Review

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Salus rei publicae als Entscheidungsgrundlage des römischen Privatrechts. By Gergely Deli. Budapest: Medium. 2015. 221 pp. ISBN 978-963-12-2773-4.

The title of this book by Gergely Deli (hereafter the A.), professor at Széchenyi István University in Hungary, perfectly encapsulates its main theme. The motto he took as the starting point for further analysis is derived from Cicero, who was a lawyer, philosopher, orator and one of Rome's greatest statesmen. In his famous Treatise on the Laws (*De legibus* 3.8) we can find the complete phrase: *Ollis salus populi suprema lex esto*. Its later and somewhat altered version as quoted in the title of the book is: *Salus rei publicae* [*suprema lex esto*]. This wording alteration is not only cosmetic; it entails essential changes to both the content and the context in which the maxim was used, with the original phrase taking on different meanings over the course of history. According to Kaser,[1] classical Roman jurists did not limit its meaning solely to public or political relations. They understood that the concept of the common good should also embrace private relations between persons. Accordingly, the original *salus populi* principle was considered of vital importance to resolve conflicts arising between private actors or to protect citizens' rights. Over time, Cicero's statement was transformed, using the notion of *res publica* instead of *populus*. This change was crucial as it transformed this maxim into a principle with public and even political nuances. In his book, nonetheless, the A. uses both versions indistinctly, without exploring the evolution of this term in depth. This perceptible gap leaves the reader with a sense of insufficiency.

In the last paragraph of the book a global explanation of the

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[1] M. Kaser, "'Ius publicum' und 'ius privatum'," in *ZSS* (RA), 103 (1986), 18–19.

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book's central thesis can be found:[2]

> What was protected was the existing social order and not a fictitious, ideally conceived one. The word *salus* in the title of this book also expresses this. Its first meaning is the imagined "state of existence" before a period of decay or the "integrity" associated with that state. As we have seen, the legal decisions examined here refer precisely to this original state prior to the damage and make it the final criterion for decision. Through this ultimately "conservative" and preservative function, consideration was given to the "most fundamental" law at the crossroads between private interest and the common good, the essence of which was nothing other than the welfare of the people or of the republic, or *salus rei publicae.*

According to the above statement, the A. analyses selected cases to confirm his thesis. His main goal is to identify the general principles forming the basis of the decisions made in the cases considered. It is reiterated throughout the book that the dogmatic approach should be "the articulated expression of justice" (87) and the dogmatic tools should "serve to reach a just decision" (167). Nevertheless, the A. considers that the technical-legal method must be subordinated to the greater purpose of the common good. To achieve this goal, extra-legal arguments may be used (10–11).

The A. is aware of the selective nature of the cases he has chosen from among the countless legal problems faced by Roman jurists (11). He justifies his choice on the basis that they include examples from the widest possible spectrum of the law: procedural law (*pactum de quota litis*), property law (*specificatio*), contract law (*lex commissoria*), quasi-legal relationships (*negotiorum gestio*), maritime commercial law (*actio oneris aversi*) and inheritance law (12). The A. selects these six problematic areas, which already

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[2] 172:

> Was man beschützte, war die existierende, gegebene und nicht eine fiktive, als ideal erdachte Gesellschaftsordnung. Auch das im Titel des vorliegenden Bandes erscheinende Wort salus drückt dies aus. Seine erste Bedeutung ist die über den Verfall gestellte "Existenz" bzw. die sich daran anknüpfende "Unversehrtheit." Wie gesehen weisen die hier geprüften rechtlichen Entscheidungen genau auf diesen, vor dem Schaden bestehenden, ursprünglichen Zustand hin und machen ihn zum letzten Entscheidungskriterium. Durch diese letztendlich "konservative," bewahrende Funktion wurde auf das am Kreuzungspunkt zwischen Privatinteresse und Gemeinwohl stehende "grundlegendste" Gesetz Rücksicht genommen, dessen Wesen nichts anderes als das Wohlergehen des Volkes bzw. der Republik, das salus rei publicae war.

caused interpretative and decision-making problems in Roman times, and proposes a fresh approach to the cases. In doing so, he seeks to contribute to previous studies addressing the majority of these issues. If the hypothesis and conclusions drawn from the analysis turn out to be erroneous, at least his findings in each case would have their own scientific value. However, in the explanation of the case selection there is a noticeable lack of arguments regarding the book's main thesis: the balancing of private interests and the common good. This absence raises suspicions of arbitrariness or even randomness of the choices made.

The internal structure of the book reflects the selection of these six problematic areas. The book is divided into eight chapters which are subdivided into smaller sections. Apart from the first and the last chapters (the Introduction and Conclusions respectively), the other six open with a presentation of the subject and close with a summary. This structure substantially facilitates its reading and comprehension. There are, however, some "editorial" inconsistencies between the contents and the main text of the book. According to the contents, chapters two and five do not include conclusions while in the main text both chapters do in fact close with the conclusions (29–37; 114–16).

The first legal problem analysed (chapter two) is the admissibility of an agreement between a party and his representative according to which the latter's fee would depend upon the successful outcome of the litigation (*pactum de quota litis*). This issue caused problems in ancient Rome and still gives rise to controversy nowadays. The range of solutions to this problem in different modern legal systems illustrates its conflictive nature. The A. quotes a passage of the Digest describing the decision of the praetor Claudius Saturninus in the case of Marius Paulus as advocate of Daphnis.[3] After outlining two different interpretations of the text by Berthold Kupisch and Thomas Rüfner,[4] the A. proposes his own reading in support of Kupisch's opinion, which negates any absolute prohibition of the principle of *pactum de quota litis*. The argument in favor of allowing agreement on the fee depending on the success of the trial was to enable access to justice

[3] D.17.1.6.7 (Ulp. 31 ed.).

[4] See B. Kupisch, "Ulpian D. 17,1,6,7 (31 ad edictum): Kaiserliche Hüter einer anwaltlichen Standesethik. Aus der Reskriptenpraxis der *divi fratres*," in K. P. Berger, et al., eds., *Festschrift für Otto Sandrock zum 70. Geburtstag* (Heidelberg 2000), 559; T. Rüfner, "Die Geschäfte des Herrn Marius Paulus – Winkelzüge und Standesethik in D. 17,1,6,7," in H. Altmeppen, I. Reichard und M. Schermeier, eds., *Festschrift für Rolf Knütel zum 70. Geburtstag* (Heidelberg 2009), 987.

by the widest possible group of persons (160). In the case at hand, he holds that the conduct of the representative was manipulative and greedy. He also relies on the statement by the jurist Marcellus mentioned at the end of the passage: if the advocate agrees to assume the procedural risk, a higher fee may be charged; otherwise the fee should not exceed the usual limit. This point of view balances conflicting interests (*utilitates*) and utility (*utilitas*). In other words, the A. sees this as an example of a nexus between private autonomy and common interest in order to address problems of major social relevance.

The second issue presented (chapter three) is *specificatio*, i.e. the creation of a new thing out of someone else's materials, and more particularly the issue of the ownership of the newly created thing. The A. asks whether good faith (*bona fides*) is necessary to acquire ownership of the manufactured item, considering the different opinions of Roman jurists regarding the relevance of good faith and the different approaches to this matter by the Sabinian and Proculian schools. The issue was whether the principle of *bona fides* should be applied either to the creation process itself or to the state of mind of the manufacturer regarding the legal status of the material. However, the problem of acquisition of ownership of the newly created thing, along with the issue of the *bona fides* of the manufacturer, was not seen by the A. as a matter of primary importance and the reader will therefore not find the solution to this matter in the text. Instead, the A. focuses on the issue of fair compensation despite the existence of two competing principles of natural law on acquisition of ownership as expressed by Gaius.[5] He supports Gaius' opinion that those who act in bad faith should face the consequences. Otherwise, the party acting in good faith who has been adversely affected by the grant of property rights should receive compensation for the work carried out or the value of the material. Gaius balances the interests of both parties to reach a fair decision that is also in the common good.

Somewhat weaker arguments in support of the main hypothesis of the work are found in the case of the possibility of withdrawal from a contract due to its non-performance (chapter four). Under Roman law, the so-called *lex commissoria* was an ancillary agreement (also known as a *clausula cassatoria*) to sale and purchase agreements (*emptio venditio*), particularly in the case of sales on credit. According to this agreement, the vendor was

[5] Respectively G.2.66–72 and 73–79. Under modes of natural acquisition of ownership regulated in sections 73–79, the rule of just compensation should be applied.

entitled to back out of the contract if the purchaser did not pay the full price by a certain date. In the case of hire purchases, the instalments already paid were forfeited. In his approach to this issue, the A. offers a different explanation by applying an economic and behavioral analysis of the law. It is obvious that Roman jurists took numerous aspects into account when making their decisions. In this case, they found a fair and effective solution. The main function of the right of withdrawal was to provide vendors with an adequate guarantee that they would be able to sell their goods in an uncertain market dominated by purchasers with low purchasing power or very unstable monetary conditions. In this sense, the right of withdrawal was useful for both parties: for vendors it made the sale safer, while for purchasers it made the purchase possible by allowing the purchase price to be paid at a later date. Accordingly, abolition of the right of withdrawal could have had serious social consequences (162–163).

The notion of *utilitas* previously mentioned was also the basis for resolution of the conflict of interests arising from *negotiorum gestio* (chapter five). This is a legal relationship arising neither from contract nor from delict, but rather from the actual situation of acting on another person's behalf without their authorization. The A. mentions the "half-sided" nature of *negotiorum gestio* when there is no agreement between the unauthorized *gestor* and the person whose affairs need to be managed. The issue relates to the conditions for the *gestor* to claim the expenses of such management. The A. questions whether these private interests provide a sufficient legal basis for involvement of the authorities in the reimbursement of the costs. The state monopoly on the use of force has usually proven useful where the common good or private interests are at stake and no other private interest prevents its application. The main problem, therefore, is whether *negotiorum gestio* should be promoted by public authorities. To evaluate when the state should intervene in the private affairs of citizens, Roman jurists used the concept of *utilitas* to establish a link between private autonomy and common interest. The condition that the activity of the *gestor* should at least be "useful at the commencement of the *gestio*" (*debet utiliter esse coeptum*) – viewed from an ex ante perspective – is advantageous because neither the *gestor* nor the principal know before running a business whether the business will be successful or not. According to Ulpian,[6] the *gestor* should act in a manner that is objectively useful to the principal. Of course, this also means that his activity should be deemed appropriate and

[6] D.3.5.9.1 (Ulp. 10 ed.).

sufficient ex ante. By introducing an ex ante perspective, Ulpian brilliantly sums up the criteria of relevance and usefulness. His solution favors only those managers who reasonably believe that their actions are both effective and useful. Such managers deserve to be reimbursed, even if it turns out that their actions did not produce the desired result. Applying this reasoning, Ulpian balances controversial private interests in a manner that also promotes the common good.

The next example (chapter six) concerns the so-called *actio oneris aversi*.[7] This action applies to misappropriation of combined generic goods transported on a ship where one or more of the parties did not receive their part due to a shipwreck or other similar circumstance. This measure promotes two different interests: transport safety and economic efficiency. A maritime carrier who did not deliver cereals to the right person could be held liable to pay a penalty for an amount exceeding the compensation for breach of contract. To avoid this possibility, the carrier would not be interested in delivering the cereals to anyone other than the original contractual partner. For reasons of security of the supply of cereals and common interests, this principle protected the parties involved in this risky economic activity. The solution was therefore positive not only for traders but also for the general public: it promoted the stability of long-distance trade in cereals and helped to ensure that goods were delivered to the person who valued them most at the time of the conclusion of the agreement.

The last case (chapter seven) relates to a passage of the Digest attributed to Papinian regarding a condition imposed on a son in his father's will for him to become his heir.[8] The A. seeks to answer two important questions. Firstly, he explains how the condition mentioned in the text should be characterized and then he explores the significant links existing between lawlessness (*sub condicione . . . , quam senatus aut princeps improbant*), impossibility (*nec facere non posse credendum est*) and immorality (*quae facta . . . contra bonos mores fiunt*). After a very detailed analysis of the text, the A. states that the praetor's intention was to abolish – by means of *ius honorarium* – a will which according to the *ius civile* was fully effective. The difficulty was that such illegal and at the same time immoral conditions were in force according to *ius civile*, and the

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[7] See D.19.2.31 (Alf. 5 dig. a Paul. epit.). The A. following an exegesis (118–35) of this enigmatic passage concludes that this fragment may be interpreted logically and without contradictions.

[8] D.28.7.15 (Pap. 16 quaest.).

praetor sought not only to remove the condition but also to deny application of the entire will. Papinian concludes that illegal conditions are considered impossible and therefore invalid rendering the entire will void. In this case, *salus rei publicae* overrode private interests, represented in this case by the will of the testator.

To sum up, the A. confirms the main theme indicated at the beginning of the book after a detailed discussion of these six examples. His analysis is in any case subordinated to a specific premeditated perspective: to demonstrate that the protection of the common good may also be achieved through intervention in private affairs. He applies a consistent approach to achieve his intention. However, as we have sought to highlight, this idea is clearer in some cases than in others, particularly because Roman jurists do not tend to make explicit references to these matters. The work reviewed is written in virtually flawless German and in a clear and intelligible style. The titles of the six chapters containing the examples are formulated as questions, while the text itself proposes numerous questions which are duly answered. The erudition of the A. and his knowledge of the abundant literature on the topic and the numerous sources in both Roman and modern law are combined with concise statements that preclude idle speculation.