

## The praetor as a promoter of *bonum commune*

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**Abstract.** – The common good is the reason why political authority exists, the reason why the state exists. This is clearly visible today, and it was also clearly visible to the Romans. The praetor's work represented *par excellence* the actualization of the common good under specific conditions and for particular persons. The praetor was endowed with powers which ensured autonomy of action in Rome, limited only by the one-year-long term of office, or an objection by members of the magistracy. He was to act for the benefit of his fellow citizens as a group, and enhance their relationship with the *civitas* as well as among the citizens themselves. It was only in the latter sphere that he began to play an important role in the protection of private rights. The urban praetor combined all three spheres, which led to the emergence of ways for resolving and settling conflicts, thus improving conditions for the development of individuals within the State, understood as a community of citizens. The claim that the praetor promoted the common good that way – being both predestined and empowered to do so – results from an attempt at identifying the values behind legal solutions. It is not enough to establish what functions were performed by the magistrate and what tools he had at his disposal. It appears that the quintessence of the mission the praetor was entrusted with was promotion of the common good – the way, naturally, it was understood by him and his fellow citizens understood it. The acts of magistrates were praetorian to the extent to which they serve the common good.

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Recently much has been said about the Roman praetor, this time in the context of a broader reflection on the case law of the European Court of Justice. Indeed, as regards the status or form in which the Court arrives at its decisions, some have claimed it is very similar to that of the Roman praetor—the creative, active setting of standards<sup>1</sup>. This new, promising manner of looking to ancient law for functional references emerged in the early years of European integration, the legal order and new judicial authorities. Naturally, this is not the only context in which contemporary European lawyers pay careful attention to the role of the Roman magistrate, particularly in the times of the Roman

<sup>1</sup> Cf. e.g. M. SAFJAN, *Europeizacja prawa prywatnego – ewolucja czy rewolucja. Perspektywa orzecznicza*, in: *'Aurea praxis aurea theoria'*. Księga pamiątkowa T. Erecińskiego II, Warszawa-LexisNexis 2011, 2513-34.

Republic. Whenever the common-law world has taken an interest in Roman law, it has always been fascinated with the praetor who appointed and supervised private judges. He has been perceived as the archetype of jurisdictional activity; a magistrate endowed with great freedom on the one hand, yet on the other, bound by concern for *aequitas*. The praetor is considered to be the precursor of the office of chancellor in England<sup>2</sup>, and an important example of the administration of justice and its enforcement<sup>3</sup>. It is little wonder, therefore, that the figure of the praetor is shown on the bronze doors of the Supreme Court of the United States. The symbolic depiction of legal tradition with reference to the praetor's edict is explained in a rather characteristic way. The praetor is referred to as a magistrate who ensured the enforcement of "judge-made (common) law in Rome, thus establishing for the first time courts and the principle of stare decisis"<sup>4</sup>, which is believed to be the quintessence of the binding force of precedents. The idealization of Roman praetorship, and its numerous reinterpretations, aimed at providing explanations or making comparisons, is rather surprising, considering that Roman law scholars have long held the praetor in high esteem. Emphasizing the significance of civil jurisdiction exercised by the praetor, Theodor Mommsen placed him in the centre of legal development in the times of the Republic<sup>5</sup>. Maxime Lemosse emphasized the dominating role of the praetor as the person who, within the procedure for the protection of private rights, was called upon to lead a real legal debate<sup>6</sup>.

The concept of the common good does not seem to be 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 teaching of the Church, which has been invoked, to a greater or lesser extent, by nearly all political parties over the past twenty years in Poland, including post-Communist ones, in their political programmes. It is therefore not surprising that the category of the common good has become

<sup>2</sup> Cf. e.g. W.W. BUCKLAND, *Praetor and Chancellor*, in *Tulane Law Review* 13, 1939, 163-77; W.W. BUCKLAND and A.D. McNAIR, *Roman Law and Common Law. A Comparison in Outline*, 2nd ed., Cambridge-Cambridge University Press 1952, 4.

<sup>3</sup> T. COREY BRENNAN, *The Praetorship in the Roman Republic I*, Oxford-Oxford University Press 2000, 5.

<sup>4</sup> D. MASON, *The Supreme Court's Bronze Doors*, in *American Bar Association Journal* 63 (10), 1977, 1396.

<sup>5</sup> T. MOMMSEN, *Römisches Staatsrecht II-1*, 2nd ed., Leipzig-Verlag von S. Hirzel 1877, 210ff.

<sup>6</sup> M. LEMOSSE, *Cognitio. Études sur le rôle du juge dans l'institution du procès civil antique*, Paris-Librairie André Lesot 1944, 181 and 191.

the subject of a constitutional consensus; indeed, it can be 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”.

The social teaching of the Church refers to the common good as a universal category. It appears to be intuitively understandable and basic—just like human dignity. It is not, however, only intuition that offers proof of its existence and significance. History shows that the modern concept of the common good is universally intelligible. It would seem that the concept was known to pagan Greek philosophers, as Marek Piechowiak recently pointed out in his excellent book<sup>7</sup>. It is also clear to Poles who read their own Constitution: the fundamental law not so much of a state that is Christian, but one that builds its collective identity based on the Christian tradition<sup>8</sup>. Thus, it is not unreasonable to ask whether the Romans appreciated the value of the common good, and what endeavours were made to pursue the concept. In attempting to answer that question, one can hardly limit the research and be satisfied with mere words<sup>9</sup>. Instead, one should focus on the concepts and their meaning, and above all on the social reality whose efficient regulation was accomplished by the pragmatics of Roman law. And if there is a key word that could guide the search, that word would be *utilitas*<sup>10</sup>. One should, naturally, be fully aware of the difference in the context: that—to restate the obvious—circumstances in Rome differed, particularly with regards to the legal perception of man and his “rights”<sup>11</sup>. Although the jurist Ulpian splendidly proclaimed the equality of all men under natural law, his pronouncement came quite late as far as the history of Rome is concerned—in the third century AD<sup>12</sup>, nor is there any certainty that his conviction was widely shared. The Roman citizen was vested with the “rights of freedom” (*iura libertatis*)-extolled in the period when the Roman Republic became the Principate (Empire), similar to a certain extent, to today’s subjective public rights. Man as such, however, did not have any grounds for making legal

<sup>7</sup> M. PIECHOWIAK, *Dobro wspólne jako fundament polskiego porządku konstytucyjnego*, Warszawa-Trybunał Konstytucyjny Wydawnictwa 2012.

<sup>8</sup> Cf. F. LONGCHAMPS DE BÉRIER, *...wdzięczni naszym przodkom (...) za kulturę zakorzenioną w chrześcijańskim dziedzictwie Narodu i ogólnoludzkich wartościach...*, in *Preambuła Konstytucji Rzeczypospolitej Polskiej*, Warszawa-Trybunał Konstytucyjny Wydawnictwa 2009, 23-31.

<sup>9</sup> PIECHOWIAK, *Dobro* cit. 51.

<sup>10</sup> Cf. Ulp. D. 9.3.1.1; Pomp. D. 19.5.11; Tryph. D. 26.3.10; Ulp. D. 2.15.8.24; Ulp. D. 43.13.1.6; Ulp. D. 4.1.1; Ulp. D. 47.9.1.1; Ulp. D. 4.9.1.1; Ulp. D. 14.4.1 pr.

<sup>11</sup> F. LONGCHAMPS DE BÉRIER, *The Status of a Bearer of Rights within the European Legal Tradition: the Tradition of Rome and Jerusalem – a Case Study*, in *Fundamina* 19 (2), 2013, 352-66.

<sup>12</sup> Ulp. D. 50.17.32.

claims; therefore, in Rome, there was nothing similar to subjective law, in its modern sense, especially since the ancient Roman jurists, who referred to extreme subjective situations such as *status (libertatis)* for freedom and *condicio (servilis)* for slavery, lacked a uniform concept of subject of the law<sup>13</sup>. Only a rich and well-connected *pater familias* could feel relatively safe and secure in Roman society.

The concept of the State was also understood differently in Rome; although, in fact, it was more favourable 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<sup>14</sup>. 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*<sup>15</sup> – 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<sup>16</sup>. 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 multiple meanings 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

<sup>13</sup> W. DAJZAK and T. GIARO and F. LONGCHAMPS DE BÉRIER, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa-Wydawnictwo Prawnicze PWN 2009, 196-7.

<sup>14</sup> Cf. Z. STAWROWSKI, *Dobro wspólne a filozofia polityki*, in *Dobro wspólne. Teoria i praktyka* (eds. W. ARNDT and F. LONGCHAMPS DE BÉRIER and K. SZCZUCKI), Warszawa-Wydawnictwo Sejmowe 2013, 22.

<sup>15</sup> H. KUPISZEWSKI, *Prawo rzymskie a współczesność* (eds. T. GIARO and F. LONGCHAMPS DE BÉRIER), 2nd ed., Kraków-OD.NOWA 2013, 239-66.

<sup>16</sup> F. LONGCHAMPS DE BÉRIER, *L'abuso del diritto nell'esperienza del diritto privato romano*, Torino-Giappichelli Editore 2013, 201.

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 *ius*<sup>17</sup>. 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”<sup>18</sup>. He sat on a raised dais 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 organ entrusted with the function nowadays known as the judiciary was the praetor<sup>19</sup>. Seated on his *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 upholding the law not by an ordinary citizen, but by an official elected for one year and endowed with said authority, was law *par excellence*. Created by officials, and therefore called *ius honorarium*-from *honoros*, meaning “office” and “dignity”-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 enforces 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<sup>20</sup>. A citizen was elected to hold the office of praetor and to administer the law in accordance with his knowledge and experience.

<sup>17</sup> Paul. D. 1.1.11.

<sup>18</sup> 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, 329-34, 347-56.

<sup>19</sup> Cf. e.g. R. MARTINI, *Il problema della ‘causae cognitio’ pretoria*, Milano-Giuffrè Editore 1960; I. BUTI, *Il ‘praetor’ e le formalità introduttive del processo formulare*, Camerino-Jovene Editore 1984, 42-3.

<sup>20</sup> Marcian. D. 1.1.8. Cf. e.g. B. FRESE, *Viva vox iuris civilis*, in *ZSS* 43, 1922, 466-84.

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 common good is the reason why political authority exists”<sup>21</sup>, the reason why the state exists. This is clearly visible today, and it was also clearly visible to the Romans. This is illustrated by one of the best-known passages expressing the thought of classical Roman jurisprudence, as well as that of sixth-century Justinian compilers: “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”<sup>22</sup>. 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”<sup>23</sup>. 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 based on the example of Rome and Roman legal experience.

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“The responsibility for attaining the common good, besides falling to individual persons, belongs also to the State.... The State, in fact, must guarantee the coherency, unity and organization of the civil society of which it is an expression, in order that the common good may be attained with the contribution of every citizen. The individual person, the family or intermediate groups are not able to achieve their full development by themselves for living a truly human life. Hence the necessity of political institutions, the purpose of which is to make available to persons the necessary material, cultural, moral and spiritual goods. The goal of life in society is in fact the historically attainable common good”<sup>24</sup>, not only that which is attainable in the future. When

<sup>21</sup> The Pontifical Council for Justice and Peace (*Iustitia et Pax*), *Compendium of the Social Doctrine of the Church* (April 2<sup>nd</sup>, 2004) [hereinafter referred to as CSDC].

<sup>22</sup> Ulp. D. 1.1.1.2.

<sup>23</sup> CSDC 164.

<sup>24</sup> CSDC 168.

organizing themselves, societies have always looked for conditions enabling the integral development of – as has been aptly put – “everyone, or the majority in each *civitas*”. The historical aspect therefore includes not only the existing possibility which is real and accessible – within the reach of man and society, one that should and can be attained. It also encompasses the past: the history of attaining the common good. It has been attained in various periods and to various degrees. The awareness of its achievement in history also differs. After all, “the demands of the common good are dependent on the social conditions of each historical period and are strictly connected to respect for and the integral promotion of the person and his fundamental rights”<sup>25</sup>. The social teaching of the Church also points out that “these demands concern above all... the organization of the State's powers, a sound juridical system”<sup>26</sup>. Rome offers meaningful examples, even though it perceives, e.g. the soundness of its juridical system in a way that differs from its understanding in the Pandectist system of “contemporary Roman law” in the nineteenth century. Nevertheless, today, we look with admiration at the efficiency and effectiveness of the ancient public authorities of the Roman Empire, which some scholar compare – not without evident fascination – to modern mega-organizations<sup>27</sup>.

In those days, and on that scale, the common good was implemented above all by the magistrates, in particular the praetor, whose task was to harmonize the various particular interests<sup>28</sup>, which he did in the way he understood said interests and which his skills allowed: in accordance with the power he was granted as well as the organization of his year-long, non-recurring office. M. Piechowiak points out that under common law, it was communitarianism that placed the category of common good in the centre; but in that tradition, the common good and human rights are contrasted<sup>29</sup>. In Rome, on the other hand, the perception of the common good appears to be closer to the social teaching of the Church, and not because the category of human rights was unknown in ancient times.

Much has been said above about the office of the praetor. But who was he? How did the post of *magistratus* appear in the Roman public legal order? What was his role with regard to private law? We should perhaps refer to an

<sup>25</sup> CSDC 166.

<sup>26</sup> Ibid.

<sup>27</sup> Cf. e.g. F.G. MAIER, *Megaorganisation in Antiquity: The Roman Empire*, in *Journal of Institutional and Theoretical Economics* 151 (4), 1995, 705-13; A. BÜRGE, *Roman Law and Rome as a Megaorganisation*, in *Journal of Institutional and Theoretical Economics* 151 (4), 1995, 725-33.

<sup>28</sup> Cf. CSDC 169.

<sup>29</sup> PIECHOWIAK, *Dobro* cit. 24, 50.

account by Pomponius, a second-century jurist, who is quoted at length in Justinian's "Digest": "When the consuls were being called away to the wars with neighbouring peoples, and there was no one in the *civitas* empowered to attend to legal business in the city, what was done was that a praetor also was created, called the urban praetor on the grounds that exercised jurisdiction within the city. Some years thereafter that single praetor became insufficient, because a great crowd of foreigners had come into the *civitas* as well, and so another praetor was established, who got the name peregrine praetor, because he mainly exercised jurisdiction as between foreigners (*peregrini*)"<sup>30</sup>. The ancient legal historian probably meant, respectively, the year 367 BC and the establishment of a new order of magistrates in *Leges Liciniae Sextiae*, as well as 242 BC, when the second praetor was established. The *praetor peregrinus* was allowed much more freedom in his activities, and contemporary scholars may well be right in believing that even the *urbanus* began to follow suit at some point<sup>31</sup>. In any case, both officials set an example for others: they fulfilled their mission, or, to use the contemporary expression, their vocation to act for the benefit of others.

In AD 367, the urban praetor was awarded the *imperium minor* and the duty to enforce order in the city. The *custodia urbis* later developed into criminal and civil jurisdiction. The praetor independently settled undisputed civil and criminal cases<sup>32</sup>, unless they were submitted to the popular assembly in exercise of the right, vested in each citizen, to appeal to the people. To lawyers, he is best known for the fact that he settled civil disputes in a suit. He prepared and implemented it, acting without constraint in the first phase of the procedure mentioned above – called *in iure* precisely because of the praetor's presence. He then referred the case for resolution by a judge or tribunal of judges: through judgment, release, or the creation of law. Apart from that, "the praetor could perform *auspicia*, command an army (*imperium militare*); he could also propose a legislative initiative (*ius agendi cum populo* – only in judicial matters and to elect magistrates, *ius agendi cum patribus* – only during the absence of the consul), and furthermore he created law independently by passing edicts"<sup>33</sup>.

<sup>30</sup> Pomp. D. 1.2.2.27-28.

<sup>31</sup> F. SERRAO, *La 'iurisdictio' del pretore peregrino*, Milano-Giuffrè Editore 1954, 18-30; A. GUARINO, *Storia del diritto romano*, 10th ed., Napoli-Editore Jovene 1994, 293.

<sup>32</sup> Cf. e.g. E. LOSKA, *Rola pretora w 'quaestiones perpetuae'*, in *Interes prywatny a interes publiczny w prawie rzymskim* (eds. B. SITEK and C. LÁZARO GUILLAMÓN and K. NAUMOWICZ and K. ZAWORSKA), Olsztyn-Wydział Prawa i Administracji UWM 2012, 95-109.

<sup>33</sup> A. DĘBIŃSKI and J. MISZTAŁ-KONECKA and M. WÓJCIK, *Prawo rzymskie publiczne*, Warszawa-



The establishment of the office of urban praetor did not introduce a qualitative change in the order of Roman magistrates. He gave much support to the consuls as their *collega minor*, but was established for the convenience of the citizens and for their sake. Initially, the political goals of appointing a new magistrate were defined differently – he was first of all expected to act in military and criminal cases. He was endowed with powers which ensured autonomy of action in Rome, limited only by the one-year-long term of office, or an objection by members of the magistracy. He was to act for the benefit of his fellow citizens as a group, and enhance their relationship with the *civitas* as well as among the citizens themselves. It was only in the latter sphere that he began to play an important role in the protection of private rights. The urban praetor combined all three spheres, which led to the emergence of ways for resolving and settling conflicts, thus improving conditions for the development of individuals within the State, understood as a community of citizens. The claim that the praetor promoted the common good that way – being both predestined and empowered to do so – results from an attempt at identifying the values behind legal solutions. It is not enough to establish what functions were performed by the magistrate and what tools he had at his disposal. It appears that the quintessence of the mission the praetor was entrusted with was promotion of the common good – the way, naturally, it was understood by him and his fellow citizens understood it. It could even be argued that the acts of magistrates are praetorian to the extent to which they serve the common good. The third century jurist Paulus quoted above pointed out that it was the expectations made of the praetor that were of primary importance, not the way a particular magistrate fulfilled his obligations towards his fellow citizens as a community, or towards particular individuals. He emphasized that while explaining that the word *ius* was used to refer to praetorian law, as “the praetor is also said to create laws when he judges wrongly, which obviously refers not to what the praetor actually does, but to what he should do”<sup>34</sup>. And those expectations concerned attaining the common good, both by promoting *bonum et aequum*, and by following the principle of *utilitas* in the practical performance of his duties.

To complete the picture, it should be explained that the two magistracies: *praetor urbanus* and *praetor peregrinus*, were not the only praetorian offices in Roman history. Further on in his history of law, Pomponius wrote: “The

LexisNexis 2010, 25. Cf. W. KUNKEL and R. WITTMANN, *Staatsordnung und Staatspraxis der römischen Republik* II, München-Verlag C. H. Beck 1995, 242ff.

<sup>34</sup> Cf. fn. 17.

annexation of Sardinia and soon afterward of Sicily and in due course of Spain and finally of the province of Narbonne brought the creation of as many praetors as there were provinces that had come under Roman rule, some of these praetors presiding over affairs of the city, others over provincial affairs. Then, Cornelius Sulla set up criminal courts (*quaestiones publicae*) dealing, for example, with forgery, with parricide, and with stabbings, and he added four further praetors. Next Gaius Julius Caesar set up two praetors and two aediles to oversee the corn supply, and from the name of the Goddess Ceres these were called the cereal praetors and aediles. Thus, twelve praetors and six aedilships were created. Subsequently, the deified Augustus established sixteen praetors, and then later on the deified Claudius addend two praetors to exercise fideicommissary jurisdiction. One of those posts has since been suppressed by the deified Titus, and reestablished by the deified Nerva to exercise jurisdiction between the imperial treasury and private citizens. Thus, there are eighteen praetors exercising jurisdiction in the *civitas*<sup>35</sup>. That number included the two praetors appointed to begin with, another two appointed in 227 BC, and two more in 197 BC<sup>36</sup>, another two appointed under the reign of Sulla, four more in Caesar's times, and four more again in the reign of Augustus; finally, two more fideicommissary praetors (*praetores fideicommissarii*) were appointed by Claudius.

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In the study of Roman law, much attention has been paid to the activity of the urban praetor with respect to the protection of private rights, embodied in the edict. In the nineteenth century, scholars were fascinated with attempts at reconstructing that legal act which has not, after all, survived to our times. Older forms of the process: that of *legis actiones* and the formulary system, have been studied and described after a textbook was discovered in Verona at the beginning of the nineteenth century, written by Gaius between 141 and 161 BC. Without much exaggeration, it could be said that practically all contemporary discussion of Roman private law is concerned with the activity of the praetor or that which was derived from it.

The people of Rome placed authority (*imperium*) in the hands of the praetor, giving him the power to decide what was the law in a particular case—hence his jurisdiction (*ius dicere*)<sup>37</sup>. Little can be said, however, about his “everyday”

<sup>35</sup> Pomp. D. 1.2.2.32.

<sup>36</sup> Cf. e.g. G. WESENBERG, s.v. *Praetor*, in *Realencyclopädie der Classischen Altertumswissenschaft* XXII-2, Stuttgart-J.B. Metzler 1954, 1587.

<sup>37</sup> Cf. C.A. CANNATA, *Profilo istituzionale del processo civile privato II: Il processo formulare*, Torino-Giappichelli 1983, 7ff; F. WIEACKER, *Römische Rechtsgeschichte. Quellenkunde, Rechtsbildung, Jurisprudenz und Rechtsliteratur* I, München-Verlag C.H. Beck 1988, 429ff.

enforcement of the law. This is due above all to the fact that we know about his activities mainly from the praetorian edict. Secondly, we are aware of the vast freedom he was allowed in acting and using his authority<sup>38</sup>. At times, this was documented, if he permanently adopted interesting, innovative, and above all necessary and useful solutions. That is how the legal regime mentioned above, called *ius honorarium*, was formed. The practice of documentation developed into the *edictum perpetuum*, issued at the beginning and for the duration of the praetor's term of office; it was distinct from *edicta repertina*, issued during the year as needed. Contrary to expectations, the former did not entail any revolutionary changes. It introduced innovative solutions one by one, in the form of new clauses. The other types of edict were issued *ad hoc*: these were the *decreta*, one-time decrees which were acts of the magistracy rather than creating law. The pragmatic aspects of the praetor's work can also be seen in the remedies he employed, now referred to as praetorian means of administrative nature. The protection he offered was provided more by his power than by jurisdiction (*magis imperii quam iurisdictionis*)<sup>39</sup>: he restored to an original state (*in integrum restitutio*), ordered the presentation of someone or something, 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 objections made by parties against the suit (*exceptiones*), editing the texts of developed litigious formulas, or instructions for judges<sup>40</sup>. 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 endeavour gain an idea about his day to day work<sup>41</sup>. The question is to what extent can we succeed.

The praetor's freedom was limited, as has already been said, by the short

<sup>38</sup> Cf. e.g. M. SCARLATA FAZIO, *s.v. Praetor*, in *Novissimo Digesto Italiano XIII*, Torino-UTET 1966, 551; R. MARTINI, '*Causae cognitio*' e *discrezionalità*, in *Studi G. Donatuti II*, Milano-Giuffrè 1973, 695-708.

<sup>39</sup> F. GALLO, *L'officium del pretore nella produzione e applicazione del diritto. Corso di diritto romano*, Torino-Giappichelli 1997, 29.

<sup>40</sup> M. KASER and K. HACKL, *Das römische Zivilprozessrecht*, München-Verlag C.H. Beck 1996, 185ff.

<sup>41</sup> GALLO, *L'officium cit.* 68ff.

term of office which he could not hold again in the following year, and by the possibility of members of the magistracy of equal or higher rank protesting. There was also a number of factors which contributed to making sure that praetor exercised the utmost diligence in promoting the common good. The first was his mature age; in order to be elected, at least from 180 BC onwards, the praetor had to be at least 40 years old<sup>42</sup>. Modern constitutional provisions perceive raising the passive right to vote as an instrument which ensures the stability and prestige of the office, as well as a mature approach to the performance of official duties. Since the times of Sulla, under Roman law it was also necessary to have experience in order to hold an office of lower rank within the Republic<sup>43</sup>. Moreover, having served as a praetor, it was possible to begin thinking about a higher office; thus, the concern for one's reputation while serving as praetor was motivated by the hopes of holding the office of consul in the not too distant future. More importantly, however, that concern encouraged the praetor to perform his duties in a manner most readily approved by his fellow citizens. Such approval could be ensured by paying particular attention to the common good – as understood by the citizens. The Romans had their own idea of consistency, uniformity, and proper organization of their society; they had their own expectations in terms of the availability of material, cultural, moral and spiritual goods which allowed them to lead their lives in accordance with their ambitions and aspirations. For it was on such ambitions and aspirations that the perception of what we now call the common good depended. Taking into consideration the subjective perspective of citizens at a particular point in history, the conditions which promote the integral development of both individuals and society at large vary. In this the common good seems historically relativistic, which does not undermine the reasonableness of the category of the common good itself, or attempt to identify who and how they contribute to its achievement and the ways in which it can be accomplished.

The praetor's significance for the achievement of the common good in Roman society is emphasized by the observations made by Oliver Brupbacher. He begins with three aspects related to praetorship. Firstly, the office was not created on the assumption that it would be a specialized institution for the administration of *iurisdictio*. It was not until later that it became so: instead its independence came with the gradual incorporation and development of

<sup>42</sup> Liv. 40.44.1.

<sup>43</sup> W. KIERDORF, s.v. *Praetor*, in *Brill's Encyclopedia of the Ancient World New Pauly XI*, Leiden and Boston-Brill 2007, 772.

jurisdictional powers. Secondly, it was not the administration of *iurisdictio* that determined the evolution of praetorship in the first place, but rather the military and political needs and demands that arose with the expansion of the Roman Empire. This is due to the fact that, thirdly, each year the number of praetors elected and the scope of tasks they were assigned depended on current needs. This resulted in a structural flexibility that is not generally expected by jurisdictional authorities<sup>44</sup>.

Having presented an overview of the scholarly discussion concerning the office of the Roman praetor, O. Brupbacher then refers to the doubts expressed by Franz Wieacker as to the central role of the praetor in the development and improvement of private law. Fifty years ago, F. Wieacker argued that those who held the office of praetor were not jurists and had no legal education; they were appointed for reasons other than their legal skills, and were supported by assistants who had experience in administration rather than in law<sup>45</sup>. It is therefore inaccurate to present praetors as being influential jurisdictional magistrates. How could such persons effectively develop civil law, which is distinguished by unprecedented and unparalleled specialization and professionalism<sup>46</sup>? Next comes Niklas Luhmann's inspiration thought<sup>47</sup>, and O. Brupbacher turns his attention to the role of the praetor in the structural coupling between the legal order and social life. The *magistratus* enters the realm of private law primarily to exert political control over the use of force, that is, self-help in private relationships. In fact, in order to contain violence<sup>48</sup>, the praetor's authority rather than knowledge was needed. Therefore, it seems reasonable to suggest that the praetor played a central role not in the law and its development, but in the process of linking the Roman law to its natural social environment. Thus, if we accept that the shift in emphasis is correct, and praetorship can be more accurately described as "structural coupling", it becomes clearer that the role of the praetor in fact boils down to that of promoting the common good. O. Brupbacher believes, on the other hand, that the function of the Roman praetor is better described as regulatory. And without such regulation, the history of Roman private law from 300 BC onwards would not have been such an unprecedented and unparalleled history of

<sup>44</sup> O.M. BRUPBACHER, *A King of Judges? An Essay in Reconstruction of Tasks and Functions of the Republican Praetor as Jurisdictional Authority*, in *Ancilla Iuris* 107, 2006, 113.

<sup>45</sup> F. WIEACKER, *Vom römischen Recht. Zehn Versuche*, 2nd ed., Stuttgart-K.F. Koehler 1961, 107-8.

<sup>46</sup> Cf. BRUPBACHER, *A King* cit. 135.

<sup>47</sup> N. LUHMANN, *Das Recht der Gesellschaft*, Frankfurt a. M.-Suhrkamp 1995, 440-2.

<sup>48</sup> DAJZAK, *Prawo* cit. 145.

sophistication and practical application of the legal capacity for making distinctions, a history of development, complexity and success. The central role played by the praetor in creating conditions for such legal development was based precisely on the structural coupling of the legal order with its social environment, above all with politics, and in facilitating the development of legal dogma<sup>49</sup>.

In conclusion, it should again be stated that 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 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”<sup>50</sup>. Praetors corrected existing regulations and created new ones when practising 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 selected, 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

<sup>49</sup> BRUPBACHER, *A King* cit. 150.

<sup>50</sup> DAJCAK, *Prawo* cit. 44.

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”<sup>51</sup> in Roman law was to a large extent the result of the praetors’ promotion of the common good.

<sup>51</sup> W. LITEWSKI, *Podstawowe wartości prawa rzymskiego*, Kraków-Wydawnictwo Uniwersytetu Jagiellońskiego 2001, 18.