

Routledge-Giappichelli Studies in Law

INDIVIDUAL WILL AND THE CIVIL LAW TRADITION

RETHINKING LEX PRIVATA

Edited by
Tommaso dalla Massara



G. Giappichelli Editore



This volume sets out to explore the relationship between individual will (*voluntas*) and the legal rule. What unfolds in the following pages is a wide-ranging itinerary, moving between past and present, most notably ancient Rome and the contemporary world.

The guiding question is as radical as it is enduring: in what way can *voluntas* (a psychological impulse internal to the individual) come to determine the legal rule? European private law tradition rests on the premise that legally binding acts – contract and will, to mention only two paradigmatic cases – derive their force from individual will. From the Roman sources arises, with exemplary force, the notion of *lex privata*: the idea that private will itself may generate binding legal norms.

Such a premise immediately leads to further questions. Above all, it compels reflection on the authenticity of that will: what if *voluntas* is compromised? The law of defects (*error, dolus, metus*) opens the problem of whether distorted or corrupted will can truly sustain the validity and effects of a legal rule.

The reflections gathered in this book approach the European civil law tradition as a broad and unified phenomenon, one in which law is inseparably bound to the historical and cultural contexts in which it takes shape.

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK



G. Giappichelli Editore

First published 2026
by Routledge
4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
605 Third Avenue, New York, NY 10158

Routledge is an imprint of the Taylor & Francis Group, an informa business

and by G. Giappichelli Editore
Via Po 21, Torino – Italia

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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data

A catalogue record for this book has been requested

ISBN: 978-10-411-3438-1 (hbk-Routledge)
ISBN: 978-10-411-3451-0 (pbk-Routledge)
ISBN: 978-10-036-6986-9 (ebk-Routledge)
ISBN: 979-12-211-1602-1 (hbk-Giappichelli)

DOI: 10.4324/9781003669869

Typeset in Simoncini Garamond
by G. Giappichelli Editore, Turin, Italy

The title has been subjected to a peer review process prior to publication.

Financed by the funds of the Project of Relevant National Interest (PRIN) 2022 - 2022R739JM “The regulatory will” with contributions from the following research units: CUP F53D23003650006 - Department of Law of the Roma Tre University (funded by the European Union – NextGenerationEU, Mission 4, Component 1); CUP J53D23005830008 - Department of Law of the Cattolica University of Milan (National Recovery and Resilience Plan (PNRR), Mission 4 “Education and Research” – Component 2 “From Research to Business”, funded by the European Union – NextGenerationEU – Investment 1.1); CUP D53D23007410006 - Department of Legal Sciences of the University of Salerno (funded by the European Union – NextGenerationEU, Mission 4, Component 2 – Investment 1.1).



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Chapter 8

THE WILL IN THE *PER FORMULAS* PROCEDURE IN ROMAN LAW. THE *ACTIO*

Federica Bertoldi

ABSTRACT: *In the Roman legal system, the actio was portrayed as a claim that was protectable by the praetor and which would entail the existence of the asserted legal situation as enunciated by the plaintiff through the postulatio actionis and the connected editio actionis. Through these passages, the plaintiff's will/voluntas became the norm through the granting of a formula, which would lead to the litis contestatio and the judgment that closed the trial.*

KEYWORDS: Voluntas – Actio – Anspruch – Editio actionis.

SUMMARY: 1. The concept of *actio*. – 2. Literature review: Modern understandings of Roman *actio*. – 2.1. Bekker and Windscheid. – 2.2. Muther's critiques. – 2.3. Developments since Muther. – 3. The *per formulas* procedure and modern understandings. – 4. *Actio* in Roman legal sources. – 4.1. *Actio* as a protectable claim. – 4.2. The *editio actionis*: A meeting point between law and action. – 4.3. The *postulatio actionis*, *editio actionis* and *denegatio actionis*. – 5. Legacy of the Roman concept of *actio*. – References.

1. The concept of *actio*

The Roman concept of *actio* remains elusive, as evidenced by the persistent debates between scholars of Roman law and proceduralists since the nineteenth century. To complicate matters, the *actio* enucleated in the formular process was lost in Justinian law. This led to this classical concept being fragmented by the operations carried out by Justinian compilers. There is, however, an element commonly believed to be inherent in the concept: the consistent idea that *actio* was intended to protect a right.

Modern dogmatics have not clarified the notion of *actio*, since it has not always been emphasised that this concept – and its relations to subjective right – responds to an original (if not unique) conception by Roman jurists that is largely absent in modern legal systems (Biondi 1931, 132). Modern continental jurists tend to favour more abstract conceptualisations, whereas Roman jurists adhered to concrete reality. Moreover, the method by which they elaborated the law was casuistic, based primarily on concrete cases, deduction and analogy (Biondi 1931, 133).

While Justinian's *Institutiones* have only one title on the *actiones*, the

Digest reserves a considerable space for this subject. Based on quantity, it could even be said that the last term of the tripartition *personae, res, actiones*, was the most significant (Brugi 1896, 758). Two corollaries follow from this: firstly, that the *actio* was, for Roman jurists, the most technically engaging element of the procedural relationship. Secondly, that the thought of Roman jurists was dominated by the concept of *actiones*. In practice, jurists sought the prerequisites of an *actio* and determined the contents and consequences that flowed from it. In this regard, it seems useful to research the content of the *actio*, in order to clarify (as far as possible) the concept as understood by Roman jurists.

One cannot assume that Romans made a clear distinction between substantive and procedural law, since *actio* was at the origin of numerous legal figures (e.g., contracts). Sometimes (perhaps unconsciously), there is no clear distinction between the formular procedure and the *cognitio extra ordinem*, meaning that, when confronted with passages in the *Digesta*, it is not always evident which of the two procedures the jurist (or interpolator) was referring to.

Furthermore, there is a lack of a complete treatment of the civil process of the intermediate period, which has led many civil procedure scholars to detach themselves from historical research, neglecting the Romanist roots of debates on *actio*/action or how much of the Roman *actio* has passed into contemporary European law.

The present study will therefore demonstrate that, in the Roman formulary process, the actor's will/*voluntas* was transformed into legal normativity through the granting of the *formula*. This gave rise to the *litis contestatio*, the sentencing that concluded the process, and the incontrovertible presupposition that constituted the binding procedural *status* between the parties.

2. Literature review: Modern understandings of Roman *actio*

2.1. Bekker and Windscheid

The first scholar to deal with the problem of the Roman *actio* was Ernst Immanuel Bekker, who posed the question of whether there was an identification between Roman *actio* and subjective right, and between *actio* and judicially protected claim (*Klage, Klagerecht*). Given that a claim, as the subject of an action, could be qualified in Roman legal language as *res*, no *res* is *per se* judicially actionable. *Res* can only be judicially protected when an *actio de hac re* is used. When the equity guided praetor crafted a *formula in factum* for a *res* not already covered by the edict, he thus recognised the possibility that a *res* without *actio* was judicially protectable. If what happened in Rome as an exception had become the rule, modern principles would have recognised

that a legal claim does not require any action existing outside of it, but has an inherent judicial enforceability. Actionability would thus be a quality of a claim. Consequently, according to Bekker, the *actio* arises immediately upon the conclusion of a contract or at the performance of a legal act and is enforceable regardless of whether there is a reason (*Anspruch*) to bring it. Bekker therefore held that the *actio* was a public prerogative of the magistrate – to issue a *formula* and appoint a judge – as well as a private right of the defendant to the assumption of the cross-examination (Bekker 1870, 366-371; 1871, 4-17; 1894, 169-188, 199-203).

Some doubts surrounding this issue were dispelled by Bernhard Windscheid in 1856. His monograph is the continued basis of a debate that still has not concluded, since the modern problematic of both *actio* and action can be said to have its birthplace in Windscheid's works (Windscheid 1856; 1857). He went so far as to affirm that the Roman concept of *actio* was entirely foreign to modern German law and did not coincide with that of action (*Klagerecht*) (Pugliese 1954, XVII). This had repercussions in both Romanist and procedural-civilist doctrine. As noted, Windscheid stood at the boundary of purely historical studies of Roman law (that is, those not dealing with contemporary legal debates) and studies of modern dogmatics (both civil and procedural) beyond the direct influence of Roman sources (Pugliese 1954, XVI-XVII). Naturally, his theories had repercussions in both fields.

In Windscheid's view, the Roman *actio* does not presuppose a violation of law, nor is it implicit that *actio* is a means of enforcing a right. Therefore, *actio* is not something that lies behind law, nor is it derived from law; rather, it is an expression of law. In Roman legal language, when someone has an action or is entitled to an action, it means what for moderns is the attribution to a subject of a legal right or claim. Here, Windscheid's *Anspruch* theory is central: the *actio* stood in place of the claim (*i.e.* the right to demand a certain conduct from another). The use of this concept by both German and Italian scholarship thus started from Windscheid, who saw the claim as the modern equivalent of the *actio* as a substantive legal situation that was clearly distinct from both action in the procedural sense and from subjective right. Windscheid later refined this notion, which eventually found its legislative formulation in § 194 BGB.¹

According to Windscheid, the Roman legal system did not delineate individual prerogatives in terms of subjective rights, but of *actiones*. It did not note

¹ The concept of a claim was included in the BGB in § 194: «Das Recht, von einem anderen ein Tun oder Unterlassen zu verlangen (Anspruch), unterliegt der Verjährung ...». Literally, this means the 'Right to demand an act or omission from a third party'. However, it should be understood as the 'Right to demand in court an act or omission from a third party'.

when one's will became law for others (*i.e.*, having a certain right), but that in certain relationships an individual could judicially enforce their will before other individuals (*i.e.*, having a certain *actio*). Therefore, the Roman legal system was not a system of subjective rights, but one of judicially enforceable claims (*Ansprüche*). Legal protection created rights; the right existed insofar as it was granted procedural protection. The *actio* is not derivative, but an original and autonomous construct. It exists through the activity of the judicial and jurispudent magistrates, who can or may also deny it (Windscheid 1856, 3). This clear-cut theory was later confined to the *actiones quae ex praetoria iurisdictione pendent* (Bruns 1882, 23-37; Windscheid 1906, 189-192).

Actio indicates, for Windscheid, what one can demand from another; in other words, it is the term that stands in place of claim (Windscheid 1856, 5-6). He chose 'legal claim' to designate the personal direction of law, by virtue of which something is demanded of a particular individual. *Actio* in this sense is explained by the circumstance that Roman citizens did not possess what the law now attributes to moderns, but what the *forum* ascribed. This theory found its basis in the independence of the praetor in relation to the *ius civile*, which enabled him to deny protection to a right based on the *ius civile* and to grant it even when the latter did not recognise it.

One might imagine the repercussions this doctrine had on Romanist studies. First, the *actio* would be considered the foundational element from which the law itself derived. Second, the *actio* would stand in place of the law, and would come to be equivalent not to the modern concept of action, but rather to that of claim. To possess an *actio*, for a Roman, meant to possess a legally enforceable claim. Therefore, a Roman was faced with the question of whether they could act to protect that claim. Consequently, according to Windscheid, for modern jurists the right is the *prius* and the action is the *posterius*. For Romans, by contrast, the *prius* was the *actio* and the *posterius* was the right.

While modern legal language employs the vocabulary of rights, Roman legal language used that of actions. *Actio* was the power vested in the subject before the trial. Therefore, the Roman citizen was interested in what the relevant edict, the source of law, said. When an individual brought a lawsuit, they were asserting a right to which they were already entitled thanks to edictal concession. The action, inserted in the edict clause, created the right. Windscheid thus saw the *actio* as simultaneously standing in place of the right, expressing the right, and being the *Anspruch* (claim) (Guarino 1953, 406).

In the formulary procedure, the praetor would have rendered justice without being strictly bound by law. He could recognise a claim that could not be justified by law by disallowing another that was formally grounded in the law.

The legal order thus emerges as a regulation of judicially enforceable claims (Windscheid 1857).

2.2. Muther's critiques

A year after Windscheid's first paper, Theodor Muther published a systematic critique (Muther 1857). While researching the meaning of *actio*, Muther discovered that originally *agere* meant to appear (*i.e.*, to act before the praetor), whereas *actio* would have denoted the bilateral act by which the trial began. Accordingly, formulating an *actio* thus became the *formula* for initiating a litigation, through which the terms *praetor actionem dat, tribuit, denegat*, and so on, should be understood. For Muther, *actio* is the right to obtain the *formula*, or more broadly, the right to judicial protection.

Within this framework, the most important moment was the *editio actionis*, in which the plaintiff asked the praetor for the *formula* of the action (*postulare actionem*). Since a *formula* was established for certain cases in the edict, it could be said that the plaintiff had a claim to this grant even before it was granted, provided all the conditions to which the *actio* was promised were fulfilled. Muther thus admitted a claim to have the *actio* even before it was granted. Furthermore, in the event of arbitrary *denegatio* by the praetor, there were grounds for provoking the *intercessio*.

The claim to the *formula* precedes the *litis contestatio*; thus, when Roman jurists stated '*actio ei competit*' in reference to the plaintiff, they were referring to that prior entitlement. When debating whether someone was entitled to a claim in an individual case, the focus was on whether the factual or legal prerequisites of that specific *formula* had been met. According to this view, Roman jurists admitted a right to state protection without the need to presuppose a dispute: their legal system was thus a system of rights, in that only rights in the subjective sense could be asserted in court.

Therefore, the most frequent sense of the word *actio* was, in Muther's view, that of a claim to the granting of a *formula*. Within the framework of formulary law, the praetor is obliged to grant it as a representative of the state. The right to the granting of the *formula* would have arisen alongside the introduction of the formulary procedure. Nevertheless, the thought behind this claim would not have disappeared (*i.e.*, that the right to invoke the protection of the state would arise from the offence to a right).

Eventually, with the disappearance of the formulary procedure, the *formula* was replaced by the *libellus conventionis*, which would be presented to the magistrate to determine whether the litigation should be allowed to proceed. Although the structure of the process changed, the right of the offended party remained identical. This fact was recognised by the compilers when they

collected the passages of the classical jurists, in which *actio* was understood as ‘right to act’. Thus, for Muther, there existed no essential divergence between the ‘right to act’ in the Roman sense and that of the law of his own time.

2.3. Developments since Muther

Muther’s criticism was followed by a heated reply from Windscheid, who reiterated his positions (Windscheid 1857). Later, Windscheid’s ideas would be taken up by various authors, such as August Sigismund Schultze, who held that in the flower of praetorian legal production, *i.e.* during the formulary procedure, there was only one actual right, which was granted by the magistrate either by *decretum* or *per formulam*, thus denying any normative value to general or abstract precepts (Schultze 1883, 384). The praetor was entrusted with the composition of the formula and thus the interpretation of *ius civile*. Because he could deny the action, the principles of *ius civile* were only effective if the praetor accepted them in a concrete case. Although Windscheid had found a concept originally distinct from both substantive right and *actio* in *Anspruch*, subsequent doctrine reworked the category to the point of affirming its coincidence with *actio* and *actio* with subjective right (Falcone 2013, 341).

Windscheid’s thesis, which attributed substantial legal significance to *actio*, was subsequently developed by other authors, including Heinrich Degenkolb, for whom the action was a simple legal faculty, and Moritz Wlassak, who identified *actio in personam* with the right of credit, or the *actio* with the claim (Degenkolb 1877, 9-15; Wlassak 1893, 303-323). This thesis was reiterated by Leopold Wenger, Gino Segrè and Benedikt Frese.²

Equally noteworthy are the contributions of other scholars. Alois Brinz believed that subjective right coincides with action, or rather that *actio* and subjective right overlap, since the *actio* exhausts the content of the right (Brinz 1884, 144-150). Ernst Levy highlighted the distinction between *actio* and the active side of *obligatio* (Levy 1918, 63-73, 82-97). James Goldschmidt declared that equating *actio* with a claim is erroneous (Goldschmidt 1925, 58-59, 153-157). Finally, Julius Binder assigned primacy to action over subjective right (Binder 1927).

Fundamental here is Emilio Betti’s opinion, which evolved and became

² Wenger embraces the idea of the *Rechtsschutzanspruch* in Roman law, or a claim to legal protection directed against the magistrate. According to Segrè, the *actio romana* is not the *ius agendi* (*i.e.*, the faculty to enforce a right), but the secured expectation of the creditor resulting from an obligatory bond. According to Frese, *actio* is not *Zwang*, but entitles *Zwang* and is comparable to the modern claim. Wenger 1925, 10-13; 1926, 11-13; Segrè 1930, 517-524; Frese 1935, 229-249.

increasingly nuanced over time (Betti 1920, 5-53; 1932, 205-237; 1935, 205-237). He considered it appropriate to erase the discriminating line between *actio* and subjective right. At an early stage, Betti adhered to the traditional notion of the 'concrete right of action' (Betti 1920, 5-25). This was followed by a further elaboration of a concept of action as a right of a specifically procedural nature only with respect to an asserted reason, regardless of its justification (Betti 1932, 205-222).

According to Betti, the reason (*res* or *actio*) in litigation is the assertion of a legal relationship of determined parameters by the person who takes the initiative in the proceedings. During the trial, this assertion, which may be identified with the claim, tends to represent what in the concrete case is substantive right. Thus, the action is directed at asserting a reason against an adversary. As a procedural power (*potestas agendi*), the action itself is the power to assert a given reason in court, and thus to promote the forced implementation of the legal relationship.³ As *potestas*, the action has the nature of the potestative right to which corresponds, or a legal subjection in the adversary. This right is at once power and burden, in a means to an end in the legal relationship to which it applies. In other words, it is an instrumental power that, according to its purpose, must serve to enforce a concretely founded 'reason'.

In essence, 'reason' mediates between right and action. When sources describe a private individual having an *actio* against another private individual, they mean that individual could assert a 'reason' in court that represented a relationship of substantive right towards him. At the heart of Betti's approach is the 'reason' as an assertion intended to justify the measure being sought, subject to the demonstration of its factual basis.

Betti's thought, after an evident evolution, eventually arrived at sustaining that the action is not only incumbent on the holder of the right, but also on those who are not (dalla Massara 2022, 61-83; Stolfi 2022, 171-195). In this understanding, the plaintiff's aspiration to be right, *i.e.* to obtain a favourable decision, is brought to the forefront (Betti 1935, 443-444; 1936, 70-74). Regardless, through the term *actio*, Roman jurists usually designated both what moderns mean by 'action' and what they mean by 'reason'. Here, 'reason' is intended to represent the relationship of substantive law or the legal case on which the dispute is based. Meanwhile, the action is the instrument that initiates the trial and opens the way to judicial protection, which happens insofar as one of the 'reasons' envisaged is asserted with that action.⁴

³ Gai 4.123.

⁴ See Cels. 3 *dig.* D. 44.7.51.

Finally, Betti would go on to maintain that substantive right is indissolubly linked to the trial and enforcement (Betti 1955, p. v.). This connection would have gone much deeper in Roman law than in modern law.

Equally interesting at this point is Biondo Biondi's view that the *actio* was not law, but simply legal activity, which has a determined beginning and development that leads to a specific outcome (Biondi 1931, 131-139, 156; 1933, 31-32; 1935, 443). Therefore, the action creates the right and is the fulcrum of the entire legal system, since law is always affirmed and develops as a function of the action (Biondi 1931, 141). While having a right or having an action are entirely equivalent concepts under current legal systems, this was not the case for Roman jurists, for whom the right was a situation created by agreement (Biondi 1931, 154).

Also significant in the twentieth century was the contribution made by Alessandro Pekelis, who, with a slant closer to the theory of law, revived Binder's thesis (Pekelis 1937, 94-95). Pekelis argued that in an evolved legal system, the position of advantage in which private holders of an interest find themselves is reduced (from a legal point of view) to the power to trigger state intervention (*i.e.*, to action). He thus concluded that the relationship to subjective right is the common denominator of all theories of action.

Some of Pekelis' reflections were taken up by Giovanni Pugliese in his well-known work, '*Actio e diritto subiettivo*'. Criticising the then-dominant Windscheid thesis, Pugliese believed that studies dealing with the relationship between subjective right and action had been characterised by the acceptance of an overly 'elastic' notion of action (Pugliese 1939, 5). He showed that the difficulty in defining the notion of action stems from the ambiguity of its meaning in Roman sources (Pugliese 1939, 5-6). According to him, *actio* places the holder in a position of legal dominance over another subject, who will consequently find themselves in a position of legal subjection (Pugliese 1939, 20). Therefore, someone who is in a state of subjection cannot prevent the holder from taking legal action and especially cannot materially escape the consequences of such action.

According to Pugliese the *actio* is nothing other than the power of *agere*, meaning 'to assert a right'; *actio* was thus the extrusion of a legal power (Pugliese 1939, 21, 33). *Actio* is the power to pursue in court what one is entitled to and therefore cannot be identified with the substantive right being asserted. The *actio* was understood by Roman jurists as the power to act in the trial and seek a certain result consisting in the protection of a pre-existing substantive situation (*i.e.*, the sanction for it). Thus, *actio* refers to the initiation of the sanction mechanism, which unfolds as ascertainment, condemnation and enforcement (Pugliese 1939, 173). The *actio* places the

holder in a position of dominance over another subject who is in a position of subjection (Pugliese 1939, 19).

Pugliese contends that *actio* presupposes the validity of the legal 'reason' being asserted: only those who can demonstrate the truth of their claim possess *actio* (Pugliese 1939, 150). There is no *actio* if the content of the *intentio* of the *formula* does not correspond to reality (Pugliese 1939, 152). Hence, *actio* postulates the soundness of the reason and is based on the favourable judicial pronouncement (Pugliese 1939, 157). In this way, Pugliese challenged the concept of a private right through the lens of procedural dynamics.

In this regard, Antonio Guarino's input is also worth considering (Guarino 1953, 389-406). He upholds the thesis that action and subjective right coincide, reducing every subjective right to a specific claim against a single, determined, passive subject. Meanwhile, Orestano affirms the 'unreality of action' and the impossibility of arriving at a single solution to the problem if one approaches the concept of *agere* in the abstract and independently of its setting in concrete practice (Orestano 1959, 816-817). The only reality in the problem of action is thus the behaviour of legal science. The problem of action, like that of subjective right, is thus resolved in its history.

Carlo Gioffredi here asserts that only two basic meanings can be found in the term *actio*: that of a procedural act and that of a legal institution of a procedural nature (Gioffredi 1980, 218). The former is more concrete and focused on 'procedure', whereas the latter is more abstract, ideal and focused on 'right of action'. Nevertheless, there is some overlap between the two meanings, which is constituted by the fact that in both aspects the *actio* aims at a single purpose consisting of the protection of the right. All the other meanings sought in the sources can be traced back to these two basic significations.

Carlo Augusto Cannata further emphasised the distinction between modern interpreters and classical Roman jurists (Cannata 1980, 8; 2001, 98-99). The former recognises an instrumental subjective right in the *actio* in that it functions as a means for the realization of a substantive right. However, this right is one that exists in and of itself, regardless of the merits of the claim. For Roman jurists of the classical period, on the other hand, 'having action' was equivalent to having well-founded reasons for winning a case against someone. Action therefore was a procedural subjective right that was instrumental to a substantive subjective right and accrued to the subject only if the substantive subjective right existed. Only the one whose claim was founded in a subjective right had the right to go to trial to pursue that claim. Otherwise, the trial would be futile; a judgment unfavourable to the plaintiff meant the plaintiff exercised an action they did not have.

According to Giuseppe Provera, *actio* was *ius* and therefore power to

which one was subject (Provera 1983, 341). This power was no different from the power conferred on a given subject for the protection of their interest, which was *ius* only by virtue of this protection. Conversely, Talamanca stated that Roman jurists, even if they saw law as a process, did not ignore the substantive dimension (Talamanca 1990, 279). Not only was the *actio* category itself understood in a substantial sense, but where judicial protection was provided, a substantial subjective situation was also identified.

To conclude this overview and consider more recent scholarship, it is worth mentioning Riccardo Cardilli's assertion that the *actio* is neither an element of the subjective right functional to its defence, nor an element instrumental to the right in an objective sense, but a structure of *ius*: the *ius* as action (Cardilli 2010, 99-100; 2023, 100-101). From a different angle, Stefania Romeo argues that the edict represents the first 'regulatory' framework of the claims of the parties: whoever wants to bring an action must fundamentally verify that the claim being asserted falls within the parameters of that edict (Romeo 2020, 62, fn. 80). In this regard, the edict 'codifies' a fabric of actions and represents a particularly reliable precedent on which to build the action. Thus, according to Romeo, the action protects the right but does not imply ownership of it. The *actio* is a *ius* that is clearly distinguished from both the objective right and the subjective right, the protection of which it is preordained (Romeo 2020, 64).

3. The *per formulas* procedure and modern understandings

Having analysed the most important doctrinal approaches to Roman *action*, it seems useful to place it more clearly within the formulary procedure to explore its more concrete importance. The formulary procedure is pivotal, as it constitutes the procedural paradigm that most significantly shaped the notion of *actio* as elaborated in the literature discussed above.

The conduct of the trial first required the initiative of the plaintiff, who was the interested party complaining about a violation suffered or the failure to meet a specific expectation. The one who initiated the process therefore had to bring 'legitimacy' to it (*i.e.*, a 'justification' for the process itself) (Pugliese 1963, 259). The plaintiff's initiation materialised their *agere* (*i.e.*, the concrete exercise of the *action*) (Pugliese 1963, 260).

The term *actio*, in its procedural sense, originally denoted the ensemble of verbal acts on which the first Roman trial, that of *legis actiones*, hinged (Pugliese 1958, 24). In the later formulary trial, its meaning is believed to refer both to the concrete activity of the plaintiff during the trial (a procedural activity to enforce a given interest) but also as an abstract model of

procedural activity prepared by the praetor and made available by hypothetical plaintiffs at the beginning of the judicial year (Pugliese 1963, 261).

Thus, in the subsequent formular process, each *actio* corresponded to a *formula*, which was the enunciation of the task to be entrusted to the adjudicating body. An *actio* could be deemed to exist only if a suitable *formula* scheme was found in the praetor's edict. This *formula* was, however, malleable by the parties and the praetor, since clauses (such as *exceptio* and *praescriptio*) could be added. In fact, both the concrete activity of the plaintiff and the abstract scheme of that activity were specified in the relevant *formula*, to determine a distinct *actio* each time. Thus, the semantic scope of *actio* encompassed the 'activity of the plaintiff in the process', both in concrete terms and as an abstract scheme or model (Pugliese 1963, 261).

Each plaintiff's claim was therefore linked to a particular *formula*, which was either provided for in the edict or granted individually by the praetor. As seen above, the dominant scholarly view holds that, for Roman jurists, only plaintiffs who *were* right and *had* a right were entitled to an action.⁵ In this context, a very well-known text by Celsus is illuminating: '*Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi*'.⁶ This was echoed in the Institutes, which reports the only testimony preserved in legal sources of a Roman jurist's reflection on the content of the *actio*:⁷ '*... actio autem nihil aliud est quam ius persequendi iudicio quod sibi debetur*'.⁸ To paraphrase these texts, action is the right to pursue what is due in court.

Biondi and Michail Andréev have cast doubt on the authenticity of the text, but its tenor is not such as to authorise suspicion (Biondi 1931, 176-180; Andréev 1965, 73). On the contrary, this 'lapidary' statement is very relevant and seems to underlie the distinction between action and subjective right and the relationship between these two concepts.

This very passage constituted the basis of the gap discussed above between what Romans understood by *actio* and what moderns understood as action (*Klagerecht*) (Pugliese 1954, XII-XIV). The interpretative challenges posed by this definition appear to lie at the root of scholars' inability to enunciate an unambiguous concept of action (Brugi 1896, 758-761; Pekelis 1937, 92-93; Fazzalari 1988, 30-31).

⁵ It is not clear from the literature whether the problem of the plaintiff's interest in bringing proceedings also emerged in the context of the formative process. More precisely, it does not indicate whether the plaintiff had to have an interest in bringing proceedings.

⁶ Cels. 3 dig. D. 44.7.51.

⁷ See: Pugliese 1939, 179; 1979, 792-793; Orestano 1959, 792-793.

⁸ I. 4.6 pr.

For Windscheid, for example, *actio* indicated what one party may demand from another; that is, *actio* indicated a claim capable of judicial enforcement (Windscheid 1856, 5-6). It stands in place of law, being an expression of subjective right, and is what qualifies as *Anspruch*, or pretence. This idea has had decisive consequences for Romanist studies. Firstly, the *actio* would be the primary element from which law would be derived; secondly, the *actio* would take the place of law and would come to be equivalent not to modern action, but to claim. To have an *actio* for a Roman meant, as noted above, to hold a legal claim.

It was only with Francesco Carnelutti that the idea that the claim could be an intermediate element between action and subjective right was buried in modern procedural law (Carnelutti 1927, 280-292). An expectation was derived from the obligation to behave in a certain manner, based on the rule prescribing that conduct. This expectation is what a part of Italian doctrine conceives as the set of attributions conferred by the legal system on a subject for the satisfaction of their 'interest'.⁹

This modern construction of claim, however, departs significantly from the idea Windscheid and his followers had. Windscheid's formulation that *actio* was the equivalent of what we call a claim came to mean that *actio* was the equivalent of right (as argued by Wlassak and Wenger) and can be recovered through a thorough analysis of Celsus.¹⁰

Celsus, in stating that the *actio* is the '*ius quod tibi debeatur iudicio persequendi*', highlights both the procedural and the substantive aspect of the action, the latter of which can be called a claim. That is, it is the right to pursue in court what is due is a judicially enforceable claim. In essence, it constitutes a claim activated by the plaintiff through the *postulatio actionis*, which, once subjected to the magistrate's control of admissibility, becomes prosecutable by means of the granting of the formula.

⁹ Betti 1920, 26-34; Pugliese 1954, XXXIII; Calamandrei 1947, 8. According to Betti, the will of the obligor may not bend to perform. In this case, the legal power inherent in the subjective right is no longer sufficient to realise the expectation. The attitude of pretension that it assumes as soon as the expectation remains unsatisfied is a weapon directed at the obligor's reluctant will. To overcome the resistance of the latter, a further legal power (action) is indispensable, either as condemnatory or executive action. Where the subjective right is not honoured, the right of action takes over: this has a subsidiary and eventual function, subordinate to the ineffectiveness of the latter. In short, the two powers stand in a relation of subordinate alternation and subsequent competition. In the person who is passively legitimised to act, the power of action is correlated with pure juridical subjection, which never takes the form of an obligation of conduct, even negative content. This power primarily corresponds to an interest and arises immediately with the interest in implementation of legal protection.

¹⁰ Wlassak 1893, 306; Wenger 1926, 12. See also Jolowicz 1952, 475.

In this light, the subjective right became an action through the exercise of the plaintiff's will. This will/*voluntas*, once recognised, became normalised, in the sense that the exercise of the *actio* led to a judgement (*i.e.*, an ascertainment of the claim asserted), which would be followed by the judge's command to the parties to do what the ascertainment itself required (Marrone 1955, 5-6). The judgement, as the judge's *dictum*, also became the norm, entailing the parties' obligation to uphold it (Marrone 1965, 14). Therefore, the traditional doctrine holds that the judgement, from the moment it recognised or disavowed the reason asserted, had a nature of ascertainment that was endowed with its own normative efficacy (*i.e.*, it is *res iudicata*, or shareable) (Betti 1968, 216). It can therefore be concluded that Roman jurists had already attributed normative effects to the judgement, not only in the formal process, but in any kind of process (Pugliese 1960, 227-228; 1965, 492).

4. *Actio* in Roman legal sources

To avoid excessively dogmatic approach and to adopt a more empirical angle and take a different approach to the problem at hand, it seems useful to study the position of this subject within the Roman legal system itself, especially in relation to its procedural means (Gioffredi 1980, 216). In this framework, the concept of *actio* seems to have had a pre-eminent value over subjective right, or to have determined 'a fusion between claim and action' (Gioffredi 1980, 217).

The *actio* is, in essence, the procedural articulation of the verb *agere* (Brugi 1896, 760). This is demonstrated in certain passages of the Digest like Paul. 2 *ad ed. aed. cur.* D. 21.1.44.1, but especially in Ulp. 14 *ad ed.* D. 4.9.3.1, where the *actio in factum* is the *actio honoraria* as opposed to the *civilis*. As Gioffredi has pointed out, there is a reference to the origin of the action, to the normative source that confers judicial protection (Gioffredi 1980, 220).

In the sources, the locution *formulam, iudicium dare* or *denegare*, is often preferred to *actionem dare* or *denegare*. This indicates that the praetor, with the progress of legal conceptions, is conceived not so much as someone who gives (or denies) a *formula*, but rather as one who admits (or refuses) legal action, grants (or denies) the power to defend a right being claimed (*i.e.*, the *actio*). This also applies to other expressions such as *agere, petere, experiri actionem* (Gioffredi 1980, 219).

Even phrases in the sources like '*aliquis actio competit*', '*alicui actio est*' or '*habere actionem*' refer to a more pregnant form of *actio* with a 'subjective' connotation. In other words, *actio* in these phrases is a right and therefore a claim involving a power to act according to a procedural scheme (the

formula) established by the legal order (Pugliese 1963, 262). Therefore, only if the action were grounded from the point of view of substantive law, would the claim (*i.e.*, the right and power to act in respect of that particular dispute) have arisen.¹¹ Other sources also use *actio* in this sense.¹² In a passage from Julian, for example, it is said that if a person gave 10 coins to Titius so that he would manumit Sticus by the kalends, if Sticus was not manumitted, the *actio* could only be available after the kalends.

Therefore, one should also ask how *actio* is to be understood when it is followed by its particular specification and name (*e.g.*, *actio depositi*, *actio mandati*, *actio empti*, *actio ex stipulatu*, *actio doli*, *actio iniuriarum*, *actio furti*) (Gioffredi 1980, 220). A particular *actio* corresponds to a particular legal relationship which it is designed to protect. There are multiple cases in which it is said that the plaintiff is entitled to a certain action and not another. What is of interest ultimately at stake is the substantive legal case; the *actio* is invoked not as a *formula*, but as a procedural means that is suited to that case and expressly stated.

4.1. *Actio* as a protectable claim

It is here useful to consider the concept of a claim, or *Anspruch* (which itself indicates the power to claim or demand). This concept has been developed by German doctrine and carries with it various shades of meaning.

According to Bekker *Anspruch* indicates a legal relationship involving three parties – plaintiff, defendant and judge – resulting in two distinct rights: the right for the relations of the active party with the passive party to be recognised by the judge (with the possible pronouncement of a pecuniary sentence) and a right against the defendant to the performance of a specific obligation (Bekker 1871, 15). As we have already seen, for Windscheid, *Anspruch* is a legal

¹¹ Falcone 2013, 341. According to Fabiana Falcone, these phrases hint at the shaping of an idea of *actio* perceived as *ius*.

¹² Gai 3.181: *Unde fit, ut si legitimo iudicio debitum petiero, postea de eo ipso iure agere non possim, quia inutiliter intendo DARI MIHI OPORTERE, quia litis contestatione dari oportere desiit, aliter atque si imperio continenti iudicio egerim; tunc enim nihilo minus obligatio durat, et ideo ipso iure postea agere possum, sed debeo per exceptionem rei iudicatae vel in iudicium deductae summoverti. quae autem legitima <sint> iudicia et quae imperio contineantur (?), sequenti commentario referemus; Iul. 10 dig. D. 12.1.19: Veluti si Titio decem dederò, ut Stichum intra calendas manumitteret, ante kalendas nullam actionem habeo, post kalendas ita demum agere potero, si manumissus non fuerit; Paul. 21 ad ed. D. 6.1.23 pr.: In rem actio competit ei, qui aut iure gentium aut iure civili dominium adquisiit. 1. Loca sacra, item religiosa, quasi nostra in rem actione peti non possunt; Pomp. 22 ad Sab. D. 45.1.27.1: Si stipulatus hoc modo fuero: 'si intra biennium Capitolium non ascenderis, dari?', non nisi praeterito biennio recte petam.*

concept in its own right, distinct from both the subjective right and the *actio*; it is conceived as a right to demand the elimination of a violation of a primary right (Windscheid 1856, 3). For Wlassak, this notion was subsumed under the right of claim (Wlassak 1893, 303-323). For Mitteis, *Anspruch* is an actual *Verlangendürfen*, a permissible demand directed against a specific adversary (Mitteis 1908, 91-92). Betti argues the claim is not to be confused with the subjective right, but neither is it to be confused with the *actio*, because several claims may arise from a single subjective right, just as a single *actio* may serve to assert multiple claims. (Betti 1920, 5-53). Finally, for Georges Cornil, the claim represented the active side of the debt and expressed the creditor's due (Cornil 1950, 39-48). The claim would have nothing in common with the *actio*, but neither would it be confused with the subjective right. It thus fell between the right and the *actio*.

Beyond this much debated category, however, it is crucial to reiterate that Roman jurists spoke the language of *actiones*, not that of modern subjective rights. Whoever acted improperly, acted *non recte* (i.e., they did not have the *actio*).¹³ If this was evident in the *in iure* phase, the praetor could deny the *actio*, or, in the case of granting an illegitimate *actio*, sanctions were provided for (Pugliese 1958, 28). Thus, in the phrase *actio competit*, the *actio* is seen as the reflection of the claim. Meanwhile, in the phrase *habere actionem*, the *actio* is something that is due because it is provided for by the legal order and allows one to act, or assert a right against the other party. It is the will/*voluntas* of the plaintiff that becomes the norm (Pugliese 1939, 173-179).

There are some texts in the Digest that seem to confirm that Roman jurists employed the term *actio* as a synonym for claim, if not right. Regarding real rights, Celsus, seeking to define property (itself a difficult task), states that it is what is defended by *rei vindicatio*.¹⁴ On the other hand, with respect to obligations, Modestinus clearly refers to the possibility of taking judicial action against the debtor.¹⁵

Here, Gioffredi's assertion is convincing: in a legal system lacking codification, it was difficult to think of the precept or the institution that formed the basis of a relationship (Gioffredi 1980, 234). Instead, it was much easier to refer to the *actio* that afforded protection; and the praetorian edict, with its catalogue of *actiones*, suggests it. The real difficulty for a Roman, therefore, was not the typicality of the actions, but rather making a pre-existing

¹³ See Gai 4.178, 186; Ulp. 28 *ad ed.* D. 13.7.9.5; Call. 2 *ad ed. mon.* D. 6.1.50 pr.; Quint. *inst. orat.* 3.6.73. In this passage, Quintilian qualifies action as a right.

¹⁴ Cels. 18 *dig.* D. 6.1.49.1: *Eum est, quod ex re mea superest, cuius vindicandi ius habeo.* See Gioffredi 1980, 230.

¹⁵ Mod. 4 *pand.* D. 50.16.108: '*Debitor*' *intellegitur is, a quo invito exigere pecunia potest.* See Gioffredi 1980, 231.

right under dispute fit into the procedural scheme. The risk was that the praetor (and, later, the *iudex*) would not agree on the link between the case and the procedural scheme (Brugi 1896, 763).

A plaintiff asserting an unfounded claim was not barred from performing procedural acts, subject to the possibility of the praetor denying the action and the judge acquitting the defendant. This does not detract from the fact that the Roman *actio* theoretically entailed the power to enforce a single substantive right that was incumbent on the plaintiff. In some cases, the plaintiff could choose between several possible courses of action for a legal situation that presented multiple possibilities for protection. The plaintiff's will/*voluntas* in the choice of action was thus important.

In this regard, Quintilian's input is pertinent: '... *habeo ius actionis: non habes*'.¹⁶ Discussing *ius actionis*, he qualifies action as a right. The *ius actionis* is thus the right allowing one to act (*i.e.*, the prerogative) and the claim granted by the legal order to be able to take legal action. We are thus faced with a locution that encapsulated an abstract concept, but which inherently carries the potential for the plaintiff's will/*voluntas* to become concretely normative.

4.2. The *editio actionis*: A meeting point between law and action

Acts of impetus, by which the plaintiff advanced the process towards its final goal, constituted the plaintiff's *agere* (Pugliese 1963, 260). As previously observed, each claim by the plaintiff corresponded to a particular *formula*, whether it was already provided for by the edict or granted individually by the praetor. The *actio* is, therefore, the procedural expression of the *agere*. It is in this sense that the expressions *praetor actionem dat*, *tribuit* or *denegat* must be understood.¹⁷

The most crucial moment for the plaintiff was not only that of the *litis contestatio*, where everything is practically accomplished, but that of the *editio actionis*, in which he asks the praetor for the *formula* of the action (*postulare actionem*). In most instances, this would lead to the praetor's granting of the *formula*, thus allowing the plaintiff's will/*voluntas* to acquire normative

¹⁶ Quint. *inst. orat.* 3.6.73.

¹⁷ Cic. *de part. orat.* 99: *Atque etiam ante iudicium de constituendo ipso iudicio solet esse contentio, cum aut sitne actio illi qui agit aut iamne sit aut num iam esse desierit aut illane lege, hisne verbis sit actio quaeritur. Quae etiamsi ante quam res in iudicium venit aut concertata aut diiudicata aut confecta non sunt, tamen in ipsis iudiciis permagnum saepe habent pondus, cum ita dicitur: plus petisti; sero petisti; non fuit tua petitio; non a me, non hac lege, non his verbis, non hoc iudicio.*

force. As has been rightly observed, because a *formula* was established for certain cases in the edict, the plaintiff could be said to have a claim to this concession even before it was granted, provided all the conditions necessary for the *actio* were met (Brugi 1896, 760). The claim to the *formula* thus preceded the *litis contestatio*. When Roman jurists said ‘*actio ei competit*’ in reference to the plaintiff, they were thinking of the claim to the concession of the *formula*.

The *editio actionis*, however, constituted a procedural stage within the formulary process that has not yet been thoroughly studied.¹⁸ The defendant being sued had to know what action was being brought against them and why to decide how to most effectively prepare their defence (Cannata 1982, 139-140). Symmetrically, the plaintiff had to choose the most suitable action to protect their claim. This choice would inevitably shape the entire development of the subsequent trial, unless *denegatio actionis* by the magistrate. Regardless, the plaintiff had to indicate the action being brought. The following text from Ulpianus rules out the possibility that ‘*edere actionem*’ could simply consist of informing the defendant of the name of the action the plaintiff intended to request from the praetor:

Ulp. 4 *ad ed.* D. 2.13.1 pr.: *Qua quisque actione agere volet, eam edere debet: nam aequissimum videtur eum qui acturus est edere actionem, ut proinde sciat reus, utrum cedere an contendere ultra debeat, et, si contendendum putat, veniat instructus ad agendum cognita actione qua conveniatur. 1. Edere est etiam copiam describendi facere: vel in libello complecti et dare: vel dictare. eum quoque edere Labeo ait, qui producat adversarium suum ad album et demonstret quod dictaturus est vel id dicendo, quo uti velit.*

Where anyone wishes to bring an action, he should give notice; for it seems most fair that one who is about to bring an action should give notice so that the defendant accordingly may know whether he ought to admit the claim or contest it further and so that if he thinks it should be contested, he may come prepared for the suit, knowing the action by he is sued. 1. To give notice includes providing a means for taking a copy, the drawing up and furnishing of a written statement or dictation. Labeo says that a person also gives notice if he brings his adversary to the tablets proclaiming the

¹⁸ See: Lenel 1894, 385-392; Schott 1903, 35-45; 1904, 28-43; Wlassak 1904, 169, fn. 1; Wenger 1905, 1960-1967; Pugliese 1963, 353-361; Fernández Barreiro 1969, 32-43; 1975, 125-144; Lemosse 1975, 45-54; Guarino 1980, 74 fn. 48; Cannata 1982, 139-142; Buti 1984, 189-220; Gómez-Iglesias Casal 1984, 26-28; Murga Gener 1989, 249-252; Fernández Barreiro 1990, 78; Lemosse 1991, 298-304; Kaser, Hackl 1996, 220-221; Bürge 1995, 1-50; Varvaro 2023, 89-91.

edict and points out the action which he is about to dictate or declares the one which he intends to use (trans. Watson 1985, 58-59).

For Ulpianus, the *editio actionis* is a 'condition of the *actio*'s proceedability' and responds first and foremost to a requirement of fairness (Romeo 2020, 61, fn. 80). Any legal action intended to be exercised had to be explicitly stated, and the defendant had to know the action being brought against them so they could justifiably decide whether to resist. If he decided to proceed with the litigation, he had to be able to defend themselves. Consequentially, according to Wenger, '*edere actionem*' means the formal communication to the defendant of the claim that the plaintiff wants to assert in proceedings (*i.e.*, the substantive subjective right they intend to exercise (Wenger 1905, 1962-1963)).

'*Edere actionem*' in formal proceedings meant to indicate the *formula* by which to 'procedurally channel' the action the plaintiff wanted to use to enforce a claim (Fernández Barreiro 1969, 45). As Pugliese observes, the indication of the procedural *formula* indirectly reveals the plaintiff's claim, rendering the latter a reflex manifestation of the former (Pugliese 1963, 360, fn. 64). '*Edere*' also consists in giving the opportunity to transcribe or to draw up a written document and deliver it, or to have it drawn up under dictation. On a residual basis, Labeo states that whoever brings an opponent before the bar and shows what they intend to dictate or use for the formulation of a claim also indicates the action.¹⁹

Accordingly, the praetor established the plaintiff's obligation to *edere actionem* (*i.e.*, to make the action explicit). Only upon completion of the *postulatio actionis* could the praetor, if the action was successful, follow up with a *decretum* of *datio actionis*, with which the magistrate adhered to the scheme proposed by the plaintiff (Sciortino 2015, 200-201). According to some scholars, this procedural phase took place extrajudicially, while others hold it was the first moment of the *in iure* phase before the magistrate.²⁰

In my opinion, this phase seems to mirror the *postulatio exceptionis*, which is why I consider it to have formally been part of the process. According to Pugliese, the magistrate, when confronted with the *postulatio actionis*, enjoyed discretionary power in his response (Pugliese 1939, 349). He was not obliged to *dare actionem*, despite what the *ius civile* established, but he was obliged to *ius dicere* (*i.e.*, to pronounce on the *formula* proposed by the plaintiff), authorising the relative *litis contestatio*, or opposing it. At the time

¹⁹ Ulp. 4 *ad ed.* D. 2.13.1.1.

²⁰ For the former, see Lenel 1894, 385; Pugliese 1963, 353-361; Fernández Barreiro 1969, 32-33; Kaser, Hackl 1996, 220. For the latter, see Schott 1903, 35-36; Wlassak 1904, 169, fn. 1.

of the *postulatio actionis*, the plaintiff was required to identify the intended *formula* in at least one of two ways: orally, by enunciating it so that the defendant could write it down, or by providing them with notes for transcription.

What is of interest here, however, are the effects of this *editio*, which are made very clear from an *incipit* of a constitution of Severus and Caracalla, the continuation of which could be interpolated: '*Edita actio speciem futurae litis demonstrat, quam emendari vel mutari licet, prout edicti perpetui monet auctoritas vel ius reddentis decernit aequitas*'.²¹

The *actio edita* reflected the species of future litigation, in which action can be changed or corrected, as the perpetual edict allowed or as was decreed by equity. Consequently, it predisposed the course of the litigation that led to the judgement. It is evident, however, that the magistrate had the discretionary power to grant, modify or even deny the *actio* chosen by the plaintiff. The will of the plaintiff was therefore conditional. However, in the presence of certain conditions, it could lead to the granting of the *formula* and a judgment based on the same *formula*. As mentioned above, the plaintiff's will/*voluntas* therefore established the status of the parties and became the rule. While the passage of the constitution was certainly reworked, the substance indicates that the choices made by the plaintiff from the earliest steps conditioned the dispute, despite any adjustments made by the praetor or requests from the defendant.

According to Max Kaser and Karl Hackl, the primary function of the *editio* was to inform the defendant, enabling them to prepare an appropriate defence strategy. It therefore did not bind the editor, as the trial could also take place using an improved *formula* or even a different action from the one announced (Kaser, Hackl 1996, 220-221). This aspect had led previous scholarship, starting with Otto Lenel, to hold that there were two phases of *editio*: one extrajudicial and one taking place *in iure*.²² According to this model, the plaintiff first had to notify the adversary (first in a freer form, and then in a legally 'more armoured' form) of the action with which they intended to pursue a claim. In the sources, however, direct evidence of this dichotomy is lacking (Burge 1995, 43). Rather, it was structural considerations based on logical arguments that prompted Lenel to make this distinction. He believed he could thus resolve certain apparent contradictions in contemporary doctrine. This made it possible to explain why the title *de edendo* in the *Album* preceded the title *de in ius vocando*, even though the *editio* was supposed to be an integral part of the *litis contestatio*.

Nonetheless, the fact that the terms *editio* and *edere* were used by Roman

²¹ C. 2.1.3 (a. 202).

²² Lenel 1894, 374-392. See also Wlassak 1924, 8, 72-85.

jurists without any indication of a double meaning (despite their clear opposition) has caused problems in the literature, as it begs the question of how the terms were used in everyday practice despite the lack of semantic differentiation. In fact, as Alfons Bürge has shown, the sources on the *editio actionis* demonstrate how the parties' interaction in the phase preceding the *litis contestatio* was characterised by a compulsion to engage in a legal qualification of the claim.²³ In fact, the sources show that the parties could negotiate the formulation of the object of the lawsuit. Roman jurists indicated this procedure when they mentioned, for example, that a plaintiff had prepared for multiple courses of action before finalising the decision at a later stage.

This range of possible strategies is also reflected in the latitude accorded to the *procurator* or *cognitor*. If we dispense with the assumption that there was a division of the *editio*, which is not indicated in the sources, it becomes clearer how the subject matter of the trial was gradually finalised in the interaction between the parties (Bürge 1995, 43).

According to Bürge, whether more importance was given to the will/*voluntas* of the parties (based on private autonomy) or more attention was paid to the actions of the magistrate (which conclude the preliminary proceedings) is in fact irrelevant (Bürge 1995, 43-44). It remains clear is that the praetor had the coercive power to deny an action in the event of a defective *editio* or unwillingness to undertake an *exceptio*, which determined the behaviour and strategies of the defendant (Bürge 1995, 44). The Roman trial's requirement of legal qualification and the obligation to make evidence public before the final determination of the object of the trial through *litis contestatio* indicates two ancient procedural peculiarities that are profoundly alien to modern models of civil procedure.

4.3. The *postulatio actionis*, *editio actionis* and *denegatio actionis*

From the above, it is possible to clarify what was meant by *editio actionis*: a means of formally announcing a claim and therefore notifying others of the *formula* with which the plaintiff would proceed (Wenger 1905, 1961). This was not the concrete formula that would be the subject of the *litis contestatio*, since it did not yet contain the possible exceptions of the defendant, which implies that it referred primarily to the abstract scheme contained in an edict. This is confirmed by Cicero, who illustrates how the *editio actionis* took place and which indicates that it was the first formal act of the trial (and therefore not an extrajudicial step):

²³ TPSulp. 2; TPSulp. 3. See Wolf 1985, 781, fn. 34; Camodeca 1992, 59-60; 1999, 56-57; Wolf 2012, 34-35. See also Bürge 1995, 43.

Cic. *p. Caec.* 7.19: *Atque illis paucis diebus, postea quam videt nihil se ab A. Caecina posse litium terrore abradere, homini Romae in foro denuntiat fundum illum de quo ante dixi, cuius istum emptorem demonstravi fuisse mandatu Caesenniae, suum esse seseque sibi emisse...*

In the course of the next few days, realizing that nothing could be squeezed out of Caecina by the threat of a lawsuit, Aebutius formally notified him in the Forum at Rome that the estate of which I have already spoken and which I showed that the defendant purchased on the instructions of Caesennia, was his own, bought by him for himself... (trans. Grose Hodge 1979, 115).

Ebutius, recognising that he could not get anything out of Caecina, notified him in the Forum of his desire to take legal action to claim his property rights to the Fulcinianus estate through a *rei vindicatio*. This text demonstrates how the will/*voluntas* of the plaintiff was relevant not only in shaping the procedural dispute, but also in the specific choice of action, which would be the basis of the *formula* elaborated by the magistrate in the *in iure* phase once the respective claims of the parties had been collected. I believe this choice was binding, as the term '*denuntiat*' suggests. Whoever proposed the action therefore had the power to determine the subject matter of the trial in a way that was in part binding on the praetor and the judge. It was thus a central choice, reflected by the fact that there is no title in the Digest that does not discuss what action was involved (Brugi 1896, 763). A trace of this posture remained in the *Basiliká*, where translating the title D. 2.13, *De edendo*, it says that the *libellus* must indicate the action of the traditional list.²⁴

At this point, however, it seems useful to highlight the relationship between *editio actionis* and *litis contestatio*. A constitution from the Severan age is very interesting in this regard.²⁵ The *res* is not intended to be deduced in the action when only a simple *postulatio* is made, or the defendant has been made aware of the nature of the action before the trial. Thus, there exists a substantial difference between *litis contestatio* and *editio actionis*. Both are equally mandatory, but have little in common.

During the *postulatio actionis*, the plaintiff determined the most appropriate legal action; at this stage, the plaintiff had a claim against the defendant. After the grant of the action by the praetor, the situation changed: the

²⁴ Bas. 7.18.1.

²⁵ Imp. Severus et Antoninus AA. Valenti C. 3.9.1 (a. 202): *Res in iudicium deducta non videtur, si tantum postulatio simplex celebrata sit vel actionis species ante iudicium reo cognita. inter litem contestatam et editam actionem permultum interest. lis enim tunc videtur contestata, cum iudex per narrationem negotii causam audire coeperit*, D. k. Sept. Severo III et Antonino AA. cons. s.

plaintiff's claim was transformed into a real *actio*. It thus became protectable from that moment on and could therefore be made the subject of *litis contestatio* by the parties. In essence, the magistrate's approval of the *formula* was commonly considered a '*dare actionem*', meaning that the initial claim became an *actio* legally protected by the magistrate and his edict (Goldschmidt 1925, 44, 56-59).

It is here important to investigate the role of the praetor in the event of *denegatio actionis*. Because the plaintiff's choice had its own relevance, it is logical to think that the power to *denegare* was limited by *aequitas*. Thus, there were limits to the praetor's discretion, since he could not 'oppose the *postulatio actionis* out of pure malevolence towards the plaintiff or for no appreciable reason' (Pugliese 1939, 350).

It therefore seems accurate to speak of an obligation to *dare actionem* within the boundaries of *aequitas*. More precisely, this duty was framed by the body of praetorian norms codified in the edicts. In fact, the praetor was bound by his own edict and therefore could not deny an *actio* promised in the edict, unless it was due to a lack of meeting the stated requirements or the intrinsic groundlessness of the reason formulated by the plaintiff with the *postulatio actionis* (Pugliese 1939, 350).

5. Legacy of the Roman concept of *actio*

The above discussion illustrates how the divergent constructions of the concept of action in modern law stem from a contested conception of the Roman notion of *actio*. In contemporary law, there is a veritable literature on the concept of action. Of the various disputes, all of which have been listed by Pekelis, those of interest here concerned the foundational questions of civil procedural science that may also concern Roman law (Pekelis 1937, 92-93). The two fundamental questions here have been whether *actio* can be understood as a subjective right or whether it constitutes a procedural prerogative reserved exclusively to those who are substantively entitled to enforce a legal situation.

As I have shown, in the Roman legal system, *actio* was considered a claim that was protectable by the praetor and entailed the existence of the asserted legal situation enunciated by the plaintiff through the *postulatio actionis* and the related *editio actionis*. The above passages indicate that the plaintiff's will/*voluntas* acquired normative effect through the granting of the *formula*, which led to the *litis contestatio*, the judgement that closed the trial and an incontrovertible presupposition that implied the authority of the judgement.²⁶

²⁶ Ulp. 2 *ad ed.* D. 44.2.1; Pugliese 1969, 743-744. Macer. 2 *de appell.* D. 42.1.63: *Saepe constitutum est res inter alios iudicatas aliis non praeiudicare. quod tamen quandam distinctionem habet ...* See also Pugliese 1962, 732, 766-767.

Only the praetor could grant the *actio* within the scope of his discretion. This implied not only the discretion to withhold protection for situations grounded in the *ius civile*, but also the faculty to extend protection to novel configurations of interests under the *ius honorarium*. Outside exceptional cases, the praetor was anchored to his edict, which was a reference and guarantee handbook for any Roman citizen. Since there was no legal codification, the edict, published at the beginning of each praetor's term in office, allowed citizens to know the *formulae* that would be used by the magistrate during the year.

Modern proceduralists, in constructing the various concepts of action, cannot detach themselves from its historical Roman genealogical matrix, which provided the foundation for both *ius commune* and *ius canonicum* (Pekelis 1937, 92). Contemporary legal thought thus requires historical study to understand this concept if it is to move beyond the nineteenth century debate on the notion of Roman *actio*.²⁷

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²⁷ Brugi 1896, 759; Orestano 1959, 787. In this regard, Orestano has suggested recognising not only the historicity of the various constructions of action, but also the problem of action itself.

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