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Role of Arbiter in Roman Classical Law

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Abstract

The paper deals with the role of the jury in Roman court proceedings. It presents the basic characteristics of Roman civil procedure in the classical period. It points out the differences between the older period of so-called proceedings by means of statutory actions (*legis actiones*) and proceedings by means of so-called procedural formulas. The emphasis is on the classical period of Roman law. The court proceedings of this period differ in substance from both the older and the Justinian proceedings. The judicial process of the Emperor Justinian is based on the type of extra ordinem procedure that was introduced during the reign of the Roman emperors. This procedure has all the characteristics of a modern judicial procedure – the trial is presided over by a professional judge, appointed by the State and trained in law, the legal effects of the proceedings occur when the action is served, there is a possibility of appeal within a hierarchical system of appeal courts, etc. The court proceedings under classical law are much less formal and based on greater cooperation between the parties; the parties themselves determine the conditions under which they will submit to the judge's judgment, and the state only authorizes the parties' agreement. The parties also choose the arbitrator in whom they have confidence and to whom they entrust the fate of their dispute. The arbitrator focuses not on the legal evaluation of the dispute, but only on proving particular facts that are alleged by the parties during the process. The arbitrator's judgment itself is as binding and immutable as that of a modern court and can also be – very quickly and effectively executed by the power of the state.

Keywords

Roman law – Roman litigation – proceeding per formulas – arbiter – M. T. Cicero – *iudicium quod imperio continetur*

The main aim of this article is to show the main differences of between the court procedures in the times of the classical Roman law and the period of post-classical or Justinian's law. Attention will be paid in the first place to the main features of the civil procedure in the period of classical law, its basic principles and aims.

The foundational works in the field are perceived to be those of Wenger,[1] the more recent works of Kelly,[2] Kaser,[3] Seidl,[4] Metzger.[5] A brief overview of Roman court proceedings is given by Pichonnaz.[6] On the European history of judicial proceedings in general Nörr.[7]

In addition to these overview works, there are also studies on individual particular issues of Roman civil procedure, such as evidence (Rozwadowski,[8] Visky,[9] more recently also Sorka[10]), the issue of court proceedings as a limitation of arbitrariness (Diosdi),[11] the course of proceedings before the judgment (Litewski),[12] individual developmental stages of Roman civil procedure (classical Roman procedure – Litewski,[13] legisational procedure – Gintowt).[14]

The earliest court proceedings are dealt with by Boháček[15] and an analysis of the key concept of litiscontestatio is given by Kupiszewski.[16] The local and spatial organization of the Roman trial at the end of the Roman Republic is dealt with by DeWitt.[17] In this case, it is a description of exactly what trials looked like in the central part of the Roman Forum media, and it emphasizes how important the choice of tribunal location was for the court.

1 Wenger (1925), pp. 181–197.

2 Kelly (1966).

3 Kaser (1966).

4 Seidl (1971).

5 Metzger (2005). Here, he deals with the question of the appointment of a judge and, in particular, the question of procedural time limits both in the in iure and the apud iudicem phase. However, his interpretation of the procedural concept of intertium, based on a surviving municipal law found on a bronze tablet in Spain in 1982, is not universally accepted.

6 Pichonnaz (2008), pp. 50–59.

7 Nörr (2015).

8 Rozwadowski (1969), pp. 1–29.

9 Visky (1968), pp. 23–70.

10 Sorka (2021), pp. 593–601.

11 Diosdi (1963).

12 Litewski (1969), pp. 227–257.

13 Litewski (1971).

14 Gintowt (1960), pp. 13–29.

15 Boháček (1951), pp. 7–26. Boháček points out the fundamental difference between classical procedural Roman law and Justinian law. It was the Justinian process that was adopted into common procedure thanks to the Italian law schools of the 12th century.

16 Kupiszewski (1963), pp. 243–265.

17 DeWitt (1926), pp. 218–224.

The extremely interesting question of the manifestations of will in Roman civil procedure has been treated by Babusiaux.[18] The problem of court proceedings under the Republic is also dealt with by Classen.[19]

The issue of the judge and his responsibility is dealt with by Metzger,[20] by Biondi[21] and also by Birks.[22] The relationship between power and law in the adjudication of a dispute is also dealt with by Wacke.[23] Düll,[24] in his much quoted work on the good in procedural law, understands the role of the judge as one who finds a conciliation, or better still, a peaceful settlement between the parties. Plescia[25] also elaborates on the process of appointing a judge and his responsibility.

On arbitration as dispute resolution in general, see Cary,[26] and on arbitration in the context of ius commune, see Martone.[27]

In the Czech literature there are only a few monographic works dealing with Roman procedural law. These include monographs by Vážný[28] and an unfinished monograph by Heyrovský.[29]

Among the more minor works we can mention Heyrovsky's work on the role of the judge[30] and representation before the court,[31] as well as Poláček's work on the question of *denegatio iustitiae*[32] by Roman magistrates.

As a curiosity, we can mention Bartosek's study dealing with Roman procedural law from a Marxist perspective.[33]

In more recent times, Roman procedural law – within the framework of particularistic topics – has only received attention at conferences.[34] A comparison of Roman and canonical procedure is dealt with by Hrdina.[35]

18 Babusiaux (2006).

19 Classen (1978), pp. 597–619.

20 Metzger (2004), pp. 243–275.

21 Biondi (1970), pp. 26–39.

22 Birks (1988), pp. 36–60.

23 Wacke (1978), pp. 372–389.

24 Düll (1931).

25 Plescia (2001), pp. 51–70.

26 Cary (1926), pp. 194–200.

27 Martone (1984).

28 Vážný (1935), pp. 66–71.

29 Heyrovský (1925), pp. 11–87, esp. 80.

30 Heyrovský (1914).

31 Heyrovský (1914).

32 Poláček (1947).

33 Bartošek (1969), pp. 117–164.

34 Role of the arbitrator see Knoll (2008), Židlická–Salák (2011).

35 Hrdina (2020), pp. 61–88.

To fully understand the role of the classical civil procedures particular to the main difference between the role of a judge and the role of an arbitrator. There is a vast difference between a judge and an arbitrator. The judge of the time of Justinian's proceedings became the typical representative and model for all subsequent proceedings.

Individual elements of Justinian's proceedings influenced all subsequent proceedings including the canonical (or better roman-canonical process) and the modern proceedings.[36] Those elements are a single professional judge, the procedural effects associated with the moment of filling a suit (*actio*), the possibility of appeal to a higher instance the principle of pleadings and principle of secrecy of proceedings.

Before we can assess the role of the arbiter in Roman litigation, we have to say something about the procedure itself, about the main features, the basic principles, remark some milestones of the history of Roman civil process. And we cannot avoid some observations about the nature of the society and the role and position of lawyers and arbiters.

The first question is: what was the reason of introduction of the Roman civil procedure? In the early days, the Roman state was not characterized by a great concentration of power. On the contrary. It was more or less loose association of families and tribes. Each family was self-sufficient both economically and politically. Each family was represented by the *pater familias* – the only member of the family who was able to conclude contracts and to liable for the torts of members of his household.

The state intervened only in the areas which were shared among the families. Adoptions, making of the last wills in public, public religious acts and so on.

Even disputes between families were left to be resolved by the individual fathers of the families.

The main aim of the state was to persuade the quarreling fathers familias not to retort to the violence but to go to court – *si in ius vocat ito* (if you are summoned to court, you shall go).[37]

And it is obvious that self-help was largely allowed in the older Roman law. As time went on, it was more and more restricted.

Leges Iuliae de vi publica et privata – part of the judicial reforms of Augustus – imposed public penalties for the use of violence.

Decretum divi Marci allowed to impose a fine if the creditor forcibly took possession of the debtors belongings in order to force him to pay the debt. And moreover, the creditor loose his case.[38] Emperor Justinian enlarged this protection to the property of children of the debtor or to the property of the 3rd party.

And finally – the imperial constitution (389 CE) declared that an owner who removed his property from possession of another party by force has to return this property and will lose the case.

We can find many traces of self-help in the source of Roman law: the owner of the promise is entitled to destroy an aqueduct which is illegally placed on his land. The rule

36 Boháček (1951), p. 7.

37 Of course, Roman law also knew self-help, but it was increasingly limited by the judicial process. About this best (in English) Diosdi (1963), pp. 187–189.

38 Dig. 48, 7, 7.

is different from the projecting roof or balcony, where the self-help is banned. The aqueduct, unlike the roof places an excessive burden on the owner of the land on which is built.

Self-help was limited to the defensive cases – according to the principle *vim vi defendere licet.* In other case the applicant should go to court. The decision reached by the court should be acceptable for both parties. Therefore the authority of priests was used. And connected with the formality of words of the first codification of Roman Law – the Law of the XII Tables.

The words used in the law-suit should be the same as in the codification – the principle of magic formula.

The pontiffs (pontifices) drew up forms for individual lawsuits based on the words of the law. These were called *legis actiones* – statutory actions.[39] These formulas were spoken orally during the litigation and were often accompanied by symbolic actions (gestures).[40] In addition to fixed formulas, *legis actiones* also contained variable formulas that were adapted to the specific case. *Legis actiones* became immutable over time.[41] Even a very small deviation from the prescribed formulation resulted in the loss of the case.

The Law of XII Tables contained rules of procedural law.[42] The rules were considered as important and were placed at the beginning of the first tablet. The procedural rules were incorporated with the vision of limiting the use of violence – everybody will know how to get access to the court. The implementation was the outcome of the class-struggle among patricians and plebeians.

The interpretation of the provisions of the Law of XII Tables was entrusted to the legal experts – pontiffs at the first time and then a jurisprudence (*iuris prudentes* - experts in the legal questions). Many of well thought out legal institutions have been created on the basis of the interpretation of the Law of XII Tables – by instance the institute of prescription. This institute is so well designed that every attempt to remove it from the legal order was futile.

According to lawyer Gaius the use of *legis actiones* was very complicated and even the slightest mistake could lead to the complete loss of the whole procedure.[43] The statutory actions were hated by the litigants and there was a strong urge to replace them.

The change was provided by statutory law. *Lex Aebutia* – in the first half of the 2nd century BC introduced the use of the new form of procedure – the formula (*formulae*). By another act (it was two acts to be precise – *leges Iulianus iudiciorum*) the statutory actions were completely removed.

Therefore, we divide the trial into two parts – between the judicial officer (magistrate) and the jury. The magistrate, especially as he was directly elected by the citizens, was not

39 Osuchowski (1971), pp. 159–165.

40 Karlova (1872), pp. 74–97.

41 Gaius 4, 14.

42 On the procedural law of the Law of XII Tables, see Behrends (1974), pp. 57–74.

43 Gaius 2, 72.

restricted in the exercise of his office by laws or legal usages, but could act at his own discretion without regard to the provisions of the laws.[44]

This was especially true of those officials who were tasked with deciding on the private rights and duties of citizens. This broad decision-making power, quite unprecedented in modern times, was based partly on the fact that the magistracy was elected by the citizens[45] and also on the fact that the basis of the magistrate's activity was his power – the *imperium*.[46]

In the case of the praetor, he was exclusively entrusted with the power to adjudicate disputes between citizens in the field of private law (*iurisdictio contentiosa*). This power was conferred on him by a statutory mandate – the *lege Licinia* of 367 BC. In addition to the office of praetor, the office of inferior *curiae aedile* was created[47], who had supervision over the marketplace and therefore over the purchase contracts that were concluded in the marketplace. The jurisdiction of the *praetor urbanus* was from the middle of the 3rd century BC limited to disputes between Romans, and for private disputes with an international element another office was established, namely the *praetor peregrinus*. In the Roman provinces, the governor exercised civil jurisdiction. In the Republican period these were the *praetor*, *proconsul* or *propraetor*. Under the Principate, then, this power was exercised by the *proconsul*, *legatus Augusti pro praetore* or *praefectus Aegypti*. In the provinces, the *quaestores* exercised the lower magisterial activity, i.e. the supervision of the marketplace.[48]

The official himself was entitled *ius dicere*, i.e. to find the law, in fact to decide disputes independently. But from the earliest times it had been customary for the magistrate merely to co-operate in the commencement of the litigation and the laying of its foundation, the actual evidence and the pronouncement of the judgment being entrusted (*iudicem dare*, *iudicari iubere*) to juror chosen by both parties, who were called in formula to decide the entire case.

Therefore, Roman court proceedings are divided into two separate sections, the proceedings before the magistrate and the proceedings before the juror.[49] The official examined whether the legal requirements were met – whether the matter in dispute could be heard in court at all or whether the parties had standing to litigate.[50]

Further, it was the task of the magistrate to ascertain what the plaintiff's formal claims were and what grounds the defendant raised in his defense. The parties had to agree on these grounds and declare on what terms they were willing to submit to the adjudicator's

44 Wlassak (1882), pp. 22–32; Jörs (1886) p. 156ff.

45 See Lintott (2003), p. 98.

46 List of magistrates with imperium see Heyrovský (1904a), p. 36.

47 Broughton (1951), pp. 13–22.

48 Heyrovský (1904a), p. 36. See Dig. 1, 2, 2, 27; Dig. 1, 2, 2, 28; Dig. 1, 2, 2, 32.

49 Keller (1883), pp. 268–293.

50 Kelly (1966), p. 102ff.

finding, and the praetor authorized this affirmative declaration of the parties (which is called a *litiscontestatio*) on behalf of the State.

A more detailed trial of the case was then held before a jury and evidence was taken. At the conclusion of the proceedings, the arbitrator rendered a judgment. Procedural formulas were used to determine the legal basis of the litigation.[51]

The above-mentioned *lex Aebutia* therefore introduced compulsory court proceedings according to such procedural formulas. The authority of the formula process was based on either *ius civile* – that is, if the parties to the dispute were Roman citizens and the dispute was conducted either in Rome or in another Roman municipium. In such a case it was called *iudicium legitimum*. Any other dispute conducted by means of formulas was based on praetorian jurisdiction and was called *iudicium quod imperio continetur.*[52] In these proceedings, the praetor directs the judge in writting under what circumstances he is to decide the dispute and under what conditions he is to sentence the defendant (and what he is to sentence him to) and under what conditions he is to acquit him. Each formula thus begins with the appointment of an arbitrator (*Titius iudex esto*).

Formula has two parts (*intentio* and *condemantio*). *Intentio* contains the factual allegations of the plaintiff. The verification of these allegations is the task of the arbitrator in the second phase of the process. Condemnation is a direction, given to the juror to condemn the defendant if the statements of the plaintiff are correct. Condemnation must in any case expressed in money.

The formula thus drawn up, which included the appointment of the arbitrator, the *intentio* and the *condemnatio*, was first approved by the magistrate and then communicated to the defendant Roman law sources say that the defendant issued the formula (*formulam*, *iudicium edit*) and the latter accepted it (*iudicium accepit*). This acceptance firmly and irrevocably established the subject matter of the proceedings.

The introduce of *intentio* and condemnation allowed the separation of the legal and factual assessment of each case. The legal assessment (*questio iuris*) was left to the trained jurists and officials, but the proving (*questio facti*) and delivering of a judgement is delivered by person chosen by the litigants themselves and in whom they have confidence. Such a trial was much less formal than the old trial by *legis actiones* and contributed greatly to the further development of Roman law.

Therefore the process is swift and informal and the judgement is sentenced by the entrusted person. The official (*praetor*) can create new substantive law through ancillary suits (*actiones utiles*).

The basic element of Roman civil procedure is therefore the lawsuit (*actio*). The term *actio* has a broad meaning in Roman law. On the one hand, it means the legal proceedings themselves.[53] It also means a procedural device, i.e. either the *legis actio* of an earlier proceeding or the written form of a more recent proceeding. However, the term *actio* also has a meaning under substantive law. By *actio* the Roman jurists meant a right of

51 Heyrovský (1904b), pp. 1–12.

52 Gaius 4, 104; Gaius 4, 105.

53 Wlassak (1891), p. 72ff.

action, i.e. in a material sense an unsatisfied legal claim or a set of such claims which can be satisfied (enforced) by a judicial decision.[54]

Dig. 44, 7, 51.
Celsus libro tertio digestorum
Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi.

An action is nothing else but the right to recover what we are entitled to by means of a judicial proceeding.[55]

Thus, the Roman law *actio* has a private law character and a separate *actio* in the sense of a procedural remedy was given for each type of legal claim.

It follows from the above that the praetor could, by virtue of his power (*iuris dictio*), deny the use of actions[56] or even create new actions. This power was based on his imperium and in its use he was limited by the prohibitory power (*ius intercessionis*) of another praetor or consul. He was also limited by the length of his term of office, each praetor issuing his own list of suits under the praetor's edict. However, there was nothing to prevent the praetor from adopting the actions created by his predecessor into his own edict, thus ensuring the continuity of those procedural means that had proved successful.

From this point of view, Roman law actions are divided into civil actions (*actiones civiles*) and praetorian actions (*actiones honorariae*).

Dig. 44, 7, 25, 2.
Ulpianus libro singulari regularum
Omnes autem actiones aut civiles dicuntur aut honorariae.

All actions are said to be either civil or praetorian.

Civil actions were based on laws that were enacted by popular assemblies. These actions were named after the law under which they were issued (e.g. *actio legis Aquliae*).

Praetor can add something to or amend the claim of the *ius civile*. He is able to order the judge to take into account a non-existent fact. The intention and condemnation need not to name the same person. The praetor can slightly alter the wording of the claim – *rumpere/corrumpere*.

With the help of the praetor many institutions of modern law were created as: direct representation, assignment of claims, wrongful damage to property, protection of the natural children of the testator. The function of praetor required a certain amount of

54 Heyrovský (1904a), p. 245.

55 Scott (1933).

56 Poláček (1947), pp. 24–27.

legal skill: praetor himself was usually a skilled lawyer – legal capacity was the best way how to be elected by the fellow citizens.

All actions, both civil and praetorian, were published in the Praetorian Album. This praetorian album (named after the whitewashed wooden tablets, publicly displayed) contains both the actions and other decrees of the Roman official – such as interdicts, exceptions or praetorian stipulations.[57]

The Praetor issued this list of lawsuits at the beginning of his term of office so that citizens would know what legal rules he would follow during this period in addition to the legal rules adopted by law. These rules were promulgated in the form of actions that the praetor intended to take in this or that situation – I will allow the litigation (*iudicium dabo*), I will order the oath to be executed (*iurare cogam*), I will allow the litigant to take actual possession of the property (*in bonorum possessionem dabo*), I will ensure that one of the parties provides security (*satisdari iubeo*).

However, Roman law sources refer to both the praetorian edict and the album as *edictum*.[58]

This edict did not bind the next praetor, who replaced the edict's publisher after the next election. Nor did it bind its own publisher; it was binding only by custom, not by right. However, if the praetor decided differently from what he implied in his edict, then his decision could be overruled by the praetor or consul. It was only a law from the late republican period that decreed,[59] that the praetors be bound by their own edict.

Typical Roman conservatism, however, compelled Roman officials to adopt from the official albums of their predecessors those forms of action that had proved successful in the previous period and "met the practical needs and legal convictions of the nation".[60]

And those actions that did not prove successful in legal practice were excluded from the Praetorian Edict. At the same time, the praetor could still propose new actions. Thus, each praetorian edict consisted of both actions that were taken over from the predecessor (*edicta tralaticia*) and new actions (*edicta nova*). The Praetorian edict thus became – despite its limited duration of one year – on the one hand a permanent and fixed part of Roman civil procedure. On the other hand, it could always be revised by a new praetor to reflect changes in society and economic life. The edict was issued both in Rome by individual officials (*praetor peregrinus* and *urbanus*, *aedil curulis*) and in the provinces (*edicta provincialia* – edictum Asiaticum, edictum Siciliensae).

During the period of Roman republic several wealthy families controlled power in Rome and shared responsibility for guiding community as public servants – praetors, censors, consuls and even dictators. Every family had a long queue of marble ancestors in atrium. Members of those families respected each other and shared and created legal norms and moral attitudes as some kind of tradition passed from one generation to another. The change has come with the change of the form of government.

57 Heyrovský (1904a), p. 40.

58 Dig. 1, 2, 2.

59 *Lex Cornelia* – from 67 BC.

60 Heyrovský (1904a), p. 41.

The privilege *respondere ex auctoritate principis (*granted by emperor Augustus) was the first instance of state authorization for lawyers.

During the Principate it became customary for the praetor to introduce a new principle, rule or institution only on the instruction of the Roman Senate, on the basis of a *senatus consulta*.

The independent action of the praetor in issuing new charges was completed by the intervention of the emperor Hadrian.

Hadrian commissioned the jurist Salvius Iulianus to go through and organize all the existing edicts, and at the same time issued a *senatus consultum* ordering the Roman officials to respect this arrangement.

The Perpetual edict of Hadrian deprived praetors to make changes in the formulas of intentions. From Ulpianus onward the new professional stratum of lawyers occurs in the service of Roman emperors. However, the emperor has the main and final say in the creation of law and his decrees become the main source of law.

This type of informal and swift judicial process was accepted even by the foreigners who were not under power of Roman state. Foreigners agreed to have their dispute with roman citizen decided by a "foreign praetor" praetor peregrinus. The praetor was able to take into account the customs and rules of international trade because of his authority. The new set of rules was created: *ius gentium.*

Now we're heading into conclusion: what was the role of the arbiter in the classical roman law. In the crucial phase the whole trial was divided. The legal part was prepared by skilled official: the proper *actio* (law-suit) was meticulously chosen or can be changed or amended by praetor. The exceptions were prepared to reflect the attitude of the defendant.[61] Both parties confirmed the legal assumptions of the *actio* and were willing to submit to the judgement (*litiscontestatio*). The parties then chose an arbitrator.

In the next stage he confirmed in evidence the assumptions set out in lawsuit and delivered a judgment for conviction, always for money.

The judge was bound by the wording of the pleading and was instructed by the praetor that this was how the trial must be conducted and not otherwise. Neither the judge nor the parties can alter the statement of claim. The statement of claim also indicates what rights and obligations are to be examined in the process of proof, what allegations of the plaintiff and defenses of the defendant are to be examined by the judge. The formula also determined for the judge what the outcome of the case was to be: if the plaintiff's material allegations were upheld, the defendant would be ordered to pay a certain amount (this amount could either be given as a precise sum or could be determined with more or less discretion by the judge). If the plaintiff's allegations were negated (or if the defendant's objections were successful) then the defendant was acquitted.

Unlike the praetor, the judge did not determine the basis of the dispute, but he examined the truth of the parties' factual allegations, the conduct and implementation of the

61 Koschembar-Lyskowski (1893), pp. 13–23; Krüger (1892), pp. 47–64. He deals in particular with the relationship between *exeptio rei venditae ac traditae* and *exceptio doli.*

evidence. The judge relied on his own judgment and his own experience.[62] He makes a free evaluation of the evidence.[63]

In this context, Vážný stresses that a judge is bound only by the norms of *ius civile* and is governed by praetorian law only on the express instruction of the praetor. However, the judge does not apply praetorian law, he only ascertains the existence of certain facts and draws from them certain legal consequences, such as those prescribed by the formula.[64]

In the proceedings *apud iudicem*, the parties (or their hired speakers) first present the matter in dispute (*perorationes*). Next, they proceeded to the taking of evidence, the aim of which was to convince the judge of the correctness of the claim.[65] The most common means of proof were the examination of witnesses, the reading of documents, local inspection, and the swearing of the parties. According to Cicero's account, the Romans preferred the testimony of living persons, especially credible Roman citizens, to documentary evidence (*est ridiculum, cum habeas amplissimi viri religionem, tabulas desiderare*).[66]

Witnesses, however, are not required to testify in court, and the penalty for refusing to take an oath is known in the Law of the XII Tables only for those witnesses who are involved in a formal legal action (such as a mancipation or the making of a will).[67]

The oath was usually used as evidence when there was no other evidence and the matter remained in dispute. In such a case, the oath as evidence was decisive.[68] However, Vážný points out in this connection that the principle of the free evaluation of evidence was maintained even in the case of oaths, so that if new evidence appeared later, the judge could rule contrary to the oath.

The origins of the limitation of the principle of free evaluation of evidence can be traced back to the Christian emperors[69] Even Emperor Hadrian, in his edict, emphasizes the autonomy of the judge in evaluating evidence.[70] At the same time, Emperor Hadrian explicitly rejects the legal principle of evidence.[71] According to Cicero, the judge must not be bound by testimony but must be guided by his logical judgment. Arguments mean more than testes.[72]

62 On guarantees of judicial independence, see Szymoszek (1982), pp. 3–17.

63 Collinet (1934), p. 1ff.

64 Vážný (1935), p. 68.

65 Wenger (1925), pp. 181–183.

66 Costa (1927), p. 135.

67 *Qui se sierit testarier libripensve juerit, ni testimonium jatiatur, inprobus intestabilisque esto*.

68 Gaius: Dig. 9, 12, 31.

69 Emperor Constantine here (Cod. 4, 20, 9) embodies the principle that the testimony of a single witness carries no weight (*unius omnino testis responsio non aiudiatur*).

70 *Ex sententia iudicis sibi aestimatio, quid aut credat aut parum probatum sibi opinatur*. Dig. 22, 5, 3, 2.

71 *Idem: quae argumenta, ad quem modum probandae cuique rei sufficiant, nuIlo certo modo satis definere potest.*

72 Cicero (1928), pp. 1, 38, 59.

The question of who is obliged to bear the burden of proof (*onus probandi*) is resolved quite clearly in Roman law – it is the plaintiff: *semper necessitas probandi incumbit illi qui agit.*[73]

The plaintiff is therefore obliged to prove the entire factual background. If the defendant bases its defence on a fact that is different from the facts alleged by the plaintiff in the statement of claim, then the burden of proof is reversed and the burden of proof is on the defendant. The Roman jurists add to this that the one who uses a procedural objection (and by this objection just brings into play the fact not contained in the pleading) is in the same position as the one who sues.[74]

Not everything is subject to proof. Facts which are considered to be common knowledge or which have been confirmed (admitted) by the other party are not proved. Roman jurists also did not hesitate to ease the burden of proof by the use of various assumptions and fictions,[75] which were able to solve even very complex legal cases. The lawyer Tryphoninus solves the case of the so-called "simultaneous death" by means of the conjecture that the adult son survived his father.[76] Using the presumption in favor of *favor libertatis*, Ulpianus solves the factually controversial case of the release of newborn children.[77]

The sentence was pronounced in the name of state and was also executed by the state power.

Conclusion

In a short summary: arbiter was chosen by the parties from a rank of famous members of society. He had the full confidence by the parties. He ruled only on facts of the case. He passed sentence within the legal limits set by the praetor. The sentence was executed by the state power. This type of decision is characterized by speed, credibility and clarity.

Roots of this process lie in the autonomous character of the Roman families and it's not surprising that same arbitration is used in arbitration proceedings.

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Role arbitra v klasickém římském právu

Příspěvek poukazuje na stěžejní rozdíly mezi klasickým a justiniánským soudním řízením. Zásadní rozdíl spočívá v samotném pojetí soudní moci. V klasickém římském právu je formulový proces založen na moci prétora a vychází z myšlenky omezit svévoli římských občanů tím, že namísto řešení sporů silou je to římský stát, kdo zajistí vynesení rozsudku a jeho výkon. Oproti tomu císařský soudní proces (také nazývaný *extra ordinem*) vychází z myšlenky nadřazenosti státní moci, které občan zcela podléhá a která jediná je schopna zajistit spravedlivé vyřešení jeho sporu.

Klasický římský proces je tak založen na autonomii, tedy svobodné vůli občanů a snaží se je přesvědčit, že jimi zvolené soudní řešení sporu bude rychlé, účinné a trvalé. Výhodou, kromě efektivity řízení, byla možnost volby žaloby, která vytvořila právní rámec projednávané věci, s tím že prétor mohl žalobu upravit. Na druhé straně měly strany sporu právo zvolit si arbitra podle své vůle. Mohla to být osoba známá, bohatá nebo vážená, která měla plnou důvěru obou stran. Tato osoba byla pečlivě vedena prétorem a byla povinna vyřešit spor se silou a autoritou státu.

Charakter soudního řízení v době klasického římského práva měl stěžejní vliv na vývoj římského práva hmotného a byl předchůdcem moderního arbitrážního řízení.