- INTERNATIONAL MEMORIAL COURSE MARKO PETRAK -

ROMAN LEGAL TRADITION AND CONTEMPORARY LEGAL SYSTEMS

Dubrovnik, Croatia, 11th-13th October 2024

themed:

ROMAN LAW OF OBLIGATIONS – FROM PRINCIPLES TO SPECIFICS, FROM ANTIQUITY TO MODERN CODIFICATIONS

FRIDAY, 11th OCTOBER 2024

08:30 – 09:00h **Registration**

09:00 – 09:30h **Opening address** (**Magdalena Apostolova Maršavelski**)

Keynote speeches

Chair: Aleksander Grebieniow

09:30 – 10:00h **Éva Jakab** (Károli Gáspár Reformed University, Budapest): Banking, credit and paper money in classical Roman law

10:00 – 10:30h **Sebastian Martens** (University of Passau): Of sold inheritances and a spy's memoirs – the (ir)rationalities of an account of profits

10:30 – 11:00h **Coffee break**

Roman law I

Chair: Tommaso Beggio

11:00 –11:30h **Janez Kranjc** (University of Ljubljana; Slovenian Academy of Sciences and Arts): The role of oath (*iusiurandum*) in Roman law

11:30 – 12:00h **Antonio Leo de Petris** (University of Macerata): The *litis contestatio* as a way of extinguishing correal obligations

12:00 – 12:30h **Marko Sukačić** (Josip Juraj Strossmayer University of Osijek): D. 18,6,9 (*Gaius libro decimo ad edictum provinciale*) – Why should the seller pay for the trees?

12:30 – 14:00h **Lunch break**

Roman law II

Chair: Marko Sukačić

14:00 – 14:30h **Enrico Sciandrello** (University of Torino): Real contracts in Roman legal experience

14:30 – 15:00h **Tomislav Karlović** (University of Zagreb): Conclusion and dissolution of contracts *inter absentes* in Roman law

15:00 – 15:30h **Máté Giovannini** (Károli Gáspár Reformed University, Budapest): *Per epistulam mandatum suscipi potest*. The documentary application of mandate

16:00h **Guided visit to the *Rector's Palace*, seat of government of the Dubrovnik Republic (1358-1808)** (courtesy of *Dubrovnik Museums*, https://www.dumus.hr/en/)

SATURDAY, 12th OCTOBER 2024

Roman law III

Chair: Jakob Fortunat Stagl

09:00 – 09:30h **Franciszek Longchamps de Bérier** (Jagiellonian University, Krákow): Laziness and the performance of contract in Roman law

09:30 – 10:00h **Marco Falcon** (University of Padua): *Pollicitatio* in the reflection of Roman jurists

10:00 – 10:30h **Grzegorz Blicharz** (Jagiellonian University, Kraków): The nature of services and the nature of obligations. Roman law and the Western legal tradition

10:30 – 11:00h ***Coffee break***

Roman law IV

Chair: Franciszek Longchamps de Bérier

11:00 – 11:30h **János Erdődy** (Pázmány Péter Catholic University): *Lex Laetoria* (*Plaetoria*) and its appearance in the Drusilla lawsuit

11:30 – 12:00h **Lucia Zandrino** (University of Torino): *Pater* '*creditor*' and *filius* '*delegatus*'. Re-reading D. 39.5.2.pr.-1.

12:00 – 12:30h **Mirna Dajak** (University of Split): The liability of ships' masters, innkeepers and stablekeeprs for loss suffered by guests and passangers

12:30 – 14:00h ***Lunch break***

Roman law V

Chair: Mirza Hebib

14:00 – 14:30h **Jakob Fortunat Stagl** and **Igor Adamczyk** (University of Warsaw): *Favor debitoris*. The idea of debtor protection in comparison with other *favores*

14:30h – 15:00h **Vid Žepič** (University of Ljubljana): *Datio in solutum necessaria* as a manifestation of *favor debitoris* in Roman postclassical law

15:00h – 15:30h **Ivana Vlašić** (University of Mostar): *Mutuum* – between real and consensual elements

SUNDAY, 13th OCTOBER 2024

Roman law and beyond I

Chair: Henrik-Riko Held

09:00 – 09:30h **José-Domingo Rodríguez Martín** (University of Vienna): The reception of Roman terminology in Byzantine law of obligations

09:30 – 10:00h **Vukašin Stanojlović** (University of Belgrade): The intricacies of *cautio usufructuaria*: tracing its roots and impact in Roman legal tradition

10:00 – 10:30h **Silvia Schiavo** (University of Ferrara): Some observations on the Franco-Italian Draft Code of Obligations, 1927

10:30 – 11:00h ***Coffee break***

Roman law and beyond II

Chair: Tomislav Karlović

11:00 – 11:30h **Andreja Katančević** (University of Belgrade): Costs of childbirth and Serbian Civil Code

11:30 – 12:00h **Janko Paunović** (University of Vienna): Reception of Roman legal wisdom through the work and writings of Valtazar Bogišić

12:30 – 12:30h **Mirza Hebib** and **Nasir Muftić** (University of Sarajevo): *Quinam damnum dent* – AI and liability

12:30 – 14:00h ***Lunch break***

Roman law and beyond III

Chair: Grzegorz Blicharz

13:00 – 13:30h **Mattia Milani** (University of Foggia): *Fiducia* in Roman Law and Its Legacy in Modern Legal Systems

13:30 – 14:00 **Aleksander Grebieniow** (University of Warsaw): The historical argument in the modern law of obligations

14:00 – 14:30h **Henrik-Riko Held** (University of Zagreb): *Cessio* in practice - *ius commune* and ABGB in the Croatian experience

14:30h **Closing of the course** (**Tommaso Beggio**)

BOOK OF ABSTRACTS

FRIDAY, 11th OCTOBER 2024

Keynote speeches

Banking, credit and paper money in classical Roman law

Éva Jakab (Károli Gáspár Reformed University, Budapest)

The common view that all Roman money consisted merely of coins was questioned already decades ago by ancient historians (see e.g. Chris Howgego, W.V. Harris, Keith Hopkins, Dominic Rathbone, Elio Lo Cascio, Sitta von Reden). Dealing with the nature of Roman money they classified certain types of cashless money transactions as paper money. However, the new issues have hardly triggered any reactions among scholars of Roman law. There is a gap between historical and legal historical research. The main aim of this chapter is to harmonize views on money-related transactions in the Roman world.

Despite common modern terminology which understands paper money as a country's official currency, this chapter will focus on money transactions carried out through transferring legal documents – especially debt notes, *cheirographa*. Already Crook pointed out that in the Greek part of the Empire "deeds of hand (*cheirographa)*, acknowledging debt and promising payment", served as constitutive instruments. In the Roman law of obligations, writing was rarely a required formality. Nevertheless, it seems likely that the Hellenistic practice of using negotiable instruments became common also among Roman citizens. The legal nature of *cheirographa* is a controversial topic under Roman law: did they serve as mere evidence or did they have a constitutive character? A closer sight into the documentary, literary and juridical sources can prove how far such transactions were acknowledged before Roman courts and how they were interpreted by Roman jurists.

Of sold inheritances and a spy's memoirs – the (ir)rationalities of an account of profits

Sebastian Martens (University of Passau)

Traditionally, continental Civil law is structured according to certain factual situations, like contracts, delicts etc. While this structure is helpful in many ways, it makes it difficult to develop general principles for the different types of remedies. One such remedy has suffered from this, in particular. Although Roman law allowed for an account of profits sometimes, the discussion in the ius commune on a *lucrum ex negotiatione* did not lead to clear concepts in today's codes. Rather, the Civil law seems to proceed on similar lines as the Common law, where the House of Lords held that an account of profits may be awarded in some circumstances, where ordinary remedies are inadequate. In my paper, I will trace the historical origins of our current rules on the account of profits and explore the (different) reasons brought forward for this memory. Thus, I will try to establish a (more) coherent system of these rules and a general principle behind them.

Roman law I

The role of oath (*iusiurandum*) in Roman law

Janez Kranjc (University of Ljubljana; Slovenian Academy of Sciences and Arts)

The existence and the role oaths played in Roman law reflect a deep-seated belief that oaths should be respected. In Roman tradition perjury was strongly frowned upon and severely punished. The fate of a perjurer, illustrated by Livy's description (Ab U. c. 1, 24), probably remained in the Roman subconscious even after the belief that Jupiter punished perjurers had largely disappeared.

Oath played an important role in Roman public life. There were oaths of loyalty, of obedience to a law or to a person, oaths taken by the plebs that the persons of tribunes would be sacrosanct, etc. In civil law the praetor incorporated the system of oaths into the civil procedure. The oath proffered by one party to the other, if duly sworn, put any claim out of contention.

According to Gaius (D. 12, 2, 1) "Conscientious oath-taking is relied on as an important means of shortening litigation (*remedium expediendarum litium*). Disputes are settled in this way by virtue of agreement between litigants or on the authority of the judge."

There were two types of oath in Roman law. The first one was possible in the course of a judicial trial *(iusiurandum in iure, iusiurandum necessarium*). The second one was agreed upon between the parties to a dispute (*iusiurandum voluntarium*).

In some cases related to claims to a specific thing or a fixed sum of money the claimant could tender the defendant to swear to the justice of his case. If the defendant accepted and took the oath, he won. If he refused, he lost and an immediate execution on his property followed. The defendant had the right to retender the oath (*referre iusiurandum*) to the plaintiff, inviting him to swear instead. If he took the oath, he won, if he refused, he lost.

A defendant could require the plaintiff to swear to the good faith of his claim (*non calumniate causa agree*); similarly the plaintiff could demand from the defendant to swear that he was not denying his claim for chicanery. This type of oath was made obligatory by Justinian (C. 2, 58, 1 pr.).

The oath could also be agreed upon between the parties to a particular dispute. The claimant who swore to uphold his claim could use a praetorian action *de iureiurando* against the debtor. The debtor, who under oath denied the existence of his debt could use the *exceptio iurisiurandi* against the creditor who sued him. With regard to this type of oath, jurist Paul (D. 12, 2) notes that "The taking of an oath is a species of settlement (*speciem transactionis continet*) and has greater authority than *res judicata*.

The *litis contestatio* as a way of extinguishing correal obligations

Antonio Leo de Petris (University of Macerata)

The aim of the proposed report is, after having examined (and possibly distinguished) correal and solidary obligations, to deal with the issue linked to *litis contestatio* as a means of extinguishing the obligation. On this point, it is necessary to distinguish the developments of pre-Justinian jurisprudence from Justinian's law. As is known, in pre-Justinian law the *litis contestatio* has the effect of extinguishing the obligation, terminating, also, the procedure *in iure*. The *litis contestatio*, however, loses this effectiveness in Justinian law (where, indeed, it loses all relevance). And yet, in the *digesta* we come across many texts which still admit the effectiveness of the *litis contestatio* as a means of extinguishing the correal obligation and others where, on the other hand, this effectiveness is denied (specifying how only payment would extinguish the obligation for everyone). This contrast has been at the center of a long debate which will be examined in detail, starting with the *Glossa*. It reconciled this antinomy by maintaining that in the first case the *litis contestatio* was *effectualis* (*cum effectu*), that is, it presupposed payment. This explanation, which could be considered acceptable in Justinian law, appears impossible in pre-Justinian law. The report, therefore, after having succinctly reconstructed the debate, will propose a different solution to the long debate.

D. 18,6,9 (*Gaius libro decimo ad edictum provinciale*) – Why should the seller pay for the trees?

Marko Sukačić (Josip Juraj Strossmayer University of Osijek)

The liability for the material defect of the sold good is the principle of law of obligations included in the legal systems of countries in continental Europe. It was developed from Roman law, mainly from the rules created by the *curule aediles* regarding the sale of slaves and livestock. Yet, there are some peculiar examples of comparable liability for other goods as well. For instance, Gaius had in his 10th book of commentary on the provincial edict (D. 18,6,9) spoken about the quite unique situation. The force of the wind had overthrown the trees on the land that is the object of the sale. He concludes that if the sale is concluded and the buyer was not aware of the described course of events while the seller was, the seller should reimburse the buyer's interest.

The question that emerges is: does Gaius see the missing trees as a latent defect of the sold immovable and the seller's silence as a concealment of an existing material defect? To add to the confusion, a similar peculiar situation can be seen in another Gaius source (D. 18,1,35,8), where he holds that concealment of the name of the neighbor of the immovable that is to be sold also leads to the seller's liability. Therefore, this contribution aims to explore the liability of the seller of the immovable for the dubious latent defect in the described peculiar situations. This way, it can be evaluated whether the maxim *caveat emptor* correctly defines the rules of risk management for withheld information and events that occurred during the precontractual negotiations in the sale of the immovable in classical Roman law.

Keywords: *emptio venditio*; *periculum*; material defect; immovable; Roman law

Roman law II

Real contracts in Roman legal experience

Enrico Sciandrello (University of Torino)

The research concerns the topic of real contracts in Roman legal experience, a topic that has been the subject of studies, including recent ones, which have shown how this category, in the Roman perspective, had narrower confines than those usually considered. The characteristic element of these contracts is to be found in the datio rei, understood as the transferable delivery of property. Why then are figures such as deposit, commodate and pledge included in this category by the legal science of the Justinian and later periods? The aspect that seems to have most influenced this change of perspective is to be found in the emergence of consent as an element common to every contract. For this reason, the role played in this matter by the doctrine of Sextus Pedius (D. 2.14.1.3), who seems to have been the first to place consent at the centre of the entire contractual problematic, must be investigated.

Conclusion and dissolution of contracts *inter absentes* in Roman law

Tomislav Karlović (University of Zagreb)

One of the important features and novelties of these contracts, which the Roman jurists emphasized repeatedly, was the possibility to enter into a contract *inter absentes*, However, the moment when the contract was concluded and the effects of declarations of wills between absent parties were not discussed in more detail and consequently are not elaborated in the literature. In an effort to give some answers and elucidate these issues, the responses of Roman classical jurists dealing in general with the effects of declarations of wills between absent parties are analysed in the paper. The preserved sources primarily deal with the renunciation of contract, so they are in the focus of investigation, but as the relationship between the will, the declaration of will and its effects should be the same, it is believed that the conclusions drawn thereof can be analogously used for the conclusion as well.

Per epistulam mandatum suscipi potest. The documentary application of mandate

Máté Giovannini (Károli Gáspár Reformed University, Budapest)

According to the Roman view, the gratuitous activities performed by persons in a friendly relationship towards each other belonged to *officium*, the comprehensive range of moral duties that maintained social order. In accordance with the historical premises, the legally regulated contract of mandate is also based on an altruistic activity performed for the benefit of others. In legal texts, the verb *mandare* usually means that someone requests or entrusts another person to carry out an act. In their decisions, the legal scholars used the term *mandare* in both a narrower and a broader sense. Paul begins his commentary on the edict with an illustrative list of the typical expressions and ways in which a *mandatum* can be created between the parties. The sources report on the use of the *actio mandati* in numerous, sometimes very different applications, such as credit mandate, *mandatum post mortem*, or mandate to purchase. In the written records of Roman law, there are a large number of cases mentioning mandate. The focus of my paper is on documents related to the daily transactions of the Romans. The purpose of the examination is to outline the relation between the consensual contract can be reconstructed from the primary legal material of classical Roman law and the structure and functions of *mandatum* used in practice.

SATURDAY, 12th OCTOBER 2024

Roman law III

Laziness and the performance of contract in Roman law

Franciszek Longchamps de Bérier (Jagiellonian University, Krákow)

Laziness or sloth, like the matter of some other great subjects in the field of law— as unjust enrichment and the abuse of rights, proves at the same time both easy and not easy to describe. With regard to laziness, the description is easy inasmuch as the words describing this phenomenon come from everyday language (*desidia*, *tarditas*, *ignavia*, *segnitia*, *pigritia*). The difficulty is caused by the lack of an unambiguously established terminology. Then, one particular question that must be asked concerns the challenges that laziness creates for private law. It is most certainly worth starting with Roman law in order to answer the question. Ancient legal sources suggest that sloth was put alongside the generally understood carelessness and negligence when it comes to explaining what fault really is as a premise of liability for damages, and even more as a standard of expectations and duty in the performance of contractual provisions. Laziness, in at least some circumstances, becomes the express opposite of diligence.

In private law sloth results in financial consequences. These will not always be borne directly by the slothful person herself but rather by those responsible for the person or for the resulting state of affairs, as in the case, for example, of a guardian or a seller. The study of the manifestations of laziness stigmatized by the law invites us to summon up and strengthen the motivation for persistent and tireless work, understood as a virtue and practiced with wise moderation.

Sources: D. 17,2,72; I. 3,25,9; I. 3,14,3; C. 5,38,3; C. 4,24,8; D. 9,4,26,6; D. 21,1,18 pr.; D. 26,7,7,3

Pollicitatio in the reflection of Roman jurists

Marco Falcon (University of Padua)

According to the majority of the scholars, *pollicitatio*, as conceived in the context of the Roman evergetism, consists in the non-formal promise to a local community to provide for a pecuniary benefit or for a public work. However, from a legal point of view, its binding effects, its qualification as a source of obligations and its unilateral or bilateral nature are disputed.

This lecture aims at casting new light on the topic through the discussion of the problems linked to the institution, as listed above.

To do so, an idea expressed a few decades ago by Giambattista Impallomeni will be reprised and further investigated. The author, indeed, argued that *pollicitatio* had binding effects stemming from a 'real obligating element'. The validity of this hypothesis will be evaluated, along with the possible significance and nature of the 'real obligating element'. This latter notion belongs in the broader framework of innominate contracts, which, therefore, will also be taken into account in the discussion.

The nature of services and the nature of obligations. Roman law and the Western legal tradition

Grzegorz Blicharz (Jagiellonian University, Kraków)

Given the broad range of the Roman *locatio conductio*, the subject matter varies widely: from contracts for the use of things, to contracts for specific work and the provision of services, to contracts of employment; from obligatory relationships to real relationships serving the aforementioned purposes; and finally from private-law relationships to public-law relationships according to the 'private' or 'public' nature of the things and services. The paper will show a new perspective on the Roman meaning of specific task (*opus*) and services and works (*operae*), which allows a better understanding of the diversity of regulation of service provision in the Western legal tradition. It will demonstrate Roman and Greek roots of the division between *obligation de résultat* and *obligation de moyens*.

Roman law IV

Lex Laetoria (*Plaetoria*) and its appearance in the Drusilla lawsuit

János Erdődy (Pázmány Péter Catholic University)

The protection of *minores* in Roman law included complex measures (e.g. guardianship, penal actions, processual remedies). Protecting citizens under 25 was put into effect in two separate stages. Stage one was the *lex Laetoria* (*Plaetoria*), an Act dating back to the end of the 3rd century or the beginning of the 2nd century BC. Despite having full capacity, *minores* were yet allowed to obtain a *curator* to be appointed to administer their affairs. Simultaneously, an *actio legis Laetoriae* was often granted, a *popularis actio poenalis*, against whoever deceived a *minor*. Stage two ensured processual remedies established by the praetorian edict. This introduced *exceptio* on the one hand, and *in integrum restitutio* on the other.

The primary sources of *lex Laetoria* encompass papyri sources from the Faiyum Oasis, from around the turn of the 3rd and 2nd centuries AD. One Greek papyrus (BGU II 378) is specifically remarkable from a legal point of view: it contains a petition for the suspension of execution related to a contract of loan. This *khirographum* is part of the Drusilla Lawsuit from the 2nd century AD. This is an archive with 21 papyri which all give us a profound insight to the everyday reality of Roman law. The analysis of these primary sources, including the case in the papyrus BGU II 378, allows us to approach Roman law in action and understand how Rome managed to handle herself as an Empire.

Pater '*creditor*' and *filius* '*delegatus*'. Re-reading D. 39.5.2.pr.-1

Lucia Zandrino (University of Torino)

My contribution consists in examining the content of D. 39.5.2.pr-1, a text about delegation between *pater delegans* and *filius delegatus*. Remarks will be made about the status of *filius* and how the specific rules about obligations could impact on the relation with the *pater*. A possible interpretation of the text will be given with regard both to economical and juridical aspects of the context related.

The liability of ships' masters, innkeepers and stablekeeprs for loss suffered by guests and passangers

Mirna Dajak (University of Split)

The strict liability of the debtor was applied in classical law, among others, in the case of *custodia*. Because of their bad reputation, shipmasters, innkeepers and stable owners (*nautae, caupones, stabularii*) were responsible for the belongings of their guests and passengers regardless of their fault for any disappearance and destruction of entrusted things, unless it happened by *vis maior.* It is generally considered that Digest 4.9. title *„Nautae caupones stabularii ut recepta restituant*" granted distinct actions. In this presentation, the terms *nautae, caupones, stabularii* are defined and certain specifics related to the shipmaster are emphasized. Passengers, or guests, had at their disposal the *actio furti et damni adversus nautas, caupones et stabularios* and later also the *actio ex recepto*. The author analyzes basic features and purpose of these lawsuits, the differences in their application, the controversial issues that accompany them, as well as the possibility of applying some other lawsuits. From the period of emperor Justinian and later on liability for *custodia* was interpreted as *culpa in eligendo* or *culpa in custodiendo.* In this context, liability of shipmasters, innkeepers and stable owners was noted in certain modern civil codifications.

Roman law V

Favor debitoris. The idea of debtor protection in comparison with other *favores*

Jakob Fortunat Stagl and **Igor Adamczyk** (University of Warsaw)

The purpose of this paper is to verify – or falsify – the statement that *favor debitoris* is a Roman concept. The existence of such a principle is mentioned in the literature on the occasion of other *favores* such as *favor libertatis*, *favor dotis* or *favor rei*. In the Roman sources, however, *favor debitoris* does not occur, unlike the aforementioned *favor libertatis* and *favor dotis*. Of course, the non-occurrence of a specific term does not necessarily indicate that a given phenomenon, a legal institute in our case, did not exist. It is worth mentioning in this context the concept of *begriffslose Präexistenz* coined by Emilio Betti and Franz Wieacker, which translates into "pre-existence devoid of terms". Nevertheless, it is important to consider whether the absence of *favor debitoris* in the sources is nonetheless not coincidental.

Occurring in Roman texts e.g. *favor dotis* and *favor libertatis* describe the adoption of solutions in favour of either the dowry or liberty of the slaves. Both of these constructions have certain points in common. First of all, they were a clear exception to the rigors of the *ius civile*. They also have their origin in statute law, i.e. *leges, constitutiones principis*. Moreover, they serve the purpose of achieving certain important social objectives assumed by the state. Both of these phenomena therefore fully correspond to Paulus' definition of *ius singulare* (D. 1, 3, 16 Paul. l. sing. de iure singulari). The *ius singulare* was a kind of privilege, constituting a separate system from the *ius civile*. Other examples of *ius singulare* is for example *testamentum militis*. The use of the term *favor* in the jurists' texts would not be purely semantic, but also legal. Each *favor* mentioned in the sources would then have to be regarded as a separate system of *ius singulare*.

In this context, the paper aims to show whether *favor debitoris* also qualifies as *ius singulare*. Of course, the absence of this term in the Roman texts would lead one to conclude that such a general system of debtor protection did not exist after all. However, given the aforementioned term *begriffslose Präexistenz*. It should be considered whether the Roman texts nevertheless offer the possibility of deducing the existence of a separate debtor protection system, along the lines of other *favores*.

Datio in solutum necessaria as a manifestation of *favor debitoris* in Roman postclassical law

Vid Žepič (University of Ljubljana)

Under classical Roman law, the debtor was obliged to fulfil the specific object of the obligation he owed. If the creditor agreed to accept an alternative form of fulfilment, the debtor was considered to have been released from his obligation by offering such an alternative. This alternative form of performance was called *datio in solutum voluntaria*.

Emperor Justinian, in his 4th novel, significantly expanded the rights of the debtor. This constitution allowed the debtor to offer the creditor payment in immovable property instead of the initially agreed monetary payment if the debtor was unable to sell his property. The debtor could use this legal mechanism as a defence if the creditor insisted on payment in cash, provided the debtor could prove that he had no significant movable assets and that he had failed to sell his immovable assets at a reasonable price.

If the creditor refused to accept the immovable assets offered, he would face the consequences outlined in the concept of creditor´s delay (*mora creditoris*). This mechanism, designed to prevent the excessive depletion of the debtor's assets through repeated auctions, was a significant departure from the rights of the creditor under classical Roman law.

Emperor Justinian recognised that his constitution, while favourable to debtors, was not in the best possible interests of creditors. Nevertheless, he implemented it out of compassion for debtors (*clementia*). This new principle of necessary fulfilment of an obligation by providing something of value instead of payment (*datio in solutum necessaria*) stands out as one of the most significant examples of favouring the debtor's position (*favor debitoris*).

Favor Debitoris is not merely an interpretation of legal texts and transactions in the debtor's favor. It embodies a broader array of legislative measures aimed at protecting the weaker contractual party. This lecture will delve into specific instances of *datio in solutum necessaria,* illustrating how the overarching principle of *favor debitoris* significantly shaped the evolution of Roman law during the post-classical period. Through a meticulous examination of legal texts, attendees will gain a profound understanding of the ideological underpinnings of Roman law regarding obligations in the period of late antiquitry.

Mutuum – between real and consensual elements

Ivana Vlašić (University of Mostar)

Loan is one of the oldest and most important contractual relations of ancient law. Roman law, which was woven into the contemporary European continental legal system, offered answers to numerous legal and social questions and created institutes that are still in full use today. The dogmatic framework of the loan agreement (*mutuum*) and the legal nature of the *mutuum* is a complex issue within Romanist scientific circles. Many debates have developed on the basis of the constructive elements that the *mutuum* of Roman law must contain, as well as regarding the question of what role consensuality plays in the creation of the *mutuum*. The author analyzes elements of the reality of the loan, which strongly reflects the moment of handover of the object in question and the elements of consensuality that are essential for the creation of this contract and what is the legal relationship between these elements, looking back at the consensuality of the modern age expressed in the positive legal arrangement of the loan in the legislative framework of Bosnia and Herzegovina.

SUNDAY, 13th OCTOBER 2024

Roman law and beyond I

The reception of Roman terminology in Byzantine law of obligations

José-Domingo Rodríguez Martín (University of Vienna)

Byzantine law played an essential role in the dissemination of Roman law in Eastern Europe. But the process of reception was not limited to the mere translation of Roman technical terms into Greek, but also the coining of its own legal terminology and the creation of new concepts. A very interesting example of this phenomenon is to be found in the law of obligations, in relation to the concept of *vitium* in sales.

The intricacies of *cautio usufructuaria*: tracing its roots and impact in Roman legal tradition

Vukašin Stanojlović (University of Belgrade)

The dominant characteristic of the usufruct is its dualistic legal nature. The synthesis of real and obligatory elements has created an authentic legal institute, thanks to which it survives for centuries after the collapse of the legal system from which it originated. However, the author posits that usufruct was initially *ius in re*, lacking obligatory ties between owner and usufructuary. Therefore, the scope of obligations falling on the usufructuary was significantly narrower than assumed. Namely, he had a "general" obligation to refrain from any unlawful behaviour that would cause harm to the owner. Consequently, for the damage caused, he would be liable like any third party who unlawfully destroys or damages someone else's property. Provided that the damage is the result of the active and immediate action of the usufructuary, the owner had at his disposal *actio legis Aquiliae*, as well as specific procedural means (*actio in factum*). If the reduction of assets is not the result of physical damage to the property (for example, untying an animal or releasing slaves), the owner would not be able to sue for the resulting damage.

By the late Republic, the praetor likely intervened and transformed the institute. This included obligation for the usufructuary to give security in the form of *stipulatio* committing to: provide warrantor, exercise the right as *bonus pater familias*, return the thing to the owner after the cessation of the right,

and behave *sine dolo*. These obligations evolved further over time, becoming integral to the right of usufruct. In the case of breach any of these obligations the owner had *actio ex stipulatu*.

In connection with this, the author examines the questions of the emergence and evolution of *cautio usufructuaria*, the legal status before its introduction, and its legal nature and forms.

Key words: Roman law, usufruct (*ususfructus*), *cautio usufructuaria*, *actio legis Aquiliae*, *actio ex stipulatu*.

Some observations on the Franco-Italian Draft Code of Obligations, 1927

Silvia Schiavo (University of Ferrara)

In the last decades many scholars have focused their interest and research work on the ideas of creation and implementation of a new European *ius commune*. This interest also led to several projects for a common civil codification, projects that have different and various roots -think, for instance, to the *Principles of European Contract Law* of the "Lando Commission", or, in more recent times, to the *Draft Common Frame of Reference*- and that often recall the Roman legal Tradition. The projects themselves became, then, subject of several studies as well, studies that sometimes try to figure out if the solutions here provided can be an effective contribution to the creation of a new European *ius commune* and to the harmonization of the different approaches that the national civil codes present on several problems.

My paper aims to look back to a quite old project for a *ius commune* of obligations and contracts: the case represented by the Franco-Italian project of 1927. The "father" of this "unitary code" for Italy and France was Vittorio Scialoja, who, immediately after World War I strongly pursued the idea of the aggregation of jurists, together with the necessity of coordination between the private law of France and Italy but also looking to other European countries.

After a short description of the program of Scialoja, and of the debate it initiated among scholars, the paper will focus on some aspects dealing with the sources of obligations (art. 1- art. 86 of the project). In this perspective, it will consider the choices made by the compilers and will evaluate the impact of Roman Law and Roman legal tradition on them and the relation with the solution previously adopted in the *Code civil* (1804) and in the *Codice civile del Regno d'Italia* (1865).

Roman law and beyond II

Costs of childbirth and Serbian Civil Code

Andreja Katančević (University of Belgrade)

The paper deals with the question why paragraph 1328 ABGB, which makes a father liable for the cost of giving birth to an illegitimate child, was not accepted into SCC, although most provisions dealing with damages were included. Two circumstances are proposed as possible reasons.

Firstly, an illegitimate pregnancy was considered shameful in Serbia of that time and it was carefully concealed. It often occurred that the illegitimate child was murdered in order to hide the pregnancy of a woman. Therefore, it seems highly unlikely that any woman would attempt to sue the father and thereby expose herself to social condemnation.

Secondly, the costs of childbirth in Serbia were very low, or even non-existent. Professional help in childbirth was not available, while the pay of a midwife was advanced by the state and even if it was not, the pay was relatively small.

The employed methods are linguistic, historical and systemic interpretation of the sources and the historical method. Published and unpublished materials from the Serbian Archive are used.

Reception of Roman legal wisdom through the work and writings of Valtazar Bogišić

Janko Paunović (University of Vienna)

In this paper, the author will explore the eighth section of the sixth book of the General Property Code for the Principality of Montenegro and the legal maxims (regulae iuris, brocardica) of Valtazar Bogišić. Bogišić masterfully and brilliantly managed to imbue this accumulated legal wisdom, derived from the works of Roman jurists, with the essence of Montenegrin national character. The focus will naturally be on the legal maxims dealing with obligations. Much has been written about this section of the Code, especially in recent times, making this an opportune moment to honor the late Marko Petrak, a visiting professor from the Dubrovnik region in Montenegro, who also dealt with property law legal maxims in his work.

In the first part of the paper, the author will present Bogišić's educational journey based on archival material from Cavtat and Vienna, an aspect often overlooked in the recent wave of interest in Bogišić. Following this, the paper will examine the legal maxims of an obligatory nature, including a comparative analysis of the sources Bogišić might have drawn upon when drafting this section of the Code. The normative regulation of this section is particularly intriguing, and this regulation will also be discussed in detail.

Quinam damnum dent – AI and liability

Mirza Hebib and **Nasir Muftić** (University of Sarajevo)

In Roman law, establishing tort liability required the cumulative fulfillment of several conditions: the occurrence of damage, the existence of an illegal act, a causal link, and the intention of the perpetrator. Considering the necessity of intention as a subjective element in the committed action, generally, individuals could not be held responsible for damage caused by someone else's actions. An exception to this rule arose when damage was caused by individuals *alieni iuris* or slaves, wherein the *pater familias* was obligated to compensate for the damage caused by their subordinates. This phenomenon is termed "noxal liability" and, with specific clarifications, also applies to the regulation of damage caused by animals. The principle of – *noxa caput sequitur* (the injury follows the head or the person) concerning animals is justified by the owner's dominion over the animal and, in the case of a subordinate, by the potestative relationship connecting them to the family, namely, the *pater familias*, as a person *sui iuris*.

The famous European jurist Samuel Pufendorf, in his book "*De jure naturae et gentium*", drawing from the insights of the Roman jurist Ulpian, asserts the principle that no one should inflict harm, and if damage occurs, it should be compensated. In the fourth section titled – *Quinam damnum dent* (Who can cause damage), he delves into the criteria crucial for identifying the perpetrator, i.e., the individual accountable for the inflicted harm.

This presentation explores the relevance of applying some Roman legal rules to contemporary relations concerning damages attributable to artificial intelligence. The problem emerges from its characteristics: autonomy, self-learning capacity and opacity. A human creation, perphaps for the first time, possess characteristics that renders it unfathomable for humans. Although this technology is new, its characteristics are not, which is why Roman law remains relevant.

Roman law and beyond III

Fiducia in Roman Law and Its Legacy in Modern Legal Systems

Mattia Milani (University of Padua)

Fiducia in Roman law was a formal transfer of property, basically aimed to the retransfer of that property in a later moment. The obligation assumed by the transferee could be shaped in different ways, through a flexible agreement traditionally called *pactum fiduciae*, according to the purpose for which *fiducia* was being used for (e.g. real security, deposit, gratuitous loan, *donatio mortis causa*, among others). It is commonly believed that many institutions of modern European legal systems stem from Roman *fiducia*, even though *fiducia* itself was unknown to medieval jurists, and therefore is not part of the tradition that originated from them. As is well known, the modern 'fiduciary transaction' was a creation of the 19th century German legal doctrine based on Roman legal sources, promptly accepted by scholars and then introduced in other European legal systems. One may wonder, however, why the 19th century German jurists came up with the idea of focusing on Roman legal sources on *fiducia*? What interests or needs drove them? And how many principles of ancient *fiducia* can be found in the notion of 'fiduciary transaction' and in the contemporary trusts? By giving an answer to these questions, this lecture aims to shed new light on the legacy of ancient *fiducia* in modern legal systems.

The historical argument in the modern law of obligations

Aleksander Grebieniow (University of Warsaw)

Compared with the centuries of legal development, the modern codes of private law are relatively recent. They are the result of considerable legal experience, although they are generally regarded only as a turning point that separates history from the law in force. The belief that a codification renders obsolete the legal order in force before its enactment is incorrect. The formal discontinuity cannot invalidate the continuity of the content of the laws, the continuity of the legal tradition. It is reasonable to assume that past legal experience has some bearing on the law in force and can be used to resolve specific cases. This assumption forms the basis of the current project of a historical and problem-oriented commentary on the Polish Civil Code. The aim of the project is to identify and use material from Roman law onwards in order to provide historical arguments for modern legal debates. Inspiration from the past is particularly fruitful in the area of the law of obligations.

Cessio in practice - *ius commune* and ABGB in the Croatian experience

Henrik-Riko Held (University of Zagreb)

Cessio, it is known, is a transfer of a claim from one creditor (*cedens*) to another (*cessionarius*), while the debtor (*cessus*) remains the same. This legal manoeuvre relies on the concept of a claim as a transferable property asset, and it was as such essentially shaped in the 19th century. However, here as elsewhere Roman law and Roman legal tradition generally had a substantial role. In principle, Roman law was actually strongly opposed to the idea of a transfer of a claim from one person to another, and the same sentiment existed in the Middle Ages (*nomina ossibus inhaerent*). However, both legal systems found ways to practically achieve the effects of the transfer. In Roman law that was done via procedural representation and in time by the result oriented *actiones utiles*. In the Middle Ages the same result was achieved through the transfer of the written legal document and all the authorisations contained within. This reflects the basic mode of functioning of both legal systems - Roman law was an actional legal system, and (late) medieval law is significantly marked with the relevance of the written legal document. Finally, modern developments were enshrined in different civil codifications, one of which is the ABGB.

General historical development of *cessio* is adequately addressed in literature (Zimmerman, Hattenhauer, Luig). The aim of this paper is to particularly analyse historical developments in Croatian lands. Both in medieval times and in the modern period of the application of the ABGB, Croatian lands were a part of the areas influenced by the mainstream *ius commune*, albeit on the periphery. Exactly that merits a closer analysis which may help to better understand the problem of adaptation of developed legal concepts from centres to more peripheral areas. Additionally, it may shed some light on the influence of the result-oriented approach of courts and practitioners on a legal concept (since this process does not rely exclusively on the centre-periphery dynamic but rather has its own logic). After an overview of the historical development of the *cessio*, the paper will concentrate on the notarial documents from the medieval practice and on the case law regarding the application of ABGB in Croatia (taking into account both published and unpublished sources). This will hopefully provide a better understanding of the lesser-known strands of development of *cessio* within the larger European context of *ius commune*.