Litigation System in Ancient Roman Law: The Law of Twelve Tables

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Abstract

This study aims to introduce Roman Law as the most ancient legislation, the real reasons behind its legislation, and its regulation of relations in a primitive society. The research also shows the importance of historical studies in legal sciences, mainly studying the history of law, particularly ancient laws. Moreover, the study highlights the significance of studying Roman Law as an indirect historical source of our civil law, as it includes many legal systems and terms inherited by the modern civilisation, which are still in common with the present era's legislation. The paper also explained the declarative and executive litigations system in ancient Roman Law, i.e.the Law of the Twelve Tables issued 450 BC.

Keywords: Roman Law, Legislation, Declarative litigations, Executive litigations, Praetor.

Introduction:

Roman law is a unique example of historical legal studies. In this discipline, the researcher understands how legal systems are born, how they develop, and how they perish, affected by the various political, social, and economic factors and conditions that permeated a state that has lived for more than eleven centuries. It becomes clear to them that the law is not static. It emerges, develops, and adjusts according to the conditions of society. This emergence and change is the result of the development of society, not by chance or accidental drift from the legislator. Hence, studying Roman law is necessary to understand the present Iraqi law with its substantive and structural rules, identify its connection with modern principles, and determine its impact on the formation of our current law.

Recent historical research has shown the social similarity between different peoples throughout their life stages in all political, social and economic aspects at the times of their formation and phases of development, in addition to the means they took to solve their problems and control their social relations. It has also displayed the extent of convergence and similarity in the development of their laws and legal traditions. Therefore, the claim that studying Roman law is useless on the pretext that it was futile to study dead laws is no longer consistent with correct scientific thinking, which demands that it is not enough to verify the existence of the already applied legal rules; rather, their historical origins must be searched.

The significance of the study:

The study of the history of law has gained increasing importance, especially after the emergence of the jurist Savigny's historical school. It has been evident that studying the history of law is of great importance to know the historical origins of legal systems and their substantive and structural rules to understand these laws and work to develop them.

The Study Problem:

Legal studies are limited to the study of laws currently in force without paying attention to the ancient legislative systems arguing that they are dead laws and that it is futile to study them. This contradicts the actual reality, which requires an understanding of the Latin Legislation (Roman Law) and influences the present Iraqi law in one way or another.

Research Methodology:

The researchers adopted the analytical approach by reviewing, analysing, examining, and reformulating the historical texts and then abstracting advanced ideas in the light of the present reality. The study consists of

an introduction and a prelude to the definition of ancient Roman Law and the importance of its analysis for students of Law. The research has been divided into two parts.

The first part deals with the system of declaratory litigations, which has been divided into three sub-sections. Each sub-section dealt with declarative litigation, i.e. oath or bet litigation, judge appointment litigation, and declaration claim. The second part of the study dealt with executive litigations; it was divided into two sub-sections. The first dealt with expropriation action and the second with mortgage action. Finally, the research ends with a conclusion, main recommendations, findings, and references.

Prelude: The definition of Roman Law

The Law of the Twelve Tables is The oldest Roman legislation issued in 450 BC. This law shows us the legal situation at the time of Roman Law, which is the stage of the emergence of this law. Roman historians record that this law was enacted because of the demand of the common people, that oppressed class, to end the monopoly of knowledge of the law by the noble class, who enjoyed all the privileges and positions in the Roman state. The main goal behind it is to legislate traditional legal laws and declare the law to the people. The legislation of this law was enacted to organise relationships in a primitive society whose economy is founded upon agriculture and whose affairs are controlled by a minority of the noble class.

The study of Roman Law deals with the illustration of the regulations of legal systems prevalent in Roman society from the establishment of Rome in 754 B.C. to the death of Emperor Justinian in 565 A.D. it is not limited to studying the Roman legal systems and principles in its final form or in a particular era. It rather examines the illustration of the regulations of these systems in different eras and stages of Roman society to show us how these systems emerged, grew and developed and what was their last destiny, whether they survived or perished.

Ancient historians argued that the enactment of the Law of the Twelve Tables came as a result of the revolution of the common people's class and their demand for equality with the noble class. The rules were ambiguous and religious men monopolised the knowledge of these rules and interpreted them for the noble class's interest, which prompted the public to demand the writing down of custom rules so that the rules were applied to them too.

Roman Law is in force only in Scotland and Southern Africa, but it is taught in world universities, including American and Japanese universities. Moreover, no scientist of our time denies the benefit of studying the procedures and systems of Roman Law for jurists. Discussing the significance of this study and making it the opening part of the research does not mean that it needs an explanation or defence. The reason is that some students and legal practitioners do not understand the value of historical studies and are only interested in studying the man-made laws in force. They neglect to examine and firmly establish the legal rule and search for its historical origin in terms of time, place, and the political, social, and economic conditions accompanying its legislation. This is a real defect in understanding legal rules - rather legal systems in general- which requires us to pay attention to historical studies in general and the history of law in particular.

And the conclusion one can come up with is that the Roman Law at this stage was a primitive and customary law that corresponded to the situation in which Roman society was at that point in history. It was a law that carried the features of nomadism, cruelty and formalism and was formulated in a brief poetic style far from the accuracy and clarity of the scientific method.

The Significance of Studying Roman Law:

The study of Roman Law is necessary for some aspects to trace the foundations of the structural rules and part of the substantive rules of Arab civil legislation. The study of Roman Law is also a means to build the legal mindset of law students at the beginning of their study. It is one of the man-made legislation that has reached us, representing a pattern of human civilisation and an indicator of the development of the human mind and its interaction with time, place, political, social and economic conditions and values within the framework of civilisational advancement. It is also considered the historical source of many European laws, especially the French civil law, which no one denies the influence of Arab civil laws on it to varying extents. Therefore, studying Roman Law is necessary to understand Iraqi law and Arab legislation that adopts the Latin legislation in the current era.

Hence, the issue requires us not to be satisfied with merely familiarising ourselves with the Roman rules and their historical development and find out the impact of these rules on modern laws to search for their connection with modern principles and to stand on the impact they had on the formation of our current law.
Therefore, some thought that their study of Roman Law had become useless on the pretext of the futility of studying dead laws. Such an opinion is inconsistent with proper scientific thinking, which requires that it is not enough to verify the existence of the legal rules in force. Instead, searching for their historical origins is necessary, as it is challenging to comprehend man-made laws without referring to their historical sources. The Roman jurist Cicero was right to suggest, "To be ignorant of what occurred before you were born is to remain always a child."

Such an argument requires students and practitioners of law to trace the sources of the legal rule in terms of time and place and to know the circumstances in which the legal rule was initiated and the political, social and economic nature of that society. Studying the history of law has evident importance in building legal culture, as this study develops the legal ability of the law student because limiting law students to studying the existing provisions of the prevailing law devoid from its historical origins will make them practitioners stripped of all practical experience, and have no knowledge in law except for daily affairs.

Any legislation established by natural social factors is sound legislation and capable of survival. In contrast, the legislation created by man-made factors or the legislator's desires is corrupt legislation whose destiny is to perish. Hence, The study of Roman Law is necessary when we accept that the study of law should not be limited to the study of current systems and the training of jurists capable of interpreting existing texts. Rather, it should aim to train men able to judge the validity of specific legislation. They distinguish at one glance between its sound parts and corrupt elements and estimate the extent of a legislation's ability to survive and its ability for repealability and modification.

Declaratory Litigations

The first three Tables of the Law of the Twelve Tables issued in 450 BC included a system of litigation that did not abandon formalism, which failure to observe resulted in the loss of truth. Declarative litigations are intended to be the recognition of truth by the judiciary and its acknowledgement by the opponent. And the declarative litigations of the Law of Tables are the litigation of oaths, the litigation of requesting the appointment of a judge; then the litigation of the judicial declaration was added to them. To comprehensively understand the points in this chapter, the researchers examined each litigation in a separate sub-section.

Oaths Litigations

The use of force was left only for a while, as opponents continued to resort to force, which was closer to the people's desire in those stages of civilisation. However, when the public authority gained power and was able to intervene to establish order in society, it worked to prevent individuals from using force in resolving their litigations to preserve the stability and security of society. Therefore, it imposed on litigants to choose a judge to whom they would present the case. If they did not agree on a judge, the General Assembly would choose one for them. This was the mandatory arbitration stage, which still had traces of resorting to force.

The litigation of oath and bet is public litigation filed, whether to claim a real right, such as ownership, or to claim a right of a person, an obligation arising from a contract, or a crime such as a debt, a fine or a family right, such as the claim of a son who is under the guardianship of others. It was called the litigation of oath and bet because both parties used to swear in the past on the validity of their claim by a religious oath. Then, it was replaced by a sum of money, which each of the disputing parties pledged to pay to the public treasury if he lost the case.

Its procedures are summarised in that when there was a dispute over the ownership of a slave, for example, and the case was a bet in kind, both parties presented themselves before the Praetor, accompanied by witnesses and the disputed slave. Each of them would claim that the slave is owned by him and confirms this by touching the slave with his stick. There would be no plaintiff or defendant. The procedures of this litigation remind us of the primitive man's resort to force to obtain the rights they claimed.
After that, a short dialogue occurs between the two parties, each agreeing to demand the disputed thing properly. As a result, the judge orders them to leave the item in dispute to make them feel the power of the state and its role through its intervention in preventing conflict resolution through the use of force. Then one of the two opponents addresses the other, saying, "As long as you claim the slave without due right, then I

bet you an amount; the other one replies, “So do I.” The Praetor decides who of the two opponents has the right to the ownership of the slave during the hearing of the dispute, and guarantors should be responsible for him.

The two parties choose the judge to whom the case is referred or appoint the judge. This is done in official terms and special signs, which each litigant must perform in full. If a litigant makes a mistake, his claim is void, even if the truth is on his side. All these procedures are concluded with the attendance witness that they have been completed legitimately so that no opponent would retrieve the litigation. The last procedure is called a certificate of litigation.

Litigation for the appointment of a judge or an arbitrator (*Nomination*):

According to the jurist Gaius, it is specific litigation limited to the conditions specified by law and includes disputes over the presence of rights. In this case, the Praetor chooses the judge to rule on the principle of right. Cases that fall under this litigation include debts arising from an oral stipulation and disputes about the limits of the right, not its existence, such as the case of dividing inheritances and common funds. In this case, the plaintiff resorts to the Praetor to determine a resolution for the limits of the disputed right. This litigation, however, does not include a bet, as the loser is not subject to pay any penalty to the state treasury, and its purpose is to request the appointment of a judge or an arbitrator at the request of the plaintiff and after the defendant’s denial, to settle the dispute.

Declarative Litigation:

This litigation is not mentioned in the Law of Tables but in the Law of Celia in 250 B.C. It is filed to demand a certain sum of money. It is similar to the previous litigation in that there is no bet, but it differs in that the judge is not appointed immediately but after thirty days of the defendant’s denial. Both parties must appear before the Praetor to nominate a judge to settle the dispute after the aforementioned period has passed. Its procedures begin by asking the defendant about his debt to the creditor. If he denies the debt, he is advised to appear before the Praetor at the time specified above to choose a judge.

Executive Litigations:

Executive litigation enables the right holder to obtain his right after the debtor has officially recognised it or proved it. Execution usually takes place on the person of the debtor under the procedures of a case of seizure of possession or a suit for taking debtor as a hostage, which is filed by the person who obtained a judgment against his opponent with the intention of execution. It aims to enable the person in whose favour a decision has been issued or who has an executive document in hand to execute against the debtor’s body or property. The Law of the Tables laid down two litigations of this type, namely, the litigation of laying hands and the litigation of taking a hostage. For a full understanding of these two litigations, this section has been divided into two sub-sections; the first subsection dealt with the ligitation of laying a hand and the second with taking a hostage.

Litigation of laying a hand

Obligation theory went through a long development through Roman law. In ancient law, the obligation was an authority given to the creditor over the debtor’s body rather than his money. This authority is similar to the authority of the owner of the real right over the disputed thing. Under this authority, the creditor had the right to imprison the debtor, kill him, chain him, and enslave him if he did not pay the debt within sixty days. If there were several creditors, they had the right to cut his body into pieces or sell him outside Rome as a slave.

Hence, the relationship between the creditor and the debtor was material, focused on the debtor’s body rather than his financial liability. The content of this lawsuit was that Roman law allowed a creditor who had a sentence against the debtor to pay a certain amount of money, or if the debtor had admitted his debt before the Praetor, to arrest that debtor and keep him in his house (the creditor’s house) in chains. If sixty days had passed since his detention and no one had come forward to pay his debt, the creditor may sell him as a slave outside Rome or kill him.

He could also keep him to benefit from his work, and the debtor was not allowed to object, even if he gave this right to a non-debtor, such as one of his relatives. If the latter claims that the laying hand took place

without a legal basis, the execution procedures shall be suspended. However, If it were found that the intervening party is not right in his request, he would face the procedure of laying a hand twice the amount of the original debtor.

This system is a prominent example of the principle of force, which man in ancient societies was committed to. Ancient laws, except the Islamic Sharia, allowed the creditor to seize the debtor if the latter was unable or refused to pay his debt. This system was followed by the Romans in the era of the Law of the Twelve Tables. Moreover, this executive case clearly highlights the traces of the creditor's intervention to take his right and get revenge on the debtor. The legislator tried in the Law of the Tables to mitigate the creditor's burden on the debtor through the principle that the law ordered the creditor who holds his debtor to expose him in the public markets three times, perhaps one of his relatives or friends come forward to pay his debt.

This method, though it is called litigation, it is not more than the creditor's utterance of some debts borrowed for a religious reason, such as a seller who did not pay the full price of an animal that he sold to another buyer to present it to the gods, and he decided that the soldiers use this litigation to collect their salaries and feed their horses. If he did that, he could, under the Law of the Twelve Tables and without a court order, take over the debtor's money and take that money as a hostage until the debt is paid. However, the ownership of the money is not transferred to the creditor, and he has no right to dispose of it.

This method, usually used outside the Judicial Council, is one of the results of the individual judiciary in Roman law though the Council organised and limited its use. Thus, the debtor was granted, in the initial era of the empire, the right to avoid imprisonment by giving up his money to the creditor and was considered free during his imprisonment after being considered a slave. Eventually, private custody was abolished in 388 AD, which ruled out the execution system on the debtor's body and replaced it with the execution on his money as in the current era. The obligation became a legal relationship - after it was a physical restriction - to which the debtor is committed with his liability, not his body and freedom. This is a crucial change in Roman Law towards respecting a man's humanity by putting the execution on their financial liability rather than his body and freedom. It is also a change in the relationship between the creditor and debtor to a legal relationship after it was a material restriction on the debtor.

Conclusion

Findings and Recommendations

Findings

The study has arrived at a set of findings, including that the Law of Tables, issued in 450 B.C., carries traces of nomadism, cruelty, and formalism. However, the Romans' genius made it one of the greatest laws established by man to organise their social relations. The research also showed the importance of historical studies of legal systems and rules to understand the causes behind laws and the factors of their development and extinction over time, which would benefit legislators in set legislation that meets the requirements and needs of society and survives for a long time. The transition of Roman society from an agricultural to a commercial society greatly impacted the development of law to accommodate the new relations, even though a small group of the noble class, the heads of families, controlled society's affairs.

Since Roman Law is the historical source from which most modern legislations were derived, including the current Iraqi law, the importance of studying this law arises to build students of law's legal education and their legal ability to identify the historical roots of legal rules.

The study revealed the influence of Greek philosophy in the legal debate on Roman law. Moreover, the research proved the invalidity of the opinion that it is futile to study dead laws as this opinion is inconsistent with proper scientific thinking. Roman law has directly affected Iraqi civil law, especially the litigation of taking a hostage, which was referred to in Article 280 of the Iraqi Civil Code.

Further, the paper clarified the nature of declarative litigation, which is intended to establish rights through judiciary and opponent's acknowledgement. It also examined the executive litigations filed by those who obtained a judgment against their opponent with the intention of execution. The study also found that declarative litigations included within the substantive litigations were not mentioned in the Law of the Twelve Tables but in the Celia Law in 250 B.C.

Recommendations:

Among the most important recommendations arrived at through the research are:

1. The importance of studying ancient laws because most modern laws were born out of the development of the ones that preceded them. Legislators should study ancient laws, especially Latin ones, which are considered an indirect historical source for our modern laws.
2. The positive legislator must consider the importance of political, social, and economic factors when developing the legislation because it results from these factors and their interaction, rather than the legislator's desire.
3. The importance of the role of political, social and economic relations between peoples and nations contributes to the development of legislation at the internal and external levels. This was proved by the Roman state's openness to different peoples and nations, which contributed to the development of Roman Law and the transformation of the state's economy from agriculture to trade.
4. Interest in studying Roman Law as a means to build the legal mindset of law students at the beginning of their study as it is one of the legislations that reached us as a model of human civilisation.

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