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Abstract of doctoral thesis titled
"*Contumacy in civil and criminal proceedings extra ordinem*"
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The contumacy is included by DOMIZIO ULPIANO in D. 21.1.1.9. (1.1 *ad. ed*) among the *animi vitia*, that is a defect in the decision-making process that leads to the violation of the *obsequium* due to any authority. By that contumacy embraces every refusal to obey the judge's orders. The ambiguity of the word was constant for a long time until a definition in a technical and narrow sense was processed by a jurist who wrote towards the end of the 3rd century A.C., Hermogenian, which was repeted through the following centuries. The concept of "absentia" is the genus of the species "absentia". This word defined generically any situation of "non-presence", but in the 2nd century AD, it assumed a more technical meaning of "absence for good cause". This *animus* allows us to identify three *species* in the *genus* of *absentia:* the *latitatio*, characterized by *animus fraudandi*, the *absentia*, identified by *animus contemnendi*, and finally the mere *absentia* when there is a lack of the intention to disregard the judge's order. According to Hermogenianus, three conditions were necessary to declare the sentence in absence of a party: to be regularly cited, the absence of a good cause and the territorial jurisdiction of the judge.

In case of legal regulations of contumacy proceedings, the extant sources do not allow us to have a clear and complete picture in the first *cognitiones*. In the beginning, the institution presents itself rather regulated in a way depending by the series of cases and obtains both the inspiring criteria as well as the solutions to the arising problems by the judicial practice and by the imperator's responses to the specific cases. The contumacy enables the establishment and carrying out of a unilateral procedure without precluding the examination of the dispute. Therefore the judge is no longer bound by a judgment of merits, predetermined by the substance, but must accept the *veritas rei*. The judge must examine the case also considering the reasons for the contumacy. The *cognitio* of the judge in contumacy processes inevitably presents a summary nature, since it is linked to the allegations of the present part.

In the specific case in which the petitioner did not appear in court, the traditional rule provided for the so-called *circomdutio edicti*, which involved only the annulment of the term for the execution of that judgment, in the sense that his request was falling into nothingness, but the petitioner kept in any case the right to reapply.

Regarding how to pronounce against the merely absent, the sources seem to contradict each other. However, the same sources never say explicitly that the judgment is invalid *ipso jure*, but only that the judgment against the *absens* does not improve into *res judicata*. This means that the sources actually should be read under a different light. In other words, in every age the sentences pronounced against *absentes* were never automatically void *ipso iure.* So, they would not have purchased the *firmitas* of res judicata as they could be subject to appeal.

The reform of the judgment against the person who is recognized *absens*, not in default, therefore only takes place if his reasons are eventually proven during the appeal.

Finally, the overview of the sources on the civil trial by default, allows a glimpse of a reality made by concrete solicitations and by questions that arose in the practice of law, that could find no solution in an legislative, but through the answers to the specific cases

that were elaborated by emperors and jurists on the push of some new principles inspired by *aequitas ratio*, aiming at the pursuit of the *veritas rei*.

Then we can define the penalties for the absent and for the defaulter. Even in this procedure, a key role in the contumacy declaration, as happened in private trials, was played by the failure to comply with summons. The magistrate had the authority to order the appearance in court of the accuser. If he was absent, he was not apologized but he was condamned as a *calumniator*.

When we compare both the Italian Civil and Penal Code and the European Law to the Roman Law, we can say that Italian law rules of civil and penal procedure are strongly affected by the influence of the Roman tradition. The European Law, still under development, presents many uncertainties and some inaccuracies, especially when the word absence replaces the word contumacy. This replacement does not take into consideration that the former is only the *genus* while the second is its *species* that characterizes our institution. Anyway, as it is a recent law, it will be necessary to wait for its future developments, in order to outline the strength and the gaps of this new proceeding.