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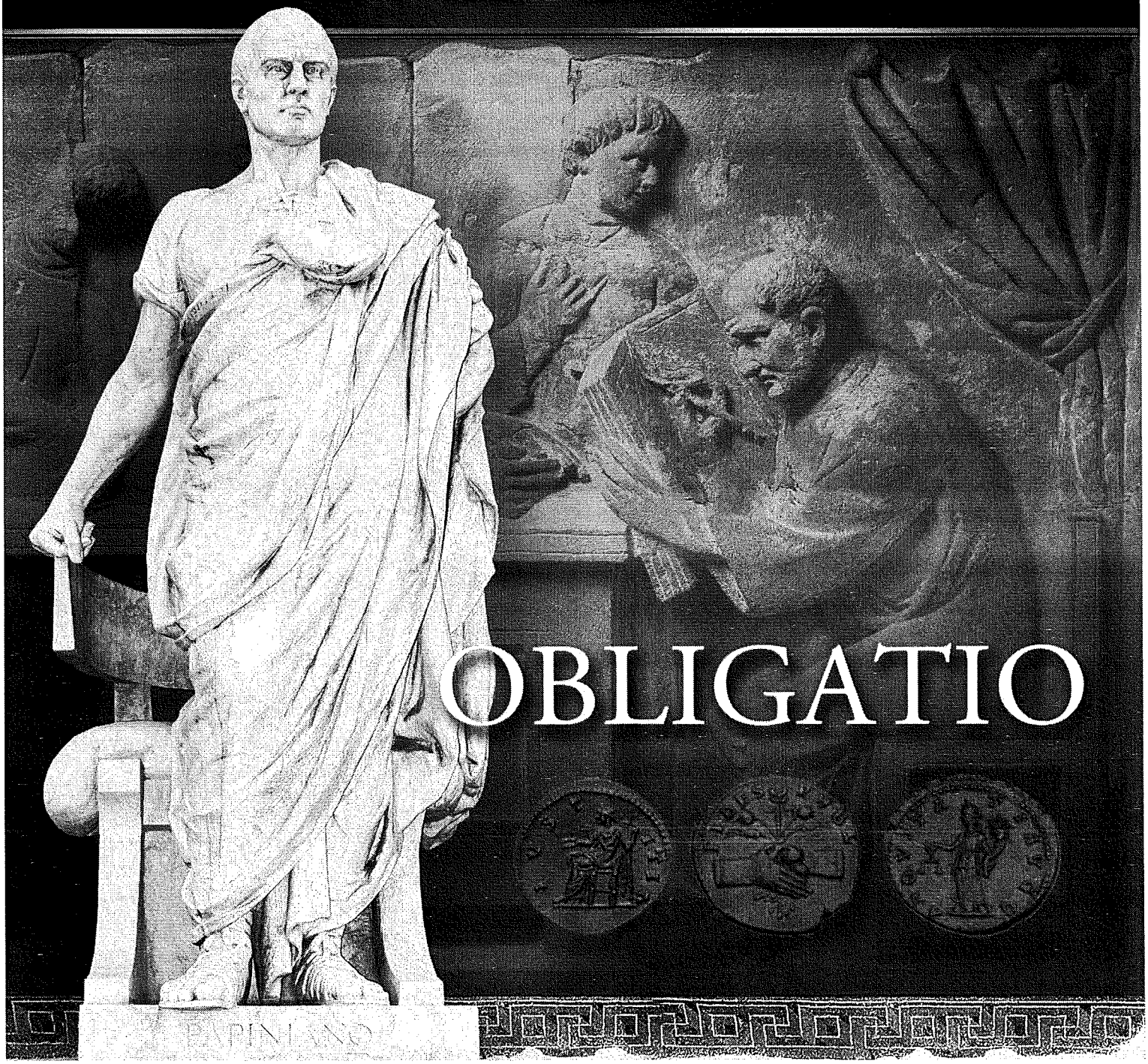

OBLIGATIO

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BONA FIDES В РИМСКИЯ ГРАЖДАНСКИ ПРОЦЕС (НА АНГЛИЙСКИ ЕЗИК)

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Резюме: Въпреки че не винаги се разграничава като изрично процесуално явление, доктрината за abusus iuris има дълга история и е позната на всички периоди от историческото развитие на гражданското съдопроизводство. Като един от основните принципи на съвременния граждански процес, ако се анализира исторически, може да се отбележи, че забраната за злоупотреба с процесуални права нито е съвременна в правния смисъл на тези термини, нито в историческата ретроспектива губи значението, я характеризира в съвременния граждански процес. В статията акцентът е поставен върху правораздаването в Древен Рим с особен акцент към института на злоупотребата с процесуални права. В нея се разглежда началото и развитието на организираните методи за правна защита в римския граждански процес с цел да се определи основната му характеристика през различните етапи от неговото развитие и да се анализира неправомерното поведение на страните пред съда и процесуалните механизми за потушаване на симулирани съдебни спорове. Историческата ретроспектива обхваща различни периоди от развитието на римския съдебен процес. Основният стимул за анализ на историческото измерение на гражданския процес в Древен Рим е да се анализира генезиса и еволюцията на прилагането на принципа на bona fides в римския граждански процес.

Ключови думи: римски граждански процес; злоупотреба с процесуални права; симулиран съдебен процес.

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BONA FIDES IN ROMAN CIVIL PROCEDURE (ENGLISH LANGUAGE)

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Abstract: Although not always distinguished as an explicit procedural phenomenon, abusus iuris doctrine has a long history and is familiar to all periods of historical development of civil procedure. As one of the basic principles of contemporary civil procedure, if analysed historically, it can be noted that the prohibition of abuse of procedural rights is neither modern nor contemporary in the legal meaning of those terms, nor in the historical retrospective loses the importance that characterize it in the modern civil procedure. Within the paper, the focus is set on the administration of justice in ancient Rome with particular interest on the institute of abuse of procedural rights. The paper discusses the beginnings and development of organized methods of legal protection in Roman civil procedure with the aim to determine its basic characteristic through different stages of its development and to analyse the frivolous behaviour of the parties before the tribunal and procedural mechanisms for supressing vexatious litigation. The historical retrospective is covering different periods of development of the Roman litigation. The main drive for analysis of the historical dimension of civil procedure in ancient Rome is to analyse the genesis and evolution of the principle of bona fides in Roman civil procedure.

Keywords: Roman civil procedure; abuse of procedural rights; vexatious litigation.

1. Introduction

History, and especially legal history teaches us that nothing in the world, and therefore nor in the development of different areas of social life is accidental. On the contrary, the development of the social order is modelled by variety of social laws, its gradual progress is affected by particular aims among which the ones that are of economic nature prevail[1]. The permanent changes that are stimulating the social progress leave their mark in the legal sphere as well. After all, the contemporary law emerges as a product of gathered experiences, its improvement is a result of a historical recollection, legal heritage and regulations obtained from the spiritual and civilizational tradition.

The reasons for studying the history of civil procedure are arising from the need to recognize the laws of social development and their reflection in the system of providing legal protection. As it is noted *„the comprehension of such laws requires history, and particularly legal history, which provides the jurists with the benefit that the experiment has for the natural sciences"*[2]. Therefore, historical analysis of different types of civil procedures has a significant role. Such analysis provides us with clarification of the present and understanding of the current state of affairs in the field of civil procedure, but at the same time it provides us with a proper and constructive observation of its future. In order to understand the meaning of the contemporary civil procedure, it is certain that one needs to be familiar with its history and therefore in order to understand the nature of different procedural institutes in the present or to anticipate its future regulation one has to look at their past as well.

The paper will discuss the beginnings and the development of organized methods of providing legal protection in Roman civil procedure with the aim to determine its basic characteristic through different stages of its development. The main drive for analysis of the historical dimension of civil procedure in ancient Rome is to study the institute of abuse of procedural rights and to analyse the genesis and evolution of the principle of *bona fides* in Roman civil procedure.

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[1] See HORVAT, M. *Rimsko parvo.* [*Roman Law*]. Zagreb, 1977, p. 3.
[2] *Ibid.*

2. Roman Civil Procedure – General Remarks

On the historical legal scene, *Ius romanum* legal order lasted for more than thirteen centuries from the legendary founding of Rome (754 or 753 BC) until the death of the Eastern Roman emperor Justinian (565 AD). In that quite long period of existence of the Roman state, Roman law, from a legal order of a small Latin city and primitive population with closed natural production, under the strong influence of the progressive productive forces and the development of the slave-owning production relations, gradually became a universal law of one world kingdom[3]. More than ten centuries Roman law has been developing and progressing while going through several specific periods marked by significant historical events of the Roman social order, which were a result of changes that affected the social and especially the economic structure of the Latin Empire. These changes have reflected in the area of protection of private rights as well. Therefore, during different phases of development of the Roman social order, the protection of subjective civil rights has emerged through different models.

The most primitive form of such protection was self-help – protection of the right with one's own power which could occur either in the form of an attack to protect one's own good or in the form of resistance when someone else is attacking. Given the weaknesses of the self- help[4], the state was gradually intervening to limit or completely eliminate such protection[5]. The process of complete takeover of administration of justice by the *imperium* went through several stages. In that period from self-help to full state protection, a notable place belongs to the institute of *arbiter ex compromisso.* The next step in that process is the emergence of *iudicium privatum* – a specific institute of Roman civil procedure familiar to the classical period of its development which appears as a kind

[3] See HORVAT, *op. cit.,* (*supra*, n. 1), p. 1; ROMAC, A. *Rimsko parvo.* [*Roman Law*]. Zagreb, 1987, p. 1.

[4] Defining self-help as an individual fight for one's rights can easily detect its weaknesses: self-help always interrupts the peace and order; it always goes in favor of the stronger (which does not mean that the stronger is always right); and finally, the subjectivity is always present within self-help (the limits of self-help cannot be determined correctly since no one is a good judge *in causa sua*).

[5] In Rome, self-help was prohibited by Marcus Aurelius with his decree *Decretum Divi Marci* in the second half of 2nd century AD. According to the decree, if creditor has tried on his own to realize his claim, without mediation of the court, he would lose such a claim as punishment. According to ROMAC, A. *Rimsko parvo.* [*Roman Law*]. Zagreb, 1998, p. 463.

of compromise between individual self-help and state intervention[6]. In the postclassical period, legal protection was fully provided by the *imperium* – the administration of justice emerges exclusively as an intervention of the state authority.

From the period of monarchy to the period of dominate, Roman civil procedure evolved through three periods: a) pre-classical period – *legis actio* procedure, which lasted from the founding of Rome until the middle of the 2nd century BC; b) classical period – *formula* procedure, which lasted from the middle of the 2nd century BC until the middle of the 3rd century AD; and c) postclassical period – *cognitio* procedure, which emerged in the classical period firstly as an exception and by the end of the 3rd century AD it became a regular method of protection of private rights. The last model outlasted the collapse of the Roman Empire and continued its existence in the Byzantine and Canon law. The three above mentioned periods in the development of Roman civil procedure can be classified according to the nature of the legal protection as well. The first two periods belong to the system of private trial – *ordo iudiciorum privatorum* (*iudicium privatum*), where specific split of the proceedings exists. The procedure was divided in two phases *in iure* and *apud iudicem*, with the state authority having competencies only in the first phase of the proceedings, while the final decision on the disputed matter was rendered by *iudex privatus*. The third period corresponds with the extraordinary model of trial, where the procedure is managed by state judges as imperial officials[7].

Our knowledge of Roman civil procedure is based on modest sources. The Romanists point to Gaius *Institutiones* as a basic legal monument regarding the models of administration of justice in ancient Rome[8]. In addition, other sources have significantly

[6] UZELAC, A. *Teret dokazivanja.* [*Burden of Proof*]. Zagreb, 2003, p. 15.

[7] The described development line of civil justice models, from the earliest jury courts to the imperial clerical courts corresponds to the general concentration of the all state power, both in administrative and military, as well as in legislative and judicial functions, in the hands of the absolute emperor and his bureaucratic apparatus. According to HORVAT, M. *O dvodiobi u najstarijem rimskom civilnom procesu*. Zbornik Pravnog fakulteta u Zagrebu. [*On division in the Oldest Roman Civil Procedure*, Collection of papers of the Faculty of Law in Zagreb]. Zagreb, 1958, p. 138.

[8] The fourth book of Gaius *Institutiones* gives detailed explanation of the *iudicum privatum* models of trial – the *legis actio* and *formula* procedure. Until the discovery of Verona manuscript of *Institutiones*, very little was known about these forms of legal protection, especially regarding *legis actio* procedure. Apart from Institutiones, information on the old *legis actio* procedure can be found in *Lex Duodecim Tabularum*, in Cicero's writings and in one part of the *Lex de Calia Cisalpina*. According to ROMAC, A. *Rimsko parvo.* [*Roman Law*]. Zagreb, 1987, p. 401.

contributed to expending the knowledge regarding the contours of Roman civil procedure: *Lex de Gallia Cisalpina*, discovered in 1760, *Fragmenta Vaticana*, discovered in 1821, *Lex Coloniae Genetivae*, discovered in 1870, *Fragmentum Atestinum*, discovered in 1880, the wax plates of *Pompeii, Puteoli* and *Herculaneum*, discovered in the past hundred years, and *Lex Irnitana*, discovered in 1981.[9] Facts on *extraordinaria cognitio* procedure inherent to the postclassical period can be found in Justinians's Codification.[10]

Before we continue with analysis of the development line of civil procedure in ancient Rome, we would like to point out one remark which appears to be important regarding the subject matter of this paper. Namely, from the legal monuments that testify on the models of administration of justice it can be concluded that even in the most ancient times prohibition on taking actions that could harm the proper course of procedure was familiar. In that respect, Roman law gives many testimonies[11]. Still, Roman law does not recognize the concept of abuse of procedural rights as it is accepted in the contemporary litigation. However, it doesn't mean that this ancient legal system wasn't familiar with mechanisms for repressing the improper and vexatious exercise of procedural rights.

3. *Bona Fides* in Roman Civil Procedure

3.1. *Legis Actio* Procedure.

Legis actio procedure is the earliest emerging stage of Roman civil procedure. In the pre-classical period the possibility of exercising private rights was reduced to a minimum – the right to sue (*actio*) was very limited due to the fact that *actio* could be used only if its content and formulation corresponded to the terms stipulated by law. The claims were adjusted to the text provided by law meaning that they were unchangeable as the

[9] According to METZGER, E. *Roman Judges, Case Law, and Principles of Procedure*. - *Law and History Review*, 22/2, 2004, electronic reprint from Roman Law Resources, p. 4.

[10] For more data on the live monuments (sources) regarding Roman civil procedure see E. METZGER, E. *An Outline of Civil Procedure in Roman Law*. (September 5, 2009). Cambridge Companion to Roman Law, Forthcoming, Available at: *SSRN*: http://ssrn.com/abstract=1588142, p. 3-6.

[11] БЛАГОЈЕВИЋ, Б. *Начела приватнога процеснога права.* [*Principles of private procedural law*]. Belgrade, 1936, p. 128.

laws themselves[12]. Hence, we get the name of the procedure, from the words *leges*[13] and *actio*[14]. The basic characteristics of this procedure were considered to be „...*strict formalism, orality, immediacy and the public*..."[15]. Essential characteristic of *legis actio* procedure is that it proceeded through two stages, although it may be more correctly to say that it consisted of two separate procedures. From today's perspective, we are adjusted to a procedure that takes place in an organic continuity before a court, from the beginning to the end. But, at that time, the bipartite procedure was considered as a rule. Only the first stage of the procedure took place before the judicial magistrate (*praetor*). He managed the procedure until the moment of *litis contestatio*. From that moment on, in another place and in front of another person, the second stage of the procedure began, where according to the procedural program of the magistrate, the factual claims of the parties were examined in order to create a basis for making a final decision. The first stage of the procedure was known as *in iure* procedure, while the second as *apud iudicem* or *in iudicio* procedure[16].

The main feature of *in iure* procedure was the strict formality with presence of archaic admixtures. The purpose of this stage was for the praetor to determine the legal substance of the dispute, i.e. to determine whether there is an appropriate „litigation program" in the existing laws[17] and to examine whether the procedural activities of the parties have been taken in the prescribed form, in order to approve the further course of the procedure. At this stage, the praetor did not play a productive role in creating the law. Given the strict formalism of the procedure, the praetor appeared as a controller and a supervisor. His role was to monitor whether the parties completed their activities in the proper manner and whether they adhered to all the formalities, ritual words and gestures that had to be carried out. If some error or disrespect occurred, the praetor was authorised to end the procedure and declare it null and void.

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[12] ROMAC, A., *op. cit.* (*supra*, n. 8), p. 405.

[13] Claims were introduced by laws, primarily due to the Law on XII Tables.

[14] Claims were named *legis actiones*, meaning „legal" claims. *Legisactiones* were considered as foundation of early civil procedure. DE PLESIS, P. *Borkowski's Textbook on Roman Law.* Fourth ed. Oxford University Press, 2010, p. 66.

[15] ROMAC, A., *op. cit.* (*supra*, n. 8), p. 405.

[16] WENGER, L. *The Roman Law of Civil Procedure*. Translated and Annotated by A. Arthur Schiller. - *Tulane Law Review*, 1930-1931, p. 358.

[17] UZELAC, A., *op. cit.* (*supra*, n. 6), p. 16.

The presence of both parties before the magistrate was inherent to *in iure* procedure. The summoning of the defendant – *in ius vocatio* – was a private matter of the plaintiff for which the plaintiff was fully responsible[18]. He was obliged to summon and to bring his opponent before the judicial authority so the procedure could begin. Wherever he was found by the plaintiff (except in his home, which was uninfringeable), the defendant had to appear due to the summoning and was obliged to follow the plaintiff before the magistrate.[19] Otherwise, the plaintiff was authorized to force him to come before the praetor after confirming the refusal of the defendant before witnesses[20]. Already in this initial phase of *in iure* procedure we come across elements that are significant in term of abuse of civil procedure. On one hand, it is assumed that in order to relieve defendant's position, in terms of preventing vexatious and frivolous behaviour and abuses in form of unfounded and unjustified summoning, the defendant had the opportunity to avoid going before the magistrate by giving a guarantor (*vindex*), guarantying that he would appear before the judicial authority on a specific day so the procedure can begin.[21] On other hand, given that *in iure* procedure could proceed only with the presence of both parties, if the hearing was postponed, and the magistrate did not have enough trust in the defendant that he would come again on the day the magistrate had determined, the defendant had to give a monetary guarantee (*vadimonium*) that he would come on the day when the procedure should continue, and the amount of the given monetary guarantee would have gone in favour of the plaintiff if the defendant did not appear. This was considered as a certain procedural punishment for the defendant[22]. If the defendant refused or was unable

[18] Detailed regulations for summoning the defendant before the court were specified with the first table of the Law on XII Tables: *Si in ius vocat. Ito. No it, antestamino. Igitur em capito* (Tab. I, 1) – If someone is summoned to court, he shall go. If he refuses to go, let it be witnessed. Only then he can be seized.

[19] There were some cases when certain restrictions were placed regarding the time when a summoning could be made. For ex., a person engaged in harvesting crops or producing wine could not be compelled to go to court at certain times. DE PLESIS, P., *op. cit.* (*supra*, n. 14), p. 66.

[20] See BLAGOJEVIĆ, B. *Građanski postupak u rimskom pravu.* [*Civil Procedure in Roman Law*]. Beograd, 1960, p. 11 and METZGER, E. *Litigation in Roman Law*. Oxford University Press, 2005, p. 4-6.

[21] On the duty of the *vindex* see KASER, M., K. HACKL. *Das Römische Zivilprozessrecht*. 1996, p. 64, 224.

[22] See BLAGOJEVIĆ, B., *op. cit.* (*supra*, n. 20), p. 12 and HORVAT, M., *op. cit.* (*supra*, n. 1), p. 347.

to provide the money guarantee, he was handed over to the plaintiff, who held him in private house arrest until the day set for continuation of the procedure[23].

After appearance of the parties before the judicial magistrate, the plaintiff would have presented his claim, stating his *legis actio* and specifically clarifying the legal grounds for which he sought protection. *Legis actiones*[24] were „*ceremonial, to each individual word, precisely defined formulas which parties in in iure procedure have spoken by rote, along with possible gestures*"[25]. The exchange of this solemn formulas was highly stylized with ritual symbolic features.

Regarding the idea of *bona fides* in civil procedure, we encounter mechanisms for suppression of vexatious litigation at different types of *legis actiones*. In most pronounced form they can be noticed in *legis actio sacramento*[26]. Within the typical property *legis actio – legis actio sacramento in rem*, we come across the institute of *provocatio ad sacramentum*, i.e. parties inviting each other to wager[27]. What was the essence of such act? Once the parties had brought the subject or a part that symbolized it before the judicial magistrate, they would, holding a wand (*festuca*) in their hands, utter their vindications and counter-vindications with solemn words, each one of them claiming that the subject was his. Afterwards the praetor would have asked them to solemnly wager. The party that lost the case, also lost the wager in favour of the state. This fine – *poena sacramenti* contains elements of a punishment for the party who caused the dispute. Depending on the value of the dispute, whether it was greater than or less than 1000 aeses, the amount of the wager was 50 or 500 aeses[28]. If the value of the dispute was over 1000 aeses, the plaintiff bade the defendant with the words: „*Quando tu iniuria vindicavisti quingentis assibus sacramento te provoco*" [Because you wrongly vindicated, I bid you to a sacrament of 500 aeses] and the defendant would answer „*Et ego te*" [I bid

[23] According to BLAGOJEVIĆ, B., *op. cit.* (*supra*, n. 20), p. 12.

[24] In his *Institutiones*, Gaius speaks about five types of *legis actiones*: *legis actio sacramento, legis actio per iudicis postulationem, legis actio per condictionem, legis actio per manus iniectionem, legis actio per pignoris capionem.*

[25] According to HORVAT, M., *op. cit.* (*supra*, n.1), p. 347.

[26] *Legis actio sacramento* is one of the oldest *legis actones*. It was a regular claim (*legis actio generalis*) that could be used to protect rights when no other type of claim was stipulated. It appeared in two forms, as *legis actio sacramento in rem* and *legis actio sacramento in personam.*

[27] The requirement of a deposit had the practical consequence of preventing frivolous litigation. See DE PLESIS, P., *op. cit.* (*supra*, n. 14), p. 67.

[28] Only in procedures for a person's freedom, the value of the wager was always 50 aese.

you as well]. It is assumed that in ancient times the parties immediately placed the *sacramento*. It was fully refunded only to the party who succeeded in the litigation. At certain times, both parties obliged to the magistrate in an event of a loss of the dispute, that they would pay the *sacramento* in favour of the state, and for this obligation they had to provide guarantors – *praedes sacramenti*[29]. Likewise, the party could also lose the wager if it was founded that her factual claims presented in *in iudicio* procedure were untrue.

Regarding *legis actio per condictionem*, in case of *certa pecunia*, the parties could mutually stipulate one-third of the amount of the wager in event of losing the dispute (*sponsio et restipulatio tertiae partis*). In this case, the amount of the agreed wager wasn't paid in favour of the state but to the party that has won the dispute[30]. In these penal stipulations we recognize rather ruthless but effective mechanisms for keeping meritless debt cases out of litigation. Regarding vexatious litigation, this procedural devices were created by the praetor so he could encourage a behaviour that he desired before his tribunal and that was a threat to impose debt on the misbehaving litigant.[31]

Within *legis actio per manus iniectionem*, if the *vindex* (debtor's guarantor) denied the reasoning of the creditor's *actio*, the *vindex* had to engage with the creditor in a new litigation for the justification of the *manus iniectionem*. In case he lost the dispute, the *vindex* would be sentenced to a double amount of the original debt[32].

In iure procedure ended with the act of *litiscontestatio*. The magistrate would set the legal framework for the dispute and referred it to a private judge. *Litiscontestatio* had the significance of most important procedural institute of *in iure* procedure. It was characterized by strict formalism and took place orally, before witnesses[33]. The act of *litiscontestatio* meant completion of *in iure* procedure.

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[29] According to EISNER, B., M. HORVAT. *Rimsko parvo.* [*Roman Law*]. Zagreb, 1948, p. 558.

[30] EISNER, B., M. HORVAT, *op. cit.* (*supra*, n. 29), p. 560.

[31] See METZGER, E. *Obligations In Classical Procedure*. – In: Thomas A. J. McGinn (Ed.). *Obligations in Roman Law, Past, Present, and Future*. The University of Michigan Press, 2013, p. 168.

[32] *Ibid*, p. 562.

[33] Hence the name *litiscontestatio*, from the words *lis* - dispute and *contestatio* - determination before witnesses.

The second stage of *legis actio* procedure, the *in iudicio* procedure began the second day after *litiscontestatio*. The procedure was in competence of *iudex privatus* according to the magistrate's procedural program. His function was to determine the accuracy of the parties' factual allegations and to make the final decision[34]. This stage of the procedure was characterized with informality[35]. Procedural activities were taken orally and directly before the judge. The parties briefly argued the case, the lawyers extensively presented their arguments and the evidence was presented. Since presence of both parties before the judge wasn't obligatory, in order to prevent possible abuse of procedural rights in a form of undue delay of the procedure, this stage was familiar with the contumacy procedure. The party was waited until noontime on the day when the hearing before the judge was scheduled. If one of the parties did not come, the opposing party could request rendering a default judgment which meant that the party who did not appear before the judge have lost the case.

After presentation of evidence, the judge would orally and publicly pronounce the judgment holding to the legal reasoning contained in the act of the magistrate. There was no possibility of appeal against the judgment. It was *res iudicata*.

3.2. *Per Formulas* Procedure.

As a regular method of legal protection, *legis actio* procedure existed for quite a long period of time, almost five centuries. Most of that time, it managed to meet the needs of Roman social order and to perform the function for which it was created. However, over time, it become an unfitting model of administration of justice. It could no longer match the growing economic relations and the increasingly developed social life. Its weaknesses, such as rigidity, strict formalism, rudeness, mysticism, ritualism and complexity seemed as a brake on the social and legal development of the Roman state and that is where the need of institution of a new model of procedure arose. Before that new model of administration of justice was created, attempts were made to make the *legis actio*

[34] See also ЗОРОСКА КАМИЛОВСКА, Т. *Римската граѓанска постапка и нејзиното влијание врз современата граѓанска постапка*. Зборник на трудови Современото право, правната наука и Јустинијановата кодификација. [*Roman Civil Procedure and its Impact on Contemporary Civil Procedure*. Collection of Papers Contemporary Law, Legal Science and the Justinian's Codification]. Skopje, 2004, p. 458.

[35] See also DE PLESIS, P., *op. cit.* (*supra*, n. 14), p. 69.

procedure practically applicable even though it was inconsistent to the social needs. That was made by introduction of unknown procedural institutes or by modification of the existing ones'. However, all those measures could only prolong the existence of *legis actio* procedure for a certain period of time. Its apparent flaws could not be annulled and therefore the end of its existence was obvious[36].

A new model of procedure was beginning to take its place in the development of Roman civil procedure – a model that could meet the growing social needs, a model that was less formal, less rigid, less expensive and risky, a model where participation wasn't obligatory for the parties, a model in which the procedure wouldn't be declared null and void due to misinterpretation of words, a model in which the magistrate from a passive observer became an active creator of the law, a model that has the *formula* as its noticeable institute. Therefore its name *per formulas*, i.e. *formula* procedure[37].

Structurally, the organization of the procedure has not changed. The bipartition of the procedure was still a rule. As for the difference in peculiarities in both stages of the procedure, if comparing *legis actio* with *formula* model, it can be concluded that changes mainly occurred in *in iure* procedure, while *apud iudicem* procedure, due to its characteristics remained almost unchanged.

In *ius vocatio* continued to be considered as a private matter of the plaintiff, but now the roughness of the previous model of summoning was replaced with *vadimonium*, i.e. a solemn promise of the defendant that he would come to the magistrate on a certain day. As the *in iure* procedure could not commence without the presence of both parties, there were mechanisms for ensuring the procedural discipline of the defendant. In order to avoid the undue delay of the proceedings and the risk of procedural time barring[38], the

[36] On the reasons for introduction of *formula* procedure and its characteristics see HORVAT, M., *op. cit.* (*supra*, n. 1), p. 350-351, ROMAC, A., *op. cit.* (*supra*, n. 5), p. 408, BLAGOJEVIĆ, B., *op. cit.* (*supra*, n. 20), p. 23-25.

[37] It is assumed that *formula* procedure has its origins in the procedure conducted by the *peregrinus praetor*, where the *peregrinus* appeared as parties. They were not given the opportunity to use the *legis actiones*, so the procedure took place through written act named *formula*. The practicality of this type of procedure was soon noticed, so *Lex Aebutia* allowed the *formula* procedure to be used by Roman citizens. The introduction of *formula* procedure as an exclusive and regular method of legal protection in the Roman state was made with *Leges Iuliae*.

[38] Within *iudicium legitimum* the judgement had to be rendered within 18 months, because otherwise the litigation would have become obsolete and would have remained unresolved due to the consumptive force of *litiscontestatio*, meaning that it could not be repeated in the future. Within

plaintiff had several alternatives to summon the defendant before the magistrate. One of those measures was *actio in factum* – to ask the praetor to sentence the defendant to pay a fine[39].

During the procedure before the magistrate, it was no longer typical to use solemn words and gestures – the plaintiff presented his claim in an informal manner asking the magistrate to issue an appropriate formula according to which the private judge would act in the next stage of the procedure while determining the factual assertions of the parties. After the plaintiff would finish with his presentation, the magistrate would give the defendant an opportunity to refer to the plaintiff's claim.

Since the praetor got a creative role in *formula* procedure as a creator of the law, this competence of his had positive reflection in controlling the procedural discipline and suppression of eventual abuses of procedural rights. The praetor appeared in a unique position, to simultaneously recognize and annul procedural abuses using various mechanisms to ensure that the parties act *bona fides* during the procedure. These mechanisms included *actiones*, defences, oaths and procedural duties[40]. In this regard, when it comes to *actio in simplum*, regarding *actio certae pecunie*, the parties have taken an oath that they are litigating *bona fide*. The oath was called *iusiurandum calumnae*. If the plaintiff did not take the oath, he would lose the case, and if the defendant acted in the same manner it was considered that he did not adequately defended himself from the action (*indefensio*)[41, 42].

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iudicia imperio continentia the judgement had to be rendered during the service of the same praetor, meaning up to one year. According to EISNER, B., M. HORVAT, *op. cit.* (*supra*, n. 29), p. 585.

[39] BLAGOJEVIĆ, B., *op. cit.* (*supra*, n. 20), p. 27.

[40] According to METZGER, E., *op.cit.* (*supra*, n. 10), p. 22. With such mechanisms, the praetor could enforce or encourage appropriate behaviour of the parties before the tribunal. METZGER, E., *op. cit.* (*supra*, n. 31), p. 158.

[41] МАРКИЋЕВИЋ, А. *Поштење и савесност у грађанској парници.* [*Bona Fides in Civil Litigation*]. Нови Сад, 1972, p. 21.

[42] The term *indefensio* is equated with the situation when the defendant in *in iure* procedure does not defend himself in a manner that it is expected considering his position, but he rather behaves in such a way that he frustrates the proper conduct of the procedure and the occurrence of the *litiscontestatio*. According to EISNER, B., M. HORVAT, *op. cit.* (*supra*, n. 29), p. 580.

The praetor also penalised the inactivity of the parties. In order to prevent the procedural tactics[43] that would produce negative effect on *in iure* procedure in terms of its commencement, prolongation or disabling the act of *litiscontestatio*, he had the authority to deny the plaintiff the legal protection that was asked (*denegare actionem*), and as a punishment for the passive defendant, the praetor could allow the plaintiff *missionem in bona* – possession of the defendant's property, which would be sold (*venditio bonorum*) if the defendant continued to be *indefensus*[44]. As the distinguished Romanist Leopold Wagner states *„this is, as a rule, a greater evil than the worst possible outcome of the lawsuit"*[45]. Therefore, the defendant preferred to engage in the dispute[46].

In *formula* procedure, a powerful weapon was individualized in the hands of the defendant that protected him from the vexatious and dishonest plaintiff. It was known as *exceptio doli,* an instrument that prevented a certain claim to be realized through judicial system if such a claim was lawful according to the strict provisions of *ius civile* but was a result of a fraud act. With this instrument, praetor did not annul the claim itself, but gave the defendant a mechanism for infinite paralysis of the claim – *„The creditor remained a creditor, but the debtor never paid his debt: Wise and necessary compromise between law and justice"*[47].

Furthermore, in *formula* procedure we encounter penalties for the insolent and vexatious litigants – *poena temere litigantium.* The penal stipulations were intended to supress vexatious litigation.[48] In Gaius *Insitutiones* it is noted:

For the purpose of avoiding vexatious litigation, the parties are sometimes deterred by pecuniary penalties, and sometimes by an oath which is imposed by the Praetor and

[43] The defendant might not appear before the magistrate or refuse to dispute regarding the merits of the case (*indefensio*) during the hearing. The plaintiff might not obey the orders of the praetor.

[44] See EISNER, B., M. HORVAT, *op. cit.* (*supra*, n. 29), p. 548; METZGER, E., *op. cit.* (*supra*, n. 10), p. 14. On sanctions imposed to the *indefensus* see also METZGER, E. *Absent Parties and Bloody Minded Judges.* – In: A. Burrows and A. Rodger (eds.). *Mapping the Law.* Oxford University Press, 2006, p. 455-473.

[45] WENGER, L., *op. cit.* (*supra*, n. 16), p. 373.

[46] From today's perspective, in this rule we recognize a mechanism for strengthening procedural discipline and preventing possible abuses of the process by the defendant.

[47] CRUET, J. *La vie du droit et l'impuissance des lois.* Paris, 1920, p. 30-31

[48] METZGER, E., *op. cit.* (*supra*, n. 31), p. 159.

sometimes by fear of infamy. Denial of the liability by defendant in certain cases is punishable by doubling the damages to be reimbursed..., sometimes a wager is allowed for the penalty amount...[49]

Thus, in order to prevent the intention of unfounded objections by the defendant, as a procedural punishment against him it was stipulated that if he denied the debt he would be sentenced to pay double amount of the claim (*lis infitiando crescit in duplum*)[50]. Sometimes, if the defendant led the lawsuit to the end and lost the case, infamy would reach him[51].

For the vexatious plaintiff who initiated the procedure only with the purpose to harass the opponent, Roman law recognized *actio calumniae* (*iudicium calumniae*). In its essence, *iudicium calumniae* was a mechanism in the hands of the defendant against the plaintiff who had initiated the procedure in *mala fide*. If the defendant was maliciously sued and the plaintiff knew that his claims were unfounded, the defendant could file a lawsuit against his opponent for one tenth of the value of the dispute matter of the previous procedure, but to succeed in his *actio* he had to prove that the plaintiff had acted with *calumniae causa* (vexatious)[52,53].

It was considered that the plaintiff acts *mala fide* if he claimed something that should be returned straightaway: *Dolo facit qui petit quod redditurus est*[54]. In case of *fictus possessora* if someone has engaged in litigation to delay the procedure and to allow the rightful holder to acquire ownership with maintenance was liable for the damage caused

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[49] Gaius, 4.171.

[50] This referred to *actio iudicati, depensi, actio legis Aquiliae, legatorum per damnationem* (Gaius, 4.171).

[51] Gaius, 4.182. EISNER, B., M. HORVAT, *op. cit.* (*supra*, n. 29), p. 582-583.

[52] BERGER, A. – In: *Encyclopedic Dictionary of Roman Law*. Vol. 43. The American Philosophical Society, 1953, Reprinted 1991, p. 521.

[53] A counter of *iudicium calumniae* was *iudicium contrarium*, a counterclaim by the defendant against the plaintiff who sued negligently and lost the case. This counterclaim was only allowed in specific cases. Within *iudicium contrarium* the former plaintiff was sentenced to one tenth of the value of the dispute which he lost, regardless of whether he acted maliciously or not. BERGER, A., *op. cit.* (*supra*, n. 52), p. 522.

[54] *Paulus*: D. XL IV.4.8

to the plaintiff. The same applied for the holder of the subject who would maliciously alienate the subject in order to impede its return[55].

Describing the litigation caused by immorally based old formal contract *expensilatio* and the lawsuit based on immoral grounds, *Valerius Maximus* cites an appropriate example of behaving *mala fide*[56].

Regarding the principle of *bona fides* in Roman civil procedure, it is also important to mention the significance of the principle of publicity which was strictly respected during the conduct of the procedure, both in *formula* and *legis actio* procedure. The purpose of this principle was not to make the procedure „public" in the sense of its conduct in front of a wide audience, but to provide public control over the conduct of the procedure, as the presence of the public had great impact on prevention of abuse of process.

In iure procedure ended with issuance of a *formula*[57] by the judicial magistrate by which he would set the legal framework of the dispute. The magistrate handed the *formula* to the plaintiff who handed it over to the defendant in the presence of the magistrate. The handing of the *formula* covered the act of *litiscontestatio*. The act of *litiscontestatio* had significant effects in term of the idea of *bona fides* in Roman civil procedure as well. Namely, due to its consumptive force, the plaintiff had to be prudent not to ask more then

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[55] HORVAT, M. *Rimsko parvo.* [*Roman Law*]. Zagreb, 1958, p. 190.

[56] *„Notum suis temporibus iudicium commemoravi, sed ne quod relaturus quidem sum obliteratum silentio. C. Visellius Varro gravi morbo correptus trecenta milia nummum ab Otacilia Laterensis, cum qua commercium libidinis habuerat, expensa ferri sibi passus est eo consilio, ut, si decessisset, ab heredibus eam summam peteret, quam legati genus esse voluit, libidinosam liberalitatem debiti nomine colorando. evasit deinde ex illa tempestate adversus vota Otaciliae. quae offensa, quod spem praedae suae morte non maturasset, ex amica obsequenti subito destrictam feneratricem agere coepit, nummos petendo, quos ut fronte inverecunda, ita inani stipulatione captaverat. de qua re C. Aquilius vir magnae auctoritatis et scientia iuris civilis excellens iudex adductus adhibitis in consilium principibus civitatis prudentia et religione sua mulierem reppulit. quod si eadem formula Varro et damnari et ab adversaria absolui potuisset, eius quoque non dubito quin turpem et inconcessum errorem libenter castigaturus fuerit: nunc privatae actionis calumniam ipse conpescuit, adulterii crimen publicae quaestioni vindicandum reliquit.", Valeri Maximi, Factorum et Dictorum Memorabilium* (8.2.2).

[57] The *formula* consisted of several main parts*: iudicus nominatio* (appointment of a judge), *intentio* (plaintiff's statement of claim, where he stated the allegation on which his claim was based.), *demonstratio* (description of the facts justifying the claim), *adiudicatio* (authorization of the judge to determine to whom the right of property belongs when dividing the subject), and *condemnatio* (ordering the judge to convict the defendant if it is determined that the plaintiff is right). Secondary elements of the *formula* were *praescriptiones* (which set out a certain legal question on which the further course of the procedure depended) and *exceptiones* (objections by the defendant).

what belonged to him (*plus petitio*) since the defendant could be completely released due to the untruthfulness of the claim. The plaintiff could not file a claim for a second time, not even for the smaller but exact amount because he could not *lis contestate* twice[58].

Apud iudicem stage of *formula* procedure, similar to the same stage of *legis actio procedure,* was carried out informally, with application of adversarial principle, principle of publicity, immediacy and orality. At this stage of the procedure, parties proved the truthfulness of their allegations and the judge, respecting the legal program appointed by the praetor and upon his free judicial belief, valued the evidence and pronounced the judgement.

Concerning the issue of abuse of process, particularly interesting is the fact that in the classical period of development of Roman civil procedure a specific mechanism was individualized against the judge who would render an unjust judgment acting *dolo* or *culpa.* In the sphere of quasi-delicts, a *iudex qui litem suam fecerit* (a judge who would have made the case his own) was held liable. There was a specific quasi-delict *actio* for compensation of damage. The ground for the judge's liability was malicious deliberation of wrongful decision. Interested in favouring one of the parties or harming her, or by accepting a bribe, the judge could be held liable. When deciding over a dispute, the judge exercised law, but if his motive was to harm one of the parties, such exercise was considered to be abusive[59].

As in *legis actio* procedure, there was no possibility to challenge the judgment in the *formula* procedure as well.

3.3. *Cognitio Extra Ordinem* Procedure.

The last development stage of Latin civil procedural system was *cognitio* procedure. The needed change of the existing *per formulas* model occurred due to several

[58] HORVAT, M., *op. cit.* (*supra*, n. 1), p. 357.

[59] See DEVINE, D.J. *Some Comparative Aspects of the Doctrine of Abuse of Rights.* - *Acta Juridica*, 1964, p. 152; SUPRA, D., N. MACCORMIC. *Iudex qui litem suam fecit.* - *Acta Juridica*, 1977, p. 149. On corruption in Roman litigation, see DE PLESIS, P., *op. cit.* (*supra*, n. 14), p. 64-65.

reasons[60]. That transition from the old to the new model of procedure wasn't straightforward and fast. On the contrary, it was gradual and slow. Its beginnings were noticeable in the authority of the praetor to take over and resolve certain legal relations for which the law did not recognize proper method of protection. In such cases, the praetor would fully take over the conduct of the procedure: all stages of the procedure, beginning from determination of legal framework of the dispute to establishing the facts and rendering a decision, to taking care of its enforcement. Gradually, this „extraordinary" activity of the praetor supressed *formula* procedure out of the scene and was established as an exclusive and regular model of administration of justice in the postclassical period[61].

Cognitio procedure was considered as a discontinuity of the previously organized system of administration of justice. We say discontinuity because its basic principles and the manner of its conducting differed drastically from those inherent to the previous models of trial[62]. With introduction of *cognitio* procedure, judicial protection became "administrative". It was in the hands of ordinary state clerks, who, in addition to other duties, performed the administration of justice as well. With concentration of the procedure and its conduct by one person the bipartition of the procedure was no longer necessary. The complete *etatization* of the system of administration of justice is considered as the main feature of *cognitio* procedure. The new system introduced new institutes and the procedural institutes of the classical period fundamentally changed their meaning in order to adapt to the new model of trial. *Litiscontestatio* lost its meaning of a procedural agreement by which the parties authorized the private judge to resolve the dispute. It continued to exist in *extra ordinem* procedure as an institute with a completely different

[60] Primarily, the change of the political structure of Roman state and introduction of absolute monarchy should be considered as one of the main reasons in that regard.

[61] Hence the name of the procedure as *extraordinaria cognitio*. In the time of the principate, when the praetor exercised his *imperium* by conducting the entire judicial procedure, it was said that he was deciding *extra ordinem iudiciorum privatorum*, which meant outside the regular method of private trial. The word *cognitio* means examination, determination, decision-making and referred to the activity of the praetor, earlier the *iudex privatus* in judicial procedure. Although, over time this procedure had become a regular method of protection, the name extraordinary remained. According to ROMAC, A., *op. cit.* (*supra*, n. 5), p. 412.

[62] Instead of principles of orality and publicity, the procedure became written and closed for the public. The adversarial principle was gradually replaced with the inquisitorial. The principle of free evaluation of evidence was suppressed by the system of legal evaluation of evidence.

definition. It was believed that it indicated the moment when the judge proceeded with hearing of the parties after he had briefly presented the case.

In the following text we will refer to several procedural institutes of *cognitio* procedure that seems relevant in the context of idea of procedural *bona fides*, more specifically with mechanisms for prevention of abuse of process.

Firstly, we will discuss the methods of summoning the defendant to court[63]. In regulation of this procedural activity, two developing stages can be distinguished. First, *in ius vocatio* was replaced with *litis denuntiatio*, while the latter was replaced with *libellus conventionis* and *libellus contradictionis*, a model that resembles the modern European system of service of process. Within *litis denuntiatio* the defendant had to appear before the court at any time within four months from the date of delivery of *litis denuntiatio*. On the other hand, the plaintiff was obliged to formally initiate the procedure in the mentioned period. In order to prevent the conscienceless conduct of the parties in terms of non-compliance with the stipulated time period, the plaintiff who did not initiate the procedure would lose the litigation and would have been obliged to reimburse the defendant all the costs (cost related to summoning and preparation regarding the scheduled hearing) while the defendant would be disciplined with contumacious sentence[64]. Within *per libellos* procedure, the plaintiff had to take an oath or give security in order to confirm the truthfulness of his assertions and to swear that he would initiate the procedure within two months and that he would participate in the procedure until its completion. Otherwise, he would have to reimburse the defendant twice the costs of the procedure. The defendant, on the other hand, had to oblige by an oath or guarantee that he would appear before the court on a certain day and that he would participate in the procedure until its completion (*caution iudicio sisti* and *fideiussorum iudicio sistendi causa*). Otherwise, he could have been detained[65]. If the defendant disregarded the summons, he committed the offence of *contumacia*.[66]

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[63] Summoning of the defendant was no longer a private matter of the plaintiff. The complete etatization of the judicial procedure was already noticeable in this initial stage of the procedure since the state authorities took over the summoning.

[64] BLAGOJEVIĆ, B., *op. cit.* (*supra*, n. 20), p. 53-54.

[65] EISNER, B., M. HORVAT, *op. cit.* (*supra*, n. 29), p. 598; BLAGOJEVIĆ, B., *op. cit.* (supra, n. 20), p. 54-55.

[66] DE PLESIS, P., *op. cit.*, (supra, n. 14), p. 80.

In the development of Roman civil procedure, for the first time in *cognitio* procedure system of legal remedies was introduced.[67] The possibility of challenging the rendered decision arose due to the new organization of administration of justice, where the state had a monopoly over the regulation of its organization. Given the hierarchical structure of the state authorities, the introduction of *appelatio* appeared as necessity. Due to its characteristics, the appeal was considered as ordinary, devolutive and suspensive legal remedy.

In order to prevent the undue delay of the procedure by vexatious and frivolous challenging of the rendered decision, draconian penalties were provided for the unscrupulous and malicious exercise of the right to appeal. Emperor Constantine decreed that any wealthy party whose appeal was rejected as unfounded would be sentenced to two years of persecution and confiscation of half of its property. The poor party could be sentenced to two years of forced labour in the mines. It can be noticed that at that time the type and the amount of the punishment were individualized according to the economic status of the party. In Justinian's time, these draconian measures against the abusive behaviour of the parties were lessened in a manner that the judge was entitled to decide in each individual case on the type of the punishment for the party who would abuse the right to appeal[68]. Frivolous appeals were also prevented according to the provision which stipulated that the decision to be rendered, could also be on detriment of the applicant and with the possibility of imposing fines that in some cases could reach four times the costs of the other party[69].

In a certain period, the right to appeal was not restricted, which meant that the party could file an unlimited number of appeals to the higher authority and so on to the emperor. This procedural rule generated great possibility for abuse of the right to appeal. As a result of parties' dilatory tactics in this context, the procedures were significantly delayed, which indicated that parties have succeed in their intentions to misuse the process. Therefore,

[67] On appeals in *cognitio* procedure see KASER, M., K. HACKL, *op. cit.* (*supra*, n. 21), p. 501-509; DE PLESIS, P., *op. cit.* (*supra*, n. 14), p. 81-81.

[68] BLAGOJEVIĆ, B., *op. cit.* (*supra*, n. 20), p. 58.

[69] EISNER, B., M. HORVAT, *op. cit.* (*supra*, n. 29), p. 600.

in Justinian's time, a key limitation was set – each party could successively file an appeal to the higher authorities only twice[70].

The provisions of the classical period for the longest duration of litigation did not apply in *cognitio* procedure. Since the parties were „effective" in their abusive manoeuvers resulting in undue delay of the procedure, in order to supress those manifestations, Justinian introduced *lex properandum*, according to which each litigation terminated *ex lege* three years from the moment of *litiscontestatio*[71]

But, that wasn't all regarding the prevention of abuse of procedural right. In his *Codex*, Justinian devoted an entire chapter to vexatious litigants. In *Institutes*, Book 4, chapter XVI is entitled as *De Poena Temere Litigantium*. It is noted there:

Nunc admonendi sumus, magnam curam egisse eos qui iura sustinebant, ne facile homines ad litigandum procederent: quod et nobis studio est. idque eo maxime fieri potest, quod temeritas tam agentium quam eorum cum quibus agitur, modo pecuniaria poena, modo iurisiurandi religione, modo metu infamiae coercetur.

[It should be noted here that the authors and guardians of our law have always sought to prevent people from vexatious engaging in litigation, and we wish the same. And the finest manner to do that is to suppress such urges of plaintiffs or defendants, sometimes with fines, sometimes with oaths, sometimes with fear of infamy].

In the time of Justinian, in order to prevent vexatious behaviour of the parties, it was stipulated that each defendant, before presenting his defence, had to take an oath that he did not admit plaintiff's claim only because he believed he had justified reasons. In certain cases, the defendant who unreasonably denied the claim could be fined twice or three times the value of the plaintiff's claim. In order to prevent the frivolous behaviour of the plaintiff, he was obliged to take an oath *de calumnia*. Lawyers of both parties had to take similar oaths as well. All these formalities were introduced in order to replace the old *actio calumniae*, which served to punish the unscrupulous plaintiff to the amount of

[70] BLAGOJEVIĆ, B., *op. cit.* (*supra*, n. 20), p. 58.
[71] EISNER, B., M. HORVAT, *op. cit.* (*supra*, n. 29), p. 601.

one tenth of the value of the dispute in case he lost the dispute. The reason for abandoning this procedural institute was its rare application in practice. Therefore, it was primarily replaced by an oath, and afterward by a rule that anyone who initiated an unfounded lawsuit must reimburse the defendant all the losses and costs incurred due to such procedure[72].

4. Conclusion

Although not always distinguished as an explicit procedural phenomenon, *abusus iuris* doctrine has a long history and is familiar to all periods of historical development of civil procedure. As one of the basic principles of contemporary civil procedure, if analysed historically, it can be noted that the prohibition of abuse of procedural rights is neither modern nor contemporary in the legal meaning of those terms, nor in the historical retrospective loses the importance that characterize it in the modern civil procedure. And this is due to the fact that it appears as a regulatory principle regarding the procedural behaviour of the parties in the system of administration of justice in general, regardless the organization and the time existence of certain type of civil procedure.

Following the idea of *bona fides* throughout the development line of Roman civil procedure, it can be concluded that the liability for malicious or frivolous conduct of the parties is based on the culpability as an essential component. In that respect, regardless of the periods of its evolution, Roman civil procedure remains loyal to the idea of *dolus*. *Calumnia* is equated only with situations where there is a (malicious) intention of the parties to abuse the process or to violate particular procedural provision in order to cause damage to the opponent or the procedure itself[73]. The existence and concept of idea of vexatious litigation in Roman civil procedure lead us to conclude that although Roman law did not accept the doctrine of abuse of rights in general, in one particular legal sphere, i.e. in civil procedure, the Romans profiled the doctrine of abuse of procedural rights and created mechanisms to supress *mala fide* behaviour in the procedure.

[72] Institutes, Lib. IV, Tit. XVI.2.
[73] БЛАГОЈЕВИЋ, Б., *op. cit.* (*supra*, n. 11), p. 128-129.