

***AEQUITAS AND BONA FIDES IN THE LEGAL PRACTICE  
OF ANCIENT ROME AND THE PROHIBITION  
OF THE ABUSE OF RIGHTS***

*UDC 340.13 (37): 347. 132. 14*

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**Abstract.** *The topic of this paper is a short overview of the principles aequitas and bona fides in the legal practice of ancient Rome and the analysis of a few examples of the prevention of the abuse of rights, based on these principles. The aim of the paper is to suggest the legislator that, in addition to a specific emphasis given to the prohibition of the abuse of rights, the future Serbian Civil Law Code (a project currently in progress) should stress the principles of justness, conscientiousness, and honesty, and that judges should be allowed more freedom in the application of these principles, in order for abuse of rights to be more successfully prevented in particular cases, much more numerous than legally expressible. This proposal implies the competence of judges, who should be up to this task both professionally and ethically in the very complex Serbian circumstances. In the end of the paper, dilemmas and opinions of some authors regarding ways to prevent present-day abuse of rights are given. An answer to the question from the beginning is also offered, i.e. it is concluded that judges should be given more freedom in the application of the principles aequitas and bona fides, in order for abuse of law to be prevented as successfully as possible (this especially applies to those new instances which cannot be foreseen in the legal acts). Along with this, a position is presented that perhaps, like old Romans, we should stress today that judicial application of law implies the respect of justice, and that in justice there is indeed something divine; this would, with a strong responsibility of the judge, imply a necessity to bring justice and law as close to each other as possible.*

**Key words:** *Serbian Civil Law Code (project); ancient Rome, the classical age and the age of Justinian; legal practice; aequitas and bona fides; the prohibition of the abuse of rights.*

Should the code of civil law explicitly allow more freedom to the judges so they could apply the principles of rightfulness, conscientiousness, and honesty? Naturally, to those competent judges, legally and ethically up to the task. In this respect we must

certainly bear in mind current legal practice, solutions to particular situations and problems that stem from reality, and are thus far more complex than it would ever be possible to express in legal norms. Moreover we are certainly to underline the principle according to which the abuse of rights is forbidden. This principle prevents unfairness and dishonest action, and hence indeed asserts *aequitas* and *bona fides*. One should thus pay some attention to Justinian's *Corpus iuris civilis* and the legal practice preceding this major codifying work. Hereby a question arises: could one conclude that Justinian's Codification allowed enough freedom to the judges to act according to the principles of *aequitas* and *bona fides*? Judging by numerous fragments from the opuses of classical jurists, pertaining to justice, justness, equality, conscientiousness, and honesty, one should say the answer to this question is yes; for those writings were elevated to the status of law by means of codification, a laudable effort for which Justinian should indeed be offered our gratitude. Still, the emperor lauded himself and his team helping him prepare *Digesta* perhaps a bit too much. Hereby he expressed a position which deserves to be especially pointed out. Namely, in his book "*Deo auctore*", published on the occasion of the completion of *Digesta*, Justinian first said that almost all law created until that moment should be encompassed in this collection. However, it should all be purified and ordered, during which process "all authors should be paid equal attention, without our keeping a particular area of authority for anyone, for it has turned out that not all of them are either best or worst for all, but that particular ones are the best or the worst in particular matters."<sup>1</sup> Consistently, he further insisted that comments of jurists less respected than Papinian should also be incorporated, should this be "necessary for additions to or further clarifications of the work of the most wise Papinian". He added: "Do not hesitate to incorporate these too, allowing them legal power, so that the very learned contributors to this collection could be paid all due respect, as if it were from their teachings that the constitution of princeps originated and as if it were proclaimed from our divine mouth"<sup>2</sup> He then concluded: "In any case we ascribe this to our own merit, because all their power originates from us. For the one who improves that which has not been done accurately is more laudable than the one who found it first."<sup>3</sup>

One could discuss this position at great length, but the question that arises first is: did this position imply the role of the judge who would be allowed to "improve" the imprecise acts during their application? Having in mind the insistence on justness in a number of places in *Digesta* and *Institutiones*, one could give an affirmative answer to this question, although it is quite clear that in this particular case Justinian extolled the role of the codifier (allowing for himself even the hint of divine, the usual practice of the period). During this process, in the constitutions written in praise of the creation and pronouncement of certain parts of Codification, he strictly limited the role of judges (and other actors in the judiciary), ordering them to adhere to what was written in the volumes. In time, however, he was forced on a number of occasions to allow for certain corrections. The prohibition of any changes was certainly not unwarranted, however it might have been overemphasized, which could present an unpleasant problem for the judge, and put

<sup>1</sup> *Deo auctore*, 5, translated from Malenica, A. – Justinian's *Digesta*, volume I, Belgrade 1997, pp.7. There is also a translation into Serbo-Croatian by Romac, A. – *The Sources of Roman Law*, Zagreb, 1973, pp.106.

<sup>2</sup> *Deo auctore*, 6, translated from Malenica, op.cit., and Romac, op.cit.

<sup>3</sup> *Deo auctore*, 6, translated from Malenica, op.cit., and Romac, op.cit.

him in the position between the proclaimed *aequitas* and the explicit *prohibitio*.<sup>4</sup> One could say that there were some contradictory actions in this respect. Simultaneously with the support to the principles of *aequitas* and *bona fides*, there was a kind of dogmatization of the codifying work, followed by huge laudation to the job done and the actors involved (which became an argument against the codification of private law in general). The importance of the codifier's work was undoubtedly vast, but its basis is naturally to be found in the previous millennial construction of law in general, and the incorporation of particular principles of justness. As pointed out, one should not overlook the fact that the greatness of Justinian's work is primarily in its "collection of the best that had been created throughout centuries". This venture is therefore "a summary, an outline of a long evolution, whose biggest and most important portion consists of the ordinances of the classical period."<sup>5</sup> The product of the classical age were also those legal principles particularly emphasized in Justinian's Codification; the principles originating from the earlier legal practice, permeated by the ethical principles of justness, conscientiousness, and honesty (*aequitas* and *bona fides*). The first title of the first book of *Digesta* reads: "On Justice and Law" (*De iustitia et iure*). At the very beginning of this work the words taken over from Ulpian's books are quoted: "The one who has dedicated his life to legal matters should first know where law (*ius, iuris*) comes from. It was named after justness (*iustitia*); for, as Celsus rightly interpreted, "law is the skill of the good and the just (*ars boni et aequi*)"<sup>6</sup> Under the first title of *Digesta* the following Ulpian's provision was added: "Justness is an uninterrupted and continuous willingness to allow to every person his right."<sup>7</sup> Though without the name of the author quoted, this provision was printed in the first volume of *Institutiones*, as the beginning of the first *titulus*, entitled, like in *Digesta*, "On Justice and Law".<sup>8</sup> The well-known provision on three legal principles, usually ascribed to Ulpian's *Regulae*, was also presented under the first title of *Institutiones*: "Legal rules are: to live honestly (honourably), not to bring harm to the other, and to give (allow) everyone that which is theirs (that which belongs to them)".<sup>9</sup> Under the first title of Justinian's *Institutiones*, one can also find the following thought: "The legal science is the knowledge of divine and human matters (issues), the art of distinguishing between the just and the unjust".<sup>10</sup> As Stanojevic points out, in relation to this beautiful thought, "no judge should ever forget that justice is not a plain matter, but should remember that it is on the verge of the divine."<sup>11</sup> This was undoubtedly the

<sup>4</sup> Some remarks on the issue could be found in Jovanovic, M. – The judiciary between *aequitas* and *prohibitio* in the age of Justinian (a sketch of a broader outline), within the national project Civil Law Codification, Volume 3, The Faculty of Law, Nis, in press. Within this project, original papers were published on the issue of Roman codifications (from the Law of XII Tables to Justinian's *Corpus iuris civilis*), in "Civil Codification", proceedings, Volume 1, The Faculty of Law, Nis, 2002, and *Ibid*, Volume 2, 2003.

<sup>5</sup> Stanojevic, O. – Roman Law, Belgrade, 1991, pp.95.

<sup>6</sup> D.1 1,1 after the translation from Malenica, A – Justinian's Digest, Belgrade, 1997. Instead of the word "law" matters, the word "legal" matters was incorporated, since, although the first word is closer to the original, the second one is more suitable to modern terminology (in the sense that it pertains to legal activity in general).

<sup>7</sup> D.1 1, 1, 10, after translation

<sup>8</sup> *Institutiones Iustiniani*, 1, 1, after the translation by Bakotic, L. – Justinian's Institutions (Iustiniani Institutiones), Belgrade, 1912

<sup>9</sup> *Institutiones Iust.*, 1, 1, 3, after translation

<sup>10</sup> *Institutiones Iust.*, 1, 1, 1, after translation

<sup>11</sup> Stanojevic, O. – Roman Law, Belgrade, 2001, pp.113

understanding of the authors of Justinian's Codification, too. They however insisted that the final decision was on the emperor himself, and the emperor alone, should there be any dilemmas. Therefore, supreme justice and the ultimate link with God should be in his hands. Still, there is a concession: "among all things there cannot be found anything that deserves as much attention as does the rule of law, which brings order to both divine and human matters and which eliminates any unjustness."<sup>12</sup> This emphasis put on the importance of law sounds among other issues as if the intention was to say that the abuse of supreme reign was excluded, since in the rule of law even the emperor was to act according to the principle of justness.<sup>13</sup>

*Aequitas* and *bona fides*, having transformed from religious and ethical principles into legal ones, in time transformed Roman law in numerous spheres.<sup>14</sup> Even the emperors would call upon these principles, in the times when their constitutions were the basic (and practically the only) active sources of law. This process took many years, and certain transformations became necessary as Rome was expanding, in the time of intensive economic growth and the creation of the market (that would in time practically become international). As it is known, the leading role in this process belonged to city and peregrine praetors, who were not really legislators, but had a specific role in legal practice. The judicial function of the praetor in a way seemed indirect during the proceedings, since the sentence was pronounced by the arbiter (a chosen judge). However, taking into account the fact that in the first phase of the proceedings, *in iure*, it was the praetor who decided whether the demand was legal, in other words, it was him to allow (or disallow) the suit and approve the choice of the magistrate, and to give this magistrate certain instructions for reaching a verdict (in the *apud iudicem* phase), it is clear that the praetor was the one to create the proceedings, and via the proceedings – material law; for, in formal proceedings he had the authority to disallow the suit, even though the prosecutor was the one to formally initiate the procedure. Likewise, the praetor could do the opposite: allow the suit even though it was not allowed for such cases according to *ius civile*. In time, by means of an edict and a proclamation on the program of work (not present in *ius civile*), the praetor would be allowed to introduce some novelties. In this respect, the activity of peregrine praetors was more pronounced, although city praetors also introduced many novelties. In this procedure, praetors were guided by the principles of justness, conscientiousness, and honesty. Therefore, although the principles of *bona fides* and *aequitas* were especially emphasized in the works of

<sup>12</sup> The constitution "*Deo auctore*" on the preparation (compilation) of Digesta 1, after the translation by Romac, A – The Sources of Roman Law, Zagreb, 1973 and Molenica, A. – Justinian's Digesta, Belgrade, 1997, pp.3. Some data on the final decision of the emperor, as a supreme legal institution in some lawsuits, can be found in the paper mentioned: Jovanovic, M. – The judiciary between *aequitas* and *prohibitio* in the age of Justinian (a sketch of a broader outline)

<sup>13</sup> On some aspects of the abuse of supreme authority see Petrovic, M. – The abuse of supreme power (state sovereignty), "The Abuse of Rights", Proceedings of the International Conference on the Abuse of Rights, held at the Faculty of Law, Nis, 1996, pp. 215-229.

<sup>14</sup> On the character of the *bona fides* principle see Horvat, M. – *Bona fides* in the Development of Roman Law of Obligations, Zagreb, 1939; see also Kranjc, J. – *Ius est ars boni et aequi*, Collection of scientific disputes, Ljubljana, XL/1980. On the importance of the principles *bona fides* and *aequitas* see also Sarkic – Malenica: Legal Theories and Institutions of the Classical Period, Volume I, Novi Sad, 1994, pp. 137-143. Occasionally calling upon Horvat, Stojanovic D. – Conscientiousness and Honesty in Traffic, Belgrade, 1973, pp.53 also points to some aspects of this problem.

classical jurists, they had been applied in judiciary and more general legal practice since much earlier. Additionally, the very *bona fides* principle in time underwent transformations, covering an ever wider meaning and enabling the foundation of many new institutions.<sup>15</sup> And the newly-built legal system, thanks primarily to legal practice, would significantly differ from the old civil law. In time, changes would permeate all of private law, and they would be the most conspicuous in law of obligations. Instead of proclaimed will, as a determining factor for the validity of legal business, the rule of accepting the actual will of contractees would prevail, i.e. there would be made a legal definition of the incongruence between the actual and the proclaimed will, by means of special institutions, some of which would gain the importance of private law delicts (*error, dolus, vis ac metus*, etc.) Instead of the objective responsibility principle, there would prevail subjective responsibility (with the replacement of the personal execution with the actual one), and there would even be made a fine differentiation between the degrees of guilt (*dolus, culpa lata, culpa levis in abstracto, culpa levis in concreto*, etc.) *Bona fides* would pervade other property relations, too, for instance those of real law, so that in the acquisition of property by means of *usupatio* the conscientiousness of acquisition would be insisted upon. This change and numerous others would in time break the rigid formalism of the old Roman *ius civile*, deleting all symbolism and abstraction, primarily in property relations; for strict formalist procedure in the changed social conditions in which old ethical provisions had already vanished was not only pointless, but also contrary to the goal of subjective rights.

Along with changes mentioned and some others, almost regularly by means of legal practice, the application of the principles *aequitas* and *bona fides*, and some other congruent principles (such as the one of suitability, for instance) would become a grounds for noticing the abuse of rights and for building a principle to forbid such behaviour. As some authors claim, "the principle of conscientiousness and honesty and that of the abuse of rights represent the same idea."<sup>16</sup> Actually, the abuse of rights is a contrast to this principle, and it is natural that while it is being applied, a principle of the prohibition of abuse should emerge. This principle was not however explicitly defined in Roman law, i.e. the abuse of rights itself was not separately defined, which in some authors brought about a dilemma on whether Roman law knew the abuse of rights at all.<sup>17</sup> A lack of its definition is certainly not a reason for this dilemma, and it is unquestionable that the roots of today's definitions are to be found in Roman law. The dilemma partly originates from the differences in contemporary understanding of the abuse of rights – the narrower, subjective, and the broader, objective (certainly more acceptable) one; it also comes from the fact that it is not always easy to distinguish between the abuse and the breach of law, or the abuse and the exceeding of law, and is therefore not easy to state the criteria that would define the abuse of rights. We shall not however look into these

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<sup>15</sup> On the history of the *bona fides* principle and the corresponding reference list, see Horvat, M. – *Bona fides* in the Development of Roman Law of Obligations.

<sup>16</sup> Stojanovic, D. – *Conscientiousness and Honesty in Traffic*, Belgrade, 1973, pp.53

<sup>17</sup> In short on some aspects of this issue, along with a short reference list in Jovanovic, M. – *Do Gaius and some other jurists testify on the abuse of rights?*, "The Abuse of Rights", Proceedings of the International Conference on the Abuse of rights, The Faculty of Law, Institute for Legal and Social Research, Nis, 1996, pp. 78-92. See also Jovanovic, M – *Does Marcian testify of the abuse of rights?*, Proceedings of the Faculty of Law, Nis, 1994-1995, pp. 100-114.

matters here, since renowned Yugoslav and international authors have already written a lot on them.<sup>18</sup> Nor shall we delve into a deeper analysis of the existence or non-existence of the abuse of rights as an institution in ancient Rome, a dispute today almost superfluous. An opinion on this issue has been given before, and another long established position could be added: "It is an error to consider the abuse of rights a matter of recent origin, and to believe that individualism and the prohibition of the abuse of rights are mutually exclusive."<sup>19</sup> Along with a shortest comment on this dilemma, there will be presented concrete examples from legal practice which could be treated as the abuse, or the prohibition of the abuse of rights.<sup>20</sup> This is even more prominent since many renowned civil law theoreticians find the roots of the abuse of rights as an institution precisely in Roman law.<sup>21</sup> The negation of this institute, at times followed by much exaggeration about the authenticity of certain sources, seems to be a result of a partial approach, and sometimes of some hairsplitting in legal analysis, where contemporary theoretic concepts are often projected upon the age of ancient Rome. In this approach it is sometimes forgotten that justness, today as a rule called upon in the analysis of the abuse of rights, was asserted precisely in Roman law as a principle inseparable from law.

The dilemma arises in some authors because of the famous general Roman principle, pointed out in many sources, that the exercise of one's rights is not illegal; i.e. that "he who exercises his right does not bring harm to anyone else".<sup>22</sup> Paulus actually literally said: "No one brings harm (to anyone else) if he does not do that which he does not have the right to"<sup>23</sup> Or, translated even more literally: "No one has done harm (to the other) except if he has done that which he has no right to do"<sup>24</sup> It is obvious that here the fact a procedure is illegal is taken to be the basis of compensation. In the same edict commentary Paulus also claimed: "It is not considered a forcible action if one exercises his right and resorts to a legal suit."<sup>25</sup> And Gaius, also in an edict commentary, said the following:

<sup>18</sup> Excellent papers were published in "Abuse of Rights", Proceedings of the International Conference on the Abuse of Rights, Faculty of Law, Nis, 1996. In the paper by Vukadinovic, G. – The grounds of a theory of the abuse of rights, pp.11-16 there is a summary of the untranslated doctoral dissertation Markovic, M. – La theorie de l'abus des droits en droit compare, Paris, 1936. There are 43 papers in the 423 pages of the proceedings, followed by a reference list of 260 titles, compiled by Janjic, J. – Bibliography material: abuse of rights (Proceedings, pp. 425-434). In the papers published there are also numerous bibliographic units on the abuse of rights.

<sup>19</sup> Konstantinovic, M. – The prohibition of the abuse of rights and the socialization of law, Archive, 1925, reprinted in Annals of the Faculty of Law, Belgrade, Vol. 3-4, 1989, pp.269, after Lazic, M. – The abuse of rights in neighbourhood relations, Proceedings "Abuse of rights", of the International Conference on the Abuse of rights, pp.109, no.7. The position that this dilemma is redundant has also been pointed out in the mentioned papers Jovanovic, M. – Do Gaius and some other jurists testify of the abuse of rights?, Proceedings "The Abuse of Rights", pp. 78-92, and Jovanovic, M. – Does Marcian testify of the abuse of rights?, Proceedings of the Faculty of Law, Nis, 1994-1995, pp. 110-114.

<sup>20</sup> Some examples have already been mentioned with a slightly different approach in the aforementioned papers M. Jovanovic (no. 14 and 16), and Kovacevic-Kustrinovic, R. – The domain of the application of the abuse of rights principle, Proceedings "Abuse of Rights", pp.19, where the author calls upon M. Markovic (no. 15).

<sup>21</sup> Some of the papers of civil law theoreticians can be found in the Proceedings "Abuse of rights" (no. 15), along with an extensive list of authors sharing this opinion.

<sup>22</sup> *Qui suo iure utitur, neminem ledit* (a proverb from Paulus's fragment, different from the original, but used in the same sense)

<sup>23</sup> D. 50, 17, 151 (*Paulus*): *Nemo damnum facit, nisi qui id fecit, quod facere ius non habet.*

<sup>24</sup> Translated after Romac, A. – Latin Legal Proverbs, Zagreb, 1982, pp. 128 (*damnum*)

<sup>25</sup> D. 50, 17, 155 (*Paulus*).

"It is not considered that the one who exercises his right carries out an offensive action."<sup>26</sup> However, the proverbs above do not justify abuse. Rather, they only assert certain subjective rights (otherwise not separately theoretically defined, however with the content that went without saying). To stress the liberty of exercising one's own right was logical in the context of overall striving for the inviolability of private property and other real rights, and also in the context of the principle of the autonomy of the will of parties in matters of private law; it was also logical from the aspect of detachment from legal constraints. One could indeed claim that the emphasis put on the liberty of exercising one's right indirectly guaranteed protection from the attacks of other subjects and their possible attempts to hinder someone's exercise of subjective rights. After all, the principle of the proverbs mentioned above is generally not at all incongruent with the principles of justness, conscientiousness, and honesty. Quite the contrary, justness inheres that no one should be imperiled by a direct breach of their right, or by the exercise of the other's right to his disadvantage. And, let us stress this once again, the principle of justness (which in essence inheres both the principle of conscientiousness and that of honesty) was pointed out in the first book of Justinian's *Digesta*, and in the first book of *Institutiones*, too. This fact is certainly not neglectable, not only from the point of view of Justinian's codification commission. The principle of justness is somewhat contradicted with a piece of data (presumably the only of its kind) from Ulpian's works (where he calls upon Proculus), saying that the landowner, even beyond prescribed legal constraints, could do as he wished on his land, even when this would cause damage to his neighbour.<sup>27</sup> This was, however, an exception to the rule which, though asserting private property, by no means affirmed harassment (for there are real-life situations in which the breach of land-property rights can cause harm to a neighbour even when there was no harassment or violation of property rights, but as a rule, in such a situation the damages are less for the neighbour than they would have been for the proprietor if he had not exercised his rights).<sup>28</sup> After all, sources testify of the emphasis put on the prohibition of harassment, for example in a famous and often quoted Gaius' and especially Celsus' remark: "Malice should not be forgiven." – "Malitis non est indulgendum."<sup>29</sup> In addition, one should always keep in mind the context in which a remark was given. For example, the following thought taken out of its context could also be interpreted as an allowance of the abuse of rights: "No one can impose on himself a duty (position) and (later on) renounce (it)."<sup>30</sup> The statement refers to wills and other unilateral procedures, but when one takes it out of its context, it might be interpreted as a possibility of facile abandonment of a contractual obligation.

Some authors however think one cannot claim a general principle of the prohibition of harassment. They believe that these issues were covered only in particular acts, passed for some particular cases in Justinian's time, whereas the mentioned fragments were

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<sup>26</sup> D. 50, 17, 55 (*Gaius*).

<sup>27</sup> D. 39, 2, 26 (*Ulpianus*).

<sup>28</sup> For example, by means of a drainage of marshland the flow of water could be established over the neighbour's land, which might cause some damage to the neighbour (though not too much), but without this drainage there would be no use of the first proprietor's land at all.

<sup>29</sup> D. 6, 1, 38 (*Celsus*).

<sup>30</sup> Translated after Romac, A. – *Latin Legal Proverbs*, Zagreb, 1982, pp. 417 (*negotium*)

actually interpolated.<sup>31</sup> However, the interpolation position is not acceptable, due to the relative coherence of narration in the fragments mentioned. Moreover, the interpolation of classical texts usually meant the deletion of old institutes and the introduction of new ones, which is not the case here, and even more rarely it meant the introduction of fully new provisions. After all, it is quite certain that the text from Gaius' institutions was not interpolated, since this text, in addition to the concrete case, put forward a general principle interpretable as the provision that one's right could not be used at the expense of the right of others. This issue will be dealt with later.<sup>32</sup> In any case, modern Romanistics has already given up the extreme criticism of the school of historical law, which is certainly warranted on the issue of the interpolation of classical texts, although one should not diminish the huge contribution of this school to gaining insight into the interpretation of some old texts from the earliest Roman period.<sup>33</sup> The claim that these are about particular instances and particular cases does not at all prove that there was indeed no more general principle on the prohibition of the abuse of rights, although this was nowhere explicitly stated. It is well known that Roman jurists often acted casuistically, usually not formulating general rules, but such rules are relatively easy to draw from analogous verdicts in particular cases. And the aforementioned Gaius' position practically became accepted as a general principle. Finally, with no intention to go into this matter any deeper, one could reasonably conclude that through their judicial and other legal practice, along with the conclusion of many particular cases, although not explicitly defining the theoretical institute of the abuse of rights and the principle of prohibition (nor some other institutes and principles, for that matter), in numerous cases, with no explicitly prescribed constraints, the Romans prevented the exercise of rights at the expense of others; not only pure harassment, but also that which might have been unintentional. Accordingly, one could claim that the praise should go to those authors who consider Roman law the cradle of the abuse of rights institute, in which origins of both subjective and objective concepts of the modern doctrine can be found, in other words, in which origins can be found of most criteria we operate today when defining this institute.<sup>34</sup> And, more generally, the building of this institute was proclaimed through the very principles of *aequitas* and *bona fides*. As Malenica points out, in classical law, *bona fides* became "a legal standard applied to a number of legal relations, for instance in purchase or sale, partnership, some real contracts, etc."<sup>35</sup> In other words, the apprehension of law in the classical Roman period, including the concepts of *aequitas* and *bona fides*, actually tacitly included the prevention of the abuse of rights. As has been told, some authors, for instance Stojanovic, are right to point out that "the principles of conscientiousness and honesty and that of the abuse of rights represent the very same

<sup>31</sup> See Eisner-Horvat: Roman Law, Zagreb, 1948, pp.235, and no. 5 on the same page.

<sup>32</sup> *Gaius: Institutiones*, I, 53, translated after Stanojevic, O. – Gaius: Institutions, Belgrade, 1982, pp.45.

<sup>33</sup> For example, the authenticity of the so-called Royal Laws (*leges regiae*), for details see Jovanovic, M. – A commentary on the old Roman *ius civile* volume I, *Leges regiae*, The Faculty of Law, Nis (publication centre), Nis, 2002.

<sup>34</sup> More on the issue in Stojanovic, D. – Conscientiousness and Honesty in Traffic, Belgrade, 1973, pp. 53-63; see also the papers of the Proceedings "Abuse of Rights" (no. 14 and no. 15)

<sup>35</sup> Sarkic – Malenica: Legal Theories and Institutions of the Classical Period, Volume I, Novi Sad, 1994, pp. 138-139.



idea."<sup>36</sup> The legal practice of classical Rome actually permeated almost all private law, especially property law, with the principle of the prohibition of the abuse of rights. And by means of Justinian's Codification, which gave legal power to the fragments of classical jurists, by proclaiming the above principles, the prohibition of the abuse of rights was legislated in practice, although in the post-classical period, due to the emperor's legislative activities, there were some changes to the *aequitas* principle.<sup>37</sup> Actually, already Citation Act of AD 426 gave legal power to the principles from the work of five known classical jurists. And the work of these legists and some others provides data on the legal practice which list a couple of situations very illustrative of the abuse of rights. Some of this situations are widely known, not only in Roman law theory, but in all civil law theory.

First of all one should point out that *bona fides* was introduced as a "legal standard" by the praetor practically from the moment he acknowledged the legal importance of fraud (*dolus*) in obligation matters. This actually happened in those cases where some actions of parties were not legally prohibited by Roman law, but the praetor decided to declare them delicts of private law, offering for protection *actio de dolo* (*actio doli*), which occurred already in the period of Cicero.<sup>38</sup> Around this period the praetor also introduced *exceptio doli* in order to reject the suit of the party that had committed fraud. For fraudulent behaviour during the conclusion of a legal business the defendant was given *exceptio doli praeteriti* (*specialis*). For fraudulent action committed at a later time, i.e. for a fraudulent pressing of charges (when circumstances due to which the suit was unjust occurred only after the charges were pressed), the defendant was given *exceptio doli praesentis* (*generalis*). This secured legal protection in numerous relations between loaners and borrowers, and defined numerous cases to treat unfair or immoral behaviour (as had been very rare in the earlier period and had been penalized through *nota censoria*). Along with *dolus*, *vis ac metus* and *fraus creditorum* would also gain legal importance (for instance, the manumission of a slave whom one citizen owed to the other). Texts from the age of classical jurists provided data on rich such practice. Most such texts, i.e. numerous fragments offering suitable solutions, would be copied into Justinian's *Digesta*, and some situations, though without quoting any sources, would also appear in *Institutions*.

Similar actions were taken when the plaintiff sued calling upon the formalism of civil Roman law, and his suit contradicted the principles of justness, conscientiousness, and honesty. As Horvat insists, in objecting to such a charge "Roman lawyers introduced the principles of justness and appropriateness into the old civil law, and thus broke the formalism of civil law."<sup>39</sup> This practically introduced the prohibition of the abuse of rights, i.e., in Stojanovic's words, "it did not allow for the apparition such as formalism to become more important than the very goal for which subjective right was acknowledged in

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<sup>36</sup> Stojanovic, D. – Conscientiousness and Honesty in Traffic, pp. 53

<sup>37</sup> Sarkic – Malenica: Legal Theories and Institutions of the Classical Period, pp. 143-146.

<sup>38</sup> The suit introduced upon the proposal of Cicero's contemporary and friend Aquilius Galus, 66 BC. Data taken over from Horvat, M. – Roman Law, Zagreb, 1958, pp.355, where one can find a broader discussion of this matter.

<sup>39</sup> Horvat, M. – Roman Law, Zagreb, 1958, pp. 356.

the objective order".<sup>40</sup> This was attainable because, although *aequitas* and *bona fides* had not yet been explicitly accepted in the legal system, the judge of the classical period, as Malenica points out, still had the opportunity to "call on the obligation to act honourably and reach the verdict that annulled the legal norm that would prevent a just sentence".<sup>41</sup> A good example, today probably more fit for the realm of the breach of rights, but for the original period still classifiable as the abuse of rights, was given by Valerius Maximus, a writer of the first half of 1<sup>st</sup> century AD. It is about a case that originated from an immorally grounded old formalist literary contract, and the corresponding suit initiated with immoral grounds, whose outcome became a turning point in the legal life of ancient Rome and was therefore considered by Valerius Maximus an event worth noting down. The text was not incorporated in Justinian's Digesta, because it was not presented in a book by a legist (probably also because it was generally well-known in the age of Valerius Maximus and similar actions had already been taken in all adequate situations, according to the principles of conscientiousness and honesty). The example succinctly illustrates the judiciary practice in which moral principles were ascribed legal importance. In his work "On Deeds and Proverbs Worth Mentioning", the author wrote: "Gaius Viselius Varon, seduced by severe illness, wrote into the book that he had received from one Otatilia of Latharen, his paid mistress, the amount of three hundred thousand sesterces, so that, in the event of his death, she could claim this amount from his heirs. Intending to leave this to her as his legacy, he presented this lustful benefaction of his as a debt. However, Viselius managed to get out of this danger contrary to the wishes of Otatilia. Offended for having lost her feat, because her hope that he should die did not come true, with the help of her usurer lady-friend, she immediately initiated a lawsuit, demanding to receive the money. This was both morally ungrounded and based on a void contract. In this case Gaius Aquilius, a husband (citizen) of great reputation and a man versed in civil law, who was the chosen judge in the case, after counselling with the most distinguished fellow citizens, and his own reasons of rights and morals, denied this woman's claim."<sup>42</sup>

According to the old rules *pater familias* could freely write down all his claims and debts into the treasury book. However, in this process *devotio*, the will of gods, was also counted on if one should act dishonestly. The age of the verdict above, however, was already dramatically different from preceding periods. The old Roman religiousness had but vanished, and in this particular example it was also quite obvious that there was no actual indebtedness. More generally, by this period, precisely due to the old family-protecting religious, customary, and moral norms slowly vanishing, some constraints on testate will had been imposed, so that the next of kin should not be fully deprived of legacy. Already in *lex Furia testamentaria*, and then in *lex Voconia* (late 3<sup>rd</sup> and early 2<sup>nd</sup> centuries BC), and unquestionably in *lex Falcidia* of 40 BC, the legacy freedom was constrained, i.e. a compulsory share of inheritance for the next of kin was determined, not available to the testator. Legacy motives were also important in this process. Had

<sup>40</sup> Stojanovic, D. – Conscientiousness and Honesty in Traffic, pp. 53.

<sup>41</sup> Sarkic – Malenica: Legal Theories and Institutions of the Classical Period, pp. 139.

<sup>42</sup> Valerius Maximus: *Factorum ad dictorum memorabilium*, 8, 2, 2. Translated after Malenica, A. – The Sources of Roman Law, Belgrade, 1993, pp. 35-36. Serbo-Croat translation also available in Sarkic – Malenica: Legal Theories and Institutions of the Classical Period, pp. 139.

Viselius bequeathed this substantial amount to Otatilia, it is quite probable that his heirs would have never actually paid the money to her, since this was a great deal of money immorally grounded (and it is also possible that a portion of this amount would have represented the mandatory legacy for the next of kin). It was much more secure to make this amount of money a contractual obligation. An old literary contract, *expensilation* (*nomina transcriptitia*), was used for this, since *pater familias* had the right to make up such a document, during the process of registering debts and claims in his treasury book. However, in this case, the debt was quite obviously fictitious. It was not really a debt but a present made to the paid mistress in a concealed way. Calling upon the immoral grounds and the action contrary to the character of the contract, the judge refuted Otatilia's charge and indirectly in practice denied the unquestionability of this old form of obligation issues. This established a precedent for future similar situations, and also introduced a practice in which it was possible to prevent the abuse of an old literary contractual form (indirectly, to prevent the abuse of contractual freedom in general). Until Justinian's time this old formalism had vanished, and there was no need to separately define this kind of abuse of rights; and the general principles of justness and honesty (*aequitas* and *bona fides*) were explicitly given in the very beginning of *Digesta* and *Institutiones*, and they were mandatory for all obligation matters, preventing the abuse of rights.

In the relations between loaners and borrowers the application of principles *aequitas* and *bona fides* was undoubtedly given supreme importance. However, instances of the abuse of rights occurred in other *inter vivos* property relations. Gaius testified of a prohibition to exercise property authority, and the position of this jurist is usually taken to be a proof of the existence of the abuse of law prevention institute: "*Male enim nostro iure uti non debemus*."<sup>43</sup> – "We must not use our rights with the purpose of wrongdoing."<sup>44</sup> Or, in free translation: "We are not to abuse our rights."<sup>45</sup> When this statement is quoted, the context is sometimes omitted. In addition, the text of Justinian's *Institutiones*, almost identical to that of Gaius (with some remarks), is often overlooked. Ulpian's text is neglected too, even though it was incorporated into *Digesta*. In some nuances it is different from Gaius' text, but it adds another, earlier example of the abuse of rights that had been severely penalized. Stanojevic studied Gaius' work a lot, though he did not pay special attention to this particular problem. While supporting the thesis which denies the institute of the abuse of rights in ancient Rome, he still concedes: "There are some texts, however, from which one could conclude that the exercise of just any right, regardless of its motives or consequences, was not allowed."<sup>46</sup> Correspondingly, Puhan believes that already in the classical, and especially in the post-classical period there prevailed the rule that no owner could exercise his property right only to harm the other."<sup>47</sup> The situation described by Gaius is a bit broader in scope than the one in which a right is used only to harm the other. He actually treated a specific situation, ownership of slaves, also touching upon the

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<sup>43</sup> *Gaius: Institutiones*, I, 53.

<sup>44</sup> Translated after Stanojevic, O. – *Gaius: Institutiones*, Belgrade, 1982, pp. 45.

<sup>45</sup> Translated after Stojcevic-Romac: *Dicta et regulae iuris*, Belgrade, 1980.

<sup>46</sup> Stanojevic, O. – *Gaius noster*, Institute of Legal History of the Faculty of Law Belgrade, Belgrade, 1976. Also about this in Stanojevic, O. – *Roman Law*, Belgrade, 2001, pp.196.

<sup>47</sup> Puhan, I. – *Roman Law*, Belgrade, 1969, pp. 201-202.

custody over spendthrifts. The integral text from Gaius' Institutions reads: "Slaves are in their master's power. This power belongs to *ius genitum*, for in all peoples we can notice that masters have the right of life and death over slaves, and whatever the slave obtains, he has obtained it for his master. However, in our time neither the Romans nor other peoples under Roman authority are allowed to rage at their slaves for no reason, for under the constitution of the holiest Antoninus, he who kills his slave for no reason will be punished as if he had killed the slave of another. The master's too cruel actions against the slaves are also punishable according to the constitution of the same emperor; in fact, when some provincial governors asked him for instructions on what to do with the slaves who had run away from their masters and sought refuge in temples or by the ruler's monuments, the emperor ordered that such masters be compelled to sell their slaves, if their actions on those slaves were unbearable. This is just in both cases: we must not use our rights at the advantage of wrongdoing; for this reason spendthrifts are also forbidden to manage their gains (property)."<sup>48</sup>

Gaius' text was incorporated in Justinian's Institutions, too (In. 1, 8, 2-3), although not quite literally. There was also given the full text of the rescript of Antoninus Pius, and previously there had been emphasized the principle of justness and the state interest for the prevention of the abuse of rights: "... And this order is indeed just, for the state also has an interest that no one should abuse his cause."<sup>49</sup> Therefore, not only was the abuse of rights legislated in Codification, but there was also an explicit emphasis put on the interest of the state to prohibit abuse (although what is literally mentioned is the abuse of one's own cause). And the prohibition of abuse was for the first time explicitly mentioned after a concrete case; in the prescript of the emperor on the particular case of slave molestation, i.e. by means of instructions to the consul to prevent the abuse of slaveholders' rights over slaves. This, however, established a legal practice for further actions in similar cases. Still, a rescript issued by the princeps, even if it had legal power, was a specific constitution, and as a rule it pertained to the concrete case in question only. Here, however, the rescript of Antoninus Pius assumed broader importance, that which bans malevolent behaviour to slaves in general, so that Gaius presented this to his students as a general position against the abuse of rights. However, this rescript assumed full-fledged legal power only by means of the collections of institutions of later dates, and over the Quotation Act (which also incorporated the work of Gaius, along with Paulus, Papinian, Ulpian, and Modestinus), and finally, for the entire Roman state, over Justinian's Codification. In Justinian's Institutions the text of Pius' manuscript was transcribed literally. The integral text on the issue reads: "Slaves are under their master's rule, and this authority is based on international law; for we notice that in all peoples masters have had full authority over the life or death of their slaves. However, no one in our state is today allowed to excessively molest slaves with no legally acknowledged reason. For, after the constitution of the divine Pius Antoninus, he who kills his slave for no reason must be equally punished as the one who kills someone else's slave. This order also reins the excessive cruelty of masters. Because it is He (the emperor) – counselled by certain provincial governors on the issue of slaves that would seek shelter in a

<sup>48</sup> *Gaius: Institutiones*, I, 53, after the translation by Stanojevic, O. – Gaius: Institutions, Belgrade, 1982, pp.45.

<sup>49</sup> *Institutiones Iustiniani*, 1, 8, 3, translated after Bakotic, J. – Justinian's Institutions (*Iustiniani Institutiones*), Belgrade, 1912, pp. 21.

religious temple or under an imperial monument – who has ordered that, whenever the master's cruelty looked unbearable, the master be coerced to sell his slaves under good terms, and negotiate the price of this transaction himself; and this order is very just, since the state also has an interest that no one should abuse his cause (*male utatur*). Here is the exact wording of this rescript sent to Elius Marcian: 'Even though it is necessary to preserve the inviolable power of masters over their slaves, and that the masters' rights are not at all restricted, it is also the masters' own interest that those who justifiably beg against cruelty, famine, unbearable injustice, should not be denied help. You shall therefore study the charges (*quaerellis*) of those who have found shelter under the royal monument having fled from the family of Julius Sabinus, and should you ensure that they have been treated more cruelly than justice (*aequum*) holds, or that they have been severely offended (*infami iniuria*), you shall order that they be sold, never again to be returned under the authority of their present master. And let Sabinus well remember that I shall act even more strictly against him, should he attempt to thwart this order of mine."<sup>50</sup>

The text of Antoninus' rescript was incorporated into the first book of *Digesta*, by means of a fragment from the work of Ulpian, one of the five famous jurists, who wrote after Gaius. Ulpian presented a slightly different text related to the rescript. He took down another occurrence of reaction to cruel treatment of slaves by slaveholders: "Therefore, slaves are under the rule of masters, whose such rule undoubtedly comes from the right of the people (*ius genitum*), for in all peoples we can notice that there has been an authority of the master over the life or death of his slave, and whatever is obtained through the slave is to become the master's property. However, in this time no one who lives under supreme Roman authority is allowed to hurt his slaves beyond measure and in excess of legally acknowledged grounds, for it was ordered in the constitution of divine Antoninus that he who has killed his slave for no reason should not be punished more leniently than he who has killed someone else's slave. Based on the same constitution of the same princeps huge cruelty of masters is also punishable. If a master has hurt slaves, forced them to pederasty, or immoral disgrace, it will be shown, based on the rescript of divine Pius to Elius Marcian, the proconsul of Betica, that such masters should become the parties of the (provincial) governor. This is the wording of this rescript: 'It is necessary that the rule of the master over his own slaves remain intact, so that no right is hindered to people. However, it is the master's interest not to fully refuse help to those who rightfully seek mercy against fury, or greed, or an unacceptable injury inflicted. You shall therefore hear the cry of those among Julius Sabinus' slaves who have found shelter under (our) statue, and if you find that they have been in a worse condition than is just (*aequum*), or that they have been stricken by a disgraceful injury, order that they be sold immediately and not returned to the master. Let him who acts to thwart my constitution know that he will be more severely punished when he approaches me.' And divine Hadrian banished one Umbricia, a married woman, because she had treated her slaves most cruelly for a trifling reason."<sup>51</sup>

The rescript of the emperor Antoninus Pius (AD 138 – 161) obviously has a double meaning. It testifies of a tendency to treat slaves more humanely, because it indirectly

<sup>50</sup> *Institutiones Iustiniani*, 1, 8, 1-2, translated after Bakotic, op.cit., pp. 21.

<sup>51</sup> D. 1, 6, 1-2, translated after Malenica, A. – Justinian's *Digesta*, Belgrade, 1997, pp. 125-126. The translation of the fragment somewhat differs from the translation in *Institutions*, but only in matters of style.

grants them a limited right to life and imposes an obligation to slaveholders to respect this right, although *ius vitae ad necis* over slaves is still emphasized. Reasons for this were not purely ethical, although even Seneca had claimed that the slave was also a man, and Antoninus Pius (Pius – the pious one) was known for humane actions.<sup>52</sup> They were much more political in nature (reliance on slaves as labour force and the imminent danger of insurrection).<sup>53</sup> In that sense this rescript could be treated as a constraint on the private property right in public interest. However, the public, i.e. state interest for the prevention of pointless molestation or murder of slaves would be emphasized only in Justinian's Institutions. The very rescript did not mention public interest, and it was not mentioned in Gaius or Ulpian either. The interest of slaveholders is pointed out, which could actually mean the tendency to protect the interests of the entire slaveholding class, although this was not unequivocally expressed. And according to Gaius' additions (not found in Ulpian or Justinian's Institutions). One could conclude that the text was actually about the prevention of the abuse of property law for the sake of proprietors themselves, or their families. Specifically, while emphasizing that the right of these people could not be abused, Gaius said: "For this reason, too, spendthrifts are forbidden to manage their gains (property)"<sup>54</sup> It is well known that already the Law of Twelve Tables prescribed custody over spendthrifts, according to Ulpian.<sup>55</sup> Some authors do not trust this piece of data, and consider this institute appeared at a later date. However, due to the tendency of the Law of XII Tables to break up large family groups, one cannot rule out the possibility that there was some need of custody already in that period, but primarily due to the fact some heads of the family were uneducated or still too young. In time this institution began changing in many aspects only to become full-fledged custody of spendthrifts in the classical period.<sup>56</sup> Early on, the object of custody was only the inherited property, later this included other goods, in cases where they were spent without control or beyond normal limits, in other words, whenever they were squandered. It is an interesting fact that Justinian's Institutions, in prescribing that spendthrifts should be put under custody, called upon the Law of XII Tables (In. 1, 23, 3). And it is quite certain that Gaius, while discussing custody of spendthrifts as an institution of a later period (after the Law of XII Tables), also entailed the prohibition of the abuse of property rights, so that family property and the resulting security would not be hindered. Rules of action on this matter had however been established long before. Specifically, in relation to slaves as *res se*

<sup>52</sup> Lucius Aeneas Seneca: Letters to a Friend, 5, 47, 1, translated after Vilhard (*L. Aeneas Seneca: Epistulae morales ad Lucilium*), Novi Sad, 1978, pp. 144. It is known that Seneca's life ended tragically. He committed suicide under the pressure and upon the order of Nero. Some data on Antoninus the Pious (after *Scriptores historiae Augustae, Ant. Pius*) are given in Maskin: The History of Ancient Rome, translation, Belgrade, 1969, pp. 396-398.

<sup>53</sup> Organized slave rebellion actions had been more frequent in the previous period, but in this period sources of slavery seem to have been more meager, and there was more understanding on how important slave labour force actually was. We believe Maskin is right when he sees this Antoninus' measure as a symptom of the crisis of slaveholding economy (The History of Ancient Rome, pp. 406), although serious problems regarding the matter would occur about a century later (which is especially well illustrated in Diocletian's Price Edict).

<sup>54</sup> Gaius' Institutions, I, 53, the final sentence.

<sup>55</sup> The Law of XII Tables, V, 7b-7c (see Danilovic – Stanojevic: Texts in Roman Law, Belgrade, 1970, pp.27). Provisions reconstructed after: *Ulpianus: Regulae*, XII, 1-2; *Ulp. D. 27*, 10, 1; *D. 27*, 12, 2-3.

<sup>56</sup> More on this in the paper mentioned Jovanovic, M. – Do Gaius and some other jurists testify of the abuse of rights?, pp. 86-89.

*moventes* that could indeed rebel, first reactions against the cruelty of slaveholders appeared only in Gaius' time. In the text above Ulpian mentioned a situation in which a cruel Roman woman had been banished by Hadrian (AD 117 – 138) because of the molestation of her female slaves, which was indeed a public punishment, the one wanting a deeper analysis. Unfortunately, more relevant data on the event are lacking. Some Roman poets certainly ridiculed the cruelty of mistresses over slaves, but they gave no information on possible penalization; some information on this Hadrian's act is found in the historical novel on the life of this emperor, however the intonation of the explanation is highly ethical.<sup>57</sup> According to the text of rescript and Gaius' additional comparison with custody over spendthrifts, the point here is primarily to prevent the abuse of slaves, whose value, as part of the slaveholder's ownership was very high. Naturally, there is some public interest in this prohibition, too. However, as mentioned earlier, in the time of the pronouncement of this rescript this was not pointed out. This would be done only in Justinian's Institutions where the prohibition became a legal act constricting property rights. The rescript was on the other hand ordained only to prevent the abuse of rights in some particular situations.

In property relations of *mortis causa* there were situations classifiable as abuse of rights. The very constriction of testate (legacy) rights, an important factor of testate freedom, and the introduction of mandatory legacy obligations to the next of kin represented a kind of prevention of the abuse of property rights. Reactions to these situations, through the mentioned acts constricting the amount of bequeathed goods, became full-fledged legal constraints. Apart from these constrictions, testate freedom remained intact, including the freedom of conditioning in general, the condition of widowhood (*conditio viduitatis*), where the legacy was allowed to the widow in case she did not remarry, i.e. if she remained a widow. During the conflict with Augustus' matrimonial legislation *conditio viduitatis* would get the status of abuse of rights. However, even in the earlier period, this institution had been incorporated as a building block of the prevention of the abuse of rights. It is not known when this conditioning practice started, but it certainly did not originate from the oldest times, when marriage was a stable and almost sacred institution, and when woman was very much respected and almost equal to man.<sup>58</sup> In time, in the period of the Republic, the situation changed to the advantage of men. However it seems that marital relations were no longer those of mutual respect in this period, so that legacy to the widow was ever more often conditioned with a request that she did not remarry. This condition was not considered incongruent with legal or moral views, and the woman who had married only once (*unvira*) was very esteemed in society, for, due to the already established domination of men and changed relations between the sexes, it was considered normal that the woman had to be faithful to man even after his death. In the beginning, this condition was imposed by the husband himself, or more

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<sup>57</sup> Yourcenar, M. – Hadrian's Memoirs, translated into Serbian by J. Pavlovic, Belgrade, 1983, pp.118-119.

<sup>58</sup> More on marriage and the position of woman in the first centuries of Rome in Jovanovic, M. – The Position of Woman in the Oldest Roman Law, master's thesis, The Faculty of Law, Belgrade, 1984. Also see Jovanovic, M. – Conclusions des recherches sur la position de la femme dans le plus ancien droit romain, *Facta Universitatis*, Vol.1, no.2, University of Nis, 1998, pp. 157-182. Some conclusions and the list of the most relevant literature are to be found in the study Jovanovic, M. – A commentary on the old Roman *ius civilae*, Volume I, *Leges regiae*, The Faculty of Law, Nis, 2002.

rarely by third parties (probably the husband's agents, who tried to prevent the dissolution of some of the woman's property from the family after her remarrying). In time, however, there seem to have been cases where this condition was breached, for in the time of Quintus Mucius Scaevola (1<sup>st</sup> century BC) it was considered that compliance with conditions should be secured, both of this particular one and of others, all of which were legally expressed in the negative form. This is why after Mucius Scaevola *cautio Muciana* was introduced, according to which the widow, should she remarry, was obliged to make restitution for the legacy received.<sup>59</sup> At first glance already, *cautio Muciana* looked like a constraint on woman's freedom (which among other issues it was). The purpose of this constraint was, however, broader and it might be said to have had the importance of the prohibition of the abuse of law, in two respects. On one hand, if the woman in question was loyal and chaste, the husband was allowed to definitely prevent her second marriage, even if she was young and with no children and not particularly interested in getting any bequest. The widowhood condition, however, did not forbid her a second marriage unconditionally and she could probably remarry and renounce her legacy. But she could have remained unmarried only because of her respect of the late husband. The husband did not breach her right by imposing this condition, but he could have had bad intentions, and could have imposed the condition solely to prevent her from remarrying, even though he was aware that she was not interested in the legacy. In fact, counting on her morality and respect he could also undermine her wishes and prevent her from having a normal life in which, for instance, she could have children in the second marriage. Although it was probably quite rare that a woman was not interested in the legacy (sometimes women regained their original dowry only by means of the legacy), these situations were still possible. And the husband could abuse his conditioning right and cause injustice to the woman. The introduction of *cautio Muciana*, although quite different in character, allowed some freedom to woman; it legally allowed the woman to renounce the legacy and remarry, and such legal allowance naturally loosened any moralistic reins. On the other hand, it was possible that the widow unscrupulously evade the widowhood condition with no consequences, which was certainly the reason to introduce *cautio Muciana*. The evasion of the widowhood condition could have been an instance of the abuse of rights, but until this legal institute was introduced, the behaviour of such a widow had probably been morally condemned, but produced no legal effects. She had the right to remarry, and had acquired the legacy before. As an honest woman she could indeed renounce the conditioned legacy, but the overall decline of morality and ever less harmonious relations between spouses would make the evasion of the widowhood condition much more frequent: in practice, this meant widowhood until the legacy was allowed (and possibly spent), and then – remarriage. For this ultimately immoral behaviour there were introduced reactions in legal practice, and then the legal institute of *cautio Muciana*. The freedoms of conditioning and remarriage remained; in other words neither was the testator forbidden to condition nor was the widow forbidden to remarry. But in both cases, the behaviour (of the testator or of the widow) could be incongruent with the principles of justness, conscientiousness, and honesty. *Cautio Muciana* was passed to prevent such situations. The widow was allowed to remarry with

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<sup>59</sup> D. 35, 1,1; D. 35, 1, 7, etc.



no public condemnation, if she gave up her legacy: and she who tried to evade the will of her late husband was obliged to restitute the goods from the legacy, while her reputation was definitely at stake in such a development.

The situation changed completely with Augustus' caducary legislation where *cautio Muciana* assumed a different meaning.<sup>60</sup> Originally a means to prevent the abuse of rights, in new circumstances it would indirectly become a means preventing the application of certain legal norms, and it would in practice enable the abuse of rights. Augustus' marital legislation (*lex Iulia de maritandis ordinibus* and *lex Papia Popea*, mostly quoted in the sources as *lex Iulia et Papia*) compelled Romans to enter marriages and have legal children. These laws made up an integral whole with the Law against Adultery (*lex Iulia de adulteriis*), whose aim was to restore the old morality, i.e. to suppress the omnipresent libertine behaviour. They are called caducary after *caduca*, the goods which the disobedient were not allowed to inherit. Those assets became "detached" from such persons, and were assignable to those who obeyed the laws and who remarried according to the new legislation (also respecting new marital constraints) and who had offspring. Divorced and widowed individuals were also compelled to remarry, if they had not reached a certain age limit, except in some very rare circumstances. Therefore, after the expiry of the mourning period (*tempus lugendi*), which practically assumed the role of *vacatio legis*, the widow was usually coerced to remarry. But, if there was a widowhood condition imposed on her, after *cautio Muciana*, this widow could lose her previous legacy, which was not very stimulating for the next marriage. Centuries of bequeathal freedoms now collided with Augustus' caducary legislation. At the same time, this whole procedure set up preconditions for the abuse of rights. If the legacy was the only source of income for the wife, the bequeather was now in a position to deny her any possibility to obey the law, by means of the widowhood condition, especially if she had no children.<sup>61</sup> On the other hand, the widow who was not in any financial danger could also call upon *cautio Muciana*, and so evade the legal obligation, and still ask for some rights according to caducary legislation, for there was a justified reason for her not to obey the provisions of such laws.

In this situation, since the long-established testate freedom (i.e. the freedom of management of one's private property) was not to be directly questioned, the official jurisprudence was instituted. Its sentences were obligatory for all, in accordance with *ius respondendi ex auctoritate principis*, allowed to certain jurists by Augustus (and on by other emperors). They prescribed different actions depending on whether the condition had been imposed by a third party or the spouse, and also depending on whether or not the condition was imposed at all. There remained the condition saying that the woman would keep using the legacy allowed "until she remarried", and there also remained the one saying that she should not remarry while her children were still young; however, the condition that forbade remarriage at all, or the one that told her "not to remarry while her children were alive"<sup>62</sup> had to be questioned. If the condition had been imposed by the

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<sup>60</sup> More on this, from a different viewpoint in Jovanovic, M. – Augustus' Matrimonial Legislation (Caducary Laws), doctoral dissertation, The Faculty of Law, Belgrade

<sup>61</sup> More on this issue in the dissertation mentioned above, M. Jovanovic – Augustus' Matrimonial Legislation (Caducary Laws).

<sup>62</sup> D. 35, 1, 62, 2 (*Ter. Clem.*)

third party, this was seen as a typical example of the evasion of the law, and it was considered void (*pro non scriptis*). The way Papian justified such behaviour of the jurists was interesting. He said that the spirit of law was such that the application, rather than hindrance of legal norms was to be favoured, so that in such a respect this provision was unlawful and could be freely deleted.<sup>63</sup> Terencius Clemens, calling upon Julianus, said that the interpretation of law should help this legal act, useful for the state because of more offspring, too, so that the condition *ipso iure* could be considered improper, because it had practically allowed the law to be evaded.<sup>64</sup> The bequeather did not really breach any provision of positive law, because he was not explicitly forbidden to condition, but he acted contrary to the spirit of the law and was unjust to the woman, for the law compelled the woman to remarry (and thus gain some privileges). We could hence say that the testator this way abused testate right (i.e. conditioning right) causing damage both to the woman and to public interest, expressed in caducary legislation. Conditions that way lost their power and a means was found to prevent such behaviour, although the condition formally remained.<sup>65</sup> The whole situation was, however, much more complex and delicate when the spouse was the testator. By a simple deletion of the widowhood condition, the authority of husband over wife would have been seriously shaken, exactly in the time in which Augustus was trying to restore the dignity of marriage. The situation seems to have been so complicated, that even the Senate had to be involved (according to some incomplete information from Justinian's *Codex*).<sup>66</sup> The solution was found in some kind of *beneficio legis* for the widow, on additional condition: remarriage without the restitution of goods from the legacy was allowed (as if the condition had been fulfilled), provided the next marriage was concluded within a year after the end of the mourning period (*tempus lugendi*) and after the oath was given that the remarriage was initiated solely for giving birth to children (*liberorum quaerendorum causa*).<sup>67</sup> The sanctions from caducary laws were formally cancelled by Constantine in AD 320,<sup>68</sup> and the text of Constantine's constitution was copied into Justinian's *Codex*.<sup>69</sup> The final annulment occurred however only in 410, and the constitutions of that year were also incorporated into Justinian's *Codex*.<sup>70</sup> According to one constitution, however, in the West an obligation to the widow to remarry if she was younger than 40 was reimposed.<sup>71</sup> But there are no available data on the cases of widowhood conditioning from the legacies of this period. Justinian pronounced two constitutions in 531 in which he fully annulled *conditio viduitatis*, proclaiming that the surviving spouse was to be allowed the legacy regardless of his or her intention to remarry, and with no oath, however with the preserved 12-month mourning period for women (*tempus lugendi*); but five years later, in 536 he reinstated an act similar to that of the pre-Augustan age.<sup>72</sup> If

<sup>63</sup> D. 35, 1, 28 (*Papinianus*)

<sup>64</sup> D. 35, 1, 64 (*Ter. Clem.*)

<sup>65</sup> D. 35, 1, 100.

<sup>66</sup> C. 6, 40, 3, 1.

<sup>67</sup> D. 35, 1, 74.

<sup>68</sup> C. Th. 8, 16, 1.

<sup>69</sup> C. 8, 57 (58), 1.

<sup>70</sup> C. Th. 8, 17, 2-3; C. 8, 58 (59), 1-2.

<sup>71</sup> More on this in Astolfi, R. – *La lex Iulia et Papia*, Padua, 1986, pp. 44, no.65.

<sup>72</sup> C. 6, 40,, 2; C. 6, 40, 3; *Novellae Iustiniani*, 23, 43-44.

the surviving spouse entered a new marriage within less than a year, he or she would lose their legacy. The explanation behind this provision was that within this year one was to carefully consider the option of a new marriage. If a new marriage was not entered within this period, one could get the legacy, but it would still be lost if the new marriage was entered at a later time.

In classical Roman law there were also examples of the abuse of family rights. Actually, again related to Augustus' matrimonial legislation, according to some data, there were many examples of the evasion of legal provisions. These actions contained elements of both abuse and breach of law. Augustus' laws demanded that Romans enter marriage, and (with some additional restrictions unknown to previous laws) that they have legal children. Submission to these laws gave many advantages in the sectors such as property law and to an extent public law. For example, in public appointments, some preference was given to candidates who were married and had children (*patres*). They were followed by the married ones with no children (*orbi*). Only if there were no candidates from the first two groups could the unmarried ones with no children (*celibates*) be appointed. Along with natural children, adopted children were accepted, too. There are testimonies, however, for instance from Suetonius' work or Tacitus' *Annals*, that there indeed was evasion of legal regulations, both by means of the right to marriage and divorce and by means of child adoption. There were instances of marriages entered only for the sake of appointment, after which divorces were settled. There indeed was the right to divorce, but in some cases there was also evasion of laws, by abusing the right to marriage and divorce. In the biography of Tiberius, Suetonius testified of such one-day long, simulated marriages.<sup>73</sup> And from Tacitus' *Annals* one learns of fraudulent child adoptions; i.e. children were adopted only for the citizens to gain the adopter status, after which the children were practically deserted.<sup>74</sup> There are however not enough reliable data on ways to prevent such behaviour, even though we know for sure such actions were publicly discussed in assemblies and in the Senate. These issues certainly deserve more attention than here possible, although for the aim of this paper even that is not necessary, since a single example to follow shortly will suffice to illustrate the point. One ought to mention, however, that in Justinian's *Institutions* (when Augustus' laws had long lost legal power) there was a possibility that the adopter return the funds to his adopted son once the latter became emancipated. Also, if the adopter disinherited or emancipated his adopted son for no good reason, he was obliged to allow the son a quarter of his own assets, plus everything the adoptee had brought or earned himself.<sup>75</sup>

A typical example of the abuse of family rights could be found in a fragment from the works of the jurist Marcian. The fragment is not fully preserved, and the remaining text seems quite incongruent, which provides room for different interpretations. There is no question however about the essence of this institute and its prevention of the abuse of rights. As in the widowhood condition, the matter is again about the conflict between the

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<sup>73</sup> Suetonius Tranquillus: *Twelve Roman Emperors, Tiberius*, 35, translated by Hosu (*Suetonius Tranquillus: De vita caesarum*), Zagreb, 1978.

<sup>74</sup> Tacitus: *Annals*, XV, 19, translated by Crepajac (*Pub. Corn. Taciti: Ab excessu divi Augusti – Annales*), Beograd, 1970.

<sup>75</sup> *Inst. Iust.* 1, 11, 3, translated after Bakotic.

long-established practice and the spirit of Augustus' caducary laws.<sup>76</sup> For sons and daughters to marry, which was demanded from Romans under Augustus' reign, the father's consent was still necessary, as before. In other words, the compliance of *pater familias* was still mandatory for persons to enter a marriage. This had been an important segment of paternal authority (*patria potestas*) ever since the oldest times. Actually, this was an almost unquestionable right of the father, with no legal constraints. Naturally, this does not mean that, especially in the earliest Roman history, there were no moral, religious, and customary constraints, nor the profound influence of public opinion.<sup>77</sup> However, strictly legally speaking, there were no constraints on the power of the father. Therefore, it depended on the father's will in which cases a consent to a marriage would (or would not) be given. Although some time close to the end of the Republic there had already been established a custom that future spouses should explicitly personally express their willingness to enter the marriage, the father's consent remained an important factor in the procedure. With his own times in mind, Paulus said on this matter: "A marriage will not be declared without the consent of all, both those entering marriage and those under whose authority those entering marriage are."<sup>78</sup> The big power given to *pater familias* on this matter seems to have remained during the entire history of Rome. In *Institutions* (around AD 160) Gaius said on the authority of fathers: "In our power are also our legal children. This right is characteristic of Roman citizens; hardly anywhere are there people with so much power over their children as us. This was pronounced by the divine Hadrian in the edict issued because of some who demanded for themselves and their children the status of citizens of Rome, although I do not forget that in Gaul children are also ruled by parents."<sup>79</sup> The almightiness of *pater familias* is usually related to the oldest period of Rome, where there had been a domination of the restricted household economy, and where family members were mutually very much interdependent. This might appear so from the legal aspect. However, from the viewpoint of real life one could not claim that the head of the family in the earliest period was so absolutistic, as many would later suggest.<sup>80</sup> One should rather claim that his despotic

<sup>76</sup> More on this issue in the dissertation Jovanovic, M. – Augustus' Matrimonial Legislation. Some aspects to be found in the mentioned paper from the Proceedings "The Abuse of Rights" and the paper on the abuse of rights from the Proceedings of the Faculty of Law in Nis, 1994-1995.

<sup>77</sup> On constraints on the power of *pater familias*, in a condensed, but very informative form, see: Stojcevic, D. – Roman Private Law, Belgrade, 1969, pp. 67-69. More on old religious and customary norms limiting the obstinacy of any family member, see Des Coulanges, F. – The Ancient City (*La Cite antique*), translated after Prokic-Milosavljevic, Belgrade, 1956. Some aspects of old relations, along with the interpretation of corresponding provisions from the Law of Twelve Tables have been touched upon in the papers by M. Jovanovic: Enigma regarding the evasion of manus in accordance with the law of XII tables, presented at the International Congress of Romanicists and Historians of Ancient Law (S.I.H.D.A.), Madrid, Spain, September 1998; Roman Law and the Serbian family of the 19<sup>th</sup> century, paper presented at the Congress of Romanicists of Central and Eastern Europe and Italy, Rome, Italy, December 1998; Tutorship on women in accordance with the law of XII tables, presented at the Congress of Romanicists of Central and Eastern Europe and Asia, Novi Sad, Serbia, October 2002. The procedure of inheritance from the Law of XII tables, from the aspect of the position of woman, was touched upon in the paper by M. Jovanovic : A historically relevant fragment for the status of woman (Inst. Iust. II, 13, 5), paper presented at the International Congress of Jurists ("Contemporary Law, Legal Science, and Justinian's Codification"), Skopje and Ohrid, Macedonia, October 2003.

<sup>78</sup> D. 23, 2, 2 (*Paulus*)

<sup>79</sup> *Gaius: Institutiones*, I, 55 (translated after Stanojevic, pp. 45).

<sup>80</sup> A concise overview of the constraints on paternal power, with an accentuation of the legal norms in Stojcevic:

nature developed at a later stage, once moral, religious, and customary norms had loosened. In the changed social and political circumstances, such legally unconstrained authority could indeed be abused, both in generally and in terms of consent that was necessary to some marriages. Marcian, who wrote after Gaius, possibly testified on this matter too: he wrote of an "unjustified" denial of consent to a marriage (still, calling upon Augustus' laws).

According to this fragment preserved within *Digesta*, Marcian literally said: "In accordance with the thirty-fifth chapter of *lex Iulia*, the one who unjustifiably disallows the children under his authority to marry, or who refuses to allow dowry according to the constitution of the divine Severus and Caracalla, he shall be coerced by the proconsul and provincial governor to allow such marriage and the dowry. The one who does not demand marriage (does not tend to marry [his heirs]) is also considered to be preventing marriage."<sup>81</sup> At the first glance already the fragment seems rather incongruous, which makes many Romanicists uncertain about it, an issue we cannot further discuss here.<sup>82</sup> It is almost certain that the text had been more detailed before, and that compilers abridged it, incongruously pasting the part referring to *lex Iulia* (after which the jurisdiction on these matters was allowed to the *praetor urbanus*) to the part from the constitution by Severus and Caracalla, probably pronounced in AD 211 (where the jurisdiction of provincial authorities was not mentioned). One should keep in mind that after *constitution Antoniana* of AD 212 citizenship was allowed to most Roman subjects, and the constitution above had probably regulated the extension of the application of Augustus' legislation to the "new" citizens, where the jurisdiction of provincial magistrates was pointed out in case there were any controversies. The compilers, however, abridged the text from *lex Iulia*, deleted the provisions on the institution in charge, and pasted to this a part of the constitution by Severus and Caracalla. Some authors suggest a bit different text reconstruction, which might be closer to the original. However, this is an issue we cannot look into here. As it may be, it is clear from the text, and relevant to this paper, that the "unjustified" refusal to consent to a marriage was disallowed, and that after *lex Iulia* and the constitution mentioned, the state body was in a position to coerce this individual to consent. This might also mean that in practice there were family heads who did not comply with Augustus' laws. Actually, from the data on Augustus' time, and on Augustus himself, it is certain, at least as far as higher social strata were concerned, that there were numerous politically motivated marriages, and that

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Roman Private Law, Belgrade, 1969, pp. 67-69. See also papers from above: M. Jovanovic: The Position of Woman in the Oldest Roman Law; A commentary on the old Roman *ius civile*; Volume I, *Leges regiae*; also in Jovanovic, M. – Rome of the age of Romulus, patriarchal or matriarchal?, *Proceedings of the Faculty of Law, Nis*, 1995; Jovanovic, M. – Some aspects of the position of woman in accordance with the Law of XII tables, *Proceedings of the Faculty of Law, Nis*, 1999, etc.

<sup>81</sup> D. 23, 2, 19 (*Marcian*), translated after the Italian translation by Astolfi: *La lex Iulia et Papia*, Padua, 1986 (2<sup>nd</sup> edition), pp.142.

<sup>82</sup> After the data from Astolfi: *La lex Iulia et Papia*, pp. 144, n. 10, and pp.145, no.11, Morio proposed the following reconstruction of Marcian' text: "According to the thirty fifth chapter of *legis Iulie* those who have children and grandchildren under their authority and they unjustifiably disallow these heirs to marry, or who refuse to give dowry, will be coerced, by the city praetor or after the constitution of the divine Severus and Antoninus, to allow the marriage and provide dowry; the one who does not demand marriage is considered as forbidding the marriage, too." A broader commentary is given in the same book by Astolfi, and there is a short overview of the issue in Jovanovic, M. – Does Marcian testify of the abuse of rights?

fathers often arranged for marriages themselves, not paying much attention to their children's wishes. August himself married his daughter and granddaughter to his own choice. He also made Tiberius' stepson divorce and married him to his own daughter Julia.<sup>83</sup> Along with the right to marry and divorce their children, fathers of the family were also able to prevent a marriage, which was contrary to the spirit of Augustus' legislation, which demanded that citizens should get married and have offspring. Due to the fact men consistently opposed the adoption of such laws, there might have been situations in which fathers and sons conspired to evade laws; however, there also could have been situations in which the father disallowed the marriage, regardless of his son's (or daughter's) will. Dowry was also mentioned in the text, since this was a long-established institution, such that it duly followed in the footsteps of any newly-settled marriage.<sup>84</sup> Not allowing dowry was almost equal to not allowing the marriage. It is interesting that there is an additional provision, claiming that even the one who "does not demand marriage" (i.e. does not 'tend' to the marriage of his children) was treated equally to the one disallowing marriage. One concludes from this that Augustus wanted to practically force parents to try harder and marry their children (probably specifically their sons).

The situation presented above is specific and rather complex to interpret. Since there was an explicit legal regulation and the general obligation to marry in the very same legal act, it is not easy to here distinguish between the abuse of law and the indirect breach of law, i.e. the violation of other persons' rights. However, considering the character of paternal power, the situation cited above could be treated as the abuse of rights. The goal of the legal regulation was generally to make citizens obey Augustus' matrimonial legislation, in order to both accomplish the prescribed legal provisions and serve in the best interest of sons and daughters, who gained some privileges upon marriage, and were deprived of the same privileges as *celibes*. This did not cancel the father's right to give consent to the marriage of his children. In fact not a single provision limited the father of a family his right to consent to the marriage. However, his possible unconscientiousness was in a way penalized. Even though there might have been cases before in which fathers had not much tried to marry their sons and daughters, it was only after Augustus' laws that such behaviour became treated as unconscientious and practically disallowable. The fragment did not call such behaviour ill-intended (*malitia*), but unjustified, as most Romanists translate the word *iniuria* in this context.<sup>85</sup> The translation such as "unjust" or "harmful" would be as adequate in the context of a behaviour which contradicts the principle of conscientiousness and honesty, i.e. justness. Naturally, justness was here treated from the point of view of caducary laws, whose purpose was to achieve certain demographic goals. This is old family law of a specific character, a kind of sanction, also of a specific character: a kind of coercion to a certain pattern of behaviour. One could say here that the abuse of rights ultimately consists in the absence of the exercise of rights:

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<sup>83</sup> As testified by Suetonius (*De vita caesarum Augustus*). Some data were also given by Tacitus (*Ab excessu divi Augusti*). A short discussion is also given in the author's dissertation M. Jovanovic: Augustus' Matrimonial Legislation.

<sup>84</sup> On the history and character of the dowry, see Gide, P. – Etude sur la condition privée de la femme dans le droit ancien et modern, Paris, 1885, pp. 449-543 (Du caractère de la dot en droit romain).

<sup>85</sup> On translation dilemmas and differences see Astolfi, R. – La lex Iulia et Papia, 2<sup>nd</sup> revised and extended edition, Padua, 1986 (1<sup>st</sup> edition 1970), pp. 142 and further.

for "unjustified" denial of consent to marriage has the significance of not exercising rights. There is actually an explicit provision saying that the lack of interest in marrying one's children is to be treated as one's unjustified noncompliance. Considering the nature of father's rights from the very beginning, this formulation, apart from the empowerment, naturally inheres an obligation: to conduct this matter regularly and purposefully. The exercise of these rights enabled individuals subjected to family fathers to marry, which was, according to Augustus' laws, the interest of society, the family, and the future spouses. Within the traditional set of father's rights, this obligation had nowhere been explicitly prescribed, but it went without saying, along with the nature of law (previously along with the nature of customary or moral provisions). With caducary laws this obligation was emphasized and in practice got legal importance. If these rights were not exercised, which was the practical outcome of the father's refusal to comply with the marriage of his children (even more so, since the father's inactivity was also regarded as noncompliance), the father disabled his subordinates to act in accordance with legal provisions, the compliance with which would both make these individuals obey the law and obtain some personal benefit. Thus, by not exercising his rights, the father prevented some other persons from exercising their rights, from gaining certain benefits and from fulfilling their legal obligations. With this new coercion to exercise rights, the father's rights were not cancelled, not even seriously constrained, but his possible obstinacy or negligence in the exercise of his rights (i.e. the unjustified lack of exercising his rights) were restricted; for the father abused his rights if he did or did not exercise those rights in a particular way, harming both his children and some public interests, expressed in caducary legislation. Without a more detailed research it would be difficult to estimate how many particular cases of these restrictions there were in the three centuries in which Augustus' laws remained valid. However, it is quite certain that through these laws a principle of the prohibition of the abuse of rights was instituted (although not explicitly defined), a century and a half before Gaius uttered his famous rule: *Male enim nostro iure uti non debemus*. And two centuries after Augustus, the principle was reiterated in an imperial constitution, i.e. it was extended so that it could be valid for the corresponding situations in the provinces, too. The proclaimed principle was retained later on, certainly with a reason.

The text quoted above, in the final form published in *Digesta*, was undoubtedly somewhat awkwardly abridged, and thus seems clumsily worded and causes numerous uncertainties in modern authors. To the codification commission, however, it sounded quite clear for the principle they wanted to emphasize. For their goal was not to write a history of law (although this is what they up to a point did, fortunately), but to collect and sort texts that would serve as valid sources of law. One should recollect that from Augustan age, when this prohibition was instituted, to Justinian's age, when the text was abridged, the state organization changed a lot, and the centre of the world moved to Constantinople. However, the compilers of *Digesta* thought that the cited text (where the prohibition and its sources were listed) should be incorporated into the Codification, by which process the law preserved its legal power, but in a more general way, by emphasizing the principles of the prohibition of the abuse of rights; for we know that by the time of Justinian all matrimonial legislation had become almost fully void (except for some actions forbidden to married persons), while sanctions for celibates and orbes had been explicitly given up as early as in 320, by means of a Constantine's constitution, later

on taken over by *Codex Iustinianus*. Therefore, there was no longer any legal coercion to enter marriage, but the text in question was still kept as legislation. That which was considered inadequate or unsuitable in Justinian's age was either explicitly rescinded, or simply left out of the Codification, such as for example *SC Claudianum*, which had once draconically punished the woman if she had an intercourse with someone else's slave (she would become a slave to this slave's master herself).<sup>86</sup> Constraints on parental power, however, seemed more acceptable in this age, due to the character of this power. For Justinian's Institutions almost literally reiterated Gaius' remark (from Institutions) on authority over children: "The authority we have over our children is a trait of citizens of Rome, for there are not other peoples in the world who hold children in such power as we do."<sup>87</sup> This coincides with Marcian's fragment incorporated into Digesta which claims that sons, born or adopted, cannot in any way force their fathers to release them from parental power.<sup>88</sup> However, under the same title names and texts of Papinian and Ulpian were also mentioned. According to these the underaged adopted son, upon coming of age, if he had "a strong reason", had the right to appeal to the court and ask for emancipation and release from the paternal authority of his adopter.<sup>89</sup> It is quite possible that these provisions also applied to the cases of abuse of paternal rights over the adoptee, or the abuse of adoption rights in general, which was, according to some data, in Tiberius' age especially abused for gaining privileges via *ius liberorum*.<sup>90</sup> Until the time of Justinian, however, *ius liberorum* had practically vanished, already in Constantine's constitution of 320 mentioned above, and it was eventually explicitly discontinued (through the statement that this freedom was allowed to everyone) in Honorius' and Theodosius' constitution of 410.<sup>91</sup> Therefore, there were no more privileges to be gained over children, but the text above probably remained, among other issues, in order to prevent the abuse of rights, perhaps the son's right to marry, too. In the particular case of compliance with the marriage, Institutions called upon a previously introduced constitution and claimed that children of mentally incompetent fathers were allowed to marry without parental consent.<sup>92</sup> A similar provision had been valid for daughters before, and here this right was given to sons, too. Therefore, there were provisions protecting children when their father was unable to exercise his rights, and when children were unable to free themselves of his power. Hence the issue here was not that rights were unjustly exercised, but that there was inability to exercise one's rights, which harmed other persons. As for not exercising rights, there is an interesting provision from

<sup>86</sup> In Institutions (I, 30, 14) it is said that such a provision was not suitable for the time of Justinian, and was therefore not incorporated into Digesta. On this and some other aspects of the position of woman according to Justinian's Institutions see Jovanovic, M. – A historically important fragment for the status of woman, presented at the International Congress in Skopje and Ohrid, Macedonia, October 2003.

<sup>87</sup> Inst. Iust. 1, 9, 2, translated after Bakotic.

<sup>88</sup> D. 1, 7, 31 (*Marcianus*)

<sup>89</sup> D. 1, 7, 32 (*Papinianus*); D. 1, 7, 33 (*Marcianus*)

<sup>90</sup> This issue has been covered earlier. On *ius liberorum* see Astolfi: La lex Iulius et Papia; see also Jovanovic: Augustus' Matrimonial Legislation, summary given in Jovanovic, M. – The famous Roman *ius liberorum*, Proceedings of the Faculty of Law, Nis, 2000-2001, pp.64.

<sup>91</sup> C. Th. 8, 17, 3; C. 8, 58 (50), 1 and 2. More on this in the dissertation M. Jovanovic, pp. 162; see also Jovanovic, M. – The constitution of emperor Constantine on celibates and the childless, Proceedings of the Faculty of Law, Nis, 2002.

<sup>92</sup> Inst. Iust. 1, 10.



the Introduction to Serbian Civil Legal Code (SGZ): "The law will see to it that the rights should cease and vanish when they are not exercised for a long period thus causing harm to the other."<sup>93</sup>

In conclusion, we could simply agree that Roman law undoubtedly knew of the principle of the abuse of rights, and that sources testify of this institute in a number of places. Although there was no separate theory of abuse and no legally proclaimed general principle of the abuse of rights, legal prohibition of this abuse appeared as early as in Augustus' legislation. Gaius defined the general principle, and after accepting the works of jurists as sources of law, this principle assumed legal power, practically before Justinian. It was built up through legal practice in general, judiciary practice at most, through the application of the proclaimed principles of *aequitas* and *bona fides*. The prohibition from Augustus' law and Gaius' definition of principles were incorporated in Justinian's Codification. And by means of the principles of *aequitas* and *bona fides*, emphasized at the very beginning of Digest and Institutions, by means of which the principle of prohibition of the abuse of rights was also implied, the judiciary was allowed to take notice of the abuse of rights in particular instances, and to prevent such abuse by applying the principles above.

Finally, how is one to act today, what answer to the question from the beginning of the paper can we offer? With the current stage of the abuse of rights theory and the corresponding rich judiciary experience, have all issues been solved? As R. Kovacevic Kustrimovic points out "not all issues pertaining to the abuse of rights are closed. To the contrary, some have remained unclear since before, and some are being imposed by contemporary social progress... The modern era has unfortunately not made the prohibition of rights abuse redundant. True, modern legal science itself has not been able to make a significant advancement related to this principle. However, we can undeniably hold that abuse has broadened its scope, thus eating into the entire legal system. Where an act containing explicit prohibitions of certain kinds of behaviour appeared, the abuse of rights would quickly submerge, only to appear in unexpected places in other areas. From the sphere of private law where numerous absolute subjective rights were constrained, as time passed, abuse found its way to the realm of public law. This induced a question – was the abuse of rights principle from private law still valid, or was it impossible in the public law realm?"<sup>94</sup> Not going into the very complex realm of public law, since this is not the subject of this paper, we could only conclude that the abuse of public rights has been present in almost all history, and that the principle prohibiting the abuse of public authority is much older than many think.<sup>95</sup> After all, until recently, the position prevailed

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<sup>93</sup> Civil Legal Code of the Kingdom of Serbia, official issue, Belgrade, 1891, introduction, B, art.35 (pp.11).

<sup>94</sup> Kovacevic – Kustrimovic, R. – The domain of the application of the abuse of rights principle, Proceedings "The Abuse of Rights", from the International Conference on the Abuse of Rights, the Faculty of Law, Nis, 1996, pp. 17-30.

<sup>95</sup> Some issues of the abuse of public authority have been treated by a number of authors in the Proceedings "The Abuse of Law", the Faculty of Law, Nis, 1996, pp. 205-301. Thematically very interesting is the paper mentioned above by M. Petrovic – The abuse of supreme authority (state sovereignty), pp. 215-229. As for the history of the abuse of public authority an interesting discussion is found in M. Kulic, The abuse of official position felony in Roman state. "It is supposed that certain abuses developed from the constitution of responsibility, and from the official statements of Roman public officials after the end of their service" (pp. 256 of the Proceedings).

that the principle of the prohibition of the abuse of rights had been unknown to ancient peoples. The problem today, however, is to find the way to prevent various types of private rights abuse, for life is, obviously, much more complex than any law is able to define. Thus, it is not possible to legally foresee all the possible instances of abuse. The only solution available seems to be to define the general principle. In that sense, V. Vodinelic says: "If in a legal system the abuse of rights is defined as a general legal principle, then it is possible – by means of concretization – to derive prohibition from all not explicitly forbidden types of abuse. This is possible, necessary, and has been achieved in many systems already. This is the case in our country too, even though our law does not contain an explicit principle of the prohibition of the abuse of rights..."<sup>96</sup> It is beyond doubt that the future Civil Legal Code should also contain the principle of the prohibition of the abuse of rights. Naturally, this general principle cannot solve all problems. As R. Cvetic points out "there is no single criterion to answer the question when the legal system should deny protection to the particular act of exercising a subjective right, in cases where this right has been abused or unlawfully exercised. Nor can this legal problem be solved by passing indefinite general principles and provisions as measures. On the other hand, no matter how useful the casuistic approach might be, in its determination of the typical instances of abuse, it certainly lacks the necessary general nature, which would inhere all-inclusiveness and groundedness in principles. Such a problem can only be solved by means of cooperation between legislative and judiciary power. The general prohibition of rights abuse should exist, but it should be left to the court to reach its verdict within the legal system, coercive acts, good manners, and moral customs in the particular case, by rationally combining the intention to bring harm, the lack of justified interest or goal, the controversial behaviour, guilt, dishonesty, and lack of conscientiousness."<sup>97</sup> The author is right to propose such a solution, although it is not very attainable in the present Serbian circumstances. However, it is useful and necessary to list criteria stemming from the practice of the prohibition of rights abuse in the provisions of particular branches of law. Still, before all, it is necessary to define a general principle of the prohibition of the abuse of rights, via Civil Legal Code, which should reassert, explicitly and emphatically, the principles of *aequitas* and *bona fides*. In addition, in defining these principles, in some general manner, more freedom should be given to judges when they assess their breach in practice, in real life, since life always gives birth to new situations, not explicitly defined in regulations. That is, these principles should not be too strictly limited, the way Justinian limited his regulations to the strict application only of that which was written.<sup>98</sup> In this process, naturally, special attention should be paid to the education, choice, and practical work of judges, who should be allowed enough independence, and of whom enough competence, enough professional skills and ethical qualities should be expected, too, such that they could guarantee the faith in the judiciary and the reification of the principles of *aequitas* and *bona fides*. Perhaps a general remark should emphasize, the way Romans did, that there is

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<sup>96</sup> Vodinelic, V. – Concretization of the prohibition of the abuse of rights, Proceedings, "The Abuse of Rights", pp. 39-69.

<sup>97</sup> Cvetic, R. – Criteria to determine the abuse of rights, Proceedings "The Abuse of Rights", pp. 71-77.

<sup>98</sup> Some observations on this matter in the paper mentioned Jovanovic, M. – Legislation between *aequitas* and *prohibitio* in Justinian's age (a sketch of a broader overview)

something divine in the profession of a judge, which should naturally be confirmed in practice. In other words, the thought based on the text of Justinian's Institutions should somewhere be incorporated, the thought that says that "no judge should ever forget that justice is not a plain matter, but should remember that it is on the verge of the divine."<sup>99</sup>

## **AEQUITAS I BONA FIDES U PRAVNOJ PRAKSI ANTIČKOG RIMA I ZABRANA ZLOUPOTREBE PRAVA**

**Mila Jovanović**

*Predmet ovoga rada je kratak osvrt na principe aequitas i bona fides u pravnoj praksi antičkog Rima i analiza nekoliko primera sprečavanja zloupotrebe prava, baziranog na primeni ovih principa. Cilj rada je sugestija zakonodavcu da se, uz posebno naglašavanje zabrane zloupotrebe prava, u budućem Građanskom zakoniku Srbije (na čijem se projektu trenutno radi) istaknu principi pravičnosti, savesnosti i poštenja i da se dopusti sudijama veća sloboda u primeni ovih principa, radi uspješnijeg sprečavanja zloupotrebe prava u konkretnim slučajevima, brojnijim no što se to može zakonski izraziti. Pri tom se podrazumeva kompetentnost sudija, njihova stručna i etička doraslost zadatku u vrlo složenim srpskim prilikama. Na kraju rada se iznose dileme i mišljenja nekih autora u pogledu načina sprečavanja brojnih današnjih vidova zloupotrebe prava. Zatim se daje odgovor na pitanje s početka rada, odnosno zaključuje se da treba sudijama dati više slobode u primeni principa aequitas i bona fides, radi što uspješnijeg sprečavanja zloupotrebe prava (posebno novih vidova, koji se možda ne mogu zakonski predvideti). Pri tom se iznosi stav da bi možda, poput starih Rimljana, trebalo i danas naglasiti kako sudska primena prava podrazumeva poštovanje pravde i da u pravdi ima nečeg božanskog; a to bi značilo, uz naglašenu odgovornost sudije, težnju ka što većem približavanju pravde i prava.*

**Ključne reči:** *Građanski zakonik Srbije (projekat); antički Rim, klasično i doba Justinijana; pravna praksa; aequitas i bona fides; zabrana zloupotrebe prava.*

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<sup>99</sup> Stanojević, O. – Roman Law, Belgrade, 2001, pp. 113.