

Revisiting *favor debitoris* in Post-Classical Roman Law

From Idealism to Pragmatism in the Law of Obligations

Assistant professor dr. Vid Žepič, LL.M.
(University of Ljubljana, Faculty of Law)

Law School, National and Kapodistrian University of Athens
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School of Raphael,
Vision of the Cross



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... *et dimitte nobis debita nostra, sicut et nos dimittimus debitoribus nostris.*

... and forgive us our debts as we forgive our debtors.

Mt. 6:12

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„[I]l *favor debitoris* [...] è un nuovo orientamento [...] è la nota dominante della nuova legislazione in tema di obbligazioni.“

Biondo Biondi (*Il diritto romano cristiano*, 1952–1954).

Favor debitoris – Term not explicitly found in Roman sources, but interpreted in:

- narrow sense: a principle of legal interpretation favoring debtors;
- broader sense: a set of laws and policies designed to protect (debtors as) economically weaker parties.

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Factors of Evolution of Postclassical Law of Obligations (4th–6th century)

- Christianity tolerated since 313, state religion since 380;
- social & economic changes:
 - *Tenuiores* (lower classes, especially small landholders, coloni, and urban plebs) vs. *potentiores* (wealthy landowners, elite bureaucrats, and members of the senatorial classes)
 - Anti-patronage movement
 - *patrocinium*: a relationship in which a patronus grants protection to a dependent individual.
 - Inflation
- Eastern/Greek influences: Increasing role of written documents in transactions (though vulnerable to falsification);
- doctrine of legal schools: generalization / systematization of classical casuistry;
- procedural changes:
 - Decline of the formulary procedure and rise of the extraordinary procedure
 - Issues of lengthy proceedings, judicial corruption
 - introduction of parallel judicial institutions (*defensor civitatis* and *episcopalis audientia*)

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Favor debitoris

Rudolf von Jhering (1818–1892), *Der Kampf um's Recht* (1892), 137 s.

"The private law of the Roman Republic, characterized by the strong and robust legal sense of the ancient Roman people, could have also provided a vital and refreshing source in the imperial era ... The spirit of imperial law is rather unusual. One would expect it to bear the traits of despotism – severity, hardness, ruthlessness. But it is, in fact, marked by the opposite; it is characterized by humanity and gentleness. This gentleness, however, is despotic – it robs one to give to another. The gentleness of arbitrariness and capriciousness is not true kindness; rather, it is violence that seeks to correct the injustice it has itself created. [...] I believe it is a completely general statement that sympathizing with the debtor is a sign of a weak time. This is called **humanity**. But the robust era ensures that the creditor gets what they are owed. It does not forsake the severity toward the debtor if it is necessary to preserve the security of legal transactions, trust, and credit."

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Manifestations of *favor debitoris* according Jhering

- *beneficium ordinis* (Nov. 4, 1–2): the right of surety to compel the creditor who had sued him before the principal, to sue the principal first.
- *beneficium divisonis* (Nov. 99): liability of *fideiussores* is divided by the number of solvent sureties
- the two-year moratorium on the sale of pledged property (C. 8, 33, 3);
- expansion of the right to set-off (C. 4, 31, 14),
- *datio in solutum necessaria* and its church privilege (Nov. 4, 3; Nov. 120, 6, 2)
- limitation of interest in contractual relationships to *duplum* (C. 7, 47, 1),
- *beneficium inventarii* (C. 6, 30, 22) limited the heir for the debts of the testator,
- the binding nature of a majority creditor decision in granting of moratorium (C. 7, 71, 8),
- *Lex Anastasiana* (C. 4, 35, 22) ... etc.

Jhering, *Der Kampf um's Recht* (1992), 145:

"Better to clearly wrong a hundred creditors than possibly treat a debtor too harshly [...]

There is no easier way to practice humanity than at someone else's expense. [...] But this 'humanity' reminds one of Saint Crispin, who stole leather from the rich to provide shoes for the poor."

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Early Scholarly Perspectives on Christian Influence in the Late Roman Law of Obligations

- Salvatore Riccobono (1911 and 1934):
 - „Everything in the *Corpus iuris civilis* that appears truly and essentially new compared to classical Roman law is almost entirely a product of Christian ethics. Everything else is merely an adaptation of the old.“
 - Christian influenced reforms in Justinian's codification can be recognized through terms such as *benignius, mitius, iustius, tutius, humanius, commodius, aequius est...*
 - E.g. just price (*iustum pretium*); promotion of settlements (*transactiones*), eased restrictions on donations etc.
 - „Christian thought“ might have entered legal practice through *episcopalis audientia*:
 - The jurisdiction of bishops, recognized by the State: originally limited to spiritual matters and disputes among ecclesiastics, though also practiced by the bishops with regard to laymen in the capacity of arbitrators ...

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Early Scholarly Perspectives

- Giovanni Baviera (1912); Ivo Pfaff & Stephen Brassloff (1897/1933)
 - Christianity emphasized spiritual salvation rather than earthly justice: „My kingdom is not of this world.“
 - Pagan emperors (e.g., Diocletian’s *laesio enormis*) enacted reforms protecting the poor and weak.
 - imperial reforms aimed at protecting economically weaker parties marked the beginning of a shift towards a state socialist or welfare-oriented state.

- Biondo Biondi (*Il diritto romano cristiano*, 1952–1954)
 - under Christian emperors, debtor protection evolved from gradual reforms into a legislative "revolution" that reflected Christian ethics – mercy (*clementia*), kindness (*benignitas*), and love (*caritas*) towards debtors.

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Early Scholarly Perspectives

- Paul Koschaker (1943):
 - Christianity originated in the East, which Koschaker saw as the "homeland of social ideas and socialism,,"
 - Contrast of Eastern „social values“ with Roman „individualism“, rooted in paternal family authority.
 - *humanitas*, *benignitas*, and *caritas* paralleled with Mesopotamian *mīšarum*: social justice enacted through royal decrees, including debt relief and protection for the weak.

- Fritz Schulz (1946):
 - The humanizing tendency operated independently of Christianization
 - *Humanitas* has a Stoic origin, but by the 4th and 5th centuries, it was no longer perceived as a specifically Stoic legacy.
 - The bearers of Christianization were not the legal schools, but rather the upper bureaucracy.

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Synthesis

- Max Kaser defined *favor debitoris* as one of guiding principles (*Leitgedanke*) in post-classical law of obligations.
- Kaser/Knütel/Lohsse, *Römisches Privatrecht* (2021), 109:
 - „The *favor debitoris*, the protection or favoring of the debtor, also has classical roots ... In the post-classical period, the importance of this guiding principle grows, as it is nourished both by Christian compassion and by considerations of state expediency, which oppose sacrificing the debtor's economic existence to the unrestrained greed and ruthlessness of creditors.“
- „Value-based legal arguments/justifications“ in imperial legislation as indicators of a legal tendency toward *favor debitoris* (even if not rooted in Christian ethics!).

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Humanitas

- In classical sources signified kindness, education and tact in classical sources (Gell. N.A. 13, 17, 1); under patristic influence merged with mercy (*miser cordia*) and commandment of love for one's neighbor.
 - Lact., *Institutiones Divinae* 6, 10, 2: *Sed tamen primum officium justitiae est, conjungi cum Deo; secundum, cum homine. Sed illud primum, Religio dicitur; hoc secundum, misericordia vel humanitas nominatur.*
But the first duty of justice is to be united with God; the second, with man. The first is called Religion; the second, mercy or humanity.
- Humanity as an essential attribute of imperial majesty and motto of „new justice“
 - C. 5, 16, 27, 1: *Nihil aliud tam peculiare est imperiali maiestati quam humanitas, per quam solam dei servatur imitatio ...*
Nothing is more characteristic of imperial majesty than humanity, by which alone the imitation of God is preserved...
 - Sirm. 13: *Convenit, nostris praescita temporibus ut iustitiam inflectat humanitas [...]*
It is fitting, as foreseen in our times, that humanity should bend justice...

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Humanitas

- In context of *laesio enormis*
 - Diocl. C. 4, 44, 2: If you or your father sold a property of greater value for a lesser price, it is humane (*humanum est*) that if you return the price the sold estate may be recovered by you through the authority of a judge intervening on your behalf.
- In context of alternative between *cessio bonorum* / *moratorium*:
 - Iust. C. 7, 71, 8: When a petition is made that people be granted relief through the unfortunate surrender of their goods, and creditors be given the choice either to grant a five-year moratory or to accept the cession of goods ... we have chosen the more humane position over the harsher one (*humaniorem sententiam pro duriore elegimus*). ... **(5)** ... those are to be preferred who lean toward the more humane view, not demanding cession but instead allowing a debt relief (moratory) (*qui ad humaniorem declinant sententiam non cessionem exigentes, sed indutias*).

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Humanitas

- Extension of the time period within which a court judgment must be voluntarily fulfilled from two to four months under Justinian was valid not only for principal debtor but also for surety:
 - Iust. C. 7, 54, 3, 3: In the past, by a most unfortunate example, a grace period of two months was granted to convicted debtors, yet their sureties were not allowed to enjoy the same benefit... Cutting off such harshness, we decree that the four-month grace period we have granted to the condemned be extended also to their sureties, so that the law is not undermined. For when a surety is compelled to pay, the condemned person had no experience of our sense of humanity (*nullum condemnatus habebat nostrae sensum humanitatis*), since through the intervention of the surety he was immediately forced to make payment.
- Expansion of *beneficium inventarii* from soldiers to other legal subjects
 - Iust. C. 6, 30, 22, 1: [...] *nobis apparuit esse humanum et non solum milites adiuvare huiusmodi beneficio, sed etiam ad omnes hoc extendere ...*
 - ... it appeared to us to be humane not only to grant this kind of benefit to soldiers, but also to extend it to everyone.

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Benevolentia

- *Benevolentia* (goodwill) invoked in Justinian's praise of the *lex Anastasiana* – the assignee could only collect from the debtor the amount he paid for the debt, along with interest, but not nominal value of the debt
 - Iust. C. 4, 35, 23: *Anastasio divae memoriae principi iustissima constitutio conscripta est tam humanitatis quam benivolentiae plena ...*
 - A most just constitution was enacted for the emperor Anastasius of blessed memory, full of both humanity and benevolence ...

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Clementia

- *Clementia* (clemency, forgiveness) invoked in Nov. 4, 3 (regarding *datio in solutum necessaria*), which introduced the option for debtors to fulfill their debts through a substitute payment if they couldn't sell their properties at a fair price. If the debtor owned multiple properties, the creditor had the right to choose which one to take.
 - Iust. Nov. 4, 3: *Quod autem de cetero humanis auxiliatur curis, licet quibusdam creditoribus non forte sit gratum, a nobis tamen propter clementiam sancitur ... Sed hoc quidem sit clementia quaedam clara legis ...*
 - As for that which henceforth offers aid to human concerns, although it may not perhaps be pleasing to certain creditors, it is nevertheless established by us out of clemency... Yet let this indeed be a certain shining example of the law's mercy.

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Pietas

- A sense of duty towards gods, homeland, and family (especially parents), both during life and after death (Ambr. De Off. 1.27.126; *De Tobia* 10, 36–37).
 - Justinian banned seizure of the debtor's body or delaying burial to force payment, reflecting piety and respect for the dead (Iust. C. 9, 19, 6; Nov. 60).
- Justinian allowed the pledgor to buy back pledged property within two years after it was sold.
 - Iust. C. 8, 33, 3, 3b: *Et postquam ... pietatis intuitu habeat debitor intra biennii tempus in suam rem humanum reversum ... et suum pignus recuperare ...*
 - And thereafter... out of consideration for mercy, the debtor shall have a period of two years in which he can recover pledged item.

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Lk 6:34-35: And if you lend to those from whom you expect repayment, what credit is that to you? Even sinners lend to sinners, expecting to be repaid in full. ³⁵ But love your enemies, do good to them, and **lend to them without expecting to get anything back**. Then your reward will be great, and you will be children of the Most High, because he is kind to the ungrateful and wicked.

Mt 5:42: Give to the one who asks you, and **do not turn away from the one who wants to borrow from you**.

Mt. 18:21-35: ... 32 "Then the master called the servant in. 'You wicked servant,' he said, 'I canceled all that debt of yours because you begged me to. 33 Shouldn't you have had mercy on your fellow servant just as I had on you?' 34 In anger his master handed him over to the jailers to be tortured, until he should pay back all he owed. 35 **"This is how my heavenly Father will treat each of you unless you forgive your brother or sister from your heart."**

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Influences of Patristics and Conciliar Resolutions?

- Church Fathers – general criticizing usury practice, promoted debt reliefs, charity, general scepticism towards commercial transactions ...
- Church asylum for debtors (C. Th. 9, 45, 1; C. Th. 9, 45, 1)
- Proceedings of *episcopalis audientia* followed „Christian law“ (*lex christiana*) with state law applied subsidiarily (C.Th. 1, 27, 1). Episcopal courts aimed to be fairer and faster, protecting individual, —especially the poor, from corrupt state officials.
- Usury condemned on the council of Nicea (325) and plausible influence on prohibition of *lex commissoria*:
 - Can. 17: *Si quis inventus fuerit ... usuras accipiens...turpis lucri gratia: deiciatur a clero.*
 - If anyone is found to be receiving interest for the sake of shameful profit, he shall be removed from the clergy.
 - Const. C. Th. 3, 2, 1: *Quoniam inter alias captiones praecipue commissoriae legis crescit asperitas, placet infirmari eam et in posterum omnem eius memoriam aboleri ...*

Since, among other harsh provisions, the severity of the *lex commissoria* has grown especially burdensome, it is our will that it be annulled and that all memory of it be abolished for the future

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Outlook: Byzantine „*favor debitoris*“

- Novella 163 : Μέγιστα τῶν ἐν ἀνθρώποις ἐστὶν ἀγαθὰ δικαιοσύνη τε καὶ φιλανθρωπία, ἡ μὲν τὸ ἴσον ἐκάστῳ νέμουσα καὶ τῶν ἄλλων οὐκ ἐφιεμένην, ἡ δὲ πρὸς ἔλεον τρέχουσα καὶ χρεῶν τοὺς δεομένους ἐλευθεροῦσα δυσκόλων.
- The greatest of goods among humans are justice and philanthropy. Justice, because it gives to each person what is due to them without desiring what belongs to others; and philanthropy, because it tends toward mercy, freeing those in need from the burden of harsh debts.
- Proheiron 14, 16: Εἰ καὶ πολλοῖς τοῖς πρὸ ἡμῶν ἔδοξε δεκτέαν εἶναι τὴν τῶν τόκων ἐκπίσιν, ἴσως διὰ τὴν τῶν δανειστῶν δυσκληρίαν τε καὶ ὀμότητα, ἀλλ' οὖν ὡς ἀναξίαν τῆς ἡμῶν τῶν χριστιανῶν πολιτείας ἀπευκταίαν εἶναι κεκρίκαμεν, ἅτε τὰρ τῆς θείας νομοθεσίας κεκωλυμένην, διὸ κελεύει ἡ ἡμετέρα βασιλευσία, μηδενὶ μηδαμῶς ἐξεῖναι ἐν μηδεμίᾳ ὑποθέσει τόκον εἰληφέναι, ἵνα μὴ νόμον φυλάττειν οἰόμενοι ἴνον ἡμετέρας παραβαίνωμεν· (8th century)
- Although it may have seemed appropriate to many before us to allow the collection of interest, perhaps due to the harshness and cruelty of lenders, we have decided that it is unworthy of our Christian state, as usury is forbidden by divine law. Therefore, our gentle decree commands that no one, under any circumstances, should accept interest, so that we may not transgress God's law while thinking we are following human law.

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Conclusions

- Christianity did not radically reform neither political order nor the law of obligations in post-Constantinian times (e. g. usury).
- Influence was limited due to doctrinal fluidity within Christianity, as church doctrines had not yet been fully developed during this period.
- Justinian curbed exploitative lending practices (e.g., the prohibition of *lex commissoria*, limitations on interest rates), but his reforming constitutions contain no explicit references to Christian ideas, unlike the *Procheiron*, and were driven by value-based motivations of ambiguous origin.
- The tendency to favor debtors was more strongly influenced by social and economic factors than by direct theological doctrine.

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Thank you for your attention!

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