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D. 47, 1 *De privatis delictis* as the general part of the law of private delicts*

[D. 47, 1. *De privatis delictis* como parte general de los delitos privados]

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Resumen

El objetivo principal de este texto es el análisis del contenido normativo de los títulos consecutivos del Libro 47 de los Digestos de Justiniano, el que responde a la pregunta de si D. 47, 1 puede ser la parte general del derecho de los delitos privados. El método seguido ha desarrollado la noción de parte general, no sólo entendida como producto de la jurisprudencia moderna, sino sobre todo como herramienta interpretativa de un texto legal, que es, en este caso el contenido del Libro 47 del Digesto. El punto clave del texto es la descripción de la estructura de apilamiento formada por los títulos consecutivos del Libro 47 que dependen sustantivamente de la regulación del título primero, que contiene los principios

Abstract

The main goal of this text is the analysis of the normative content of the consecutive titles of the Book 47 of the Digests of Justinian which responses to the question whether D. 47, 1 may be the general part of the law of private delicts. As a method we have developed the discussion on the notion of the general part, not only understood as a product of modern jurisprudence, but above all, as an interpretative tool for interpreting a legal text, which is in this case the content of the Book 47 of the Digest. The key point of the text is the description of the stacking structure formed by the consecutive titles of the Book 47 that are substantively dependent on the regulation of the first title, which contains the general principles of

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generales de la responsabilidad por delitos privados. Los fragmentos D. 47, 2 a D. 47, 23, que tratan de las normas de responsabilidad por delitos privados específicos e individuales, contienen respectivamente disposiciones que modifican o completan las normas generales de responsabilidad del *De privatis delictis.* Este análisis conclusiones conducen finalmente a una respuesta positiva a la pregunta planteada al principio.

Palabras clave

Corpus Iuris Civilis – Digesto – delitos privados – parte general – Derecho penal

liability for private delicts. The passages D. 47, 2 to D. 47, 23, dealing with the rules of liability for specific, individual private delicts respectively contain provisions modifying or supplementing the general rules of liability under *De privatis delictis*. This analysis lead eventually to a positive answer to the question posed in the beginning.

Key words

Corpus Iuris Civilis – Digest –Private Delicts – General Part – Criminal Law

Introduction

It is beyond doubt that the term "general part" was unfamiliar to the Roman jurists. The absence of this phenomenon within Roman legal terminology does not, however, render meaningless the discussion of the institution itself. Luigi Garofalo[1] states that the non-existence of a coherent theory of law and, for that matter, of systematised general parts within Roman law and, more specifically, Roman criminal law, is essentially a non-contentious issue. In this context, he also cites the assertion of C. Gioffredi, according to which "the Roman jurists knew the institutions that we include in the general part, but they did not create a system […]"[2]. The main point of the following text is to prove that regarding the private criminal law contained within the Digest, the Romans did actually create a system. A system analogous to the modern criminal codifications divided between a general and a special part of the legal text. On no account is it the object of this paper to attempt to reconstruct the general part in isolation from the original structure of the text of the Digests. Even though there are certainly various provisions of a general character spread all over the text of the Digest[3]. Such an exercise would interfere unduly with the compilers' sense of proportion in the construction of the Digests and in the ordering of the successive fragments, whose position in the course of the text is far from coincidental[4]. Thus, it would significantly distance the present considerations from their legal–historical value.

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[1] Garofalo, Luigi, Pojęcie 12345 i żywotność rzymskiego prawa karnego, *Zeszyty Prawnicze* 3.1 (Warszawa: Wydawnictwo Naukowe UKSW, 2003) 7-41.

[2] Garofalo, cit. (n. 1) 16 [10].

[3] This matter is briefly addressed by Stagl, Jakob, "Część ogólna jako metoda prawnonaturalna. Na przykładzie postanowienia Wielkiego Senatu w sprawach karnych o dopuszczalności ustaleń alternatywnych", *Forum Prawnicze* (in press), 10.

[4] The relevancy of order or even sequence of the subsequent parts of law within the Digest as a whole is subject to further discussion in the last chapter of this text where the issue of *prima pars legum* and the *ratio* behind the systematisation is addressed.

Insofar the legal historian–as it is yet to be emphasised at least several times–„is permitted to investigate the ideas working behind the scenes even if the actors themselves were not conscious of them"[5].

The search for a general part within the Digest is not a question of transplanting certain modern concepts into an ancient text. Instead it is a matter of noticing certain similarities that *per se* lead to a consideration of certain structures present in late antique legal text as analogous to the modern general and special parts. A significant part of this article will therefore centre around a discussion of the methodological arguments justifying such a revolutionary view[6]. The matter of the Book 47 of the Digest, first of the *libri terribiles*, will serve as the object of analysis. The choice of the object of study was dictated primarily by the structural uniqueness of the books, which, as Dario Mantovani notes[7], were composed in such a thoughtful and orderly manner that they deserve to be distinguished as a distinct 'mass' within the text of the Digests[8]. By distinguishing the *Libri Terribiles*[9] from the other constituent parts of the Digests and referring to them as 'massa penale', the author points out that his aim is to expose the collocations and not necessarily to demonstrate the displacements[10]. Adopting this last assumption also underpins the reasoning presented here, as it is the careful layout and thoughtful composition that make it possible to distinguish between the different components–being general or special–within the course a book. With regard to the initial and the following titles of the Book 47 of the Digest, the concepts of 'general part' and 'special part' will be used not in a literal sense but as to the essence analogous to that commonly accepted in modern jurisprudence. Nevertheless, the ratio guiding such a distinction–i. e. the one between the general and the special–is the same for all periods and constitutes the main reason why the topic is addressed here at all. As J. Stagl points out, each of the *Libri Terribiles* begins with an introductory title containing the general principles governing the subsequent, more detailed and casuistic titles within the book[11]. This is where one should see the counterpart, or rather, the prototype of the general part known in modern times.

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[5] SCHULZ, Fritz, *Classical Roman Law* (Oxford: Clarendon Press, 1951) 16.

[6] Revolutionary yet not innovative since the issue has already been reported by STAGL, "Część ogólna", cit. (n. 3) and STAGL, Jakob, "Il sistema didattico di Gaio e il sistema dei *Digesta*", en *Teoria e storia del diritto privato*, 8 (2015), avaible online: https://www.teoriaestoriadeldirittoprivato.com/wp-content/uploads/2021/12/2015_Contributi_Stagl.pdf [last access on 25th November 2024]

[7] MANTOVANI, Dario, *Digesto e masse bluhmiane* (Milano: Giuffrè, 1987) 150; 15 a) 'La massa penale'.

[8] Distinct in regard to the order proposed by Bluhme who first noticed and described the possible categorisation of the respective fragments into specific masses. *Vid.* GUARINO, Antonio, *Storia del diritto romano* (Napoli: Jovene, 1990) 562-563.

[9] This term referring to the set of books dedicated to the criminal law was established by Justinian himself in the *constitutio Tanta*, § 8 a. A special attention to such wording is put by GIUFFRÉ, Vincenzo, *Il diritto penale nell'esperienza romana* (Napoli: Jovene, 1989) 146.

[10] GIUFFRÉ, cit. (n. 9) 152.

[11] STAGL, "Część ogólna", cit. (n. 3) 9.

The structure of this paper is as follows. To begin with, the concept of the general part is presented in general terms and then the problem of its application to legal sources well in advance of its modern birth. The following chapter examines the normative content of the first title of the Book 47 , D. 47, 1 *De privatis delictis* with the aim to extract the general rules of liability for private delicts. Subsequently the examination moves forward to analyse the normative content of the following titles of the book in question starting with the second title D. 47, 2 *De furtis* and then moves on to the other provisions regarding particular (qualified) types of theft to finish on the examination of the remaining titles, providing for regulations of different private delicts. The above analysis is then summarised in a consecutive chapter focusing on describing and at the same time clarifying the relationship between the various titles of the Book 47, as well as their dependence on the initial title, D. 47, 1 *De privatis delictis*. Finally, the last chapter chapter is to summarize all the conclusions reached consecutively in the course of the argument and conclude on the analogy between a general part and the first title of the Book 47. It therefore leads to give an affirmative answer to the question put in the beginning of the research process i. e. "May the D. 47, 1 *De privatis delictis* be considered, *mutatis mutandis*, a general part of the law on private delicts?".

I. General Part

One of the commonly cited definitions of the general part, as provided by J. Stagl, describes it metaphorically as a set of codification norms drawn out in front of the parenthesis, being a product of the historical process of abstraction[12]. This term is clearly not intended to provide an all-encompassing definition covering all the features of the term, but it does capture what seems to be the essence of the problem, that is, the reason behind extracting the general part from the course of a legal text[13]. On the other hand, with due regard to the ancient manifestations of the existence of a general part, M. Avenarius seems to reduce the entire essence of the general part to a set of legal definitions, to which, in the Digests, corresponds the content of Book 50 titles 16 and 17[14]. This approach, however, does not seem to be supported by the core of the concept of the general part, which has much more to offer than the mere definition of terms that are used in the law. Not without awareness of the danger of over-generalisation that the general part's method[15] may entail, it is necessary to address the issue directly. Looking at the general part as a kind of interpretative directive for the interpretation of the casuistic premises contained in the special part will allow it to be used as a legal

[12] Stagl, "Część ogólna", cit. (n. 3) 1.

[13] The discussion of this topic yet from different angle continues in the final chapter of this text.

[14] Avenarius, Martin, "Ein 'Allgemeiner Teil' der Digesten?", en Baldus, Christian – Dajczak, Wojciech (Hrsg.), *Der Allgemeine Teil Des Privatrechts* (Frankfurt am Main: Peter Lang, 2013) 69-96, 82 sq.

[15] Stagl, "Część ogólna", cit. (n. 3) 11 sq.

tool. A tool that will make it possible to unify interpretation within the system. In the case described here, the system of private criminal law, regulated by Book 47 of the Digests. In order to prove that such an approach to the general part is not only conceivable, but also strongly justified by the very structure of the text of the Book 47, all its consecutive titles were subject to an analysis. The results of this analysis were then used to establish the relationships between the individual titles, which are not apparent at first sight, but already exist in the text itself. The identification of these relationships made it possible to clarify the image of the stacking construction into which the consecutive regulations are arranged. This construction is described in a subsequent chapter, summarising the analysis of the normative content of the Book 47. It is worth mentioning that such structure within the frames of *Corpus Iuris Civilis* appears to be a unique feature of the Digest since there are no analogous constructs to be found within the Institutions of even the *Codex*.

One of the key elements in the elaboration of the criteria of distinction of the general part is the question of the distinction between *genus* and *species* in Roman jurisprudence[16]. In this case, as in the previous one, it is not possible to build a critique of this endeavour on an argument based on the lack of consistency in the use of these two concepts by the Romans themselves. As Remo Martini notes in the opening words of his text[17], it is understandable that there was sometimes an erroneous interchangeable use of the terms *genus* and *species*. Accepting the presumption of infallibility of Roman jurists does not lead to any constructive conclusions, but on the contrary can sometimes be very harmful. The author very clearly expounds the essence of the process of dividing into species and grouping them under a specific genus. The use of the latter verbs is not accidental, because, as he points out: while *divisio*, by means of which we can separate individual species, consists in dividing the whole into smaller parts, genus cannot be separated, because there is nothing wider above it[18]. Hence, the *genera* can be determined by the method of deduction, that is, in this case, by grouping the individual species and on this basis determining the genus to which they belong[19]. Carrying out this whole process in the course of interpreting the Digests is superfluous, since this has already been done by the compilers at the stage of their composition. Awareness of the latter is at the same time a key starting point for the elaboration of the definition of the general part within a given unit (book) of the Digests. The general part would thus contain passages so broad in subject matter as to encompass within its scope the entire matter of regulation within the genus in question. The specific part, on the other hand, would consist of regulations co-

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[16] *Vid.* TALAMANCA, Mario, "Lo schema *genus–species* nelle sistematiche dei giuristi romani", en *Colloquio italo–francese. La filosofia greca e il diritto romano* (Roma: Accademia Nazionale dei Lincei, 1977) 3-290; MARTINI, Remo, "*Genus* e *species* nel Linguaggio Romano", en GUARINO, Antonio – LABRUNA, Luigi (eds.), *Synteleia, Vicenzo Arangio–Ruiz*, (Napoli: Jovene, 1964) 462-468.

[17] MARTINI, cit. (n. 16) 462.

[18] MARTINI, cit. (n. 16) 466.

[19] The dialectic method of the general part deriving form *divisio* and *partitio* is also described by STAGL, "Część ogólna", cit. (n. 3) 10-11.

vering further species within a given *genus*. This is, against all appearances, not difficult to illustrate, since, as already noted in the introduction, Books 47 and 48 are distinguished by their exceptionally orderly character[20].

In the present case, the analysis of the structure will take place with reference mainly to one "text", or rather a unit of text, namely the Book 47. From a technical point of view, it would be necessary to use the tools of systemic analysis of the legal text, which Antonio Guarino refers to as "l'analisi logico – sistematica"[21]. This type of analysis, classified by the author as 'structural'[22], consists primarily in checking the consistency of the source in terms of the collocation of its various components and determining whether they have been correctly positioned within the system they form[23]. The Digest is however a unique source in this respect, as when analysing them there is also a need to carry out the aforementioned systemic analysis a contrario. This is due to the fact that, in accordance with the assumptions underlying the codification, they form, both within the framework of the whole and of the individual units (books, titles), an organised and well thought-out system. At the very least, such a presumption should be taken as the starting point of the analysis.

However, if we take as a starting assumption that there is a systemic correspondence between the individual fragments[24] and that they form a complete whole, such reasoning will enable a wider view of the source, potentially leading to entirely new conclusions. Assuming that, from a systemic point of view, the content of the Book 47 remains unchallenged, it is possible to proceed to the next step of the exegesis, which would be to ask according to what key the already specific fragments (in this case: the subsequent titles) have been arranged[25]. If the answer to a problem formulated in this way is too difficult or simply impossible to give, one can also consider it from a completely different angle. Namely, to ask what actually results from such and not such a different location of the titles within the unit under study (in this case: an individual book). It is this conundrum that leads to the distinction within the Book 47 its 'general part' and 'special part'. Indeed, the whole process of analysis carried out in this way does not boil down to discovering the guiding idea behind the compilers. On the contrary, it makes it possible to notice certain phenomena which, for the compilers themselves, remained unnoticed. Thus it has been already pointed out by F. Schulz that „the historian is permitted to investigate the ideas working behind the scenes even if the actors themselves were not conscious of them."[26]. As Emilio Betti[27] noticed,

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[20] Here again, Mantovani, cit. (n. 7) 150.

[21] Guarino, Antonio, *Giusromanistica elementare* (Napoli: Jovene, 2002) 112.

[22] Guarino, cit. (n. 21) 107.

[23] Guarino, cit. (n. 21) 112 sq.

[24] Guarino, cit. (n. 21) 113.

[25] On the arrangement of the titles within the *Libri terribiles vide* Stagl, "Część ogólna", cit. (n. 3) 9 sq.

[26] Schulz, cit. (n. 5) 16.

[27] Betti, Emilio, "Diritto romano e dogmatica odierna", en Luraschi G. – Negri, G. (eds.), *Questioni di metodo. Diritto romano e dogmatica odierna. Saggi di Pietro de Francisci e di Emilio Betti* (Como: Edizioni New Press, 1997).

a later jurist is always a step ahead of his predecessors due to the fact that he is aware of the existence of certain factors that the contemporary (from the point of view of the issue in question) jurists could have not even faintly foresee[28]. It is then crucial to distinguish between projecting modern concepts on ancient institutions[29] and simply using modern tools for the interpretation of ancient law. Since the former is substantially unacceptable, the later seems to find a justification within the objective and estimated results of such method[30].

II. *De privatis delictis*

As already indicated in the introduction, the analysis of the content of the Book 47 has been divided into three parts. The first part addresses the regulations contained in the first title of this book. It should be noted that this overview is by no means intended as a summary of the normative material in 47, 1 but instead is aimed at extracting general principles out of it. The identification of the latter will prove crucial in establishing the relationship between the content of the first title (*de privatis delictis*) and the rest of the Book 47. The initial title of the Book 47 does not refer to specific delicts or list their types. On the contrary, the regulations contained therein are of a general nature, as they apply in principle to all types of private delicts respectively. Whenever a specific type of delict is mentioned in the course of the content of this title, this only serves as an exemplary explanation or illustration of the general rule in question. The individual institutions and rules concerning private delict proceedings are described here in the order in which they appear in the course of the title. Although these rules may seem rather obvious yet for the sake of further argument it is absolutely crucial to list them in the order in which they are described. Presenting all these (general) principles of liability will make it possible to illustrate the interrelationship between the regulations of Title D. 47, 1 and therefore decide whether they correspond in nature to the general part of the law of private delicts, and the other titles of this book, which would in turn belong to its special part.

The general rules deriving from the subsequent provisions of the title under examination will be listed and described in the order they appear in the course of the text in the book. At this point, a reservation should be made in advance concerning the last title, i. e. D. 47, 23 *De popularibus actionibus*, which belongs neither to the general part nor to the special part. For this reason, it will remain outside the subject of the analysis presented within this chapter. The general rules for liability decoded from the provisions of the title 47, 1 *De furtis* have been listed below. Next to each of them there is an indication of a specific place within the order of the title that such a rule derives from: *i)* heirs and successors (of the wrongdoer) are not liable in penal actions and cannot be sued for theft

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[28] BETTI, cit. (n. 27) 30.

[29] This particular situation is mentioned by AVENARIUS, cit. (n. 14) 72, as a potential methodological threat.

[30] This issue will be discussed in more detail in the final chapter alongside with specific methodological arguments relating directly to the subject in question.

(*Civilis constitutio est poenalibus actionibus heredes non teneri nec ceteros quidem successores: idcirco nec furti conveniri possunt*[31]); *ii)* heirs and successors are allowed to prosecute and can bring in actions for theft and action under *lex Aquilia* but not an action for insult (*Heredem autem furti agere posse aeque constat: exsecutio enim quorundam delictorum heredibus data est: ita et legis Aquiliae actionem heres habet. Sed iniuriarum actio heredi non competit*)[32]; *iii)* the liability follows the wrongdoer. (*Non tantum in furti, verum in ceteris quoque actionibus, quae ex delictis oriuntur, sive civiles sunt sive honorariae, id placet, ut noxa caput sequatur*)[33]; *iv)* there is no liability overlap. A delict does not reduce the responsibility for another delict (*Numquam plura delicta concurrentia faciunt, ut ullius impunitas detur: neque enim delictum ob aliud delictum minuit poenam*)[34]; *v)* in case of combined delict the liability form respective actions is accumulated and not excluded one by another[35]; *vi)* in case of concurrence of grounds of liability the general rule is that it can be asserted from both actions (*Quaesitum est, si condictus fuerit ex causa furtiva, an nihilo minus lege Aquilia agi possit. Et scripsit Pomponius agi posse, quia alterius aestimationis est legis Aquiliae actio, alterius condictio ex causa furtiva* […])[36]; *vii)* the rule regarding proceedings with an action arising from delicts is that a pecuniary compensation is claimed on the grounds of ordinary law and excludes the criminal prosecution. In case of seeking the extraordinary punishment however, there must be a criminal prosecution instituted against the miscreant (*Si quis actionem, quae ex maleficiis oritur, velit exsequi: si quidem pecuniariter agere velit, ad ius ordinarium remittendus erit nec cogendus erit in crimen subscribere: enimvero si extra ordinem eius rei poenam exerceri velit, tunc subscribere eum in crimen oportebit*)[37].

The fragments not included in the index above are those that only provide examples of legal position described in abstracto by the preceding provision. For instance, in the fragment D. 47, 1, 2 4. there is nothing but a clarifying illustration of the rule from the D. 47, 1, 2, 3 which concerns the concurrence of grounds of liability. D. 47, 1, 2, 4 gives an example of stealing and whipping a slave that would result in liability for both action for theft and for insult which is exactly what the concurrence of grounds of liability from the preceding fragment was about. It does not however contain any autonomous normative material and so no other rules can be decoded from it. A similar situation is encountered in several other passages. For this reason, they are not included in the above inventory. Indeed, the idea standing behind the preparation of the latter, as already indicated, was

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[31] D. 47, 1, 1 pr. Any quotations of the text of the Digests in the course of this article are taken from the critical edition of the Digest: Mommsen, Theodor – Krueger, Paulus, (Hrsg.), *Corpus Iuris Civilis*, *editio stereotypa decima* (Berlin: Weidmann, 1905).

[32] D. 47, 1, 1, 1.

[33] D. 47, 1, 1, 2.

[34] D. 47, 1, 2 pr.

[35] D. 47, 1, 2 pr.

[36] D. 47, 1, 2, 3.

[37] D. 47, 1, 3.

to present the general principles decoded from the provisions of the title D. 47, 1 as opposed to providing the reader with a summary of its contents.

III. D. 47, 2 – 22

The subject of the analysis of this chapter is titles D. 47, 2 to D. 47, 22. Studying their content in terms of decoding the rules of liability contained therein for already specific delicts will later allow to determine the relationship between them and the title 47, 1 which was described in the prior chapter.

1. *D. 47, 2. De furtis*

The second title of the Book 47, *De furtis*, the most extensive of all the passages dealing with private delicts, is devoted entirely to the issue of theft. The legal definition of theft, or more precisely, of its basic type, is contained in the D. 47, 2, 1, 3 derived from Book 39 of Paulus' commentary on the edict. It reads as follows: *furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus eius possessionisve*[38]. The definition can also be extended to cover the dichotomous division into *furtum manifestum* and *nec manifestum* arising from the following passages, which is, indeed, a highly relevant designator of the thief's liability, after all the amount of damages will depend on the classification of the act. In addition to the aforementioned definition, the essential components of the content of the title *De furtis* are the principles of liability specific to this very delict (theft) arising from the successive quoted passages from the works of Roman jurists. Although, like the principles of liability for private delicts in general, these are generally very well and widely known, for the sake of completeness it is necessary that they be listed and briefly summarised. This need is motivated primarily by the fact that the individual principles of liability for theft will be reflected, or not, in the principles of liability for the specific qualified types of that tort, which are the subject of the norms of the successive titles of the Book 47. Hence, it proves necessary to indicate in detail all the basic principles in order to be able to proceed to their specific adaptations or exclusions in the specific cases contained in the descriptions of the qualified types.

The starting point of these considerations is the assumption that, while in relation to the initial title of the book, i. e. 47, 1 *De privatis delictis*, the consecutive title corresponds already to its special part. On the other hand, between the latter and the consecutive titles concerning particular types of theft, there is something of a stacking construction analogous to the relationship between *lex generalis*[39] and *lex specialis*. The subsequent regulations on qualified types of theft rather focus on highlighting exemptions from the general rules applicable to theft, and it is

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[38] Eng.: A theft is a malicious seizure of a thing for the sake of making profit or the use or possession of this thing.

[39] In order to clarify this reference it is enough to look at the definition of the term 'generalis', one of those provided by *Thesaurus Linguae Latinae* vol. 12 pars III, Don. Gramm. IV 539, 12 (Lipsiae: Teuber, 1936 – 1942) 1772, stands as follows: *speciale est, quod ad unum pertinet, quod ad multitudinem, generale dicitur*.

precisely for this reason that these rules should be briefly presented. Likewise in the chapter dealing with the general provisions concerning the private delicts, the subsequent rules will be listed in the order they appear in the course of the book. Next to each of them, in brackets, there will be an indication of a specific place they occupy within the title: *i)* an action for theft in respect of an item is granted once; the subsequent use of the stolen item by the thief does not give rise to a further claim for theft. Bringing action for vindication does not preclude the assertion of a *condictio* (*Ei, qui furti actionem habet, adsidua contrectatione furis non magis furti actio nasci potest, ne in id quidem, in quod crevisset postea res subrepta.; Sed si eam a fure vindicassem, condictio mihi manebit* […])[40] ; *ii)* an action for theft (*actio furti*) lies to a person who has interest, if the interest is honest (*Cuius interfuit non subripi, is actionem furti habet; tum is cuius interest furti habet actionem, si honesta causa interest*)[41]; *iii)* an action for theft does not lie to a possessor in bad faith (*Sed furti actio malae fidei possessori non datur* […])[42]; *iv)* an action for theft does not lie to someone to whom the thing was due by a stipulation if it was not the debtor's fault that it was not delivered (*Is, cui ex stipulatu res debetur, furti actionem non habet, si ea subrepta sit, cum per debitorem stetisset, quo minus eam daret*)[43]; *v)* an action for theft does not lie to the inheritance, but it does lie to the one who has interest in a specific thing (*Si res commodata est et is cui commmodata est decesserit: quamvis hereditati furtum fieri non possit et ideo nec heres eius cui commodata est possit agere, tamen commodator poterit furti agere: idemque et in re pignerata vel in re locata* […])[44]; *vi)* an action for theft is available to anyone who has another's thing at his own risk, while *condictio* lies only to the owner. ([…] *et puto omnibus, quorum periculo res alienae sunt, veluti commodati, item locati pignorisve accepti, si hae subreptae sint, omnibus furti actiones competere: condictio autem ei demum competit, qui dominium habet*)[45]; *vii)* if the object of the pledge is stolen, the creditor is entitled to an *actio furti* for the amount of the entire value of the object of the pledge and not only up to the amount of the claim against the debtor. The debtor, on the other hand, has a regressive claim for the return of the balance (*Creditoris, cuius pignus subreptum est, non credito tenus interest, sed omnimodo in solidum furti agere potest: sed et pigneraticia actione id quod debitum excedit debitori praestabit*)[46] ; *viii)* an action for theft does not lie against those in power (sons-in-power and slaves) (*Servi et filii nostri furtum quidem nobis faciunt, ipsi autem furti non tenentur: neque enim qui potest in furem statuere, necesse habet adversus furem litigare: idcirco nec actio ei a veteribus prodita est*)[47]; *ix)* liability follows the wrongdoer[48] in such extent that the claim resulting

[40] D. 47, 2, 9 pr.; 47, 2, 9, 1.
[41] D. 47, 2, 10; 47, 2, 11.
[42] D. 47, 2, 12, 1.
[43] D. 47, 2, 13.
[44] D. 47, 2, 14, 14.
[45] D. 47, 2, 14, 16.
[46] D. 47, 2, 15 pr.
[47] D. 47, 2, 17 pr.
[48] Literal reference to D. 47, 1, 1, 2 where the rule "liability follows the wrongdoer" is set.

from a deed follows the person of the wrongdoer and not that it is not to be ever satisfied (*Quod dicitur noxam caput sequi, tunc verum est, ut quae initio adversus aliquem nata est caput nocentis sequatur*)[49]; *x)* it is only necessary to indicate the thing in an action for theft in such a way that it can be identified (*In actione furti sufficit rem demonstrari, ut possit intellegi*)[50]; *xi)* if something was broken by a theft who handled it without the intention of stealing it the latter cannot be object of the claim from *actio furti* (*Si quid fur fregerit aut ruperit, quod non etiam furandi causa contrectaverit, eius nomine cum eo furti agere non potest*)[51] ; *xii)* an action for theft and *condictio* can be brought against *impubes* if he is capable of guilt (*Impuberem furtum facere posse, si iam doli capax sit* […])[52]; *xiii)* a land cannot be an object of theft yet there is an action for theft in respect to the movable things from the evicted land (*Verum est, quod plerique probant, fundi furti agi non posse*)[53]; *xiv)* the things caught on land, sea, air cannot be object of an action for theft because they did not belong to anyone (*Si apes ferae in arbore fundi tui apes fecerint, si quis eas vel favum abstulerit, eum non teneri tibi furti, quia non fuerint tuae: easque constat captarum terra mari caelo numero esse*)[54] ; *xv)* a theft can be committed also by accepting an undue payment by a person who pretends to be a creditor, the same goes for *falsus procurator* (*Falsus creditor [hoc est is, qui se simulat creditorem] si quid acceperit, furtum facit nec nummi eius fient.;* [D. 47, 2, 43, 1] *Falsus procurator furtum quidem facere videtur* […])[55] ; *xvi)* even though a stolen thing no longer exists an action for theft still lies against the thief. ([…] *etiamsi exstincta sit res furtiva, attamen furti remanere actionem adversus furem* […])[56]; *xvii)* in the action for theft the plaintiff's interest is the real value of the stolen thing and not its multiple (*In furti actione non quod interest quadruplabitur vel duplabitur, sed rei verum pretium* […])[57]; *xviii)* making use of or selling a pledge by a creditor is considered theft (*Si pignore creditor utatur, furti tenetur*)[58] ; *xix)* a thing that is part of a vacant inheritance cannot be object of theft unless it has been pledged or given as a loan by the deceased or someone has a usufruct on it (*Si is, qui rem pignori dedit, vendiderit eam: quamvis dominus sit, furtum facit, sive eam tradiderat creditori sive speciali pactione tantum obligaverat* […]; *Infitiando depositum nemo facit furtum [nec enim furtum est ipsa infitiatio, licet prope furtum est]: sed si possessionem eius apiscatur intervertendi causa, facit furtum* […])[59]; *xx)* a liability for theft does not reduce the liability attached to the object of theft on another basis (*Si debitor pignus subripuit, quod actione furti solvit nullo modo*

[49] D. 47, 2, 18.
[50] D. 47, 2, 19. pr.
[51] D. 47, 2, 22. pr.
[52] D. 47, 2, 23.
[53] D. 47, 2, 25 pr.
[54] D. 47, 2, 26 pr.
[55] D. 47, 2, 43 pr.
[56] D. 47, 2, 46 pr.
[57] D. 47, 2, 50 pr.
[58] D. 47, 2, 55 pr.
[59] D. 47, 2, 67 pr.; 47, 2, 68 pr.

recipit)[60]; *xxi)* proceeding by the action for things taken by force excludes the proceedings by the action for theft (*Si quis egerit vi bonorum raptorum, etiam furti agere non potest: quod si furti elegerit in duplum agere, potest et vi bonorum raptorum agere sic, ut non excederet quadruplum*)[61].

As it will be demonstrated in the following chapter, there is something of a stacking construction between *leges generales* and *leges speciales* not only in regard to the title D. 47, 1 (i. e. the general part of the book) and the subsequent titles, but also the title D. 47, 2–the basic type of theft–and the other titles concerning the qualified types of the same delict (described by the titles D. 47, 3–9, D. 47, 14 and D. 47, 17 -18). The subsequent regulations on qualified types of theft rather focus either on highlighting exemptions from the basic (not to say general since the matter is the special part of the book) rules applicable to theft or on developing on these rules. For that reason, having formerly extracted the primary rules of liability for theft from the title D. 47, 2 *De furtis*, it is crucial to demonstrate their modifications and developments in the provisions regarding the qualified types of the very same delict.

In case of the titles on qualified (particular) types of theft the compatibility with the general regime of liability established through the provisions of D. 47, 1 will be shown with regard to the provisions of D. 47, 2 *De furtis*. The motivation behind this technical endeavour will be explained in the following chapter, which will have as its subject to determine precisely the relationship between the successive titles of the Book 47. It should be stressed once again that the following index is by no means supposed to be a summary of the normative content of the consecutive titles of the Book 47. On the contrary, its purpose is to list all the modifications and exemptions from the rules of liability established either in Title D. 47, 1 or D. 47, 2, the latter, as already mentioned, exclusively in relation to theft. The titles on theft (D. 47, 3–9, D. 47, 14 and D. 47, 17 -18) will be presented in the first place. The analysis of the rules of liability for other private delicts will follow.

2. *Subsequent titles*

a) *D. 47, 3. De tigno iuncto.* The subject matter of this title constitutes a *lex specialis* not only with respect to the general rule from section D. 47, 1, 2, 3 which concerns the concurrence of grounds of liability but also a *lex specialis* with respect to the special rule from the title concerning the basic type of theft, i.e. D. 47, 2, 89 that is the liability for theft does not reduce the liability attached to the object of theft on another basis. The first of these rules concerns the general concurrence of grounds for liability, while the second concerns the concurrence of grounds for a claim for theft and others with respect to the object itself. In relation to the aforementioned rules, *De tigno iuncto* thus restricts to a certain extent the possibility of asserting claims. The limitation is that although the victim of the theft of material has a claim for twice the value of the thing stolen,

[60] D. 47, 2, 80.
[61] D. 47, 2, 89.

he cannot recover (via *rei vindicatio*) it if it has already been incorporated in the elevation of the building.

b) *D. 47, 4. Si is, qui testamento liber esse iussus erit, post mortem domini ante aditam hereditatem subripuisse aut corrupisse quid dicetur.* This title, in turn, constitutes a *lex specialis* with respect to the particular special rule of the title on theft in the basic type, i.e. D. 47, 2, 17 that is an action for theft does not lie against those in power. Indeed, this rule provides that *actio furti* may not be brought in against subjects in the power of the injured party, i.e. his children and slaves. *Servus qui in testamento liber iussus erit...* does not modify this prohibition to its full extent, but allows an action for theft to be brought against a particular type of subject, namely a slave who was liberated in a will and committed the act after his master's death but before the will was in force. The necessity of modifying the rule of D. 47, 2, 17 is based, as Ulpian repeats after Labeo in his commentary on the Edict, on principles of equity[62] and arises in this case from the necessity of closing a kind of a legal vacuum. For if there had been no special rule, the vacuum would have consisted in the impossibility of asserting the claim, since the wrongdoer could not answer as a slave, because he was no longer one, nor as a free man, because he was not yet one.

c) *D. 47, 5. Furti adversus nautas caupones stabularios.* The special nature of the subject matter of this title is manifested in the peculiar modification of the basic regulation concerning theft, i.e. its definition. Fragment D. 47, 2, 1, 3 containing the definition of theft states that it is "a malicious seizure of a thing for the sake of making profit or the use or possession of this thing", and thus it indicates intentionality as a hallmark of the subjective side. It also implies, already at the level of asserting a claim for a malicious act, that the claim is precisely against the person who committed the act with the intention of enriching himself. In the special cases described in this title, namely proceedings against *nautas*, *caupones* and *stabularios*, the claim can instead be asserted alternatively, i. e. against both the actual perpetrator (as defined by theft) and the operator. The latter could be in such case liable even though he had no malicious intention nor anything to do with the committed delict in general.

d) *D. 47, 6. Si familia furtum fecisse dicetur.* The object of the regulation of this title is undoubtedly a qualified type of theft and thus a *lex specialis* in relation to the norms of D. 47, 2 The special characteristic of a claim for theft committed by a slave family lies in the possibility of choosing the method of assertion of the claim not by the injured party, but by the slave owner. Indeed, it is up to the latter to decide whether he wishes to establish the guilt of the slaves and render them in compliance with the general principles of liability, or to pay in compensation only as much as the claim against the free person would amount to.

e) *D. 47, 7. Arborum furtim caesarum.* The qualified type of the delict described in this title is characterised by the specific object of the theft, which is a tree. In addition, in this case the 'concealed' nature of the offence is also an element of

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[62] *Haec autem actio, ut Labeo scripsit, naturalem potius in se quam civilem habet aequitatem, si quadem civilis deficit actio* […].

the offence, as this concept is defined in D. 47, 7, 7 where, following Ulpian, we read that secretly felled trees are those which have been felled without the knowledge of their owner[63]. The type of theft in question modifies the general rule on concurrence of grounds of liability expressed in D. 47, 1, 2, 3, because after the second action is brought under the same basis, the praetor will only award the difference in value of the claim in respect of the action brought in the first instance. The provisions from the title *De furtis* however in this respect seem to remain intact.

f) *D. 47, 8. Vi bonorum raptorum et de turba.* The subject matter of the following title directly refers to the provision expressed in the fragment D. 47, 2, 89 according to which proceeding by the action for things taken by force excludes the proceedings by the action for theft. In this case the description of the qualified type of theft is not to modify the rules of responsibility for the basic type, but rather to develop them. Undoubtedly, however, it is a special provision.

g) *D. 47, 9. De incendio ruina naufragio rate nave expugnata.* In the case of the title *De incendio, ruina, naufragio*... the basic premise proving the necessity of considering the subject of its regulation as *lex specialis* in relation to the basic type of theft is the aggravation of liability. It manifests itself in the amount of the claim for damages, which in this case amounts to four times the value of the stolen thing (*in quadruplum*). In the other types of theft, in the variant where the perpetrator is apprehended ex post and not in the act of committing the offence, the claim for the offence is, as a rule, for double the value of the thing (*in duplum*).

h) *D. 47, 14. De abigeis.* The qualified type of theft regulated in this title provides a significant modification regarding to the basic liability for theft (that is–deriving from the title D. 47, 2 *De furtis*) in such extent that it sanctions the delict in question with death. D. 47, 14, 1 in the very beginning specifies the punishment for the theft of cattle indicating that due to the severe character of such act it is usually condemned to death, a punishment that is considerably aggravated in comparison to the standard liability for theft (a fine of a multiple of the value of the stolen object).

i) *D. 47, 17 De furibus balnearies.* This particular qualified type of theft modifies the rules of liability from the D. 47, 2 (i. e. the basic type of theft in such extent that if provides a specific punishment is case that the thieves defend themselves with weapons (D. 47, 17, 1 *in fine*). Even though such provision is not a direct modification of any of the general rules from D. 47, 1, it should be considered an indirect interference with the general provision: since it modifies a rule that is itself already a modification to a general provision.

j) *D. 47, 18. De effractoribus et expilatoribus.* A case analogical to the one described in the preceding title. The punishment provided for this type of delict (robbery) significantly aggravates the liability provided for the act of theft and hence D. 47, 18, 1, 1 is a modification of the rules from D. 47, 2.

k) *D. 47, 10. De iniuriis et famosis libellis*. Certain provisions of this title constitute a *lex specials* in regard to the general rule expressed in D. 47, 1, 1

[63] *Furtim caesae arbores videntur, quae ignorante domino celandique eius causa caeduntur.*

according to which all actions are heritable with the exception of an action on account of *iniuria* (*sed iniuriarum actio heredi non competit*). *De iniuriis et famosis* libellis however provides some exemptions to this rule to the extent that is grants an action for *iniuria* to the heirs of the deceased in particular situations expressed in D. 47, 1, 6 and D. 47, 1, 7. In absence of contrary regulations with regard to the remaining cases mentioned in the course of this title it should be considered that the general rules apply. I. e. since there are only two leges stating otherwise, in the rest of the fragments within this title the action for *iniuria* should be seen as inheritable. The latter illustrates a clear cut example of the general nature of the provisions of the title D. 47, 1.

l) D. *47, 11 De extraordinariis criminibus*. This title does not provide any exemptions nor specifications with regard to the rules of liability for private delict since it merely contains descriptions of malicious acts that do not fall within the frames of any other type of delict (or rather, from the structural point of view– title). However, since such a catalogue of extraordinary delicts has been placed in the very middle of the Book 47, this very fact should support its recognition within the general frames of liability described in the first title.

m) *D. 47, 12. De sepulchro violato.* The title *De sepulchro violato* provides an exception in regard to the rule from D. 47, 1, 2, 1 that concerns the question of a concurrence of grounds of liability. The fragment D. 47, 12, 2 expressis verbis excludes the possibility of asserting a claim under *Lex Aquilia* even though, if not stated otherwise, it should be technically possible. The rest of the title refers to the specific circumstances resulting from the hallmarks of the tomb violation thus it does not exempt nor specify the general rules of liability.

n) *D. 47, 13. De concussione.* In absence of any exceptions or modifications in regard to the D. 47, 1 it should be considered that the general principles of liability under title one will apply to this delict as well.

ñ) *D. 47, 15. De praevaricatione – D. 47, 16. De receptatoribus.* There is too little content in these two titles to allow one to extract from them any special features. Because of that it is only to be said that likewise in the case of D. 47, 13 the general rules from the D. 47, 1 should apply here as well.

o) 17. *D. 47, 19. Expilatae hereditatis.* In absence of any exceptions or modifications in regard to the D. 47, 1 it should be considered that the general principles of liability under title one will apply to this delict as well.

p) *D. 47, 20. Stellionatus.* The offence described in this title is particular in that it does not, by its nature, qualify for either a public trial or a private action. It does not either modify any general rules from the title D. 47, 1 since the subject matter of this title is such specific that it shall not be affiliated with any precedent or following malicious acts described in the Book 47.

q) D. 47, 21. *De termino moto* – D. 47, 22 *De collegiis et corporibus.* Since these two titles deal with specific and individual delicts (which consists of, respectively, removing boundary stones and creating secret associations) they are not to be considered qualified types of any aforementioned delicts. Due to that it is hardly possible to look for any modifications/exemptions from the general rules provided in D. 47, 1. The provisions of these two titles should be therefore counted as

belonging to the special part on the basis that they establish special kind of delict not comparable to any other described in the course of the Book 47.

III. The relationship between D. 47, 1 and the remaining titles of the book

In order for the conclusions drawn from the analysis carried out in the above chapters to answer the research question posed, i.e. "May the D. 47, 1 *De privatis delictis* be considered, *mutatis mutandis*, a general part of the law on private delicts?", they must be addressed in the appropriate order. To make this possible, it is first necessary to take a closer look at the relationship between the *lex generalis* and the *lex specialis* in more general terms and then to illustrate the issue on specific examples originating from the Book 47. Before doing so, however, it is worth briefly outlining the perhaps obvious, yet for the purposes of this text, necessary characteristics of those two terms. Such description will allow one to look at the individual regulations of the consecutive titles of the Book 47 from a slightly different perspective. A perspective that will provide the *criterium divisionis* that justifies the positioning of the specific titles within the general part or the special part. However, challenging it would be to come up with a clear and complete definition of the *lex generalis* for the purposes of this discussion, it would be sufficient to encapsulate its essence. Thus, to paraphrase G. Bassanelli Sommariva[64], the term *generalis* referring to *leges* would be used to indicate that a certain provision is directed to a generality of subjects and not to solve particular cases in need of a particular decision[65]. *Mutatis mutandis*, within the course of the Book 47 a provision (title) should be then considered general if it refers to a generality of premises of liability and on the contrary, special if it refers directly to the liability for a particular delict. This being said, the characteristics of the provisions of D. 47, 1 *De privatis delictis*, namely the fact that they do not in any case refer directly to a particular offence, but to all the private delicts instead, constitute the very first argument in favour of designating this title as a general part of the book. All of the remaining titles of the Book 47–with exclusion of the last one, D. 47, 22 *De popularibus actionibus,* which, as it was already stressed, does not fall within the scope of the law of private delicts–deal directly and exclusively with particular offences, being different types of theft or other private delicts.

Categorizing individual titles as general or special, and more specifically, designating the D. 47, 1 as a general one, containing *leges generales* meanwhile the titles D. 47, 2–22 as special, containing *leges speciales* allows us to move to the second argument, which is the relationship between the general and the special provisions of the Book 47. First of all, it should be stressed that not all of the

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[64] Bassanelli Sommariva, Gisella "*Leges generales*: linee per una definizione", en *Studia et Documenta Historiae et Iuris*, 82 (Roma: Pontificia Università Lateranense, 2016) 61-97.

[65] Bassanelli Sommariva, cit. (n. 64) 72.; the author discusses the issue of leges generales present mainly in the legislation of Theodosius and Justinian, i. e. The Theodosian Code and the Corpus Iuris Civilis, the characteristics that she enumerates however may be used to define the concept in a wider perspective, not only in respect to the imperial legislation.

special provisions[66] have a direct relationship with the provisions of the first title, namely that they do not modify or specify directly the general rules of liability for private delicts. As already pointed out above, this is primarily a matter of the titles on qualified types of theft, i. e. titles D. 47, 3–9., D. 47, 14 and D. 47, 17–18. That very fact does not however exclude them from contributing to the cleverly designed stacking structure into which all private delict law is arranged. For it should be noted that while the special regulations for specific types of theft do not directly relate to the matter of the regulation of the first title, they are after all directly related to the second title, that is, the regulation of theft in the basic type. The latter, on the other hand, in the framework of its provisions, indeed refers directly to the general rules of liability for private delicts expressed in the D. 47, 1 whether to specify them or to provide for exceptions[67]. Thus having in mind both the relationship between the title D. 47, 1 and the title D. 47, 2 and the relationship between the title D. 47, 2 and the titles D. 47, 3–9, D. 47, 14. and D. 47, 17–18 it can be assumed that there is indeed a relationship between the latter and the first title it is simply of an indirect nature. To put it in other words, the provisions of the titles on the qualified types of theft (D. 47, 3–9, D. 47, 14 and D. 47, 17–18) do modify or specify the general rules from the first title to the extent that they modify the provisions of the second title which is already a modification of the general rules itself. A relationship between those titles and the general part thus emerges via their direct relationship with the title D. 47, 2 *De furtis*. Such explanations makes it now possible to picture the whole stacking construction of the law of private delicts contained in the Book 47 as well as it provides a vivid justification to the attribution of the title D. 47, 1 *De privatis delictis* to the general part of the Book 47 while the remaining titles to the special part of this book.

IV. Πρῶτα: the Roman Notion of a General Part?

The normative content of the Book 47 is, as it was already emphasised several times, unique in various respects. Its distinction alongside the consecutive book, which is the second part of the *Libri Terribiles* within the so-called *massa penale*[68], gives due emphasis thereto. The structural uniqueness of the books 47 and 48 od the Digest, however, is by no means limited to the orderly nature or the comprehensive coverage of the matter of regulation. Most importantly, this book forms, within the Digests, an autonomous system, a comprehensive branch of law, in this case private criminal law, which, while remaining in harmony with the codification as a whole, is itself able to 'guide by the hand' its addressee in terms of interpretation. Such guidance however is to be achieved exclusively by means of systematic interpretation and under no circumstances by treating *Libri terribiles* as a disorderly enumeration of private and public offences respectively.

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[66] From now on this term will be used in respect to the provisions of the titles D. 47, 2–22 as they have been identified as belonging to the special part of the Book 47.

[67] E. g. in the case of D. 47, 2, 18 which refers *expressis verbis* to the rule from D. 47, 1, 1, 2.

[68] MANTOVANI, cit. (n. 7) 150.

Such an approach would deny the whole imperial rationale standing behind the idea of codification as expressed in the introductory constitutions[69].

The Digest system, however, is not unique. There is thus a far-reaching analogy between the Justinianic system and the didactic system of Gaius[70] since the order of the Digests corresponds to a large extent to a much older one, as already known from the Gaius' Institutions. In the first chapters of the Institutions, Gaius addresses general questions concerning the law[71], which should be noted in particular in view of the issue of the Justinian πρῶτα raised above, that the Emperor, following Gaius, places at the beginning of the collection and gives as a starting point for the study and interpretation of the entire normative matter in force[72]. Following this line of thought, it is reasonable to assume that the existence of a peculiar „general part" within the Digests as a whole entitles one to search for analogous structures within the individual books. As the boundaries of the present work are set by the subject criterion, for which the private criminal law was taken, the aim was to examine whether a certain general part is present in the content of the Book 47.

It is now the moment to return to the question posed in the introduction, i. e. "May the D. 47, 1 *De privatis delictis* be considered, *mutatis mutandis*, a general part of the law on private delicts?". In the light of all of the above, nothing but an affirmative answer should be given. The awareness of certain factors that the roman jurist could not even faintly forsee[73] gives a modern scholar a possibility for a wider interpretation of roman law. Perhaps even, given certain circumstances, allows them to make use of tools unknown to the romans, fruits of modern

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[69] For instance as expressed in the constitution *Deo Auctore*, § 5: *Cumque haec materia summa numinis liberalitate collecta fuerit, oportet eam pulcherrimo opere extruere et quasi proprium et sanctissimum templum iustitiae consecrare et in libros quinquaginta et certos titulos totum ius digerere, tam secundum nostri constitutionum codicis quam edicti perpetui imitationem, prout hoc uobis commodius esse patuerit, ut nihil extra memoratam consummationem possit esse derelictum, sed his quinquaginta libris totum ius antiquum, per millesimum et quadringentesimum paene annum confusum et a nobis purgatum, quasi quodam muro uallatum nihil extra se habeat: omnibus auctoribus iuris aequa dignitate pollentibus et nemini quadam praerogatiua seruanda, quia non omnes in omnia, sed certi per certa uel meliores uel deteriores inueniuntur*.

[70] The issue of analogy between the ratio of Justinian's codification and the didactic system of Gaius has been addressed and exhaustively justified by Stagl, "Il sistema", cit. (n. 6) 2; for the contrary, *vid*: Varvaro, Mario, "La dote, il ius singulare e il 'sistema didattico' di Gaio", en *Seminarios Complutenses de Derecho Romano*, XXIX (Madrid: Universidad Complutense de Madrid, 2016).

[71] Stagl, "Il sistema", cit. (n. 6) 10.

[72] It is crucial to underline that *dihairesis* was the characteristic feature of Gaius and his works, and it was the cultivation of this method in the jurisprudence that led to conceptualisation of law (civil law) through set of concepts that contributed to the spreading the abstraction within the legal doctrine primarily strictly pragmatic and developed "senza astrazione, niente diairesis" *vid.* Schiavone, Aldo, "Astrarre, distinguere, regolare. Forme giuridiche e ordine teologico", en *Quintus Mucius Scaevola*. *Opera*, Scriptores iuris Romani, 1 (L'Erma di Bretschneider: 2018) pp. 29-56, 39 sq.

[73] Betti, cit. (n. 27) 30.

jurisprudence, in attempting to interpret the law[74]. Therefore there is no reason to underestimate the potential of a systematic or even structural interpretation of the Book 47. The latter enables one to notice features that remain unnoticed for those who ignore its structural uniqueness like for instance the above mentioned relationship between the subsequent titles on private delicts. The view suggesting that the attempts to determine a general part within the parts of the Digest other than titles 16 and 17 of the Book 50 would serve no purpose[75] is detached from the source accounts, that subjected to a profound analysis prove otherwise. Only having recognised the stacking construction formed by the consecutive titles of the book and having acknowledged the existence of a set of general rules contained in the introductory title one may be able to conduct a proper interpretation of the law on private delicts within the frames of the Justinian's legal system. In the light of all of the above it seems appropriate to take a closer look at the issue of origin of the general part. The very fact that its concept, as stated multiple times, was a product of modern jurisprudence does not exclude the possibility that its essence had been already there centuries ago, just for certain reasons omitted as not-fitting the average scheme of Roman legal thought[76].

The view that structures analogous to the general part were known to Roman law[77] is not, contrary to the *opinio communis*[78], detached from the source accounts– such as for instance the very structure of particular units of Roman legal texts–and represents one of the crucial conclusions of the analysis conducted in the precedent chapters. At this point it should be noted that Justinian himself, in the constitution *Omnem*[79], already makes a distinction between the parts of the laws contained in the Digests, referring to the initial one with the term πρῶτα, or *prima pars legum*[80]. The scope of the subject matter of the regulations contained in this section of the Digests can be described as primary issues. It is not surprising, therefore, that the emperor himself noted the need to explain the reasons why they have been placed at the beginning of the collection (*nihil est anterius quia quod primum est nihil ante se habere non potest*[81]). It is also significant that a Greek term (πρῶτα) is used to designate them. Although the use of Greek terminology in the course of

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[74] *Vid.* WIEACKER, Franz, *Ausgewählte Schriften*, Bd. 1, "Methodik der Rechtsgeschichte" (Frankfurt am Main : Metzner, 1983) 117.

[75] Avenarius, cit. (n. 14) 72.

[76] The reasons for such statement are explained in detail in the final part of this chapter.

[77] This problem was flagged up by STAGL, "Część ogólna", cit. (n. 3) 4, at the beginning of his text, when he points out that the genesis of the construction of the general part does indeed already lie in Roman law, but that the matter had hitherto been rather neglected in doctrine.

[78] For instance, AVENARIUS, cit. (n. 14) 72, argues that there is little to be gained by posing a question whether a particular part of the Digest can be called a "general part". The following text however, is to prove otherwise.

[79] Const. *Omnem*, §2.

[80] This refers to the first four books of the Digest.

[81] Const. *Omnem*. Eng.: there is nothing former since what is first cannot have anything before.

Unless indicated otherwise all of the translations within the course of this text are made by the author herself.

the Latin text of the Digests is not uncommon, a careful tracing of the catalogue of meanings of πρῶτος reveals a certain concretisation of meaning in relation to the Latin equivalent of the word (*primus, a, um*). For instance, in classical Greek the term πρῶτος is known to denote the most important, the most prominent whether in the army[82] or in the state[83]. In other cases, in relation to persons, it can also mean the most suitable or best in a given category (profession)[84]. By analogy, in relation to rights, the term should therefore mean not so much "first in order", and therefore in a numerical sense, as "first-rate", "most important". Moreover, the aforementioned definition of πρῶτα and its meaning within the text of the constitution Omnem is covered to all intents and purposes by the definition of the latin term *generalis* provided by Seneca, according to whom *quod est generale supra se nihil habet*[85]. A linguistic interpretation thus leads to the conclusion that the positioning of the first books in this particular place in the structure of the Digests[86] is not only not coincidental, but even crucial for the interpretation of all the other regulations contained within this system.

The linguistic arguments seem convincing enough albeit they do not predominate in essence over the substantive ones. As already emphasised in the precedent paragraph, the four initial books of the Digest were placed as *prima pars legum* due to the importance of their content and at the same time the relevance of considering them a starting point for further study of law[87]. The latter suggests that the ratio behind the specification of this particular part of the Digest is essentially equivalent to the main ratio of the general part to the extent that it is crucial for the interpretation of anything that follows (within the course of the same legal text of system). Pulling the group of legal primary issues out in front of the parenthesis and placing it at the very beginning of the body of laws was not a coincidence. On the contrary, in the Const. *Omnem* referred to above, the emperor clearly emphasises the intentionality of this process[88]. This attests rather unambiguously in favour of the existence of a systemic interpretation of the Digests as early as at the level of legislative foundations. Therefore, the assertion that such interpretation or the attempt to identify structures analogous to the general part within the Digest is an anachronistic exercise can hardly be accepted. For, in view of all the considerations given, the latter consists, in the case of the Digests, not in interfering with the original content or structure of the text in order to classify the passages in question as belonging to a general part or a special part, but rather in naming the division that is already present there. The whole Digest

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[82] Sophocles, *Philoctetes* 1305.

[83] Euripides, *Medea* 917.

[84] Lucian, *Hippias* 3.

[85] Seneca, *Epistulae* 58, 12.

[86] Likewise Stagl, "Część ogólna", cit. (n. 3) 8, who, in addition to purely linguistic considerations, recognises Justinian's reasoning leading inevitably to the adoption of an interpretation that favours the recognition of the πρῶτα as precisely that initial, most important part of the entire law, and thus the counterpart of the general part of the Digests as a whole.

[87] This is particularly evident by even a cursory analysis of the Justinian law curriculum. Vide: Stagl, "Il sistema", cit. (n. 6) 32-33.

[88] Const. *Omnem*, § 2.

is by no means an index of unrelated texts of Roman jurists, on the contrary, it is an autonomous legal text only composed by fragments of the works of roman jurists. Although such a need for classification was unfamiliar to the Romans[89], there is little methodological obstacle against using the terminology elaborated in later times to name that which already existed in the roman legal texts[90]. Especially that the general part is a natural product of abstraction and a level of abstraction required in order to achieve such an outcome was perfectly achievable for the Roman jurists at the time[91].

The issue of πρῶτα addressed in the beginning of this chapter illustrates exhaustively the substantial analogies between the reasons of its distinction or collocation and the *ratio* standing behind the general part as such. Therefore, if this is apparent enough at such a high level of generality–the latter is a simplification touching on the question of the scope of regulation, wich in case of the Digest is enormous since it covers the entire law–it should be even more noticeable in cases of more concrete nature. Namely, that by inference *a maiore ad minus* one should conclude that since there is a construct that by the very words of the imperial description draws in mind a picture of a prototype of a general part of law as a whole, then such a structure should be even more apparent within a concrete branch of law. Indeed, in view of the argumentation presented above it is to be noted that in case of the law of private delicts that derives from the Book 47 of the Digest the structure is clear and orderly enough to notice a general part within its first title, D. 47, 1 *De privatis delictis*.

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[89] Talamanca, cit. (n. 16) 31.

[90] Here again, Wieacker, cit. (n. 74) 117.

[91] The unwritten principle of no abstraction nor *dihairesis* illustrated by Schiavone, cit. (n. 72) 39 – 40, can be easily challenged after Gaius.

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