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ROMAN LAW FOUNDATIONS OF THE MODERN INSTITUTION OF PERSONAL SERVITUDES

*...modern European law sails under
Justinian's flag.¹*

ABSTRACT: Although servitudes did not originally emerge in Roman law, but much earlier, Roman law laid the legal foundations for this institution, as well as for the majority of legal institutions that, through the influence of Roman legal history and tradition, were subsequently received into modern legal systems, including the contemporary legal system of the Republic of Serbia. Following the division of the Roman Empire, Serbia relied politically, culturally, religiously, and legally on its eastern part, the so-called Eastern Roman Empire, better known as the Byzantine Empire. Although medieval Serbian law was initially archaic and predominantly customary in nature, through the reception of institutions from Byzantine law, servitudes gradually found their place within the legal system of medieval Serbia. A major milestone in the reception of Roman law institutions was the enactment of the Serbian

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¹ Stanojević, O. (2003). *Rimsko pravo [Roman Law]*. Sarajevo: Pravni fakultet Univerziteta u Sarajevu. p. 95.

Civil Code of 1844, through which traditional Roman law institutions were implemented indirectly via the Austrian Civil Code. Contemporary Serbian law continues its course under the sails of Roman law and, as such, belongs to the family of continental European legal systems, whose origins, spirit, and tradition are rooted in the Roman state and legal heritage. In this manner, the Roman Empire, as the cradle of modern civilization, continues to live on today through its legal institutions. Roman law recognized two forms of servitudes: predial (land) servitudes and personal servitudes. By employing historical, analytical, and comparative methods, the co-authors aim to present the historical development and significance of the institution of personal servitudes from the period of Roman law to contemporary legislative solutions, with the purpose of emphasizing the universality of the Roman legal legacy.

Keywords: *servitudes, Roman law, Serbian Civil Code, legal history.*

1. On the universality and reception of Roman law

Much has been written in legal literature about the significance of Roman law and its influence on contemporary legal systems, thereby giving rise to the justified questions of the actual role and impact of Roman law on positive law, as well as whether it is at all well-founded to speak of the universality of Roman law. The answer to these questions is rather straightforward when one compares the institutions of civil law in ancient Rome with those existing today. One such institution is that of *servitudes*. The institution of servitudes, although one of the oldest, may be traced from the Law of the Twelve Tables to Justinian law, and possesses a ‘universal character.’ There is scarcely any institution of Roman law that has become such an integral part of modern legal systems (Stanković & Vladetić, 2018, p. 388). Roman law belongs to the treasury of antiquity and represents one of the greatest achievements of the ancient world, alongside Greek philosophy and art, not only because of its intrinsic value, but also due to its influence on the legal history of Europe and the world. However, it did not emerge from nowhere, just as Greek philosophy did not (Stanojević, 2003, p. 5). Latin legal terminology is universally accepted in contemporary legal scholarship, owing to the genius of Roman jurists who, in a concise and clear manner, through maxims and legal aphorisms, succeeded in explaining fundamental legal principles and concepts (Stefanović, 2025, p. 19). The analysis of the Roman legal heritage provides a unique opportunity to reconsider and reassess its role and significance, with the aim of once again emphasizing the importance

of Roman law and highlighting the sophistication of a legal system whose institutions have endured for more than two millennia.

However, the reception of Roman law was neither rapid nor systematic. It proceeded gradually, in a partial and rather spontaneous manner, conditioned by the practical need for the legal regulation of social relations lying beyond the scope of customary law. The Germanic peoples who established states on the territory of the Western Roman Empire possessed their own customary law. Roman law, applied by the existing Romanized population, as well as the law codified in the compilations of Germanic rulers, remained in practice for a certain period of time; however, it was eventually displaced by Germanic customs and largely fell into oblivion. Owing to the civilizational development of these peoples, a need arose for a more developed legal system, and the rules of Roman law, which legal schools beginning with the glossators had rescued from oblivion, gradually began to be reapplied in practice. Those parts of Roman law which regulated newly emerging social relations not governed by customary law were particularly accepted (Malenica & Deretić, 2011, p. 127). The greatest significance in the reception of Roman law was attributed to Justinian's codification. Within the *Corpus Iuris Civilis*, the entire legal heritage of the classical Roman period was codified, thereby preserving, in its original form, the most important achievements of Roman juristic theory of that period (Zorić & Župljanić, 2019, p. 82). The establishment of a universal Roman Empire represented the perpetual aspiration of the Byzantines. Justinian's restoration gave the most magnificent expression to this aspiration. Consequently, it has always remained in the consciousness of the Byzantines as their most glorious memory (Ostrogorski, 1969, p. 88).

The reception of Roman law took place gradually and in distinct stages. As Obolensky observes: "The acceptance of Byzantine law in the countries of the Eastern European community may be viewed within the context of two broader historical phenomena: the spread of Byzantine civilization throughout these lands and the 'reception' of Roman law across medieval Europe as a whole. Byzantine law, regardless of the extent to which it was revised and interpreted throughout the history of the Empire, remained firmly grounded in Justinian's codification of Roman law. The same fundamental body of law that prevailed in Eastern Europe during the Middle Ages, and in certain regions even survived the fall of Constantinople, continued to exist in Italy, Spain, and Southern France during the so-called 'Dark Ages,' ultimately becoming, in the twelfth and thirteenth centuries, part of the common heritage of Western civilization" (Obolensky, 1996, p. 375). Subsequently, during the nineteenth century, the reception of Roman law proceeded through the great European civil codifications. The territories within

the Austro-Hungarian Monarchy became acquainted with the institutions of Roman law primarily through the French Code Civil and the Austrian Civil Code, the latter of which served as a model for Jovan Hadžić in drafting the Serbian Civil Code. Due to the absence of adequate contemporary legislation governing the field of personal servitudes, the provisions of the Serbian Civil Code still constitute the primary legal source relied upon by courts in the Republic of Serbia. This creates room for broad judicial interpretation of archaic legal norms, the rendering of inconsistent judgments, and legal uncertainty.

Considering that Roman law constitutes the foundation of every democratic society, the reception of Roman law continues today through the process of harmonizing Serbian positive law with the law of the European Union. This represents a comprehensive, long-term, and legally binding process arising from the Stabilisation and Association Agreement. The process entails the gradual adaptation and harmonization of domestic legal regulations with the legal *acquis* and fundamental legal principles of the European Union (*acquis communautaire*), with the aim of ensuring compatibility and the proper application of legal norms, which constitutes a key prerequisite for membership in, and accession to, the democratic family of European states.

2. Roman law concept of personal servitudes

Gaius' tripartite division of law into persons, things, and actions (*Omne ius quo utimur vel ad personas pertinet, vel ad res, vel ad actiones*) (Gaius, 1982, p. 24), which was later adopted by Justinian in the Institutes, constitutes the foundation of legal systematics. This classification was subsequently received in the French (1804), Austrian (1811), Serbian (1844), and Swiss (1912) civil codes. Within the law relating to things, a special place is occupied by real rights over the property of another (*iura in re aliena*) (although a more precise term would be "rights in the property of another"). These are absolute rights, operating *erga omnes*. The essential distinction between these rights and ownership lies in the fact that ownership is based on one's own thing, whereas *iura in re aliena* confer only a portion of proprietary powers, exercised over another person's thing rather than one's own. In other words, the right-holder acquires only certain faculties of use over another's property, while the *ius abutendi*, understood as the right of disposal, remains with the owner. As real rights, personal servitudes are also enforceable against third parties (*erga omnes*), who are under a duty of abstention. However, in addition to their predominantly proprietary elements, these servitudes also contain certain obligations-based elements, making them a complex legal institution

(Medić, 2017, p. 604). Roman jurists classified *iura in re aliena* into servitudes (*servitutes*), pledge (*pignus*), superficies, and emphyteusis. Pledge differs from other real rights over the property of another in that it serves as a means of securing the creditor, whereas servitudes, superficies, and emphyteusis constitute rights of use over another's property (Stefanović, 2025, p. 190).

The origin of servitudes “owes itself” to the practical nature of the Romans and their ability to resolve legal problems as they arose in practice. In their efforts to resolve concrete cases, the Romans extensively drew upon Greek rhetoric, philosophy, and logic (Vuletić, 2015, p. 257). Servitudes are defined as civil real rights which restrict the owner's use of a thing (Milošević, 2005, p. 242), and as such emerged out of the need to regulate disputes arising between neighbours in ancient Rome. Initially, in Rome, immovable property was required to be separated by a physical space belonging to neither of the neighbouring owners. For urban immovables, this space was known as the *ambitus*. As time passed and Rome grew into a densely populated metropolis, such a system became unsustainable (Perelló, 2013, p. 607). In order to enable more rational use of urban land, the *ambitus* was replaced by a boundary demarcation between plots in the form of a wall, referred to as a “common wall” (*paries communis*), which was considered jointly owned by both neighbours, thereby giving rise to new legal rules governing such structures. These walls were often constructed with arches (*paries fornicatus*) designed to strengthen their structure, but also to allow passage between the two properties, i.e., land parcels. However, any unauthorised interference with another's property (*facere in alieno*) was prohibited. In order to perform any act on a neighbour's property, the establishment of a servitude was required, i.e., a legal entitlement granted in favour of a non-owner, whereby the holder of the servitude was allowed to have the thing “serve” him. It is from this idea that the term “servitude” originates, both in Serbian and in Latin: *servire* – to serve.

2.1. Predial (Real) Servitudes

The Roman concept of servitudes, as received and further developed in Justinianic law, encompassed two categories: predial (real) servitudes and personal servitudes. This is evident from the maxim of Marcian in the Digest: *Servitutes aut personarum sunt, ut usus et usus fructus, aut rerum, ut servitutes rusticorum praediorum et urbanorum* (“Servitudes are either of persons, such as use and usufruct, or of things, such as servitudes of rural and urban estates”) (Stojčević & Romac, 1971, p. 458). “In Roman law, predial servitudes emerged first. With the emergence of private ownership, resulting from the division of previously

collective property, the need for such servitudes arose” (Kočan, 2014, p. 247). The establishment of predial servitudes (*servitutes praediorum*) required the existence of two estates: the servient estate and the dominant estate. A predial servitude is established over one parcel of land, referred to as the servient estate (*praedium serviens*), in favour of the owner of another parcel, referred to as the dominant estate (*praedium dominans*). Roman law recognizes two types of predial servitudes: rural and urban servitudes. The criterion for this distinction lies in the character of the dominant estate: any agricultural land fell under rural servitudes, even if located within the boundaries of a city, whereas if buildings were erected on a parcel of land, the servitude was classified as urban, even if the land was situated in a rural area (Stefanović, 2025, p. 191). Stanojević systematically enumerates rural and urban servitudes: Rural servitudes arose earlier, some being already known at the time of the Law of the Twelve Tables: *iter* (the right of passage on foot over another’s property), *via* (the right of passage with vehicles, a right of way), *actus* (the right to drive cattle), *aquaeductus* (the right to conduct water through another’s property), and *aquaehaustus* (the right to draw water from another’s source). Urban servitudes developed in connection with urbanization and the expansion of the city of Rome, facilitating the use of buildings and urban land. These include servitudes such as the right to support a building on a neighbour’s wall, the right to extend a balcony over another’s airspace, and the right to discharge rainwater into a neighbour’s yard (Stanojević, 2003, p. 225).

2.2. Personal Servitudes

Personal servitudes are attached to the person and arise in order to secure a benefit for a specific individual in relation to another’s property. As these are strictly personal rights, the Romans considered that personal servitudes could not be transferred either *inter vivos* or *mortis causa*. “Different forms of servitudes were subject to different modes of acquisition, the most common being testament, contract, and judicial decision” (Stefanović, 2019, p. 52). Personal servitudes constitute an institution comprising three real rights: usufruct (*ususfructus*), use (*usus*), and habitation (*habitatio*). They originated from the need to provide for wives after the husband’s death and for female children after the father’s death, who for a long historical period held an unequal inheritance position in relation to husbands and male descendants (Lazić, 2000, p. 1). Some authors also classify within personal servitudes the right to use another’s slave or animal (*operae servorum vel animalium*), which grants the holder the right to make use of another’s slave or animal. It is considered that the origins of personal servitudes lie in the desire of property

owners to provide material security for close persons after their death, by granting them, through a legacy, a lifelong right to use property which is otherwise bequeathed in its entirety to the heirs by testament. As universal successors, they became owners of the estate, but subject to a burden which temporarily limited their ownership rights (Bujuklić, 2011, p. 265). It is noteworthy that in classical Roman law usufruct (*ususfructus*), use (*usus*), and habitation (*habitatio*) were regarded as separate rights rather than servitudes, with usufruct in particular excluding any ownership rights over the thing itself, being limited exclusively to the entitlement to collect its fruits.

3. Usufruct (*ususfructus*)

In Justinian's Institutes, usufruct (*ususfructus*) is defined as a personal servitude whereby the holder acquires the right to use and enjoy the fruits of another's property, without impairing its substance – *Usus fructus est ius alienis rebus utendi fruendi, salva rerum substantia* (Justinianove Institucije 2.4, according to Stojčević & Romac, 1971, p. 510). This definition, although centuries old, remains highly relevant and applicable today. It was received through the Serbian Civil Code and its interpretation by Jovan Hadžić in Article 374 of the SCC: *He to whom the right of enjoyment of another's thing belongs may enjoy the thing without limitation, provided that its substance is not impaired* (Živković, 2014, p. 182). In contrast to the view presented in Justinian's Institutes, Gaius held that the usufructuary could not acquire ownership by usucaption, because he did not possess possession (*detentio*), but only the right of use and enjoyment (*ius utendi fruendi*) (Gaius, 1982, p. 113). We consider Gaius' definition to be more precise and more reflective of the nature of usufruct, since if a person, for example, uses a thing under usufruct and exploits it by extracting sand from a riverbank or quarrying stone, he is in substance affecting the very essence of the thing, which is prohibited under the Justinianic definition. For this reason, Gaius' definition appears more adequate, more general, and therefore of greater practical applicability.

Originally, usufruct could be established only in favour of a natural person; however, under Justinian law it was extended to legal persons as well, though for a duration not exceeding one hundred years. The usufructuary was entitled to the fruits of the thing (*fructus naturales and fructus civiles*), including the offspring of animals, but not the child of a female slave. In the case of slaves, everything acquired by the slave through the use of the usufructuary's property or through his own labour belonged to the usufructuary, whereas acquisitions obtained on any other basis belonged to the owner. Usufruct was a personal,

non-transferable right (except through *in iure cessio*), although the exercise of usufruct could be transferred by lease, sale, or gift (Lazić, 2000, p. 26).

The bundle of rights held by the usufructuary consists of *usus* and *fructus*, i.e. *ius utendi* and *ius fruendi*. The usufructuary was entitled to use the thing in the ordinary manner and to collect its fruits. His obligations were numerous: he had to maintain the servient property and bear the necessary maintenance costs, to act with the diligence of a good head of household (*bonus pater familias*), not to alter the economic purpose of the thing through its use, and to undertake to return the thing upon termination of the usufruct “without impairing its substance” (*salva rerum substantia*). The owner retained the right of disposal (*ius abutendi, abusus*), however, since he exercised no factual control over the thing, what remained to him was merely “bare ownership” (*nuda proprietas*), i.e. the owner is left only with the power of full disposition – transfer of ownership, while all benefits derived from the thing belong to another subject (Slijepčević, 2022, p. 3). The object of usufruct may be both movable and immovable property. The essential requirement is that it must be a non-consumable thing, since upon termination of usufruct the holder must return the thing in its identical, unchanged condition. However, during the Principate this rule was modified. Usufruct could also be established over consumable things (*res consumptibiles*), in which case it was referred to as “improper usufruct” (*quasi ususfructus*), later termed by Pandectist scholarship as *ususfructus irregularis*. Unlike ordinary usufruct, where the usufructuary must return the same thing to the owner, in improper usufruct the holder is obliged, upon termination, to return things of the same kind, quality, and quantity. There is also an important distinction between the two forms: while “proper” usufruct has a proprietary (real right) character, “improper” usufruct constitutes an obligational legal relationship.

4. Right of Use (*Usus*)

A key characteristic of the Roman legal tradition is undoubtedly the evolution and transformation of legal institutions, driven by the demands of everyday life, the development of commercial relations, and the emergence of commodity-money relations. This development also extended to the right of use (*usus*). Initially, the holder of the right of use (*usuarius, usuarius*) possessed an entitlement which Ulpian formulated in the following maxim: He who has been granted the right of use may use the thing, but has no right to collect its fruits (*Cui usus relictus est, uti potest, frui non potest*) (Ulpian, D. 7.8.2 according to Stojčević & Romac, 1971, p. 510). A dilemma that persists to this day troubled the classical jurists, and the first attempt to define the scope of this

right is found in Labeo, a contemporary of Augustus. He examines a situation in which the right of use of a rural estate is granted and highlights two essential characteristics of the right: (1) that it cannot be equated with usufruct, since its scope is narrower; and (2) that it produces the effects of a personal servitude *erga omnes*. This is reflected both in its positive aspect, namely the exclusive right to use a wine and oil storage facility, and in its negative aspect, namely the right to exclude the owner from access to the estate (Stanojlović, 2023, p. 159). Although Labeo's definition more precisely clarifies the content of the right of use compared to Ulpian's view, it still does not fully determine the scope of the usufruct's powers. As the right of use proved impractical, particularly in relation to objects that cannot be used without simultaneously taking their fruits (e.g., cows or olive groves), it was gradually extended to include the collection of fruits, but only to a minimal extent, namely as much as is "sufficient for one's own subsistence and that of one's family" (*quod ad victum sibi suisque sufficiat*), as stated by Ulpian in Book 17 of his *Libri ad Sabinum* (*The Roman Law Library – Ulpian, libro 17 ad Sabinum*, 2025).

5. Right of Habitation (*Habitatio*)

The right of habitation also constitutes a personal servitude recognized under Roman law, whereby the holder of the right (the habitant) acquires a real right to reside in and use another person's house (residential premises) for his own needs and those of his family members. Given that this is a real right rather than an obligational relationship, the right of habitation was most commonly established by legacy or donation. *Habitatio*, unlike other personal servitudes (*usus*-right of use, and *usufructus*-usufruct), did not terminate upon *capitis deminutio*-loss of the holder's legal status, nor upon non *usus* – non-exercise of the right. Prior to Justinian, the legal nature of this servitude was disputed and was often equated with ownership. However, from Justinian onwards, it was treated as an independent real right over another's property, which could not be transferred to third parties (Kecman & Piljić, 2025, p. 212).

6. Conclusion

Personal servitudes constitute an important institute of property law that has existed for centuries and grants their holders the right to use another person's property as servient property, without the entitlement to affect or consume the substance of the encumbered thing. Roman law recognized three forms of personal servitudes: usufruct (*usufructus*), use (*usus*), and

the right of habitation (*habitatio*). The importance of adequate regulation of personal servitudes is evident from the very fact that they impose limitations on ownership and on the proprietary powers of the owner of the encumbered property. The usufructuary is entitled to usufruct, the user (*usuary*) is entitled to use the thing, while the holder of the right of habitation (*habitant*) is entitled to reside in the property. The owner of the encumbered thing is left with nothing but “bare ownership” (*nuda proprietas*). Each of the holders acquires specific real rights over the encumbered property. Thus, the usufructuary is entitled to full use of the servient thing and to collect its fruits. The use of the servient thing involves more limited powers compared to usufruct; accordingly, the usuary may use the thing within the scope of personal or family needs, and may hold possession or co-possession over it. The habitant also has the right to possession or co-possession of the servient property, which he may exercise exclusively through habitation, without any right to collect its fruits.

In modern law, among the three personal servitudes known to Roman law, usufruct has the greatest practical significance. However, adequate statutory regulation of this important institute was lacking in the post-war period. Consequently, the prevailing judicial practice, based on the Law on the Invalidity of Legal Provisions Enacted before 6 April 1941 and during the Enemy Occupation, is to apply the provisions of the Serbian Civil Code by analogy to all issues concerning usufruct. Such a solution has caused confusion in practice, as courts have rendered divergent and inconsistent judgments, which ultimately undermines legal certainty. It is our view that *de lege ferenda* it is necessary to improve the legal framework and comprehensively regulate all relevant issues concerning personal servitudes, given that these institutes had their place in legal systems two millennia ago, whereas this is not the case in contemporary positive Serbian law.

Conflict of Interest

The authors declare that they have no conflict of interest.

Author Contributions

Conceptualization: N. S., V. V., and G. M.; methodology: N. S.; formal analysis: N. S.; writing—original draft preparation: N. S., V. V., and G. M.; writing – review and editing: N. S., V. V., and G. M. All authors have read and agreed to the published version of the manuscript.

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RIMSKI PRAVNI TEMELJI SAVREMENOG INSTITUTA LIČNIH SLUŽBENOSTI

APSTRAKT: Iako izvorno službenosti nisu nastale u rimskom pravu, već mnogo ranije, ono je postavilo pravne temelje, kako ovog tako i većine pravnih instituta, koji su na talasu rimske pravne istorije i tradicije recipirani u savremene pravne sisteme, uključujući i postojeći pravni sistem u Republici Srbiji. Nakon podele Rimskog carstva Srbija se politički, kulturološki, religijski i pravno oslanjala na istočni deo carstva, tzv. Romejsko carstvo, poznatije pod imenom Vizantija. Iako je u početku srednjovekovno srpsko pravo bilo arhaično, mahom običajno, recepcijom instituta iz vizantijskog prava, službenosti polako pronalaze svoje mesto u pravu srednjovekovne Srbije. Veliki značaj u recepciji instituta rimskog prava obeležilo je donošenje Srpskog građanskog zakonika 1844. godine, implementacijom tradicionalnih instituta rimskog prava, posrednim

putem, preko Austrijskog građanskog zakonika. Savremeno srpsko pravo i danas plovi pod jedrima rimskog prava i, kao takvo, spada u porodicu evropskokontinentalnih prava, koje svoje poreklo, duh i tradiciju pronalazi u rimskom državnom i pravnom nasleđu. Na taj način, Rimsko carstvo, kao kolevka savremene civilizacije, kroz svoje pravne institute, živi i danas. Rimsko pravo je poznavalo dva oblika službenosti: stvarne (zemljišne) i lične. Cilj koautora jeste da upotrebom istorijskog, analitičkog i komparativnog metoda prikažu istorijski razvoj i značaj instituta ličnih službenosti od perioda rimskog prava do savremenih legislativnih rešenja, a sve u nameri da ukažu na univerzalnost rimske pravne zaostavštine.

Ključne reči: službenosti, rimsko pravo, Srpski građanski zakonik, pravna istorija.

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