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THE SIGNIFICANCE OF INTEREST FOR ACTIVE LEGITIMATION IN ROMAN CIVIL PROCEDURE

1. INTRODUCTION

In modern civil procedure, it is often enough for an applicant to have his claim admitted to proceedings to show that he has an interest in the matter. In this regard, his interest may be seen as a necessary condition for active legitimation. Sometimes persons who are not parties to the litigation may obtain the right to sue.

A creditor has the right to bring a case to court to have a given transaction recognized as invalid if the debtor sold or alienated a property on which the creditor could levy execution. In this case, the creditor himself is not a party to the transaction, but as a result of the alienation of the property, his interest may be infringed by the fact that the debtor does not have the funds to satisfy the creditor's claim. So, for example, a third party, for instance an ex-wife, can bring proceedings against her ex-husband to recover funds by means of a creditor's claim. In this case, the ex-wife's interest is the recovery of the funds, but not directly from the ex-husband, since in the future they could become the subject of a dispute concerning the division of the marital property.

A pledgee may challenge the pledgor's sale of a pledged item, since he has an interest in foreclosing the pledged item in the event of the pledgor failing to fulfill the main obligation.

Another situation in which a claim may be brought without a direct infringement of the applicant's right is the seizure of property in common ownership. So, if all of the debtor's property is seized, including that which is in common ownership, and the seizure is carried out with no consideration of the debtor's share in this property, the interests of the other co-owner will be violated and he will not be able to dispose of his share in the jointly owned property. In consequence, he will have a right to claim for the restoration of his part of the confiscated property, since his share in it may not be confiscated.

An encumbrance put on jointly owned property without the consent of all co-owners may also be regarded as a violation of the interests of the non-consensual co-owners and therefore serve as grounds for the right to claim. In one case of this type, the court invalidated an agreement for the establishment of a servitude which consisted of the installation of a mobile communication station on the roof of a building in common ownership. The lawsuit was filed by one of the joint owners of the building who had not given his consent to the servitude and therefore his interests were violated.

A claim to invalidate a public auction may be filed by a person who has an interest in such a claim if the provisions applicable to the auction have been violated, thereby leading to an unfavorable outcome of the sale. So, for example, a seller may call for the auction to be declared invalid if his property has been sold at a lower price due to the auctioneer's failure to conduct a true valuation within the statutory period.

A third party may be involved in a lawsuit because he has a procedural interest in the outcome of the proceedings. Thus, for example, the Supreme Federal Court of Brazil applied the concept of legal interest to intervene in proceedings, permitting third-party interest on the grounds that a third party could participate in the formation of a legal precedent which might affect the legal aspect of similar cases in the future, even though there was no relevant legal relationship.¹

¹ A. CABRA, *Interesse ad agire e zone di interesse (Standing to sue and zones of interest)*, «Civil Procedure Review», mar./jun. 1.1/2010, p. 170.

A considerable amount of attention has been paid in work on modern civil law and process to the relationship between interest and the right to sue. Authors like E. Garbagnati,² M. Chirga,³ A. Cabra,⁴ S. Satta,⁵ and L. Comoglio have written on this subject.⁶ In this regard, the question of the significance of interest for active legitimation is extremely relevant in the modern civil process.

However, few studies have been devoted to the study of interest as a condition for active legitimation in Roman law, although both the term “interest” itself and the meaning of interest in Roman civil proceedings may be traced back to Roman sources. To determine whether an applicant had the right to sue, Roman lawyers conducted a precise examination of his interest to file a lawsuit. Hence, to obtain an in-depth view of this issue, we should turn to the sources of Roman law.

2. THE MEANING OF THE TERM “INTEREST” IN ROMAN LAW

The opinion that the concept of “interest” began to take shape as a legal term already in Roman law is generally accepted in contemporary scholarship.⁷ The Latin word *interesse*, which has been borrowed by many languages, is the infinitive of the verb *intersum, interfui, -, interesse*.

² E. GARBAGNATI, *Azione e interesse*, «Jus» 1955, p. 316 ff.

³ M.F. GHIRGA, *Interesse ad agire*, «Diritto-on-line» [dir. proc. civ.] 2015: <http://www.treccani.it/enciclopedia/interesse-ad-agire-dir-proc-civ>

⁴ A. CABRA, *op. cit.*, p. 154-181.

⁵ S. SATTA, *Diritto processuale civile*, Milano 1981.

⁶ L.P. COMOGLIO, *Azione ed interesse. Rinnovate suggestioni di un'antica disputa, Vita e Pensiero*, «Pubblicazioni dell'Università Cattolica del Sacro Cuore JUS» 1/2014, p. 111-136.

⁷ See M. KASER, “*Quanti ea res est*” *Studien zur Methode der Litis aestimation im klassischen römischen Recht*, München 1935; E. ALBERTARIO, *Ancora sulla pecuniarietà dell'interesse nelle obbligazioni*, «Il Foro Italiano» 61.4/1936, p. 209 ff.; E. BETTI, *Id quod interest*, «Novissimo Digesto Italiano» 8/1962; D. MEDICUS, *Id quod interest. Studien zum römischen Recht des Schadensersatzes*, Köln-Graz 1962; S. TAFARO, *Recensione a H. Honsell, 'Quod interest' im 'bonae-fidei-iudicium'*. *Studien zum römischen Schadensersatzrecht*, «Index» 2/1969, p. 359 ff.; R. ZIMMERMANN, *The law of obligations: Roman*

As a rule, this verb occurs in the sources of Roman law in the third person singular (*interest*, *intererat*, *interfuit*, *intersit*), in contexts denoting something that is „different”, „important”, or „beneficial.” Of course, not all the scholars concerned agree that in Roman law the Latin word *interesse* had already developed into an established legal term.

However, in many passages in the Roman jurists, this term certainly has a legal meaning close to the modern one. Thus, for example, one of the constitutions in Justinian’s Code is entitled *De sententiis, quae pro eo quod interest proferuntur* (C. 7,47), where *quod interest* denotes the limits to the satisfaction of a plaintiff’s interests.

In Justinian’s Digest the verb *intersum*, *interfui*, -, *interesse* occurs in the syntagmata *mea* (*tua*, *sua*, *nostra*) *interest* (in my, yours, our, our interest), *id quod interest* (what constitutes interest), *quanti interest* (in the amount of interest), and *si interest* (if there is interest). In modern languages, this term functions as a noun, while in Roman law it is always used only in the verb form. Nevertheless, some signs of substantiation may already be observed in Latin legal texts: 1) the use of inconsistent definitions in the genitive case with *interest* (for example, *interest creditoris, emptoris, actoris* – the interest of the creditor, buyer, plaintiff); 2) with modifiers (for meanings such as „in the public interest”); 3) the use of possessive pronouns in the ablative with *interest* in the singular – *mea, tua, sua, nostra interest*.⁸

M. Bartoshek writes that in Roman law *interest* denotes a legal interest in something, especially in the law of obligations, when the creditor (plaintiff) seeks *id quod eius interest* (*quanti actoris interest*), i.e. compensation for damage that he sustained due to the debtor’s non-performance of the contract („positive interest”), or because the creditor

foundations of the civilian tradition, Oxford 1990; G. VALDITARA, *Dall’aestimatio rei all’id quod interest nell’applicazione della condemnatio aquiliana*, [in:] *La responsabilità civile da atto illecito nella prospettiva storico-comparatistica: I Congresso internazionale*, ARISTEC, Madrid, 7-10 ottobre 1993, ed. L. VACCA, Torino 1995, p. 76 ff.; C. SCHIEDER, *Interesse und Sachwert. Zur Konkurrenz zweier Grundbegriffe des römischen Rechts*, Göttingen 2011 et seq.; R.C. STEINER, *Interesse positivo e interesse negativo: a reparação de danos no Direito Privado Brasileiro*, São Paulo 2016.

⁸ Thesaurus Linguae Latinae (TLL). s.v. *intersum*: v. 7.1, p. 2281-2290.

acted on the assumption that the terms of the contract would be kept („negative interest”).⁹

So, in Roman law, the verb *interest* acquires a legal meaning, since it is a necessary condition to establish an obligation, assess the amount of damages due, establish an easement, or file a claim. The connection of interest with the right to sue can be traced in the modern civil process.

3. INTEREST AS A CONDITION FOR ACTIVE LEGITIMATION IN ROMAN LAW

The idea of the necessity of having an interest as an important condition for the right to sue goes back to Roman law, where interest is inextricably linked with the person who makes a claim, because he has such an interest. R. Jhering, who is the author of the most significant classical work on interest in law, defines the concept of subjective right on the grounds of interest: according to the well-known definition, a subjective right is nothing but a protected interest.¹⁰ G. Provera points out that according to the general opinion, the term *actio* serves to denote a subject's legal affiliation, that is, for his potential for *agree*, to use a strictly prescribed model to satisfy his interest by force.¹¹

So, the role of interest as a prerequisite for a person to file a claim is a subject which has been discussed in sufficient detail in articles and monographic publications on Roman law.

The role of interest as a condition for the right to sue is also indicated by some scholars in relation to individual claims. G. Provera presents the connection between interest and the right to sue, with a detailed discussion of the concept of a claim in Roman law and the conditions

⁹ M. BARTOSHEK, *Rimskoe pravo: ponyatiya, terminy, opredeleniya*, Moskva 1989, p. 159.

¹⁰ G. PROVERA, *Diritto e azione nell'esperienza giuridica romana*, «Collana della Rivista di Diritto Romano. Scritti giuridici» 2001, p. 12: <http://www.ledonline.it/rivistadirittoromano/scrittiprovera.html>

¹¹ *Ibidem*, p. 4.

for it to be made in court.¹² W. Buckland,¹³ P. Du Plessis,¹⁴ C. Sanfilippo,¹⁵ A. Watson,¹⁶ and many others point out the need for an interest in a claim on the grounds of a contract of agency. Researchers such as D. Dozhdev, L. Parenti,¹⁷ and R. Zimmerman,¹⁸ write about a plaintiff's interest in suing for theft. W. Smith¹⁹ considers the value of interest for a claim for presentation. I. Fagnoli gives a detailed description of the role of interest in active legitimation for the *quod vi aut clam* interdict.²⁰ C. Schieder argues that interest perceived as a material principle in the interpretation of contract law based on the idea of the subjective right of a person whose right has been violated, was the decisive factor determining liability or exemption from liability in Roman legal sources from the point of view of public protection.²¹

Nevertheless, in my opinion, a comprehensive study of the significance of interest for the active legitimation of claims and interdicts in Roman law would be useful, since this issue is also relevant for the study of modern civil procedure.

I will use Justinian's Digest, as well as the work I have cited above to examine the relationship between interest and the right to sue in Roman law, which served as the source for R. Jhering's doctrine of interest.

¹² *Ibidem*, p. 1-14.

¹³ W.W. BUCKLAND, *A Text-Book of Roman law from Augustus to Justinian*, Cambridge 1963.

¹⁴ P. DU PLESSIS, *Textbook on Roman Law*, Oxford 2015.

¹⁵ C. SANFILIPPO, *Corso di diritto romano. Il mandato. Parte prima*, «Rivista di Diritto romano» 4/2004.

¹⁶ A. WATSON, *Contract of mandate in Roman law*, Oxford 1984.

¹⁷ L. PARENTI, *Notazione sulla legittimazione attiva all'actio furti per i frutti del fondo dato in locazione al colono*, «Seminarios Complutenses de Derecho Romano» 28/2015, p. 783-808.

¹⁸ R. ZIMMERMANN, *The law of obligations: Roman foundations of the civilian tradition*, Oxford 1990.

¹⁹ W. SMITH, *Actio ad Exhibendum*, [in:] *A Dictionary of Greek and Roman Antiquities*, ed. J. MURRAY, London 1875, p. 511-512.

²⁰ I. FAGNOLI, *Studi sulla legittimazione attiva all'interdetto vi aut clam*, Milano 1998.

²¹ C. SCHIEDER, *op. cit.*, p.45.

Thus, in many passages of Justinian's Digest, it is precisely the plaintiff's interest that is indicated as the condition for his right to file a claim. A considerable number of examples can be cited regarding claims for theft.²²

Ulpian writes that a person in whose interest it is to be protected against robbery has the right to sue.²³ The Roman jurist Paul makes a similar comment, adding that the interest must be based on legitimate grounds.²⁴ According to Ulpian, legitimate grounds could be possession in good faith, since no proceedings for theft may be granted to an owner acting in bad faith.²⁵

Hence the question whether a thief who has been robbed has a claim for theft is an important issue. C. Schieder believes that it concerns the nature of the interest subject to protection, whether it is a factual or a legal interest.²⁶ He draws attention to Paul's observation in D. 50,17,24,²⁷ on the basis of which we may conclude that the interest is factual, not legal. C. Schieder argues that Paul's statement refers to a dispute between Servius Sulpicius and Mucius, which could be resolved in different ways depending on whether the interest was considered to be factual and natural (as Servius claimed) or legal and normative (according to Mucius). This is an interpretation of Ulpian, D. 47,2,10. If the interest is determined on economic grounds, then the thief has a right to claim, but if the definition is normative and on the grounds of natural law, then he does not have such a right.²⁸

Mucius believes that a thief who has been robbed has no right to claim against another thief, as only a *bona fide* owner has such a right,

²² A.M. GUZHVA, *Kategoriya «interes» i pozov z kradizhki (actio furti) u rimskomu pravi*, «Naukovij visnik Hersonskogo derzhavnogo universitetu. Seriya «Yuridichni nauki» 5.1/2015, p. 91-101.

²³ D. 47,2,10 (Ulp. 29 *ad Sab.*): *Cuius interfuit non subripi, is actionem furti habet.*

²⁴ D. 47,2,11 (Paul. 9 *ad Sab.*): *Tum is cuius interest furti habet actionem, si honesta causa interest.*

²⁵ D. 47,2,12,1 (Ulp. 29 *ad Sab.*): *Sed furti actio malae fidei possessori non datur, quamvis interest eius rem non subripi, quippe cum res periculo eius sit(...).*

²⁶ C. SCHIEDER, *op. cit.*, p. 144.

²⁷ D. 50,17,24 (Paul. 5 *ad Sab.*): *Quatenus cuius intersit, in facto, non in iure consistit.*

²⁸ C. SCHIEDER, *op. cit.*, p. 144.

since only such an owner has an interest protected by law. Pomponius concurs with this view: like Mucius, he does not consider the interest of a thief who has been robbed fair grounds (*honesta causa*) for such a legal consequence. Servius presents a fundamentally different opinion: he rejects the argument that interest should be founded on equitable grounds, and according to him a thief is entitled to *actio furti*. However, his right is only subsidiary, providing the true owner does not make a claim or cannot be expected to do so in the future. Thus, Servius understands interest as something pertaining to naturalness in the antithesis of “right” against “naturalness,” which, according to C. Schieder, is a “naturalization” of the concept of interest.²⁹

Iavolenus writes that an owner who is not the lawful heir to a property or asset does not have a right to claim for theft, since only the person who is interested in the fact that the thing was not stolen has a right to claim, and only a person who is liable to sustain a loss or damage may have an interest. A person who expects to gain an advantage cannot be sued for theft. A person may become the owner of an asset or property by acquisitive prescription. But if the thing is stolen from him prior to its acquisitive prescription, he does not suffer damage.³⁰

R. Zimmerman draws attention to Gaius (3, 205), another important passage for the definition of the subject of the right to claim. This passage says that if a tailor undertakes to repair a garment for a certain price and it is stolen from him, then he, not the owner of the garment, will have the right to claim for theft. According to Zimmerman, this corresponds to the rule which says that a claim for theft may be made by someone who has an interest in keeping the thing which has been stolen. Usually this person is the owner, but if the owner initiates proceedings against someone who has become liable to him under a contract which provides

²⁹ *Ibidem*, p. 144.

³⁰ D. 47,2,72,1 (Iavol. 15 *ex Cass.*): *Eius rei, quae pro herede possidetur, furti actio ad possessorem non pertinet, quamvis usucapere quis possit, quia furti agere potest is, cuius interest rem non subripi, interesse autem eius videtur qui damnum passurus est, non eius qui lucrum factururus esset.*

for the safekeeping of a thing, then the other party to the contract assumes the owner's right to claim for theft.³¹

This applies not only to a contractor in an agreement for the hire of work, but also to a tenant who enters a contract for the hire of a thing, a user in a loan agreement, or a pledgee. At the same time, Roman jurists exclude the possibility of a father claiming for the theft of a thing given on loan to his son, since the father is not obliged to keep this thing safe (D. 47,2,14,10). Not every person who has an interest in the preservation of a thing has the right to sue for theft, but only one who will be liable on the grounds that the thing was lost through his fault.³²

In this case, the plaintiff's interest is based on his liability to the owner of the thing that was transferred under the contract: the tenant, borrower, or pledgee who lost the thing will subsequently be liable to the owner who may claim under the contract.

However, if the thing is pledged, the pledgee (creditor) is still entitled to claim for theft even though the thing is not his property. Moreover, he may claim both against a third party and against the pledgor, i.e. the owner of the thing. That is, both the pledgee and the pledgor have an interest in filing a claim. Whether the pledgor is solvent or not has no effect on the pledgee's interest, since in any case the pledgee has an interest in the possession of the collateral.³³

The pledgee's interest in a claim for the theft of a thing subject to a pledge is based on the fact that the obligation is secured by a pledge against which he could levy execution in the event of the pledgor's default. That is why in the period when the obligation has not yet been

³¹ R. ZIMMERMANN, *op. cit.*, p. 933.

³² *Ibidem*, p. 934.

³³ D.47,2,12,2 (Ulp. 29 *ad Sab.*): *Sed et si res pignori data sit, creditori quoque damus furti actionem, quamvis in bonis eius res non sit: quin immo non solum adversus extraneum dabimus, verum et contra ipsum quoque dominum furti actionem, et ita Iulianus scripsit. Nec non et ipsi domino dari placet, et sic fit, ut non teneatur furti et agat. Ideo autem datur utrique, quia utriusque interest. Sed utrum semper creditoris interest an ita demum, si debitor solvendo non est? Et putat Pomponius semper eius interesse pignus habere, quod et Papinianus libro duodecimo quaestionum probat: et verius est ubique videri creditoris interesse, et ita et Iulianus saepissime scripsit.*

fulfilled the pledgee (creditor) has an advantage over the pledgor (debtor) for the restoration of the thing which has been pledged.

Another party with an interest in a claim for theft is a seller who loses the item he has sold due to its theft before he manages to hand it over to the buyer. Papinian writes that the owner of a slave he sold but did not manage to transfer to the buyer before the slave was stolen is entitled to claim for theft. The seller cannot fulfill the obligation to transfer the slave because the slave has been stolen. If he does not hand over the slave, he will be liable to the buyer for a claim under their sales agreement. Accordingly, it is the seller who acts as the interested party who must file a claim for the theft, since he is the one who has an interest in ensuring that his obligation to sell is fulfilled. Zimmerman points out that the seller is still the owner until the thing subject to the sale is transferred, and this is a special situation: the owner (i.e. the seller) is liable to the non-owner (i.e. the buyer) for the safekeeping of the thing subject to the sale.³⁴ According to Zimmerman, a tenant, user, or mortgagee may claim for theft only if he can fulfill the obligation. If he misses the opportunity to perform, the right to claim for theft passes to the owner, since he is now the one who has an interest in the safekeeping of the thing. The buyer has a right to receive the goods, and this requirement takes precedence over the seller's right to his property, which implies an interest in the safekeeping of the thing subject to the sale. That is, the obligation in itself does not give sufficient grounds for a claim for theft, Zimmerman argues.³⁵

This is corroborated by the fact that an action for theft cannot be brought if the thing which was stolen did not belong to the plaintiff or the slave who was sold died through no fault of the seller.³⁶ In the latter case, we have a logical consequence of the rule that the risk of accidental loss of the thing lies with the buyer, i.e. the death of the slave with no fault on the part of the seller who did not manage to hand the

³⁴ R. ZIMMERMANN, *op. cit.*, p. 935.

³⁵ *Ibidem*, p. 935.

³⁶ D. 4,7,4,5 (Ulp. 3 *ad ed.*): *Haec actio in id quod interest competit, proinde si res non fuit petitoris aut si is qui alienatus est sine culpa decessit, cessat iudicium, nisi si quid actoris praeterea interfuit.*

slave over to the buyer. This is considered a case for which the seller is not responsible even in the event of theft.

Also, an heir is responsible to a legatee for the safekeeping of a thing subject to gift by will. If a slave subject to the legatee's choice is stolen, it is the heir who may claim for theft, since he will be liable to the legatee for a claim for presentation: it is the heir who must provide the legatee with a slave so that he can make a choice. It was the heir who was the party injured by the theft, since he owned the slave. The legatee's interest is to exercise his choice, and only then will he become the owner of the slave. He might choose another slave, one who has not been stolen.³⁷ The theft violates the interest of the heir in the execution of the testator's will to provide certain slaves for selection for the performance of gift by will. Consequently, the heir, who is the party under an obligation to the legatee, may claim for the theft of the slave subject to gift by will.

According to Ulpian, a *colonus* (tenant farmer) has the right to sue for theft because he holds such an interest even though he does not have the right to ownership.³⁸ Paul is another Roman jurist who uses the same argument regarding a harvest stolen from the land held by a *colonus*, that is, both the landowner and the *colonus* have a right to claim for theft, since both have an interest in protecting the harvest against theft: the *colonus* is interested in enjoying the harvest, and the landowner is interested in receiving rent from the *colonus*, which may depend on the amount and value of the crops the *colonus* has harvested.³⁹

In this case, a plaintiff's interest need not be associated with a right to the goods which have been stolen: the landowner of the plot rented and cultivated by the *colonus* has no right of ownership of the harvest stolen from the *colonus*, but he does have an interest in receiving rent from his tenant. So he may claim for theft, because he is indirectly

³⁷ D. 47,2,81,2 (Pap. 12 *quaest.*): *Si ad exhibendum egissem optaturus servum mihi legatum et unus ex familia servus subreptus, heres furti habebit actionem: eius interest: nihil enim refert, cur praestari custodia debeat.*

³⁸ D. 47,2,14,2 (Ulp. 29 *ad Sab.*): *Praeterea habent furti actionem coloni, quamvis domini non sint, quia interest eorum.*

³⁹ D. 47,2,83,1 (Paul. 2 *sent.*): *Frugibus ex fundo subreptis tam colonus quam dominus furti agere possunt, quia utriusque interest rem persequi.*

interested in the *colonus* being able to sell his harvest and paying the rent from his proceeds.

There is an opinion that this passage refers to a *colonus* who was a *partiaris*, that is, a “shareholder” of the property, hence the harvest was shared out, with one part apportioned to the *colonus*, and the rest to the landowner. In this case, both the *colonus* and the landowner could sue for theft, in proportion to their share in the expected harvest. However, in a reference to Paul’s commentary on Sabinus (D. 19,2,25,6), L. Parenti rejects this interpretation.⁴⁰ He explains the double legitimization of a claim for theft, for the *colonus* and for the owner, by the fact that the owner’s right to claim on his share in the harvest had already been established by the time of Pomponius as a natural effect of the *colonus*’ tenancy. Hence, the revenues from the harvest were treated as *percepti*.⁴¹

The right to claim for theft is not held by the person who loses possession, but by the person whose interest is affected by the loss. Thus, Paul asks who has the right to sue for theft if a letter is stolen while it is still on its way to the recipient – the sender or the recipient? He tries to find an answer in terms of who had an interest in the letter’s safe arrival, that is, who would have benefited thereby. Here it is the content of the letter that determines who had an interest in its safe arrival and who would sustain a loss if the letter were stolen. In addition, even an intermediary to whom the letter was delivered for subsequent dispatch to the ultimate addressee could have the right to a claim (D. 47,2,14,17). A plaintiff’s interest in a claim for the theft of a letter which was sent but did not reach its rightful addressee is based on the usefulness of the letter’s contents or on the defendant’s obligation to deliver the letter to the addressee. In this case, the right to claim is neither connected with possession nor due to right of ownership.

Another type of proceedings in which Roman jurists observe the need for a litigant’s interest is *actio ad exhibendum* (i.e. the defendant was required to present a thing believed to have been acquired fraudulently,

⁴⁰ L. PARENTI, *Notazione sulla legittimazione attiva all’actio furti per i frutti del fondo dato in locazione al colono*, «Seminarios Complutenses de Derecho Romano» 28/2015, p. 787.

⁴¹ *Ibidem*, p. 808.

for the plaintiff to examine it in court). W. Smith considers the prospective plaintiff's need to have an interest in bringing such a claim and writes that there was a general legal rule that anyone could bring an action if he had an interest in the provision of a thing (*quorum interest*).⁴² He refers to Paul's well-known saying. Nevertheless, it follows from this reference that the interest must be objective, and not far-fetched. So, if someone wants a defendant to show his books just because he has an interest to see them, this should not be considered sufficient grounds, because the defendant may need his books for other important purposes, for instance his education.⁴³

There are other passages in the Digest which indicate the need for a prospective plaintiff to have an interest to bring an *actio ad exhibendum*. The judge admits such a claim only if the applicant has a genuine interest, regardless of whether the thing belongs to him or not. If the judge finds that there is no interest, he will dismiss the claim.⁴⁴

It seems that interest in the presentation of a thing is procedural, since the presentation of an exhibit in court is in itself a prerequisite for the protection of another right. So, for example, if a slave is bequeathed by gift by will and it is established that another person wants to choose the same slave, then the legatee may file a claim for presentation to give this person the opportunity to make a choice.⁴⁵ In this case, the legatee cannot file a vindication claim, since he has not yet become the owner

⁴² W. SMITH, *op. cit.*, p. 511.

⁴³ D. 10,4,19 (Paul. 4 *epit. Alfeni digest.*): *Ad exhibendum possunt agere omnes quorum interest. Sed quidam consuluit, an possit efficere haec actio, ut rationes adversarii sibi exhiberentur, quas exhiberi magni eius interesset. Respondit non oportere ius civile calumniari neque verba captari, sed qua mente quid diceretur, animadvertere convenire. Nam illa ratione etiam studiosum alicuius doctrinae posse dicere sua interesse illos aut illos libros sibi exhiberi, quia, si essent exhibiti, cum eos legisset, doctior et melior futurus esset.*

⁴⁴ D. 10,4,3,9 (Ulp. 24 *ad ed.*): *Sciendum est autem non solum eis quos diximus competere ad exhibendum actionem, verum ei quoque, cuius interest exhiberi: iudex igitur summatim debet cognoscere, an eius intersit, non an eius res sit, et sic iubere vel exhiberi, vel non, quia nihil interest.*

⁴⁵ D. 10,4,3,10 (Ulp. 24 *ad ed.*): *Plus dicit Iulianus, etsi vindicationem non habeam, interim posse me agere ad exhibendum, quia mea interest exhiberi: ut puta si mihi servus*

of the thing (that is, the choice of the subject of the testamentary refusal has not been made yet). But once the slave is identified, the legatee may sue for his recovery. V. Smith explains this by the fact that the plaintiff could claim the slave as his property only once the choice had been made, since he could not make the choice himself. If a person wanted to emancipate a slave (*in libertatem vindicare*), he could bring an action.⁴⁶

Ulpian quotes Pomponius to argue that the grounds for the right to claim for presentation may be the right of ownership as well as the right of usufruct, possession, or a pledge, since both the owner and the holder, the usufructuary and the pledgee have an interest in presentation.⁴⁷ In other words, the presentation of a thing in the proceedings is a prerequisite for the protection of possession or real right (property, usufruct, pledge). As Schieder points out, according to Servius, having an interest gave a plaintiff grounds for the right to bring an *actio ad exhibendum*, as in the case of the right to an interdict *quod vi aut clam*. According to Schieder, this is the same result of the naturalization of the concept of interest as observed in an injured party's right to claim against the thief of their property. And just as in the case of a thief who forfeited the right to be protected against an *actio furti* because he had no legal grounds for an interest, so too with an *actio ad exhibendum*: in order to deprive a thief or robber of the right to an action for restitution, it was necessary for the applicant to prove his interest – to give a just and valid reason, *iusta et probabilis causa*, as Neratius calls it.⁴⁸

Another claim which could be made once an applicant proved he had a genuine interest could be filed on the grounds of a contract of mandate. Alan Watson gives a detailed analysis of the meaning of interest in

legatus sit quem Titius optasset: agam enim ad exhibendum, quia mea interest exhiberi, ut Titius optet et sic vindicem, quamvis exhibitum ego optare non possim.

⁴⁶ W. SMITH, *op. cit.*, p. 511.

⁴⁷ D. 10,4,3,12 (Ulp. 24 *ad ed.*): *Pomponius scribit eiusdem hominis nomine recte plures ad exhibendum agere posse: forte si homo primi sit, secundi in eo usus fructus sit, tertius possessionem suam contendat, quartus pignoratium sibi eum adfirmet: omnibus igitur ad exhibendum actio competit, quia omnium interest exhiberi hominem.*

⁴⁸ C. SCHIEDER, *op. cit.*, p. 153.

a contract of mandate in Roman law.⁴⁹ Here the principal had a right to make a claim on the grounds of a contract of mandate, provided he could prove his interest. So, if he wanted to acquire an estate, which he bought by himself or through his attorney acting on his behalf, then although the obligation would not be binding on the attorney, the creditor would not have a right to make a claim, because the creditor did not have an interest in the performance of the contract: the purchase was transacted as a result of the principal's own actions or of the actions of another person. The purpose of the main contract was achieved: the alienation had been effected, though not by means of the said contract of mandate. The principal did not sustain any damage as a result of the attorney's failure to fulfill the obligation, but his interest had not violated, which means he had no grounds to bring a claim. According to Ulpian, if a contract of mandate was made for the performance of a specific transaction but nothing was lost due to its non-performance, or if another party conducted the transaction, no claim could be made for non-performance. Moreover, Ulpian generalizes and says that the same holds for other similar cases.⁵⁰

P. du Plessis points out that another passage, namely D. 17,1,6,4,⁵¹ says that the principal does not have an interest.⁵² Here Ulpian admits the principal's claim, even if the commission was not in his interest, but consisted in the fact that the attorney acted as a guarantor for a third party or gave a loan to a third party. However, du Plessis argues that the two texts can be read as consistent with each other if the latter passage is interpreted as containing obvious interest. He writes that if we

⁴⁹ A. WATSON, *op. cit.*, p. 102-124.

⁵⁰ D. 17,1,8,6 (Ulp. 31 *ad ed.*): *Mandati actio tunc competit, cum coepit interesse eius qui mandavit: ceterum si nihil interest, cessat mandati actio, et eatenus competit, quatenus interest. Ut puta mandavi tibi, ut fundum emeris: si intererat mea emi, teneberis: ceterum si eundem hunc fundum ego ipse emi vel alius mihi neque interest aliquid, cessat mandati actio. mandavi, ut negotia gereres: si nihil deperierit, quamvis nemo gesserit, nulla actio est, aut si alius idonee gesserit, cessat mandati actio. et in similibus hoc idem erit probandum.*

⁵¹ D. 17,1,6,4 (Ulp. 31 *ad ed.*): *Si tibi mandavero quod mea non intererat, veluti ut pro Seio intervenias vel ut Titio credas, erit mihi tecum mandati actio (...)*

⁵² P. DU PLESSIS, *op. cit.*, p. 287.

assume that the character called Seius in the passage is the principal's debtor, then the principal has an interest, because the attorney acts as a guarantor for the debtor, even if the principal's interest is not mentioned verbatim in the commission.⁵³

Another passage in Ulpian says that no claim can be made on the grounds of a commission if what is entrusted is in the interest of the attorney himself, while the principal does not have an interest.⁵⁴ That is, what is done for one's own benefit should be done at one's own discretion, not under a contract of mandate.

Consequently, the principal has the right to make a claim on the grounds of a contract of commission (mandate) if he has an interest in the performance of the commission; if the principal has no such interest, then there can be no claim. According to C. Sanfilippo, a mandate which is the subject of a contract of mandate should be of interest to the principal, or to a third party, or both, or their common interest shared with the attorney. There are no situations where only the attorney is has an interest, since in that case there would be no subject of obligation, since no one can become obligated in his own interest.⁵⁵

W. Buckland points out that a contract of mandate should relate to the principal's interest, and hence contracts of commission may be classified according to who has an interest in them: the principal, the agent, a third party, or any combination of the parties. He writes that a contract of mandate was valid if the principal had an interest in it, while a contract of mandate which was only in the interest of the attorney and/or a third party did not warrant an *actio directa* (a direct claim). He goes on to say that the general rule that the principal had to have an interest was based on Ulpian's text (D. 17,1,8,6), which required the existence of an interest not so much for the validity of the mandate as for an *actio directa* (direct action) made on the grounds of the mandate.⁵⁶

⁵³ *Ibidem*, p. 287.

⁵⁴ D. 17,1,6,5 (Ulp. 31 *ad ed.*): *Plane si tibi mandavero quod tua intererat, nulla erit mandati actio, nisi mea quoque interfuit (...)*

⁵⁵ C. SANFILIPPO, *Corso di diritto romano. Il mandato. Parte prima*, «Rivista di Diritto romano» IV/2004, p. 33.

⁵⁶ W.W. BUCKLAND, *op. cit.*, p. 515.

A lawsuit was not the only course of action for which the sources called for an interest. Interest also served as the grounds for the exercise of the right to defense in an appeal or to obtain a praetor's interdict.

Thus, Ulpian argued that the only appeals admitted were ones brought by parties whose interests were involved directly, or who had been entrusted with a mandate or were conducting business on someone else's behalf but without a formal mandate. He cites the example of a mother who, having learned that her son had lost a case in court, was entitled to file an appeal. In this example, the interest was due to the mother's family relations with her son, who had lost his case in the court of first instance.⁵⁷

In Roman law, interest was an indispensable concept, used not only for defense on the grounds of legality, but also for the possessor's defense. The possessor's defense provided for his inability to prove his title to possession because, according to the established view in Roman law, trespass on someone else's right to legal possession was not considered a violation of the law, but of public order. This was a logical consequence of the fact that Roman law considered possession (*possessio*) a *de facto* state, not a property right. According to D. Dozhdev, the possessor's interest, as reflected in the remedies available to him, was that his holding could not be arbitrarily disturbed.⁵⁸ Therefore, the legitimation of possessory defense could not be based on the existence of a violated right. Accordingly, a different criterion had to be applied to grant someone an interdict for the protection of possession instead of simply the infringement of his right. The Digest of Justinian presents the interest of the person whose possession has been disturbed as such a criterion.

But, in my opinion, there could have been different grounds for the identification of a person interested in the protection of his possession, and they were always determined by taking the specific circumstances into account. The most effective in this respect was the recuperative interdict *quod vi aut clam* (concerning what was committed by force

⁵⁷ D. 49,5,1,1 (Ulp. 29 *ad ed.*): *Sed et cum mater filii rem sententia eversam animadverteret, provocaverit, pietati dandum est et hanc audiri debere: et si litem praeparandam curare maluerit, intercedere non videtur, licet ab initio defendere non potest.*

⁵⁸ D. DOZHDEV, *Osnovanie zashity vladeniya v rimskom prave*, Moskva 1996, p. 35.

or stealth). Ulpian calls it an *interdictum restitutorium*: “the cunning of those who do something by force or stealth is countered by means of this interdict” (D. 43,24,1,1).

So, let’s find out what Roman lawyers considered to be the interest of a person authorized to receive protection through the *quod vi aut clam* interdict.

First of all, we should observe that not always could possession be based on the material (physical) association of a thing with a specific person.

Thus, Paul writes that even those who do not enjoy this interdict may have an interest in it.⁵⁹ So, according to him, if trees which do not bear fruit, for example, cypresses, are cut down, then the interdict is available only to their owner. But if the trees bring pleasure and relaxation to a usufructuary, then he too may claim a right to the interdict. Here the procedural means of protection is due to the user’s immaterial (aesthetic) interest in the right to enjoy the usufruct.

In a comment on this passage, I. Fargnoli notes that it would be unfair to limit the usufructuary’s sphere of interests to protection if he is considered to be in the same position as the owner as regards protection. A *vi aut clam* operation not only impairs the owner’s right to his property, but also reduces the beauty of the site and affects the sphere of interest of those who enjoy the site.⁶⁰ There is also the interest of a person who is not under an obligation to return the plot in an undamaged condition when the usufruct expires, while of course the usufructuary must return the land in the same condition in which he received it and with no change.⁶¹

In a passage on the theft of a statue from a public place, Ulpian attributes a right to the interdict to the person whose statue it was, since it is in his interest for the statue to stay on its original site.⁶² Fargnoli

⁵⁹ D. 43,24,16 pr. (Paul. 67 *ad ed.*): *Competit hoc interdictum etiam his qui non possident, si modo eorum interest.*

⁶⁰ I. FARGNOLI, *op. cit.*, p. 83.

⁶¹ *Ibidem*, p. 85.

⁶² D. 43,24,11,1 (Ulp., 71 *ad ed.*): *Quaesitum est, si statuam in municipio ex loco publico quis sustulerit vel vi vel clam, an hoc interdicto teneatur. Et exstat Cassii sententia*

emphasizes that in this situation, the interest of the authorized person also entails an additional aspect: the person who seeks to use the interdict is not interested in enjoying the right of ownership of the statue put up in his honor, or in suing for damages for the violation of his property rights due to the theft of the statue, but it is in his interest for the theft not to be committed at all (*opus factum non esse*), and therefore his interest in the protection of the statue in his honor against removal deserves to be defended. An interest in *opus factum non esse*, protection against the commission of a particular offense, is more of an interest in rights belonging to the emotional and immaterial sphere not connected with property rights.⁶³

The fact that interest constitutes the criterion for the active legitimation of the *quod vi aut clam* interdict is clearly expressed by Julian in D. 43,24,11,14, which says that *interdictum hoc non solum domino praedii, sed etiam his, quorum interest opus factum non esse, competere*: „the right to use this interdict may be claimed not only by the owner of the property but also by those in whose interest it is to be protected against the commission of the offense.” But in the next passage of the Digest, the Roman jurist Venonius attributes the right to apply for this interdict both to the *colonus* and the fructuary, on the grounds of their right to enjoy the fruits, and for the owner, if he has an interest in this.⁶⁴ That is, Venonius’ opinion may be read as follows: the owner is entitled to the interdict not because he has a right of ownership, but because he has an interest in the protection of his possession. This means that interest treated as a condition for active legitimation takes precedence over a subjective right.

Another passage of the Digest says that the *quod vi aut clam* interdict also afforded protection to a person enjoying an asset or holding property

eum, cuius statua in loco publico in municipio posita sit, quod vi aut clam agere posse, quia interfuerit eius eam non tolli.

⁶³ I. FARGNOLI, *op.cit.*, p. 81.

⁶⁴ D. 43,24,12 (Venon. 2 *interd.*): *Quamquam autem colonus et fructuarius fructuum nomine in hoc interdictum admittantur, tamen et domino id competet, si quid praeterea eius intersit.*

on the grounds of *precarium*.⁶⁵ This can be explained by the essence of the institution of the *precarium*, under which an owner granted the use of a thing to a person on his request (*preces*). The precarist was allowed to enjoy the thing for as long as it pleased the grantor. The owner could terminate the *precarium* at any time, so quite naturally, the precarist had a greater interest in the possession of the thing than the owner. Roman law recognized persons who owned a thing on the grounds of *precarium* as possessors, and hence precarists were entitled to use *vi aut clam* in consequence of the qualification of the legal nature of their possession.

D. Dozhdev discusses a situation where the interest of a possessor takes precedence over the interest of its owner who is not directly enjoying the use of the said property. He points out that the possessor's interest in his potential to take the possession from the holder at any time he pleases should cede to the interest in the preservation of the property, protecting the holder's enjoyment of it against trespass by third parties. Hence, according to Dozhdev, the active authorization of possessory interdicts to the advantage of the *de facto* holder forces to interpret that this denial of protection went against the interest of the owner currently not enjoying the direct use of his property and limited his exercise of control over it.

In my opinion, D. 43,24,11,10 is a clear example where interest is the criterion for a person's right to a *quod vi aut clam* interdict. In this passage, protection is granted to the buyer of an estate on the terms of *addictio in diem*.⁶⁶ That is, according to Julian, who is quoted by Ulpian, during the conclusion of the contract of sale, any benefit or disadvantage ensuing from the estate falls to the buyer even before the alienation. Even the improvement of the purchased plot of land as a result of its development does not deprive the buyer of his right to the interdict

⁶⁵ D. 43,24,11,12 (Ulp.71 ad ed.): (...) *si tamen precario sit in possessione, videamus, ne, quia interest ipsius, qualiter qualiter possidet, iam interdicto uti possit? ergo et si conduxit, multo magis: nam et colonum posse interdicto experiri in dubium non venit.*

⁶⁶ D. 43,24,11,10, (Ulp. 71 ad ed.): *Si fundus in diem addictus sit, cui competat interdictum? et ait iulianus interdictum quod vi aut clam ei competere, cuius interfuit opus non fieri: fundo enim in diem addicto et commodum et incommodum omne ad emptorem, inquit, pertinet, antequam venditio transferatur, et ideo, si quid tunc vi aut clam factum est, quamvis melior condicio allata fuerit, ipse utile interdictum habebit (...)*

against the developer. But since the buyer cannot be considered the owner, because the conclusion of the contract of sale in itself does not give the buyer grounds for ownership, Ulpian calls this interdict an *utile interdictum*, an “interdict by analogy,” like the praetorian *actio utilis* claim. That is, the formula of the interdict, which in this case is afforded to the buyer, is constructed on the model of the *quod vi aut clam* formula provided for in the praetorian edict. However, in the same passage Ulpian goes on to say that the buyer will have the right to use the interdict once he is in possession of the property.⁶⁷ Hence, the question of the grant of a possessory interdict to a buyer who is not yet the owner of the property remains a controversial issue.

Schieder believes that in pre-classical Roman law the *quod vi aut clam* interdict served to protect the enjoyment (*usus*) of land. However, the jurist Servius applied this interdict in a case where there was no such legal relationship, but only permission to cut down trees in a forest.⁶⁸

Ulpian observed that the right to *vi aut clam* was held by the user of a jointly held property where another of the joint users wanted to cut down the trees, since the right to exercise this interdict was held by a person who had an interest.⁶⁹ According to Ulpian, the interdict could be exercised even by someone who had permission to cut down trees on someone else’s property if a third party cut them down.⁷⁰ Schieder points out that in this case, as in the case of the thief who was robbed, it is also a question of whether interest is interpreted as a natural or as a legal phenomenon. So it is again a question of whether a legal interest is necessary, or whether the natural interest inherent in the usual permission (to fell trees) is sufficient. According to Schieder,

⁶⁷ D. 43,24,11,10 (Ulp. 71 ad ed.): *Si ita praedium venierit, ut, si displicuisset, inemptum esset, facilius admittimus interdictum emptorem habere, si modo est in possessione.*

⁶⁸ C. SCHIEDER, *op. cit.*, p. 149.

⁶⁹ D. 43,24,13,3 (Ulp. 71 ad ed.): *Si ex sociis communis fundi unus arbores succiderit, socius cum eo hoc interdicto experiri potest, cum ei competat, cuius interest.*

⁷⁰ D. 43,24,13,4 (Ulp. 71 ad ed.): *Unde apud Servium amplius relatam est, si mihi concesseris, ut ex fundo tuo arbores caedam, deinde eas alius vi aut clam ceciderit, mihi hoc interdictum competere, quia ego sim cuius interest: quod facilius erit admittendum, si a te emi vel ex aliquo contractu hoc consecutus sim, ut mihi caedere liceat.*

Ulpian's statements on this issue are mutually contradictory, nonetheless he resorts to the opinion of Servius, although he considers it quite far-reaching. Schieder concludes that a classic natural interest did not necessarily need to have a legal character to be recognized as the content of a right.⁷¹

4. CONCLUSIONS

Thus, in Roman law, the right to sue was subject to the *is actionem habet cuius interest* rule. Material interest gave the grounds for procedural means of protection, i.e. a claim, interdict, or appeal. The grounds for an interest could be the right of ownership, the obligation to return a thing based on a contract (hire, loan, storage), the execution of a warrant, gift by will, etc. A person had the right to sue if he could prove he had an interest. As I have shown, the connection between interest and the right to sue is confirmed by the large number of cases where by Roman lawyers use the verb *intersum, interfui, - , interesse* in the sense of material interest in filing a claim.

A person's private interest, regardless of whether he was a trustee, owner, victim of theft, etc., served as the necessary condition for his right to a claim or interdict. As I have shown, a number of researchers have addressed this issue in their work on the basis of a detailed analysis of the sources.

Provera has given a precise definition of the specific relationship in Roman law between material interest and the right to sue. Provera states that interest was the relationship between a need and that which served to satisfy it, and that interest assumed the status of a right when its holder had the opportunity to react to any infringement of his interest; and he goes on to associate opportunity with the lodging of a claim, so that *ius* and *actio* became synonymous, since they represented and expressed

⁷¹ C. SCHIEDER, *op. cit.*, p. 149.

one and the same essence. The grounds for this were the potential the holder of the interest had to file a claim for the protection of his interest.⁷²

What determined his potential to file a claim was not the fact that he had a subjective right, but that he had a verifiable interest. Hence, we may draw a conclusion about the procedural significance of interest in Roman law. I have shown that the pre-eminent role of interest in a litigant's potential for a claim under Roman law was due to the leading role of the claim in comparison with subjective law. This role can be explained by the difference in the way the claim was understood in Roman law compared with modern law, in which the concept is contrasted with its understanding in subjective right.

THE SIGNIFICANCE OF INTEREST FOR ACTIVE LEGITIMATION IN ROMAN CIVIL PROCEDURE

Summary

The aim of this article is to examine the importance of interest for an applicant's right to legal protection in Roman civil procedure. I establish a connection between the interest of the authorized person and his right to sue or apply for an interdict by reviewing the sources of Roman law concerning a claim for theft or on the grounds of a contract of mandate or *actio ad exhibendum*, as well as interdicts on the protection of possession. This enables me to define the persons with a right to enjoy these forms of procedural protection thanks to having a proven interest. Thus, the contractor who is robbed of the subject of his contract had the right to sue for theft, since he was responsible for the safekeeping of the thing. So, too, was the creditor of a pledge, since he had an interest in owning the subject of the pledge. The applicant for a right to *actio ad exhibendum* needed to have an interest in the presentation of the thing, regardless of whether he was its owner. The person entitled to bring an action on the grounds of a contract of mandate was the principal, if he had an interest in the execution of the commission. Interest was also the necessary condition for an applicant to claim a right to the *quod vi aut clam* interdict, which could be granted not only to the owner of the thing, but also to other persons whose interests were infringed.

⁷² G. PROVERA, *op. cit.*, p. 12.

ZNACZENIE INTERESU DLA LEGITYMACJI CZYNNEJ W RZYMSKIM POSTĘPOWANIU CYWILNYM

Streszczenie

Celem niniejszego artykułu jest zbadanie znaczenia interesu dla prawa wnioskodawcy do uzyskania ochrony prawnej w rzymskiej procedurze cywilnej. Podjęto próbe ustalenia związku między interesem osoby uprawnionej a jej prawem do wytoczenia powództwa lub złożenia wniosku o interdykt, dokonując przeglądu źródeł prawa rzymskiego dotyczących roszczenia z tytułu kradzieży lub na podstawie umowy zlecenia lub obowiązku okazania rzeczy, a także interdyktów dotyczących ochrony posiadania. Pozwala mi to zdefiniować osoby uprawnione do korzystania z tych form ochrony procesowej dzięki posiadaniu udowodnionego interesu. Tak więc wykonawca, który został okradziony z przedmiotu umowy, miał prawo pozwać o kradzież, ponieważ był odpowiedzialny za strzeżenie rzeczy. Podobnie było z Zastawnikiem, ponieważ miał on interes w zachowaniu przedmiotu zastawu. Wnioskodawca ubiegający się o prawo do *actio ad exhibendum* musiał mieć interes w okazaniu rzeczy, niezależnie od tego, czy był jej właścicielem. Uprawnionym do wytoczenia powództwa z tytułu umowy zlecenia był dający zlecenie, jeżeli miał interes w wykonaniu zlecenia. Interes był także konieczną przesłanką dochodzenia przez wnioskodawcę prawa do interdyktu *quod vi aut clam*, który mógł być przyznany nie tylko właścicielowi rzeczy, ale także innym osobom, których interesy zostały naruszone.

Keywords: active legitimation; interest; lawsuit; protection of interest; the right to sue; action for theft; action for mandate; *actio ad exhibendum*; Roman law; Roman civil procedure.

Słowa kluczowe: legitymacja czynna; interes; powództwo; ochrona interesu; prawo wytoczenia powództwa; skarga z tytułu kradzieży; skarga z tytułu zlecenia; *actio ad exhibendum*; prawo rzymskie; rzymska procedura cywilna.

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