Case-Based Reasoning and Formulary Procedure

A guard against individual emotions

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DPSP Annual
Volume 1 (2020)

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.

Keywords

formula, setting, individual emotions, rationality, law, individualism, community

Cite as

Gardini, Marco. Case-Based Reasoning and Formulary Procedure: A guard against individual emotions. DPSP Annual, I: Research, Volume 1 (2020), 108-130.

Article Info

Research question · Law and Emotion
Reviewed by: Luca Nogler, Carel Smith
Volume 1 (2020)

1. The most appropriate viewpoint to understand civil law: the controversy

Even in systems where the law tends to present itself in the form of legal enactments, as it happens in most continental European countries, the primary element of legal experience is to be found in the process of setting and solving problems posed by real life. [1]

Take this case: a person asks another to lend him some silver for a banquet; at the end of the day the same person asks for the same silver for the following day; the lender cannot conveniently take the silver back to his house and, therefore, leaves it at the house of the borrower, where it is lost: who must suffer the loss? [2]

There are three solutions to every dispute: the first is to use violence to annihilate and impose the will of the most powerful; the second is for the aggrieved party to accept the loss without trying to pass it over to someone else; the third is to transform the chaotic dispute into a controlled controversy, in order to decide who is right and who is wrong. Here comes the law: the door of the law is opened when the parties renounce to use violence but are also not willing to forgive each other or, at least, to let things go. [3]

2. How to decide where the right is?

One option is for the parties to put the question, openly and freely, to a judge. This is indeed the most common course of action and, therefore, it is habitual to address the problem of "finding law" thinking "primarily of the judge". [4]

Is there an alternative to simply delegating the issue solely and exclusively to the judge, asking him to find the "right decision" in "the battle of arguments"? [5]

3. The formulas

The Romans addressed the problem of justice with a practical attitude. Every pretense of justice had to be converted into a specific claim. Every claim implies the desire to change something. The individual who pretended to have a right for a change had to state exactly what he wanted. The judicial process was held to ascertain whether or not the claim was right; if it was found to be wrong, things remained as they were. A philosophical attitude could have suggested that the right positions were many (A, B or C) and it was up to the judge to choose among them the one he preferred. The Romans, instead, believed that the right position could be chosen only through an adversarial procedure, the controversy, where the premises had to be agreed upon in advance and where the facts deemed to be relevant had to be selected and arranged in descriptions already approved. [6]

The Romans conceived a two-stage procedure for dealing with civil law disputes. [7] Above all, they tried to keep apart, as much as possible, the setting of the problem from its final solution with a judgment. [8] They always felt the need to 'declare' [9] in advance the criteria by which the claims made by the parties had to be addressed. [10]

The first phase of the judicial process was held before the magistrate and was devoted to

the choice of the facts and of the criteria by which the dispute was to be addressed. The criteria were inherent to formulas provided for by the magistrate in his Edict. The praetor's Edict benefited from the experience of the Roman jurists, whose activity was mainly devoted to the selection of the aspects of life that were worth to be considered "right" for the entire community. The incessant work of the jurists, therefore, allowed the refinement of the old formulas and the formation of new ones. [11]

The second phase was held in front of a private citizen, who was to serve as a judge charged with the duty to assess and evaluate the facts and give his 'opinion' [12] on the basis of the guidelines laid down in the first phase and now displayed in the formula.

The formulas confined the content of the dispute to what was strictly relevant. In addition, the preemptive setting was such as to allow only two possible alternative outcomes of the case (e.g.: "If it appears that..., condemn; if it does not appear, absolve"), leaving no space for ambiguity. [13] This feature of the Roman trial highlights the strong rational imprint of Roman law. Indeed, after having defined the case with the formulas, the judgment on the relevance of the arguments raised by the parties could be dealt with in a very straightforward way. Once transposed into a setting by 'mutual formal agreement' [14] the judge, as anticipated above, had only the task of hearing the witnesses and evaluating the arguments of the parties, in order to reach a solid 'opinion' regarding which side was right. Being an opinion, the judgment was final. The mistakes of the judge, or the possible false witness statements, could influence the outcome of the dispute, but they could not corrupt the law, since it had already been previously saved into the formula drafted in the first phase. If *Titius* was found right, when he was wrong, it did not create problems in terms of law. The important thing was that the criteria to decide had been properly set during the first stage. For us, today, this could sound unacceptable. For the Romans it was unacceptable as well, but in a different way. They dealt with the unjust sentence without questioning its outcome. Once the parameters to decide who should be right were correctly stated (and their correctness was assured by the fact that they were agreed upon over a formula sanctioned by the magistrate), any external circumstances, such as the misconduct of the judge or the mendacity of the witnesses, were dealt with in a separate proceedings, against the judge or against the witnesses; indeed, they were circumstances unconnected with the object of the judgment.

The need to protect the criteria, even at the expense of the individual judgment, should not surprise. For the Romans the main reference point of the law was represented by the community, not by the individual citizen. [15] The formulary procedure was permanently abolished by the sons of Constantine, who decided that the cases were to be decided by applying "the rules" directly, without the mediation of the formulas; [16] the tools that had protected the rationality of the law, in fact, as time went on, had begun to be perceived as insidious traps.

The benefit of a preventive agreement regarding the setting of a dispute can still be

experienced today in the canonical procedure. Can. 1676 § 3 describes the “formula of the doubt”: “The formula of the doubt not only is to ask whether the nullity of the marriage is established in the case but also must determine on what ground or grounds the validity of the marriage is to be challenged”. The hearing to agree on the formula is held before a judge and is used to define the reasons of nullity that the parties are ready to prove. The demand, therefore, is crystallized and will constitute the exclusive reference for the final judgment. If, for example, the validity of a marriage is being challenged because a spouse in the period prior to the wedding was in favor of divorce [17], and if subsequently the evidence shows no grounds for that reason of nullity, but shows grounds for a different one (for example, the exclusion of children [18]), the court will be forced to declare that the reason of invalidity agreed upon is not proven and he will not be allowed to declare the marriage null on the different ground emerged during the evaluation of the evidence. Things remained as they were prior to the commencement of the dispute.

In addition to guiding the parties in the process of selecting the viewpoint, the formulas presented another advantage: they could not be mistaken as “commands” or “prescriptions of conduct”. Scholten indirectly states that in the area of civil law the rules are the product of an ancient tradition, and not a fruit of political power (“which claim obedience”), more interested to mold reality than to understand and accept it as it is. [19] The formulas were immediately recognized as “tools” to solve the controversies. They were drafted to serve the need to solve a controversy, not to be imposed on reality. They immediately revealed which factual details were to be sacrificed and they were solution oriented, in that they suggested the outcome given certain premises. If a party wanted a different outcome, he could not simply say “I disagree”; he had to suggest a different formula, which meant pointing out different premises.

The formulas were also useful in bridging the unavoidable gap that separates words from reality. The illusion that the problem of words’ significance can be solved through a scrupulous use of a vocabulary has been replaced by the awareness that it requires a creative activity. [20] If we nowadays can assume that every lawyer knows that the meaning of a word must always be chosen in light of the facts of the case, it is nonetheless easy, after having been “inspired” by a word, to forget the reality that suggested the word and begin a journey through a path paved of words only. The formulas, however, contained an explicit agreement about a set of meaningful factual settings. Inside them the facts were already qualified and coordinated to reach a final result. The risk of neglecting the reality in favor of an abstract meaning was therefore significantly reduced. [21]

In conclusion, the formulas provided a final definition of the question of law before taking and evaluating the evidence, hence preventing an irrational interference of the emotions. As a matter of fact, when the judge alone is allowed to decide the relevant facts after the evidence has been examined, the risk of a unilateral and biased selection of the premises with hindsight increases. The law uses and takes emotions into account as long as they are part of something that can be shared with others. Individualism and law stand on opposite

sides. What is individual, indeed, destroys the space for categories, and law is all about categories.

4. Law and factual details

The citation "*in causa ius esse positum*" [22] quoted by Paul Scholten [23], comes from one of the most famous fragments of the Digest [24] in which Alfenus [25] was asked who, among many potential tortfeasors, should be sued; he first of all answered that the solution was to be found in the factual details of the case.

If the law depends on the facts, it should follow that the more facts are taken into consideration, the more accurate the decision becomes. One, however, shouldn't infer from this proposition that the more facts are taken into consideration, the more accurate the decision becomes. From a disorderly or excessive amount of factual details a standstill of the deciding process is likely to ensue. [26] A multitude of factual details ("the facts of the case itself") poses the problem of "relevance" and "coordination". Without establishing an order of precedencies it would be impossible to decide on right or wrong and people would be obliged to resort to free arbitration (or even to a "toss up"). In order to reach a rational decision, the facts should be organized into a perspective, and, in order to do so, some factual details should be sacrificed in favor of those that are considered the best on which to hinge the adjudication. The necessity to rely on a clear pattern is such that, in every judicial procedure, the need is felt to impose at least a timeline for changing the claim or advancing new ones. From a certain point on, the facts must be only those alleged to in the judicial proceedings, and those left outside should be treated as if they did not exist.

This necessity of restriction, however, should not be taken as an authorization to disregard the details of the case, even the most minute one. [27] Not knowing all the details, in fact, has many implications. First of all not knowing the details would imply a restriction of choice. But almost all factual patterns are susceptible to different interpretations and can therefore be set along different rules or formulas. [28] An historical event cannot have a univocal interpretation; the one case, one rule scenario is often either and illusion or a result of superficial legal awareness. It is therefore very dangerous to escape from facts as soon as a first clear legal pattern seems to emerge. At a certain point in time it is a necessity to set on a specific formula (or rule) and forget the alternatives but, doing that in a rush, it implies the risk of setting the dispute along a line that is wrong or unfavorable. The facts of the case carry all the emotional strengths that prompted the dispute. A sacrifice will be unavoidable, but not at the cost of disregarding the circumstances of the case.

In order to illustrate and sum up the main points outlined above I could use an example. The relationship of buying and selling is a complex operation, is practiced by many and on several occasions. We "know" it intuitively simply by living, since childhood. We abandon the intuitive dimension, that consists of an immediate, individual, emotional experience, when we want to explain that experience to others. [29] The legal purchase-sale experience

can be explained dividing it into meaningful segments, which seem to be suitable for the purpose we have in mind. There is for example the problem of the price. Has it to be monetary or may it also consist of a thing? With the segments we build an image, an articulated schema, which tells us, for example, that there must be at least two persons or, better, at least two parties.

While making these operations of clipping and describing the individual pieces, we proceed as needed (it is a work in action). But when we are asked to judge a case that at first glance seems to fall under the purchase-sale schema, we are confronted with an important methodological issue: do we proceed by overlapping each element of the purchase-sale schema with the individual facts under consideration, as if it was only a matter of performing an analytical and self evident operation, or do we first re-live the factual details and only afterwards do we look for the more adequate schema? In other words, which comes first, the rule or the case? The suggestion that emerges from Roman law is to adopt the second course of action and give precedence to the case. [30] As impeccably expressed by Paul Scholten, however, when we approach a case, we are bound to use our previous experiences:

> in the multiplicity of phenomena that gave rise to a lawsuit, the judge searches for the facts which are relevant for his judgment. He will not be able to do so without taking a rule as point of departure, without a decision in mind — why else would this fact be relevant and that not? In the administration of justice we can only perceive the facts in light of the rule, [in light of] the decision [31].

On the other hand, Paul Scholten, warns us to avoid the risk of acting as those who have a clear decision immediately in mind and they later collect the reasons for it. [32]

In sum, the rules can be both a point of departure and of arrival, but it is of the utmost importance not to forget the lesson of the jurist Paulus: we must first of all try to experience the case in all its nuances and, only afterwards, we will choose the applicable rule.

The categories are the realm of cognition, the facts are the realm of sentiments and intuitions. Bringing the facts into categories requires a quality that the Romans put at the top of all virtues that a jurist should have: *prudentia*. Being prudent means to ‘take care’ [33], and proceed cautiously only after having gained a deep comprehension of the case, so as to avoid that the chosen rule is felt as a violent interference with life [34].

This tells us that the emotions do play an important role. Understanding the case means being able to re-live it, with all the connected emotions. There is nonetheless the moment when the case has to be explained in rational terms, through a virtuous use of natural language and using the descriptions that we inherited in the form of rules (or formulas). That is the moment when some facts will be given precedence over others. From that moment on, the schema will be stronger than the individual emotions.

In conclusion I should only reiterate that when the rule (or formula) is chosen and agreed upon by the parties before the evidence has been taken before the judge, the law is safeguarded against irrational and uncontrollable subjective emotional interferences with hindsight.

5. The case of the borrowed "family silver

In order to explore the territory that separates life from legal categories and, therefore, in order to investigate the potential impact of emotions in the Roman civil law, it could be useful to take a better look at the case of Ulpianus [35] that I put in a nutshell at the beginning of the paper.

> If you asked me to prepare a dinner room and to give you the silverware and I did so and, the following day, asked the same and, due to the fact that I could not conveniently take the silver back home, I left it there and it was lost. What action can be brought and who must bear the risk of the loss? With regard to the risk Labeo [36] said there was a significant difference depending on whether or not I had put a guard in charge of the premises: If I put a guard, the risk was to be borne by me, if not, the risk was to be borne by the person with whom the things were left. My opinion is that an action for loan is to be brought, indeed the person with whom the things must answer for 'custody [37],' unless it was expressly agreed otherwise. [38]

As it habitually happens in the sources handed down through the Digest, the description of the facts is reduced to a minimum. Nothing is said about the role of the lender (was he a private individual; was he a person who used to organize banquets?), and about the ties between the protagonists (was there an old bond of friendship, kinship, business?); nothing is said about the context that justified the loan (was it made for an event that involved also the lender?), nor on the details of the premises where the dinner was to take place, nor on the people who would take part to it, nor on the defenses for the night; what happened to the silverware, finally, is hidden behind the expression 'was lost [39]', that veils the exact causes and circumstances of the loss of the silverware.

The description of the events culminates in two questions: a) what action can be submitted; b) who has to bear the risk of the loss. The order of the two questions suggests, correctly, that the allocation of the loss depends on the setting of the case along a template, and not vice versa.

Which scheme is better suited to frame the case? At first glance one would think of a "loan for use" but, in principle, different configurations cannot be ruled out. A second option would be that the lender, leaving the silver for the night, has entered into a "deposit", which is an operation done for his own interest; if that was the case, there is no doubt that the risk would be imposed on him, as there would be no reason to depart from the general rule according to which 'it is the owner who bears the loss of his goods' [40]. The depositary, in fact, answers for fraudulent actions only, while in the loan-lease the borrower answers not only for negligence but also for 'custody'. The facts of the case may, however, be read in a third way, by emphasizing the importance of the assignment being

requested to the owner of the silver [41], obtaining, as a result, a "mandate". There could finally be a fourth possibility, which is, subdividing the case into three distinct operations: a loan (for the first day), a deposit (for the night), a loan (for the following day).

The few factual details offered by Ulpianus outline a relationship based on the request to be able to enjoy things owned by others, and the acceptance of this request by the other without a consideration; it is therefore likely that Ulpianus wanted to draw attention to a setting that has the typical features of a 'loan for use' [42] and to look at the matter from the perspective of the action for loan. [43] What happened to the silver is likely to be a theft; otherwise it would be necessary to think of 'events' [44] such as a landslide or a robbery, the consequences of which would normally be suffered by the owner.

At this point the problem is to choose the formula best suited to address the problem proposed. According to Gaius [45], the borrower had two available templates, a '*formula in factum'*, [46] which restricted the liability only to the willful conduct of the borrower, and a ' *formula in ius'*, [47] in which the judge was asked to adjudicate the recovery of any loss suffered on the basis of what was considered to be fair. The '*formula in factum'* gave the judge little room to weigh the peculiarities of the case; the '*formula in ius'* was therefore best suited to enable the judge to give weight to the circumstances of the case. In the case presented by Ulpianus, however, the judge was expected to apply the criterion of 'custody', which suggests that, in case of theft, the loss should be suffered by the borrower, who was in the best position to protect the good and who, moreover, was the only beneficiary of the operation. Applied as a strict rule, however, the 'custody rule' could turn flexible proceedings, in which the judge must 'adjudicate using the standard of good faith' [48],into the equivalent of 'rigid proceedings' [49]; in other words, the flexible proceedings in theory allow the judge to decide on the basis of what he deems fair, but if the 'custodyrule' was interpreted in a rigid way ("every time there is a theft, the borrower is to be condemned") there would be no room whatsoever for exceptions based on the particularities of the case. It would consequently be important to ascertain whether or not Ulpianus set the rule "in abstracto", apart from the case, or "in view of the case". [50]

Both Ulpianus and Labeo actually show the willingness to find room for exceptions to a rule that, read in the above mentioned abstract way, would always trigger liability. Labeo says that the rule does not apply if the lender put a person of his choice in charge of monitoring the scene. By doing so, in fact, the main justification for the use of the rule of 'custody' (consisting in the fact that the lender, entrusting the good to the borrower, loses control of the good), is eroded. Unlike Labeo, Ulpianus says that the borrower must not suffer the loss every time the parties have agreed to this effect. It would seem a quite narrow exception. What remains to be seen, therefore, is if the expression '*aliud nominatim convenit*' could refer to something different than an explicit agreement. The margin for such an interpretation is narrow because the adverb "*nominatim*" means 'by name', i.e. with words. A translation that whished to be respectful of the text, should be "unless expressly agreed upon with words". It is true that an explicit agreement would solve the

problem more effectively than any presumption; it would eliminate the problem at its roots. However, such a translation would credit Ulpianus with an unusual rigidity and, therefore, the narrow margin mentioned above is worth to be explored, in order to see whether the expression could be construed as to include inferences to be made on the basis of special circumstances (i.e., non verbal agreements). In order to do so, it could be useful to enrich the minimal description provided by the Digest [51] with hypothetical details, and then evaluate their relevance. Let us assume, for example, that at the end of the first day the borrower had shown that the sites were not entirely secure and that the 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.

The presumptive nature of the rules neatly differentiates them from precepts. The rules should be considered as ‘rulers’ [53] (this is the literal meaning of the Latin word *regula*), instruments for judgment based on certain premises; if the premises change, the rule must be accordingly tuned or substituted with a different one. [54] The adjusting process stops only when one encounters circumstances so individual that they are not worth to be picked up within a rule. A rule, indeed, to be a rule, must consider the facts in a simplified manner; it cannot gather the extreme peculiarities of the case without thereby losing its ability to be a rule. At the same time, the rule, being unable to embrace all details, cannot point to the final outcome of the case, as if they should be achieved at any cost, bending the facts of the case to the rule, rather than adapting the rule to facts.

7. Facts and individual emotions

I would briefly return to the case of the borrowed silver in order to make a final consideration with specific regard to the role played by emotions. Above I tried to consider the impact of small factual details. I have however confined the hypothetical occurrences to facts that could be relevant at a general level (the presence of a guard, the insistence on leaving the silver for the night, etc.). What can be said, however, of those individual conditions that the law cannot generally afford to consider? Could, for example, the hypothetical poverty of the lender, in contrast with the hypothetical opulence of the borrower, have influenced the decision of the judge? It is very difficult to give a well-grounded answer. What could be said, however, is that the Romans were inclined to give weight only to facts that were selected through a rational process, a process that could explain the reasons of the exception to the rule. [55] The exceptions were hardly left unexplained, as the fruit of an intuition. The formula, and the supporting jurisprudential

rules (in this case the rule of *custodia*) were, as said above, a safeguard against emotional mistakes, because they forced to make explicit choices and agreements about the conceptual frames in which the decision had to be embedded. The impact of individual emotions, however, cannot be ruled out, especially if one considers that the judgment was given without explaining the reasoning.

8. Criminal and administrative law: a different room for emotions

I would now like to review two contemporary cases that I have selected in order to illustrate the impact of emotions on judicial issues when the law seems to be left without safeguards.

I chose two cases taken from the contemporary criminal and civil Italian law.

8.1 The El Aofir case

In Milan, August 17, 2003, a non-EU citizen took possession of a Lancia car parked on Viale Ungheria. The police, alerted by the owner, began an immediate search. The patrol "Fox 49" intercepted the car and, at gunpoint, almost blocking the road, summoned the driver to stop. He stopped, opened the door, but suddenly he shut it and resumed the escape with the car, succeeding in going through the narrow gap between the middle road and the Carabinieri's car (one of the officers had to jump aside to avoid being run over). Pursued by "Fox 49" and other alerted patrols, the fugitive was stopped by cars in line waiting at a traffic light. To disentangle himself from that situation, the fugitive performed a U-turn maneuver, jumped above the curb, and took the urban ring road in the wrong direction, putting himself in the third lane, the one occupied by the fastest cars proceeding in the opposite correct direction. The fugitive was closely followed by the patrols "Fox 49" and "Fox 74", which were forced to stop the pursuit, in order to avoid collisions with cars coming in the opposite direction. Meanwhile, from Vimercate proceeded on the third left lane a Ford Focus where, in the back seat, was lying a child of five. At the exit of a curve, the fugitive Lancia found himself confronted by the Ford. It tried to avoid it by steering to the right, where, however, there was another car. The Ford Focus collided head-on with the Lancia Dedra, bucked and capsized. The little five-year old, not restrained by seat belts, was projected out and died two days later, as a result of the trauma.

After the arrest, the fugitive claimed to have acted under the influence of psychotropic drugs and alcohol. No tests were made on this, but the doctor who intervened in the immediacy of the incident did not consider it to be true. According to testimonies, the fugitive proceeded without hesitation at speeds exceeding 100 miles per hour, sometimes pointing the cars that were coming in the opposite direction, and then dodging them at the last moment by moving to the left. The witnesses were unanimous in stressing the particular determination of the fugitive, who had continued to drive without fear; otherwise, it was said, he could have chosen to take the emergency lane or he could have stopped the vehicle and continued to escape on foot, through the fields.

The case was interpreted as follows: given that the death of the small child and the injuries suffered by other drivers were directly related to the conduct of the defendant, it is to be decided only whether the defendant should be held accountable for willful or reckless homicide. With the exception of a brief reference contained in the appeal to the Supreme Court, the fact that the baby was asleep in the back seat without being secured to the belt has never been given consideration.

On 21 March 2004, the court of first instance made the following reasoning: given that the fugitive would flee at all costs, despite the "clear risk" of colliding with other vehicles, he must be deemed to have accepted the risk that his conduct would cause death or injury to other drivers. The defendant was therefore held accountable for aggravated “indirectly willful” murder and bodily harm. He was therefore sentenced to 24 years in prison, which later on was shortened to 16 years only for reasons of procedural benefit.

The following year, May 9, 2005, on appeal, the penalty was raised to 18 years in prison. Following a path outlined by a Supreme Court decision [56], the notion of “indirect willingness” was replaced with “ordinary, direct, willingness”. The switch was explained as follows "you have direct intent whenever the harmful event is an ancillary consequence, necessary or highly probable, of the main wanted event." The defendant was therefore convicted of ordinary (intentional) murder.

A few months later, on 23 November 2005 [57], the ruling was upheld by the Supreme Court on the basis of this argument: "when the realization of certain facts is highly probable, by accepting them, the agent wants them."

The prevailing case law considers that the agent responds on the basis of indirect willingness, instead of gross negligence, every time the event was expected and accepted as the price to be paid in order to reach a specific result. [58] In this case, the defendant wanted to escape. Did he, in order to escape, would have agreed even to kill someone? In order to test this “acceptance”, is it sufficient to measure it against an abstract event (death of a man) or must the “acceptance” be measured against the event actually occurred (head-on collision of his car with another car, resulting in the death of a child)? Here the tension between the category and the actual case can be felt in a very sharp way. The main facts on which the court inferred intent (indirect in first instance, direct in appeal) were: high speed driving in the wrong direction; swerving at the last moment; not having given up the escape; absence of a driving license. These are all willful rings of a chain that ended with a death.

In order to blame the last fatal episode on willingness, there is the need to make a logical leap, that can be done by hinging on the notion of “knowledge and forecast". [59]

The historical roots of this argument can be traced back to a famous passage of Celsus [60], that during the Middle Ages had encountered considerable fortune (the so-called *lex quod Nerva*). [61]

"The fact that Nerva [62] said, that gross fault was 'willful misconduct' [63], was not subscribed to by Proculus, but I believe it is very true. Indeed, if a person is not careful, as he should according to the nature of men, he betrays the faith put in him unless he takes care of the thing deposited using his habitual care. He therefore cannot be considered to have respected the faith put in him if he shows for the thing deposited with him less care than in relation to his things."

Celsus describes the disagreement between Nerva and Proculus [64] about the scope of a rule according to which the depositary must answer for the damages or loss of the things deposited with him. The ordinary rule requires that the depositary can be asked to answer only on the basis of a willful conduct. Without the proof of a willful conduct there could be no action. Nerva came up with the following argument: the depositary who, for the things deposited with him, does not use the same degree of care he uses for his own things can be considered to have acted with fraud (willingly, not negligently). For example, the basement is being flooded and the depositary brings his belongings to safety, leaving the others things in the water. He knows that the water will damage them and, leaving them there, is considered like having wanted the result.

As already said, the point of Nerva, approved by Celsus as "most true" [65] was justified by the fact that the action *in factum* for deposit was available in case of fraud only. [66] This explains why, in order to allow the plaintiff to obtain a monetary redress, Nerva and Celsus suggested to equate knowledge with intention: you knew? then you wanted. Can this equation be easily transplanted from the field of compensation (where what is given to one party, is taken from the other party and what is not given to one enriches the other) to the field of criminal law, where the judgments are individual (the question is only whether or not the agent must be punished)? The different logical character of criminal law and the severity of its consequences should suggest to use the equation only with the utmost care.

In a comment to the trial decision, it was observed that the acceptance of the event as it actually occurred (head on between the car of the fugitive and the car carrying the child), would have required not only the acceptance of the death of others (including that of a child), but also the death of the agent himself. [67] The instinct of self-preservation would normally be the strongest. The steering itself could be seen as the expression of a hope of avoiding any accident.

It is my strong belief that, in this case, powerful emotional factors that pushed in favor of the equation suggested by Nerva played a pivotal role. The accused was of Moroccan nationality. From a research that I have personally done on the web, the media had emphasized the tragic loss of the child, creating a widespread feeling of disdain. Newspaper articles were commented by the readers with considerations that certainly were not inspired by understanding or forgiveness. The mother's grief over the loss of her child had made inroads in many minds: the minds of the patrol agents, the minds of the judges and even the minds of the lawyers assisting the defendant. [68] The emotional background

that surrounded the handling of the case was apparent also in terms of style: in the documents of the court the victim was always referred to as "the little Nicolò", while the defendant's name was frequently misspelled (the correction was made only by the Supreme Court) and his actions were invariably described choosing terms that betrayed loathe. In this context, the court had to choose between two settings: involuntary manslaughter, allowing for a penalty of a maximum of seven years and eight months in prison, or voluntary manslaughter, requiring a minimum of twenty years in prison. It looks like the judges oriented the facts so as to justify a charge that allowed for a severe and fast judgment. [69]

This case seems to validate the theory according to which "indirect intent" is a tool to conceal a moral judgment, so that intent is recognized in a "bad" man and denied in a "good" man. [70]

8.2 The Stamina case

A group of people led by prof. Vannoni (degree in literature and philosophy) developed a therapeutic treatment for neurodegenerative diseases based on specially treated stem cells. Many patients, convinced of the efficacy of the treatment, requested the opportunity to benefit from it at the expense of the National Health Service.

In the Public Hospital of Brescia, on the basis of an agreement with the foundation that promoted the "stamina method" [71], the administration of the therapy began.

Upon learning of this practice, the AIFA [72] issued an ordinance forbidding the therapy. [73]

To this prohibition many patients reacted by resorting to civil courts (chosen on the basis of the place of residence of the patients), requesting the issuance of interim measures to allow them to continue the treatment at the hospital in Brescia. Several judges operating in different Italian cities [74] granted the requests of the patients and, consequently, ordered the hospital in Brescia to continue the treatments.

A Scientific Committee established by the Minister of Health for assessing the efficacy and safety of the treatment expressed a very negative opinion, but the clash between individual measures provided for by the civil courts and the directives coming from public bodies continues.

A criminal investigation conducted by the public prosecutor in Turin has also begun and has ended with a plea agreement of prof. Vannoni.

What are the reasons for this clash between institutions? The "case" originated from the competition of two jurisdictions, the civil and the administrative. The Italian legal system, in fact, allows citizens to apply to ordinary courts to obtain all the necessary measures to protect "fundamental personal rights"; the "right to health" is considered to be one of them. If a provision of a public nature interferes with the right to health, the citizen is consequently allowed to resort to ordinary civil courts to obtain a non-application of the

administrative directive in his specific regard.

The Stamina "case" reveals a community crumbling under the weight of desperate patients, emphasized by the power of the media. In a recent lecture at the University of Parma, prof. Gragnoli, told his personal experience with a similar case, fifteen years back, in Modena, with regard to a contentious treatment for cancer. He revealed the confession of a judge who said he had often decided in favor of the claiming party even if he was not really convinced of the scientific soundness of the cure. Why? Who am I, said the judge, to kill the last hope of these people? The problem is that by doing this the judge was, at best, being generous using the fiscal resources of the community. On one side there where the patients bringing their sufferings inside the court room, on the other side there was the budget of the Italian National Health System. The generosity of the judge, moreover, could be misplaced and result in false illusions and dangerous treatments. Here we touch once more the dramatic clash between the individual person (with a name ad a surname) and the community. [75] The interest of the community usually comes in the form of an abstract reasoning, and the judge is required to be "an agent of the community". Should the reasoning prevail over the real person? What if it is wrong?

The more the judge is left alone, the more difficult it is to administer justice without falling victim to the emotions.

9. Conclusions: law and individualities

Roman law was sensitive to the particularities of the individual case, but firm in its principles. [76] The principles could be firm, because there was a community that was committed to maintain the system. The rationality of the system could be experienced at its best in Roman private law, where it was up to the parties to choose the setting of the case before the evidence had been heard and examined.

Today we have lost sight of the value of the setting phase of the controversy. In private law cases the parties can state their claims without restrictions and the judge, eventually, finds himself alone to decide both the setting and the outcome. He alone has to decide the facts that are to be given precedence over the others and he must do so after having seen the results of the evidence. How does he decide? He has to fight many temptations: the temptation to escape from the facts too soon [77], to oversee the facts he does not want to see or, worst of all, to conceal or change the facts he does not like because they do not fit with the outcome he has already chosen.

Through the use of the formulas, however, we have seen how the Roman judicial proceedings could be safeguarded against ungovernable individual emotions. They are a component of our life and, as such, have always played and will continue to play an important role to understand reality. The law, however, works on a different tune. A judgment should be just and, in order to be so, it must be based upon premises that are clear, fixed and common to both the parties. If the premises are foggy or keep changing,

the adjudication will be controlled by the more powerful individual emotions (of the judge or of one of the parties).

We often experience the dramatic friction between the boundaries of a category, that embodies the law and the subjective expectations of individual persons. The two examples that I have selected outside civil law show how difficult it is, in the absence of a rigorous and shared setting of the case, to separate law from individualities, with the result that the concrete decisions tend to be founded on grounds that are "other than intellectual ones." [78]

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Dictionary

- adjudicate using the standard of good faith. “Iudicium ex fide bona.”
- custody. “custodia”
- decision. “iudicium”
- declare. “dicere”
- event. “periculum”
- it is the owner who bears the loss of his goods. “Res perit domino”
- judge. “iudex”
- loan for use. “commodatum”
- most true. “Verissimum”
- mutual formal agreement. “litis contestatio”
- opinion. “sententia”
- rigid proceedings. “Iudicium strictum.”
- ruler. “regula”
- taking care. “prudens”
- The law is to be found in the features of the case. “in causa ius esse positum”
- was lost. “perierit”
- willful misconduct’. “dolum”

Cases

- Cass. 13/1983, (z.d.).
- Cass. 1703/2000, (z.d.).
- Cass. 42219/2005, (z.d.).

Legislation

- Codex Justinianus. *Code of Justinian. Codex Iustinianus, Paul Krüger (ed.) (editio stereotypa;* 1877.

Names

- Alfenus. “was a Republican Roman jurist who lived during the first century B.C.”
- Celsus. “a Roman jurist who lived between the first and second centuries A.D.”
- Gaius. “Gaius (floruit AD 130–180) was a celebrated Roman jurist.”
- Labeo. “Marcus Antistius Labeo (d. 10 or 11 AD) was an ancient Roman jurist”
- Nerva. “Consul before 24 AD. Jurist, frequently mentioned by other jurists of the classical period.”
- Paulus. “Julius Paulus (fl. 222–235 AD), Roman jurist.”
- Proculus. “Proculus was the name of an ancient Roman jurist, around 50 A.D.”
- Ulpianus. “a Roman jurist who lived between the second and third centuries A.D.”

Institutions

- arbiter. “appointed by the magistrate to reach a settlement between parties that were not standing on neatly opposed positions, employing a considerable amount of discretion”
- civil law. “private law” (Private law and civil law are exchangeable in this article. To be precise civil law is a part of private law, that includes real rights, obligations and responsibility, leaving out the commercial law. The distinction in Italy has no longer reason to exist.)
- classical. “the first two and a half ages AD”
- Digest. “The Digest, also known as the Pandects (Latin: Digesta seu Pandectae), is a name given to a compendium or digest of Roman law compiled by order of the emperor Justinian I in the 6th century (AD 530-533).”
- Eleatic school. “The Eleatics were a pre-Socratic school of philosophy founded by Parmenides in the early fifth century BC in the ancient town of Elea. Other members of the school included Zeno of Elea and Melissus of Samos. Xenophanes is sometimes included in the list, though there is some dispute over this. Elea, whose modern-day appellation is Velia, was a Greek colony located in present-day Campania in southern

Italy."

- formula in factum. "restricting the liability only to the willful conduct of the borrower"
- formula in ius. "asking the judge to adjudicate the recovery of any loss suffered on the basis of what was considered to be fair"
- iudex. "appointed by the magistrate to decide between parties standing on neatly opposed positions because of the chosen formula, leaving no space for ambiguity"
- legis actionis. "the forms of actions which had to respect the instructions of the law of the Twelve Tables"
- pre-classical. "the last two ages BC"
- proceedings "per formulas." "i.e. that the parties are to set up their dispute following a template that is agreed upon by them, with the consent of the magistrate, on a case by case basis."
- Twelve Tables. "According to Roman tradition, the Law of the Twelve Tables (Latin: Leges
- Duodecim Tabularum or Duodecim Tabulae) was the ancient legislation that stood at the foundation of Roman law."
- Ulp. 28 ad ed. D.13.6.5.14. "The Digest of Justinian (abbreviated as 'D') is composed of 50 'books' (the number of the book is indicated by the first number after 'D'). Each book is divided into 'Titles' (second number after 'D'). Each Title is divided in 'Fragments' -in the past referred to as 'Laws'- (third number after 'D'). Each 'Fragment' is divided into 'Paragraphs' (fourth number after 'D'). The abbreviation 'D.13.6.5.14', therefore, pinpoints the fourteenth paragraph, of the fifth fragment, of the sixth title of the thirteenth book of the Digest. In the Digest each fragment is preceded by a summary indication of the author and the work from which the fragment was extracted. 'Ulp. 28 ad ed.' indicates that the fragment was extracted from the 28th book 'Ad Edictum' of Ulpianus ('Ulp')."

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[1] Paul Scholten wrote his General Method of Private Law in a time that obliged him to accept the formal preeminence of legislation. He was, however, perfectly conscious of the fact that legal enactments are nothing but a tool in the hands of those who must solve actual and concrete legal issues. "The parliamentary system tries to find a method to discover [what law is] and to distill legal rules from it. How poorly it succeeds in this. Scholten, "General Method of Private Law." block 492

[2] This is a case by Ulpianus, "a Roman jurist who lived between the second and third centuries A.D." See Mommsen en Krueger, *Iustiniani Digestae*, Ulp. 28 ad ed. D.13.6.5.14. "The Digest of Justinian (abbreviated as 'D') is composed of 50 'books' (the number of the book is indicated by the first number after 'D'). Each book is divided into 'Titles'

(second number after ‘D’). Each Title is divided in ‘Fragments’ -in the past referred to as ‘Laws’- (third number after ‘D’). Each ‘Fragment’ is divided into ‘Paragraphs’ (fourth number after ‘D’). The abbreviation ‘D.13.6.5.14’, therefore, pinpoints the fourteenth paragraph, of the fifth fragment, of the sixth title of the thirteenth book of the Digest. In the Digest each fragment is preceded by a summary indication of the author and the work from which the fragment was extracted. ‘Ulp. 28 ad ed.’ indicates that the fragment was extracted from the 28th book ‘Ad Edictum’ of Ulpianus (‘Ulp’).” The case will be analyzed later in this paper.

[3] “Law” and “forgiveness” represent a distinct alternative, an alternative which is easy to oversee under the influence of the notion of justice, a notion that apparently conveys the best of all virtues and stays at the top of our contemporary lay ethical points of reference. The gap, however, is clearly perceivable comparing the Roman with the Evangelical proposal. Ulpianus says “Justice is made of the constant and perpetual effort to give to each person what he is entitled to” (Ulp. 1 *reg.* D.1.1.10 pr.: *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*). The Evangelist Matthew (5:38-42), after having urged the adoption of a “no resistance” attitude, replacing the “Eye for eye and tooth for tooth” rule (Ex 21:24) with the offer of the “other cheek”, suggests the following: 39 If anyone wants to go to law with you over your tunic, hand him your cloak as well. 41 Should anyone press you into service for one mile, go with him for two miles. 42 Give to the one who asks of you, and do not turn your back on one who wants to borrow.” (http://www.vatican.va/archive/ENG0839/__PVE.HTM) I must say that, in this regard, I agree with Liesbeth Huppes-Cluysenaer, who pointed out that most of the time people do not forgive but, nonetheless, “let things go” just to avoid the trouble of a conflict. Many times, unfortunately, the forbearance, the act or refraining from exercising a legal action, when it is not coupled with true forgiveness, generates a dangerous sense of frustration that poisons the atmosphere of peace that one wanted to preserve.

[4] Scholten makes clear that when one is occupied with the problem of finding law, “one thinks primarily of the judge although this is not the only one who has to find the law. Scholten, “General Method of Private Law.” block 9.

[5] The reference to the “battle of arguments” is inIbid. block 465.

[6] The importance of this selecting process was expressed by Paul Scholten in this way: “To conceive of facts in terms of a rule, and of a concrete rule in terms of a general rule, it is necessary to put aside the particularities of that which is given. Application of law is not possible without simplification of the information. ”Ibid. block 212, which refers in this passage to Sauer, *Grundlagen des Prozessrechts*.

[7] civil law, “private law.” is the branch of law that deals with the relationships between private individuals who confront each other on equal standing. The Romans designated these proceedings as *iudicia privata*, as opposed to *iudicia publica*, which were designed to prosecute criminal conducts. For a general reference to the Roman law of civil procedure *see*

Kaser, *Roman private law.*, 390-434.

[8] Scholten was aware of the delicacy of the preliminary setting process necessary to reach a judgment: “in the multiplicity of phenomena that gave rise to a lawsuit, the judge searches for the facts which are relevant for his judgment. Scholten, “General Method of Private Law.” block 467.

[9] “dicere.”

[10] This is in sharp contrast with the present necessity of giving the rule “simultaneously with the decision” Scholten, “General Method of Private Law.” block 39. In the early Roman period the proceedings were called “*legis actiones,*” “the forms of actions which had to respect the instructions of the law of the Twelve Tables.”; later on, however, the proceedings became "*per formulas*",“i.e. that the parties are to set up their dispute following a template that is agreed upon by them, with the consent of the magistrate, on a case by case basis.” In the formulary procedure the forms of action had become flexible and more capable of adjusting to the complexities of reality.

[11] Kaser, *Roman private law*. 409-410, believes that the pre-classical, “the last two ages BC.” and classical, “the first two and a half ages AD.”,devoted the highest degree of mental energy to the elaboration of theformulas (*formulae*) that were gathered in the praetorian edict.Roman jurisprudence is an example of methodology to understand reality (the theme of Roman jurisprudence has recently been the subject of an extensive work: Schiavone, Carden, en Shugaar, *The invention of law in the West*.). The law was extracted from the solutions to real life problems that were worth to be valorized beyond the individual case. It might be that it was also this peculiar Roman experience that inspired Scholten when he wrote that “it is the task of the jurist to analyze which aspects of the judgment can stand generalization and will therefore also be important in other cases, and which aspects must be seen as purely individual.“ Scholten, “General Method of Private Law.” block 477. This approach of Roman law was the product of a severe custom, which demanded that, in order to have legal significance, and therefore be worthy of consideration by the entire community, the facts had to be framed into precise forms. The history of Roman law can be seen as a gradual process through which, moving from templates in which reality was rigidly imprisoned, new legal frames have gradually emerged in order to address the complexity of reality to the best possible extent. This was done by drawing up new templates and adapting old ones.

[12] “sententia.”

[13] It must be said that next to the *iudex*, “appointed by the magistrate to decide between parties standing on neatly opposed positions because of the chosen formula, leaving no space for ambiguity.” there was the option of the *arbiter* “appointed by the magistrate to reach a settlement between parties that were not standing on neatly opposed positions, employing a considerable amount of discretion.” (the *iudex* decided *iudicia*, the *arbiter*

decided *arbitria*). Cicero noted that the *iudicia* were firm, while *arbitria* were flexible. The firmness derived from the rigidity of the alternative true-false that characterized the *iudicia*.

[14] “litis contestatio.”, which had two effects: bind the parties to accept the judgment and preclude a second decision “iudicium.”on the same issue.

[15] This is what I believe was Scholten thinking when he wrote that “A legal decision is never purely individual, as opposed to a moral judgment. Scholten, “General Method of Private Law.” block 476. The incompatibility between the law and the individualistic dimension is explained in clear terms in Villey, *Le droit et les droits de l’homme*.

[16] The sons of Constantine ordered in 342 A.D. that the formulas, that with their entrapping words posed a threat to the judicial proceedings, must be eradicated (“ *Iuris formulae aucupatione syllabarum insidiantes cunctorum actibus radicitus amputentur”* Codex Justinianus, *Code of Justinian*.

[17] Diocese of Madison, “Explanations of the Grounds of Nullity.”: “The groom's parents were divorced when he was very young. Both his parents have since been married several times, with each marriage ending in divorce. All of his aunts, uncles, siblings, and close friends have been married several times to several different people. In his mind, marriage can end whenever the spouses are ready to move on, and he has never really considered the possibility of an indissoluble marriage. When he promises to stay with his wife "until death do us part," he thinks it is just a nice figure of speech” (Madison, Wisconsin, U.S.).

[18] For example: “The bride and groom agree before the wedding that they will never have any children under any circumstance. They consistently use contraception throughout the course of their marriage. When they conceive a child despite using contraception, they choose to have an abortion”.Ibid.

[19] “The doctrine that reduces all law to commands, would never have gained such an acceptance if people had also taken private law into account, and not just penal law”. Scholten, “General Method of Private Law.” block 85.

[20] “[T]here is an authority here, which must be respected, not one, which requires unconditional surrender” Ibid. block 169.

[21] Words should be used, not suffered as something that imposes itself at all cost. The problem of word’s significance is the same as Scholten describes with regard to written law: “he has to respect the authority of the written law, and of the words, but that in the end these words are nothing other than a tool. Ibid. block 166.

[22] The law is to be found in the features of the case, “in causa ius esse positum.”

[23] Scholten, “General Method of Private Law.” block 39.

[24] D.9.2.52.2 Alf. 2 *dig.* see for explanation nt. 2.

[25] Alfenus, “was a Republican Roman jurist who lived during the first century B.C.”

[26] “Tout comprendere c’est tout pardonner” Tolstoy, *War and Peace*, 117. (see answer to reviewers for the little adjustment which was made here)

[27] Most of the time the facts of the cases are neglected. Even the best descriptions are incomplete. It is often very difficult for the scholars to formulate a sound opinion of a case without having access to all the procedural documents.

[28] The formulas could be considered as a special type of rules.

[29] For a general overview of the rational underpinnings of the legal experience see Beduschi, *Tipicità e diritto*.

[30] Paulus, “Julius Paulus (fl. 222–235 AD), Roman jurist.” wrote a conclusive explanation on this point: “a rule is something which briefly describes how a thing is; the law may not be derived from a rule, but a rule must arise from the law as it is; by means of a rule, therefore, a brief description of things is handed down.” (D.50.17.1 Paul. 16 *ad Plaut.*: *regula est, quae rem quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat. Per regulam igitur brevis narratio traditur*...). This passage was the gist of Gardini, “Damnum Iniuria Datum and the Law of Torts: From Cases to Rules.”, 83-94.

[31] Scholten, “General Method of Private Law.” block 469.

[32] Ibid. nt. 55.

[33] “prudens.”

[34] I could not come up with a better description of the quality of the good jurist than the one given by Scholten: “It is not unjust that in the end the ideal judge is not the one who is sharp witted or learned, but the one who is wise” Scholten, “General Method of Private Law.” block 528.

[35] See footnote 2.

[36] “Marcus Antistius Labeo (d. 10 or 11 AD) was an ancient Roman jurist.”

[37] “custodia.” The latin word *custodia* cannot be easily translated. The word expressed a criterion to apportion liability that mainly suggested that the borrower should be held accountable for ordinary theft even in the absence of fault.

[38] D.13.6.5.14 Ulp. 28 *ad ed.*: *Si de me petisses, ut triclinium tibi sternerem et argentum ad ministerium praeberem, et fecero, deinde petisses, ut idem sequenti die facerem et cum commode argentum domi referre non possem, ibi hoc reliquero et perierit: qua actione agi possit et cuius esset periculum? Labeo de periculo scripsit multum interesse, custodem posui an non: si posui, ad me periculum spectare, si minus, ad eum penes quem relictum est. ego puto commodati quidem agendum, verum custodiam eum praestare debere, penes quem res relictae sunt, nisi aliud nominatim convenit.*

For some references on this fragment see Gardini, “Damnum Iniuria Datum and the Law of Torts: From Cases to Rules.”, 155-172.

[39] “perierit.”.

[40] “Res perit domino.”

[41] The expression “*sternere and ministerium praebere* could imply a request to prepare the room for the banquet

[42] “commodatum.”

[43] *Actio commodati*.

[44] “periculum.”

[45] “Gaius (floruit AD 130–180) was a celebrated Roman jurist.”

[46] “restricting the liability only to the willful conduct of the borrower.”

[47] “asking the judge to adjudicate the recovery of any loss suffered on the basis of what was considered to be fair.”

[48] “Iudicium ex fide bona.”

[49] “Iudicium strictum.”

[50] See Scholten, “General Method of Private Law.” block 472.

[51] “The Digest, also known as the Pandects (Latin: Digesta seu Pandectae), is a name given to a compendium or digest of Roman law compiled by order of the emperor Justinian I in the 6th century (AD 530-533).”

[52] “iudex.”

[53] “regula.” What is meant is defined by Google translate as: “a straight strip or cylinder of plastic, wood, metal, or other rigid material, typically marked at regular intervals, to draw straight lines or measure distances.”

[54] Scholten has perfectly expressed this fundamental quality of the rules by saying that “The rules, which the judge uses, are auxiliary, they are not decisive. The case can be of such a nature, that despite the rule, a conclusion is accepted which is opposite to that which one would have expected according to the rule.” Scholten, “General Method of Private Law.” block 38. In block 473, the same point is made even more clearly: “the rule transforms by itself, application is formation of law and therefore this formation is partly happening on the basis of the case.

[55] According to an authoritative opinion, echoed by Schulz and thoroughly developed by Viehweg, *Topik und Jurisprudenz. Ein Beitrag zur rechtswissenschaftlichen Grundlagenforschung*., in chapter 4, “*Topik und ius civile*” the classical jurists should have

adopted the Aristotelian dialectical technique. Actually Schulz, *Principles of Roman Law*,. devotes an extensive coverage to the subject (Part. II, Chapter III, II, "Dialectical jurisprudence"), but acknowledges that the jurists had adopted the dialectical system, but mainly for illustrative purposes, and not to decide the cases, where they made reference to their traditional costume. In fact, if we look at the experience of procedural actiones, as it is done in this paper, a continuity comes to light that brings us back to the time of the Twelve Tables ("According to Roman tradition, the Law of the Twelve Tables (Latin: Leges Duodecim Tabularum or Duodecim Tabulae) was the ancient legislation that stood at the foundation of Roman law.") and therefore, if anything, to the influence the Eleatic School ("The Eleatics were a pre-Socratic school of philosophy founded by Parmenides in the early fifth century BC in the ancient town of Elea. Other members of the school included Zeno of Elea and Melissus of Samos. Xenophanes is sometimes included in the list, though there is some dispute over this. Elea, whose modern-day appellation is Velia, was a Greek colony located in present-day Campania in southern Italy."). The absoluteness of the assumptions that characterize the ancient actiones, on which the structure of contractual relationships had been modeled, is undeniably the result of an attitude that required the adoption of a rigorous conception of being. This is not to exclude but, rather, to openly acknowledge that the contact with Greek philosophy of the Socratic tradition has helped to soften the rigidity of Roman law. Unlike Schulz, Viehweg believes that the dialectical method has instead influenced the Roman jurists in making the search for solutions more flexible. The references to Aristotle made by Viehweg appear so interesting, that it would be important to deepen them, not so much in the historical perspective, which would reduce the study of the influence of Greek philosophy to mere erudition, but in a philosophical perspective, in order to see if indeed the works of Aristotle offer elements to clarify the technique adopted by the Roman jurisprudence.

[56] Cass. 1703/2000 (z.d.).

[57] Cass. 42219/2005 (z.d.).

[58] Frank, "Vorstellung Und Wille in Der Modernen Doluslehre.", 170.

[59] See. Cass. 13/1983 (z.d.).

[60] "a Roman jurist who lived between the first and second centuries A.D."

[61] Cels. 9 dig. D.16.3.32: *Quod Nerva diceret latiorem culpam dolum esse, Proculo displicebat, mihi verissimum videtur. nam et si quis non ad eum modum quem hominum natura desiderat diligens est, nisi tamen ad suum modum curam in deposito praestat, fraude non caret: nec enim salva fide minorem is quam suis rebus diligentiam praestabit.* On this famous fragment one of the last researches is Agnati, *Il commento di Bartolo di Sassoferrato alla lex quod Nerva (D. 16,3,32).*; see also, of the same author Agnati, "Responsabilità del depositario e del debitore. D.16.3.32 (Lex quod Nerva) nelle interpretazioni di Azzone e Accursio."

[62] “Consul before 24 AD. Jurist, frequently mentioned by other jurists of the classical period.”

[63] willful misconduct’, “dolum.”

[64] “Proculus was the name of an ancient Roman jurist, around 50 A.D.”

[65] “verissimum.”

[66] As for the ‘loan for use’ , for the depositthe *formula in factum* was in time followed by a *formula in ius*, where the judge was free to take into account all the circumstances of the case, that were to be judged according to good faith.

[67] Vigano, “Fuga spericolata in autostrada e incidente con esito letale: un’ipotesi di dolo eventuale?”F. Viganò, *Fuga spericolata in autostrada e incidente con esito letale: un'ipotesi di dolo eventuale?*, Corriere del merito, fasc. 1, 2005, p. 70 ss.

[68] I personally wrote to one of the two lawyers who assisted Abdellah. I asked him: don’t you agree that your client had to experience the harshest consequences for emotional reasons? How did he react to the judgment? Mr. Raffaele Ronchi answered that both he and Mrs. Millemaci (the other attorney) felt sorry for him, even if defending him had been difficult, because they could not help but empathizing with the family of the little Nicolò.

[69] A little over one year for three levels of decisions is quite fast in Italy. It looks like the judges oriented the facts so that they could justify a charge that allowed a severe sentence. It is a situation that reminds of the story told by Hermann Isay, where the judges let themselves be guided by their aversion: “they had a clear decision immediately in mind, they later collected the reasons for it. Scholten, “General Method of Private Law.” block 518.

[70] Bar, “ZStW.”, 510.

[71] For a thorough analysis of the “Stamina case”, see Bassi, *Le Pubbliche Amministrazioni e il loro diritto, Elementi di diritto amministrativo sostanziale*, 323–331.

[72] The Italian Drug Agency.

[73] The correctness of the ordinance was challenged before the Administrative Court (TAR, Tribunale Amministrativo Regionale). The request for a stay of the AIFA prohibition was refused because the order was considered properly issued.

[74] For example, Venezia, Catania, Matera etc.

[75] Scholten, “General Method of Private Law.” block 500.

[76] For ‘principles’ here I mean directives of higher level that, unlike the rules, are not susceptible of direct application. Here I find myself once more in perfect agreement with Paul Scholten: “A legal principle is not a legal rule. Were it a rule, it would be so general,

that it would either say nothing or too much. Direct application through subsuming a case under a principle is not possible, for this the principle must firstly turn into a rule by adding a more concrete content. Ibid. block 252.

[77] It is widely accepted that, in continental Europe, we show a tendency of escaping from facts as soon as possible because we feel a "systematic urgency", a need to systematize as soon as possible: "As long as we are confronted with something we sense more or less vaguely, but do not see clearly, we are not yet completely convinced" (Ibid. block 241). This attitude has historical reasons, but I believe it is a tendency inherent to human behavior. The obstacle to move back and forth from abstract narration to the factual narration could be explained at an emotional level: when, after having heard part of "the story of the case" and while in one's mind an intellectual thread is already starting to develop, new unbalancing factual details arise (which do not fit into the mental design built so far), there will be the temptation to discard them.

[78] Ibid. block 19. In the territory where the guidance of rationality is of no help, the judge and the parties (in the preparation of the case and in the acceptance of the judgment), can resort only to another kind of guidance. Ibid. block 530. Among the two forms of help envisaged by Scholten, I would share his personal preference –if I am not mistaken- for the "Person in Creation and History.

Acknowledgements

This article is presented at the second Symposium in honor of Paul Scholten. A small adjustment has been made in par. 4 as a result of the review of C.E. Smith