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Real Contracts in Roman Law and Their Development in Positive Law with Special Emphasis on Loan Contracts (Mutuum)

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Abstract: This paper has analyzed Real Contracts in Roman law and their development in positive law in Kosovo with particular emphasis on loan contracts. Real contracts have been analyzed analytically - their types and importance focusing on the review of the loan contract, the characteristics, rights and obligations of the contracting parties - lenders and borrowers. The focus has been put on the specific consideration of this very important contract for the economy of Kosovo. The key significance of these contracts is that they enter the ranks of the oldest legal contracts. The legal rules for the loan contract have been recognized since Roman law. This contract in Roman law was a real contract, a feature that has remained until the contemporary law but with few changes. The legal rules for this contract are found in the Law of Hammurabi which recognizes the loan in cash with interest and without interest. The loan, or *mutuum*, is the oldest and most important real contract of Roman law. As an unprotected legal relationship has existed since ancient times and relied on the friendly giving of a certain amount of replaceable and consumable items to the debtor's property, who committed to return the same amount of the same items to the creditor after the contracted deadline. The review was conducted based first of all on Roman Law and then focus shifted to the national legislation of the Republic of Kosovo, which is currently in force, but often focusing on the problems that exist in our practice. The loan contract is of particular importance in legal circulation considering its purpose, whereby the lender's good intentions towards the borrower prevail. The loan contract (mutuum) in the positive law of Kosovo is regulated by the Law on Obligations, 2012.

Keywords: Real contract; Roman law; loan contracts (mutuum); positive law; Kosovo.

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1. Introduction

A loan contract is an important contract that ranges in the group of contracts for use of property and rights. This contract creates the legal relationship between the lender and the borrower. While with this contract we imply such an agreement where *lender* is obliged to the borrower to deliver a certain amount of money or a certain amount of other substitutable items in ownership, and *borrower* is obliged to return this amount after the expiration of the specified term, i.e. the same amount of money, i.e. the same amount and the same quality of the item of the same type (Alishani, 1988, p. 1390).

In Roman law the most frequent source of obligations were *contracts* or *contractus*. *Contracts* or *contractus* were bilateral and multilateral legal affairs (Puhan, 1977, p. 307).

In postclassical and Justinian law, *contractus* is the consent of the wills of both parties from which the relationship of obligation has been established between them, protected by a separate lawsuit. However, the word *contractus* in Roman legal vocabulary is of relatively new origin: for the first time the word "*contrahere*" was used for entering into contract in the Praetorian edict. During the classical period it marked every permissible action which would lead to the creation of relationship of obligation, as opposed to the tort. Since then some jurists have noticed that most of these obligations have the common feature of being created by the consent of the wills of the parties. Because the importance of the form has been less and less, while the will of the parties has been increasingly more important, and that the validity and content of the obligation has been increasingly assessed according to the will of the parties, and not according to the validity of the form, consent of the wills of the parties (*convention, consensus*) was very quickly understood as an essential constitutive element of the largest number of contracts. Thus, it derived to the postclassical - Justinian meaning for the contract (Bilalli & Bahtiri, 2015, p. 429).

The creation of the contract required the consent of at least two persons with legal capacity: *duorum pluliumve* in *ideni placitum vel consensus*. Any agreement of the will of two or more persons (persons with legal capacity was not always a contract: it could be a simple agreement and irrelevant for justice (*pactum, conventio*). *Conventiones quadem pariunt actiones ... quae pariunt actiones, in suo nomine non stant, sed transeunt in proprium nornen contractus* - only some agreements give the right to sue ... those agreements that give the right to sue do not keep their name, but they get a special name: contract or contracts (Puhan, 1977, p. 308).

Gaius has divided the contracts according to the way in which they are concluded into four groups: *real* which are concluded upon the delivery of items respectively; *verbal*, which are concluded verbally, respectively with the pronunciation of solemn words; *literally*, which are concluded literis, respectively in written form; and *consensual*, which are concluded by consensus, respectively to the simple consent of the wills. Its division was also approved by Justinian Institutions (Bilalli & Bahtiri, 2015, p. 432).

1.1. The Notion of Real Contracts in Roman law

Real contracts are the contracts in which, in addition to the consent for the essential features of the contract, the delivery of the item is also required (Luarasi & Tirana, 1998, pp. 56-57).

According to the meaning adopted in Justinian's codification, *real contracts* are concluded in such a way that one party gives or the other party does something, while it is obliged to return the same or the other thing, or a certain counteraction. Thus, here the delivery of the item is a formal condition for the creation of the contract (*re contrahitur obligation*): until one of the parties performs the action, there is no contract, regardless of whether the parties have agreed on all elements of the contract. Therefore, even real contracts are formal contracts, because the simple consent of the wills is not enough for their formation. But those unlike *nexum*, *stipulation* and *literal contract*, are not solemn - it is enough to simply hand over items without pronouncing solemn formulas and gestures. The agreements of the parties here are only *pactum de contrahendo* (unprotected agreement for entering into a contract with the delivery of the item). It follows that the contract is not legally binding on the parties until delivery is made (Gorenc, 2006, p. 147; Semini (Tutulani), 1998, p. 86).

The real form of concluding contracts was the delivery of the item: delivery of the item was taken as the only sign that the co-contractors are really of the opinion to enter into the contract. In Rome, the real form appeared relatively early. When introduction of *condictios de certa credita pecunia* and *de omni certa re* took place, these claims sanctioned the *mutuum (loan),* as the most ancient real contract. This occurred in the third century B.C. As *neksum* was derogated at that time, bound in the form *per aes et libram*, it was necessary to fill the gap by providing protection to the legal relationship, which existed in practice and which was considered as credit legal work, which does not cause harmful consequences that *nexum* had (Puhan, 1977, p. 335).

Although it brought (caused) the birth of an *obligatio re contracta*, the case of *solutio indebiti* by Gaius was not considered as *obligatio ex contractu*, from the moment that, according to this lawyer, the one who paid more than was stipulated in the contract, intended to extinguish such a connection that existed (Mandro, 2011, p. 356).

In Gaius's time, real contracts were understood much more narrowly: they are created only in those cases in which upon the delivery of the items the ownership is transferred to the other party, while that party is obliged to return the item to the creditor. For those reasons Gaius in real contracts only counts *mutuum* (loan) although other contracts, which were later listed as real (*commodatum*, *depositum*), have been popular in his time and have even won, in addition to praetorian protection, lawsuits *in ius conceptae* - means they have ranged *ius civile*. However, Gaius does not mention even *fiducia* among the real contracts, even though it was a real contract in which the ownership was transferred. Probably that is because at its time *fiducia* was mainly used in conjunction with *mancipatio*, hence rather observed as *pactum* than as a valid independent contract. Except this, *fiducia* as a collateral in practice has since been pushed by the pignus (Bilalli & Bahtiri, 2015 p. 444).

Delivery was a form of concluding a real contract when it was done on the basis of loan, loan for use, deposit and pledge. In Justinian's time the rule was that service made on any legal basis served as a form of contract. Upon introduction of loan, deposit and pledge as real contracts, *obligatio re*, which previously brought the delivery of an item in ownership, took on a different meaning according to the type of real contract. Thus, for example, in the case of a pledge, only the transfer of possession was caused, while in the case of the loan and deposit contract, it created the right to keep the item. In the loan contract the same amount of the same items had to be returned, while in other real contracts the same item had to be returned (Mandro, 2011, p. 356).

2. Types of Real Contracts in Roman Law

After the introduction of the delivery of the item as a form of mutuum, the delivery of the item was accepted as a form of contract also in some cases defined as acts: when the item is delivered to the debtor for use, when the item is delivered to the debtor to keep and when the item is delivered to the creditor on the name of the guarantee. Thus, four well-known real contracts arose: 1) *mutuum*, 2) *commodatum*, 3) *depositum* and 4) *pignus.* In some of the mentioned cases, through the delivery of the item, the debtor's property was constituted on the object of the obligation, while in others only the retention or detention. Property was constituted

in those cases when the objects of prestation were replaceable, while the detention when they were irreplaceable (Mandro, 2011, p. 356).

The late classical and postclassical law in real contracts lists three more contracts: *commodatum*, *depositum* and *pignus*. With this, the meaning of real contracts is expanded, because in these three contracts the ownership is not transferred, but in the first two only *detencia* while in the third the possession. What they have in common with *mutuum* is that they are concluded with the delivery of the item (Bilalli & Bahtiri, 2015, p. 444).

Since in addition to the four cases mentioned or in addition to the four stated legal reasons (*causa*): delivery of the item on the basis of the loan, delivery of the item on the basis of the loan for use, delivery of the item on the basis of the deposit and delivery of the item on the basis of the pledge, there were many other deliveries of the items, on any other legal basis (on the basis of exchange, on the basis of precarium, on the basis of gift, on the basis of transaction, on the basis of *aestimatum* etc.), the praetors began to provide their protection to the co-contractors, who had made any of the mentioned deliveries of the items, because it was considered unfair that the delivery of the item to any other person, if this person does not perform the act of promised to remain unsanctioned (Puhan, 1977, p. 335).

Thus, the group of so-called anonymous real contracts was created (*contractus real innominati*). The group of anonymous real contracts was definitely systematized in Justinian's time. Since then, the rule has been that every delivery of the item, made on any legal basis, serves as a form of creating real contracts (Puhan, 1977, p. 335).

For the meaning of real contracts, the transfer of ownership is no longer valid, but only the delivery of items. Such a meaning was also transferred to Justinian's law. Justinian's law recognizes as real contracts the following: *mutuum (loan)*; *commodatum (loan for use - service*), *depositum (deposit)* and *pignus (pledge)*. Fiducia does not even mention Justinian's law, because it had been completely obliterated from use. Therefore, we will talk first about the fiducia and then about the four real contracts of Justinian's law (Bilalli & Bahtiri, 2015, pp. 444-445).

2.1. Fiducia

Fiducia is a formal contract of the most ancient law that served either to secure creditors or to hand over one's property to someone else to preserve it (Gai 2:59: *Fiducia contrahitur aut cum creditore pignoris jure aut cum amico, quo tutus nostrae res apud eum essent* (Puhan, 1977, p. 330).

Fiduciary legal works are those legal works which are based on *the honor of the contracting party*. This is characteristic of the past when certain persons made the

transfer of ownership of an item to another person in order to secure any claim that the owner had against him, while the winner of the right of ownership over the debtor's item had to take the item to return it to the debtor after fulfilling the obligation to the creditor. However, in these cases the creditor has become the owner and if he did not respect the honor there was no legal obligation to return the item owned by the creditor to the debtor through the court, because the return of the item to the debtor is part of the fiduciary legal work which now no longer relies on the legal norm but on the honor of the contracting party. The word *fiducia* has the meaning of the word *honor (honesty)* (Aliu, 2014, p. 368).

Fiducia concluded for the purpose of securing creditors was called *fiducia cum creditore*. With this contract, the debtor in *form per aes et libram* or *in jure cesio* form handed over any item in the property as a guarantee that he will return it, if he performs the main obligation regularly and on time (Puhan, 1977, p. 330).

Fiducia took its name in the beginning from the fact that the obligation to return things did not create an obligation relationship - it was not protected by law - but was based on moral norms - *in civic consciousness (fides)*. Therefore, *fiducia* was not a legal institution. It was concluded at that time only between friends (*fiducia cum amico contracta*). However, its implementation quickly expanded to other people, as well as in the relationship between creditors and debtors (*fiducia cum creditore contracta*). At that time, ways were sought to secure a sanction for the recipient's obligation. The first step in that direction was made with the institution *usurceptio* (Bilalli & Bahtiri, 2015, p. 445).

Fiducia concluded for the purpose of handing over one's thing to someone else to preserve or use it was called *fiducia cum amico*. With this contract, the fiduciante transferred to the fiduciary any of his property, obliging him to keep the item and return it undamaged. Under the contract *fiducia cum amico* fiduciante rights and fiduciary obligations were created. This was a unilateral contract. The fiduciante had the right to request that the fiduciary preserve the item and return it undamaged. The fiduciary was obliged to preserve the item, to use it within the allowed limits, when he had permission, to deliver it undamaged when it was foreseen by the contract, or when the fiduciante demanded it and to be responsible for any damage caused to the thing. Since the fiduciary when preserving the item could have expenses related to the maintenance of the fiduciary object, he was authorized to demand the reimbursement of all necessary expenses. So, contract *fiducia cum mico* could also be bilateral and unequal (contractus bilateralis in equalis) (Puhan, 1977, p. 331).

Bonae fidei iudicia, includes (disputes) from sale and purchase, mandate, deposit, fiducia, partnership, tutoria, return of dowry (Romac, 1989, pp. 392-393).

3. Loan for Use (Commodatum)

The use loan was a real, mutual, unequal contract, created by the delivery of any irreplaceable item in use, free of charge, to the temporary recipient, who pledged to keep the item, will use it properly and according to the contracted use will return it undamaged to the lender (Mandro, 2011, p. 358).

Borrowing for use was for the exclusive benefit of the borrower, and therefore, usually took place among friends, relatives or acquaintances, without involving any commercial or economic interest (Domingo, 2017, p. 12). The object of the loan for use contract could only be irreplaceable items and in order for the contract to arise, the item subject to the contract had to be returned again.

Object of the contract on loan for use could be exclusively *irreplaceable items*, or items which the borrower was obliged to return in kind. When the object of the contract were the items that were regularly assigned as *res quae pondere numero mensurave constant* or *si res consumptibiles*, while the parties had specifically stated that they demand the return of the item *in specie*, the loan for use agreement or commodatum did not exist. There could be either a loan agreement or an irregular deposit contract. In order for a contract on the use of such items to arise, they had to be demanded to be returned *in specie*. In such cases, *commodatum ob pompam vel ostentationem* existed (Puhan, 1977, p. 338).

Commodatum is a real contract which consists in that *one party (commodant - service provider or lender)* makes available for *the other party (commodator - service recipient or borrower)* the non-consumable item for free use, while the party is obliged to return the same item to the commodator after use and undamaged in essence. The basic purpose of *commodatum* is to enable the recipient of the service to use the items amicably. He has the right to use the item within the limits provided by the contract.

Commodatum is *contractus bileteralis inaequilis*. Therefore, the service provider, whose request was compulsorily created with the conclusion of the contract, had *actio commodati directa* at his disposal. The service recipient had *actio commodati contraria* available for his eventual request to the service provider. *Actio comomodat directa* and *contraria* are lawsuits for the protection of the mutual rights of the service recipient and the service provider (Puhan, 1977, p. 458).

3.1. Rights and Obligations of the Parties to the Loan for Use (Commodatum)

Although *mutuum* in principle has been free, throughout Roman history interest was paid and was very high. This is seen from the frequent violent rebellions of the plebeians against the creditors, but also from the relatively frequent attempts of the legislators to limit the interest rate. So, since *The law of the twelve tables* we find the provision which has maximized the interest rate to 1/12, 8.33%) per month. The

same degree is foreseen by both laws issued in the middle of the IV century B.C. A plebiscite from the same time had cut it in half. At the time of Cicero an interest rate of 1% per month was allowed. Justinian had maximized to 8% per year on trade loans, 4% did not dare to pay *illustres*, while in all other cases it could have been contracted *to highest 6% per year* (Bilalli & Bahtiri, 2015, p. 453).

At the time of concluding the contract, only rights arose for the lender and only obligations for the borrower. The fundamental right of the lender was the right to request the recipient to keep the object of the loan, to use it according to the agreement and to return it undamaged at the appointed place and time (Mandro, 2011, p. 359).

4. Deposit (Depositum)

Deposit or *depositum* was a real contract (Bydlinski, 2013, p. 136) and mutual and unequal that was created by the delivery of any irreplaceable item to the deposit receiver, who pledged to keep the item free of charge and that at the request of the depositor or after the contracted term will return it undamaged (Puhan, 1977, p. 339).

Entrusting the objects of another person for preservation is a well-known practice of the Romans even before the Law of the Twelve Tables. The law provides for punishment *in duplum* for one who does not return the item received for preservation. However, the trustees of the items for safekeeping at that time was not considered by Romans as a contract, but the non-return of items received for preservation was considered the same as by the Law of Hammurabi, theft. All abstract forms have been used to link such work, in particular *fiducia*. According to *fiducia*, the meaning that the obligation to return items received for safekeeping are of a concrete nature. Such work *ius civile* is called "*servandum dare*". Since the time of Cicero such work has not been considered an independent contract but has been entered into in the form of *fiducia*. Praetor for the first time gave it the special name *depositum* and began to defend it with *actio in factum*. At the time of Gaius *depositum* was obviously considered an independent contract because it states that there are two means to protect it: *actio in factum pretoria* and *in ius concept* that means *deposit act* (Bilalli & Bahtiri, 2015, p. 453).

4.1. Object of the Deposit (Depositum)

Object of the deposit contract were *irreplaceable items*. The depositor had the right to ask the deposit recipient to keep the entrusted items and return them undamaged. The obligations of the deposit recipient were correlated with the rights of the depositor (Mandro, 2011, p. 359).

Object of the deposit contract were irreplaceable items. When the deposit recipient was handed over to keep the items usually taken as *res quae pondere numero mensura constant*, and the depositor had not insisted on returning the same items, then it was a special kind of *depositum* (Mandro, 2011, p. 339). Only movable items can be subject to deposit.

4.2. Rights and Obligations of the Contracting Parties - the Depositor and the Depositary

The contracting parties to the deposit are: the depositor and the depository, who have certain rights and obligations.

The obligations of the depositary were correlated with the rights of the depositor. The depositary was obliged: 1) *to preserve the object of the deposit*, 2) *keep it in good condition* and 3) *return it at the time it was contracted or when the depositor requested it* (Puhan, 1977, p. 340). Preservation of items is the purpose and essence of the deposit.

The depositary was liable for the obligations taken only when the damage to the thing or the non-performance of the obligation could be attributed to his dolus or his *culpa lata*. When the performance of the obligation became impossible for any other reason, he was released from any responsibility. The relatively insignificant degree of liability of the depositary due to non-performance of obligations under the deposit contract stemmed from the fact that the deposit was a contract entered into for the exclusive interest of the depositor: lucrative for the depositor. The depositary on the basis of the depositum gained neither the right to use the thing nor the right to claim the reward (Puahn, 1977, p. 340).

Preservation of items is the purpose and essence of the deposit. However, the depositary is not obliged (unless he is specifically obliged to do so) to pay special attention to the storage of the items: since the deposit is free of charge and there was no benefit from the storage, he only responded for damage to the items by fraud. In Justinian's law is also the answer to *culpa lata* (severe carelessness, which equates to dolus). It was not held responsible for careless preservation (Bilalli & Bahtiri, 2015, p. 454).

The depositary was liable for the obligations only when the damage to the thing or the non-fulfilment of the obligation was done through his fault; on the contrary, he was relieved from any responsibility.

4.3. Special Cases of Deposit

Some special deposit cases were regulated somewhat differently from regular cases. These are: a*) depositum miserabile,* b) *irregular deposit* and c) *sequestratio.*

a. - ***Depositum miserabile*** - If someone in case of severe bad weather and disasters has been forced to deposit the item for storage without having the time and opportunity to choose the depositary, the praetor has made available the lawsuit in duplum, thus increasing the liability of the depositary. Justinian has given *actio in duplam* only if the depositary denies the deposit.

b. - ***Irregular deposit*** - consists in what the depositary is entrusted with for storage of the substitutable item (e.g. wheat, wine, but usually money) while he is obliged to return not the same item but the same number of items of the same type (Bilalli & Bahtiri, 2015, p. 455).

Unusual deposit: was a deposit on replaceable items. The depositary became the owner of the entrusted items and at the request of the depositor or within the contracted period was obliged to return the same amount of the same items. This type of deposit is very similar to the loan contract. The difference between them was that the loan was related to the interests of the debtor, while the deposit was related to the interests of the depositor (Mandro, 2011, p. 360, Puhan, 1977, p. 340-341).

c. - *The case of the extraordinary deposit was* ***sequestrum*** or **court deposits**. *Sequestrum* was a contract by which the disputing parties handed over the object of the dispute to the third person, forcing him to give the entrusted object to the party who had won the trial after the end of the dispute. The sequestrator or depositary according to the contract on the court deposit acquired the mediating possession over the entrusted object and with all the possessive interdicts (Puhan, 1977, p. 340).

5. Pledge (Pignus)

Pledge or *pignus* was a real, accessory, reciprocal - unequal contract, created by the delivery of an irreplaceable item to the creditor, who was authorized to possess the item, sell it and from the sale price derive the primary asset, when the debtor had not done this himself properly, even if he was obliged to preserve the object of the pledge and return it undamaged, when the debtor fulfills the primary obligation properly (Puhan, 1977, p. 341).

Pignus (pledge) was a real contract that consisted of the delivery of a movable or immovable item to secure a debt. Pignus meant the transfer of possession but not ownership (Domingo, 2017, p. 11).

The word pignus signifies the meaning *genusi* for the right of pledge (hence also includes *fidiucia cum credore* and mortgage). However, in the narrow sense it marks the contract with which the debtor in the relationship of existing obligations) *pledge debtor - mortgagor)* delivers to his creditor *(creditor - mortgagee)* any item to secure the payment of the debt, while he is obliged to return the item when the debt is paid. As a result, on the one hand, it creates a legal-civil relationship (right of pledge) of the pledge creditor to the thing accepted as a pledge, while on the other hand, an obligation relationship arises, which imposes special rights and obligations to parties. In that relationship of obligation, the pledgor is the debtor while the pledgee is the creditor.

From the contract on *pignus* two different sets of rights and obligations were created. The rea1 right of the creditor was created for possessing the object of *pingus*. This right was conditional on the resolution: it continued until the moment provided for the fulfillment of the primary obligation. When the debtor performed the obligation, the *jus possidendi* of the creditor was terminated. When the debtor had not performed the primary obligation, *jus possidendi* of the creditor passed on *jus distractionis*, or in the right to sell and derive the asset from the sale price, taking the obligation to deliver *hyperocha* to the debtor. The constitution of the mentioned real-legal authorizations of the creditor was a consequence of the accessibility of the contract on the pledge.

The second group of rights and obligations arising from the contract on *pignus* had a binding character. The debtor had the right to demand that the creditor preserve the object of *pignus*, not to use it and to return it undamaged if the primary obligation is paid to him regularly and on time.

6. Loan (Mutuum)

The loan is the oldest and most important real contract. It was strict and one-sided and was created by handing over replaceable items owned by the debtor, who pledged to pay the same number of replaceable items at the creditor’s request or within the prescribed time limit. For the loan to rise, it was required as follows:

1. delivery of the item;

2. the item had to be replaceable;

3. the item would pass into the ownership of the debtor. (Mandro, 2011, p. 356-357).

The loan contract is, in fact, the only real contract that Gaius specifically deals with in his Institutions (Zimmermann, 2012, p. 153).

As an unprotected legal relationship, it existed since ancient times and was based on the amicable provision of a certain amount of replaceable and consumable items for property to the debtor, who vowed to return the same amount of the same items to the creditor after contracted term. When conditions were introduced as a means of protecting creditors in the amicable loan agreement, the mutuum became a real contract, even the first. It was considered that the loan does not exist, until the money is delivered, because the loan is a real contract (Romac, 1989, p. 294).

Since then loan (*mutuum*) was a real, unilateral and a harsh contract, which was created by the delivery of replaceable items of property to the debtor, in which case the debtor pledged that at the request of the creditor or within the prescribed time will pay the creditor the same amount of identical replaceable items (Puhan, 1977, p. 336).

From the sources that we had at our disposal for this contract, it can be said that we have the rules of this contract since the oldest laws. *The Law of Hammurabi* contains provisions for the loan contract. This law recognizes loans in cash, both with interest and without interest (Alishani, 1988, p. 143).

The loan therefore enters among the oldest legal affairs of Roman law. Even the Law of the Twelve Tables had provided for the level of the interest rate and contained some provisions for regulating it. Then it was concluded in the form of *nexum, sponsio* and *expensilatio*, snd was obligatory to contain the right to pay interest, it gave the right to sue and would led to serious consequences for the debtor (*manus iniectio*). Such a loan is called *fenus*.

In addition to such a loan, loans between friends, neighbors and members of the same gender have been in use for a very long time. Such a loan was called *mutuum*. Unlike *fenus*, *mutuum* is based on friendly, neighborly or citizen trust - *bona fides*, - and not in legal provisions. Therefore, there was a moral obligation and did not give the right to sue. It was the social service and therefore not only did not give the right to interest, but it was offensive, dishonest, to pay for the creditor (Bilalli & Bahtiri, 2015, pp. 447-448).

It is anticipated that the mutuum would initially apply exclusively to cash loans, in accordance with lex Silia, and was only later extended by *lex Calpurnia* in other materials such as cereals, wine, oil, copper, silver and gold. This argument claims that if mutuum had been initially applied to all subjects, including money, then lex

Silia, which provided a condition for the return of money, would have been unnecessary. This would be the case if *lex Calpurnia*, as some have argued, to ensure the return of all subjects, including money (Hall & Douglas, 1986, p. 405).

6.1. Creation of Mutuum

Mutuum was a real contract created by the delivery of substitutable items to the debtor's property.

Delivery of item with *mutuum* constituted the form of the contract. *Mutuum* did not exist unless there was a delivery of the item. It just existed as *pactum de mutuo dando* unprotected by lawsuit. Delivery of the item could be done in any of the ways of fair delivery. In addition, just as delivery of the item, mutuum also provided some cases of delegation, or authorization of the debtor to take the object of the loan to a person who was obliged to implement such an order.

The object of the loan could only be replaceable items, so the loan existed only when the debtor was obliged to return not the same item he had received, but the same amount of the same items. When the parties entered into a contract if they had not categorically determined whether it was a replaceable or irreplaceable object, they assumed the legal assumptions that the object would be replaceable whenever it came to items which in the market are treated as *res quae pondere numero, mensurave constant* (Puhan, 1977, p. 336).

For *mutuum* to be created, it is necessary to deliver the items to the ownership of the debtor. Therefore, *only the owner of the items* can be presented as a lender. Delivery of items by the non-owner does not create *mutuum* even if both parties are aware, respectively if they believe that the lender is the owner of the items which he gives to the borrower. Therefore, the return of such items could have been requested not on the basis of *mutuum* but on the basis of groundless enrichment. *Mutuum* will not exist even if the item has been handed over only in possession (*detentio*). Then it will create *commodatum, depositum, locatio conditio* etc. As for delivery the simple *traditio* is enough in all its variants, because the items which may be the subject of the loan fall into *res nec mancipi*. Initially the presence of the parties and the direct delivery of the items was requested; it could later be carried out or accepted through an intermediary (usually bankers). In order to create *mutuum* from the delivery of items, it should have been performed according to the agreement for the debtor to return the same amount and the same type of items (Bilalli & Bahtiri, 2015, p. 451).

6.2. Contracting Parties

Loan (mutuum) contracting parties are: *lender* and *borrower*. In this contract *the lender has the role of debtor* because he has to transfer the right of ownership of that item, and he has the role of creditor because he has the right to demand the return of items of the same type or to transfer a certain right, and the borrower has to return the amount of money, other item of the same quantity and quality after the expiration of the deadline (Alishani, 1988, p. 139). The economic effect of this contract is that the borrower with this contract will use foreign money or any substitutable item, while its purpose is for the borrower to acquire ownership of the particular item.

Loan *(mutuum)* in principle is free. Based on it the creditor can not claim interest and nothing more than what he has given. The interest could be contracted only with special stipulation (*stipulatio usurarum*), not with added pact. However, in classical law, the interest could have been contracted by a pact, in the case of a special maritime loan (*fenus nauticum*). Later this was possible in all cases of non-cash loans, while Justinian allowed this for cash loans taken from the banker (Bilalli & Bahtiri, 2015, p. 451).

Parties can be all persons who have the capacity to act. Exceptionally, since the second half of the 1st century AD according to a decision of the senate (S. *C. Macedonianum*), for lending to persons *alieni iuris* has sought the consent of *paterfamilias.* The reason for this decision was an event which concerned the world: a person named Mecedo (hence the name of the decision), who was burdened with a lot of debts, while he did not have his property, he drowned his paterfamilias, to inherit and pay the creditors who forced him. The loan entered into in violation of this senate decision created an *obligatio naturalis*. The creditor can not force him to pay, because the praetor will disallow that or will put in a formula (he and not the debtor) *exeptio. S. C. Macedonian*. However, if the debtor pays such debt, or accepts it when it is done *sui iuris*, is considered to have fulfilled the obligation and can not demand the return of what he has given (Bilalli & Bahtiri, 2015, p. 451).

6.3. Obligation

The basic obligation of the debtor was as follows: *pay the creditor the same amount of the same items*, as much as he had received when he had concluded the loan agreement. This obligation of the debtor had to be performed either at the request of the creditor, when the term of the obligation was not determined, or at

the time as he was committed before the creditor. The debtor had no other obligations (Puhan, 1977, p. 337).

The creditor had the right to demand the return of the same amount of the same type of items. He had no other right, could not claim any additional repayment or interest. The debtor's basic obligation was to pay the creditor the same amount of the same kind of items. This means neither less nor more. This is because the contract was essentially free. The debtor performed this obligation either within the deadline assigned or at the request of the creditor when there was no deadline.

In the period of principality of Vespasan, in the first century A.D. a special rule presented by a *senatusconsultum Macedonianum* imposed a ban on lending money to sons of the family *filli famialis* (Mandro, 2011, p. 358).

6.4. Types of Loan (mutuum)

In Roman law as well as in the laws before this, interest-bearing and interest-free loans were known (Le mutuum ou pret de consommation le commodat au pret a usage). This means that in a period of development of legal relations around this contract there were friendly loans, loans as assistance to relatives, loan to friend. This is a form that still exists even now in some cases when the loan is made between natural persons. On the other hand, this law also foresaw a loan with interest (Alishani, 1988, p. 143). In addition to the ordinary contract on the loan or mutuum, Roman law also recognized some types of non-ordinary loan. *Foenus nauticum* or *pecuina traecticia* were loan contracts given by creditors to shipowners for the purpose of conducting overseas trade.

A particular figure of the loan contract is borrowed from Greek law into Roman law. It is about the so-called foenus nauticum. By foenus nauticum we mean the case of a loan of money which had to be transported by sea by the borrower and used to purchase goods at the place of arrival or to be used to purchase goods which were destined to be transported by sea.

6.5. Foenus Nauticum

Foenus nauticum. - Special provisions have also applied to maritime loans (*foenus nauticum*) which for the creditor has been very risky, the debtor (usually the captain of the ship in charge of the overseas trade) was obliged to repay the borrowed money only if he fortunately arrives on the other shore or with the goods back. If money or goods along the way are destroyed, the contract is deemed non-existent. Thus, *foenus nauticum* was a kind of maritime insurance. Therefore, the

creditor was entitled to interest without special stipulation (the pact was sufficient) and the interest rate was not subject to any restrictions. Only Justinian maximized the rate to 12% per year (Bilalli & Bahtiri, 2015, p. 453).

7. Loan Contracts in Positive Law

In positive law in Kosovo, the loan contract is concluded between *lender* and *borrower*, as contracting parties. The contractor who is obliged to deliver ownership of a certain number of replaceable items to another entity, which is called the lender, while the contractor who takes ownership of a certain number of replaceable items and is obliged to return the item after the expiration of the deadline in the same quantity and type, is called the borrower. The loan contract is part of the group of contracts for the use of property and rights.

This contract is regulated by legal provisions of Article 567-576 of the Law on Obligational Relationships, of our country (Law No. 04 / L-077, Official Gazette of the Republic of Kosovo, No. 16/19 June 2012).

The loan contract has special characteristics that distinguish it from other contracts regulated by the LOR of Kosovo. The loan contract is, *bilateral contract*, *commutative* and *extended term contract, by name*, *remunerative charge contract*. In principle, this contract is considered a charitable contract, but the obligation of the borrower to pay interest in addition to the main debt can be contracted, as is the case with contracts in the economy, where the borrower is always obliged to pay interest, regardless of is it contracted or not (Hetemi, 2002, p. 351).

There are several types of loan contracts. The most important types of loan contract, for which the rules of the ordinary loan agreement cannot be applied, are: 1) *investment loan contracts*, 2) *emission loan contracts*, 3) *Lombard loan agreement* and 4) *annuity loan contracts*. Not all the rules of the loan contract apply to these special loan cases, but some special rules apply, specific to these special loan contracts (Alishani, 1988, p. 160, Dauti, 2016, p. 371; Gorenc, 2006, p. 2110).

References

Alishani, A. (1988). *Law of Obligations*. Prishtina.

Aliu, A. (2008). *Civil Law* I. Prishtina.

Bilalli, A. & Bahtiri, B. (2015). *Roman Law*. Prishtina.

Domingo Osle, Rafael (29 March, 2017). *The Roman Law of Contracts*. An Overview https://ssrn.com/abstract=2942873 or http://dx.doi.org/10.2139/ssrn.2942873.

Dauti, N. (2016). *Contracts (For Master studies)*. Prishtina.

Gorenc, V. (2006). *Basics of statutory and contractual commercial law*. Prishtina.

Hetemi, M. (2002). *Law with basic knowledge of business law*. Prishtina.

Hall, David, Locke & Raymond, F. Douglas (1986). Economic Analysis of Legal Institutions: Explaining an Inexplicable Rule of Roman law. *Indiana Law Journal*: Vol. 61: Iss. 3, Article 5. https://www.repository.law.indiana.edu/ilj/vol61/iss3/5.

Lurasi, A. (1998). *Commentary on the Civil Code, Obligations and contracts in general*. Tirana.

Mandro, A. (2011). *Roman Law*. Tirana.

Puhan, I. (1977). *Roman Law*. Prishtina.

Romanc, A. (1973). *Izvori rimskog prava / Sources of Roman Law*. Zagreb.

Semini, M. (1998). *Law of Obligations and Contracts, Special Part*. Tirana.

Semini, M. (1998). *Law of Obligations and Contracts, General Part*. Tirana.

Zimmermann, R. (March 2012). The Law of Obligations: Roman Foundations of the Civilian Tradition. *Published to Oxford Scholarship Online*.

Legislation

Law on Obligational Relationships. Law No. 04 / L-077, *Official Gazette of the Republic of Kosovo*, No. 16/19 June 2012.