LMU LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

Traditions of Teaching (Roman) Private Law in Europe

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I.
Teaching Roman Law as Timeless Private Law

Azo of Bologna (ca 1150-1230)
Quaestiones Sabbatinae

Bolognese School of Glossators:
Irnerius - Bulgarus - Joannes Bassianus - Azo - Accursius

Teaching the Justinian law books (529-534 AD):

- *Institutiones* = textbook for first-year students
- *Digesta/Pandectae* = collection from scientific legal literature (mostly 2nd/3rd century AD)
- *Codex Iustinianus* = collection of imperial constitutions (2nd to 6th century AD)

Azo famous for

- ***Summa*** *Codicis*; *Summa Institutionum*; later also: *Summa Digestorum* = synthetic and condensed representation of the Justinian law books

- ***Lectura*** *Codicis* = transcript of teaching lessons on the *Codex Justinianus*

- ***Brocardica*** *aurea* = "Golden Weaponry", collection of legal maxims with supporting and contradicting passages from the Justinian law books

- ***Quaestiones Sabbatinae*** –

"Saturday Disputes"

"Moot court" tradition: Small written case and passages from the Justinian law books

Students will plead, teacher will comment.

Since 1252: obligatory for all Bolognese doctores of the *ius civile* and the *ius canonicum*.

Transcripts of the Quaestiones of Azo have survived and were published by E. Landsberg in 1888.

Quaestio X

(Landsberg 71.20 - 75.17; cf. Aulus Gellius, Noctes Atticae 5,10)

- **Plaintiff (P):**

"Won litigation" to be **interpreted broadly**, not only as litigation with a third party.

If P started the first litigation only to let D win and the condition occur, this is **not bad faith** (*dolus*) but permissible pursuit of own interests, arguing with Digest 42,8,24: “Civil law is written for the vigilant.”

If D failed to formulate a narrower condition (“won litigation against a third party”), he has to **blame himself** and bear the loss.

- **Defendant (D):**

It must not benefit P that D **won against him** in the first litigation.

It is unjust that P would have an action being founded in his **wickedness** (loosing intentionally the first litigation).

“Won litigation” in the sense of the condition has to be one **lucrative for the buyer**. It cannot be his own case against the seller. Hence the condition has not been occurred, the action not justified, arguing (from far away!) with Digest 13,7,22,4 (?): Recourse claims of a pledgor only in case of lucrative pledge sale.

- **Solution/Azo:**

The narrower interpretation
according to meaning and purpose
is more likely,
arguing with Digest 50,17,114:
“In obscure cases one must examine
what is more likely or more common.”

→ Justinian law books as a treasure trove for **– timeless – legal arguments.**

Studying law is learning
to find the argument
within the (more or less) **memorized text masses.**

Rhetorical/topical impact.

II.
Teaching Roman Law after the Codification of Private Law

since then:
Roman law as a propaedeutic exercise?
“Legal laboratory” working with a set of rules, destilled from ancient sources?

“From the perspective of dogmatic history, the contemporary objects of Roman law are often irrelevant to the *ratio*: many sources deal with the law of slavery, for example. In very few cases, however, the *ratio* of a decision changes if ‘slave’ is replaced by ‘used car’, for example.”

Ch. Baldus, AcP 210 (2010) 22

III.
Teaching Roman Law as a Historical Legal System

- ancient social, economic and mentally impacts
- procedural view
- open discussions (*ius controversum*)
- purpose: critical view on modern concepts, categories, principles

German Civil Code
(Bürgerliches Gesetzbuch)
§ 162. Preventing or bringing about the occurrence of a condition.

(1) If the occurrence of the condition is prevented in bad faith by the party to whose disadvantage it would be, the condition is considered as if it had occurred.

→ Debtor owes because of ficticious occurrence of the condition.

Digest 35,1,24 pr. (Iul. 55 dig.; mid IInd AD) = 50,17,161 (Ulp. 77 ed.; early IIIrd AD)

→ Debtor owes because of ficticious occurence of the condition.

Different cases.
Solution by fiction not shared by all in every case!

■ Fiction **necessary** (and widely shared), if creditor can enforce his right **in natura**

(e.g. his freedom/manumission: **ancient impact**).

D. 40,7,3,16 (Ulp. 27 Sab.):
conditioned **manumission** by testament

■ Fiction **not necessary**
(and not widely shared: ***ius controversum***),
if creditor can anyway enforce only
compensation in money
(*condemnatio pecuniaria*: **procedural view**).

D. 18,1,50 pr. (Ulp. 11 ed.):
conditioned **sale**
compensation by *actio praescriptis verbis*
[**not** the sale action; that means: Labeo does
not work with the fiction]."

■ In modern law there is the principle of enforceable performance ***in natura***, compensation in money is secondary.

Therefore, fiction is **always necessary (critical view on modern principles).**