

THE LAW – A FORMAL SOURCE OF LAW IN ANCIENT ROME

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Abstract: *The law as a formal source of law appears in the Roman society as a result of the social and political fight between the patricians and the plebeians, as the latter aimed to fulfil their own interests which covered new subjective laws, that conflicted with the political and judicial order of the Roman society at the beginning of the republic. The law would prevail both through its regulatory content, but also through elements of legislative technique which were used, significantly more evolved than the other sources of law in the Roman society.*

Key words: *lex, magistrate, formal source of law, legal habit, goods.*

1. Introduction

The age of the republic, an age during which Rome would become a universal state as a result of its significant territorial conquests, the citadel city becoming the most powerful state of the antiquity, was mainly characterized, in regard to the social and political situation, by a severe fight between the patricians and the plebeians, a fight which resulted in the change of the Roman state, from a slavery oligarchic republic to a democratic slavery republic which, as a result of the social reform that occurred towards the middle of the third century BC, thus aggravating the social and political fight to the extent to which the very existence of the Roman state was threatened, because of the recession of the plebeians.

The change in the economic and social structure of the Roman society, the increasing role of the plebeians within the Roman state, as well as the obvious influence of the magistrates who were organized as an administrative and political institution, will constitute factors which configure law, thus leading to significant changes in regard to the formal sources of law which will, in turn, determine the replacement of the legal habit with the law. From an etymological point of view, the word law meant an agreement of will between two parties. When the agreement was reached between two

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people who were subjects of law, the term *lex* was equivalent to that of contract/convention or sometimes contract clause; "when the agreement of wills occurred between the magistrate and the people, the word *lex* meant a legal regulation, namely a law" (Cambrian, 2009, p.32).

The role and importance of the law seen "lato sensu" caused the famed legal adviser Gaius to unequivocally state that the law is what the Roman people demand and order – *quod populus Romanus iubet atque constituit* (Gains, 1.3) – within its gatherings, whether called *comitia curiata*, *comitia centuriata*, or *comitia tributa*.

Considering the fact that in the old age the legal habit is the main formal source of law, thus reflecting the structure of the state, it also appears as an exclusive prerogative of the patricians, as they were the ones who knew the law, thus being appointed as such; they were also familiar with the procedure by which justice was administered, namely the pontiff's chart; thus they were the only ones who had the right to show what was just.

This was the means by which the structure of class was perpetuated in the Roman society; in any litigation between a patrician and a plebeian, the first would always be considered to be right, which would likely cause dissatisfaction with the plebeians who would become more and more vocal in regard to making the legal habits public and codifying it in the form of a new law which would have to be public; thus, the law would be the only legal form which could protect the tradition and morals of Roman society.

This social background is eloquently described by the great savant Theodor Mommsen, who, based on historical documents stated the following: "Governing by magistrate, which was reduced to a mere tool, with a significant role in the Senate, by exclusively possessing all functions and sacred offices, gifted with the exclusive knowledge of all divine and human things, familiarized with the routine of political practice, with influence in community gatherings, the patricians maintained their demands of exclusive possession of legal authority for a long time." (T. Commonsense, 1987, p.159).

In regard to those previously stated, the plebeians will not remain indifferent; they will insist in their demand to codify and publish the legal habits in a law, an endeavour which will be achieved in the year 451 BC when the most important Roman law will be passed, collectively known as the "Law of the XII Tables".

The legislative technique was thoroughly regulated both in regard to the effective procedure of adapting the law, as well as the magistrates who were competent to initiate law. Thus, only the superior magistrates would enjoy *imperium* as the consuls, praetors, province governors and dictators, while *potestas* was provided to censors, questors and plebeian tribunes, all being able to initiate law.

Regularly, the project of law was subjected to the attention of the senate, who would individually vote, invoking the arguments which pertained to the regard for the old Roman traditions.

The project of the new law was incorporated in an edict, the legal form by which the future law was brought to public knowledge.

By the procedure of promulgatio, the project of law was posted in the Roman forum 17 days before it was due to be voted within the popular gatherings. Thus the content of the new law would be debated within unofficial gatherings, but changes to the law were impossible, as it was required to be kept in its initial form; the people would vote in favor by using the formula *Uti Rogas* or against, namely by *antiquo*, a procedure which would reaffirm the supreme will which ultimately belonged to the Roman people.

In regard to the legislative technique, the content of the law did not allow for inconclusive provisions, a law which was in regard to the same matter, thus avoiding the situation in which a single law would regulate more matters. Thus, *Lex Caecilia Didia* 98 BC, which required all laws to have unified provisions (T. Commonsense, 1987, p.119).

Within the popular gatherings, the vote was initially expressed openly and in an oral manner; subsequently, under the incidence of the *Papiria* law (131 BC) the vote was to be secret and expressed in writing.

The voting procedure was held in Rome, in *curiae*, by *centuriae* or tribes and not per capita. Thus, in order to pass a law, a simple majority among the *curiae*, *centuriae* or tribes was required and not "half plus one of the total citizens who would vote" (T. Cambrian, 1987, p.33).

According to this law, in order to pass a project of law, the vote of 18 of the 35 tribes which existed in the late stage of the Republic was needed, even if the number of the people who voted against was significantly larger but they were from the list of the other 17 tribes (Cassius Bio, 1973, p.36).

The debates which were held in popular gatherings were subject to a special procedure according to which, the last ones called on to vote were the magistrates, thus the citizens would express their opinions and objections first; thus "no one was forced to forgo his opinion (Cassius Bio, 1973, p.36), as a result of a influence exercised by a significant personality".

Once it was voted, the project became a law and was to be named after the magistrate who had the legal initiative. As a result, the legislator name was stated as a feminine „nomen gentilicum" (T. Cambrian, 1987, p.33). Thus, if the magistrate who had the legal initiative was Augustus, the law was to be named „*Lex Iulia*", or if it was initiated by Cornelius Sulla it would be called „*Lex Cornelia*".

In case the project of law was initiated by one of the consuls, the law would be named after both consuls (see *lex Fufia Caninia de manumissionibus*, named after the two consuls, namely L. Caninius Gallus and C. Fufius Geminus) (T. Cambrian, 1987, p.33).

After the project of law was voted within the popular gathering, it was subject to approval by the senate, that exercised control over the law under the pretext of its conformity to the traditions and morals of the Roman society, a procedure which was true censorship used by the patricians who aimed to control the legal activity, thus maintaining their privileged position.

As a result, it was obvious that the magistrate who had the legal initiative would make all necessary efforts to not "bring to the people initiatives which would be opposed by the senate" (Molecule, Ocean, 1993, p.41).

The text of the law was then deposited in the vault of the state after the senate performed its control; a number of copies of the legal regulations would be brought to public knowledge. We must also mention that the effects of law would be produced without the legal regulations being brought to public knowledge by posting the text of law in the forum. The law would cause effects until it was repealed, whether expressly or in a tacit manner. As a rule, in regard to a law's activity in time, it was repealed by the passing of a new law "which provided a different regulation on the same matter." (Dig. 1.4.4.)

The text of law could be passed entirely or just partially, a situation in which only some provisions of that certain law would be modified "by additional provision, thus being in a situation called subrogation." (T. Cambrian, 1987, p.33). The procedure to repeal, modify or complete a law which contained private regulations was an exception, as its provisions were still in force for centuries, thus ensuring an increased stability in the circuit of the Roman state.

The laws were classified mainly depending on the organism which initiated it. Thus, in case they were passed by the people in one of their gatherings, as suggested by a magistrate, the laws would be called „leges rogatae” or „leges date”, as is the example of a magistrate who was invested by the people by delegation to regulate a special field, such as granting citizenship or starting new colonies." (T. Cambrian, 1987, p.33).

As a result, depending on the popular gathering in which they were passed, the rogatae laws were in turn divided into curia laws passed in comitia curiata, centuriate laws passed in comitia centuriata and tribal laws passed in comitia tributa.

The law as a formal source of law would have a reduced impact in the empire age, given the new background of the social and political life, in which the central role will be played by the emperor according to the principle of caesarship.

From our known sources of law, the last law which was passed comes from the time of the emperor Nerva and it regards agricultural provisions - *lex agraria* " (Borden, 1998, p.263).

The law ceased to be a formal source of law in the age of the emperor Traian (98-116 AD) a significant promoter of the cult of the emperor.

The logical and formal structure of law during this time had three parts: *praescriptio*, *rogatio* and *sanctio*.

The first part, *praescriptio*, mentioned the name of the magistrate who initiated the law, the name of the popular gathering and the name of the commission who voted the law, the date of the vote and the order of the vote within the commissions.

The *rogatio* was the part of the law which was usually drafted in chapters and paragraphs.

Sanctio was that part of a law which showed the legal consequences in case the provisions of the law were violated, depending on the categories of laws: *leges perfectae*, *leges minus quam perfectae* and *leges imperfectae* (Julian, *Regular*, 1.1.2).

The sanction in case of perfect laws was the absolute annulment of the act concluded with the violation of legal provisions. Thus *lex Aelia Sentia* stated that the freeing of a slave by fraudulent means was rightfully annulled.

In the third category, that of imperfect laws, the sanction was diffuse by not showing what legal consequences would be produced in case the laws were violated. However, the provisions of such a law were fulfilled not by direct means, but by exceptions which could be invoked during a trial.

Thus, by „*lex cincia de donis et muneribus*” a quantum-ultra modum- would be instituted, thus setting the limits for a liberality in case of donation which, if disrespected and the donor overstepped the limit, he would be called to justice; he would defend himself by invoking an exception, based on which he was absolved of the obligation he undertook (see *legis cincia de donis et muneribus* exception).

That particular law was created in order to discourage excessive donation which the lawyers claimed from their clients in exchange for their services, as, during those times, the activity of lawyers was free, according to the principles which regulated their mandate.

However, this law proved to be less effective, which caused the appearance of a new regulation, namely „*senatus consultum Claudianum de repetundis*”, passed in the year 47 AD, thus stating the maximum amount which a lawyer could claim from his clients, namely 10.000 sestets (Del Prejudice, Electronic, 1989, p.477).

The client who paid more than the established limit would file a special action called „*actio poenalis quadruplum*” against his lawyer (Del Prejudice, Electronic, 1989, p.477).

According to tradition, the first Roman law was passed in the year 449 BC, generically known as the “Law of the XII Tables”.

This endeavor was preceded by the passing of the first Roman law, which, by its content as well as by the legislative techniques it used, was a true criminal code; according to the opinion of historian Titus Livius it represents “the source of all subsequent Roman law” – *corpus omnis romanis iuris...fons omnia publici privatique iuris*, as declared by the people’s tribune Gaius Terentilius Arsa.

In the year 462 BC he would suggest the forming of a commission of 5 members, tasked with drafting a book of public laws, respected by the consuls “in exercising their legal power” (T. Commonsense, 1987, p.168).

Given the position of the senate regarding this initiative, after 10 years in which the plebeians would insist in their endeavor to systematize and publish habitual law, Terentilius Arsa, obtained the forming of a commission of 10 people – *decemviri legibus scribundis*, tasked with codifying the laws which were to be brought to public knowledge; this work was published in the forum, written on 10 wooden tables.

Subsequently, the Senate, in an attempt to counterbalance the huge social tension caused by the plebeians, had approved the election of 10 men who were tasked with exercising the function of supreme magistrate, thus replacing the consuls, having as a main objective the passing of a public law.

The ancient sources mention that the purpose of this commission was to form a delegation that would travel to Greece and bring back to Rome a series of Greek laws, among which there were the laws of Solon.

The plebeians were dissatisfied with the content and the form of those comprised in the Laws of the XII Tables, thus, in the year 449 BC, a new commission was formed, with 5 plebeian as members, a commission which drafted the legislative monument known as "the Law of the XII Tables".

The law published on 12 bronze tables would limit the discretionary power of consuls who would rule with respect to the spirit and letter of the law. This law would be posted "in the forum, in front of the senate's tribune" (T. Commonsense, 1987, p.168).

As stated by specialty doctrine, the Law of the XII Tables was the result of a compromise between the patricians and the plebeians, a compromise which would respond to the circumstances of the moment and save the Roman state from eventually dissolving.

For the very first time, Rome instituted the principle of judicial syllogism, according to which consuls had to try in accordance with the law and were held to provide an equal and public solution.

Along with the legal consequences, the law has important political significance, as the consuls were subject to public control for their activity of performing justice, which was achieved in accordance with the procedure and rules stated by the decemvirate law.

However, there are still provisions in force which ensure the continuation of the class structure which existed in the Roman society, by strengthening and guaranteeing quirt property or by maintaining regulations which aggravated the existing social distinction between owners and non owners and by a fear of restriction regarding civil rights; significant in this manner was the interdiction of marriage between a patrician and a plebeian.

2. Instead of conclusions

When analyzing the content of the Law of the XII tables, we notice that it is, without a doubt, of Roman origin, as it reflects the level of the Roman society in the fifth century AD, by showing in specialty doctrine "the fact that Rome was a state of agricultural workers in which commercial transaction was reduced."(Gripe, 1973, p.136).

There are numerous provisions regarding goods both in regard to establishing their legal regime and their classification; an important role is played by the agricultural lands, thus the means of acquiring such lands are regulated, as well as the sanctions which apply to those who do not respect property rights.

At this time, economy was a response to the matter of obligation, as trade was accidental, being impossible to develop merchandise based economy at this stage which would likely create evolved legal tools and institutions.

The Roman conservative and traditionalist vision resides in the regulations which pertain to succession or those regarding family law, in which case the decemvirate law advocates for maintaining the existing legal order.

By responding to the same legal commandments, the procedure according to which justice was performed was extremely difficult, highly rigid and formalist, to the extent to which the mere change of gender of the noun used within a legal formula would inevitably lead to the loss of the right by the holder.

In this context, “the sacred forms of trials were extremely complicated and disrespecting them would lead to the most serious consequences”(Monier, 1956, p.315).

The legal content of this legislative code comprises both public and private provisions which, despite the fact that the law would only be published for a few decades, as it was destroyed in the year 300 when Rome was burned by the Gauls, stayed in force for 11 centuries, representing a true *carmen necessarium* in the conscience of the Roman people, as stated by the famous speaker Cicero.

Decemvirate law was never abolished although many of its regulations became inoperable in the classical and post classical age but this did not prevent the praetor, as main judiciary magistrate, to modify, correct and sometimes even add to the so called, *jus civile*” stated in the Law of the XII Tables, which, considering the new social historical background, was called upon to provide new forms of expression in regard to its content or legislative technique.

However, all those called upon to perform the act of justice have provided new interpretations to the text regulated as a monument of Roman law, thus attempting to prove the continuity of Roman law in the classical and post classical Roman age. Thus, some subtle proceedings of passing Roman law were considered, laws which will be applied to cases which were not considered at the time the initial law was passed (Bruhl, 1925, p.543).

The Law of the XII Tables would represent “a symbol of the Roman people, a creation which will provide distinctive and individual identity to its own culture” (Bruhl, 1925, p.543), within universal civilization.

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*** Digeste, 1.4.4.

*** Gains, 1.3.

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