Civil Procedure Review
AB OMNIBUS PRO OMNIBUS

5

Some Remarks on Extinctive Prescription in Legal History

Annalisa Triggiano[1]

Abstract: Prescription, as it is well known, is, in a general sense, a means of acquiring or losing rights, or of freeing oneself from obligations, by the lapse of time under conditions prescribed by the Law. It derived from classical Roman Law and further developed under Emperors Theodosius and Justinian. Prescription, or Limitation of Actions, is found in virtually all legal systems in Western legal tradition including the Law of the Church.In this paper, I will shortly discuss, in a historical comparative perspective, the most relevant aspects of Extinctive Prescription in legal history, focusing more carefully, but not only, on Roman Law.

La prescrizione, come è ben noto, è, in termini generali e atecnici, un mezzo per acquistare o perdere diritti, o un mezzo per liberarsi da un determinato obbligo, basata sul decorso del tempo e da condizioni prescritte dalla Legge. Essa era ben nota anche all'Antichità, in particolare agli imperatori Teodosio II e Giustiniano, che a tale espediente si dedicarono diffusamente. Attualmente la Prescrizione Estintiva è nota a tutti i sistemi giuridici moderni, compreso il Diritto Canonico. In questo articolo, succintamente, si discuterà, in chiave storico-comparatistica, gli aspetti più rilevanti dell'istituto in questione, partendo dal diritto romano ma espandendo il ragionamento fino alle moderne codificazioni.

Keywords: limitation of actions, extinctive prescription, roman legal tradition, Civil Codes, lapse of time; Tradizione romanistica, prescrizione estintiva, perdita dell'azione, decorso del tempo, codificazioni civili

1 Docente a contratto di "Roman Law" presso il Dipartimento di Scienze Giuridiche dell'Università degli Studi di Bologna. E.mail: annalisa.triggiano@unibo.it

INTRODUCTION

This paper deals with Limitation of actions, or extinctive prescription, as the subject is usually called in Civil Law jurisdictions. This is both a highly technical and a highly political topic. This paper is only aiming to focus on one political aspect: how long should prescription periods run, since it is here that we can appreciate the great effort of Roman Emperors in making rules to put a limit to the length of litigations. But as it will be shown in first Part of the paper, the term prescription, historically, had a meaning which was very far from how we intend it today. It was a part of roman "*formula*".

As it twill be shown in Part 2 of the paper, historically the extinctive prescription was firstly characterized by being an *exceptio*, based on the lapse of time by which the Defendant could prove, for example, his good and long lasting right of possession, in oppostion to plaintiff's action for recovering land (so called '*rei vindicatio*').

But extinctive prescription regarding to actions – I am referring to Part 3 of this paper – is a creation of Emperor Theodosius II: by reading one of his constitutions, we argue that prescription, at his time, did not only play a role with regard to obligations, although, in this paper, I will mainly mention – in a historical comparative perspective, which is based on the analysis of modern codifications – the extinctive prescripton of obligations (Limitation of actions in contract and tort law).

Methodologically, as I will show mainly in Part 5, the first possibility to geto over Justininan's long lasting model of extinctive prescription, is simply to shorten them. But things were not so simple: it took a long time, but this is what modern legislations basically are trying to do.

Long prescription periods (30 years, according to Justinian) are, in my opinion, the weakest part of Roman Law, if we consider it in the present time.

Recent codes have shortened general prescripton periods to 15 years[2], 10 years[3] or simply 3 years[4].

But there's something more that Roman Emperors understood, thousands of years ago: statutory periods are always set periods of a given duration. In Roman Law, as it happens still today, in setting deadlines, three aims are generally sought to be met: they should ensure that there will be an end to litigations, to minimize the unfairness to defendants of being subjected indefinitely to the threat of being sued over a particular matter, they should provide a mechanism for the Courts to function more effectively by ensuring that litigation is not getting started so long after the event that there are likely

2 Art. 374, Code Civil (Egypt)

3 Art. 2934 Codice Civile (Italy), art. 1159 Codigo Civil (Mexico), art. 2922 Code Civil (Québec), art 127 Obligationenrecht (hereinafter: OR) (Switzerland)

4 Law Reform (Limitation of Actions &C.) Act 1954 (England), Latent Damage Act 1986, Administration of Justice Act 1985, Consumer Protection Act 1987 and, for Germany, see beyond in the text.

Civil Procedure Review, v. 13, n. 1: jan.-abr. 2022.
ISSN 2191-1339 – www.civilprocedurereview.com

evidentiary problems, and they should create an incentive to early settlements, so that the disrupting effect of unsettled claims on commercial intercourse be minimized.

1. THE ORIGINS OF EXTINCTIVE PRESCRIPTION

The topic of extinctive prescription, or limitation of actions, has, until recently[5], very widely, been regarded as dull and unrewarding. The aim of this Paper is tracing some short remarks on extinctive prescription, which has very ancient origins.

I firstly want the reader to reflect on a peculiar aspect of extinctive prescription. From the history of such topic, we will argue that 'positive'prescription was set earlier than the prescription of actions. Secondly, I have to underline that, historically, two different terms have been employed for the two legal institutions here under consideration: (Negative/Extinctive) Prescription and Limitation of Actions.

The former is in use in legal systems belonging to Romanistic Legal Family and is deriving, directly, from Roman *Longi Temporis Praescriptio*. The bracked qualification is intended to clarify that we are not dealing, in this paper, with acquisitive (or positive) prescription which is traditionally the acquisition of a title to the property as a result of a due lapse of time.

This was the historical root of the notion of *Longi Temporis Praescriptio* which – as I will show – was extended only in post classical period to Limitation of Actions. Under the older *ius commune*, the Roman term was still used in a broad sense, to cover what was usually referred to as 'acquisitive' and 'extinctive prescription. The Natural Law Codifications proceeded, thus, from this basis[6]; so did Scots[7] and South African Law[8].

In England, interestingly, Prescription is a term that has mainly retained its original, acquisitive flavour. This is a remarkable topic. The functional equivalent to extinctive prescription, in English Law, is "Limitation of Actions". And such term is in use in Australian territories as well.

As the term clearly suggests, the English institution is procedural by its nature: Limitation does not affect the 'right', but merely the ability to pursue that right in a court. As I will show, the approach is by no means alien to civilian tradition.

Predominantly, however, the combination of both legal institutions under the same doctrinal and statutory umbrella is no longer regarded as helpful today, since they are largely governed by different rules.

5 See the fundamental Report *Extinctive Prescription. On the Limitation of Actions*, The Hague London Boston, 1995.

6 See, e.g., § 1478 and ff. ABGB (former version)

7 Prescription and Limitation Scotland Act 1973

8 Prescription Act 68 (1969)

The idea that the lapse of time could cause a loss of rights is not, surprisingly, a roman invention. Probably, in ancient Attic Law there was something similar to modern concept of extinctive prescription: but I am not thinking about Hellenistic "paragraphé".

If we take a look at Demosthenes' *pro Phormione* speech (ll. 25-27), we find something quite interesting about the so called "*prothesmia*". According to Demosthenes, Solon is supposed to set up the principle by which contractual actions expire within 5 years[9].

But Roman Law, is, of course, much more interesting, as you may imagine, for discovering the origins of extinctive prescription, although may important scholars may not seem to care about historical roots of prescription[10].

2. *PRAESCRIPTIONES* IN CLASSICAL ROMAN LAW?

In private Roman Law[11], the lapse of time had its influence, in classical period, also on the right to claim for something. But I have to underline that, at least in Classical Law, there is no relationship between the word *praescriptio* and what we call today as extinctive prescription, despite of the similarity of the words.

In fact, *praescriptio* was a term exclusively dealing with the system of litigation based on *formulares actiones* in Roman Republic. According to jurist Gaius, *praescriptones* (and, before them, *exceptiones*) were clauses of the so called *formula* which had the purpose to trace the *causa petendi*, peculiarly when the claim was based on a *formula quo incertum petimus*[12] .

9 F. Zuccotti, *Per una storia della Prothesmia prescrittiva*, in *Hellenic Law Review – Rivista di Diritto Ellenico*, 2012, p. 1; I. Giannadaki, *The time limit (prothesmia) in the Graphe Paranomon*, on *Dike* (17) 2014, p. 16 ff.; *The Oxford Handbook of Demosthenes*, ed. G.Martin, Oxford 2018, p. 393ff.

10 R. Zimmermann, *Comparative foundations of a European Law of Set-Off and Prescription*, Cambridge 2002, especially p. 66f. In this monography there's a considerable selected bibliography on extinctive prescription in many legal experiences: see page 67 and ff. The German Scholar, who i careful in describing the new tendencies on prescription, in a comparative perspective, is strangely neglecting History of Roman Law. Much more careful, in his historical analysis, is the huge work of A. Piekenbrock, *Befristung, Verjahrung, Verschweigung unf Verwikung: eine Rchtsvergleihende Grundlagen Studie zu Rechsanderungen durch Zeitblauf*, Tubingen 2006, p. 59, 61, 78, 90ff., 113., 156; E. Chevreau, *Le temps et le droit: la réponse de Rome. L'approche du droit privé*, Paris 2006, p. 97ff.

11 M. Amelotti, *La prescrizione delle azioni in diritto romano*, Milan 1958, and D. Norr, *Die Entstehung der longi temporis praescriptio: Studien zum Einfluss der Zeit im Recht und zur Rechtspolitik in der Kaiser*, Koln -Opladen,1969.

12 See, for more details, *The Oxford Handbook of Roman Law and Society*, eds. P. du Plessis, C. Ando, K. Tuori,Oxford 2016, p. 215 ff. Cfr. Gai 4. 130-132: Gai. 4, 130-132: *Videamus etiam de praescriptionibus quae receptae sunt pro actore. 131. Saepe enim ex una eademque obligatione aliquid iam praestari oportet, aliquid in futura praestatione est: veluti cum in singulos annos vel menses certam pecuniam stipulati fuerimus; nam finitis quibusdam annis aut mensibus huius quidem temporis pecuniam praestari oportet, futurorum autem annorum sane quidem obligatio contracta intellegitur, praestatio vero adhuc nulla est. Si ergo velimus id quidem quod praestari oportet petere et in iudicium deducere, futuram vero obligationis praestationem in integro relinquere, necesse est ut cum hac praescriptione agamaus EA RES AGATUR CUIUS REI DIVES FUIT; alioquin si*

Civil Procedure Review, v. 13, n. 1: jan.-abr. 2022.
ISSN 2191-1339 – www.civilprocedurereview.com

Doubtless, in late Byzantine Law, *praescriptio* and *exceptio* were meant to be as synonymous, while in Classical Roman Law, all texts referring to *praescriptio* as a kind of *exceptio* based on the lapse of time are considered as untrustworthy, since they are not genuinely Roman.

However, it is quite sure that in Roman Legal Experience there was not a unique and 'technical' term which could describe exactly the phenomenon of loss of rights by the lapse of tie, at least as we consider, as I told before, Classical Period.

Nevertheless, there were many different expressions, sometimes quite complex too, which were useful to distinguish perpetual actions from temporary actions.

The Jurist Gaius, for example (see, e.g., 4,110-11) describes the actions which praetor granted within a year (*intra annum dare*), which were opposite to *perpetuae actiones* based on *ancient leges* or *senatus consulta* (*perpetuo accommodare, perpetuo dare*).

The Jurist Paulus[13], yet, traces a difference between actions which praetors granted within one year and actions which were granted even after such deadline as well.

Even in Justinian's *Institutiones* we find expressions like *perpetuo competere*, in *perpetuum extendi*, *perpetuo dari*, as opposite to *intra annum vivere*, *anno terminari*.

But in late Roman Empire, things and words begin to change: in the system of litigation called *Cognitiones Extra Ordinem*, the word *praescriptio* is meant to be a kind of 'defense', or 'defendant's act of defense'. Terms like *praescriptio* and *exceptio* became as synonyms, as it is well shown in Justinian's *Digesta* D. 44.1 (*De exceptionibus praescriptionibus et praeiudiciis*), and in C. 8.35 (36) (*De exceptionibus sive praescriptionibus*), and finally, in C. 7.30 (*De annali exceptione italici contractus tollenda et de diversis temporibus et exceptionibus et praescriptionibus et interruptionibus eorum*).

But the term *praescriptio* is increasingly used, assuming the exact meaning of 'defense basing on the lapse of time'.

---

sine hac praescriptione egerimus, ea scilicet formula qua incertum petimus, cuius intentio his verbis concepta est QUIDQUID PARET N. NEGIDIUM A. AGERIO DARE FACERE OPORTERE, totam obligationem, id est etiam futuram in hoc iudicium deducimus, et quae ante tempus obligatio... 131a. Item si verbi gratia ex empto agamus, ut nobis fundus mancipio detur, debemus hoc modo praescribere EA RES AGATUR DE FUNDO MANCIPANDO, ut postea, si velimus vacuam possessionem nobis tradi,... sumus, totius illius iuris obligatio illa incerta actione QUIDQUID OB EAM REM N. NEGIDIUM A. AGERIO DARE FACERE OPORTET, per intentionem consumitur, ut postea nobis agere volentibus de vacua possessione tradenda nulla supersit actio. 132. Praescriptiones autem appellatas esse ab eo, quod ante formulas praescribuntur, plus quam manifestum est.

13 Cfr. D. 44, 7, 45 pr. (Paul. 1 ad ed.): *In honorariis actionibus sic esse definiendum cassius ait, ut quae rei persecutionem habeant, hae etiam post annum darentur, ceterae intra annum. honorariae autem, quae post annum non dantur, nec in heredem dandae sunt, ut tamen lucrum ei extorqueatur, sicut fit in actione doli mali et interdicto unde vi et similibus. illae autem rei persecutionem continent, quibus persequimur quod ex patrimonio nobis abest, ut cum agimus cum bonorum possessore debitoris nostri, item publiciana, quae ad exemplum vindicationis datur. sed cum rescissa usucapione redditur, anno finitur, quia contra ius civile datur*.

3. EXTINCTIVE PRESCRIPTION AND THEODOSIUS II

It is useful, n this direction, to remind shortly that the most ancient traces of *longi temporis praescriptio*, which was meant to be as an *exceptio* basing on the lapse of time, are in two ancient Egyptian *papyri*. *Longi temporis preascriptio* was a statutory rule firstly set up by Emperors Severus and Caracalla, through a rescript in 199 A.D., as it is well shown in Papyrus BGU 267[14], *longi temporis praescriptio* seemed to be a "veto opposé à la *rei vindicatio*"[15], due to the plaintiff's guilty behavior. I do strongly agree with Mrs. Chevreau's idea above cited. She picked up exactly, from my point of view, the deep meaning, and the essence, of *longi temporis praescriptio* as it showed itself in late Roman Empire.

One Century later, more or less, the Emperor Constantinus issued a *constitutio* which mentioned a brand new of *praescriptio*, the so called *longissimi temporis praescriptio* (or *Rescriptum Constantini de quadraginta annorum praescriptione*: FIRA, I, 96 and FIRA, III, 101), whose aim was protecting, by an *exceptio*, a *possessio* lasting for at least fourty years[16].

But the genuine extinctive prescription, at least as we today intend it, then, referred to actions, firstly appears on stage, in Roman Legal experience, only under the Emperor Theodosius II, in 424 A.D.

The Emperor aimed to shorten the term of all civil litigations, setting up a "*certum tempus in protrahendis litibus*" (he expressly made mention of safety and fairness in legal affairs, even in the sense that we commonly intend such topics: suretyship of rights).

It is useful to remind the content of the *Lex Theodosiana*, at least in a footnote[17]. Thirty years lasting *praescriptio* was intended to cover both *hereditatis petitiones* and

14 We may read it in *Fontes Iuris Romani Anteiustiniani*, I, nn. 84 ss. and online here: bgu.1.267 = HGV BGU 1 267 = Trismegistos 20201 (papyri.info)

15 Chevreau, *op. cit.* (supra n. 10) 111

16 Cfr. C. J. Kraemer - N. Lewis, *Constantine's Law on Longissimi Temporis Praescriptio*, in *Actes Ve Congrès de Papyrologie* (Bruxelles 1938), p. 245ff. and, lately, M. De Simone, *P. Col. VII, 175. Aspetti giuridici di un verbale di udienza*, in *Annali Università degli Studi di Palermo*, 56 (2013), p. 29ff. The text of the Statute is in A. C. Johnson, P.R. Coleman-Norton, F. C. Bourne, *Ancient Roman Statutes* (Austin 1961) 241, n. 305

17 Imp. Theodosius A. Asclepiodoto PP. CTh. 4.14.1 (year 424): *Sicut in rem speciales, ita ad universitatem ac personales actiones ultra triginta annorum spatium minime protendantur. Sed si qua res vel ius aliquod postuletur, vel persona qualicumque actione vel persecutione pulsetur, nihilominus erit agenti triginta annorum praescriptio metuenda: eodem etiam in eius valente persona, qui pignus vel hypothecam non a suo debitore, sed ab alio possidente nititur vindicare. Nam petitio finium regundorum in eo scilicet, quo nunc est, iure durabit. 1. Quae ergo ante non motae sunt actiones, triginta annorum iugi silentio, ex quo competere iure coeperunt, vivendi ulterius non habeant facultatem. Nec sufficiat precibus oblatis speciale quoddam, licet per annotationem, meruisse responsum vel etiam iudiciis allegasse, nisi, allegato sacro rescripto aut in iudicio postulatione deposita, fuerit subsecuta conventio. In eandem rationem illis procul dubio recasuris, quae post litem contestatam, in iudicium actione deducta habitoque inter partes de negotio principali conflictu, triginta denuo annorum devoluto curriculo, tradita oblivioni ex diuturno silentio comprobantur. 2. Non sexus fragilitate,*

Civil Procedure Review, v. 13, n. 1: jan.-abr. 2022.
ISSN 2191-1339 – www.civilprocedurereview.com

contractual actions. *Diuturnum silentium* of the plaintiff (his long-lasting silent and guilty behavior), as we argue by reading such text, is one of the most relevant and modern ideas to justify, and to understand, the essence of the remedy of extinctive prescription.

Some actions kept on being perpetual under Theodosius, as they used to be, for example *actio finium regundorum*; while *actiones communi dividundo* ad *familiae erciscundae* were meant to be as temporary.

The Emperor made mention, in his text, of many important, and surprisingly modern aspects of extinctive prescription. For example, it was ell described that the commencement of prescriptive. Finally, the Emperor underlined that prescription did not run against *pupilli*, women while he made no mention of *absentes* and *milites*. Also, such idea has had great luck in legal history, since it is, nowadays, a suspensive factor of extinctive prescription.

The *lex Theodosiana*, here above mentioned, was contained in Justinian's Code as well, but Byzantine jurists – as it often happened – made in it some textual changes.

4. Extinctive Prescription and Justinian

To have an idea of how Emperor Justinian considered the topic of extinctive prescription, first of all, we have to consider some parts of his famous Constitutio Haec quae necessario, whose date of issue was 13th February 528 A.D., opening the Codex.

Justinian strongly underlined his aim to shorten the length of litigations (*amputare prolixitatem litium*). One may say that Justinian did not discover anything new, about the topic of extinctive prescription[18], but – I have to underline – the lack of new rules in Justinian's era was due to the fact that Theodosius, just one Century before, had been careful to fully cover all the aspects of extinctive prescription.

So – this is just my humble opinion – it may be incorrect to underrate Justinian. Sources show a different point of view: some scholars, instead, rightly underline that

non absentia, non militia contra hanc legem defendenda, sed pupillari aetate dumtaxat, quamdiu (83) sub tutoris defensione consistit, huic eximenda sanctioni. Nam quum ad eos annos pervenerit, qui ad sollicitudinem pertinent curatoris, necessario ei, similiter ut aliis, annorum triginta intervalla servanda sunt. 3. Hae autem actiones annis triginta continuis exstinguantur, quae perpetuae videbantur, non illae, quae antiquitus fixis temporibus limitantur. 4. Annorum autem curricula ita numerari conveniet, ut et illa in demensionem tempora reducantur, quae ante nostrae mansuetudinis sanctionem iugi taciturnitate fluxerunt. 5. Verum ne qua otioso nimis ac desidi querimonia relinquatur, ei, qui se fiducia perpetuitatis actionem non movisse commemorat, decem post hanc legem annorum spatia continua superioribus addi praecipimus, ut, si quidem ante sanctionem hac lege praefinitos annos decurrisse patuerit, praeter ea tempora, quae manarunt, decem actori annorum spatia prorogentur, ita ut tempus illi hoc continuum ex legis tempore numeretur. Quod si decem illi anni superesse videbuntur aut amplius, ulterius eum nihil desiderare conveniet, sed proprio lapsu temporis decurrente ad triginta usque consummationem debere suo spatio esse contentum; si annos quidem restare non dubium est, sed infra decem eorum intervalla concludi, nihilominus etiam sic eum spatium tantum oportebit accipere, ut decem integer numerus compleatur; postquam hac definitione nulli movendi ulterius facultatem patere censuimus, etiamsi se legis ignorantia excusare tentaverit. Dat. XVIII. kal. decemb. Constantinopoli Victore v. c. cons. Theodosian's Statute was also reprinted in Justinian's Code, exactly in C. 7.39.3.

18 Chevreau, *op. cit.* (supra, n. 10) p.121 ff.

Justinian's reign was representing the start of the idea connecting *longa taciturnitas* (long-lasting guilty silence) to *firmitas* (safety of legal bargaining).

According to Justinian, extinctive prescription had a thirty years lasting period. But, overall, if we take a look at C. 7.31.1[19], we realize that, under Justinian, prescription had an ambiguous appearance, referring both to extinctive and acquisitive effect. Such aspects, as I underlined before, characterized many modern Civil Codes.

The Emperor Justinian, furthermore, was the first to trace a difference between limitation of actions and *peremptio causae* (limitation period of the trial, or péremption d'instance, as French Law says): this we may argue reading the famous *Lex Properandum*, which set up a maximum period of only three years for civil litigation causes (Cfr. C. 3.1.13)[20].

5. Final Remarks in a Historical Comparative Perspective

Justinian's asset of extinctive prescription, ambiguously characterized by extinctive and acquisitive effects, and by a considerably long limitation period (30 years), has had great luck in Legal History, peculiarly in Countries like French and Italy.

Infact, the old articles of the French Code Civil, going back to the year 1804 (artt. 2219-2281), and the articles of Italian Codice Civile, going back to the year 1865 (artt. 2105-2147) were faithfully inspired by Roman Rules. This may sound, of course, as no surprise.

But the trend, in modern legislations, has been to shorten the periods of extinctive prescription. In recent times, Germany and France, for example, have changed the asset of prescription in their codes, focusing, pecurliarly, on shortening limitation periods, as I will shortly remind.

In this direction, a not inconsiderable amount of legal literature has also been generated by attempts to reform or harmonize, especially in Europe, the law of prescriptio/limitation of actions.

In Germany, for example, the rules relating to prescription have surprisingly been regarded as one of the less satisfactory features of the BGB.

19 *Cum nostri animi vigilantia ex iure quiritum nomen et substantiam sustulerit et communes exceptiones in omni loco valeant, id est decem vel viginti vel triginta annorum vel si quae sunt aliae maioris aevi continentes prolixitatem, satis inutile est usucapionem in italicis quidem solis rebus admittere, in provincialibus autem recludere. sed et si quis res alienas, italicas tamen, bona fide possidebat per biennium, miseri rerum domini excludebantur et nullus eis ad eas reservabatur regressus. quae et nescientibus dominis procedebant: quo nihil inhumanius erat, si homo absens et nesciens tam angusto tempore suis cadebat possessionibus.* * iust. a. iohanni pp. * <a 531 d. xv k. nov. constantinopoli post consulatum lampadii et orestis vv. cc.>

20 CI.3.1.13pr.: Imperator Justinianus *Properandum nobis visum est, ne lites fiant paene immortales et vitae hominum modum excedant, cum criminales quidem causas iam nostra lex biennio conclusit et pecuniariae causae frequentiores sunt et saepe ipsae materiam criminibus creare noscuntur, praesentem legem super his orbi terrarum ponendam, nullis locorum vel temporum angustiis coartandam ponere*. * iust. a. iuliano pp. * <a 530 d. vi k. april. constantinopoli lampadio et oreste vv. cc. conss.>. Cfr. A. Metro*, Brevi note sulla mors litis per inattività*, on *Fundamina*, 20, 2014, 638ff.; A. Agudo Ruiz, *Nota sobre CI. 3.1.13 Lex Properandum*, on *Revista General de Derecho Romano* (*RGDR*), 27 (2016).

Civil Procedure Review, v. 13, n. 1: jan.-abr. 2022.
ISSN 2191-1339 – www.civilprocedurereview.com

The so-called German "Schuldrechtsmodernisierung", or "Modernization of the Law f Obligations", took finally place in the year 2002, and its most relevant provision is, in § 195 BGB, a general limitation period of three years.

Still more relevant is what happened in France[21], in recent times. The growing dissatisfaction towards the law of liberative prescription was denounced in France for more than a Century.

Scholars and practitioners regularly urged the French Legislature to revise the part of the Code Civil related to the law of prescription, which was one of the most ancient in Europe. In 2008, the French Legislature took the necessary step and drastically reformed the Law of Prescription.

The general period has been shortened and unified (five years: see art. 2224, new version, of French Civil Code), there are new grounds for suspension (including codified principle *contra non valentem agere non currit praescriptio*), and a long-stop period has been introduced[22].

The Civil Code of Netherlands (NBW) has a general term of prescription which is lasting twenty years: it seems that this Code is holding on Justinian's tradition[23] but, if we read it more carefully, the most relevant term, because of its relation to the Law of Obligations, is of five years (see art. 3:307 and ff.).

As far as Danish Law is concerned, the general prescription rules in Danish Law are embodied partly in the Prescription Act of 1908, which prescribes a 5 years prescription period; and partly in art. 5-14-4 of Danish Code, containing a 20 years prescription period. It is worth reminding that Danish Law, in my opinion, is a good system, mixing shorter and longer prescriptive periods.

Taking a final look beyond European Countries, in the Prescription Act of South Africa we may find, as well, a wide range of prescriptive periods, from 3 years until 30 years[24].

In Brazilian Law[25], the articles 177 and 178 of the Brazilian Civil Code (CCBr) show a wide range of prescriptive periods, especially in the law of contracts (from 6 months until 3 years).

On the other side of the World, the Civil Code of Japan seems to be still inspired by traditional, ancient rules on extinctive prescription. The Civil Code (1896 Law No.

21 Délais de prescription | economie.gouv.fr

22 J. Cartwright, S. Vogenauer, S. Whittaker (eds.), *Reforming the French Law of Obligations*, Oxford 2009.
It may be interesting reading a paper that offers a comparison between French Law and Louisiana's Law: see B. West Janke, F.X. Licari, *The French Revision of Prescription: a Model for Louisiana?*, in *Tulane Law Review*, 85 (2010), p. 2 ff.

23 Art. 3:306

24 Prescription Act 1968, Ch. III, Prescription of Debts, § 11, sections A-D

25 K.S. Rosenn, *Civil Procedure in Brazil*, in *Am. J. Comp. L*., 34 (1986) p. 487

89), the Commercial Code (1899 Law No. 48) and other relevant laws prescribe various limitation periods depending on the type of claims. In principle, the limitation period is 10 years (see art. 167 and ff.)[26]. But a property right other than an obligation right or ownership right shal lapse if it is not exercised for 20 years.

However, the period is shortened to 5 years if claims are related to commercial activities. It should be further noted that there are many other exceptions to the length of applicable limitation periods, such as 3 years for tort claims and 2 years for accounts receivable related to movable assets. Limitations periods commence when a right becomes exercisable. Limitations periods are characterized as a matter of substantive law. Although the right in question is deemed to expire after the relevant limitations period, a party is not prevented from filing suit, and the court will not inquire into the limitations period unless it is raised by the opposing party as a defense.

I think, furthermore, that may be interesting to mention New Zealand too. The Limitation Act of 1950 was a descendant of an English statute of 1623. The law of limitation in England was comprehensively reviewed in 1939, and as a result of that review, a new Limitations Act 1939 (UK) was passed. Limitation Act 1950 shown various limitation periods, going from 90 days (actions for unjustified dismissal and other employment-related personal grievances) to 3 years (action for misleading or deceptive conduct under the Fair Trading Act), to 6 years (action founded on contract or tort). New rules have been set up by Limitation Act 2010. Claims to recover land, for example, have a prescription period of 60 years, if based on adverse possession[27].

In the same area, if we consider Queensland, the statutory rules go back to 1974 (Limitation of Actions Act) and it contains different periods of limitation for different classes of actions, as we may argue by reading § 9, Part II[28]. In New South Wales the general term of provision for limitation of actions is 6 years[29].

Then I am coming to the end of these short remarks on extinctive prescription, so it seems useful to clarify European tendencies of "soft law" sources concerning our topic.

I am referring, peculiarly, to so-called "Principles of European Contract Law" (PECL[30]), and to so-called "Draft Common Frame of Reference (DCFR[31]), which aims to become a general scheme for European Legislators, following the idea of a brand new *ius commune*.

In general, it doesn't matter whether the obligation has a contractual origin. This becomes evident in PECL, whose Chapter 14 is placed among the chapters devoted to

26 Japanese Law Translation - [Law text] - Civil Code

27 Limitation Act 2010 No 110 (as at 01 March 2017), Public Act – New Zealand Legislation

28 View - Queensland Legislation - Queensland Government

29 Limitation Act 1969 No 31 - NSW Legislation

30 Principles of European Contract Law - PECL | Trans-Lex.org (trans-lex.org). see O. Lando*, Principles of European Contract Law,* in *The Rabel Journal of Comparative and International Private Law*, 56.2, 1982, 261ff.

31 See Draft Common Frame of Reference. Outline Edition (univr.it)

Civil Procedure Review, v. 13, n. 1: jan.-abr. 2022.
ISSN 2191-1339 – www.civilprocedurereview.com

the general part of the Law of Obligations. The same is valid for DCFR, since extinctive prescription is ruled in Chapter VII of Book III ("obligations and Corresponding Rights"), and Book III goes before Specific Contracts (Book IV), Benevolent Intervention in Another's Affaire (Book V), Non-Contractual Liability (Book VI) and Unjustified Enrichment (Book VII).

Article 14:102 PECL resorted to the word "claim" to identify the object of prescription. The claim was defined here as "the right to perform an obligation", a translation of the word "Anspruch" (§ 194 BGB, or pretensiò in article 121-1 Civil Code of Catalonia). Without using the word "claim", the same idea is intended to be found in DCFR where article III-7:101 says that " a right to performance an obligation is subject to prescription".

It is interesting, in such direction, that PECL and DCFR codify the contra non valentem agere principle whose origins would be interesting to reconstruct, given that for PECL (art. 14:301) and DCFR (art. III.-7:301) the first ground for suspension is the ignorance of the identity of the debtor or the facts concerning to the right.

CONCLUSIONS

The aim of this work was tracing a redlining connecting Roman experience with present, in the field of prescription of rights, or actions, by the lapse of time. Roman Jurists, and Roman Emperors, too, felt the importance of the lapse of time as a legal means for acquiring, or, later, losing rights. And, in such direction, they set up many rules on many aspects of prescription, which still nowadays seem to us surprisingly complex, and modern, too.

I only intended to show how new tendencies, in an everchanging topic as extinctive prescription, may go together with their historical roots, going back to Roman Law, often relying on long-lasting prescription periods, even if new legislations are shortening prescription periods.

A historical-comparative perspective is, in my opinion, one of the most useful and reliable legal methodologies to approach, correctly, to the aim of harmonizing Private Law, and not only in Europe, if we trust in such methodology deeply and follow it carefully.