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NEGOTIORUM GESTIO – ROMAN FOUNDATIONS OF UNAUTHORIZED MANAGEMENT OF ANOTHER'S AFFAIRS IN SERBIAN CIVIL LAW

"Aliena negotia exacto officio geruntur"
The business of another is to be conducted with particular attention
Codex Justinianus – 4, 35, 21
(Stojčević, & Romac, 1971, p. 34).

ABSTRACT: *Negotiorum gestio* is a legal institute that originates from Roman law. It still exists today and in the legal literature we find a term that defines it as: the unauthorized performance of another's affairs, i.e., agency without authority. The institute of *negotiorum gestio* has been continuously used and is the subject of legal regulation in most countries of the continental, European legal systems, including the law of the Republic of Serbia, for more than two millennia. The aim of this paper is to compare the solutions from Roman and contemporary law of obligations using the normative, descriptive, comparative and analytical-synthetic scientific methods. The paper is divided into three parts: the first part, which deals with the Roman understanding of the *negotiorum gestio* institute, the second part, which presents the current solutions regarding this institute contained in the Law of Contract and Torts of the Republic of Serbia, and

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the third part, which, using a comparative and the historical method, draws conclusions about whether current solutions contained in contemporary law are better than those that were applied in the ancient period.

Keywords: *Roman law, negotiorum gestio, the management of another's affairs without authorization, civil law, The Law of Contract and Torts.*

1. Institute negotiorum gestio in Roman law

The Roman Empire lasted more than a thousand years. During that long period, everything changed, in accordance with the Roman sentence – *panta rei*. The Roman state was changing, the structure of the population and their status in society, their rights and obligations, and finally the law itself was changing. If we look at the history of the Roman Empire through the generally accepted periodization of: the period of the kings, the republic, the principate and the dominate, a large number of legal institutes evolved, including the *negotiorum gestio.*

During the classical period, there were obligation relationships that were not classified as either contracts or torts. The main reason why quasi-contracts arose lies in the fact that classical jurists noticed that in addition to contracts and torts, as the primary sources of obligations, there are also special sources (*ex variis causarum figuris*). The famous Roman jurist Gaius (lat. *Gaius*) wrote two capital legal works: Institutions (lat. *Institutiones*) in which he presented Gaius' famous tripartite division into: persons, things and lawsuits, and another scientific work called Res cottidianae in which he also made a tripartite division, but not rights but obligations. Thus, according to Malenica, "Gaj divided obligations into: contracts, delicts and obligations arising from different causes (*obligationem ex variae causarum figurae*). In this third group, there are both obligations arising from permissible and those arising from illegal actions. The first obligations could not be classified as contracts because they were created without the consent of the will, and the second as torts because they lacked some characteristics of a tort. Both were protected by separate lawsuits. It seemed to Justinian's jurists that there was a basis for dividing these obligations into two groups, into *obligationes quasi ex contractu* and *obligationes quasi ex delictu*, i.e. obligations similar to contacts and obligations similar to delicts" (Malenica & Deretić, 2011, p. 418).

1.1. Quasi-contracts

Today we call "false" obligations quasi-contracts, although Roman jurists never used that term, because it was introduced into legal terminology by jurists from the Justinian period. Gaj and other jurists of the classical period said that the obligation arises "as if from a contract" (*quasi ex contractu*), however, during the Middle Ages, the term acquired its new form "*ex quasicontractu*" in the sense of "false, supposed contract" (Stanojević, 2010, p. 308), which has remained until today.

According to Mousourakis: "Quasi-contract' is an unsatisfactory term applied to certain specific obligations which did not arise from contract or delict but were legally enforceable. These obligations arose from legal acts that resembled contracts in respect of several characteristics, but which were nevertheless not contracts since they were not founded on agreement. These obligations were therefore said to arise 'as if from contract' (*quasi ex contractu*). The most important quasi-contracts were unauthorized administration (*negotiorum gestio*), guardianship (tutela) and undue payment (*solutio indebiti*)"(Mousourakis, 2012, p. 239)

According to their characteristics, quasi-contracts are very close to contracts, because they contain an obligation recognized by law, which is protected by special lawsuits. In addition to this similarity, quasi-contracts as well as contracts arise from legally permissible actions of the parties (although there is no agreement between the contracting parties), and in the event that a quasi-contract is established, the relations between the parties are regulated according to principles similar to those of contracts. However, there are certain differences between contracts and quasi-contracts. Quasi-contracts are not based on agreement between the parties, unlike contracts and pacts, which are. The essence of the creation of a quasi-contract lies in its creation by force of law (*ex lege*), as a result of actions and circumstances. So, unlike contracts and pacts where consent is the *conditio sine qua non* of creation, this is not the case with quasi-contracts.

Most authors agree that there were five quasi-contracts in Justinian's law: management of another's affairs without a mandate (*negotiorum gestio*), unjustified enrichment (*condictiones sine causa*), accidental property community (*communio incidens*), guardianship obligations (*tutela*), and obligations arising from *legate per damnationem* (Jocić, 1990, p. 262; Stojčević, 1988, p. 302).

Unjustified enrichment (*conditiones sine causa*) is a quasi-contract in which one party acquires a thing or value from the property of another party

without a valid legal basis, or the valid legal basis has ceased, but the party does not return the thing or value, usually due to a mistake. This obligation relationship does not have the most adequate name. Namely, the term legally unjustified enrichment is used because things are found with the debtor without a legal basis (because it was subsequently established that the legal basis has ceased to be valid or has become null), however, the debtor still holds that thing or value and in that way is getting rich. We believe that the term is not appropriate because a thief gets rich without a legal basis, but also any person who came to the state without a contract with the owner or for free, and refuses to return it to the rightful owner (e.g. a found object).

Accidental property community (*communio incidentens*) is a quasi-contract that arises when two or more persons become co-owners of some property or thing, without having had a previous agreement (eg heirs or beneficiaries). In relation to the common thing, these persons are co-owners. This legal relationship is classified as a quasi-contract, because it arose from a permitted action, but without the consent of the parties.

Obligations from tutorship (*tutelage*) – After the termination of tutorship, an obligation relationship arises between the tutor and his recent ward. In the classical period, this relationship was seen as *negotiorum gestio*. In Justinian's codification, this relationship was separated into a special quasi-contract, as a relationship that arises without prior agreement of the parties. The obligation relationship that arises after the termination of tutorship, between the tutor and the ward, carried certain rights and obligations. The tutor had to return the protégé's property and submit a report on the management of the protégé's property, and compensate him for any damage he caused in the performance of his duties. The protégé had the obligation to compensate the tutor for all the expenses he incurred in connection with the management of the property.

Obligations arising from legatees *per damnationem* arise when the testator (*de cuius*) leaves a legatee to someone. A legacy is a disposition in the event of death by which the testator leaves a certain property benefit from the legacy to a certain person (the legatee), without appointing him as an heir. The legatee does not acquire the entire inheritance, nor its aliquot part, but receives a precisely determined right from the inheritance. At the moment of death, an obligation relationship would arise between the legatee and the heir, according to which the heirs were obliged to hand over the legatee's thing. "By means of this form the legatee acquired a claim, supported by a strong personal action (*actio ex testamento*), against the heir or heirs for payment of the legacy. The effect was that the legatee was in almost the same position as a creditor of the deceased estate. Virtually any kind of thing could be the

object of such a legacy, including incorporeal things, services and even future things" (Mousourakis, 2012, p. 302).

1.2. Negotiorum gestio

Management of another's affairs without a mandate (*negotiorum gestio*) exists when one person (*negotiorum gestor*) performs an action (legal or factual) for the benefit of another person (*dominus negotii*) who did not authorize him to do so. "By such action the negotiorum gestor bound himself to conduct the matter to the end and to return to the *dominus negotii* all that he gained or acquired (proceeds, fructus) from the transaction; on the other hand the latter was bound to reimburse the gestor for his expenses" (Berger, 1968, pp. 593-594).

In terms of their content, negotiorum gestio and mandate have certain similarities, and because of this, they are legally regulated in an identical way in many legal systems. *Mandatum* (mandate, representation) is "consensual contract by which a person assumed the duty to conclude a legal transaction or to perform a service gratuitously in the interest of the mandator or of a third person. The Mandatum was based on a personal relationship of confidence (friendship) between the parties, it therefore ended by the death of one of them, by revocation by the mandator or renunciation of the mandatary" (Berger, 1968, p. 574). "In both cases one person (the mandatarius/the gestor) manages somebody else's (the mandator's/principal's) affairs. As in mandate, the scope of matters which the gestor can take care of for the principal is very broad; they may be of a factual or of a legal nature. As in mandate, the (negotiorum) gestor must, however, not have acted solely in his own interest. The negotium has to be alienum, or alterius; it may be alienum et suum, but it may not be suum tantum. Like mandate, negotiorum gestio gives rise to an imperfectly bilateral relationship. There is, first of all, an actio directa, by means of which the principal may sue the gestor for damages in case of mismanagement and for the restoration of whatever the latter might have acquired in the course of executing the gestio. The gestor, on the other hand, may avail himself of the actio negotiorum gestorum contraria, if and when he has incurred any expenses or suffered damages. The main difference between mandatum and negotiorum gestio is that the one is a contract, the other an obligational relationship ex lege. The right-duty connection between gestor and principal, in other words, is not based on any kind of agreement but arises from the mere fact of the negotiorum (alterius) gestio" (Zimmermann, 1990, pp. 433-434).

Conversion of these two obligation relationships is possible. *Negotiorum gestio* is carried out without authorization, without approval. However, the subsequent approval of the work, while it is still in progress, by the *dominus negotii*, turns the unauthorized work into an authorized one, whereby the negotiorum gestio takes the form of a mandate. This subsequent approval in Roman law also had its own special name: *ratihabitio* (Šarac, 2008, p. 767). "According to Justinian's law, ratihabitio always exists when the master knows about the performance of the work and does not prohibit the further work of the *negotiorum gestor*" (Milošević, 2005, p. 358). It was not required that the owner not know about the interference in his affairs, but it was enough that he did not oppose it.

By performing other people's work, between the negotiorum gestor and the owner (*dominus negotii),* an obligation relationship arises in which the negotiorum gestor must act with special care when performing the work. "The business must have been carried on in the interest of the other. In Roman Law a voluntary agent could recover his expenses only if he acted in the interest of the principal. If the agent acted solely in his own interest, he could not recover as negotiorum gestor but he might have an action (condictio) against the principal to the extent that the latter was unjustly enriched at his expense" (Lorenzen, 1927, p. 192). *Negotiorum gestor* is entitled to both necessary and useful expenses, but not luxury expenses, for carrying out the work of another. If, however, the owner has not approved the work, then he is not obliged to reimburse any costs.

In the legal literature, we find five essential conditions necessary for the existence of *negotiorum gestio* in Roman law: "a) The work performed by the *negotiorum gestor* must be someone else's, which was first evaluated according to objective criteria, but since the post-classical period, the subjective aspect has also been looked at, i.e. whether he had the intention and was aware of doing someone else's work. If it is a matter of disposing of one's rights or performing work on one's own account, this obligation will not exist; b) He had to undertake the work on his own initiative, as a result of his free will, otherwise, if it was undertaken due to some contractual or legal obligations, this obligation relationship will not exist, but another, usually a *mandate*; c) The work must be useful for the *dominus negotii* and evaluated objectively, whereby the final result was not required to be successful, but in some cases the subjective assessment of the business owner was also taken into account; d) The work should have been undertaken with the intention of demanding compensation from the *dominus negotii* for the costs he incurred in carrying out his work; e) It was required that the owner does not know that

the negotiorum gestor is performing his duties, if he knew and did not object, there will be a mandate (*mandatum*)" (Jocić, 1990, p. 263).

In this way, *negotiorum gestio* became a two-sided unequal obligation, with rights and obligations on both sides in an obligation relationship. The undertaken work performed by the *negotiorum gestor* would create an obligation relationship that created certain rights and obligations: the *negotiorum gestor* was obliged to do the work he started with increased conscientiousness, to bring the work started to completion, to submit an account of the work done to the owner of the work and to transfer to him all that he acquired by performing the work. *Negotiorum gestor* is also responsible for *culpa levis* (lack of ordinary care), and if he prevented the occurrence of damage by performing the work, he would be responsible only for dolus, "The term used by Roman jurists to denote "cunning and fraudulent behavior done in an effort to mislead, deceive others and damaged" (Bujuklić, 2007, p. 269).

The *dominus negotii* was obliged to compensate all the costs that the *negotiorum gestor* incurred while performing the work and to assume all the obligations that the *negotiorum gestor* took upon himself while performing the work. *Dominus negotii* was obliged to bear only the expenses that were necessary and useful to him.

Regarding the protection of their claims*, dominus negotii* and *negotiorum gestor* had different claims. *Dominus negotii* had at his disposal the *actio negatorium gestorum directa*, and the *negotiorum gestor actio negatorium gestorum contraria.*

2. Management of another's affairs without a mandate (*negotiorum gestio*) in the civil law of the Republic of Serbia

In the civil law of the Republic of Serbia, management of another's affairs without a mandate is regulated by articles 220-228 of The Law of Contract and Torts from 1978. Within these articles, the following is regulated: duties of a manager of another's affairs, due care and responsibility, rights of a manager of another's affairs, doing other people's work with the intention of helping others, taking allowances, management of another's affairs despite the ban, wrong management of another's affairs and subsequent approval.

Article 220 of the law defines the general rules governing the management of another's affairs without a mandate (*negotiorum gestio*): "(1) Doing business without an order means carrying out the transactions of another person, whether legal or material, without order or authority, but on

account of the one otherwise normally engaged in them, and for the purpose of protecting that person's interests. (2) Doing other person's business without invitation is permissible only should the transaction need to be carried out without delay, because of possible immediate danger of damage or loss of an obvious benefit" (The Law of Contract and Torts, art. 220).

The Law of Contract and Torts (1978) allows the performance of another's work without authorization if there is urgency, and it exists in the case where the delay would result in damage to the person whose work it is. The second condition is that there is a benefit to the person whose job it is. This benefit does not always have to be material, although it most often is. The benefit that arises does not have to appear only to the person whose job it is, but also to another person. For example, if a tenant undertakes necessary repairs to the building he lives in, because the owner of the building is prevented from doing it himself, thus his interference in the business of the owner of the building benefits him, as well as other tenants who live in that building. As Marković observes: "Performing other people's work can only be approached informally if the work does not suffer from delay and damage or loss of obvious benefit is imminent" (Marković, 2015, p. 41).

Interference of a person in someone else's affairs without authorization can be achieved by both material and legal action. It can be any act that the manager of another's affairs would undertake without an order, which represents the performance of some obligation of the person whose job it is or the acquisition of some right for him, and also any material action that he performs with the intention of the person whose job it is, it establishes the relationship of management of another's affairs (Perović, & Stojanović, 1980, p. 665). For the creation of this obligation relationship, the fulfillment of one negative condition is required: that the person whose job it is has not prohibited someone from interfering in his affairs without authorization.

Regarding rights and obligations, the law states the following: "(1) A manager without order (authority) shall notify the principal for whom he acts about his act as soon as possible and shall continue the business commenced, should this be reasonably possible, until his principal is able to take over the matter. (2) After completing the business transaction he shall render account thereof and shall hand over everything he has acquired while doing his business to his principal. (3) Unless otherwise ordered by statute, a manager acting without order (authority) shall have the duties of authorised person" (The Law of Contract and Torts, art. 221).

A manager without authority is obliged to inform the person in whose work he interfered as soon as possible about his procedure. It is only extremely

permissible to interfere in other people's business without approval, and only under the conditions provided for by law, when there is a threat of damage or loss of benefits for the person whose business it is. Management of another's affairs can occur under different circumstances, so a manager without authority may not be able to inform the other party. For example, when he does not know who the person in whose business he interfered is, or when he knows but that person is absent. The law stipulates that in that situation a manager without authority should continue with the work he started, and upon completion, send him to pay the bill and hand over the work to the person whose job it is. A job started by a manager without authority must not be abandoned.

A manager without authority doesn't just have obligations. The law also lists the rights that belong to him: "1) A manager without order (authority) who has acted in all respects reasonably regarding the circumstances of the case, shall be entitled to request his principal to relieve him of all duties assumed by him because of the business, to take over all duties entered into on his behalf, to redress all his necessary and useful expenses, as well as pay for any eventual loss sustained by him, even should the expected result not be achieved. (2) He shall also be entitled to adequate compensation for his efforts, after deducting losses sustained by his principal, or after providing him with a benefit entirely corresponding to his intentions and needs" (The Law of Contract and Torts, art. 223).

By performing other people's work, it is possible to increase other people's property, and the question arises, what if the expenses incurred by a manager without authority for performing someone else's work are not compensated? In order to eliminate any doubts, the law also provided for this possibility. Namely, every manager without authority has the right to take away things with which he has increased someone else's property and for which he is not compensated for the expenses incurred, if they can be separated without damaging the thing to which they were added. The person whose business he interfered with can, if he wants, keep those extras if he compensates him for their current value, but at most up to the amount of expenses incurred. Therefore, this right belongs only to expenditures that were necessary and useful.

Article 226 regulates managing other person's affairs despite a prohibition (*prohibente domino*). "1) Whoever carries on business on behalf of another in spite of a prohibition by his principal shall not have the rights of a manager acting without authority, provided he was aware or had to be aware under the circumstances of the prohibition. (2) He shall be liable for damage caused by

interfering in other person's affairs, even should damage occur without his fault. (3) However, should the prohibition to engage into the affair be contrary to law or morals, and in particular should someone prohibit the other person to fulfill his statutory duties which must not be postponed, the general rules of managing business without authority shall apply" (The Law of Contract and Torts, art. 226).

The existence of a ban excludes the possibility that a person who has interfered in other people's affairs, despite the ban, may acquire the position of manager of another's affairs. The person whose job it is, can pronounce the prohibition of interference in business before the interference itself, but also after the interference has already started. In order for the prohibition to be effective, it is necessary that it fulfills certain conditions: the prohibition must be known to the person who interferes in another's business or, according to the circumstances, must have known about it. The second condition is that the ban on the performance of work must not be against the law or morality. For example no one can prevent the extinguishing of their house that has been engulfed in fire.

The person who is the owner of the work can later approve what was done even then "the manager without authority shall be considered as person having received authority and as if he had acted from the beginning by authority of his principal" (The Law of Contract and Torts, art. 228).The statement giving subsequent approval can be expressed in any way, even indirectly. If the job owner approves, after execution, what has been done, the manager of another's affairs becomes the assignee and is considered to have worked on the order of the job owner from the beginning.

3. Conclusion

The legal solution that regulates the management of another's affairs without a mandate deviates from the solutions that existed in the past. In older codifications, the performance of other people's work without authorization was only allowed in order to eliminate greater damage to the persons whose work it is. However, the current law allows the performance of other people's work even when it has the purpose of achieving an obvious benefit to the person whose work it is. However, even according to the current Serbian law, it is forbidden for someone to carry out other people's work without authorization, and if someone acts contrary to this prohibition, he is exposed to responsibility. The purpose of this prohibition is to protect a person's personality, respect his freedoms and ensure the inviolability of his rights.

Of course, there are situations when doing other people's work without authorization is allowed if special conditions are met and if it is done in the manner and within the limits prescribed by law.

The institute management of another's affairs without a mandate has a lot of similarities, but also differences compared to the Roman negotiorum gestio, especially from the period of Justinian's codification. The biggest difference compared to solutions from the past relates to the obligation of the gestor to inform the business owner as soon as possible that he will manage his affairs, but for that he must wait for approval and thus convert the legal work into an order. Like most of the real institutes taken from the Roman law, they continued to live in the same or modified form and in the rights of continental-European legal systems, while they do not exist in the common law system. This is also the case with the institute negotiorum gestio, i.e. management of another's affairs without a mandate. It does not exist in Anglo-Saxon common law, with the exception of maritime law, where a special institution of rescue (salvage) has been developed, which recognizes the salvager's right to compensation for salvage.

In law, there is a principle "*Culpa est immiscere se rei ad se non pertinenti*" – "It is a fault to meddle with what does not belong to or does not concern you" (*Pomponius – The Digest of Justinian* – 50, 17, 36) (Stojčević, & Romac, 1971, p. 83). Where is the justification for management of another's affairs without a mandate? When the legislator looks for justified reasons for allowing someone to enter someone else's sphere with his actions, he starts from the principle of altruism. The legislator exceptionally allows meddling in other people's affairs, if there is approval. We consider this solution correct, because interference in other people's affairs is allowed only when help is necessary, in the interest of the party in whose sphere one interferes. In practice, this legal solution proved to be correct, leaving no room for free interpretation in cases of management of another's affairs without a mandate.

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NEGOTIORUM GESTIO – RIMSKI TEMELJI NEZVANOG VRŠENJA TUĐIH POSLOVA U SRPSKOM GRAĐANSKOM PRAVU

REZIME: *Negotiorum gestio* je pravni institut koji potiče još iz rimskog prava. On postoji i danas, a u pravnoj literaturi srećemo termin koji ga definiše kao: nezvano vršenje tuđih poslova tj. poslovodstvo bez naloga. Institut *negotiorum gestio* se u kontinuitetu koristi i predmet je pravne regulative u većini zemalja kontinentalnog, evropskog pravnog sistema, gde spada i pravo Republike Srbije, već više od dva milenijuma. Cilj ovog rada je da se upotrebom normativnog, deskriptivnog, komparativnog i analitičko-sintetičkog naučnog metoda, uporede rešenja iz rimskog i savremnog obligacionog prava. Rad je podeljen na tri celine: prvi deo, u kome su obrađena rimska shvatanja instituta *negotiorum gestio,* drugi deo, koji izlaže aktuelna rešenja u vezi ovog instituta sadržana u Zakonu o obliacionim odnosima Republike Srbije, i treći deo, u kom se, upotrebom komparativnog i istorijskog metoda, izvode zaključci o tome da li su bolja aktuelna rešenja sadržana u savremenom pravu ili ona koja su važila u antičkom periodu.

Ključne reči: *Negotiorum gestio, rimsko pravo, nezvano vršenje tuđih poslova, građansko pravo, Zakon o obligacionim odnosima.*

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