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REFLECTIONS ON LEGAL TAXONOMY: THE EXAMPLE OF *IUSIURANDUM*

Abstract

Background: This article presents a study on the relationship between taxonomy, used in law textbooks for easier assimilation, and the legal structure of the institutions, based on the particular case of the so-called necessary oath (*iusiurandum necessarium*) in Roman law, which is presented in sources in a particularly unsystematic and confusing way. The reason for these reflections is determined by the difficulties of understanding the necessary oath that one finds when beginning their studies according to the criteria of doctrinal distinction between the necessary and voluntary oaths.
Research propose: The purpose of this article is to determine the relationship between law and taxonomy, and answer the question whether taxonomy serves the purposes of research and application of law or, on the contrary, it is cultivated by the mere scientific inertia coming from the natural sciences. It is a question of gaining a better understanding of the sensitivity of classical jurisprudence, as well as the order of *Corpus Iuris Civilis*.
Methods: The starting point of the article constitute citing different doctrinal opinions concerning the criteria of distinction between the necessary and voluntary oaths in ancient Rome. They are analyzed in the light of the jurisprudential sources, in order to verify their validity. The method is based on the exegetical analysis of these sources.
Conclusions: The classification of legal knowledge must be based on both social and legal realities reflected in written laws, regardless of whether they are fitted into easier-to-understand categories.

Keywords: taxonomy, necessary oath, Roman law.

1. Introduction

The idea of order seems connatural to human life itself. Needless to say, all civilizations were always organized within a hierarchical structure that seemed to be a social reflection of order; so it was also in Ancient Rome, organized in its

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beginnings in *gentes*, and continuing through until today within different factors such as economic, political and/or military power.

And the same idea of order, as Lèvy-Strauss states, was at the basis of primitive thought and the foundation of organizing ideas and, therefore, of taxonomy itself.[1] Hence, it seems unquestionable that contemporary law participates in taxonomy and that Roman law has naturally done so as well.

Emperor Justinian orders in CI. 1.17.4 that the law of the old jurists should be compiled, but those opinions that can be applied not only to the interpreted case, while leaving others to the marginal manuals of the law, however, since they were not used or accepted by classical jurisprudence.[2]

Justinian's will is expressed in fragments such as D. 33.9.3.9, which discusses the interpretation of the legacy of supplies and, in particular, the goods to be considered included in it;[3] in D. 46.3.80, in the manner of contracts´ fulfillment;[4] or in D. 41.1.7.10, on the definition of *tignum*,[5] which develops the

[1] **H. Lèvy-Strauss**, *La pensèe sauvage*, Paris 1962, pp. 25–30. The author deals with the thinking of tribes, whose social and economic organization focuses on the survival and subsistence of a small group of people.

[2] CI. 1.17.1.4 (*Imperator Justinianus*): *Iubemus igitur vobis antiquorum prudentium, quibus auctoritatem conscribendarum interpretandarumque legum sacratissimi principes praebuerunt, libros ad ius Romanum pertinentes et legere et elimare, ut ex his omnis materia colligatur, nulla secundum quod possibile est neque similitudine neque discordia derelicta, sed ex his hoc colligi, quod unum pro omnibus sufficiat. Quia autem et alii libros ad ius pertinentes scripserunt, quorum scripturae a nullis auctoribus receptae nec usitatae sunt, neque nos eorum volumina nostram inquietare dignamur sanctionem*.

[3] D. 33.9.3.9 (*Ulpianus libro 22 ad Sabinum*): *Ligna et carbones ceteraque, per quae penus conficeretur, an penori legato contineantur, quaeritur. Et Quintus Mucius et Ofilius negaverunt: non magis quam molae, inquiunt, continentur. Idem et tus et ceras contineri negaverunt. Sed Rutilius et Ligna et Carbones, quae non vendendi causa parata sunt, contineri ait. Sextus autem Caecilius etiam tus et cereos in domesticum usum paratos contineri legato scribit.*

[4] D. 46.3.80 (*Pomponius libro quarto ad Quintum Mucium*): *Prout quidque contractum est, ita et solvi debet: ut, cum re contraxerimus, re solvi debet: veluti cum mutuum dedimus, ut retro pecuniae tantundem solvi debeat. Et cum verbis aliquid contraximus, vel re vel verbis obligatio solvi debet, verbis, veluti cum acceptum promissori fit, re, veluti cum solvit quod promisit. Aeque cum emptio vel venditio vel locatio contracta est, quoniam consensu nudo contrahi potest, etiam dissensu contrario dissolvi potest.*

[5] D. 41.1.7.10 (*Gaius libro secundo rerum cottidianarum sive aureorum*): *Cum in suo loco aliquis aliena materia aedificaverit, ipse dominus intellegitur aedificii, quia omne quod inaedificatur solo cedit. Nec tamen ideo is qui materiae dominus fuit desiit eius dominus esse: sed tantisper neque vindicare eam potest neque ad exhibendum de ea agere propter legem duodecim tabularum, qua cavetur, ne quis tignum alienum aedibus suis iunctum eximere cogatur, sed duplum pro eo praestet. Appellatione autem tigni omnes materiae significantur, ex quibus aedificia fiunt. ergo si aliqua ex causa dirutum sit aedificium, poterit materiae dominus nunc eam vindicare et ad exhibendum agere.*

Law of the XII Tables 6.7.[6] It is not by chance, therefore, that Justinian thought of legal manuals, much more methodological, when he ordered to gather the most general, analogical[7] opinions, since these passages are systematic, almost doctrinal:[8] beyond the interpretation of a concrete case, they systematize and lay the foundations for a future taxonomy.

The jurist Gaius systematized the Roman Law, since he simplified it through concepts and classifications (both theoretical), as a method of study for future jurists. In this sense, the future jurists did not need to base their work on the knowledge of divine and human things, what is stated by Ulpian in D. 1.1.10.2.[9] Thus, Gaius gives the definitions of legal sources (G. 1,2–7, the division of *res* (G. 2,1–22), or the division of obligations (G. 3,88–89), to mention some of the best-known examples. For his part, Cicero carried out a project of systematization of Roman Law in a book not preserved: *De iure civili in artem redigendo*, although the jurists of his time were not interested in the project.[10]

On the contrary, the Digest contains legal opinions, which, although organized by the compilers according to the subjects, are far from corresponding to the requirements of taxonomic order and clarity. In this paper I focus on a particular example of the lack of systematization in the Digest, that is, the necessary oath, evident in the sources equating it to the *litis contestatio*, the *confessio* or the *novatio*, among others.[11] The multitude and diversity of these references allows us to maintain that the procedural institution of the oath was not well-ordered in classical Roman law, and that, although in D. 12.2 there is a distinction between the necessary, voluntary, and judicial oath, the same is not clearly outlined in this title (D. 12.2), and even B. Biondi denies the existence of such a distinction after an examination of the title about *iusiurandum necessarium*.[12]

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6 *TIGNUM IUNCTUM AEDIBUS VINEAVE ET CONCAPIT NE SOLVITO.*

7 In our view, the analogy is not only a self-regulatory way of alleviating legal loopholes (**H.J. Wolf**, *Roman Law, an Historical Introduction*, Kansas City 1976, p. 64), but a method of developing the science of law. In Roman law, the analogy was introduced by Labeo, **F. Cuena**, *Derecho y Sistema*, Jueces para la Democracia 1994/22, p. 51.

8 **J. Gaudemet**, *Tentaives de systématisation du droit à Rome*, INDEX 1987/15, p. 79; **B. Biondi**, *Obbieto e metodi della sciencia giuridica*, Scritti Ferrini, Milano 1946, p. 219.

9 D. 1.1.10.2 (*Ulpianus libro secundo regularum*): *Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.*

10 **T. Viehweg**, *Tópica y Jurisprudencia*, Madrid 1986, p. 73; **F. Schulz**, *Principios del Derecho Romano*, Madrid 1990, p. 86.

11 **A. Villanueva Martínez**, *Diversas equiparaciones del juramento necesario en las fuentes*, Revista Internacional de Derecho Romano (RIDROM) 2021/26, pp. 384–418.

12 **B. Biondi**, *Il giuramento decisorio nel processo civile romano*, Roma 1970, pp. 44–45.

The chaos around the oath within the Roman legal order does not, at first sight, respond to the characteristic order of all knowledge, leading to the organization and taxonomy of concepts. Perhaps for this reason the doctrine has focused on determining the criterion of distinction between the necessary and voluntary oath in order to finally unite this institution. However, the different doctrinal views on the criterion of distinguishing the necessary oath have made it difficult for us to study it, since we have considered, from the beginning that they did not respond to legal reasons and that, therefore, they did not help a better understanding of the oath. For this reason, we have also addressed this issue, the subject of this work, which, for our part, is the point of arrival for our investigation, and not the starting point, hoping to reaffirm in the case of the necessary oath the scientific virtue of law, denied by Kirchmann.[13]

2. Criteria of the distinction between the necessary and voluntary oath[14]

As it has already been shown, B. Biondi denied that there was a distinction between the necessary oath and the voluntary oath, and does not attribute a decisive role to the will within the oath: both of the oaths were the result of free agreement between the parties. He does not consider the will the determining factor for distinguishing between the two types of oath, since, in any event, the defendant can return the possibility of swearing.

The criterion of the distinction most followed by the doctrine is based on the provenance of the fragments of the title D. 12.2. *De iureiurando sive voluntario sive necessario sive iudiciali*, which has been held, for the first time, by Demelius in the work that revived the interest in this institution.[15] Thus, the sources of D. 12.2 that come from the title of the Edict of the Praetor *de rebus creditis*[16] refer to the necessary oath, while the sources that come from the title

[13] **J.H. Kirchmann**, *La jurisprudencia no es ciencia*, trans. Antonio Truyol Serra, Madrid, 1961. **F. Wieacker**, *Fundamentos de la formación del sistema en la jurisprudencia romana*, Barcelona 1991, p. 23 defines the requirements of science (completeness, isolation and coherence).

[14] For the history of the doctrine on the necessary oath, see **L. Amirante**, *Il giuramento prestato prima della litis contestatio nelle legis actiones e nelle formulae*, Naples 1954, pp. 1–47.

[15] **G. Demelius**, *Schiedseid und Beweiseid im römischen Civilprozesse*, Leipzig 1887, pp. 26–28.

[16] According to **O. Lenel**, *Essai de reconstitution de l'Édit perpétuel*, I, Paris 1901, p. XXII, this is the Title XVII of the Perpetual Edict. However, **O. Karlowa**, *Römische Rechtsgeschichte*, 2, Lipsiae 1901, p. 597 *et seq*., considers that the necessary oath was limited to the title *si certum petetur*, succeeding to *de rebus creditis*, and therefore restricts its field of application

of the Edict *de iureiurando*[17] imply the agreement of will between the parties and, therefore, they are related to the voluntary oath. Both jurists, L. Debray[18] and V.E. Ioachimovici,[19] followed this theory.

In particular, the latter author considers that the sources coming from the title *si certum petitur* (except for D. 12.2.25 and D. 12.2.39) are expressed in a coercive sense. He understands that the oath is voluntary to the extent that there is an agreement between the parties, and it is necessary when there is no such agreement. He gives an indisputable example of a necessary oath from D. 12.2.34.6, to illustrate the terminology associated with this oath.

> D. 12.2.34.6 (*Ulpianus libro 26 ad edictum*): *Ait praetor:"Eum, a quo iusiurandum petetur, solvere aut iurare cogam": alterum itaque eligat reus, aut solvat aut iuret: si non iurat, solvere cogendus erit a praetore.*

According to this source, the Praetor orders that the defendant, from whom the oath has been asked, must swear or pay, and if he does not swear, he will be forced to pay by the praetor. As this author points out, the verb used is *cogo*, which means "to force, move".[20] At the same time, the terms *solvere* and *reus* limit the offer of the oath by the plaintiff. On the other hand, if it was a voluntary oath, in which the will of the parties intervenes, both parties could offer the oath,

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to the claim of money, without its extension to other due things being as early as Demelius maintains. As we say, the scope of the necessary oath and its criterion of distinction are two different issues, and in this work we will focus on the criterion of distinction between the necessary and the voluntary oath.

17 **O. Lenel**, *Essai…*, p. XXI, places it within Title XIV *De iudiciis*.

18 **L. Debray**, *Contribution à l'étude du serment nécessaire*, Paris 1908, p. 4, who provisionally accepts it as a working hypothesis. However, the coincidences with Demelius begin and end in this working hypothesis: from the effects of the oath, to the scope of application of the necessary oath, Debray departs from the Demelius' theses.

19 **V.E. Ioachimovici**, *Le iusiurandum necessarium a l´époque classique du droit romain*, Paris 1912*,* pp. 15–30. In fact, the author claims that, in order to avoid the situation of either paying or swearing, the defendant is then given the power to refer the oath (D. 12.2.34.7). In this is manifested the necessary character of the oath: for the oath cannot be avoided once it has been offered.

20 **R. De Miguel**, **Marqués de Morante**, *Nuevo diccionario latino-español etimológico*, Leipzig 1867, *s.v.*, *cog,* p. 188.

in accordance with D. 12.2.9.3;[21] D. 12.2.9.6;[22] D. 12.2.13.6;[23] D. 13.5.25.1.[24] Ultimately, for this author, in the necessary oath only the plaintiff can defer the oath, before which the defendant has to swear, pay, or refer the possibility of swearing (D. 12.2.34.7[25]). However, in the case of the voluntary oath, both parties may defer and refer the oath.

This same distinction of the necessary and voluntary oath depending on the edict from which the texts came is shared by A. Münks, who divides the texts of the title D. 12.2 into three groups: first, the commentaries of Julian, Gaius, Paulus and Ulpianus on the Edict *si certum petetur*, and which are the foundation of the *iusiurandum necessarium* (D. 12.2.18; D. 12.2.19; D. 12.2.23; D. 12.2.24; D. 12.2.25; D. 12.2.34; D. 12.2.35; D. 12.2.39); the second group, consisting of the commentaries of these jurists on the *Edictum de iureiurando*, concerning the *iusiurandum voluntarium* (D. 12.2.1-13; D. 12.2.17; D. 12.2.20–22; D. 12.2.26–28; D. 12.2.30); and the last group having no common origin.[26]

C. Bertolini does not share this criterion of distinction, who instead differentiates the extrajudicial oath (e.g., D. 12.2.28.10; D. 44.5.1.2; D. 12.2.5.4)

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[21] D. 12.2.3 (*Ulpianus libro 22 ad edictum*): *pr. Ait praetor: "Si is cum quo agetur condicione delata iuraverit". Eum cum quo agetur accipere debemus ipsum reum. Nec frustra adicitur "condicione delata": nam si reus iuraverit nemine ei iusiurandum deferente, praetor id iusiurandum non tuebitur: sibi enim iuravit: alioquin facillimus quisque ad iusiurandum decurrens nemine sibi deferente iusiurandum oneribus actionum se liberabit.*

[22] D. 12.2.9.6 (*Paulus libro 19 ad edictum*): *Remittit iusiurandum, qui deferente se cum paratus esset adversarius iurare gratiam ei facit contentus voluntate suscepti iurisiurandi. Quod si non suscepit iusiurandum, licet postea parato iurare actor nolit deferre, non videbitur remissum: nam quod susceptum est remitti debet.*

[23] D. 12.2.13.6 (*Ulpianus libro 22 ad edictum*): *Si quis iuraverit in re pecuniaria per genium principis dare se non oportere et peieraverit vel dari sibi oportere, vel intra certum tempus iuraverit se soluturum nec solvit: imperator noster cum patre rescripsit fustibus eum castigandum dimittere et ita ei superdici: propetws my omnue.*

[24] D. 13.5.25.1 (*Papinianus libro octavo quaestionum*): *Si iureiurando delato deberi tibi iuraveris, cum habeas eo nomine actionem, recte de constituta agis. Sed et si non ultro detulero iusiurandum, sed referendi necessitate compulsus id fecero, quia nemo dubitat modestius facere qui referat, quam ut ipse iuret, nulla distinctio adhibetur, tametsi ob tuam facilitatem ac meam verecundiam subsecuta sit referendi necessitas.*

[25] D. 12.2.34.7 (*Ulpianus libro 26 ad edictum*): *Datur autem et alia facultas reo, ut, si malit, referat iusiurandum: et si is qui petet condicione iurisiurandi non utetur, iudicium ei praetor non dabit. Aequissime enim hoc facit, cum non deberet displicere condicio iurisiurandi ei qui detulit: sed nec iusiurandum de calumnia referenti defertur, quia non est ferendus actor, si condicionis quam ipse detulit de calumnia velit sibi iurari.*

[26] **A. Münks**, *Vom Parteieid zur Parteivernehmung in der Geschichte des Zivilprozesses*, Köln 1992, p. 8.

from the judicial oath – referring to the entire judicial debate, and not to the *apud iudicem* phase and, within the latter category, also speaks of the extra oath offered by the judge.[27]

Finally, R. de Castro-Camero does not follow the division between necessary and voluntary oath, but prefers to speak of two different types of them: *iusiurandum non certa pecunia*, which would have its reflection in D. 12.2.3, and D. 12.2.3.1, and *iusiurandum certae pecuniae* (D. 12.2.34.6 and 7). According to the author, the characteristics of *iusiurandum non certae pecuniae* would be: the oath being taken by the defendant as a result of the applicant's offer (D. 12.2.3); its evidentiary and liberating effects, a possibility to be offered in all kinds of action, including injunctions. Moreover, if the oath was not sworn or remitted, it must have been considered as if the litigation had not been submitted under oath (D. 12.2.5.4). In this case, the oath could have been accepted, dispensed with or rejected without any consequences other than the fact that the dispute had not been submitted to the oath. In this type of oath, the oath could not be returned (D. 12.2.17). For its part, *iusiurandum certae pecuniae* is characterized by the fact that the praetor forces the defendant to pay or to swear, and, if the defendant did not swear or pay, the praetor used coercive means, which could have been avoided if the defendant returned the oath. In this case, only the oath could be sworn or returned, otherwise the defendant would be forced to pay. In addition, *iusiurandum certa pecuniae* could only be lent in trials in which a certain amount of money was claimed, since it was not necessary to estimate the amount of the dispute to determine the amount of the disputed thing (*condictio*; and actions with similar structure to *condictio*, in which it is required *poena sponsionis*), and that, in any case, both the *condictio certae pecuniae* and the *actio certae pecuniae* were very old actions that could preserve the oath as archaic institution.[28]

One can agree with this author insofar as her position is more descriptive than analytical. Her considerations are, on the other hand, formal, as is the distinction followed further: if it is included in the title of the edict *de iureiurando*, then it is a *non certa pecunia* oath (called by the other authors a voluntary oath); if, on the contrary, it is included in the title of the edict *si certum petetur*, then it is *iusiurandum certae pecuniae*. Such a system has already been carried out

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[27] **C. Bertolini**, *Il giuramento nel diritto privato romano*, Studia Iuridica 1967/13, Roma, pp. 88–98.

[28] **R. De Castro-Camero**, *Soluciones "in iure" a una controversia patrimonial: transacción, juramento y confesión*, Sevilla 2006, pp. 170–173. The author indicates that she does not consider it appropriate to extend *iusiurandum certa pecunia* to *condictio certae rei* and *iudicium operarum*.

with other names, and the change of nomenclature does not reach any kind of explanatory relevance.

Again, the author's considerations are based on terminological analysis for a while in D. 12.2.3, the praetor says *Si is cum quo agetur condicione delata iuraverit*,[29] with the consequence that the oath thus given will take advantage of any subsequent actions, in D. 12.2.34.6, the praetor's words are distinct (*Eum, a quo iusiurandum petetur, solvere aut iurare cogam*): the praetor not only obliges to take the oath, but the alternative, imposed coercively, that is to pay. Consequently, the author wonders whether one or the other type of oath was taken, and answers are given on the basis of the object of the dispute, that is, whether it is an amount of money or anything else. One understands that such an answer is not correct, just as one cannot accept the distinction between the voluntary and necessary oath in relation to the edictal provenance of the paragraphs of D. 12.2.

The Pandectistics, according to B. Windscheid, has drawn up the decision-taking oath contract, whereby the parties refer the resolution of a dispute to the oath of one of them, so that the voluntary oath must be distinguished (offered in front of the judge) from the necessary oath, which is that offered by the judge himself. As the author rightly points out, in the Roman sources, the oath is compared to the judicial sentence, or to the transaction,[30] which corresponds to the necessary oath (sentence) and the voluntary oath (compromise). Although the sources make the comparison of the necessary oath with the judicial judgment and the transaction among others, in our opinion, these equations do not serve as a basis to establish the characteristics of the necessary oath in front of the volunteer one, but they speak of the complexity of the oath.

3. The content of the oath as a criterion for distinguishing between the different types of oaths

As I have stated, the distinction between the different types of oath must be based on their content. Due to this fact, the sources present in D. 12.2 referring to the content of the oath, that is, to what the parties must have solemnly affirmed, as well as their relevance cannot be overlooked.

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[29] D. 12.2.3 (*Ulpianus libro 22 ad edictum*): pr. *Ait praetor: "Si is cum quo agetur condicione delata iuraverit". Eum cum quo agetur accipere debemus ipsum reum. Nec frustra adicitur "condicione delata": nam si reus iuraverit nemine ei iusiurandum deferente, praetor id iusiurandum non tuebitur: sibi enim iuravit: alioquin facillimus quisque ad iusiurandum decurrens nemine sibi deferente iusiurandum oneribus actionum se liberabit.*

[30] **B. Windscheid**, *Diritto delle Pandette*, v. II, p. II, Torino 1904, pp. 219–220.

There are a plurality of examples of the content of the oath in the Digest that respond to the formula *dare non oportere*, or some equivalent formulas (*dare mihi*/*tibi*/*sibi oportere*). Thus, in D. 12.2.9.1,[31] we can read *dare sibi oportere*; in D. 12.2.9.6,[32] *dare mihi oportere*; in D. 12.2.11.2,[33] *dari mihi oportere*; in D. 12.2.28.10,[34] d*are non oportere*/*dari sibi oportere*; in D. 12.2.29,[35] *dari tibi oportere*/ *tibi dari oportere*; in D. 12.2.30.5,[36] *mihi dare oportere*; in D. 12.2.42.1,[37] *dare non oportere*; in D. 12.6.43,[38] *dare non oportere*. The factual situations of all these texts are very similar, as the oath is given in judgment, always in claims of credit.

While we consider that the content of the oath cannot be ignored from an exegetical point of view, they were the particular factual situations, that is, the texts in which the content of the oath did not correspond to *dare non oportere* or equivalent formulas, which allowed us to specify the scope of the oath. And the

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31 D. 12.2.9.1 (*Ulpianus libro 22 ad edictum*): *Iureiurando dato vel remisso reus quidem adquirit exceptionem sibi aliisque, actor vero actionem adquirit, in qua hoc solum quaeritur, an iuraverit **dari sibi oportere** vel, cum iurare paratus esset, iusiurandum ei remissum sit.*

32 D. 12.2.9.6 (*Ulpianus libro 22 ad edictum*): *Iusiurandum defensoris vel procuratoris ei ab adversario delatum prodesse exceptionemque domino parere Iulianus scribit. Idem ergo dicendum erit et si datus ad petendum procurator reo deferente iuraverit **dari mihi oportere**: nam actionem mihi parit. Quae sententia habet rationem.*

33 D. 12.2.11.2 (*Ulpianus libro 22 ad edictum*): *Item si iuravero usum fructum alicuius rei vel meum esse vel **dari mihi oportere**, eatenus mihi competit actio, quatenus, si vere usum fructum haberem, duraret: quibus vero casibus amitteretur, non competit mihi actio. Sed si rerum, in quibus usus fructus propter abusum constitui non potest, iuraverit usum fructum se habere vel sibi deberi, effectum iurisiurandi sequendum arbitror ideoque tunc quoque videri eum recte iurasse puto et ex eo iureiurando posse petere usum fructum cautione oblata.*

34 D. 12.2.28.10 (*Paulus libro 18 ad edictum*): *Item cum ex hac parte iusiurandum et actionem et exceptionem inducat, si forte reus extra iudicium actore inferente iuraverit se **dare non oportere** et actor reo deferente **dari sibi oportere**, vel contra, posterior causa iurisiurandi potior habebitur: nec tamen praeiudicium periurio alterius fiet, quia non quaeretur, an dare eum oportet, sed an actor iuraverit.*

35 D. 12.2.29 (*Tryphoninus libro sexto disputationum*): *Quod si iuravi te deferente non iurasse te **dare tibi oportere**, et adversus utilem actionem, qua hoc quaeritur, an iuraveris **tibi dari oportere**, opponenda est exceptio iurisiurandi perementis quaestionem actione comprehensam.*

36 D. 12.2.30.5 (*Paulus libro 18 ad edictum*): *Si iuravero usum fructum **mihi dari oportere**, non aliter dari debet, quam si caveam boni viri arbitratu me usurum et finito usu fructu restituturum.*

37 D. 12.2.42.1 (*Pomponius libro 18 epistularum*): *Si fideiussor iuraverit se **dare non oportere**, exceptione iurisiurandi reus promittendi tutus est: atquin si, quasi omnino idem non fideiussisset, iuravit, non debet hoc iusiurandum reo promittendi prodesse.*

38 D. 12.6.43 (*Paulus libro tertio ad Plautium*): *Si quis iurasset se **dare non oportere**, ab omni contentione discedetur atque ita solutam pecuniam repeti posse dicendum est.*

very variety of the content is in itself indicative of its transcendence, because, otherwise, it would always respond to the same formula.

Thus, in the first place, one should consider D. 12.2.30.2, in which an amount of money was claimed by a married woman, from the edict *de iureiurando*,[39] making it a voluntary oath for some part of the doctrine, and in a *iusiurandum certae pecuniae* for R. de Castro-Camero, that is, an oath with decisive effects characteristic of a necessary oath.

> D. 12.2.30.2 (*Paulus libro 18 ad edictum*):
> *Si mulier iuraverit decem dotis sibi deberi, tota ea summa praestanda est: sed si iuravit decem se dedisse in dotem, hoc solum non erit quaerendum, an data sint, sed quasi data sint, quod ex eo reddi oportet praestandum erit.*

According to this text, if a married woman swore *decem dotis sibi deberi*, that she was owed ten as a dowry, she must have been given full of that figure. If, on the other hand, she swears to had given ten in dowry (*decem se dedisse in dotem*), it is only outside the disputed question that that amount was given in the dowry, but it must be returned to her whatever the husband is obliged to.

The legal effects differ depending on the content of the oath, despite the fact that, in both cases, an amount of money is claimed, so that the distinction according to the object of litigation maintained by R. de Castro-Camero does not attend to the legal effects of the oath. On the other hand, the consequence of the oath is the payment of the sworn amount in one case, or of the sworn dowry amount, once *retentiones* are subtracted, in the other. For the reason that in any case the payment of the claim will be made, neither the edictal origin of the fragment determines if the oath is necessary or voluntary: the payment of the amount is derived from the oath, and not from the agreement of will.

In the second place, the source D.12.2.42.1[40] also distinguishes the effects of the oath by reason of its content, which varies.

> (*Pomponius libro 18 epistularum*): *Si fideiussor iuraverit se dare non oportere, exceptione iurisiurandi reus promittendi tutus est: atquin si, quasi omnino idem non fideiussisset, iuravit, non debet hoc iusiurandum reo promittendi prodesse.*

In this case, if the guarantor swears *se dare non oportere*, this oath shall also be taken by the respondent. On the contrary, if he swore that he had not given the bail, then this oath cannot avail the principal debtor. There are two different contents of the oath, and from that different content derive effects for

[39] **O. Lenel**, *Palingenesia Iuris Civilis*, I, Graz 1960, p. 997.
[40] **O. Lenel**, *Palingenesia Iuris Civilis*, II, Graz 1969, p. 57.

third parties, or only *inter partes*: the guarantor may swear *dare non oportere*, which he is not obliged to give, an oath which will avail the principal debtor; or that he did not give a personal bond, in which case the existence of the guarantee contract is denied and has no effect on the main claim.

Finally, in D. 12.2.25, which proceeds from the twenty-sixth book of Ulpian's commentaries to the title *rebus creditis* of the Edict,[41] it also reveals a different content of the oath from the *dare oportere* formula.

> (*Ulpianus libro 26 ad edictum*): *Sed et si servus meus delato vel relato ei iureiurando, iuravit rem domini esse vel ei dari oportere, puto dandam mihi actionem vel pacti exceptionem propter religionem et conventionem.*

According to this text, if the servant took the oath offered or referred to, swearing that the thing belonged to the the owner or must be given to the owner, the owner must be given either an action or an exception according to the religion and convention. It should be noted that there are two contents of the oath: *rem domini esse*, referring to an *actio in rem*; and *ei dare oportere*, relating to an *actio in personam*, and in both cases the effect of taking the oath is identical, as the slave owner will have an action or an exception. For this reason, we must exclude as valid the criterion of distinction of R. De Castro-Camero based on the controversial object.

Even if this text relates to the scope of the necessary oath, since its content refers to a claim for money and a certain thing, again the content of the oath changes, and its effects depend on that change.

As in this text the effects are identical although the content of the oath is *dare non oportere* or *rem domini esse*, one may wonder why or, which is the same thing, and what makes it voluntary. The answer, in addition to the previous sources, is found in D. 25.2.11.1 in the *actio rerum amotarum*, which offers a differential and contrasting factual assumption.[42]

> (*Ulpianus libro 33 ad edictum*): *Qui rerum amotarum instituit actionem si velit magis iusiurandum deferre, cogitur adversarius iurare nihil divortii causa amotum esse, dum prius de calumnia iuret qui iusiurandum defert.*

In this passage, when the husband or wife repudiates the other and subtracted things before the divorce, they can exercise the *actio rerum amotarum*. If the

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41 **O. Lenel**, *Palingenesia*…, I, Graz 1960, p. 341.

42 In logic, it would be an argument *modus tollens*, as opposed to the *modus ponens* offered in the previous passages.

plaintiff wishes to offer the oath, the defendant is obliged to swear *nihil divortii causa amotum esse*, provided that the offeror first takes the oath of slander.

The object of the oath is *nihil divortii causa amotum esse*, which coincides with the *nominatio facti* of the action.[43] On the other hand, according to O. Lenel, the formula of *actio certae creditae pecuniae* has been as follows: *Iudex esto. S. p. N. N. A. A. sestertium decem milia dare oportere, iudex N. N. A. A. sestertium decem milia c., s.n.p.a*.[44] In both cases, the content of the oath coincides with the *intentio* of the *actio in ius*, or with the *nominatio facti* of the *actio rerum amotarum* and, in any event, with the claim of both actions.[45]

L. Amirante,[46] A. D'Ors and E. Valiño[47] distinguish different types of actions derived from the oath depending on their content, although they do not make the distinction between the different oaths according to the same criteria and, for this reason, they do not complete the systematization and reconstruction of the necessary oath in Ancient Rome, although we agree with their assessments.

Therefore, textual evidence indicates that the legal effects of the oath depend on its content, and that it is a necessary oath insofar as that the content coincides either with the *intentio* of the action or with the *nominatio facti* of the action. With this criterion, the oath can be truly decisive in the litigation.

4. Conclusions

Regarding the necessary oath, it has become apparent that the purely formal criteria for the distinction between the necessary and the voluntary oaths did not take into account the legal effects of the oath itself. Thus, this classification of the oath operated outside of the sources, not only in its effects, but also in its own literality, which referred, in many of them, to the content of the necessary oath.

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43 According to **A. Wacke**, *Actio rerum amotarum*, Graz 1963, p. 61, the formula of *actio rerum amotarum* is: *S.P. N.N., quae A.A. nupta erat, rem q.d.a. A.A. divortii causa amovisse eamque amovisse eamque rem AA redditam non esse, iudex quanti ea res est, tantam pecuniam N. N. A.A. s.n.p.a.*

44 **O. Lenel**, *Essai...*, I, p. 273.

45 In this way, we can explain the fact that different oaths produce the same effects in D. 12.2.25, since the *rem domini esse* oath coincides with the *intentio* of the *rei vindicatio*, *vid*., **O. Lenel**, *Essai*…, I, p. 211.

46 **L. Amirante**, *Il giuramento*…, pp. 132–133.

47 **A. D'ors**; **E. Valiño**, *El problema de la «actio ex iure iurando»*, Estudios de derecho romano: homenaje al profesor Don Carlos Sanchez del Rio y Peguero, Zaragoza 1967, pp. 182–183.

A taxonomy of the necessary oath based on its edictal origin, in addition to not clarifying the institution of the necessary oath in Ancient Rome, entails a strong confusion as to its legal discipline. On the contrary, the criterion based on the content of the oath, of which the texts give abundant news, is in keeping with legal discipline and its effects, and is thus able to determine the criterion of distinction between the necessary oath and the voluntary oath from a legal perspective.

Why did the necessary oath escape legal systematization, the creative interpretation of jurists? Because of the evolution of the Roman trade one could not take the oath except for when a *certum* was claimed, and the contractual actions were based on *bona fides* and, consequently, the actions claim for an *incertum* with a *demonstratio* in the formula. Little by little, the *condictio*, ductile and abstract, fell into disuse for its effects of strict law in front of a demanded flexibility from the trade.[48]

Perhaps for this reason the mandate of Justinian to gather the opinions of the jurisprudence that went beyond the scope of the specific case was frustrated by the practical nonapplication of the necessary oath. This lack of presence in the legal life would imply the consequent lack of attention of the compilers, especially when the justice was strongly bureaucratized and the legal regime of the necessary oath was contrary to the structure of the jurisdiction.[49]

Although one understands that taxonomy helps to organize and understand different branches of knowledge, including law, one can dispense with the taxonomy if it is not based on relevant criteria from the point of view of the legal structure. In this last case the object of the study of law is the law itself. The study of law takes as its object the social reality itself, and not the mutable positive legal norms. In this sense, we consider that research in Roman law has the non-derogable virtue of understanding the legal reality.

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[48] **A. Villanueva Martínez**, *Capacidad en el juramento necesario*, Revista jurídica Universidad Autónoma de Madrid 2020/42, pp. 81–104.

[49] **B. Biondi,** *Il giuramento*…, p. 59.

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REFLEKSJE NA TEMAT TAKSONOMII PRAWNICZEJ NA PRZYKŁADZIE *IUSIURANDUM*

Abstrakt

Przedmiot badań: W niniejszym artykule rozważa się relację między taksonomią stosowaną w podręcznikach prawa rzymskiego w celu łatwiejszego przyswojenia materiału a prawną konstrukcją instytucji. Analizie poddany został przykład tzw. rzymskiej przysięgi koniecznej (*iusiurandum necessarium*), która w źródłach przedstawiana jest w sposób szczególnie nieusystematyzowany i niejasny. Asumpt do tych rozważań stanowią trudności w zrozumieniu instytucji przysięgi koniecznej, które napotyka się, rozpoczynając badania w oparciu o doktrynalne kryteria rozróżnienia przysięgi koniecznej i dobrowolnej.
Cel badawczy: Celem niniejszego artykułu jest określenie relacji między prawem a taksonomią oraz odpowiedź na pytanie, czy taksonomia służy badaniom i stosowaniu prawa, czy też przeciwnie: jest praktykowana jako rezultat zwykłej naukowej inercji, wywodzącej się z nauk przyrod-

niczych. Celem jest lepsze zrozumienie subtelności klasycznej jurysprudencji, a także struktury *Corpus Iuris Civilis*.

Metoda badawcza: Punkt wyjścia analiz stanowią opinie doktryny, dotyczące kryterium rozróżnienia między przysięgą konieczną i dobrowolną w prawie rzymskim. Kategorie te są następnie analizowane w oparciu o źródła jurysprudencyjne. W ten sposób ważność proponowanych kryteriów rozróżnienia poddawana jest weryfikacji. Metoda opiera się na egzegetycznej analizie źródeł.

Wyniki: Klasyfikacja wiedzy prawniczej musi wynikać tak z realiów społecznych, jak i prawnych. Nie może mieć na nią wpływu to, czy te ostatnie, odzwierciedlone w prawach spisanych, dają się dopasować do łatwiejszych do zrozumienia kategorii.

Słowa kluczowe: taksonomia, przysięga konieczna, prawo rzymskie.