



PLUS RATIO QUAM VIS SIHDA 2018 - KRAKÓW

LXXIIe Session de la Société Internationale Fernand De Visscher
pour l'Histoire des Droits de l'Antiquité à Cracovie

11–15 septembre 2018

RÉSUMÉS – ABSTRACTS – RIASUNTI –
RESÚMENES – ZUSAMMENFASSUNGEN



Honorary Patronage of
the **President of the Republic of Poland Andrzej Duda**
in the year of the **Centenary of Regaining Independence**
1918–2018



UNIVERSITAS
IAGELLONICA
CRACOVIENSIS



1918 · 2018

Honorary Patronage of the **President of the Republic of Poland Andrzej Duda**
in the year of the **Centenary of Regaining Independence 1918–2018**

COMITÉ DIRECTEUR

EMMANUELLE CHEVREAU (PARIS)

FILIPPO BRIGUGLIO (BOLOGNA)

FRANCISZEK LONGCHAMPS DE BERIER (KRAKÓW)

COMITÉ ORGANISATEUR

FRANCISZEK LONGCHAMPS DE BERIER

PAULINA ŚWIĘCICKA

KAROLINA WYRWIŃSKA

ŁUKASZ MARZEC

TOMASZ PALMIRSKI

GRZEGORZ Blicharz

PIOTR ŁOCHOWSKI

KAMIL SORKA

KAMIL STOLARSKI

SECRÉTARIAT SCIENTIFIQUE

SIHDA2018@UJ.EDU.PL

SECRÉTARIAT TECHNIQUE ET FINANCIER

KONFERENCJE@UJ.EDU.PL

**LXXIIe Session de la Société Internationale Fernand De Visscher
pour l'Histoire des Droits de l'Antiquité à Cracovie**

11–15 septembre 2018

PLUS RATIO QUAM VIS

**RÉSUMÉS – ABSTRACTS –
RIASUNTI – RESÚMENES –
ZUSAMMENFASSUNGEN**

éd. Paulina Świącicka

Kraków 2018





CONFÉRENCES INAUGURALES

WACŁAW URUSZCZAK

Uniwersytet Jagielloński, Kraków – Pologne

La fondation de l'Université de Cracovie au XIV^e siècle. La place du droit romain dans les plans de Casimir le Grand

En 1363, le roi de Pologne Casimir le Grand (1333–1370), a entrepris de créer un *studium generale*, c'est-à-dire l'université à Cracovie. C'était une entreprise conjointe entre le roi et l'Eglise, représentée par le pape Urbain V et l'archevêque de Gniezno, Jarosław Bogoria Skotnicki. D'autres actes juridiques ont été discutées, comme la supplique du roi adressée au pape, le privilège de fondation du roi du 12 mai 1364 et la bulle d'érection du 1er septembre 1364. On a présenté aussi l'organisation de l'université et ses activités dans les années 1364–1400.

WITOLD WOŁODKIEWICZ

Uniwersytet Humanistyczno-Społeczny w Warszawie – Pologne

'Plus ratio quam vis' (Universal Maxim)

The Latin maxim *Plus ratio quam vis*, which is the motto of the SIHDA Session in Cracow in 2018, is not a formula derived from sources of legal nature. Nevertheless, it is an universal maxim, which can be applicable also to law.

As a motto of the Jagiellonian University, it was suggested first by professor Karol Estreicher in 1952. The motto was officially adopted in 1964 in the 600th anniversary of founding of the Jagiellonian University.

The maxim comes from the poet Maximianus, who lived in the 6th century AD and was the author of the poem *Elegiae*. However, the maxim might have significantly earlier roots and perhaps comes from Gaius Cornelius Gallus, who lived in the times of Octavian August and Virgil.

The maxim may refer to the rational quality of the created law and its development (*ratio*). Moreover, it can also concern the issue of defence against physical and mental constraints (*vis*). Finally, it may also denote the postulate of rationality of legal education and the role of Roman law in it.

TOMASZ GIARO

Uniwersytet Warszawski, Warszawa – Pologne

Rationality in Roman Law

Legal phenomena are frequently considered a product of *consensus*. This is implied by the theory of social contract, starting with the Athenian sophists of the 5th century BC through the thinkers of the Law of Reason, such as Hobbes or Locke, up to the contemporary contractual theories of justice of Rawls and Buchanan. Even if social contract is generally associated with the political philosophy of liberalism, also conservative thinkers which – as Burke – substitute the social contract with the concept of tradition, interpret it frequently in form of a (pseudo)consensual pact between the generations.

Was the Roman legal rationality particularly shaped by *consensus*? *Consensus*, which means in the last resort compromise, appears as the central concept of Roman constitutionalism. A clear consensual element appears already in the Catonian definition of the state as a social community weld by the *iuris consensus* in the sense of the acknowledgment of the same law. An identical element appears in the Ciceronian program of the coalition of the two Roman orders of the senate and equites (*concordia ordinum*), based on the consent of all the good citizens (*consensus omnium bonorum*). Somewhat later the concept of social harmony will return in a stronger form of *consensus universorum* as an ideological foundation of the Principate of Augustus.



Legal dogmatics of private law very rarely faces Copernican choices. Settlements and compromises bestow upon the legal doctrine the note of direct practicability and commonsensical prudence which distinguishes it from exact and empirical sciences, and even from somewhat “harder” social disciplines. The dogmatic mentality belongs to the type of bounded rationality which is limited not only by the facts, but also by the normative sources of law. Their modification requires, in the same way as legislative and judicial law-making, a *consensus (communis opinio)* which is impossible without a compromise.

The juristic compromise is visible not only in the practice of the administration of justice, but also in procedural institutions. The arbitration court was well known in Rome. In the Roman civil procedure the *praetor* was expected to bring about the compromise (*transactio*) between the parties which was allowed at any stage of the process preceding the sentence.

Only on the background of a *consensus* in a given community of interpreters we may decide, whether a judicial sentence is only an isolated mistake in art or, conversely, the starting point of the judicature *contra legem*, but still *secundum ius*. As a matter of fact, only lawyers confess so openly as the medieval gloss *usum imperatorum* that the common mistake (*error communis*) might be accepted as truth (*veritas*).

TRAVAUX SCIENTIFIQUES EN SESSIONS PARALLÈLES

(dans l'ordre alphabétique)

SEBNEM AKIPEK ÖCAL

Ankara Üniversitesi – Turquie

Adoption. From Antiquity to Modern Law

Nearly from the beginning of early ages, persons who cannot become biological parent tried to find ways to have children, may be not biologically, but legally. The legal way to have a child is “adoption”. The religions also gave importance to this concept and adoption is mentioned in the wholly books like the *Bible* and the *Quran*. The ancient laws all have their own adoption systems. Especially the Greek and the Roman Laws had their unique adoption systems.

Adoption has legal, ethical and sociological implications. In all the modern legal systems it is recognised and mostly regulated in detail. When defined, adoption means, legally to take an individual born to others as one's own child. Some law systems are encouraging adoption, while in some law systems it is not a very popular institution.

The practice of adoption has changed significantly over the time, especially from the ancient times. In the ancient times mostly the death of the parents was a common reason of adoption, while today infertility of the couple is a common and main reason of adoption.

In Roman law mostly adoption was not in the interest of the child, but adoption was practiced to secure an heir. One of the most famous adoptions in Roman law is the adoption of Hadrian by the emperor Trajan. By way of this adoption Hadrian has succeeded Trajan as the emperor. Also it should be mentioned that in Roman law, though the adoption of boys were common, adoption of girls was not actually desired. Besides the adoption of children, named as *adoptio*, adoption of an adult was also possible and named as *adrogatio*.

As is known Turkey has taken the Civil Code from Switzerland by way of reception in 1926. Adoption is regulated in the Swiss-Turkish Civil Code. It is a part of family law. While Turkey was taking the provisions regarding adoption, some major changes were made compared to the Swiss version. Also in Turkey the Civil Code was all over amended in 2002. Again the Swiss amendments were effective and still today nearly the Swiss and Turkish Civil Codes are very similar to each other. But again one of the major changes in the new Civil Code of 2002 was related to adoption. Actually the whole idea and system of adoption has been totally changed. There are major differences from the Swiss law.

In this paper Turkish law regarding adoption shall be discussed with all its effects and the differences between Swiss and Turkish law shall be explained. Especially the reasons of these differences shall be evaluated by using the antiquity law and its roots.

PIOTR ALEXANDROWICZ

Uniwersytet im. Adama Mickiewicza w Poznaniu – Pologne

‘Leges non dedignantur sacros canones imitari’. Canonical Reinterpretation of Justinian’s Novel (83,1) in Lucius III’s Decretals

Emperor Justinian in one of his novels stated that the imperial laws should not refrain from following the sacred and divine rules in cases regarding jurisdiction over criminal affairs of the clerics (*Nov.* 83,1). This general statement was found very attractive by medieval canonists, who used it in the discussion on the relation between the two laws. They were inspired by the reiteration of this passage from the *Novel* in two *Decretals* (X 2,1,8; 5,32,1) issued by the papal curia during the pontificate of Lucius III (1181–1185). The pope built an analogy between imitating the canons by the civil laws and supporting the canons by the imperial constitutions. The medieval decretalists took on this concept and elaborated on the complex matter of Roman law as a supplementary

source for canon law. The paper will examine how the Justinian's *Novel* gained its second life after a couple of centuries and how it was interpreted by medieval canonists. The medieval canonists commentaries to two above-mentioned canons will serve as a textual basis for the analysis.

CARLOS AMUNÁTEGUI PERELLÓ

Pontificia Universidad Católica de Chile – Chili

A Legal Concept of 'libertas'

Legal scholars from Ancient Rome were rather reluctant to give definitions of the legal concepts they used, unless these were utterly important juristic developments. Nevertheless, the Roman jurist Florentinus left us a definition of *libertas* which is exceptionaly broad and well constructed, able to fit both the public and the private law of the time: *libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur* (D. 1,5,4). The focus of this paper will be the elucidation of this concept and tracing its consequences into legal history.

FRANCISCO J. ANDRÉS SANTOS

Universidad de Valladolid – Espagne

'Ratio', 'vis' y 'tempus' en algunas fuentes jurídicas bizantinas

En esta comunicación me propongo analizar la terminología empleada en ciertas fuentes jurídicas del llamado “renacimiento jurídico macedonio” en Bizancio (ss. IX–X), concretamente el la *Eisagoge*, el *Prochiron* y, por contraste, las *Novelas* de León VI, con el fin de traducir términos latinos como ‘ratio’, ‘vis’ y ‘tempus’ tomados del Derecho justiniano. El objetivo es comprobar hasta qué punto la adaptación al griego bizantino de esos términos técnicos latinos supuso un cambio de significado – dada la necesaria ambigüedad, imprecisión y textura abierta de todo lenguaje natural – y, consiguientemente, sutiles cambios en la regulación de las instituciones jurídicas, de modo que el Derecho romano conservado en esas fuentes pueda considerarse, consciente o inconscientemente, deformado.

HANS ANKUM

Koninklijke Nederlandse Akademie van Wetenschappen, Amsterdam – Pays-Bas

Une interprétation du texte de Paul, D. 24,2,9 concernant la nécessité de la présence de sept témoins citoyens romains pubères en cas de divorce dans le droit romain classique

CRISTIÁN AEDO BARRENA

Universidad Católica del Norte, Antofagasta – Chili

L'obligatio' come cosa incorporale: la soggezione personale

A. Le definizioni di l'*obligatio* romana. La evoluzione della *obligatio* nell periodo classico è molto conosciuto. Come indica Dumont, il sostantivo che si menziona deriva da un verbo che suppone una condotta attiva. *Obligatio* è, in questo senso, l'atto di *legare*, piu che trovarsi *legato*. Ma la sua evoluzione permette di apprezzare che, il senso attivo del verbo, e del sostantivo correlativo, si modificherà nella misura che il vincolo si trasforma in un altro ideale e, conseguentemente, patrimoniale: dell'atto di legatura alla situazione del debitore di fronte all'aspettativa del creditore. Da questa prospettiva, l'*obligatio* ha riagruppatò, già nell'epoca classica, sotto un stesso nome, gli stessi effetti derivati di delitti e contratti, indipendentemente della modalità dell'atto che dava luogo all'*obligatio*, perchè come informa Pieri, la derivazione al sostantivo “zio” rivelava la nozione astratta di processi.

Abbiamo due famose definizioni, una, di Paulo ed un'altra di Giustiniano. Secondo Paulo, D. 44,7,3 pr.: *obli-*

gationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum (“la sostanza dell’obbligo non consiste in che uno faccia nostra una cosa o una servitù, bensì in costringere ad altro affinché darci, farci o prestarci”). E nella conosciuta definizione di Giustiniano 3,13 pr.: *obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura*. (“l’obbligo è un vincolo giuridico per il quale rimaniamo costretti a compiere secondo il diritto della nostra città”). La bibliografia e le discussioni su queste definizioni sono abbondanti e non costituiscono l’oggetto della nostra investigazione. Tuttavia, sarà necessario fare riferimento brevemente, per la nostra riflessione posteriore.

Nella definizione di Paulo si focalizza l’attenzione nella distinzione tra l’*obligatio* e l’*ius corporale*. Nell’*obligatio*, la soddisfazione dell’interesse tutelato viene data per l’attività del debitore; invece nel diritto reale, la soddisfazione si produce attraverso l’attività del proprio titolare. Più che una definizione, Paulo sta mettendo in evidenza, semplicemente, che l’*obligatio* non offre all’individuo attivo un potere su una cosa, bensì di creare una relazione tra due individui determinati; uno, l’*obligatus*, gravato con un dovere giuridico, specificamente, di prestazione. In relazione con la definizione di Giustiniano, il problema è nell’origine della definizione, Scherillo considera che l’espressione *iuris vinculum quo necessitate adstringimur*, può essere stata presa da Gayo 3,87. Per Talamanca, senza nessun dubbio, si tratta di un testo classico, perchè di un’altra forma non avrebbe senso la remissione, nell’epoca imperiale avanzata, all’*ius civile*; tuttavia non crede che possa accetarsi la tesi di Scherillo, rispetto del fatto che l’origine si trova in Gayo.

Per quello che tocca ad *aliquid solvendae rei*, Guarino ha difeso la tesi che la definizione, essendo classica, è incompleta, perchè bisogna leggerla come *solvere rem*, in altri termini, che si sarebbe riferito solo ad un tipo di obbligo (quella di *dare*) escludendo quelle di *fare* e *non fare*. In ogni caso, quello che importa è che la definizione permette di escludere qualunque riferimento diretto al creditore. Per l’autore, l’oggetto del vincolo è esclusivamente il debitore, un vincolo-*ligatio* nel quale si adstringe al soggetto passivo a soddisfare.

B. Godéva il creditore di un vero diritto soggettivo di credito? Entrambe le definizioni, in qualsiasi caso, descrivono l’*obligatio*, ora, come una relazione idealizzata che mette al debitore nella necessità di soddisfare una prestazione; e, al creditore, lo dota di un vero *ius* per ottenere la soddisfazione di quella prestazione, (precisamente, il testo di Paulo, fa riferimento alla contrapposizione tra la *res corporalis* del *ius* proprio de l’*obligatio*). Nuovamente, deve farsi riferimento a due questioni per capire adeguatamente quello che è stato scritto in precedenza. La prima è spiegare, esattamente, l’idea del diritto soggettivo o potestà del creditore nell’*obligatio* romana, la seconda, esaminare la portata di questa potestà. In quanto a l’esistenza del potere o diritto del creditore, può darsi la seguente domanda, ebbe il creditore a Roma un genuino diritto soggettivo? Secondo Guzmán Brito, la questione non consiste nel decidere se i giuristi romani riconoscevano i poteri o facoltà di un individuo. Il fatto decisivo, nel suo concetto, è che quelli poteri siano stati disegnati come di diritto. Da questa prospettiva, Guzmán Brito fa notare che le fonti hanno multipli riferimenti a *potestas*, ma, aggiunge, in nessuna di esse se li qualifica come *ius*. In realtà, come fa notare d’Ors, l’espressione *ius* ha un senso unico tra norma e facoltà: “che è precisamente quello di posizione giusta (...) *ius* est non vuole dire, giustamente, ‘non c’è facoltà’ o ‘non c’è norma’, bensì piuttosto ‘è giusto’ o ‘è una posizione giusta’”. Nonostante la distinzione tra proprietà e normatività fosse impropria della mentalità romana, grazie al monopolio del imperatore diventò possibile. L’*ius* smette di essere una disposizione privata e facilita l’apparizione del diritto obiettivo, sorgendo in una epoca postclásica l’idea di *ius* come diritto soggettivo.

Villey, da parte sua, ha fatto notare che tra i testi di Gayo, l’espressione *ius* non si riferiva unicamente alla facoltà o potestà. Mette, a modo d’esempio, i passaggi gayani 2,12 y ss., nei quali si fa riferimento a diversi specie di *iura* (*ius eundi* o diritto di passare; *stillicidium avertendi* di deviare le acque di pioggia, tra altri). Ma aggiunge Villey che anche *ius* fa riferimento a situazione negative: *ius dispari altius tollendi* (diritto di non su-elevare) *stillicidium dispari avertendi* (diritto di non deviare acque di pioggia): insomma che l’espressione *ius* pure può fare riferimento a carichi. Rispetto al trattamento gayano, Villey crede che la parola *iura*, nella partizione gayana delle cose, fa riferimento a cose incorporeali. In effetti, bisogna ricordare che tra le cose Gayo distingueva tra quelle private e quelle pubbliche, e dentro delle prime i corporali ed incorporeali (*servitutes*) *ususfructus*, *hereditas*, *obligatio*.

Per Villey, Gayo raccoglie una tradizione giuridica che lascia sentire la sua influenza della filosofia greca. Di fron-

te alle cose corporali (materiali) il giurista ubica quelli che sono create dal diritto e che esistono, potrebbe dirsi, in una maniera ideale. Perciò, in Gayo, *obligatio* ed *ius obligationis*, secondo Villey, significano la stessa cosa.

Un appunto sul pensiero filosofico greco, stoico e la posizione dei giuristi. Per il pensiero greco, dentro l'essere troviamo le cose corporali, quelle che possono percepirsi per i sensi, e gli incorporali, quello che non possono percepirsi, ma che esistono. Il pensiero stoico abborda la questione da un altro punto di vista, perchè separa il mondo dell'essere dal mondo del no-essere. Le cose corporali che appartengono all'essere sono quelle che possono toccarsi, nel senso di percepire, Gayo ci dice in 2,12 che le cose corporali sono quelli *tangi possunt*. Il Codice civile cileno, nell'articolo 565, dice che le cose corporali, sono quelle che: "hanno un essere reale e possono essere percepite per i sensi". Le cose incorporali, per il pensiero stoico, non si trovano nel mondo dell'essere: sono tutti quelli che hanno esistenza ideale, come l'amore, l'amicizia etc. Questa è l'idea che raccoglie il pensiero giuridico. Cose incorporali non sono tutti quelli di esistenza ideale, bensì quelle di interesse patrimoniale, come vedremo ora.

Fermiamoci nello schema della *Institutas* e nel trattamento delle cose incorporali e, particolarmente nei obblighi, necessariamente deve concludersi che, almeno l'*obligatio*, come cosa incorporale, non fu considerata un diritto soggettivo, anche se c'è un importante differenza tra il passaggio di Gayo 2,14 e quello di Giustiniano 2,2,3.

Tanto allegro, come Giustiniano, definiscono e si riferiscono alle cose incorporali di un modo simile. Secondo Giustiniano 2,2,3: *incorporalis autem sunt, quae tangi non possunt, qualia sunt ea, quae in iure consistunt: sicut hereditas usufructus obligationes quoquo modo contractae*; Gayo 2,14 dice: *incorporalis sunt, quae tangi non possunt, qualia sunt ea, quae < in > iure consistunt, sicut hereditas usufructus obligationes quoquo modo contractae*. La difficoltà interpretativa si trova, dunque, particolarmente nella frase *quae < in > iure consistunt*, dato che abbiamo trovato due possibili traduzioni al spagnolo.

Prima, annotiamo che tra il passaggio di Giustiniano e quello di Gayo, sono due differenze. In effetti, in quello di Giustiniano si esprime *incorporale autem sunt*, sparendo nell'appuntamento di Gayo, *autem*. Più significativa ci sembra la seconda differenza, perchè mentre in Giustiniano 2,2,2 si legge: *quae in iure consistunt*, la particella 'in' non si trova nel testo originale del palinsesto veronese. Vediamo ora in cui si tradursi la difficoltà interpretativa che abbiamo parlato. La frase *quae < in > iure consistunt* ammetterebbe due possibili traduzioni al spagnolo. Con l'impiego della particella 'in' dentro la frase, i traduttori delle *Institutas* di Giustiniano hanno capito il passaggio come segue: "Più sono incorporali quelle che non possono essere toccate; quali sono quelle che consistono in un diritto". Invece, nella traduzione di Samper, notando l'inesistenza nel testo originale della particella 'in', si è permesso una traduzione che giudichiamo più adeguata al pensiero giuridico romano.

Così, la frase *quae < in > iure consistunt*, può significare: "perché la sua consistenza proviene dal diritto"; in altri termini che sono realtà che esistono solo giuridicamente. Con indipendenza dell'assenza della particella 'in' la traduzione di Samper è la più adeguata al pensiero giuridico classico. E non diciamo questo solo per l'evidente prossimità del testo di Gayo col mondo classico, che costituirebbe un argomento, ad ogni modo, ma il trattamento che dispensa all'*obligatio* ci fa pensare in questo modo. In questo senso, sembra chiaro che tanto nelle *Istituzioni* di Gayo, come nelle *Institutas* di Giustiniano non si abbordino gli effetti degli obblighi, come si conoscono modernamente, bensì l'*obligatio* in sé. In effetti, in entrambe le fonti si abbordano le cause per le quali si contraggono gli obblighi ed i suoi modi di estinguere, per finire con lo studio dei delitti. E in questo contesto, come analizzeremo nel punto seguente, il creditore non contò mai su un genuino potere per costringere il debitore per la soddisfazione della prestazione in natura; in primo luogo, come conseguenza dell'idea di legatura personale, dopo per il principio dell'*omnis pecuniaria* che dirige il procedimento formulario.

C. Gli strumenti di tutela: l'*obligatio* in prospettiva processuale. Abbiamo notato già perchè, secondo il nostro giudizio, non ha senso riferirsi alla posizione del creditore come un vero diritto soggettivo di credito e, da questa prospettiva, siamo in condizioni di abbordare la portata della posizione del creditore. L'analisi suppone un doppio percorso; da una parte, riflettere sull'applicabilità, o no, della dualità debito-responsabilità; da un'altra parte gli strumenti di tutela coi quali contava il creditore. Come indica Betti, il dovere primario di prestazione si consuma nell'azione processuale, perché detto dovere è inesigibile. In altri termini, l'esigenza della condanna, come dice Betti, la *condemnari oportere*, produsse la transizione dall'obbligo principale all'*obligatio iudicati*. Il creditore aveva solo un'aspettativa di condanna che, verificata, produceva la surrogazione idonea ad esigere quello che si era risolto giudizialmente; in altri termini, la condanna produceva un effetto sostantivo: la nascita di un

obbligo pecuniario come conseguenza della prima che surrogava il principale. Pelloso ha capito che l'espressione '*vinculum iuris*' della definizione di Giustiniano, non poteva significare altro che un vincolo coercibile mediante *actio*, cioè, che il vincolo giuridico si capiva unicamente dall'azione, in modo che l'*actio* stessa rimaneva immersa nella sostanza dell'*obligatio*. Precisamente per ciò la *litis contestatio* appare come modo di estinguere l'obbligo, Potremmo pensare allora che, tecnicamente, non c'è debito, non c'è legatura del debitore.

Ma l'affermazione dell'autore, nel senso di scartare completamente il debito, non permette di conciliare adeguatamente il passaggio gayano 4,114, che autorizzava al debitore soddisfare il debito, benché avesse operato la *litis contestatio*. Cioè sembra inconciliabile comprendere che, nonostante avere operato un modo d'estinguere, anche così si ammettesse la soddisfazione del credito primario.

Betti capisce che questa disfunzionalità può spiegarsi perché, nel suo concetto, la *litis contestatio* non produceva l'estinzione integra dell'obbligo primario, bensì l'estinzione della sola responsabilità, sussistendo il debito. Da parte sua Santoro considera che la spiegazione può ammettersi per il diritto romano se si considera che l'*actio* rappresentava la responsabilità; in conseguenza, si estingueva l'*actio*, ma non il *debitum*. Vediamo finalmente gli strumenti di tutela del creditore. Il primo momento dell'*obligatio* romana suppone il compimento da parte del debitore: negli obblighi di *dare* il compimento si denomina *solutio* o pagamento, e la soddisfazione dipende del tipo di prestazione, *certum* o *incertum*. Negli obblighi di *facere*, il compimento si denomina *satisfactio* che è sempre *incertum*. Più complesso risulta determinare il contenuto della prestazione di *praestare*, questione nella quale non possiamo fermarci in questo lavoro. Quando non si produceva la soddisfazione personale del debitore, il creditore contava allora con alcuni strumenti destinati ad ottenere la soddisfazione.

Ovviamente, le azioni del creditore dipendevano dal tipo di prestazione alla quale era soggetto il debitore. La domanda allora era: che cosa poteva chiedere il creditore, di fronte all'inadempimento contrattuale? Nel diritto moderno si stabilisce l'idea che il creditore-querelante può esigere il compimento forzato che suppone la soddisfazione della stessa prestazione. Lasciare "indenne" suppone restituire quello a cui era soggetto. Solo se non è possibile, potrebbe chiedere una somma dineraria equivalente o, propriamente, l'indennità di danni. Ne il Code, ne quelli che si ispirano a lui risolvono questo apparente concorso di modo diretto. Neanche il Codice civile cileno o quello italiano. Ma il BGB ammette la consacrazione del principio negli articoli 249, in relazione con l'articolo 251 del Codice Civile. Nel diritto romano, deve differenziarsi l'epoca da evoluzione dell'*obligatio*, corrispondendo l'applicazione di uno o un altro procedimento.

Nel contesto delle azioni della legge, l'esercizio di quelle azioni fu rappresentato per azioni personali, e una volta ottenuta la sentenza per la *manus iniectio* che si articolò come uno dei meccanismi destinati a rimpiazzare la vendetta privata ed a consacrare l'heterotutela, nel contesto di un procedimento, di fronte ad un magistrato. Come ricorda Porpora, la *manus iniectio*, nel senso che il debitore doveva lavorare a favore del creditore per soddisfare il credito, equiparandosi la situazione del debitore a quella de *nexi*. L'ultimo passo sarebbe rappresentato per la spiritualizzazione del vincolo. Si stima che con la *lex Poetelia Papiria*, del 326 a.C, si abolì di modo definitivo la prigione per debiti. Ciò avrebbe permesso il passo di un vincolo centrato nell'azione fisica, al vincolo patrimoniale del debitore.

Ma la cosa certa è che quella affermazione deve chiarirsi. In primo luogo, deve farsi notare che il contenuto della *lex* abolì esclusivamente il *nexum*; in secondo luogo, la portata de la *lex* viene discussa perché questa, in definitiva, venne solo a dare soluzione alla situazione dei *nexi* che si trovavano in precedenza in stato di prigione alla *lex*, cioè, che non abolì in modo assoluto, ne per il futuro, la legatura personales del debitore.

Abolito il procedimento di azioni della legge attraverso le *leggi Ebuca* e *Julia*, il procedimento formulario cedè passo ad un procedimento esecutivo di carattere patrimoniale. Anche così, bisogna avere presente che, seguendo a Voci, la *manus iniectio* e, in conseguenza, la legatura personale, rimase vigente nonostante dopo la promulgazione della *lex Poetelia Papiria*, ma non con la forma della *manus iniectio*, per quanto rimaneva esclusa ora la morte o la vendita del debitore; la *manus iniectio* si traduceva nel lavoro che il debitore doveva realizzare in favore del creditore, per soddisfare il credito, dovendo questo ultimo proporzionargli l'alimentazione ed il riposo.

Il procedimento esecutivo di carattere patrimoniale prima descritto suppone l'esercizio dell'azione personale. Come indica Fuenteseca, nell'epoca classica, la divisione fondamentale delle azioni si era limitata alle figure dell'*actio in rem* e dell'*actio in personam*. Nel procedimento formulario, trattandosi dell'azione personale, come abbiamo visto, esisteva il principio dell'*omnis condemnatio pecuniaria*.

Il reclamo di danni son suppose, allora una serie de rimedi disponibili per il creditore derivati dell'inadempimento e, in particolare, il concetto di "danno", come un specifico tipo di rimedio fu altrui al diritto romano. Nelle azioni di diritto che contenevano un *intentio certa* il giudice condannava al valore equivalente alla prestazione che non si era eseguita, cioè si applicava il principio dell'*aestimatio risi*. Si trattava, in conseguenza, di una norma interamente obiettiva, non avendo importanza le perdite rassegnate al margine del valore della cosa. La situazione fu differente nel caso delle azioni con *intentio incerta*. In questo caso le circostanze proprie della vittima furono introdotte dal giudice per stimare che somma di denaro era equo porporzionare al querelante. In quanto al procedimento formulario, della cosa giudicata emanava la conseguenza che il querelante, se otteneva sentenza favorevole, poteva chiedere l'esecuzione, ancora con opposizione del querelato. Il termine era di trenta giorni, contati dalla sentenza. L'azione si denominava *actio iudicati*: le concedeva il pretore contro il condannando e contro il *confessus* ed era sempre personale. L'esecuzione aveva carattere patrimoniale. L'*actio iudicati* veniva a rimpiazzare, così, alla *manus iniectio*. Il pretore poteva decretare la *missio in bona* che autorizzava il querelante a prendere possesso dei beni del querelato, benchè il creditore non avesse carattere di padrone o possessore, facendolo come mero usurpatore. Il creditore doveva pubblicare, per spazio di 30 giorni o 15 si era morto (la *proscriptio*), il sollecito di esecuzione della sentenza. Se in quello termine non compiva il debitore, c'erano due alternative: la *cessio bonorum*, possibile in virtù della *lex Iulia di bonis cedendis*, 17 a.C.; o l'asta pubblica al migliore offerente, *bonorum emptor*. La possibilità della vendita dei beni del debitore rappresentò un passo avanti, senza alcun dubbio, in relazione con l'esecuzione, ma il carattere personale dell'*obligatio* non sparì. Il debitore privato dei suoi beni era equiparato, come si dimostra di vari passaggi di Gayo tra essi, Gayo 2,98; 3,77; 80 e 81, ad un morto.

Inoltre la *bonorum venditio* ricadeva su tutti i beni del debitore, con indipendenza della soffisfazione o valutazione del credito, precisamente alla luce del principio della condanna pecuniaria del procedimento formulario; ed avrebbe portato, oltre alla vendita di tutti i beni del debitore, la nota d'*infamia*, cioè, la perdita della dignità sociale, come conseguenza del credito insoddisfatto. Queste azioni di carattere patrimoniale, provano al nostro giudizio che il credito, strettamente, non costituisce un diritto personale.

Come già è stato accennato, l'*ius* non è un potere, come si capisce nel diritto moderno, ne l'*obligatio* un dovere di prestazione verso il creditore, nel senso di poter esigere la soddisfazione del credito stesso. La migliore prova di questo è che non adverte un transito del vincolo personale al patrimoniale. Nel procedimento di esecuzione proprio del procedimento formulario, rimane latente il carattere personale del vincolo: la possibilità della vendita dell'intero patrimonio del debitore e la nota d'*infamia* sono solo esempi.

Per questo motivo, può concludersi che la definizione di Giustiniano, quando esprime che l'*obligatio* è un *iuris vinculum*, non si riferisce tanto alla patrimonializzazione della relazione obbligatoria, ma alla sua esistenza puramente giuridica e in questo senso, non può contrapporsi assolutamente ancora il carattere patrimoniale coi tratti personali del vincolo che rimasero con procedimento formulario.

NADJA EL BEHEIRI

Pázmány Péter Katolikus Egyetem – Hongrie

‘Ius als ars boni et aequi’ und das Streben nach wahrer Philosophie

Das bekannte dem spätklassischen Juristen zugeschriebene Fragment des Ulpian dient als Ausgangspunkt für einige Überlegungen zur Aufgabe der Rechtswissenschaft. Es wird ein Überblick über den Meinungsstand der letzten fünfzig Jahre geboten. Dabei wird ausführlicher auf die Auffassung des spanischen Autors Álvaro D'Ors eingegangen. Die verschiedenen Ansätze der modernen Autoren werden vor allem auch durch die Abweichungen bei der Übertragung des Textes in moderne Sprachen fassbar. Die Unterschiede beziehen sich dabei vor allem auf die Begriffe *ars* und *aequitas*. Die verschiedenen Konzeptionen im Zusammenhang mit diesen Begriffen wirken sich aber auch auf die viel diskutierte Interpretation der Aussage des Ulpian aus, wonach die Juristen nach wahrer Philosophie streben. In diesem Zusammenhang soll der Text des Ulpian aus der Perspektive der aristotelischen Begriffe Praxis und Poiesis untersucht werden.

PETR BĚLOVSKÝ

Univerzita Karlova, Praha – Tchéquie

The Practice and Regulation of Money Lending during the Roman Republic

Lending and usury went hand in hand during the history of the Roman republic. Livy, Tacit, Cicero and others repeatedly mention political tensions that resulted from the increasing interest rates as well as the number of debtors in Rome. These events that frequently shaped the republican politics and often led to political turmoil gradually resulted in passing of several laws that aimed to relieve the debtors of their burden, either by setting-up a limit of interest rates (*lex Duilia Menenia*, *lex Marcia*), by abolishing debt-bondage (*lex Poetilia*), or by canceling or reducing excessive debts (*lex Iulia*). However, most of these laws had very weak effect on the everyday practice since they either were ignored from the beginning, or very soon fell out of use. Sources mention also cases where creditors had found their clever ways around these restrictions. The paper, therefore, examines the overall development of the practice and legal regulation of money lending during the Roman republic.

ZUZANNA BENINCASA

Uniwersytet Warszawski, Warszawa – Pologne

L'‘occupatio’ come modo d'acquisto della proprietà ‘naturalis ratione’

L'occupatio costituisce un modo particolare di acquisire la proprietà, basato sulla *naturalis ratio*, in cui l'acquisto della proprietà coincide con l'acquisto del possesso delle cose ritenute *res nullius*, cioè appartenenti a nessuno. Nel diritto romano, venivano considerati *res nullius in primis* gli animali selvatici viventi nello stato di natura, definito dai giuristi come la *naturalis libertas*. Secondo la regola riportata da Gaio e successivamente approvata dai compilatori giustiniane, il momento dell'acquisto della loro proprietà equivaleva al momento della materiale apprensione dell'animale. Tale soluzione non sembra però essere sempre univocamente accettata: infatti, dall'altro testo attribuito a Gaio (D. 41,1,5,1) si può dedurre che nel periodo repubblicano esistevano diverse idee in materia. Secondo il giurista Trebazio l'animale ferito in modo tale da poter essere appreso, apparteneva al cacciatore fino a quando questo inseguiva la preda precedentemente ferita, e solo nel momento dell'abbandono della caccia, l'animale riacquistava lo status di *res nullius*. Di conseguenza, Trebazio riteneva che se l'animale ferito inseguito da un cacciatore, fosse stato preso da un terzo *ut ipse lucri faceret*, il cacciatore avrebbe potuto esperire l'*actio furti* nei confronti di quest'ultimo. Questa presa di posizione non è stata però seguita dagli altri *iurisprudentes*. Come momento dell'acquisto della proprietà veniva individuato il momento della materiale apprensione dell'animale, giustificando tale posizione con la presunzione, che durante la caccia dell'animale precedentemente ferito, potevano capitare molte cose che avrebbero potuto impedire la cattura dell'animale. Cercando di ricostruire i motivi per cui giuristi del periodo repubblicano cercavano di interpretare così estensivamente il concetto dell'occupazione, si può ipotizzare che alla base della *quaestio* riportata da Gaio si poneva il contrasto sempre più evidente tra la libertà di caccia proveniente dal *ius naturale* e il bisogno di salvaguardare gli interessi dei proprietari delle aziende agricole che tendevano a riservarsi l'esclusivo diritto di cacciare gli animali selvatici sui loro fondi.

JOSÉ MARÍA BLANCH NOUGUÉS

Universidad Autónoma de Madrid – Espagne

Sobre la ‘litis contestatio’ y la intransmisibilidad ‘hereditaria’ de las acciones penales en derecho romano: regla general y excepciones

La comunicación parte de la naturaleza y función de la *litis contestatio* en el Derecho Romano la cual produce, entre otros, el efecto de transformar las *obligationes ex delicto* en obligaciones de naturaleza procesal que, por consiguiente, se transmiten contra los herederos del autor, ya fallecido, del delito. Ahora bien, las acciones judiciales derivadas de *crimina* que atentaban gravemente contra el Estado se transmitían *post mortem* contra los herederos, a tenor de diversas fuentes jurídicas, aún antes de la *litis contestatio*, y en la comunicación se aborda

particularmente la cuestión de si el pretor, según su criterio, llegó a extender esta regla a supuestos de *obligationes ex delicto* derivadas de acciones penales privadas, a través de la concesión de una *litis contestatio ficticia*, como así pudiera tal vez deducirse de algunas fuentes jurídicas.

Fuentes: Gai 4,112; I. 4,12,1; D. 2,11,10,2 (Paul., 1 *ad Plaut.*); D. 47,1,1 pr. (Ulp., 41 *ad Sab.*); D. 48,2,20 (Mod., 2 *de poen.*).

GRZEGORZ JAN BLICHARZ

Uniwersytet Jagielloński, Kraków – Pologne

The Maxim ‘usque ad coelum’ and the Power of the State. Roman Reasoning and the Origins of Modern Limitations to Property Rights

The thought of Paulus in the Justinian’s *Digest* – D. 8,2,1 (Paulus, book 21 *ad edictum*): *quia caelum, quod supra id solum intercedit, liberum esse debet*, is usually understood as a confirmation of unlimited property rights. The passage from Justinian’s *Digest* seems to extend the right of the owner of land to what is above it. This understanding was disseminated in *ius commune* and skillfully developed by Accursius. Moreover, he extended the scope of property rights to what is under the surface of the earth – *et ad inferros*. Therefore, he paved the way to limit the power of the state and royal privileges. In fact, the passage of Paulus itself has quite a different reasoning. The maxim was born out of a commentary on the opinion of Paulus, who expressed it in order to protect the public interest. In the passage of the *Digest* it serves the benefits of the community and public land, whereas in the times of *ius commune* and nowadays the very same maxim is used to protect private owners and their interests from the power of the state.

There are many models for regulating property over and above the surface of the earth both in common law and civil law countries. Today, however, especially in US law the application of the maxim *Usque ad coelum* has been limited for exactly the same reasons which Paulus used in his famous passage. Looking at the origins of the maxim one finds that it served to protect the public interest. Today, as in a mirror reflection the very same reasoning is used to limit the maxim for the sake of the community. Nowadays, its scope has been reduced, first in relation to what is above the surface of the earth, and now it is questioned in relation to what is underground. Analysis of current US law shows the transformation of legal thought and the timeliness of the Western legal tradition. What remains unchanged throughout the ages are not only the Roman law solutions, but above all the reasoning: the underlying arguments and values.

EMESE VON BÓNÉ

Erasmus Universiteit Rotterdam – Pays-Bas

Law and Opera: A Comparison between the Roman Emperor Titus and Leopold II, Emperor of the Holy Roman Empire, King of Bohemia in “La Clemenza di Tito” by Wolfgang Amadeus Mozart

A perfect source to do research in Roman law and legal history is Opera. Many libretti of opera’s have legal aspects such as *crimen maiestatis*, *adulterium*, *matrimonium* etc. In this lecture I will show you the legal aspects in Mozart’s opera *La Clemenza di Tito* and I will combine Roman law and legal history with parts of the libretto of *La Clemenza di Tito*. The rule of Emperor Tito (79–81 AD) can be compared with the reign of Leopold II (1790–1792), Emperor of the Holy Roman Empire, King of Bohemia. The libretto of *La Clemenza di Tito* was written by Metastasio (1698) the adoptive son of the Roman law professor at the university of Rome, Gian Vincenzo Gravina. In this lecture we will listen to one of the most beautiful aria’s of *La Clemenza di Tito* about *clementia*, a Roman law aspect but also a modern legal phenomena.

Law and Opera is a perfect combination because Opera has a treasure of legal history sources!

RÓBERT BRTKO

Univerzita Komenského v Bratislave – Slovaquie

‘Ratio’ del diritto giustiniano verso alcune controversie tra Proculiani e Sabiniani

Dopo aver esposto le differenziazioni principali tra le due scuole e le diverse tesi riguardanti i contrasti tra i giuristi Proculiani e quelli Sabiniani, relazione presenta alcune controversie, per es.: determinazione della pubertà, natura del prezzo nella vendita etc. La maggior parte delle controversie tra Proculiani e Sabiniani sono ricordate nelle istituzioni di Gaio. Le soluzioni di alcune controvesie possiamo trovare nel diritto giustiniano, che preferiva la tesi dei Proculiani oppure Sabiniani secondo varii criterii incluso quello cristiano.

ALFONS BÜRGE

Leopold-Wenger-Institut für Rechtsgeschichte, München – Allemagne

Das ‘receptum nautarum cauponum stabulariorum’ im Lichte des modernen lexikographischen Befundes

Der 2015 erschienene Artikel *recipio* des Thes.l.L., Vol. XI 2 Fasc. III 326–354 (Schrickx), lässt klare Folgerungen für die dogmatische Gestalt des *receptum nautarum cauponum stabulariorum* zu, die hier skizziert werden sollen.

PETER CANDY

University of Edinburgh – Grande-Bretagne

Rome’s Economic and Legal Transformation: The Development of Roman Maritime Law in the Late Republic

In this paper I demonstrate that the development of Roman maritime law coincided with the steep increase in the volume of Roman maritime traffic during the late Republic. By comparing the chronological distribution of Roman shipwrecks with the likely date ranges for the introduction of maritime legal rules, I show that the most prolific period of praetorian and juristic innovation coincided with the period during which the volume of maritime traffic was increasing at its greatest pace. The coincidence of these processes gives rise to the problem of the relation (if any) between them. The application of theoretical frameworks, such as law and society scholarship, and the New Institutional Economics, enable us to form hypotheses in this respect. So far as a relation can be established, the results of this research lend insights into broader questions, such as the contribution of institutional change to economic development in the ancient world, and the relationship between legal, economic, and social change in that environment over time.

CONSUELO GARCÍA CARRASCO

Universidad Carlos III de Madrid – Espagne

‘Vis rationis’: racionalidad normativa y jurisprudencia romana. A propósito de D. 21,1

Desde hace unos años son varias las normas comunitarias, nacionales e internacionales, a propósito del “análisis de impacto” como instrumento para mejorar la calidad del ordenamiento jurídico; para lograr la “racionalidad normativa”, entendida en sentido formal (*legal drafting*) y material (memorias de impacto ‘*ex ante*’ y ‘*ex post*’). Así: Comunicación de 2005 de la Comisión Europea al Consejo y al Parlamento: “Legislar mejor para potenciar el crecimiento y el empleo”; Recomendación de la OCDE de 2012 sobre política normativa y gobernanza, e informe de 2014; o *Better regulation package* de la Comisión Europea (2015).

Como contrapunto a estos medios “formales” de producción de las normas, se encuentran los modos “informales” de gestarse el Derecho en Roma, a partir de las lagunas o deficiencias de la regulación en vigor.

Un esempio illustrativo sono le prescrizioni degli edili in materia di compraventa di schiavi; prescrizioni che concretano la giurisprudenza attraverso *responsa* dotati di intrinseca, riconoscibile e riconosciuta razionalità (concetto di “enfermedad”, “fuga”...). Esso è ciò che potremmo denominare valutazione di impatto ‘*ex ante*’.

Per la sua parte, le fonti letterarie e i documenti della pratica – tavolette e papiri – ci permettono di conoscere la percezione che i propri romani ebbero dell’efficacia delle loro norme; della loro capacità di incidere nella realtà: impatto ‘*ex post*’.

Il modo particolare di regolare il “saneamento per vizi occulti” nei codici civili europei – non come “inadempimento del dovere di prestazione”, né tampoco “vizio del consenso”, ma responsabilità speciale intesa come “attribuzione del rischio al compratore” –, ci permette di parlare di un altro tipo di “impatto”.

Questo e altri esempi significativi per valutare l’incidenza delle norme (leggi matrimoniali di Augusto e *pignus* ...) sono l’oggetto del lavoro di ricerca che motiva la presente relazione.

JOSÉ FÉLIX CHAMIE

Università Externado de Colombia – Colombia

L’origine del potere nell’età romana: più la ragione che la forza?

Una riflessione sull’origine e sull’esercizio del potere

L’emergere dell’idea di potere nell’antichità romana è stato un fatto di forza oppure un fatto di ragione? Per tentare di rispondere a questa domanda occorre avere conto del concetto di *imperium* ed i suoi collegamenti con l’origine del potere. Infatti, uno dei capisaldi delle ricostruzioni del diritto pubblico romano con riferimento al concetto di potere, è il concetto di *imperium*. *Imperium* è la somma di poteri il cui titolare è il magistrato repubblicano. Potere sovrano, inizialmente e potenzialmente illimitato, legato al vecchio monarca, al *rex nemorensis*, colui che ha il *manus*. La costituzione repubblicana romana apparentemente attribuì al magistrato le varie funzioni di questo potere, le riservò infatti al magistrato ed ebbe di regolamentare il suo esercizio durante il periodo dello sviluppo dell’ordinamento giuridico e sociale. Le prime ipotesi sul significato del termine *imperator* lo si ricerca nella relazione semantica con il concetto di *imperium*. Diversi sono i motivi di mutazioni semantiche del concetto di *imperator* e il suo fardello ideologico nel contesto sempre dell’*imperium*, la cui vicenda non è stata libera di mutamenti. Il sistema giuridico è un sistema di comandi che corrisponde ad un sistema di alleanze volontarie che sembra caratteristica della vita civile, e nell’epoca storica della formazione del sistema giuridico romanistico si occupa dell’unità di elementi politici, religiosi e giuridici. Si parla così del riconoscimento del potere e da cui emana – l’eterogeneità psicologica e giuridica iniziale del potere. La riflessione sugli origini del potere è altrettanto rilevante nel nostro tempo, anche per trovare un modo migliore di spiegare il presente approfittando della conoscenza del passato, per illuminare in modo efficace le prospettive odierne del potere. Dunque, questa relazione ha la pretesa di chiedersi, con delle difficoltà che ciò comporta, se l’origine del potere sia stato piuttosto una questione della ragione ovvero della forza; e chiederci pure cosa possiamo imparare ancora oggi da queste riflessioni, in particolare sulle sfide del nostro tempo, e l’uso ragionevole del potere nel rispetto della dignità umana. Bisogna usare con la ragione il potere nei confronti degli altri. Ma, cosa significa questo? È una sfida tuttora, e come ci ha detto San Giovanni Paolo II ‘Il Magno’, “l’uso della ragione nella vita quotidiana e nei momenti di maggiore impegno politico e sociale, è stato considerato e deve esserlo, ora e sempre, un indice indispensabile e qualificante di saggezza, di umanità, di civiltà” (Visita pastorale alla Diocesi di Padova, incontro di Giovanni Paolo II con i rappresentanti e le autorità della città e della Regione nel Palazzo della Ragione, Padova – domenica, 12 settembre, 1982).

VALERIUS M. CIUCĂ

Universitatea "Alexandru Ioan Cuza", Iași – Roumanie

L'humanisme juridique romain, avant la lettre, par l'intermède du 'jus actionum'. Le pérégrin et la Rome sous l'égide du Mercurius

Aequat omnes cinis
(Seneca, *Epistulae*, 91,16)

Protéger la possession des biens meubles et immeubles d'une personne étrangère à Rome, à l'Epoque classique romaine constitue, de notre perspective, une noble conception juridique qu'une cité puisse en exprimer dans sa politique vis-à-vis des étrangers.

La propriété romaine supposait des nombreux débats. C'était une institution très complexe du point de vue politique.

La possession supposait des nombreuses évaluations factuelles. C'était une institution très complexe du point de vue juridique.

Rome avait agi au sens de la protection de la possession, donc, de la paix sociale, et, par cela, elle avait agi le vois humaniste de la factualité non-politique.

La possession est une institution humaniste et universaliste par définition. En protégeant la possession, la bonne foi, la liberté des affaires et l'équité universelle, Rome avait protégé quelques unes des valeurs juridiques qui représentent le squelette de l'idéologie des droits fondamentaux de l'Homme contemporain.

L'*actio Publiciana*, par l'intermède des deux fictions juridiques qu'elle implique (l'usucapion instantanée et celle de la citoyenneté Romaine pour des circonstances juridictionnelles d'opportunité; Gai 4,36: *Si quem hominem Aulus Agerius emit et is ei traditus est, anno possedisset, tum si eum hominem de quo agitur ex jure Quiritium ejus esse oporteret, neque is homo arbitrio tuo restitueretur: quanti e ares erit, Numerium Negidium Aulo Agerio condemnato: si non paret absolvito.*) représente l'épitomé de cet humanisme juridique avant la lettre. Celui-ci est un humanisme juridique qui anticipe l'humanisme européen de l'époque moderne, un « humanisme » connu par la *Dacia Felix*, *Tres Daciae*, et respectivement, *Dacia Romana* pendant l'époque de son genèse, cela classique.

JEROEN M.J. CHORUS

Gerechtshof Amsterdam – Pays-Bas

'Plus ratio quam vis caeca valere solet' et le droit romain

L'Université Jagellonne n'a adopté sa belle devise *Plus ratio quam vis* qu'après cinq siècles et demi de son existence. *Plus ratio quam vis*, la raison [vaut] plus que la force, en 1952 le professeur Karol Estreicher jr. eut déniché ces mots latins quelque part pensant qu'ils étaient une partie d'un proverbe. Le bon professeur n'avait pas la moindre idée de son auteur ni, heureusement, de la situation de fait qui eut amené cet auteur à s'exclamer le vers dont ces mots ne sont que la première moitié. Le vers entier est ainsi conçu: *Plus ratio quam vis caeca valere solet*, la raison prévaut, d'ordinaire, sur la force aveugle. C'est que la science littéraire appelle une « sentence ».

Je vous renseignerai, d'abord, sur le peu que l'on sait du poète, Maximianus, qui naquit, semble-t-il, à Rome vers 480. On ne connaît de lui que les six *Elegiae*, parues en Italie ostrogote, peut-être, en 539, donc peu de temps après que le *Codex secundus* de Justinien fut promulgué à Constantinople. La deuxième de ces *Elegiae* contient, au début du vers 72, notre hémistiche.

Ensuite, je vous expliquerai la situation de fait que Maximianus qualifia de *vis caeca* et celle qu'il y préféra vainement, la *ratio*. D'ores et déjà, je vous avertis de l'indécence, voire obscénité, des propos de notre poète.

On arrivera, finalement, au droit romain. La sentence ne se trouve pas dans les sources de droit de l'Antiquité romaine. Se peut-il, quand même, y trouver l'idée incarnée dans la belle devise? La réponse de cette question, la dernière partie de cette communication y sera vouée.

The Influence of the German Historical School on the Roman Law Development in Serbia in the 19th Century

The development of Roman law studies in Serbia began in the mid-nineteenth century. The beginning of the Roman law studies was part of the process of restoration of Serbian statehood. Therefore the history of studies of the Roman law is reflected in the way of modernization of the Serbian State. The beginning of the study of Roman law was marked in the spirit of Natural law. The merit for the introduction of Roman law in Serbia belongs to a Lyceum teacher and a famous Serbian comedy writer Jovan Sterija Popović, who supported the ideas of the Natural Law School. Popović as an experienced lawyer understood well the importance of Roman law in the process of legal education and thanks to him in 1843 Roman law was introduced in the *curriculum* of the Lyceum. Immediately after adoption of the Serbian Civil Code (1844) an order was issued to replace the study of the ancient Roman law with the modern civil law. This was completely in accordance with legal educational policy practised in the Austrian Empire at the beginning of the nineteenth century. And when the ABGB entered into effect, Roman law was removed from the legal *curriculum* and replaced by a study course that was primarily focused on the ABGB. In 1849 Roman law was reintroduced in the *curriculum* of the Lyceum in Serbia. Similar to the Austrian Empire, Roman law in Serbia was reintroduced thanks to the breakthrough of the ideas of German Historical School. The paper discusses how the ideas of German Historical School became dominant in Serbia and how it influenced the survival and development of Roman law.

RADEK ČERNOCH

Masarykova Universita, Brno – Tchéquie

Roman Law Aspects of Today's 'donatio mortis causa'

Donatio mortis causa (deathbed gifts) was one of the institutes enabling to handle the property *mortis causa* in ancient Rome. This institute is used even nowadays in various jurisdiction, both in continental (Roman law) and English (common law) legal systems. This paper will focus on those aspects of *donatio mortis causa* that were paid attention to both in Roman and in Today's law. Thus, we will be dealing with the problematics of application of Falcidian portion (*quarta Falcidia*) and the relationship of *donatio mortis causa* and legacies (*legata*), as given mainly by English court decision *Sen v Headley* [1991] EWCA Civ 13 (28 February 1991), and Czech (Law Nr. 89/2012 Coll.) and Austrian (ABGB idF BGBl I 87/2015) Civil Codes.

GIACOMO D'ANGELO

Università degli Studi di Palermo – Italie

Alle origini dell'usucapione

La storiografia oggi dominante tende a riportare al precetto tradizionalmente collocato in *XII Tab.* 6,3 la regolamentazione dei termini dell'usucapione. Un rinnovato esame di alcune testimonianze ciceroniane, tuttavia, sembra suggerire una diversa ricostruzione: le *XII Tavole* non regolavano l'usucapione ma un meccanismo processuale – l'*usus auctoritas* – da cui solo più tardi l'*interpretatio prudentium* enucleò l'istitut dell'*usucapio*.

Matematica e intuizione. Calcolo delle quote ereditarie da parte dei giuristi romani

La prima monografia ideata come una raccolta e spiegazione delle competenze matematiche utili per un giurista è stata l'opera di Friedrich Pollack, pubblicata nel 1734.

La presentazione della maggioranza degli esempi dell'utilizzo dell'aritmetica da parte dei giuristi era legata ai riferimenti ai titoli dei *Digesta* giustiniani. Tuttavia, quello che nella *mathesi forensi* si spiegava con l'aiuto delle operazioni sulle frazioni basate sull'algoritmo, nell'antica Roma doveva essere visto nell'ottica dello stato di sapere matematico. Questo è il primo motivo per non identificare il pensiero matematico dei giuristi romani con il modo in cui nei tempi moderni è stata collegata la matematica con il discorso giuridico antico. Il secondo motivo di quest'atteggiamento è da cercare nella funzione della *mathesi forensi*. Al di fuori dell'ambito della *mathesi forensi* rimangono le questioni relative al calcolo della quota ereditaria la cui valutazione trascendeva le operazioni puramente matematiche benché fosse legata al loro uso. La prima di tali questioni era la libertà nella divisione dell'eredità in quote. La seconda si riferiva a come calcolare le quote ereditarie quando la somma delle quote delle quali aveva disposto il testatore differiva dalla totalità. I suddetti problemi portano alle domande:

- che cosa dalla scienza matematica d'allora dovessero sapere i giuristi romani per trovare una soluzione al riguardo?

- se e quali dubbi dal punto di vista matematico si possano scorgere nel modo di pensare dei giuristi sulla questione?

Trovare risposte a queste domande permetterebbe di uscire dal quadro ispirato alla *mathesi forensi* delle relazioni fra la matematica e il diritto dell'antica Roma. Tale ampliamento della prospettiva aprirebbe la strada per domandare, nella parte finale della presentazione quali conclusioni potrebbero essere tratte dall'uso da parte dei giuristi romani dei termini e delle competenze matematiche nell'argomentazione giuridica.

GERGELY DELI

Széchenyi István Egyetem, Győr – Mosonmagyaróvár – Hongrie

'Plus ratio quam vis': Ulpian's Famous Regulation on Market Prices

According to a deservedly famous fragment of the *Digest* (Ulp./Pomp., D. 4,4,16,4), the contracting parties of a sale were by nature permitted to defraud one another about the price. Interestingly, this Roman legal practice seems not to be deeply influenced by Aristotelian theory on just price. Leading legal scholars of the so-called Classical Period argued for a seemingly much more individualistic and liberalistic approach. I argue that the Roman legal solution has been founded on natural reason instead of fear of sanctions: *plus ratio quam vis*. In my paper I offer a new interpretation of the above heavily contested fragment and show how its regulation harmonizes with other "naturally permitted" (*naturaliter licet*) legal norms such as the prohibition of deduction of damages from the *peculium* of a self-harming slave (Ulp., D. 15,1,9,7).

ADOLFO A. DÍAZ-BAUTISTA CEREMADEZ

Universidad de Murcia – Espagne

Derecho y poder en las relaciones familiares en el imperio de Diocleciano

El modelo de familia impuesto por Augusto en los albores de nuestra Era sufrió una importante evolución a lo largo de los tres siglos del principado, llegando al imperio de Diocleciano una estructura familiar completamente diferente de la tradicional. En los rescriptos de Diocleciano se percibe una sociedad en la que apenas tiene relevancia la *familia extensa*, siendo sustituida por unas intensas relaciones de familia nuclear. En ellas se percibe una fuerte presencia activa de la madre que con frecuencia gestiona el patrimonio familiar en detrimento del *pater familias*, que en muchos casos, no está presente. También la hija o la hermana son partícipes de los negocios.

The Pass of Risk in the Contract of Sale

This paper discusses the issue of the transfer of the risk transfer in the contract of sale (*emptio venditio*) in the Roman and in the modern civil law.

In the introductory part of the paper, the contract of sale, respectively its main features, as well as the main rights and obligations of the seller and the buyer, are first presented. Particular attention is paid to the concept of perfection of the contract, and for a close relationship, the author's aim is to examine the influence of two contradictory principles of Roman law that are directly related to the risk transfer of the contract of sale. This contract is based on the principle of the Roman law *periculum est emptoris* and against the principle of *rem perit domino*. Each of these principles provides a different answer to the question of who will carry the risk of accidental destruction from the moment the contract of purchase is concluded until the transfer of the property (*traditio rei*). The paper will further investigate the reasons why Roman lawyers have preferred the principle of *periculum est emptoris*, and its author will also show what discussion has evolved over these two principles at the time of the so-called reception of Roman law, especially in the work of the French author R.-J. Pothier and in the works of authors of so-called pandekt's law (G. Puchta, H. Dernburg, B. Windscheid).

Though considerable attention has been paid by the modern scholars of the Roman law to the problem of the risk-transfer, as evidenced by a great deal of scientific literature, this issue is still up to date, which is witnessed by the different legal rules in modern civil codes. French law combines the risk transfer of a contract of sale with the moment of the acquisition of ownership, whereas German civil code (like the Austrian one) combines the transfer of risk with the moment of acquiring the possession, that is, the moment of physical disposition with the purchased thing.

At the end of the paper, attention is being paid to modern Czech legislation, as the Czech Civil Code of 2012 leaves the traditional Austrian concept (which was recognized by Czechoslovak civil codes from 1950 and even 1964) and brings a new solution to this question, which is an interesting mixture of the principle *res perit domino* and the principle *periculum est emptoris*. The paper also points to the theoretical problems that this new Czech solution brings.

DMITRY DOZHDEV

Moskovskaja Vysshaja Shkola Socialnyh i Ekonomicheskikh Nauk, Moskvá – Russie

Labeone nel D. 19,2,58 e nel D. 19,1,53: La locazione della 'insula' e la sua resistenza alla regola 'emptio tollit locatum'

Adeguatezza dogmatica della regola *emptio tollit locatum* pone sensibili problem pratici quando l'acquirente della cosa affittata preme un fondato interesse nel conservare i presenti conduttori. La situazione discussa dal Labeone si presenta come affitto della *insula* intera dal singolo conduttore che poi da in affitto ai molteplici subaffittuari diversi appartamenti. L'acquirente della *insula* dal primo locatore vuole conservare dei residenti esistenti e garantisce al venditore il pagamento del somma intero della *merces* dovuta a quest'ultimo da tutti gli affittuari. L'accordo dell'acquirente con il primo locatore fa parte del contratto della vendita, mentre il nuovo domino rimane estraneo al contratto di locazione in corso. L'interesse del compratore comprende l'insula come impresa fruttifera tenendo conto del pagamento più elevato che segue da parte dei subaffittuari. L'acquirente aspetta questo reddito e riguarda l'acquisizione della *insula* come investimento. In questa prospettiva la figura del primo affittuario si trasforma in quella dello "manager" chi gestisce l'impresa e produce il reddito al nuovo domine. Il rispettare la locazione in corso equivale al riconoscere la potenza fruttifera della *insula*, mentre la permanenza dei residenti attuali riserva la fonte delle entrate derivanti dall'investimento. In termini della compravendita il venditore è tenuto di assicurare al compratore il funzionamento e la produttività dell'impresa oggetto del contratto. Quest'interesse esteso affettua il tipo contrattuale.

MARZENA DYJAKOWSKA

Katolicki Uniwersytet Lubelski Jana Pawła II, Lublin – Pologne

‘Indignitas’ – the Roman Roots of the Unworthiness of Inheritance

The subject of discussion is the Roman origin of the institution of unworthiness of inheritance, known to many contemporary civil law systems, including Polish (Article 928 of the Civil Code). This institution derives from the imperial legislation of ancient Rome as distinct from both the *testamenti factio* and the inability to inherit (*incapacitas*). Applied initially in individual, more and more numerous cases requiring the intervention of the emperors, it has evolved into a sanction accompanying certain behaviors, resulting in the loss of the inheritance or the subject of the provision to the state treasury (*aerarium*) or – with time – the imperial treasury (*fiscus*). On the one hand, the institution expressed a social conviction about the need to stigmatize cases of inheritance from the testator by a person who committed a serious crime against him, especially murder, on the other hand it served to tighten responsibility for violation of certain duties or orders. In the next part of the discussion, the institution of unworthiness of inheritance in Polish civil law will be discussed against the background of European solutions. An attempt will be made to answer the question whether the unworthiness of inheritance in contemporary Polish law shows analogies to its Roman predecessor.

JANOS ERDÖDY

Pázmány Péter Katolikus Egyetem, Budapest – Hongrie

‘Ius naturale’ and ‘naturalis ratio’. An Attempt of Synthesis?

The views concerning the Roman law concept of *ius naturale* basically come into two groups. Some authors accept the existence of *ius naturale* as practically binding law, whereas others regard it a pure philosophical “Gedankenexperiment”. This twofold state of ideas on *ius naturale* are fuelled for the most part by the contemporary “Meinungsklima”, though primary sources also raise some important issues of interpretation, increasing obscurity of this notion. It could therefore be set out to give a brief outline of the abstract approach and concept of *ius naturale* put forward by Ulpian at the beginning of the *Digest*.

A particularly interesting factor in close connection with this topic is the direct link made up between *ius naturale* and *naturalis ratio*, though this latter term is applied with regard to *ius gentium*. Consequently, in addition to considerations regarding *ius naturale*, it could likewise be worthwhile to try to point out how these two normative layers influence each other, and what consequences are drawn by secondary authors on this topic. When trying to collect the most common arguments and counter-arguments within this scope, a systematic understanding of both *ius naturale* and *gentium* is hopefully becoming eligible.

RAQUEL ESCUTIA ROMERO

Universidad Autónoma de Madrid – Espagne

Consideraciones en torno a la ‘pudicitia’ en Roma

Considerada como una virtud superior, una cualidad casi congénita a la esencia femenina ideal, la *pudicitia* es, según Séneca, la belleza más extraordinaria, invulnerable a cualquier edad, la máxima distinción de la mujer (*pulcherrima... forma, maximum decus... pudicitia*), por lo que debía conservarse entre las primeras (*quae in primis esse retinendam*) por tener el principado entre las virtudes femeninas (*in hac muliebrum virtutum principatus est*), puesto que una vez perdida arruinaba todas las demás. Símbolo del honor de la matrona romana de la que se ha de predicar, entre otras virtudes, la honestidad, fidelidad, castidad, modestia, prudencia y entrega, la *pudicitia* se componía como una cualidad personal que debía mostrarse y ser apreciada por todos y que conformaba el ideal femenino llegando incluso a tener su personificación y culto como divinidad.

Por ello, se pretende el análisis y significado real de tal virtud, que se convierte en deber y carga de las mujeres romanas a la que no todas alcanzan, la defensa otorgada frente a los ataques, violaciones consentidas o no de la

misma, así como las consecuencias sociales y jurídicas de su pérdida a la luz de las fuentes literarias, epigráficas y jurídicas.

RALPH EVÈQUE

Centre d'Histoire et d'Anthropologie du Droit à Paris-Nanterre – France

L'apparition des écoles de Droit au cours de l'Antiquité tardive: la diffusion de la raison romaine à Rome et dans les provinces

Durant la République (509 avant J.C.–27 av J.C.) et au cours du Haut-Empire (27 avant J.C.–284), il n'y a pas de preuve directe d'un enseignement académique du Droit. C'est-à-dire que Rome n'a apparemment point connu pendant ces périodes d'écoles dispensant une formation juridique régulière, organisée, systématique, officielle et comportant une part conséquente de théorie. Pas plus que d'étudiants, honorés à l'issue de leur cursus de diplômes validant des acquis de connaissances. En effet, les *scholae* sabinienne et proculienne, que la doctrine a longtemps considérées comme des écoles de Droit, sont des établissements de pratique juridique. Ce constat n'entraîne toutefois pas l'absence d'une transmission du savoir juridique durant la République et les trois premiers siècles de l'Empire. En effet, en-dehors de sa transmission académique, le Droit est diffusé par d'autres moyens, incidents, indirects, insoupçonnés. Il s'agit de la pratique du *respondere-docere* mais aussi de la transmission d'un savoir juridique élémentaire dans les écoles de rhétorique. Si nous n'avons guère de preuves directes de l'existence d'écoles de Droit au cours du Haut-Empire, nous pouvons de manière indirecte imaginer qu'il y avait, dans la première partie de l'Empire, une transmission du savoir juridique élaborée qui ne reposait pas uniquement sur le *respondere-docere* ou l'apprentissage de notions rudimentaires de droit au sein des écoles de rhétorique. En effet, sont parvenus jusqu'à nous, à partir du milieu du II^e siècle après J.C., des ouvrages qui révèlent, pour le Haut-Empire, l'existence d'un enseignement théorique, systématique et élaboré du *ius civile*. C'est en effet vers le milieu du II^e siècle que l'on observe la naissance d'un genre nouveau de littérature juridique: la littérature didactique dont l'une des premières – sinon la première – illustrations nous est donnée par les *Institutes* de Gaius.

L'Antiquité Tardive fut une période décisive quant à l'enseignement du Droit puisque nous avons, dès la fin du III^e siècle, des preuves directes de l'existence d'un enseignement académique du Droit. Comment pouvons-nous expliquer ce changement? Par trois grands facteurs. Tout d'abord, du fait du caractère absolu que prend le pouvoir impérial à partir de l'Antiquité Tardive, qui implique un interventionnisme global. En second lieu, il faut noter qu'alors que l'Empire devient bureaucratique à partir de la fin du III^e siècle, il s'avère nécessaire de former un grand nombre de fonctionnaires. Or, ces derniers devaient souvent posséder des connaissances juridiques. Enfin, la création d'un enseignement académique et organisé du Droit répond à la nécessité de former des professionnels (juges, avocats et notaires) qualifiés. La transmission « rudimentaire » du savoir juridique qui dominait sous la République et le Haut-Empire n'était plus adaptée à un Empire dans lequel, depuis la *Constitution antoninienne* de 212, tous les habitants disposaient de la citoyenneté romaine et, en conséquence, étaient accessibles au *ius romanum*. A partir de ce moment, le Droit est – entre autres – enseigné dans des écoles, sur la base de programmes officiels et dans le but de former des professionnels de haut niveau qui serviraient, en tant que fonctionnaires, l'administration sur laquelle se basait l'empereur pour affirmer son pouvoir. En Occident seuls les écoles de Rome et – dans une mesure plus discutable – d'Autun semblent attestées. Nous ne possédons que peu d'informations sur leur activité. Au contraire, pour l'Orient, nous connaissons plusieurs établissements dans lesquels était dispensé un enseignement académique du Droit au cours de l'Antiquité Tardive: Beyrouth, Constantinople, Alexandrie, Athènes, Césarée en Palestine ou encore Antioche. C'est à suivre la naissance et le développement de ces établissements nouveaux que nous allons nous attacher. C'est également à montrer qu'il s'agit là d'un événement majeur en tant que cela permet la diffusion massive de la raison juridique romaine que nous allons nous atteler.

El Derecho creación de Roma. Reconocimiento atemporal, ¿hoy en crisis?

Roma transmite al mundo los imperecederos moldes de organización jurídica y política de la sociedad: su Derecho privado, regulador del cúmulo de circunstancias sociales, familiares y patrimoniales y su Derecho público, que regula el ejercicio del poder político y las relaciones del individuo con los entes públicos. Me atrevo a parafrasear un excelso poema Manuel Machado al afirmar:

¡Ay del jurista que olvida su pasado/ y a ignorar su prosapia se condena!.../ ¡Ay del que sueña descubrir mediterráneos/ que son Mare nostrum para los romanos.../ ¡y amigo de ilusorias novedades,.../ desoye la lección de los textos compilados!.../ ¡Oh ilustre colega, reniega de la vana pseudociencia y vuelve al Corpus iuris civilis,/ ¡solo Roma, amigo mío, es capaz de crear Derecho de la nada!

Expresa un preclaro filósofo español Ortega y Gasset, con su habitual lucidez: “A veces para ser entendido hay que exagerar”. Me acojo a su pensamiento para decir que mi último verso es una exageración... pero no muy grande. ¡Por supuesto que soy consciente de que todos los días se crea Derecho! ¡Libreme Dios de que alguien deduzca lo contrario! Pero también legistas más que legisladores y leguleyos más que juristas, creen haber hallado esas “ilusorias novedades” que, desde hace veinte siglos los jurisconsultos romanos descubrieron y desde hace nueve los maestros glosadores y comentaristas transmitieron, llegando hasta hoy incólumes, en una medida, nada desdeñable. Para estudiar Derecho romano, ¡solo Derecho romano!, nace la Universidad. En la Bolonia medieval. Pero retornemos sobre la historia y río arriba lleguemos al origen. Aquel de donde brota todo el caudaloso río que arriba al océano legislativo. Y si vamos al hontanar veremos como el Derecho nace en Roma.

Con anterioridad lo único que existe es “prehistoria del Derecho”. No existe un orden jurídico con los parámetros y categorías, con la significación y alcance que hoy lo conocemos. El conjunto de disposiciones normativas de los imperios, reinos o pueblos tales como el sumerio, babilónico, egipcio, fenicio, hebreo o ático, etc., son prehistoria, pues aún en sus monumentos legislativos más relevantes, así el *Código de Hammurabi* y las *Leyes de Solón*, solo pueden encontrarse rudimentos y atisbos de una cultura jurídica.

El título de mi intervención: “El Derecho, creación de Roma”, podría ser otro: “El Derecho, creación del *ius civile*”. Así un célebre civilista publicó un estudio titulado: “Del *ius civile* como Derecho, al Derecho civil como derecho privado”. Y es que el Derecho civil debe reconocer que sus categorías y contenidos esenciales son reproducción casi literal de la herencia romana desarrolladas en atención a las necesidades económico-sociales de cada tiempo.

Ruiz Jarabo, magistrado de la Corte de Casación, en su Discurso de ingreso en la Real Academia de Jurisprudencia y Legislación, expresa de forma genial cuánto pretendo transmitir: “Roma, el pueblo que vino al mundo con la misión, casi divina, de crear el Derecho”. También, el más prestigioso administrativista español del siglo XX, García de Enterría, no duda en afirmar en su Discurso de ingreso en la Real Academia Española que: “el Derecho Romano es el fondo común sobre el que se han formado históricamente todos los Derechos occidentales existentes”.

Teseo, hijo de Teso, llega a Creta con el propósito de matar al Minotauro y liberar a su pueblo. Ariadna, hija del rey Minos, se enamora de él y le entrega un hilo, para desenrollarlo cuando se adentre en el laberinto en el que se encuentra el monstruo. Solo enrollando ese precioso hilo será capaz de alcanzar la salida. He querido traer a colación este relato del “hilo de Ariadna”, cargado de simbolismo, para afirmar que algunos juristas actuales, cuando en ocasiones se adentran en el laberinto de ciertos conceptos del Derecho sin conocer su origen, se pierden en su andadura y no saben salir de ese dédalo, cuestión de difícil resolución, al no tener la precaución de ir desenrollando ese filamento histórico y con el cual sería más fácil la formulación, interpretación o aplicación del Derecho positivo, causa de su labor legislativa, doctrinal o forense, respectivamente. Y ese “hilo de Ariadna” es, en bastantes supuestos, el Derecho Romano.

Y digo en bastantes supuestos, sin absolutizar, pues para la actual ciencia y práctica del Derecho Romano presenta un triple contenido, perfectamente diferenciado. En el tiempo presente hay tres Derechos Romanos: un

histórico, que fue y ya no es; otro que es precedente; y un tercero que es vigente. Procedo a explicarlo. En primer lugar en ocasiones, quizás las menos, se presenta como un Derecho histórico del que nada en Derecho vigente recuerda su rastro. Y puedo añadir que, en muchos de esos casos es así, afortunadamente. Las circunstancias sociales que regula el orden jurídico han mutado para mejor y por ello esas instituciones han desaparecido felizmente. Pueden así considerarse institutos tales como el *nexum*, la *manus maritalis*, o la *manumissio*.

En segundo lugar, en muchas otras es un precedente histórico de instituciones de Derecho vigente. Los ejemplos en esta categoría son inacabables por lo que resulta imposible siquiera su mero enunciado. Derecho Romano se conforma así como el elemento interpretativo por excelencia. Así, de acuerdo con el artículo 3 del título preliminar del Código civil español.

Art. 3 CC: *Las leyes se interpretarán...de acuerdo con sus precedentes históricos....*

Pero, en tercer lugar, el Derecho Romano va más allá de su condición de precedente, al poderse reconocer, en sentido estricto, como Derecho vigente. Esta tercera manifestación son las geniales categorías e instituciones, atemporales y ageográficas, que han traspasado su vigencia inicial y, transmitiéndose por el cauce de la historia de la ciencia jurídica, se han convertido en precipitado recogido en el tenor literal de códigos y leyes que conforman el Derecho positivo.

Así los Códigos civiles europeos, sobre común base romanística, han hecho realidad una nueva etapa normativa, de exquisita perfección técnica y de loable armonía normativa, que recuerda esa máxima latina al anunciar un nuevo amanecer: *Magnus ab integro saeculorum nascitur ordo*.

Resaltando esta tercera categoría puede, sin ambages, afirmarse: “Derecho Romano como Derecho vigente”. El adverbio comparativo “como” sobra. Es cierto que cabe introducirlo para evitar equívocos. De hacerlo así, debe utilizarse el término “como” no en su habitual condición de “adverbio”, sino en su forma de “conjunción”, que se introduce en la oraciones comparativas de igualdad. En este sentido, añado “como” con un valor copulativo de correspondencia o correlación recíproca entre dos realidades o mejor dos conjuntos armónicos que, en este caso, lo son de instituciones jurídicas.

Más allá del inmovilismo legalista que provoca la cosificación del Derecho y más allá del cambio constante del Derecho que lo vuelve efímero, está ese estadio que es el Derecho clásico que permanece y se mantiene indemne en lo esencial de su contenido y al tiempo se adapta en lo accidental para resolver conforme a las circunstancias económico sociales de cada época desde hace veinte siglos y, por ello, también a las del tiempo presente. Su creación presenta la frescura del momento de su elaboración.

Así, bastantes de las categorías más importantes de los Derecho positivos actuales, europeos y mundiales, son romanas que se han traspuesto en una época histórica, con conciencia o incluso sin ella. El Romano es el marco conceptual, el alfabeto jurídico, el elenco esencial de nuestros Códigos civiles europeos y americanos. Las categorías elaboradas por la jurisprudencia romana o recogidas en las constituciones imperiales, con posterioridad a su vigencia histórica se convirtieron en un conjunto de Derecho inmanente que, fundado en la razón, asume vocación de universalidad.

En este sentido de reconocer que el Derecho romano es Derecho vigente, podría hacerse un símil o analogía con el contenido del *Edicto de pretor* en la etapa de la República romana. Es bien conocido cómo en el *Edictum perpetuum* – que se dictaba nuevo cada año al entrar en el ejercicio de la magistratura el elegido Colegio de pretores – coexiste un *Edictum traslaticium* que es aquella parte del *Edicto* que el nuevo colegio toma de los *Edictos anteriores* y un *Edictum novum* que el colegio que entra en cargo incorpora, *ex novum*, para responder y dar respuesta procesal a las nuevas necesidades de su tiempo.

Pues bien, aquel conjunto permanente – por convertirse su contenido en traslaticio – que pasa de una Pretura a otra debido a su carácter atemporal es similar a lo que representa hoy ese conjunto de instituciones y categorías jurídicas esenciales que desde la Roma clásica, pasando por su cristalización en el *Corpus Iuris Civilis*, atraviesa el arco histórico de XIV siglos de la historia de la ciencia del Derecho, como *ratio scripta*, y llega al proceso de codificación incólume conformando un *Tesaurus* jurídico universal, capaz de seguir llegando a los rincones más apartados del orbe, en los que su distancia física se une a su alejamiento cultural.

Son ya demasiadas las ocasiones, en mi ya larga trayectoria universitaria, en las que he tenido que exponer y razonar una verdad que por ser difícilmente contestable, no debería ser necesario explicitar, y menos aún razo-

nar: el valor insustituible e incomparable del Derecho Romano, su vigencia atemporal y su carácter axial para la civilización. En alguna conversación, cuando compruebo que mi interlocutor no asume lo obvio – hasta la mitad del pasado siglo era hartó excepcional, pues ningún jurista culto lo cuestionaba – suelo terminar el debate con una afirmación, de la que cada día me siento más convencido: “El aprecio por el Derecho Romano es una cuestión de cultura jurídica y no solo, sino también es una cuestión de cultura, en su más hondo sentido”. Los más cultos lo aprecian y hasta veneran, los menos lo infravaloran o desconocen.

En el tiempo presente, va creciendo para desgracia de la Ciencia jurídica, los que ignoran la base elemental del Derecho Romano, que les proporcionaría claves conceptuales y no solo históricas para la adecuada comprensión de las parcelas jurídicas a las que dedican sus desvelos y estudios. Y ello por defecto de sus profesores, si se trata de operadores prácticos del Derecho, un día estudiantes de su Licenciatura, o lo que es más grave por dejadez o carencia de sus Maestros académicos cuando se trata de universitarios estudiosos de las distintas disciplinas jurídicas. A todos ellos, les refiero ese pensamiento clarividente de Agustín de Hipona: “Nadie ama lo que ignora. Cuanto más se conoce, ...con tanto mayor empeño anhela el alma saber lo que resta”.

He podido constatar, he escuchado, y sobre todo leído, en los más grandes, juristas e intelectuales, una admiración rendida hacia el Derecho Romano. Por el contrario, los que me he encontrado, en persona o encuadrados, con escasa estima por el Derecho Romano, su nivel de conocimiento jurídico es hartó exiguo y/o su sensibilidad cultural suma escasa. Es decir, adaptando la máxima agustiniana: “lo que no se conoce, no puede apreciarse”. Cuánto más culto se es y/o cuánto Derecho se sabe, más se reconoce el Derecho Romano. Utilizo la voz reconocer en esa acepción expresa: “Admitir como cierto algo”. Reconocer pues no es otorgar o conceder, sino verificar. Y a veces no se reconoce, no se constata, debido al positivismo extremo de algunos juristas en el tiempo presente y de la hiper-especialización de otros prescindiendo de cualquier estudio previo de la parte general de su parcela jurídica y de las bases comunes a todo el Derecho.

ANDRÁS FÖLDI

Eötvös Loránd Tudományegyetem, Budapest – Hongrie

Irrationalismus und Liberalismus in den ‘legis actiones’

Man pflegt das archaische römische Zivilprozessrecht mit einem offensichtlich anachronistischen Terminus als Ordnung der *legis actiones* zu nennen. Die Literatur weist aber seit der zweiten Hälfte des 20. Jh. (siehe zB Pugliese, Biscardi, Schmidlin) darauf hin, dass die beiden alternativen Erklärungen von Gaius (Gai 4,11) bezüglich des Ursprungs dieses Terminus unbegründet sind. Das Wort *lex* ist nämlich in diesem Kontext nicht als Gesetz auszulegen, sondern bedeutet vielmehr Spruchformeln. Gaius stellte demgegenüber zutreffend fest, dass die Regeln der *legis actiones* von der *nimia subtilitas veterum* geprägt worden waren (Gai 4,30). Von dieser Kritik des Gaius ausgehend bestrebt der Vortrag darzustellen, was für irrationale (oder für uns als irrational erscheinende) Züge das altrömische Zivilprozessrecht aufzeigt, und es wird auch darauf eingegangen sein, in welchem Sinne ist es gerechtfertigt, das altrömische Zivilprozessrecht für “liberal” zu halten.

RICHARD GAMAUF

Universität Wien – Autriche

Zur prozessualen Funktion der ‘dolus’-Klausel bei der ‘actio de peculio vel de in rem verso’

Neben den Forderungen bzw. Schulden zwischen Gewalthaber und Gewaltunterworfenem oder unter Gewaltunterworfenen des Beklagten waren aufgrund ausdrücklicher Anordnung in der Formel der *actio de peculio vel de in rem verso* auch vom Gewalthaber dolos vorgenommene Verkürzungen eines *peculium* durch den *iudex* in der *condemnatio* zu berücksichtigen. Damit knüpfte die adjektivische Haftung aus der *actio de peculio vel de in rem verso* streng genommen an drei zu unterscheidende Voraussetzungen an: der Existenz eines *peculium*, einem *versum* im sonstigen Vermögen des Gewalthabers und daneben auch von ihm arglistig vorgenommene Entnahmen aus dem *peculium*. Daneben spielte die *dolus*-Klausel der Klage eine weitere wichtige Funktion für den

Kläger: Im Prozess ermöglichte sie ihm indirekt den Zugang zu Informationen über den Umfang des *peculium* und die verurteilungsrelevanten Hinzu- und Abrechnungsposten, da mangelnde Kooperation des Beklagten den Verdacht doloser Verringerung des *peculium* nähren konnte.

MARÍA TERESA GARCÍA LUDENA

Notaria, Madrid – Espagne

Responsabilidad de los poseedores de animales: ‘actio de pauperie’ como exponente de la victoria del ‘ius’ sobre la ‘vis’

Se pretende realizar un acercamiento a la responsabilidad civil por daños causados por los animales, en aras de la eficacia del principio de *alterum non laedere*, enfocándolo como muestra del predominio del sentido común y la defensa frente al daño injustificado. Efectuaremos un recorrido histórico entorno a la misma desde la *Ley de las XII Tablas*, pasando por las modificaciones introducidas por el derecho romano clásico, por el justiniano y al influjo de nuevas concepciones filosófico-jurídicas y, ulteriormente, por las debidas al derecho medieval castellano, representado por el *Fuero Juzgo* y las *Partidas*, fijándonos en sus similitudes con la actual regulación española contenida en el artículo 1905 del Código civil y normas concordantes, sin olvidar la interpretación que de él ha hecho la jurisprudencia para dar respuesta a las actuales demandas sociales.

CARMEN GÓMEZ BUENDÍA

Universitat Rovira i Virgili, Tarragona – Espagne

‘Alienus dolus nocere alteri non debet’? Casistica in Ulpiano 76 ‘ad edictum’

In questa relazione saranno esaminati una serie di frammenti di Ulpiano dal libro 76 *ad edictum*, in cui il giurista descrive casi in cui il *dolus* di un terzo è incluso nella formula dello *iudicium*. Nei casi che esamineremo, il pretore mediante la concessione dell’eccezione, consente di includere nella formula il *dolus* di un terzo che non opererà come parte nel processo. *Ad exemplum*, potremmo citare il caso di D. 44,4,4,27, in cui il *dolus* del venditore può essere opposto al compratore nel caso in cui quest’ultimo ottenga il beneficio del tempo di possesso del venditore attraverso l’*accessio possessionis*. La maggior parte dei frammenti si trovano in D. 44,4, sotto la rubrica: *De doli mali et metus exceptione*.

HIROKUNI GOTO

Kobe Daigaku, Kobe, Honshu – Japon

The Relationship between ‘heredis institutio ex re certa’ and ‘fideicommissa’

This paper considers the relationship between *heredis institutio ex re certa* and *fideicommissa*. An important source is Marci., D. 36,1,30 (= I. 2,17,3). This was the subject of much discussion, especially among pandectists. Since the 8th edition of his work (*Juristische Kurz-Lehrbücher Römisches Privatrecht* § 68 II 3), which is one of the most popular textbooks of Roman law today, M. Kaser has stated: “Wohl das Kaiserrecht hat ferner den *ex re certa* Eingesetzten Alleinerbe werden lassen, der aber die Erbschaft, vermindert um den ihm zugewendeten Gegenstand, den Intestaterben als Erbschaftsfideikommiß herausgeben muß; Sev. Ant.-Marci. D. 36,1,30.” Is it really possible to say such things based on this source?

ALEKSANDER GREBIENIOW

Uniwersytet Warszawski, Warszawa – Pologne

The ‘successio anticipata’ in the Classical Roman Law

Successio anticipata denotes a phenomenon questioning the dichotomy of acts concluded either *inter vivos* or *mortis causa*. In fact it is a transmission of patrimony in the event of death, though executed during lifetime of the *de cuius* to be.

Successio anticipata is not an ancient legal concept, although the expression *supremum iudicium anticipare* can be found in the Roman sources. It describes a set of practices widely known at that time (estate planning), which make use of various legal institutions. Their common core is an agreement. Already the jurists and emperors of the Classical Roman Law recognized contracts which had the intergenerational patrimonial transfers as an object. It seems not to be true that the Romans did not know contracts on succession, but they simply understood them differently.

SELDAG GUNES PESCHKE

Ankara Yildirim Beyazit Üniversitesi – Turquie

The Importance of Legal Education in the Classical Period in the Development of Roman Law

In the “Classical Period” between the 1st Century BC and 3rd Century AD, Roman jurisprudence came to an higher point of its time. In this period, great jurists took direct part in governmental tasks and the central imperial administration of justice. By the early 1st century BC, secular jurists were consulted on the matters relating to law and they started to take part in legal subjects. They focused on interpreting and generating formal opinions on legal issues, as the pontiffs had done in earlier times. The jurists consisted in giving advice on questions from the citizens, magistrates and judges, providing assistance to litigants on matters of legal procedure, preparing the forms for the suits and related works.

The jurists were entrusted with the task of educating those who wished to enter the practice of law. Considering the public interest, they gave free consultancy to researchers of the legal issues and to the ones who were willing to learn.

In the classical period, the jurists had formed a *secta* or *schola* in the senate to discuss the problems which were asked to them. At the time of Augustus, two law schools (Sabinians and Proculians) were founded which effected the influence of legal institutions widely, especially on Roman private law. Over several centuries the ideas of the two law schools were shared by their students and followers to shape the legal issues. The discussion of the different legal interpretations and opinions in legal issues had contributed significantly to the development of the law.

VERENA TIZIANA HALBWACHS

Universität Wien – Autriche

‘... si matrimonium moribus legibusque nostris constat ...’

Nur eine Konstellation der partnerschaftlichen Lebensgemeinschaft ist vom römischen Recht als sogenanntes *iustum matrimonium* anerkannt; sein Zustandekommen setzt einerseits bestimmte (auch durch rechtliche Vorgaben “definierte”) Erfordernisse voraus und löst andererseits spezifische Rechtsfolgen aus; durch diese unterscheidet es sich von anderen Formen des Zusammenlebens von Mann und Frau (die allerdings ebenso nicht notwendig rechtsfolgenlos bleiben). Dennoch wird – mit Blick auf das Fehlen konstitutiver (rechtlicher) Elemente für die Eheschließung – das *iustum matrimonium* in der romanistischen Literatur regelmäßig als ein faktisches Verhältnis, als “verwirklichte Lebensgemeinschaft” mit “rechtlichen Rückwirkungen” umschrieben und wurden diverse Theorien über den eigentümlich rechtlichen Charakter der Ehe entworfen. Die römischen

Juristen haben die Frage nach dem “Wesen der Ehe” in dieser Form jedenfalls nicht diskutiert.

Allerdings zeigen die Quellen ein breites Spektrum an Problemlagen und Abgrenzungsschwierigkeiten, mit denen sich die römischen Juristen in Folge des Konzepts des *iustum matrimonium* und seinen rechtlichen Implikationen konfrontiert sahen. Ausgehend von Ulpian, 32 *ad Sab.* (D. 24,1,3,1) zum Thema des Verbots der Ehegattenschenkung soll an einigen Texten exemplarisch untersucht und aufgezeigt werden, welche Lösungsversuche im Sinne einer Reaktion auf praktisch vorgefundene Situationen unternommen wurden.

GABOR HAMZA

Eötvös Loránd Tudományegyetem, Budapest – Hongrie

Roman Law and the School (Trend) of Natural Law

The fundamental concept of the trend (school) of natural law is that there is a *ius commune* being independent of positive law (*ius positivum*). The legal scholars belonging to the trend of natural law in the sixteenth and seventeenth centuries thought to have discovered the traces of the *ius commune* in the *Testamentum Vetus* and the *Testamentum Novum*. However, the fact that comparative law related studies had been extended to the laws of the states (ethnicities) of the Mediterranean world, did not necessarily mean that the role of Roman law as *ius commune Europaeum* was challenged. Arthur Duck, in his work *De Usu et Autoritate Juris Civilis Romanorum in Dominiis Principum Christianorum Libri duo*, presented a kind of comprehensive history of reception legitimized Roman law. Roman law (*ius civile*), despite the plan of the *Corpus Iuris Reconcinnatum*, did not lose its importance for Gottfried Wilhelm Leibniz, though he had become aware of its shortcomings, apparent in certain cases. In Leibniz's works, Roman law continued to preserve its character of *ratio scripta*. By Grotius, and this particularly applies to his works titled *Florum sparsio ad ius Iustinianum* and *De iure belli ac pacis*, Roman law and the law of foreign states (ethnicities) can often be seen with comparative approach. The same applies to Samuel Pufendorf. In his work titled *De iure naturae et gentium*, Pufendorf referred to parallel legal phenomena. The comparison between the institutions of the law of various states served mainly for legitimizing the theory of natural law. Another characteristic of the school of natural law was that the historical factor lost completely its importance. However, for the exponents of the new school of natural law the historical factor gained again some importance. In the researches carried beyond the horizon of the Roman law, the search for analogy was, in most cases, only of secondary importance. What mattered was to establish the similarity between individual institutions, without analyzing the causes. In some cases, the “assimilation”, attained indirectly, through mediation, was taken into consideration. Heineccius's *De utilitate litterarum orientalium in iurisprudencia*, was an example of this approach. The beginnings of the comparative analysis of law which followed practical objectives in particular went back to the late period of the school of natural law. The best-known representatives of this school were Johann Stephan Pütter and August Friedrich Schott. Pütter considered the *ius commune* of Germany, to which he attributed an autonomous existence, as of equal importance as an equivalent to post-reception Roman law. Pütter criticized the custom or practice of juriconsults to mix the rules of Roman and German law. For him Roman law meant the *ius peregrinum* which had to be opposed to *ius patrium*. Pütter was the first legal scholar to try to find a way to *deutsches Privatrecht*, the reconstruction of which was, incidentally, a mere *opus desperatum*, because of its particularism. Apart from Heineccius, it was Pütter who undertook to elaborate the “details of the German *ius commune*”, considered as being autonomous. He had to face, however, the fact of reception and, for that reason, he gave up the idea of “banishing” Roman law from Germany. He called the attention to the fact that the “ancient” Germanic law did not cease to exist after the reception of Roman law. August Friedrich Schott was in fact, as he himself stressed in the preface to his work entitled *Entwurf einer juristischen Encyclopädie und Methodologie zum Gebrauch akademischer Vorlesungen*, Pütter's follower. When dealing with the Roman law, he pointed out that Roman law was taken into consideration not only by German courts but it was equally in application in most European countries. The fact that he laid emphasis on the difference between the two kinds of law (legal systems) in application in Germany, was completed by mentioning “Mosaic law” contained in the *Testamentum Vetus* which was part of the so-called “Göttliches Positivrecht”.

HENRIK-RIKO HELD

Sveučilište u Zagrebu – Croatie

Functions of the 'legis actio per condictionem' and the Prerequisites for the Just War in Roman Law

In the older studies of Roman law, as well as in certain recent elaborations of the subject, certain types of the *legis actio* procedure have been brought in connection with the procedure for the initiation of the just war or *bellum iustum*. In continuation of those researches, the aim of this paper is to specifically expound on the functions of one of the *legis actiones*, namely *legis actio per condictionem*, as they are traditionally understood and analyse whether they might be associated with the original substantive prerequisites for the initiation of just war. *Legis actio per condictionem* is usually denoted as pertaining to claims arising from *mutuum*, *stipulatio*, *expensilatio*, *indebiti solutio* and *furtum* (cf. M. Kaser, K. Hackl, *Das römische Zivilprozessrecht*, München 1996, p. 112). On the other hand, a crucial prerequisite for the initiation of just war in its original application was the existence of a pecuniary wrong done by a contesting tribe, more precisely its defaulting on an obligation of *dare, solvere, facere* towards Romans (Livius, *Ab urbe condita* I,32,11). Explication of the possible connections on a functional level may shed some light on the origins of the *legis actio per condictionem* procedure and the level of its immersion in the religious setting of the early Roman legal order.

Recognizing the general theme of this year's SIHDA conference and the motto of the Jagiellonian University in Kraków where it takes place, *Plus ratio quam vis*, it might be fitting to deal with the concept of *bellum iustum*, a very important Roman contribution for the development of the law of war, and a famous example of the attempt to include rational and moral factors in the procedure for the initiation of war activities, as well as its possible relevance in the private legal context.

VIOLA HEUTGER

Universität Luzern – Suisse

Anmerkungen zu 'Codex Theodosianus' 14,9,2 und der Bibliothek von Konstantinopel

Im Jahr 372 ordnen die Kaiser Valens, Valentinian und Gratian an, dass sieben Personen, vier griechischsprachige und drei lateinischsprachige, als Kopisten, Buchbinder sowie als Aufsichtspersonen für die Bibliothek in Konstantinopel eingestellt werden sollen. Die ersten Mitarbeiter der Bibliothek werden aus der Bevölkerungsgruppe der *condicionales* requiriert und aus Steuerleistungen finanziert. (C.Th. 14,9,2). Wenige Jahre zuvor hinterließ Kaiser Julian seine Buchbestände der Bibliothek und Kaiser Valens entfaltet mit der Erstellung des Aquädukts reiche Bautätigkeit in der Stadt. Der Ausbau der Hauptstadt zu einer Bildungsmetropole beginnt mit der Einrichtung der Bibliothek. Es stellt sich die Frage, aus welcher Bevölkerungsgruppe diese Kopisten stammen. Zu hinterfragen ist auch, warum sie aus Steuermitteln finanziert werden und die Art ihres Unterhalts so genau beschrieben wird.

MARIA ILIEVA KOSTOVA

Libera Universitas Studiorum "Černorizec Hrabăr", Varna – Bulgarie

'Recta ratio'

Dans les textes juridiques latins, il y a des passages où les juristes romains écrivent sur *ratio naturalis* et *ratio civilis*. Gaius appelle la même chose *ius gentium* et *ius naturale*. Ils sont tous les deux basés sur *ratio naturalis*. Gaius attribue le droit de défense légitime à *ratio naturalis*, et non à *ius naturale* ou bien *ius gentium*. D'autre part il se réfère à *ius gentium* concernant son opinion sur l'esclavage mais ne fait pas appel à *ratio naturalis*. Les scientifiques examinent la question de savoir quelle théorie ou philosophie a influencé Gaius, Paulus, Ulpianus. Cicéron et les théories philosophiques grecques sur l'esprit universel ont influencé Gaius et d'autres juristes dans la période I–III siècle. Ainsi, nous devrions penser que *ratio* est une base principale dans le droit pour Gaius et

quelques autres juristes romains. Cette situation nous permet de considérer que la définition d'Ulpien sur la nature ou *ius naturale*, dans laquelle il a employé la phrase *natura omnia animalia docuit* probablement n'est pas une interpolation ...

EVA JAKAB

Nemzeti Közszolgálati Egyetem, Budapest/ Szegedi Tudományegyetem – Hongrie

State and Succession: A Case Study

Jeremy Bentham emphasized that there are two “sacred points in the law of a country”: property and inheritance. Indeed, inheritance did matter also in the Roman world. In Gaius' elementary survey of Roman law (*Institutiones*) 279 passages dwelt with succession while contract law was discussed just in 93. Modern scholars calculated that some 60 or 70 per cent of all Roman litigations arose over problems connected with inheritance. Law, religion and moral interacted in shaping the rules of passing over the family possession. The Romans were “obsessed with the making of wills” (E. Champlin) and had “a horror of intestacy” (H. Maine). A survey of the documentary evidence (wills, court proceedings and imperial rescripts) can explain the significance of the topic both for Emperors and individuals – revising the reliability of commonly accepted premises as the principle of the personality of law.

RENATA KAMIŃSKA

Uniwersytet Kardynała Stefana Wyszyńskiego w Warszawie – Pologne

Force and Deception in Using Public Things

It's hard to say if there are more supporters of power solutions or those of well-thought-out ones throughout the world. Often it occurs that using force gave nothing or little only. Sometimes it's worth to think something over and apply this solution than put pressure.

However the supports of power have their pros; they're faster, often simpler to implement and effective. Sometimes some people may reach some goals only thanks to the pressure. Such situations happened also in ancient Rome, i.a. while using public water. The access to it was common, but some citizens wanted to have more quantities of it, or just provide for themselves steady deliveries. That's why often moved they to use force or insidious solutions, e.g. they were stealing water.

A valuable source of information on this matter is the work *De aquaeductu urbis Romae* by Frontinus. Apart from thefts, another public water-related offences was the deliberate deterioration of the quality of water, in particular its pollution. However the majority of water offences by private person could not have been committed, if they have not been for the support of public officers (e.g. *procuratores*).

The aim of the considerations will be then to depict this issues, the range of threats as well as kinds of remedial measures and punishment.

TOMISLAV KARLOVIC

Sveučilište u Zagrebu – Croatie

'...et res periculosa est sub iudice offenso litigare' – Some Aspects of 'officium iudicis' in Romano-Canonical Procedure

By these words Bonaguida d'Arezzo, *Summa introductoria super officio advocacionis in foro ecclesiae* I,3, appealed to the attorneys coming before canonical judges to act reasonably and not to anger them by disrespectful pleading. Strong words, insults against the other party, commotion and unrest, were just some of the issues judges encountered in the courtroom while hearing the cases. In these paper it is investigated into the contents of *officium iudicis* in the sense of, in contemporary vocabulary, judicial “case management” in the literature of early Romano-Canonical procedure. How the judges were expected to direct the process to swift resolution; what

were their duties, but also the duties of the advocates; what were the judges authorized to do to discipline the advocates; these and other questions are discussed on the basis of *ordines iudicarii*.

MIKLÓS KELEMEN

Nemzeti Közzolgálati Egyetem, Budapest – Hongrie

Suffragium: Korruption oder regelgerechte Auswahl?

Hohe Würdenträger in der spätrömischen kaiserlichen Hierarchie waren dazu berechtigt, Vorschläge beim Besetzen gewisser vakanter Amtsstellen zu machen, und für das Amt eine von ihnen für geeignet gehaltene Person zu empfehlen (*suffragandi licentia*). Die “erkaufte Empfehlung” (*suffragium venale, -emptum, -comparatum*), die man nur im Begriffsbereich des im Allgemeinen widersprüchlich beurteilten *suffragium* sinnvoll deuten kann, wird in der Fachliteratur besonders kritisch bewertet.

Mit den Worten von den meistzitierten Repräsentanten der Fachliteratur ist das *suffragium* ein “äußerst riskantes Geschäft”, das meistens zu Korruption führt und das Auswahl “degenerierte zur Handelsware”. Das *suffragium venale* liegt auf diese Weise außerhalb des Ämterpatronats im engeren Sinne, es bedeutet ein davon unabhängiges Patronat. Beim *suffragium venale* setzt in erster Linie nicht der Patron sich für seinen Klienten ein, sondern der Aspirant erwirbt sich einen Patron, um sich das Amt oder einen Vorteil zu verschaffen.

Unseres kurze Referat liefert einige Beiträge zum Begriff und Bedeutungsgehalt des *suffragium* mit Hilfe von Textquellen des römischen Rechts, vor allem aber von Ausschnitten aus kaiserlichen Verordnungen. Es wird außerdem darauf hingewiesen, dass in der Praxis des römischen Beamtentums die nach dem modernen Verständnis verbotenen oder als Korruption bezeichneten Methoden (Patronat, Empfehlung für das Amt) akzeptiert und systematisch verbreitet waren.

ISTVÁN KEVEVÁRI

Nemzeti Közzolgálati Egyetem, Budapest – Hongrie

Rule by Law or Rule by Men? Some Remarks on Plato's and Aristotle's View on Monarchy, Tyranny and Law

In contemporary political theory we address the rule of law as the primary value of our democracies. We usually define the rule of law in opposition to rule of men but we can observe the rise of the populist regimes around the world and the increased importance of the world leaders as personalities. In my paper I do not want to go on a straight argument against the rule of men and stand for a depersonalized somewhat technocratic politics, but I want to analyze this problem through the lenses of two ancient Greek authors: Plato and Aristotle.

It would be very anachronistic to speak about the rule of law in the ancient times but we can discover some prefigures of our modern concept of rule of law in some of the texts of Plato and Aristotle. However this “rule of law” is merely the second best option to the rule by men who possess philosophical wisdom (Plato) or practical wisdom (Aristotle). There is some strangeness in the hierarchy of the constitutions of both authors because while the best regime is the monarchy that is ruled by the wise the worst constitution is the tyranny of a dishonorable man. My question is that what grounds can we constitute this divide and what makes a great statesman?

PHILIPP KLAUSBERGER

Universität Wien – Autriche

Darlehensgewährung an Sklaven: Geschäftsführung oder aufgedrängte Bereicherung? Anmerkungen zur ‘actio de in rem verso’ bei Ulpian (29 ad ed.) D. 15,3,3,4

Ulpian (29 ad ed.) D. 15,3,3,4: *Sed si mutua pecunia accepta domum dominicam exornavit tectoriis et quibusdam aliis, quae magis ad voluptatem pertinent quam ad utilitatem, non videtur versum, quia nec procurator haec impu-*

taret, nisi forte mandatum domini aut voluntatem habuit: nec debere ex eo onerari dominum, quod ipse facturum non esset. Quid ergo est? Pati debet dominus creditorem haec auferre, sine domus videlicet iniuria, ne cogendus sit dominus vendere domum, ut quanti pretiosior facta est, id praestet.

Ein Sklave hat Geld als Darlehen empfangen und mit diesem Geld das Haus seines Herrn mit Wandverkleidungen und gewissen anderen Dingen verziert, die mehr die Sinne erfreuen als der Nützlichkeit dienen. Fraglich ist, ob der Darlehensgeber seinen Anspruch gegen den Herrn mit der *actio de in rem verso* durchsetzen kann. Ulpian verneint dies mit der Begründung, es liege keine Zuwendung in das Vermögen des Herrn vor, zumal auch ein Prokurator diese Posten nicht in Rechnung stellen könnte, außer er hätte einen Auftrag seines Herrn oder (wenigstens) dessen Zustimmung. Der Herr müsse freilich dulden, dass der Gläubiger all das wieder wegnimmt, was weggenommen werden kann ohne dem Haus zu schaden.

Dieser Text wirft eine Reihe von Fragen auf. Zunächst gilt es zu klären, warum Ulpian die adjektivische Haftung des *dominus* ablehnt. Auffallend ist, dass der Jurist das Handeln des Sklaven mit dem Tätigwerden eines (freien) Prokurators vergleicht. Ganz offensichtlich soll der Herr nicht aus Geschäften verpflichtet werden, die er selbst nicht in dieser Weise getätigt hätte. Am Ende der Stelle versucht Ulpian die Interessen des Darlehensgläubigers insofern zu berücksichtigen, als er diesem ein *ius tollendi* einräumt.

NIKOLAUS KRAUSLER

Universität Salzburg – Autriche

Polybios in Montesquieu's Thinking: Mixed Constitution and Separation of Powers

Subject of the lecture is the demonstration of the parallels and differences between the theory of the mixed constitution of Polybios and the theory of the separation of powers of Montesquieu.

The parallels arise from the fact that Montesquieu was inspired not only by the English constitution, but also by the Romans to conceive his theory of the separation of powers. In both systems, the power in the state is limited and controlled by itself, with each political force finding a counterweight. Also, in both systems, all state organs are forced to cooperate with each other. Through the mixed government Polybios had the goal of creating a constitution that is more durable than a monarchy, aristocracy or democracy in its pure form. With his theory of the separation of powers Montesquieu wanted to provide political freedom for the individual citizen in the state. The lecture also wants to prove that Montesquieu noticed the principles that stand behind the mixed constitution of Polybios. His great intellectual achievement was to abandon himself from the theory of the mixed constitution. It is not the mixture of individual forms of government that forms the intellectual basis of his thinking, but the separation of powers itself. The mixing of the different forms of government leads to the distribution of competencies to different state organs and this distribution is the basis for power control. By creating the three branches – a legislature, an executive, and a judiciary – Montesquieu eliminated the no longer necessary step of mixing governments and so he could immediately concentrate on the distribution of competences to different state organs in order to provide political freedom for each individual citizen in the state.

MICHAEL KRUPA

Paris-Londron Universität Salzburg – Autriche

Blutige Hand nimmt kein Erbe – Einfluss der Digestenstelle 34,9,3. auf die Rezeptionsgeschichte der römischen 'indignitas' in den französischen und deutschen Rechtskreisen

Der Tatbestand des Verwandtenmordes bildet das Herzstück des heutigen französischen, österreichischen und deutschen Erbunwürdigkeitsrechts. Für die genannten Rechtssysteme bildet Marcianus Digestenstelle 34,9,3 das dogmatische Vorbild der jeweiligen Regelung. Das zitierte Digestenfragment enthält das *Dekret* Kaiser Antoninus Pius, das einen eingesetzten Erben als erbunwürdig erklärt, da dieser seinen Erblasser umbringen ließ.

Niemand soll aus einem anderen gegenüber verübten Fehlverhalten Gewinn ziehen können – vor allen nicht derjenige, der seinen Erblasser ermordete, um in Besitz seines Vermögens zu gelangen. Diese aus dem *Digest* 34,9,3. stammende dogmatische Erkenntnis bildet aus Sicht der europäischen Privatrechtsentwicklung nicht die alleinige Schöpfung der römischen Jurisprudenz. Der gegenständliche Sachverhalt samt seiner rechtlichen Beurteilung ist ebenfalls dem germanischen Recht zu entnehmen. Das im Titel des Vortrages zitierte Rechtsspruchwort findet seinen Niederschlag nicht nur im Sachsenspiegel und in den friesischen Gesetzen, sondern auch in den einzelnen *Leges barbarorum*.

Das Ziel des Vortrages ist es, das „Aufeinandertreffen“ der römischen und germanischen Rechtskulturen im Rahmen des Rezeptionsprozesses des römischen Indignitätsrechts auf fränkischem und deutschem Rechtsboden zu analysieren. Ein besonderes Augenmerk wird dabei auf die Perioden des *mos gallicus* und des *Usus modernus Pandectarum*, in denen das einheimische Rechtsverständnis bei der Rezeption einzelner Lehren des römischen Rechts stark berücksichtigt wurde, gelegt. In diesem Zusammenhang werden sowohl Pothiers, Domats und Carpzovs Ausführungen als auch die Erkenntnisse der eleganten holländischen Jurisprudenz in Hinblick auf die Rezeption der römischen *indignitas* behandelt und ihr Einfluss auf die französischen, österreichischen und deutschen Privatrechtskodifikation ausgewertet. Der Code civil, das ABGB und das BGB präsentieren sich trotz eines gemeinsamen Vorbildes – der römischen Indignitätslehre – als ein aus vielen einzelnen Elementen zusammengestelltes Mosaik. Der Fluss der römisch-gemeinen Rechtstradition schlug bezüglich der gemeinrechtlichen Indignität drei unterschiedliche Wege ein. Die vorliegenden Unterschiede sind durch den unterschiedlichen Einfluss des einheimischen Rechts auf das rezipierte römische Recht zu erklären. Diesem Ansatz geht der gegenständliche Vortrag nach.

JOANNA KULAWIAK-CYRANKOWSKA
Uniwersytet Łódzki, Łódź – Pologne

The Force of Argument and the Argument of Force in the Martial's "Epigram" XII,52

A Roman poet Marcus Valerius Martialis in the *Epigram* XII,52 described a story of Sempronia – a woman, who was either abducted or seduced, but who also later left her lover and returned to her lawful husband. The poet, however, did not present a mere description of the adultery, but, by repeating the terminology that was associated with violence (*raptus*, *rapina*, *raptor*, *rapta*), put emphasis on the motive of force (*vis*). This might suggest that Martial could have been trying to convince the public that the heroine was forced to leave her husband. This assumption also allows hypothesizing that the *Epigram* was composed as a speech in defence of Sempronia. The main aim of the paper is to assess to what extent this attempt could have been effective and credible in the eyes of an ancient reader. Moreover, describing the mutual relations between poetry, law and rhetoric will allow determining if Martial knew Roman law and wanted to make use of his knowledge or if he simply found linguistically attractive using the words that sounded similar but did not have the same meaning

SŁAWOMIR PATRYCJUSZ KURSA
Uniwersytet Humanistyczno-Społeczny w Warszawie – Pologne

La 'ratio legis' delle riforme giustiniane nell'ambito della successione testamentaria

Lo scopo della relazione è quello di determinare la *ratio legis* delle riforme di Giustiniano nell'ambito della successione testamentaria attraverso un'analisi delle fonti di diritto in vigore sotto il suo regno. A tale analisi vengono sottoposte sia le costituzioni (*leges*) dell'imperatore Giustiniano che le interpolazioni dei testi originari del periodo classico e postclassico introdotti dai compilatori dietro l'autorizzazione dell'imperatore, contenute nei *Digesta* di Giustiniano e nel *Codice* di Giustiniano. Verranno presentati i motivi delle innovazioni di Giustiano relativi alle capacità di disporre o di ricevere per testamento (*testamenti factio*) e alle forme del testamento, sia ordinarie che speciali, che funzionavano nell'ambito giuridico nell'età giustiniana. Le riforme condotte da Giustiniano e relative alla pubblicazione ed esecuzione del testamento saranno pure l'oggetto dell'analisi. Inoltre, verranno spiegate le ragioni per cui l'imperatore in alcuni casi rinunciava alle innovazioni di legge da lui

introdotte. Nella parte conclusiva verranno tratte le conclusioni indicanti gli spunti generali e quelli speciali che motivarono l'imperatore Giustiniano ad introdurre le suddette riforme.

PATRICIO RODRIGO LAZO GONZALEZ

Universidad Católica de Valparaíso – Chili

Funciones dogmáticas de la 'exceptio doli'

La *exceptio doli*, como cualquier otra creación del pretor, fue concebida para desempeñar ciertas funciones en el proceso formulario, en tanto en cuanto ella podía insertarse en determinadas fórmulas, de modo de establecer con claridad los extremos entre los cuales podía moverse juez, tabto para absolver como para condenar. Tales funciones eran específicas e inmediatas, puesto que estaban en estrecha relación con el asunto específico sometido al conocimiento del magistrado y a la sentencia del juez. Su función, por lo tanto, al estar primariamente vinculada al programa de decisión que constituye la fórmula, era en primer término, procesal. Con todo, la interpretación de la que fue objeto permitió a la *exceptio doli* se insertarse en el mecanismo de funcionamiento de los institutos, de modo de desempeñar funciones dogmáticas. Es decir, al incorporarse ella en los *responsa* de los juristas acerca de problemas reales o imaginarios, y, por esta razón, abstractas, o sea, desvinculadas de los problemas particular y empírico e independientes de las funciones que se tuvo a la vista al momento de su creación. El objetivo de esta comunicación es examinar algunas de las funciones dogmáticas de la *exceptio doli*, en el entendido de que puede llamarse así a todas las consecuencias producidas por las operaciones de distinto orden, que inciden en el desarrollo del Derecho romano y en su evolución como sistema. Así, la doctrina en torno a la *exceptio doli* habría cumplido servido para dotar de contenido a ciertos conceptos jurídicos asociados a ella, ejemplo paradigmático de lo cual es el concepto de retentio; lo mismo puede decirse del dolo, en todos aquellos aspectos que no se había desarrollado como consecuencia de la *actio de dolo*. Otras funciones apuntarían a la optimización y ajuste del derecho a las necesidades de la práctica, como ocurre con la protección de los convenios no obligatorios, con las reglas que rigen la interpretación de los contratos o las estipulaciones, cuando en ellos se acuerda una *clausula doli*, o bien con la extensión de su uso al procedimiento interdictal.

FRANCISZEK LONGCHAMPS DE BÉRIER

Uniwersytet Jagielloński, Kraków – Pologne

'Plus ratio quam vis': Roman Law as an Obvious Toolbox for Private Law?

Limitations of the liability for the debts of the deceased might be the most recent example of the importance of jurisprudential framework created by the Roman law of succession. The example proves illustrates that the framework and institutions of Roman law could be considered an obvious toolbox for the contemporary private law.

In 2015, an amendment to the Polish Civil Code made the benefit of inventory the rule for acquiring an inheritance. The general limitation of liability for the debts of the deceased appears obvious to the present generation of Poles. It seems unjust to them favoring creditors of the deceased by adding the property of successors to the inheritance, and in that way better securing the payment of the hereditary debts. Yet, Roman law gave persons appointed to the inheritance a choice: either to accept the succession and become liable for all the debts pertaining to the whole of the estate, including those that exceeded the value of the inheritance – or reject it so as not to risk any liability. The situation changed significantly when the benefit of inventory was introduced by the Justinian's *Constitution* of November 27, 531. The benefit of inventory was a new institution, but was in line with the old way of thinking, determined by the praetorian law and the right to decide – *ius deliberandi*. In Rome an inventory was drawn up in the presence of a notary and witnesses. The document was signed by the heir, who declared that the inventory was in compliance with the actual state of affairs. The heir was responsible to satisfy the creditors till assets constituting the inheritance were exhausted. And the assets were enlisted at the inventory. This solution is commonly used in contemporary legislations. Jurisprudential framework of the Roman law of

succession allows to describe and evaluate how regulations of this type of acceptance vary in the contemporary civil jurisdictions: about the prescribed way of preparing an inventory, in declaration periods, and in the way of indicating one's intention to take advantage of the benefit of inventory.

ELŻBIETA LOSKA

Uniwersytet Kardynała Stefana Wyszyńskiego w Warszawie – Pologne

False Charge as a Form of Violence

There are many forms of violence: physical one, psychological one, direct one, indirect one. Most of them are not legally indifferent. Using a threat can lead to undermining the effectiveness of a legal act. Violence as the use of physical force can be punished in the criminal court; There were laws in ancient Rome regulating this matter. They stated what was considered as violence and how it was penalized. The most interesting among them were the *lex Cornelia de sicariis et veneficis* and two Augustan laws: the *lex Iulia de vi publica* and the *lex Iulia de vi privata*. They allow to assume that violence was possible also during the trial.

PIOTR ŁOCHOWSKI

Uniwersytet Jagielloński, Kraków – Pologne

Deathbed Gifts as More Efficient Alternative to Specific Bequests. Modern Polish Law in Roman Legal Perspective

In 2011 the Polish Parliament adopted to the Polish civil law a new legal regulation – specific bequest (*legatum per vindicationem*). This legal regulation was supposed to be a better alternative to deathbed gifts (*donatio mortis causa*). For this reason a draft bill containing a proposal of introduction of deathbed gifts into the Polish legal system was rejected in 2011 by the Polish Parliament. In the opinion of opponents of deathbed gifts, this contract is not suitable to the Polish civil law due to the fact, that the Polish inheritance law has forbidden the conclusion of agreements as to succession. However, in 2013 the Polish Supreme Court stated, that any positive provision which forbidden this contract does not exist in Polish civil law, therefore, it can be presumed that deathbed gifts are allowed. This judgement led to the situation that there are in force two different regulations in Polish civil law: specific bequest and deathbed gifts.

Despite the above judgment of the Supreme Court of Poland and the raised arguments, a part of the legal doctrine still argues that deathbed gifts should not be allowed in Polish legal system, because in one legal system cannot be in force both deathbed gifts and specific bequest. However, based on the legal experience of Roman law, we can notice, that these two legal instruments can co-exist in the one legal order. Therefore, we should consider the experience of Roman law in the discussion on subject of deathbed gifts, arguments and examples coming from Roman law. They seem helpful for understanding of the essence of the legal institution.

ETELVINA DE LAS CASAS LEÓN

Universidad de La Laguna, Santa Cruz de Tenerife – Espagne

El origen de las 'regulae iuris'. Paulo, D. 13,1: 'Regula est, quae rem quae est, breviter enarrat. Non ex regula ius sumatur, sed ex iure, quod est regula fiat (...)'

Los juristas de la época republicana tardía, bajo la influencia de la dialéctica griega, formularon determinados principios a través de la generalización de decisiones a las que habían llegado a través del estudio de casos particulares. Intentaban solucionar los casos que se les presentaban prescindiendo de cualquier tipo de regla o más bien sin saber que a través de algunas de esas decisiones estaban construyendo reglas que nos llegarían hasta nuestros días. A lo largo de este trabajo se estudiará el origen y evolución de las *regulae iuris* romanas, donde los juristas, sin darse cuenta elaboraron un *corpus* de reglas que han sido y siguen siendo utilizadas no sólo por los ordenamientos jurídicos del Civil Law, sino también del Common Law.

DAVID MAGALHÃES

Universidade de Coimbra – Portugal

Same-sex Marriage in Roman Law: ‘plus ratio quam vis’

The problem of same-sex marriage is not new. Literary sources show that wedding ceremonies between males indeed occurred in Imperial Rome, some of them involving Emperors and aristocrats.

The first question arising is this: were they legally binding? After a careful analysis of Roman legal sources, the conclusion is negative; *coniunctio maris et feminae* (D. 23,2,1; later I. 1,9,1) was the rule. Matrimonial ceremonies and cohabitation were a clue to *affectio maritalis* (v.g. D. 24,1,32,13), but this could exist without them. Moreover, in legal texts, the rituals suggesting the *affectio* always presupposed and involved different-sex unions. Then, a second question must be posed: why did Roman law deny validity to a socially accepted phenomenon? We think the answer lies in a reasoning that can be summarized by the maxim *plus ratio quam vis*: socially spread homosexuality, even if involving powerful people, wasn't enough to change the concept of *matrimonium*. Love and companionship weren't aliens to the Roman conceptions of marriage, but to Roman Law same-sex unions were a private matter and there was no public interest in their regulation. It was not discrimination but treating differently what was inherently different.

If there is a contribution of Roman law to nowadays controversies, that one is a deeply rooted concept of different-sex marriage, apart from biblical teachings. A court trying to change it is engaging in judicial policymaking – but, in a democratic system, this role belongs to legislatures elected by the people and not to non-elected branches. That's why *Obergefell v. Hodges* and similar decisions avoid popular choice and impose one of the possible solutions.

ALESSANDRO MANNI

Università degli Studi di Napoli Federico II – Italie

D. 48,19,13 e la ‘ratio’ nella determinazione della sanzione criminale

Partendo dall'esegesi del frammento trådito in D. 48,19,13 (Ulp., 1 *de appellat.*), riguardante la facoltà del giudice di modulare le sanzioni per i *crimina* nell'ambito della *cognitio extra ordinem*, si intende discutere alcuni profili dell'evoluzione del pensiero giuridico romano in tema di funzione della pena, alla luce di recenti studi in materia. In particolare, il pensiero espresso in questo frammento (e ribadito anche in altre fonti) verrà confrontato con gli altri “criteri-guida” nell'irrogazione della pena che caratterizzano il titolo *De poenis* dei *Digesta*.

ŁUKASZ MARZEC

Uniwersytet Jagielloński, Kraków – Pologne

“De Usu et Autoritate Iuris Civilis Romanorum”: Arthur Duck on Russia and the 17th Century Eastern Europe Legal Systems

Arthur Duck (1580–1648) was the English civil lawyer and the advocate of King Charles I. He wrote *De Usu et Autoritate Iuris Civilis Romanorum in Dominiis Principum Christianorum* (1652), the first work on the significance and influence of the Roman Law in Europe. This work, once popular in Europe, became forgotten after Savigny's publications. In his work Duck described European legal systems, trying to find out how significant Roman law was in shaping their national systems. Although Bohemia, Hungary and Poland were quite distant to him, he attempted to estimate the contribution of Roman law to the development of the legal systems in these countries. Duck didn't describe Russia though both countries had intense commercial and diplomatic relations, but mentioned it as a hostile power.

DANIELE MATIANGELLI

Universität Salzburg – Autriche

‘Partes ed adfinis’: Degli azionari del passato?

Molte sono ancora le domande aperte sulle *societates publicanorum* a Roma. Senz’altro la domanda più interessante è quella relativa alla loro struttura interna ed esterna e alla possibilità di una capitalizzazione sociale estesa. Diverse fonti, sia giuridiche che no, ci danno uno spaccato dell’attività economica delle società di pubblicani e della loro organizzazione interna. Altre fonti ci mostrano come queste società giungessero ad una contrattazione con lo stato romano e potessero aggiudicarsi contratti pubblici. Allo stato attuale della ricerca possiamo ben dire quali fossero i ruoli e le attività del *manceps*, dei *magistri* e *pro magistro* e dei *socii* di una *societas publicana*. Poche sono purtroppo le fonti che si occupano invece di quelle figure di investitori, che non sembrano essere soci diretti (quindi facenti parte del contratto di *societas*) della società ma detentori di una qualche forma di capitalizzazione o di quote. Menzioni di queste figure di investitori ne troviamo in Plauto (*Trinummus*), Livio (*Ab urbe condita*) e in Cicerone (*In Verrem*). È molto difficile capire che tipo di partecipazione abbiano avuto alla società, ma quel che sembra abbastanza certo è che essi non fossero *socii*. Erano forse una forma di azionari dell’antichità? Investitori che detenevano parti del capitale di una *societas*? Avevano diritto solo ai dividendi o dovevano subire anche le perdite? Erano in altre parole figure di azionari a “responsabilità” limitata? E alla fine della società avevano diritto a parte della liquidazione sulla base delle loro quote? E domanda ancor più fondamentale: le quote erano cedibili? Come avveniva l’acquisto e la vendita di queste quote o azioni del passato? Parte della letteratura romanistica ha tentato nel passato (Badian e Nicolet) e negli ultimi anni (Fleckner e Du-four) di dare delle risposte a questi interrogativi.

L’obiettivo della presente comunicazione è proprio quello di far luce sulle vicende giuridiche ed economiche di queste figure di “shareholders” del passato tenendo conto dell’enorme quantità (almeno per l’epoca) di capitali necessari per le imprese dei pubblicani.

FELICE MERCOGLIANO

Università degli Studi di Camerino – Italie

‘Minus vis quam ius’. Mobilità volontaria e migrazioni in Roma imperiale: aspetti giuridici

L’intervento s’incentra su aspetti dei flussi migratori a Roma nell’epoca dell’espansione imperialistica. Si pone peraltro in rilievo che alla condizione giuridica personale di schiavo ci si sottoponeva anche tramite attività negoziali e non coercitivamente. Cenni sono indirizzati alla figura del mercante professionale di schiavi e ad alcune considerazioni su flussi e consistenza numerica degli immigrati e della servitù nel contesto della mobilità nell’età imperiale.

TINA MILETIĆ

Sveučilište u Splitu – Croatie

Compulsory Arbitration in Medieval Croatia – ‘ratio’ or ‘vis’?

Arbitration is a form of alternative dispute resolution, where the voluntariness of parties to use a third party to find a non-litigious resolution to their disagreement is key. That consent of the parties involved represents basis for considering arbitration settled, but also it is that consent what gives the arbitrator or arbitral tribunal authority to resolve dispute and render an arbitral award. Undermining the consensual basis for arbitration presents significant problems. First, it leaves unclear what justifies the arbitral award. Second, it blurs the distinction between arbitrators and the formal court system. Finally, it raises a question of justification for preventing some parties from pursuing legal remedies. This is not only a modern issue and much can be learnt from its application, and problems, in the past. In some autonomous communes on the Adriatic coast in the 14th and 15th



century, blood relatives and in-law relatives were forced to resolve their arguments through conclusion of an arbitration agreement. The arbitrators were obliged to decide using the principle of fairness and according to the law and facts (*de bono et de equo, de iure et de facto cognoscendi*). The arbitration award was *firmum, ratum et vallidum*, and its enforceability was ensured by the city governor the same way as the execution of court judgements. Legislative intention of public authorities was certainly laudable – the goal of preventing lengthy disruption of familial bonds, and indeed, causing greater animosity between family members, as drawn-out and expensive court proceedings would probably further on undermined already distorted family relationships. However, it is not clear that mandatory arbitration was the means to do so. Did the fact that public authorities prescribed compulsory arbitration in the case of family disputes represent a reasonable act or unnecessary show of force? Did the city government consider compulsory arbitration the right way to solve disputes, by contrast to the perhaps coercive court proceedings?

In accordance with this year's SIHDA central theme *Plus ratio quam vis*, the paper will discuss how compulsory arbitration was used as a way of solving family disputes in Medieval Croatia, and assess its merits and disadvantages. That assessment will be fueled by a comparison both Roman law solutions and modern comparative regulations concerning mandatory arbitration.

IVAN MILOTIĆ

Sveučilište u Zagrebu – Croatia

Preventing Local Wars by Using Arbitration Epigraphic Evidence on Disputes in the Province of Dalmatia

One of the tasks put before the Romans in the province of Dalmatia in the 1st and 2nd century AD was to establish a sustainable long-term policy towards indigenous communities and to find a means to peacefully incorporate them into the system of provincial municipal organisation. The Roman territorial divisions often neglected or were contrary to the traditional legal regimes and local rights that existed amongst the adjacent communities, which resulted with many disputes that we have considerable epigraphic records of. These were boundary disputes, disputes over water right and the rights of passage. For purpose of bringing them to an end (and preventing their emergence into the local acts of violence) the provincial magistrates made considerable efforts to achieve efficient, quick, final, and binding resolution. For this, the magistrates resorted to arbitration procedures that existed under Roman law and initiated them between local indigenous communities in mandatory words. This presentation will provide a brief overview of these procedures and peculiarities of such dispute resolution and will indicate how a Roman concept of dispute resolution became operative between the disputants who were both not the Romans and had a little to do with Roman law.

WATARU MIYASAKA

Tsukuba Daigaku, Tsukuba, Ibaraki – Japon

Foreclosing a Collateral on a Real Security Right is Often Accompanied by 'vis'

In Japan, a private foreclosure with violence by creditors by way of, for example, *datio in solutum* or a real security right with provisional register of immovables, or an interference with public auction by illegal occupants abusing a special lease contract for a short period has been troubling under the current civil code system. At the time of the ancient Rome, the *Twelve Tables* provided a restraint of debtor's body or even a possibility of cutting debtor's limbs by plural creditors. Such a private foreclosure with violence has been prohibited little by little, and it is assumed that, according to the *Tabulae Pompeianae Sulpiciorum* 79, until the beginning of the Principate period at the latest, a public auction system has been established and a rational practice in contract has appeared, which compares well with modern one in that the creditor should converse the collateral into cash on the basis of its monetary value, cover the debt, and return a residual money (*superfluum*) to the debtor.

This paper overviews this historical development and considers conditions needed for appearance of such a rational system.

MATEJ MLKVÝ

Univerzita Komenského v Bratislave – Slovaquie

Trial of Virginia and Prevention of ‘vis’ in ‘controversia de libertate’

According to Livy the fall of decemviri in Rome was initiated by the trial of a plebeian girl by the name of Virginia. Virginia was not only unjustly taken possession of by Marcus Claudius under the threat of force, but also condemned to slavery by one of the *decemviri* Appius Claudius. This led to the tragic murder of Virginia by her own father and subsequent turmoil leading to the fall of the decemvri regime in Rome. Although almost certainly a fictitious account, the legend may be the reason for certain peculiarities of status controversy pertaining to liberty in Rome. These include the possibility of representation even during the *legis actio* proceedings, the obligation to pay *sacramentum* only in the amount of 50 asses, the award of *vindicias secundum libertatem* and (if we are to believe Cicero in his *De domo sua ad pontifices oratio*) the relativisation of *res iudicata* relating to unjust judicial decision on servile status. Whether these peculiarities can be attributed to transgressions in the legendary trial of Virginia will be the focus of the article.

LUCIE MRÁZKOVÁ

Masarykova Universita, Brno – Tchéquie

Enforcing the Land Reforms in Ancient Rome and Inter-war Czechoslovakia

After the First World War, Czechoslovakia has decided to execute a large-scale land reform. When the Supreme Court was faced with a need to justify the moral reasons for this reform, the comparison with a land reform in ancient Rome was chosen.

This paper analyzes that comparison and also compares the respective situations in ancient Rome and Czechoslovakia concerning social circumstances, means to enforce these reforms and the willingness to enforce them. It also deals with differences in protection of property rights in both cases and argues the adequacy of such historical inspiration.

SZILVIA NEMES

Eötvös Loránd Tudományegyetem, Budapest – Hongrie

References on ‘ratio’ and ‘rationabilis’ in the Sources of Roman law. From Reasoning to the Concept of the “Reasonable Person”

Reasonableness constitutes a fundamental principle in several modern legal systems and its concept is embedded in a number of European international legal documents such as the UNIDROIT Principles or the DCFR. The hypothetical person based upon a legal fiction, the “reasonable person” is also crafted by the courts in modern case law. In ancient times, however, these concepts were not yet elaborated clearly, moreover — as emphasized e.g. by Fritz Schulz — it is hardly possible to prove that the Romans would have formulated such principles of law on the level of abstraction as we can observe them today. It may be much more assumed that not even the classical Roman jurists were aware of them in many cases. Due to the lack of abstraction the Romans used *ratio* and *rationabilis* on a broad scale of interpretation. In my presentation I would like to examine this scale of interpretation and its relation to the rhetorical works of classical authors as Cicero and Quintilian.

SHIGEO NISHIMURA

Fukuoka Daigaku, Fukuoka, Kyushu – Japon

***Paul., D. 2,14,25: 'Idem in duobus reis promittendi (...)'.
Zur Frage des rätselhaften Wortes 'idem'***

Nach den gegenwärtigen Ausgaben versteht man das Wort als dasselbe, d.h. mit dem Inhalt der vorhergehenden Stelle I,24 (*pactum* von *fideiussor in rem suam*) und konstruiert darauf eine sehr komplizierte Theorie des Gesamtschuldverhältnisses. Jedoch findet sich das Wort *'idem'* am Anfang einer Stelle in *Digesten*, abgesehen von Verbindung mit Juristennamen oder *'et'* daneben von dem gewöhnlichen Ausdruck wie *idem iuris*, sehr selten. Dagegen behandelt man in *Basiliken*: B. 11,1,25 und insbesondere BS. 11,1,24 nr. 2 (Cyrillus) *'idem'* ignoriert und zwar pr und §1 ohne Punkt und Trennung einheitlich. Damit versteht man diese Stelle als Darstellung der persönlichen Wirkung bei *pactum* des Einen der Gesamtschuldner. Das scheint mir vernünftig und passt gut seinem folgenden Darstellung in I,27 pr. Es wäre nicht ganz ausgeschlossen, dass das Wort *'idem'* eigentlich den Juritenamen (Paul) bei der Abzuarbeiten aus der originären Schrift bei tribonianischen Herausgabearbeit bezieht, aber nach der vollen Beschreibung des Juristennamen in dieser Stelle wegen eines Fehlers dort bleibt.

MARÍA ISABEL NÚÑEZ PAZ

Universidad de Oviedo – Espagne

Dos memorias de mujer y violencia en el Alto imperio. De la 'damnatio memoria' de Livila al 'epitafio' ('manu mariti crudelissimi') de Iulia Maiana

En el presente trabajo se reflexiona sobre la memoria femenina y los criterios de imputación penal a partir del nuevo papel que desempeñan las mujeres en la vida pública a partir de Octavio Augusto. El punto de partida es Livila (nieta de la emperatriz Augusta Livia) quien pasa a la historia por ser la primera vez que la *persecutio post mortem* recae sobre una mujer. Al delito de adulterio (aunque ya era viuda) tipificado en la *lex Iulia de adulteris* se unía el más grave de los crímenes, la lesa majestad, ya que la hija del héroe Druso traiciona al Estado uniéndose con un hombre que ambicionaba el trono imperial y es parte implicada en el atentado contra su tío, el emperador Tiberio. Merecen ser atendidas las peculiaridades de la ejecución de su pena de muerte y la *damnatio memoriae* decretada por el Senado sobre la persona de Livila, en el ámbito de reformas de la nueva legislación penal del emperador Octavio. El estudio que se presenta culmina con el epitafio de una mujer ejemplar, Iulia Maiana, en el que se condena el *uxoricidio* cometido en la persona de esta *matrona univira* y madre de hijos legítimos que fue asesinada por su esposo (*manu mariti crudelissimi*) con el que estuvo casada veintiocho años. Se trata de un monumento funerario de carácter excepcional que es memoria viva de la violencia y sirve para dar publicidad a un *uxoricidio* cometido en el espacio doméstico familiar.

MAURO G. ARDILES OSSES

Università degli Studi di Palermo – Italie

'Utilitas' y 'arca communis' a propósito de la relevancia externa del contrato de sociedad

A partir de la consensualidad del contrato de sociedad en época republicana en Roma, la romanística retiene como cierta la regla general por la cual este contrato no produce efectos jurídicos respecto de terceros, es decir, no tiene relevancia externa. Más allá de esta regla, la experiencia jurídica romana nos ilustra casos donde sociedades sí tienen una externalidad en cuanto a sus efectos contractuales. Gayo, en su famoso pasaje D. 3,4,1 pr. (3 *ad ed. prov.*), nos da un elenco, no taxativo, de estas sociedades al otorgarles el privilegio del *habere corpus*. Esta expresión, explica el mismo Gayo, se traduce en que estas sociedades pueden tener *res communes*, *arcam communem* y *actorem sive syndicum*. El objetivo de nuestra exposición es analizar que significa que algunas sociedades posean *arca communis* y como este elemento, junto a la noción de *utilitas*, pueden ayudarnos a esclarecer el sentido del enunciado “relevancia externa del contrato de sociedad”, por ejemplo, en casos como el pasaje de Papiniano, D. 17,2,82 (3 *resp.*).

MICHELE PEDONE

Università degli Studi di Napoli Federico II – Italie / ERC Platinum

The “Direct Tradition” of Imperial Constitutions: Some Remarks

The theme of the text of imperial constitutions has been debated for decades. Over time, scholars have maintained different opinions about the fidelity of the manuscript tradition of legal codes in respect of the original content and formulation (*ipsissima verba*) of the *leges* issued by Roman emperors. Epigraphic and papyrological evidence of imperial legislation has appeared as a heuristic benchmark for all the theories based on manuscript tradition sources. The role of imperial constitutions on papyrus in the framework of the historiographic reconstruction, however, should not be misunderstood. Starting from the case-study of a papyrus of the Viennese collection concerning a criminal pardon, this talk aims at proposing some methodological reflections on the use of archaeological finds as “direct sources” of the emperor’s legislative policy.

JULIO DAVID PELÁEZ

Universidad Francisco Marroquín – Guatemala

Das Recht der Maya: Verzeihung und Ersatz anstatt Haft

Was ist die Antike? Die Epoche am Mittelmeerraum von 800 vor Christus bis zur Fall des Römischen Reichs. Aber was geschah im Rest der Welt? Warum ist die Antike nur auf diesen Raum begrenzt?

In der Rechtsgeschichte gab es andere Kulturen, die auch ein Rechtssystem besaßen und Gesetze entwickelt haben. Ein Beispiel dafür ist die Maya Kultur. Diese Kultur siedelte von Südmexiko bis Costa Rica bereits im vierten Jahrhundert vor Christus. Ihr Rechtssystem wurde parallel zur Europa gebildet.

Das Rechtssystem der Maya wiederherzustellen ist sehr kompliziert. Die Spanier haben versucht das Rechtssystem der Maya im XVI Jahrhundert zu vernichten, indem sie ihre Gesetze auferlegten. Trotzdem die mündliche Tradition der Gesetze überlebte bis unsere Zeiten.

Das Rechtssystem der Maya wurde als “Tlamelahuacachinaliztli” (zurückbiegen) bezeichnet. Für die Maya Recht und Gerechtigkeit sind Synonyme und es gibt keine Unterscheidung zwischen Rechtsgebiete. Die Ordnung und die Strafen für Straftaten waren die Hauptzwecke des Systems. Obwohl die Maya die Todesstrafe ausgeübt haben, war die Verzeihung am wichtigsten. Also wenn es Verzeihung von der Beleidigte gab, dann war die Todesstrafe unnötig und andere Strafen würden vorgeschrieben. Das Gefängnis existiert nicht.

Heute überlebt dieses System in Guatemala und das Rechtssystem der Maya ist bereits von der Rechtsprechung anerkannt. Im Moment leben zwei unterschiedliche Rechtssysteme zusammen, aber man hofft, dass es irgendwann nur ein Rechtssystem wird.

ZSUZSANNA PERES

Nemzeti Közzolgálati Egyetem, Budapest – Hongrie

The Survival and Transformation of the ‘donatio propter nuptias’ in Hungary in the Early Modern Times

The specific Hungarian institution of *dos* with the meaning of the amount the future widow got from the fortune of her husband for fulfilling her marital duties turned into a regularly used institution during the Middle Ages but its roots date back to the times before the foundation of the Hungarian state. There is still a debate whether it has its origin from the *donatio propter nuptias* of the Roman law and the German institution of *Morgengabe*, or it was a specific, original Hungarian tradition of the settling Hungarian tribes. Anyway, it gained specific Hungarian character through the constantly developing legal customs ruling the area of private law in Hungary. During the early modern and modern times it became one of the most often used marital property institutions as *dos legalis* or later *dos scripta* specified and developed mainly by the prenuptial agreements and last wills of the spouses.

The presentation aims to reveal the main features of this legal institution compared to the ancient ones through the examination of prenuptial agreements and other family documents written in the early modern times in Hungary mainly by the upper class nobility. The reason why the upper class nobility gets into the focus of this research is the usage of the different terminology in the documents such as *Morgengabe*, *donatio propter nuptias*, *dos*, *Widerlag*. The variation of terminology happening due to the trilingual environment (German, Latin and Hungarian) in the that time Hungarian upper class lived under the Habsburgs is an important issue to finding out whether only the terminology varied covering the same institution behind or the institutions defined with different terminology really and meaningfully differed from each other. The documents will prove that the latter happened causing the infiltration of foreign legal institutions into the Hungarian law.

MARÍA DEL PILAR ÁLVAREZ PÉREZ

Universidad Autónoma de Madrid – Espagne

Publician Action and Protection of “the Best Right to Possession”

Publician action protected the possessor undergoing usucapion in the event of a formal defect in the manner of acquisition or in cases of lack of ownership in the *tradens*. In Justinian times, the scope of this action was restricted to cases of acquirers *a non domino* through *traditio ex iusta causa*, as a consequence of the disappearance of *mancipatio* and *in iure cessio* as methods of acquiring property. The remedy was preserved with this and other functions in Medieval and Common Law, until the 19th-century codes which no longer mention it. This silence led to the doctrine that followed codification (especially to the French and Italian, and later the Spanish, doctrine) in which the permanence of this action as part of their respective positive law became a subject for debate. After conducting a study of the origins and development of this pretorian right, we shall observe the current case law configuration of this remedy.

MARKO PETRAK

Sveučilište u Zagrebu – Croatia

‘Plus salus quam ratio’ – Roman-Byzantine Law and Intestate Succession ‘pro anima’ in Medieval Statutes of Dalmatian Communes

The purpose of this contribution is to analyze the regulations on intestate succession *pro anima* in medieval statutes of Dalmatian communes in a historical and comparative context. According to medieval Dalmatian law, in cases of intestate succession of a deceased person without descendants, a certain portion of his inheritance was given *pro anima*, i.e. for the celebration of masses for his soul (*pro remedio animae*) or for charitable purposes (*ad pias causas*).

In the first part of the paper, the regulations on intestate succession *pro anima* in the statutes of Dubrovnik (Ragusa), Split (Spalato), Trogir (Traù), Šibenik (Sebenico), Pag (Pago) and Rab (Arbe), which were adopted from the 13th to the 15th century, will be mutually compared and separated from the cases of testamentary succession *pro anima* and caducary succession *pro anima*.

The second part of the paper brings an analysis of the Roman-Byzantine foundations of mentioned aspect of medieval Dalmatian law of succession, with a special regard to the *Novel* XII of emperor Constantine VII Porphyrogenetos, promulgated between years 945 and 954. Porphyrogenetos’ *Novel* prescribed that in the case of intestate succession of a deceased person without descendants, a third of his inheritance was distributed *pro anima* (...τὸ τρίτον τῷ νάντων θεῷ...ὕπὲρ τῆς αὐτοῦ τοῦ τελευτῶντος ψυχῆς).

In the final part of the paper, the medieval Dalmatian regulation of intestate succession *pro anima* will be compared with some other similar medieval regulations with possible Byzantine roots, notably with the *Assise regum regni Siciliae* (12th c.) and the Venetian statutes anterior to those of Doge Jacopo Tiepolo (1242). One could only hope that this study will discover another fine example of the “influence and reception of Byzantine law outside Byzantium and after Byzantium” (B. Stolte).

On Falsified Testaments and Quarrelling Heirs (P. Col. 123 I,28–34)

The present paper is based on the analysis of a decision regarding rights to inheritance issued by Septimius Severus and Caracalla in Alexandria on the 15th of March 200 and copied on the P. Col. 123 I,28–34. The decision concerns conflict between heirs of a deceased, whose testament's originality has been put in question.

P. Col. 123 I,28–34

Π[ρ]όκλω Ἀπολλ[ω]νίου.
 τοὺς γεγρ[α]μμένους κληρονόμους, καὶ κὰν αἱ διαθήκαι
 π[ε]πλάσθαι λέγωνται, τῆς ν[ο]μῆς οὐκ ἔστιν
 δίκαι[ον] ἐκβληθῆναι. φροντ[ί]σουσιν δὲ οἱ
 τὰ[ς] δίκας ἐπιτετραμμένοι καλέσαι τοὺς
 εὐ[θ]υνομένους εἴ γε τὸ πρᾶγμα ἔστιν ἐν τῇ
 τάξει τῶν διαγνώσεων.

MILENA POLOJAC

Universitas Singiduniensis, Belgrade – Serbie

‘Lex Aquilia’ in Serbian Medieval Law

Famous Roman statute, *lex Aquilia* and its interpretation by Roman iurists was present very modestly in the medieval Serbian law. The reception is reduced down to only two fragments from the *Digest* title 9,2: *Ad legem Aquiliam*. The fragments are concerned with the cases of damage caused by burning – *urere*: D. 9,2,30,3 (Paulus, 22 *ad edictum*), D. 9,2,49,1 (Ulpianus, 9 *disputationum*). The way of reception shows decay and vulgarisation of the Justinianic tradition. These texts were associated with criminal law and merged with the fragments from the *Digest*: book 47, title 9 (*De incendio ruina naufragio rate nave expugnata*), and the cases of *incendium* – D. 47,9,9 (Gaius, 4 *ad legem duodecim tabularum*), D. 47,9,11 (Marcianus, 14 *institutionum*).

The above mentioned fragments from the Justinian's *Digest* first found their place in the Byzantine compilations (*Ekloga*, *Proheiros Nomos*, and the *Syntagm of Matthew Blastares*).

Then they became part of the Serbo-byzantine compilations: the *Nomocanon of Saint Sava* (ca. 1219), chapter 55 called City-statute (translation of *Proheiros Nomos*), the *Syntagm of Matthew Blastares* (14th century) translated into Serbo-Slavonic language (E-7). The abridged version of the *Syntagm of Matthew Blastares* was made in medieval Serbia by reducing ecclesiastical law and preserving civil and criminal provisions. The compilation entitled *Constantine Justinian's Law* is based mainly on the *Syntagm of Matthew Blastares*.

As an illustration and for comparison, the author presents some interpretations of fragments D. 9,2,30,3 and D. 9,2,49.1 in the western legal tradition.

ATTILA PÓKECZ KOVÁCS

Nemzeti Közzolgálati Egyetem, Budapest – Hongrie

Les réformes constitutionnelles de la dictature de Sylla (81–79 avant J.-C.)

La dictature romaine républicaine était une magistrature légale, qui dominait l'État sans que les autres pouvoirs (Sénat, les comices et les magistrats) soient suspendus. La prise du pouvoir par Sylla à la fin de l'année 82 est survenu parmi des conditions politiques graves. Une fois débarrassé de ses principaux ennemis politiques Sylla a décider agir *plus ratio quam vis*, quand il a été nommé *dictator legibus scribundis et rei publicae constituendae* sans limitation de temps. Investi des compétences dictatoriales Sylla a réalisé une vaste réorganisation de la Répu-

blique romaine. Dans le cadre de sa législation il a réformé des magistratures, de l'administration provinciale, la justice et le Sénat.

Après avoir réalisé ses réformes constitutionnelles – donc la tâche, qui lui avait été confié par la *lex Valeria* – en 79 avant J.-C. il abdiquait. L'abdication de Sylla était une faite caractéristique du respect des règles coutumières républicaines, selon lesquelles la dictature avait été une magistrature à durée limitée.

La dictature de Sylla était une période d'exception pour réformer l'État romain dans une forme légale. Son pouvoir reposait sur des événements de la guerre civile (massacre de nombreux citoyens, les proscriptions), mais pendant sa magistrature exceptionnelle et extraordinaire il a respecté les principes généraux de la dictature républicaine: la délimitation de la tâche à accomplir et avec son abdication la limite de la durée. Sylla comme général victorieux a réussi de transformer sa position de force en un pouvoir civil légal, donc comme dictateur il a agit *plus ratio quam vis*.

DAVID PUGSLEY

Exeter University – Grande-Bretagne

On Reading Friedrich Bluhme

1. Inhalt (missing in Labeo and Conticini)

There are too many discrepancies between the Inhalt (list of contents) and the actual contents. It cannot have been compiled at the end. It must be an early draft, renamed and used as the Inhalt when Bluhme had to produce one in a hurry in September 1820.

2. Uebersicht

It would be nice to have a short statement of Bluhme's discovery in his own words. The version in the Uebersicht is incomplete. There is a better one at the beginning of the first chapter.

3. First chapter

In den Titeln de V S und de R I ist eine regelmässige Inscriptionenfolge unverkennbar. First sentence of first chapter. Extraordinary way to start. Ambiguous. Whose discovery is unverkennbar? Gustav Hugo's. This sentence may come from a letter from Bluhme to Hugo during the winter of 1818–9. Hugo should take the credit for this first step in two *Digest* titles, and Bluhme should take the credit for its extension to all the other *Digest* titles.

ELENA ORIVE QUINTANA

Universidad Autónoma de Madrid – Espagne

'Obnoxii fisco': Algunas observaciones sobre la condición jurídica de los tabajadores de las manufacturas imperiales en los siglos IV–VI

En la comunicación se aborda el tema de la situación de algunos de los trabajadores que desarrollaban sus servicios en los talleres o manufacturas del Estado, bajo la dirección del *comes sacrarum largitionum*, durante los siglos IV a VI d.C.

Se realiza un estudio de las principales fuentes jurídicas y literarias relacionadas con este tema.

ENCARNACIÓ MARTÍ RICART

Universitat Rovira i Virgili, Tarragona – Espagne

La 'regula iuris': 'nomina hereditaria ipso iure divisa sunt' y deudas garantizadas con 'pignus'. Comentario sobre D. 29,2,55, Marciano 2 reg.

Comentario sobre las cuestiones más relevantes en relación a la *regula iuris: nomina hereditaria ipso iure divisa sunt* y a la fórmula *indivisa pignoris causa*, y análisis del texto del jurista Marciano (D. 29,2,55); en el análisis del

texto se propone que la masa hereditaria objeto de *ius abstinendi* esté compuesta, principalmente, por deudas garantizadas con *pignus*.

ANA M. GONZÁLEZ RODRÍGUEZ

Universidad Carlos III de Madrid – Espagne

‘Reddere irae rationem’. Venganza y racionalidad del castigo en una controversia pseudoquintiliana

Que la razón debe prevalecer sobre la ira a la hora de castigar la injusticia es una idea ampliamente desarrollada por Séneca en su diálogo *De ira*. El hombre bueno y sabio no se aíra ante lo injusto, sino que persigue su castigo y corrige el mal causado. Tiene su contrapunto en el espíritu femenino, tendente a la reacción vengativa desmesurada, incapaz de dominar sus impulsos más instintivos. Estas reflexiones, que el filósofo escribe para su hermano Novato, aparecen evocadas de un modo sorprendente y paradójico en la argumentación sostenida por el *advocatus* de la *Declamatio minor* 297 atribuida a Quintiliano. En este discurso declamatorio se ofrece una particular visión de la ley del talión que nos invita a reflexionar sobre el castigo del culpable y la satisfacción de la víctima en la experiencia jurídica romana.

JAN RUDNICKI

Uniwersytet Warszawski, Warszawa – Pologne

Gai 4,16: Force above Reason?

In the conclusion of one of the most climatic fragments of his *Institutions*, Gaius tells us that for the ancestors “for what a man had captured from the enemy was held to be most distinctly his own”. This information is not only a historical curiosity, but also reflects a rule that things belonging to the enemies of the People of Rome were treated as ownerless and therefore possible to occupy. In other words, Roman law knew a possibility of lawful acquisition of ownership by force. Furthermore, this possibility was regarded perfectly legal for the next millennia by both private and later also modern international law. The concept of conquest, the prize law on the seas or various provisions of private law systems (like §§ 193–219 ALR; § 402 ABGB) gives more than enough arguments to prove the thesis that lawful acquisition of rights by force was an universal legal doctrine as long as war was considered a normal and just way of settling disputes and the *ultima ratio regum*. Therefore, the question arises, whether the principle stated in the motto of the Jagiellonian University was not hampered by such customs and regulations. This paper aims to prove that – to the contrary – acquisition of rights by force is reasonable from the point of view of a political community as it justifies profits gained at the expense of the aliens. It also reflects the realities of war and is also deeply rooted in probably every culture. Taking into consideration the foundations of Western legal tradition, we find strong basis for the lawful acquisition of rights by force not only in Roman, but also in Biblical law (with all the provisions concerning the property of the enemies given by God to the victorious Israelites). Given all the examples from the history of our legal tradition, we can rather say that contemporary strict prohibition of almost any kind of looting or depriving the foes of their property in both national and international laws is a relatively new improvement.

ANNETTE RUELLE

Université Saint-Louis, Bruxelles – Belgique

‘Plus ratio quam vis’: le traitement du handicap de Rome à nous

La naissance d’un enfant handicapé en droit romain offre une belle illustration à la problématique des rapports entre raison et violence au cœur de l’expérience des droits anciens comme modernes.

En droit romain, le traitement d’une telle naissance diffère selon qu’on la considère en droit public, où le handicap est un *prodigium* dont la qualification par le sénat signifie la rupture de la *pax deorum*, à savoir une menace

existentielle pour la communauté civique tout entière, ou en droit privé, sous l'Empire, où les jurisconsultes ne font plus de toute malformation, même grave, une figure de l'altérité radicale.

On se posera dans les deux cas la question de la part de violence et de raison, d'exclusion et d'inclusion, dans ce traitement différentiel d'un problème auquel la Convention des Nations Unies relative aux droits de la personne handicapée du 13 décembre 2006 a donné une portée inédite. La réflexion s'ouvrira pour conclure à la question des minorités et aux évolutions contemporaines préconisant un élargissement de la notion de l'homme au fondement du contrat social.

PAVEL SALÁK

Masarykova Universita, Brno – Tchéquie

Descendant of a Soldier and Soldier's Last Will

A freedom of testamentary disposition was not absolute in Roman law, but it was limited to the claim of a forced heirs. Especially the son of the testator was protected, if he wasn't mentioned, the testament could be considered void from the beginning. Not only the living descendant is protected by the power of law, but also a conceived child. Nevertheless, the military testament had many exceptions to these rules. These exceptions were not just a result of a privileged position of soldiers, but rather an attempt to rationally solve the specifics of military life, when soldiers were often separated from their families.

BENET SALWAY

University College London – Grande-Bretagne

The Currency Revaluation Legislation of AD 301 (AE 2015, 1500)

Associated with the notorious *Edict on Maximum Prices*, the Roman emperor Diocletian and his colleagues also ordered the revaluation from 1 September AD 301 of the units of currency already in circulation, an economic measure known only from a group of imperial pronouncements (of uncertain number and type) preserved uniquely in a very fragmentary copy inscribed on the façade of the civic basilica of Aphrodisias in Caria (J.M. Reynolds in C. Roueché, *Aphrodisias in Late Antiquity*, London, 1989, n° 230). Following the discovery of a new fragment of this text in 2014 (A. Chaniotis, T. Fujii, *Journal of Roman Studies* 105 [2015], p. 227–233), Karl Strobel produced a new edition of the legislative dossier (*Tyche* 30 [2015], p. 145–172) but without the benefit of the readings published by S.J.J. Corcoran (www.ucl.ac.uk/volterra, Laws 193 to 305, n° E3200) of further fragments known since 1996. I present here the new consolidated edition and translation to appear in *L'Année épigraphique* 2015 (Paris, 2018) as n° 1500 and explain the advances in our knowledge, including the implications for our understanding of Diocletian's administrative reforms, and the extent of the uncertainties that remain.

SILVIA SCHIAVO

Università degli Studi di Ferrara – Italie

Ingratitudine del liberto e revoca della libertà: alcune osservazioni

Nelle ricerche dedicate all'ingratitude del liberto un aspetto che ad oggi rimane ancora poco chiaro è quello relativo all'origine della *revocatio in servitutem*, a proposito della quale si registrano posizioni dottrinali diverse e contrapposte. In particolare, mentre per alcuni studiosi la revoca della libertà avrebbe trovato applicazione già in età classica, per altri l'istituto sarebbe stato introdotto in via generale da Costantino e in precedenza sarebbe stato impiegato solo in casi eccezionali e sporadici.

La comunicazione intende riprendere questa discussione, concentrandosi sulla rilettura di alcuni rescritti imperiali da cui è possibile ricavare elementi utili per l'approfondimento della questione (come, per esempio, C. 7,16,23 e C. 7,16,30 di Diocleziano e Massimiano).

Sulle spese di edificazione nella ‘Lex Icilia de Aventino publicando’

La ricerca di precedenti del trattamento classico del rimborso delle *impensae* porta necessariamente alla revisione della legislazione arcaica in quelli casi in cui potrebbe aver avuto luogo un certo tipo restituzioni reciproci. Da una parte, delle leggi regie sulla repartizione e distribuzione della terra, che non sono state ampiamente rivedute su questo argomento. Dall'altra, quelli di età repubblicana, con speciale attenzione nella *Lex Icilia de Aventino publicando* di ciò che è noto da Dionisio de Halicarnaso in Ῥωμαϊκή ἀρχαιολογία. La distribuzione delle terre dell'Aventino è legata alle *impensae* poiché è già contemplato in questa *lex* un caso molto particolare di rimborso delle spese per edificazione sul suolo altrui. Si vedrà che in questo caso l'equità prevale anche di fronte alla forza.

SEBASTIAN SCHNEIDER
Universität Tübingen – Allemagne

D. 23,4,26,3: Ein ‘pactum’ zwischen Eheleuten über Reisekosten

In D. 23,4,26,3 (4 *resp.*) gewährt Papinian einer Ehefrau zur Durchsetzung einer Vereinbarung über ihre Reisekosten eine *actio utilis in factum* gegen ihren Mann, da eine *actio directa* nicht bestehe. Schon der genaue Inhalt der Abrede und die Umstände des geschilderten Falles sind unklar. Besonders umstritten ist aber seit jeher die Qualifikation der Klage: Sie wird von der herrschenden Meinung als Fortentwicklung der *actio praescriptis verbis* zur Durchsetzung von Abreden mit einer *dare*-Vorleistung angesehen (vgl. Ulp./Maur., D. 2,14,7,2), die sich auf eine *dotis datio* stützt (Santoro, in: *Le teorie contrattualistiche romane nella storiografia contemporanea*. Napoli 1991, p. 83–124, 108; zust. Gröschler, *Actiones in factum*, 2002, p. 29 Fn. 12, und Artner, *Agere praescriptis verbis*, 2002, p. 224 f.). Gegen diese Erklärung spricht aber, dass Papinian nicht auf eine *dotis datio*, sondern auf die *fides conventionis* abstellt. Daher wird die *actio* auch als analoge *actio mandati* (Burdese, SDHI 62 (1996), p. 531) oder als *actio* mit *formula in factum* (Cuiacius, *Op. Omn.* IV,992) aufgefasst. Der Vortrag versucht eine Neubetrachtung unter besonderer Berücksichtigung der eherechtlichen Besonderheiten des Falles.

ELTJO SCHRAGE
Universiteit van Amsterdam – Pays-Bas

The Comparative Legal History of Limitation and Prescription

Within both the Civil law and the Common law (as well as in mixed legal systems) we find means of acquiring and losing rights, or freeing ourselves from obligations by the passage of time. The ratio thereof is at least two-fold: At one side, for a claimant or creditor prescription and limitation imply stimuli to actually bringing the action. If a creditor is negligent in protecting his assets, the law does at a certain stage no longer protect him. On the other hand, for the possessor and debtor prescription and limitation imply a certain protection against claims which have been at rest for too long, i.e. claims against which defences might have been lost. A claim should not hang above the head of the debtor as if it were a Damocles' sword. In the common-law tradition this is a cornerstone of one of the oldest pieces of legislation in the field of limitation of remedies, the *Limitation Act* of 1624. Complementary to limitation two legal institutions developed independently in England and in Germany and Switzerland: laches (from Law French *lachesse*, carelessness) and *Verwirkung*.

There is surprisingly little academic literature concerning the doctrine of limitation as a general topic. In Paris Jean Lambert in 1507 published a collection of tracts, among them a thirteenth-century tract of Dino de Mugello, which was translated into German in 1599. In 1511 Giovanni Balbo, professor of civil law in Turin, devoted his verbose *Tractatus de praescriptionibus* mainly to acquisitive prescription. In 1530 Nicolaus Roth in Frankfurt published an old, twelfth-century *Compendium* written by Rogerius. In modern times too academic



attention is sparse until the nineteen-seventies. A milestone in the recent comparative legal history of limitation is the work by the Swiss Professor Karl Spiro (1975), some twenty years later followed by the reports of the XIVth Congress of the International Academy of Comparative Law of 1994, which was held at Athens. On the scholarly level from then onwards a richer literature followed, among which works by David Johnston and Reinhard Zimmermann deserve special mention. Much has been achieved in the European perspective. In 2003 the Lando Commission published recommendations for a limitation regime of contractual claims. In 2009 a European Committee of scholars published a Draft Common Frame of Reference. Germany (2002) and France (2010) enacted new legislation; Switzerland is on its way. There are numerous national law reports: by the Scottish Law Commission (1989, 2007 and 2012), the Law Commission of England and Wales (2001), the Irish Law Reform Commission (2011), the South African Law Reform Commission (2011). In May 2016 the English government stated that it would “bring forward proposals to respond to the recommendations of the Law Commission ... to simplify the law around land ownership”. The Convention on the Limitation Period in the International Sale of Goods (1974) also deserves mention, even though it has only been ratified by about twenty countries. In 2014 the EU Commission withdrew the Proposal for a Common European Sales Law (CESL), because it intended to release a modified proposal regarding e-commerce. However, this new proposal does not contain rules on the limitation periods. They remain in the realm of Member States.

Also modern case law shows important developments. The question whether the regime of limitation and prescription is compatible with the fundamental right to property came to court, even to the European Court: *JA Pye (Oxford) Ltd v United Kingdom* and *Howald Moor v Switzerland*. Important differences between the Common law and the Civil law in the context of limitation and prescription came to the surface in the discussions (and decisions) about ownership of looted art, which eventually lead to the Washington Principles.

A birds eye view of these (preparatory) developments on the legislative level both in the Common law and the Civil law shows a certain similarity in the problems the legislator wants to face: the differences in duration of the limitation period both of the long stop and the shorter periods, the start of those periods, with or without discoverability test, the interruption of the limitation period, the interdependence of the effect of limitation and the acquisition of title. If the remedy which aims at the restoration of lost possession turns out to be time barred, this state of affairs will influence the legal position of both the dispossessed owner and the actual possessor, as already Roman law shows. This state of affairs calls for a more profound study into the similarities and differences of the law of limitation and prescription, both according to Common and to Civil law. At first glance it is already obvious that this comparison can only be made on a historical basis.

HESI SIIMETS-GROSS

Tartu Ülikool – Estonie

David Hilchen (1561–1610) und Iniurien: antiken Vorbilder und die Realität

David Hilchen, ein Jurist, Stadtsyndicus of Riga und der berühmteste Humanist Livlands war sowohl gelobt als auch gehasst. Das Letzte hat zum Schluss auch zu zwei Gerichtsprozessen geführt, eines unter anderem wegen *iniuria*. Einerseits hat er in seinem Leben versucht, humanistische Ideale zu verfolgen. Ist das immer gelungen und welche Iniurien ihm vorgeworfen wurden und seine Einstellung dazu wird anhand seiner Briefe, Dokumente aus seinem Prozess und anhand seinen Briefen untersucht.

CRISTINA SIMONETTI

Università di Roma 'Tor Vergata' – Italie

'Non ho abbandonato l'orfano al ricco, la vedova al potente, chi ha solo un siclo a chi ha una mina, chi ha una pecora a chi ha un bue'. Il processo tra i Sumeri

Il processo è il principale mezzo di difesa dei diritti in tutte le civiltà umane. Sebbene esistano notevoli problemi circa l'efficacia e le garanzie di equità nell'esercizio giurisdizionale (cfr. ad esempio i §§ 27 e 28 del *Codice di Ur-Namma* parlano del falso testimone o del testimone che si rifiuta di prestare giuramento), tuttavia è nel processo che gli uomini hanno sempre cercato di far prevalere le ragioni sulla forza. Non fanno eccezione neppure i Sumeri, uno dei più antichi popoli attestati storicamente, che ci hanno lasciato alcune testimonianze a questo riguardo.

I testi processuali ascrivibili ai Sumeri, in realtà, sono da suddividere in due grandi gruppi, che risalgono a due periodi ben distinti: quelli più antichi, risalenti al periodo protodinastico (che si conclude intorno al 2350 a.C.), e quelli più recenti, risalenti al periodo neo-sumero, e più precisamente al periodo di Ur III (2112–2004 a.C.). Le materie presenti sono le più varie, anche se per lo più riguardano il diritto di famiglia e delle persone, e le loro caratteristiche non sono uniformi. Tra i documenti più recenti, sono molto interessanti i cosiddetti *di-til-la*, ovvero "giudizi finiti": sebbene anch'essi riguardino diverse materie, tuttavia la loro struttura sembra più omogenea: sembrano essere, infatti, dei casi archiviati, con l'annotazione non solo delle dichiarazioni prestate davanti ai giudici, ma anche dei vari ufficiali che hanno avuto parte nella procedura: il *maškim*, ovvero una sorta di magistrato che istruiva il processo, i giudici (*di-ku₃*), che possono essere in numero variabile, da uno a quattro. In questo breve studio si illustreranno i testi raccolti, esaminandone la struttura, e si cercherà di descrivere le varie procedure che li hanno prodotti (purtroppo non sempre le sentenze sono annotate, e quasi mai spiegate), con l'obiettivo di individuare i criteri di valutazione delle prove e le motivazioni delle sentenze.

BOUDEWIJN SIRKS

Oxford University, All Souls College – Grande-Bretagne

What Kind of Secured Goods could a Creditor Claim with the 'Serviana'?

As it is, the *actio Serviana* has in its formula the condition that at the time of the pledge agreement the pledged good has to be *in bonis* of the debtor. The general view is that this refers to quiritary ownership, be it *pleno iure* or bonitary (i.e. possession of a usucapient), and that the *actio hypothecaria* is identical to the *Serviana*. That would mean that provincial land or property of peregrines could be pledged but not be claimed with this action by the pledgee-creditor. Still, we see securities in the provinces seized. Moreover, in early Byzantine law there is no *Serviana* but a general *tès hupothèkès agogè*. Is it possible that in *bonis* included also the *bona fide possessio* of provincial land? It will be argued that this is most likely if not indeed the case.

BRONISŁAW SITEK

Uniwersytet Humanistyczno-Społeczny w Warszawie – Pologne

Impunibilità chi agisce nell'interesse pubblico

La determinazione del significato dell'espressione *ius publicum* adoperato da Ulpiano nel D. 50,17,116,1 consente di stabilire il tipo di negozio giuridico che una volta realizzatosi non era più reversibile. *Ius publicum* in questo contesto non significa altro che la precedenza data al diritto positivo rispetto ai contratti ovvero al diritto statuito dalle parti di un negozio giuridico.

La regola ulpiana D. 50,17,116,1: *Non capitur, qui ius publicum sequitur*, collocata dai compilatori nel libro quindicesimo al titolo diciassettesimo dei *Digesta*, creò molti problemi interpretativi anche a O. Lenel stesso, quando ha intrapreso il tentativo di ricostruire il libro undicesimo del commentario all'editto pretorio.

La sua collocazione da parte dei compilatori della regola ulpiana deriva da un carattere generale. Origina-

riamente poteva essere strutturata diversamente ma con il medesimo significato. Non è da escludere che, originariamente, la regola fosse legata al caso di inapplicabilità da parte di un *minores* di uno dei provvedimenti di tutela stragiudiziale ovvero di *restitutio in integrum propter aetatem* nel caso in cui il negozio giuridico compiuto con esso si basava sulle disposizioni di legge.

L'analisi delle fonti dimostra in maniera evidente che non fu Ulpiano l'autore di questa regola, ma dall'autore nuovamente proposta e comunque successivamente a Gaio, Pomponio e Callistrato. In più, non sono i *prudentes* non sono gli autori della regola, ma i compilatori che sulla scorta della *opinio communis* già nota e in precedenza usata.

Così la condotta o tutti quei negozi giuridici compiuti in conformità al diritto positivo, non potevano aprire verso una responsabilità civile, e con ciò non potevano produrre effetti giuridici negativi per l'attore. Ulpiano intese proporre la regola che i compilatori inserirono nel 50,17. Possiamo affermare con inequivocabile certezza che la regola fosse nota già nel II secolo d.C. Attraverso essa si volle, così, affermare un principio: colui che segue la prescrizione di una legge non sarà ritenuto responsabile civile.

PETRA SKREJPKOVA

Univerzita Karlova, Praha – Tchéquie

Traces of Roman Law in the Laws on Violence in the Codification of Municipal Law of the Czech Lands from 1579

One of the most important legal texts that emerged in Bohemia during the period of humanism is the Code of Municipal Law, which was written by Pavel Kristián of Koldin in 1579. This legal text, was used until 1811 when it was replaced by ABGB. The text is remarkable by being heavily influenced by Roman law. It was not just the inspiration at a general level that is not unusual during this period. Very often, we see there direct references to Roman law as a whole as well as references to specific norms of Roman law, including citations of original texts, although of course in a modified form.

One of the legal problems that Koldin has given considerable attention to is violence, in its various forms. Special attention is given to this problem in the part of the Code, which is devoted to criminal law. Roman influence can be seen in the repeated application of Augustus' laws on violence – *leges Iuliae de vi*. In addition, however, the regulation of violent behavior and its repression also appear in the section of this Code dealing with private law.

This codification illustrates the high level of Czech law in the period of the Estates as well as detailed knowledge of Roman law as well as its sources.

İPEK SEVDA SÖĞÜT

Kadir Has Üniversitesi, İstanbul – Turquie

General Outlook on the Restraints of Trade in Roman Law

The Roman legal sources deal with problems of restraints of trade mainly in the context of the relationship between patron and freedman (*libertus*). It is no coincidence that the issue arose in that particular context. Before slaves were set free, they would often acquire special knowledge and skills from working in the masters' businesses. If a slave was set free to administer the estate of his former master as *procurator* (a representative in terms of a general power of attorney), his livelihood was secured. In other cases, he had to establish his own occupation to survive after his manumission. His obvious choice would have been the occupation he had learned under his former master and present patron. For example, the freedman of a medical doctor could become a doctor himself and the freedman of a slave-dealer did not begin agitate for the abolition of slavery, but became a slave-dealer himself.

MAREK SOBCZYK

Uniwersytet Mikołaja Kopernika w Toruniu – Pologne

‘Datio ob rem’ and ‘datio ob causam’ – the Purpose of Performance in Roman Law

The interpretation of the concept of “purpose of the performance” is one of the most difficult and complex issues in the application of *condictio causa data non secuta* in contemporary law. In particular, within the meaning of § 812 I sent. 2 2nd alt. of the German civil code and art. 410 § 2 of the Polish Civil Code, two different approaches are presented. According to the first one the purpose of the performance should be interpreted narrowly as a counter-performance or other equivalent from the recipient’s side, yet outside the scope of contracts. The followers of the broader interpretation postulate that this notion should refer to any licit future event or legal effect.

This problem has its roots in Roman law and it is strictly connected with the Roman notions of *datio ob rem* and *datio ob causam*, their evolution and the development of the contractual system through the centuries until the general recognition of the freedom of contract principle.

The most important field of application of the Roman *condictio ob rem* referred to the Roman doctrine of innominate contracts, where the party who gave his performance afterwards claimed its restitution, because the other party did not fulfil his obligation. In that case the purpose of performance was to receive counter-performance from the recipient. However, there were several typical cases where the purpose was different; especially it did not relate to the behaviour of the recipient. The most important of them were a dowry given on the account of a future marriage and a donation in contemplation of death. Moreover, some general settlements of Roman jurists supported the idea of the wider meaning of the purpose of the performance. That can be seen as a clue for the interpretation of contemporary provisions on *condictio causa data non secuta*.

KAMIL SORKA

Uniwersytet Jagielloński, Kraków – Pologne

‘Plus ratio quam vis’? An Oath as Irrational Factor in Roman Civil Trial

The motto of the Jagiellonian University proclaims some type of preponderance of the rationality above the physical strength. However, it illustrates already more developed perspective of social life. Especially the very origins of every society relied rather upon irrational beliefs, such as primitive religions. Those institutions that had derived from this early period often kept their special, privileged position.

One of those was the oath used to decide cases between parties in conflict. If one party offered to another the possibility of swear specific fact and that second party swore, the *praetor* – as Ulpian informs us – was to keep the oath regardless of its content. In fact, the magistrate and the judge, being unable to contest content of the oath, were bound to treat it as true. According to Gaius, that kind of the oath was particularly useful to decide cases (D. 12,2,1: *maximum remedium expendarum litium*).

Special force of the oath is to attribute primarily to its religious origins. However, in singular cases the process of rationalization can be observed. The oath of a pupil without the permission of his tutor was void. Under Septimius Severus and Caracalla the person who perjured, having taken the genius of the emperor, was to be scourged. Finally, the oath became just one between evidences, subject to judiciary discretion. That can be somehow defined as a victory of rationality over the force of traditional beliefs.

‘Et iuris consultus calculat’. Überlegungen zum ‘liber singularis de gradibus et adfinibus’ des Iulius Paulus

Das Fragment Paul. (*l. s. de gradibus et adfinibus et nominibus eorum*) D. 38,10,10 ist nicht nur das objektiv längste, sondern vermutlich auch das langweiligste der *Digesten*. Der Vortrag untersucht, inwieweit sich in dem scheinbar öden *Traktat* des Paulus zu den Verwandtschaftsbezeichnungen Elemente finden lassen, die für den Stil und die Methode dieses Juristen eigentümlich sind. Daraus ergeben sich nicht nur Folgerungen für die rationale “Komposition” des *Traktats*, sondern es können auch Schlüsse für die Überlieferungsgeschichte des Textes gezogen werden.

EMILIJA STANKOVIC

Univerzitet u Kragujevcu – Serbie

Tradition and Reception of Roman Law in Medieval Serbia through the Institute of Servitude

Famous Serbian historian Stojan Novakovic stated that “through out entire history we have lived in the classical homeland of Roman law and, in regards to legal ideas, we have been under the influence and rule of Roman law”. The first phase of the influence of Roman law on Serbian law was through Byzantine church law in Medieval times. This influence was realized in two ways: by reception and through tradition. At the beginning there were church laws which had undisputed power in Ortodox church, but also the laws in the field of marital and family law. The further influence of Roman law was exercised through the translation of *Nomocanons*, prepared by St. Sava in 1219, originating from *Nomocanon* of Photios from 883. This was not just an ordinary translation, since, besides the excerpts from Iustinian’s *Novels* (*Novellae*), he also added, so called, the *law of Moses* and the entire *Proheiros*, known in Medieval Serbia under the name *Zakon gradski* (*civil law*). Some of its sections, together with *Ekloges* and *Nomos Georgikos* (*Agricultural law*) comprised the Serbian compilation entitled Iustinian’s *Code*.

The adoption of Tzar Dusan’s *Code* marked further influence of Roman law on Serbian legislation. It was passed in 1349 and amended in 1354. However, it is necessary to underline that Byzantine law had strong, it could be said, even determining influence on the adoption of this code, as well as on the entire legal life of Serbian state at that time.

The sources reveal that 60 provisions of this *Code* were assumed from *Vasiliki* (*Imperial book*). Yet, the Agreements with Dubrovnik, issued Charters and common law were mostly used as the sources of codification. In old Roman manuscripts, Tzar Dusan’s *Code* is never mentioned alone, always in the third place, following the Serbian-Byzantine collections: shortened version of Matija Vlastar’s *Syntagm* and Iustinian’s *Code*. This fact underlines the significant influence of Roman law, not only in a substantial, but also in a formal sense. The tradition of Byzantine law is particularly reflected in the relations of agricultural and civil laws. The regulations on agricultural servitudes and agricultural offences are the same as in Byzantine law. Thus, one of Serbian kings, King Milutin, used Greek rules for the purpose of regulating real estate sales.

KAMILA STLOUKALOVÁ

Univerzita Karlova, Praha – Tchéquie

‘Mancipatio’ and ‘in iure cessio’ – Few Remarks on Their Resemblances and Differences in the “Institutions” of Gaius

Mancipatio and *in iure cessio* are methods to acquire the ownership, or, more generally speaking, to acquire the power (not only over the property, but over the persons, as well). Both are defined as formal and abstract proceedings known to the Roman civil law. However, these legal proceedings resemble each other not only in the above-mentioned characteristics. On the other hand, they differ in many aspects, as well, the most visibly in the form of their performance.

We may divide the position of the *mancipatio* and *in iure cessio* in the Roman legal order and the relationship between them into three categories: a) *mancipatio* and *in iure cessio* frequently alternate each other (e.g. transfer of the ownership of the *res Mancipi*, Gai 2,22); b) both of them shall be used jointly to receive the desired result (*adoptio stricto sensu* which combines several mancipationes with the final *in iure cessio* – *vindicatio* from the side of the adopting father, Gai 1,134); and c) only one of them shall be used for the relevant purpose and the second one does not suit (e.g. *in iure cessio hereditatis*, Gai 3,85; *mancipatio familiae*, Gai 2,103).

KAMIL STOLARSKI

Uniwersytet Jagielloński, Kraków – Pologne

‘Iusta causa usucapionis’ and the Nature of Usucaption

Usucaption has been present in legal orders since ancient Roman times. Nevertheless, there are essential differences between perception of this institution. We can observe this using both historical and comparative methods. The author puts forward the thesis that *iusta causa usucapionis* (the title of usucaption) is an essential element for the character of usucaption. Above all, the nature of usucaption depends on whether or not *iusta causa usucapionis* exists as a prerequisite for usucaption in a particular legal order

TOMASZ SZELĄG

Uniwersytet Pedagogiczny im. Komisji Edukacji Narodowej, Kraków – Pologne

‘Plus ratio quam vis’: Religious Policy of Emperor Julian the Apostate

Flavius Claudius Julianus a Roman Emperor (361–363) was pagan and tried to promote the old Roman religious traditions as a means of slowing the spread of Christianity.

After the fourth year of Julians’ campaign in Gaul, in February 360, Constantius II ordered Julian to send him some of Gallic troops what provoked rebellion and proclamation of Julian as en Emperor. Civil war was avoided by the death of Constantius II, who, in his last will, recognized Julian as his sucesor. After gaining the Purple, Julian started a religious reformation of the Empire on many levels.

The author’s deliberation focus on plans for individual religious reforces and especially on the problem of the real meaning of constitution *Magistros studiorum*. The edict has an appearance of neutrality and its literally meaning could not be interpreter as a plot against any individual teacher or group of them. The specific interpretation was in the letter Julian wrote from Antioch precisely explaining the decree. Emperor forbids Christian teachers from using the pagan scripts (in fact it was the basis of Roman education). “If they want to learn literature, they have Luke and Mark: let them go back to their churches and expound on them” – Julian writes about Christian teachers in his letter. In general this was an attempt to drive the Christian religion out of highly educated, rich and governing classes of the Empire – the Christian were to lose their social standing and within a generation or two the educated elite of the Empire would be pagan.

JAN ŠEJDL

Univerzita Karlova, Praha – Tchéquie

Piccole osservazioni sulla procedura delle servitù

La relazione si concentra sul tema principale di tutti gli istituti del diritto romano – la tutela del diritto. Le servitù, facendo parte dei diritti reali, con la sua specifica distribuzione dei diritti e doveri tra i soggetti, rappresentano una situazione specifica per la difesa. In questa relazione saranno sottolineati alcuni aspetti delle *actiones in rem*, strumenti tipici per la tutela dei diritti reali, nella specifica costruzione delle servitù e anche prendendo in considerazione lo sviluppo della procedura e del diritto.

JÁN ŠURKALA

Univerzita Komenského v Bratislave – Slovaquie

The Influence of ‘naturalis ratio’ on Formation and Development of ‘actio Publiciana’

The article deals with relationship between *naturalis ratio* and Publician action. Regardless no explicit mention of the *naturalis ratio* engagement the author finds some indirect clues that *naturalis ratio* provided *praetor*’s interference to *ius civile* with additional legitimacy. Firstly, it is well founded in the Justinian sources that a *praetor* intended to mitigate the hardness of civile law. Secondly, the formula of action contains some elements, which points to its natural law origin. Finally, the general overview of the action development soundly evidences the tendency of continual enlargement of scope of application on the basis of analogy with some reference justice.

PAULINA ŚWIĘCICKA

Uniwersytet Jagielloński, Kraków – Pologne

KAROLINA WYRWIŃSKA

Uniwersytet Jagielloński, Kraków – Pologne

‘Homo oeconomicus Romanus’ as ‘homo rationalis’. Roman Legal Practice in the Light of the Law & Economic Philosophy of Law

O. Holmes, ‘The Path of Law’, Harvard Law Review 10 (1897), p. 469:

At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. We follow it into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a dominant class, in the absence of generalized ideas, we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it. The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can’t count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past...

Since the time the idea of a contract or a tort have been constituted in the main fields of interest of individuals living in communities. It is a truism to say that the proper construction of principles and rules of contractual performance of an obligation or principles of tort liability, were one of the most important conditions for proper

functioning of any community. According to the ancients, but not only to them, the statement that such rules should be fair and equitable seems to be intuitively convincing. Nowadays, just as in ancient times, the concept of fairness (*aequitas*) can be regarded as a general basis for many sources of obligations.

Not only legislators but also lawyers as well as theorists and philosophers of law were and are interested in shaping aforementioned principles. One of the proposed solutions is nowadays the one offered by the proponents of the Law & Economics philosophy of law (the Economic Analysis of Law), according to which the function of law is to achieve a situation economically effective (economic efficiency), which can be gained e.g. by minimising of the transaction costs. And, although *primo visu* the replacement of principles of justice and equity with the postulate of economic efficiency of law, as put forward by economists, might be objectionable, after further consideration it does not seem to be completely unjustified. Reduction of the costs borne by society in case of obligations could lead to good results.

Obviously, despite the usual descriptive approach to the study of sources it is necessary to apply certain elements of “the economic method” to the analysis of legal cases. However – and one needs to strongly emphasise this – it does not amount to the thesis that the Romans themselves knew and used the economic analysis of law in the modern sense. Such a statement would be simply absurd: the economic analysis of law, just as any other analysis (e.g. a linguistic one), requires to “translate” an interesting case into a specific language, in this case – the language of modern economics, which leads to a reduction of the case to a particular conceptual system, which the Romans did not know, because they could not know it. But still, one cannot fail to notice that since the beginning of the civilisation economic factors have always been influencing development of institutions and entire legal constructions. Moreover, concepts such as utility (*utilitas*), efficiency (*efficacitas*) and fairness (*aequitas*), to which – willingly or unwillingly – some “economists” refer to, were not unknown to Roman jurists, and even if some of them did not speak about them in an abstract way, they certainly understand them intuitively. In such way the Romans tried to answer the same fundamental question that today is posed by contemporary lawyers: How can we construct properly the principles of contracts or torts, and, after, contractual and tort liability?

First we present – in short – the aims and basic principles of the L&E Analysis (basic notions of the L&E Analysis of Law as tools of the Analysis of Law). Next, we show the method of an “experimental analysis” as possible to be used for analysis of solutions developed by the *praetor* and the Roman jurists in the field of contract and tort cases in order to answer the question if such solutions were the cost-effective solutions (economic efficiency). Finally, we will try to answer the following question: Were the Romans *homines oeconomici* in the light of the L&E Analysis?

KONSTANTIN TANEV

Universitas de Nationalibus et Mundi Oeconomia, Sofia – Bulgarie

‘Ratio’ – Il contenuto del diritto o misura del comportamento umano

La famosissima riga di Gaio dal primo libro del *Digesto* Giustiniano (D. 1,1,9; Gai 1,1) contiene la frase celebre: *quod vero naturalis ratio inter omnes homines constituit, id apud omnes peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur*. Essa viene utilizzata come fondamento del diritto universalmente percepito dai tutti genti umani. Cuiacio nel suo commento sullo stesso libro di Gaio (*Jacobi Cuiacii, IC praestantissimi. Operum postumorum. Tomi quarti. Pars prior. Lutetiae Parisionum* 1658. Col. 48) ha visto in concetto filosofico di *ratio* un argomento stoico a favore della giustizia come un elemento essenziale del diritto. Però, lui ha menzionato che non tutti hanno accettato quel punto di vista e soprattutto Orazio come un Epicureo sia concertato sul un altro valore – quello di utilità (Hor. s. 1,3: ... *ipsa utilitas, iusti prope mater et aequi*).

Nel nostro indagine cerchiamo la risposta nell’alcuni lavori dei giuristi romani come Sabino, Cassio, stesso Gaio, Ulpiano ed altri, qual valore sia adoperato nei concetti di *ratio* e *utilitas*, nel suo senso più generale come fondamento o contenuto del diritto.

ANNA TARWACKA

Uniwersytet Kardynała Stefana Wyszyńskiego w Warszawie – Pologne

No lictors? None Needed. ‘Auctoritas censoria plus quam vis’

The censor’s office was one of the most important magistracies in the period of the Roman Republic. Its competences included conducting the *census*, compiling the lists of senators and knights, keeping custody over public morality, as well as control over public incomes and expenses. The censors were entitled to visible signs of authority, which were characteristic for higher magistrates: right to seat on a curule chair, to wear a *toga praetexta* and the *mullei* boots. However they were not accompanied by lictors. The aim of the paper is to show how the dignity of the censors enabled them to impose their will without resorting to physical force as well as how their authority extended both to private citizens and other magistrates.

METHODY TODOROV

Sofiyski universitet “Sv. Kliment Ohridski”, Sofia – Bulgarie

Considerazioni sulle qualche relazioni di Quintus Aurelius Symmachus come fonti per lo studio dell’‘appellatio’ nel diritto tardo-romano

Relazioni di Quintus Aurelius Symmachus come Praefectus urbi Romae (AD 384–3850) sono una fonte importante per lo studio dell’amministrazione della giustizia e del diritto tardo-imperiale nel IV secolo. La tradizione manoscritta di relazioni non include le decisioni imperiali su questi rapporti di Quintus Aurelius Symmachus. Le relazioni sono fonte importante per l’informazioni sull’applicazione pratica della diritto nel Tarda Antichità Romana. D’altra parte le fonti principali sul diritto di questa epoca le costituzioni imperiali, sono incluse nei codici di Teodosio e Giustiniano, ma senza dettagli specifici del casi in questione. L’attenzione è rivolta alle relazioni su problemi dell’appellazione come parte significativa dell’attività giudiziaria di *Praefectus urbi Romae*.

DAVID TRITREMME

Universität Wien – Autriche

Von vermieteten Sklaven und verletzten Maultieren. Überlegungen zur ‘culpa in eligendo’ bei der ‘locatio conductio rei’

Wird ein Sklave als Maultiertreiber vermietet – ...*servum meum mulionem conduxisti*... – und verletzt er ein ihm anvertrautes Maultier des *conductor*, so stellt sich die Frage der Haftung für den entstandenen Schaden. Sowohl in Labeo (5 *post. a Iavoleno epit.* D. 19,2,60,7 cit. supra) als auch in Ulpianus (18 *ad ed.* D. 9,2,27,34: ...*servum conductum ad mulum regendum*) wird neben der deliktischen Noxalhaftung eine vertragliche Haftung des *locator* befürwortet, sofern diesen ein Vorwurf hinsichtlich der Auswahl des Maultiertreibers trifft – *culpam* ... *quod eum elegissem* (ex: D. 19,2,60,7; vgl auch D. 9,2,27,34: ... *si pro perito imperitus locates sit*...). Anknüpfungspunkt der vertraglichen Einstandspflicht ist die Haftungsfigur *culpa in eligendo*. Wiewohl sich die rechtshistorische Wissenschaft teilweise schon ausführlich mit Fragen zur *culpa in eligendo* befasst hat, bieten die einschlägigen Quellen zur *locatio conductio rei* – wie der Beitrag zeigen wird – noch reichlich Diskussionspotenzial.

ANGELINA TROIANO

Università degli Studi di Palermo – Italie

‘Ratio post vim’? L’editto di abrogazione dei provvedimenti triumvirali e la ‘restitutio’ di Ottaviano

Il progetto di riorganizzazione istituzionale di Augusto può essere analizzato anche nella prospettiva di una razionalizzazione degli esiti del triumvirato costituente a seguito delle violenze del periodo del *bellum civile*. Dione Cassio, Tacito e Svetonio attestano, infatti, l’emanazione da parte di Ottaviano di un editto con cui vengono abrogate le disposizioni triumvirali di quegli anni, ritenute illegittime. Il ritrovamento di un *aureus* del triumviro, databile nel 28 a.C., ha riaperto il dibattito sia con riguardo al contenuto dell’editto che sul contesto politico-istituzionale di riferimento. Dall’analisi delle fonti e alla luce anche dei recenti studi effettuati sul tema, è possibile provare a ricostruire il contenuto dell’editto e soffermarsi su quali siano stati, nello specifico, i provvedimenti triumvirali abrogati da Ottaviano e quali quelli rimasti in vigore ancora nel corso del Principato.

DANIIL TUZOV

Sankt-Peterburgskij Gosudarstvennyj – Russie

L’invalidità relativa della compravendita edilizia e il negozio claudicante nel ‘Senatusconsultum Volusianum’

E’ analizzata la disposizione del *Senatusconsultum Volusianum* (Volusio, P. Cornelio cos. VI non. Mart. SC.) che, da una parte, confermava la sanzione d’invalidità, prevista dal *Senatusconsultum Hosidianum* per la vendita di edifici allo scopo di demolizione, vietata da quest’ultimo *sentusconsulto*, e dall’altra vietava, per la prima volta, la demolizione di edifici da parte del proprietario stesso. E’ inoltre approfondita l’interpretazione giurisprudenziale della norma in esame, contenuta in Paul., 54 *ad ed.* D. 18,1,52.

CEM UYSAL

MEF Üniversitesi, İstanbul – Turquie

Was Greek Rationalism Dead in the Ancient Rome?

It is no secret that Western culture owes a great deal to Greek philosophers when it comes to rationalistic thought. Greek philosophy has had a heavy emphasis on subjects such as “ethics” and “virtue”; and always had a strong tradition at cosmology, metaphysics and all fields of science.

Some authors from the 19th and 20th centuries suggest that the Roman state was unsuccessful at keeping this tradition alive: Maybe it was this decline of rationalism that turned the Roman Republic into an Empire, or maybe the absence of rationalism was the reason all along for Roman imperialism. Some authors even claim that accepting Christianity was a clear sign of Rome’s willingness to deny the “natural order of things”.

While it is true that the Roman philosophy was less significant than Greek during middle ages, according to some other authors, it may be considered inaccurate to think of Roman philosophy as limited to its appropriation (and limitation) of the Hellenistic schools. Even when Stoics were the dominant thinkers of a certain period, other philosophical currents such as Neoaristotelianism, Neopythagoreanism, and Middle Platonism have been prominent. And in the political climate of the third century, the tide turned in favour of Neoplatonism; which also has as noteworthy an interest in all sciences and virtues as ancient Greek philosophers. The fact that a shift such as this one could happen contradicts the supposed negative correlation between rationalism and Roman imperialism.

Greek and Roman Rhetoric's in 18th Century French "Memoires" and "Factums": 'plus ratio quam vis'?

French lawyers' *Memoires* and *Factums*, as published in the 17th and 18th century, have a remarkable introductory paragraph, which deviates in language from the formal legal content of the rest of these documents. For a moment, a Roman orator seems to speak to the reader, albeit only in this first paragraph, then the facts and legal arguments are summoned up in the *Factum*, court documents written by a lawyer that are later called *Memoires*. *Plus ratio quam vis*? It can be argued that in a pleading the legal arguments belong to the field of *ratio*. A discourse in which terms of power, equations from outside the legal framework, and irrelevant emotions play a role, could be considered to belong to the field of the orator, possibly the field of *vis*. What can be said about the language used in this first paragraph and its purpose? The use of overstatement and other rhetorical devices can be traced back to Greek and Roman orators.

First, let us give a brief overview of some of these introductory paragraphs of the *Memoires* and *Factums*, in order to find out how they are used by French lawyers in the 18th century. Then follows an overview on the role of Greek and Roman orators in the education of 17th and 18th-century French lawyers. Finally, an answer will be given if these emotional introductory paragraphs were approved or rejected by fellow legal practitioners.

CARLOS GIL VARELA

Universidad de Cádiz – Espagne

El Riesgo en la 'locatio conductio rei'

Justiniano afirmaba que el arrendamiento era muy semejante a la compraventa y que uno y otro contrato se regían por las mismas reglas de derecho: *Locatio et conductio proxima est emptioni et venditioni iisdemque iuris regulis consistit* (I. 3,24). Atendiendo a esta similitud puesta de manifiesto repetidas veces en las fuentes (Gayo, D. 19,2,2; Gai 3,145–147 etc.), parece que cuando la obligación de entrega contraída por el *locator* era específica, el riesgo de pérdida debería haber sido asumido por el *conductor*. De esta manera, si en la compraventa se acuñaba la máxima del *periculum est emptoris* (I. 3,23,3; Gayo, D. 18,1,35,4; Gayo, D. 18,6,2,1 etc.), en justa correspondencia tendríamos que señalar que en el arrendamiento, *periculum est conductoris*. Sin embargo, ésta no parece ser la solución adoptada en Roma. Todo lo contrario, parece que se apuntaba a la opuesta: *periculum est locatoris* (Alfeno, D. 19,2,30,1).

Partiendo de esta aparente contradicción, en la comunicación se analizará la causa de la divergencia y el alcance de la responsabilidad del *locator* ante la pérdida o deterioro de la cosa arrendada.

MARIO VARVARO

Università degli Studi di Palermo – Italie

Überlegungen zur Klageformel der 'actio furti nec manifesti'

Der Stand der Forschung zur Rekonstruktion der Klageformel der *actio furti nec manifesti* regt zu neuen Diskussionen an. Es ist daher angebracht, noch einmal die Formelstruktur dieser Klage einer Überprüfung zu unterziehen. Unter anderem ist zu fragen, ob sie eine *demonstratio* und demzufolge eine *intentio incerta* hatte. Dieser Fragestellung folgend, kann das aus den klassischen Quellen stammende Material in einem neuen Licht besehen und gewertet werden.

KEITH VETTER

Loyola New Orleans Law School – États-Unis

Geographical Anomalies Caused by ‘Verbatim’ Adoptions of Justinian’s Code in the Louisiana Civil Code

The Civil Code of Louisiana is unique for many reasons. The first is that Louisiana is the only State in the United States to be governed by a European style Civil Code. The Common Law, derived from the English Common Law, governs the other forty-nine States. This paper deals with a particular section of the Louisiana Civil Code not found in many other jurisdictions with European Civil Codes. I have not made an exhaustive search of every Code, so I cannot say that no other jurisdiction contains this section.

The section I am referring to deals with Common, Public and Private Things. Many of the articles replicate the language of Justinian’s *Code*. There are however some deviations from the exact language of Justinian’s *Code* in the *Siete Partidas*. As Louisiana was a colony of Spain for approximately forty years, it may very well be that the source of the Articles was the *Siete Partidas*. But the articles considered by this presentation are limited to those that are exactly as used in Justinian’s *Code*.

Why are the articles considered the cause of geographical anomalies? The answer lies in the difference between the geography of the Mediterranean world and the present State of Louisiana. The overflow and course changes by the Mississippi River, one of the world’s largest, as well as the overflow and course changes of lesser rivers, created the greater part of the Southern half of the State of Louisiana. It resembles a miniature Amazon delta region, a geography that has little similarity to the Mediterranean world.

I will focus in this presentation on one article, which deals with the area of the seashore that in Justinian’s *Code*, as well as that of Louisiana, was a Common thing, owned by no one, and open to public use. The wording of the Article in the Louisiana Civil Code leads to the conclusion that when the compilers of the Louisiana Civil Code used the words “winter season”, they intended to say “summer season”. Thus, if we use the original intent of the drafters of the Louisiana Civil Code, the word winter should mean summer. Further clarification will be given in the presentation.

ANTONIO MARTÍNEZ VILLANUEVA

Universidade de Vigo – Espagne

‘Sacramentum’ e ‘iusiurandum’

El juramento necesario en Derecho Romano es una institución jurídica procesal, que permitía poner fin a la controversia por medio de la afirmación del derecho de una de las partes: el demandante defería el juramento al demandado, que o bien juraba que no debía, o devolvía la posibilidad de jurar al demandante de que sí era acreedor.

Fundado en las creencias religiosas, este medio de resolución de litigio permitía solucionar la controversia a falta de prueba, erradicando la posibilidad de violencia extrajudicial. Y es que la sanción de perjurio, de marcado carácter religioso y social, implicaba que el juramento necesario coadyuvase la justicia material.

Además, el proceso primitivo se basaba en dos juramentos contrapuestos. Contraposición de posiciones verbalizadas por medio de una fórmula solemne que se juraba en nombre de un Dios.

En consecuencia, el juramento fue el primer medio procesal que impidió la violencia en el proceso arcaico, además de en la época clásica.

Analizaremos la relación entre el *sacramentum* y el *iusiurandum* en nuestra breve intervención.

ANDRZEJ WADAS

Academia Ignatianum, Kraków – Pologne

‘Arrectisque auribus adstant’. Elements of the Roman Tradition and Law in the Jesuit ‘Ratio Studiorum’

The article argues that the Society of Jesus has always valued classical studies most highly so much so that the Jesuit educational system was patterned after the Roman tradition. The schooling was rooted in the Latin language (which was the official language of the Society), and was imbued with old Roman virtues, such as *gravitas*, *pietas*, *iustitia*, *observantia*. To be a Jesuit was to be a Roman in language (*Romanus ore*) and the member of the Latin speaking society of scholars (*respublica litteraria*). There was a strong conviction that pastoral care (*cura animarum*) should be linked to the classical rhetorical tradition which holds as true that the actual power (*vis*) lies in the power of words and over words.

JACEK WIEWIOROWSKI

Uniwersytet Gdański, Gdańsk – Pologne

Universal Significance of the Legal Maxims ‘dolo facit, qui petit quod redditurus est’ and ‘venire contra factum proprium nemini licet’

The text addresses the issue of universality of legal maxims *dolo facit qui petit quod statim redditurus est* and *venire contra factum proprium nemini licet*. Author draws on the findings of historical studies concerning *regulae iuris* in Western Legal Tradition in general, focusing on the historical roots of both expressions and the examples of their application in modern law (§ 242 Bürgerliches Gesetzbuch: “Leistung nach Treu und Glauben”; “estoppel” in common law). He points to their correspondences with the findings of natural and social sciences, regarding the evolutionary roots of morality. According to him it underlines the real universal significance of both legal maxims.

MARKUS WIMMER

Johannes Kepler Universität, Linz – Autriche

‘Via debita uti’ – Fragen des Rechtsbesitzes

Servitutenbesitz findet sich bei Prädialservituten durch die Interdikte *de itinere actuque private* (D. 43,19) und *de aqua* (D. 43,20) geschützt. Der Rechtsbesitz eines *iter* kann als das *uti* eines *iter fundo debitum*, als Ausübung einer Wegeservitut für ein herrschendes Grundstück, oder auch als *itinere precario concesso uti*, als prekaristischer Wegegebrauch für eine *possessio fundi* vorkommen. In der ersten Gruppe bildet auch das Schein *debitum* eines *iter* für den *fundus* eines Ersitzungsbesitzers noch den Fall eines interdiktengeschützten Rechtsbesitzes, jedoch bereits als ein Grenzfall des Systems. Dagegen ergeben sich in der zweiten Gruppe viel mehr Fälle eines gegen Dritte interdiktengeschützten prekaristischen Wegegebrauchs zugunsten des Sachbesitzes eines *fundus*: Vitiöser Rechtsbesitz für vitiösen Sachbesitz, etwa widerrufenes *precarium itineris* für widerrufenes *precarium fundi* wäre hier als ein Grenzfall vorstellbar, der immer noch interdiktengeschützt gegen Dritte bliebe, solange die *possessio fundi* nicht preisgegeben ist. Dies motiviert es, nach Korrelationen von (auch fehlerhaften) Rechtsbesitz zu (wenn auch fehlerhaften) Sachbesitz zu suchen, die als *itinere uti* interdiktengeschützt überliefert oder wenigstens rekonstruierbar sind.

Recherches sur les origines de la distinction ‘mala in se’ – ‘mala prohibita’

1. Dans l’histoire des idées la distinction entre *mala in se* (*per se*) et *mala prohibita* joue un rôle considérable depuis l’Antiquité. La distinction est liée aux idées du droit naturel (texte 1). Un point de départ dans le domaine juridique se trouve dans un texte de Papinien (texte 2) et le problème est transmis à la théologie de St Augustin (texte 3) et ensuite à St Thomas d’Aquin (texte 5). Dans la *Glose Ordinaire* la distinction est encore plus raffinée: Accurse distingue entre *ignorantia iuris naturalis*, *ignorantia iuris quasi naturalis* et *ignorantia iuris civilis* (texte 4).

2. Chose intéressante: la distinction est utilisée par un juge anglais comme en témoigne une référence dans un arrêt royal du 15 siècle. Y.B. Mich. 11 Hen.VII f. 35, pl. 35 (1496)

3. Depuis cette époque la distinction est devenue importante dans la doctrine criminelle du common law, mais on en voit des traces aussi sur le continent européen.

4. Suit un bref exposé sur le développement des idées sur les degrés de fautes en droit pénal et sur la division des actes criminels qui en est la conséquence.

Textes:

1. Aristote, *Ethique à Nicomaque*, V,7,1, 1134 b 18–24: τοῦ δὲ πολιτικοῦ δικαίου τὸ μὲν φυσικόν ἐστι τὸ δὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τὴν αὐτὴν ἔχον δύναμιν, καίου τῷ δοκεῖν ἢ μή, νομικὸν δὲ ὃ ἐξ ἀρχῆς μὲν οὐδὲν διαφέρει οὕτως ἢ ἄλλως, ὅτανδὲ θῶνται, διαφέρει, οἷον τὸ μνάς λυτροῦσθαι, ἢ τὸ αἶγα θύειν ἀλλὰ μὴ δύο πρόβατα, ἔτι ὅσα ἐπὶ τῶν καθ’ ἕκαστα νομοθετοῦσιν, οἷον τὸ θύειν Βρασίδα, καὶ τὰ ψηφισματώδη.

La justice politique a deux formes, naturelle et conventionnelle. Une règle est naturelle, quand elle a la même force partout et ne dépend pas de notre approbation. Elle est conventionnelle, quand elle est dès le début indifférente dans u sens ou un autre. Mais quand elle est définitive, il y a une différence: la rançon pour un prisonnier de guerre est à un mina et qu’une offrande consiste dans une chèvre et ne pas de deux brebis, et toutes les régulations pour des cas spéciaux, comme l’offrande pour Brasidas et d’autres lois spéciales.

2. D. 48,5,39(38),2 Papinianus, 36 *quaestionum*: *Quare mulier tunc demum eam poenam quae mares sustinebit, cum incestum iure gentium prohibitum admiserit: nam si sola iuris nostri observatio interveniet, mulier ab incesti crimine erit excusata.*
3. Saint Augustin, I,15: *Ut igitur breviter aeternae legis notionem quae impressa nobis est, quantum valeo verbis explicem, ea est qua iustum est ut omnia sint ornatissima...*
4. Accursius, *Glossa Regula est ad D. 22,6,9*: *Dic quod ignorantia alia facti alia iuris et facti, alia probabilism, alia non probabilis, item iuris alia iuris naturalis, alia quasi naturalis alia civilis.*
5. Thomas d’Aquin, *Summa Theologiae*, I,II, q.100, a 3: *Ad primum ergo dicendum quod illa duo praecepta sunt prima et communia praecepta legis naturae, quae sunt per se nota rationi humanae, vel per naturam vel per fidem.* (Lottin II,97)
6. F. de Vitoria, *Relectio de Indis*, III,4:
Et quidem multa hic videntur procedere ex iure gentium, quod, quia derivatur sufficienter ex iure naturali, manifestam vim habet ad dandum ius et obligandum. Et, dato quod non semper derivetur ex iure naturali, satis videtur esse consensus maioris partis totius orbis, maxime pro bono communi omnium. Si enim, post prima tempora creati orbis aut reparati post diluvium, maior pars hominum constituerit, ut legati ubique essent inviolabiles, ut mare esset commune, ut bello capti essent servi, et hoc ita expediret, ut hospites non exigerentur, certe habebat vim, etiam aliis repugnantibus.

And, indeed, there are many things in this connection that issue from the law of nations, which, because



it has a sufficient derivation from natural law, is clearly capable of conferring rights and creating obligations. **And even if we grant that it is not always derived from natural law, yet there exists clearly enough a consensus of the greater part of the world, especially in behalf of the common good of all.** For if after the early days of the creation of the world or its recovery from the flood the majority of mankind decided that ambassadors should everywhere be reckoned inviolable and that the sea should be common and that prisoners of war should be made slaves, and, if this, namely, that strangers should not be driven out, were deemed to be a desirable principle, it would certainly have the force of law, even though the rest of mankind objected thereto. (Translation J.P. Pawley Bate, *The Classics of International Law*)

TOMOYO YOSHIMURA

Hiroshima Kokusai Daigaku, Hiroshima – Japon

‘Res extra dotem’ and the ‘usus’ of Wife

This paper discusses on the *res extra dotem* (or *parapherna*). They were the things which belonged to the wife besides the dowry. They contained gold, jewelry, clothing, furniture, money, estate, slave and so on. Among them, we will observe the movable at first. They seem to have made up the wife’s *peculium*. We can find a lot of texts concerning many kind of movable in D. 34,2. And we can find a lot of conflicts concerning them at the end of the marriage in these texts. To find out the legal situation of these things, we should examine who had the rights of *usus*, *fructus*, *abusus* and *administratio* on them, husband or wife (ex Ulp., D. 23,3,9,3). In particular, we will discuss the problem from the viewpoint of their *usus* of wife. These small things will reveal the new phase on the separate property between husband and wife in Roman law.





INDEX OF AUTHORS

A

Akipek Öcal, Sebnem	5
Alexandrowicz, Piotr	5
Amunátegui Perelló, Carlos	6
Andrés Santos, Francisco J.	6
Ankum, Hans	6

B

Barrena, Cristián Aedo	6
Beheiri, Nadja el	10
Bělovský, Petr	11
Benincasa, Zuzanna	11
Blanch Nougues, José María	11
Blicharz, Grzegorz Jan	12
Bóné, Emese von	12
Brtko, Róbert	13
Bürge, Alfons	13

C

Candy, Peter	13
Carrasco, Consuelo García	13
Černoch, Radek	16
Chamie, José Félix	14
Chorus, Jeroen M.J.	15
Ciucă, Valerius M.	15
Cvetković-Dordević, Valentina	16

D

Dajczak, Wojciech	17
D'Angelo, Giacomo	16
Deli, Gergely	17
Diaz-Bautista Ceremadedez, Adolfo A.	17
Dostalík, Petr	18
Dozhdev, Dmitry	18
Dyjakowska, Marzena	19

E

Erdődy, Janos	19
Escutia Romero, Raquel	19
Evêque, Ralph	20

F

Fernández de Buján, Federico	21
Földi, András	23

G

Gamauf, Richard	23
García Ludeña, María Teresa	24
Giaro, Tomasz	3
Goto, Hirokuni	24
Gómez Buendía, Carmen	24
Grebieniow, Aleksander	25
Gunes Peschke, Seldag	25
Gutiérrez Masson, Laura	25

H

Halbwachs, Verena Tiziana	25
Hamza, Gabor	26
Held, Henrik-Riko	27
Heutger, Viola	27

J

Jakab, Eva	28
------------	----

K

Kamińska, Renata	28
Karlovic, Tomislav	28
Kelemen, Miklós	29
Kevevári, István	29
Klausberger, Philipp	29
Kostova, Maria Ilieva	27
Krupa, Michał	30
Kulawiak-Cyrankowska, Joanna	31
Kursa, Sławomir Patrycjusz	31

L

Lazo Gonzalez, Patricio Rodrigo	32
León, Etelvina de las Casas	33
Longchamps de Bérrier, Franciszek	32
Loska, Elżbieta	33

Ł

Łochowski, Piotr	33
------------------	----

M

Magalhães, David	34
Manni, Alessandro	34
Marzec, Łukasz	34
Matiangelli, Daniele	35
Mercogliano, Felice	35
Miletić, Tina	35
Milotić, Ivan	36
Miyasaka, Wataru	36
Mrkvý, Matej	37
Mrázková, Lucie	37

N

Nemes, Szilvia	37
Nishimura, Shigeo	38
Núñez Paz, María Isabel	38

O

Orive Quintana, Elena	42
Osses, Mauro G. Ardiles	38

P

Pedone, Michele	39
Peláez, Julio David	39
Peres, Zsuzsanna	39
Petrak, Marko	40
Pilar Álvarez Pérez, María del	40
Plisecka, Anna	41
Polojac, Milena	41
Pókecz Kovács, Attila	41
Pugsley, David	42

R

Ricart, Encarnació Martí	42
Rodríguez, Ana M. González	43
Rudnicki, Jan	43
Ruelle, Annette	43

S

Salák, Pavel	44
Salway, Benet	44
Schiavo, Silvia	44
Schiele, Carolina Manzor	45
Schneider, Sebastian	45
Schrage, Eltjo	45
Šejdl, Jan	52
Sevda Söğüt, İpek	48
Siimets-Gross, Hesi	46
Simonetti, Cristina	47
Sirks, Boudewijn	47
Sitek, Bronisław	47
Skrejpková, Petra	48
Sobczyk, Marek	49
Sorka, Kamil	49
Spengler, Hans-Dieter	50
Stankovic, Emilija	50
Stloukalová, Kamila	51
Stolarski, Kamil	51
Šurkala, Ján	52
Szeląg, Tomasz	51

Ś

Święcicka, Paulina	52
--------------------	----

T

Tanev, Konstantin	53
Tarwacka, Anna	54
Todorov, Methody	54
Tritremmel, David	54
Troiano, Angelina	55
Tuzov, Daniil	55

U

Uruszczak, Waław	3
Uysal, Cem	55

V

Varela, Carlos Gil	56
Varvaro, Mario	56
Velden, Bastiaan D. van der	56
Vetter, Keith	57
Villanueva, Antonio Martínez	57

W

Wadas, Andrzej	58
Wiewiorowski, Jacek	58
Wimmer, Markus	58
Winkel, Laurens	59
Wołodkiewicz, Witold	3
Wyrwińska, Karolina	52

Y

Yoshimura, Tomoyo	60
-------------------	----



