Pisa Winter School
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Historical Background of Solidarity in European Law

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- Part one

- What is Roman Law and why we refer to it as historical background of EU law.

- Roman law is usually identified with the great Codification ordered by the emperor Justinian in the years 529 – 534 A.D. It is composed by three “official” parts and one not “official” added after his death in 565.
- The official parts are: the Code, the Digest and the Institutes.

The Code, adopted first in 529 and then substituted by a second edition in 534, is a collection of imperial laws (called *leges*) put in force by Roman emperors from Augustus (27 B.C. – 14 A.D.) to Justinian. They are distributed in 12 books and their texts are not reproduced entirely, but only in what was related to relevant legal principles contained therein.

- The Digest is the greatest part of the Codification, formed of 50 books. In it there are collected the fragments of more than 2000 legal works written by Roman jurists between the I century B.C. and the end of III century A.D. So the Digest represents the real monument of the Roman legal science and legal thinking.

The Institutes are a textbook written by 3 eminent jurists of the Justinian's age and their purpose was to expose as easy as possible the bases of the private law to law students at the beginning of their 5-years-undergraduate career. It is very important to remark that the Institutes were not only a textbook, but even a law book, the rules of which must be concretely applied.

Out of the official parts of the Justinian's Codification we find his laws put in force after 534 until his death in 565, called New Imperial Laws or New Constitutions. The emperor had no time to collect them in an official book, hence, we know them by means of private collections, the most important of which includes 168 Imperial Laws written in Latin and Greek.

In the early Middle Age (VI – XI centuries) we have little or no information about this large Codification of Roman Law; it was as if it had disappeared from the European history until the legal Renaissance of the end of the 11th century, when it resurrected first in Italy and then in the Western and Central Europe. At this moment Roman law collected in the Justinian's Codification was called 'Civil Law' and since then it started the Civil law tradition.

This Civil law reflects the basic unity of the European continental legal tradition. From the 12th century until the time of the French Revolution all countries of Western and Central Europe had a common legal ground and a common legal science, educated in Universities.

- Together with Roman law (= Civil law) in the Middle Age, a great role in the formation of the European legal tradition was played by Canon law, that is the legal system created by the Roman Church.
- The term used to indicate the legal system formed by both Roman law and Canon law was *ius commune*.

The legal development begun in the 12th century was probably caused by the desire of the Roman Church and of the Sacred Roman German Empire to be recognized as the supreme and universal authorities; for they needed each one a new rational legal system for their political and social legitimation and purposes.

The Empire found it in the Civil law, based on the rediscovered Justinian's Codification, the Church found it in the Canon law, based on the decisions of the Councils of Bishops since IV century A.D., mixed with many rules coming from the late Roman law of the IV – VI centuries A.D.

Beginning from the University of Bologna (founded in Italy in 1088), the *ius commune* was taught in all Universities and legal Schools throughout Europe (included England). Their graduates applied this law according the way they had learnt it, when they moved into key positions in the administration of their kingdoms, principalities, cities and in the Church.

From 12th to 16th century the whole of law-educated people in continental Europe formed a single cultural unit and Roman – canon *ius commune* oriented their way of legal thinking and their language. Law professors could move freely from one University to the other all over Europe and the same textbooks were used everywhere.

After the religious reform during the 16th century, the study of Canon law disappeared in Protestant countries and suffered a decreasing importance in the Catholic ones, whereas Roman law tradition kept its role because its rules and principles were considered as the highest expressions of the mankind's natural reason and of a natural law.

- This is why legal education went on being essentially based on Roman law everywhere.
- The phenomena of *ius commune*, Universities and legal education was brought by European countries to their colonies in America.

- For this reason the European legal tradition has so many common features with the legal systems of those American countries that were French, Spanish and Portuguese colonies.

The situation of the English Common law is partially different from the continental countries. On the one side, England was never completely cut off from their legal culture. Roman – Canon law and, after the Church reform at the beginning of the 16th century, Roman law were taught in the Universities of Oxford and Cambridge and its influence was considerable on the rules introduced by the Court of Equity above all in some fields, such as the law of obligations.

On the other side, in many legal sectors English judges and legal science proceeded to create and develop their own set of rules along different lines than their continental counterparts.

The same evolution took place in the legal systems of the British colonies.

- We can end the first part with a contemporary quotation.
- The editors of the *DCFR* stated that this Draft could "help to show how much national private laws resemble one another and have provided mutual stimulus for development <directed to unification> and indeed how much those laws may be regarded as regional manifestations of an overall common European legacy".

Part two

- Considering the role of Roman law in the European legal tradition, our question now is:
- What is the position of Roman Law face to Individualism or Solidarity?

- What we mean for individualism in a legal system? We mean a legal system where individual interests overcome general ones, where individual freedom and individual rights are considered as more important than collective rights.

- Quite the opposite, for solidarity we mean a legal system where individual freedom and rights are subordinated to general and collective interests and the aim is to find a balance between both.

- In the 20th century there was a common place very hard to die.
- Roman law was deemed as the highest expression of individualism and of the ideology of capitalistic societies on a legal level.
- This idea belonged to the communist dictatorship as well as to the nazist one.

- Lenin deleted Roman law in the learning plans for law students in the Soviet Union, but Stalin reintroduced it saying that «we must know the enemy in order to fight him better».
- In the program of the German nazist party Roman law should be replaced by a common German law, because it was too dependent on «a materialistic and capitalistic world order».

- The ground thereof was the use of Roman law made by the European civil law science in the 19th century to build a bourgeois legal system fit for capitalistic needs.
- In making it there were exalted only the individualistic features of some institutions of Roman law, such as the chief of the family's (*pater familias*) powers, the freedom of will, the owner's powers on his land, house and slaves and the creditor's powers on his debtor's body.

- But a quite different view is given us by a true and objective analyse of the Roman law sources in their historical evolution.
- Let us examine the examples just mentioned and someone else.

- Family law
- In the most ancient times of Roman law, family law was built on the chief's powers. The chief was the *pater familias*, who had a power of life and death on the members (wife, children and slaves) of his family and a total control over their activities (included the legal ones). The *pater* alone was the titular of all the familiar asset.

- The primitive rules on Roman family are the greatest expression of individual powers and interests.
- But little by little there was an evolution in the legal system towards a more solidaristic conception of the family and consequently of the family law.

- With reference to a wife. Passage from a kind of marriage where the husband received personal and patrimonial powers over his wife to a kind of marriage without any personal power over his wife and a power over her dowry just for the duration of their marriage.

- With reference to children. Already in the 5th century B.C. the Law of the Twelve Tables (450 B.C.) for the first time limited the *pater*'s power to sell his own children; later the censors (2 Roman magistrates) controlled the exercise of the *pater*'s powers on his children in conformity to the social habits.
- Subsequent was the prohibition for *patres* to sell or to kill their own children. Since 1st century A.D. children under their father's power were gradually allowed to carry on legal activities for their own and to have their own assets.

- With reference to slaves. In the 2nd century A.D. the Roman emperors introduced important limits to the *pater*'s powers. He was forbidden to inflict punishments to his slaves or to kill them without a just cause, imposing penalties for such cases.

- Inheritance law
- At least since 5th century B.C. Roman law admitted the possibility for a *pater* to regulate his own death succession by means of a will.

- A will is an act of extreme individualism quite different from the primitive succession where male children replaced their dead father in his assets. But really, the freedom of will was limited.

- Limits to the freedom of will: some one came from social habits and tradition (prohibitions for the testator not to mention his children in his will) and some one from law (possibility to invalidate partially or totally a will, had a child omitted in it; need to justify children’s disinheritance and a strict list of the causes thereof).

- Property law
- In the most ancient Roman law a private landowner was given unlimited power, that allowed him to dispose of his land in the widest way. No one could prevent him to make something in it, even when his only aim was to cause damages to his neighbours or to stop their passage through his land to reach a river or a public street.

- The borders of a piece of land were deemed sacred and its owner was recognized to have full powers on it “as far as the sky and as far as the hell”, like medieval jurists have commented. It means that everything existing over and under the soil only belonged to its owner.

- But since the 5th century B.C. some limits were introduced to such enormous powers. The Law of the Twelve Tables (450 B.C.) prohibited an owner to bury a corpse in his land situated inside the city walls because of religious causes reflecting also general health interests.

- Starting from the 4th century B.C. Roman law added new limitations to private landowners:
- A) it admitted some types of servitudes between two pieces of land (*servitutes praediales*), such as the right of way through a neighbour's land or the right of taking water from it;

- B) it sanctioned the landowner who omitted to cultivate his land allowing the censors to exclude him from political rights;
- C) it restricted the private owner’s power to destroy a building on his land in order to sell bricks, wood beams and eventually marble, not to change the urbanistic plan of the city;
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- D) it allowed public authorities and private companies to open and exploit gold, silver and copper mines under third-parties' lands because of the metal needs;
- E) finally, it forbade private owners to make something in their lands with the only purpose to damage their neighbours.

- With reference to ownership on slaves, Roman law for the first time introduced the idea of the abuse of powers. When a slave owner was proved to use too much severity against his slave, he was compelled to sell him on the ground that «no one is allowed to use his powers in a wrong and bad way» (Gaius Institutes 1.53 and Justinian’s Institute 1.8.2).

- This rule is considered as the first historical root of the modern theory of the abuse of a right.

- Law of obligations
- In the ancient Roman law – until the 4th century B.C. – the creditor was granted immense powers on the debtor's body in case he failed to perform.
- Had the debtor not payed the due sum of money after 30 days from the judgment, the creditor was authorized by the magistrate having jurisdiction on the case to bring him at home and to imprison him with chains.
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- The creditor might make him work and then sell him in a market in Rome or abroad. If he did not find a buyer, he might have killed him freely, without a punishment.

- But at the end of the 4th century B.C. creditors were forbidden by law to satisfy their claims on the debtor's body and were only allowed to address them to the debtor's assets.

- Then Roman jurisprudence gradually recognized that, had the debtor not made the performance he had promised, he was liable towards the creditor and his liability was expressed in terms of a payment of a sum of money.
- By this way, replacing debtors' bodies with their assets prevented the risk of dangerous social riots in the general interest of all the community.

The role of good faith and fair dealing in the law of contracts.

In all historical periods of Roman contract law a general principle was *pacta sunt servanda* (agreements must be respected).

- According to this principle, a contract should be in any case executed in conformity to the terms fixed by the contracting parties when it was concluded.
- But the strictness of such a principle has been balanced by good faith and fair dealing since the 2nd century B.C.
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The texts of Roman jurists reflect three main concrete functions of the principle of good faith and fair dealing (*bona fides*) in contract law:

a) as a standard to appreciate the correct execution of contracts and the preservation of a balanced relation between the parties' obligations as they had intended when the contract was concluded;

b) as a means for a correct interpretation and implementation of the contracting parties' agreement (*id quod actum est*);

c) as a means to integrate the contractual content determined by the parties with collateral and functional duties.

- The principle of good faith and fair dealing developed in Roman law represents the historical roots of that applied in actual European civil law systems (as in § 242 of BGB, art. 2 of the Swiss CC, arts. 1366, 1375 of the Italian CC., art. 762 (2) of the Portuguese CC, art.3.12 of the Dutch NWB, art. 1104 new text of the French CC).

- In the English Common law too it is known the principle of good faith and fair dealing, but the reference to it is not so common and it seems to be tied more to the concept of good faith used in international trade.

- Good faith in international trade is to be applied in the light of the special conditions of international trade. Standards of business practice may indeed vary considerably from one trade sector to another, and even within a given trade sector they may be more or less stringent depending on the socio-economic environment in which the enterprises operate, their size and technical skill, and so on.

- The knowledge of how this principle was employed in Roman law and in the European legal tradition including national Civil Codes or legal systems might help us to understand its potential implementation and the reasons why it has been established in drafts of harmonization and unification of European contract law.

DCFR and *CESL* draft make reference to good faith and fair dealing with very similar words, saying that:

each party has a duty to act in accordance with good faith and fair dealing. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defense which that party would otherwise have, or may make the party liable for any loss caused to the other party. This duty may not be excluded or derogated.

In its art. I. – 1:103 the DCFR defines the expression *"good faith and fair dealing"* referring it *to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.*

Both the drafts consider Co-operation as an immediate consequence of good faith and fair dealing:

The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations.

- So, in the frame of a wider concept of good faith and fair dealing it is also inserted the provision on co-operation, which is a consequence of a correct implementation of the contracting parties' agreement.

- Coming back to Roman law, my third example from the law of obligations concerns the strict liability introduced to protect general and collective interests in some cases.
- Let us consider one of them.

- We must first remind that in its final step Roman law provided for a fourfold scheme of the sources of the obligations: contractual, quasi-contractual, delictual and quasi-delictual obligations.

- The category of quasi – delictual obligations includes a group of wrongful conducts, mainly regulated and punished by praetorian-made rules (the praetor was a Roman magistrate charged with a jurisdictional function). We now focus on that of an inhabitant of a house, from which something was thrown down or poured onto the street and killed or injured someone or damaged another’s property.

- In this case a strict liability was imposed on the inhabitant regardless of his fault and regardless of whom dwelling in the house had caused the damage throwing down something (members of the family, servants, employees, guests).
- The inhabitant – no matter if owner or tenant – was held to be responsible of a strict liability and , if the case, of a vicarious liability, because he was in charge of the place from where the injurious act occurred.

- His liability depended on the circumstance that he was in control of a potential source of danger to other people’s lives, health and property.

- Third Part

- Some final reflections

- From the examples discussed above we may openly perceive that Roman law tradition developed relevant elements of solidarity, if by this word we mean a regard to collective and general interests.

- We may follow the thought thereon of one of the greatest Italian 20th century - scholars of Roman law: Francesco De Martino.
- Why his thought is so important for our speech?
- Because he was a marxist, but at the same time a deep connoisseur of Roman law, about which he wrote monumental studies and papers.
- So, we can not accuse him to have a liberal and bourgeois view of Roman law nor an aprioristic and ideological opposition to it.

- In his essay about *Individualism and Roman Private Law*, published for the first time in 1941 and re-edited in 1979, at the end of his analyse he affirms that the legal tradition based on Roman law is not individualistic in the sense of a usual prevalence of individual interests on general ones.

- There were always values and criteria expressing general interests, which might have moderated the effects of the most relevant rules allowing individualistic freedom and powers.

- If we refer to our examples, De Martino is completely right. All the strong individual powers of a *pater*, a testator, a landowner or a creditor were balanced by social habits (*mores*), familial solidarity, neighbours' interests, social and general interests.
- This was also the deep meaning of the prohibition for owners to kill their own slaves or to act cruelly against them without a just cause; of the clause of good faith and fair dealing to be respected by the contracting parties; and of the strict and vicarious liability to be charged on inhabitants for damages caused by something thrown or poured from their houses.

- Thank you for your attention