Case-Based Reasoning and Formulary Procedure, A Guard against Individual Emotions

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Abstract

Roman law achieved its greatness through a progressive improvement of tools designed to properly “set”, rather than “solving”, disputes.
This aspiration is well displayed in the first of the two stages in which the proceedings were organized, when the parties had to channel their claims into a scheme: the “formula”.
The formulas have been the best result that Roman legal reasoning could produce and they can still give us precious methodological insights.
With the help of some examples taken from the Digest and from contemporary judicial experience this paper will try to investigate the legal struggle between individual emotions and rationality.

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owner had nonetheless decided to leave it there ("do not worry; what could happen? I find it difficult to take the silver back home"). Is it conceivable that such a circumstance could not be presented before the 'judge'[52], at least in terms of acceptance of the risks inherent in the conditions of the house? After being put on notice of the risks for the night, in fact, the claim to be compensated for the loss of the silver could hardly be considered to be a request made in good faith. But instead of saying "do not worry", the owner could have shown his disappointment ("You should have told me in advance! Now I find myself in a difficult position"). In this case would it not be reasonable to believe that the borrower, insisting on keeping the silverware, had taken the risk upon himself for the night? I believe that during the second phase, before the judge, the 'custody rule' was not applied "mechanically", regardless of the circumstances of the case; on the contrary, it was possible to see the extent to which the rule could be adapted.

This case allows us to identify two different moments where emotions played a major role. The first was before the magistrate, during the first stage, since the choice of the formula depended on the factual details that the magistrate was willing to consider, with all the related implications of emotional character (we have seen that the same factual pattern could be addressed using different formulas: loan, deposit and mandate). The second was before the judge, since the final judgment depended on his willingness to give weight to specific factual details, each one of which was the bearer of precise emotions. Does this mean that even in Roman law emotions could have a disruptive force? No, because the margins of choice were in both moments very controlled. In the first stage the choice was not open but, as we have seen, limited to the schemas (formulas, rules, concepts) elaborated by the jurists. In the second phase, instead, the discretion of the judge was restricted by the specific formula agreed upon. Within that formula the factual circumstances could allow a deviation from the applicable rule (as seen for 'custody' rule) only when they were certain and worthy; if the circumstances suggesting the deviation were doubtful, the rule would have prevailed, that is, in case of doubt, the loss should have been suffered by the borrower.

6. Rules and precepts

The case of the "borrowed silver" has made possible to experience two different ways in which the rules can be used: one flexible and prudent, the other rigid and authoritarian. This conclusion gives the opportunity to make some general considerations about the difference that runs between rules and precepts, regardless of the historical context in which they operate.

The ways in which the rules (formulas or ordinary rules) are used can vary significantly: one can be called "creative", which implies the coordination of the chosen data within a schema (an abstract representation, stripped of non-essential details) capable of suggesting a unified meaning; the other, which we might call "applicative", in which an established schema (concept) would be merely applied. There is a considerable difference between making use of legal concepts or rules only after having retraced their origins (i.e., the problems that culminated in the formulation of those rules), and using them as a fixed pattern ready to be imposed on reality. In the first case, not losing sight of the paths that led to the creation of the rule, the interpreter would naturally be inclined to leave it open to possible developments; the rule would accordingly acquire its proper presumptive nature, with the goal of suggesting a potential outcome, which remains valid until circumstances arise that can suggest different outcomes. In the second case, by isolating the schema from its roots, the rule would acquire a rigidity that would encourage a process of mechanical application, thus losing the possibility of valorizing the minute characteristics of the case.