Fortuna versus Justitia – Preliminaries to a Genealogy of European Private Law

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Abstract: This article intends to lay the ground for a genealogy of European private law, in the sense that its purpose is not to follow a mere chronological development of legal rules, notions or institutions, but to organize certain practices employed in the European culture for settling private disputes under the conflicting symbolic patronage of two mythological figures: the Greek goddesses Tyche and Themis, or their Roman equivalent, Fortuna and Justitia. It is a genealogy insofar as it follows the traits of certain practices, such as vindicta, donum, lex talionis, iudicium Dei, trial by ordeal or the duel in a lineal descent from a similar mythological ancestor, Fortuna. Although some of these practices were also employed within a certain historical legal framework, enforced by the political authorities through legislation and judiciary courts, and, as such, appearing to be under the patronage of Justitia, they remained fundamentally irreducible to the spirit of justice, which has its roots in ancient Greek philosophical thought and Roman law and which can be expressed through the latin phrase “suum cuique tribuere”. From this genealogical perspective on European private law, Christianity played an ambiguous part: although it contributed to the development of the private law, with regard to both substantial and procedural rules, it also introduced certain asymmetries in the administration of justice, such as forgiveness, or it fully supported certain practices which belong to the realm of Fortuna, such as the inquisition, trial by ordeal or the witch hunt.

Keywords: *European private law, Roman law, genealogy, vindicta, duel.*

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1. Chronology, diachrony, genealogy

The attempt to propose an outline for a genealogy of European private law should start with a series of terminological clarifications which should justify the preference for this particular type of approach to the detriment of other related types of analysis of the past.

An esteemed topic of research in the field of law-related studies is the history of law, either on specific segments, temporal or geographical, such as Roman law in the Classical period or the history of French public law, or on specific branches of law, such as the history of private, criminal or public law. Employing such a historical perspective, the subject of knowledge, regardless of the specific divisions or fundamental criteria his epistemological field is articulated upon, follows a chronology in the most neutral possible way, in order to reveal the most comprehensible image of the object of knowledge. The chronology is the fundamental guiding axis or the underlying matrix in the historical endeavor, since it is the one which both guarantees a specific succession and is in charge with the proper arrangement of events in their order of occurrence in time. As long as its main concern is to produce the most accurate determination of certain temporal arrays of past events, the most vulnerable and delicate issue chronology has to deal with is to synchronize specific events, making it possible for the present day subject of knowledge to relate the event to its specific time frame and also to relate it to other events belonging in the same time frame.

A diachrony is one of the two fundamentally opposed perspectives in linguistic analysis, alongside synchrony. If the latter is focused on the horizontal network of the relations between specific elements within a specific time frame, the first is concerned with the vertical evolution of the entire network in time. If the synchrony is preoccupied with a static image of the field of investigation, where history bears no importance, the diachrony is concerned with the dynamics of an element or of the field itself. The terms were originally used by the Swiss linguist Ferdinand de Saussure, who introduced the structuralist method, by focusing the analysis of language on the static, synchronic relations between words understood as signs. Reading the language as a map, the sign is understood as confluence point and its meaning as deriving neither from the reference of the sign in the real world, nor from its history, which would require a diachronic analysis, but from those static relations between signs themselves (Saussure, 2011, pp. 100-109).

A genealogy is a specific historical endeavor which narrows its scope of research on the history of families, tracing and following their descent and lineage in the past. The purpose of a genealogical research is to gather information about a family in order to compile the entire web of social relations which constitutes the kinship. This specific science, with its particular scope, was employed in philosophical investigations as well, Friedrich Nietzsche and Michel Foucault being the most famous authors who borrowed or incorporated in their philosophical projects the term itself or specific genealogical elements, which caused a dilution of the strict meaning of the term as a particular type of research.

As a philosophical pursuit, Nietzsche used the term in *On the Genealogy of Morals* as a critical method which presupposed a philosophical interpretation of history in order to illuminate a contemporary state of affairs, not through mere reflection upon past events, but through a particular interrogation on the conditions and power-relations that made it possible for a specific trait of the contemporary world to persist and impose itself in the detriment of other possible ones (Nietzsche, 2016). Foucault uses the genealogical method in a somewhat similar manner, as a critical tool for analyzing discourses and social institutions, and this particular approach proved to be decisive for understanding the conditions and the ways in which the modern man was constructed, as well as the construction of Modernity itself, with its modern subjects. Proceeding in a similar mode as Nietzsche and holding a similar Nietzschean assumption regarding the constructive dimension of power-relations, he inevitably expanded the notion of genealogy in order to correspond to the amplitude of his philosophical endeavor, which articulated a counter-history of the modern subject and of Modernity itself. The genealogy of Modernity and of the modern subject is not only one of the most important philosophical contributions of Foucault, but also the entire problematic of the human nature which his genealogy entails, after the crisis of the modern metaphysics, especially after the postmodern subversion of the modern subjectivity, is probably one of the most acute Foucauldian philosophical concerns (Foucault, 2005).

In both senses, as a rigorous scientific historical endeavor and as a philosophical perspective without a strict semantic attachment, the genealogy incorporates a chronology and a diachrony – insofar as it relies on a specific succession of events within a time frame and insofar as it is concerned with the evolution of an entire web of relations between events. It is not only a chronology and it cannot be reduced to a diachrony because the purpose of a genealogy is to establish a place for a particular chosen

element in a broader historical and contemporary milieu. Especially as a philosophical pursuit, in the effort of carving a place in the contemporary, legitimized, petrified scenery, a genealogical attempt also implies a suspicious ethical posture, since it is out of an inexplicable fidelity for the one it ought to rehabilitate that it demands responsibility for the future and formulates in undertone a reprimand. It is a matter of an inexplicable fidelity because, unlike Nietzsche and Foucault, it does not rely on a moral evaluation of past and present events, even though what triggers the entire genealogical endeavor is a sort of discomfort with the present. But it is of aesthetical nature, a mere displeasure, since there is nothing to admire here, today. It is, nevertheless, a critical endeavor of the ignorant present and past, demanding an integral reevaluation of both in the name of the chosen, admired object of fidelity. It is also, from the perspective of the one entangled in the genealogical pursuit, a delay, an irrational persistence in the proximity of that which is worthy of wonder.

2. A genealogy of European private law

The genealogy of morals of Nietzsche and the genealogy of specific institutions of Modernity of Foucault are the philosophical projects that shook the foundations of European thought. What would a genealogy of European private law focus on, what would its purpose be and how would it proceed? It would seem that the *telos* of such an attempt is already fulfilled by the two genealogical projects, the one of Nietzsche and the one of Foucault, since law is already situated at the crossroads of the moral and the political; but even for such a modest result as a tapestry out of Nietzschean and Foucauldian threads, a genealogy of European private law should be followed. However, in order to avoid overlaps, it should firstly proceed by defining not the law, the legal, the judiciary, as the conjugation of the moral and the political, which would only lead to Nietzschean and Foucauldian approaches, but of that which European private law means for the contemporary world, as an external, identifiable object with technical articulations and relevance. As such, the term encompasses the two major European legal families, the continental law and the common law, both descending from the Roman law, borrowing Greek philosophical reflexes, incorporating Christian and ecclesiastical ingredients and following the impulses of Modernity. This alchemic set of ingredients is neither homogenous nor endogenous, but the European private law, that which corresponds to the private law of the Western cultural space, could be imagined as an iridescent object whose fissures show simultaneously the

heterogeneous elements and their insertion as an integral part within a whole (Ciucă, 2012).

The scope should get even narrower, since the genealogical range was established to the Western legal families, continental law and common law. Although the European private law is concerned with the relations between individuals, civil law legal systems, like those of French inspiration, hold a stricter definition of what private law means, in contrast to common law legal systems, where the definition is broader, including also the relations between individuals and public entities, or between public entities themselves who subject their interactions to private law. The sense private law has within common law legal systems is the most appropriate one for a genealogical approach on the European private law as a whole, but not for technical legal reasons, which would imply a comparative evaluation of the internal taxonomies on the daunting scale of an entire legal family, but because it is the broader understanding of private law that is focused primarily on the individual, regardless of the counterpart he finds himself interacting with, either another individual or a public authority. Operating a selection as such on the entire range of interactions, the result does not correspond to neither of the meanings of private law in each European legal family: since it is concerned not only with interactions between individuals, but also with those between individuals and public authorities, it is out of the scope of the civil law understanding of private law, and since it excludes the relations between public authorities who submit their interaction to private law, it doesn't match entirely the common law understanding of private law either.

Following Nietzsche, a genealogy of European private law should be rooted in a concerned perspective on the contemporary state of affairs. As I stated before, this concern does not rely on a moral evaluation, but on a mere displeasure after an esthetically oriented glance on the landscape described by the European private law: the innoxious nature, the cardinal care for the vulnerable, the exposed, the disadvantaged, the marginal, the apparently inexplicable fixation on solemnities, form and formalities, the annoying overarching perpetual drive to include a *tertium* in the interactions between parties, or the laborious infinitesimal mechanisms for sanctioning, balancing and eroding all that is irrational, excessive, hazardous, useless or wasteful. To all of these one could turn a blind eye, as it would be the incidental disruptive frame, the rough edges or the marginal, even though strident, flaw of a rather vibrant, captivating picture. Some of these contemporary traits of European private law are already mentioned by the legal doctrine, even if in an insinuating and equivocal manner, but they are

nothing but diagnoses made possible through the use of specific methods: only choosing and following a specific *methodos*, a specific path, certain possibilities reveal themselves and others do not; as such, the diagnosis is valid only within its specific set of possibilities, which, if left aside, appears as one of the many possible interpretations of symptoms or of surface effects of rather subterranean causes or processes that can be speculated upon in various ways. Therefore, a genealogical perspective should constitute itself in a specific *methodos* in order to make visible in its own way that which is not revealed, to identify both the symptoms and the causes of the contemporary state of European private law. It should be concerned indeed with the same disruptive elements, not as incidental, but as part of the premises which allowed for the slide and fade in a passive, harmless public service, which demands almost nothing from those who understand to make use of it, available for everyone as long as the result of the utilitarian projection of a party renders the appeal to a court as economically efficient.

Private law, the law concerned with the individual in its interactions, the law which is probably the most fundamentally European, is both the means of the domestication of the individual and the product of the already domesticated one, both the taming device and the device of the tamed. Turning to the genealogical terminology, the genealogy should explain the fact that the contemporary individual is simultaneously a descendant and an ancestor, both a specific part of a lineage that made him possible and the basis for the perpetuation of the similar. The object of the inexplicable fidelity mentioned before, that of whose absence causes the displeasure, which triggers the esthetical discomfort with the contemporary state of European private law, is that which is missing in contrast to that which was inherited, that which was removed in contrast to that which became dominant. The genealogy of the European private law is the rehabilitation of that which was excluded or absorbed, of that which is lacking from the contemporary picture in order to be worthy of admiration. European private law, the algorithmic, mathematical, surgical *techné*, the peak of Western civilization, has the grace of a well programmed mechanism which corrects its own results: it produces similar items and incorporates in the items themselves the triggers for correcting that which is seen as digression.

3. Tutelary deities: Tyche / Fortuna, Themis / Justitia

Fortuna is the Roman equivalent of the Greek goddess Tyche, the goddess of luck, chance, fortune, fate or providence. She was often depicted in Premodernity, throughout Antiquity and during the Middle Ages, as a

woman, blindfolded at times, holding in her hands *cornucopia* (horn of plenty) and *Rota Fortunae* (wheel of fortune), which she handles after her own whims. Everyone placed on the wheel of fortune suffers through the caprice of her random spinning of *Rota Fortunae*, changing the positions of those on the wheel, bringing prosperity or disaster, great misfortune or abundance.

If in the Classical Greek mythology Tyche is the daughter of Aphrodite, goddess of love and beauty, and Zeus, thunder god and ruler of the Olympian gods, in literature she was given various genealogies, as daughter of Aphrodite and Hermes, the emissary of gods, or considered as one of the Oceanids, the water nymphs daughters of the titan Oceanus or Zeus, and the titan Tethys. Tyche was also related to the goddess of retribution, Nemesis, which would punish those who proved to be arrogant before the gods. Tyche, however, is also a metaphysical term which is related to the field of accidental causes, *symbebekos*, which refers to causes with an unintended effect. Aristotle in *Physica* operates a distinction among these accidental causes which are efficient causes (Aristotle, *Physica*, II, 198a) or *causa efficiens* in their Roman equivalent, between those causes which do not presuppose deliberation, *automaton*, which refers to spontaneity, and causes where there is a certain degree of rational choice, *proairesis*, which refers to *tyche* (Aristotle, *Physica*, II, 197a-198a). Atomists were most fascinated with *tyche* as a causal principle, identifying luck, fate, chance with a sort of blind necessity, *ananke*, which operates without any finality. In the field of causes, Aristotle separates *tyche* from a material *ananke* and places it in an inferior position to *nous* and *physis*, the two causes which act for a purpose, *telos*. (Peters, 2007, pp. 284-285).

The introduction of the cult of Fortuna in Rome was attributed to two of the legendary kings of Rome: the Etruscan Servius Tullius (578 BC-534 BC), the sixth of the seven legendary kings of Rome, who also built the first temple dedicated to the goddess, or Ancus Marcius, the fourth. The day for celebrating Fortuna was the 24th of June, or Midsummer's Day, which would also be the date of the festival of *Fors Fortuna*, the two goddesses who merged into one, *Fors* being correlated to divine blessing and prosperity. At the end of the third century BC, the importance of the cult of *Fortuna Publica Populi Romani* was reflected in the unmatched splendor of the sanctuary of Fortuna Primigenia of Praeneste.

As a goddess, she is said to have claimed the young lives of the prospective heirs to the Roman Empire, the grandsons Gaius and Lucius of Princeps Augustus, appearing as *Atrix Fortuna* (Marguerite Kretschmer, 1927, pp. 267-275). She was also closely related to *virtus*, which implied a set of masculine strengths (*vir* is latin for *man*), such as worth, valor, character,

courage, excellence. Due to this connection between Fortuna and *virtus*, there was a belief in Rome that those public officials who lacked virtues will bring misfortune on both themselves and Rome. There is also a connection between *Fortuna* and *fortis*, which means strong, robust, vigorous and also determined, courageous, brave, dynamic and *fortuito*, *fortuitus*, which means random, accidental (Gheorghe Gutu, p. 267).

Themis was a titaness of the ancient Greek mythology which embodied fairness, the divine order as a natural law, closer to customs rather than the human positive laws. She was depicted as holding the Scales of Justice, which symbolize balance. The etymology of the word can be traced to the greek verb *tithēmi* which means to put, and her name refers to that which is put in place. There is a striking connection that can be made between the meaning of the name of the Greek titaness and the ancient Greek principle of justice, which was later referred to by the phrase 'suum cuique tribuere', meaning 'to each his own', and which was mentioned ad litteram at the beginning of Justinian's *Institutiones: Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere* (Iustiniani Institutiones, 1,1,3-4). The principle was also mentioned in Plato's *Republic*, where he refers to Socrates holding a similar understanding of justice, and was also the underlying principle on which Aristotle built his notion of distributive justice in his *Nicomachean Ethics*.

The equivalent of the Greek Themis in the Roman mythology is Justitia, a deity introduced by the emperor Augustus (63 BC – 14 AD) and whose first temple dedicated to her in Rome was established in 13 BC by the emperor Tiberius (42 BC – 37 AD). She is usually depicted with a blindfold, carrying a sword and the scales.

If there is a striking resemblance between the depictions of Tyche / Fortuna on the one side and Themis / Justitia on the other, is that they were both represented at a certain point with a blindfold. If the blindfold was not used in the Roman representations of Justitia and became dominant only after the 15th century in Europe, the depiction of Fortuna with a blindfold is a rather isolated occurrence. The interpretation for the blindfold of Justice is that she is impartial, that she should intervene without considering the personal traits of the parties and she should only use the objective scale that she holds in order to evaluate the competing claims of the parties. Fortuna, however, was never depicted with scales and when she was wearing a blindfold it was to symbolize not her impartiality or neutrality, but rather her capricious nature, the hazard of chance and fate, and, as such, her blindness not only to her subjects, but to Justice as well. If, however, we are to consider only the blindfold as a symbol of impartiality, of disregard towards

personal characteristics of the subjects, than both deities appear to have a similar vocation for settling private disputes and conflicting claims.

4. Moments in a genealogy of European private law

The genealogy of the conflict between the two goddesses can be followed through five moments:

The first moment belongs to Atrox Fortuna and it is a time where private disputes are settled exclusively under her patronage through practices such as *vindicta*, an universal practice of resolving conflicts through revenge, which consists in killing, by the victim or by a member of his family, the offender or a member of his family, *donum*, an universal practice through which parties can gain control over one another through the rules of giving, accepting and returning a gift, *lex talionis*, a universal practice which follows the principles of symmetry, reciprocity and correspondence, *judicium Dei*, the judgment of God, or trial by ordeals, which consists in subjecting the accused to certain tests that, if he survives, establish his innocence (Codrea, 2015, pp. 105-109).

The second moment refers to the gradual imposition of Justitia to the detriment of Fortuna through the gradual development of Roman law, a time where the intervention of Fortuna is severely limited in Rome and in the territories under Roman domination.

In the third moment, corresponding to the Middle Ages, although Justice gains stability, Fortuna governs certain practices such as trials by ordeals, through combat, fire, water, cross, ingestion, poison, boiling oil, turf, and Christianity also introduces certain asymmetric forms of settling private disputes through the inquisition, witch hunt and forgiveness, which fall under the patronage of Fortuna.

In the fourth moment, spanning from the early modern period to the end of the First World War, Justice dominates the realm of settling private disputes. However, Fortuna manages to escape the overarching dominion of Justitia through duel, which was a modern practice even though it was developed in the 16th, and which lasted as an autonomous alternative to the remedies offered by Justice in the European cultural space even until the end of the Second World War (Nye, 1998, p. 84).

In the fifth moment, all territories ruled by Fortuna fall under the occupation of Justitia, but the spirit of Fortuna is encapsulated in certain legal figures, such as force majeure and *rebus sic stantibus*.

The history of European private law can be understood as a more or less linear development of Justitia through time – from its Greek

philosophical premises and its Roman law foundation, with the Christian contribution and the polishing of Modernity. However, a genealogical endeavor should read that which is missing from the contemporary scenery, the blanks, that which was excluded, removed, ignored or left aside as a sign of a particular angle of writing and reading history: that from the perspective of the dominant, of the one who emerged victorious from a conflict and who shaped a specific historical narrative. The history of European private law is mostly centered on Justice and its internal development, of the apparatus destined to establish *suum cuique tribuere*, of the norms which allowed the progressive transformation of the scales and sword of Justice into an elaborate mechanism which operates with a surgical precision. Contrasted to this historical evolution of Justitia, some practices which were employed to settle private disputes appear as marginal, incidental occurrences. However, those disparate practices can all be connected through a specific feature, which constitutes both the reason for why they were left out of the history of Justitia and the reason for being under the same patronage of Fortuna. If the history of European private law is the history of Justitia, the genealogy of European private law is the history of the confrontation between the two deities, Justitia and Fortuna, with their specific followers, advocates and disciples and with their conflicting, shaping demands upon their devotees.

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