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Iusti prope mater et aequi.
Utilitas in Roman Jurists' Legal Interpretation

SUMMARY

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‘The mother, so to speak, of justice and right’ (*Sat.* 1,3,97–98) – this is how Horace, one of the most prominent Ancient Roman poets, presented the criterion of *utilitas* (‘utility, usefulness, expediency, advantage’). This poetic perspective can be effectively referred to Roman law, since *utilitas* has established itself in almost all of its fields. On the other hand, a longer reflection on Horace's thought may cause consternation: after all, is it right if justice and fairness are derived from utility, especially in law? This study looks at how to define the essence of *utilitas*, which manifested itself in the ways the Romans thought *about* and *in* the law, and thus how to relate this poetic phrase to Roman jurists’ legal reasoning and interpretation.

The Roman jurists were above all practitioners. The conviction that legal reflection was pragmatically oriented is very firmly established in Roman legal scholarship. This is not surprising, since in the case of a conflict between the rules of law and the needs of legal practice, Roman jurists used to give priority to the latter. It seems, however, that Roman legal researchers have not yet fully appreciated the role of *utilitas* in legal interpretation made by Roman jurists. For instance, they tend to overlook non-legal sources, especially rhetorical ones, which provide a fuller and more theoretical perspective on this criterion. It is then difficult to draw more general conclusions, for instance about the content of the category. Jurisprudence, as it usually does, provides in turn more examples of the application of *utilitas* in practice. Only a synthesis of these two perspectives shows the full picture of what was behind the concept of *utilitas*.

The topic of *utilitas* has been of interest to many researchers. Among the leading studies conducted on the topic, those by U. Leptien, H. Ankum, M. Kaser, M. Navarra and recently by B. Spagnolo and J. Sampson are worth particular mention. The above researchers have mainly focused on a particular form of the presence of the category *utilitas* in the thought of Roman jurists: the so-called decisions *utilitatis causa*. Their essence seems to be as intriguing as it is obvious to Roman legal scholars: these are, generally speaking, dogmatically indefensible decisions contrary to the legal rules. Researchers, although they agree on the interpretation of the nature of these cases, have different concepts on the role played by the category *utilitas* as well as its within them.

H. Ankum explains these exceptions by the general needs of legal practice, claiming that they are a manifestation of the Roman jurists’ pragmatical method. U. Leptien perceives them as decisions taken on grounds of expediency, understood as the requirements of practice, the economy, society, as well as the world of values. For him and for M. Navarra, the understanding of the category was, however, not general, but case-specific. A different

approach was presented by M. Kaser, who claimed that the decisions *utilitatis causa* refer to general principle, stating that any regulation should be as useful as possible for the society, but at the same time fair and compatible with the binding values.

It has not escaped the researchers' attention that the jurisprudential references to this category reach far beyond the framework of *utilitatis causa* decisions. Again, the researchers tend to see this category in more general terms as the equivalent of purposefulness and practicality, (a case-specific or general) utility of the law, a symbol of certain social values or even as an emotionally charged (empty) formula. And here, *utilitas* understood in various ways was to be a manifestation of the legal method, to advocate the adoption of certain solutions (not only those constituting an exception to the rule), to guide the interpretation of the law, and to serve law-making activity, including filling in legal gaps.

Consequently, based on the current research results it is impossible to discern not only the very nature of the category in legal thinking, but even to grasp the difference between the understanding of *utilitas* in legal interpretation not only within but also beyond the *utilitatis causa* decisions The sources in which *utilitas* is situated in the area of general legal theory (including dozens of *utilitatis causa* decisions) delineate an interesting and challenging research field. So what can it mean that, as Paulus writes, *ius civile* is useful for all or for the majority of citizens (D. 1,1,11)? What does it mean that a given solution was adopted because of *utilitas* (*utilitatis causa receptum*)?

The course of considerations was guided by the theses expressed in the literature in an attempt to explain the unique nature of *utilitatis causa* decisions. For this reason, the work builds upon itself: its structure is determined not only by the need to establish to what extent pure pragmatism or a purposive approach were related to the interpretation of the Roman jurists, but also whether these categories are able to fully explain the specific nature of these decisions.

The starting point for consideration was, therefore, to define the semantic field of the term *utilitas* and to determine whether it expresses a practical sense or whether its meaning is broader. The next stage was to decide whether and when *utilitas* can be understood in purposive terms, and whether it can be linked to any method of legal interpretation. Subsequently, it was necessary to estimate the scale of the phenomenon of interpretation *ex utilitate*. Finally, the role of *utilitas* in *utilitatis causa* decisions was examined. In contrast to previous theoretical approaches, *utilitas* was analysed in a broader intellectual

context, that is, with reference to ancient rhetorical and philosophical thought taking the role of a frame used to present Roman legal thought.

Since the reference to *utilitas* in a function similar to the one in *utilitatis causa* decisions can also be found in the writings of Cicero and Quintilian, the considerations began with an attempt to reconstruct the content of the category. It was shown that *utilitas* was not only an expression of striving to satisfy human needs, but also a conviction about the solid moral basis of law. In both philosophical and jurisprudential thought, *utilitas* remained inextricably linked to ethical measures, such as *aequitas* and *honestas*, as well as justice (*iustitia*). Indeed, whether a given legal rule could be assessed as good and just depended on whether it was perceived as useful at the same time. Distinguishing these ideas was basically impossible, and not only in philosophy, but also in the thought of jurists. A particular illustration of the interrelation between these categories is the definition of *ius*, described by Celsus as *ars boni et aequi*. Since all ancient *artes* strove to achieve a goal useful to human beings (*finis utilis vitae*), the categories *bonum et aequum* should be interpreted as the object of the useful pursuits of *ars iuris*. Hence, it would be a mistake to perceive *utilitas* in the legal thought solely through the prism of the needs of legal practice or pragmatism, although they are undoubtedly included in it as well.

In an attempt to establish whether *utilitas* can be understood in purposive terms and whether it is a manifestation of the legal method, it has been proved that this idea determined the whole interpretative activity of the Roman jurisprudence. It constituted both the basis of jurists' deliberations and guided their thought. To put it differently, it contained both the beginning and the end of interpretative activity. It was also shown that *utilitas publica* and *utilitas privata* were two harmonised perspectives towards one category. *Utilitas*, always united with what is good and right, thus drove the activity of Roman jurisprudence. As such, every interpretative action had to follow the pattern of teleological interpretation *ex utilitate*. Hence, it will not be an exaggeration to say that all decisions of jurists were adopted in a certain sense *utilitatis causa*. For this reason, *utilitas* should be seen as a determinant of the method of interpretation. On the other hand, this assumption weakens the hypothesis that purposive considerations could suffice to explain the uniqueness of *utilitatis causa* decisions. Proposing or accepting a decision for the sake of a particular utility could therefore not constitute their distinctive feature.

The source and causes of the nature of *utilitatis causa* decisions was found in the rhetorical theory of legal interpretation in the so-called *status*, that is schemes

of interpreting and analysing a particular controversial issue. Two of these *status* contrasting the interpretation made according to the will or intention of the law or the legislator (*ex voluntate/sententia*) with the literal interpretation (*ex scripto/litteris*) helped to finally understand *utilitatis causa* decisions. Firstly, the *status scripti et sententiae* where the party speaking *ex sententia* argued *contra scriptum*, i.e. against the literal interpretation. Here, the interpreted law was sometimes seen in terms of a normative entity and sometimes as a linguistic phenomenon. Regardless of whether the focus was on the regulation as a whole or on specific concepts, the effects of such an interpretation were not limited to a broadening or narrowing understanding of norms, but above all brought about a result completely opposite to that produced by literal interpretation. Thus, the *contra scriptum* interpretation resulted in either non-application of a norm, although according to the literal interpretation it should have been done, or its application, although its literal understanding did not indicate that. Secondly, according to the *status syllogismi* the interpretation was conducted *supra scriptum*, i.e. in spite of the fact that the law did not provide for a proper regulation for the case being decided. In such cases, *ex sententia* interpretation allowed the rhetor to overcome the unambiguous results of linguistic interpretation.

Hence, fragments of Cicero's writings proving that *utilitas* was a determinant of *ex sententia* interpretation was priceless for this study since the above-mentioned schemes of rhetorical interpretation, both *contra* and *supra scriptum*, perfectly fit *utilitatis causa* decisions. Like the rhetors, jurists used to perceive law from two perspectives: sometimes as a normative entity and sometimes as a linguistic expression and just like the rhetorical one, the jurisprudential interpretation *utilitatis causa* invariably led to the overcoming of the unambiguous results of literal interpretation. Thus, it sometimes resulted in a deviation from the rules of law, and sometimes in breaking the literal meaning of the words constituting law as a linguistic phenomenon. It is therefore not the tension between rule and exception, but the conflict of literal and teleological interpretation that provides the initial composition for the *utilitatis causa* decisions.

According to the rhetorical theory of legal interpretation, *utilitas* was understood as the equivalent of the good of the community, perceived not as the interest of the state or some of its institutions, but as the benefit of all citizens. Hence, rhetorical *utilitas* always implicitly includes the attribute *communis* or *rei publicae*. Here, then, the ethical aspect of the criterion is quite obvious. Meanwhile, in the sources of jurisprudence, *utilitas* (and its derivatives) sometimes occurs on its own, sometimes specified by the adjective *communis*

or *publica*, and sometimes as one the content of which is specified by the adjective complement, indicating the benefit of specific entities.

The reference to the criterion, however, always fulfils a unified function, corresponding to the one it performed in rhetorical argumentation. Therefore, *utilitas* of the jurists and *utilitas* of the rhetors were considered to be parallel categories. In jurisprudential thought, therefore, one *utilitas* was present above all, no matter whether it was invoked with or without the adjective *publica*, and as such it also always indicated the ethical adequacy of decisions. Thus, although in each of the cases it is possible to reveal the practical needs behind a given decision, or the intended political and legal goal, they were not, and certainly not exclusively, indicated by the category of *utilitas*, whose role in this context remained unchanged. For this reason, it seems that the content of the criterion should be clarified only when jurists do so explicitly.

Although the appeals *ad utilitatem* in the *utilitatis causa* decisions are uniform in character, they obviously bear the characteristic marks of the lawyer's preferred style. Ulpian, for example, was the only jurist to use the phrase *utilitatis gratia* alongside *utilitatis causa* and *propter utilitatem*. Even if dividing the sources according to the given expressions is not particularly helpful in understanding the category of *utilitas* – looking at the content of these expressions is indeed. In the term *utilitatis gratia* Ulpian managed to capture the essence of the matter. The solutions that break the clear results of linguistic interpretation were broken not 'for the sake of', but 'thanks to' and 'with the help of' *utilitas*.

It is also worth noting that in the sources in which jurists used the derivatives of the term *utilitas* such as *utilius est* or *sententia utilior*, the same pattern of interpretation can be observed. Thus the effect of the analyses is not only to complete the catalogue of *utilitatis causa* decisions, but also to show that the strength of this criterion was not hidden in the word *utilitas* (what could come to mind as the researchers analysing *utilitatis causa* decisions limited themselves to source texts in which the noun *utilitas* appeared) but in the whole category.

While making reference to the rhetorical tradition, however, it should be emphasised that jurisprudential *utilitas*, although it indeed embodied the good of all citizens, did not, unless the jurist indicated otherwise, correspond to either the will of the legislator or the intention of the one making the declaration of will. In this sense, the jurisprudential interpretation of *ex utilitate* became independent of the rhetorical one. It should also be emphasised that the phrase *utilitatis causa* is by no means an argument from the realm of judicial rhetoric or a catch-phrase, but a signal appealing to the value underlying the legal order. It was not,

therefore, an extra-systemic criterion, but on the contrary, one that underpinned the legal order. For this reason, the *utilitatis causa* decisions cannot be seen as a sign of renunciation of the system. Rather, they should be regarded as having prevented intra-system axiological inconsistency. Consequently, although they seem dogmatically unacceptable, at a higher level they are compatible with the overarching guideline of interpretation. For this reason, *utilitatis causa* decisions should not be regarded as exceptions to the binding law but, on the contrary, as a clarification and elaboration of the legal rules.

Thus, although the boundaries of what is permitted, forbidden, and commanded did not seem unambiguous, the criterion of *utilitas* was an effective tool for breaking them down. *Utilitas*, pointing to the benefit of the community as the supreme aim of law, was for the Roman jurisprudence the basic determinant of interpretation, and such a strong one that it also allowed for correcting unambiguous results of literal interpretation. By demonstrating that law cannot be reduced to a logical syllogism, *utilitas* had at the same time a law-making and corrective function, as well as a stabilising and persuasive one. It was a multi-faceted tool of thought and guided the legal thought, constantly paving the way to what was not only necessary due to the needs of legal practice, but above all to what was – to repeat after Horace – *iustum et aequum*.

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