## Medieval and Post-Medieval Roman Law

The Latin term *usura* denotes, generally, the use of an object. In relation to money, *usurae* are the interests accruing—as though measuring use into the money itself—during a specified period of time, such as a month or a year; similarly, *faenus* (or *foenus*) refers generally to earnings and specifically to interest. Rules about these are to be found, above all, in Justinian's *Digests* (D.22.1) and *Codex* (C.4.32).

The payment of interest could be legally compulsory. Regional practices were incorporated into the *Digest*'s judgments on this. An especially important instance of legally compulsory interest was when a debtor went into arrears (*mora*, delay). The rate of default interest was, already in antiquity and still in the Middle Ages and into modernity, in a constant state of flux: these interest rates were generally between 4 and 12 percent per year. Default interest was seen as a flat adjustment to make up for the losses incurred by the creditor through the delay.

The question of to what extent one could contractually set interest rates was of extraordinary economic and social importance. *Usurae* (*faenus*) and the respective words in the national languages—for example, in German *Wucher*, in English "usury"—denote, alongside interest, also the transaction of rate setting, and there, most particularly, credit with interest. Because transactions with interest were seen as offensive and were allowed within only narrow bounds, the word *usurae* and its national-language counterparts also gained the general meaning of an unbalanced, exploitative contract.

Roman law allowed a pledge of interest to be included in a contract. If the payment in question was through a consensual contract (*obligatio consensu*, *contractus bonae fidei*), such as sale, then the pledge of interest was informal, though the boundaries of good morality (*boni mores*) were to be maintained. For other contracts a person pledged interest through a stipulation. All these contracts required an *obligatio verbis*: that is, a formal oral transaction—if possible, accomplished before a witness—or a written transaction set down in a legal document (*instrumentum*) or in another sort of writ (*alia scriptura*).

A transaction was, above all, required for contracts of credit (*mutuum*). In principle such contracts engendered no obligations of interest, but the receiver of credit could pledge interest to the creditor in a stipulation to the actual contract of *mutuum*. For this, however, it was not sufficient for the receiver of credit simply to make a promise upon receipt of the sum of credit—that is, where the pledge of interest was solely an aspect of the contract of credit; rather, a separate pledge was necessary. That said, if the receiver of credit did pay interest that had been informally pledged (i.e., without a stipulation), then that receiver could not demand the interest back as a payment that was not legally required. Throughout history, up to the twenty-first century, there has remained a conceptual separation between credit itself and an agreement upon interest for credit. Since the end of the twentieth century, consumer-protection laws have required that credit with interest be agreed upon in writing, in a way reminiscent of the stipulation.

Free or informal agreements of interest have been mistrusted since Roman law in antiquity. Both under Christian rulership and before that, there were caps on interest rates, which were differentiated according to person and circumstances. Further, interest was not allowed to rise above the principal sum (*sors*). This latter condition was interpreted as meaning that creditors could insist on interest from an unlimited stipulation only until the sum of all paid and remaining interest reached the original capital sum. Thus not only was back interest limited, but the creditor was also forced after a certain time—in the course of normal repayment—either to insist on a return of the money or to let it stand with the receiver of credit, without interest. In addition, any pledge to pay interest upon interest (*usurarum usurae*, or compound interest) was legally void. One could, however, retroactively combine the interest (when it was paid, at any rate) to form a new credit, and then could agree upon interest for that credit.

The provisos against collecting interest were strengthened in the Middle Ages and modernity, influenced by the bans on interest in the Bible and in canon law. Clerics were stripped of their positions if they offered credit with interest or did so through intermediaries. In the confrontation between Roman law, which was fundamentally tolerant of interest, and canon law, canon law was considered stronger because it was divine law (*ius divinum*); the ban on interest was enforced not only in the church court but also in the secular court. No one, whether Christian or not, was to require interest of a Christian. Interest was forbidden in order to prevent people from becoming covetous instead of diligent. To take interest on credit was seen as selling time itself; time, however, could not be sold, because it was at the disposition of everyone. A further argument was that money was, by nature, barren (*sterilis*). This particular basis for a ban on interest was later withdrawn because it was realized that many things become fruitful through human diligence.

In early modern times, interest on credit at moderate rates came to be seen as not necessarily forbidden by canon law, divine law, or natural law (*ius naturale*). This depended on the credit's use (*lucrum*, or gain) by the recipient and the outlay (*impensa*), waiver (*lucrum cessans*), or loss (*damnum*) to the creditor, as well as on the risk that the creditor would lose his or her capital outright (*periculum amittendae sortis*); this was also restricted by the injunction that one not demand credit of a poor person, to whom one should rather be giving alms. The inherent risk had already brought forth in antiquity special regulations for nautical credit (*faenus nauticum*). During the Middle Ages and early modernity countless regulations developed that allowed interest up to certain limits, as well as special terms for Jewish moneylenders. In addition to interest for nautical credit, traders in antiquity could often demand up to 12 percent per year, while others might demand up to 8 percent; this was antiquity's provision for traders. Grotius saw the interpretation of interest as a risk premium, to be described alongside the insurance contract (*assecuratio*).

Creditors sought through numerous contractual configurations to bypass the strict limits on interest. They stipulated reimbursement of capital through the delivery of goods of a higher value, or insisted that goods be pledged in addition to the return of the capital. Or credit was disguised as a sale to the creditor with the understanding that repurchase would take place at a higher price. In cases where the recipient of credit truly had an object of some value, this served the creditor as security; for fictitious sales, an object of no great value sufficed, which the creditor would nonetheless dispose of in extreme circumstances. Another popular strategy was the masking of credit as the sale of a pension. Such practices were forbidden, to the extent that they gutted the regulation of interest.

One may see how enduring was the animus against transactions of interest in that the laws of the nineteenth century still found it necessary expressly to allow the taking of interest. The question of interest-taking was shunted, though, to the field of ideological conflict—with Karl Marx in his description of finance capitalists as those with whom industrial capitalists share the excess value extracted from the production of the workers, and under German Nazism with the anti-Semitic position seen in the "breaking of the thralldom to interest" that was described as a "steel axis" and in the "abolition of work-free and effortless income" (point 11 of the party program of the German National Socialist Workers' Party, 1920).

Pledges of compound interest are today still fundamentally legally void in Germany. Banks, however, may pledge interest on the interest that accrues on and is added into accounts. The open account, too, makes it possible to add interest to the capital and pay interest on both; this option is, however, closed in cases of consumer credit as soon as the consumer's account falls in arrears. The clause that did not allow interest to grow to be greater than the capital sum has now been abandoned.

[*See also* Baldus de Ubaldis, Petrus; Bartolus of Saxoferrato; Credit in Medieval and Post-Medieval Roman Law; Grotius, Hugo; Natural Law, *subentry on* Medieval and Post-Medieval Roman Law; Pufendorf, Samuel von; and Wolff, Christian von.]

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