Zeszyty Prawnicze
24.2 / 2024, s. 255-277
DOI 10.21697/zp.2024.24.2.14

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'LEGIS ACTIO SACRAMENTO IN REM' AS A RITUAL*

Many contemporary jurists like to see the law as a logically ordered system that treats man in the spirit of the Enlightenment as a purely rational being, leaving no room for unnecessary formalism or actions which are not utilitarian. However, their attitude is not an accurate reflection of reality. First of all, they forget that human behaviour is not only guided by reason but also influenced by feelings and experiences. Moreover, it should be pointed out that contemporary legal orders are permeated with more ritualistic, symbolic, or strictly formalised actions than these jurists care to admit. The utterance of prescribed words, the customary formulation of contracts and other legal actions, the routine of rising and sitting down, the arrangement of the courtroom, the entries in public reciords, the attendance of witnesses and their oaths – all these are firmly established in contemporary legal orders. These elements lend solemnity to legal acts, stand as symbols for their effects, organise their course or simply make them easier to remember for all the participants.

Undoubtedly, the strongest use of ritual and formal conduct is in procedural law. This paper focuses on the origins of the ancient Roman process of *legis actio sacramento in rem* used for *vindicatio* and describes the rituals and symbols such actions involved. The origin of other legal actions can then be sought in court proceedings for rights *in rem*, actions

* The work on this paper was supported by the Czech Science Foundation grant 23-07791S.

that were separate from procedural law and sometimes even had no connection with rights *in rem*.

The beginnings of the process

In every society procedural law clearly evolves gradually, hand in hand with the development of the state and the creation of its legal order. However, the circumstances in which civil procedure was formed in ancient Rome have not been precisely described. From today's perspective, its foundations and the entire archaic period are hazy, obscured by a fog with only selected fragments visible through the mists. There are thus only a few clues from which we can deduce the circumstances of this development. What we know for certain about the society of the ancient Romans is that it was organised on a family basis, divided into clans and tribes. Disputes arising within a family could be resolved domestically, without the need for a formal procedure. But if a conflict arose that went beyond the family, it is likely that in the earliest period it was group-based, that is, conducted between members of the families involved in the dispute[1]. It is clear that in the very early days the conflict could not have been bound by any rules and was played out without the involvement of the state. Traces of this state of affairs persisted in exceptional cases even in the classical period, since in some situations it was permissible to prefer self-help, i.e., extra-legal means, instead of procedures involving state authorities. Self-help may be regarded as an application of the rule *vim vi repellere licet* justifying necessary defence and arising from nature itself[2]. It was possible, for example, to kill a thief who qualified as a *fur manifestus*, thereby both repelling the attack and punishing the offender. Similarly, it was permissible to eject a possessor of property with a defective title

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1 M. KASER, *Das römische Zivilprozessrecht*, Munich 1966, p. 18.

2 D. 43,16,1,27 (Ulp. 69 *ad ed.*): *Vim vi repellere licere Cassius scribit idque ius natura comparatur…* „*Cassius writes that it is permissible to repel violence by violence; this right is established by nature…*"

to ownership, instead of resorting to the institutionalised interdict *de vi.* Once ejected, the holder had no means of reclaiming possession.[3]

However, it is not easy to say what the "state of nature," the situation before the institution of the civil process was like. This period may roughly be defined as the time before society entered into a social contract. On the one hand, people were absolutely free; on the other hand, no state institution had yet developed to protect their interests and resolve conflicts. The scholarship done on Roman law in the nineteenth century based these considerations largely on the conclusions of Rudolf von Jhering, who was inclined to conceive of the state of nature as a struggle of all against all. Since there were no laws enforced by the state, no legislators and no judges, the people had to assert their interests themselves in a self-help manner, using violence[4]. In specific situations, it might not have been easy to distinguish self-help from revenge, which only propagated the chain of violence and portrayed a world in which the stronger fists won. It should be stressed that this concept is not as schematic as it might seem at first sight. Jhering himself admits that the emergence of collective morality is not dependent on the formulation of state institutions and formal procedures, so that a kind of common justice can be exercised without them[5]. If a group of people became engaged in a fight with another group, the reason did not always have to be an attempt to advance their own interest at the expense of another's; often it could be in defence of a party against another party who tried to deny it justice. Thus, the state of nature consisting in a permanent violent struggle does not at all imply the absence of the capacity to perceive general justice, nor does it presuppose that every instance of self-help and every act of violence had to be a denial of justice.

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[3] PS, 5,6,7: *Qui vi aut clam aut precario possidet ab adversario, impune deicitur.* „*Whoever obtains possession from the other party by force, secretly or through extortion, is expelled with impunity.*" G. 4,154: *Namque eum, qui a me vi aut clam aut precario possidet, inpune deicio.* „*For him who has obtained possession from me by force, or secretly, or by way of extortion, I can expel with impunity.*"

[4] R. Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, Erster Teil*, Leipzig 1891, p. 122.

[5] *Ibidem*, p. 122.

The determination of the characteristics of the state of nature is not the primary domain of the study of Roman law, but a topic elaborated in detail by philosophers over a long period of history, and there is no doubt that Jhering's concept follows the ideas of the English philosopher Thomas Hobbes, who said that at the beginning of history there was a state of mutual warfare, a *bellum omnium contra omnes*:

> Hereby it is manifest, that during the time men live with out a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man[6].

Hobbes's emphasised the need for a strong sovereign, a Leviathan who forces his subjects to abide by a social contract, is the result of individuals surrendering some of their liberties and rights to the state in exchange for peace. For, in the state of nature, every individual enjoys only as much of his subjective rights as he is able to win against others. Here, again, we see that the motive for the emergence of the state, law, and ultimately procedural rules, is the people's desire to bring the violent state of nature to an end.

But the fact that scholars of Roman law have treated the state of nature as a self-evidently violent condition provokes criticism. In the first place, there is reasonable doubt whether specialists in legal studies have the qualifications to say what the state of affairs might have been like at the beginning of archaic Roman society, since that is much more of a question for anthropologists rather than for experts on legal theory. Historians of Roman law tend to overlook the empirical findings of anthropology in formulating such theories. Also, we should avoid seeing spurious causal relationships where there are none. This tends to be happen when we treat the concept of the state of nature as a period full of violence. For example, if *legis actio sacramento in rem* is considered as a symbolic fight between two parties for an object, primarily due to the use of the rod, the authoritative claiming of a thing, this does not say anything at all about whether such a fight was actually

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[6] T. HOBBES, *Leviathan Or, The Matter, Forme, and Power of a Commonwealth Ecclesiasticall and Civill*, Oxford 1881, p. 93.

held in reality, not symbolically[7]. Both options are conceivable and somehow logically justifiable. But there is no means of verifying what actually took place. So the preference of one of the alternatives would be due much more to the random mental disposition and choice of the author of such a text than to empirically supported data. After all, no comprehensive theoretical notion of the state of nature can be relied upon in an examination of the development of the civil process, and declaring such a notion universally valid would call for a high degree of idealisation and schematisation[8]. Thus, it seems that embarking on a definition of the state of nature would not be practical at all, and would only take Roman law scholars up a path leadings to a dead end. It is impossible to travel back in time and ascertain how society lived before a sufficiently strong state structure and legal order took shape. All that is clear is that at some point there must have been a time when there were no laws. The sources of law, even in the archaic Roman period, are already evidence of evolutionary development and do not resemble the state of affairs that existed before their creation. So there is nothing we can say for certain about the state of nature.

Similarly, we cannot say anything for certain about how and why the state of nature was surmounted. The definition of the state of nature implies that its demise is linked to the emergence of the state and its law, i.e., to the time when the resolution of disputes was formalised and put under a higher authority. It is also suggested that this change was generally intended to be beneficial from a broader perspective. A theory of the state of nature as a period of violence would add that the advantage of the changeover lay in the elimination of a situation where the individual had to be constantly ready to repel attacks by others or to attack in order to assert his own right. Paradoxically, however, there was no eradication of violence; on the contrary, the use of force was rechannelled to apply the law and monopolised by the state. However, even the discussion of what made people entrust the adjudication of disputes to the authority

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[7] G. MacCormack, *Formalism, Symbolism and Magic in Early Roman Law*, «TR» 37/1969, p. 463.

[8] M. Kaser, *Das römische…*, p. 20.

of the state has not been conducted without controversy. On the one hand, the explanation usually offered is that people were compelled to submit to the nascent authority of the state because the unrestricted use of force to resolve disputes arbitrarily was contrary to the public interest and public order[9]. The state did not tolerate its inhabitants resolving disputes on their own with the use of unrestricted violence, even though the disputes were ones which, from today's point of view, would be described as private and did not directly concern public authority. This theory is widely accepted, and the reasoning behind it seems plausible[10], but one cannot help feeling that again it is based on a simplistic view of the world as free of other motivations and grounded only on the use of violence. An alternative view of the origins of the civil process has emerged, despite the controversy attending it, based on the belief that people submitted voluntarily to an impartial authority. This may have been seen as generally advantageous because such a procedure offered the prospect of a definitive end to ceaseless contention and the removal of a state of potentially permanent violence. So it is possible that parties to a dispute resorted to assistance from a state authority on a voluntary basis, not because they had no other means of reaching a resolution to their dispute. Nor can it be ruled out, in terms of historical development, that the origins of civil procedure lie not in the formation of a state authority but in the practice of litigants choosing private arbitrators to resolve their disputes, and that with time this became the socially established custom[11]. Only later did the state begin to take over this role. This would then mean that *legis actio sacramento in rem,* the model of the earliest private law process on record, would have meant proceedings before a private arbitrator chosen by the parties to the dispute themselves, and that they submitted voluntarily to his judgment[12].

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[9] E. SCHÖNBAUER, *Der Gütegedanke im römischen Zivilprozeßrecht*, «ZSS» 52.1/1932, pp. 251-281. Cf. J. VÁŽNÝ, *Římský proces civilní*, Praha 1935, p. 15.

[10] M. KASER, *Das römische…,* pp. 20-21.

[11] M. KASER, *Eigentum und Besitz im älteren römischen Recht*, Weimar 1943, p. 31.

[12] M. WLASSAK, *Der Judikationsbefehl der römischen Prozesse: mit Beiträgen zur Scheidung des privaten und öffentlichen Rechtes*, Wien 1921, p. 247.

In addition to the question of how the Romans in the archaic period arrived at the settlement of disputes by way of a state-led process, one may also ask how the substantive separation of the vindication action and the *legis actio sacramento in rem* came about. As such, the distinction of disputes over rights *in rem* from other proceedings does not seem surprising and is offered in view of their specific circumstances. What is interesting, however, is the manner in which this distinction was made. Indeed, it may be assumed that proceedings for the protection of property rights evolved from proceedings against a thief[13]. If an item went missing from someone's possession and he found it in someone else's possession, he could reasonably believe that it had been stolen. Its actual possessor was accused of *furtum nec manifestum* (not manifest theft) and forced into a defence that could only consist of proving he had acquired the item in an acceptable way, either from the plaintiff or from a third party. This was the only way to dispel the suspicion that the defendant had deliberately stolen the property. This logic is reflected in the earliest record of proceedings to protect the right of ownership, where the plaintiff insisted adamantly that the thing was his and made the defendant explain how it had come into his possession. If theft was proved, a secondary effect was the expected return of the thing to the plaintiff. However, if the possessor proved that he was in possession on the grounds of a legal title, the suspicion of theft was thereby rebutted, and the focus was broadened from a narrow emphasis on the defendant to what had happened to the item. It was necessary to turn to its previous possessors and investigate how the item came to them and whether they were the ones who had deliberately stolen it from the plaintiff. Thus, often proceedings concerning the defendant himself quickly turned into an inquiry on the developments leading up to the case. Indeed, this is why, after the suit was filed, the matter in dispute was typically brought to court and a formal trial ensued. By presenting the thing in court, the defendant who was its actual holder averted suspicion of intent to misappropriate it. In this way, the thing may have been held outside the sphere of dominion of the parties while

[13] M. Kaser, *Das römische…*, pp. 67-68. M. Kaser, *Eigentum und Besitz…*, pp. 67-70.

proceedings were pending, or it may have been entrusted to the custody of one of the parties by order of the judge. The successful litigant became entitled to it when judgment was given in his favour. He could take it away without delay and resume possession as one of the attributes of ownership. The conclusion of the *legis actio sacramento in rem* is thus only a logical consequence which leads to full focus on the thing, not on the person of the holder. The recovery of the defendant's property is no longer a mere side-effect of the investigation into the theft, but the direct and sole objective of the proceedings.

The course of legis actio sacramento in rem proceedings

Evidence of the course of the civil trial is provided by Gaius' Institutions[14]. In Gaius' account, the object of the action is a slave, hence the use of the word „man," not „"thing" or „object." When we consider the Institutions, however, we should remember that, although this second-century AD text claims to describe an ancient legal procedure, that is precisely the proceedings used by the ancients, this is not its earliest form, the putative original stage of its development. Hence, for example, Gaius presents proceedings which have already been divided into an *in iure* and an *apud iudicem* stage, while it is clear that in the earliest times civil proceedings were not divided and formed an integral entity.

The plaintiff initiated the formal proceedings by a *vindicatio* to execute the power he claimed to possess the thing in dispute:

> *Si in rem agebatur, mobilia quidem et moventia, quae modo in ius adferri adducive possent, in iure vindicabantur ad hunc modum: qui vindicabat, festucam tenebat; deinde ipsam rem adprehendebat, veluti hominem, et ita dicebat: HUNC EGO HOMINEM EX IURE QUIRITIVM MEUM ESSE AIO SECUNDUM SUAM*

[14] Cf. U. Manthe, *Agere und aio: Sprechakttheorie und Legosaktionen*, [in:] *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*, eds. M.J. Schermaier, J.M. Rainer, L.C. Winkel, Köln 2002, p. 431–444.

CAUSAM. SICUT DIXI, ECCE TIBI, VINDICTAM INPOSUI, et simul homini festucam inponebat[15]…

The plaintiff expressed the fact that the thing belonged to him in three ways at the same time: he grasped the movable object, pointed to it with a rod, and uttered the prescribed procedural formula. In these three external ways, he ritually manifested his inner will and made it unquestionably known to the others involved. At the same time, the plaintiff's performance of these acts made him aware of the significance and consequences of the action he was taking and, potentially, of the risk involved in its outcome. He must have been fully aware that he was initiating civil proceedings, the strictly ritualised form of which showed him that it was not just an ordinary dispute over ownership, a quarrel he might have had on the streets of Rome, but a procedure leading to definitive decisions on the outcome of the case. In this way, the ritual affected the emotions of the participants and was a manifest sign of dominion.[16] The plaintiff was embarking on a course of action which might lead to the possibility of his definitive, officially confirmed loss of the obbject of the proceedings. His *vindicare* signalled his formal taking control of the thing and referred to the original struggle for the thing and attempt to carry it away. The defendant replied in a similar manner, pronouncing his *contra vindicare*, the praetor then concluded the pronouncement of claims by ordering both parties to let go of the thing:

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[15] G. 4,16. Source of the Latin text of the Institutions of Gaius: J. Kincl, *Gaius: Učebnice práva ve čtyřech knihách*, Plzeň 2007. „*When the sacramentum was a real action, movables and animals that could be brought or led into the presence of the magistrate were claimed before him in the following fashion. The vindicant held a wand, and then grasping the object itself, as for instance a slave, said: 'This man I claim as mine by due acquisition, by the law of the Quirites. See! as I have said, I have put my spear (vindicta) on him,' whereupon he laid his wand upon the man…*" Source of the English translation of the Institutions of Gaius: E. Poste, *Gaius Institutiones*[4], Oxford 1904.

[16] K. Tuori, *The Magic of Mancipatio*, «RIDA» 55/2008, p. 516.

> *…adversarius eadem similiter dicebat et faciebat. cum uterque vindicasset, praetor dicebat: MITTITE AMBO HOMINEM, illi mittebant*[17]*…*

The plaintiff then took the floor again and engaged in a ritualised dialogue with the defendant, in which he first invited him to state the reason why he had the thing in his possession and then to make the procedural stake that was a prerequisite for the resolution of the dispute:

> *…qui prior vindicaverat, ita alterum interrogabat: POSTULO ANNE DICAS, QUA EX CAUSA VINDICAVERIS; ille respondebat IUS FECI, SICUT VINDICTAM INPOSUI; deinde qui prior vindicaverat, dicebat QUANDO TU INIURIA VINDICAVISTI D AERIS SACRAMENTO TE PROVOCO; adversarius quoque dicebat similiter ET EGO TE; scilicet di se re M aeris plurisve agebatur, D, si de minoris, L asses sacramenti nominabant; deinde eadem sequebantur, quae cum in personam ageretur. postea praetor secundum alterum eorum vindicias dicebat, id est interim aliquem possessorem constituebat, eumque iubebat praedes adversario dare litis et vindiciarum, id est rei et fructuum; alios autem praedes ipse praetor ab utroque accipiebat sacramenti causa, quia id in publicum cedebat.*[18]

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[17] „*The adversary then said the same words and performed the same acts. After both had vindicated him, the praetor said: 'Both claimants quit your hold,' and both quitted hold.*"

[18] „*Then the first claimant said, interrogating the other: 'Answer me, will you state on what title you found your claim?' and he replied: 'My putting my spear over him was an act of ownership.' Then the first vindicant said: 'Since you have vindicated him in defiance of law, I challenge you to stake as sacramentum five hundred asses': the opposite party in turn used the same words, 'I too challenge you.' That is to say, if the thing was worth more than a thousand asses, they staked five hundred asses or else it was only fifty. Then ensued the same ceremonies as in a personal action. The praetor then awarded to one or other of the claimants possession of the thing pending the suit, and made him bind himself with sureties to his adversary to restore both the object of dispute and the mesne profits or value of the interim possession, in the event of losing the cause. The praetor also took sureties from both parties for the stake (summa sacramenti) which the loser was to forfeit.*"

After the praetor stage, Gaius' Institutions no longer continue the proceedings before the judge, so the praetor determined in whose custody the slave was to be put until the dispute was resolved.

Some aspects of the rituals and symbols used in *legis actio sacramento in rem* deserve detailed attention. The formalised process itself, tried and tested over a long period of time and forming a tradition consisting of actions and statements uttered in a precise order and according to a clearly defined script, is undoubtedly a ritual. It may be regarded as the result of the development of the law and legal culture, since it was the ritualised conduct which displaced the informal exercise of self-help and transformed it into a regulated, controlled, and supervised process. Some authors note the religious significance of rituals and point out that in the earliest period, this supervision was the duty of priests, who thereby acquired a say in legal matters[19]. Even if we do not see a sacred dimension in the sphere of private law, since it did not regulate relations with the gods, we cannot overlook its pontifical dimension, as until the mid-third century BC the right to interpret legal acts belonged to the college of pontiffs. A ritual vindication uttered by the plaintiff required a ritual response from the defendant[20]. Therefore, a vindication could only be responded to by means of a *contra vindicatio*; the action of the plaintiff and the praetor automatically obliged the defendant to accept this way to resolve the dispute and respond in the same manner. Indeed, an informal response could not produce the intended effects against the plaintiff's formal demand, of course, providing the defendant wanted to respond. If the defendant remained silent, the object was deemed to belong to the plaintiff regardless of the substantive state of the law, and the ritual declaration that the thing was his would hold in all circumstances.

This consequence testifies to the constitutive force of the words spoken and the gestures made, since in certain circumstances the plaintiff could bring about the effects he wanted by insisting on his right of ownership, at least between the parties to the dispute. However, those effects were

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[19] Cf. P. Noailles, *Fas et ius*, Paris 1948, pp. 45 ff.

[20] M. Kaser, *Das römische…*, p. 20.

entirely dependent on the use of the prescribed form. If the plaintiff were to assert ownership in his own words, without the ritualised gestures or, for example, in his own home, he would not achieve what he wanted and his words would have no effect on the material situation. It is debatable whether it would be right to claim that the final effect manifested a magical or supernatural meaning inherent in the words spoken. The constitutive power of the plaintiff's words is often explained in this way, and most likely, such a description corresponds to the way the ancient Romans understood the situation, at least in this part of the proceedings[21]. It is useful to note, however, that the constitutive effect need not always be explained, even in archaic societies, by the intervention of the supernatural; it may be justified by the power of the law itself. If a society has a sufficiently developed legal order and generally recognises its binding force, the creation, modification or extinction of rights and obligations as a result of the performance of a prescribed act may be justified without the need to invoke magic. Indeed, formalism is often confused with magic. While magic requires the observance of a precise procedure, a formal procedure need not necessarily be a manifestation of magic[22]. Yet situations where the utterance of prescribed words affects a legal reality still occur today, showing that belief in the supernatural is not a necessary requrement. It is enough for a legal regulation to endow the utterance of the prescribed words with the power to accomplish the intended effects. The philosopher of language J.L. Austin defined such prescribed formulas as performative utterances.[23]

Similarly, one may ask to what extent *legis actio sacramento in rem* may be characterised as a strictly formal act. There is no dispute that it had a precisely prescribed course, and that it depended on the utterance of prescribed words and the performance of prescribed gestures, all in their proper order and before a magistrate. It was therefore bound by time, place, with specified participants attending, delivering a fixed oral formula and prescribed gestures. After all, such elements occur

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[21] M. Kaser, *Das altrömische 'Ius'*, Göttingen 1949, p. 326.

[22] G. MacCormack, *op. cit.*, p. 442.

[23] Cf. J.L. Austin, *Jak udělat něco slovy*, Praha 2000. Original edition: *How To Do Things With Words* (Oxford: Clarendon Press, 1962).

in the present-day form of court proceedings. However, the popular claim that the slightest deviation by the parties from the formal rules of procedure necessarily led to the suit's failure must be revised. Such a strict interpretation is based on the provisions of Gaius' Institutions, which say that a suit concerning vines (*vites*) would be unsuccessful if the case involved the cutting of vines, because the prescribed wording required the use of the term trees (*arbores*) in accordance with the wording of the Laws of the Twelve Tables:

> *Actiones, quas in usu veteres habuerunt, legis actiones appellabantur vel ideo, quod legibus proditae erant, quippe tunc edicta praetoris, quibus conplures actiones introductae sunt, nondum in usu habebantur, vel ideo, quia ipsarum legum verbis accommodatae erant et ideo immutabiles proinde atque leges observabantur. unde eum, qui de vitibus succisis ita egisset, ut in actione vites nominaret, responsum est rem perdidisse, quia debuisset arbores nominare, eo quod lex XII tabularum, ex qua de vitibus succisis actio conpeteret, generaliter de arboribus succisis loqueretur*[24].

However, it is possible that this provision only gave a general expression of the need for the words the litigants said to comply with the legal provisions, especially when it concerend the unreservedly recognised Laws of the Twelve Tables[25]. It would seem to be an exaggeration to suggest that any error, any departure from the prescribed formulas, always necessarily led to failure in the proceedings. At least, it cannot be reliably deduced from Gaius that it would be right to make such a broad generalisation.

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[24] G. 4,11: „*These actions, which our old jurisprudence employed, are called statute--process, either because they were appointed by statute before the edict of the praetor, the source of many new actions, began to be published, or because they followed the statute itself and therefore were as immutable as the statute. Thus, it was held that a man who sued another for cutting his vines, and in his action called them vines, irreparably lost his right because he ought to have called them trees, as the enactment of the Twelve Tables, which confers the action concerning the cutting of vines, speaks generally of trees and not particularly of vines.*"

[25] G. MacCormack, *op. cit.*, p. 442.

Descriptions of the course of the proceedings also discuss the *sacramentum* or procedural stakes, which both parties were asked to contribute, again in a ritual manner, once they had made their respective claims. The money staked seems to have dominated the case, since the judge was to decide which party would lose the case amd forfeit his money[26]. Proceedings for a property right were thus indirectly decided in outcome of a finding of *iniustum sacramentum*. The inclusion of a procedural stake was arguably a way for the initially weak public authority to have a say in private law disputes between clans and families[27]. The *sacramentum* represented a sum of money to be staked by each party with the understanding that if they lost, the money would be treated as a fine and go to the treasury. Initially, this sum was deposited in cash in the sanctuary, with the winning party redeeming their stake, and the losing party's stake going to the treasury. Later it was not deposited in cash, but its payment was secured by means of *praedes sacramenti*. The deposit of the money in the shrine demonstrates the sacred nature of the stake, linking the process to the religious life of the ancient Romans. Already in Gaius' Institutions the stake is described in a way where it is not a symbol of some other thing, it is not a substitute: the sum of money deposited is the object of the stake. Previously, however, the stake was probably a surrogate. Perhaps the monetary stake superseded an original obligation incumbent on the losing party to make a sacrifice to the gods for *iniuria vindicare*, the utterance of a materially unjustified claim of a better right of possession which disturbed the peaceful order on earth and was also unwarranted with respect to the gods[28].

However, in addition to the financial stake having a surrogate nature, we can identify two other material symbols which represent something that is not visible, or at least not present materially in the process. The first is not referred to in Gaius' description, which concerns a slave or other movable, not real estate, as the object of the dispute. Originally, vindication did not apply to real estate because in the earliest period land

[26] J. VÁŽNÝ, *op. cit.*, p. 18.
[27] M. KASER, *Eigentum und Besitz…*, p. 137.
[28] *Ibidem*, p. 34.

was *ager publicus*, the common property of the Roman people as a whole, and individuals were only granted possession of real estate but not ownership in the true sense of the word, so there was no need to protect the right of ownership. This is evidenced by the use of the word *res* in the extant records of *legis actio* and the necessity of pointing to the object that was brought before the magistrate. It was only later that an extension was made, which, however, required an adaptation in the proceedings. If the thing was immovable, the parties and the magistrate went to the site and made their vindication and counter-vindication there. Later on, the magistrate no longer went to the site in person, but merely invited the parties to go there with witnesses and bring a lump of earth or perhaps a brick from the house to the court[29]. A similar procedure was followed if it was too difficult to bring a large movable item to court – it was enough to produce a fragment of a column, a component from a boat, one sheep from the flock or even a tuft of wool from a sheep[30]. The *legis actio* was then held on a part of the whole, which symbolised the subject of litigation.

Gaius explicitly refers to the rod as the second real symbol used in the process, a symbol of dominion over the thing which was the subject of the dispute:

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[29] L. Heyrovský, *Římský civilní proces*, Bratislava 1925, p. 122.

[30] G. 4,17: *Si qua res talis erat, ut sine incommodo non posset in ius adferri vel adduci, veluti si columna aut grex alicuius pecoris esset, pars aliqua inde sumebatur, deinde in eam partem quasi in totam rem praesentem fiebat vindicatio. Itaque ex grege vel una ovis aut capra in ius adducebatur, vel etiam pilus inde sumebatur et in ius adferebatur; ex nave vero et columna aliqua pars defringebatur. Similiter si de fundo vel de aedibus sive de hereditate controversia erat, pars aliqua inde sumebatur et in ius adferebatur et in eam partem perinde atque in totam rem praesentem fiebat vindicatio, veluti ex fundo gleba sumebatur et ex aedibus tegula, et si de hereditate controversia erat, aeque res aliqua inde sumebatur.* „*If the object of dispute was such as could not conveniently be carried or led before the praetor, as for instance a column, or a herd of cattle, a portion was brought into court, and the formalities were enacted over it as if it were the whole. Thus if it was a flock of sheep or herd of goats, a single sheep or goat, or even a single tuft of hair was taken before the magistrate; if it was a ship or column, a fragment was broken off and brought similarly; if it was land, a clod; or if it was a house, a tile; and if it was a dispute about an inheritance, then in the same way.*"

> *Festuca autem utebantur quasi hastae loco, signo quodam iusti dominii; quod maxime sua esse credebant quae ex hostibus cepissent; unde in centumuiralibus iudiciis hasta praeponitur*[31].

Its use expressed the objective to be accomplished, namely, the acquisition of the right to exercise dominion over the thing. It is not the purpose of this paper to resolve the frequently addressed question of how exactly the symbolism of the rod used in vindication is to be understood. Gaius, for example, argues that the rod was used *hastae loco*, instead of the spear, a weapon used to fight and despoil an enemy with the intention to occupy his property and take over his assets. However, this interpretation has been subjected to extensive criticism, for example, with the observation that the direction in which the wand was pointed was not towards the other party, but towards the thing itself, so perhaps it was used more as a pointer to strengthen the asserted claim rather than as a weapon. Perhaps it was used to reinforce the words spoken with a physical gesture of taking hold of the object of the claim. In connection with the similarity of this gesture to taking hold of the thing physically, the question arises whether the use of the rod was not redundant, and whether its role has not been interpreted too simplistically[32].

Finally, we need to consider the obscure origin of the question *postulo anne dicas qua ex causa vindicaveris* and the answer *ius feci, sicut vindictam inposui*. The plaintiff apparently asked the defendant to state the reason why he had uttered a *contra vindicatio*, but the defendant did not give a straighforward answer, and only said that he had a right to do what he did. However, there was no need to say this at all, since his assertion of the existence of a right to possess the thing was already self-evident from the *contra vindicatio* itself. Perhaps in the case of the acquisition of a thing by mancipation there was a prescribed formula which the defendant could say to give this information and

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[31] G. 4,16: „*Now the wand which they used represented a lance, the symbol of absolute dominion, for what a man had captured from the enemy was held to be most distinctly his own. Accordingly in Centumviral trials (where questions of inheritance are decided) a lance is set up in front as an ensign or symbol.*"

[32] For a more detailed commentary on the role of the rod, see M. KASER, *Das altrömische 'Ius'*, pp. 327-328.

refer to his predecessor in title, but unfortunately its form has not come down to us. In other cases, a brief statement without a reason for *contra vindicatio* was sufficient, because the proof of the facts came later. The doubt presented over the wording of the parties' declarations also underlies a dispute between Roman law scholars as to whether the parties were engaged in a ritual monologue or a dialogue. They were only apparently reacting to each other; in reality they uttered their statements without regard to what the other party said. W.W. Buckland thought that it was more of a monologue, emphasising that the defendant was merely negating the plaintiff's claim and that clearly the plaintiff was the more active party in the proceedings[33]. Hence, he presented a general proposition that in Roman private law ritual conduct was always performed by those who stood to gain from it. P.M.Tiersma provides a clarification of this theory, attributing such behaviour to the person whose position is substantially enhanced, here it is the person who is to obtain the thing[34].

Derived legal actions

We can observe a tendency for Roman law to take an economical approach to the institution of new legal acts and forms. This means that brand new forms were not created for new acts but derived from existing acts. This is also the case with the vindication action and *legis actio sacramento in rem*, from which legal acts such as *in iure cessio*, *manumissio vindicta*, *adoptio* and *emancipatio* were derived. At first sight, it might seem striking that actions which did not entail a contest between the parties, nor even had the nature of a judicial procedure, were derived from court proceedings. However, in general terms, it

[33] W.W. Buckland, *Ritual Acts and Words in Roman Law*, [in:] *Festschrift Paul Koschaker mit Unterstützung der Rechts- und Staatswissenschaftlichen Fakultät der Friedrich-Wilhelms-Universität Berlin und der Leipziger Juristenfakultät zum sechzigsten Geburtstag überreicht von seinen Fachgenossen I. Band*, Weimar 1939, p. 17.

[34] P.M. Tiersma, *Rites of passage: Legal ritual in Roman law and anthropological analogues*, «The Journal of Legal History» 9.1/1988, p. 20.

is typical of derived legal actions that the new use does not seek in any way to negate the original form; on the contrary, its effects arise from that form[35]. The form and its effects are linked; it is the intention that differs. This is evident, moreover, if we consider the potential reasoning of the person who was the first to use vindication to transfer ownership under *in iure cessio*. He certainly did not use vindication as a fictitious legal act, but instead wanted to bring about its effects in new circumstances.

In iure cessio may be considered a typical example of a derived legal action which adopted the form of *legis actio sacramento in rem*. In this way, the existing ritual was extended and consolidated, albeit in a modified form, both in the legal order and the society of ancient Rome. Admittedly, the prevalent view in legal scholarship is that *in iure cessio* was derived from vindication, but it is not the only opinion on the matter. For example, Henri Lévy-Bruhl, one of its critics, observes rhe differences between the two institutions and criticises their alleged connection[36]. He understands *in iure cessio* as an officially confirmed procedure to waive ownership, as an independent way of transferring ownership. However, such a claim is difficult to defend if we consider the course of *in iure cessio*, and the similarity with vindication is more than striking. From a comparative perspective, the use of an instrument for the transfer of ownership which was originally a procedure is not a rare practice. For example, Blackstone describes a similar procedure in English law called common recovery[37].

There are not many clues to the timing of the institution of *in iure cessio*, it seems likely that it emerged shortly before the promulgation of the Laws of the Twelve Tables. Perhaps, therefore, the text of the code

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[35] E. Rabel, *Nachgeformte Rechtsgeschäfte*, «ZSS» 27/1906, p. 299.

[36] M. Kaser, *Das altrömische…*, p. 105. Cf. H. Lévy-Bruhl, *Quelques Problèmes du très ancien Droit romain (Essai de Solutions Sociologiques)*, Paris 1934, pp. 114-136.

[37] G. Beseler, *Beiträge zur Kritik der römischen Rechtsquellen. Zweites Heft*, Tübingen 1911, p. 150.

confirmed the existence and effects of this legal action[38]. *In iure cessio* is also described in Gaius' Institutions:

> *In iure cessio autem hoc modo fit: apud magistratum populi Romani, veluti praetorem, is cui res in iure ceditur rem tenens ita dicit HVNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO; deinde postquam hic vindicaverit, praetor interrogat eum qui cedit, an contra vindicet; quo negante aut tacente tunc ei qui vindicaverit, eam rem addicit; idque legis actio vocatur. Hoc fieri potest etiam in provinciis apud praesides earum*[39].

This description gives the same formula for the acquirer's statement as the words said in *legis actio*, literally *MEUM ESSE AIO*; vindication is mentioned, and everything proceeds with the cooperation of the praetor. Thereby a vindication was effected, the transferor was invited to make a counter-indication, but instead he remained silent, which is comparable to the situation where, in an actual adversarial process, the defendant acknowledges the plaintiff's title. Here, however, not only did the transferor's silence give rise to procedural consequences, but it also set the stage for changes in the substantive law. The magistrate played an essential part: he concluded the formalised procedure, confirming the acquirer's right of ownership, and effectively transferring ownership. The *addictio* transferred the property with constitutive effect to the acquirer and may thus be regarded as a performative utterance as defined by J.L.Austin. Perhaps the *addictio* was not the manifestation of an external influence on the form of *in iure cessio*, but an element present in the ordinary process at the time when *in iure cessio* was separated from it, and when it was not divided into two stages. Thus, in

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[38] M. Wlassak, *Der Gerichtsmagistrat im gesetzlichen Spruchverfahren*, «ZSS» 25.1/1904, pp. 109-110.

[39] G. 2,24: „*Conveyance by surrender before a magistrate (in jure cessio) is in the following form: in the presence of some magistrate of the Roman people, such as a praetor, the surrenderee grasping the object says: I SAY THIS SLAVE IS MY PROPERTY BY TITLE QUIRITARY. Then the praetor interrogates the surrenderor whether he makes a counter-vindication, and upon his disclaimer or silence awards the thing to the vindicant. This proceeding is called a statute-process; it can even take place in a province before the president.*"

the original trial conducted exclusively before the magistrate, the full procedure did not finish with a declaration as to whose *sacramentum* was wrongful, but continued, presumably directly, with the assignment of the thing to the winner of the dispute by means of an *addictio*[40]. Axel Hagerström sees a parallel with the taking of the spoils of war, which was the earliest and fundamental way of acquiring property[41]. This connection is confirmed by Gaius when he describes the role of the rod symbolising the spear in vindication[42]. In order to rightfully acquire the spoils of war, the war had to be authoritatively designated as a *iustum piumque bellum*, otherwise it would be unjust and contrary to the divine order. Similarly, *in iure cessio* introduces a conflict, which is shown physically with the help of the rod and gestures of reaching out to the object and pretending to grasp it. Since no war has actually been declared, the priests, and later the magistrate, allow the claimant to take the thing and give their approval. The true motive for the institution may have been the need for a public method of transferring *res nec mancipi*. Mancipation did not lend itself to this, but for things of value it may have been practical to transfer them publicly to avoid potential conflicts between the two parties in the future. The purpose of *in iure cessio* was therefore to provide legal certainty.

However, the declaration made by the acquirer claiming a disputed item was more than just a link between *legis actio sacramento in rem* and *in iure cessio*. A similar formal statement was made in mancipacion, another form of transfer of ownership[43]. Therefore, we may put forward a hypothesis that not only *in iure cessio* but also mancipation was derived from vindication. However, it happened at different times: mancipation was earlier, became a separate procedure at an earlier stage and certainly absorbed other influences. Its origins may have come from some kind of pre-trial proceedings preceding vindication, which is why it bore no self-evident resemblance to *in iure cessio*. However, it is important

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[40] M. KASER, *Das altrömische…* , pp. 108-109.

[41] A. HÄGERSTRÖM, *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung. II. Über die Verbalobligation*, Uppsala 1941, p. 309.

[42] G. 4,16.

[43] M. KASER, *Das altrömische…*, p. 107.

to note that the ritual of *legis actio* gave rise to both formalised ways of transferring property rights, the only ways to transfer ownership of *res mancipi* in an economical manner. This way to resolve a dispute over the ownership of a thing may therefore be seen as the precursor of the official form for any change of ownership.

Conclusion

It is evident that the need to resolve disputes non-violently led to the institution of the norms of procedural law. The need to pursue such a dispute, irrespectively of the possible commission of theft, led to the separation of the substantive claim of vindication within the earliest process of *legis actio sacramento in rem*. The ritualised procedure combined the use of several symbols and imposed strict formal requirements on the parties. However, these characteristic features of the procedure, which were usually obligatory, did not make it a form of civil process that was soon abandoned; on the contrary, they turned it into a precursor of other legal actions which did not involve litigation. The combination of formalisms, gestures and symbols proved to be particularly suitable for the institution of both formal methods of transferring property rights. While mancipation was probably only slightly inspired by the procedural rules applicable in the archaic period, *in iure cessio* was directly based on them. Strict procedural rules have been proved to work in practice and have been able to establish with certainty when and under what circumstances a thing may pass from a transferor to an acquirer. Perhaps this is a manifestation of a general human expectation which is reflected in today's procedures for the conveyance of certain kinds of property.

'Legis actio sacramento in rem' as a ritual

Summary

A ritual can be characterised as a form of conduct based on traditional and established rules. The basic purpose of its use is to confirm the validity of a particular

action. Ritual consists of a set of precisely prescribed formal gestures, words or even movements. Undoubtedly, in legal practice the largest use of ritual and formal conduct is in procedural law, which is full of ritual formulas. To some extent, this is true of contemporary legal orders, but it is absolutely self-evident when we look at the earliest extant records of the ancient Roman process of *legis actio sacramento in rem*, which is described in detail in Gaius' Institutions. This strictly formal procedure was fully ritualised and based on the parties using prescribed oral formulae. In many cases, the words and gestures could have had a constitutive character, provided they were performed in the prescribed manner. However, this was undoubtedly true of legal actions derived from civil proceedings, for example, *in iure cessio*, a form of transfer of ownership in which the transferor and transferee merely pretended to conduct legal proceedings in order to achieve a different kind of objective, transfer of ownership. An *addictio* with constitutive effect transferred the property to the transferee and could therefore be considered a performative utterance as defined by J.L. Austin.

'Legis actio sacramento in rem' jako rytuał

Streszczenie

Rytuał można scharakteryzować jako formę postępowania opartą na tradycyjnych i ustalonych zasadach. Podstawowym celem jego stosowania jest potwierdzenie ważności określonego działania. Rytuał składa się z precyzyjnie określonych formalnych gestów, słów, a nawet ruchów. Niewątpliwie w praktyce prawniczej największe zastosowanie rytuał i formalne zachowanie znajdują w prawie procesowym, które jest pełne formuł rytualnych. Do pewnego stopnia dotyczy to współczesnych porządków prawnych. Natomiast jest to oczywiste, gdy spojrzymy na najwcześniejsze zachowane ślady starożytnego rzymskiego procesu na podstawie *legis actio sacramento in rem*, który został szczegółowo opisany w *Instytucjach* Gaiusa. Ta ściśle formalna procedura była w pełni zrytualizowana i opierała się na stosowaniu przez strony określonych formuł słownych. W wielu przypadkach słowa i gesty mogły mieć charakter konstytutywny, o ile były wykonywane w określony sposób. Niewątpliwie dotyczyło to jednak czynności prawnych wywodzących się z postępowania cywilnego, na przykład *in iure cessio*, formy przeniesienia własności, w której zbywca i nabywca jedynie pozorowali prowadzenie postępowania sądowego w celu osiągnięcia innego rodzaju celu, przeniesienia własności. *Addictio* ze skutkiem konstytutywnym przenosiła własność na nabywcę, a zatem mogła być uznana za wypowiedź performatywną w rozumieniu J.L. Austina.

Keywords: process; property; symbol; formal act; *in iure cessio*.
Słowa kluczowe: proces; własność; symbol; czynność prawna formalna; *in iure cessio*

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