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THE GIOVANNI PUGLIESE LIBRARY AS A GUARANTOR OF THE CIVILIAN TRADITION

One of the great news of the year 2023 for European romanistics has been the appearance of the "Biblioteca Giovanni Pugliese", which is presented as a new series in the framework of the editions promoted by the Department of Jurisprudence of the Roma Tre University; the new series published by the Roma TrE-Press publishing house is co-directed by professors Antonio Carratta, Tommaso dalla Massara, Giuseppe Grisi, Francesco Macario, Maria Rosaria Marella, Giorgio Pino, Giorgio Resta, Vincenzo Zeno Zencovich, Andrea Zoppini.

If the launch of an initiative that promotes the study of Roman law, Civil law, Civil procedure Law and Comparative law should always be a cause for celebration, on this occasion it is even more so, as this project aims to give continuity to the publishing activity carried out for years by the Centro di Eccellenza in Diritto Europeo of the said University.

Since the beginning of the 21st century, this renowned institution has been responsible for promoting research into the romanistics foundations of European law with the aim of laying the bases for a common legal experience through the organisation of doctoral courses, conferences and seminars, the promotion of various research, advanced training and consultancy activities, as well as the development of collaboration between international scientific institutions.

The results of this enormous work have been reflected in the publication of the former collection directed by Professor Letizia Vacca, which also bore the name of the distinguished Romanist Giovanni Pugliese. Since 2008, this collection has published

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almost fifty printed works[1] which, from a multidisciplinary perspective, have highlighted the persistence of the foundations of Roman law in current European legal systems.

This new project arises with the vocation of keeping alive the essence of this old editorial collection, in that it aims to promote the study of Roman law from a European perspective, but also taking advantage of the enormous possibilities offered by the new digital resources, to try to promote greater dissemination of the works published among the scientific community. For this reason, from the outset it has been committed to *open access* publication, combining the new digital format with the traditional print publication method.

Given the remit of this new series, the decision to retain the name of Professor Giovanni Pugliese in its title cannot fail to be commended, since, beyond the well-deserved tribute it represents to one of the most important Romanists of the 20th century, this collection is perfectly aligned, both from the point of view of methodology and with regard to the content of the publications it aims to house, with the predominant contents of the distinguished Italian Romanist's work.

In addition to his multidisciplinary nature – not only did he make numerous contributions on various strictly romanistics subjects, among which his major contributions to the field of Roman procedural law [such as *Actio e diritto subiettivo* (Milan, 1939) or the two volumes of *Il processo formulare* (1947-1962)] stand out, but also published writings of notable relevance in the field of modern civil law (where the volume *Usufrutto, uso, abitazione*, published as part of Filippo Vassalli's Treatise on Civil Law in 1954, is worth mentioning) and, especially in his last stage as a researcher, he showed a great interest in comparative law – Giovanni Pugliese's prolific work would have been characterized by promoting the combination between the use of conceptual constructions and the application of the historical-critical method to better understand the essence of legal phenomena.

In contrast to the dogmatic methodology that prevailed at the beginning of his career, in which attention was paid only to the content of the legal sources, assuming that these were unquestionable axioms, the distinguished Romanist always defended

[1] The complete list of the works published by the Centro di Eccellenza in Diritto Europeo 'Giovanni Pugliese' can be consulted at: <https://centroeccellenza.uniroma3.it/centro-di-eccellenza-in-diritto-europeo-giovanni-pugliese/>.

that law was a historical construction and, as such, could not be understood without taking into account the historical dimension in which it had been created or ignoring its evolution over time. Hence the importance he attached to the study of Roman law in order to understand many of the problems of the modern world. In the face of the increasingly widespread practice of approaching legal research in a supposedly aseptic way, importing methods from the world of natural sciences in an attempt to approach the study of law as if it were a discipline that was little less than mathematical, his legacy is more important today than ever.

And for this reason it is only to be welcomed that the Biblioteca Giovanni Pugliese collection stands as the guarantor of a civilian *tradition* – understood in the Latin sense, that is, as the transmission of knowledge from generation to generation – which allows us to understand that only by taking into account the material reality in which the law is created and applied can we come to understand the true meaning of the solutions that have been applied, are applied or are intended to be applied in the future to resolve certain legal controversies.

In this sense, it is a real success that the new collection has begun with the publication of the monograph '*La divisione giudiziale della comunione non ereditaria. Studio sulla funzione dell'adiudicatio*' by Marta Beghini (Rome, March 2023), because, not only does it deal with a procedural subject of the first order, but it does so following the example of Professor Pugliese, that is, displaying an extraordinary mastery of the conceptual constructions in this field, while applying a historical approach to shed some light on legal issues that are still of great importance today.

The work begins with a brief introduction, by way of a premise, in which the author acknowledges that this work takes as its starting point a pronouncement of the Sezioni Unite della Cassazione which not only affirmed that the sentence of division was constitutive in nature, but that this reality was already established in Roman law (pp. 13-14). On the basis of this affirmation, Marta Beghini has proposed a review of the functioning of the judgments of division of non-heritable common property in the context of the Roman process in the classical period.

Her thesis is presented in five chapters, divided in turn into a series of shorter and more concise sections, in which, in a direct and very well organized manner, various

aspects related to the function of the *adiudicatio* are analysed, understood not only as *pars formulae*, but also in the sense of the pronouncement issued by the *iudex communi dividundo*. The work concludes with a final chapter in which a recapitulation of the whole work is made, pointing out the main conclusions reached as a result of this meticulous research work.

The first chapter (pp. 15-53), which is aimed at delimiting the object of the research, analyses the phenomenon of the dissolution of the common thing through the exercise of the *actio communi dividundo*, which fulfilled a double function: on the one hand, it would have served for the attribution of parts of the common thing among the litigants through the *adiudicatio* and, on the other hand, it would have made it possible to adjust the proportion of the share to be distributed among the parties through the *condemnatio*.

Having clarified its divisive purpose, Marta Beghini begins, from the outset, to show signs of the independence and originality that characterise her research, as she points out that although the *actio communi dividundo* has traditionally been analysed together with the *actio familiae erciscundae*, she nevertheless considers that the marked differences between the two procedural resources, both in relation to the role played by the *iudex* in the divisional process and with respect to the characteristics of the object of the division, justify that they should be treated separately. And it is precisely for this reason that she announces that throughout this work she will focus her attention on the function of the *adiudicatio* in the framework of the *iudicium communi dividundo*.

Once the object of the study has been defined, this first chapter provides a detailed overview of the main doctrinal contributions that have been made on this subject since the end of the 19th century (pp. 30-50). Despite the fact that in this list there is perhaps a lack of any reference to the work of D'Ors or Drosdowski, there is no doubt that the author has made a careful study of the most specialised bibliography on the subject in order to present, in a very clear manner, the different positions held in relation to the divisional regime as a whole, the role of the *adiudicatio* or the supposed constitutive effectiveness in the divisional processes.

The elaboration of this state of affairs allows the reader to discover that there are not only many problems, but also of a very varied nature, in relation to the processes of judicial division substantiated on the basis of the *actio communi dividundo*. For this

reason, in view of the need to narrow down her research even further, Marta Beghini warns that she will focus mainly on clarifying the role played by the *adiudicatio* in order to figure out the effects that judicial division has on the object of the process and the parties involved in it.

With the contours of the work perfectly outlined, in the second chapter of the work, the nature of the *adiudicatio* is analysed. And Marta Beghini does so, true to her style, in a straightforward manner: from the outset, she points out that although it is true that it has traditionally been considered that the pronouncement issued by the judge or arbitrator in divisional proceedings was constitutive in nature – which she demonstrates with an overwhelming exposition of the literature consulted in this respect – it does not seem so clear that, in view of the sources that have been preserved, the function of the *adiudicatio formularia* was exclusively constitutive in nature.

In this respect, she analyses the fragment in Gai 4.42, stressing the identification that Gaius makes of *adiudicatio* as the activity of *adiudicare rem* (pp. 60-63). And it is precisely at this point that one of the central proposals of the work is put forward, since in contrast to the position traditionally held on the basis of Arangio-Ruiz's interpretation, which considered this definition to be a tautological construction, Marta Beghini argues that it is a technical expression with a marked significance in the legal sphere.

This original interpretation of *adiudicare rem* is based on a careful reading of the Gayan fragment. From the author's point of view, this definition would have delineated the function played by the *adiudicatio* in the formal process: while the Gayan passage does make express reference to the *litigatores*, it omits any allusion to the *potestas iudicis*, which seems to indicate that the *iudex* would not have absolute discretion in this type of divisional process, but that his action would be mediated both by the will of the litigants involved in the process and by the characteristics of the *res* object of the division.

Then, in this same chapter, some of the most significant sources are examined in relation to the alleged constitutive nature of the *adiudicatio* (Tit. Ulp. 19.16, Vat. Frag. 47a, Paul., 6 *ad Sab*., D. 10.2.44.1 and Marc., 17 *dig*., D. 41.3.17). The conclusions drawn from the analysis of these sources, carried out with the conciseness and exhaustiveness that characterise the author, allow us to glimpse one of the main conclusions of her research, that is, that the function of the *iudex* in the *iudicium communi dividundo* was delimited both by the will of the parties involved and by the

characteristics of the object of the division.

The third chapter begins by analysing the different meanings of the term *res* in the sources and its possible divisibility. In this sense, a distinction is made between those things that, being divisible, can be divided materially into homogeneous portions or, on the contrary, are subject to intellectual or legal division through the notion of quota (pp. 93-106). After this preliminary explanation, the author then goes through the title *Communi dividundo* in Digesto 10.3 in order to analyse the contours of the communal phenomenon and, above all, to determine in which cases the *actio communi dividundo* could be applied.

As a result of the analysis of different fragments contained in this title (Paul., 6 *ad Sab*., D. 10.3.19 pr.; Ulp., 19 *ad ed*., D. 10.3.4 pr.; Ulp, 19 *ad ed*., D. 10.2.20.4; Paul., 6 *ad Sab*., D. 10.2.44 pr.-8; Paul., 23 *ad ed*., D. 10.3.1-9; Gai, 7 *ad ed. Prov*., D. 10.3.2 pr.; Ulp., 30 *ad Sab*., D. 17.2.31), the author concludes that the concept of communion present in the context of the *iudicium communi dividundo* is derived from the notion of *res communis*, which designates the object of division, but not in a concrete way, but as a unitary category characterised by the fact that it belongs to several subjects.

On the basis of this consideration, Marta Beghini explains that in some cases there could be concurrence between the exercise of the *actio communi dividundo* and other procedural remedies such as the *actio familiae erciscundae* or the *actio pro socio*, leading to situations of overlapping between these actions. However, it does not establish in which cases each of them should be applied. In view of the sources analysed, the author concludes that the classical jurists, who were not interested in general categories, never managed to define when the *actio communi dividundo* should be applied in a taxative manner. Instead, they opted to evaluate the characteristics of the common thing to be divided on a case-by-case basis in order to determine which action should be exercised.

However, she specifies that, in any case, the exercise of the *actio communi dividundo* had to be carried out on things that were contemplated in a singularised manner, as if they were a unitary whole belonging to several subjects. And it is precisely on the basis of this observation that the following two chapters of her presentation are based, in which the author deals with the functioning of the procedures for judicial division according to the characteristics of the thing in common.

Both chapters have the same basic approach, as they start from the analysis of

various fragments of Title 10.3 of the Digest – while the fourth chapter focuses on the processes of material division, the fifth chapter deals with the division by ideal quotas – in order to draw a series of partial conclusions on the functioning of judicial division in classical Roman law.

The first of the conclusions reached in this regard concerns the exclusion of the exercise of the *actio communi dividundo* in cases of possession acquired violently or clandestinely, since only *possessors ex iusta causa* would be entitled to exercise this action (Ulp. 20 *ad ed*., D. 10.3.7.3-4). As Marta Beghini rightly points out, division was only contemplated when it was presumed that possession of a common thing could become *dominium ex iure Quiritum* (pp. 125-129).

Secondly, different forms of division are distinguished according to whether it is a materially divisible thing, such as an estate, which can be adjudicated by fractions (Ulp., 32 *ad ed*., D. 19.1.13.17); a thing which is not materially divisible, such as a slave (Ulp., 19 *ad ed*., D. 3.6.9; Paul., 23 *ad ed*., D. 10.3.8.3; Paul., 6 *ad Sab*., D. 10.3.19.3); or it is not expedient to divide (Ulp. 32 *ad ed*., D. 19.1.13.17), in which case the thing is awarded to one of the parties, who is obliged to pay an *aestimatio* of the respective shares to the remainder; the latter solution can also be applied in cases of things which are almost impossible to divide (Ulp. 2 *ad ed*., D. 10.2.55), although in the latter case it is also admitted that the judge can sell the thing and divide the proceeds between the parties.

Finally, in the fifth chapter, reference is made to several cases of division by ideal shares with provision for several real rights. From the analysis of the sources, the author concludes that in cases where the judge in charge of the division provided for the inclusion of some kind of usufruct (Ulp., 19 *ad ed*., D. 10.3.6.10; Lab., 2 *post. a Iav. epit*., D. 33.2.31) or pledge (Ulp., 19 *ad ed*., D. 10.3.6.8) the integrity of the *res* was respected and, above all, a merely constitutive effect was not produced as a consequence of the divisional pronouncement.

The last of the chapters functions as an epilogue (pp. 171-180), in which the author reconstructs the main arguments discussed throughout this work, in order to focus on the two main conclusions that, in her opinion, can be drawn from the analysis of the fragments of Title 10.3 of the Digest: firstly, that despite the enormous discretion enjoyed by the *iudex* in charge of the divisional process, his function would be delimited

by the will of the parties and the characteristics of the thing, since only by taking both variables into account could he carry out the best possible division; secondly, that the traditional debate between the constitutive or declaratory effectiveness of the judicial pronouncement in divisional processes must be overcome, since the *officium iudicis* operates on a strictly procedural level. The judge does not generate or constitute new legal relations, but intervenes to regulate the legal relations already existing in the context of a process of dissolution of the initial community.

In this way, Marta Beghini closes a work that, in a step-by-step manner, offers an overall perspective on the functioning of divisional trials in the Roman legal experience. Based on a detailed study of the most controversial doctrinal questions on this subject, she sets out an investigation which, thanks to her magnificent mastery of the sources, has enabled her to reach conclusions of great significance not only for modern Roman studies, but also for understanding the effects of the application of the law in our current legal systems.