Pragmatism, Tolerance and Compromise
Values behind Governing an Ancient Megaorganization

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Abstract

The language of theories of governance and administration is not often applied to organizations of ancient times. There is, however, no doubt that the Roman Empire was a challenging example of megaorganization. There were two basic models of governing it: decentralized and bureaucratic. The latter is obvious for the super power of antiquity which kept under control people of various origins and an extended territory. The former seems more instructive as it involved less officials but broader groups of town citizens throughout the empire. The tiny central imperial chancellery and provincial governors cared only for some of the most important issues: peace, defense of borders, maintenance of order and observance of the law, collection of taxes. The rest remained in the hands of the cities. All the efforts were based on common values of Roman administration: pragmatism, tolerance and compromise. They guaranteed the success of the empire for centuries as the decentralized approach proved effective and creative, and helped to form an imperial identity of its citizens. Public and private Roman law and its jurisprudential framework was an important factor for the identity.

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1. The art of administration in the realm of European legal studies

In Europe, governance tends to be discussed within the realm of legal studies. There is a strong tradition to keep it closely connected to administrative law. Governance as a study of administration or rather of administrative praxis is often named the art of administration. The Polish term *nauka administracji* and relevant expressions in several Slavic and Romanic languages often use the same word for art and science, which makes the study of governance and administration 'scientific' at least in expectations for results of researches on administration. One might say, however, that the academic study of administrative praxis is the science of administration. In fact, we sometimes say legal science for legal research and its academic results.

The interest in administration starts in the Enlightenment with French bureaucracy of the 18th century. The branch of law that discusses regulations relevant to administrative activity of the government can be described and named administrative law not earlier then at that time. In Poland, the study and teaching of the history of administration tends to begin only from the Enlightenment. The distinction between public administration and administrative law[1] leads to recognition of the existence of the latter only in the 19th century. It is also pointed out that modern administrative law is not related to the ancient legal tradition of Romans, and the possible influences of Roman law are, at best, "second-hand." They result from extrapolation of pandectist categories[2] of the 19th century understanding of "contemporary Roman law"—new legal system created from Roman legal sources for the current usage of civil law in Germany.

Does the history of administrative law start only then? It happened to the administration to be active and effective before the French created its structures by legal regulations. What about ancient Chinese administration that was famous for its efficiency and well organized system of officials? Europe and its law is rooted in Roman law, therefore it seems more relevant

[1] Cf F. Longchamps (1912-1969), *W sprawie pojęcia administracji państwowej i pojęcia prawa administracyjnego (Remarks on terms 'state administration' and 'administrative law')*, Zeszyty Naukowe Uniwersytetu Wrocławskiego Seria A No 10 (1957), p. 19–21.
[2] T. Giaro, *Diritto Romano attuale. Mappe mentali e strumenti concettuali*, in: P.G. Monateri, T. Giaro, A. Somma, *Le radici comuni del diritto europeo. Un cambiamento di prospettiva*, Roma 2005, p. 149.

to turn attention rather to Roman legal science and Roman administrative praxis that governed the huge ancient empire of Caesars for long centuries.

Why do we turn to Roman law? Roman law is the legacy of legal thought. It allows us to illustrate how law reflects values and what those values might be from the legal perspective. Looking at the history of law from such perspective seems important particularly since framing the legal order in a deductive system has not been entirely successful. The perspective offered by Roman law warns against a naïve faith in progress and the linear development of history. It leads to the conclusion that in our search for enduring reference points in legal discourse, we should focus on values and ways of resolving conflicts rather than on dogmatic formulae. In taking such a position, it seems instructive to look at the evolution of Roman law as an example of legal discourse. It might allow to identify and understand how solutions are arrived at through heated debate, often with the genuine conviction that one is simply uncovering what was already 'hidden' somewhere in the law – and which applies or at least should be applicable – but has just not been realized thus far. From the perspective of the fundamental values of private law discovered in a such a manner, the experience of Roman law might inspire to a critical assessment of contemporary law.

2. Roman law as an instructive tool for contemporary legal analyses

"As for Europe in the exact sense of the term, there is a certain feature, that could be its very exclusive property which no other land can possibly claim a right to, no other parts of the world can call it theirs, no other territory is willing to fight for. The feature is: being Roman or more exactly being written in or being inspired by Latin as well as by its culture and the other kinds of the influence it has had on the Continent. Europe differs from what is not Europe by the 'Latin' or 'Roman' nature of the sources it draws on."[3] Rémi Brague wrote of the identity of the Continent *vis-a-vis* the world outside and whatever is alien to Europe. Let us think about Poland as an example of a European country.

The Ciceronian republicanism found in the Polish reservoir of Latin culture forms a *sui generis* genome of Polish identity. Roman law had brought to Poland by the occupants: Russia, Prussia (Germany), and Austria at the time of the partitions (1795–1918), but was accepted as the Polish legal tradition by Poland after regaining its independence in 1918.

[3] R. Brague, *Europa. Droga rzymska* (*Europe, the Roman Road*) translated by W. Dłuski, Warszawa 2012, p. 32.

In the United States, Roman law had become central quite recently to the discussion on comparative law and, even more interestingly, it also had a central role to play in the debate on the perspectives of economic growth. It had attracted particular attention in the literature on modern economics and finance, especially in the years 1997–2008 as a result of the economic research carried out by a number of distinguished scholars from Harvard University: Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Professor Robert W. Vishny from the University of Chicago.[4] Their research focused on issues of investor protection and corporate governance across the world. They reviewed cross-country differences in laws and practices pertaining to these issues and how the differences cause economies, stock markets, and firms' financing practices to vary. This area of studies is known as *law and finance*, and the authors of the research called their results *legal origins theory*. As Ulrike Malmendier pointed out, "the law and finance literature suggests a causal impact of countries' legal systems. Another strand of the literature emphasizes the role of the political environment and argues that the effectiveness of institutions varies considerably with the political support they receive."[5] It not only concentrates on future progress, but emphasizes continuity with the past, studies legal traditions and tends to evaluate their usefulness for financial and commercial development in the contemporary globalizing world.

The legal origins theory blames Roman law for creating worse opportunities for economic growth than common law systems. According to American researchers, Roman law impedes the financial development of countries whose legal system remains within the civil law tradition. They describe civil law—in contrast to common law—as legal systems in which the country's company law or commercial code originates in Roman law. "Economists who investigate the determinants of financial development and economic growth across countries have long debated the importance of the institutional environment, including a country's legal system. Only more recently, however, they have started distinguishing between civil-law systems with *Roman legal origin* and common-law systems. Legal origin is used as an econometric instrument, i.e., an empirical technique to causally identify how amenable different legal systems are to economic growth and financial development. The main result is that

[4] R. La Porta, F. Lopez-de-Silanes, A. Shleifer, R. W. Vishny, *The Legal Determinants of External Finance*, Journal of Finance 1997, vol. 53, No. 3, p. 1131–50; R. La Porta, F. Lopez-de-Silanes, A. Shleifer, R.W. Vishny, *Law and Finance*, Journal of Political Economy 1998, vol. 106, No. 6, p. 1113–55; R. La Porta, F. Lopez-de-Silanes, A. Shleifer, *The Economic Consequences of Legal Origins*, Journal of Economic Literature 2008, vol. 46, No. 2, p. 285–332.

[5] U. Malmendier, *Law and Finance at the Origin*, Journal of Economic Literature 2009, vol. 47, No. 4, p. 1076.

countries with Roman legal origin have been found to have less developed financial markets."[6] It should, however, be noticed that law and finance tends to be cautious about making direct accusations against Roman law, referring to the *Roman law tradition* or *civil law (originating in Roman law*)[7] rather than to Roman law itself. "The characterization of Roman legal-origin countries as *rigid* and unwelcoming towards economic growth"[8] seems typical of the literature approving the legal origins theory. This is because the flexibility of the *law as practiced* is considered to be stimulating for economic growth. Law and finance considers "*Roman legal origin* as an econometric instrument to measure the causal impact of law on growth."[9] Therefore it is essential to note that "the finance and law theory claims to present two empirical findings in its support; (1) that the legal origin predicts the level of investor protection, and (2) that the legal origin helps [to explain] the level or quality of financial development."[10]

It is pleasing to learn that Roman law is at the center of economists' interests. The main question, however, is what they consider to be Roman law. Their understanding of the civil law tradition has a significant influence on the evaluation of their critique of the presence of Roman law in contemporary jurisprudential debates. It is worth remembering that in the 1950s, a prominent professor from Rome, Riccardo Orestano, defined six meanings of Roman law, the last of them being described by the neologism *romanesimo*. This notion of Roman law "does not correspond to any historic formation, but it is a hypostasis of idealistic and heterogeneous aspirations, i.e. an entirely subjective concept of Roman law. Considered in an abstract way, Roman law is the result of the aspirations and their eponym."[11] Roman law understood as *romanesimo* is used as a part of the apologies for or arguments based on the evaluation of Roman law. However this evaluation has no research basis. These aspirations are of a political or sentimental nature; they change in different epochs based on the evolution of the current and leading approaches in a particular period. This is the meaning of *Roman law* as used, for example, by the Polish nobility in the 16th, 17th and 18th centuries. They identified Roman law with a despotic emperor and considered it a legal system of dictatorship and absolutism, believing the democracy of nobles would be threatened if based on the Roman law tradition.

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[6] U. Malmendier, *Roman Law and Law-and-Finance Debate*, in: H. Altmeppen, I. Reichard, M. Schermaier (eds.) *Festschrift für Rolf Knütel*, C.F. Müller Verlag, Heidelberg 2009, p. 719.
[7] La Porta 2008 [fn 4] p. 286.
[8] Malmendier [fn 5] p. 719.
[9] Ibid. p. 720.
[10] M. Graff*, Myths and Truths: The "Law and Finance Theory" Revisited*, Jahrbuch für Wirtschaftswissenschaften / Review of Economics 2006, vol. 57, No. 1, p. 63.
[11] R. Orestano, *Diritto romano*, in: *Novissimo Digesto Italiano*, 5, UTET, Torino 1953, p. 1025; R. Orestano, *Introduzione allo studio storico del diritto romano (An Introduction to the Historic Research in Roman Law)*, 2nd ed., Torino 1961, p. 511–2.

The tradition only came to Poland with the partitions, when Poland ceased to exist as an independent state in 1795, and with the French, Austrian and German codes respectively that were subsequently introduced and came into force. But Roman law was used as *romanesimo* also in point 19 of Hitler's NSDAP program which stated: "We demand that Roman law, which serves a materialist world order, be replaced by German common law."[12]

Roman law literature and the study of comparative law entails a critique which blames law and finance for overestimating the division into civil law and common law. "[T]he distinction between legal systems with and without Roman origin—so-called civil-law and common-law countries—is less sharp than the law-and-finance literature suggests."[13] Researchers in Roman law had a similar experience: for years, research into Roman law promoted an opposition between *classical* and *Justinian* law, i.e. an opposition between so-called original Roman concepts and the Byzantine dogmatic mind and the simplified jurisprudence of sixth century compilers—strongly overstating the differences. In the law and finance analyses, the opposition is more between England and France, although insisting on that seems to take us to the Middle Ages, when England was very France-oriented. The civil law tradition is not simply French law. Nevertheless, it should be noted that the evolving legal origins theory is beginning to realize that: "A deeper understanding of the dynamics of legal traditions may also inform the crucial question of whether the differences between common and civil law will persist into the future."[14]

There are various ways in which Roman law and its inheritance manifests its presence in today's legal world; various emanations. But regardless of their present stage, Roman jurisprudence was flexibility and innovative. To understand the differences amongst the emanations, i.e. the plurality of legal solutions and regulations within the civil law tradition, one has to be aware of the origins. Simply referring to Roman law does not lead us very far. It is necessary to perceive and understand the spirit of Roman law, which has nothing to do with an abstract idea of Roman law, it is about *Roman law in action*,—the Roman legal experience.

First, an ignorance of Roman law, i.e. of the spirit that formed Western civilization and European legal tradition, might be detrimental to those who trust the conclusions of any research like that of law and finance. Secondly, and more obviously, the more general a

[12] Cf e.g. L. Preuss, *Germanic Law versus Roman Law in National Socialist Legal Theory*, Journal of Comparative Legislation and International Law, Third Series 1934, vol. 16, No. 4, p. 269–280; M. Stolleis, *The Law under the Swastika. Studies on Legal History in Nazi Germany*, University of Chicago Press, Chicago/London 1998, p. 21ff.
[13] Malmendier [fn 5] p. 721.
[14] La Porta 2008 [fn 4] p. 327.

statement, the greater the margin of error created. Therefore the globalized blaming of Roman law or any legal tradition has to be considered risky from the very outset. Nevertheless, the founders of the law and finance analysis insisted that "being aware of all of that they did not change much the legal origins theory, although continuing the research they shaped it in more subtle way. Our interpretation of the meaning of legal origins has evolved considerably over time," and they decided to interpret legal origins broadly as highly persistent systems of social control over economic life.[15] "Subsequent research showed that the influence of legal origins on laws and regulations is not restricted to finance. In several studies […], we found that such outcomes as government ownership of banks, the burden of entry regulations, regulation of labor markets, incidence of military conscription, and government ownership of the media vary across legal families. In all these spheres, civil law is associated with a heavier hand of government ownership and regulation than common law. Many of these indicators of government ownership and regulation are associated with adverse impacts on markets, such as greater corruption, larger unofficial economy, and higher unemployment. In still other studies, we have found that common law is associated with lower formalism of judicial procedures[16] and greater judicial independence[17] than civil law. These indicators are in turn associated with better contract enforcement and greater security of property rights."[18] Nevertheless they concluded the article with an answer to the criticism by repeating: "our framework suggests that the common law approach to social control of economic life performs better than the civil law approach. When markets do or can work well, it is better to support than to replace them. As long as the world economy remains free of war, major financial crises, or order extraordinary disturbances, the competitive pressures for market-supporting regulation will remain strong and we are likely to see continued liberalization. Of course, underlying this prediction is the hopeful assumption that nothing like World War II or the Great Depression will repeat itself. If it does, countries are likely to embrace civil law solutions, just as they did back then."[19] They published this statement in 2008, i.e. at the outset of the global economic crisis.

It is a positive factor when legal traditions are the object of particular interest among economists, also when they blame Roman law for its detrimental influence on financial markets because it confirms that the interest in Roman legal tradition has not been extinguished. The

[15] Ibid. p. 326.
[16] S. Djankov, R. La Porta, F. Lopez-de-Silanes, A. Shleifer, *Courts*, Quarterly Journal of Economics 2003, vol. 118, No. 2, p. 453–517.
[17] R. La Porta, F. Lopez-de-Silanes, C. Pop-Eleches, A. Shleifer, *Judicial Checks and Balances*, Journal of Political Economy 2004, vol. 112, No. 2, p. 445–70.
[18] La Porta 2008 [fn 4] p. 286.
[19] Ibid. p. 327.

tradition is of importance not only to the European, but also the global civil law tradition originating in Roman law. The critique of the legal origins theory calls for experts in Roman law and thus there is a continuous need for an in-depth knowledge in Roman law: the teaching of it should be accessible to all and not only to lawyers. Access to a basic knowledge of Roman law should be created for others as well: economists, sociologists, historians, social philosophers and specialists in cultural studies. What is needed above all is good research into Roman law being conducted at numerous public and private institutions. It is not sufficient to have a limited group of experts, but to have independent centers for Roman legal studies. This is necessary not only to have straightforward information, but also to gain a deeper insight into our understanding of Roman law. Roman law is not only part of legal history, but is present in our legal systems due to their legal traditions – not only due to reception of law, but even independently, i.e. also due to its reasonableness and economic utility. The notions of reasonableness and economic utility belong to the very nature of law, and these concepts were perceived and understood well by the ancient Romans. Even when certain legal regulations were drafted in a country because of their reasonableness and economic utility—surprisingly or not—they correspond to, or resemble, what the Romans knew thousands of years ago. No doubt reasonableness and economic utility are typical features of Roman law and in order to see this we have to be aware of what the tradition is. The debate on law and finance shows that it is quite instructive to study Roman law, a treasury of comparative and historical arguments in legal debates.

3. Roman administrative praxis and governance

In 1995, various articles were published in the "Journal of Institutional and Theoretical Economics," which demonstrate another courageous opening of a new research perspective. A professor of history from Zurich wrote about the Roman Empire as an ancient megaorganization[20]. Professor of civil and Roman law—then from Saarbrücken, and now from Munich—submitted a paper entitled "Roman law and Rome as a megaorganization."[21] In 2001,

[20] F.G. Maier, *Megaorganisation in Antiquity: The Roman Empire*, Journal of Institutional and Theoretical Economics 151/4 (1995), p. 705–13.
[21] A. Bürge, *Roman Law and Rome as a Megaorganisation*, Journal of Institutional and Theoretical Economics 151/4 (1995), p. 725–33. Cf. also J. Martin, *The Roman Empire: Domination and Integration*, Journal of Institutional and Theoretical Economics 151/4 (1995), p. 714–24, S. Ghoshal, P. Moran, L. Almeida-Costa, *The Essence of the Megacorporation: Shared Context, not Structural Hierarchy*, Journal of Institutional and Theoretical Economics 151/4 (1995), p. 748–59.

professor from Salerno in Italy wrote an article with a clearly programmatic character: "For Roman administrative law,"[22] reminding that in the last 30 years a lot of work of Roman law specialists has been devoted to the history and the public law of Rome. A number of topics that were covered by Roman law specialists related to the Roman administration: provincial administrative systems, internal organization of particular cities, the activity of municipal officials, tax collection and systems of public "concessions" to organizations of tax collectors, prerogatives of imperial officials. These books and papers, however, were not advertised as elements of reconstructing "Roman administrative law," nor even as a legal history of Roman administration[23].

It is quite fortunate to recognize the existence of administration in Rome, and even in earlier countries and domains than the Roman Empire. Why, then, arbitrarily cutting off all the pre- Enlightenment history of administration? Is not it simply a blind shortening to keep lectures in the history of administration more compact? It is true that continuity of administrative institutions can easily be demonstrated only starting from the time of the Enlightenment—from regulations enforced by absolute monarchies of Europe. Today, however, a history researcher does not need to feel constrained to show the continuity. She is not enslaved by questions about the reception of legal institutions. We are more interested in solutions adopted in similar social situations or when dealing with problems of a similar nature—even if they result from various sources and inspirations and when historical continuity cannot be proved.

The phenomenon of megaorganization is brought by the Roman Empire led by emperors from Augustus to Theodosius, i.e. from 27 BC till AD 395. One efficient administration for centuries over one and a half million square miles, and 40 to 60 millions of inhabitants. It is, therefore, not without reason that researchers are fascinated how it was possible to manage a gigantic state at a time when a journey to Rome from Trier, the capital of Constantine the Great, took a month of traveling.

The Roman Empire adopted two forms: the principate and the dominate. It might seem at the first glance that the dominate should be the natural object of researches on governing the Empire. The dominate had well-developed bureaucracy—an official apparatus that was supposed to control the permanent economic and social crisis. However, the principate and its centrality with decentralization is more interesting for anyone interested in smart governing of an extensive empire. In the era of the principate, the tiny central imperial office and provincial

[22] F. Lucrezi, *Per un diritto amministrativo romano*, in: *Atti dell'Accademia Romanistica Costantiniana. XIII convegno internazionale in memoriał di André Chastagnol*, Napoli 2001, p. 783–84.
[23] Ibid. p. 778–779.

governors cared only about some of the most important issues: peace, defense of borders, maintenance of order and observance of the law, collection of taxes, and higher degrees of what we now call the system of justice. The rest remained in hands of the cities, hence where they did not exist like in Gaul conquered by Julius Ceasar, Romans had to found them in order to rule efficiently over large areas of new territories. Urban elites identified themselves with the Capital. The paths of career were open to provincial Roman citizens who started in order to make them feel closer to the central power of the City. As early as in the 2nd century AD 40-50% of senators came from the provinces, like emperor Trajan himself.[24] The success of the government was ensured by the smart ruling. The Roman governing at the time of the principate was based on compromise, tolerance and pragmatism. Do not we lose much starting the history of administration from the Enlightenment?

Concentrating on what was directly taken or inspired by Roman law significantly limits the scope of study of the principate administration. Every European lawyer is able to distinguish acts of any contemporary state based on the *imperium* from those based on the *domnium*. In fact, the distinction sounds good in Latin, but it seems rather pandectist. It is not taken from classical Roman law, i.e. the first three centuries AD. It seems better to keep the original distinction *imperium—gestio*. The former is the sovereign power of a state, tha latter its managerial activity of governance. The *imperium* was the quintessence of the Roman rule. Romans did not intend making conquered peoples Roman citizens. The Roman Empire was about the effective control over conquered territories and their population. The managerial activity could have been public or private. It is worth to note that *utilitas* was the crucial criterion for distinguishing private law from public law. The jurist Ulpian wrote: "Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests (*utilitas*), some matters being of public and others of private interest. Public law covers religious affairs, the priesthood, and offices of state."[25] Romans would certainly agree that the reason the office of praetor existed and that his duties were performed was the common good—*utilitas* either of the individual citizens or the State made up of them. The principle of the common good, to which every aspect of social life must be related if it is to attain its fullest meaning, stems from the dignity, unity and equality of all people. Indeed, every aspect of social life achieves its full potential through reference to the common good: even when it is a category that is not explicitly recognized, and even when the thought that all men are equal is only beginning to gain wider recognition. And that is what can be observed

[24] F.G. Maier [fn 20] p. 708.
[25] Ulp. D. 1.1.1.2.

based on the example of Rome and Roman legal experience. Here we have a lot to be compared with the *utilité publique* known today very well from the French theory of administration.[26]

4. Roman officials as promoters of the common good

The concept of the State was understood differently in Rome than we understand it now; although, in fact, it was more favorable for what we understand today as the common good. The State was conceived as being a community of citizens, and was therefore referred to as a public thing – *res publica*. It was not separate from the citizens; it did not exist in isolation from them. Idealistically, in Kantian fashion, we would call it a community of free individuals in its pure form.[27] In Martin Buber's wording, the idea could be expressed as follows: Rome is us – you and me, but fully you and fully me, so I with you. Let us add that—despite references to *humanitas*[28]—there was no room in Rome for mercy, the way it is understood in Christianity. Moreover, the claim that the ancients mastered the seven deadly sins to perfection appears to be thoroughly justified.[29] Finally, the entire public legal order in Rome, in which the praetor held a special place, was different too. The person and the office were perceived in conjunction with one another, which is emphasized when it comes to clarifying the ambiguity of the word *ius*. The Romans were fully aware of this and did not complain at all about it. The jurist Paulus wrote: "The term 'law' is used in several senses: in one sense, when law (*ius*) is used as meaning what is always fair and good, it is natural law (*ius naturale*); in the other, as meaning what is in the interest of everyone, or a majority in each *civitas*, it is civil law (*ius civile*). Nor is it the less correct that in our *civitas* the *ius honorarium* is called law. The praetor is also said to render a legal right (*ius*) even when he makes a wrongful decree, the reference, of course, being in this case not to what the praetor has done, but to what it is right for a praetor to do. By a quite different usage the term "*ius*" is applied to the place where the law is administered, the reference being carried over from what is done to the place where it is done. That place we can fix as follows: wherever the praetor has determined to exercise jurisdiction, having due regard to the majesty of his own *imperium* and to the customs of our ancestors, that place is correctly called

[26] Cf J. Zimmermann, *Prawo administracyjne* (*Administrative law*), 3rd ed., Warszawa 2008, p. 33.
[27] Cf. Z. Stawrowski, *Dobro wspólne a filozofia polityki* (*Common good and filosophy of politics*), in *Dobro wspólne. Teoria i praktyka* (*Common good. Theory and praxis*), eds. W. Arndt, F. Longchamps de Bérier, K. Szczucki, Warszawa 2013, p. 22.
[28] H. Kupiszewski, *Prawo rzymskie a współczesność* (*Roman law and the contemporary world*), eds. T. Giaro, F. Longchamps de Bérier, 2nd ed., Warszawa 2013, p. 239–66.
[29] F. Longchamps de Bérier, *L'abuso del diritto nell'esperienza del diritto privato romano*, Torino 2013, p. 201.

ius".[30] That last statement explains why the initial phase of the two older types of Roman procedure protecting private rights, *legis actiones* and the formulary system, is called *in iure*, or "at the praetor's", "before the praetor".[31] He sat on a raised dias on the chair of office (sella curulis or curule seat) which had no backrest. The magistrate and place where he performed his official function merged to the extent that the two were simply called – the law. This should come as no surprise, since in our times the court tends to be identified with justice, and the militia (now the police) with power. Since the early days of the Republic, the body entrusted with the function nowadays known as the judiciary was the praetor.[32] Seated on his chair, i.e. *sella curulis*, the praetor was not only a statuesque embodiment of the law in action, law which was close to the citizens of the Republic. In the earlier statements made in the above-cited text by Paulus it is clear that the Romans had no doubt that the process of enforcing the law not by an ordinary citizen, but by an official appointed for one year and endowed with said authority, was law *par excellance*. Created by officials, and therefore called *ius honorarium*—from *honor*, meaning "office"—it was law, like natural or civil law, although not in the same way. Besides specific references to goodness and justice, the term *ius* is also used as a category that does not express any judgment: what matters is who administers the law, who exercises jurisdiction, and not whether it is in compliance with the existing legal order. It is only the outcome of official acts that is judged, like any law: from the point of view of goodness and justice. Through the activities of the *magistratus*—the praetor—the law is brought up to date for citizens, which is why a passage from a textbook by the jurist Aelius Marcianus, who said: "praetorian law is the living voice of civil law", should be appreciated for its accuracy and aptness.[33] A citizen was elected to hold the office of praetor and to administer and enforce the law in accordance with his knowledge and experience. Through his official acts as a magistrate, he had to ensure that goodness and justice prevailed in specific circumstances of everyday life. It seems reasonable to perceive in the performance of his official duties the institutional expression of concern for what is meant today by the idiomatic expression "the common good".

The pragmatic aspects of the praetor's work can be seen in the remedies he employed, now referred to as praetorian non-procedural measures. The protection he offered was provided more by his power than by jurisdiction (*magis imperii quam iurisdictionis*): he restored to an original state (*in integrum restitutio*), ordered the presentation of someone or something,

[30] Paul. D. 1.1.11.
[31] Concerning the praetor's place in the *forum* see E. J. Kondratieff, *Reading Rome's Evolving Civic Landscape in Context: Tribunes of the Plebs and the Praetor's Tribunal*, in *Phoenix* 63 (3–4), 2009, p. 329–34, 347–56.
[32] Cf. e.g. I. Buti, *Il 'praetor' e le formalità introduttive del processo formulare*, Camerino 1984, p. 42–3.
[33] Marcian. D. 1.1.8. Cf. e.g. B. Frese, *Viva vox iuris civilis*, in *ZSS* 43, 1922, p. 466–84.

prohibited or ordered specific behaviour (*interdicta*), authorized entry into possession of someone's property (*missio in possessionem*), demanded obligations to be assumed orally in the form of stipulations (*cautiones*). The praetor exercised jurisdiction through the *legis actiones* or the formulary system of procedure, refusing to refer the case to a private judge (*denegatio actionis*), granting claims made by parties against a suit (*exceptiones*), editing the texts of developed litigious formulas, or instructions for judges. To extend that protection, he introduced fictions into the formulas, switched subjects, employed analogy, constructed new solutions by creating *ad hoc* complaints based on facts. We are quite familiar with the arsenal of measures employed by the *magistratus*, and it is on their basis that we endeavor gain an idea about his day to day work. The question is to what extent can we succeed.

The praetors were neither lawyers, nor professional magistrates specialized in efficient governance or administration. Neither of these shortcomings was necessarily a drawback, if the attainment of the common good[34] as necessitated by the needs and expectations of a particular generation of Roman citizens is considered to be of crucial importance. The praetors were mature men, held in high esteem by society as is confirmed by their election. They usually held their office for the first time ever, and, therefore, had no more experience than what could be gained from mere observation. Observation, however, or even understanding is one thing, and the ability to act efficiently is quite another. Thus, praetors often consulted advisors, among them jurists. Furthermore, they contributed their own experience in looking for practical and rational solutions. From their experience of everyday life, they were aware of established or acceptable courses of action, as well as being aware of social expectations. This had to suffice to prudently and creatively manage a high-ranking office, and to perform their duties—with a little good will and involvement—in the best interests of society. The office was held for a short term, and the praetor was not expected to implement any long-term policies. The office was, to some extent, embodied in decrees, which until the very end were adopted on an ancillary basis. "In the common model of legal development, the decrees, issued occasionally, were more a record of changes that have already occurred than an innovation, and more a case study than a general rule".[35] Praetors corrected existing regulations and created new ones when practicing

[34] The concept of the common good does not seem to been an invention of modern times, even though it was not authoritatively and convincingly taken up until recently by the Second Vatican Council. It is thus rightly associated with the social teachings of the Church, which has been invoked, to a greater or lesser extent, by nearly all political parties over the past twenty years, including post-Communist ones, in their political programmes. It is therefore not surprising that the category of the common good has become the subject of a constitutional consensus; indeed, it can found at the very beginning (in Article 1) of the Constitution of the Republic of Poland of 1997: "The Republic of Poland shall be the common good of all its citizens".

[35] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego* (*Roman Law. At the Foundations of Private Law*), Warszawa 2009, p. 44.

their administration. They made the edict into an extensive collection which not only provided for a comparatively broad protection of private rights, but which also specified when the praetor could be counted on for assistance. The political system, the manner in which the praetor was appointed, and the powers he was granted gave him considerable autonomy. Thus, the intention was to have him act at his own discretion. The most important thing was that he should decide about the most appropriate solution at a particular time. The praetor's work represented *par excellance* the actualization of the common good under specific conditions and for particular persons. It can therefore safely be said that the "balance between traditionalism and conservatism on the one hand, and innovation on the other"[36] in Roman law was to a large extent the result of the praetors' promotion of the common good.

[36] W. Litewski, *Podstawowe wartości prawa rzymskiego* (*Basic values of Roman law*), Kraków 2001, 18.