The Possible Motivation of the *Lex Cincia de donis et muneribus*

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1. Reasons for the difficult classification of donations.

Whereas outside technical legal language the concept of donation is easily intuitive, in the legal sphere it poses innumerable problems to doctrine, even to modern civil law doctrine, which questions whether the donation is an act or a transaction; if, as a legal transaction, it is unilateral or bilateral (contract); if it is a way of acquiring property (art. 609 of spanish C.c.); if it is but a general cause of various legal acts and relations.

However, classifications difficulties appear even more clearly upon consideration of the institution in Roman Law, and for the following reasons (1):

a) Firstly, because the institution in question is very ancient.

b) Because Gaius' Institutions, respecting Roman tradition, refer to donations only incidentally, jointly with sale and legacies.

c) Furthermore, a « *De donationibus* » chapter is missing in Sabinus' books and in the Perpetual Edict, as seems to be deduced from the respective comments by legal experts. It only begins to emerge in some post-classical collections and laws

(1) Biondi, *Successione testamentaria e donazioni*, 2ª ed. Milano, Giuffrè,, 1955, p. 629 ff.

(Fragmenta Vaticana). As for the placing of donations in the Th.C. and in the Digest, this clarifies nothing for us nor does it correspond to any systematic orientation.

For all this, the institution raises serious problems, as previously stated. In our programme we considered it appropriate to assemble them at the end of the law of succession, since we regard it to be unquestionably related to the family and inheritance.

2. **The lex Cincia de donis et muneribus.**

We can consider donations those (transactions or) assumptions whereby, in a spirit of liberality, a person grants property to another, who grows wealthy gratuitously, that is, without involving a reciprocal service.

In modern Roman law doctrine the *donatio* is considered (in the classical age) not as a typical transaction, but rather as a general cause of various transactions, the *causa donandi* (2).

The *donatio* is not a contract, since no specific action in defense of the donee stems from it. The latter's only recourse lies in the action itself of the transaction to which the *causa donandi* belongs.

The *donatio* may concern tangible property or rights. In the first case, the *causa donandi* will operate through a property transferring transaction (*mancipatio*, *traditio*, etc.). In the second, the free pecuniary allocation (payment or taking charge of another's debt, relinquishment, etc.) may take effect in many different ways.

In the evolution of the Roman law institution one must indicate the *lex Cincia de donis et muneribus* as an extremely important landmark. The title of the *lex*, which in fact was a

(2) ARCHI, *La donazione, Corso di diritto romano*, Milano, Giuffrè, 1960, p. 23 ff. and. bibliogr. cited in it.

plebiscite approved upon proposal of the plebeian tribune *Cincius Alimentus* (as one knows, as from the *lex Hortensia*, of 286 B.C., plebiscites had a general binding force) refers to the tribune which made the proposal and to the contents, as appears in Titus Livius, 34,4, and in Cicero, *de oratore*, 2, 286 (3).

The *lex Cincia* raises the problem of its motivation. Usually, the authors who have studied it (SAVIGNY, RUDORFF, ASCOLI, RADIN, SIBER, DENOYEZ, CASAVOLA, LONGO, ARCHI (in a *corso* about « *la donazione* », 1960 and in Spain professor GARCÍA GARRIDO and SAMPER) (3bis), tend to refer to a motivation of an

(3) Titus Livius, 34,4,9 : *quid legem Cinciam de donis et muneribus (excitavit), nisi quia vectigalis iam et stipendiaria plebs esse senatui coeperat?*.

Cicero, *de oratore*, 2, 286 : *ut M. Cincius quo die legem de donis et muneribus tulit...*

Cicero, *de senectute*, 4: ... *quum quidem ille admodum senex suasor legis Cinciae de donis et muneribus fuit.*

(3bis) PRINGSHEIM, *Animus donandi*, ZSS, 42 (1921) 273 ff.; STOCK, *Zum Begriff der donatio* (Leipzig, 1932) ; ASCOLI, *Trattato delle donazioni* (Milano, 1935) ; STOLFI, *Sul concetto di donazione* (Milano, 1935) ; ASCOLI, *Donazione*, NDI, 5 (1938) 188 ff; FERRARI, *La donazione nei papiri di Ravenna, Studi Riccobono* 1 (Palermo, 1936) 457 ff; BIONDI, *Le donazioni. Corso di dir. rom.* (Milano, 1940) ; DE ROBERTIS, *Il concetto di donazione nel diritto romano, Annali Bari* 2 (1940) 71 ff ; BIONDI, *Il concetto di donazione, Scritti Beatificazione Ferrini* 1 (Milano, 1947) 102 ff; BALBI, *Liberalità e donazione*, Riv. di dir. comm. 46 (1948) 157 ss ; LÉVY, *Essai sur la promesse de donation en droit romain*, RIDA, 3 (1949) 91 ff; PRINGSHEIM, *Liberalitas, Studi Albertario* 1 (Milano, 1952) 659 ff; ARCHI, *Animus donandi, Atti Verona* 3 (Milano, 1953) 111 ss; BIONDI, *Successione testamentaria e donazioni*, 2ª ed. (Milano, 1955), 627 ff; ARCHI, *L'evoluzione della donazione nell'epoca postclassica*, RIDA, 5 (1958) 391 ff; *La donazione. Corso di dir. rom.* (Milano, 1960) ; BIONDI, *Le donazioni* (*Trattato di dir. civ. ital.* sotto la direzione di F. VASSALLI, vol. XII, t. IV) (Torino, 1961) ; TALAMANCA, *Donazione possessoria e donazione traslativa*, BIDR, 64 (1961) 249 ff ; DUPONT, *Les donations dans les constitutions de Constantin*, RIDA, 9 (1962) 291 ff ; ARCHI, *Enciclop. del Diritto*, 13 (1964) 930 ff ; *Problemi testuali : Fideiussio animo donandi, Synteleia Arangio-Ruiz* 2 (Napoli, 1964) 909 ff ; BROISE, *Appunti sull'animus donandi*, BIDR, 67 (1964) 227 ff ; YARON, RIDA, 11 (1964) 288 ff ; MURGA, AHDE, 37 (1967) 276 ff ; BIONDI, *Donazione*, NNDI, 6 (1968) 224 ff. We make no reference to the bibliography on special types of donations, as this goes beyond the

ethical nature: to restrict donations of doubtful purpose or which are unconsidered, to avoid and counteract the overindulgence of acts of liberality, etc.

The purpose of the *lex Cincia de donis et muneribus* could be better understood if brief reference is made:

1rst) to the context in which it was approved;

2nd) to the parts composing the said law.

Let us now consider this second point very briefly: the Cincia law seems to have been composed of two parts:

a) In the first, donations made *ob causam orandam* were forbidden.

b) In the second part of the law, which tends to be considered fundamental to Roman law doctrine, donations were forbidden beyond specific *modus*, except those made to persons exempted from the application of the said prohibition.

In order to better understand the possible motivation of the *lex Cincia*, we shall first place it in the context of the age in which it was approved, namely the end of the IIIrd. century B.C. Thus, that century is of fundamental importance in Rome's history and is characterized by features such as:

theme we are dealing with in this article; nevertheless, on the specific theme of the *lex Cincia*, reference should also be made to: RADIN, *La disparition de la loi Cincia*, RHD, 7 (1928) 248 ff; SIBER, *Confirmatio donationis*, ZSS, 53 (1933) 141 ff; BUSSI, *La donazione nel suo svolgimento storico, Cristianesimo e diritto romano* (Milano, 1935) 177 ff; KRÜGER, *Die unmäßige Schenkung*, ZSS, 60 (1940) 80 ff; ARCHI, *Condictio liberationis e restitutio in integrum nella donazione, Studi Solazzi* (Napoli, 1948) 740 ff; DENOYEZ, *Les donations visées par la loi Cincia*, IURA, 2 (1951) 145 ff; CASAVOLA, *Lex Cincia. Contributo alla storia delle origini della donazione romana* (Napoli, 1960); GARCÍA GARRIDO, *Observaciones sobre el origen y estructura de la donación romana*, AHDE, 30 (1960) 737 ff; MELILLO, *Arnobio e l'ultima vicenda della lex Cincia*, LABEO, 8 (1962) 62 ff; GAUDEMET, *Perseverantia voluntatis, Mél. Meylan* 1 (Lausanne, 1963) 139 ff; LONGO, G., *Lex Cincia de donis et muneribus*, NNDI, 9 (1968) 803 ff; SAMPER, AHDE, 38 (1968) 122 ff.

a) The *nobilitas* becomes predominant. In fact, before the IIIrd. century B.C., it was those of great gentile lineage who held political power and the magistracy, especially those who had *imperium,* as well as the *auspicia*, as the *imperium auspiciumque* formula indicates. But as from the *lex Ogulnia*, of 300 B.C. the plebeians are already allowed access to the major sacerdotal colleges, thus breaking down the great barrier between patricians and plebeians, which was of a religious nature. A new social group starts to assert itself, the *nobilitas*, composed not only of patricians but also of enriched plebeians, who have access to the highest magistracies (4).

b) Merchants and publicans emerge (215 B.C.) as a result of the expansion within the Peninsula and around the Mediterranean (conquest of Sicily, 1st province; Corsica and Sardinia, 2nd province: year 238 B.C.) (5).

c) War breaks out with the other great Mediterranean power, Carthage. The first Punic War ends in 242 B.C. with a « compromise » peace. In the second (218-201) Hannibal is about to conquer Rome on several occasions, but in the end the Roman legions vanquish in *Zama Regia* and Carthage loses all preponderance until it is actually destroyed in the following century, at the time of the third Punic War, if it can thus be termed, given Rome's incredible superiority. Now, in the second war with Carthage, great prestige is achieved by the Roman general Quintus Fabius Maximus, « *Cunctator* », so called because of his strategy not to plan global battles against Hannibal, but, on the contrary, to weaken the Carthaginian forces by means of small and continuous skirmishes. We shall subsequently return

(4) CASSOLA, F., *I gruppi politici romani nel III secolo a.C.*, Edizione anastatica, « L'ERMA » di Bretschneider, Roma, 1968, p. 5 ff; *vid.* ROULAND, *Pouvoir politique et dépendance personnelle dans l'Antiquité romaine*, Bruxelles, 1979.

(5) *Vid.* NACK-WAGNER, Roma, trad. de Juan GODÓ, *Labor*, 1966, p. 84 and ff; FUENTESECA, *Lecciones de historia del Derecho Romano*, Madrid, 1978, p. 133 ff; TORRENT, *Derecho Público Romano y sistema de fuentes*, Oviedo, 1982, p. 330 ff. and bibliography cited by the author.

to this great controversial figure, since this is of interest to our theme.

d) The *nobilitas* to which we have referred was probably in principle a warrior aristocracy and remained as such for a long time (6).

e) A new *ordo* appears, an equestrian order, with an already specific meaning.

f) In the year 268 B.C. apparently the silver standard was introduced and a minting factory was set up next to the temple of Juno Moneta (hence the origin of the Spanish word 'moneda') (7).

We shall now refer to the figure of Quintus Fabius Maximus, the Temporizer.

He was five times Consul (the 1rst in 233), twice *dictator*, *censor* (in 230), *princeps senatus*, *pontifex* (8). All this gives us an idea of the political relevance he had. Now, according to some (the doctrine's majority) he was a staunch conservative, an enemy of all progress and of « democrats ». Let us now consider why we do not share this opinion, for the rest common, save rare exceptions. As one knows, at the end of 218 Hannibal had already defeated Publius Cornelius Scipio and Tiberius Sempronius Longus in Ticino and Trebbia and controlled Cisalpine Gaul. Some time later, in Trasimenus, Flaminius fell, fighting in the first line against the great Carthaginian general who wished to pay him military honours in acknowledgement of his valour (9).

Many historians interpreted the advent of Q. Fabius as a reaction of senatorial and conservative circles to Flaminius' « popular strategy », who is considered as a fanatic of the offensive at any price and, therefore, the antipodes to the *Cunctator*.

(6) Cassola, F., *I gruppi politici romani nel III secolo a.C. cit., loc. cit.*
(7) Nack-Wagner, *op. cit.*, p. 163.
(8) Cassola, F., *op. cit.*, p. 259.
(9) Titus Livius, 22, 7.

But perhaps, despite appearances, there was no such antithesis of strategy, but simply different levels of capability and tactical experience ([10]).

But, furthermore, we know that Q. Fabius came into conflict with the Senate, over an agreement with Hannibal concerning the handing-back of prisoners, which consisted in the army from which the most men had been captured, having to pay the other contender a given amount (2 1/2 pounds) for the surplus of returned captives during the exchange.

As the *redemptio ab hostibus*, in the Republican period, was of the Senate's competence, the majority of senators, in disagreement with such an initiative by Fabius Maximus, opposed the freeing of prisoners. The agreement was declared invalid, but Fabius, nevertheless, applied it, paying out of his pocket the ransom for 247 prisoners (Titus Livius, 22, 23, 5-8), demonstrating, thereby, great « *humanitas* » ([11]). Furthermore, the *Cunctator's* poverty was an established fact. His funeral service was spontaneously paid for by private citizens, not by the State. And it is known that the *gens Fabia* was in an inferior position to the one which corresponded to its extremely high social and political rank.

Why this reference to the figure of the *Cunctator*? Well, because Cicero (*Cat. ma.* 10) states that he is the inspirer (*suasor*) of the *lex Cincia de donis et muneribus*.

3. **Motivation of the law.**

The prohibition of « *ob causam orandam* » donations, in the first clause of the law, is the most frequently quoted. As one knows, in Rome the parties before a court were not assisted by jurists, whose activity was rather technical in nature and they

(10) CASSOLA, F., *op. cit.*, p. 293, maintains an opinion contrary to the majority of authors: see by this author, *op. cit.*, *loc cit.*, n. 1 and 2.

(11) CASSOLA, F., *op. cit.*, p. 311.

tended to reject the forum practice. However, others, gifted as orators, were those who acted in the forum, and were denominated *patroni, advocati, oratores.* Their performances and the exercising in general of forum oratory, demanded a knowledge and practical experience unattainable for the great mass of citizens, occupied all day with farming or artisanal jobs. Only the sons of noble families, accustomed since childhood to following public life, in all and each of its aspects (political and of the forum) had the opportunity of reaching the necessary preparation. However, we believe that perhaps the first part of the Cincia law, referring to the prohibition of « *ob causam orandam* » donations, of which we are informed in Tacitus (*Ann.* XI, 5, 2) and by other historians of the Imperial era, is perhaps the most important from a social and political viewpoint. Proof being that it is the most frequently quoted. Despite ARANGIO-RUIZ considering such information to be incredible, since the said clause is only recalled in the writings of the Imperial era, as we mentioned. (ARCHI, on the other hand, upholds the existence of such a part in the law) ([12]).

We consider that the prohibition to compensate lawyers and patrons beyond a certain limit or *modus*, seems to have a multiple purpose:

— To avoid that the nobles obtain considerable earning from their monopoly of the oratorial art.

— To prevent the wealthy litigant from finally prevailing, by securing a more skilled defense counsel for himself, over the poor contender who had only been able to offer a few gifts.

— The law was to oppose the attempt to corrupt magistrates and judges, forbidding them to obtain donations from those concerned ([13]) (as appears in Modestinus, D. 1, 18, 18 and in Cicero, *de legibus*, III, 4, 11).

(12) ARCHI, *La donazione cit.*, p. 16.

(13) Modest., D. 1, 18, 18: *plebi scito continetur ut ne quis praesidum munus donum caperet nisi esculentum potulentumve, quod intra dies*

In Livy, 34, 4, 9 it states:

> « *quid legem Cinciam de donis et muneribus (scil. excitavit) nisi quia vectigalis iam et stipendiaria plebs esse senatui coeperat* ».

The political and social circumstances which motivated the law in question would have more remote origins, since Livy's paragraph is found in a « *de lege Oppia* » discourse attributed by Livy to Cato the Elder. Thus the opinion of a person such as Cato seems to indicate how the patrons' rapacity vis-à-vis the clients (the relation between defense and defended was similar to that of the *clientela* in the Latin sense) had transformed the traditional donations into a real « tribute » of their own (income, exaction) and the humble were « *vectigales* » of the wealthy. Q. Fabius Maximus and Cincius Alimentus endeavoured to restrain such a state of affairs (14).

The opposition of some nobles (it is these and not the Fabiuses, who represented the conservative aristocracy) to the proposal of the Cincia law, is confirmed by the anecdote narrated by Cicero (from *oratore,* II, 286) about Claudius Centhus, who, the day of the *rogatio,* addressed Cincius and with an obvious tone of scorn said to him: « *quid fers, Cinciole?* », to which the tribune answered, very airily: « that, if you want something, buy it for yourself » (15).

On the other hand, one should not forget that, as we mentioned, the relation between defense and defended was similar to the ancient *clientela.* Thus the term *patronus* is used in connection with the *municipia.* It was frequent for the *municipia* to call upon a Roman senator, or someone of social and political relevance in order to represent them at the trial. Probably to the said person services would be rendered (perhaps in kind: works, etc.) in compensation for such « representation ». Some-

proximos prodigatur; Cicero, *de legibus,* III, 4, 11: *donum ne capiunto neve danto neve petenda neve gerunda neve gesta potestate.*

(14) CASSOLA, *op. cit.,* p. 284 ff; see ROULAND, *op. cit.,* p. 79.

(15) CASSOLA, *op. cit.,* p. 288.

times, some *Tabulae patronatus* appear, engraved in two bronze copies (one for the *municipium* and the other for the *patronus*).

The term *patronus* also appears in relation to the *civitates*; and the provinces: *patronus provinciae* (person who would take charge of the province's representation and its protection in Rome, in the case of abuses by a provincial magistrate). Normally, the *patronus* would be a descendant of the province's conqueror ([16]).

The terms (and the figure) of patronage is therefore generic (*patroni causae*; *patronus liberti*; *patroni collegii*) and appears both in the field of what we consider Public law as well as in Private law.

The theme of patronage has been extensively studied by SERRAO ([17]).

I have dwelt on setting out the socio-economic and political circumstances which, in my view, may be found as the basis or motivation of the *lex Cincia*, which is the norm that brought about the determination of the concept of donation by revealing the *causa donationis*.

As for the second part of the law, it was probably motivated by reasons of family protection, as well as by its position in the *census*. There was, therefore, public interest in avoiding acts of excessive liberality , which could even bring down a family : that of the prodigal donor (we do not use here the term prodigal in the technical sense), to a lower class in the *census*, which, as is known, was a timocratic order, according to assets.

The law would legally resolve such abuses with an energetic veto or prohibition, which, however, was understood by the

(16) On the term *patronus, vid.* BERGER, *Encyclopedic Dictionary of Roman Law*, American philosophical society, Philadelphia, 1953, p. 622 ff.

(17) SERRAO, *Classi, partiti e legge nella repubblica romana*, Pacini, Pisa, 1980; see specially in this book: *Appunti sui « patroni » e sulla legittimazione attiva all'accusa nei processi « repetundarum »*.; *vid.* ROULAND, *Pouvoir politique cit.*, p. 85 f.n. 207 and *passim*.

praetor and by the jurisprudence not as a veto to make or receive donations, but rather as a restraint on their application; in short, as a veto or prohibition for the donee to constrain the donor to implement the donation.