence of the weigher and of the copper balance created certain difficulties, especially in such cases when the buyer could not pay on the spot. This because the balance had to be touched by a copper bar, which signified the conclusion of a juridical act, even if the seller had delivered the goods and the buyer had not paid the price. Consequently, the appearance and the production of the effects of sale were made by a single act.

Aware of the possible disadvantages, the jurists resorted to a much subtler procedure of stipulation.

Mention shall be made that this time, too, they used forms by which other juridical operations were created, as well. But why stipulation, precisely? There were two reasons: first of all because it seemed to be the simplest possibility of concluding a contract,

and second because it could be used in the relationship between citizens and travelers. However, stipulation is an unilateral contract where there is a sole creditor and a sole debtor. A sale, however, is a much more complex juridical operation where both the seller and the buyer became the creditor and the debtor at the same time. This is the reason why the sale was made by means of two stipulations: one by which the seller bound himself to transfer the property and the other by which the buyer bound himself to transfer the money. Later on, the practice required supplementary stipulations meant to generate other obligations on the part of the seller. But, as far as this juridical operation was done in the form of mancipation, the pledge obligation against errors and against eviction had an extra-contractual character and was sanctioned by delictual actions: *actio de agri modo*[16] and *actio auctoritatis.*[17] Alongside the evolution of the juridical ideas and with the assimilation of the extra-contractual procedures, these obligations would turn into natural effects of the sales and purchasing contract, as they were generated—as well in the case of transferring the goods and that of paying the price—through the agency of certain stipulations.

At a certain moment this system, too, proved its limits, as each obligation needed a separate stipulation. In order to eliminate this impediment, the Romans realized that the willing agreement of the parties should have been materialized in a sole juridical procedure able to generate the obligations of both the seller and the buyer, and so they took from public law the consensual sale by means of which the quaestors[18] transferred to the private persons the slaves' property originating from the prisoners of war. As the number of these transactions was very large, selling by way of mancipation or with the help of stipulation—which became anachronistic—led to the agreement that a simple willing agreement was enough. Due to the advantages it presented, the consensual contract was also applied in the relationships between private persons and was improved at the recommendation of the praetor; consequently, at the beginning of the 1st century BC Quintus Mucius Scaevola had already included the actions meant to sanction that juridical operation included in the list of good faith actions; this was later acknowledged by Gaius.[19]

Adoption means that a son of a family can be passed from the authority of a *pater familias* to another[20] and is the result of the jurists' creative interpretation of the dispositions of the Law of the XII Tables that made it possible for this to be used in the context of certain procedures specific to other juridical operations. As some householders could not have children of their own and did not have the possibility to adopt an abandoned child and raise him/her as their own, there was the danger of not being able to continue the family cult. Because religion used to play a very important role in society, the Romans imagined an artificial way of strengthening parental authority—adoption. To this aim, juridical procedures were to be used, intended to have effect over the danger of parental failure of the *pater familias* from the original family and to create a new authority as, according to the Roman mentality, authority could not be transmitted. Unfortunately, the Law of the XII Tables made available, for the citizens, archaic procedures whose effects were seen only later. For the parental authority to cease it was necessary for the son of a family to be sold three times, in the form of mancipation;[21] each sale was available for 5 years. Consequently, a period of 10 years was necessary in

order to make the parental authorship cease, as the son went out of the authority of the *pater familias* only after the third mancipation.

In order to avoid such a long interval of time, the jurists interpreted the dispositions of the Law of the XII Tables in a very creative way, so that the three sales, accompanied by two emancipations *vindicta,* were made on the same day. In order to create a new parental authority it was necessary to use an authority-generating juridical procedure. That is why they resorted to the *in iure cessio*,[22] that is, to a fictitious process organized by the judiciary magistrate, whose consequence was that the parental authority of the adopter was artificially created. This is how, due to their flexibility, these procedures achieved new functions and contributed to the creation of some new juridical operations.

4. All these things point out the fact that the Roman juridical system was characterized by a symmetry visible in the forms of expression and in the juridical norms. Due to them, Roman private law was known for its extraordinary vitality, able to dispose of juridical procedures, capable to offer efficient solutions to all hypotheses that appeared in real life, and improved by jurisprudence and by the activity of the judiciary magistrates. Therefore, the flexibility of the forms of expressing the juridical operations is in close connection with the physiognomy of certain origins of law. If they had a static character, the prompt reaction of the juridical system against the new realities would not have been possible, even if the forms of expression of the juridical operations had been characterized by flexibility. Yet this is not possible, because all systems imply harmony—which means that the efficiency or the inefficiency will soon emerge at the level of the whole, as well as the level of each separate component.

The Roman scholars deliberately created an almost absolute system, as their experience contributed to the consolidation of the concept of legislative stability. According to this approach, few laws were adopted, because the lawmaker could not foresee all the circumstances that might have appeared in real life; yet the lawmaker created forms of expressing the juridical operations and flexible sources of law that turned Rome into a famous commercial center and into the master of the whole world, strengthening its political and commercial supremacy ("Roma caput mundi regit orbis frena rotundi").

5. Why did this study choose to analyze the physiognomy of some juridical operations and of some forms of expression encountered in the practice of the courts of ancient Rome and did not analyze the contemporary juridical procedures? Are not the current material conditions much more complex and much more numerous that those of ancient times? Yes, of course, they are. Nevertheless, the Roman juridical thinking reached a very high level, a level which the posterity could not attain until now. The originality of the Roman juridical solutions contributed a lot to the development of the of dynamic character of private law, which was sustained with the help of some "living" juridical procedures that could be adapted to all the situations offered by life and contributed to the recognition and assessment of the legitimate claims of the parties. These procedures demonstrated their utility and are more real and visible than in the numerous contemporary regulations, defined by an excessive promulgation of laws which are the expression of the static component of law, almost completely unable to promptly react

to the changes occurred in real life. That is why Roman law is one of the forms through which Rome showed its superiority over the ancient world, because a dynamic juridical component means the existence of a similar one, viable and able to gain supremacy over the other juridical systems of antiquity.

The awareness of such a thing can have extremely positive effects over the forms of human organization, as its members can start the process of creating simple and efficient procedures able to offer the best solutions to contemporary social relations. Just like in the past, these elements will be useful in differentiating among the legal systems, as they will encourage other systems to use modern forms of expressing the juridical procedures and norms.

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Notes

1. Codification resulted also from the superiority of the static component of law.
2. This concerns adoption in a restricted sense, that is, that juridical operation which involved the passing of a son from under the power of a *pater familias* to another *pater familias*. This mention was necessary as adoption—broadly speaking—contained also adrogation, whose effect was that of passing a *sui iuris* person to another person's *sui iuris*.
3. The physiognomy of adoption was presented in the forms used until the time of Emperor Justinian, when it came just at the beginning after the declarations uttered in the presence of the magistrate, by the two householders recorded in the archives. C. St. Tomulescu, *Drept privat roman* (Bucharest: Tipografia Universităţii din Bucureşti, 1973), 149–150.
4. Jean Gaudemet and Emmanuelle Chevreau, *Droit privé romain*, 3rd edition (Paris: Montchrestien, 2009), 289.
5. Joan Miquel, *Derecho privado romano* (Madrid: Marcial Pons, 1992), 313.
6. *Gai Institutiones*, 3. 176.
7. *Gai Institutiones*, 3. 177.
8. René Robaye, *Le Droit romain*, 3rd edition (Bruxelles: Academia-Bruylant, 2005), 241.
9. Jean-François Brégi, *Droit romain: Les obligations* (Paris: Ellipses, 2006), 186; Manuel Jesús García Garrido, *Diritto privato romano*, 2nd edition, ed. Marco Balzarini, transl. Laura Biondo (Padua: CEDAM, 1996), 393.
10. See Constantin St. Tomulescu, "Rolul monedei în vechiul drept roman," *Analele Universităţii "C. I. Parhon"* (Bucharest) 11 (1958): 117–125.
11. Kaius Tuori, "The Magic of *Mancipatio*," *Revue internationale de droit de l'Antiquité*, 55 (2008): 499–521; György Diósdi, *Ownership in Ancient and Preclassical Roman Law*, transl. J. Szabó (Budapest: Akadémiai Kiadó, 1970), 64–72.
12. *Gai Institutiones*, 3. 119.
13. See Constantin St. Tomulescu, *Limba latină pentru Facultăţile de Ştiinţe Juridice*, vol. 1 (Bucharest: Litografia şi Tipografia Învăţământului, 1958), 14–16.
14. I. C. Cătuneanu, *Curs elementar de drept*, 3rd edition (Cluj–Bucharest: Editura "Cartea Românească," 1927), 501–503.
15. Paul Frédéric Girard, *Manuel élémentaire de droit romain*, 7th edition (Paris: Librairie Arthur Rousseau, 1924), 159; *Gai Institutiones*, 1. 113.
16. Pascal Pichonnaz, *Fondements romains du droit privé* (Paris: LGDJ; Zurich: Schulthess, 2008), 461.

17. Grigore Dimitrescu, *Drept roman,* vol. 2, *Obligaţiuni, succesiuni: Note de cursul predat studenţilor de la Facultatea de Drept din Bucureşti în anul II Licenţă* (Bucharest: Imprimeria Independenţa, n.d.), 190.
18. One of the prerogatives of these magistrates was the selling of war prisoners in public markets.
19. *Gai Institutiones*, 4. 62.
20. Gaston May, *Éléments de droit romain à l'usage des étudiants des facultés de droit*, 15th edition, rev. and enl. (Paris: Sirey, 1923), 149.
21. "Si pater filium ter venum duuit, filius a patre liber esto." Constantin Stoicescu, *Curs elementar de drept roman*, 2nd edition (Bucharest: Naţionala Jean Ionescu, 1927), 102.
22. Vladimir Hanga and Mircea Dan Bocşan, *Curs de drept privat roman*, 2nd edition (Bucharest: Universul Juridic, 2006), 144–145.

Abstract

The Utility of the Forms of Expressing Juridical Procedures in Roman Private Law

The Roman legal advisers created—for the first time in the history of law—the juridical procedures meant to build up a close relationship between the way in which will was achieved and its exteriorization. Being endowed with a keen practical spirit, they succeeded to formulate juridical notions meant to provide the most favorable frame for the exteriorization of the will of the subjects settled by the juridical relationships. The importance of consecrating the concept of juridical process, and especially the one referring to its form of expression, is of utmost significance because, given the flexibility specific to the forms of expressing the juridical processes, they supplied the Roman society with extraordinary vitality. Thus, they could be applied to any possible present or imaginary situation by contributing—alongside with the way of expressing the juridical norms—to the superiority of the dynamic component of the law as compared to the static one and, implicitly, to a permanent adaptability of the society to the new material conditions specific to globalization.

Keywords

juridical procedures, forms of expressing juridical concepts, equity, vitality, the static component of law, the dynamic component of law.