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Law of Obligations

GLOBAL LAW AND TRANSATIONAL LEGAL STUDIES

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A Brief Survey on The Extintion of Obligations

1. Fulfilment

We define an obligation as "extinguished" when such obligation is not effective anymore because of some act or fact legally relevant in this sense. Nowadays, the concept of extinction is mostly connected to the concept of fulfilment of obligation, where fulfilment consists in accomplishing the task included in or in behaving accordingly to the content of the obligation itself. On the contrary, according to the general consensus among Romanists, Roman archaic law was ruled by the principle of "Formalkorrespondenz", namely of "formal correspondence" or "formal matching". Thus, obligations could be extinguished not by mere fulfilment, but also the accomplishment of a legal act was needed, whose form had to be, at the same time, both the same of and opposite to the act that created the obligation.

This principle can be easily inferred by the following remarks:

- archaic law included only two legal acts with obligatory effects, namely *sponsio* and *nexum*;
- there were two legal acts with extinctive effects, namely *acceptilatio* and *solutio per aes et libram* (see under), whose form was actually at the same time both the same of and opposite to *sponsio* and *nexum*.

However, fulfilment (*solutio*, in Latin) started to be considered as the main modality by which an obligation could be extinguished (without any need of entering into a further specific legal act) already in the Republican age; at the same time, the number of sources of obligations increased. Both events lead to the creation of new rules for fulfilment, which could be applied only if the parties had not agreed otherwise.

These rules can be summed up as following:

1. **fulfilment had to be "exact"**, namely, it should concern exactly the kind of conduct or behaviour on which the parties agreed as way of fulfilment (for example, if you have promise to give a horse, you do not fulfil the obligation by giving a cow);
2. **fulfilment had to be "total"**, namely, it should concern the whole content of the obligation (for example, if you have promise to give ten, you do not fulfil the obligation by giving five; and please notice that partial fulfilment could be discounted from the total only if the creditor expressly agreed to, which means creditor had the right to refuse payment if it was not total);
3. **fulfilment could be required immediately**;
4. **fulfilment could be required at debtor's residence**, namely, debtor could refuse to fulfil the obligation in any other place than his residence if not otherwise agreed with the creditor.

As already mentioned, these rules could be easily derogated by a different agreement between the parties. Even in the case under 1), a "non-exact" fulfilment could be considered as valid (so, it could have extinctive effect) if the creditor agreed on it. This was called "*datio in solutum*" in Latin and was admitted as a way of extinction of obligations.

Rules about the person who could legitimately fulfil the obligation or receive such fulfilment were complex. First of all, we must remember that obligations were conceived as a "legal bond" between two (or more, in rare cases) people. This gave originally a "personal" connotation to obligations; debtor could not fulfil the obligation to anybody else than the creditor; the creditor could not ask for the fulfilment to anybody else than the debtor.

In reference to fulfilment to the only person of the creditor, this principle was, however, interpreted in the light of the Roman legal system as a whole, which implied, for instance, that obligations could be fulfilled to the slave or the *filiusfamilias* of the creditor, if he authorized such slave or *filius* in this sense, or that obligations could be fulfilled to the tutor, if the creditor was an *inpuber*, or to the curator, if the creditor was a furiosus, and so on. Also, in the case of *stipulatio*, the obligation could be fulfilled to the adstipulator or to the *adiectus solutionis causa*.

On the other side, only a few exceptions were admitted to the general rule that the creditor could ask the fulfilment of the obligations only to the debtor, and these exceptions mainly regarded cases of personal security or other minor cases. Nonetheless, it was probably admitted already in a very ancient age the possibility for the debtor to fulfil the obligation by way of a third party, beyond the ordinary cases referring to slaves, *filiifamilias* etc. Admissions regarded firstly all obligations having as content the giving of a sum of money, as it was considered irrelevant whether the creditor obtained such money as fulfilment of the obligation directly from the debtor or from somebody else; in this sense, we can also remember the procedure of *manus iniectio*, where a third party could redeem the debtor by paying his debt. The same standard was then applied to cases in which fulfilment consisted in giving something different from money, both if it was a fungible and a specific thing. Obligations regarding a *facere*, though, were always considered differently; these usually implied either specific skills or capability in the debtor, or a juridical relationship founded on *fides* (trust) or *amicitia* (friendship), or both; thus, the debtor was considered the only one who could properly fulfil the task given to him.

Fulfilment could consist, according to general rules, either in giving something (*dare*, in Latin) or in doing something (*facere*, in Latin). Legal sources also mentioned another Latin verb, which is *praestare*. This seems to have referred originally only to personal securities. In progress of time, the verb was used with a rather general meaning, referring mainly to fulfilment itself, regardless of if it consisted in giving something, doing something or giving security for somebody.

2. Other Modalities of Extinction

The Roman law system admitted, beyond fulfilment, many other modalities by which an obligation could be extinguished. Such modalities could be distinguished in **modalities *ipso iure*** (the obligation was extinguished automatically, because of the ius civile), **modalities *ope exceptionis*** (the obligation was extinguished because of an *exceptio* given by the Praetor), and **modalities *ope iudicis*** (the obligation was extinguished because of the final condemnation, so it was due to the *iudex*, the judge). There is one only modality *ope iudicis*, namely compensation (as we will see, the word 'compensation' has in Roman law a very different meaning from the ordinary meaning of '*reinbursement*' or '*restoration*' given to the word in the AngloAmerican world).

The following extinctive modalities are the most relevant:

- *Solutio per aes at libram*

The *solutio per aes et libram* was originally a sort of ritual payment of the debt. As *mancipatio and nexum*, it required the use of a scale and a quantity of bronze, which was needed for payment (after money was coined in Rome, only a symbolic coin was needed). Five Roman citizens who had reached puberty had to be present as witnesses, together with the creditor, the debtor and the *libripens* (the man who held the scale). The debtor had to declare formally that he set himself free; at the same time, he put the metal or threw the coin on the scale. In the archaic age (before coinage), the metal was weighed by the *libripens* and then given to the creditor; after coinage, the coin was given by the debtor to the creditor, as a symbol. As we have already mentioned when we described the theory of the "formal correspondence", the *solutio per aes et libram* extinguished mainly the obligation arising from *nexum*, but it was also used for extinguishing the obligation deriving from the *iudicatum* (and also of a kind of *legatum* with obligatory effects, called *the legatum per damnationem* – but this course does not include the law of succession, so we can avoid entering into details). It operated *ipso iure*.

After fulfilment began to be considered as a proper modality of extinction of the obligation, and after *nexum* was abrogated, the *solutio per aes et libram* was still applied as an "imaginary fulfilment", as Gaius notoriously wrote. Thus, obligations deriving from the *iudicatum* or from the *legatum per damnationem* could be extinguished by *solutio per aes et libram*, by such avoiding real payment.

- *Acceptilatio*

Acceptilatio was the legal act by which obligations arising from verbal contracts (first of all, from *stipulatio*, but also from *promissio iurata liberti* and *dotis dictio*) could be extinguished. It was constituted, as *stipulatio*, of a question and an adequate answer, according to the following pattern: the debtor asked "Have You received what I promised?"; the creditor answered "Yes, I have received it". Also *acceptilatio* operated *ipso iure*. After fulfilment became the proper modality of

extinction, *acceptilatio* also was applied as an "imaginary fulfilment", and in a more massive way than the *solutio per aes et libram*. This gave way, during the Principate, to a new interpretation of the law. Thus, an *acceptilatio* applied to non-verbal obligations, which was considered as void according to ordinary principles, was also considered at the same time valid as an informal pact, and, as such, it operated *ope exceptionis*, according to the general rules of pacts.

- *Pactum de non petendo*

The creditor could promise, by way of a simple informal pact (called '*pactum de non petendo*'), that he would not have asked the fulfilment of the obligation. This pact would have worked *ope exceptionis*, because of the *exceptio pacti conventi* given by the Praetor in every case of pact. Only in case of theft and *iniuria*, such pact, being mentioned by the Twelve Tables as a way of extinguishing the obligation arising from such delicts, would have worked *ipso iure*.

The same ***pactum de non petendo*** could be applied in case of *transactio*, namely in case the parties decided to sort out a litigation by way of contracts or other legal acts. In such case, each party would have renounced to some claim or attributed some right to the other party. Renunciations could be done by pacts; attributions could be done directly by legal acts with real effects (*traditio, mancipatio, in iure cessio*) o by contracts with obligatory effects (usually with *stipulatio*). Therefore, *transactio* was not considered as a kind of legal act, but as a possible cause of an abstract legal act. In late antiquity, *transactio* started to be considered as a proper innominate contract, for the defence of which the *actio praescriptis verbis* was given.

- *Novation*

The novation ('*novatio*') consisted in the replacement of an old obligation with a new one, in such a way that the first one was extinguished and the second one arose in its place. The novation also extinguished personal securities, real securities (pignus and hypotheca) and possible accessory obligations for interests. It operated *ipso iure*. Novation could be obtained by way of a *stipulatio*, which should satisfy the following requirements: a) '*idem debitum*' («same debt»), namely the content of the new obligation should be the same of the old one; b) '*animus novandi*' («intention to novate»), namely the two parties should both agree on the novation to be done; c) '*aliquid novi*' («something new»), namely the new obligation should have some element of novelty in comparison to the old one.

Requirements under b) and c) need further explanations.

According to the general consensus, the *animus novandi* (b), at least till the late classical age, was conceived as implicit. Thus, its existence should have been inferred by the objective circumstances in which the *stipulatio* took place. This changed under Justinian; the emperor enforced a constitution, according to which the animus novandi should be explicit.

The aliquid novi (c) determined the kind of novation that took place.

We talk about "**objective novation**" when the *aliquid novi* consisted in a new objective element added to the new obligation; as a change in the content of the obligation could never happen, because of the *idem debitum*, the *aliquid novi* in this case could consist in a condition, term, personal security or new purpose (for instance, a *causa dotis* or a *causa donationis*) of the obligation.

The *stipulatio Aquiliana* was a very unusual case of objective novation. In the *stipulatio Aquiliana*, all obligations of the same debtor towards the same creditor could be novated together by one only *stipulatio*. According to what Gaius wrote, this was done with the aim to extinguish such *stipulatio* with one only *acceptilatio*; so, the final purpose of this whole process was simply the remission of all debts of one person towards another. Apparently, the *stipulatio Aquilana* went against the principle of *idem debitum*; many explanations have been given on this point, but some scholars simply infer from this that *idem debitum* was never a proper requirement for novation in Roman law.

We talk about "**subjective novation**" when the *aliquid novi* consisted in the change of one of the two parties, namely the creditor or debtor changed in the new obligation. In subjective novation, the novating *stipulatio* was preceded by an authorization, given by the old creditor or debtor, called "delegation", and the original obligation (which had to be extinguished) was mentioned in the novating *stipulatio*. Thus, there were two possible cases: 1) either the original debtor

delegated to his old creditor a new party, who would promise (by such becoming the new debtor) what was already due by the original debtor ("passive" novation), or 2) the original creditor delegated his debtor to a new party, who would be promised (by such becoming the new creditor) from such debtor what was already due to the original creditor ("active" novation).

General "novatory effects" were also probably attributed to the transscriptio and to the litis contestatio (refer to lectures about procedural law).

- *Compensation*

Compensation is, in civil law systems, a modality of extinction applied when both parties have debts one towards the other, namely both parties are at the same time debtor and creditor one towards the other. Thus, debts are extinguished in the measure of the smaller one (for instance: if A owes B ten, and B owes A 5, the debt of B is extinguished, while the debt of A is reduced to 5).

Nowadays, compensation can operate, in the different legal systems, either automatically, by mere force of law ("legal compensation"); or in trials, because of the final sentence of the judge ("judicial compensation"); some legal systems even admit compensation by mere agreement of the two parties, in which case compensation can be recognised as a kind of contract ("contractual compensation").

In the Roman law system, only judicial compensation was admitted (compensation operated *ope iudicis*), and only starting from the formulary procedure on; in the procedure per *legis actiones*, it was impossible to admit two different claims in the same trial. However, even in the formulary procedure, judicial compensation was not admitted in general terms. Only three specific cases of compensation were admitted:

1. ***Actiones bonae fidei***. In all *actiones bonae fidei*, compensation was generally admitted, but debts should derive from the same juridical relationship which the trial focused on. However, it was not necessary for debts to be homogeneous.
2. ***Bankers***. In Rome, bankers (*argentarii*, in Latin) had a duty to keep accounting books in good order. Thus, if they decided to bring forth an action against one of their clients for sums that were due, they had to calculate the balance (in reference to their debts towards the client) prior to that. The right sum had to be mentioned in the formula. If their calculation revealed to be wrong and they asked for more than it was due, they would have lost the trial, according to procedural rules.
3. ***Bonorum emptor***. The *bonorum emptor* could possibly discover, as final purchaser of the goods in the executive procedure called *bonorum venditio*, that a sum of money due to the original debtor has never been paid. In this case, he would have had a claim for such sum as praetorian successor of the original debtor. If the debtor of the sum was at the same time creditor of the original debtor, compensation should have been applied. In this case, though, the *bonorum* emptor should simply mention both debts in the formula, as the judge should have calculated the balance by himself.

With the progress of time, compensation seems to have been generally admitted also in the *actiones stricti iuris*, due to a *rescriptum* enforced by the emperor Marcus Aurelius. According to such *epistula*, compensation would have been applied by way of *exceptio doli*. However, the true limits of this innovation are much disputed.

Other emperors intervened in this field. Eventually, Justinian reformed the whole legislation. Compensation became then a general remedy, as debts could be compensated even if they did not depend on the same cause or were not homogeneous or already determined in their amount if they could be easily determined. Apparently, Justinian also made compensation work *ipso iure*; however, in most cases the sentence of the judge would still have been necessary to convert the value of debts in terms of money.

- *Other modalities of extinction*

There are also some further modalities or causes of extinction of obligations *ipso iure*, but it must be noted that some of them work only for some obligations.

1. **Confusion.** In a general perspective, confusion worked as a general modality of extinction not only of *iura in re aliena*, but also of obligations; thus, if the creditor and the debtor became the same person (this could happen, in most cases, by way of inheritance), the obligation was extinguished.
2. ***Adrogatio* and *conventio in manum*.** *Adrogatio* and *conventio in manum* extinguished *ipso iure* the debts of the *adrogatus* or the woman on which the manus was acquired, but in the classical age the Praetor gave to the creditor an *actio utilis* for this. However, such rule was not applied to obligations deriving from delicts, as these were defended by penal noxal actions; thus, the victim could sue the (new) paterfamilias.
3. **Opposite agreement (*contrarius consensus*).** All obligations arising from consensual contracts could be extinguished by an opposite agreement between the parties, until the contract was performed.
4. **Death.** Death was a cause of extinction in the contracts of *societas* and *mandatum*, for reasons we already discussed. Also, penal actions could not be brought forth against anybody else than the culprit; hence, obligations arising from delicts would have been extinguished if the culprit/debtor would have died before the *litis contestatio* (in the classical age, the heir could have been liable, namely sued with a *reipersecutory* action, in the limits of his enrichment). Only in the case of *iniuria*, the death of the delict's victim would have caused the extinction of the obligation.

A Brief Guide to *obligationes* naturals

In some cases where, being there no *obligatio iuris civilis*, nonetheless a payment was made, the praetor impeded the *solvens* (the payer) from bringing forth the *condictio indebiti* against the receiver to ask his payment back. This effect is called *soluti retentio* (roughly translated, «keeping what has been paid»). In progress of time, the common label of *obligatio naturalis* was created in order to define such cases, whose list was build up quite haphazardly; however, it can be said that each *obligatio naturalis* is a "moral" obligation, as the praetor judged it unfair to let the *solvens* have his money back. The main cases of *obligatio naturalis* concerned the (not existing, according to ius civile) obligations of the *filiusfamilias*; the obligations of the slave and the obligations destroyed by the litis *contestatio*.

A Brief Guide to Subjective Requirements for Responsibility in Obligations

According to Roman law, the object of the obligation should have been possible at the moment when the obligation was created, namely the fulfillment of the obligation itself should have been possible at such moment, otherwise the obligation was void. The impossibility to fulfill the obligation, though, could happen after the obligation was created. In this case, it was relevant to determine whether the impossibility was due to the debtor or not. Generally speaking:

- if the impossibility was not due to the debtor, the obligation was simply terminated and the debtor was free from it;
- if it was due to the debtor, in case of obligations defended by actions stricti iuris, he would have been considered as liable only because of his positive behaviour or conduct ("factum debitoris" namely «the fact of the debtor») in making the fulfillment impossible (which originally implied that omissions could not be considered relevant). An exception was made for obligation whose objects were "generic" (belonging to a genus) things, which could be replaced any time with things of the same kind and quantity (as money was a "generic" thing, all obligations where the debtor had to give a sum of money were included in this category); in this case, the rule was that "genus numquam perit " («the genus never dies»), which meant that no such thing as the impossibility to fulfill the obligation could ever happen, the consequence being that the debtor was liable in every case.

In all other obligations, a "subjective requirement" (namely a requirement referred to the psychological attitude of the debtor) was needed, which could consist in:

1. ***Dolus.*** *Dolus* was the deliberate intent to avoid the fulfilment of the obligation or to make it impossible. It was a favourable standard to the debtor, as he would have been held responsible only if he acted willingly; therefore, it was often required in obligations where the activity of the debtor was done for free and only to the advantage of the creditor, as in depositum.
2. ***Culpa.*** *Culpa* is quite a complex notion. It can be roughly defined as negligence but is more precisely described as the failure to respect some standard of conduct. Such standards were elaborated, under Justinian's law, according to different categories of culpa: *culpa lata*, when the debtor "does not understand what everybody understands" (as Ulpian and Paul wrote), so he shows less care than everybody else would have shown (under Justinian, *dolus* included also *culpa lata*); *culpa levis* (also called *culpa in abstracto*), when the debtor does not show the same care of the bonus («good») paterfamilias (the «average man», in this context); *culpa in concreto*, when the debtor does not show the same care that he shows in his own business ("*diligentia quam in suis*": this was often applied in cases of professional liability, as for instance with craftsmen).
3. ***Custodia.*** *Custodia* is a much-disputed concept. Presently, it is conceived by Romanists as the strictest standard for contractual liability, implying the responsibility of the debtor in all cases including theft, with the only exception of "*casus*" («unforeseeable circumstances») and "*vis maior cui resisti non potest*" («*force majeure*», namely accidents or natural events as, for instance, floods, storms, etc.). It was often required in obligations where the debtor obtained some advantage from the creditor for free, as in *commodatum*.

A Brief Guide to the "Dangerous Liasons" between *Mutuum* and *Stipulatio*

- Mutuum is a re contract → its effects are produced from the contract once the thing is handled over.
- *Stipulatio* is a *verbis* (verbal/oral) contract → its effects are produced from the contract once the question and the answer are said.

Both contracts were unilateral → only one of the two parties became debtor and was liable for the contract.

- Mutuum is a loan for consumption ("causal" contract) and, as such, the obligation arising from it concerns always the giving back of a sum of money (or other consumable and "repleaceble" things).
- *Stipulatio* could have different legal purposes ("abstract" contract) and, as such, the obligation arising from it can concern a sum of money.

- Mutuum could never include interests ("gratuitous" contract) → no obligation for interests could arise directly from such contract.
- *Stipulatio* could include interests.
  - It was possible to create two parallel obligations, one by mutuum (for the capital sum) and one by *stipulatio* (for interests; as interest in Latin are called *usurae*, we talk about *stipulatio usurarum*).
  - It was also possible to novate the obligation deriving from mutuum into a new obligation deriving from *stipulatio*.
  - It is very probable that mutuum was included among contracts of ius civile well after *stipulatio*. Such inclusion was done with a view to the interest of creditors. Before mutuum was included among contracts of ius civile, a relevant risk was run by creditors handling the money over to debtors before these latter promised to give the money back. This happened because the debtor, having already the money, could refuse to conclude the *stipulatio*.

It is evident from these premises that, according to Roman law, You could decide to create an obligation for giving (back) money both by mutuum and *stipulatio*. The choice determined some consequences.

In mutuum, one became debtor only if he had received the money. The creditor, however, could not be very happy about the impossibility to include interests; he should have been cautious enough to have the debtor promise such interests in a *stipulatio usurarum*. However, the debtor was in any case liable for the capital sum.

In *stipulatio*, one became debtor after answering the ritual question, independently from having already received the money. *Could the creditor ask the money back even if he never gave it to the debtor, only based on the debtor's promise? The answer, in the archaic and first Republican age, was (unfortunately for the debtor) yes.* The debtor was however liable, and this was due to the formal nature of the archaic law. Probably starting from the middle Republican age, a specific remedy was given by the Praetor to the debtor, called "*exceptio non numeratae pecuniae*" (i.e., roughly translated, "exception referring to the money that has not been given"). This could be opposed to the creditor who, though he never handled over the money to the debtor, sued the same debtor asking him to pay the money due by a stipulation. When general remedies for *dolus* (fraud) were also given by the Praetor, the *exceptio doli* replaced the *exceptio non numeratae pecuniae*.

It is evident that the complex juridical relationship between mutuum and *stipulatio* was mainly determined by the formal nature of *stipulatio*, which nature made it originally irrelevant that the money was handled to the debtor, as the exchange of question and answer was the only element needed. The inclusion of mutuum among contracts of ius civile from one side, and the remedies given by the Praetor from the other side, were the solution to this problem.