Pázmány Law Working Papers
2014/18

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UTILITAS AS THE DELINEATION OF THE COMMON GOOD IN ROMAN LAW[*]

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Introduction

In his 2010 monograph[1] Tobias Kleiter examined the meaning of *utilitas* among many other notions. With respect to this latter notion, he asserts that in the scope of decision-making jurists referred only to *utilitas*, when considerations of expediency (Zweckmäßigkeitserwägungen) were also taken into account.[2] The way he sees it, the notion of *utilitas* finds its meaning and importance separately, that is in each particular case, though in these separate cases this notion was paramount. Consequently, it is highly unlikely that an overall definition of value would be available.[3] Another author of the secondary literature, Ankum[4] explicitly points out that the expression of *utilitas* was used for the most part in such cases, when a logical and – considering our contemporary notions – dogmatically perfect decision would have been less practical, therefore these decisions would have likewise been less accepted by the public.[5] Even such a consideration could be allowed that the reason for this narrower acceptance was that – despite being logically flawless – they were somewhat unjust.[6] It is doubtlessly apparent from what just has been said that Roman law texts serve as the best examples of an "anti-dogmatic"[7] way of thinking, and this is best supported by the idea of *utilitas* – just to mention one from the many potentials. Yet, such an idea ought to be reconsidered according to which the quotidian use of *utilitas* is seen as a practical implication of the antithesis of Interessenjurisprudenz and Begriffsjurisprudenz.[8] True as it may be that there are several strong hints to support this assertion, real life, however, could have been much more nuanced.

On the meaning and etymology of utilitas

As for the origins of the expression of *utilitas*, it stems from the verb *utor, uti, usus sum*[9], which latter implies the practical usability of a particular object.[10] The meanings of *utilitas* can be examined in ordinary Latin old 21143, and restricted to legal terminology (Heumann – Seckel, 610).[11] The

[*] This paper is presented int he scope of TÁMOP-4.2.1.B-11/2/KMR-2011-0002. (A tudományos kutatások kibontakoztatása a PPKE-n) of Pázmány Péter Catholic University.

[1] Tobias KLEITER: *Entscheidungskorrekturen mit unbestimmter Wertung durch die klassische römische Jurisprudenz*. München, Verlag C. H. Beck, 2010.

[2] KLEITER op. cit. 23.

[3] KLEITER op. cit. 23. He acknowledges, however, that some exceptions can be made; cf. KLEITER op. cit. 23-24.

[4] J. A. ANKUM: "Utilitatis causa receptum". On the Pragmatical Methods of the Roman Lawyers. In: J. A. ANKUM – R. FEENSTRA – W. F. LEEMANS (ed.): *Symbolae iuridicae et historicae Martino David dedicateae*. Tomus primus, ius Romanum. Leiden, E. J. Brill, 1968. 1-31.

[5] ANKUM op. cit. 28-29.

[6] Cf. Max KASER: *Zur Methode der römische Rechtsfindung*. Göttingen, Vandenhoeck und Ruprecht, 1962. 62.

[7] ANKUM op. cit. 31.

[8] ANKUM op. cit. 2.

[9] Cf. Alfred ERNOUT – Antoine MEILLET: *Dictionnaire étimologique de la langue latine. Histoire des mots*. Paris, 1951[3]. s. h. v.

[10] Cf. Alois WALDE – Johann Baptist HOFMANN: *Lateinisches etymologisches Wörterbuch*. Bern – München 1956[3]. s. h. v.: „von etwas Gebrauch machen, gebrauchen, anwenden"; *Oxford Latin Dictionary*. Oxford, Clarendon Press, 1968. s. h. v.: „To use for some end or purpose, to make use of […]".

[11] For the former cf. *Oxford Latin Dictionary* s. h. v.; while for the latter see Hermann Gottlieb HEUMANN – Emil SECKEL: *Handlexikon zu den Quellen des römischen Rechts*. Jena: Verlag Gustav von Fischer, 1926. s. h. v.

everyday use of the word implied reference to usefulness, advantage of any kind, convenience or even interest, as well as expediency or practical convenience. The uses and meanings of legal importance include serviceability, suitability (*Brauchbarkeit*), usefulness (*Nützlichkeit*), or even the use or the benefit (*Nutzen*) of something, as well as benefit in general, an advantage (*Vorteil*), or interest (*Interesse*). Concerning the general meanings of ordinary Latin, 'practical convenience' should be pinned, in contrast to 'strict legality'. Here the example of Lucretius[12] should likewise be mentioned, who – describing how mankind gradually evolved – mentions that it was *natura* that urged all men to begin to speak – as he puts it: to utter various sounds. In addition, it was *utilitas* that mould the names of things, where *utilitas* refers to need and use at a time. Again, as for the legal uses, a similar use is reported by Gaius, when he states for instance that – with regards to the *stipulationes* of different kinds of *pupilli* – a more accommodating or even indulgent interpretation was accepted on account of the fact that they might benefit from such a decision.[13]

The example of one particular meaning of utilitas in the sources

From the legal aspect, the reference to 'common good' appears to be the most interesting to scrutinise with special attention to the topic chosen. As Heumann – Seckel point out, "Beste" (good) and "Gemeinwohl" (general welfare) are those meanings that are to be taken into account.[14] There are many texts in the Digest in which these meanings are reflected, among which the most famous is the text covering the question of *ius praetorium*.

> Pap. D. 1, 1, 7, 1 (2 def.)
>
> *Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam. Quod et honorarium dicitur ad honorem praetorum sic nominatum.*

The well-known and widespread text by Papinian gives an outline of *ius praetorium* in the form of a '*quid est*'-definition.[15] In this definition the jurist enumerates all those characteristics which are exclusive to this praetorian set of norms, and which is expressly referred to as *ius* by Papinian himself.[16] It is a necessary consequence of all what have just been said that any reference to *utilitas publica* serves clearly as a foundation for the validity of *ius praetorium*. This Papinian-text, along with its principium, is highly similar to the initial fragments at the very beginning of Gaius' Institutes.

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[12] Cf. Lucr. 5, 1028-1029: „*At varios linguae sonitus natura subegit / mittere et utilitas expressit nomina rerum […]*".

[13] Cf. Gai. 3, 109: *Sed in his pupillis propter utilitatem benignior iuris interpretatio facta est*. A parallel opinion can also be found in the Digest (Ulp. D. 27, 3, 16 [74 ad ed.]). Again, this concept is also traceable in Gaius' Institutes, where the jurist points out that for the sake of convenience equity requires that, if after the death of a person giving a mandate and without having notice of his decease, the mandatory execute his commission, he may recover against the heir of the principal in an action of mandate (Gai. 3, 160: "*[…] sed utilitatis causa receptum est, ut si mortuo eo, qui mihi mandaverit, ignorans eum decessisse exsecutus fuero mandatum, posse me agere mandati actione […]*")

[14] On this cf. footnote n. 11 above.

[15] Concerning the question of '*quid est*'-definitions see e.g. PÓLAY Elemér: *A római jogászok gondolkodásmódja* [The Way of Thinking of Roman Lawyers]. Budapest, Tankönyvkiadó, 1988. 91skk. As for *definitio*, as well as ὅροι and πιθανὰ cf. mainly Schmidlin's paper, with a rich list of current literature at the end. Bruno SCHMIDLIN: Horoi, pithana und regulae – Zum Einfluß der Rhetorik und Dialektik auf die juristische Regelbildung. In: Hildegard TEMPORINI (hrg.): *Aufstieg und Niedergang der römischen Welt* II, 15. 101-130.

[16] See Max KASER: ‚Ius publicum' und ‚ius privatum'. *ZSS RA* (CIII) 1986. 19.

Gai. 1, 2 and 6

(2) Constant autem iura populi Romani ex legibus, plebiscitis, senatus consultis, constitutionibus principum, edictis eorum, qui ius edicendi habent, responsis prudentium. […] (6) Ius autem edicendi habent magistratus populi Romani. sed amplissimum ius est in edictis duorum praetorum, urbani et peregrini, quorum in provinciis iurisdictionem praesides earum habent; item in edictis aedilium curulium, quorum iurisdictionem in provinciis populi Romani quaestores habent; nam in provincias Caesaris omnino quaestores non mittuntur, et ob id hoc edictum in his provinciis non proponitur.

At one point Kaser remarked that fragment 3 of the Gaian text – which is not cited here – circumscribes *lex*, while fragments 4 and 5 specifies on what basis *senatus consulta* and *constitutiones principis* obtain the force of law (*legis vicem*). *Edicta*, however, are not specified in this respect.[17] Though this remark by Kaser is fully compatible with the Gaius-source, it should equally be taken into consideration that Gaius at least enumerates *edicta* as *fons iuris*, while Papinian – despite bringing up *ius praetorium* in a separate fragment with reference to *ius civile* and connected to *utilitas publica* – fails to mention *edicta* as a source of law in the *principium*.

Pap. D. 1, 1, 7 pr. (2 def.)

Ius autem civile est, quod ex legibus, plebiscitis, senatusconsultis, decretis principum, auctoritate prudentium venit.

At this point it is worth placing the scrutiny back towards the topic of *utilitas*. It is apparent even from the present text that *utilitas publica* is eventually the means via which *edictum*, or rather its content to be more precise becomes part of the legal system.[18] As for the characteristics of *ius praetorium* enumerated by Papinian, the first among these is the fact that this set of norms was introduced by the praetors themselves (*quod praetores introduxerunt*). Consequently, praetors can be regarded as the genetic sources of law concerning this segment of *ius honorarium*. All participles are aiming to refer to the actual activities of praetors: *adiuvandi*, *supplendi* és *corrigendi* – but first and foremost these should be observed as possibilities. From these functions *corrigendi* appears to have been the most peculiar, as through this praetors were entitled to correct the inequalities of *ius civile*.[19] At this point, however, Kaser hastens to point out that these threefold functions are far from being separate, let alone separable – on several occasions these functions tend to overlap.[20]

Besides these somewhat superficial remarks on the Papinian text, the last two expressions at the end of the first sentence in this text should be examined in-depth: *iuris civilis gratia* and *propter utilitatem publicam*. Both expressions possess a scope pointing forward, that is towards the future. In other words, both aim to cover that in favour of which the aforesaid praetorian activities were exercised, thus *adiuvandi*, *supplendi* and *corrigendi* takes place supporting *ius civile* and *utilitas publica* at a time. It is necessary to emphasise that the expression *utilitas* has several forms in which it may be presented. Not only does it cited as *utilitas publica*, but likewise does it make numerous appearances

[17] KASER (1986) op. cit. 30.

[18] With a repeated reference to Ankum's paper, it is to be remarked that *utilitas* appears in the sources under the form *utilitas causa receptum est*, yet, *utilitas publica* should clearly be separated from this former expression. In the form of *utilitas publica* the common weal is expressed in the broadest sense, as a kind of principle according to which the state is interested in ensuring a legislation that serves community life the best. In this scope, to achieve the common weal, the private sphere is also considered, that is private relations of private persons. In detail cf. KASER (1986) op. cit. 18.

[19] MAX KASER: ‚Ius honorarium' und ‚ius civile'. *ZSS RA* (CI) 1984. 4 and 72, as well as KASER (1986) op. cit. 19.

[20] See for instance Kaser's example of *actiones in factum*, with regards to *actiones utiles* and *directae*. It is equally interesting to refer to *bonorum possessions*, where Kaser also gives further examples of both *adiuvandi* and *corrigendi* activity of the praetors. In detail cf. KASER (1984) op. cit. 72[336].

under the form *utilitatis causa receptum*,[21] where *causa* – mainly as a counterpart of *gratia* – refers to the origin of *utilitas*, consequently, *utilitas* in such an expression points backwards.

In the previous comparison, *utilitas* was mentioned as a twofold phrase, and now *utilitas publica* should be better examined, on the basis of Papinian's reference to the functions of *ius praetorium* as something being realised *propter utilitatem publicam*. Cicero in his work "*De legibus*" mentions this under the form *utilitas communionis* which is used in the scope of *res publica*, in order that this latter could be interpreted.

> Cic. re p. 1, (25), 39
>
> *Est igitur, inquit Africanus, res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.*

Such an interpretation of *utilitas* in this text[22] could be deemed acceptable which comprehend *utilitas* only with regards to *iuris consensus*. In the everyday life, this legal consent, which meant to be a common agreement about laws and rights, found its practical application in three important sets of norms: *ius civile*, *ius gentium* and *ius naturale*. The above mentioned *us praetorium* is only comprehensible with regards to *ius civile*, and focusing to this latter, the *principium* of the Papinian-text should likewise be taken into account, as it has a common link to the text describing *ius praetorium*. It should also be emphasised that Cicero's concept of common good stemmed from the idea of ius naturale, which assertion is well-supported by a passage from his work *De officiis*.[23] From this text, it apparently turns out that law, common good and nature were all mutually related to one another – its practical demonstration is existence of the link between *lex naturae* and *utilitas hominum*.[24] As for the origin of the notion of *utilitas*, the Greek tended to underline in the relation between κοινόν and ἴδιος that δίκαιον incorporated by the νόμος should in certain cases give way to that which is useful to the individual (συμφέρον). The stoic idea in comparison put the emphasis on different points, having been derived mainly from the philosophical works by Panaetius (Παναίτιος), the results of which were "imported" to Rome by Cicero himself.[25]

The previously cited Papinian-text in which the jurist describes the meaning of *ius praetorium* is a direct sequel to the *principium*. This latter text – as it has also been examined – enumerates the material sources of *ius civile*, and it is apparent from the text that neither the *ius praetorium*, nor its material bearer, the *edicta* are not mentioned among those from which *ius civile venit*. Yet, this *ius civile* is one of the results stemming from the practical approach and application of *iuris consensus*, the deeper and more detailed analysis of which can lead to the scrutiny of each source of *ius civile* itself, consequently, in the case of *lex*, the appearance of *utilitas* can also be traced. That is how we can easily get to the topic of *lex Oppia* (215 BC), which was a *lex sumptuaria*, one of those various laws that were passed to prevent inordinate expenses (*sumptus*)[26] in all different fields of life.[27] With

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[21] See also KASER (1986) op. cit. 17-18.

[22] The text stems from the critical edition as follows: *M. Tullii Ciceronis Librorum de re publica sex quae supersunt*. Recognovit Reinholdus KLOTZ. Leipzig, Teubner. 1869.

[23] Cic. de off. 3, 30: *Non igitur magis est contra naturam morbus aut egestas aut quid eiusmodi quam detractio atque appetitio alieni, sed communis utilitatis derelictio contra naturam est; est enim iniusta*.

[24] HONSELL op. cit. 97. He asserts moreover that this connection is equally valid with respect to common good and justice. In addition, he also underlines the existence of such rapport with regards to other values (eg. *honestas*, *aequitas*). On this cf. KASER (1986) op. cit. 21, and mainly note n.63.

[25] Cf. KASER (1986) op. cit. 20. Cicero's work "De officiis" is largely based on Panaetius' works. Cf. PETZ Vilmos (ed.): *Ókori lexikon* [Lexicon of the Ancient]. Budapest, Franklin Társulat, 1902-1904. s. v. 'Panaetius'.

[26] Cf. PETZ op. cit. s. v. 'sumptus'; William SMITH (ed.): *Dictionary of Greek and Roman Antiquities*. Boston, 1870^2. s. v. 'sumtuariae leges'.

[27] On this see also Gell. 2, 24, where *lex Fannia* and *lex Licinnia* are those explicitly mentioned. For further primary sources cf. e.g. Liv. 34, 1-8; Val. Max. 9, 1, 3; Tac. Ann. 3, 33, 34. Concerning the content of *lex Oppia*

regards to these *leges sumptuariae* altogether, it should be remarked that in the course of antiquity it was considered the duty of the state to put a check upon extravagance even amongst private people, and among the Romans in particular we already find traces of this in the laws attributed to the Kings, and also in the Twelve Tables.[28] This particular law, *lex Oppia*, was proposed by the tribune Gaius Oppius under the consulship of Quintus Fabius and Tiberius Sempronius, in the middle of the second Punic War. It enacted that no woman should possess more than half an ounce of gold, nor wear a dress of different colours (*vestimentum versicolor*), nor ride in a carriage (*iunctum vehiculum*) in the city or in any town, or within a certain radius of it, unless on account of public sacrifices. This law was repealed twenty years afterwards, mainly because as the war passed, the question was raised whether it would be better to do away with this law, since the circumstances had changed already. Basically two factions arouse, one arguing that the repeal of this law would be a mistake, as modesty (*pudor*) is a virtuous act, which used to be characteristic to women as well.[29] On the other hand, the faction for the repeal of the law emphasised that there are other places than Rome where ladies also wore ornaments.[30] Moreover, the leader of this second faction, Lucius Valerius also points out the difference between men and women, as the former are allowed to wear purple on their garments (*purpura vir utemur*).[31] As for their technical arguments, Cato referred mainly to the *exemplum maiorum*, which happens to be the primary reason why the ancestors passed no such law before, as there was no extravagance to be restrained.[32] The motive for following the *exemplum maiorum* is that this can be regarded as such that guarantees the common welfare, the benefit of *res publica*. In contrast to these arguments, Valerius put stress on the existence of two different kinds of laws: he acknowledges that those laws which have been passed as permanent institutions because of their enduring benefit, none should be repealed (*perpetuae utilitatis causa in aeternum latae sunt, nullam abrogari debere fateor*).[33] Yet, there are those laws that have been demanded by the community itself in the case of a crisis, and which are subject to change as conditions themselves change (*temporibus ipsis mutabiles esse*).[34] Consequently, laws passed in time of peace are frequently annulled by war, and vice versa: peace those passed in times of war are often repealed as peace returns (*quae in pace lata sunt, plerumque bellum abrogat; quae in bello, pax*).[35] His example is that the situation is similar to the handling of a ship: while some means are useful in fair weather, there are others which deemed applicable in a storm. The most important conclusion by Valerius is claiming that these two kinds of laws are so distinguished by nature (*haec cum ita natura distincta sint*).[36] This is the piece of argument that reminds us to *ius naturale* as a set of norms which stem from *natura*. Here a special reference to Lucretius' phrase from his work "*De rerum natura*" should again be made – as it was cited above: „*At varios linguae sonitus natura subegit / mittere et utilitas expressit nomina rerum […]*" (Lucr. 5, 1028-1029). Also, Cicero's description of res publica should be noted here, mainly because when he wanted to outline the actual content of utilitas communionis, he did made reference to *natura* as well (cf. Cic.

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it is enough to refer only to the latest works in the rather rich secondary literature, such as e.g. Eliane Maria AGATI MADEIRA: La lex Oppia et la condition juridique de la femme dans la Rome républicaine. *Revue Internationale des Droits de l'Antiquité* LI (2004). 88-92; EL BEHEIRI Nadja: Jog és erkölcs egy korai római törvény tükrében [Law and Morals in the Reflection of an Early Roman Law]. *Jogelméleti Szemle* 2003/4 http://jesz.ajk.elte.hu/el16.html; PÉTER Orsolya: "Feminae improbissimae" A nők közszereplésének és nyilvánosság előtti fellépésének megítélése a klasszikus római jog és irodalom forrásaiban [The Assessment of Women's Public Appearance in the Sources of Classical Roman Law and Literature]. *Miskolci Jogi Szemle* 2/2008. 82-83.

[28] To support this, suffice it to refer to Table XI concerning the limitation of burial luxury, which could also be considered as an interest point of the Sullan law prohibiting such expenses (*lex Cornelia sumptuaria*, 81 BC).

[29] Cf. essentially Liv. 34, 2, 7-10; for the further arguments by Marcus Portius Cato cf. AGATI MADEIRA op. cit. 93-96; PÉTER op. cit. 83.

[30] Cf. Liv. 34, 7, 5-7.

[31] Cf. Liv. 34, 7, 2; AGATI MADEIRA op. cit. 97.

[32] Cf. Liv. 34, 4, 7.

[33] Cf. Liv. 34, 6, 4.

[34] Cf. Liv. 34, 6, 5.

[35] Cf. Liv. 34, 6, 6.

[36] Cf. Liv. 34, 6, 7.

de off. 3, 30: "*[…] communis utilitatis derelictio contra naturam est […]*).[37] As a result, *utilitas* and *natura* are both placed on a common platform, which implies that all human communities, and therefore *utilitas communionis* or *publica*, are related to and stem from nature.

[37] Cf. Theo MAYER-MALY: Gemeinwohl und Naturrecht bei Cicero. In: ZEMANEK – HEYDTE – SEIDL-HOHENVELDERN – VEROSTA (ed.): *Völkerrecht und rechtliches Weltbild. Festschrift für Alfred Verdross.* Springer Verlag, 1960. 196 sq.; EL BEHEIRI op. cit. supra.