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# THE 'SOCIETAS LEONINA' IN THE WORK OF COMMENTATORS

In Roman law a *societas* was a contract concluded between two or more persons with the purpose of sharing profits and losses. What the partners contributed to the common business was money, goods, rights, claims against third parties, or their personal professional skills and labor. Funds and things collected became the joint property of all partners, normally in equal shares. If the contributions of the partners were not equal or if their parts in labor or personal services were of different values, then different shares were established at the conclusion of the partnership. Accordingly, the share of each partner in the profit and loss was fixed by agreement[1]. Thereby a partnership in which one of the partners was

[1] There is a significant number of reference works covering this topic. For 19th century references, see Ch.F. von Glück, *Ausführliche Erläuterung der Pandeckten nach Hellfeld, ein Commentar*, Erlangen 1813, pp. 414-416, 425. For more recent critical analyses, see E. Del Chiaro, *Le contrat de société en droit privé Romain sous la République et au temps des jurisconsultes classiques*, Paris 1928; A. Manigk, *'Societas'*, «RE» Zweite Reihe 3/1929, col. 772-781; A. Poggi, *Il contratto di societá in diritto romano classico*, Torino 1930 (repr. Roma 1972); F. Wieacker, *'Societas'. Hausgemeinschaft und Erwerbsgesellschaft. Untersuchungen zur Geschichte des römischen Gesellschaftsrechts*, I, Weimar 1936; Idem, *Das Gesellschafterverhältnis des klassischen Rechts*, «ZSS» 69/1952, pp. 302-344; C. Arno, *Il contratto di società*, Torino 1938; É. Szlechter, *Le contrat de société en Babylonie, en Grèce et à Rome, étude de droit comparé de l'antiquité*, Paris 1947; V. Arangio-Ruiz, *La società in diritto romano*, Napoli 1950; M. Bianchini, *Studi sulla 'societas'*, Milano 1967; F. Cancelli, *Società. Diritto Romano*, «NDI» 17/1970, pp. 495-516; A. Guarino, '*Societas consensu contracta*', Napoli 1972; Idem, *La società in diritto*

only liable for loss and excluded from sharing in the profit was invalid. A partnership of this kind was called a *societas leonina*.

There is one passage in Ulpian referring to such partnerships. It was subsequently placed in title 2 of book 17 of the Digest (*Pro socio*) by Justinian's compilers:

> D. 17,2,29,2 (Ulp. 30 *ad Sab.*): *Aristo refert Cassium respondisse societatem talem coiri non posse, ut alter lucrum tantum, alter damnum sentiret, et hanc societatem leoninam solitum appellare: et nos consentimus talem societatem nullam esse, ut alter lucrum sentiret, alter vero nullum lucrum, sed damnum sentiret: iniquissimum enim genus societatis est, ex qua quis damnum, non etiam lucrum spectet.*

Ulpian states that according to Aristo, Cassius gave a response that a partnership could not be contracted in which only one of the partners took all the profit (*lucrum*), while the other sustained all the loss (*damnum*). Cassius called such an agreement a *societas leonina* (a leonine partnership). Ulpian agrees with the opinion that a partnership in which one of the partners receives all the profit and the other is excluded from sharing in the profit but only sustains all the loss is null and void (*nullum est*). In the grounds for his opinion Ulpian says that a partnership in which one of the partners were to sustain all the losses and never expect any profit would be most unfair[2].

These issues were also discussed by representatives of the Bologna school of Glossators in the 11th century[3]. They focused on the explanation

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*romano*, Napoli 1988; F. Bona, *Studi sulla società consensuale in diritto romano*, Milano 1973; M. Talamanca, *Società in generale: Diritto romano*, «ED» 42/1990, pp. 814-860; J.H. Lera, *El contrato de sociedad. La casuistica jurisprudencial clasica*, Madrid 1992. See also M. Kaser, *Neue Literatur zur 'societas'*, «SDHI» 41/1975, pp. 278-338.

[2] See A. Guarino, *La società col leone*, «Labeo» 18/1972, pp. 72-77; J. Garcia González, *Sociedad leonina*, [in:] *Homenaje al profesor García-Gallo*, III, Madrid 1996, pp. 285-294; K.-M. Hingst, *Die 'societas leonina' in der europäischen Privatrechtsgeschichte*, Berlin 2003, pp. 35-127; J.M. Blanch Nougués, *Reflexiones acerca de la 'societas leonina' en el Derecho Romano*, «RIDA» 65/2008, pp. 83-106.

[3] The name of the school of Glossators stems from its most significant type of scholarship, i.e. glosses (sing. *glossa*, γλωσσα). Glosses were explanatory notes on passages in

of the terms *lucrum* and *damnum* as used in the quoted passage, which could be a relevant circumstance making a *societas leonina* admissible. A review of their extant glosses indicates that in general the Glossators held such contracts invalid pursuant to Justinian's law. Yet they made a few attempts to re-interpret certain provisions of Roman law. One such attempt was to answer the question if the holder of a "lion's share" had the right to bypass the invalidity effect of a *societas leonina* by assigning just a minimum share in the profit to his partner in the form of a *nummus unus* (a small payment)[4].

This comes as no surprise, since at the time law, including partnership law, was regulated by customs, which differed from city to city throughout Italy. The situation did not change until the late 13th century, when Roman

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Justinian's legislation (mostly the Digest) created with the use of the scholastic method. The work of the Glossators focused on the theoretical analysis of Justinian's legislation, with no general interest in practical issues. See W. Litewski, *Historia źródeł prawa rzymskiego*, Warszawa-Kraków 1989, p. 163; H. Lange, *Römisches Recht im Mittelalter*, I: *Die Glossatoren*, München 1997, pp. 118-124; E.J.H. Schrage, *'Utrumque Ius'. Eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts*, Berlin 1992, pp. 33-37. The school of Glossators was established by Irnerius, who was sometimes referred to as the *lucerna iuris*, the "lantern of the law." His most accomplished students were the *quattuor doctores* (the Four Doctors of Bologna) – Bulgarus, Martinus Gosia, Hugo de Porta Ravennate, and Jacobus de Boragine. Rogerius, another distinguished Glossator, also lectured and wrote in the 12th century and was probably a student of Bulgarus. The chief 13th-century Glossators were Azo of Bologna, Accursius (Francesco Accorso), and Odofredus (Odofredo Desani). For these and other representatives of this trend, see H. Kantorowicz, W.W. Buckland, *Studies in the Glossators of the Roman Law: Newly Discovered Writings of the Twelfth Century*, New York 1939; F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*², Göttingen 1967; M. Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna*, 850-1150, New Haven 1988. See also, *Juristen. Ein biographisches Lexikon. Von der Antike bis zum 20. Jahrhundert*, ed. M. Stolleis, München 1995; W. Litewski, *Słownik encyklopedyczny prawa rzymskiego*, II: *Biogramy*, Kraków 1998, pp. 286-288; R. Wojciechowski, *'Societas' w twórczości glosatorów i komentatorów*, Wrocław 2002, pp. 24-30.

[4] See K.-M. Hingst, *op. cit.*, pp. 129-142; T. Palmirski, *'Societas leonina' w twórczości glosatorów*, [in:] *'Regnare, Gubernare, Administrare', Z dziejów administracji, sądownictwa i nauki prawa, Prace dedykowane Prof. Jerzemu Malcowi z okazji 40-lecia pracy naukowej*, Kraków 2012, pp. 181-189.

law started to be put into practice on a large scale. The change resulted from the work of the school of Post-Glossators, often referred to as Commentators or Counsellors, who flourished in that period in Italy[5]. Representatives of this school based their work not only on the Code of Justinian, but also on opinions in the glosses to it. The school's leading representatives were Cino da Pistoia (Guittoncino dei Sinibaldi de Candia Pistoia, Cinus de Sigibuldis, 1270-1336), his student Bartolus de Saxoferrato (Bartolo da Sassoferrato, 1313 or 1314--1357)[6], and the latter's student Baldus de Ubaldis (Baldo degli Ubaldi, 1327-1400)[7].

The question arises whether the introduction of numerous new legal constructions, also within partnership law[8] addressed the *societas*

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[5] The name "Post-Glossators" is purely chronological but is rather unfair, because it undervalues the school's significance. The two other names stem from the school's basic types of writing – commentaries and *consilia*, legal advice provided both to judges (*consilia sapientis, consilia iudicale*) and to parties in court proceedings (see R. Wojciechowski, *op. cit*., pp. 41-42, and the bibliography quoted there). Hence, writing about representatives of this school, F. Wieacker (*op. cit.*, pp. 81 and 82, note 6) uses the term "Konsiliatoren" (see also W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*[3], Warszawa 2018, pp. 100-101). According to F. Calasso (*Medio Evo del diritto*, Milano 1954, p. 564), this school also used to be called the scholastics' or dialecticians' school because its representatives used the dialectic methodology. For the methodology of the Commentators' scholarship, see V. Piano Mortari, *Dogmatica e interpretazione. I giuristi medievali*, Napoli 1976, pp. 155-262.

[6] Bartolus is considered the most prominent representative of the school of Commentators. As he was regarded as an authority, the accepted rule was that those who neither used Bartolus' methodology nor availed themselves of his opinions could not be referred to as lawyers (*nemo iurista nisi Bartolista*: "none but a follower of Bartolus is a lawyer"). See F. Calasso, *Bartolismo*, «ED» 5/1970, pp. 71-74.

[7] Jason de Mayno (1435-1519) is considered to have been the last significant member of the school, since this lawyer created a summary of the main trends in the development of the school of Commentators, in his extensive commentaries to passages in the Code of Justinian. See V. Piano Mortari, *Commentatori*, «ED» 7/1970, pp. 794-803. For these and other representatives of this school, see R. Wojciechowski, *op. cit.*, p. 37 and the bibliography quoted there. See also items quoted in footnote 3.

[8] For a detailed list, see R. Wojciechowski's short summaries after each chapter of his book (pp. 124, 147, 179, 201 and 206), as well as in his final remarks (pp. 209-214). One of examples worth mentioning is Bartolus de Saxoferrato and his work on partnership contracts, where he took an innovative approach to assumptions regarding

*leonina* as well. Perhaps the Commentators regarded the *societas leonina* as self-evidently invalid, so they only mentioned it in passing.

The only well-known Commentator to mention it was Baldus de Ubaldis, who stated in his commentary to the Digest that any partnership in which one partner received all the profit, while the other sustained all the loss was called "leonine" and was invalid[9].

There are only two other mentions in the work of other Commentators. The first is in the work of Petrus de Ubaldis, Baldus' brother[10], who discusses particular issues regarding partnerships, among them the case of a leaseholder (a farmer) who leased out the draught animals belonging to his landowner to a third party in return for a fee (*merces*). The third party was to do certain jobs for the leaseholder applying his own labor or using the animals, or to plow someone else's land with them and his own oxen, or to transport the grain which is to be sold by the leaseholder using both his own and the landowner's horses and oxen. From the perspective of the honest, upright man (*vir bonus*) the draught animals were probably not intended for such use. Petrus considers the leaseholder's use of the animals is not in the landowner's best interest. The loss resulting from any deterioration in the condition

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the existence of a partnerships. He was also the first lawyer to deal in a systematic manner with the business name (*signum*) used by the partners. In turn Baldus de Ubaldis, Bartolus' student, may be called the creator of a comprehensive medieval doctrine on partnerships.

[9] 'Illa societas quo unus habeat lucrum, alius damnum: dicitur esse leonina: & non valet' (*Corpus Iuris Civilis Iustinianei, cum commentariis Accursii, scholiis Contii, et D. Gothofredi lucubrationibus ad Accursium, in quibus Glossae obscuriores explicantur, similes & contrariae afferuntur, vitiosae notantur. Accesserunt Iacobi Cuiacii Paratitla in Pandectas & Codicem, Studio et opera Ioannis Fehi, Tomus hic Primus Digestum Vetum continent*, Lugduni 1627, repr. Osnabrück 1965, col. 1664). According to Baldus, who is considered to have established the medieval doctrine on partnership (see R. Wojciechowski, *op. cit.*, p. 98), profit and loss in all types of partnerships was to be divided between the partners ("…ut quando negotiantur, et ex communicatione lucrorum et participatione damnorum," *Consilia*, Venetiis 1575, lib. 1, cons. 120, n. 3).

[10] Petrus de Ubaldis, *Tractatus de duobus fratribus et aliis sociis*, Coloniae Agrippinae 1586, p. 167, note 28. For remarks on this work, see H. Coing, *Europäisches Privatrecht,* I: *Älteres Gemeines Recht (1500 bis 1800)*, München 1985, p. 465, note 9.

of the animals would only be suffered by the landowner, while the profit would only be enjoyed by the leaseholder[11].

The issue is that the farmer does not utilize the animals leased together with the land to plow the land in the leasehold, but in a way uses them contrary to their purpose, which may lead to a deterioration of their condition. In Petrus' opinion such conduct is contradictory to the nature of the partnership. He claims that the profit resulting from the work performed by the animals should be enjoyed by their owner *pro sua rata*, who should also have the same share in any losses. A leaseholder may only use the leasehold in accordance with its purpose[12]. Petrus categorizes this use of property as a partnership between the landowner and his tenant the leaseholder, who has leased out the landowner's property. This partnership can be understood in the following way: these persons gain profit resulting from the leaseholder's labor and the work of the animals he has leased from the landowner, or of the work of the leaseholder's own animals and the animals he has leased. According to Petrus' description it seems that in the situation described above the landowner has not consented to the leaseholder's actions. Hence this case cannot be called a partnership at all, but not because it could be categorized as a *societas leonina*. If the landowner had consented to the use of his animals in this way, which would mean that the profit accruing thereby would go (exclusively) to the tenant, such a partnership would be the illicit *societas leonina*, since the lessor (the landowner) would have no share in the profit gained (partly) with the use of his property. To resolve

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[11] "(…) quaero, quid si colonus locat (…) animalia pro certa mercede, (1) vel cum eis lucratur locando operas suas, & animalium, (2) vel cum bobus communibus, colendo terram alienam, (3) vel portando cum equis communibus, vel asinis granum extra districtum ad vendendum, ad quem usum verisimiliter boni viri arbitrio non videntur destinata dicta animalia, nec videtur de domini intentione, ut colonus ob eam causam utatur dictis animalibus, cum animalia ob eam causam deficiant cum damno domini, & utilitate coloni, praeter naturam societatis, [D. 17,2,29,3]".

[12] "ideo puto, quod dictae operae debeant cedere ad lucrum domini, pro sua rata, quemadmodum ad damnum cedit, licet enim qui possit uti re communi ad usum destinatum (…)".

the problem, Petrus de Ubaldis replaces the lion's share with a *pro sua rata* share in the profit and loss[13].

The *societas leonina* was also discussed by Baldus de Ubaldis' student, Paulus de Castro (Paulus Castrensis) in his Commentary on the Code of Justinian. The background for his deliberations was the case of a partnership in which one of the partners contributed only the capital (*pecunia*) and the other only his work (*opera*)[14]. The Commentator asserts that the provisions of a contract in which the former partner would enjoy no profit generated by the partnership (as he would be obliged to transfer it to the other partner) but would be liable for any losses incurred during the partnership, would be excessively strict and burdensome. Therefore, such provisions would not be equitable[15]. Hence, we would have to consider if, in the event of the partnership bringing no profit, the outstanding capital should be vested only with the partner who contributed it, or if the other partner, who had worked without compensation, should be entitled to a share in this capital as well. Paulus is of the opinion that the partner who had contributed the capital to the partnership would be excessively burdened if he were to share the capital with the other partner who had contributed only his work. The latter would gain a profit (in the form of part of the capital

[13] K.-M. Hingst (*op. cit.*, p. 145) refers to an excerpt of the *Commentary on the Pretorian Edict* by Paulus included in D. 17,2,29 pr., and claims that, in order to avoid the invalidity of the partnership, we would have to assume that the partners have equal shares in the partnership. To my mind this would be the case only if there were no other pertinent provisions in the partnership contract, which Paulus does in fact say in the passage quoted.

[14] This type of partnership is mentioned by C. 4,37,1 (Impp. Diocletianus et Maximinus AA. et CC Aurelio, a. 293): "Societatem uno pecuniam conferente alio operam posse contrahi magis obtinuit." Cases of such partnerships and, in particular, the issues related to the division of the partnership's assets after its termination were discussed in detail especially by Commentators active in the 14th century. See R. Wojciechowski, *op. cit.*, pp. 168-179 and the bibliography quoted there.

[15] "(…) nimis esset durum quod ille qui ponit capitale et nullum lucrum habuit deberet ipsum communicare cum socio et sic ille lucraret et iste pateretur damnum: vnde non esset aequalitas" (*Pauli de Castro Prima super Codice. Clarissimi iuris utriusque doctoris Pauli Castrensis Commentariorum in Codicem Iustinianum pars prima*, Lugduni 1540, Rubrica '*Pro socio*', p. 224, note 3).

vested with him when the partnership was terminated), even though the partnership had not brought a profit, while the partner who had contributed the capital would not have gained any profit but sustained all of the loss. As Paulus' words indicate, such a division of profit and loss is like a *societas leonina*. However, a question arises – whether the alternative provision, i.e. that the partner contributing the capital keeps all of it, would not be unfair to his partner. In the event of no profit, his work would go unremunerated. I would not agree with that point of view, since it signifies that the capital of the partner providing it had "worked" to no result as well. In other words, the effort that led to no return would correspond to no interest on the capital.

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My review of the extant works I have discussed clearly shows that the answer to the question whether the Commentators contributed to the development of the institution of the *societas leonina* is "no," since the institution was mentioned directly only in the commentary to Justinian's Digest by Baldus de Ubaldis. It was also mentioned in Petrus de Ubaldis' *Tractatus de duobus fratribus et aliis sociis*, but only as an *a contrario* argument to justify the claim that the lessor of an animal must have a share in the leaseholder's profit resulting from the use of the animal for the purposes of carrying out another agreement he (the leaseholder) has concluded with a third party[16]. Similarly, the *societas leonina* and its legal effects are mentioned in Paulus de Castro's commentary to the Code of Justinian.

Perhaps the fact that there was no mature consideration of this topic resulted from the fact that the Commentators assumed, just as it was assumed in Roman law[17], that as a rule partnerships were fraternal in

[16] Since there were no clear contractual provisions, the *societas leonina* is referred to in this treatise as a negative concept, in order to justify the share of profit that was not regulated in the contract.

[17] See D. 17,2,63 pr.

character,[18] which in turn explicitly excluded any attempts to dodge the prohibition on a lion's share enjoyed by any of the partners[19].

## The 'Societas Leonina' in the Work of Commentators

### Summary

In Roman law a *societas* was a contract concluded between two or more persons with the purpose of sharing profits and losses. In the first place they were divided according to the provisions of the agreement, but a partnership in which one of the partners was only liable for loss and excluded from sharing in the profit was prohibited. A partnership of this kind was called a *societas leonina*. This article attempts to answer the question whether the Commentators contributed to the development of this institution.

## Lwia spółka w dziełach Komentatorów

### Streszczenie

W prawie rzymskim *societas* był to kontrakt zawierany pomiędzy przynajmniej dwiema osobami w celu podziału osiąganych przez spółkę zysków i strat, które ona przynosiła. Podział ten następował w pierwszym rzędzie stosownie do postanowień umowy, przy czym zabroniona była spółka, w której jeden wspólnik ponosił tylko straty, nie otrzymując żadnych zysków. Tego typu spółka nazywana była lwią spółką (*societas leonina*). W niniejszym artykule podjęta została próba odpowiedzi na pytanie o wkład komentatorów w rozwój tej instytucji.

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[18] For relevant examples see Baldus de Ubaldis, *Consilia*, Venetiis 1575, lib. 4, cons. 178.

[19] Even Baldus de Ubaldis himself – in spite of being considered the creator of the comprehensive medieval doctrine on partnerships, as I have said – in his definition of a partnership claimed that profit and loss was to be shared by the partners in all instances (see *Consilia*, lib. 1, cons. 120, n. 3).

**Słowa kluczowe:** prawo rzymskie; Justynian; szkoła glosatorów; szkoła komentatorów (konsyliatorów); spółka; *lucrum*; *damnum*; *societas leonina*.

**Keywords:** Roman law; Justinian; school of Glossators; school of Commentators (Counsellors); partnership; *lucrum*; *damnum*; *societas leonina*.

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