Review

Jorge Menabrito Paz*

Das Edikt de pecunia constituta. Die römische Erfüllungszusage und ihre Einbettung in den hellenistischen Kreditverkehr. By Johannes Platschek. Munich: C. H. Beck, 2013. 292 pp. ISBN 0978-3-406-64758-1.

Professor Johannes Platschek has written a stimulating monograph on a convoluted subject. Originally, as is well known, the classical *ius civile* did not acknowledge consent alone for a binding agreement. The handing over of a thing, a solemn declaration, or an entry in a ledger (up to the late republic) was also required. Formless consent was sufficient for an enforceable contract in only four cases, the so-called consensual contracts: *emptio venditio* (sale), *locatio conductio* (hire), *societas* (partnership agreement), and *mandatum* (agency agreement) (D.44.7.2).

The praetor would originally also have protected simple agreements aimed at relieving the debtor from his entire obligation or some features of it, by granting an exception, provided that such *pacta*, as they were technically called, neither contravened nor evaded a law, nor supported an unjustifiable deceit (D.2.14.77). Thus, for the *ius honorarium* simple consent was justiciable only as a defense, but not as a judicial remedy, that is to say, no claim could be pursued on account of a pact: [*P*]*ropter conventionem hic constat non posse constitui obligationem: igitur nuda pactio obligationem non parit, sed parit exceptionem* (D.2.14.7.4).

Nevertheless, as stated by the *Edictum perpetuum* under the rubric *De pecunia constituta*, according to D.13.5.1.1 and Lenel § 97, the praetor could grant an action against *qui pecuniam debitam constituit* ("he who fixed the payment of an amount owed"), even though this agreement was made by consent alone, or, according to Ulpian, precisely because of this reason: *Hoc edicto praetor favet naturali aequitati: qui constituta ex consensu*

---

* Researcher, Universidad Nacional Autónoma de México.

Roman Legal Tradition, 10 (2014), 58–67. ISSN 1943-6483. Published by the Ames Foundation at the Harvard Law School and the University of Glasgow School of Law.

facta custodit, quoniam grave est fidem fallere (D.13.5.1 pr.).

Platschek's quest for a definitive explanation for this edict begins here.

After a suggestive introduction, the book is divided into three chapters. 1: *Pecunia constituta* in the praetorian edict. Here Platschek examines the origin, the essence, and the purpose of the edict, along with its main consequence, *der verheißene Rechtsschutz* or *actio de pecunia constituta* [hereafter ADPC]. 2: The work of the jurists on the edict. Here he appraises the development of the edict through its jurisprudential interpretation. 3: *Pecunia constituta* in the transactional and documental *praxis*. Here he arranges similar practices within the Digest, the works of Cicero, and various documents of Greek and Roman provenance.

Platschek dates the edict *de pecunia constituta* to some time between the second half of the third century and the first half of second century BC, i.e., some time between the emergence of the praetor *peregrinus* and the promulgation of the *lex Aebutia* that introduced the formulary procedure (p. 67). The main basis for his conviction, which is also his primary thesis, is that in order to overcome the hurdle of the compulsory and ritualistic Latin language within the contemporary *stipulatio*, it would have been the praetor *peregrinus* who would first have taken measures in this regard under the influence of Greek law (pp. 41, 75, and 77). Only subsequently, following the example of his colleague, would the so-called praetor *urbanus* have embraced an action to claim a formless promise of payment (*Erfüllungszusage*).

Platschek says that evidence for the Greek provenance of the edict can be traced in the four following qualities.

1. The informal character of the *constitutum* (pp. 71 ff.)

The consensual element portrays the promise of payment or *constitutum* as a binding agreement that determines the liquidation of a principal extant debt (*Hauptschuld*) (p. 5), i.e., it was initially purely an agreement to fulfill a monetary obligation. However, the promise's lack of specific form — *Constituere autem et praesentes et absentes possumus . . . et per nuntium . . . et quibuscumque verbis*, according to D.13.5.14.3 — represents for Platschek an "unrömisches und hellenistisches" phenomenon (p. 71).

2. The *sponsio* and *restipulatio dimidiae partis* concomitant with ADPC (pp. 57 ff.)

Platschek notes that in conformity with Gaius (4.171) and the *lex Rubria*, c. 22, where ADPC was brought, defendant and plaintiff were compelled respectively to promise and counter-promise one-half of the claimed amount as a procedural penalty, either for the baseless defense or the baseless lawsuit, as inferred from the judicial defeat. For Platschek, this *sponsio dimidiae partis* [hereafter SDP] resembles similar penalties evidenced in Plato's *Laws* (956b-d), and Egyptian-Ptolemaic documents, mostly for half as much as the principal (*hemiolía* or *hemiólion*).[1] According to Platschek, these influenced ADPC (pp. 64 and 70): "In der actio de pecunia constituta und der *sponsio dimidiae partis* lässt sich die Wirkungsweise der ἡμιολία wiedererkennen."

Platschek also considers Plato's *Laws* (920d), where the philosopher — presumably going beyond the positive law[2] — enacts a rule regarding breach of contract, mandating that actions may be brought before the tribal courts when the parties are unable to come to settlement before arbitrators or neighbors. To give reasons for the binding force of the agreements, Plato says: "As far as he who agreed, established" (Ὅσα τις ἂν ὁμολογῶν συνθέσθαι), allowing Platschek to associate the Greek verb *syntithénai* with the Latin *constituere*: "Die Wortbildung συντιθέναι aber entspricht con-stituere; τιθέναι liegt bedeutungsmäßig eng bei *statuere*" (p. 60).

3. The delictual origin of ADPC (pp. 76 ff.)

For Platschek, even if ADPC was a procedure for pursuing compensatory damages, rather than a penalty — at least for Marcellus and Ulpian, who according to D.13.5.18.2 considered it an *actio ad rei persecutionem* — this nature certainly did not gainsay its delictual origin: since ADPC would have expired after a year,

---

[1] Edouard Cuq, "Usurae," in *Dictionnaire des antiquités grecques et romaines* (Paris 1892):

> La forme neutre, qui se rencontre ordinairement dans les inscriptions, est très rare dans les papyrus. . . . [L]e débiteur en retard doit payer moitié en sus du capital. Certains auteurs ont prétendu que l'hémiolia était, non pas de 50 p. 100, mais d'une fois et demie le capital. Cette opinion est aujourd'hui condamnée par des textes formels.

A. Philippin, *Le pacte de constitut: actio de pecunia constituta* (Paris 1929), 26 n.2: "Que l'*hémiolion* fut vraiment l'augmentation de la moitié. Cela ressort aujourd'hui sans conteste du papyrus Oxyrhynchus 1040: quatre artabes plus l'hémolion = six artabes."

[2] Cf. L. Gernet, "Les Lois et le droit positif," in *Oeuvres complètes de Platon: Les Lois*, XI (Paris 1951), clxxvii ff.

when the promisor fixed the payment of his own amount owed, instead of that of someone else. This is how Platschek explains the following regulation from Justinian's constitution dated AD 531 (C.4.18.2.1):

> [A] veteribus . . . neque in omnibus casibus longaeva sit constituta, sed in speciebus certis annali spatio concluderetur . . . . Hac apertissima lege definimus . . . , et neque sit in quocumque casu annalis, sed (sive pro se quis constituat sive pro alio) sit et ipsa in tali vitae mensura, in qua omnes personales sunt actiones, id est in annorum metis triginta.

Platschek is thus compelled to infer that ADPC must also have been passively intransmissible. Nevertheless, as it seems that the edict itself did not differentiate between *constitutum debiti proprii* and *constitutum debiti alienii*, Platschek considers that such a distinction would have to have been subsequently created either by jurisprudential interpretation or by imperial law; and hence ADPC must have been in origin a delictual remedy (p. 81).[3]

Avowing the delictual character of ADPC, Platschek connects it to Wolff's renowned theory of the *Zweckverfügung* (disposal to a purpose), which explains the dogmatic basis of a contract in ancient Greek law.[4] For the Greeks, liability for any owed amount would have been the result of wrongful retention, since the wrongdoer prevented the wronged party from "disposing" the debt he was entitled to collect as he wished according to his "purpose." Thus, this situation encompassed two elements: (a) a previous delivery, i.e., a real contract,[5] and (b) a wrong, leading

---

[3] Following Bruns, Platschek (p. 83) bases this inference on D.4.7.4.6, which states that the action derived from fraudulent sales of *res litigiosae* "non est poenalis," in order to change the conditions of the trial, i.e., things that are in turn the subject of a pending action. And, as revealed by D.4.7.7: [*Haec actio*] *pertinet ad rei persecutionem, videtur autem ex delicto dari.* Although it is a wrongful act which gives rise to the claim, viz., a *delictum*, the action concerned allows one to recover only compensatory damages, not punitive ones. Therefore, concludes Platschek, quoting D.4.7.4.6 and D.4.7.6 — *in heredem autem . . . vel post annum non dabitur* — even if the action from *alienatio iudicii mutandi causa facta* is *rei persecutoria*, not *poenalis*, it cannot be granted either after a year's time or against the heirs of the seller. Cf. Carl Georg Bruns, "Das constitutum debiti," in *Zeitschrift für Rechtsgeschichte*, 1 (1862), 68 ff.

[4] H. J. Wolff, "Die Grundlagen des griechischen Vertragsrechts," in *ZSS* (rA), 24 (1957), 26–72.

[5] Concerning the unavoidable handing over of a thing in Greek contracts, it is a commonplace to cite Plato's *Laws* (Pl. *Leg.* 849e, 915d-e) and Aristotle's *Nicomachean Ethics* (Arist. *Eth. Nic.* 1162b), where credit transactions are considered unenforceable unless something has been pawned.

the wronged party to pursue damages with the so-called *díke blábes*. Platschek notices in ADPC an acknowledgment of the *Zweckverfügung*, and he states that, as attested by the surviving Greek and Roman documents, *constitutum* was a binding promise of payment preceded by a *mutuum* — the principal extant debt. This situation therefore begot an "area of intersection" (*Überscheidungsbereich*) where a real obligation met up with an undertaking (pp. 5 and 9). The nonpayment of the promise resulted in a wrongful retention, which hindered the creditor's own ends and prompted the consequent liability:

> [K]ein anderes Prinzip als der Zweckverfügung beherrscht das constitutum debiti: die Erfüllungszusage ist verbindlich und klagenbewehrt, weil und wenn ihr die Begründung der Darlehensschuld durch Auszahlung des Darlehens vorangelt (p. 78).
>
> * * *
>
> Neben den Vorstellungen des römischen ius civile von Vertrag und Rechtsgeschäft erhielt sich damit ein Bereich des Kreditrechts, in dem die Vorausverfügung des Gläubigers und die Verwirklichung des einvernehmlich konkretisierten Vorenthaltungstatbestand eine deliktische Haftung erzeugen: griechisches Recht im prätorischen Edikt (p. 84).

It is this delictual character, together with the impossibility of fulfilling *stipulationes* for a non-Roman citizen, that should have permitted a *condemnatio incerta* within the *formula* of ADPC. After finding the defendant guilty, instead of being restricted to condemning him to repay the concrete amount of the outstanding debt, the judge would have been authorized by this clause to estimate a compensatory payment in accordance with the plaintiff's concern for the breach (*teneri id quod interest*). This is at least what Platschek's opinion is, based on D.13.5.23 and D.13.5.14.2, against what is otherwise manifested in further paragraphs of the Digest:

> Interessenschutz des Darlehensgläubigers, der in den peregrinen Rechtsordnungen durch formlose Versprechen von Strafen und Schadenersatz bei nicht termingerechter Rückzahlung gewährleistet wird, ist nach römischem ius civile ohne Stipulation nicht zu erreichen. Diese Lücke schließt der Prätor mit einer klage auf das Interesse aufgrund formlosen constitutum . . . . Der Empfänger des constitutum erhält damit neben dem Wert der zugesagten

Leistung Schäden und entgangenen Gewinn infolge der unterbliebenen Leistung ersetzt (p. 41).

4. The incorporation of *chirografa* and *syngrafae* into classical Roman law (pp. 7 ff. and 263)

Leaving the exposition of the *ius civile* aside, Gaius mentions *chirografa* and *syngrafae*, which resembled promissory notes that resulted in an obligation when the signatory had written down that "she owes something" or that "something will be paid by her," which were unique to foreigners (G.3.134). In view of the fact that between Romans written documents were merely considered evidence of a prior loan or *stipulatio*, the binding effect conceded to the notes alone, along with their etymological Greek provenance, suggests — according to Platschek — that Roman *chirografa* and *syngrafae* were nothing else but a Latin version of the Hellenistic credit forms common throughout the Mediterranean world, which were adopted in order to equalize and regulate international commerce.

Consequently, Platschek maintains that both of the documented *constitutae* set forth in D.13.5.5.3 and D.13.5.24 concomitantly testify their Greek origin when they are compared with the promissory notes mentioned in G.3.134. In fact, Platschek continues, the statements of the former — *tibi soluturum sine controversia* and *si ad diem supra scriptum non dedero* — from which ADPC originate, recall the *verba* of the latter — *debere se* and *daturum se* (p. 6): ". . . der Prätor mit der actio de pecunia constituta Erklärungen sanktioniert, die an die von Gaius beschriebenen Urkunden erinnern."

In my opinion, Platschek's assumptions are not entirely cogent.

Regarding the *constitutum* arising from consensus alone through Greek endowment, he relies mainly on Philippin's and Kaser's opinions[6] without giving any other arguments. On the one hand it is clear that ritual binding acts comprised of invocatory words show the use of a common language among participants, and that these do therefore not apply when parties come from different cultural backgrounds, because such a situation would complicate verbal communication; but on the other hand it is hard to maintain that Roman law did not face this problem before coming into contact with the Greeks. Moreover, there are

[6] Philippin (note 1), 42; M. Kaser, *Das römische Privatrecht*, 1, 2nd ed. (Munich 1971), 584.

no traces of the worship of a deity equivalent to the Roman *Fides* among the Greeks.[7] This Roman "Faith" was defined by Cicero as "justice within matters of credit" (*justitia in rebus creditis*) (Cic. *Part. or*. 22.78), and Ulpian, naming Celsus, specifically refers to *res creditae* as a token of "following the faith in others" (*alienam fidem sequere*) (D.12.1.1.1). But, as already mentioned, reliance on credit alone seems to have been a forlorn affair in the Greek transactional sphere, where collateral was allegedly always essential.

With respect to the Greek *hemiolía* as the origin of the Roman SDP, Platschek chiefly revisits Revillout's position,[8] which Philippin had already countered.[9] The latter noted that: (a) SDP had a procedural and formal nature that made it distinct from the *constitutum* itself, whereas *hemiolía* comprised the substance of a single contract with no mandatory oral solemnities. This posture is not utterly rejected by Platschek, for he recognizes a "Prozessstrafe" in Plato's *Laws* (956b–d) (p. 58). (b) SDP embodied a penalty for either the plaintiff's or the defendant's rashness, whereas *hemiolía* sometimes represented a penalty clause, and sometimes a compensation for the use of money (*loyer de l'argent*).[10]

Considering Platschek's position on *hemiolía* and SDP, one should ask why the praetor would have ordered formal promises as SDP and the related *restipulatio* within the procedure of an action that was designed to overcome the solemnities of the *stipulatio*.

---

[7] *Diós Pístios* is a calque employed by Dionysius of Halicarnassus for Jupiter Fidius, the deity in whose temple the treaty was deposited that Tarquin had drawn up with the city of Gabii (Dion. Hal. *Ant. Rom*. 4.58.4). Because the temple was located on the Quirinal Hill, scholars have hypothesized Sabine origins for this god, especially on linguistic grounds because of the deity's alternative name Semo Sancus (Dion. Hal. *Ant. Rom*. 2.49.2). Cf. Joseph Antoine Hild, "Fides," in *Dictionnaire* (note 1), and H.-F. Mueller, "Dius Fidius," in *The Encyclopedia of Ancient History* (Chichester 2012).

[8] The French Egyptologist even believed he had found precedents of the Roman *constitutum* in Phoenician, Babylonian, and Egyptian laws. Cf. Eugène Revillout, *Les obligations en droit égyptien comparé aux autres droits de l'antiquité* (Paris 1886), 65 ff.

[9] Philippin (note 1), 24 ff.

[10] Platschek recognizes that *hemiolía* was also a penal clause par excellence (p. 61). But it is clear, as Philippin has also noted, from Modestinus that a penal clause for half of the amount due would have resulted in an evident infringement of the attested prohibition to stipulate for a penalty instead of interest or *usurae* above the lawful rate (12 percent per annum): *Poenam pro usuris stipulari nemo supra modum usurarum licitum potest* (D.22.1.44). Meanwhile, Marcellus rejects (in D.13.5.24) allowing ADPC to claim *usurae*.

ADPC could have had a delictual character, since in its origin the praetor very probably conceived it as an *actio in factum*, in order to redress what he considered misconduct; a hint in this regard — leaving aside the suspicious reference to the *aequitas naturalis* — may come from D.13.5.1 pr. When he explains the foundation for granting ADPC, Ulpian says "because it is a serious matter to break faith with someone" (*quoniam grave est fidem fallere*). But that certainly does not mean that this conception could have only been achieved by way of Hellenic notions. If we look for a connection between Roman and Greek law (or between institutions of any two legal systems), we will in all likelihood find it. For example, the so-called *actio auctoritatis* in the case of eviction — the existence of which goes back to early republican times, perhaps even to the Twelve Tables, and which is based on a closely related institution of incontestable Roman provenance, namely the *mancipatio*[11] — can also be found in Plato's *Laws* (915d). If we recognize that there are many phenomena that are common to the transactional life of all societies, it should not astonish us to come across the same or similar solutions even within legal systems that were not or have never been in touch with each other; just as, by the same token, globalization at any given time of human history has not and will not cause legal cultural differences to disappear: *Ius civile est, quod neque in totum a naturali vel gentium recedit nec per omnia ei servit* (D.1.1.6 pr.).

Even if one assumes the delictual character of ADPC, it is nevertheless quite another thing to accept that the judge was empowered to ponder the plaintiff's concern in order to sentence the defendant to pay not only realizable compensatory damages, but also lost gain and moratory damages as well. An ADPC with a *condemnatio incerta* has been argued (and questioned) by a large number of authorities,[12] but it seems that it is Platschek's understanding of *constitutum* that makes him accept this interpretation. If I understand him correctly, for Platschek the essence of *constituire debitum* was to reinforce a preexisting debt by informal means in situations where the fulfillment of a *stipulatio* was not possible, thus increasing the debtor's liability without any

[11] The so-called *actio auctoritatis* disappeared together with the *mancipatio*, and it is therefore absent from the *Corpus iuris civilis*. Cf. F. Schulz, *Classical Roman Law* (Oxford 1951), 533 ff.

[12] Varvaro summarizes the scholars' positions: M. Varvaro, "Sulla storia dell'editto *De pecunia constituta*," in *Annali del Dipartmento di storia del diritto, Università de Palermo*, 52 (2007–2008), 335 n.22. See also R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town 1990), 511–12.

limits other than those the parties had agreed: "Erklärungen über eine bestehende Schuld lassen sich als constituire qualifizieren, wenn sie eine Zusage enthalten, deren Einhaltung anhand der Formelklausel neque fecisse messbar ist" (p. 173).

As for the link between the documented *constitutae* set forth in D.13.5.53 and D.13.5.24 and *chirografa* and *syngrafae*, based on the wording as it appears in G.3.134, it seems to me that Platschek overestimates a series of mere happenstances.

Post scriptum. I find it hard to accept that the origin of the *constitutum* would rely on sanctioning the legal performance of non-Roman citizens in the late republic all at once and within a precise compass. If it would have been so, the gradual and long-lasting relaxation of the *stipulatio* attested for the remaining gamut in the sources does not make sense.[13] It is clear to me that ADPC enlarged the limits of consensus, and that the *constitutum* was used to increase the debtor's liability, for, as already mentioned, only the agreements aimed to relieve the debtor from her entire obligation or some features of it were protected by the praetor, and only *ope exceptionis*. Any change in the terms and conditions of a debt in favor of the creditor was unenforceable in a court of law, as there was a lack of consistent actions. But this loophole in the *ius civile* was a setback in the first place for the Romans themselves, and not only for strangers. Furthermore, it has been emphasized since Cujas[14] that *stipulatio* must not have been a proper vehicle to modify the terms and conditions of an extant debt in favor of the creditor successfully, because it would have irremediably provoked a *novatio*, thus releasing the debtor from all the accrued interest. "Die Haftung aus *constitutum* [Platschek notes] tritt stets neben die aus der Hauptschuld, die Stipulation hingegen ist grundsätzlich zur Novation fähig" (p. 182). Accordingly, *constitutum* certainly presupposed an already existing debt, nevertheless its ensuing action was entirely independent from the action of the latter; that is to say, the primary

---

[13] Apart from the constitution of Theodosius II and Valentinian III dated AD 428 (C.Th. 3.13.4 = C.5.11.6), which abolished all verbal solemnities regarding the promise of dowry, it was not until AD 472, with the renowned constitution of Leo I the Thracian (C.8.37.10), that the formal *stipulatio* was officially superseded by the written document. Cf. M. Kaser, *Das römische Privatrecht*, 2, 2nd ed. (Munich 1975), 373 ff. For the previous period, the sources attest to a relaxation within the formal *stipulatio*, e.g. G.3.92 and D.45.1.1.6, but not a disregard of it.

[14] *Et breviter constitutum est conventio, qua quis respondet citra stipulationem soluturum se, quod ipse, vel alius debet. Quo genere priorem obligationem non novari constat.* See Jacob Cujas, *Opera ad Parisiensem Fabrotianam editionem deligentissime exacta in tomos XIII*, 3 (Prati 1887), 94.

obligation never varied intrinsically, but was overlapped by a new one: *. . . si quid tunc debitum fuit cum constitueretur, nunc non sit, nihilo minus teneat constitutum, quia retrorsum se actio refert*. (D.13.5.18.1).

One may or may not agree with Platschek's conclusions but his work is serious and profound: it represents an outstanding opportunity for reasoning and dialectics, for which one is thankful.