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PREDICTABILITY OF JUDICIAL DECISIONS AND FOUNDATIONS OF EUROPEAN LAW: LEGAL SECURITY IN ROMAN LAW BEYOND THE SUBJECTION OF THE JUDGE TO THE STATUTE [1]

Introduction

It is believed that in the post-modern age the legal security and the predictability of judicial decisions have entered a crisis because the principle of the judge's subjection to the statute is also in crisis. The Roman law could teach us that the legal security and the predictability of judicial outcomes have experienced a pre-modern age where they were not linked to the modern principle of the judge's subjection to the statute but were instead linked to the principle of unambiguous, clear and precise wording of the legal paradigms which the judge was subjected to in order to deliver his judgment.

According to the Roman foundations of the European law, the institutions of the European Union have drawn our attention back to the necessity of unambiguous, clear and precise legal text.

The Latin sources analysed here show the use of the formulae («precise, strict, and simple») and not of the statutes as a guarantee of predictability of judgement outcomes and as a control of the sentences of the judges. We may say that the judge in the Roman formulary procedure was subject to the magistrate's formula and not to the statutes, because the relationship was between the judge and the formula and not between the judge and the statute.

In conclusions, the current crisis of the statute should not necessarily lead us to abandon the need to guide the judges' decisions with clear, precise and unambiguous legal paradigm.

Keywords: *Roman law, European law, judgement*

Introduction and research methods: the crisis of the legal paradigm and legal security in post-modern age

The *fattispecie* theory – in English legal paradigm – concerns the topics of the legal certainty and legal security, particularly in terms of the predictability of judicial decisions. The basic structure of the 'legal paradigm' the legal order assigns to 'legal effects' is: 'if *a*, then *b*' / 'if not *a*, then *c*' (Betti 1947; Cataudella 1967; Lantella - Caterina 2009).

Today, in the Italian legal order, it is believed that the structure of the legal paradigm is in crisis: since the Forties to the present, in the Italian legal order we have moved from the age of 'codification' (Irti 1999) – centred on the general statute and the abstract legal paradigms – to the current age of 'jurisdiction' (Di Porto 2017) – based on the prominent role of judicial decisions. During the age of 'codification' the judges took their decisions on the basis of the legal rules, with the legal paradigm structure. During the age of 'jurisdiction' the judges take their decisions on the basis of the principles and values of the legal order, without the legal paradigm structure.

This passage implies a slow and progressive crisis of the general legislation, of the abstract and general legal paradigm and, consequently, of the legal certainty (cf. Alpa 2006; Lipari 2015; Perlingieri 2018).

For some scholars, the outcome of a judgment can be considered more predictable if the legal solution to be applied by the judge to a case may be based on an abstract and general legal paradigm, previously provided by the statute, whose legal effects are assigned by the same statute. Consequently, this passage represents a problem that needs to be solved, because the judicial decisions can be more predictable if the judge stands between the legal paradigm and the case. In this way, he would not be alone in front of the case: he would be between what the law has provided 'in the past' – the legal paradigm – and what is happening 'in the present' – the case (Irti 2014).

For other scholars, the passage from the age of codification to the age of jurisdiction is a consequence of the passage from the 'modern age' to the 'post-modern age': according to them, the structure of the legal paradigm and

the legal certainty are typical of the modern age, since it is based on the State monopoly of the production of law through the statute, to which the judge was subject according to the theory of the separation of powers. So, the crisis of the legal paradigm of the post-modern age would be a return to the law of the ‘pre-modern age’ (Grossi 2014).

Instead the Roman law – which is a pre-modern age law – can perhaps teach us that the legal security and the predictability of judicial outcomes have experienced a pre-modern age where they were not linked to the modern ideological character of the judge’s subjection to the statute but were instead linked to the principle of unambiguous, clear and precise wording of the legal rule which the judge was subjected to in order to deliver his judgment.

Legal certainty and legal security as foundations of European Law: the ‘knowability’ of the law and the ‘predictability’ of judicial decisions. The wording of the legislation as «unambiguous», «clear» and «precise»

In this context, in Europe, the institutions of the European Union (EU) are drawing our attention back to the legal text in accordance with the Roman foundations of the European law (cf. Di Porto 2017; Tufano 2019).

Since the late 1970s, the European Court of Justice (ECJ) has raised the legal certainty to the status of a general principle of the European Union Law (Raitio 2003). The European Court of Justice has interpreted the principle of legal certainty mainly in two ways: on the one side, as a constraint for national legislators to make statutes more easily knowable (above all the publicity and drafting of legal texts with a clear, precise and unambiguous wording: *e.g.* ECJ, 10th March 2009, C-345/06 and ECJ, 9th March 2017, C-141/15); on the other side, as a constraint for national courts in the application of the same statutes (through the preference of a literal interpretation over other interpretative criteria: *e.g.* ECJ, 12th December 1990, C-172/89 and ECJ, 24th November 2016, C-645/16).

As regards as the first profile, if a member State adopts or maintains in force a legislative text transposing European directive lacking the requirements of «clarity», «precision» and «unambiguousness», it must be condemned for failing to comply with the obligations imposed by the same directives (*e.g.* ECJ, 24th October 2013, C-143/83). Moreover, the European Court of Justice has imposed the same obligation on the EU institutions to formulate the rules clearly, precisely and unambiguously (*e.g.* ECJ, 21th June 2007, C-158/06). According to the European Court of Human Rights (ECHR), «one of the requirements flowing from the expression 'prescribed by law' is foreseeability» and «a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable citizens to regulate their conduct» (*e.g.* Centro Europa 7 s.r.l. and Di Stefano v. Italy, 7 June 2012, where the Strasbourg Court held that «the laws in question were couched in vague terms which did not define with sufficient precision and clarity the scope and duration of the transitional scheme»). Furthermore, the European Parliament and the Council have expressly established the need to ensure the «predictability of the outcome of litigation» by predetermining the law applicable to disputes (*e.g.* Regulation (EC) 864/2007 of the European Parliament and of the Council of 11th July 2007 on the law applicable to non-contractual obligations).

As far as the European contract law is concerned (Petrucci 2018), the principle of legal certainty has become an objective, to which the interpretation of the rules envisaged in projects for the unification of European contract law must aim at (*e.g.* DCFR Art. I.-1:102).

The principle enshrined, according to which the legislation of both the Member States and the European institutions must be unambiguously worded, is intended to enable the parties to know their rights and obligations in a clear and precise way – the knowability of the law – and the judges to respect the statute – the predictability of judicial outcomes.

A synthesis between, on the one side, the tendency of the Italian legal order to consider the judges as subject only to the law's principles and not to the statute's legal paradigms and, on the other side, the objectives of a legal policy set out by the institutions of the European Union could be found in the foundations of the European legal system (cf. Wieacker 1980; Moccia 2005): namely in the Roman law and, consequently, in the Roman idea of legal security (Frier 2013).

Legal security and predictability of judicial decisions in Roman law beyond the subjection of the judge to the statute in pre-modern age

In the course of time, jurists have given the term 'legal certainty' a variety of meanings which could be summarised as follows (Biscardi 1987): 'effective knowability of the law by citizens' and 'predictability of the content of judicial decisions' (Bertea 2001).

The Roman law scholars have also talked about legal certainty in various ways with reference to Roman law. They have usually used the following two words: 'certainty' and 'security'. The word 'certainty' is a concept that means the 'knowability' of the law. The word 'security' is a concept that has the different meaning of 'predictability' of judicial decisions (cf. Schulz 1934; Lombardi 1967; Serrao 1987; Talamanca 1999; Solidoro Maruotti 2018).

We can find a confirmation of what was affirmed by Roman law scholars in the words of a Roman jurist, Sextus Pomponius, who lived in the 2nd century AD.

Pomp. *l.s. enchirid.* D. 1, 2, 2, 4

> «*Postea ne diutius hoc fieret, placuit publica auctoritate decem constitui viros, per quos peterentur leges a Graecis civitatibus et civitas fundaretur legibus: quas in tabulas eboreas perscriptas pro rostris composuerunt, ut possint leges apertius percipi […].*»
>
> [«After that, to put an end to this state of affairs, it was decided that there be appointed, on the authority of the people, a commission of ten men by whom were to be studied the laws of the Greek city states and by whom their own city was to be endowed with laws. They wrote out the laws in full on ivory tablets and put the tablets together in front of the rostra, to make the laws all the more open to inspection […].»] (Watson 1985).

Pomp. *l. s. enchirid.* D. 1, 2, 2, 10

> «*[…] Eodem tempore et magistratus iura reddebant et ut scirent cives, quod ius de quaque re quisque dicturus esset, seque praemuniret ^praemunirent^, edicta proponebant. […].*»

> [«[…] the magistrates also were settling matters of legal right, and in order to let the citizens know and allow for the jurisdiction which each magistrate would be exercising for any given matter, they took to publishing edicts. […].»] (Watson 1985).

Pomp. *l. s. enchirid.* D. 1, 2, 2, 37

> *«[…] Gaius Scipio Nasica, qui optimus a senatu appellatus est: cui etiam publice domus in sacra via data est, quo facilius consuli posset. […].»*
> [«[…] Gaius Scipio Nasica, who was given the title Optimus (The Best) by the senate, and to whom was also given by act of state a house on the Via Sacra, so that he could be consulted the more easily. […].»] (Watson 1985).

The idea of certainty of law expressed by Pomponius in his *enchiridion* contains both profiles of the knowability of the law and the predictability of judicial decisions (Nörr 1976). The knowability of the law is expressed in D. 1, 2, 2, 4 e D. 1, 2, 2, 37. The predictability of judicial decisions is expressed only in D. 1, 2, 2, 10.

For Pomponius, the knowability of the law is guaranteed by the public display of the text of the statute of the XII Tables (D. 1, 2, 2, 4) and the accessibility of the consultation of jurists (D. 1, 2, 2, 37). The statutes and the interpretation of jurists grant legal certainty in the sense of the knowability of the law but not in the sense of the predictability of judicial outcomes. This is due, on the one side, to the minimal role of the statutes in the formation of Roman private law (Rotondi 1912) and to the absence of the principle of the judge's subjection to the statutes (Gallo 2014; Cerami 2018), and, on the other side, to the judge's freedom to choose the jurisprudential opinion he preferred in the face of different interpretative opinions (Cannata 2003).

Instead, Pomponius, with reference to the edict of the praetors (D. 1, 2, 2, 10), seems to express the idea of the knowability as a limit to the power of the magistrates, but also the idea of the predictability of judicial outcomes.

The reason for this assertion lays in the 'two-stage' structure of the Roman formulary trial (cf. Scialoja 1894; Pugliese 1963; Cannata 1982; Talamanca 1987; Kaser - Hackl 1996). The first stage of the trial (called *in iure*) took place before the tribunal of the magistrate (firstly the *praetor*) who 'said the law' (in

Latin: «*ius dicebat*»): he established the rule of law applicable to the particular controversy submitted to him, guiding and controlling the composition by the parties of a particular trial program, called *formula*, on the basis of the general *formulae* provided in the edict published by him at the beginning of his yearly office. The second stage (called *apud iudicem*) took place before a private judge, chosen by the parties, who 'judged' (in Latin: «*iudicabat*»): he evaluated the case submitted to him and resolved the controversy on the basis of the rule of law recalled by the *praetor* in a particular *formula* (called *iudicium*).

The publication of the edicts was functional both to the knowability of the law, that would have been said for each controversy by each magistrate (*in iure*), and also to the predictability of the law, the private judge would have observed in the second stage when taking his decision (*apud iudicem*). The publication of the edicts by magistrates at the beginning of their year of office was projected on the legal future. Pomponius said that the praetors started publishing edicts in order to let the citizens know the jurisdiction that each magistrate would have exercised over any given matter («*ut scirent cives, quod ius de quaque re quisque dicturus esset*»).

The magistrates looked at the future cases whereas the judges looked at the law previously said by the single magistrate in the past: the verbal times used by the *praetor* in the edictal clauses (such as: «I shall give a judgement» or «I shall have the pacts observed» and so on) are always inflected to the future (cf. Lenel 1927; Kaser 1951). The magistrate thus expressed his will to dominate future events with such edict.

The necessity expressed by Pomponius invests both stages of the possible future trials, because the allusion to the «law [applicable] to each matter» («*ius de quaque re*») refers to what Giuseppe Grosso has called the main «moment of determination and formal definition of the law» in Rome (Grosso 1960): the *formulae*. A *formula* was a written short period based on an ingenious linguistic construction conformed to the rigorous and crystalline structure of the legal paradigm (Arangio-Ruiz 1950): 'if *a*, then *b*' / 'if not *a*, then *c*'. Indeed, Sandro Schipani states that the *formulae* are «normative statements» that «sculpt the essential elements of a legal relationship», almost as if they

were the «first elements of the construction of a legal paradigm» (Schipani 2009). We shall see it later.

The previous publication of the general *formulae* in the edict corresponded to the legal need for the schematization and typification of the cases, in order to safely guide the judicial decisions, which thus become calculable in advance by the parties (Weber 2016; cf. Talamanca 1979; Pugliese 1986; Mantovani 1998). The edict was a «project», a «forecast», a «program» (Schiavone 2017): the general *formulae* put the citizens in a position of «knowing» («*scirent*») in advance the future exercise of jurisdiction by the magistrate (Pomp. *l.s. enchirid.* D. 1, 2, 2, 10).

But to be more precise the analysis of the problem of the predictability of judicial decisions in Roman law cannot concern the general *formulae* provided by the magistrate in the edict. It should concern the particular *formula* (*iudicium*) approved in a concrete controversy by the parties under the *praetor*'s control. The predictability of a particular judgement outcome depends on this factor. The discretion of the *praetor* in giving a particular *formula* that had already not provided in his edict and the possibility for the parties to find an agreement on a particular wording of the *formula* under the *praetor*'s control, do not allow a definitive 'crystallization' of the particular trial program the judge could and should have adhered to. Only when a particular *formula* was approved at the end of the first stage, the possible outcomes of the particular judgment could result more predictable to the parties at the beginning of the second stage.

In the Roman formulary trial, the judge was subject to the magistrate's *formula*, since the relevant relationship was not that between the judge and the statute but between the judge and the *formula*. For these reasons the predictability of judicial outcomes may be considered as not depending on the text of the statute but on another text: the *formula* approved by the magistrate for the legal qualification of each dispute.

The Roman private judge among the tracks of the *formula* «precise, strict, and simple»

These considerations are based on a suggestion: the outcome of a judgment may be more predictable if it is guided by a text – or, if you prefer, by a legal paradigm – that conditions it. This suggestion is confirmed by the Roman sources.

For the Roman formulary trial, the text in question is not the statute but is to be identified on the trial program that gave the name to this type of trial: the *formula* of the *praetor*.

A particular *formula* was the main factor of predictability of judicial decisions: the *formula* was a «very strict constraint», an «insurmountable limit» for the judge and a «synthetic statement of the judge's powers» (Cannata 1961; Talamanca 1990; Marrone 1994; Corbino 2003). It was the legal tool the *praetor* put at the disposal of the parties to crystallize, schematize and typify all the cases in legal paradigms. In this way the judge could decide the controversy guided by clear and definite «formal determinations» of the law. These particular *formulae* represent the 'words of the law' to which the judge had to conform the 'words of the sentence': the words of the *formula* guide and predict the judicial outcomes.

The structure of the *formula* was «binary»: acquittal or condemnation. To be more precise, the *formulae* can be divided into «two large groups» (Talamanca 1987): 1) on the one hand, the *formulae* where the discourse is based on the alternative «*si paret* [...] *si non paret*»; 2) on the other hand, the *formulae* which are vice versa built on the scheme «*quod* [...] *si non paret*».

Many Roman law scholars have put forward suggestive hypotheses about the history of these «two models» (Fiori 2003). It is sufficient here to record the interpretative direction of other influential scholars, according to which both types of *formulae* show transparency, logicality and clearness (Arangio-Ruiz 1912; cf. Gröschler 2017).

So, the alternative hypothetical period, expressed by the phrase «if it is proved» («*si paret*» or «*quod*») – on which the condemnation depends – and by the phrase «if it is not proved» («*si non paret*») – on which the acquittal depends – makes the eventual judicial outcomes predictable.

The structure of the hypothetical period of the *formula* recalls the «basic structure» typical of the Roman legal norms: «legal paradigm + legal effects» (Carcaterra 1968; Carcaterra 1972; Marino 2017): «if it is proved + condemn» («*si paret* [...]» + «*condemnato*») and «if it is not proved + acquit» («*si non paret*» + «*absolvito*»). See, for example, the *formula* of the 'action for a definite sum of money' (*sub* 1: *actio certae creditae pecuniae*) and the *formula* of the 'action to protect the property' (*sub* 2: *rei vindicatio*).

1. Let *Gaius Aquilius* be the judge. If it is proved that *Numerius Negidius* owes *Aulus Agerius* ten thousand sesterces – the matter of the controversy – the judge will condemn *Numerius Negidius* to give *Aulus Agerius* ten thousand sesterces. If it is not proved, the judge will acquit him.
2. Let *Gaius Aquilius* be the judge. If it is proved that the land belongs to *Aulus Agerius* on the basis of the Quirites law – the matter of the controversy – and the land is not returned to *Aulus Agerius* in accordance with the judge's arbitral evaluation, the judge will condemn *Numerius Negidius* against *Aulus Agerius* for a sum equal to the value of the land at the time of the sentence. If it is not proved, the judge will acquit him.

In the examples of the *formulae* reported (Mantovani 1999), the words «owe» («*dare oportere*») of the 'action for a definite sum of money' (*actio certae creditae pecuniae*) and the words «belongs to <him> on the basis of the Quirites law» («<*eius*> *esse ex iure Quiritium*») of the 'action to protect the property' (*rei vindicatio*) are the logical starting point of the condemnation in each *formula*. The legal order indicates the legal facts that legitimate the configuration of «owe» and of «belongs to <him> on the basis of the Quirites law».

These legal facts, which the legal effect contained in the sentence come from, represent the 'major premise' («owe» and «belongs to <him> on the basis of the Quirites law») followed by the 'minor premise' referred to in the first part of the *formula* (called *intentio*: «if it is proved» or «if it is not proved») and from which the 'conclusion' indicated in the last part of the *formula* derives (called *condemnatio*: «condemn» or «acquit»). This is the type-structure of «legal syllogism», that can be associated with the type-structure of the *formula* (cf. Volterra 1988; Capogrossi Colognesi 2016).

The type-structure of each particular *formula* can assume a complexity resulting from the parties' insertion of additional clauses, normally provided by the praetorian edict, that may influence the condemnation in negative (in favour of the defendant) or in positive (in favour of the claimant). For example: an additional clause that influences negatively the condemnation, in favour of the defendant, is the so called 'arbitrary clause' of the 'action to protect the property' («and the land is not returned to *Aulus Agerius* in accordance with the judge's arbitral evaluation»: it means that if the defendant returned the land, during the second stage, the judge would not condemn him to pay the sum of money).

In this way, the syllogistic reasoning the judgment was based on, could become complex but never illogical (cf. Schulz 1951; Schulz 1953). The trial program and the instructions given to the judge were always clear. The more precise and detailed was the *formula*, the more rigorous were its tracks and limits the judge was compelled to follow.

It is not by chance that Cicero describes the judgment, where the *iudex* was guided by a *formula*, as «*derectum, asperum, simplex*» – «precise, strict, and simple» – in contrast to the arbitration, where the *arbiter* did not decide according to the text of a *formula* (De Giovanni 2010):

Cic. *pro Rosc. com.* 10-11

> «*[10] […] aliud est iudicium, aliud est arbitrium. […] Ei rei ipsa verba formulae testimonio sunt. [11] Quid est in iudicio? Derectum, asperum, simplex: SI PARET HS IↃↃↃ DARI. […] Itaque alter causae confidit, alter diffidit*»
>
> [«the judgement is a thing, arbitration is another thing. […] The terms of the formula are an evidence of this. How is the judgement? It is precise, strict, and simple: "If it is proved that fifty thousand sesterces should be given". […] Thus, the former trusts his cause, the latter does not.»]

Interestingly, Cicero proposes the reason why the parties of a controversy may be led to appeal a judge, rather than by referring to an *arbiter* outside the *praetor*'s tribunal. Cicero considered the formulary trial more convenient for the claimant in case he could trust the favourable outcome of the trial («*causae confidit*»): «Thus, the former trusts his cause, the latter does not» («[…] *Itaque*

alter causae confidit, alter diffidit» in Cic. *pro Rosc. com.* 11). If the claimant is sure of his victory, it is advisable for him to activate a judgment restricted by a *formula*. The definite limits of the very narrow *formulae* guarantee those who can trust the favourable outcome of a judgment and protect the party that envisages a good chance of success (cf. Wacke 2003).

The sequence of the points and the matters in a *formula* precisely guided the judge in his task to detect the decision of a dispute; it was the only tool that could give the process a «crystal clear transparency». Once the *formula* had been foreseen, each party was able to know the sequence of the points and of the matters the judge had to examine and consequently the «risks to which he would have been exposed». This allows us to think, when engaged in a formulary trial, «the Romans were able to predict the final outcome with a much greater degree of approximation than in any other form of private procedure» (Cannata 2001).

Conclusions

From the *formula* to the legal paradigm: beyond the theory of the separation of powers

As quickly recalled, the Roman law scholars used to say that the private judge was not directly subject to the statutes (Labruna 2013; Gallo 2014; Centola 2017; Cerami 2018): their theory lays on the fact that the subjection of the judge to the statutes and the legal security are «ideological characters» of the modern age, based on the theory of the separation of powers of the Baron of Montesquieu (cf. Catalano 1974).

Pomponius's and Cicero's texts analysed here show the use only of the *formulae* and not of the statutes as a guarantee of predictability of judgement outcomes and as a control of the sentences of the judges. We may say that the judge in the Roman formulary procedure 'was subject to the magistrate's *formula*' and not to the statutes, because the relationship was between the judge and the *formula* and not between the judge and the statute.

It is a suggestion that comes directly from the 'father' of the theory of the separation of powers.

In his book *L'esprit des lois* ('The spirit of the statutes'), Montesquieu stated that in ancient Rome the *formula* was the tool to guarantee the control of the judges' task and the predictability of the trial outcomes (Montesquieu 1748; cf. Brutti 2012). I believe that, since Montesquieu in ancient Rome saw a limitation of the power of the judges not in the statutes but in the *formulae*, this confirms that the predictability of judicial decisions and the legal security have nothing to do with the modern theory of the separation of powers, which instead is based exactly on the subjection of the judge to the statutes.

The judge may not have been expressly subject to the statutes but was in any case subject to the legal paradigm («unambiguous», «clear» and «precise» – to use the words of the European Court of Justice – or «precise, strict, and simple» – to use Cicero's words) contained in the *formulae* as the main and fundamental guarantee of the legal security and predictability of judicial decisions.

In conclusion, the Roman legal experience can therefore teach us that the legal security and predictability of judicial outcomes, whose text of the *formula* – based *ante diem* on the scheme of the legal paradigm – was a guarantee, knew a pre-modern age in which they were in no way linked to the modern principle of the subjection of the judge to the statute. Thus, the crisis of the statute should not necessarily lead us to abandon the need to guide the judges' decisions with «clear», «precise» and «unambiguous» legal paradigm.

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Endnotes

[I] With some additions and modifications, I am reproducing the text of a lecture of mine Predictability of judicial decisions in Roman law held in Wuhan on 6th June 2019, during my stay as a visiting scholar at Zhongnan University of Economics and Law, hosted by Professor Huang Meiling.