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ABSTRACTS
RÉSUMÉS
RIASUNTI
RESÚMENES
ZUSAMMENFASSUNGEN

INDEX OF AUTHORS
INDEX DES AUTEURS
INDICE DEGLI AUTORI
ÍNDICE DE AUTORES
INDEX DER AUTOREN

L

M

N

O

P

R

S

T

U

V

W

Y

Z

A

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Commutative Justice under the Tetrarchy: An Analysis of laesio enormis and Rent Remission

Keywords: Diocletian, Tetrarchy, rent, prices, economics

Many legal obligations in the Roman Empire were underpinned by economic transactions between one or more parties. It was common for one of these parties to have less bargaining power than the others. Several petitions from the Tetrarchy concern scenarios where a weaker party has found themselves in economic distress in consequence of their transaction with a stronger party. These include transactions where one party has fallen into arrears on their rent, as well as where one party has been compelled to accept a significantly higher price for a good or service than the market clearing rate.

These petitions arrived at a time when the Empire was recovering from a period of economic and political disruption. During the dynastic crisis which followed the death of Alexander Severus, trading links across the Mediterranean had been disrupted and Roman patterns of production and consumption fragmented. The structure of the imperial government had undergone significant changes, with a much larger central imperial staff and an increased willingness to attempt interventions in economic transactions, as demonstrated by the Diocletian price edict and currency decree. Even before the third century, long term trends in the structure of the agrarian economy were affecting the law.

Analysis of Diocletian legal doctrines from an economic perspective have so far focused on the need to balance the interests of stronger and weaker landholders, with an emphasis on ensuring that land remained in productive use even where tenants have fallen into arrears (Kehoe 2007). This reflected a broader desire to stabilise production after the disruption of the earlier third century. It also fits into the broader pattern of Diocletian legal-economic policy, which sought to bind the smallholding *coloni* more closely to the land they worked and prevent them moving between different estates in order to stabilise revenues.

This paper will build on these insights by combining an analysis of rent remission and *laesio enormis*. It will argue that Diocletian legal-economic policy developed a specific approach to issues of commutative justice, or justice in transacting. This emphasised a greater role for the imperial court as a source of moral authority, perhaps anticipating the later 'confessional' state of the Justinian period (Sarris and Miller 2018). However, this approach was also deeply pragmatic: the harshness individual economic transactions was ameliorated as far as necessary to achieve greater economic and fiscal stability.

ŞEBNEM AKIPEK ÖCAL

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Real Rights and the Principle of Numerus Clausus Compared to Personal Rights and the Freedom of Contract: a Comparative Analysis of Roman Law and Turkish Law

Keywords: Real right, personal right, *numerus clausus*, freedom of contract, Turkish Law

One of the most important concepts in law is that of 'absolute rights'. An absolute right is a right that can be asserted against and has to be respected by every person. There are several types of absolute rights. An absolute right may be against a person, like the personal right; or it may be against property, like real rights. In Civil Law, the real right refers to a right that is attached to a property, rather than a person. Real rights include several different types, namely ownership, usufruct, mortgage, pledge, easement of habitation and servitudes.

In Roman law, real rights, especially ownership, were always bee regarded as important concepts. Private ownership, especially, played a central role in all periods of Roman law. In the early years there were two different ways in which private ownership of *res mancipi* and *res nec mancipi* could be transferred. An owner could, by limiting his/her ownership, create other rights wich had the same character as real rights. In that way limited real rights began to evolve and develop. But they were also limited in number, so the principle of *numerus clausus* emerged.

The same principle is still operative in most civil-law systems including Turkish law. However, a completely different approach is followed in respect of personal rights. As for the personal rights, contrary to this principle, there is no limit in number or type.

Personal rights are usually created by contracts and in contracts personal rights can only be enforced against the other party to the contract. In the law of contracts, the basic principle is that of contractual freedom. In other words, freedom of contract is based on mutual agreement and the free choice of the parties. Therefore, the parties may conclude any type of contract they want, and they may also create new types of contracts. Freedom of contract is recognized as a general principle of the civil law by the European Court of Justice. But this freedom has also some limits. These limits are mostly imposed by law.

In this paper, starting from Roman times, the evaluation of real rights and personal rights will be explained and both concepts shall be compared especially from the point of view of the principle of *numerus clausus*. The situation in Turkish law regarding both rights shall also be introduced.

JOSÉ LUIS ALONSO

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Jurisdiction and the Law

Keywords: jurisdictional discretion, legal norm, peregrine law

In 1883, August Schultze famously posited that the jurisdictional discretion behind the rise of the *ius honorarium* inevitably entailed the abrogation of the old *ius civile* as law: in the heyday of the formulary procedure *ius civile* was no longer law; only the law imposed by

the magistrate for each concrete case formally existed (Schultze, *Privatrecht und Process in ihrer Wechselbeziehung*, Freiburg i. B. 1883, 384).

More than a hundred years later, Hans Julius Wolff came to a similar conclusion regarding Roman Egypt. The fall of the Ptolemies created a legal vacuum: all existing law ceased to be such, because it was no longer binding for the Roman administration; and even though the local legal traditions survived thanks to Roman tolerance, they were not binding and therefore not law, as their occasional rejection confirms. (Wolff, *Das Recht der griechischen Papyri Ägyptens I*, München 2002, 115-116).

The extreme theories of Schulze and Wolff are a reminder of the *aporiae* that result from projecting a strictly normative understanding of the law back into Antiquity. Any attempt to grasp how the law actually operated in the Roman world needs to start by considering how the jurisdiction operated: a project where much can still be gained from a joint study of the legal and the papyrological sources.

CARLOS AMUNÁTEGUI PERELLÓ

Pontificia Universidad Católica de Chile |Chile

Andrés Bello's Civil Code and Its System of Sources

Keywords: Andrés Bello, Civil Code, legal sources, tradition

Andrés Bello's Civil Code is one of the most influential legal works of the American 19th century. It is still in force in five Latin American countries and its continental influence goes well beyond these five nations. Recently, a new edition including its source system has been published by us. This work underlines the fundamental continuity of Roman legal texts, through modern understanding and the role of tradition in the configuration of modern legal systems.

MATTHIAS ARMGARDT

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Causation and Counterfactual Reasoning in Roman Law and Modern Jurisprudence

Keywords: causation, Roman law, jurisprudence

The counterfactual approach of causation is under attack in modern legal theory. In the first part of my talk I will go back to classical Roman law to show how important and fruitful counterfactual reasoning was in antiquity. In the second part of my talk I will show (against Michael S. Moore, *Causation and Responsibility*, 2009, p. 412) that the counterfactual account of causation is able to deal with the problems of overdetermination if we introduce the concept of 'normative ideal worlds' (based on the possible worlds semantics invented by Leibniz). Thus, the great intuition of the Roman jurists concerning counterfactual reasoning can be made use of in modern legal theory in a fruitful way.

LORENA ATZERI

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A Byzantine Legal Text and Its Editors

Keywords: Roman law, Byzantine legal sources, humanist editing, early modern scholarship, texts and their transmission

The present paper will focus on the editing process of a late Byzantine legal source from the 16th to the 18th century and its consequences for the modern text.

B

LEANNE BABLITZ

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Legal Hearings in the Forum of Pompeii

Keywords: legal hearings, *chalcidica*, *Eumachia*, Pompeii, archive of Sulpicii

Within the archives of the Sulpicii family (first century C.E.) we find record of both legal activities and the sales of slaves taking place at *chalcidica*. Three different *chalcidica* are attested as being located in Puteoli: the Hordonianum, the Octavianum, and the Caesonianum. Like her neighbours in Puteoli, Eumachia also built a *chalcidicum* in her community of Pompeii. This structure, together with a crypt and a portico, are mentioned in the dedicatory inscriptions for her complex. Unfortunately, the physical shape of a *chalcidicum* is unknown. Scholars have struggled to piece together the very fragmentary evidence for over a century. In her 2005 *JRA* article examining the material evidence for the locations at which slaves were sold, Elizabeth Fentress identified two raised recesses within the portico, on the front of Eumachia's building, as *chalcidica*. I think she is correct. In this presentation, I will provide further evidence to support her identification of these spaces. The location and form of these recesses, parallel other spaces at which we know legal activities took place. This paper confirms new locations for legal hearings within the Forum of Pompeii and further strengthens the link between the Augustan building program and Eumachia's complex.

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Ein entlaufener Bär zwischen Natur und Institution

Keywords: *actio de pauperie,* Gefährdungshaftung, Tierschaden, Natur, Eigentum

Im Einleitungssatz zu Digesten 9.1.1.10 verneint Ulpian zunächst grundsätzlich die Anwendung der *actio de pauperie* auf wilde Tiere. Der Jurist führt das Beispiel eines Bären an, der seinem Eigentümer entwichen ist und Schaden angerichtet hat. Den Ausschluss der Haftung begründet Ulpian damit,

dass das Eigentum mit dem Entlaufen des Tieres erloschen ist. Moderne Autoren haben auf den Widerspruch (Polojac), bzw. den, gedanklichen Fehler (Wacke) hingewiesen, der zwischen den beiden Sätzen des Fragments zu bestehen scheint. Der grundsätzliche Haftungsausschluss im ersten Satz macht das Argument über den Eigentumsverlust überflüssig. Im Schrifttum ist das Schwergewicht allgemein auf die Qualifizierung des Bären im Hinblick auf die *actio de pauperie* gelegt worden. Diese Fragestellung wird auch von Ulpian D. 9.1.1.2 angesprochen,wo es heißt, dass die Klage alle vierfüßige Tiere betrifft und von D. 9.1.4, in der Paulus eine *action utilis* für jene Fälle vorsieht, in denen ein Schaden durch ein anderes als ein vierfüßiges Tier entstanden ist. Im Bereich der Sekundärliteratur finden sich sowohl Autoren, die die Anwendbarkeit der *actio de pauperie* auf wilde Tiere bejahen als auch solche, die eine Gewährung der Klage verneinen. Symptomatisch für den Meinungsstand ist die Tatsache, dass Max Kaser in der ersten Auflage seines Handbuches die Anwendung auf wilde Tiere bejaht, sich aber in der zweiten Ausgabe nicht mehr festlegen will. Bei Ulpian selbst finden sich noch zwei weitere Stellen, die im Hinblick auf die *actio de pauperie* ausdrücklich von wilden Tieren sprechen (D 9.1.1.6 und D. 9.1.1.7). Letztere der beiden Stellen sagt, dass die Klage ganz allgemein (*generaliter*) Anwendung findet, wenn ein Tier entgegen seiner gezähmten (wilden) Natur einen Schaden anrichtet. Die Problematik der Stelle ergibt sich zum einen aus der rechtlichen Qualifikation von Tieren und deren natürlichen Eigenschaften. Grundlegend für die Beurteilung der Stelle ist aber auch das Verständnis von Eigentum seitens der römischen Juristen. Die Perspektive des vorliegenden Beitrags ergibt sich aus der Verknüpfung der beiden Aspekte.

JAQUELINE BEMMER

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The Conceptual Evolution of 'poena': Multinormative Penal Attitudes and Practices in Late Antiquity

Keywords: Roman law in Late Antiquity, *poena*, Theodosian Code, Patristics, punishment

This paper explores the semantic colourings, (inter-)textual embedding, and contexts in which the term *poena* occurs in Roman legal sources of late Antiquity. It examines its conceptual evolution within the purview of criminal law, including domestic and ecclesiastical penal practices as well as extra-judicial dispute settlement embracing the characteristic multi-normativity of the period. I seek to discern the historic progression of the term and its representations as synchronic actualisations of punishment and atonement, and examine to which extent penal strategy, philosophy of pain and soteriology came to bear on its development and apperception. I focus primarily on a selection of texts from the Theodosian Code and the writings of early Christian authors whose textual meaning I analyse through the theory of *corpus* linguistics. The resulting methodology used for the study of historical legal texts allows me to scrutinise changes in register and provides empirical data for potential concurrent dichotomies as well as for the diachronic progression of key concepts signified by the term *poena*.

YASMINA BENFERHAT

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L'apparition de la notion de paternité de l'oeuvre littéraire: L'exemple de la Rome antique

Keywords: Pliny the Younger, intellectual property, money, glory, Martial

Quelle aurait été la réaction d'un Romain si on lui avait parlé de la paternité d'une oeuvre littéraire? Dans une Rome où, par exemple, circulaient plus de cent pièces attribuées à Plaute avant que l'érudit Varron ne fasse un tri pour en garder finalement une vingtaine, parions qu'il aurait été étonné. Ce qui complique particulièrement les choses pour nous au 21esiècle, c'est qu'on n'écrivait pas forcément pour s'assurer des revenus dans la Rome antique. Or, quand on s'intéresse aujourd'hui au droit d'auteur c'est le plus souvent lié à des questions d'argent: l'argent que doivent rapporter ses écrits à un auteur, l'argent que ses écrits rapportent à son éditeur avec en corollaire la question de l'exclusivité d'une part, la question de la copie d'autre part.

A Rome aussi, on pouvait gagner de l'argent avec ses écrits: le premier cas est le plus simple avec un auteur de pièces de théâtre. Le second cas est un peu moins simple : si un poète remportait un concours de poésie avec prix offert par l'empereur, il était bien payé pour ses oeuvres. Le poète Martial a reçu des récompenses de l'empereur Domitien, mais il semble que cela n'ait pas été le cas le plus fréquent: pour bon nombre d'auteurs le but poursuivi était d'assurer sa propagande, ou de faire plaisir à des amis, ou encore (et peut-être surtout) de s'assurer la gloire synonyme d'immortalité, mais pas de gagner sa vie. Ces auteurs ne percevaient pas d'argent, quand des copies de leurs écrits étaient diffusées par un libraire, ou par une relation. Quid du droit de la propriété intellectuelle dans ces conditions?

Nous nous proposons d'étudier la notion de paternité d'une oeuvre dans la Rome antique de la République et du Haut-Empire, en examinant tout d'abord les cas avérés de rétribution de la production d'une oeuvre littéraire. Puis nous nous intéresserons à ces auteurs qui n'ont pas écrit pour être rétribués, et qui ont un rapport à la notion de paternité d'une oeuvre plus complexe, en prenant l'exemple de Pline le Jeune. Mais le plus intéressant pour nos recherches est sans doute Martial, et nous finirons avec lui.

FEDERICA BERTOLDI

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From the Lex curiata de imperio to the Lex (regia) de imperio

Keywords: *Lex curiata de imperio*, Principate, *Lex regia de imperio*

The majority opinion states that the Principate of Augustus was based on the *auctoritas* of the *princeps* and that this new constitutional form was only institutionalized by the reign of

Vespasian. The analysis of the sources shows, instead, how the investiture of individual emperors required the enactment of a single *lex* and how this process was repeated for every emperor deemed legitimate by the senate and the people. In conclusion, the presence of the *lex de imperio* from the Royal period to the Justinianic era, regardless of its force and legislative effectiveness, constitutes a constant in Roman constitutional history.

ARNAUD BESSON

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Égyptiens après 212: statut juridique ou dénomination culturelle?

Keywords: statut personnel, citoyenneté, *Constitutio Antoniniana*, Égypte, papyrology

Le statut des Égyptiens après l'octroi universel de la citoyenneté romaine en 212 constitue un problème historiographique ancien. Theodor Mommsen pensait que puisque ceux-ci ne jouissaient d'aucune citoyenneté avant 212, ils n'avaient pas pu bénéficier de l'octroi universel de la citoyenneté romaine. En outre, le *P. Giss.* I 40 qui porte le texte de la *Constitutio Antoniniana* renferme également l'extrait d'un autre édit de Caracalla, lequel exige l'expulsion des 'Égyptien' d'Alexandrie vraisemblablement en 216. Comment interpréter la désignation d'Égyptien qui apparaît également dans une autre inscription tardive (*SEG* IX 356) après l'universalisation de la citoyenneté romaine? S'agit-il d'un statut juridique ou d'une dénomination purement culturelle? Ces conclusions peuvent-elles être étendues à d'autres groupes d'individus?

JOSÉ MARÍA BLANCH NOUGUÉS

Universidad Autónoma de Madrid |Spain

Sobre el límite temporal del usufructo en favor de las civitates en derecho romano

Keywords: *usufruct*, *civitates*, *municipes, praescriptio centum*

This paper concerns the legacy of a usufruct in favour of *civitates* in Roman law. This issue was discussed by the classical jurists since usufruct originated as a limited right extinguished by the death of its holder. Justinian's compilers certainly amended various fragments of the Digest (D. 71,56; D. 33,2,28) establishing a limit of 100 years. The communication also deals with the temporal limitation on the *usufruct* in favour of legal persons in European and Latin Amercian civil codes.

GRZEGORZ JAN BLICHARZ

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Roman Nicety in Canadian Inheritance Law: Beyond Spacetime?

Keywords: escheat, *caducum*, *delatores*, estimating value of estate, estate without heirs

As Roman law held a special place in the ancient world, it seems reasonable to ask whether it is still significant and meaningful to the modern world. A particular regulation of Canadian inheritance law proves how much Roman law was based on common sense and an awareness of human nature. It would be difficult to believe that the legislators in the Canadian provinces were inspired by the ancient Roman concept. Since February 7, 2015 there has been new law on escheat in force in New Brunswick. It repeats the foregoing regulation from 1973 and grants the Crown the right to dispose of an escheated estate as it deems proper. Interestingly enough, the statute directly allows the state to transfer the estate as a reward to a person who discovered that it is escheated in favour of the state (discovery of the escheat). By doing this it extends the typical right of the state to grant escheat to a person with a justified interest or a moral claim to inheritance. On behalf of the state the Lieutenant-Governor in Council decides what portion of an estate should be granted to person who discovered the escheat. It is quite a remarkable way of solving the position of estate without heirs when compared to other modern legal orders. It seems, however, that quite a similar solution when compared to Roman law, yet not the same one. Emperor Augustus applied the legal concept of *caducum* (escheat) as a way to increase the treasury's revenue. Publius Cornelius Tacitus wrote in his 'Annales' that there were appointed officers — *custodes*, who were responsible for taking over estates without claimants and thereby estimating their value. Later a system of so-called informers — *delatores* was created. Those who informed the state of *caducum* received half of the value of the reported property in gratitude. This allowed for a decrease in administrative costs of enforcing escheats and probably enhanced the effectiveness of the regulation at the same time. *Delatores* who simply denounced others whipped up particular opposition in society. The solution now applied in the provinces of New Brunswick, Nova Scotia, Prince Edward Island, Manitoba, British Columbia and Saskatchewan urges us to ask how much flavour of Roman rationality it contains: either one of regulating *caducum* and *delatores*, or one of treasure trove.

This, in turn, immediately evokes Roman law and a question about its cognitive power very often hidden from the eyes of modern legal doctrine. What is the basis of comparison of such particular and narrowly tailored solutions? Does Roman law prove its unique rationality among other ancient legal orders not only in large things, but also in little things? What does it mean for legal science that we can trace similar solutions, yet disconnected in space and time: used in antiquity and nowadays?

MIRCEA DAN BOB

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La laesio enormis, le code civil autrichien de 1811 et une affaire de famille

Laesio enormis, the Austrian civil code of 1811 and a family business

Keywords: *laesio enormis*, Austrian Civil Code, Roman law

En feuilletant parmis des actes appartenants à mon arrière-grand-pere, j'ai découvert des contrats de vente, conclus il y a presqu'un siècle. Ils contiennent de manière constante une clause faisant référence à l'art. 934 ABGB sur la laesio enormis. Ma présentation se penchera sur l'application de ce texte dans la Transylvanie roumaine, en faisant le rapport avec ses origines romaines: la solution romaine, comment a-t-elle été reçue par le code civil autrichien? quel a été l'étendue de son application pratique? est-ce qu'on peux parler d'une réception fidèle?

Whilst searching through family papers, I discovered some sale contracts concluded a hundred years ago by one of my ancestors. Their clauses were constantly referring to the §934 ABGB's provisions on *laesio enormis*. It is the aim of my paper to give an account on the application of this text in the Romanian historical province of Transylvania, by comparing it to its Roman origins: How was the Roman law solution received in the ABGB? What was the extent of its application in practice? Did it successfully stay true to its original sense?

RIAN BOBBINK

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Antichresis: A Comparative Study of Classical Roman Law and the Contractual praxis from Roman Egypt

Keywords: *Antichresis*, Roman and Hellenistic law, juristic papyrology, possessory pledge, fruits, protection of debtor or creditor

In our paper we study the right of *antichresis* in the antique Mediterranean world. We explore the interplay between papyrological sources on *antichresis* from Roman Egypt written in Greek and classical Roman legal writings. Moreover, we examine the embedding of the legal concept of *antichresis* in the broader legal continuum of the Mediterranean world.

The papyrological sources consist of contracts, drafted on papyri in Greek. The classical Roman material consists of fragments from the *Corpus Iuris Civilis*, which were mainly dispute resolutions. Thus, the studied source materials show different phases of the interaction between contracting parties. One of the finds from this research is that a substantive difference between *antichresis* in the Ptolemaic and Roman Egyptian contracting praxis and *antichresis* in Roman dispute resolutions existed. In classical Roman law, protection of the debtor was emphasized, whereas in the Greek papyrological contracts the position of the creditor was favoured. This could be explained by differences in the socio-economic context of both sources. In Roman Egypt creditors seem scarcer, which would make obtaining credit harder, leading to contracts, which show a great emphasis on the protection of creditors. How these contracts were judged, if contracting parties would resolve to a form of dispute resolution, remains largely unknown.

Furthermore, there are differences in the availability of sources. The papyrological sources show a remarkable continuity. Contracts of *antichretic* loans are continually attested between the third century BC up until the Arab conquest. On the other hand, the presence of antichresis in Roman legal sources shows no such continuity. The legal concept was only mentioned for the first time in the third century AD. It is unlikely that *antichresis* was a familiar legal concept in Rome before this time, although Roman legal sources from the first century AD and earlier are limited. *Antichresis* is then again absent in Roman legal writings from the fourth and fifth century, only to re-appear in the sixth century through Justinian's *Corpus Iuris Civilis* and *Novellae*.

Still, *antichresis* from Roman Egyptian and from Roman legal writings shared a lot of common features. They could be established in the same forms: as an independent legal concept or combined with the right of pledge. Furthermore, antichresis from Roman Egypt and Roman *antichresis* were created on the same type of objects, which were slaves, estates and limited real rights thereon. These objects were more or less readily accessible in both areas researched, although slaves were more available in Rome than in Roman Egypt. What is more, *antichresis* could fulfill the same two economic functions in Rome and Roman Egypt: interest *antichresis* and amortization *antichresis*. What do these differences and similarities say about the law regarding this legal concept and its place in the antique Mediterranean world? Our study points out that *antichresis* was a pan-Mediterranean legal concept. We could not establish a mutual influence of sources from the Hellenised Roman East and Roman sources from the Italic peninsula. However, a common origin of Roman and Egyptian *antichresis* is plausible.

EMESE VON BÓNÉ

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Marital Power from Roman Times up to the French and Dutch Civil Code Illustrated in Mozart's Opera 'La Nozze di Figaro'

Keywords: marital power, Roman law, French law, Dutch law, opera

A musical illustration of a marriage in the 18th century is Mozart's opera 'Lá Nozze di Figaro' where Count Almaviva gave grateful Figaro a job as head of his servant-staff, and is now persistently trying to exercise his '*droit de seigneur*' – his right to bed a servant girl on her

wedding night – with Figaro's bride-to-be!

In Roman times the *pater familias* had marital power. In Roman sources we find the term *manus* which means the marital power which the husband had on his wife. The wife in *manu* depended on the authority of her husband. By establishing *manu* the bride went over from her family to the family of her husband. When a woman went over to the family of her husband in *manu* she lost her legal position of being *sui iuris*. She lost her jurisdiction and could not have property rights.

In Robert Joseph Pothier's *Traité de la puissance du mari sur la personne et les biens de la femme* the husband is again *chef du mariage* and has authority over his wife: *Le mariage, en formant une société entre le mari et la femme, dont le mari est le chef, donne au mari, en la qualité qu'il a de chef de cette société, un droit de puissance sur la personne de la femme, qui s'étend aussi sur ses biens*.

In Pothier's *Traité du contrat de mariage* we read: *Le Code civil ne considère le mariage que sous les rapports civils. Le projet de Code définissait le mariage: un contrat dont la durée est dans l'intention des époux, celle de la vie de l'un d'eux ce contrat peut néanmoins être résolu avant la mort de l'un des époux dans les cas et pour les causes déterminées par la loi*. In France, it was considered very important to uphold marriage.

In the Netherlands, the subordinated position of women was described by one of the first female lawyers, Betsy Bakker-Nort (1874-1946), who wrote a doctoral thesis on the legal position of the married woman. Her dissertation is a comparative study of the position of the married woman in Germany, Switzerland, England, France, and the Netherlands. Her conclusion was that of all the European countries analyzed, the Netherlands had the most unfavourable marriage legislation. She also wrote a paper on marriage legislation, *Les Femmes contre le Code Napoléon*. In the Dutch Civil Code of 1838 we find in art. 161 almost a literal translation of art. 213 of the French Civil Code according to which a woman has to obey her husband. In 1930, Betsy Bakker-Nort published a reform bill. She concluded that the resistance against abolition of the marital authority was based on tradition. Only in 1957 did women in the Netherlands become legally independent of their husbands with the *Lex van Oven*.

MARÍA JOSÉ BRAVO BOSCH

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The Empress Theodora and Legal Reform of Justinian

Keywords: Theodora, Justiniano, Mujeres, Legislación, Prostitución

The Empress Theodora influenced the legislation of Justinian lelating to women. While there is no reliable evidence about the extent to which the emperor consulted with his wife on this issue, the sources at our disposal clarify Theodora's position and Justinian's clear intention to legislate in favour of the legal status of women of his time.

In the same way, modern scholarly opinion, almost unanimously, is firmly committed to a clear role for Theodora in the Emperor's legislation concerning women.

Our objective will be to determine precisely what power and influence Theodora had on this legislation of Justinian.

La emperatriz Teodora influyó en la legislación de Justiniano, en lo que se refiere a las disposiciones con respecto a las mujeres. Si bien es cierto que no consta de forma fehaciente por parte del emperador que hubiese realizado consultas sobre ese tema con su esposa, las fuentes a nuestra disposición clarifican la posición de Teodora y la intención de legislar a favor de la situación jurídica de las mujeres de su época.

Del mismo modo, la doctrina, casi de forma unánime, apuesta decididamente por un protagonismo claro de Teodora en la legislación femenina del Emperador.

Nuestro objetivo será reivindicar precisamente el poder y la influencia de Teodora en el feminism jurídico de Justiniano.

C

PETER CANDY

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Law, Rhetoric, and Saufeius' Ship: The Use of chiasmus in D.19.2.31 (Alf. 5 dig. a Paulo epit.)

Keywords: Roman law, Republican juristic literature, *responsa*, rhetoric

In this paper I examine the relationship between rhetorical style and legal reasoning in Roman juristic thought against the backdrop of a well-known juristic text: D.19.2.31 (Alf. 5 *dig. a Paulo epit.*). This text – which has become something of a *cause célèbre* among Roman legal scholars – has a complex authorial history that starts with its origins in the late Republic and moves through its epitomisation by Paul and (potential) interpolation by the Justinianic compilers. To compound the issue of its interpretation, the *responsum* at the heart of the text is provided in answer to a question about an otherwise unattested *actio* (or form of conduct), and proceeds through an apparently difficult course of legal reasoning.

The argument that I shall present in this paper is that the *responsum* at the heart of the text has a chiastic structure typical of that found in other literary sources from the same period. The observation that the response is framed using this technique marks the section out as authentically republican and helps to disentangle the authorial difficulties described above. Further, the recognition that Servius or Alfenus couched their legal reasoning within a rhetorical style also sheds light on the relationship between juristic literature and its wider cultural context during the late Republic. Altogether, it is submitted that this text cannot be fully understood without sensitivity to both its legal and literary contexts and demonstrates the ways in which Roman lawyers and specialists in Roman literature can profit from one another's work.

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Diritto e società: la legislazione suntuaria del III e II sec. a. C.

Keywords: *Sumptus,* legislazione, *Oppia,* donne, *tributus*

Già le XII tavole (Tab 10.2) contenevano norme repressive del lusso nei funerali, ma è tra il III e il II sec. a. C. che si assiste per la prima volta al ricorso allo strumento legislativo per regolamentare il lusso, una materia fino a quel momento riservata all'intervento censorio. Non è un caso che il problema si sia posto alla fine della seconda guerra punica e ben si inquadra nella serie di iniziative portate avanti dalla oligarchia per salvaguardare il suo potere e le basi stesse della società romana. L'evidente interesse dei gruppi egemoni al tema del sumptus e la circostanza che la legislazione suntuaria diverrà dopo il II sec. a. C. un elemento permanente dell'attività politica di tutte le grandi personalità, testimoniano l'importanza dell'argomento al fine di una valutazione complessiva della società del tempo. Appare opportuno analizzare le leggi sul sumptus del periodo, sulla base delle fonti in nostro possesso, al fine di individuarne il contenuto: La *lex Metilia de fullonibus* del 217 dettava restrizioni all'arte tintoria vietando il ricorso a tecniche eccessivamente costose. La *lex Oppia* del 215 si rivolgeva esclusivamente alle donne e riguardava l'abbigliamento femminile e l'uso di gioielli. La legge vietava alle donne di possedere più di mezza oncia di oro, di indossare vestiti multicolori e di andare in carrozza all'interno di Roma ad eccezione che nelle ricorrenze di festività religiose pubbliche. La *lex Orchia de coenis* del 182 -181 a. C. limitava il numero degli invitati ai banchetti. La *lex Fannia cibaria* del 161 a.C. dettava regole limitatrici del lusso nei banchetti imponendo un solenne giuramento da fare davanti ai magistrati. La *lex Didia* del 143 a. C. estendeva a tutto il territorio italico le prescrizioni della *lex Fannia*. La *lex Licinia* di data incerta (forse del 131 a.C.) ampliava il contenuto della *lex Fannia*. Tra queste la *lex Oppia* presenta delle peculiarità che la diversificano dalle altre leggi suntuarie: è l'unica che si rivolge esclusivamente alle donne e riguarda abbigliamento femminile e gioielli, mentre tutte le altre pongono limitazioni ai banchetti; è l'unica ad essere stata abrogata venti anni dopo nel 195 a. C. dopo un acceso dibattito che divise l'opinione pubblica; inoltre la *lex Oppia* è l'unica che non compare nelle elencazioni delle leges sumptuariae di Aulo Gellio e di Macrobio. La l*ex Oppia* -a mio avviso- ha imposto alle donne sui iuris di tributare all'erario il loro oro eccedente e rappresenta un escamotage pensato per sottoporre a tassazione I cospicui patrimoni femminili senza formalmente imporre un tributus che avrebbe legittimato le donne a chiedere maggiore partecipazione alla vita pubblica, introdotto dopo la battaglia di Canne in un momento in cui la res publica attraversava una grave crisi economica. Venti anni dopo, cassata l'emergenza del 215 a. C. dovuta alla guerra punica, la legge infatti venne abrogata.

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Il rescritto dei Severi a Gemina: una risposta apparentemente dissonante: Cordiali saluti

Keywords: A*estimatio dotis, partus ancillarum,* restituzione della dote, patti, incrementi dotali

Un rescritto risalente al 197 d.C. (C.5.18.1) sancisce una disciplina diversa rispetto a quanto di regola disposto riguardo all'attribuzione definitiva al marito dei *partus ancillarum dotalium* in caso di *aestimatio* (Fr. Vat.114; D.23.3.18; D.24.3.66.3; C.5.13.1.9a). Gli imperatori rispondendo a Gemina, infatti, stabilirono che, nonostante l'*aestimatio dotis*, le schiave con i loro nati, sciolto il matrimonio, si sarebbero dovute restituire alla moglie. Si tratta di contrasto effettivo o è solo apparente antinomia tra i testi? Una possibile soluzione della questione appena prospettata potrebbe intravedersi ove si rifletta sia sull'oggetto della stima sia, soprattutto, sul diverso contenuto del patto concluso tra le parti nelle singole fattispecie descritte dalle fonti richiamate.

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'Res communes omnium', 'commons': Palingenesia de una categoría jurídica romana?

Keywords: *res communes omnium*, commons, dominio público, recursos naturales, new commons

Cuestionada por romanistas como Mommsen (1889), la categoría de las res communes omnium ha sido utilizada a lo largo de la historia para los más diversos fines. Formulada por vez primera por Marciano (D. 1,8,2 pr.;1) -aunque en realidad antes otros juristas ya se pronunciasen respecto del mar, el litoral, o el aire como "*communem usum omnibus hominibus*" (Celso D. 43,8,3,1)- ha servido: desde para legitimar la independencia de una ciudad como Venecia, cuando se disputaban su dominio el imperio y el papado en la Edad Media (Baldo de Ubaldis); hasta para la defensa, por parte de los juristas holandeses, de la libertad de los mares para la navegación y el comercio frente a las pretensiones exclusivistas de España y Portugal, así como frente a Gran Bretaña en materia de pesca, en la Edad Moderna (Hugo Grocio). En la década de los 90 del siglo XX en España, a la categoría de res communes omnium se recurrió, también, por parte de la doctrina del derecho administrativo para calificar recursos naturales como la atmósfera, la flora, o la fauna, en la inteligencia de que la obligación de los poderes públicos de velar por su utilización racional (art. 45 CE) no debía llevar implícita la consideración de los mismos como 'dominio público' (en la acepción 'patrimonialista' -no 'mero título de intervención'- que en el ordenamiento jurídico español éste ha tenido desde el siglo XIX), pues de estos bienes no se puede predicar las características de inembargabilidad, imprescriptibilidad, inalienabilidad (art. 132.1 CE). El mismo argumento ha servido a algunos para

criticar la calificación legal del 'espacio radioeléctrico' como 'dominio público' optando, de nuevo, por hablar de res communes omnium. La cuestión no es relevante solo desde el punto de vista dogmático; por el contrario, tiene importantes consecuencias prácticas (así, en el ámbito fiscal cuando de tributación por contaminación medioambiental se trata, o en el ámbito administrativo cuando se persigue determinar el título habilitante para un aprovechamiento especial de estos recursos). Ante la ineficiencia del estado para la gestión y preservación de estos bienes que se definen en negativo: 'de su uso no se puede excluir a nadie', surge la idea de los commons: bienes comunes en cuanto al uso, pero también en cuanto a la gestión, que pueden estar sujetos a distintas formas de propiedad; bienes necesarios para la existencia, crecimiento y mejora de la comunidad, y en cuya gestión la comunidad también ha de participar (implica más confianza en la sociedad y menos en el estado). Entre estos están los recursos naturales (la categoría se amplía incluyendo hasta los cuerpos celestes, entre muchos otros), pero también 'new commons' como internet o, en general, el conocimiento. Establecer un cierto paralelismo entre el fenómeno ocurrido en el mundo romano y la actualidad -aunque pueda responder a distintos fines-, pasa por un studio pormenorizado del trato que la jurisprudencia romana dio a bienes como el mar y el litoral; en menor medida, el aire y el agua corriente.

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La 'Cláusula Rebus sic Stantibus' como Excepción al Principio 'Pacta sunt Servanda'

Keywords: obligación, *pacta sunt servanda, rebus sic stantibus,* buena fe

El principio '*pacta sunt servanda*' es intrínseco a las obligaciones. La propia obligación, por su etimología, implica 'sujeción física', 'ligadura' y este lazo de unión viene dado por los propios acuerdos que han asumido las partes al obligarse a una determinada prestación.

El principio '*pacta sunt servanda*' está a su vez vinculado a la buena fe de las partes e implica, por parte de éstas, el cumplimiento efectivo de lo acordado siguiendo una actitud honrada y leal entre ellas. De ahí que se considere que a los contratantes los une un vínculo sagrado e inalterable. Sin embargo, el Derecho como institución jurídica, es susceptible de evolución, de forma que se adapta a los nuevos cambios o realidades sociales que van surgiendo a lo largo de la evolución histórica. La flexibilidad es un rasgo esencial de la experiencia jurídica, tal y como señala Aristóteles con su metáfora de que 'lo justo, natural, como la regla de los arquitectos de Lesbos, se adapta a las rugosidades de la piedra'.

La cláusula '*rebus sic stantibus*' ('estando así las cosas', o 'conservando la situación de las cosas) comporta una de estas adaptaciones o cambios a los que se ha visto empujado el Derecho. La cláusula conlleva que se cumplirá lo acordado entre las partes siempre y cuando no varíen las circunstancias de hecho bajo las cuales se negoció el contrato. Pero sus repercusiones en materia de obligaciones y contratos no pueden poner en peligro el principio de seguridad jurídica entre las partes contratantes. Por un lado, nos encontramos con el principio de autonomía de voluntad de las partes y el principio 'pacta sunt servanda'; pero realmente en la práctica, pueden existir causas sobrevenidas y extraordinarias que impidan el cumplimiento de lo acordado en el contrato.

Esta situación no es nueva: si bien existe algún atisbo de la misma en las fuentes romanas, sin embargo, fue la escuela de los posglosadores quienes dieron forma a la cláusula y comenzaron a aplicarlas en el ámbito del Derecho privado. Esta excepción descansa también en el principio de buena fe contractual que pretende impedir que un contrato se transforme en fuente de lucro para uno de los contratantes frente a una pérdida desmesurada para la otra.

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The Importance of Having an Heir

Keywords: autonomy of will, position of heir, religious duties (*sacra*), testator, universal succession

The appointment of an heir is the key provision in Roman testaments. It reflects the importance of having an heir from the point of view of the Romans. As the heir was the universal successor of the deceased, he replaced him in all relations apart from those purely personal. Thus, he received not only the rights related to the property (both assets and debts), but he also had the duty to execute private religious acts (*sacra privata*). From today's point of view, it is mainly (or exclusively) the heir, for whom is this position important. However, within the frame of Roman law, there were many more people, for whom the existence of heir was essential. First, the deceased's concern – the perpetuation of a family and its name (and the execution of *sacra privata*) was possible only when having the heir – dying intestate would be a shame. The importance of of the heir is obvious, provided the estate is not insolvent. Another group consists of the creditors of the deceased because the heir will pay the debts of the deceased. Finally, the existence of an heir was important for legatees as they could obtain legacies only after the acceptance of the inheritance by the heir (*dies cedens & dies veniens*).

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Il diritto ed il suo posto nel mondo antico: a proposito di ius, fas, lex, e iuris prudentes

Keywords: *ius, iurisprudentia,* fonti del diritto, *iuris prudentes,* storia del diritto, *diritto romano,* giuristi, tradizione giuridica

La storia del diritto romano ci insegna come nelle origini il diritto (*ius*) e la religione (*fas*) non appaiono opposte; e la giurisprudenza (*iurisprudentia*)

ha conservato nella sua definizione il riferimento al ruolo della scienza non solo del giusto e del ingiusto (ragion d'essere del discernimento, discernientes), ma anche conoscenza delle cose divine ed umane. Perciò, i primi giuristi erano dei pontefici. Il risultato dell'indagine si riferisce all'idea di 'diritto' in rapporto con la 'religione' e la 'legge' nei periodi: i) fondazione della *civitas romana*; ii) i giuristi noti come *iuris conditores* nella repubblica; iii) la codificazione di Giustiniano che si chiama se stesso ed i suoi giuristi anche *conditores iuris*. In particolare in questo periodo, con la codificazione di Giustiniano e dei suoi giuristi, si vede anche maturare un cambiamento strutturale del diritto romano che è stato tradotto e prodotto in greco, favorendo così la strada a un periodo, per così dire, in cui il diritto romano si è aperto per essere 'tradotto'. Trovo di grande importanza per lo studio del diritto e nella formazione giuridica oggi, sottolineare la riflessione diacronica su alcuni aspetti dell'origine del diritto, per dimostrare il contenuto etico dell'attività della giurisprudenza romana (*cavere*, *agere*, *respondere*) molto necessario di essere preso in considerazione oggi nella professione legale; in modo da ricordare che nel diritto romano lex e ius costituiscono concetti diversi, la prima una delle fonti del secondo, che è generato da più fonti di produzione indipendenti l'una dall'altra, tra cui la legge, espressione delle potestas della città che assunse il ruolo della fonte principale, mentre le opinioni dei giuristi costituivano quasi un polo opposto. Il compito dell'avvocato è l'espressione della *peritia*, la *prudentia*, 'che dà l'autorità ai giuristi quindi fondatori del *ius*, a volte da soli, a volte con la legge, o di un'altra fonte di diritto, ma sempre responsabili di migliorandolo quotidianamente, sviluppando così una funzione pubblica prima non tecnica, ma sacerdotale, e poi tecnica e verso la laicità.

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The Emperor overruling the Jurist: Severus' decretum in favour of Rutiliana (Dig. 4.4.38 pr)

Keywords: *decretum principis*, *restitutio in integrum*, Emperor Septimius Severus, the Jurist Paul, Dig. 4.4.38 pr.

Prompted by Elsemieke Daalder's recent doctoral thesis (Leiden 2019, *cum laude*), this communication focuses on Septimius Severus' imperial court (193 - 211 CE). A number of cases argued before and decided in this court were reported by the jurist Paul, acting as a member of Severus' *consilium*. Frequently Paul was sitting in this court while a case was argued, while it was deliberated on by the Emperor and the Members of his *consilium*, and when it was decided, and that decision pronounced by the Emperor. Reports of 37 such cases have been handed down to us in Justinian's Digest. Dr Daalder gives important analyses of all those reports, filling thereby over 400 pages, 2/3, of her book.

One of the cases ended in Severus' *decretum* in favour of the girl Rutliliana. She was perhaps still a pupil, under the age of 12, when the Emperor granted to her a *restitutio in integrum* which the lower courts (of the praetor and, in appeal, of the *praefectus urbi*) had denied her. The report of this case is found in Dig. 4.4.38 pr., a difficult text which has always attracted a vivid interest among scholars. For the mere period starting with Wieacker's doctoral thesis, 1932, until 2016, Dr Daalder mentions 12 authors who produced substantial treatments of fragment 38 pr. With the additional analysis offered by her, most aspects of that fragment would seem by now to have found a satisfactory explanation. However, some questions remain, thus with regard to the four times Paul is referring to *in integrum restitutio* or similar terms. What is the *status quo ante* the pupil sought to be restored to? What had Paul in mind when he would rather have the pupil restored in a different way? What is the *status quo ante* the Emperor, in the end, overruling the Jurist, reinstated the pupil to? What is the *restitui* the prior tutors of the pupil had not sought? To these questions the major part of the communication will be devoted.

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The Role of Roman Law in Roman Commerce: Reconciling Slaves' Business Importance and Slaves' Juridical Nullity

Keywords: commerce, slaves, legal fiction, agency, family

Many scholars think that Roman commerce largely ignored Roman law which has been denigrated as only 'an extraordinarily complex and difficult system [lacking] practical utility', applicable only to the elite levels of Roman life. But continuing new discoveries of ancient Roman documentation of mundane business matters –– including wax tablets from Murecine, the *Tabulae Herculanenses*, and the archives of Lucius Caecilius Iucundus –– have demonstrated that routine banking and other transactions closely followed, and were memorialized in accordance with, Roman law principles.

The absence of a general provision for 'agency' effectively precluded free men from legally acting in commercial transactions on behalf of other free men. As members of the family, however, slaves were capable of binding the *pater familias*. Because no sizeable or complex business could function through exclusive dependence on a sole proprietor, dependents' capacity to act for a *pater familias* became critical to the economy as the Roman polity transformed itself into a heavily-monetized imperium, generating unprecedented commercial complexity. Moreover, the law strongly deterred masters' personal involvement in business: limitations on owners' financial liability were effective only when a *dominus* was not directly engaged in, or even knowledgeable of, mercantile operations.

Slave status was requisite for virtually all positions of supervisory or financial importance. Moreover, *servi* were frequently and uniquely skilled in trade and craft, often operating independently and at least partially for their own benefit, further increasing slaves' effective control of many aspects of the economy. Yet a fundamental principle of Roman law was the absolute legal nullity of slaves. A Roman slave was unable to enter into a contract or be a party to a civil lawsuit. By the letter of

the law, he lacked the capacity to own (in Latin, 'hold' [*habere*]) property of any kind. In economic reality, nevertheless, the Roman slave did 'hold' (*tenere*) enormous amounts of property. Legal theory and commercial reality were thus existentially in conflict.

Although Roman legal experts never explicitly abandoned the atavistic but (by the High Empire) manifestly fictitious principle that a slave cannot own property, Roman legal experts likewise never cease to treat assets in a slave's *peculium* as though they were the private property (*uelut proprium patrimonium*) of the slave controlling the *peculium*. In order to reconcile the irreconcilable –– to create what we and the Romans would call a 'legal fiction' (*fictio*; *credendum est*) –– the Roman jurisprudents explicitly acknowledged that 'one must close one's eyes' (*oculis coniventibus*) to the clear incompatibility between legal recognition of a slave's business capacity, including ownership of assets in his *peculium*, and legal insistence that slaves, qua slaves, had no capacity to own anything or even to enter into contracts.

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Roman law and Roman history in early 12th century England: William of Malmesbury and Bodleian MS Arch Selden B.16

Keywords: William of Malmesbury, Mediaeval manuscripts, Breviary of Alaric

The manuscript *Bodleian Arch Selden B.16* is well-known among scholars of Roman legal history as an important witness to the text of the *Breviary of Alaric* and the Theodosian tradition of Roman law. But the manuscript is far more than that, being a large Roman historical miscellany compiled and copied by or under the supervision of the early English historian, William of Malmesbury, c.1129, a good example of the extensive engagement with classical sources of this notable scholar of the twelfth-century Renaissance. This paper explores how and why William copied and commented on the Roman legal material in the manuscript and related this to the historical texts, and what this says about the understanding of and interest in Roman law in early twelfth-century England.

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The Place of Rhetoric in Late Republican Law: Some Thoughts on Pietas and the Querela inofficiosi testamenti

Keywords: Rhetoric, Succession, *Pietas*, Society, Science

The writings of the German Historical School of the nineteenth century produced a peculiar narrative concerning the development of principles of legal science in late Republican Rome. The idea outlined is that, under the influence of a singular injection of Greek concepts of categorical science and under the ingenious guidance of the noted jurist Quintus Mucius Scaevola *pontifex*, the Romans developed an autonomous system of law, beholden to nothing but its own categorical logic, self-perpetuating and autonomous, without the need for jurists, as professional legal scientists, to look beyond law's own methodology. This re-imagining of the late Republican jurists as the founders of an autonomous and scientific system of law owes more to the intellectual upheavals of the nineteenth century, the potent mix of nationalism, romanticism, science and cultural change that culminated in the production of the legal codes, than it does to extant Republican sources. The attribution of legal science to the ancient jurists amounts to the illusion of a skewed but hopeful mirror, in which eminent jurists of modernity hoped to catch a glance of themselves in the ancients whom they revered. The pre-eminence of this narrative view was secured by the victory of the Romanists of the Historical School in their input to legal codification, and further concretised by the positivistic approach to law that dominated, though not without challenge, much of the twentieth century.

The general acceptance of the narrative of legal science in modern application has allowed scope for the acceptance of its founding myth. As we have legal science now, so then must have the Romans; it is after all from the Romans that we derive our conception of the system. Yet, for all the supposition that a scientific revolution occurred in the law with Q. Mucius Scaevola, the Republican sources do not paint a picture of autonomous, systematic and pure law. Indeed, quite the opposite.

An examination of the law of succession provides an interesting starting point for an analysis of the existence of a scientific approach to law in the late Republic. The civil law on succession presents a settled approach. Nevertheless, innovation and variation occurred. Not from the culmination of legal refinement by the professional juristic class, but from the practice of the courts. Of particular interest is the means by which changed occurred, through legal instruments which made provision for decisions to go against the prescription of established succession law by appeals to socially understood ideas within Roman society, such as *aequitas* or *pietas*.

This paper intends to look at the impact of *pietas*, as a socially understood value in Roman society, and its influence on the legal innovation of the *Querela inofficiosi testamenti*. I will argue that, far from excluding social and cultural consideration in favour of an autonomous scientific approach, the Roman law of the late Republic innovated on the basis of appeals made in court, rooted in rhetorical argumentation, to the extent that social values, not scientific categorisation, was the source of legal innovation.

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Le significationes del legislator: a proposito delle categorie giustinianee di 'αἱρετικός' e di 'αἵρεσις'

Keywords: eretico (nozione di), eresia (nozione di),*Codex Parisinus Coislinianus gr. 151, Nomocanon XIV Titulorum, Taleleo*

Più che noto è il lavorio interpretativo messo in campo dai giuristi romani per definire la portata di singoli termini o di espressioni presenti in *leges*, *edicta*, *constitutiones Principum* ed in atti negoziali (in specie, *mortis causa*). Di esso già i compilatori bizantini ebbero cura che restasse traccia – ed una traccia topografica prontamente riconoscibile, non dispersa nelle diverse *materiae* – nei titoli 50.16 ('*De verborum significatione*') e 50.17 ('*De diversis regulis iuris antiqui*') del Digesto. Lungamente queste 'definizioni' della giurisprudenza romana hanno attirato l'interesse anche della dottrina moderna, innescando un dibattito cospicuo, ancora lontano dall'esaurirsi completamente. Assai più modesto lo spazio che è stato, di contro, sinora riservato dagli interpreti dei giorni nostri alle operazioni definitorie provenienti dal legislatore, pur se, per tutta la temperie tardoantica, ormai non poterono prodursi, *ex novo*, che queste ultime. La presente ricerca ne sottopone ad esame due, particolarmente significative e delicate, a causa delle implicazioni non solo di tenore giuridico che da esse sarebbero potute derivare. Ci riferiamo alle nozioni di eretico e di eresia poste tra parentesi tonde rispettivamente in C.I. 1.5.12.4 ed in 1.5.18.4. Esse sarebbero latrici nell'età giustinianea – stando ad una ricostruzione dottrinale abbastanza consolidata – di un concetto nuovo, perché più lato, di *haereticus* e di *haeresia*, comprensivo cioè anche dei soggetti professanti una fede diversa da quella cristiana e dunque degli *infideles tout court*. Tali definizioni sollevano, tuttavia, una serie di questioni, anzitutto all'interno delle stesse leggi che le contengono e poi anche in relazione ai materiali giuridici presenti nel titolo C. 1.5 ed in quelli ad esso vicini. Dal punto di vista del loro contenuto, già in passato ne era stata messa in discussione la paternità giustinianea, ma era rimasto irrisolto il nodo relativo alla loro presenza in quei provvedimenti. La nostra indagine, muovendo dalla vicende che hanno portato alla restituzione dell'attuale testo greco delle due *leges* in questione – ricostruito indirettamente da Krüger sulla base rispettivamente delle testimonianze del *Codex Parisinus Coislinianus gr.* 151 e del *Nomocanon XIV Titulorum* – tenta di risalire, servendosi di uno *scholium* sinora trascurato, alla possibile provenienza della definizione di *haereticus* di C.I. 1.5.12.4, desumendone l'estraneità dal contenuto originale della *constitutio* presente nel *Codex r.p.*; da qui si traggono, poi, le conseguenze anche in ordine alla seconda definizione, quella di *haeresia* in C.I. 1.5.18.4, strettamente imparentata alla prima.

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From the Debates on Public and Private Law: The State of Post-war Roman Law Studies

Keywords: legal history, Roman law in socialist states, Marxist ideology, division into public and private law

While the concepts of public and private law remain problematic, the matter was also subject to critical discussion in the legal literature in socialist states. It is commonly believed that the origin and idea of this division derives from Roman law. Socialist-oriented ideology generally left Roman law out of its legal system since it rejected the development of private property in favour of far-reaching state interference in private-law relationships. Any influence on the part of the legal system of a state that allowed slavery was inconsistent with the ideals of socialism. This was based on historical and dialectical materialism and was connected with the inevitable conflict between classes in society. In socialist states two tendencies in Roman-law studies should be distinguished – 'traditional' Roman law studies, referred to as 'bourgeois', and new 'Marxist Roman law studies'. Some scholars believed that only 'Marxist Roman law studies' required further development, while 'bourgeois Roman law studies', on the other hand, could only provide a basis for information collected by its researchers. The negation of the division of law into public and private in Marxist ideology was not as obvious as is commonly accepted. The paper will present, in a synthetic way, the main views of this topic, given by some Romanists after the Second World War, particularly in East-Central Europe.

D

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Bonus iudex, bonus princeps: Law and justice in the Judicial Decisions of the Emperor Septimius Severus

Keywords: Septimius Severus, Julius Paulus, imperial adjudication, *decreta*, *imperiales sententiae*

The emperor was the pinnacle of the Roman legal system. He was perceived as the ultimate source of law and justice and therefore all of his legal acts (edicts, rescripts and even judicial decisions) had the force of law (cf. D. 1,4,1,1). At the same time, cultural values dictated that, even though the emperor was above the law, it befitted him to live and act in accordance with it. Striking the right balance between imperial power and the law was especially important in the process of imperial adjudication. The subject of this paper is a collection of imperial judgments of the emperor Septimius Severus (193-211 CE), recorded by the Roman jurist Paul and transmitted in de Digest through two different works, the *Decreta* and *Imperiales Sententiae*. Paul's collection is unique: no other Roman jurist has ever published a similar collection of imperial judicial decisions. This paper will therefore focus on how, according Paul's descriptions, Septimius Severus dealt with administration of justice and

will explore the motives behind the publication of this remarkable collection of imperial judicial decisions.

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In tema di conflitto d'interessi fra tutore e pupillo o curatore e minore

Keywords: *excusatio, tutela,* lite*, pupillo,* Giustiniano

Nel titolo *de excusationibus* delle *Institutiones* di Giustiniano (I. 1.25), il conflitto di interessi fra tutore e pupillo ovvero fra curatore e adolescente è previsto come causa di dispensa dalla tutela o dalla cura soltanto qualora sfoci in una controversia giudiziaria di rilevante entità, riguardante cioè tutto il patrimonio o una eredità (§ 4). Tale disposizione si configura come una sintesi della disciplina già delineatasi a partire dall'epoca classica, come emerge da testimonianze di matrice giurisprudenziale e da costituzioni imperiali, recepita nei *Digesta* e nel *Codex* giustinianei (cfr., per esempio, D. 27.1.21 pr.; C. 5.62.16, a. 244). Tuttavia, trascorso circa un lustro dalle grandi compilazioni, l'Imperatore, avuta notizia delle molteplici liti fra amministratori e pupilli o minori, riconsidererà la questione attraverso l'emanazione di un'apposita *Novella* (Nov. 72, a. 538) e, con il dichiarato proposito di apportare correzioni in materia, vieterà di essere tutore o curatore a chiunque intrattenga con il destinatario della tutela o curatela un qualche rapporto giuridico di credito o debito, ovvero una garanzia reale. Nel dibattito che si è sviluppato sin dalla più risalente dottrina tale intervento legislativo è stato inteso talora come fonte di un'innovazione tale da creare una cesura, talaltra come una circoscritta appendice rispetto al preesistente assetto normative accolto nel *Corpus Iuris.* Al fine di chiarire la portata della Novella 72 di Giustiniano si intende proporre nella comunicazione un riscontro testuale esteso anche a testimonianze di derivazione postgiustinianea, quale contributo interpretativo volto a restituire il tenore normativo della stessa nel tentativo di vagliarne l'impatto sulla tradizione giuridica precedente e finanche successiva.

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Ratihabitio und Bestätigung. Zu Pomponius 32 ad Sab. D.41.6.4

Keywords: *Ratihabitio*, Genehmigung, Bestätigung, Rückwirkung, Ersitzung

In der Literatur wird dieses Fragment auch unter dem Aspekt der Unterscheidung zwischen Bestätigung und Genehmigung untersucht.

Der Erblasser, ein *pater familias*, macht seiner in patria potestate stehenden *filia familias* zu Lebzeiten ein nicht näher bezeichnetes Geschenk und enterbt sie später. Wenn der *heres* die donation des *pater familias* genehmigt, so entscheidet Pomponius, fängt die Tochter von dem Zeitpunkt der Genehmigung an zu ersitzen.

Es stellt sich die Frage, ob in der *ratihabitio* durch den Erben eine Neuvornahme der Schenkung oder eine Bestätigung der Schenkung des Vaters liegt. Auf den ersten Blick könnte es den Anschein haben, dass die fehlende Anrechnung der Besitzzeit auf eine gewisse typologische Nähe des untersuchten Falles zur modernen Bestätigung zurückzuführen ist.

Die *filia* kann die ihr zugewendete Sache jedenfalls zunächst nicht *donationis causa* zu Eigen-tum erwerben, d. h. der Schenkungsgegenstand verbleibt im väterlichen Vermögen. Schenkungen des Hausvaters an sein gewaltunterworfenes Kind sind nichtig, nicht aufgrund eines Schenkungsverbotes wie bei Schenkungen unter Ehegatten, sondern weil sie wegen der Vermögensunfähigkeit des Hauskindes unmöglich waren. Mit dem Tod des Vaters erlischt die *patria potestas*, d. h. die Tochter wird *sui iuris* und damit vermögensfähig. Ein Eigentumserwerb der *filia familias* als gesetzlicher Erbin nach *ius civile* an dem Schenkungsgegenstand durch Erbgang tritt nicht ein, weil sie vom Vater enterbt wurde. Auch gelangt mit dem Wegfall des Schenkungshindernisses der Erwerbstitel *pro donato* nicht zur Entstehung, obwohl die väterliche Gewalt beendet wird und die *filia familias* mit dem Tode des *paterfamilias* vermö-gensfähig wird. Eine nichtige Schenkung des Vaters an das Hauskind konvaleszierte durch den Tod des Vaters trotz Fortdauer des Schenkungswillens bis zum Tode auch noch in spät-klassischer Zeit nicht. Mit dem Erbfall fällt der Schenkungsgegenstand damit in das Vermö-gen des Erben.

Die *ratihabitio* des *heres* wird im Schrifttum zumeist als eine Neuvornahme der Schenkung gedeutet. Dies beruht vor allem auf dem vertretenen Standpunkt, dass ein nichtiges Geschäft nicht genehmigt werden könne. Unter dem Schein der Genehmigung des alten Geschäfts ver-berge sich der Abschluss eines neuen Geschäfts mit demselben Inhalt. Das wird auch damit begründet, dass die Diskussion des Juristen sich auf die Auswirkung des *ratum habere* auf die Schenkung des Vaters beziehe.

Meines Erachtens spricht in der Tat mehr dafür, in der *ratihabitio* eine Neuvornahme der Schenkung zu sehen. Hierfür lässt sich unter anderem anführen, dass ansonsten der Erbe an gesichts des Prinzips der Universalsukzession praktisch gleichbedeutend sein würde mit dem, der sein eigenes Geschäft bestätigt, denn der Erbe tritt in die Rechte und Pflichten des Erblas-sers ein. Mann könnte dementsprechend argumentieren, dass der Erbe gar nicht ein an der Schenkung unbeteiligter Dritter ist. Bei diesem Verständnis stellt sich aber das Problem, dass der *pater familias* selbst die Schenkung nicht hätte bestätigen können, weil seine Tochter ge-waltabhängig war.

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'Give me your hand as a pledge' (Soph. Phil. 820): The Hand as a Medium of Commitment and Trust in Ancient Greek Legal Practice and beyond

Keywords: hand, *πίστις, δεξίωσις, fides, dextrarum iunctio*

In the Mediterranean world, the handshake has been, since time

immemorial, and still remains today, the gesture symbolizing the turning point and confirmation of every legal agreement, acting as a physical evidence of mutual trust. The paper will explore the use of the hand (*χείρ*) and of the joining of the right hands (*δεξίωσις*) as a medium for expressing commitment and trust (*πίστις*) in ancient Greek legal practice, as illustrated by references in the Homeric epics, the tragedies, literary and epigraphic evidence. In the context of a culture of oral agreements, the giving of hands acted as a confirmation of one's will and words, creating a physical bond and commitment between the parties. Already in the *Iliad* and the *Odyssey*, gods and heroes are depicted as clasping 'each other's hands as a pledge of their good faith', the gesture expressing the very essence of being bound by commitment, as in the case of the truce agreed between Achilles and Priam for the burial of Hector. Later, in the tragedies, the giving of the right hand is demanded or recalled as evidence of agreement and of binding one's *πίστις* (faith), including instances such as the agreement of the suitors of Helen to help whomever would be her husband described at Euripides' *Iphigeneia* at Aulis. Also, in the commitment demanded by Philoctetes to Neoptolemos in Sophocles' *Philoctetes*, in Heracles' demand that his son shake hands to commit to do what he will ask him to, in Sophocles' Trachinian women, or in Jason's broken faith deplored in Euripides' *Medea*. In Xenophon's *Anabasis*, the joining of hands is also mentioned as the confirmation point of an agreement, notably between Xenophon and the King of Thrace Seuthes. Such references reveal the rich symbolism of the gesture of joining hands in the context of taking an oath of allegiance, making a pact and in pledging one's faith to another. The joining of hands also acted in marriage as a symbol of faith and trust, while the rich iconography of the joining of hands (*δεξίωσις*) between the deceased and family members in funeral monuments may have had a meaning other than simple farewell. A number of Hellenistic honorific decrees refer to the '*ἐγχειρισθεῖσαν ἑαυτῶι πίστιν*' in the sense of 'putting the people's trust into one's hands'. The use of the right hand to express commitment seems to be a common *topos* throughout the ancient world, as attested by Biblical evidence. Similar conceptions are also reflected in Roman social and legal practice, where the hand is also strongly connected to the notion of *fides*. The joining of the right hand, known as *dextrarum iunctio*, was a gesture heavy of symbolism, as a statement of loyalty and of conclusion of agreement, by which a bond of trust was formed and revealed, in marriage and patronage relationships, in private contracts and state affairs.

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L'unità del genere umano nell'etimologia isidoriana di parricidium

Keywords: *parricidium*, eguaglianza, Isidoro, *Etymologiae*, *Differentiae*

In questo contributo intendo analizzare la peculiare nozione isidoriana di 'parricidium', i suoi punti di continuità e di rottura con la tradizione romanistica e le sue possibili fonti giuridiche e letterarie, rielaborando le quali Isidoro giunge ad affermare un'eguaglianza che accomuna tutti gli uomini tra loro (*homines hominibus pares sunt*) senza operare distinzioni quanto al loro status giuridico-sociale.

L'idea dell'unità del genere umano e dell'eguaglianza fra gli uomini era del resto già presente in alcuni testi della giurisprudenza romana classica e, prima ancora, nella filosofia stoica, ma viene sostenuta dal vescovo di Siviglia alla luce della rinnovata fede cristiana, di cui egli si fa portatore, acquisendo così un significato del tutto nuovo e particolare.

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Justinian and Customary Law

Keywords: Digest, Codex, Justinian

The antinomy between Julian's theory of custom in the Digest (D. 1.3.32) and Constantine's constitution in the Codex (C. 8.52 (53).2) of Justinian's codification has troubled its interpreters for centuries. Modern legal historians tend to focus on the different eras and constitutional frameworks in which the jurist Julian and the emperor Constantine worked. The role of custom in classical times, and the question whether D. 1.3.32 is genuinely Julian's is much debated, but the derogatory force of custom in Justinian's *Corpus iuris* has attracted less interest. Most Romanists simply assert that Justinian denied custom any derogatory force. Recently two papers were published on this topic, one in 2008 by Castelluci, the other in 2011 by Buzdugan. This paper intends (1) to complement Castelluci's survey of the secondary literature on this topic, and (2) to review the way in which these two authors solve the antinomy within the *Corpus iuris*.

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Roman Law as an Interpretative Directive in the Light of 'Decisiones Lituanicae' by Pedro Ruiz de Moros

Keywords: Roman law, *Decisiones Lituanicae*, Pedro Ruiz de Moros, Arbitral Court in Vilnius, Magdeburg law

Pedro Ruiz de Moros, born in Spain and educated there and in Italian universities, after taking the professorship of Roman law in Cracow University was created a Judge of the Royal Arbitral Court in Vilnius. He applied Roman law as a criterion for interpretation in relation to Magdeburg law. Roman law served to interpret the meaning of unclear notions of German law. He was also an advocate of the subsidiary application of Roman law in the case of loopholes in national laws. His work, entitled *Decisiones (...) de rebus in sacro auditorio Lituanico ex appellatione iudicatis* (Cracow, 1565), is a commentary on five judgments. The basis of the verdict is Magdeburg law, but the author's arguments are full of references to Roman law and the works of glossators and commentators. The

judgements were selected to present cases which could not be unequivocally solved according to German law. Ruiz de Moros was trying to prove that in such cases in which German law could not give a clear answer, Roman law was capable of doing so. His views on the role of Roman law in the application of national law were expressed in an introductory dedication letter to King Zygmunt August. Beginning his deliberations by showing the superiority of the bodies applying the law over the legislator, Ruiz de Moros stressed the great importance of the knowledge of law, especially Roman law. Having shown the groundlessness of the argument that the use of Roman law testifies to dependence on the notion of Empire, the author emphasizes that sovereign European states reach for this right because of its perfection and that this should also be done by Poles. In German law, in force in many Polish cities and in Prussia, knowledge of Roman law was necessary, because it could be directly applied in the face of numerous gaps. At the same time, however, the author attributed to Roman law the role of an interpretative directive in case of ambiguities in German law, as evidenced by detailed considerations of individual decisions.

E

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Roman Foundations of the Law of Arbitration

Keywords: arbitration, multi-arbiter decision-making, *res iudicata* and arbitral awards

Roman jurists developed the *compromissum* into the first fully-fledged, detail-rich law of arbitration ever developed. It has provided all later arbitration procedures with valuable elements. Going back to the Roman beginnings helps us to understand better that arbitration is not a privatisation of a genuine state-task to provide a judicial decision-making process. Special attention is given to the development of execution and *res iudicata*-effect of arbitral awards. While central features were already in place in Justinian's times, the paper will also look into select developments in the time of the *Ius Commune*.

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Bases Romanísticas de la Reserva Vidual

Keywords: Ley Feminae, segundas nupcias, derecho sucesiones, viuda, bínuba

Tradicionalmente las segundas nupcias fueron abordadas por el Derecho en Roma desde su foment (época de Augusto) hasta su penalización (a partir de Constantino) dependiendo de las necesidades sociales del momento. Sin embargo, es en un momento puntual, con Teodosio I, donde los intereses patrimoniales de los hijos del primer matrimonio, ante las nupcias de la viuda, son tenidos en consideración por el Derecho romano, conformándose la figura de la denominada reserva vidual que después será recibida en los Ordenamientos de base romanística tales como el francés, el italiano y el español.

Es, precisamente, en la disposición *Feminae* (CTh. 3.8.2 = C.I. 5.9.1) del emperador Teodosio I donde encuentra raíz la institución de la reserva vidual con la que se le impone a la viuda una carga, una limitación dispositiva, en la medida que debía conservar los bienes provenientes de su difunto esposo o de sus familiares para los hijos habidos dentro de ese matrimonio, si contrajese nuevas nupcias, mientras que tal reserva no tendría lugar en el caso de seguir viuda o que premuriesen los hijos del primer matrimonio en beneficio de los cuales se establecía la reserva. Esta ley supuso un nuevo sistema que irá experimentando diversas modificaciones e innovaciones con la sucesiva legislación imperial.

La reserva vidual, tal y como viene recogida en los artículos 968 y siguientes del vigente Código Civil español, tiene como finalidad la protección de los intereses patrimoniales de los hijos de un primer matrimonio que, con ocasión de unas segundas nupcias por parte de su progenitor viudo, pueda suponer la eventualidad de que los bienes que provenían de una familia (la del cónyuge premuerto) finalmente acaben por el nuevo enlace matrimonial en una familia extraña a la de su procedencia.

Así se dispone en el artículo 968 CC que 'el viudo o viuda que pase a segundo matrimonio estará obligado a reservar a los hijos y descendientes del primero la propiedad de todos los bienes que haya adquirido de su difunto consorte por testamento, por sucesión intestada, donación u otro cualquier título lucrativo; pero no su mitad de gananciales'. El legislador da por supuesto que éste sería el deseo del cónyuge premuerto, y de ahí que se establezca la obligación legal de reservar sobre el cónyuge viudo desde que contrae el nuevo matrimonio, pretendiéndose así que los bienes no salgan de la rama familiar de su procedencia.

En la presente ponencia se analizará el origen y fundamento de la reserva vidual en Derecho romano, el tratamiento discriminado entre viuda y viudo, los derechos de la bínuba y los hijos del primer matrimonio, la recepción en el ordenamiento español a través de nuestro Derecho histórico y el futuro o cuestionamiento de la institución tal y como se ha producido previamente en el Ordenamiento francés o italiano.

F

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Derecho romano vigente y Derecho civil clásico

Keywords: Derecho romano vigente, Clasicidad, Atemporalidad

En el tiempo presente puede decirse que existen tres Derechos romanos: uno el histórico, que fue y ya no es; otro el que es precedente; y un tercero que

es Derecho vigente.

Así, en ocasiones es un Derecho histórico, del que nada en Derecho vigente se recuerda. En otros supuestos se configura como el más importante precedente histórico de muchísimas instituciones de Derecho positivo. Los ejemplos en esta categoría son inacabables por lo que resulta imposible siquiera su mero enunciado. El Derecho Romano se conforma así como un extraordinario element interpretativo del Derecho vigente, de acuerdo con el artículo 3, 1 del Código civil español, precepto que se encuentra con contenido similar, cuando no casi idéntico en otras muchas codificaciones.

Pero cierto contenido de Derecho romano va más allá. Se configura como auténtico Derecho vigente. Se concreta en las geniales categorías y conceptos que han traspasado su vigencia inicial y, transmitiéndose por la cauce de la Historia de la Ciencia del Derecho y de los derechos nacionales, se han convertido en el precipitado recogido en el tenor literal de los Códigos civiles que recogen casi con literalidad sus categorías y contenidos atemporales y ageográficos.

De su vigencia atemporal señala D´Aguesseau '*Todas las naciones consultan* (las leyes romanas) *aún en época presente y cada una recibe de ellas respuestas de eterna verdad. Los juristas romanos…siguen siendo hoy intérpretes seguros de nuestras propias leyes. Ellos prestan su espíritu a nuestros usos, su razón a nuestras costumbres y los principios que nos dan nos sirven de guía, aun cuando anduviésemos por un camino que les fuese desconocido.'*

Trataré en mi intervención de glosar y de desarrollar el emocionante pensamiento de grandes que lo han sabido reconocer. Así, Leibniz declara: '*No existe en el mundo libro alguno que aclare cuestiones dudosas y se caracterice por una tal riqueza de pensamiento como el* Corpus iuris civilis, *en especial el Digesto, que llega de forma increíblemente rápida al corazón de los problemas y cuya autoridad, no es de maravillarse, pues desde siempre ha sido reconocida por los pueblos más significativos de Europa'*. Y en el mismo sentido Bossuet afirma: *'Si las leyes romanas han parecido tan santas que su majestad subsiste aún después de la ruina del imperio es porque el buen sentido, principal maestro de la vida humana, reina en ellas y porque no se ha hecho en parte alguna mejor aplicación de los principios de la equidad natural'*.

Ese Derecho romano vigente se conforma como un verdadero *Teshaurus* jurídico universal capaz de ser asumido en espacios geográficos y culturales bien alejados del mundo en el que ha nacido y se ha mantenido ininterrumpido. Así Japón, y hoy China.

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Zur Inhärenz von Einreden im bonae fidei iudicium

Keywords: Inhärenz, *bonae fidei iudicium, exceptio doli, exceptio pacti*

Für die *bonae fidei iudicia* gilt die sog. Inhärenzregel. Sie besagt, dass es weder der Einschaltung der *exceptio doli*, noch der *exceptio pacti* bedarf, weil der Richter schon aufgrund des *ex fide bona oportere* dazu angehalten ist, sowohl die Arglist des Klägers als auch eine zwischen ihm und dem Beklagten abgeschlossene Abrede zu berücksichtigen.

Ein Blick in die romanistische Literatur des 20. Jh. lehrt, dass der Inhärenzgrundsatz keineswegs unumstritten ist. Einerseits existieren Belege für die Inhärenz, andererseits nicht wenige Stellen einer ausdrücklichen *exceptio doli* oder *pacti* im Rahmen eines *bonae fidei iudicium*. Wie nicht anders zu vermuten, plädieren daher die einen für die Klassizität des Inhärenzgrundsatzes und – wenig überraschend – für die Unechtheit der Zeugnisse einer Einrede im *bonae fidei iudicium*, während andere es gerade umgekehrt machen.

Die bisher nicht thematisierte Schwierigkeit liegt in der Reichweite der Inhärenzregel. Sie besagt nur, dass die Einschaltung einer Einrede vor dem Prätor nicht notwendig ist. Aus der Überflüssigkeit einer Einrede darf jedoch nicht auf ihre Unzulässigkeit geschlossen werden. Texte, die der Regel zuwider eine Einrede enthalten, sind daher nicht zwangsläufig überarbeitet.

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For a renewed interpretation of Augustan censuses, in the light of the matrimonial legislation of the Princeps and the multiplicity of status civitatis in the Italic Peninsula of the 1st century BC

Keywords: Roman censuses, Augustus, matrimonial and fertility legislation, ancient demography, citizenship

Studies of ancient demography have had, in the last thirty years, a remarkable return of interest among historians. Theses once considered classic, like those of Beloch and Brunt, have been revoked in doubt, on the basis of new research, new findings and above all new tools, by different authors, including Elio Lo Cascio and, recently, Saskia Hin.

The present study aims to highlight how, in the reconstruction of the consistency of the Roman population in peninsular Italy, at the time of Augustus, three elements can play a leading role, alongside a renewed investigation into the numbers of censuses reported in Augustus's *res gestae*.

It is first crucial to consider the knowledge that above all legal historians have been able to accumulate, concerning the (likely) objectives of the Augustan legislation on marriage and fertility. Secondly, the analysis must consider the diversity within the mechanisms for granting Roman citizenship. Finally, it is important to recall the wide variety of personal situations cohabiting within those territories that are Italian nowadays and are often presumed as homogeneous, under the point of view of the status civitatis of those who lived there, at the dawn of the Principate.

Once this presumption can be set aside for a moment, a framework will emerge in which the 'classical' interpretation of the figures we read in the Augustan censuses of the Roman *cives*,supported

by Beloch and Brunt, could be reconciled with a whole population of the Italian peninsula close to that estimated by Lo Cascio and by the scholars who followed him.

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Si alia actio non erit – Zur actio de dolo als Möglichkeit einer restitutio in integrum

Keywords: *actio quod metus causa, actio de dolo, restitutio in integrum,* subsidiäre Klage*, interpretatio*

Die These von Kupisch (*In integrum restitutio und vindicatio utilis bei Eigentumsübertragungen im klassischen römischen Recht*, 1974) über die *actio quod metus* causa als Möglichkeit einer untechnisch verstandenen *restitutio in integrum* wurde zeitnahe von Kaser (SZ 94 [1977] 101-183) und Selb (FG Kaser 1986, 259-272) übernommen und gestützt. Mittlerweile hat sie sich weitgehend (insbesondere im deutsch- und englischsprachigen Raum) durchgesetzt. Parallel dazu konnte sich, ausgehend von den genannten Autoren, auch die Meinung etablieren, die a*ctio de dolo* als Ausformung einer r*estitutio in integrum* anzusehen. Dafür spricht unter anderem die Einordnung der Texte zur *actio de dolo* in D 4.1ff und in PS 1.7.2 zur in *integrum restitutio*. Gegen eine *restitutio in integrum propter dolum* scheint aber insbesondere Ulpian 5 opin D 4.3.38 zu sprechen, demzufolge bei gleichliegendem Sachverhalt ein Minderjähriger eine r*estitutio in integrum* erhält, ein Volljähriger hingegen eine *actio de dolo (maior quidem annis viginti quinque de dolo habebit actionem, minor autem in integrum restituetur*). Wenn man die *actio de dolo* als mögliche Ausformung einer *restitutio in integrum* begreift, irritiert diese Formulierung. Warum wird nicht für den *maior* ebenso wie für den *minor* von einer *in integrum restitutio* gesprochen? Der Vortrag ist ein Versuch, diese Frage zu beantworten.

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Die actio de pauperie vor dem Hintergrund sich wandelnder Haftungs - und Sachkonzepte

Keywords: Tierhalterhaftung, Deliktsrecht, Noxalhaftung, autonomes Handeln, *actio de pauperie*

Verursacht ein *quadrupes* einen Schaden, so gewährte das römische Recht dem Geschädigten gegen den Tiereigentümer die *actio de pauperie*. Es wurde anerkannt, dass der Schaden ohne *iniuria* verwirklicht wurde. Ein Fehlverhalten wurde dem Tiereigentümer nicht vorgeworfen. Somit glich die Haftungspflicht einer objektiven Haftung. Der rechtshistorische Ursprung der Tierhalterhaftung zeigt damit einen fundamentalen Wandel der konzeptuellen Fundamente der Sach- und Verschuldenshaftung. Diese Entwicklung soll ausgehend vom vorliegenden Beispiel in den Blick genommen werden.

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Dos Excepiones Procesales con una única finalidad

Keywords: *exceptio in factum comparata vel doli mali, exceptio rei venditae et traditae, venta a non domino, reivindicatio*

Existen en el Digesto tres pasajes en los que se plantea exactamente el mismo supuesto de hecho. Cada uno de ellos sirve para explicar el funcionamiento de las excepciones que podia oponer el comprador *a non domino* frente a la acción reivindicatoria del vendedor: *la exceptio in factum comparata vel doli mali* y la *exceptio rei venditae et traditae.*

G

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Societas Publicanorum Vista en Distintos Pasajes de Cicerón como Germen de la Sociedad Anónima

Keywords: *societas*, transferability of shares, assembly, business meeting, decapitalization, joint stock company

A través de esta intervención observamos el reflejo de la societas publicanorum de la época republicana en determinados textos ciceronianos tales como Pro Rabirio Posthumo sobre la transmisibilidad de las acciones, o bien inVatinium testem interrogatio XII 29 donde se alude a las sociedades con multitud de socios, en LasVerrinas: Discurso contra Q. Cecilio se aborda la recaudación de impuestos en Asia, también conforme a la Lex portorii Asiae. E incluso en texto pro lege Manilia donde algunos ven el primer crack bursátil de la historia. Y también, con ánimo de complementar los anteriores, se alude a otros textos adicionales como Philippiques, Pro Sestio, Lex Agraria, Paradoxa Stoicorum, De Officiis. A partir de la información aportada, bien se puede deducir la afinidad de los perfiles que presenta la societas publicanorum con la actual sociedad anónima, al menos en su origen.

NICOLE GIANNELLA

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Slave Catchers and Slave Harborers: Trust on the Roman Road

Keywords: slaves, *fugitivarius*, interpreter

On the road of resistance to slavery, the question of trust is paramount though nevertheless largely ignored by modern scholarship on ancient slavery. In my paper I seek to understand

how runaway slaves discerned who they could trust on their path out of slavehood: potential sympathizers willing to assist and even shelter them or slave catchers who were actively seeking to return them to their owners.

Slave catchers and slave harborers are a form of middlemen, but have not been a part of the recent focus on other middlemen such as financial negotiators (see e.g. Verboven, Vandorpe, and Chankowski (eds.), P*istoi dia tèn technèn: Bankers, Loans, and Archives in the Ancient World*, 2008) and traders (see e.g. Wilson and Flohr (eds.), *Urban Craftsmen and Traders in the Roman World*, 2016). These economic middlemen operated within the institutional or governmental structures of the market economy and legal system and as such these structures ultimately provided some security between parties (see discussion of historians of trust in Forrest and Haour, 'Trust in Long-Distance Relationships, 1000-1600 CE', in Holmes and Standen (eds.), T*he Global Middle Ages [Past & Present* supplement, 2018]).

Slave catchers and slave harborers instead bear more similarities with a different form of middlemen: interpreters. By their very nature, both slave catchers and slave harborers must cross and even transgress boundaries. The slave catcher nominally operates within the law, but is hated by society for their profession. The slave harborer, on the other hand, is acting against both the law and the social order. Rachel Mairs has argued that the interpreter is viewed as betraying their community by assisting foreign agents (perhaps, she notes, best exemplified in the phrase '*traduttore, traditore*') in a manner not unlike the slave harborer (see discussion in '*Translator, Traditor*: The Interpreter as Traitor in Classical Tradition', *Greece & Rome* 58.1 2011: 65, 65n2).

This paper seeks to examine this process of trust-making and breaking by employing Saidiya Hartman's idea of 'critical fabulation' to the runaway slave's experience (*Scenes of Subjection: Terror, Slavery, and Self-making in Nineteenth Century America*, 1997) as found in Roman legal sources such as the juristic interpretation on the action for a slave made worse (*actio servi corrupti, Dig.*11.3) and literary sources like Apuleius' *Metamorphoses*.

The precarity of the slave's trust-giving is perhaps made most clear by the term for slave catcher, *fugitivarius*. On account of the amount of fraud involved in the process of slave recapture and rescue, *fugitivarius* comes to mean, at least in one instance (*C.Th.* 10.12.1), a concealer of runaway slaves.

FRANCESCO GIGLIO

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Regulae and τόποι in Roman Law: A Road Map for Modern Legal Systems

Keywords: *regulae*, topics, open arguments, legal reasoning

Roman law has directly influenced several aspects of the modern legal discourse both in the Civilian systems and in the Common law. Greek philosophy, and particularly Aristotelian tenets, exerted a fundamental influence upon the Roman, and consequently the modern, legal reasoning. In this paper, we shall see how Roman law moved from legal literature to legal science thanks to the spreading of Greek ideas among the jurists. In a voyage which starts from Aristotle and includes Quintus Mucius' l*iber singularis* ὅρων and Cicero's *Topica*, a case will be made of law as a systematic, coherent body which is open to external, a-systemic influences.

Cicero's analysis of the Aristotelian teachings allows us to identify the two main pillars of modern legal systems: *regulae* and open arguments. Whereas the *regulae*, linked to apodictic-deductive reasoning, provide the backbone of the system, the open arguments work as rule-breakers. On the basis of topical reasoning, the open arguments allow new ideas to permeate the barrier between law and society.

Roman law shows that any legal system is characterised by the tension between more or less static rules and more or less disruptive arguments. Law is a social science and such tension is necessary for a legal development that runs in line with societal development.

LINA GIRDVAINYTE

Université Bordeaux Montaigne |France

Legislating for the Greeks: Roman Positive Legislation in Mainland Greece

Keywords: legislation, authority, Roman, Achaia, Macedonia

Both literary and epigraphic sources attest that Roman positive legislation was first introduced in mainland Greece as early as the second century BCE, while Roman legal enactments and judicial decisions are found entering the domain of locally applicable law at around the same time. In this sense, Greece provides an excellent example of how Roman intervention in the legal and the judicial spheres need not have been congruent with provincial organization. It is equally interesting to observe that this early legislation for the Greeks was explicitly styled as part of the local laws: complementary, as it were, rather than competing with pre-existing legal traditions.

Throughout the provincial period, then, we observe a decline in Roman legislative intervention in the sense of providing a large territorial unit with a set of laws, and an increase in localised, smaller-scale legislation and regulatory activities applicable to single city-states or communities only. These were normally tailored to fit the needs and conditions of specific communities and were thus driven by primarily local rather than imperial or provincial concerns. It is striking, too, that the most extensive imperial involvement in the legislative sphere seems to have taken place within the free and privileged communities, such as Athens or Delphi. This is also where such legislation assumes a pseudo-local nature.

In this brief paper, I will try to sketch the extent and the nature, as well as the ideological underpinnings of Roman positive legislation in mainland Greece through time, and ask whether the basis upon which a legal norm or regulation was perceived as either Roman or local necessarily lay in the issuing authority.

CARMEN GOMEZ-BUENDIA

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Ancora sulle 'actiones utiles'

Keywords: *Actiones utiles,* procedura formulare*, actiones in factum*

I meccanismi procedurali della procedura formulare ci permettono di approfondire nell'evoluzione di alcune istituzioni giuridiche da una prospettiva casistica tipica dei giuristi romani. L'articolazione tecnica delle *actiones utiles* è un esempio di come una rimedio procedurale consente di rispondere a un diverso universo di problematice giuridice che si susseguono nel tempo e di come i giuristi romani contribuiscono alla sua creazione.

GÜZIDE BURCU GÜNVEREN

Bursa Uludag University |Turkey

The Importance of the Law of the Praetors (Ius Praetorium)

Keywords: *Praetor Peregrinus, Praetor Urbanus, Ius Gentium, Ius Honorarium, Iurisdictio*

As trade gained more importance in Rome, the *ius civile* which applied to Roman citizens began to fail to provide the required legal flexibility. As the centuries passed, Romans had to carry out legal transactions required by the new economic life and to enter into legal relations with outsiders more often. This also called for new rules to regulate these legal relations, independent from the nation with which the parties were associated. It was impossible for the *ius civile* to meet this requirement since it could only be applied to legal relations between Romans. The magistrate was responsible for and authorized judicial activities (*iurisdictio*) that met these new requirements. The magistrate bestowed new rights of action that were not included in the *ius civile* on the plaintiff or gave new opportunities of defence to the defendant, thus securing justice. In 367 BCE, a new magistracy called the *praetor* was created. In 242 BCE, the *praetor peregrinus* was established to resolve disputes between the outsiders or two parties when one was a Roman citizen.

The task of the *praetor* was not to put the *ius civile* aside, but to support it for the sake of the society by smoothing its rigidness. This body of rules established in this way is known as i*us honorarium*.

These new magistracies, also referred to as *praetor urbanus* and *praetor peregrinus*, released edicts on the basis of the authority of their imperium. They provided the necessary clarity in law. Those who wanted to bring an *actio*, for example, based their demands on the principles set out in an edict. Since their term of duty was limited to a year, a new *praetor* could release a new edict each year. Although it did not have to be subject to the previous *praetor's* edict, established rules are acknowledged: changes and additions were made. The *edictum* of the *praetor* became an important source of law, which provided legal security as well as flexibility and stability to the law.

The position of the *praetor peregrinus* was crucial, as it constituted the ius gentium. The rules of the *ius gentium* came into existence in the fields of law of property and of obligations. Since these rules were actually established by the *praetor peregrinus*, they are also *ius gentium*. The novelties and rules established by the *praetor peregrinus* were adopted by the *praetor urbanus*. This is why some *ius gentium* rules were implemented by bringing them into the scope of the ius civile. Therefore ius civile, *ius gentium*, and *ius honorarium* were implemented together. There is no doubt that this situation took place due to the effect of the position of the *praetor*.

H

TOMOYOSHI HAYASHI

Osaka University |Japan

The Addressees of the Responses of P. Alfenus Varus and the Accessibility of 'Ordinary' People to his Legal supports in late Republican Rome

Keywords: jurists, legal responses, ordinary people, Alfenus, legal education

In my presentation, I plan to analyze the extant fragments left with the name of P. Alfenus Varus

(hereafter Alfenus) with a focus on the form how his responses were given and how his doctrines were developed. With this analysis, I want to reflect on the addressees of his responses. Were they addressed to the jurist himself to develop his doctrine, or to his pupils in legal education, to the persons with offices and responsibilities to help their mission, or to the real clients in the actual consultations? I chose this object as I was recently inspired by an argument on D. 9, 2, 52, 1 by the historian Knapp, where a mere shopkeeper could get access to aconsultation by Alfenus concerning his own *lex Aquilia* case (R. Knapp, (Ed. P. J. Du Plessis et al., *The Oxford Handbook of Roman Law and Society* (Oxford, 2016), Chap. 28, 'Legally Marginalised Groups – The Empire'), p. 369). Knapp's argument ultimately leads to the grand question: 'Which class of people was the beneficiary of Roman law?' However, I want to confine my argument on this occasion to the forms and characters of how the doctrines of Alfenus were conveyed and to the addressees of his responses. The emphasis may shift to the internal transmission of his doctrine within the community of jurists. In order to gain a further prospect, I may make a comparison with the works of earlier jurists, e.g. Servius Sulpicius Rufus, and with the works of later age entitled '*Libri responsorum*'.

DIRK HEIRBAUT

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The Earliest Roman Law Renunciations in Flanders

Keywords: Medieval Roman law, Renunciations of learned law, *Senatus consultum Velleianum*, Flanders, Low Countries

Renunciations of Roman law are a well-known phenomenon in medieval

Europe. For the Southern Low Countries (today's Belgium), two articles by Gilissen and Vercauteren studied the first renunciations. Surprisingly, their research came to the conclusion that the county of Flanders, generally ahead of the other principalities of the Low Countries, in this lagged behind by about twenty years. However, they had not used all the material at their disposal, as for Flanders they had mainly used the charters collected by a colleague who had died prematurely.

My lecture, based on my own survey of thirteenth century charters on feudal law in Flanders and the *Diplomata Belgica* database, will show that several renunciations appeared a generation earlier in Flanders than Gilissen and Vercauteren had assumed. For example, Isabella of Wallers, already renounced her rights according to the *Senatus Consultum Velleiani* in 1239, whereas the first appearance of this renunciation according to Gilissen and Vercauteern only took place in 1273. Even though the chronology for the other principalities also has to be revised (examples will be given), this conforms more to the general pattern of legal evolution in the Low Countries.

However, this does not necessarily mean that Flanders was a pioneer of Roman law, as the renunciations indicate a resistance to, rather than an acceptance of Roman law. In general, until the late fifteenth century the reception of Roman law in Flanders and other principalities of the Southern Low Countries was very selective. Roman law was welcome only in so far as it could strengthen, not undermine the great principles of local customary law. In fact, already by the mid-thirteenth century the redaction of renunciations betrayed that the population had become exasperated by learned law and just renounced any learned exception that had been invented or could be invented in the future. Another element is the lack of knowledge of learned law amongst others than clergymen. Although one family of nobles (the Beveren family) may have been more familiar with Roman law, other renunciations betray a certain ignorance, as in a charter which has a man renouncing any benefits he might have thanks to the *Senatus Consultum Velleianum*. Nevertheless, the *exceptio non numeratae pecuniae* seems to have been well-known, because it filled a need of the practitioners of customary law.

In short, if Flanders came into contact with learned law earlier than has hitherto been assumed, this only means that its rejection also started earlier.

HENRIK-RIKO HELD

University of Zagreb | Croatia

Representation in Procedure in Roman Law and Ius Commune

Keywords: *advocatus, procurator ad litem, revocatio procuratoris, error advocatorum,* Roman law

Taking into account general theme of this year's session of SIHDA, the aim of this paper is to analyse one specific matter therein, namely the problem of representation in procedure, in Roman law as well as in the *ius commune*. The issue is related to the origins and functions of advocates and procedural procurators (*advocati, procuratores ad litem*). Having their origins in older periods of Roman law, the function of both of them changed in the postclassical and Justinianic law. In their developed stage, advocates were generally educated legal experts, professionals with their associations, who provided legal help for their clients. Procurators, on the other hand, were procedural representatives whose main function was to act in the stead of one party in procedure. One specific matter with repercussions for the relationship between both of them and their clients or principals stands out, and that is a possibility of an error by an advocate (*error advocatorum*), and a possibility to revoke a procurator. Regulation of those matters reflects the general attitude of Roman law in regard to the issue of representation.

The aim of this paper is to analyse sources of Roman law that deal with this matter, and which form basis for its further treatment in the *ius commune*. Representation being a very important matter in the medieval Catholic Church due to its complex organisation, there are numerous sources dealing with it in canon law, most importantly different *ordines iudiciarii*. In addition, similar regulation and legal reasoning may be found in sources outside canon law, an example of which may be the famous *Tripartitum* of Stephen Werböczy from 1514, a legal codification relevant for a number of central European countries. With the analysis of all those sources, we hope to help to illuminate a matter not only in its original Roman legal setting, but also in the perspective of its legal development in various contexts and jurisdictions, thus contributing both to better understanding of a legal reasoning in Roman law and its transformations and vicissitudes throughout centuries.

ANDREAS HERRMANN

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Die pervenit-Haftung im Zusammenhang mit den Klagen de peculio und de in rem verso

Keywords: *pervenit*-Haftung, prätorische Bereicherungsklagen*, actio de peculio, actio de in rem verso*

Hielten einige Autoren zu Beginn des 20. Jahrhunderts die Haftung *in id quod pervenit*, ganz gleich in welcher ihrer Erscheinungsformen, noch für justinianisch, so wird inzwischen die Klassizität der sogenannten prätorischen Bereicherungsklagen kaum mehr bezweifelt. Weit weniger gesichert ist hingegen, wie diese sich zur Verantwortlichkeit für Geschäfte oder Delikte Gewaltunterworfener verhalten.

In einigen Quellen tritt die *pervenit*-Haftung neben adjektizische Klagen (so in D. 42,8,6,12: *restituat quod ad se pervenit aut dumtaxat de peculio damnetur vel si quid in rem eius versum est*), an anderen Stellen wird sie mit diesen kombiniert (etwa in D. 15,1,3,12: *in id quod ad patrem pervenit competit actio de peculio*). Beide Konstellationen haben mannigfache Deutungsansätze und Interpolationsvermutungen gezeitigt. An ersterer wird gezweifelt, da *id quod pervenit* neben dem durch *versio* Erlangten praktisch keine eigenständige Bedeutung zukommen könne. Gegen zweitere wird vorgebracht, dass die Kopplung der beiden Haftungsbegrenzungen übermäßig, außerdem im

Formularprozess wenig wahrscheinlich sei. Stellt man diese Annahmen in Frage, rücken Ursprung und Funktion der Klagen *in id quod pervenit* erneut in den Blick.

ZACHARY HERZ

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Severan Jurists, Policy Analysis, and the Rule of Law

Keywords: Jurists, jurisprudence, Severan politics, rule of law, sources of law

One dominant feature of Roman law of the Classical period is its extreme, and superficially chaotic, polycentrism; in his *Institutes*, Gaius lists no fewer than six sources of legal authority (*Inst.* 1.2). Of course, not all law is created equal. My talk considers specifically Gaius' last category—juristic writings or *responsa prudentium*—and argues that the nature of juristic legal work changed drastically over the course of the Severan period. While juristic practice under the Severans has been approached in recent scholarship as part of Roman intellectual (Zetzel 2018, Wibier forthcoming) or political (Schiavone 2012, Peachin 2016) culture, this talk argues for a profound shift in that community's perception of its functioning in the early third century. Specifically, I demonstrate the increasing frequency of what might be called 'policy argument' in Severan juristic work; explicit claims that a law ought to be interpreted in a way that will lead to desirable outcomes under circumstances of universal promulgation. This distinctly new tendency, which may have its roots in the novel role jurists played in the Severan imperial bureaucracy, had enormous implications for the later reception and survival of Severan juristic writing, and perhaps for that writing's centrality to later legal regimes.

I begin by defining my terms, specifically what sorts of arguments might be understood as resting on policy claims. I next explain how this tendency can be isolated to specifically Severan juristic writing, before discussing a possible reason for the shift—the increasing role of jurists within Severan imperial administration. I suggest that these changes in employment practice, by boosting the careers of jurists who could advise figures concerned with matters other than doctrinal or interpretive fidelity, changed the sorts of language that could appear in legal scholarship. I conclude by discussing the ramifications of this shift in the post-Severan period—not only were these arguments idiosyncratically meaningful in the post-juristic politics of the Late Antique, but they also formulated a vision of legal argumentation that could appeal to actors with different or contingent relationships to Roman legal doctrine *tout court*. As a result, juristic writing reached audiences who looked to Roman law not as an intellectual achievement, but as the foundation of a political one.

VINCENT VAN HOOF

Radboud University | Netherlands

Asset-based financing and in rem versio

Keywords: pledge, priority, object finance, contracts, *hypotheca*

A creditor who provided financing for the acquisition of goods or equipment and got a nonpossessory pledge over these assets obtained preference over creditors with prior pledges.[1] This was a deviation from the basic rule that preference was determined by the chronological order of creation of non-possessory pledges, as expressed in the famous legal maxim *prior tempore, potior in iure*, earlier in time, stronger in right (the priority rule).

The justification for the deviation from the priority rule in favour of the purchase-money financier seems to have been that the prior creditor would have had no security without the posterior creditor enabling the acquisition. Creditors who incurred costs in preserving someone else's property had preference over creditors with prior security rights too. For example, Ulpian discussed a creditor who paid for the repairs to a ship.[2] These exceptions to the priority rule are referred to as privileges for the benefit of the property (*in rem versio*).[3] The Romans did not make exceptions to the priority rule if there was no specific justification for an exception.

Given the preferential treatment of the purchase-money financier one would expect that the parties specified the purpose of the extended credit in the contract. This would ease the burden of proof for the creditor. During my presentation, I will answer if and how the 'superpriority' of the purchase money financier influenced contracting by discussing the parties' specification of the purpose of asset-based financing in their contracts in Justinian's codified laws and epigraphic sources.

[1] D. 20,4,7,pr (Ulpianus 3 *disputationum*); C. 8,17(18),7 (Diocletianus and Maximianus in 293) and Nov 97,3. [2] D. 20,4,5 (Ulpianus 3 *disputationum*). [3] See: Dernburg *Das Pfandrecht nach den Grundsätzen des heutigen römischen Rechts* (1864) 427.

I

MARIKO IGIMI

Kyushu University | Japan

Libertis libertabusque relicta alimenta

Keywords: *alimentum, libertus, oratio Marci*, legacy, *patronus*

Alimentum is the maintenance that consists of habitation, food, clothing, etc. D.34,1 deals with the legacy of *alimentum* of which most of the legatees are freedmen and freedwomen. This explains why the *oratio* of *Marcus Aurelius* required authorization of the *praetor* to compromise in respect of *alimenta* left by will (D.2,15,8). The reason for this intervention is that the persons to whom maintenance was left tend to be satisfied by immediate payment of small sum of money.

The *oratio* was applied, however, only to the compromise between the heir and the legatees. What was the living condition of freedmen and freedwomen while the testator, i.e. the former owner

was still alive? How did they maintain their living?

The presentation analyzes the texts which deal with *alimenta* given to freedmen and freedwomen and tries to highlight the mechanism that served as 'social welfare' for the majority of people who were not well-off in Roman society.

LISA ISOLA

Universität Wien|Austria

Überlegungen zur Litiskreszenz bei der actio ex testamento

Keywords: *actio ex testamento, certum, nuncupatio,* Ableugnen, Litiskreszenz, Formelgestaltung

Die *actio ex testamento* ist ein besonders geeignetes Beispiel, um die Hintergründe der Verdoppelung des Streitwerts bei Ableugnen bestimmter Verpflichtungen zu ergründen. Einerseits geht die *nuncupatio* – welche für die im Zusammenhang mit einem Libralakt stehenden Litiskreszenzklagen Anknüpfungspunkt gewesen sein dürfte – nicht auf die Person zurück, welche später im Prozess etwas ableugnet: Nicht der Erbe, sondern der Erblasser hat diese förmliche Erklärung vorgenommen; nicht der Erblasser, sondern der Erbe bestreitet später die bestehende Verpflichtung. Möglicherweise hängt die Verdoppelungsfolge hier zudem davon ab, dass durch dieses Vermächtnis ein '*certum*' zugewendet wurde: Es könnte nur beim schuldrechtlich wirkenden Legat eines *certum* zu einer Verdoppelung des Streitwerts infolge des Ableugnens gekommen sein, nicht aber, wenn ein '*incertum*' vermacht wurde. Wie ließe sich das begründen? Der Unwertgehalt des Ableugnens eines Vermächtnisses müsste schließlich im einen wie im anderen Fall derselbe sein? Die Lösung ist in Ursprung und Entwicklung der Litiskreszenz zu suchen. Dem soll ebenso nachgegangen werden wie der Formelgestaltung bei den Vermächtnisklagen.

IDO ISRAELOWICH

Tel Aviv University |Israel

The Ontology of Roman Forensic Science

Keywords: Roman law, forensic experts, legal science

The Roman courts increasingly relied on certain disciplines other than jurisprudence, and certain professionals other than jurists for settling disputes. From the late Republic onwards, physicians and land surveyors, wine merchants and midwives were either appointed by the court to resolve procedures *apud iudicem* or were given quasi judicial authority. This tendency of the court is not self-evident. Roman judicatory proclaimed itself professional and able. Professional in a sense of being law-abiding and unbiased. Able in a sense of being prima facie unlimited in its ability and authority to interpret the law and exercise its implementation. An appeal to an exterior source of authority is an acknowledgement of the court's imperfection, and an invitation to further question its prowess.

It is therefore important to question when, how, and why the court acknowledged disciplines other than jurisprudence, and professionals other than jurists as better suited to settle disputes revolving factual matters. Disputed maternity or paternity were resolved not by a jurist, but through the skills of a court-appointed midwife. Boundary disputes fell under the jurisdiction of land-surveyors. They were equally expected to retrace old deeds. Controversies over the quality of wine sold commercially 'by tasting' were decided by wine experts, not an arbiter or a *iudex*. Suspicious deaths or acts of violence were examined by public physicians. In fact, these physicians were often dispatched by the court and ordered to file an official report. In all these instances the court itself recognized the relevance of disciplines other than jurisprudence, and professionals other than jurists and most qualified to preside over these proceedings.

My paper aims to examine the ontology of forensic science: law, knowledge, and authority. By mapping the occurrences of relying on forensic experts, I hope to learn more about the authority of the Roman court, its origins, modus operandi, and limitations. Furthermore, by identifying the disciplines which were able to ascertain hegemony over certain matters (e.g. disputed parenthood), but not others (e.g. the status of madness) I hope to be better able to explain the formation of jurisdiction altogether. By examining the dialectic relations of the court with other disciplines and professionals I expect to learn more about the formation of the court's authority, both as a social institution and as an agent of a discipline. More generally, I hope to learn more about the formation of legal science, and its emergence in tandem with other bodies of knowledge.

J

EVA JAKAB

NK University Budapest |Hungary

Law in Space: A Wooden Tablet from Britannia

Keywords: Britannia, wooden tablets, sale, interpretation, in context

Recent excavations report of the legal life in Britannia, a far province on the north-west edge of the Roman Empire. Besides the rich material from Vindolanda, interesting legal sources have also been found in the city of London and in the countryside, especially in Somerset, Wales, and Kent. Various editors (Alan K. Bowman, Roger Tomlin, Eric Turner, etc.) have furnished the international community of researchers with important texts and documents of everyday legal practice. Unfortunately, Roman law experts almost entirely missed paying attention to this material. In my contribution, I focus on the wooden tablet TLond 55 (Roger Tomlin, *Roman London's First Voices* (2016), 178-81), considering the criticisms of Giuseppe Camodeca and Fara Nasti (*Index* 45, 2017, 138-48).

ERDŐDY JÁNOS

Katholische Universität Péter Pázmány |Hungary

SC Claudianum – Modern Questions, Ancient Answers?

Keywords: *SC Claudianum*, slavery, women, Paulus, *denuntiatio*

The *SC Claudianum* decreed that any free woman, Roman or Latin, pursuing relationship with the slave of another, and failing to abandon the relationship after the denouncement of the slave's master, will become the slave of the denouncing master. It appears to be an interesting endeavour to examine the approach of contemporary manuals on this topic. How the authors of such works go about this question implies strong interpretations. It is interesting to compare these interpretations with the primary sources of the *senatusconsultum* when trying to discover the actual content and objectives of this decree, such as promoting social morals, defending sexual morality, or protecting certain interests. From a wider perspetive, the scrutiny of this *senatusconsultum* renders it possible to take a closer look at how Roman jurists approached slavery as an institution.

MACIEJ JOŃCA

John Paul II Catholic University of Lublin |Poland

Ultio Turiae – juridical vengeance in the hands of a woman

Keywords: Roman law, women

Among many virtues of one anonymous Roman matron listed in the fascinating funeral inscription called *Laudatio Turiae*, there are some quite 'non feminine' features such as bravery and perseverance.

One can read that 'it was mainly due to her efforts that the death of her parents was not left unavenged'. In the period of the late Republic, vengeance in the literal sense was replaced by pursuing personal enemies in the courts. The Roman aristocracy considered this course of action a substantial part of its ethos. It was male kin who were obliged to avenge the sufferings experienced within the family and punish wrongdoers by winning juridical condemnation against them. This anonymous Roman matron happened to live during the difficult times of the second triumvirate. Her parents were murdered. Nevertheless, in such complex circumstances she did better than many of her male contemporaries. Her *laudator* underlines: 'So strenuously did you perform your filial duty by your insistent demands and your pursuit of justice that we could not have done more if we had been present'.

K

DANUTA KABAT-RUDNICKA

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Principles of Roman law in the European Union Legal System

Keywords: principles, institutions, Roman law, European Union law, Court of Justice

Roman law and neo-Roman law (*ius commune*), underlay the legal systems of the western world in both continental (civil law) and Anglo-American (common law). In European legal culture shaped by Roman law, personalism, which places an individual in the centre and makes him/her the subject, the end, and the intellectual reference point legally and intellectually, remains central. Today, when we observe the tendency towards unification, whether on a regional or a global scale, Roman law with its unifying function can play an important role, for it offers a model which makes possible the coexistence of nations in one polity.

The idea of European unification is not new. It refers to the legal and cultural unity that has its roots in the Roman tradition. Hence, it can be taken as evidence that Roman legal culture is still alive. Principles of Roman law have become an integral part of the European Union's legal order imposed upon the Member States. They have been employed by the Court of Justice e.g. in J*ohannes Gerhardus Klomp v Inspektie der Belastingen*. The Court has also referred to legal institutions such as *qui facit per alium facit per se* as in *The Queen v Commissioners of Customs and Excise* and in dubio pro reo as in *R v Commission of the European Communities*.

Principles of Roman law support the Court's reasoning and contribute to the coherence of this relatively new legal order. They make fragmented, particularistic legal systems consistent and universal. Roman law, with its special approach to the individual, its unique way of thinking, and its universal language can be equally well applied today as it has in the past.

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Ius quod natura omnia animalia docuit: In the margin of D.1.1.3-4

Keywords: *ius naturale, ius gentium,* law, right, *oikeiosis*

In the famous fragment opening the first title of the Justinian Digest (D.1.1.3-4), Ulpianus defines *ius naturale* as the law common to both human beings and animals (3) and contrasts it to *ius gentium*, specific for human beings only (4). The extension of legal order to the realm of animals struck the scholars commenting on the fragment. Some of them even suggested the possible impact of Pythagorean philosophy, which would recognize the rights of animals. It will be argued that the term *ius* in the fragment in question is used in its objective sense as the set of rules (patterns of behaviour) and not as the subjective right. The observation that certain patterns of behaviour are common both to human beings and animals does not imply the recognition of either subjective rights of animals or any duties towards them. The idea of the natural order which rules the behaviour of animals, as well as that of human beings, was well known to the Stoics and provided the basis for their idea of *oikeiosis*.

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Roman and Local Law in Salvius Iulianus (D. 1.3.32 pr-1)

Keywords: Salvius Iulianus, local law, conflict of laws, custom, precedent

In my paper, I would like to address the classic passage of Salvius Iulianus in Book 84 of his *Digesta* (D. 1.3.32 pr-1 = Lenel, *Palingenesia*, Iul. 819, partly followed), the only explicit statement of the rules for resolving the conflict of laws preserved in Justinian's Digest, and as such, of crucial importance to the discussions about the role of local law in Roman provincial jurisdiction prior to the Constitutio Antoniniana of AD 212. Iulianus sets up a hierarchy of 'written laws' (*scriptae leges*), custom (*mores et consuetudo*), and 'law used in the city of Rome' (*ius quo urbs Roma utitur*), to be followed in that sequence, each new element coming into play in the absence of the previous one.

The reinterpretation of this passage in the Codex of Justinian (C. 1.17.1.10) puts every part of this sequence in a Roman context: the laws are assumed to be the Roman ones, and *consuetudo* is also glossed as 'longstanding custom of that mother city'. In later period, this passage permitted the glossators to accommodate local custom and the use of the *Libri Feudorum*. The prevailing modern consensus until recently continued to treat the *leges* as the Roman ones, often interpreted as meaning imperial constitutions by that date (see, for instance, E. Jakab, in *Symposion 2015* (Vienna 2016), 256-7, for a recent restatement).

This intepretation creates two significant problems. First, the discussion of the decisions of the *populus* expressed *rebus ipsis et factis* rather than *suffragio* is hardly apposite for imperial constitutions as the base case. Secondly, if we assume that *scriptae leges* are those of Rome, they effectively become the same as *ius, quo urbs Roma utitur*, putting the litigants in an impossible circular situation of resorting to Roman law in the absence of written Roman law. The solution applied by glossators of treating the latter as the custom of the city of Rome is also unlikely for the age of Hadrian.

It will be argued in this paper that (possibly in the context of excuses from civic office, as suggested by Lenel) it would be more natural to see the 'written laws' at the beginning of the Salvius Iulianus passage as local laws of individual communities, thus acknowledging their place in provincial jurisdiction. If this is so, this passage needs to be put in the context of other evidence for the use of local laws in Roman provinces and should perhaps be seen as having less of a general import than it is often assumed.

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Roman Courts as Transitional Spaces: Tales from the Imperial Age

Keywords: Roman courts, *cognitio extra ordinem*, Roman emperor, *synegoroi*, emotions

In a turn of phrase in one of his declamations, the fourth-century CE rhetor Libanius argues that, in analogy with the 'perfect condition of the body', which 'does not need a doctor', the 'perfect condition' of the soul is the one that 'does not need a judge' (*σώματος μὲν οὖν ἕξις ἀρίστη ἡ μὴ χρῄζουσα ἰατροῦ, ψυχῆς δὲ ἡ δικαστοῦ μὴ ἐφιεμένη*), since the 'courts are the infirmaries for the diseases of the soul' (*ἰατρεῖα γὰρ τῶν κατὰ ψυχὴν νοσημάτων τὰ δικαστήρια*). This notion of the courts as 'infirmaries of the soul' indicates an intermediate space where emotions and passions of the litigants are transformed and 'cured' by the intervention of the judge/healer. In addition, Roman courts also function as transitional spaces which intermediate both the needs and demands of the litigants and the will of power – and, on another level, different social and legal orders (*humiliores* vs *honestiores*; Greek rhetoric vs Roman law).

In the present paper, we will discuss the function of Roman courts as transitional spaces through the study of judicial anecdotes preserved in diverse sources such as Apuleius' *Metamorphoses*, the apocryphal Acts of Paul and Thecla and Flavius Philostratus' Lives of the Sophists, dating from the early 60s to 212-213 CE and involving both the emperor's court and the judicial *conventus* of the Roman governor.

TOMISLAV KARLOVIĆ

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Presumptions between Civil and Canon Law

Keywords: presumptions, civil law, canon law

Rules of procedure and the regulations concerning forms of proof are often indicative of the place of law in a certain society. In this paper, the development of the theory of presumptions during the 12th and 13th centuries, in the interaction between the jurists of civil and canon law, is elaborated. On the basis of Roman legal texts, presumptions were very early recognized as shifting the burden of proof; however, in the preserved sources the early authors of the 12th century could not find a coherent set of general rules on the matter. Only during the second half of the 12th century did jurists intensify their efforts to classify and define different types of presumptions. In this process, the glossators stressed the division into *praesumptiones legis* and *iudicis*, while the decretists put the emphasis on the distinction between *praesumptiones temerariae, probabiles et violentae.* The aim of this paper is to examine the convergence of two systems in the literature of Romano-canonical procedure, and especially the roles of Pillius Medicinensis and later Azo in establishing the categories of presumptions as they are used today.

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Hubris, Iniuria and Harassment

Keywords: *iniuria*, harassment

We are now surrounded by the words related to 'harassment' such as 'sexual harassment', 'power harassment', 'academic harassment', etc. In 1989 the first civil case of sexual harassment was brought to the court. On 29 May 2019, new legislation on harassment was passed in Japan. In this legislation the three elements which constitute power harassment are as follows: firstly the (ab)use of superior status; secondly excess beyond necessary and reasonable conduct and words; and thirdly the deterioration of the working environment. However, the judicial definition of the notion of the harassment seems far from clear and awaits further developments from harassment cases.

In the article, 'Harassment and hubris: the right to an equality of respect' (*Irish Jurist* 32 (1997), 1-45), Peter Birks argues that:

'the word 'harassment' seems to be the best generic description of the act involved in any example of Roman *iniuria*, and the Greek word 'hubris' combines the attitudes of mind of one who harasses another and the acts which derive from that mental attitude. The Romans used *contumelia* to express the same ideas, both the attitude of mind and the conduct emanating from it.'

After comparing Roman *iniuria* and Greek *hubris* with a distinctive type of torts in common law, he concludes that these three institutions share the common feature which is to protect the right to an equality of respect.

According to the suggestion of Peter Birks, I shall attempt to compare Greek *hubris* with Roman *iniuria* in terms of women and slaves. In *hubris* and *iniuria*, did the Greeks and Romans treat women and slaves as equally as free men or not, and how were the interests of women and slave protected as equally as those of free men? Starting with the definition of *hubris* in Aristotle's rhetoric, I shall examine *hubris* cases in some forensic speeches of the Attic orators, then move to the definition of Roman *iniuria* in the Institutes of Gaius and Justinian and look at Roman lawyers' discussions about *iniuria* in the Digest. Here a question cannot be avoided whether or not interests of women and slaves were protected for their own sake.

It is hoped that my paper will shed a light on the Greek and Roman law and the practice in their attitudes towards women and slaves and provide us with a comparative aspect on which we look at any kind of harassment in our contemporary society.

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Le Developpement Juridique De La Locatio Conductio Dans L'Ancien Droit Romain

Keywords: *locatio conductio,* le droit des obligations, le contrat de service, le contrat d'entreprise

Le contrat de locatio conductio est controversé dans la doctrine romaniste. La cause de cette controverse est l'intégration trois types différents de contrat qui se trouve d'une manière indépendante dans les droits modernes dans la 'locatio conductio'. La locatio conductio du droit romain contient le contrat de bail, le contrat de service et le contrat d'entreprise des droits modernes. Tandis que le contrat de service et le contrat d'entreprise présente un caractère d'un contrat de travail, le contrat de bail présente un caractère d'un contrat de louage. Dans cette situation, il faudrait chercher la valeur juridique que les Romains ont accordé à la locatio conductio et constater la nature juridique et le developpement de la locatio conductio.

La locatio conductio n'est pas définie dans les sources du droit Romain. Bien plus, la division en trois de la locatio conductio n'est nulle part expressément énoncé. Pour la doctrine, la locatio conductio est une opération juridique par laquelle une personne promet à une autre de procurer la jouissance temporaire d'une chose ou d'exécuter la prestation d'un service ou d'accomplir l'exécution d'un ouvrage moyennant une somme d'argent.

D'après notre idée, la locatio conductio est une institution juridique particulier au droit Romain. Il faut expliquer la locatio conductio qui est trés discuté dans le droit Romain par sa developpement historique. Au début, il existait la cession de l'usage des esclaves et des animaux. Mais afin de la situation économique empirant, on a commencé les hommes libres comme les esclaves à être employé pour achever les travails exigeant la force physique. Le louage des hommes libres à été intégré dans la locatio conductio en étant assimilé au louage des esclaves. En outre, le conducteur promettait l'ovrage qui est le produit de son taravail et à ce point, ils s'assimilaient aux hommes libres promettant leur travail. Mais, celui qui promet de fabriquer un ouvrage est une personne qui ne dépende pas de l'employeur contrairement aux esclaves et aux travailleurs libres. Parce qu'il achève le taravail en utilisant son expérience professionelle. Dans la locatio conductio operarum, tandis que les hommes libres travaillent d'une manière dépendant de l'employeur et c'est pour ça que qu'on les nomment "locator"; dans la locatio conductio operis, les artisants auraient été nommé "conductor", puisqu'ils n'avait pas travaillé d'une manière dépendant de l'employeur.

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Judged by their Judgements: Roman Trials as anti-Roman Propaganda Tools

Keywords: Roman law, *cognitio*, propaganda, martyrs, ancient novel, Christianity

Courtroom drama is anything but a modern *topos*. In classical literature it can be traced at least back to classical Athens. More relevant to our legal and media culture is its ubiquity in the Roman Empire, where trial scenes pervade not only the martyr literature of Christians and pagans, but Greek and Roman novels. 'Martyr' narratives imply the innocence of the victim and the wickedness of the Roman court, and this has led some scholars to look for hostility to Roman justice even in nonmartyr contexts; but, as the Gospel narratives of the trial of Jesus indicate, interpretation is not always so simple. The overlay of Roman procedure on indigenous judicial traditions could produce ambiguities. The popularity of these judicial acta, however accurate

they might be, give them the requisite propaganda edge; but it also suggests their forensic plausibility, which in turn suggests a working knowledge of Roman court procedures among a public far greater than the administrative élite which operated the *cognitiones*. The evidence from the ancient novels is different. The authors (with the significant exception of Apuleius) abjure Roman settings, but their depiction of trials in their sometimes fantastical plots cannot escape the influence of the legal world in which the authors lived, and this reflects on that world in ways which are by no means always positive, although without any overt propaganda intent.

PHILIPP KLAUSBERGER

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Quamvis eum qui pactus est statim paeniteat, transactio rescindi et lis instaurari non potest … Über die Bindungswirkung von Vergleichen im Lichte kaiserlicher Konstitutionen

Keywords: Vergleich, *pactum,* Privatautonomie, Vertragstreue

Mit einem Vergleich bereinigen die Parteien ein strittiges Rechtsverhältnis privatautonom, ohne die Hilfe der Gerichte in Anspruch zu nehmen. Jede Seite gibt dabei ein Stück weit nach. Im römischen Recht funktioniert dies über ein *pactum*: Der Vergleich – *transactio* – geschieht dadurch, dass eine Seite formlos auf ihr Klagerecht verzichtet und dafür eine Gegenleistung erhält. Will eine Seite später vom Vergleich nichts mehr wissen und klagt aus dem vormals strittigen Rechtsverhältnis, so steht der *actio* eine *exceptio pacti* entgegen. Was aber, wenn eine Seite bemerkt, dass sie mehr nachgegeben hat, als sie womöglich nachgeben hätte müssen? Hier kommt die Vertragstreue ins Spiel. Dass zwischen den Parteien gilt, worauf man sich geeinigt hat, ist gewissermaßen Grundvoraussetzung für das Funktionieren privatrechtlicher Beziehungen. Dennoch mag die Vertragstreue, auf die Spitze getrieben, zu einem Dilemma führen: Was gilt, wenn der Inhalt der Einigung an Grenzen stößt? Eine Partei, die aus der Einigung einen Vorteil zieht, mag auf die Einhaltung der Zusage der anderen Partei beharren. Die übervorteilte Partei wird versuchen, die Bindung der vertraglichen Einigung wieder zu beseitigen. Der Vortrag geht auf dieses Spannungsverhältnis anhand einiger Kaiserkonstitutionen näher ein.

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Manumission and a Change of Mind: How to Resolve a Contradiction

Keywords: slavery, manumission, antinomy, contradiction, reception

A father permits his son to set free a slave. The son complies with this wish and manumits the slave, not knowing that his father has died in the meantime. Is the slave free? Yes, says Julianus in Dig. 40,2,4 pr. No, says Paulus in Dig. 40,9,15,1 citing Julianus. What is word-for-word almost the exact same case meets with two different replies from the jurists as reported in the Digest. And the later jurist explicitly refers to the earlier jurist as authority for his statement. What to make of this contradiction?

This paper attempts to trace the debates surrounding these contradictory texts, in the history of the study of Roman law. Solutions proposed by the glossators and commentators, humanists, critical editors and more modern Romanists are discussed. By turning attention to one specific case and the apparently contradictory answers of the Roman jurists, this paper hopes to provide a glimpse of the changing methodologies surrounding textual transmission and the nature of Roman law in the Digest.

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The Concept of Preventive Protection in Roman Law and its Adaptation in European Legal Systems

Keywords: preventive action, civil rights protection, Roman law, European legislation

The occurrence of damage is not always caused by one sudden event. Sometimes the reason is a situation that lasts for a long time and creates the risk of damage. This means that the damage is preceded by the appearance of a threat. In Roman law there was a non-intentional delictual obligation '*actio de positis et suspensis*' and the lawyers said: '*Adversus periculum naturalis ratio permittit se defendere*' (D. 9, 2, 4). The *actio de positis et suspensis* could be filed by any citizen, having noticed a thing that was dangerously placed on the wall or ledge of the building, the fall of which could cause damage to the passers-by. The claim subject was the fine recovery from the building's owner in the amount of 10 soldis (D. 9. 3. 5). Whether there was strict liability in the case of *positum aut suspensum*, is questionable. Generally, it depends on the interpretation of Ulpian's fragment D. 9, 3, 5, 10. Perhaps this case was classified as a quasi-delict because it was so closely related to the *actio de deiectis vel effusis* and because there did not have to be an injury for liability to arise. Roman lawyers paid special attention to the task of damage prevention in neighborhood relations. For this reason, the concept of responsibility for *damnum infectum* and the associated dissentrative power of the *praetor* in the form of *cautio damni infecti* were created.

Modern European legislation has shaped damage prevention in various ways. From the point of view of the adopted legal regulation technique, two basic types of solutions can be distinguished: a general preventive claim as a construction developed by case law in the absence of expressive regulation and clear regulation of the preventive claim in the text of the Act. Neither type of solution is uniform. Within the first, three subtypes can be distinguished: 1) recognition of preventive protection as quasi-negatoria protection; 2) inclusion of a preventive claim as a sui generis compensation claim; and 3) inclusion of a preventive claim as a special protection measure based on equity principles.

The second type of solution was adopted mainly in young legislation,

including Poland. This solution, although based on the positive law, is more diverse than the first. An analysis of legal systems whose concept of preventive protection was created through the progressive evolution of case law will allow showing the substance of a preventive claim. In my presentation, I explore the legal conception of preventive protection in Roman law and its adoptation in modern systems in Europe. Placing the Roman doctrine of preventive protection in the perspective of contemporary solutions allows us to capture its timeless aspects and show the genius of ancient jurists.

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The draft of the land constitution of Salzburg of the year 1526: An analysis of the reception of Roman law regarding the right to a compulsory portion

Keywords: Roman inheritance law, old German inheritance law, history of reception, land constitution, archdiocese of Salzburg

Based on the advisory protocols to the Landtag of 15th October of 1526, in which the proximity of the inheritance law of Salzburg to the ius commune is emphasized, the lecture deals with the analysis of the draft regulations regarding the right to the compulsory portion. The analysis shows clear parallels to the ius commune, but also major differences resulting from the draft character of the land constitution. First of all, the analysis shows that the Salzburg inheritance law is infiltrated by terminological terms as well as substantive ideas of Roman law, which cannot be overlooked.

For example, the draft first lists the will and then the legal succession, so that in contrast to the old German law of succession with its primacy of family succession, the legal succession is no longer the most important method of inheritance.

In addition to the law of succession in general, the provisions of the law of compulsory portions in particular have been strongly influenced by Roman law. For example, there are no deviations from ius commune with regard to the persons who are entitled to demand the compulsory portion. Even siblings can only demand their compulsory portion if an "*inferior person (unerbere person)*" has been appointed as their heir instead of them. This is congruent with the "*persona turpis*" in common law and even shows in this detail that it has already come comprehensively to a reception within the inheritance law of Salzburg.

The analysis proves that the draft of the land constitution of Salzburg of the year 1526 provides a comprehensive testimony to the fact that an extensive reception of Roman law took place in the archdiocese of Salzburg regarding inheritance law and that Salzburg's customary law was already heavily permeated by the ius commune in the early 16th century.

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Per un Rinnovato Studio della Tradizione Manoscritta del Digesto di Giustiniano

Keywords: *Giustiniano, Digesto,* Mommsen, *manoscritti*, Padova

La trasmissione del testo del Digesto di Giustiniano rimane uno dei grandi problemi insoluti della storia giuridica, malgrado i molti studi che sono stati a esso dedicati, soprattutto nel corso dell'Ottocento e nella prima metà del Novecento. In particolare, come ha detto Stollte, dopo il passaggio di Mommsen l'erba ha impiegato molto tempo a ricrescere e sembrava non ci fosse più molto da dire sul tema; oggi, però, il terreno merita di nuovo di essere curato e vi è margine per interventi che apportino nuove prospettive, anche perché i mezzi tecnologici a disposizione permettono confronti testuali immediati tra i vari manoscritti digitalizzati e, intrecciando con quelle giuridiche molteplici altre competenze - dalla paleografia all'analisi delle miniature, dall'esame delle glosse fino allo studio del più ampio contesto storico -, si possono ottenere nuovi interessanti risultati in merito alla dibattuta questione della tradizione manoscritta del Digesto di Giustiniano.

Lungo questo sentiero si muove un progetto avviato presso l'Università di Padova, intitolato FOR.MA (The Forgotten Manuscripts), che studia 2 manoscritti risalenti al XII secolo conservati presso la Biblioteca Universitaria di Padova, i quali contengono il testo del *Digestum vetus* (codice 941) e dei primi nove libri del *Codex* (codice 688). Nell'ambito di questo progetto si è già effettuata la loro digitalizzazione e messa a disposizione degli studiosi nel sito PHAIDRA ed è in corso di stampa la riproduzione anastatica del codice 941. Si sta procedendo a un'analitica disamina degli stessi, iniziando dal *Digestum vetus*, secondo le varie prospettive di interesse: esame paleografico delle scritture principali e delle (poche) miniature presenti, allo scopo di precisare meglio luogo ed epoca di composizione del testo; studio approfondito delle glosse (in gran parte inedite), dalle quali si possono desumere molte interessanti notizie relativamente al contesto storico in cui i codici furono utilizzati, in particolare per la storia delle prime università; indagine in merito alle lezioni divergenti rispetto a quelle riportate nell'edizione di Mommsen; infine, ipotesi per una storia della tradizione manoscritta del *Digestum vetus* diversa da quelle finora proposte. I risultati di questi studi saranno presentati in un convegno che si terrà a Padova a fine gennaio 2020.

Verranno qui esposte alcune delle prime parziali conclusioni; in particolare il caso del termine *aer* nell'ambito del famoso passo di Marciano in tema di *res communes omnium* (D. 1.8.2.2.1), che nella Florentina si legge senza alcuna difficoltà, mentre è assente nei codici Vaticano, Parigino e Lipsiense; nel nostro Patavino è aggiunto in un momento di poco successivo alla scrittura primitiva, con inchiostro più leggero, il che starebbe a indicare un precoce confronto con la Florentina. Altro esempio riguarda il testo greco di D. 16.3.26 che manca nel Patavino, ma nel margine superiore si legge la traduzione in latino fatta da Burgundione Pisano; anche nel Vaticano e nel Lipsiense manca e c'è la traduzione a margine, senza

l'indicazione dell'autore; nel Parigino è invece presente il testo greco, anche se non completo.

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Estrategias interpretativas y desarrollo de la exceptio doli generalis

Keywords: *exceptio doli generalis*

La *exceptio doli generalis* es expuesta en el edicto del pretor en términos muy amplios. Ella se vale de un término jurídico de contornos no siempre precisos, como es el de dolo y, por otra, ubica la acción dolosa en un arco temporal puede abarcar desde el pasado hasta el presente. Ello da la posibilidad a la jurisprudencia para diferenciar los actos circunscritos en tiempo pasado de aquellos de tiempo presente, como primera categoría y, a continuación, para decidir la medida en que tales actos expresan la idea de dolo. En la práctica, el concepto de dolo pretérito y presente se construye agregativamente mediante el propio proceso interpretativo, y es el que nos interesa. Para efectos de este trabajo, bajo la denominación 'estrategias interpretativas' hago referencia al abanico de recursos utilizados por la jurisprudencia romana para hacer posible la aplicación de la *exceptio doli generalis*. La identificación y sistematización de tales estrategias serían una vía relevante —desde el punto de vista heurístico— para proveer de conocimiento nuevo acerca de la exceptio doli. Lo anteriormente dicho tiene por base la hipótesis de que la aplicación a diferentes materias de la *exceptio doli* constituyó un proceso gradual que los juristas llevaron a cabo de manera cuidadosa, de forma de garantizar coherencia en sus decisiones. Esta hipótesis, a su turno, recaba parte sustantiva de su fundamento en los resultados a los cuales arribaron Bretone1, Guzmán Brito2 y Wieacker3, en torno a los hábitos y las herramientas intelectuales que caracterizan a los juristas romanos, así como al valor de éstos en la formación del sistema. Especialmente relevante es, a estos efectos, la afirmación de Wieacker, según la cual, 'el "verdadero" sistema de los juristas romanos es el conjunto de las operaciones mentales con el que constataban la autarquía de estas estructuras y aseguraban la coherencia de los elementos de su campo del saber, y lo construían de tal manera, que se consolidaba progresivamente como una conexión consistente de saberes'4.

El hecho de que estas estrategias pueden ser muy diversas se pone de manifiesto por medio de dos específicas estrategias interpretativas, que serán objeto de examen en este trabajo; así por ejemplo cuando los juristas optan por valerse de la analogía, o bien cuando, su *interpretatio* perfilar los límites de aplicación de la *exceptio doli* respecto de otras, en aquellos casos en que se produce una cierta convergencia, como suele darse a propósito de la *exceptio rei venditae et traditae* o la *exceptio pacti.*

1 BRETONE, Mario, *Tecniche e ideologie dei giuristi romani* (2ª ed. Napoli, 1982).

2 GUZMÁN BRITO, *Alejandro, La interpretación de las normas jurídicas en el derecho romano* (Santiago: Instituto Juan de Solórzano y Pereyra, 2000).

3 WIEACKER, Franz (1998), *Fundamentos de la formación del sistema en la jurisprudencia romana* (Granada: Comares).

4 WIEACKER, Franz (1998), p. 51.

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Sources of International Law in Antiquity: The Case of Republican Rome

Keywords: *fons iuris*, international agreements, Roman law

One of the features differentiating international law from the other branches of law is the specific catalogue of its sources (*fontes iuris*). The catalogue includes international customs or international agreements. These are legal actions which introduce certain principles of behaviour into the legal system. What is important is that the practices of specific states, that is in their internal legislative acts, do not amount to a commitment on the side of other global players on the international stage but are often a confirmation of the application of customary law.

An agreement is a source of law which is characteristic only of international regulations. On the ground of private law, agreements shape legal relations which are attached to a different legal source. However, international agreements are not based on laws, but on the fundamental principles, which provide the ground for the international order.

The aim of the current article is to indicate which of the international agreements contracted by the Romans in the times of the Republic could be capable of instigating law-making processes, as well as to present the instances of legislative provisions and their significance on the international arena.

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Furtum e possession: rileggendo Contardo Ferrini

Keywords: *furtum, possessio,* definizioni

L'estraordinaria espansione giurisprudenziale delle fattispecie di *furtum* fino a diventare qualsiasi 'azione dolosa sopra una cosa a fine di lucro' (FERRINI), oppure "…jedes 'unehrliche Antasten' einer fremden (beweglichen) Sache in gewinnsüchtiger Absicht…" (HONSELL/KUNKEL), meritava la nota critica di SCHULZ: 'The classical conception of *furtum* was an artificial and unhappy creation of republican and classical jurisprudence... It was not a happy idea on the part of the republican jurists to extend the conception of *furtum* so far beyond the natural sense of the term'. Sotto il profile moderno della 'Better Regulation', costa trovare anche senso a questo 'catch-all crime'. Se i motivi di politica del diritto di una

tale espansione non sono evidenti, forse la via proposta da Contardo Ferrini nel suo *Diritto penale romano* (1902, che rifletteva parecchi contributi anteriori), di cercare nella transizione dalla *amotio* alla *contrectatio* (Gai. 3,195) l'influenza dello "svolgersi della teorica del possesso" ci fornirà di un argomento tecnico capace di spiegare, almeno parzialmente questi sviluppi.

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Deathbed Gifts as a Hybrid: Comparative Legal Perspective

Keywords: deathbed gifts, inheritance law

Some European legal orders allow contracts as means of transferring property in the event of death while others exclude and prohibit any attempts of this practice. As a consequence, the latter model does not allow deathbed gifts, which are contracts, but to achieve the same legal effects as a will. Deathbed gifts are indirect legal acts and could be placed in legal systematics of private law between a donation *inter vivos* and a will.

The presence of deathbed gifts in a legal order may potentially disrupt the coherence of the legal system. Wills transfer property in the event of death as contracts between the living. Deathbed gifts distort the clear distinction. Therefore, the prohibition of deathbed gifts usually seems to be an expression of striving to achieve an ideal dogmatic state of the legal order. It seems, however, that this state is unachievable because the prohibition of deathbed gifts does not extend to donations *inter vivos*, which after adding to them the condition in the form of donor survival by the recipient leads to the same effects as deathbed gifts. Therefore, on the example of the deathbed gift, we can observe that striving to create an ideal coherence in a legal system is more than difficult. Yet, an essential feature of the legal order is flexibility which ensures multiplicity, diversity, and pluralism in legal means.

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Mycenaean, Homeric and Archaic Greek Legal Concepts

Keywords: Mycenaean Greece, justice, early Greek law, court

We suppose there was a continuity in Greek legal history from Mycenaean to Homeric times.

1. Despite the collapse of the Mycenaean civilization, some Mycenaean legal terms have survived in the Homeric and archaic times. For example: 1.1. e-u-ke-to in PY Ep 704. 5-6 / PY Eb 297 and *εὔχετο* in Il. 18. 499 — in the sense 'swear in a court'.

1.2. Cf. myc. te-ke 'appointed' in jo-po-ro-te-ke (MY Ue 661), in o-wi-de , pu2-ke-qi-ri , o-te, wa-na-ka, te-ke , au-ke-wa , da-mo-ko-ro (PY Ta 711) 'Thus P. (fem.?) made inspection, on the occasion when the king appointed Sigewas' (Chadwick), hom. *ἔθηκαν in τὴν γὰρ Τρῶες ἔθηκαν Ἀθηναίης ἱέρειαν* 'for her had the Trojans made priestess of Athene' (Il. 6. 300) and *θε͂[ναι]* in μόνφον θε͂[ναι] 'condemn as criminal' in the inscription from Arcadia V century BC (IG V,2 262).

1.3. a-no-qa-si-ja (PY Ea 805) as *ἀνδρο-φασία* 'murder'.

1.4 Cf. za-mi-jo (KN As 1517) and *ζαμία* 'punishment'.

1.5 Cf. qo-i-ṇạ (KN X 7735) and ποινή.

1.6. Cf. part. praes. act. o-pe-ro 'debtor' in the phrases o-pe-ro du-wo-u-pi (PY Ep 613), o-pe-ro-sa duwo-u-pi (PY Ep 704) 'owing to two (or twice?)' and *ὀπῆλεν διπλεῖ* in the inscription from Dreros about 650 BC (Nomima I.81), *διπλάσιον ὀφείλειν* (And. 1.73), *διπλῆν τὴν βλάβην ὀφείλειν* (Lys. 1.32; Dein. 1.60), *διπλοῦν ὀφείλειν* (Dem. 23.28) et cet. The double fine was characteristic of punishment in the Classical Greece. The double fine designated de facto *ἀτιμίαν* and the exile. We can find the same sense in the texts in Linear B.

2. It is very likely that the oath played an important role in the Mycenaean times and in the Homeric period (See: e-u-ke-to-qe in PY Ep 704. 5–6; PY Eb 297).

3. It is possible that in Mycenaean times a person paid compensation to the injured party for having killed, what we can observe in the Homeric epics (See PY Ea 805 the reason for land possesion e-neka a-no-qa-si-ja 'because of murder (?)'). One type of punishment could be forced labor (KN As 1517; PY An 129).

4. We can find the concepts of the king as the judge in Mycenaean as well as in Homeric times.

4.1 In the Homeric epics the words *ἀνάσσειν, ἄναξ* and *σκῆπτρον* are closely related (see Il.2.99-108). The gold and ivory sceptres were found in the royal tholos tombs of the Mycenaean times.

4.2 The Mycenaean Greeks may have had the idea of the court, during which special scales weighs people's souls. Some scenes of the *Iliad* contain reminescences of such beliefs. The proof of the existence of such ideas can be that in Mycenaean tholos tombs the ritual scales of gold foil decorated with images of butterflies were found.

4.3 The concept that the god gives the *θέμιστες* to the king may be very old. This scene was probably depicted on Minoan artefacts (e.g. seals). We can suppose this conception was elaborated under near eastern influence.

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In conventionibus contrahentium voluntatem potius quam verba spectari placuit

Keywords: theories of contract, interpretation of contracts, interpretation of statutes, contractual freedom, planning

The traditional way of interpreting contracts was based on the content of an actual agreement that was stipulated between the contracting parties. In recent decades, contracts tended to be interpreted according to expectations of the parties, particularly creditors. Therefore, the main values are not reaching an agreement or planned

results but securing the integrity of relations and mitigation of conflicts. It is no longer desired that pacta sunt servanda – agreements must be kept. Now, rather planning *est servandum*: planning must be kept and carried out. The paper is about contracts and planning.

The brocard *pacta sunt servanda* is understood as an expression of the principle of freedom of contract in the Latin language. Yet, it seems misleading to keep the brocard literally as a legal rule and interpret contracts strictly according to what parties expressed when entering the agreement. Papinian, a Roman jurist from the second century CE, wrote: 'It was decided that in agreements between contracting parties' intention rather than the actual words must be considered.' The contractual will or intention of the parties might be considered open to their plans. Therefore surprisingly, the ancient legal tradition allows us to interpret contracts with greater freedom and in a creative way by the latent and implied authorization from the parties. We apply what is known from interpreting statutes, as we read in the ancient Roman law: 'Knowing laws is not a matter of sticking to their words, but a matter of grasping their force and tendency.' The paper is about the civil law tradition on expectations of contracting parties.

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Aestimatio damni nel terzo capo della lex Aquilia: Le api a supporto della teoria del David Daube

Keywords: *lex Aquilia, aestimatio,* Daube

Tradizionalmente, si ritiene che il terzo capo della *lex Aquilia* prevedesse una condanna per il danneggiante a pagare al suo *dominus* il più alto valore che la *res* su cui s'era appuntata la condotta illecita aveva nei trenta giorni antecedenti. La dottrina maggioritaria ritiene che il *corpus* rappresentasse l'elemento base per il calcolo della somma dovuta, la quale era costituita almeno dal più alto prezzo avuto dal bene nel predetto arco temporale.

Ho sempre trovato singolare una simile interpretazione, essedo, invece, affascinato dalla teoria di David Daube, ma, esercitando come Avvocato, mi sono vieppiù persuaso dell'impossibilità d'una simile regola. Con questo scopo, dunque, ho vagliato le fonti, cercando di verificare se le stesse supportino l'interpretazione maggioritaria, oppure offrano argomenti in favore della lettura anglosassone. Tra le varie testimonianze che ritengo supportino l'ipotesi ermeneutica del Daube, ritengo si collochino i due passi che, in *sedes materiae*, si occupano delle api. Il riferimento è a D.9,2,49 pr. (Ulpiano, 9 *disputationum*) ed a D.9,2,27,12, (Ulpiano, 18 *ad edictum*). *Narra mihi facta, tibi dabo jus*: quali accadimenti sta narrando il giurista?

È nozione della comune esperienza che il fumo determini sulle api un effetti per così dire sedativo: ciò è determinato dal fatto che gli insetti, quando avvertono la presenza di fumo, ritengono che vi sia un incendio, pertanto, rispondendo ad un istinto incondizionato, corrono all'arnia, dove fanno incetta di miele, per poter affrontare la vita fuori dal nido, in attesa di costruirne uno nuovo. L'ingurgitamento di tanto miele ha come conseguenza un rallentamento dell'animale, il che lo fa diventare, dunque, poco pericoloso, perché gli rende difficile l'estrazione del pungiglione. In caso di molto fumo, la Regina, avvertito il pericolo, lancia l'allarme e cerca di fuggire, chiamando la colonia con sé. Ma tra i *facta* da tenere in conto ci sono le caratteristiche peculiari del bene "ape", che è una *species* di insetti detta "polimorfica", nel senso che le stesse si riuniscono in una società matriarcale formata da individui appartenenti a tre caste tra di loro diverse, la Regina, una femmina fertile, le operaie, femmine sterili, ed i fuchi, i maschi, impiegati per la riproduzione e presenti solo in determinati periodi dell'anno.

All'interno dell'arnia, le api sono non solo divise nelle predette caste, ma pure ognuna destinata ad una specifica funzione, con la conseguenza che il singolo insetto non può vivere che nella colonia, poiché abbisogna dei suoi simili per poter vivere. I due passi descrivono quattro possibili accadimenti: la fuga dell'intera colonia, oppure di alcuni elementi, senza che quella venga meno, oppure la morte di tutte le api o di molte di esse, però, ancora una volta, senza che si estingua l'intera famiglia. Tanto in un caso, quanto nell'altro, proprio perché nessuna ape in sé singolarmente considerata può avere un'utilità, è evidente che non il *corpus* dei singoli insetti può essere il fulcro dell'*aestimatio*. Questi brevi passi, nella loro stringatezza, confermano che la parola *res* del capo terzo, lungi dal descrivere il bene, indichi la faccenda "danno" nella sua accezione economicocontabile.

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De iure et tempore legum rogandarum

Keywords: Roman law, legislation, enmity

The aim of this paper is to show how personal and political enmity influenced Roman law at the end of the Republic. The famous example is the grudge between Marcus Tullius Cicero and Publius Clodius, but there are also other examples. Various means were used to prevent the unwanted legislation of an adversary, from the legal ones such as the *obnuntiatio* procedure to the illegal methods such as the plain use of violence. The content of the *leges* often also reflected the state of relationships between Roman political figures.

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Römisches Recht als ratio scripta des Europäischen Rechts

Keywords: Römisches Recht, *ius naturale, ratio scripta,* Eurpäischen Rechts

Im Fokus der Untersuchung liegt das Zeitalter, in welchem das Bild des Menschen der Antike im Zentrum der Weltbetrachtung steht.

Besondere Beachtung wird dabei der naturrechtlichen Idee über die Autonomie des menschlichen Verstandes als dem Grundstein des gesamten Rechtssystems und der Gerechtigkeitsidee gegeben. Im Rahmen dessen diskutiert der Autor das Verhältnis zwischen den Begriffen i*us gentium* und *ius inter gentes* im Sinne eines Systems rechtlicher Normen bei der Regulierung der Verhältnisse unter den Völkern (Inst. 1,2,1).

Des Weiteren wird die Verbindung der aristotelischen Methoden und des römischen Rechts in Betracht genommen. Die Frage welche Normen der Gruppe *ius naturae et gentium* zugeordnet werden sowie die Relevanz der allgemeinen Rechtsprinzipien aus D.50,17,206 ; 50,17,54 ; 50,17,55 ; 50,17,128 ; 50,17,203 stellen wichtige Bestandteile der Untersuchung dar.

Angesichts der Tatsache, dass Holland die führende Rolle auf der europäischen Rechtsszene im 17. Jahrhundert einnahm, werden die Betrachtungen des Hugos Grotius auf das Rechtssystem Hollands in Werk '*Inleidinge tot de Hollandsche Rechts – Geleerdheid*', sowie sein Betrag für die Auslegung des Prinzips *pacta sunt servanda* im Prozess der Aufwertung des römischen Vertragsrechts auf der Ebene internationaler Verträge erörtert.

Zusätzlich wird der Stellenwert des Naturrechts als Norm für die kritische Bewertung des römischen Rechts diskutiert, sowie seine Bedeutung als motivierende Kraft bei den Fortschritten der Reformen im Bereich des rechtlichen Lebens und schließlich als Grundlage für die komparativrechtlichen Analysen. Abschließend wird der Beitrag des Naturrechts für die Initiierung der kodifizierten Prozesse in Europa erörtert.

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Was there Some Kind of Eviction Control in Roman Law?

Keywords: *locatio conductio,* eviction control, possession, just cause, *relocatio*

As is universally accepted, social protection was not a feature of Roman law, much less a feature of Roman private law.

A prime example was the set of rules which governed the Roman lease contract (*locatio conductio*), with its evident absence of social protection. Freedom of contract reigned supreme.

Despite this, a few Roman legal texts (C.4,65,3; D.19,2,13,11; D.43,16,12) have been construed as granting some kind of eviction control similar to modern one (i.e., landlords must have a just cause for pursuing eviction). Thus, three main questions arise:

- C.4,65,3 (214) granted possessory protection to tenants, as Ihering defended, allowing the recovery of the leased premises if there was an unlawful eviction?
- could a segment of D.19,2,13,11 ('ut, prout quisque habitaverit, ita et obligetur'), written about *relocatio tacita*, transform urban tenancies in indeterminate-time contracts to which landlords could put an end only on the grounds set out in C.4,65,3?
- the 'iusta et probabilis causa' of D.43,16,12 meant that the tenant could resist to anticipated evictions promoted by the buyer or even if the lessor himself was the eviction's promotor?

As can be easily observed, only C.4,65,3 dealt directly with evictions. D.19,2,13,11 appears in the context of *relocatio* and D.43,16,12 was written about the sale of the leased object when the *conductor* prevented its *traditio*.

In our view, the concept of eviction control was alien to Roman jurists and even to imperial legislation. On the whole, the available sources do not allow it as *locatio conductio* was not an isolated spot: its dogmatic (not to mention social) context was plainly inconsistent with eviction control. It is hard to conciliate the purported eviction control of C.4,65,3 with several texts condoning unlawful expulsions, even if at the same time damages for breach of contract were awarded to the *conductor*. Moreover, it would be puzzling to grant eviction control only during *relocatio*. And why grant it when *traditio* was hindered by the tenant and through a vague and case-by-case concept like *iusta causa*? Why not before and through direct solutions?

The protection of the tenant's right to remain in leased premises during an agreed time was a *ius commune* creation. Only after this was an eviction control conceivable – and anachronistic readings of historical sources should be rejected.

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Of Cargoes and Men: Law and Communication in Roman Sea Trade

Keywords: maritime trade, communication, transmission of information, material culture

As part of a customary and transnational tradition, sea trade practices constitute a rich source of experience, which is as valuable for the development of modern maritime law as for its reforms. This talk aims to bridge the gap between theory and practice and intends to understand what kind of communication was established between lawyers and merchants. Reading the texts of the Digest, it is possible appreciate that Roman law provided very sophisticated solutions for daily commercial issues. However, trade during the Roman Empire developed under conditions of imperfect government enforcement in private contracting. The Roman government did not use their policing power to coerce private contracts made under the rules of its legal system. Thus a big part of jurisdiction will rely on non-imperial institutions, which appear as essential for the resolution of controversies and issues. In addition, when connecting material remains and legal texts, it is possible to appreciate that the works of Roman jurists sometimes reveal that they were not quite aware of what was going on in daily commercial practices performed by the people involved in trade.

There are two inter-connected queries that indicate the background of this study: What is the relationship between Roman law and the society that

produced it? How far can we see of that relation in the material evidence? There are two divergent academic views on the issue: on the one hand, the scholars who think that Roman jurists just created law for the elite, and that consequently it does not reflect many elements of society, and on the other hand, these who think that there was a close relationship between law and society. However, both views have just benefitted of a study on the written sources, ignoring what concerns the material evidence, what can cast a light in this issue. To that aim, I will merge ancient legal sources and the archaeological record in order to understand if there was a relation within the rulings established by law and the materials and structures used in the practice. An interdisciplinary study of sources is necessary, and that in fact, the study of Roman law by itself reveals that Roman lawyer' s approach to law was mostly pragmatic, resulting in the creation of an instrument to be used in very different settings. In this talk, I will focus upon some concrete cases in order to illustrate the different issues of studying the communication and transmission of knowledge established between merchants and jurists.

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L'"editio maior" del Digesto di Theodor Mommsen e i manoscritti della 'Vulgata': nuove prospettive di ricerca

Keywords: *Digesto, Giustiniano,* Mommsen, Vulgata, *manoscritti*

L'edizione del Digesto di Mommsen fu completata nel 1870 e rappresentò un punto di svolta per gli studi storico-giuridici. Da allora, la scienza giuridica europea poté contare su un testo finalmente affidabile per avviare un processo di riflessione intorno al pensiero dei giuristi romani, che la condurrà ad elaborare quelle grandi costruzioni dogmatiche in grado di segnare profondamente il pensiero giuridico occidentale. Quella di Mommsen fu un'impresa straordinaria, per la rapidità in cui la completò e per il modo in cui superò le difficoltà poste dalla tradizione manoscritta di quell'opera. Tuttavia, voci sempre più insistenti hanno evidenziato i limiti e le contraddizioni del suo impianto editoriale. Si tratta di critiche che gli rimproverano in particolare di aver dato scarso rilievo a quei manoscritti dell'XI-XII secolo, che conservano una versione testuale del Digesto differente da quella tramandata dal *codex Florentinus* (F), risalente al VI/VII secolo, ma in più punti superiore ad essa. Una versione detta *Vulgata* o *littera Bononiensis.*

Dopo aver ripercorso le ragioni per cui Mommsen operò in tal modo, si discuterà delle critiche mossegli dalla dottrina successiva. Ciò, per definire alcune linee di ricerca meritevoli di essere sviluppate e concernenti in particolare il problema della ricostruzione del testo autentico o 'originale' (a livello giustinianeo) del Digesto, alterato dalle vicende della trasmissione, nonché l'altrettanto spinosa questione della formazione della *Vulgata.*

Quanto alla restituzione del testo autentico delle Pandette, si valuterà se la *Vulgata* conservi lezioni superiori a F, ulteriori rispetto a quelle individuate da Mommsen, Kantorowicz e Kaiser, non riconducibili a fortunati errori dei copisti o a felici restituzioni dei medievali. Per farlo, si procederà valutando caso per caso, non meccanicamente, ma sulla scorta del contenuto di altri frammenti dello stesso giurista (per ricostruirne il pensiero e lo stile) o di altri *prudentes* (alla luce quindi della disciplina del singolo istituto 'toccato' dalla variante discussa). Ci si servirà inoltre della tradizione greca (Basilici e relativi *scholia*), dei pochi testimoni prebolognesi del Digesto e di quelli che ne tramandano una *littera* diversa dalla *Florentina* e dalla *Bononiensis.* Anche rispetto alla formazione della *Vulgata* sono diverse le questioni aperte meritevoli di essere nuovamente indagate, tra cui: quale fu il testo medievale del Digesto, come mutò nel tempo e lungo quali direttrici, come riuscirono i giuristi medievali a conciliare la varietà delle sue forme con le esigenze di certezza imposte dalla pratica e con la loro concezione teocratica del diritto, che rifuggiva dale contraddizioni o cercava di ricomporle attraverso meccanismi logico-razionali.

Sarà l'occasione per esporre i primi risultati di una ricerca più ampia, che si inquadra nel progetto *For. Ma. - The Forgotten Manuscripts*, avviato presso l'Università di Padova (PI Paola Lambrini) e teso a studiare la tradizione manoscritta del Digesto e del Codice di Giustiniano, partendo da due codici del XII secolo conservati presso la Biblioteca Universitaria di Padova e contenenti il *Digestum vetus* (n. 941, utilizzato da Mommsen per la sua *editio maior* e indicato con la sigla 'U') e i primi nove libri del *Codex repetitae praelectionis* (n. 688).

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Relegatio in insulam of Hadrian's Era: The Case of King Rasparaganus

Keywords: *relegatio*, epigraphy, Hadrian, Rasparaganus, Roman law

In a small island in the Pola bay (west of modern Croatia) two sarcophagi with inscriptions were recovered, one belonging to the Sarmatian king Rasparaganus and second to his son Peregrinus. They record presence and death of the royal family of the Sarmatian tribe of Roxolani which occurred far from their homeland in the eastern parts of modern Romania. The sarcophagi denote both persons with Roman *nomen* and *praenomen* – Publius Aelius, which is identical to the emperor Hadrian's name with whom, according to *Historia Augusta* and Tacitus, Rasparaganus reached a peace agreement in 117/118 CE. Together with historiographic sources, these inscriptions confirm that after the defeat the Roxolan royal family was exiled from the Romanian plain to a small island in the northern part of the Adriatic Sea and that both Rasparaganus and his son died there as captives. They suggest that after Rasparaganus had made a peace agreement with the emperor Hadrian, in return he was granted Roman citizenship and simultaneously he took a Roman name, while all servants he had in Sarmatia were manumitted and awarded with the status of *libertini*. After that they were sentenced to exile and brought to an island in which they were

confined for the rest of their lives.

Historians often put forth that they were relegated (*relegatio*) there, though, such views have never received an adequate explanation. The case dates back to the era of the emperor Hadrian and is closely connected with him personally and with the policies and military campaigns he took in the East against Sarmatian tribes. From the legal standpoint the case is interesting because the status of *relegatus* in the Hadrian's period was reserved only to the specific groups of the Roman citizens. Moreover, by its nature, prerequisites and legal effects *relegatio* of Hadrian's era considerably departed from the Republican *exilium* and the imperial *deportatio*. Further, it was in the last decades of the 1st century and first decades of the 2nd century that *relegatio* went through considerable changes and received its final shape in the time of Hadrian. These can be reliably identified in the two aforementioned inscriptions.

By using the two epigraphic records and the legal sources the author will explain tight connections between the grant of Roman citizenship, the taking of Roman names by the Sarmatians, and manumission of their slaves on one side and the relegation of the Sarmatian royal family on the other. By using both legal and historical arguments, he will try to show that the act of relegation of the king Rasparaganus and his family fully reflects the novelties that the emperor Hadrian introduced in Roman law within the *relegatio*. Based on the epigraphic argument this paper will explain the changes in Roman law of *relegatio* in the relatively short period from Traian's to the Hadrian's rule and how it received its final shape.

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Adtemptata Pudicitia: Sanción al Acoso Callejero en la Experienca Jurídica Romana

Keywords: Acoso callejero, *adtemptata pudicitia, iniuria, convicium,* edicto *de iniuriis*

Durante el año 2018, en Chile, varios municipios comenzaron a establecer, vía ordenanzas municipales, sanciones económicas contra el acoso de connotación sexual en espacios públicos o de acceso público. Tales normativas, inspiradas sin duda en los últimos influjos feministas, no han estado exentas de críticas, sobre todo después de que en la comuna de Las Condes un verdulero fuera multado por decirle a una transeúnte menor de edad que *'coma más ensaladas para conserver su linda figura'*. Dichas críticas gravitan en torno al rol que debe jugar el derecho en la sanción de conductas como éstas.

Se dice que la historia es cíclica y lo cierto es que en la experiencia jurídica romana estos casos de acoso callejero se dieron, recibiendo una regulación pretoria en el *Edicto de iniuriis*. En él, se estableció la *adtemptata pudicitia* (*Inst. 4, 4, 1*) como una forma especial de *iniuria* (*Gai. 3, 220*) mediante *convicium* (*Ulp. 58 ad Ed. D. 47, 10, 9, 15.*-) que sujetaba el acoso callejero a mujeres y jóvenes a la *actio iniuriarum aestimatoria*, y por ende, estableciendo penas pecuniarias para esta forma particular de comisión del delito.

En este trabajo se propone analizar la *adtemptata pudicitia* como una forma se sanción del acoso callejero. Para ello comenzaremos con una revisión de la situación pre-edictal en la cual se encontraban los acosos callejeros (*T. 8,1b.*-), para luego analizar su regulación en el edicto, de forma tal de determinar el contenido de los atentados impúdicos (*Ulp. 58 ad Ed. D. 47, 10, 9, 4.*-), así como los sujetos activos y pasivos de este delito, su forma de comisión y sus sanciones (*Ulp. 58 ad Ed. D. 47, 10, 9, 15, 15-24.*-). Finalmente buscaremos la *ratio* tras esta regulación edictal, de forma tal de contribuir con una revisión histórico-dogmática a la discusión en torno a si es el derecho el llamado a sancionar el acoso callejero desde la perspectiva de un sistema jurídico que efectivamente las reguló y sancionó. Creemos que las actuales regulaciones en torno al acoso callejero tienen un correlato muy próximo en el *Edicto de iniuriis*, aun cuando es dable pensar que éstas no lo hayan tomado como fuente.

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Misure protettive contro un concepito Nell'antica Roma

Keywords: Diritto romano, nascituro, misure prottetive, *SC Plancianum de liberis agnoscendis, cura ventris*

Il nascituro era tutelato sin dal concepimento. Le fonti ricordano l'*inspectio ventris* per accettare la gravidanza, la *custodia ventris* per sineerarsi del suo svolgimento, *la custodia partus*. In ordine cronologico, la prima delie norme varate a tutela di gravidanza e nascituro ebbe a trovarsi nel *SC Plancianum de liberis agnoscendis*, integrata poi da quelle dell'editto *de inspiciendo ventre custodiendoque partu* e del rescritto *divi Fratres*. L'*inspectio ventris* veniva effettuata per accertare lo stato di gravidanza. Il *custodire ventrem* autorizzava a yigilare sull'incinta per evitare la sostituzione di neonati. La costituzione dei *custodes ventris* era regolamentata dal *SC Plancianum* varato sotto Adriano. Nell'ambito delia *custodia ventris* la donna veniva sottoposta ad esami durante 1'ultimo mese di gravidanza (*ante dies triginta quam parituram se putat*). I *custodes ventris* controllavano le abitazioni dell'incinta in prossimità del parto; i *custodes partum* sincaricavano di osservare il momento della nascita. Tutti gli istituti in parola erano informati alla tutela del nasciturо.

L'editto pretorio regolava la successione del nascituro concepito in vita del *de cuius* assicurando alla donna incinta il possesso provvisorio *ventris nomine*, considerando che dopo la nascita il bambino sarebbe entrato nel novero dei *sui heredes* del defunto.

La *cura ventris* veniva istituita anzitutto per tutelare i diritti che il bambino avrebbe acquisito in quanto erede del padre ovvero del nonno. Errando, alcuni romanisti collegavano tal cura con altri diritti connessi con la gravidanza e il parto: i*nspectio ventris, custodia veniris, custodia partus*. Il *curator ventris* rimpiazzava i *custodes* nel prevenire qualsiasi tentativo di parto sottoposto

o simulato. L'istituto era a rischio di marginalizzazione che poteva evitarsi contemplandolo quale strumento posto a esercitare i diritti di colui *qui in utero est*. Prendendo inizio dopo la costituzione del curatore, e il suo consenso, la curatela aveva efficacia per tutta la durata della gravidanza, potendo cessare allorché il *curator ventrisne* venisse sollevato in virtù del privilegio *ius trium liberorum.*

Responsabile dei suoi atti al pari di altri curatori, il curatore del nascituro veniva designato in base a criteri - data la delicatezza del suo incarico - particolarmente severi. Il *curator ventris* registrava quanto rientrasse nella inassa ereditaria che, per parte sua, garantiva (*satisdatio*). Responsabile per disonestà (*crimen suspecti*) nei confronti del pupillo, il curatore lo era in particolare qualora, amministrandone o aliendone il patrimonio, si fosse dimostrato negligente o avesse preso decisioni esorbitanti dal suo mandato ovvero si fosse impossessato di beni del pupillo o li avesse usati a proprio vantaggio. D'altronde gli spettava l'*actio contraria*. Tutte le spese, nonché le pretese a titolo di curatela, erano rimborsabili se sostenute in buona fede e nell'interesse del nascituro.

MAREK NOVÁK

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The Influence of Roman Law on the Concept of Possession in Czech Civil Law

Keywords: possession, usucaption, Czech Republic, civil code, reception

Is it possible to possess a right? Whereas Roman jurists hesitated to recognize the idea, the new Czech Civil Code does not allow any option. The influence of Roman law on the concept of possession according to the effective Czech legal regulation, especially with respect to the object of possession, is analysed in the paper.

Possession is a unique phenomenon which was introduced for the first time by Roman law. It belongs to specifics of Roman law that it distinguishes between property right and actual control intentionally exercised toward a thing. According to our belief, Rome was the only ancient nation that acknowledged this factual state in law, on solely practical reasons, and even provided it with special possessory protection executed by the *praetor* using *interdicts*, later the protection became judicial. Characteristically, possession was considered real factual power over a corporeal thing, that is perhaps the reason why the etymology of the word is derived from phrases *positio*, *sedere*, *potis* or *προτί*, which means to 'sit with power' or to 'sit nearby', both definitions emphasize a material nature. According to the primary sources it seems that possession of a right was conceivable, for instance usucaption of a servitude, *quasi possessio* or *possessio iuris* are mentioned in the texts, however, it is questionable if these examples are identical with possession of a corporeal thing.

The paper demonstrates the extent of reception of Roman law in Czech civil law and emphasises influence of Roman law regulation on modern legislation. Five years ago, the new civil code no. 89/2012 Sb. came into effect in the Czech Republic. The authors of the code refer repeatedly to Roman law and oppose the development in the second half of the 20th century under the influence of the communist ideology. Contrary to former regulations, the civil code pays more attention to possession and its characteristics, explicitly grants specialized actions against disturbance of possession and against deprivation of possession. However, the new civil code does not consider a corporeal thing to be an object of possession. In order to unify terminology, possession of a right is the only possibility, and thus the concept of possession of a corporeal thing is replaced by possession of a proprietary right. The paper focuses on reasons of this approach, discusses its suitability, and explores possible Roman law parallels.

ANNA NOVITSKAYA

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Libri actionum nella giurisprudenza romana del periodo repubblicano

Keywords: *actio, rituale, legis actio, letteratura giuridica, libri actionum*

Nell'epoca repubblicana del diritto romano la *legis actio* è una procedura rituale legata al caso concreto e orientata verso l'accertamento dello *ius* in mancanza di norme giuridiche astratte. Le *legis actiones* possono essere utilizzate per la formalizzazione di negozi orali, nonché come strumento processuale per agire in giudizio. Le *legis actiones* svolgono un ruolo centrale nella cultura giuridica orale della giurisprudenza romana repubblicana e rappresentano oggetto di riflessione per giuristi romani repubblicani. I giuristi raccolgono ed organizzano i rituali giuridici all'interno dei *libri actionum*, che divengono a loro volta un genere centrale della letteratura giuridica nel periodo repubblicano. I *libri actionum*, come il *ius civile Flavianum*, il *ius Aelianum* e i *Tripertita*, ma anche i *Manili actiones*, i *libri actionum* di *Ofilius* etc. contengono una selezione di rituali giuridici il cui scopo è quello di costituire negozi e la tutela in giudizio.

Le *actiones* perdono con il tempo il loro ampio senso creativo e si riducono a mere formule per la tutela giudiziaria. Con la riduzione e la tecnicizzazione dell'*actio,* i *libri actionum* non hanno dunque più rilevanza centrale nella tradizione letteraria giuridica. Tale posizione viene ora ricoperta dal Commentario all'Editto (*ad edictum*).

La relazione è dedicata all'analisi dei *libri actionum* come genere della letteratura giuridica repubblicana.

MARIA NOWAK

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ΑΠΑΤΟΡΕΣ once again

Keywords: succession, Roman Egypt, papyrology, Oxyrhynchos

The term *ἀπάτωρ* appeared in Egypt in Roman times and its actual spread can be dated between the first and third centuries. It took a new meaning in comparison with classical Greek literature. In the scholarship it is commonly accepted that the term applied to: 1.) children born to soldiers who could not contract a proper marriage before their *missio honesta*; 2.) children born of so-called 'mixed unions', e.g. a child born to an *aste* and

an Egyptian or an *aste* and a Roman; or 3.) children born of people who did not want to contract a proper marriage, but wanted to live together, e.g. a free-born man and freedwoman. In my opinion, none of these categories of individuals was labelled with the term *ἀπάτωρ*. In my paper I will examine the contexts in which the term was used and will try to re-define it.

O

ELENA QUINTANA ORIVE

Universidad Autónoma de Madrid |Spain

Observationes sobre la prohibición de adquirir bienes y recibir donaciones por los funcionarios provinciales en época postclásica y Justinianea

Keywords: bribery, governors, officials, *xenia*, donation

The legal sources of the postclassical and Justinianic eras reaffirmed that all profit-based activity that produced personal enrichments for officials in the provinces was forbidden. According to sources from the Republican era, governors and other provincial officials could not acquire goods or receive donations in the province in which they carried out their functions.

AYŞE ÖNCÜL

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The Continuous Existence of Roman Law under Ottoman Court Systems

Keywords: Roman Law, Byzantine law, Ottoman court systems, Harmenopoulos, Hexabiblos

The Turkish invasion of Byzantium resulted in the use of Roman law in the Ottoman Empire. In this study, we will explain Ottoman Court Systems briefly and hope to point out the need for non-Muslim courts in this system.

During the time of Orhan Bey, who transformed the principality of Osman in the Ottoman state, the Ottomans set foot in Rumeli in 1350s. The first base that they seized was the Gallipoli Peninsula. The Turkish invasion followed the publication of the *Hexabiblos*. This compilation was new and more easily attainable than the other sources that had been applied to subjects concerning the law of persons and the tolerance of the Ottoman State towards its non-Muslim subjects.

We hope to show that while the Ottoman Empire evolved, Ottoman legal education and court systems used and preserved some of the legal heritage of the Roman and Byzantine empires when in need.

P

MARLENE PEINHOPF

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Itaque tanto est sermo Graecus Latino iucundior: Überlegungen zur Verwendung griechischer Termini in den Digesten

Keywords: *Graeca vox, S*trafrecht, Verfahrensrecht, *Irenarch, Anakrisis*

In den Justinianischen Digesten finden sich zahlreiche griechische Termini. Die Gründe, die dafür in der Literatur angeführt werden, reichen von lexikalischen Lücken in der lateinischen Sprache über rein prahlerische Motive der *iurisperiti*, rhetorische Zwecke, eine bessere Verständlichkeit für das Zielpublikum bis hin zum Evozieren des griechischen Kontextes. Trojes (Graeca leguntur, 1971) Kategorisierung des Griechischen in den Digesten in vier Gruppen ist unvollständig und bedarf noch weiterer Konkretisierung. Am häufigsten ist die Verwendung einzelner griechischer Ausdrücke; bekannte und jüngst viel diskutierte Beispiele sind Ulp. 11 *ed*. D. 50.16.19, Paul. 2 *ed*. D. 50.16.5.1, Labeo 2 post. *a Iav. epit*. D. 28.7.20 pr. und Iul. 54 *dig*. D. 50.17.65.

Im Vortrag werden einige weitere Passagen, in denen griechische Ausdrücke vorkommen, näher beleuchtet, wobei insbesondere auf den ursprünglichen Kontext der *Graeca vox* eingegangen wird. Beispielhaft sei Marcian. 2 *iud. publ*. D. 48.3.6.1 genannt, das von einem Verfahren *extra ordinem* gegen *latrones* handelt und in dem der Jurist das griechische Wort *ἀνάκρισις* verwendet: Der Irenarch sollte in diesem Verfahrensabschnitt anwesend sein und seine Aufzeichnungen über die Befragung der Räuber darlegen. Warum der Jurist hier auf die griechische Bezeichnung zurückgreift, wird unter anderem Gegenstand des Vortrages sein.

JULIO PELAEZ

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The Distinction between prescripción (prescription) and caducidad (limitation of action, caducité) from the perspective of the actio

Keywords: *actio, caducidad, prescripción,* limitation of action, lapse

The distinction between '*prescripción*' and '*caducidad*' is usually confused in Spanish-speaking countries. There are many ways the distinction between these two terms has been explained. Many authors have made differentiations but the legal theories behind them have always caused confusion so that the explanations are full of contradictions.

Many of these explanations are accurate, but they do not explain their reasoning. In the end one can come to the conclusion that they are two institutions of a kind.

Therefore, the explanation on how to differentiate these two institutions has to be outside the institutions themselves. This means there has to be some link or bond that made this differentiation possible.

One way to explain this distinction can be done from the perspective of the actio. Spanish speaking countries think very often from the perspective of the legal process when they talk about law. The phrase: *pas de question,*

pas de action, seems to be the rule when it comes to law. However, the distinction made in Windschied's *Klage und Anspruch* has been present in the legal codes for decades. The civil procedure codes seem to have made this distinction, but not explicitly. Still that distinction is already a reality that many jurists want to deny. By making a comparison between *Klage* with '*caducidad*' and *Anspruch* with '*prescripción*' there is a new possibly satisfactory explanation.

MARTIN PENNITZ

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Laesio enormis 'revisited'

Keywords: *emptio venditio, laesio enormis,* Diokletian*, rescindere, iustum pretium*

Die Diskussion um die Rechtsfigur einer sog. *laesio enormis* im römischen Recht, die sich bekanntlich vor allem auf zwei Konstitutionen der Kaiser Diokletian und Maximian stützt (C. 44.44.2 und 8), wird auch in den letzten Jahren mit hoher Intensität geführt: Das zeigt sich nicht nur in einer Vielzahl neuerer Publikationen zum Thema (auch in der RIDA erschienen etwa 2007, 2014 und zuletzt 2017 einschlägige Beiträge), sondern macht zugleich deutlich, dass die Suche nach einer überzeugenden Interpretation dieser Quellen noch nicht abgeschlossen erscheint.

Allerdings gelangen im Jahr 2018 zwei eingehende und äußerst gehaltvolle Arbeiten zum Thema zu übereinstimmenden Folgerungen: Zum einen habe man davon auszugehen, dass die beiden Reskripte in ihrem wesentlichen Inhalt auf die Zeit Diokletians zurückreichen, wobei kleinere sachliche und sprachliche Änderungen von Seiten der justinianischen Kompilatoren nicht auszuschließen seien. Zweitens handle es sich um Einzelfallentscheidungen zu einem für diese Zeit typischen Sachverhalt, denen keine generellen legislatorischen Ziele zu unterstellen seien: Dementsprechend gehe es bei den Reskripten auch nicht in erster Linie um Preisgerechtigkeit beim Kauf. Drittens könne man aber die Entscheidungen mangels expliziter Hinweise im überlieferten Text und angesichts ihres konkreten Regelungsinhalts ebensowenig vor dem Hintergrund einer Verhinderung von Landflucht, eines Schutzes der ländlichen Bevölkerung vor Ausbeutung oder einer Bekämpfung der Inflation verstehen.

Bei Doris Forster (Ona´ah und laesio enormis, 2018) führen solche Überlegungen dann zum Ergebnis, dass bei den Normierungen weder eine Rezeption aus dem jüdischen Recht noch – vice versa – eine Beeinflussung des rabbinischen Rechts durch das römische anzunehmen sei. Bei Paola Lambrini (Quaderni Lupiensi 8/2018) werden die beiden Regelungen darüber hinaus dem allgemeinen Themenbereich *de rescindenda venditione* zugeordnet und zu diesem Zweck insofern inhaltlich ergänzt, als es sich hier um eine ausnahmsweise Ausweitung des Minderjährigenschutzes auf *personae alieni iuris* (Haussöhne) gehandelt haben könnte.

Aufbauend auf diese neuesten Ansätze und insbesondere auf die innovativen Überlegungen von Lambrini wird mein Beitrag – unter Einschluss weiterer Belege (z.B. die bislang etwas vernachlässigte Konstitution C. 4.44.11) – eine Interpretation der beiden Reskripte vorlegen, die ohne inhaltliche Ergänzungen auskommen möchte und somit allein auf dem überlieferten Wortlaut basiert.

DAVID PERRY

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Roman Statute Law in Latin Poetry

Keywords: statutes, poetry, law and literature

This paper addresses the theme '*Le droit et sa place dans le monde antique*' through the lens of law and literature. I explore how poets productively used one aspect of the legal knowledge available to them: statute law. Statutes appear rarely in Roman verse: out of the 500 or so attested laws in Rotondi's *Leges publicae populi Romani* (1912), the *Roman Statutes* of Crawford *et al*. (1996), and Callie Williamson's *Laws of the Roman People* (2005), no more than ten are identifiably referred to in poetic texts. I argue that the poets saw statutes as early in date and, presumably approved by some large portion of the populus, as authentic expressions of the spirit of earlier Romans. Therefore these laws are proxies for the virtues of the *maiores* often described by later republican and imperial writers.

The Twelve Tables are mentioned in many places. Other statutes appear in verse by Plautus, Varro (in the *Menippean Satires)*, Horace, Juvenal, and Martial. I discuss creating this corpus of poetic texts: I have not included references to concepts of ius or right, which are far more common than references to specific statutes. I also do not include social situations that may have legal consequences. I focus on texts referring to *leges*, *plebiscite*, and *rogationes*. Participant comments on this operation are especially welcome. The corpus is intended for studying how Romans' awareness of the creation and validity of Roman statute law affects the poetry they wrote.

The rules in the statutes in the corpus tend toward the social and moral: they do not cover administration or foreign relations but, rather, dice-playing, relations in public, and relations between the young and aged. This is no accident: the poets make the close connection of *mos* and *lex* seen in Horace (e.g., in *Odes* 4.5.21-24) and elsewhere. But Horace's complex, ironical interactions with the statutes among the reforms of Augustus are exceptional among the texts.

Other writers seem not to question the virtues they find in old statutes, but present them as normative and with little comment. Similar uses of laws for their moral dimension can be shown in prose writers like Livy and Macrobius, but poets' uses contain more riches for the interpreter.

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Insani, stulti, furiosi: Featuring Mental Disorders in Graeco-Roman Literary and Legal Sources

Keywords: Roman law, mental disorder, legal capacity, history of medicine, history of psychiatry

Based on various literary, medical, and legal sources, the paper attempts to outline the Graeco-Roman approach to what we currently call ‘mental disorders’. ‘Madness’ received a significant amount of attention in ancient Greek and Roman texts, and as a first step we try to offer insight into the various opinions of physicians and other authors regarding the origins and very nature of the condition.

This goal is somewhat difficult to achieve, due – among others – to the fact that, in the Graeco- Roman world, the dividing line between a ‘doctor’ and a layman was not clearly defined, and the prerogative of physicians to decide what mental disorders were, and who was suffering from any such disorder, was not recognised at all.

Although ancient doctors could not and did not distinguish between physical and mental disorders, many of them quite probably felt entitled to judge grave mental issues and moral character flaws equally; no legal sources, however, are known to regulate the issue to this effect, i.e. that physicians were recognised and required by any law to act as court experts in cases when the ‘sanity’ (regardless of whatever the meaning of this expression might have been) of a respondent or an accused person was questioned.

The interpretations and explanations regarding mental disorders are quite colourful in the available sources. Some followers of Hippocrates presumed that mental illness occurred in the brain, while various other sources describe a great variety of deviant behaviour patterns ranging from character flaws to conditions recognised as mental illness by our contemporary Diagnostic and Statistical Manual of Mental Disorders.

Non-medical authors often proposed views of mental disorders that were quite different from those of the doctors. One of the most important authors, Plato, in his work ‘Timaeus’, introduced the idea that madness was a condition of the soul. On the other hand, Plato also classified moral aberrations as ‘madness’.

We then investigate into certain fragments of the Digest (e.g. D.28.7.27 pr. Modestinus; D.21.1.4.3 Ulpian; D.1.5.20 Ulpian), in order to draw a picture about responsibility; i.e. how the ancient lawyers answered the question also asked by their modern successors: Are people suffering from mental illnesses responsible for their actions? Apparently, philosophers, physicians, and also lawyers struggled with the answer to a certain extent, because – as we could previously see – they could not always distinguish between mental and physical illness and between mental illness and ‘bad character’. However, Roman lawyers apparently tended to think that a mental illness with grave bouts of aggression (*furor*, i.e. a state of insanity ‘where the person in question lacks all understanding through the continuous alienation of his mental faculties’ - D.1.18.14 Macer) should and did relieve the affected individual from the responsibility for their actions. An insane parricide was to be imprisoned not put to death, and insane murderers were not held liable under the homicide laws (D.1.18.13.1 Ulpian; D.1.18.14 Macer; D.48.9.9.1 Modestinus; D.48.8.12 Modestinus).

ANNA PLISECKA

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Ignorantia iuris in Scaevola 1 dig., D.50.9.6.

Keywords: *ignorantia iuris*, municipal statute, Q. Cervidius Scaevola

The principle *ignorantia iuris non excusat*, according to which nobody can be excused from suffering the consequences of legal norm by simply asserting the lack of knowledge of it was known to Roman law and is commonly recognized in various modern legal systems.

In contrast to that general principle Q. Cervidius Scaevola in the first book of his *Digesta* (D.50.9.6) holds the contrary opinion in respect to a municipal statute. The jurist contemplating a case, in which a member of *curia* issued a sentence in contrast with norms of municipal law, claims that he can be excused from suffering the penalty on the ground of ignorance of the norm in question. The present paper aims at understanding the relationship between the general principle and the opinion of Scaevola.

MILENA POLOJAC

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Paulus D.9.2.30.3: some remarks on the farmer case in the western and eastern European legal tradition

Keywords: Paul’s farmer case, *ius commune,* Byzantine compilations, Slavonic compilations, Serbian compilations

The farmer case is one of the famous cases by Paul. It deals with the *culpa* requirement in the context of interpretation of the third chapter of the *lex Aquilia*. The damnum can be caused by burning (*urere*). In this specific case, somebody burns stubble on a farmer’s fields and the fire escapes further and spreads and burns another’s crops or vineyard. The wrongdoer was only liable when he was at fault, *culpa*. If he did so on a windy day, he is guilty of mischief, for he who even provides the opportunity is deemed to have done the harm.

In the medieval *ius commune* the text served, together with other texts dealing with the *culpa* requirement, as a basis

for the construction of a general theory of *culpa*. The canonists used the case as the most relevant text in Roman law for the question of causation starting from the sentence *qui occasione praestat, damnum fecisse videtur* (the person who created the opportunity that could lead to damage is also deemed to have caused the damage).

In the Byzantine compilations, for example the so-called *Isaurian Ecloga*, the text was abridged by dropping the first sentence from Paul's fragment: *In hac quoque actione, quae ex hoc capitulo oritur, dolus et culpa punitur*. This avoided theoretical issues, since only pure causitry was preserved. At the same time, the context of the Aquilian statute was neglected (Ecloga, XVII.41, Prochiron, 39.75). In the Farmer's Law (*Nomos georgikos*), paragraph 56, the text was even more abridged, but the reminiscence on the Paul's text is clear. The farmer case was associated with criminal law and merged with the fragments from the Digest book 47.9, and the cases of incendium. This reception shows the decay and vulgarisation of the Justinianic tradition. The farmer case is found in the earliest Slavonic legal code: The law on the trial of people, 10. Century (*Zakon sudnyi i lydem*), based mainly on the Ecloga. The text became part of the compilations used in medieval Serbia written in the Serboslavonic language: the Nomocanon of Saint Sava, ca. 1219, the Syntagm of Matthew Blastares, the abridged version of the Syntagm of Matthew Blastares, the Constantine Justinians Law, 14th century, and the Farmer's Law, 15th century.

DAVID PUGSLEY

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Bluhme Simplified

Keywords: Bluhme, First Table, *Deo Auctore*, Time-scale, Compilers

Paul Krueger, *Ordo librorum*, five pages at the back of the Digest, SEPA, combining Bluhme's first and second tables.

Bluhme, First Table, two fold-out pages, at the beginning of the article (as suggested by Savigny), parallel columns, other tables left to the end so as not to break the thread of the presentation.

Bluhme simplified:

S	**E**
Sab 102	68 Ed(1)
Ed(2) 65	79 Ed(3)
7 Ed(2b)	5 Ed(2a)
Ulp 32	36 Paul
Julianus	Celsus/M

NB, my simplification, not Bluhme's, but the details can be checked in Bluhme's First Table.

Note the parallelism, which cannot be accidental. Nothing similar in **P**.

Where does *Deo Auctore* fit in? (Make me a work which follows the order of the edict and is called Digest.)

Not at the beginning: Sab and Ed do not fit.

After Ulp 32 36 Paul: Julian, Celsus, Marcellus fit perfectly.

Time-scale: at one stage it was thought that the Digest could not be finished in 10 years

(*Tanta/Dedoken*,12). How and when was that calculated? At the end of the trial run.

What did Justinian and Tribonian do about it? They recruited more compilers. 17 compilers finished in 3 years; 1 compiler would have taken 51 years; and 4 compilers would have taken 12 years and 9 months, they would not have finished in 10 years. We are not told the names or numbers of the compilers at the beginning. There were 4, probably 1 *antecessor* and 1 *vir togatus* for **S**, and 1 *antecessor* and 1 *vir togatus* for **E**.

R

MERIKE RISTIKIVI and HESI SIIMETS-GROSS

University of Tartu |Estonia

Fontes iuris Romani: The Long Journey of Roman Law in Estonia and for Estonians

Keywords: Roman law sources, reception of Roman law, legal education, legal translation

Estonia belongs to the Nordic countries linguistically and culturally but differs in terms of legal development. There was almost no reception of Roman law in the Nordic countries, however, the territory of Estonia was part to the Holy Roman Empire until the end of the Middle Ages, and thus through the ruling German nobility, the influence of Roman law has clearly had an impact over the centuries. The 19th century codification of the private law in Baltic Provinces with many references to Roman law has been even called a 'Triumph of Roman Law'. The same codification was taken as a basis for the draft of a new private law code in 1920s. In the Soviet period, the Roman tradition was abandoned but as previously, Roman law was part of the law curricula even then. The re-established independence of Estonia brought back the legal culture that was based on Roman law. In our presentation we will observe these developments further. Although the Estonian language became the language of law studies more than 100 years ago, the texts of Roman legal sources have not been translated into Estonian, except for a translation of the XII Tables. This lacuna has now changed with a recent publication of new collection of Roman law sources which we will also deal with in our presentation.

MARIAGRAZIA RIZZI

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Diritto, riforme metrologiche e loro impatto sui costi di transazione nel Mediterraneo antico

Keywords: costi di transazione, mina commerciale, pentamina, armonizzazione metrological, diritto commerciale antico

Tra i fattori che contribuirono alla riduzione dei costi di transazione nell'area del Mediterraneo antico, riveste un ruolo centrale la diffusione di una 'tecnologia della misurazione'

e di sistemi metrologici comuni. La collocazione di sekomata e mensae ponderariae nei mercati, i diversi interventi per combattere le frodi nel peso e nella misura, l'individuazione di autorità aventi la funzione di supervisionare la fabbricazione e l'uso di pesi e misure possono sicuramente essere letti in questa direzione. Particolare rilievo assumono, inoltre, alcune riforme metrologiche stabilite attraverso interventi normativi, tra cui un significato peculiare, nell'ottica dell'analisi qui condotta, riveste la riforma della mina commerciale introdotta da un decreto ateniese di età tardo ellenistica (IG II2 1013, ll. 29-37). Si offrirà una nuova interpretazione dell'aumento apparentemente sproporzionato della pentamina fissato nello psephisma e, confrontando le unità di peso greche e romane, si dimostrerà come esso non solo abbia comportato una più facile convertibilità tra Atene e Roma, ma abbia altresì facilitato i commerci nel Mediterraneo tra tutti i territori facenti uso di uno dei due sistemi.

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The Pedagogical Sequence of de rebus and de iudiciis

Keywords: *de rebus, de iudiciis, partes digestorum*, legal education

Omnem, the introductory constitution which is chiefly devoted to the reform of the legal curriculum at the time of Justinian, offers a rather puzzling piece of information when describing the new programme: either *de rebus* or *de iudiciis* –two of the *partes digestorum*– are to be taught during the second and third years of the legal studies, 'as the allocation of time allows' (*secundum quod temporis vicissitudo indulserit* [Omnem § 3]). Such enigmatic statement has raised questions as to the exact way in which studies were organized. A detailed analysis of *Omnem* suggests that the alternative teaching of both partes does not imply that one of them was taught as a whole after the other –as it has been thought by some scholars– but rather that students would alternatively study titles from both *de rebus* and *de iudiciis* during the second and third years. It is also most likely that the sequence in which the various titles were taught was very similar to that of the old legal curriculum. All of this poses the problem of determining the pedagogical sequence of *de rebus* and *de iudiciis*, and whether this can shed further light concerning legal education and systematization in late antiquity.

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Le Unioni de Fatto come ex variis causarum figuris

Keywords: unioni di fatto, matrimonio, fonte di obblighi, quasi-contratti, comunità di beni

La famiglia è un'istituzione in crisi. Queste difficoltà devono essere viste come un'opportunità per seminare e permettere ai nuovi dogmi legali di germogliare e prosperare in un ambiente che gode di abbondanza e equanimità legale.

È per questa ragione che si propone che le unioni di fatto siano considerate come generatori di obblighi, all'interno di ciò che Gayo conosceva come *ex variis causaum figuris*. Questa propposta esige un percorso storico critico che cerchi soluzioni dal passato per affrontare i problemi attuali che il Cile sta affrontando in termini di unioni di fatto. L'avversità che si presenta in questo viaggio è trovare una serie di istituzioni che permettano al loro turno di inquadrare all'interno delle loro line guida le unioni di fatto, senza rispettare la loro essenza come un generatore di obblighi.

Per quanto sopra, il panorama legale latino-americano relativo alle unioni di fatto deve essere considerato, questo sottosistema legale ha permesso il suo trattamento. Tuttavia, il Cile è l'unico paese che non riconosce nella sua natura il fatto di essere un generatore di obbligazioni. Sebbene il matrimonio e la convivenza siano istituzioni simili, con trattamenti simili, ma confrontati.

L'obiettivo della presente inchiesta è riconoscere che le unioni di fatto o le unioni non matrimoniali possono essere incastonate all'interno del sistema di fonti dell´ obbligazioni, che originariamente funzionava nel diritto romano. Per questo è necessario ricordare che le cause o la divisione dell´obbligazioni erano contratti e delitti, e che in seguito viene incorporata la nozione di *ex variis causaum figuris*, che dopo fu compresa e sezionata in due; *quasi ex contractu e quasi ex delicto*.

Entrambi i concetti, senza godere della natura delle fonti di obbligazioni, hanno ricevuto tale trattamento, poiché le conseguenze legali delle loro azioni assomigliavano ai contratti e/o ai delitti a cui erano assimilati.

È per questo motivo che le unioni di fatto (l´antico concubinato) meritano una menzione speciale, poiché le loro somiglianze con il matrimonio sono notevoli. E la verità è che il matrimonio a Roma era un fatto sociale che generava diritti e obblighi, formava certamente una comunità di vita tra gli sposi, non fu mai considerato o catalogato come un contratto. D'altra parte, il concubinato, oggi unioni di fatto, era semplicemente inteso come una comunità di vita sessuale che era tollerata entro certi limiti, specialmente in quei casi in cui il matrimonio non era legalmente possibile.

La verità è che le unioni di fatto hanno occupato uno spazio importante che si è concluso con il suo riconoscimento nella legge. La legislazione cilena si è verificata con l'approvazione della legge N° 20.830, che crea l'accordo di unione civile. Questo crea un sistema per gli effetti della convivenza simile al matrimonio, quindi entrambe le istituzioni sono viste in linea di principio, equiparate alla legge. Tuttavia, è escluso da questa le convivenze non registrata.

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La place de la propriété dans le système des 'choses' (res) en droit romain: actualités doctrinales

Keywords: civil law, droit absolu

La propriété romaine n'est pas conçue comme un droit (*ius*) sur les choses, mais sous la forme procédurale d'une relation d'exclusivité juridiquement qualifiée. Comme telle, elle tient lieu de pierre d'angle dans le système romain des 'choses' (les 'res', livres II et III des Institutes de Gaius). Cette configuration présente une actualité remarquable à la lumière des évolutions doctrinales récentes sur la propriété, telles que, à rebours de la tradition moderne du 'droit absolu', celle-ci apparait non comme un droit, mais comme un 'mécanisme fondamental du droit', suivant l'expression du civiliste français Frédéric Zénati- Castaing. On se propose de mettre à profit la qualification romaine de la propriété pour évaluer certaines impasses de la doctrine moderne en pays de Civil Law.

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Navicularii, naucleroi, and the Roman state in the second century AD

Keywords: *navicularii, naucleroi,* professional associations, Hadrian, Miletus

The relatively restricted dossier of contemporary information relating to the development of associations of shippers (*corpora nauiculariorum*) in the early Roman imperial period has recently received a significant addition. In a copy of a letter inscribed on a marble plaque unearthed in 2011 in excavations at the ancient port of Miletus (*L'Année Epigraphique* 2013, 1578) the Roman emperor Hadrian grants to the civic authorities of the port city permission to establish a hitherto unattested 'house of naucleroi' (*ναυκλήρων οἶκος*). This text sheds new light on the technicalities of the process of obtaining permission for a professional association. In this provincial context, this represents a moment of interaction between Roman imperial authority and local legal regulation. This example also draws attention to the potential legal implications of the specific location of incorporation for the running of such a corporation. This may offer an insight into the pattern of naming of the various *corpora nauiculariorum* attested around the Mediterranean.

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Causa and the Acquisition of Property

Keywords: property, *causa, traditio, usucapio*

Causa has a fundamental role to play in two of the methods by which an individual could become *dominus* of *res*: the derivative *traditio*, and the prescriptive *usucapio*. In both of these contexts there is a debate as to whether the *causa* needed to truly exist (constitute a *iusta causa*) or whether a belief in the adequacy of the *causa* was sufficient (as a *putative causa*). In both cases there the weight of the evidence is in support of the need for a *iusta causa*, but the texts do not speak with one voice. In relation to *traditio*, a lone text of Julian questions the need for anything more than an intention to part with *dominium*. For *usucapio*, the contents of D.41.10 on *usucapio pro suo* present a contradictory message to the preceding six titles on *usucapio* pursuant to various *causae*. This paper focuses primarily on Julian's reasoning in relation to *traditio*, in order to explain why it is he questioned the need for a *iusta causa* in that context. It then turns to the contents of D.41.10 and explores possible links between *usucapio pro suo* and *traditio*. It seeks to determine whether the contrarian approach to *causa* in these two modes of acquisition developed in isolation, or whether are influence in either direction can be identified.

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La responsabilidad por vicios ocultos de la cosa vendida, su origen histórico, evolución y encuadramiento dogmático actual?

Keywords: warrantees for latent defects, redhibitory actions, current dogmatic framework, resolutory action, essential breach

El derecho romano disponía de tres acciones contractuales por vicios materiales de la cosa comprada, la 'actio empti' para reclamar por daños, que exigía dolo del vendedor, y dos 'acciones edilicias' (redhibitoria y quanti minoris), basadas en una responsabilidad objetiva, en las venta de esclavos y animales en los mercados, para rescindir la venta o pedir reducción del precio, respectivamente. Los códigos civiles europeos, siguiendo la tradición romanística, recogieron las acciones edilicias. En la actualidad se debate el problema de la pluralidad de acciones existentes para la reclamación de responsabilidad por vicios ocultos. Así, por ejemplo, el Tribunal Supremo español distingue casos de incumplimiento esencial (doctrina del aluid pro alio) que dan lugar a la 'acción resolutoria' del artículo 1.124 Cc español y casos de responsabilidad por vicios ocultos que dan lugar a la 'acción redhibitoria' del artículo 1.848 Cc, con plazos de caducidad más cortos. Se critica hoy también la ambigüedad de esta distinción. La tendencia europea ha llevado al encuadramiento dogmático de los vicios ocultos en el 'incumplimiento esencial' de las bligaciones del vendedor a diferencia de las acciones edilicias recogidas en los códigos europeos. Tendencia que se ha reforzado por los cambios económicos, pero la solución escogida puede no ser la ideal desde todos los puntos de vista.

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D.14.3.20

Keywords: letter of credit, bank, commercial law, security in Roman law

In this paper, the text of D.14.3.20 (Scaevola 5 dig.) will be analyzed. The text tells us of a dispute concerning the meaning of letter, issued by a bank manager, ex-slave; in that letter the manager promises to pay a sum of money to the receiver of letter at the bank in the future. This promise could be interpreted as a kind of guarantee, because Scaevola used the verb '*cavit*'. However, this paper pays attention to the letter as a way of settlement or remittance: that letter resembles a cheque, bond or draft on a bank, because it was drawn by the bank manager in his office. So it looks like Letter of Credit for international trade. Therefore, the manager does not get security for the payment but is warranted that the letter would be converted into the cash at the teller's window of the bank branch.

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Interventi normativi giustinianei in particolari situazioni transitorie, caratterizzati da una specifica terminologia

Keywords: misteriosa costituzione greca, disposizioni transitory, const. Dedoken, traduzione greca della const. Imperatoriam, PT. 1.5.3

Nel § 22 delle costituzioni Tanta e Dedoken viene richiamato un testo greco, che la dottrina ha generalmente identificato con una versione greca della const. Omnem.

Rilievi cronologici e formali sui riferimenti al testo greco e riflessioni circa i tempi e i destinatari della riforma degli studi di diritto realizzata da Giustiniano, avvalorano invece l'ipotesi, recentemente avanzata da Lokin, di un provvedimento temporaneo e consentono qualche nuova spiegazione riguardo alle specifiche esigenze per cui esso sarebbe stato emanato 'in risposta' ai professori. Si sarebbe trattato, infatti, di una disposizione introdotta all'inizio dell'anno accademico, o comunque nelle settimane che precedettero la promulgazione ufficiale di Tanta, Dedoken e Omnem, non però, come ritiene l'autorevole bizantinista, efficace solo fino all'entrata in vigore della const. Omnem e limitata a prescrivere agli studenti le Istituzioni e il nuovo piano di studi, bensì anche e soprattutto con lo scopo di dettare un regime transitorio di raccordo tra il vecchio e il nuovo piano di studi, da utilizzare per gli studenti che al momento dell'entrata in vigore della riforma dell'intero percorso didattico frequentavano gli anni successivi al primo. Ulteriori conferme del carattere contingente del provvedimento sembrano venire da alcuni puntuali riscontri terminologici e dal ricorso a soluzioni transitorie anche in altri momenti particolari dell'opera di compilazione giustinianea. La stessa particolare terminologia, che, nel § 22 della const. Dedoken, ne specifica il carattere di risposta ad una esigenza manifestata dai professori, è infatti riscontrabile nella traduzione greca della const. Imperatoriam – la cui versione latina è stata considerata una 'misura d'urgenza' in vista della formale introduzione nell'insegnamento, tramite le constt. Tanta e Dedoken, delle Istituzioni insieme ai Digesta – per alludere ad un 'testo in risposta' alla cupida legum iuventus. Inoltre in PT. 1.5.3 – il cui passo corrispondente nelle Istituzioni ha indotto parte della dottrina a pensare al concepimento delle Quinquaginta decisiones come soluzione transitoria, in attesa della realizzazione dell'opera di compilazione dei Digesta – viene precisato con uguale nomenclatura che la decisio è stata una risposta scritta sollecitata da Triboniano.

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Zum Klagsziel der actio pigneraticia in personam contraria in D. 13.7.9 pr.

Keywords: Pfandrealvertrag, Konträrklage, *res aliena pignori data*

In D. 13.7.9 pr. (Ulp. 28 ad ed.) wird dem Pfandgläubiger die *actio pigneraticia in personam contraria* zugesprochen, um gegen den Pfandbesteller, der ihm eine fremde Sache übergeben hatte, vorzugehen. In der Lehrbuchliteratur wird teilweise vertreten, dass der Pfandgläubiger den Pfandbesteller mit der Konträrklage darauf klagen könne, dass ihm dieser an einer anderen Sache ein Pfand bestelle. Diese Deutung soll vor dem Hintergrund der Konzeption der Realverträge des klassischen römischen Rechts und der *iudicia contraria* diskutiert werden.

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Seneca, il beneficio della manomissione e l'accusatio ingrati liberti

Keywords: beneficio, manomissione, ingratitudine, *liberti*

Il De *beneficiis* di Seneca spesso viene richiamato nelle ricerche dedicate alla *accusatio ingrate liberti*, il procedimento attraverso il quale i liberti che violavano il dovere di riconoscenza nei confronti del patrono venivano puniti. Nelle fonti si parla di dovere di *obsequium*, fortemente collegato al beneficio della manomissione. Nell'opera del filosofo, incentrata sull'idea di *beneficium*, sulle sue caratteristiche, sui concetti di gratitudine e di ingratitudine, non si discute però apertamente dell'ingratitudine del liberto e delle sue conseguenze.

Seneca parla piuttosto di una *lex qua ingrati datur actio* come mero argomento di esercitazioni retoriche, e affronta il problema se sia o meno opportuno che l'ingratitudine venga perseguita con mezzi giuridici, arrivando ad una risposta negativa.

A partire da tutto ciò gli studiosi sono giunti a conclusioni molto diverse.

Secondo alcuni il silenzio di Seneca in materia di accusatio ingrati liberti implicherebbe che all'epoca tale rimedio non era ancora stato introdotto (e questo in contrapposizione con l'idea tradizionale di una sua previsione già nella *lex Aelia Sentia* del 4 d.C.). Per altri, invece, il De *beneficiis* non avrebbe nulla a che fare con il problema dei liberti ingrati; la trattazione rimarrebbe infatti su un piano speculativo e riguarderebbe un concetto filosofico di ingratitudine: Seneca non avrebbe quindi alcun interesse ad affrontare il profilo giuridico dell'*accusatio ingrati liberti*. Per altri ancora, dietro un discorso apparentemente (solo) filosofico vi sarebbe comunque il tentativo di influenzare Nerone proprio sul tema della ingratitudine dei liberti e della revoca della libertà.

La comunicazione intende riprendere questo dibattito, attraverso la lettura di alcune fonti significative in materia (in particolare, Tac. Ann. 13,26-27 e D. 38,2,1, di Ulpiano), testi che permettono di ricostruire la connessione fra il beneficio della manomissione e l'*obsequium* e che offrono diversi spunti per prendere posizione sul rapporto fra il discorso di Seneca e l'*accusatio ingrati liberti*.

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Pretium, action de tigno iuncto e impensae: Un'interpretazione del passaggio Paolino 15 Quaestionum, D. 46,3,98,8

Keywords: *Inaedificatio, tigno iuncto, pretium, impensae*

L'edificazione con materiali altrui in suolo proprio era nota alla giurisprudenza classica come una forma di *inaedificatio*. In questo caso, il rimedio offerto dal Diritto romano è l'*actio de tigno iuncto*, che consente al propietario del *tignum* di ottenere il *duplum* del suo valore, quando sia stato usato nella costruzione di un *aedes* o *vinae* altrui, dal momento che era esclusa la possibilità di *solvere* il *tignum*.

La sua disciplina tardo-classica è conosciuta principalmente grazie a due passaggi ulpiani che compongono il titolo del Digesto 47,3: *De tigno iuncto*, che sono completati con le testimonianze di Gaio e Paolo.

Secondo Gaio, 2 r*erum cottidianarum sive Aeorum*, D. 41,1,7,10 quando si costruisce in suolo proprio con materiali altrui, per il principio *superficies solo cedit*, ciò che è costruito accede al suolo, per cui il proprietario dei materiali (*omnes materiae*) non potrà rivendicarli né richiedere la sua esibizione finché duri la unione (*sed tantisper neque vindicare eam potest neque ad exhibendum*). Pertanto, gli è consentito solo chiedere il *duplum* (*sed duplum pro eo praestet*).

Dal canto suo, Paolo, in 15 *quaestionum*, D. 46,3,98,8, a questo riguardo afferma: *Denique lex duodecim tabularum tignum aedibus iunctum vindicari posse scit, sed interim id solvi prohibuit pretiumque eius dari voluit.*

Segnala il giurista che il divieto di *solvere* il *tignum* stabilito dalla legislazione decemvirale autorizzava ad ottenere il suo *pretium*. Diversi autori hanno sostenuto che uno dei significati attribuibili alla parola *pretium* è quello di *impensae*, per cui è lecito sostenere che Paolo si riferisse al rimborso delle spese per la trave.

A questo riguardo, occorre considerare con particolare attenzione l'interpretazione proposta da Musumeci. Egli afferma che con l'espressione *pretium* del passaggio paolino si sarebbe concesso al proprietario del *tignum*, già delle Legge delle XII Tavole, la possibilità di esercitare un'altra azione per ottenere un risarcimento, equivalente al valore del *tignum* –per la perdita della sua disponibilità–, che definisce *pretium decenvirale*.

Se si accoglie questa interpretazione, l'azione reipersecutoria innominata potrebbe essere considerata un antecedente arcaico idoneo al fine di ottenere una restituzione per *impensae*. In ciò che segue considereremo quindi: (I) in primo luogo, che la parola *pretium* appare davvero in alcune fonti giuriche come sinonimo di *impensae* (II); in secondo luogo, gli aspetti dell'*actio de tigno iuncto* arcaica maggiormente sviluppati dalla dottrina romanista; infine, a proposito dei due punti precedenti, (III) le interpretazioni che sono state offerte del significato di *pretium* nell'uso che ne fa Paolo nel passaggio 15 *quaestionum*, D. 46,3,98,8 e la sua relazione con le *impensae*.

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From public to private: transformation of legal space after the introduction of the Principate?

Keywords: public, private, palace, house, Republic

Scholars of Roman law have interpreted that juridical activities moved from public to private space – or at least semi-private – after the transformation from the Roman Republic to the Empire. It has been understood that in the Republican era legal work occurred in open spaces, such as *fora*, and after the introduction of the autocratic regime, these activities took place in more controlled environments, mainly in the Imperial residences. This paper will take a critical view on this hypothesis, because it is mostly created on the basis of literary evidence, and therefore is biased by the view of the senatorial class – the Roman writers are mainly members of this group – and because the archaeological evidence of Imperial residences is largely neglected when this matter has been studied.

This paper investigates the possible change from public to private in the juridical venues and tackles it with two different source materials: literary and archaeological data. The literary material is studied to reveal the timeframe of the change: When did the juridical activities move from public to private venues? Is it truly a phenomenon which begin with the first emperor, Augustus, or perhaps earlier or later? The archaeological evidence instead reveals what type of image the emperors wanted to transmit with their palaces. In the Imperial era, these buildings became symbolic and actual venues of power and governance – including also a large number of legal functions. Did the Imperial architecture imitate the public spaces, such as *fora* and *basilicae*, which are often seen as symbols of the Republic? Or did it replicate the Roman house and other

dwellings, which are often interpreted as a symbol of private and therefore locations which did not correspond with the Republican tradition?

The literary sources are heavily influenced by the point of view of the Roman senatorial elite, which had somewhat negative attitudes towards the emperors, who had after all diminished the power of this Republican ruling class. Consequently, the narrative told by the Roman authors is likely biased. This highlights the importance of the archaeological material, which – at least if we examine the Imperial residences – should reflect an image that the new Imperial governance wanted transmit. Comparing these two materials will provide narratives of both sides of the late Republican and early Imperial power struggle. They help us to better understand, how the legal venues changed during this period, and what type of message was transmitted through the change to the citizens of the Roman Empire.

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The Places of the Court in Mesopotamia and Israel

Keywords: urban courts, oath, ordeal, elders' council

The gathering of court in the Ancient Near East took place in different places. There were urban courts, run by public officials, affiliated to the temple or to the (king's) palace. Such courts resided within the city walls, at the city gates or at the forecourt of the temples. During the trial it was possible that the people need to move to another place to take an oath or to carry out an ordeal test (i.e. jump into the river).

Moreover, there were also county courts, ran by the elders council. The trial took place at the village gate or outside, i.e. in the shade of a big tree, near the village.

In this work we would like to study these different courts, the places where they took place, their different formality and their peculiarity in Mesopotamia and in Israel.

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The Moral and Social Reputation of a Witness as Formative for the Estimation of His Assessments

Keywords: proof, evidence, witness, moral value, civil trial

The meaning and the credibility of a witness among other evidence were undoubtedly of special importance during Roman civil processes in the classical period. It was the free decision of a judge to what extent he would consider any testimony of a witness as a valid source of true information about parties personally and other circumstances. The Roman jurists were not really interested in a sphere of mere facts (*vide* the famous response of Gaius Aquillius Gallus!) and juristic writings about tasks of a judge are rare. In fact, there is no indication that any type of juristic writing was on proofs in a trial. Most of the related texts are collected in Justinian's Digest—D. 22,5 *De testibus.* Some of them cite the imperial constitutions of Hadrian on the issue.The texts suggest that statements of witnesses had to be evaluated not only on the basis of their content, but also regarding the social position of a witness. The sources use mostly terms such as *gravitas, dignitas, auctoritas* or *existimatio* (e.g. D. 22,5,2; D. 22,5,3,2). Testimony was given in favour of one of the parties and consisted not only of claiming specific facts, but also (or primarily) in giving general opinion about the private and public conduct of the party concerned. Another example of this phenomenon is given by Aulus Gellius in his *Noctes Atticae* (14,2). Aulus Gellius himself was nominated a judge in a civil case. The plaintiff was an honest man who demanded the repayment of a loan. Yet, he presented no proof. The defendant was a person of notoriously bad reputation. Aulus Gellius asked for an advice a philosopher—Favorinus. As we may conclude from his answer that included a citation of a Cato the Elder's speech, *mores maiorum* gave some possibility (at least in Cato's time) to adjudge in favour of the party which enjoyed the opinion of *melior*. Therefore, not only social, but also moral status was taken in consideration.

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Alienatio: Its Juridical Meanings

Keywords: *Alienatio*, Transfer of property, Alienation's prohibitions, *Potesta alienandi*

This work intends to determine the real significance of the word *alienatio*, and the contexts in which the jurists use it.

In relation to what the word encompasses, one doctrine says that it has acquired a wide range of meaning across time; almost every form of diminution of an owner's power can be described as an *alienatio.* Contrarily, another school of thought proposes that it was impossible to conceive of the concept of *alienatio* in regard to the alienation of a right; the classical Roman jurists did not accept a translation of *dominium.* The transference could only be conceived in terms of a material thing. We will not go in depth in this dispute, but we have to mention that the romanistic doctrine tends to analyze this term in the aforementioned context.

In relation to the concept of *alienatio*, we cannot say that it is a synonym of *modus transferendi dominii.* At the same time, we cannot affirm that there is no relation between *alienatio* and the latter. Indeed, a *modus transferendi dominii* implies alienation; however other kinds of alienation do not consist of the transfer of property.

The term *alienatio* or *abalienatio* (it seems that in Justinian's sources the terms are interchangeable) was especially relevant in connection with prohibitions that affected certain persons or things in particular positions. For example, a husband cannot alienate a farm which formed part of a dowry (*fundus dotalis*); a thing involved in a trial (*res litigiosa*) was not alienable; an

heir could not alienate the tomb from whom he inherited; an insolvent debtor was prohibited from alienating his goods to the detriment of the creditors (*in fraudem creditorum*). In this sense it could be said that the word *alienatio* was associated with prohibited acts.

In addition, the word alienatio was also important in regard to faculty to dispose (*potestas alienandi*). Aside from the owners, who can obviously alienate, a third person who has power over

the goods of someone else is authorized to dispose. But in this context, it seems that the alienation required special authorization. The sources also show that the alienation done by a third person, non-authorized, produced some juridical effects.

The paper analyzes also a group of texts that uses the word *alienatio* in a wide sense, including involuntary kinds of losses of property. And finally, we will study a set of fragments that put in relation the words *alienare* and *manumittere*.

In conclusion, the main and central matter of the paper is to throw lights on the extent of the term *alienatio*, especially in regard to alienation's prohibitions and the alienations carried out by a third person.

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Digesta: Prudentiae Romanae sive templum sive sepulcrum? Das Proömium Mommsens zur 'editio maior'

Keywords: Mommsen, *Praefatio, editio maior*, Goethe's *Farbenlehre*

This paper aims at identifying Goethe's *Theory of Colours (Farbenlehre)* as the inspiration for Mommsen's remark at the beginning of his preface to the *editio maior* that the Digest might be considered as the temple or the grave of Roman jurisprudence, which to the eyes comes to the same thing, since, as 'the poet' said, sunrise or sunset are to be considered the same (*quod ait poeta noster solem vel occidentem esse eundem*).

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Reception of Byzantine Legal Collections into Serbian Medieval Law

Keywords: Roman-Byzantine compilations, Zakonopravilo, Justinian's Code, Matija Vlastar's Syntagm, Tsar Dušan's Code

Serbian people, who settled on the Balkan Peninsula, were exposed to Byzantine influences under which they remained until the Ottoman occupation. From its foundation, the young Serbian state came in contact with Roman and Byzantine law which became the major source for building Serbian legal institutes. There was no need for a formal reception of Roman law since Roman and Byzantine rules had existed on these territories through customs and traditions. The Serbian settlers came across them and used them as a model for establishing their own legal rules. The existing common law was modified along with the further development of Byzantine law, shaping itself into a new system, but still under a huge influence of Byzantine law. The acceptance of Christianity and literacy contributed to further influx of Byzantine law into Serbian legal rules. Church laws had unchallenged authority, not only in regulating church issues, but also in governing family and marital relations. Byzantine secular laws were received in Serbia through Zakonopravilo (*Krmčija*), which was the translation of Nomocanon. This translation was performed by Saint Sava in 1219. Following its adoption in the 13th century in Serbia, Zakonopravilo was also accepted in Russia and Bulgaria, and later in Romania. Zakonopravilo remained for centuries the only legal source in Serbia and all subsequent legal compillations were based on it (Charter of Žiča, Dušan's Code, Knez Lazar's Charter, first written Law of revolutionary Serbia, Serbian Civil Code, etc.). Saint Sava brought to Serbia the latest version of the Nomocanon of 833. It is believed that this piece was more than a pure translation of the Greek text, but rather had Saint Sava's personal touch who, besides excerpts from Justinian's novels (*Novellae*), added to this compilation, the so-called Law of Moises (Chapter 48) and the entire Prochiron (Chapter 55 of *Krmčije*). Prochiron was known in medieval Serbia as *Zakon gradski* (the City law). Some of its parts, together with Eclogue and Agricultural law (*Nomos Georgikos*) formed the contents of Serbian legal compilation under the title: Iustinian's code. However, the largest influence of the traditional Roman and Byzantine law can be seen in Tsar Dušan's Code. In old manuscripts, Tsar Dušan's Code from 1349 was never mentioned alone, but always on the third place, following the Serbian-Byzantine compilation, the shortened version of Matija Vlastar's Syntagm, and Justinian's Code.

KAMILA STLOUKALOVÁ

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Familiapecuniaque and the pater familias' disposal of property in the early times of the Roman Empire

Keywords: *familia, pecunia, pater familias,* inheritance law, Twelve Tables

The paper shall contribute to the discussion regarding the relation between the *familia* and the *pecunia*. As regards the property viewpoint, these concepts define two groups of the estates of Roman citizens from the most ancient times. The *familia* and the *pecunia* appear in the Roman legal sources separately as well as together. The romanistic literature often distinguishes these concepts on the basis of: 1) necessity of performance of the *mancipatio* for the transfer of their ownership: the *familia* is therefore a synonym for the *res mancipi* (in the earliest times before the inclusion of the land), the *pecunia* for the *res nec mancipi* (see eg SABBATINI, G. *Appunti di preistoria del diritto romano.* Torino: G. Giapichelli Editore, 2014); 2) the possibility to alienate such property by the *pater familias*: the *familia* cannot be freely alienated as it contains the most important pieces of family's estate, on the other hand the *pecunia* is free from such a limitation (see e. g. JOLOWICZ, H. F. – NICHOLAS, B. *Historical Introduction to the Study of Roman Law.* Cambridge: Cambridge University

Press, 1972).

We will focus mainly on the provisions of the Twelve Tables regarding the inheritance law where both concepts are used in different hereditary situations: *Uti legassit super pecunia tutelave suae rei, ita ius esto. Si intestato moritur, cui suus heres nec escit, adgnatus proximus familiam habeto.* (Tab. V, 3-4; text from: RICCOBONO, S. (ed.). *Fontes iuris Romani anteiustiniani.* Florentiae: Barbèra, 1941). The presumption to be confirmed or declined is that the *pater familias* might deal only with the part of the property called *pecunia* in the *mortis causa* cases, while the *familia* had to remain within the family. The following question to be answered is when the situation had changed and the *familia* began to be at the *pater familias'* free *mortis causa* disposal.

AKIRA SUGAO

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Scaev. D. 2,15,3,2Ein Beispiel einer Genehmigungsverweigerung des vom Scheinerbe geschlossenen Vergleichs

Keywords: Scheinerbe, schwebende Unwirksamkeit, Genehmigung, Verweigerung, Drittwirkung

BGB §1959 regelt über die erbschaftliche Geschäfte, die vom provisorischen Erben vor der Ausschlagung vorgenommen wurden. Das Rechtsgeschäft eines Nichtberechtigten ist schwebend unwirksam gegenüber dem Berechtigten. Es wird erst dann wirksam, wenn der Berechtigte nachträglich das Rechtsgeschäft genehmigt. Wird die Genehmigung dagegen verweigert, so ist das Rechtsgeschäft endgültig unwirksam, weil die Verweigerung nicht widerrufen werden kann, wenn sie einmal erfolgt ist.

Auch im römischen Recht wird das Rechtsgeschäft eines Nichtberechtigten viel diskutiert. Unsere Stelle Scaev. D. 2,15,3,2 wurde bislang als Aussage über die Drittwirkung des Vergleichs (Scaev. D. 2,15,3pr.: '*privatis pactionibus non dubium est non laedi ius ceterorum*') betrachtet. Sie wurde so verstanden, dass der Vergleich, der vom Scheinerben mit dem Schuldner geschlossen wurde, keine Wirkung gegenüber einem Dritten hat, d. h. gegenüber dem wahren Erben (Antje Krüger, Die Drittwirkung des Vergleichs im klassischen römischen Recht, Frankfurt am Main 1993, S. 52ff.).

Prof. Finkenauer erwähnt allerdings in seinem neuen Aufsatz, der sich umfassend mit der Drittwirkung beschäftigt, unsere Stelle nicht (Thomas Finkenauer, *Drittwirkende pacta im klassischen Recht*, SZ 135(2018), S. 178ff.).

Basilika (BS. 11,2,3,2, ad eine neue Scholia 16) und Glossa ordinaria (ad '*non posse*') deuteten schon auf die Möglichkeit der nachträglichen Genehmigung. Die Wortwahl von Scaevola genauer beachtend, hätte man vielleicht dem Wort 'minimo' mehr Aufmerksamkeit widmen sollen.

Der wahre Erbe hätte die exceptio transactionis geltend machen können, wenn er den schwebenen unwirksamen Vergleich des Scheinerben genehmigt hätte. Scaevola verneint jedoch die Erhebung der Einrede, weil der wahre Erbe einmal die Genehmigung verweigert hat, weshalb der Vergleich endgültig unwirksam wurde. Was bedeutet in diesem Zusammenhang das Wort '*minimo*'? Da der Scheinerbe sich nur mit einer geringenen Summe, also '*minimo*' verglichent hatte, hielt der wahre Erbe irrtümlich diesen Vergleich für ihn ungünstig. Daher hat er die Restschulden vom Schuldner eingefordert. Diese Forderung der Restschulden muss gerade als Verweigerung der Genehmigung verstanden werden. Notgedrungen hat der Schuldner mit der Pfandklage gegen den wahren Erben geklagt.

In dieser Stelle scheint, eine Genehmigungsverweigerung stillschweigend vorausgesetzt zu sein. Ausgezeichnete Schüler wie Papinian vor den Augen, sparte sich Scaevola manchmal überflüssige Erklärungen. Für ihnen war es selbstverständlich, dass es dem wahren Erbe möglich war, den Vergleich zu genehmigen.

Versteht man D. 2,15,3,2 wie oben, muss man zugeben, dass die Stelle nicht im Einklang mit der in D. 2,15,3pr. dargestellten Regel steht. Die Vermutung liegt dann nahe, dass unsere Stelle ursprünglich in einem anderen Zusammenhang gestanden hat, und bei der Redaktion der Bücher der Digesten Scaevolas oder bei den Kompilatoren der justinianischen Digesten versehentlich mit D. 2,15,3pr. zusammengestellt wurde.

T

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Some Contributions of Four Humanist Scholars to our Knowledge of Roman Legal Institutions

Keywords: legal humanism

This paper aims to contribute to the study of legal humanism, by focusing on four protagonists who had interests in antiquarian research rather than for legal dogmatics: Italian Carlo Sigonio (1520-1584), Dutch (Friesian) Sibrandus Tetardus Siccama (1571-1622), Scottish Alexander Adam (1741-1809) and finally German Wilhelm Rein (1809-1865). They are not often dealt with by any textbook on European Legal History. But their contributions to our knowledge of Roman law should neither be ignored nor underestimated. Their writings or teachings have stimulated for example the preoccupations with understanding court practice in Roman Republic and early Empire. It seems to me that the discovery of the basic ideas of Roman Republic is one of the most tremendous achievements of humanists.

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The Role of Place in the Context of the Roman Law of Surety

Keywords: Les Apuleia, Lex Furia, quaedam societas

The question of the place of the application of the regime of joint liability

among co-sureties was discussed by Gaius (Gai. 3. 121-22). Gaius recalled the history of the *Leges Apuleia* and *Furia de sponsu*, where the first regulated the joint liability among co-sureties, and the second enactment replaced the earlier ruling by introducing the principle of several liability for the region of Italy, while the first was preserved in the other provinces. Gaius doubted whether the benefit of the *Lex Apuleia*, allowing the surety who was paying more than his own quota of the debt could sue the others for the exceeding value of his own debt was preserved after enforcing the Furian law. The benefit of Lex Apuleia, as described by Gaius, consists of a procedural tool comparable to the claim granted among the partners in a general contract of partnership.

The case of *Lex Apuleia* eventually tackled relations based on the contract of *adpromissio* among the sureties and the main creditor, while they among themselves had never made any contract. The probable remedy introduced was the action based on Apulian law. It was comparable, according to Gaius, to the later contract of partnership.

The Furian law implied a different attitude since it stipulated at once the several liabilities among the sureties who could pay the main debt.

The whole regulation was not applicable to cases of *fideiussio* which implemented a different mechanism of liability among the co-sureties (considering the options of *fides*), a regime which later was corrected by a Letter issued by the Divine Hadrian.

The curious problem still remaining challenges reasons to limit the implementation of the Furian enactment only to the regions of Italy while keeping the implementation of the Apuleian kind of partnership for the other provinces.

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From Late Byzantium to Late Antiquity and Backwards: The Court of the katholikoi kritai ton Romaion and Rhetorical Exercises in Byzantium

Keywords: *Katholikoi kritai ton Romaion,* Late Antiquity, Late Byzantium, *Peri Staseon,* education

In 1329 Emperor Andronikos III instituted the court of the 'General Judges of the Romans' (*katholikoi kritai ton Romaion*). The court was made up of two churchmen and two lay judges, who had authority to hear any case. Very soon though, specifically in 1337, three of its members were brought before the imperial tribunal and were found guilty of corruption. The trial was ordered by the Emperor himself and he presided over it.

In 1963, Theocharides edited a text from a 16th-century miscellaneous codex. Theocharides contended that this text is the official plea of one member of the court of *katholikoi kritai.* In 1979, van Dieten questioned Theocharides' contention that the published text was indeed an official statement by one of the four *katholikoi kritai ton Romaion.* Van Dieten argued against Theoharides' view based on internal elements of the text such as the way the defendant seems to address the Emperor. In 1993 Kresten also argued against the authenticity of Theocharides' text and concluded that it is instead a satirical text written shortly after the conviction of the *katholikoi kritai.*

Based on the views expressed above but also on testimonies that have escaped the notice of scholars so far, the aim of the present study is to show that the text published by Theocharides in 1963 is actually a rhetorical exercise aiming to introduce students to fundamental rhetorical concepts and strategies. It is an example of the *Peri Staseon* literature, composed shortly after 1337. It is perhaps a product of the '*didaskaleion*' school established by the eminent historian Nikephoros Gregoras and located at the Chora Monastery in Constantinople.

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Censors as Guardians of the Mores Maiorum: The Case of Divorce

Keywords: *censores, regimen morum, repudium, actio iniusti repudii*

The office of the censor had considerable political significance in the Roman Republic. This resulted from its special competences related to the census. The censors controlled the social structure, because they could assign citizens to specific units (*centuriae* and *tribus*), and also elected the Senate and elite centuries of the knights. The activity related to the compilation of citizens' lists had an additional aspect, namely the exercise of custody over good morals (*regimen morum*). The censor could punish citizens with a note for violating moral norms. The reasons for its use are a separate issue. There is a catalog of them in the literature on the subject, which, according to the researchers, proves that the activity of the censors in this area had a very casuistic character. It can however be argued that the area of application of the censorial note constituted a significant element of private law, in many situations preceding the praetorian edicts' regulations. The purpose of the paper is to trace the censorial activities in cases of divorce, most of all in the famous case of Carvilius Ruga. A hypothesis will also be presented as to the possible censorial nature of the '*action iniusti repudii*' mentioned in rhetorical sources.

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Un esempio di confronto testuale in tema di testamenti factio (cum testibus): D. 28.1.20.2 (Ulp. 1 ad Sab.) e I. 2.10.9

Keywords: *Testamenti factio (cum testibus), domesticum testimonium, peculium castrense,* confronti testuali, antinomie

L'indagine prende le mosse dal confronto tra due brani della compilazione giustinianea – D. 28.1.20.2 (Ulp. 1 *ad Sab.*) e I. 2.10.9 – che, descrivendo *prima facie* la medesima fattispecie, sembrerebbero offrire divergenti soluzioni al problema se

siano *testes idonei*, nel testamento di un *filius familias in potestate de castrensi peculio*, il padre e il fratello di costui. Ci proponiamo fondamentalmente di interrogarci sulle ragioni di tale supposto dissenso sotto due differenti angolazioni che possiamo riassumere nelle seguenti domande. Quali sono le motivazioni che giustificherebbero la sussistenza di un'ipotizzabile controversia tra i *prudentes* sul punto? Come mai lo *ius controversum* sulla questione *de qua* è sfuggito ai compilatori, i quali parrebbero, per questa via, prospettare nelle *Institutiones* imperiali una determinazione opposta a quella riferita nei *Digesta Iustiniani*, dando luogo a un'evidente antinomia? E, ancora, se si ammette la presenza di una contraddizione tra D. 28.1.20.2 (Ulp. 1 *ad Sab.*) e I. 2.10.9, si sarà trattato di involontaria disattenzione o di intenzionale puntualizzazione? Numerosi sono i temi sottesi a tali quesiti, alcuni dei quali attengono ai problemi che ruotano intorno alla storia della regolamentazione della *testamenti factio (cum testibus)* e di alcuni principi che la riguardano (pensiamo, a tacer d'altro, al noto adagio '*reprobatum est ... domesticum testimonium*'); altri hanno a che fare con le questioni, ad oggi parecchio dibattute tra gli studiosi, concernenti i metodi impiegati dai commissari giustinianei nella composizione dei testi della compilazione, la quale va intesa, di necessità, come un'operazione ecdotica e, al tempo stesso, editoriale, fluida e aperta.

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Some Observations on Definitions in Cicero's Topica

Keywords: definition, *Topica, ius civile*, etymology, argumentation

This paper addresses Cicero as jurist during the pre-classical period of Roman law. In his *Topica* Cicero made important contributions to legal reasoning. This paper poses that definition is an essential prerequisite for debate and analyses Cicero's explanation of the role of definition in legal argumentation. His instruction on how to construct a definition as well as several of his definitions are discussed. In conclusion his position in the development of Roman law is redefined.

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The dediticii in the Constitutio Antoniniana

In my paper I will suggest that these persons were not the *peregrini dediticii* mentioned in Gaius, *Institutiones* 1.14, but rather the *libertini dediticiorum numero* dealt with at length in 1.12–17. At any rate, because of their *turpitudo* these freedmen were excluded from becoming *cives Romani* (1.26). This explanation, based on Roman *ius civile* (the *lex Aelia Sentia*), seems to be corroborated by an *ἀπόφασις* (edictum) of Marcus Ulpius Tertullianus Aquila, governor of the province of Macedonia in the year 212/13, quoted in 18 manumission inscriptions published by Ph. M. Petsas, M. B. Hatzopoulos, Lucrèce Gounaropoulou, P. Paschidis, *Inscriptions du sanctuaire de la Mère des Dieux Autochtone de Leukopétra* (Macédoine), 2000. Therefore, in the edict of Caracalla the generally held meaning 'foreign barbarians' must be questioned.

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La validité du principe nemo pro parte en droit civil catalan: considérations de droit romain

Keywords: *regulae iuris, nemo pro parte,* principes successeurs, droit civil catalan, accroissement

La regula iuris 'nemo pro parte testatus pro parte intestatus decedere potest' est l'une des plus étudiées. Son application et sa portée ont suscité, depuis des siècles, de vives discussions doctrinales. Dans cette communication on compte uniquement expliquer comment cette règle est maintenue en tant que principe successeur du droit civil de la Catalogne. C'est une exception (avec le droit civil baléare) très remarquable, car ne trouve pas d'acceptation dans le code civil français, ni dans le code allemand, ni dans le code espagnol. Cela n'est pas non plus accepté dans les codes latino-américains, parmi lesquels le Code civil chilien d'Andres Bello en 1855 énonce le principe opposé. Son application en droit sud-africain est également expressément refusée.

En Catalogne, cependant, le principe *nemo pro parte* est maintenu dans toutes les compilations *modernes* du droit de succession jusqu'à ce qu'il atteigne l'actuel livre IV du Code Civil catalan de 2008.

Cette fidélité explicite au droit romain a provoqué des discussions et des tensions; le droit moderne, comme il ne pouvait en être autrement, ne suit pas exactement le schéma de la succession romaine, car il présente, sur ce sujet, une nouveauté importante: la possibilité d'instituer un héritier universel par contrat s'ajoute avec ce que les fondements successifs vont de deux (testament et loi) à trois (contrat, testament et loi, dans cet ordre) Même dans ce cas, le Code civil catalan maintient l'incompatibilité des titres de succession et utilise l'expression de titre volontaire pour englober la succession testée et la succession contractuelle.

Afin d'évaluer comment cette *regula iuris* a été reçue en tant que principe du droit catalan en matière de succession, sa validité et son champ d'application en droit romain sont expliqués de manière très succincte pour la comparer à la loi catalane, héritière des juristes du ius commune et des auteurs classiques catalans, qui ont en général accepté le nemo pro parte sans le remettre en question. À titre d'exemple, nous analysons l'application de l'accrétion ou droit d'accroissement, élément clé du système d'incompatibilité entre les titres d'héritage. Il est né en droit romain, les juristes du *ius commune* l'y acceptent ; les auteurs catalans des XVIe au XIXe siècles ne la remittent pas en cause non plus et concentrent la discussion sur la validité de certaines clauses testamentaires utilisées dans la pratique, telles que la clause dite de contentement ou l'interdiction de l accrétion qui constituait un torpillage a la ligne de flottaison du *nemo pro parte*. Dans le contexte de la discussion est

fondamental le respect à la volonté du testateur et les juristes proposent des solutions combinant ce respect avec l'application du principe.

Actuellement, la *regula iuris* romaine est maintenue en tant que principe général dans le droit catalan en matière de succession, ce que le législateur affirme non sans une certaine solennité même dans le préambule des trois dernières lois de succession, y compris le Code civil en vigueur.

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Neque enim debet nocere factum alterius ei qui nihil fecit – Eine 'Haftungsregel' der römischen Klassik?

Keywords: Haftungsprinzip, *regula*, Noxalhaftung, *locatio conductio*

[…] *neque enim debet nocere factum alterius ei qui nihil fecit.* Diesen dem Ulpian-Fragment D. 39.1.5.5 entnommenen Leitsatz bestätigen zahlreiche römische Quellen in unterschiedlichen Formulierungen und Zusammenhängen. Fraglich erscheint, ob sich aus dem Quellenbefund ein abstraktes haftungsrechtliches Prinzip für die römische Klassik ableiten lässt.

Wiewohl die römische Klassik von kasuistischer Fallpraxis geprägt ist, finden sich in den juristischen Quellen auch verallgemeinernde Rechtsansichten der römischen Juristen. Diese fassen das durch die einzelnen Fallentscheidungen der römischen Juristen etablierte Recht zusammen und nehmen somit eine Mittelposition zwischen Rechtssetzung und Beschreibung des Rechts ein.

Der Vortrag geht der Frage nach, inwieweit sich in den klassischen Quellen ein solcherart verdichteter haftungsrechtlicher Grundsatz – eine *regula* – rekonstruieren lässt, wonach das Verhalten einer anderen Person jemandem, der nichts Vorwerfbares gemacht hat, nicht zugerechnet werden dürfe. Dabei ist auch zu prüfen, welche Ausnahmen es gibt und wie diese das besagte Prinzip profilieren. Als Anschauungsmaterial dienen haftungsrechtliche Quellen zur *locatio conductio.*

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Formal Ontology of the actio Publiciana in rem

Keywords: *actio Publiciana*, NLP, Ontology, monitory owner, *dominus, usucapio*

The purpose of this talk is to confirm the major functions of the lPublician action and to clarify the relationship between the concept of Publiciana and the concept of the bonitary (*in bonis*) owner. Formal ontology is a conceptualization of the world on a computer. An ontology of legal concepts in the Roman law tradition uses mathematical logic to describe how Roman jurists recognized the real world (*Wirklichkeitszusammenhang*). This helps to avoid the pseudo problems caused by natural languages. It has been previously that suggested a shift (drift) of ontologies between the beginning (in the origins) of the legal tradition and the later expansion occurred during the classic and qualitative conversion by Justinian. The primary motivation is to find support for this idea through further study of ontology. NLP (natural language processing) with DL and its application to the problem of *interpolatio* will also be mentioned.

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'Patere legem quam ipse tuleris': from the Praetorian Edict to the European Court of Justice

Keywords: *Aequitas, Edictum quod quisque iuris, Disticha Catonis, Patere legem quam ipse tuleris,* European Court of Justice decision C-493/17

In a fragment of the *libri ad edictum* Ulpian (D. 2.2.1 pr.-1) outlines the ratio of the edict *quod quisque iuris*: the *aequitas* in mutual relations. The actual *ius novum* that a magistrate establishes against anyone, he himself ought to employ whenever his adversary demands it. Accursius explicitly relates this edict with the principle '*patere legem quam ipse tuleris*'. In fact, the glossator identified the foundation of the edict quod quisque iuris in the 'divine law', according to which '*quod tibi fieri non vis alteri ne feceris*' and in the decision of great wisdom '*in decre. dist. j. c. j. & Cato, Patere legem quam ipse tuleris'.* As it is common for the CJEU to apply maxims referring to ancient Roman law, this *regula* is often referred to as a general principle of European Law and it was applied particularly by the judges of the Courts in the decision C-493/17.

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Spaces of Citizenship: Defining Legal Status and Capacity in Roman Law and Topography

Keywords: citizenship, census, legal status, magistrate, Republicanism

Roman Republicanism, the long tradition of Republican thought and practice, has for much of history defined the European notions of citizenship and legal status. However, within the Roman tradition, the concept of citizenship contained not only a well-defined notion of attaining legal status and capacity but also a strong performative aspect. Both notions were reinforced through public legal acts which announced the inclusion and belonging of an individual in the citizen body. These legal acts had symbolic and communicative functions, by their very scale they were prominent features in the public space within the city. For example, the Roman citizenship was reinforced with the act of the *professio*, the ceremonial census in which the citizen body was surveyed by the censors, determining their eligibility for military service as well as their rank, both regarding public office and inclusion in the higher orders.

The purpose of this paper is to explore the spatial dimension of the *regimen morum* and the census and their place in the imaginary of Roman Republicanism. Beginning from Varro's depiction of the Villa Publica, the location of the census, it analyses how the symbolic and functional uses of space were intertwined. It seeks to demonstrate how the census, from the locations where it was executed to the magistrates, the censors, performing it and the citizen records themselves, were a manifestation of the role of citizenship and the performative aspects that celebrated its exclusiveness and its role in the social and political cohesion.

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The Place of Bona Fides in International Law

Keywords: *aequitas, bona fides,* contract law, international law, *ius gentium*

Cicero defined *bona fides*, or good faith, as *fundamentum iustitiae*. As such *bona fides* is a private law principle which is not solely the root of contract law, but also has an immense historical effects on international law. This paper concerns itself with the importance of *bona fides* from the perspective of international treaty law since as good faith is the basis of private law it should, by extension, also be seen as the basis of international law.

Before gaining its legal character in classical Roman law, fides had been understood as one's commitment to his/her own words, fidelity and honesty while symbolizing *tacitum in pectore numen*: the virtue of loyalty existing in the internal world of the human beings. In classical Roman law, the most important medium in which *bona fides* finds its place in its objective sense, has been the law of contracts. The obligations are believed to create a strong *iuris vinculum* between the parties. The necessary legal elasticity, on the other hand, was provided by the revolutionary '*ex fide bona*' clauses added to *iudicia bonae fidei* in the formula system and the institution of *exceptio doli generalis*. This gave the judge the possibility to oblige the parties to the requirements of good faith and equity.

Similarly, the place of Roman law in the development of the international law theories is based on natural law, *ius gentium* and the concept of bona fides as a product of these sets of legal rules. The paper demonstrates that Roman *ius gentium*, as a quasi-cosmopolitan legal system based on natural law, is an indication that Roman law is not traditionalist and conservative, but open to any changes since it sets out universal legal principles derived from natural reason, custom and *aequitas*. The natural law principle of *bona fides* always had two requirements such as the absence of dolus and the obligation to behave according to the a*equitas naturalis*. This regulates the relationship between rivals in the sphere of contract law and between sovereign states and between the states and the private actors in the sphere of international law.

Accordingly the paper examines the application of the classical Roman principle of *bona fides* in international law and the recognition of the standards of the principle in comparison to the law of contracts derived from classical Roman law. To this end the fundamental elements of *bona fides*, honesty, loyalty and reasonableness, are examined alongside sub-criteria such as the avoidance of contradictory behavior, consistency to the reasonable expectations of the other party and securing balance between party interests. Revisiting the classical Roman roots of *bona fides* and its place in the antique world provides a much needed alternative route from where to understand contemporary international law and its many challenges.

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Nomikoi in the Roman Courts (and Out of Them)

Keywords: Juristic papyrology, Legal Experts, Provincial Law, *Volksrecht, Reichsrecht*

A number of papyri from Roman times show how Roman officials, while adjudicating a case between local parties, turned to consultations with legal experts, *nomikoi*. The judge did so in order to confirm or clarify the legal rules invoked by the parties, sometimes with a specific reference to the law of the Egyptians, *nomos ton Aigyption*, as their source. The local counsels appear in proceedings before *praefects* and *epistrategoi*. Their participation is often only laconically remarked; sometimes, however, the main points of their advice are reported. In a number of instances these are cited and re-cited, not always in the most accurate manner. My aim in the is paper is to conduct a thorough re-assessment of the available material in order to reconstruct the figure of these *nomikoi* and their function in the legal proceedings. As the phenomenon probably reflects the regular consultation practice of the Roman magistrates, usually non-jurists, back in the City, of which we know almost nothing, it also allows to draw conclusions on the role of legal experts in judicial proceedings on a much larger scale.

V

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Soluciones alternativas al proceso en el Derecho Romano: El pacto

Alternative solutions to the process in Roman Law: The pact

Keywords: transaction, pact, Roman law

En nuestro día a día la transacción forma parte del repertorio procesal de los operadores jurídicos y está presente en innumerables procesos, para, precisamente, no llegar a utilizar la vía judicial. Debemos remontarnos a la época arcaica romana para encontrar un antecedente a esta institución. La gensse organizaba en torno a un jefe

militar y religioso, el pater gentis el cual, rodeado del consejo de patresfamilias, podía solucionar conflictos surgidos entre los miembros de la citada gens. Era este consejo, podía elegir entre la venganza o entre una composición voluntaria inmediata. Paralelamente, también las partes implicadas 'podían desear hacer la paz' sin tener que renunciar a sus derechos.

Con este primer antecedente, el presente estudio analiza algunas instituciones del Derecho Romano para la solución de los conflictos alternativas al proceso judicial, las cuales en su esencia perduran hasta la actualidad.

Today, the transaction is part of a procedural repertoire of legal operators and is present in countless processes, especially to avoid using judicial means. We must go back to the Roman archaic period to find an antecedent to this institution. *Gens* were organized around a military and religious leader, the *pater gentis*, who, surrounded by the council of *patresfamilias*, could resolve conflicts arisen between the members of the *gens*. This council could choose between revenge or an immediate voluntary composition. In parallel, the parties involved 'could wish to make peace' without having to renounce their rights.

With this first antecedent, the present study analyzes some institutions of Roman law for the solutions used as alternatives to the judicial process, which in their essence endure until the present time.

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'Locationes' di beni pubblici nei frammenti di Alfeno Varo

Keywords: *Locationes*, *beni pubblici*, Servio Sulpicio Rufo, Alfeno Varo

La giurisprudenza dell'ultima età repubblicana pare essersi soffermata con particolare attenzione sui problemi interpretativi posti dalle 'locationes' stipulate per la concessione a privati di beni pubblici.

Ne troviamo testimonianza in svariati escerti dell'opera di Alfeno Varo, in cui il medesimo – seguendo le orme, o forse riportando il pensiero, del suo maestro Servio Sulpicio Rufo - discute ora dell'esegesi di clausole volte a disciplinare le condizioni per lo sfruttamento di una silva (cfr. D. 19.2.29 - Alf. 7 *dig.)*, adombrando l'utilizzo dell'interpretatio contra stipulatorem; ora di una possibile efficacia verso terzi delle prescrizioni poste al redemptor che abbia ricavato pietre coti dalla miniera stabilita presso l'isola di Creta (cfr. D. 39.4.15 - Alf. 7 *dig.*); ora ancora dell'eventuale ripetibilità di canoni già pagati per l'utilizzo di bagni pubblici andati distrutti a causa di un incendio (cfr. D. 19.2.30.1 - Alf. 3 *a Paul. epit.*). Da questi e da altri esempi ancora s'intende dunque prendere le mosse per cercare di ricomporre, in modo quanto più possibile organico, la casistica giunta all'esame dei prudentes dell'ultimo secolo a.C. e l'inquadramento giuridico da questi proposto per le locationes di res appartenenti al patrimonio collettivo.

W

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The Reception of the Quasi-contracts

Keywords: quasi-contracts, reception, Donellus, Code civil

Justinian's Institutes mention five or six different legal figures under the category of obligations *quasi ex contractu*. The French Code civil still employs the category *quasi-contrats*, but that only contains the figures of undue payment and management of another's affairs. This paper traces the reception of Justinian's category and explains why only two quasi-contracts remain in the *Code civil* and the Spanish Código civil, while the category has disappeared from other modern codifications.

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Late Roman ius postliminii as the Sign of Weakening of Roman 'Soft Power' – Case Study

Keywords: *ius postliminii*, late Roman Empire, imperial constitutions, C. Th. 5.7.1 (Brev. 5.5.1) = C. 8.50.19, soft power

This presentation discusses the late Roman imperial enactment, which confirmed the rules of *ius postliminii* – the law allowing a freeborn Roman citizen captured by the enemy to recover all previous rights after returning from the captivity – while adding to it certain legal privileges but excluding its application to those who deserted to the enemy: C. Th. 5.7.1 (Brev. 5.5.1) = C. 8.50.19 (a. 366). The excerpt of the enactment is known from the Theodosian Code of 438 and approved by its *interpretatio*, written in late 5th century Gaul. Both texts were repeated by the Breviary of Alaric (ca 506 CE) and the *Lex Romana Burgundionum* (ca 501 CE) which partially shared the spirit of the discussed imperial law, while its abbreviated version was included in the Code of Justinian (534 CE). The author discusses the reasons why the law fit in the different historical and geographical circumstances: in the mid-fourth century Gaul, in the empire of Theodosius II (408-450), in late 5th century Gaul, or in Western and Eastern parts of Mediterranean of the first half of the sixth century. The enactment and its repetition by different sources are hallmarks of the weakening of Roman 'soft power' in late antiquity, underlining the universal value of the idea of 'soft power', the term introduced in political studies by Joseph S. Nye jr. in the late 1980s.

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La place du droit international dans le monde antique

1. Selon la doctrine traditionnelle l'organisation politique dans le bassin méditerranéen dans l'Antiquité Classique était la polis, la cité. Bref exposésur le lien entre l'économie et l'organisation politique.

2. Problèmes de transmission des traités: la réalité littéraire et la réalité épigraphique.

3. L'Empire romain, on l'oublie assez souvent, est né dans une série de traités internationaux. Cela commence déjà après les Guerres Puniques.

4. La plupart des traités survivants sont des foedera iniqua. Caractérisation de ces traités.

5. Le traité d'Alcántara analysé par Dieter Nörr n'est qu'un exemple des traités encore à découvrir.

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Law and its Place in Monastic Communities: Rediscovering Legal Personality in Late Antique Egypt?

Keywords: monks, monastic communities, legal personality, representation, Late Antiquity

Worldly affairs of the monastic communities and monks' contacts with the 'world outside' have become in the recent years a subject of growing interest and debate among scholars dealing with late antiquity. The literary sources depicting the Egyptian monastic milieu evoke images of the desert and the renunciation of the worldly cares and possessions by the monks. The symbolic significance of the total withdrawal from the earthly matters, ascetic life in the deserted cells, anchoritic assemblages or cenobitic communities have paved its way into common imagination and occupies an unshaken position ever since. One must, however, remain cautious while attempting to translate the monastic literature into the reality of day-to-day life of a monk in Egypt. Social, economic and legal relations between monks and the surrounding world were not avoided and sporadical phenomena, but rather an inevitable element of the monastic existence.

Thanks to the documents of legal practice it is possible to investigate the Late Antique monasticism in more diversified colours. The papyri offer us a complex picture comprising issues of administrative, organisational, and legal nature, which concern both meeting the basic needs of the monks, as well as the accumulation of wealth, including the acquisition of land and fiscal responsibilities.Thus, our sources allow us to ponder on the presence of monks and their communities in the Egyptian landscape not only in the spiritual, but also in the practical domain.

In my presentation I would like to discuss one of the aspects of a this broad issue, namely the existence of an independent legal personality of monastic communities in late antique Egypt. I would like to address the problem of legal representation of the monasteries as outlined in the sources of legal practice. For a lawyer, these questions are all the more stimulating since there has been an ongoing debate about the existence of the legal persons as such in Roman law and whether we could talk about anything approaching our current understanding of legal personality.

Y

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The Restitution and the Disposition of 'res extra dotem'

Keywords: *res extra dotem, peculium,* matrimonial property, *actio rerum amotarum, actio ad exhibendum*

Dowry was a crucial element in property relations between spouses throughout Roman legal history. Besides dowry, some goods and other properties were often brought into the husband's house (r*es extra dotem, peculium, paraphern*a). They were provided by the wife or her parents or others for various purposes, and they seem to have made up a part of the wife's '*peculium*'. But we do not know how women's *peculium* compared with slaves' and son-in-laws. It might be important to recognize the actual financial power of women (wives) and administration of property among the family. We do not have enough sources to clarify the rules and practices of *peculium*. There are few texts concerning '*res extra dotem*' in Justinian's Digest. However, we can find an important text in them, Ulpian D.23.3.9.3. It provides a classification of *res extra dotem* according to the rights and actions. We will observe this text with some other cases derived from J-Digest. It might reveal a certain aspect of women's *peculium*.

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George Buchanan and the Rule of Law: Greek and Roman Law in De Iure Regni apud Scotos (1579)

Keywords: reception of Classics, rule of law, legitimate kingship, law-making, tyrannicide

An exceptional figure of Scottish Renaissance, humanist and reformer George Buchanan (1506-1582)

published one of his major political writings, *De Jure Regni apud Scotos*, in 1579 at Edinburgh. In his ground-breaking treatise, dedicated to his pupil king James VI, Buchanan gives the portrait of an ideal prince and elaborates his core idea that the king must govern not arbitrarily, but according to the rule of law. The extent to which the idea that the monarch has to submit to the prevalence of law was revolutionary and shocking for many echoes in subsequent reactions to the *De iure*: the book was condemned by an act of parliament in 1584, and again in 1664; and in 1683 it was burned by the University of Oxford.

The treatise has the form of a Socratic dialogue between Buchanan himself and Thomas Maitland, who is clearly shaped on the Platonic model. Drawing on his deep knowledge of classics, Buchanan builds his argumentation on principles of Greek and Roman law and political institutions. A striking feature of Buchanan's work is that, unlike his contemporary authors, he bases his political theory on secular arguments rather than on precepts drawn on the Scriptures. The dialogue is impregnated with references to and quotations from a plethora of Greek and Roman philosophers, poets, historians, and legal sources such as the Law of the Twelve Tables and the *Digest*, in contrast to some rare scriptural examples, while the influence of Plato, Aristotle, Cicero and the Stoics is conspicuous throughout the essay.

The aim of this paper is to examine the direct and indirect ways in which Buchanan uses Greek and Roman philosophy, legal and political institutions, and history to deploy his political agenda. The paper focuses especially on two key concepts that are developed in detail in the *De Iure Regni*, namely the role of the people in legislation, and the theory of justified tyrannicide.

Z

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To Declare War: The Role of the Fetial Priests

Keywords: *ius*, *fetial, gentium*, declaration, war

The customary treatments on the Roman declaration of war examine solely those cases where the literary evidence permits us to allow that a declaration of war was made. A reliance on this approach has formed the basis for the view that the fetial priesthood died out only to be revived by Augustus. My research has considered every Roman war from the last quarter of the fourth century to the first quarter of the first century CE focussing on those wars where Rome did not make a declaration of war. The central question became was it always necessary for Rome to declare war. Clearly no declaration was required in those few cases where an enemy declared war on Rome. In all other circumstances the absence of a Roman declaration of war can be explained by important international law principles. Under the well understood provisions of the *ius gentium* certain offences committed against Rome brought into being an automatic trigger mechanism as it were for the opening of a state of hostilities. As a result, we see that war was either prefaced by the prewar preliminaries by the fetial priests or the *ius gentium* freed Rome from the necessity to declare war. The fetial priests acted as *iudices* and advised the Senate on which *ius* to use either the *ius fetiale* or the ius gentium.

After the fall of Rome interest was kept alive in the fetial priests due to the Christian adoption of the concept of the just war. By the late 16th century international law had become a separate discipline and the *ius fetiale* constituted the primitive forerunner of the new concept of the Law of Nations. Both Grotius and Zouche emphasized the need to declare war to legally justify the use of military force. Weiss considered the Roman ius fetiale a model of probity that deserved to be imitated by his contemporary leaders in the 19th century. Fusinato lead the way in restoring the *ius fetiale* to its Roman context as part of Roman sacral law.

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