I. INTRODUCTION

A. The nature of the law of obligations

1. The law of obligations deals with rights and duties which exist between parties of a legal relationship, such as for instance a contract. The term *OBLIGATIO* in Roman law denotes the two-way connection that Roman jurists describe as a 'legal bond' *(VINCULUM IURIS)* that gives rise to a duty to make performance[1].

The *OBLIGATIO* refers to the reciprocal rights and duties that – typically – exist between two parties: A has a right to claim something from B, so that B has a duty towards A.

The person who has a claim on the other party is called the *CREDITOR* (or obligee), the party bound to make performance is called the *DEBITOR* (or debtor/obligor).

> *On the creditor's side, we may find either an individual or a group of people (majority of creditors). Similarly, on the debtor's side we may find either an individual debtor or a majority of debtors.*

From the creditor's point of view, the legal bond of *OBLIGATIO* thus consists of a right or claim against the other party; from the debtor's point of view, it consists of a duty or obligation to make performance.

> *Note: Unlike the English word "obligation", which refers only to the debtor's side of the legal bond (ie the duties involved), the Roman OBLIGATIO denotes both sides of the relationship (ie both rights and duties).*

2. An obligation within the meaning of the law of obligations exists only between the specific creditor(s) and debtor(s) involved: A has a claim only against B[2]. This is why these obligations are described as "relative" or "personal" *(IN PERSONAM)*.

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1 Cf Iust Inst 3.13 pr: *OBLIGATIO EST IURIS VINCULUM, QUO NECESSITATE ADSTRINGIMUR ALICUIUS SOLVENDAE REI* etc. An obligation is a legal bond that binds us perforce to make performance etc.

2 For the question to which extent third parties could be beneficiaries of a contractual obligation, see below at VII.B.3.d, Fn 26.

Rights in rem, in contrast, are "absolute" in the sense that they are enforceable against all others *(ERGA OMNES);* they are not defined by a claim that the creditor has against a specific debtor but with regard to a specific object. It lies in the nature of a right in rem[3] that it entitles its holder to access and use an asset in a specific way *(IN REM),* and to assert this right against everybody else.

> *Example 1: On 3 January, Leo, a horse trader, closes a contract with Helena[4] for the sale of the stallion Hector; they agree on a price of 900; delivery of the horse in exchange for the money is to take place on 17 January. Leo knows that the stallion belongs not to himself but to Ajax; Helena does not know this.*
>
> *Since the sale is valid (The vendor's lack of ownership or authority of disposal does not affect the validity of the sale!), Helena from 3 January has a contractual right to demand delivery of the stallion; this claim matures on the 17th. Helena only has a right to delivery against Leo, the seller of the horse. Conversely, Leo has a right to demand payment from Helena, and only from her.*
>
> *Helena's (the buyer's) right to the horse is a relative right (IN PERSONAM). Ajax's (the owner's) right to the horse is an absolute right (IN REM).*
>
> *As non-possessing owner of the horse, Ajax has the right to demand delivery of Hector from whomever is in possession: before the 17th, he will successfully bring a REI VINDICATIO against Leo; if he discovers his horse only later at Helena's, he can bring a REI VINDICATIO against her and will prevail[5].*

The party who has a right in rem has a right not only against a specific person (the debtor), but against everybody who is subject to Roman law: they are legally bound to respect the holder's right to access and use a certain asset.

It is only when a third party intervenes in the right in rem that an obligation between the party holding said right and the third party

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3 For more detailed information, see Roman Law of Property I.B.

4 In the interests of a didactic concept that promotes gender equality, the examples and exercises in this book feature both male and female protagonists. As regards the scope of Roman women's legal capacity, for the purposes of the cases described here the female protagonists are assumed not to be under *TUTELA MULIERIS.* In fact, the marriage laws of Augustus freed women possessing the *IUS LIBERORUM* from tutelage.

5 On ownership, see Roman Law of Property V.; on the *REI VINDICATIO,* see Roman Law of Property X.C.–G.

comes into being: an intervention of this kind may give rise to claims for restitution, damages, or unjustified enrichment.

3. From a Roman point of view, someone is in principle considered to have a private-law right – and more particularly a claim – if his right can be enforced by means of a court action (mostly termed *ACTIO*[6]). Whether someone has an enforceable right depends on whether he is granted an *ACTIO;* in addition, the wording of the *ACTIO* determines the scope and content of the claimant's right[7].

A relative right is enforced by means of an *ACTIO IN PERSONAM,* whereas an absolute right is enforced by means of an *ACTIO IN REM*[8].

> *Cf Example 1: The case culminates in an ACTIO IN REM – that is, a REI VINDICATIO – and an ACTIO IN PERSONAM – in this case an ACTIO EMPTI.*
>
> *Once Ajax, Hector's owner, has brought a REI VINDICATIO, the possessor of the stallion – be it Leo before delivery, or Helena afterwards – has to return the horse to its rightful owner; this means that the obligation under the sales contract can no longer be fulfilled as agreed between the parties; in other words, performance of the contract becomes defective*[9]*: Leo (the seller) has to compensate Helena (the buyer) for the losses she has sustained either from the seller's failure to deliver the stallion, or from Ajax reclaiming the stallion after it has been delivered to her. Helena can enforce her claim by means of an ACTIO EMPTI – the buyer's action – against Leo.*

4. If a debtor is unable to fulfil his obligations due to insolvency, bankruptcy proceedings are instituted and his assets are liquidated for the benefit of his creditors.

■ The debtor's deficiency – the bankruptcy assets being commonly worth less than the sum of all claims against the debtor – is divided equally among the creditors, each bearing a quota of the total loss.

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6 Private-law claims may also manifest themselves in legal remedies known by other names, such as *VINDICATIO, CONDICTIO,* or *INTERDICTUM.*

7 In ancient Rome, the administration of justice is overseen by the *PRAETOR.* Drawing on the advice of legal scholars, this magistrate not only issues the catalogue of general, abstract legal remedies (mostly *ACTIONES*), but also grants these remedies in a concrete conflict between parties in the shape of a *FORMULA* outlining the further course of the proceedings (or might also deny legal protection). For the praetor's functions in relation to Roman formulary procedure, see Roman Law of Property X.B.1.

8 See Roman Law of Property I.B., X.

9 For more detailed information on defective performance of sales, see below at V. and VI.

All (unsecured) claims are reduced by an equal rate (quota), eg by one third. In case of insolvency, a mere contractual claim may thus suffer a reduction in value.

- In contrast, rights in rem remain unaffected by bankruptcy proceedings. The claim for restitution vested in a right in rem remains untouched by the insolvency of a third party.

> *Example 2: Agatha owns a painted marble statue of the god Apollo, which she hands over to Flavius for safekeeping. After an unexpected quarrel with Agatha, Flavius out of spite leaves the statue out in the rain for a whole night, causing the paint to be washed off. The damage amounts to 1.400.*
>
> *Once bankruptcy proceedings have been opened against Flavius, Agatha can assert her right as the owner of the statue and demand its return. Her claim for damages to the amount of 1.400, however, competes with the claims of Flavius' other creditors and will be paid pro rata along with these. Given a distribution rate of, for instance, 20 percent, Agatha will receive 280 in damages.*

B. Liability – obligation

Neither legal history nor theory allows for a clear-cut distinction between these two concepts; nevertheless, it is important to keep an eye on their different accents.

In terms of its historical development, liability precedes obligation. From a modern-day perspective, we tend to perceive being under an obligation as a phenomenon that frequently leads to being liable.

1. Being liable

Being liable means having to take (financial) responsibility. This responsibility manifests itself in the entitled party's right to seize assets belonging to the obligated party.

> *Originally, the entitled party's right of seizure extended to the person of the obligor: debt bondage, sometimes leading to slavery by sale TRANS TIBERIM.*

In principle, the obligated party is liable with all of their assets; this is known as personal liability.

In contrast, we talk about in rem liability if the liability extends only to specific assets belonging to the obligor.

A prime example of in rem liability is the right of pledge: if the secured debt is not repaid, liability manifests itself in the creditor's seizure of the secured asset[10].

2. Being under an obligation

Being obligor means having to make performance. Thus, our main focus lies no longer on the creditor threatening to seize the obligor's assets, but on the debtor, of whom a certain performance is expected – to give something to the other party, to do something, or to abstain from doing something.

It is only when the debtor fails to make performance (or makes defective performance) that the question of liability arises.

As a rule, the debtor is liable for the performance of the obligation: execution proceedings permit the creditor to seize the debtor's assets.

Note: There are debts which cannot be enforced by means of a court claim. Debts of this kind are called natural obligations[11]*. The obligee cannot enforce a debt of this kind in a court of justice; if the debt is paid, however, the natural obligation justifies the obligee's retention of the payment.*

- Where an obligation arises from delict, we nowadays typically use the term liability – as in liability for defective goods.

C. The content of obligations

1. Obligations entail the debtor's duty to make performance.

In legal terms, "performance" can refer to human actions of all kinds – positive actions as well as omissions.

Once the performance owed has been made in accordance with the terms agreed, the obligation has been discharged and thus ceases to exist.

2. Roman jurists used three terms to describe the possible contents of obligations: *DARE* (to give), *FACERE* (to do), and *PRAESTARE* (to owe, to be liable, to guarantee a certain result).

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10 On this topic, see Roman Law of Property XII.

11 On natural obligations, see below at II.E.3.

DARE refers to the delivery of a thing.

> *The seller effects a DARE by handing over the goods to the buyer, just as the buyer effects a DARE when he hands over the money*[12].
>
> *In a narrower sense, DARE is sometimes understood as transferring ownership.*

FACERE in general terms denotes an action, especially the provision of manpower or the achievement of a specific result.

> *In that sense, FACERE is typical for a contract for work: for instance, a transportation services agreement – FACERE – in return for money is a typical contract for work.*

PRAESTARE is a general term for owing or being liable.

> *By standing surety, one incurs the obligation to make performance for another if that person fails to perform; this, for instance, would be covered by the term PRAESTARE.*
>
> *However, PRAESTARE is also commonly used for accessory obligations under a contract, such as warranty obligations.*

3. In modern legal parlance, 'law of obligations' is an umbrella term that covers obligations arising from the production, distribution, and attribution of goods and services.

What is not included are relations that likewise constitute relative rights, but which primarily concern personal or family circumstances; these belong to the fields of family law and the law concerning persons. Obligations under inheritance law also fall into a category of their own.

> *In modern law, marriage is a contract; however, its primary subject matter deviates widely from that of contracts in the economic sphere, so that it is likewise excluded from the category of "contract law".*

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12 Note: A *DARE* may fulfil an obligation and thus end it; however, it may also give rise to an obligation: in the case of so-called real contracts, the delivery of an asset *(DATIO)* brings about the recipient's obligation to return it. On this topic, see below at III.
Along similar lines, the *CONDICTIO INDEBITI* results from a *DARE* which gives rise to an obligation. On this topic, see below at XIV.

D. Types of obligations

Roman jurists already classified obligations according to their legal bases:

1. Contracts[13]

Contracts are bilateral legal transactions recognised by Roman law.

Their content and scope depends on the agreement between the parties – *LEX CONTRACTUS.* Contractual obligations arise from the understanding reached by the parties.

With a view towards the origin of an obligation, a contract can be defined as a transaction imposing a legally enforceable duty[14].

2. Delicts[15]

Delicts are actions that are forbidden by law.

Statutory delicts aim at safeguarding certain legally protected interests in the sense that their violation entails sanctions such as monetary compensation and/or punitive damages *(POENA)*.

> *Delicts that give the injured party the right to claim compensation or punitive damages from the delinquent fall under private law. In contrast, the state's right to impose punishment from criminal offences falls under public law.*

In the case of delicts, an obligation arises when someone injures another person by an unlawful (and in most cases also culpable) action.

> *Example 3: Pius smashes Xerxes' glass goblet in a bout of temper. Xerxes has a claim from DAMNUM INIURIA DATUM for the worth of the goblet against Pius.*

The three most important delicts recognised by Roman law are *INIURIA* (an assault on a person's body or reputation), *FURTUM* (theft), and *DAMNUM INIURIA DATUM* (harm to or destruction of property)[16].

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13 On contracts, see below at II.

14 An obligation of this kind is typically discharged by means of an act of fulfilment. These two are considered separate legal transactions under Roman law. For details, see Roman Law of Property III.D.

15 On delicts, see below at XV. and XVI.

16 On *INIURIA,* see below at XV.D., on *FURTUM* below at XV.E., on *DAMNUM INIURIA DATUM* below at XV.F. and esp XVI.

3. Quasi-contracts

Quasi-contracts are obligations that arise from lawful actions performed outside a contractual relationship.

The most important quasi-contracts[17] are *NEGOTIORUM GESTIO* (unauthorised management of another's affairs)[18] and *CONDICTIONES* for unjustified enrichment (eg claims for the return of performance mistakenly rendered)[19].

> *Example 4: After an earthquake, Laura notices that the villa of her neighbour, who is currently abroad, has suffered acute structural damage. Laura orders repairs to be undertaken, which cost her 3.000. The legal institution of NEGOTIORUM GESTIO – unauthorised management of another's business – provides a set of rules for a balancing of interests between the principal (Antonius) and the gestor (Laura).*
>
> *Example 5: Daphne maintains a lively business relationship with the money lender Agrippa. In the mistaken assumption that she owes him 500, she pays him this sum. Since Daphne was not, in fact, indebted to Agrippa, she can reclaim the money from Agrippa by means of a CONDICTIO INDEBITI.*

4. Quasi-delicts

'Quasi-delicts' is the term Roman jurists of a later period use for a number of praetorian-law delicts; these include cases of liability regardless of negligence or fault[20].

> *These include eg the liability of proprietors of apartments or shops for things that fall down and cause injury to passers-by*[21].

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17 According to Iust Inst 3.27, claims resulting from the termination and liquidation of joint ownership – *COMMUNIO* – (on the *COMMUNIO* see Roman Law of Property, V.F.2) and from tutelage *(TUTELA)* along with the legacy by damnation *(LEGATUM PER DAMNATIONEM)* are also quasi-contracts.

18 See below at XII.

19 See below at XIV.

20 In addition, deliberate – thus malicious – perversion of justice by a judge was regarded as a quasi-delict: *IUDEX QUI LITEM SUAM FECIT.*

21 The relevant actions are the *ACTIO DE DEIECTIS VEL EFFUSIS* (action for things thrown or poured from a building, cf § 1318 ABGB) and the *ACTIO DE POSITO VEL SUSPENSO* (action for things placed or suspended).

Furthermore, skippers (NAUTA) and innkeepers (CAUPO, STABULARIUS) are liable regardless of negligence or fault for damage, destruction, or theft that their assistants cause to their guests' or passengers' property[22].

These quasi-delicts can be seen as the precursors of modern-day strict liability.

One example of strict liability is the legal responsibility for operational risks that someone who lawfully utilises dangerous equipment incurs regardless of negligence or fault.

For example, the liability of holders of motor vehicles relies on this principle.

In view of the manifold dangers of modern technology, strict liability – along with traditional fault-based liability – has achieved particular importance.

Revision

1. What do Roman jurists mean by *DARE, FACERE,* and *PRAESTARE*?
2. What are the characteristic features of an obligation?
3. What is the difference between an obligation and a right in rem?
4. What is a claim directed at?
5. What is a delict?
6. Which obligations are classified as quasi-contracts? What is the difference between contracts and quasi-contracts?
7. What is an *ACTIO IN PERSONAM*?
8. What effect does it have on an obligation if the obligor renders full performance?
9. What is the difference between being under an obligation and being liable?
10. In contrast to rights in personam, rights in rem remain unaffected by insolvency; what are the consequences of this?
11. What is strict liability?

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22 The relevant court claim is the *ACTIO IN FACTUM ADVERSUS NAUTAS CAUPONES STABULARIOS.* In the case of damage to property, the praetor grants a claim analogous to the *ACTIO LEGIS AQUILIAE,* in cases of theft one analogous to the *ACTIO FURTI.*

II. CONTRACTS

A. General remarks

1. Contracts are bilateral[1] legal acts by which one or both parties bind themselves to render performance.

Legal transactions consist of one or more declarations of intent by means of which the parties commit to duties or undertake dispositions that are effective in law.

- Unilateral legal acts or transactions do not depend on the consent of another person: eg making a will, abandoning property.
- Bilateral transactions depend on the consent of the second party; this holds true for all types of contracts.

> *Bilateral contracts may be limited to imposing unilateral obligations: in the case of the Roman loan (MUTUUM), for instance, both parties have to agree on the transaction; nevertheless, payment of the money only results in a unilateral claim for repayment on the creditor's part. The borrower, in contrast, does not acquire any rights from the MUTUUM.*

The contract is both the origin of the rights and duties between the parties and the yardstick by which they are measured.

Contracts are legal norms; they are similar to statutes in that they impose certain duties on the parties. This is why contractual terms are also termed *LEX CONTRACTUS.*

The freedom of parties to enter into legally binding contracts and to grant rights to each other is the most significant manifestation of private autonomy – the right of individuals to organise their relationships within the framework of (private) law on their own initiative.

This liberty to determine one's own legal relationships within the scope of private autonomy by entering into contracts is also known as **freedom of contract.** The most significant elements of freedom of contract lie in the fact that everyone is, in principle, free to enter into

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[1] Certain contracts, such as the *SOCIETAS,* are conceived as multilateral agreements; on the *SOCIETAS,* see below at IX.

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