

Alternative Paradigm for Roman Law

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As we race, stumble, shuffle or are dragged into the third millennium, we are in danger of leaving more than confused computers and microchips behind, namely the foundation of a great number of major legal systems, Roman law. Those of you who are of the opinion that this statement is just as stupid and alarmist as the Y2K alarm, I should pre-empt by explaining that I come from the last outpost of the Roman empire, that is South Africa.

South Africa is part of a small group of nations (Scotland, Québec, Louisiana, Sri Lanka, Botswana, Lesotho, Swaziland, Namibia and Zimbabwe are the other members) that have what is euphemistically called a mixed legal system. This term attempts to explain that as a result of historical chance a civilian legal system married into the common law.

In the resulting mésalliance Roman law provides the foundation of important segments of South African private law, such as the law of things and the law of obligations. As a result both Roman law and Latin held until recently important places in the curriculum of South African Law Schools.

However, in South Africa and elsewhere relevance is the criterion against which teaching and research are measured. Roman law has been taught at the universities of the Old World since the twelfth century and both teaching of and research in Roman law were perceived highly relevant. As the practical application of Roman law diminished and disappeared after codification, new functions emerged, namely the development and support of legal doctrine and dogma and a practice arena for students. Today these functions are being taken over by newer disciplines such as comparative law, sociology of law, introduction to law and legal skills. This development has severely reduced the teaching of Roman law as the accusation of irrelevance becomes increasingly difficult to rebut, and funding of historical research is drastically cut.

The said problems are aggravated by the fact that most law schools are fast developing into trade-schools and to support this accusation, I refer to an essay from a relevant, modern jurist, namely the essay *Legal education as training for hierarchy* (In Kairys *The Politics of Law. A progressive Critique* (1982) 38-58) by the Harvard scholar DUNCAN KENNEDY.

MODERN LEGAL EDUCATION

The focus of KENNEDY's attack is aimed on legal training as a reproducer of hierarchy, but in developing his point he critically analyses modern legal education.

All education consists of two components, namely knowledge and skills and KENNEDY states that the intellectual content of the law appears to be the memorising of rules and why these rules have to be the way they are. The skills learned are to retain large numbers of rules organised into categories, legal analysis, that is to identify gaps, conflicts or ambiguities and to learn certain argumentative techniques with a basic list of *pro* and *contra* arguments.

These are useful and important skills, but law schools teach these rather rudimentary instrumental skills under the pretext that they represent legal reasoning. The latter is held forth as an analytical process by way of which the correct legal solution is found. Legal reasoning or thinking like a lawyer is used to explain and validate most legal rules. Thus a number of cases which present and justify basic rules of law are discussed and presented as exercises in legal logic. Law lecturers convince students that legal reasoning does indeed exist and that once this magical gift has been acquired the correct legal solution can be found. This persuasion is achieved because the teachers decide which argument is valid in which case. In addition the so-called incorrectly decided cases play an important role in this convincing, because they are discussed to prove the existence of

this inner logic of legal reasoning which is thus shown to be capable of criticizing as well as legitimating.

The core of this approach is the distinction between law and politics. Law is presented as a neutral, a-political, merit based system, which can be studied in isolation, like a craft. Thinking like a jurist, the exercise of legal logic is held to differ from thinking like a politician, theologian or ordinary person.

Whether the dogma of thinking like a jurist and the correct legal solution are merely teaching aids or the foundations of an underlying ideology like Kennedy asserts, I do not know, but I submit that they are wrong. Two of the many questions which are never asked at University are firstly whether there is really only one correct legal solution, and secondly whether lawyers do indeed think differently from ordinary people.

As a result legal education validates the myth that a legal system exists independently of the surrounding world and that legal science is capable of finding the correct legal solution in true scientific manner, that is objective and neutral.

This separation of law from the societal context represents the common denominator of positivism, namely that science must limit herself to the facts and eliminate value judgments and that in this manner science can be neutral and objective.

However, philosophers today are generally of the opinion that even positivism cannot be objective or neutral, but philosophy falls outside the study of law which concentrates on preparation for legal practice and the real world.

In consequence, students are never told that the so-called correct legal solution is co-determined by political, economic, ideological and other factors, nor that thinking like a jurist really means that virtually any solution can be plausibly justified.

ROMAN LAW

It is here that Roman Law can play a new role in legal education since it has the potential to promote nuanced thinking.

Roman law is extremely well-suited to make students aware that the correct legal solution is a figment of the imagination, and that thinking like a jurist is a euphemism for intellectual prostitution. Roman law provides clear examples that several legal solutions are possible and that religious, political, economic and other factors determine the various solutions.

I shall now give several examples in support of this multiple choice aspect of Roman law, which examples come from the law of persons, succession, obligations and things.

Divorce

The Roman law of divorce exemplifies that various approaches towards marriage and women are possible.

The *libera matrimonia esse antiquitus placuit* of the classical period of C. 8,38,2 must be contrasted to the pre-classical and post-classical limitations on and obstacles to divorce.

In the pre-classical marriage with *manus*, divorce was in principle possible, but far from simple. Moreover, marriage was

a family affair, the wife *filiae loco* without property and the conclusion may be drawn that divorce in this social context would rather be the exception than the rule. This is supported by the fact that Aulus Gellius makes mention of the third century BC case of Carvilius Ruga, which was apparently the first notorious divorce in Rome.

In post-classical law the Christian emperors introduced legislation penalizing causeless divorce (C. Th. 3,16,1-2; C. 5, 17,7-12). In 542 AD Justinian enacted Nov. 117,10 forbidding divorce by mutual consent and in 556 AD decreed in Nov. 134, 11 severe penalties for causeless divorce, namely lifelong confinement in a monastery for both man and woman and confiscation of their estate in favour of descendants or ascendants and the monastery.

This absence of the correct legal solution is the result of different views on marriage, namely marriage as a sacrament subject to divine will as opposed to marriage as a social institution based on the free will of equal parties. Furthermore the position of women in a patriarchal society is vastly different from that in a more egalitarian social environment.

Freedom of testation

The second example relates to the "to be or not to be" of freedom of testation. The unlimited freedom of testation of the *Uti legassit suae rei, ita ius esto* mentioned by Gaius in 2, 224, granted the *pater* the power to exclude his issue as long as the law of *exhereditio* was satisfied. The subsequent material restrictions culminating in the final form in which Justinian modelled the

portio legitima were accepted in Western European and affiliated legal systems. The contrast between the Anglo-American freedom of testation and the civilian legitimate portion accentuates the view that legal problems are socio-economically determined and should be approached in the same manner.

Laesio enormis

It should be clear that it is not my intention to break new ground in romanistic studies, but that I am making use of existing research in support of a new hypothesis. I am therefore not offering anything new to BECKER's work, *Die Lehre von der laesio enormis in der Sicht der heutigen Wucherproblematik* (Beiträge zur neueren Privatrechtsgeschichte Band 10 [1993]), but want to concentrate on the tension between the imperial rescripts introducing *laesio enormis* and D. 19,2,22 [3] and D. 4,4,16 [4]. In terms of the two Digest texts it is perfectly acceptable to have the better of the other party in contracts of sale and lease, as long as you refrain from fraud. C. 4,44,2 and 8 provide on the other hand that if land had been sold at half its value, the seller could rescind the contract. The buyer could prevent rescission by topping up the price to the real value. Both zenith and nadir of this doctrine are very clearly linked to ideology. Thus the *laesio enormis* principle was extended to the buyer as well as the seller, to all sales and thereafter to all *bonae fidei* contracts during the protective community orientated Middle Ages (Dionysius GOTHOFREDUS, *Notae repetitae tertiae quartaeque praelectionis ad Corpus Iuris Civilis*, Genevae, 1619, Nota r ad C. 4, 44, 2). This proved incompatible with freedom of

contract, which concept developed during the sixteenth and seventeenth centuries to become the cornerstone of the theory of the law of contract. The doctrine of freedom of contract happened to fit perfectly in the ideas of ADAM SMITH, which promoted a faith in the self-interested, freely bargained, value-exchange mechanism as the key to all rational economic thought (ATIYAH, *The Rise and Fall of Freedom of Contract*, 321 sqq.). As SMITH's ideas turned into the ideology of laissez faire and economic liberalism, freedom of contract became a holy cow not to be interfered with since she was necessary for the successful expansion of trade and industry. Thus *laesio enormis* became an unacceptable mistake to generations of jurists who had been conditioned to regard freedom of contract as one of the basic value-free tenets of the law. The resulting avalanche of legal literature on the Codex texts even after their abolition, was as a rule critical and the fact that these texts introduced the principle of equality in the law of contract was by and large ignored. In consequence students are not informed that freedom of contract is the Siamese twin of the industrial capitalism in the period from 1770 until 1870, nor is it questioned whether the role of the courts should be restricted to enforcing agreements or whether unfairness in the bargain should be a matter for the courts (ARONSTAM, *Consumer Protection, Freedom of Contract and the Law* [1979] 13).

Justa causa traditionis

The question revolving around the *justa causa traditionis* and more in particular the problem of the causal versus the abstract

system of passing of ownership is another example par excellence of the rich variety of Roman law. The question which of the two systems prevailed in Roman law has kept the dogmatists occupied for centuries (VAN WARMELO, *Justa causa traditionis*, in *Studi in onore di Cesare Sanfilippo* 1 [1982] 618 *sqq.*). The paradox between D. 41,1,35 according to which a valid *causa* is required and D. 41,1 36 in terms of which text the abstract *causa* suffices, has led to such a number of analyses, hypotheses and theories that only a handful of specialists can find their way in this field. From the time that the humanists commenced to question the inviolability of texts and the authenticity of documents, the interpolation in its widest sense, that is from intentional alteration to accidental Justinianic and pre-Justinianic text-changes, has served her purpose beyond the call of duty and has protected dogma and doctrine against subversive attacks. It is a sad truth that no analysis of the *justa causa* question can be found which does not rely heavily on drastic adaptations within the texts. The possibility that Roman law and more in particular the Roman jurists were more inclined towards a fair solution in the concrete case than towards the support of a legal theory, is apparently hard to accept.

CONCLUSION

The Roman solutions in regard to divorce, freedom of testation, *laesio enormis*, *justa causa traditionis* and many other topics illustrate that the correct legal solution is a myth. A hypothesis can be developed that the so-called defects of the

Digest are not defects at all; that the contradictions, faulty repetitions, sloppy language and other complaints which have been pointed out and explained away, or left unmentioned by dogmatic positivists, are in reality the true proof of the genius of the Roman legal mind. It is the Roman jurist who convincingly showed us that it can be done differently, and that the solution depends on the societal context and not on juridical dogma.

The often referred to and highly acclaimed so-called legal intuition of the Roman jurists really means that they approached juridical problems holistically incorporating social, political, religious and other relevant factors. The disharmonies in the 'system' did not bother them and were considered irrelevant since the sense of necessity is lacking in their legal science. The definition of a *regula juris* by Paul in D. 50,17,1 is illustrative in this respect: *Regula est quae rem quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat.*

Such approach may be explained by the type of education the Roman received. Classical Roman jurists had studied with a rhetor. When they could easily compose sentences and paragraphs they were given topics and asked to compose a speech. The speech topics were divided in *suasoriae* and *controversiae*, the latter being a speech in which one side of a point of law was argued. Cicero had adapted Aristotle's dialectics in his *Topica*, which was a type of recipe book for rhetorics and concentrated on the development of arguments. That this thought technique influenced legal thought is generally accepted and to a degree explains the lack of system and abstraction of Roman law,

since dialectics as a scientific method was primarily concerned with persuasion. In this context the often-cited statement of Javolenus in D. 50,17,202 that *omnis definitio in iure civili periculosa est: parum est enim ut non subverti possit* fits in perfectly and explains the elasticity of concepts such as *possessio* and the absence of a definition of ownership.

By showing that law and legal science exist within a cultural context and that this cultural context is subjectively determined, with the result that the legal solutions are also subjectively determined, Roman law can provide an important counterweight to the predominance of breadwinner orientated positivism in legal education.