Atti a modulazione penale e tempistica
dell’adempimento: la speculazione
giurisprudenziale tra principi e utilitas

Mario Genovese

The research on the institutes of the stipulatio poenae and the legatum poenus reconstructs, through the exegesis of various sources among which D. 45.1.115.1-2 and D. 35.2.1.8, the legal framework provided for the omission of execution time for the primary provision, taking care to keep separate the applications relating to stipulatio poenae and legatum poenus expressed in ‘simple’ modulation (namely in unitary and conditionally form) and those relating to the same institutes in ‘dual’ modulation (namely through two distinct connected arrangements). After that it look into the meaning of the expression ‘in continenti’ which in the view of the jurist Paulus it has to be understood as ‘cum aliquo spatio’ even in light of further elements of comparison on offered by the sources related to the compromissum (D. 4.8.21.12, D. 44.7.23) and pecunia constituta (D. 13.5.21.1). In closing the study highlights a convergence trend of jurists towards standardization of the regime between stipulatio poenae and legatum poenus in default of praeferitio temporis; otherwise concerning the iussus of referee ‘si dies adiectus non sit’ it results became evolved a separate regulation.

Principio di utilizzazione negoziale
e iusta causa traditionis

Riccardo Fercia

The research aims to show how the dissensus on the causa dandi atque accipiendi was not for Iulianus (D. 41.1.36) a insuperable error, because this jurist considers possible, unlike Ulpianus (D. 12.1.18), a conversion by reduction of the void traditio, and so the agreement on the function of traditio is not attributable to donatio, but to mutui datio.
When Constantine speaks of *filii nutriendi*

Carlo Lorenzi

The Emperor Constantine issues an enactment in CTh 5.10.1 on the surrender of newborn children by their parents to other people. A particular aspect of the content of this constitution is examined here. The constitution, in fact, does not seem to be limited to the sale of newborns. Alongside the opening words “Secundum statuta priorum principum si quis a sanguine infantem quoquo modo legitime comparaverit”, also appear “vel nutriendum putaverit”. Scholars have generally interpreted this phrase as a reference to the case of exposure, but considering other texts it seems likely that the reference is to cases of child rearing entrusted to a third party. In the rubric of title 9.31 of *Codex Theodosianus*, “Ne pastoribus dentur filii nutriendi”, and in CTh. 9.31.1 there is mention of children handed over to be raised by shepherds or other rural residents, evidence of a practice that must have been fairly widespread. References to the practice of sending infants to be raised elsewhere also appear in some other legal texts. The *filii nutriendi traditi* referred to in the provisions of the Theodosian Code may be part of the category of *alumni*, if the term *alumnus* is considered to encompass, in general, any individual who is raised, fed and educated by another in a varied relationship.

La pluralità dei modelli familiari: le ‘nuove’ famiglie nell’ordinamento italiano

Vincenzo Luciano Casone

The term of *de facto family* is generally used to define a particular social dimension that, although matching the essential structure of the family originating in marriage, it lacks of any formalization of that relationship. Following the legal determinations of filiation included in the law n. 219 of the 10th of December 2012, a new scenario is portrayed which formally recognises the so-called “family of the children”. The significance of such an innovation lies in the attempt to unify the order of filiation and, at the same time, to cancel the difference between natural and legitimate children so as to consider as children also those who are born outside the matrimonial union. Such a redefinition of family does not necessarily implies the existence of a marriage bond. The effect of this law has implied a rethinking of the expression of *de facto family*, that so far, has always referred to a nucleus made of unmarried parents with children and a shift towards a *de jure* family. Today, the latter definition of family seems more appropriate than the previous one whereas the attribute “*de facto*”, instead, is merely making reference to the existence of a relationship of whatever nature, homosexual or heterosexual, between two people.
La Polonia e le prospettive del diritto privato europeo. L’unificazione e il metodo combinato

Grzegorz Jan Blicharz

The question about Polish perspective on European private law deals with the possibility of common EU legal order or even common legal order within Europe itself that can be built on national legal traditions. The phenomenon of the decodification of private law well known in Europe for decades now has returned in Poland with the question: why have a new Civil Code? The codification on the European level which means preparing a European Civil Code is no longer expected even by the European Union. The civil code as such is not enough, and not useful even on national level. The truth of the matter is to find common legal framework that can empower legal science to judge and promote legal solutions within the Western legal tradition. In Polish legal science has been proposed a new approach that can combine the experience of ancient Roman law, ius commune and comparative law in order to bring together the European legal science and to strengthen the argumentative power of comparative law. The example of subjective-objective method of construction of contracts shows how important is to study the origins of modern legal solutions, to uncover differences within civil law traditions and similarities between common law and civil law orders. The new ius commune can be enhanced thanks to the legal framework of Roman law, historical argument and comparative law perspective.

Storia, diritto e filosofia: la polemica tra Pietro Bonfante e Benedetto Croce (e Giovanni Gentile)

Francesco Arcaria

The debate between Pietro Bonfante, historian expert in Roman law, and the prominent philosophers Benedetto Croce and Giovanni Gentile in the 20th century has proved to be not a sterile academic querelle: it involves the controversial relationship between history, law and philology and has turned out to be a modern demonstration of the spirit of a century. It also provides important elements to understand the current situation and methodological orientation of the historical approach to law.

Paul Koschaker and the path to “Europa und das römische Recht” (1936-1947)

Tommaso Beggio

The aim of the present paper consists in analysing Paul Koschaker’s stances on Roman law and the crisis it faced in Germany during the thirties, as well as his academic experience, from 1936 till 1947. Actually 1936 represents the year when Koschaker obtained the prestigious chair for Roman law at the University of Berlin, whereas in 1947 his masterpiece, Europa und das römische Recht, was published. Nevertheless the article deals mainly with the content and the meaning of the work published by Koschaker in 1938, Die Krise des römischen Rechts und die romanistische Rechtswissenschaft. Since this text has been considered by the scholars either a political pamphlet against the Nazi regime, or an indirect academic support to the Nazi ideology, a detailed investigation of Koschaker’s work will be carried out, to understand if it’s actually possible to offer such a clear-cut judgments on this writing. The main stances suggested by Koschaker in order to restore dignity to Roman law will be discussed, paying attention as well to the reaction they caused among the scholars, the Italian ones in particular. Furthermore, some archival documents, in part still unpublished, will be analyzed to get a better understanding not only of Koschaker’s scientific and academic ideas, but also of his approach towards the regime. Eventually it will appear how it is necessary to adopt some prudence, when evaluating the behaviour and the ideas of a scholar who lived in such a dark age, like the one of the Nazi regime was.
La relazione fra *ius sacrum* e *ius civile* nel pensiero di Proculo e Cassio.
Lo sfondo della controversia sull’acquisizione mediante un *servus hereditarius*

**Martin Avenarius**

The contribution considers the relationship between *ius civile* and *ius sacrum* within the respective legal thinking of Proculus and Cassius. It sets out from the question whether a slave belonging to a *hereditas iacens* as recipient of a *stipulatio* can acquire for the benefit of the future heir. Gaius (3 de verb. obl. D. 45.3.28.4) reports that Proculus denied the validity of the acquisition according to *ius civile*. Cassius on the other hand considered the acquisition to be valid. He applied a concept found in ancient sacral law according to which the heir immediately obtained a cultic burden with the death of the deceased. Cassius transferred this concept to a case where the heir accepted the inheritance only later and held that the effect of the accession was to be referred back to the time of death. While in preclassical tradition Cassius saw an overlap between *ius civile* and *ius sacrum*, Proculus, in the manner of early classical legal thinking, had a strict separation of these two fields of law in mind.

**Demonstratio e intentio:**
antinomie nel processo formulare?

**Peter Gröschler**

The demonstratio, a factual description, is disputed to this day as to how the introductory *quod* is to be understood: as causal, conditional or in terms of a declarative *quod*. Arangio-Ruiz already sees a mismatch (incongruence) in the ratio of the demonstratio and intentio: Under normal circumstances, neither a lawyer nor a man of mind (according to Arangio-Ruiz) could for example express himself like in the formula in *factum concepta* of the actio depositi. The intentio also remains a mystery: intentio can literally be translated with “plan / purpose”, “intent”, “desire”, which is why the intentio is commonly equated with the claim of the plaintiff. However in reality, it contains the sentencing conditions which arise out of connecting the immediately subsequent condemnatio. The aim of this contribution is to resolve alleged contradictions.

**Dal *ius controversum* alle antinomie**

**Emanuele Stolfi**

Through the investigation of not many ancient sources – before rhetorical alone, after juridical too – in which appears the word antinomia, the author examines the possible (and different) meaning of this notion in the ‘open system’ of a *ius compositum* a prudentibus and, few centuries later (in the Justinian’s age), in the context of a new legal conception, on which is founded the compilation of Corpus iuris civilis. Therefore this article analyzes the relations between the idea of antinomy and the typical evolving of a *ius controversum*, with particular attention to the cases in which we find a contrast (more or less real) between legal solutions or definitions of the same jurist.