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Responsibility of municipal clerks in Roman law by virtue of improper disposal of public financial resources on the example of corn trade


1. – Introduction

Self-governance has its roots in Ancient times, and for sure, the Roman times. Roman municipalities and colonies are the archetype of contemporary organized self-government structures and they can be the inspirations to solve current problems in this field. Hence, the municipalities and colonies have been the subject of numerous researches, also for the author of this publication[1].

Magistratus in municipalities conducted different legal actions related with spending public financial resources. The development of organization and functioning of municipalities initiated many rules connected with magistratus (clerks) responsibility for improper disposal of public resources. The subject of this work is the analysis of rules for clerks responsibility, in relation to one of the basic assignments of magistratus, i.e. supplying the city, particularly the corn supply.

Rome and other municipalities in distant areas of the empire were food supplied by the authorities of each ancient city, what was their basic obligation. The basic component of food supply system was creating the institutional and legal frameworks. The subject of food supply was not only to deliver corn, mainly wheat, but also oil, water and other foodstuffs, which are not going to be described in this paper because of the volume of work, which is limited by the number of pages.

The organization system of food supply in Rome and in other municipalities was relatively complicated and it was constantly modified according to political systems transformations[2]. The legal system, similarly, was continuously transformed, and it was depended on new sources of creating law. Hence, the legal regulations related to corn supply were written by the lawyers in their documents, in emperors constitutions and municipalities legal acts.

Corn supply to Rome and other municipalities (municipes, civitates or res publicae) required legal procedures performed by the clerks (magistratus) entitled to represent the city, e.g. duumvirs who were counterparts of contemporary village heads, and private subjects that purchased corn, transported it, and keep, in big, for those times, stores. Exactly those legal procedures are the subject of analysis in this work. The purpose of this article is to present a character and range of magistratus' responsibility when doing their activities.

The system of corn supply organization and the legal actions linked with it, were not the subject of interest for Polish Romance philology, although, T. Łoposzko[3] and S. Mrozek[4] write about largitiones privatae. Also M. Kuryłowicz[5] writes about the penal aspects of food supply system. The issues of
ancient cities food supply were the subject of numerous works in international literature[6]. After the rough analysis of literature, there should be stated the lack of relation to issues associated with legal activities for food supply to Rome and other cities of the empire, and particularly those, associated with the character of actions and the range of magistratus responsibility.

2. – Organization of corn trade

Corn, mainly wheat, and also water, oil and wine, constituted the basis of biological existence of a man in Ancient Rome. Not all the dwellers of Rome or other cities, could afford to buy basic food products at the market prices, spending their money. Hence, the authorities of individual cities had the duty to provide the basic needs of the poorest part of their societies.

In Rome there was organized a kind of social assistance system –frumentatio, it consisted in free or for little payment corn distribution. During the rush period there were even over 300,000 of dwellers in Rome (numbering about million citizens), entitled to profit of this kind of help.

Boarding so big number of dwellers in need, originated the necessity to store appropriate corn supplies and other food products. In Rome the ediles were responsible for corn storing, whereas in provinces the responsibility was on duumvirs and ediles[7]. In some cities, there were also curatores rei publicae[8]. Exactly those clerks, working on behalf of the local communities, had at their disposal the proper financial resources for that purpose. They made proper contracts with the subjects (publican, susceptores)[9] dealing with corn purchasing from private producers, with corn transport (navicularii)[10] and the owners of harbour stores, where corn was stored.

3. – The municipalities representation at making civil-legal procedures

According to A. Bricchi[11] magistratus, performing the legal procedures with private subjects on behalf of municipalities, acted on the basis of public and private law. The public officers made mainly the contracts: sale (emptio-venditio), arrentation of public areas (locatio-conductio rei), or the contract on doing public works. In those cases, the clerk acted on behalf of the institution, which he represented. That was the direct representation, defined in sources as nomine communi municipium[12]. Therefore, that was the defection of the rule of indirect representation, typical for Roman private law at that time. Consequently, it can be stated, that there were the beginnings of dogmatically unknown construction of indirect representation. Any disputes resulting from these legal activities were solved by means of instruments of legal protection typical for formulary process (per formulas).

On the basis of analysis of sources in literature of the end of the19th and the beginning of the 20th centuries, there was worked out the distinct theory, called the indirect representation. According to that theory magistratus performed the legal procedure with the direct effect for him, only later, at the end of his authority service, he made the transfer of his liabilities for the municipality. Therefore, that was the classical indirect representation, as a consequence, during the period of performing magistratus function, the person taking civil-legal liability was self-responsible. Within mutual accounts, particularly for the damages sustained during the transport of corn, the clerk had the possibility to require the compensation against the municipalities with actiones utiles or to accept the praetor protection[13].

The Italian Romanist A. Bricchi[14], mentioned above, properly noticed in the 40s of the 20th century, that the French Romanist B. Eliachevitch[15], the main
representative of that theory, omitted the earlier research and accepted the rule, according to which *magistratus*, as a representative of organs or institutions, represented them directly. Therefore, he performed the legal procedures, also within the private law, contracting obligations with direct effect for the represented institution.

In turn, in the latest literature we can find the conception by Y. Thomas, introducing a new notion *quasi* the cities representation by the clerks at performing civil-legal activities, means something between the direct and indirect representation[16].

The conceptions mentioned above, related with the character of legal procedures, were formulated, imitating the contemporary conceptions of direct representation[17]. In the meantime, according to the Roman legal dogmatics, any definitions and generalizations were created in general for the needs of didactics, not practice, which is still something dynamic, beyond specified frameworks. Hence, Javolenus said that any definitions are not safe[18]. Therefore, the practice applied in Roman law, can be revealed though the analysis of specific events (cases), which will allow to formulate several generalizations, and as a consequence, to indicate the similarities between the past and contemporary regulations.

### 4. – Legal bases of clerks responsibility

The clerks responsible for purchasing corn and its supply to Rome or municipalities had to undertake the activities within their representation of cities. The range of *magistratus* qualifications resulted from general principles, customs, or the warrant given by the city council (*ordo decurionum*).

In case of purchasing corn, the most important issue was to fix the price. Since that determined the security of proper amount of financial resources in the state or city budget, and the clerks responsibility.

*Paul. l. primo sententiarum* (D. 50.8.7 pr.): Decuriones pretio viliiori frumentum, quod annona temporalis est patriae suae, praestare non sunt cogendi.

According to Paulus, *magistratus* was obliged to purchase corn according to market prices. Therefore, he was not obliged to search special offers. It was enough to display, that the price of corn purchased did not vary from the market price, obligatory at that moment. That statement should be seen from the perspective of fighting with the phenomenon of manipulation of corn price, e.g. through the price conspiracy. Marcianus, the other lawyer, represents similar attitude.

*Marcianus libro primo de iudiciis publicis* (D. 50.1.8): Non debere cogi decuriones vilius praestare frumentum civibus suis, quam annona exiguit, divi fratres rescripserunt, et aliis quoque constitutionibus principalibus id cautum est.

The Emperors Marcus Aurelius and Lucius Verus (*divi fratres*) decided that Decurions should not have been forced to supply corn at the lower price than the market offered. Furthermore, the similar solutions were defined in other emperors’ constitutions.

E. Albertario[19] in the textbook for Roman law of contract undertakes briefly the issue concerning clerks responsibility for the city food supply. According to the author, the lower clerks, both in provinces and in cities, were jointly and Severally responsible together with *nominators*, means with those who nominated them, to accomplish specified assignments on the basis of the corn supply contract.

The dogmatic construction of *magistratus* responsibility for the liabilities,
appearing with the occasion of making contracts on corn supply, was based on existed earlier responsibility of administrators for the property of the persons being under charge[20]. In case of constituting several administrators, all of them were jointly and severally responsible. Analogically, in case of clerks responsibility for the liabilities towards the city purse. In that case, they were also jointly and severally liable.

Since Marcus Aurelius[21] times, magistratus was responsible only in case, if he was able to notify the objection against the activities of his friend in the office, and he did not do it. However, the clerks could not institute an action (action) within the formulary process. Consequently, the magistratus responsibility[22] was becoming restricted. Papinian justifies the conception mentioned above in the text.

Papin. l. secundo quaest. (D. 50.1.11 pr.): Imperator Titus Antoninus Lentulo vero rescrisit magistratuum officium individuum ac periculum esse commune. Quod sic intellegi oportet, ut ita demum collegae periculum adscribatur, si neque ab ipso qui gessit neque ab his, qui pro eo intervenerunt, res servari possit et solvendo non fuit honore deposito. Aliququin si persona vel cautio sit idonea, vel solvendo fuit quo tempore conveniri potuit, unusquisque in id quod administravit tenebitur.

According to the Papinian’s text, the emperor Septimius Sewer in his rescript addressed to unknown Lentulus, expresses the rule concerning magistratus responsibility. According to that rule, the duties are individual for each magistratus, however the responsibility is collective – magistratuum officium individuum ac periculum esse commune. The content of that rule is the reflection of collegial system of running local authorities offices during the republican period, or later in municipalities or colonies. The responsibility of clerks, shaped in such the way, was applied also in relation to the administrators. According to Claudius Tryphinus Et tutorum quidem periculum commune est in administratione tutelae et in solidum universi tenentur[23], the administrators were jointly and severally responsible for governing the pupils’ properties. The source of joint and several responsibility was not the contract, legal act, or fault. Therefore, the joint and several responsibilities of magistratus, resulted from the risk, attributed to the public function and the constitutional duty, related with it, to take care of the city property[24].

In further part of the Ulpian text there are following two specifications of magistratus responsibility. In the second sentence the joint and several responsibility was attributed to the colleague at office, if one of them personally or his representative performed the legal action on behalf of the represented legal person, with the damage for the municipality. The joint and several responsibilities was applied only in case if the person responsible for accomplishing the legal action was insolvent. As a result, the joint and several responsibility of the colleague in an office had subsidiary character in relation to the magistratus individual responsibility. Such the solution has its reflection in the third sentence, where Ulpian writes, that in case of submitting high enough deposit by the clerk, or in case of possessing financial resources, each magistratus bears the responsibility individually, for his governance actions, including civil-legal activities.

In the following extract Ulpian presents the rule about the basis and the range of magistratus responsibility.

Ulp. l. 1 ad ed. (D. 50.8.8): Magistratus rei publicae non dolum solummodo, sed et latam neglegentiam et hoc amplius etiam diligentiam debent.

Magistratus responsibility had subjective character, so they bear the responsibility for fault (dolus), that means for intentional activities with the damages for municipality. Ulpian indicates that they were also responsible for negligence
(neglegentia) and for the shortage of proper diligence (diligenti), which they had to demonstrate, as at dealing with their own matters[25].

The joint and several responsibility rule of magistratus generated following consequences, which are described in the text by Ulpian:

Ulp. l. 3 opinionum (D. 50.8.2.10): Quod depensum pro collega in magistratu probabitur, solvi et ab heredibus eius praeses provinciae iubet.

The joint and several responsibility is linked with the right of recourse. Therefore, the payment of whole due by one of the responsible clerk, generated the right of recourse in relation to the others. The return of payment could be claimed also from the successors of the obliged persons. Such the solution appears also in municipalities legal acts, e.g. in lex Ursonensis cap. 80, where there is the regulation obliging the clerk to account the public money, which he disposed, within thirty days since resigning from the office. In case of his death, that duty was transferred on his successors[26]. Investigation of regression claims took place at the governor of province.

The clerk responsibility for the liabilities, contracted on behalf of the city, were covered from the financial resources (caution rem salvam fore)[27], that was paid by clerks to the public purse during the republic period, whereas during the principate period, the municipal clerks had to pay it. The function of deposit was to protect the interests of the state or city in case of improper governance of the property, charged to magistratus[28]. The example of constituting such the deposit for the duumvirs and ediles exists in numerous sources; in lex municipii Tarentini 1.7.12 [29], among others. Still during the 3rd century AD, all the clerks, who performed public functions- quo eius nomine rei publicae abest, paid the responsibilities for the contracted liabilities[30]. The joint and several responsibility of duumvirs for the city matters, was distinctly wider, than in case of occurring such the responsibility among the private persons.

Further analysis of the sources shows that in the 2nd century AD, the rules of municipal clerks’ responsibility, particularly the duumvirs, were spread in relation to the curators. For example curator kalendarii was responsible for the city debts because of loans, which were taken during his work in the office, even if the clerk did not do any activities associated with the loan contract[31]. In that case the responsibility was not based on a gilt, that was the decision of the emperor Alexander Sewer[32]. The clerks were also responsible for not paying the rent by renters of public lands, if they made the contract with them, independently of their fault[33]. Such a wide clerks responsibility was started to be limited in the 2nd century AD on the basis of rescripts[34].

5. – Responsibility rules of magistratus

Ulpian writes in book 50 entitled 8 De administratione rerum ad civitetes pertinencium about several rules related with magistratus responsibility.

Ulp. l. 3 opinionum (D. 50.8.2.1): Quod quis suo nomine exercere prohibetur, id nec per subiectam personam agere debet. Et ideo si decurio subiectis aliorum nominibus praedia publica colat, quae decurionibus conducere non licet, secundum legem usurpata revocentur.

According to Ulpian magistratus cannot delegate more rights than he possesses himself. That late classical lawyer gave as an example situation of delegating the third person by Decurion to rent public lands. That action constituted the violation of law-secundum legem usurpata revocentur, because of the fact, that the individual Decurion did not have such the right.
In the following text he says about the necessity of spending public financial resources according to the purpose.

Ulp. l. 3 opinionum (D. 50.8.2.2): Quod de frumentaria ratione in alium usum conversum est, sua causa cum incremento debito restituatur: idque etsi contra absentem pronuntiatum est, inanis est querella. Ratio tamen administrationis secundum fidem acceptorum et datorum ponatur.

Financial resources intended on corn purchasing could not be spent on the other purposes. The clerk himself could not do it by his own initiative, without acceptance. The clerk responsible for corn purchasing was obliged to return the amount of money, expended without accordance to the aim, together with the interest charged from the day of changing the purpose. Returning the financial resources, spent not suitably, was prosecuted judicially. Judge had the right to pass the sentence even at the absence of the person concerned. Such the solution was justified with the fundamental right which is the basis of administrating the public properties – good faith and honesty – secundum fidem.

The duty to return financial resources without accordance to the purpose, appeared also when money was spent to accomplish another public need. In the extract given above Ulpian gives the example of changing the intention of spending the financial resources earlier intended on purchasing corn, to realise the other public purpose, e.g. building the public bathhouse. Even spending those financial resources well-meant did not absolve from an obligation to return the whole amount of money to the public purse, even from their own resources.

Ulp. l. 3 opinionum (D. 50.8.2.5): Si indemnitas debiti frumentariae pecuniae cum suis usuris fit, immodicae et illicitae computationis modus non adhibetur: id est ne commodorum commoda et usurae usurarum incrementum faciant.

According to Ulpian the interest should not be exaggerated. In such the case, the person obliged to pay could refuse to pay it.

The joint and several responsibility of magistratus created the liability (rekurs) among the clerks, when one of them paid the financial resource to the city or state public purse.

Ulp. l. 3 opinionum (D. 50.8.2.9): Actio autem, quae propter ea in collegam decerni solet, ei qui pro altero dependit ex aequitate competit.

Ulpian in his argumentation, justifying such the solution, applied the rule of right. In practice, that meant that the clerk when making the decision should demonstrate proper qualifications, not only those required to perform the office assignments, but also, the moral values. Hence, he was obliged to repair the damages occurring in municipality property, caused by making a profitless contract[35].

Magistratus were jointly and severally responsible for the damage caused, if they governed the public resources improperly. As a result of such the governing one of the collegial clerks payed the damage. Consequently, he had reserved the right, to investigate from his office colleague, a half of the returned amount of money (rekurs). Such the solution was applied during the republican period, what is acknowledged in numerous examples contained in municipality legal laws[36]. In turn, the principate period was the time of applying cognitive process, hence, in many sources there are also the cases of municipality clerks responsibility at the provinces’ governors, with applying the typical cognitive processes procedures[37].

The following issue, which requires to be solved, is the case of interest of public money, which obligatory has to be returned to public purse, if it is spent
improperly.

Ulp. l. 3 opinionum (D. 50.8.3.1) Qui fideiusserint pro conductore vectigalis in universam conductionem, in usuras quoque iure conveniuntur, nisi proprie quid in persona eorum verbis obligationis expressum est.

In the text given above, Ulpian says that in case if magistratus fully guaranteed for the tax collector, he was obliged to return money, which the tax collector should have gather, but he did not do it, but also he was responsible for the interest resulting from the legal law.

Ulp. l. 3 opinionum (D. 50.8.3.2) Sed si in locatione fundorum pro sterilitate temporis boni viri arbitratu in solvenda pensione cuiusque anni pacto comprehensum est, explorata lege conductionis fides bona sequenda est.

Magistratus was not obliged to pay interest in case of crop failure. In case of renting the lands, if there was the crop failure, the renter was not obliged to pay the rent during that year, and the tax collector and magistratus who made the contract, returned to the public purse only the nominal amount of money without any interest. Such the immunity resulted from the fact, that in such the circumstances, he was treated as an honest person, who, although gave his due diligence, did not achieve the expected increase. However, he had to have good faith at executing the stipulations of contract – lex conductionis.

6. – Conclusions

Although in Roman law they did not know the notion, legal person, it was applied in municipal practice, among others. Municipalities had their own representation in duumvires persons. In the Roman jurisprudence letters and emperors’ constitutions, there were written the rules of responsibility of municipalities’ organs for improper governing of the city properties. The basic rule, which later generated magistratus responsibility, was the purposiveness of the public financial resources expenditures. The public resources disposers could not decide about any changes of their allocation. The changes in purposiveness initiated the duty of their returning to the public purse together with the interest. The clerks were responsible even in case when they changed the purposiveness of public financial resources expenditure with good faith for another public aim. The city prosecuted the claim in that account, in relation to the successors of the obliged person. Spending the public financial resources for another aim was treated as causing the damage on the public property.

In principal, the clerk who decided and gave the disposition about public financial resources expenditure was responsible for it. Payment was balanced from the deposit, which magistratus brought into municipal purse, at the opportunity of his election for the post, or from his private property. In case of his insolvency, i.e. the deposit was not big enough, or his private property was not enough to compensate the damage, then they applied the principle of joint and several liabilities of magistratus working at the same office. Such the solution had its source in the rule of collegial office governing in republican Rome and in municipalities. Therefore, when one of the duumvirs was insolvent, then the payment for the municipality had to be given by the others. However, that who paid the money had the right to institute a civil action against the office colleague for the return of payment (recurs). That action could be also instituted in relation to the successors of the person legally liable.
Abstract

Municipalities had their own representatives, the duumvirs, whose assignment was day-to-day governance of the city. The duumvirs also bore governance financial liability. The basic responsibility rule of magistratus was the purposiveness of public financial resources, being expended. The change of expenditure intentionality created a duty to return the resources to the public purse together with interest. Such the duty was on the clerks, even when they changed the purposiveness of spending the public resources, in good faith, for the other public purpose. The city prosecuted a claim of that virtue even in relation to the successors of the obliged person. Payment was balanced from the deposit, which magistratus brought into municipal purse, at the opportunity of his election for the post, or from his private property. In case of his insolvency, there was applied the principle of joint and several liability of the clerks working at the same office.

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7] Cic. de leg. 3.6.

8] Curator rei publicae was a clerk, who was entitled to replace the duumvirs. He worked in municipalities in Northern Africa. In the source literature he often appears together with the notion vel
magistratum. In that time, there was the organ, besides the duumvirs, having similar rights. The assignment of curatores was governing the community property and its protection. Such the category of clerk appears also during the late period of principate and dominate. That office was described by Ulpian in the book entitled: Liber singularis de officio curatoris.

[9] Corn in the Republic was gathered by publicans, whereas later by the susceptores, which means by tax collectors. They received their payments once a year. (C.Th. 12.6.9). They run the lists of tax payers and wrote the amount of corn delivered by them. They had the helpers -writers- scribae, whose they could not change during the year (C.Th. 12.6.27). Those writers were also called annotatores. The register of tax payers and their duty to deliver corn was kept in the city archive-tabularii publici civitatum (C.Th. 12.6.27). The activity of collecting corn and taxes was defined by the notion collatio. Corn collecting was supervised by rationalis Africae (C.Th. 11.7.11), called sometimes rationales. Their activities were controlled by the province governors, and they, in turn by vicarius Africæ (C.Th. 1.15.17).

[10] Corn was transported to Rome or other cities by water by means of private ships the owners of the ships were paid by the state. That was necessary to have the license to transport corn. Not everybody could receive the license. Claudius gave the license on condition that the number of children was proper and they were born in legal married states (iustum matrimonium). That was in relations to the pro family rules by August jurisdiction. For the service performed navicularii received the payment, and during the later period they were even released from some public duties. (Suét. Claud. 18.3-4.19; G. 1.32; Scaev. libro tertio regularum (D. 50.5.3): His, qui naves marinas fabricaverunt et ad annumanum populi Romani praefuerint non minores quinquaginta milium modiorum aut plures singulas non minores decem milium modiorum, donec hae naves navigant aut aliena in earum locum, muneris publici vacatio praestatur ob navem. Senatores autem hanc vacationem habere non possunt, quod nec habere illis navem ex lege Iulia repetundarum licet; Callist. libro primo de cognitionibus (D. 50.6.6.5): Divus Hadrianus resscriptis imminuam navium maritimarum dumtaxat habere, qui annonae urbis serviunt.) See. P. GARNSEY, R. SALLER, The Roman Empire. Economy, Society and Culture, London 1987, 87 ff.


[23] Tryph. l. 14 disput. (D. 26.7.55 pr.). See. G.G. ARCHI, Sul concetto di obbligazione solidale, Milano 1940, 322: Protectors were jointly responsible for the properties of their pupil. Their responsibility was the main, and then the other clerks were responsible, who chose the protectors. The clerks were jointly and severally responsible petunia omnibus in solidum publicae dari placuit. In such the way the responsibility of protectors is different than in case of constituting the protectors on the basis of will or datio. On the basis of action utilis tutela and action subsidiaria, magistratus who constituted the protectors they are responsible on the basis of periculum commune. In that way, there was realized the rule of officium individuum ac periculum esse commune. The similar solutions can be find at Ulpian in l. I ad ed. (50.1.25).


[28] See. J. PARTCH, Der ediktale Garantievertrag durch receptum, ZSS 29 (1908), 403-422, 408.

[29] Lex Malacitana, cap. 60.


[31] D. 50.8.12.6 (9.9); D. 50.8.11 pr. (9pr.).


[33] C.Th. 12.11.1.3 from 314 AD.

[34] D. 50.8.12.5(9.8).

[35] It should be assumed that the rule of good faith was applied similarly as in case civil-legal contracts made among the natural persons. See. W. DAJCZAK, Doba wiara jako symbol europejskiej tożsamości prawa, Poznań 2006, 9.

[36] Lex Ursonensis cap. 129.

[37] During the period of Trajan that was applied cognition in case of improper governing of the community finance resources in Nikodemia. Plin. ep ad Trai. 38.