

THE METHODOLOGICAL CRITERIA OF COUNTERPROPOSITIONS WITHIN THE ROMAN SOCIAL LEGAL FRAMEWORK

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Resumen- Partiendo de la difundida distinción, entre unos ordenamientos jurídicos abiertos, como el derecho inglés y el anglo americano, que se vinculan en el pasado al Derecho Romano, y otros cerrados o codificados, como los derechos del continente europeo, y tras detenernos en el origen terminológico de ambos sistemas y en su rígida contraposición, se procura destacar en este trabajo que Roma y su Derecho tampoco abrazan en toda su pureza, un sistema abierto.

Para su argumentación se sigue una triple vía: 1ª) la propia estructura y contenido de la teoría de las “masas” de Bluhme que ofrece datos de interés, 2ª) los *digestorum libri* [de Celso, Juliano, Marcelo y Cervidio Escévola] pues a través de ellos sus autores logran la máxima coordinación entre *ius civile* y del *ius honorarium*, y 3ª) el análisis de algunos fragmentos de esos *digestorum*, que recogidos en D. 50.17.

Abstract- Based on the widespread distinction between open legal systems, as English and Anglo American law, which were linked in the past to Roman law, and other closed or coded systems [rights of the European continent], after pausing at the terminological origin of both systems, and their rigid contraposition, in this paper we seek to highlight that Rome, and its law neither embrace an open system in all its purity.

For this purpose we follow three lines of reasoning: 1st) the structure and contents of the Bluhme’s theory, that provides useful information, 2nd) the *digestorum libri* [by Celsus, Iulianus, Marcellus and Quintus Cervidius Scaevola] through which their authors achieve the highest coordination of the *ius civile* and *ius honorarium*, 3rd) some of the fragmentos of those *digestorum*, formulated in general terms, and contained in D.50, 17 [*de diversis regulis iuris antiqui*].

(I)

1. Today, legal systems are typically classified into two types, whose names are owed to SCHULZ and their diffusion to ESSER¹. These two types of system go beyond the classic controversy between the jurisprudence of concepts² and the jurisprudence of interests³. One of these types is the “closed” system of legal regulations. An example of this type would be continental European law, in which matters are codified and which can be traced back to the axiomatic thinking of the “classical” world⁴ (ARISTOTLE), and which in modern times, relates to a systematic manner of thinking

¹ SCHULZ, F., *Storia de la giurisprudenza romana*, Italian translation by NOCERA, G., Firenze, 1968. Original version: *History of Roman Legal Science*, Oxford, 1946 (ed. Anastática, 1953). ESSER, J., *Principio y norma en la elaboración jurisprudencial del Derecho Privado*, spanish translation by VALENTI FIOL, Barcelona, 1961. Cfr. criticism by DE CASTRO, ADC, XI, 1, p. 235 ff. and 283 ff. Original version, *Grundsatz und Norm*, Untersuchungen zur Vergleichenden Allgemeinen Rechtslehre und zur Methodik der Rechtsvergleichung, 1956.

² GARCÍA DE ENTERRÍA, E, in his prologue to VIEHWEG, T., *Tópica y Jurisprudencia*, Madrid, 1964, p. 12, n. 5 (the Spanish version of *Topik und Jurisprudenz*, Munich, 1963) states that WIEACKER (cfr. full bibliographic reference *ibid*) spoke fairly of “the boring controversy surrounding the so-called jurisprudence of concepts”.

³ SEIDL takes us on a tour of Roman sources related to the difference between the jurisprudence of concepts and the jurisprudence of interests in his succinct and brilliant work, criticised by KASER, M., *En torno al método de los juristas romanos*, translation by MIQUEL, J., Valladolid, 1964, pp. 32 to 34, and specifically in his very extensive n. 74.

⁴ KASER. *En torno al método cit.*, pp. 10 *in fine* and 11, specifies that axiomatic thought derives from a series of fundamental rules and concepts which, as axioms (hence the name), do not need to be proven. From these rules and concepts, by using logical deduction, all of their maxims and concepts can be derived. These will not be capable of contradicting one another or be derived or deduced from others, or from the system. KASER concludes that only this type of legal system can be considered a “system” in the Aristotelian sense.

(HARTMANN)⁵. The other type of legal system is the “open” system, which involves a series of solutions to legal problems (today, the case law method)⁶. Examples include English and Anglo⁷-American⁸ law, in which matters are not codified and which can be traced back to the classical world and *ius Romanum*⁹ and problem-focused or topical thinking (CICERO)¹⁰, and in modern times is related to aporetic thinking (HARTMANN)¹¹.

2. Following this minimal doctrinal reminder, a warning should be given that some legal systems today, depending on the *argumenta* formulated *a repugnantibus* (to use CICERO’s terminology)¹² as salient aspects, are not produced “in all their purity”, to paraphrase

⁵ NICOLAI HARTMANN’s category is reminiscent of GARCÍA DE ENTERRÍA in the prologue to VIEHWEG, *Tópica y Jurisprudencia cit.*, p. 13 and it is VIEHWEG himself, *op. cit.*, p. 51, who summarises HARTMANN’s counterproposition between systematic-thinking and problem-focused thinking starting from the problem and bearing in mind that if emphasis is placed on establishing a system, the system operates on a selection of problems; if focus is placed on the problems, then a system is sought that will help in finding the solution.

⁶ A problem is understood to mean any matter that apparently has more than one solution.

⁷ Especially Australia and New Zealand.

⁸ That is, the United States of America (except Louisiana) and Canada (except Quebec).

⁹ *Cfr.* for all, to be used as a type of manual, differences between the Roman jurisprudential system and current open (legal) systems in GARCÍA GARRIDO M.J., *Derecho Privado Romano*, Madrid, 1991, pp. 117-120.

¹⁰ KASER, *En torno al método cit.*, p. 12 *if* and 13 *pr.* reminds us that topical thinking does not start from within the system as a whole, from which the applicable rule to resolve the case can be retrieved *by deduction*. Instead, it starts within the case itself and involves searching for the premises that will allow the case to be resolved and attempting to produce general guidelines and guiding concepts that will allow the solution to be *induced*. These guiding concepts are *topoi*, while *topics* consist of “the art of finding these *topoi*”.

¹¹ VIEHWEG, *Tópica y Jurisprudencia cit.*, p. 52, summarises the counterproposition in this way: Systematic thinking stems from the whole; aporetic thinking works the other way around.

¹² CICERO, *Top.* III, 21.

KASER¹³. On the contrary, it is *communis opinio* that the traditional distinction between “open” and codified or “closed” legal systems has become blurred, due to an inversion of the factors on which they operate. Therefore, without attempting to be exhaustive, it is fitting to present both critical observations, *a contrario*, and distinctive criteria that have been pointed out regarding certain legal systems. Taking the signifier/signified relationship as a basis, these points will make it possible to combat the dogmatism and rigidity of those salient aspects and, at the same time, support, not only our latest general statement that today the differences discussed here have become blurred, but also that their portrayal is, at the very least, questionable.

3. As anticipated, our observations will relate to: matters of law; the axiomatic and the problematic; the value or values of the *Topics*; and the systematic and the aporetic. 1) It is important to remember that although matters of law are codified in closed systems, they are interpreted, supplemented and reworked within the categories and means of casuistic law. Meanwhile in open systems, although matters of law are not codified, statute law includes important components of regulatory law.¹⁴ 2) Regarding the opposition between problem-focused¹⁵ (topical)¹⁶ thinking and deductive

¹³ KASER, *En torno al método cit.*, p.10.

¹⁴ Cfr. for all, KASER, *En torno al método cit.*, p.10.

¹⁵ KASER, (following VIEHWEG), *En torno al método, cit.*, p. 14, summarises that the topical searches for premises that are not susceptible to deduction, while logic, on the other hand, syllogises to create premises. Reminds us that anyone who uses topics to deal with a problem (hence, for some such as VIEHWEG, the terminological

(axiomatic) thinking we must point out that in the majority of cases this opposition is misguided, since the concepts belong to different areas of logic (they are not conflicting and are certainly not incompatible) and they operate at different times within the rational process.¹⁷ In other words, further to playing a first analytical role, topics can play a second synthetic one¹⁸, through which a system can be constructed.¹⁹ 3) At least two components should be mentioned in relation to the value (or values) of the word *topics*: classical sources and current doctrine. In classical sources, while *Topics* is univocal as the signifier, it is equivocal as the signified²⁰.

comparison between the problematic and the topical) cannot reject deductive thinking. This is because although the initial premises are induced, their application to the specific case is achieved using logical deduction.

¹⁶ *Topics* has a role that, in the language established by VIEHWEG, *Tópica y jurisprudencia cit.*, is problematic; hence the terminological comparison alluded to in the previous note.

¹⁷ GUZMÁN, *Historia de la interpretación de las normas en Derecho Romano*, Santiago de Chile, 2000, p. 311, who I follow, criticises VIEHWEG's counterproposition. GUZMÁN tells us that what VIEHWEG is really trying to do, is to differentiate between codified and uncodified legal systems.

¹⁸ GUZMÁN, *Historia de la interpretación cit.* p. 312, calls this second role systematic.

¹⁹ VIEHWEG, *Topica y jurisprudencia cit.*, p. 34, explains this in the following way: ARISTOTLE distinguishes between that which is apodictic, field of truth, attributable to philosophers; and that which is dialectic, field of opinion, which corresponds to rhetoricians and sophists. *Topics* comprise the art of argument and belong to dialectical rather than apodictic terrain; *topoi* are dialectical and rhetorical conclusions. CICERO does not allude to this distinction. Invention = discovery (*ars inveniendi*) art of discovering arguments, and the formation of judgement (*ars iudicandi*), are the essential parts of the dissertation, where he called the first topics and the second, dialectic.

²⁰ Thus, with the title *Topics*, ARISTOTLE composed a philosophical book: he formulates a theory of the dialectic as a rhetoric art and is primarily interested in causes. CICERO, on the other hand, with the same title, produces a prescriptive tool; he centres on the practice of argumentation; he attempts to apply a specific catalogue of topics and is interested in the results. Cfr. VIEHWEG, *Tópica y jurisprudencia cit.*, pp. 43-45 and in general, ch. II, *La Tópica aristotélica y la Tópica ciceroniana* pp. 32 ff. ARISTOTLE distinguishes between that which is apodictic, field of truth, attributable to philosophers and that which is dialectic, field of opinion, which corresponds to rhetoricians and sophists. *Topics* = the art of argument, and belongs to dialectical rather than apodictic terrain. Therefore, *topoi* are dialectical and rhetorical conclusions. CICERO does not

Today, the Aristotelian signifier of *Topics* still exists (=formulation of a “theory” of the dialectic), but for contemporary jurists, its meaning is Ciceronian and is centred on the “practice” of argumentation. Also, remember that in modern doctrine a distinction is made by VIEHWEG, between a first-degree and second-degree topic²¹, the latter of which consists of applying a simple repertoire of previously produced points of view or catalogues of topics.²² 4) Regarding the systematic and the aporetic, prudence would counsel us to avoid identifying the term “system” with “axiom”, which has the reverse effect of making that which is systematic and that which is topical irreconcilable (when this is not the case). Certainly, system-thinking comes from the whole, while in aporetic thinking the reverse occurs. However, it is no less certain that the two functions are compatible. What they reveal is that if emphasis is put on the “system”, this system will be established by selecting problems, whereas if emphasis is placed on the “problem”, then it will be necessary to search for a system to find the solution.²³

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²¹ VIEHWEG, *Tópica y jurisprudencia cit.*, pp. 52, 53 and 77, summarises by saying that the first-degree topics originate in the case itself, involve searching for the premises that might serve to resolve the case and then attempting to produce general guidelines or guiding concepts that allow a decision to be induced. This observation shows that in daily life, this is almost always the usual way to proceed. KASER, *Método de los juristas, cit.*, pp. 12 and 13, completes this note in his summary that: the guiding concepts are *topoi*, while topics are the art of discovering them.

²² A catalogue of topics, under the title *de regulae iuris antiquae*, is supplied by D.50.17.

²³ GUZMÁN, *Historia de la interpretación cit.*, pp. 312, defends this compatibility and actually calls the second function (see our n. 21) systematic. For the connections, in synthesis, between problem-focused and systematic thinking as explained by HARTMANN, cfr. VIEHWEG *Tópica y jurisprudencia cit.*, pp. 50-52. Complete bibliographic references to HARTMANN, *ibi*, p. 49, n. 24, without forgetting our notes

4. According to TORRENT²⁴, it is frequently stated that common law recognises case law as a primary source of law, and that therein lies its major difference from civil law, which only recognises enacted law or statute as a formal source of law. However, he also emphasises, and in this he coincides with CANNATA, the undeniable fact that case law precedents carry extreme importance and authority in continental European systems as well. So much so that, in many fields, it is not the law that is “known”, but rather it is the related case law that is “known”.²⁵

5. As the purpose of this work is to formulate some observations about the methodological criteria of counterpropositions, we shall now move on to focus on *argumentum a repugnantibus* and *digestorum libri*. It is our intention that considering this type of legal literature more closely may be fruitful and form a basis for argument, since in *ius Romanum* itself (represented by these *digesta*) radicalisms and extreme opposition can be avoided, and it may be

19 and 21. Remember the obvious: a problem is any matter that apparently allows more than one response and for which it is necessary to find one single response as a solution, which leads to the problem becoming incorporated into a system.

²⁴ TORRENT, A. *Fundamentos del Derecho Europeo*, Ciencia del Derecho: derecho romano-*ius commune*-derecho europeo, Madrid, 2007, pp. 248-260; 343-345.

²⁵ *Cfr.* for everyone, CANNATA, CA, *Historia de la ciencia cit.* ch. XIV: I) Dos tradiciones jurídicas II) Case law y dogmatic, pp 238-242.

an *iter* to invoke in support of an intermediary route or, at least, a less extreme position.

(II)

The *Libri digestorum* (or *Digesta*) are authentic treatises on *ius privatum*, which follow the expository order of the *Edictum Pretorium*.²⁶ They came into being as a genre of legal literature²⁷ in its pre-classical phase with the *veteres* and, specifically, in the circle of the *Servi auditores*²⁸. It is no coincidence that SERVIUS SULPICIUS

²⁶ CANNATA, *Historia cit.*, p. 77.

²⁷ GUARINO, A., *L'esegesi delle fonti del diritto romano*, I, pp. 169-178, Napoli, 1968, systematises *le forme della letteratura giuridica classica* and distinguishes between: A) commentaries: a) whether on civil or praetorian law, such as the *iuris civilis libri* or the *ad edictum* respectively; b) whether texts of the *ius publicum*; c) or works by preceding jurists such as notes and observations, with different titles (*ad ex.*: the *libri ad* and the name of the *iurisprudens* treatise; *libri ex* and the name of the author and work on which he wrote the commentary, or, finally, as *notae ad...* or *epitomae*); B) casuistic works *proprio sensu*, or rather, collection of *casus* or *problemata*, with their solutions, such as the *libri*: a) *responsorum*; b) *quaestionum*, *disputationum* and *epistularum* and c) the *digestorum*, basically collections of *quaestiones* and *responsa*, very extensive, in such as way as to contemplate all private law in force. C) monographic works: a) either of a special nature, such as the *libri* dedicated to the *ius fisci* or to the *res militaris*; b) or of specific practical importance, such as the *libri de iudicis publicis*; on exercising an *officio* of a public nature: such as those *de officio consulis*, *proconsulis*, *praesidis*, *praefecti..* or in matters of *cognitio extra ordinem*; and c) on private law, such as *manumisiones*, *nuptiae*; *verborum obligationes*; *testamenta*; *fideicommissa...*; and D) elementary didactic works in their two forms: a) systematic manuals b) elementary chrestomathy, such as the collections of: *regulae*, *definitiones*, *sententiae*, *opiniones*, *differentiae*.

²⁸ With his *Ad Brutum libri II* (work from which there are only a few references) Servius commences the *ad Praetoris Edictum* commentaries. Thus, Pomponius in D. 1.2.44 *Lib. Sing. Enchr.* tells us: *Servius duos libros ad Brutum perquam brevissimos ad edictum suscriptos reliquit* and Cic. *de leg* 1.5.17: *non ergo, a praetoris edicto, ut plerique nunc... hauriendum iuris disciplinam putas* (*plerique* means the many followers of Servius, of whom Pomponius cites 10 in the aforementioned Digest text).

RUFUS, considered to be the leading jurist at the end of the Republic (along with QUINTUS MUCIUS SCAEVOLA²⁹), in addition to being a prolific teacher³⁰, was the first to bring scientific activity into the field of *ius honorarium*, whose productive source is the Praetor's Edict itself. His follower ALFENUS VARUS was the first to write a work of this name: *Digesta*, a signifier, which importantly, comes from the verb *digerere* = to order, and therefore means order. This idea is anticipated in its title and it ends by reflecting through its successive proponents, better than any other type of work within the legal literature (with the logical exception of the *libri institutionum*), the systematic tendency of the classical jurists. The contents of ALFENUS' *digestorum libri* were, in essence, his own *responsa* and, above all, those of his maestro, which probably does not prevent³¹ them from having the nature of private law treatises, as stated in their definition.³² It is normally maintained

²⁹ In a way they apply the same scientific method. Thus, according to Pomponius, D. 1.2.2.41 *Lib. Sing. Enchr.* while Quintus Mucius Scaevola was the first to systematise the *ius civile*, this activity was continued by Servius Sulpicius Rufus in the *ius honorarium*. *Cfr.* above note.

³⁰ Creator of the Servian school (*auditores Servii*) as mentioned in D. 1.2.44.

³¹ CANNATA, *Historia cit.*, p. 77.

³² *Cfr.* LENEL, O., *Palingenesia Iuris Civilis*. I, Lipsiae, 1889, pp. 37-54. That of the *digestorum libri XL*, such as *genuinum Alfeni opus*, (*Alfeni digesta*), for which we only have numeric references to three of his books: I (D. 28.1.25 *Iav. 5 post Lab*), XXXIV (Gell. *N. Att.* 7.5.1), and XXXIX (D. 3.5.20.pr *Paul. 9 ad Ed.*); That for which indirectly, and anonymously (*Alfeni Digesta ab anonymo epitomata libri VII*) we have references to five works (to II, IV, V, VI and VII); through Paulus' epitome (*Digesta a Paulo epitomata vel Paulus epitomarum Alfeni libri VIII*) to seven (from I to VI and VIII); and where, finally, there are 16 fragments of the Digest where *Alfenus laudatur non indicato libro*, to paraphrase LENEL. It is risky to dogmatise regarding the specific and precise order (or systematic structure) and the possible (or probable) analogies to and/or differences from the one adopted, in classical times by: Celsus, Julianus, Marcellus and Cervidius Scaevola. GUARINO, *L'Esegesi cit.*, p. 142, only "assumes" the order of the material contained in the Praetor's Edict in the work of Alfenus, and on p. 143 he sheds doubt as to the classical nature of the sources (epitome and copy) used by the compilers of the Digest. TORRENT, *Diccionario de Derecho Romano*, Madrid,

that in classical times the *digesta* changed the actual order of the *ius civile*³³, which was followed by their first proponent, and that they were structured in two parts. The first part was produced with reference to the *ius honorarium*, or rather, in accordance with the concepts of the Praetor's Edict³⁴. The second belongs to *ius civile*, and

2005, p. 100 (Alfenus Varus) considers the order of the Edict to be "likely". CANNATA, *Historia, cit.*, p. 55 states that it is, still, a collection of *responsa*, but sufficiently rich and coordinated to be classified as a "treatise of private law". On p. 77 and in n. 157 he distinguishes between the structure of Alfenus' *digesta* and that of the four classical jurists. He maintains that Alfenus' digest would follow the order of the *ius civile*, and on p. 56 claims that this can even be proven. We agree with CANNATA on these issues, in that it is necessary to continue bringing up the observations of SCHERILLO, G., "Il sistema civilistico", in *Studi Arancio Ruiz*, IV (1953), pp. 445 - 467.

³³ The matters with which it dealt followed a practical order, and were centred on four fundamental aspects of the *ius civile*: *testamentum* (which allows us to speak of *ab intestato* succession); *mancipatio* (which makes it possible to deal with sale and purchase, and easement); *in iure cessio* (which leads to dealings related to society); and finally, *stipulatio* (with the many practical applications that it makes possible). CANNATA, *Historia cit.*, p. 56, tells us that it relates to the traditional order of the old collections of commonly known formulae and that it allowed the work to be consulted at ease; it was the order of the collections of *responsa* themselves and, in one case, Alfenus' *Digesta*, it can even be proven. Following SCHERILLO, CANNATA notes that while the order of the different works may present certain peculiarities, the general structure and the idea being governed is invariable. In more detail, Mucianus' order of matters was: I) Inheritance (testamentary succession, *heredis institutio*, *exhereditio*, acceptance and renouncement, legacies and *ab intestato* succession); II) Persons (matrimony, guardianship; *statuliber*; *patria potestas*; *potestas dominica*, freemen and as an appendix: *procurator* and *negotiorum gestor*); III) Things (*Possessio* and *usucapio*, *non usus* and *usucapio libertatis*); and IV) Obligations: Contracts, (*mutuum*, *commodatum*, *locatio conductio*, appendix to easements, and *societas*) and Crimes (*iniuriae*, *furtum*, *damnum iniuria dato ex lege Aquilia*). Cfr. LENEL, *Palingenesia cit.*, II, p. 1256, which gives detailed information about *Ad Sabinum librorum rubricarum index*. KASER, *En torno al método cit.*, pp. 39 to 42, carries out work on synthesis: The only thing that is shown regarding expository order is that closely-related matters were united. There is still a method of thinking that acts on the association coming from empiricism, and like in argumentation, in the majority of cases we see the genesis of systematic construction. It begins to deal with matters with an object that forms the centre of interest, and then it goes from one matter to another, via external, analogous and different relationships.

³⁴ The Edictal System was classified by MOMMSEN as "more than order from disorder" the Perpetual Edict, according to LENEL's *Palingenesia cit.*, II, pp. 1247-1255, includes four large groups of matters: 1) (titles I-XIII, inclusive, *de litis exordio*) included the general principles of *iurisdictio* and the special principles of the municipal magistrates, the establishment of judgement (*de edendo*), citation (*in ius vocando*)

deals with *de legibus, senatusconsultis et constitutionibus principum*³⁵. Regarding its legal nature, the *digestorum libri*, should not be categorised as problem-focused literature, even though they are casuistic. Certainly, the *digesta* are composed of *responsa* (with ALFENUS VARUS)³⁶ and the *libri quaestionum, responsorum, disputationum similiumque* contain the appendix (*pars posterior*), which covers laws, *senatus consulta* and, sometimes, imperial

capacity and authentication of the parties (*de postulando*), representation, (*de cognitoribus et procuratoribus et defensoribus*), procedural guarantees (*de vadimoniis*), supplementary remedies of the *iurisdictio* (*pacta conventa, receptum arbitrii, compromissum*), cases of concession of *in integrum restitutio*, finishing with the rubrics *de receptis* and *de satisdando*. 2) (titles XIV-XXIV) the most extensive includes everything relating to the problems of ordinary procedure (*de iudiciis omnibus*) and, in essence, it coincided with the matters dealt with in the civilist works, accompanied by the modifications agreed by the *praetor*. It discusses, in detail, cases where the *praetor* grants action (*iudicium dabo*) although the expository order does not respond to logical criteria and the grouping of matters seems to be more circumstantial, according to TORRENT, *Diccionario cit.*, pp. 1215-1216. It is centred on the sphere of obligation (*de rebus creditis*; of the *actiones* that tradition has called *adiecticiae qualitatis*; *de bonae fidei contractus*) in matters relating to the family (*de re uxoria*; *de liberis et de ventre*; *de tutelis* and *de iure patronato*) and to crime (*de furtis*). 3) (titles XXV-XXXV) mainly contain institutions of praetorian creation, especially *bonorum possessio* (completed in the sphere of succession in relation to *de testamentis*; *de legatis* and *de liberali causa*) and to a lesser extent, of tenement actions; *de publicanis*; *de praedictatoribus* and *de iniuriis*, among others. 4) (titles XXXVI-XLII: *de extremis iurisdictionis*) allude to the execution and efficacy of *sententiae* of the *iudex privatus*; *re iudicata*, execution procedures and arrangement with creditors. An appendix or 5th and final part (titles XLIII-XLV) deals with: *interdicta*, *exceptiones* and *stipulationes praetoriae*. KASER, *En torno al método cit.*, pp. 42 and 43, tells us that: it is characterised by its flexible procedural guidelines and the total lack of a private law system; its purpose is not to produce and ordered system and it uses discursive thinking to deal with problems; it shows the disdain that he felt for the dialectic method.

³⁵ These would be their specific references according to LENEL, *Palingenesia cit.*, II, p. 1255: *Ad leg. XII T: de hereditate legitima*; *Ad leg. Cinciam: de donationibus*; *Ad leg. Falcidiam*; *Ad leg. Corneliam: de captivis et postliminium*; *Ad leg. Aeliam Sentiam*; *De adoptionibus* (?); *Ad leg. Iuliam et Papiam* ; *De publicis iudiciis*; *Ad leg. Aquiliam*; *Ad leg. Rhodiam*; *Ad leges de adpromissoribus latas*.

³⁶ Offering the solution to a real or theoretic case, proposed to the jurist or that he poses himself, always with a dogmatic or didactic purpose in consultation with his own followers.

constitutions.³⁷ In some ways they are similar, however the *responsa* are their only material, since casuistic rules, arguments and reflections also appear along with *quaestiones* (or *disputations*)³⁸. In substance, the *libri digestorum* were something more than a casuistic collection, because they contemplated all possible arguments within private legal knowledge. They are more like the *libri ad edictum*, with the difference that they are not based on each discourse unit of the *iuris prudens*, dealing extensively with the cases to which they can refer. In other words, they deal with the legal “institution” that corresponds to the different points of the edict in question or of other sources that they consider.³⁹ Within legal literature, and starting from the distinction between the different degrees of

³⁷ CANNATA, *Historia cit.*, pp. 75-77 and n. 133 and 158. This appendix in the *digesta* is very important and its proportion in regard to the *libri*, ordered in accordance with the Edict, is of special note. Thus: 27/12, for the XXXIX *digesta* of Celsus; 58/32 for the XC of Julianus; 21/10, for the XXXI of Marcellus and 21/19 for the XL of Cervidius Scaevola. From the *Indices* of LENEL, *Palingenesia cit.*, II, p.1255, under the title IV *Digestorum, questionum, responsorum, sententiarum similiumque librorum rubricarum index*, and in regards to the *pars posterior: ad leges, senatusconsulta constituciones principum*, what is referred to in the text is clear. The inclusion (as an appendix) in these works of comments on the sources of *ius civile*. These are especially evident in the following cases: Regarding the *responsorum libri XIX* of Papinianus from 12 (proportion: 11/8) and the *responsorum libri XIX* of Modestinus from 14 (13/6). Regarding the *quaestionium libri XX* of Cervidius Scaevola from 15 (14/6); the *quaestionium libri XXXVII* of Papinianus from 29 (28/9), the *quaestionum libri XXVI* of Paulus, from 17 to 25, (16/9) C) Regarding the *disputationium libri X* of Ulpian from 8 (7/3).

³⁸ Although the notion of *responsum* (response from the jurist to the client in a real case posed by him) differs from *quaestio* (questions from the followers to the maestro when faced with nuances or variants of the case, whether posed, suggested or formulated by them as hypotheses, after the client has left), the same is not true of *libri responsorum* or *quaestionum* in which *responsa* and *quaestiones* are thoroughly mixed. According to CANNATA’s statement, *Historia cit.*, pp. 76 and 77, this makes it fitting to extend them to include the *libri epistolarum* and a long etcetera, and which, he reminds us, is the motivation for SCHULZ’s fair and generic classification of all of these models as *problem literature*.

³⁹ To paraphrase CANNATA, *Historia cit.*, p. 78, a text like this, a thematic commentary, or a vision clearly based on *ius honorarium*, is contrasted with another that has more relation to *ius civile* or that deals with matters that fall under *ius civile*.

abstraction achieved by its different types, the *responsorum libri* would represent the lowest level, while the *digestorum libri*, together with the *ad edicta*, the highest level, with the difference that in the latter (*ad edictum*) the main focus is the study of the *ius honorarium* (legal actions and means) while in the former (*digesta*) the main focus is the *ius civile* (or rather, its institutions included in *leges* and *senatusconsulta*).⁴⁰ No Severian jurist had the necessary talent or courage to face the complexity that this type of work represents, limiting their authorship, splendour and decline to the *iurisprudentes* of the second century. See: IUVENTIUS CELSUS *filius*⁴¹, SALVIUS

⁴⁰ *Vid.* for all, regarding concepts, analogies and differences within this casuistic literature, TORRENT, *Diccionario cit.*, pp. 319, 642 and 643.

⁴¹ The *digesta* of P. Iuventius Celsus... *filius* (*Celsi digestorum*), cover: the first part (*pars prior*) is related to *ius honorarium* and contains commentaries on the edict (*ad edictum*) in a total of 27 books (*lib.* 1-27). The second part (*altera*) contains the remaining books (*lib.* 28-39) with comments on the *ius civile* and, specifically, on the laws and *senatus consulta* (*ad leges senatusque consulta pertinet*) that come from it. Cfr. LENEL, *Palingenesia cit.*, I, pp. 127-171.

IULIANUS⁴², ULPUS MARCELLUS⁴³ and QUINTUS CERVIDIUS SCAEVOLA⁴⁴.

The most recent *digestarum libri* are the 40 by SCAEVOLA and the best-known are the 39 by CELSUS (perhaps not used by Justinian to the extent that they deserved)⁴⁵, and the 90 by IULIANUS (one of the greatest contributions to Roman legal literature), widely represented in Justinian's Digest, the compiler of which especially admired this jurist and titled the part of his compilation referring to the *iura* in his honour.

⁴² The *digesta* of Salvius Julianus (*Iuliani digesta*) with a total of 90 books, *cum notis* of Mauricianus, Marcellus, Cervidius Scaevola and Paulus, are from Adrianus and Antoninus Pius times, 117-138 (*conscripta sunt sub Hadriano et Antonino Pio*) and are divided into two parts (*Sunt autem divisa in duas partes*). The first covers up to book LVIII and deals with *ius honorarium* and follows the order of the Edict (*quarum prior (lib. I-LVIII), edicti sequitur ordine*), the final draft of which is fixed (being able to state, based on its *Edictum Perpetuum, ex Edicto Perpetuo a Iuliano composito*). The second part (*posterior (lib. LIX-XC)*) deals with *ius civile* and the laws and *senatus consulta* on which it is based (*ad leges pertinet senatusque consulta*). Cfr. LENEL, *Palingenesia cit.*, I, pp. 318-483.

⁴³ The *digesta* of Ulpus Marcellus, with notes by Cervidius Scaevola and Ulpianus, are from the times of Antoninus Pius and the *Divi Fratres*, 161-169 (*Marcelli digesta conscripta videntur M Aurelio et Lucio Vero imperantibus*). Their first part (*parte priore*) covers the first 21 books of the 31 of which they consist, and deal with the Edict, source of *ius honorarium* (*Ad edictum pertinent libri I-XXI (parte priore)*). Their final part consists of the ten following books and deals with other sources of the *ius civile* in which the imperial constitutions now appear (*ad leges senatusconsulta constitutiones, libro XXXI (parte posteriore) sqq.*). Cfr. LENEL, *Palingenesia, cit.*, I, pp. 318- 589-631).

⁴⁴ The *digestorum libri XL* of Q. Cervidius Scaevola, are probably the most recent (*sub Marco et Vero, Commodo, Septimio Severo. impp* 193-211). They follow (*ius honorarium*) the order of the Perpetual Edict in their first 29 books (*Edicti perpetui ordinem sequuntur libri I-XXIX*). The others deal with *ius civile* and contemplate laws and *senatus consulta* (*reliquos libros omnes ad leges senatusque consulta spectasse suspicari licet*). Cfr. LENEL, *Palingenesia, cit.*, pp. 215-270.

⁴⁵ LATORRE, A. *Iniciación a la lectura del Digesto*, Barcelona 1978, p. 35.

(III)

A final note in way of a practical example ends our thoughts on the *digestorum libri* and its nature as intermediary legal literature between our continental European legal regulations and the complex of solutions represented by “case law”, represented by English and Anglo-American law. In pre-classical and classical law, the case is made known in *iurisprudens* through the narration of the person who poses it (in modern-day terms, this would be the client). This presentation is normally rich in details, which are frequently trivial, and it is nothing but a translation of something that occurred in real life. Based on this, the next thing that *iurisprudens* will do is select and synthesise. That is to say, “isolate”⁴⁶ only the important elements of the story from a legal perspective and coordinate them, in order to arrive at a statement of the facts composed solely of the data that influence the decision. In other words, this isolation is the legally correct statement of an event, *Sachverhalt*, and the basis of its fair resolution. Therefore, on reducing a case (*species facti*) to its legally relevant elements, it loses its specific character (its individuality) and becomes an outline that can be applicable to other cases (*facti*) that share the same characteristics (*species*). This

⁴⁶ Cfr. SCHULZ, *Principios del Derecho Romano*, 2ª Ed. Translation by MA VELASCO, Madrid, 2000, pp. 39-59.

process, which can be continued indefinitely⁴⁷, is called *Tatbestand* by German Romanists. Thus, the *responsum* do not only propose a solution to a specific case, but rather to a situation that has been reduced to a type of case that arises from a typical situation.⁴⁸ Furthermore, it would be fitting to introduce an intermediary step between the specific case and the typical case⁴⁹, which would come to represent a generic case, guide or case type: *Vertatbestandlichung des Sachverhaltes*.

Moving from theory to practice we shall now pause to look at an example regarding the manner in which a case is stated and in order to do this, we shall use the first proponent of the *digestorum libri*.⁵⁰ In D. 9.2.52 pr (*II Digest*), ALFENUS poses the scenario of a slave who has been injured by a third party and dies as a consequence of the injuries (*Si ex plagis servus mortuus esset*). The problem consists of clarifying the cause and effect relationship between the illicit act that

⁴⁷ SCHULZ, *Principios cit.*, p. 61-62, after reminding us that “in the beginning there was the case”, gives the following example: the vendor of a horse has to compensate the purchaser for the damage arising from a delay, and signals the following possible steps tending towards the abstract: 1) the vendor of a horse has to compensate the purchaser for the damage arising from the delay; 2) the vendor of an animal... *id* ...; 3) the vendor of a thing... *id*...; 4) the debtor has to compensate the creditor... *id*...; 5) the debtor has to compensate the creditor for the damage arising from the violation of his credit right.

⁴⁸ *Cfr.* for all GARCÍA GARRIDO, from that now far away 1965, in his *Casuismo y Jurisprudencia Romana, Pleitos famosos del Digesto*, occupies himself with Roman jurisprudence and the casuistic elaboration of law, above all, for his clarity and synthesis: *Derecho Privado Romano cit.*, La técnica de elaboración casuística, pp. 90-94.

⁴⁹ To use the German terminology: *Sachverhalt* and *Tatbestand*, CANNATA, *Historia cit.*, pp. 53 and 63.

⁵⁰ *Cfr.* VIEHWEG, *Tópica y Jurisprudencia cit.*, ch. IV *La Tópica y el Ius Civile*, pp. 67 to 83, in general and 67 to 70 in particular, for some texts of Julianus’ Digests coming from D. 41.3.33.

has been committed (his death) and the damage initially caused (the injuries), and of a possible interruption to the customary causality. Or rather, if the perpetrator can be accused of a capital crime or whether a claim can be made in accordance with *lex Aquilia*, which, as GAIUS reminds us in 3.213, concedes to the person whose slave has died (*Cuius autem servus occissus est*) the freedom to choose (*is arbitrium habet*) between accusing the person who killed him of a capital crime (*vel capitale crimine rerum facere*) or claiming compensation for the damage in accordance with this law (*vel hac lege damnum persequi*). In other words and in procedural terms, it is asked whether the *dominus*, which was damaged in any event, can be covered by *Caput Primum* of the *lex Aquilia de damno iniuria dato* (286 AC), which penalised the unjust death of the slave, in which case the *reus* could be condemned to paying the owner (*tantum domino dare damnetur*) the maximum value of the slave during that year (*quanti ea res in eo anno plurimi fuit*), (Gaius 3,210), or if he could only invoke *Caput Tertium*, which refers (not to the death, but to the injuries, *iniuriae*) to all other classes of damage (*de omni cetero damno cavetur*)⁵¹, with the sentence, in such a case, for the person who caused the damage, being the maximum value of the damaged object during that month (*Hoc tamen capite non quanti in eo anno, sed quanti in diebus XXX proximis ea res fuerit damnatur is qui damnum dederit*) (Gaius 3.212).

⁵¹ Gaius 3.217 states that damage is understood in the broadest sense of destruction.

ALFENUS responds that the third party understands that the slave had been killed, which means that he died due to the injuries that were provoked, provided that the death did not come about (*accidisset*) as a result of medical incompetence (*medici inscientia*) or the owner's negligence (*domini negligentia*), which is equivalent to not consulting a doctor. If these two circumstances have not occurred, the owner can: *recte de iniuria occiso eo agitur*. In short, this is a problem in the relationship between cause (injuries) and effect (death). Thus, according to the jurist it must be established whether the following causality exists: *plagae + dominus diligens + medicus sciens + mors =* (which will lead to) *actio de mortuo eo*; or whether, on the contrary, this nexus does not exist: *plagae + dominus negligens + medicus insciens + mors =* (which will lead to) the *actio iniuriarum*.

A second example from ALFENUS can be found in the same book and Digest title (9.2.52.4), *Alfenus libro secundo digestorum*, in which he refers to the following case: A group was playing with a ball (*Cum pila complures luderent*) and one of them ran into (*impulit*) a young slave (*quidam ex his servulum*) trying to get the ball (*cum pilam percipere conaretur, impulit*). The slave fell over and broke his leg (*servus cecidit et crus fregit*). The question was (*quaerebatur*) whether the owner of the young slave (*an dominus servuli*) would have been able to bring action based on *lex Aquilia* against the person who made him fall over (*lege Aquilia cuius impulsus deciderat, agere potest*). He answered that he could not (*respondi non posse*) because it was due to chance and not fault (*cum casu magius quam culpa videretur*

factum). In this case we are not dealing with a problem of causality, but rather of fault. If there is fault (or even malice), *legis Aquilia de damno iniuria dato* can be exercised, while in its absence (*casus* or *vis maior*) the actor that involuntarily causes damage would not be liable.

Applying this to current law, article 1902 of the Spanish Civil Code, which regulates extra-contractual liability (or Aquilian liability, in reference to this law) it can be observed that: “Anyone who, by action or omission, causes damage to another through fault or negligence will be required to repair that damage”, which is a generic and abstract regulation, typical of closed legal systems. However, if we take the viewpoint in the two texts by Alfenus (there is no doubt that here we have a case!) we find ourselves with some of the same elements being reiterated. For instance: *iniuria*, *culpa* and *damnum* and, obviously, a necessary cause and effect relationship between the action, or omission, and the damage. In the first fragment that we discussed, D. 9.2.52 pr, special focus is given to the causality relationship and the possible causes that could interrupt the customary sequence. In the second, D. 9.2.52.4, focus is placed on the exclusion of liability through *casus* (*a contrario*, at least through *culpa*, its requirement), and in both of them, the corresponding *damnum* and *iniuria* (in their simplest terminological sense: not in accordance with law).

ALFENUS tells us of a real event involving the death of a slave, but we should point out that neither the name nor the description and circumstances of the slave are given, which distances us from the specific case. A generic reference is also not used, as might be the usual scenario of the slave *Stichus*. These elements represent two steps in relation to the abstract, which bring us closer to the legal regulation, the general and abstract characteristics of which have to be borne in mind. In the scenario to which Alfenus refers, CANNATA⁵² satirises that it would be easy to imagine the real death of a young slave, called Erotus, with golden hair. He continues hypothesising that Erotus' injuries were caused by Tullius, a treacherous baker, the previous week. All of this being true, the only aspect of interest is "the death of a slave as a consequence of injuries": *Si ex plagis servus mortuus esset*. This is not so far from a real event subsumed in a regulation, which is not a novelty, if for example, we remember the XII Tables, IV, 5, telling us *Si intestato moritur....* The first case of Alfenus is fulfilled by presenting the logical structure of a hypothetical rule, since it is as valid to say "If one dies intestate..." as "One who dies intestate..." or, in the case of Alfenus "If a slave dies as a result of the injuries caused by a third party..." as "When a slave dies as a result of the injuries...".

Once again, we have criticised the radicalism of the counterpropositions and attempted to defend the intermediary

⁵² CANNATA, *Historia, cit.*, p. 53.

stance, which, in our opinion, is reflected in the *digestorum libri* and their legacy.