THE IMPORTANCE OF THE LATIN LANGUAGE AND OF ROMAN LAW FOR DEVELOPMENTS IN EUROPEAN LAW – ILLUSTRATED FOR PROPERTY ACQUISITION

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Abstract

Property is one of the fundaments of ancient, medieval and modern society; the relevant legislation is of eminent importance and is still dominated by principles of Roman law:

– The so-called abstraction principle is applied Roman law: It separates the contractual agreement and the acquistion of property. If the contractual agreement is invalid, there is given a so-called >condictio indebiti<, even if the translation of property is valid.

– The acquisition of property in good faith is based on Roman law; the prinicple of acquisition in good faith protects the legal relations and postpones the interest of the (former) owner.

– The relationships between the property owner and the unrightful possessor may be rather intricated, Roman law gives the answers.

Roman law was the private international law that ruled the legal transactions of civil life. The European Union is on the way for more unification of civil law in its member states, but there is still a very long distance to go – the way is rather stony, because the member states are in some espects fixed on their own codified civil law. This way is stony, because there is no lingua franca in the European Union: The success of Roman law was based on the success of the Latin language, whose grammar, syntax and phonology is rather easy. Latin was the lingua franca of the ancient Europe, of the medieval Europe and in the further sequence up to the Enlightenment, whereas the European Union has as many official languages as it has member states. Nevertheless, the Latin language is not dead and the Roman law is not outdated.

Keywords: Property, Roman law, abstraction principle, acquisition in good faith, Latin as lingua franca, European Union, private international law, unification of civil law

I) Introduction

To the organizers of this conference[1] at the University of Warmia and Mazury I am very thankful that it is possible to make a lecture on Latin language and on Roman Law. For me it is something very particular to treat this subject-matter in a European country that has ever since outstanding scholars in Classical Philology and Roman Law: For Classical Philology there is made reference to Tadeusz Stefan Zieliński[2] (1859 – 1944), for Roman Law there is made reference to Raphael Taubenschlag[3] (1881–1958).

The ratification of the national codes of civil law in the 18th and 19th century did not end the influence of Roman law[4]. The main ideas and the concepts of Roman law and Roman lawyers[5] are still present in almost every corner of the national codes of civil law[6] in Europe[7]. Furthermore, the main ideas and concepts of Roman law are the links between the national codes of civil law. This is reason enough to highlight the importance of Roman law for the European legal development - in this lecture the importance of Roman law is illustrated for the acquisition of property[8].

My point is that the concept of Roman law and the corresponding Latin terminology[9] shall be the fundaments of the European Civil Law Code. The concept of the >Twelve Tables<[10] (439 BC) and of the >Corpus Iuris Civilis< (AD 529)[11] are so to speak long-lasting evergreens of Roman

[1] This is the print version of a lecture that was held at the 3rd International Conference on Comparative Law (>Transfer of Property Rights in Eastern and Central Europe<) at the University of Warmia and Mazury in Olsztyn (Poland) on 22nd and 23rd of March 2013; the text will be published by the University of Warmia and Mazury.

[2] To him cfr. http://www.zeit.de/1997/35/Ehre_dem_Polen; Jerzy Axer (ed.), Tadeusz Zielinski. My Curriculum vitae. First edition of the German original and diary, 2012 = Studies to Classical Philology. Vol. 167.

[3] To him cfr. Gregorius Krokowski/Victor Steffen/Ladislaus Strzelecki (ed.), Lecture dedicated to Raphael Taubenschlag, 1956.

[4] Raphael Taubenschlag did illustrate the importance of Roman Law for Poland: Raphael Taubenschlag: Influence of Roman Law in Poland, Ius Romanum Medii Aevii, Pars V, 7-9, 1962; EOS, Commentarii Societatis Philologae Polonorum Volumen XLVIII, Fasc. 1/1956.

[5] Hans-Dieter Spengler, To the idea of man that the Roman lawyers do assume, JZ 2011, 1021–1030.

[6] Helmut Coing, European private law, 1989.

[7] Reinhard Zimmermann, Roman law and European culture, JZ 2007, 1–12.

[8] Dirk Olzen, The historical development of the civilian idea of property, JuS 1984, 328–335; Giovanni Pugliese, Dominium ex iure Quiritum – Eigentum – Property, ZfRV 1980, 9–24.

[9] Jürgen Basedow, Latin – the clandestine official language, ZEuP 2007, 953–954.

[10] Dieter Flach, The Twelve Tables. Leges duodecim tabularum, 2004.

11 Harmut Leppin, Justinian und the restauration of the Roman Empire. The illusion of renewal, in: Mischa Meier (ed.), They created Europe, 2007, p. 176–194.

Law[12]. For the term >property<[13] in Europe we have today an almost unified understanding that in some respects is self-evident: In antiquity and in particular in the Roman Empire there was slavery and slaves were treated like mobilia in civil law. The modern constitutions of the modern states did ban slavery. In the period of Communism, which emanated from the Soviet Union over these nations that were occupied by the Red Army, there was denied the civilian component of property.

II) Latin survives the Middle Ages

Why has Latin survived from antiquity to Modern Times?[14]

– The sphere of influence of the Roman Empire was enormous and comprised almost entire Europe. The Roman infrastructure – particularly the excellent network of roads[15] – made it possible that the colonization was achieved very quickly[16].

– Roman Law has not lost its importance until now, an appropriate understanding of Roman Law without at least some knowledge of Latin is not possible.

– Latin is still one of the official languages of Roman Catholic Church.

The Latin language[17] has the following structural advantages:

– Latin pronunciation is rather easy.
– Latin writing is rather easy.
– Latin grammar is rather easy.
– Latin syntax is rather easy.

But these advantages do not come into play, if Latin is taught as a dead language as there is the practice in Germany. If Latin is taught in the same as e.g. English and French is taught, the results can be comparable.

III) Roman Law survives the Middle Ages

[12] For a chronological survey of the periods Mario Bretone, The history of Roman law. From the beginnings to Justinian, 1992, p. 351 sqq.

[13] Joachim Lippott, The property in the today constitutions of the countries in Eastern Europe, ZVgRWiss 1996, 227–260.

[14] Wilfried Stroh, Latin is dead, long live Latin. Small history of a great language, 2008. p. 103 sqq.

[15] Joachim Neumann, Tabula Peutingerina – a Roman travel map, in: Konrad Bauer/Franz-Rudolf Herber (ed.), Law and technology II, 2011, p. 341–355.

[16] The Roman army was unrivalled and very brutal; the >Bellum Gallicum< gives significant evidence for these facts.

[17] Karl Friedrich von Nägelsbach, Latin stilistics, 1980, Reprint of the edition that was managed by Iwan Müller, 1905; Raphael Kühner/Carl Stegmann: Detailed grammar of the Latin language, 1988, Reprint of the 2. edition, 1914. \

In a figurative sense the Middle Ages are sometimes described as dark. Very often good traditions and worthful knowledge became entirely obsolete and thus was forgotten, but Roman Law was conserved and came to new heights.

1) Glossatores

In the 11th century the >Corpus Iuris Civilis< was rediscovered. In the Italy of the 12th and 13th century universities began to flourish, this is particlularly true for the university of Bologna[18]. The faculties of law gained in importance. The so called *glossatores* did explain the difficult parts of the >Corpus Iuris Civilis<, thus the main contents of the >Corpus Iuris Civilis< made Roman Law significant again. Here are the most important representatives of this area:

– Irnerius (1050 – 1130)[19].
– Azo (before 1190 – 1220)[20].
– Accursius (1182/1185 – 1260/1263)[21].

2) Postglossatores

The so-called *postglossatores* did perfect the work that the glossatores had begun. They produced commentaries to the >Corpus Iuris Civilis< and thus revived Roman Law on a large scale and not only for the universities, but also for the juridicial practice. Here are the most important representatives of this area:

– Bartolus de Saxoferrato (1313 – 1357)[22].
– Baldus de Ubaldis (1327 – 1400)[23].

[18] Jürg Schmutz, Jurists for the empire: The German students of law at the university of Bologna 1265–1425. 2 Vol., 2000.

[19] To Irnerius cfr. Hermann Lange, Roman law in the Middle Ages. Vol. 1: The glossators, 1997, p. 154–162; Peter Weimar, Irnerius, in: Michael Stolleis (ed.), Lawyers. A biographical dictionary from the ancient times to the 20th century, 2001, p. 325–327.

[20] To Azo cfr. Hermann Lange, Roman law in the Middle Ages. Vol. 1. Glossatores. München 1997, p. 255–271; Peter Weimar, Azo, in: Michael Stolleis (ed.): Lawyers. A biographical dictionary from the ancient times to the 20th century, 2001, p. 53 sq.

[21] To Accursius cfr. E. Genzmer, To the life story of Accursius, in: Festschrift for Wenger, 1945, p. 223 ff.; Hermann Lange, Roman Law in the Middle Ages. Vol. 1. Glossatores. München 1997, p. 335–385; P. Weimar: Accursius, in: Michael Stolleis (ed.): Lawyers. A biographical dictionary from the ancient times to the 20th century, 2001, p. 18 sq.

[22] To Bartolus de Saxoferrato cfr. Maria Ada Benedetto, Bartolus de Sassoferrato, in: Novissimo Digesto Italiano. Vol. 2., 1958, p. 279–280; Bartolus de Sassoferrato. Studi e Documenti per il VI centenario. 2 Vol., 1962; Axel Krauß, Bartolus de Saxoferrato, in: Gerd Kleinheyer/Jan Schröder (ed.), German and European lawyers of nine centuries. 4. edition, 1996, p. 43–47; Susanne Lepsius, Bartolus de Sassoferrato, in: Compendium auctorum Latinorum Medii Aevi II,1, edited by Società internazionale per lo studio del Medioevo Latino, 2004, p. 101–156.

– Cinus Pistoriensis (1270 – 1336 or 1337)[24].

3) Usus modernus pandectarum

The so-called reception of Roman Law in Europe was almost finished, when scholars put the emphasis on a case-related treatment of Roman law[25] and thus created the *usus modernus pandectarum*[26]. These scholars did also take into consideration the >Corpus Iuris Canonici< and the local (particular) law. Thus the gap between law as a science and juridical practice was almost closed and the significance of particular law increased[27]. Here are the most important representatives of the *usus modernus pandectarum*[28]:

– Samuel Stryk (1640 – 1710)[29].
– Johannes Voet (1647 – 1713)[30].
– David Mevius (1609 – 1670) [31].

IV) Terminology is half the battle

The old Romans say *nomen est omen*[32] – a saying which emphasizes the importance of terminology. The one, who sets the terminology, sets not only a trend, but may gain power in some respect. It may be that for laymen

[23] To Baldus de Ubaldis cfr. Helmut G. Walther, Baldus as a reviewer for the papal curia in the Great Schism, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, 123. Vol. (1996), Kanonistische Abteilung 92, p. 392–409; Daniel Schwenzer, Baldus de Ubaldis, in: Biographisch-Bibliographisches Kirchenlexikon, Vol. 6, 1999, col. 66–71.

[24] To Cinus Pistoriensis Guido Zaccagnini cfr. Cino da Pistoia fu di parte bianca o nera?, Giornale storico di letteratura italiana 82, 246 (1923), p. 337–347; Guido Zaccagnini, Cino da Pistoia, 1919.

[25] Peter Weimar, About the codified private law and the common law, ZSchR 2005, I, 23–37.

[26] Martin Heger, Law in „the old empire" – the usus modernus, ZfS 2010, 29–39.

[27] Sergio Fernandes Fortunato, About the importance of common law for the German civil law, ZfS 2009, 327–338.

[28] Particular to the understanding of property acquisition Peter C. Klemm, Property and ownership restrictions in the doctrine of the usus modernus pandectarum, 1984.

[29] To Samuel Stryk cfr. Ernst Landsberg, Samuel Stryk, in: General German Biography (ADB). Vol. 36, 1893, p. 699–702; Stryk or Stryck or Stryke, Samuel, in: Zedlers Universal-Lexicon. Vol. 40, 1744, Col. 1128–1135.

[30] To Johannes Voet Johannes van Kuyk, VOET (Johannes), in: Nieuw Nederlandsch Biografisch Woordenboek, 3. edition by Petrus Johannes Blok and Philipp Christiaan Molhuysen, 1914, p. 1328–1329.

[31] To David Mevius cfr. Nils Jörn (ed.), David Mevius (1609-1670). Life and work of a Pomeranian lawyer of European importane, 2007; Hans-Georg Knothe, David Mevius (1609 – 1670), A prominent lawyer of usus modernus pandectarum, ZEuP 2010, p. 536–561.

[32] This goes back to the Roman playwright Plautus: Gisla Gniech, 'Nomen atque omen' oder 'name is but sound and smoke …'?, in: Friedhelm Debus und Wilfried Seibicke (ed.): Reader to onaomastics. Anthroponymie. 2, 1993, p. 397–410.

there is no difference between propriety and possession. But the legal language does not only dominate written law itself, but also legal transactions and juridical practice. In the decaying Roman Empire the difference between propriety and possession became blurred, because the legal language was no longer important; thus propriety and possession had almost the same meaning. It was the East-Roman emperor Iustinian that restored again the difference between propriety and possession[33]. Book forty-one of his >Corpus Iuris Civilis< treats propriety and possession; the difference between propriety (*dominium*) and possession (possession) is thus explained by Ulpian:

Dig. 41.2.17.1[34]

Ulpianus 76 ad ed[35].

Differentia inter dominium et possessionem haec est, quod dominium nihilo minus eius manet, qui dominus esse non vult, possessio autem recedit, ut quisque constituit nolle possidere. si quis igitur ea mente possessionem tradidit, ut postea ei restituatur, desinit possidere.

There is a difference between ownership and possession: that a man remains owner even when he does not wish to be, but possession departs once one decides not to possess: Hence, if someone should transfer possession with the intention that it should be later restored to him, he ceases to possess.

Here there is given a rather difficult differentiation between property (*dominium*) and possession (*possessio).* The text shows that property (*dominium*) for its existence as such shall not depend on the will of the owner to have particular property, whereas possession (*possessio*) for its existence as such shall depend on the will to possess. The Roman Law regulations for acquisition of possession and of property do live on in many European languages, i.e. *proprietas* (not *dominium*) and *possessio.*

In the Romance languages (Italian/French/Luxembourgish/Spanish/ Portuguese and Romanian) we have almost the very same word, which goes

[33] Sibylle Rosenlöcher, The development of the property-owner-relationship, Europäische Hochschulschriften, Series 2/Vol. 1040, 1990.

[34] Cfr. to the procedural difference: Dig. 41.2.12.1, Ulpianus 70 ad ed: *Nihil comune habet proprietas cum possessione: et ideo non denegatur ei interdictum uti possidetis, qui coepit rem vindicare: non enim videtur possessioni renuntiasse, qui rem vindicavit. - Ownership has nothing in common with possession; hence, a man who institutes a vindicatio will not be refused the interdict uti poessedetis; for he is not deemed to have renounced possession by asserting ownership.*

[35] To Ulpian († 223 AD) cfr. Tony Honoré, Ulpian. Pioneer of Human Rights. 2. edition, 2002.

in every case directly back to the Latin word *proprietas*[36]. Furthermore, it is interesting that in the artificial language >Esperanto[37]< the word for *property* is derived from the Latin word *proprietas* and thus accepts the key role of the Latin language and the Roman Law.

Latin: proprietas

- Italian: proprietà[38].
- English: property[39].
- French: propriété[40].
- Spanish: propiedad[41].
- Portuguese: propriedade[42].
- Romanian: proprietate.
- Luxembourgish: propriété/Eigentum[43].
- Belgian: propriété[44].
- German/Austrian: Eigentum.
- Dutch: eigendom[45].

[36] It is rather curious that in the language of Communism there is the Latin slogan „*Expropriation der Expropriateure*", which we do find in English „*expropriation of the expropriators*" and in French "*l'expropriation des expropriateurs*". The Communists that condemned the Roman Empire did use for this slogan the language of the Roman Empire, because Latin sounds so scientific.

[37] The founder of Esparanto has Polnish roots: Ludwik Lejzer Zamenhof (born as Eliezer Levi Samenhof, Polish Ludwik Łazarz Zamenhof in 1859 in Białystok and died in 1917 in Warsaw) was a ophthalmologist and a philologist. He founded under the pseudonym >Doktoro Esperanto< the artificial language Esperanto. To him: Marjorie Boulton, Zamenhof, creator of Esperanto, 1960; René Centassi/Henri Masson, The man who defied Babel, 1995; Ziko van Dijk, Universal language from Warschau. L.L. Zamenhof, Esperanto and East Europe. Nr. 4, 2007, p. 143–156; Naftali Zvi Maimon, The hidden life of Zamenhof. Original studies, 1978; Andreas Künzli, L.L. Zamenhof (1859-1917) Esperanto, Hillelismus (Homaranismus) and the so-called Jewish question in Eastern and Western Europe. Wiesbaden 2010; Edmond Privat, Ulrich Lins (ed.), Life of Zamenhof. Inventor of Esperanto 1859–1917. 6. edition, 2007.

[38] To Italian property law Lukas Plancker/Karl Pfeiffer, Italy; in: Christian von Bar (ed.), Property law in Europe, Vol. IV, p. 316–454.

[39] To English property law Frank L. Schäfer, Vindication in English, StudZR 2010, 275–296.

[40] To French property law Erwin Beysen, France, in: Christian von Bar (ed.), Property law in Europe, Vol. IV, p. 176–313.

[41] To Spanish property law Elena Rodriguez Mariscal, Spain, in: Christian von Bar (ed.), Property law in Europe, Vol. IV, p. 457–559.

[42] To Portuguese property law Maria Margarida R.A.C. de Seabra/Yanko Marcius de Alencar Xavier, Portugal, in: Christian von Bar (ed.), Property law in Europe, Vol. IV, p. 339–454.

[43] The third language is a dialect called >Moselfränkisch<, which uses the German diction.

[44] To Belgian property law Erwin Beysen, Belgium, in: Christian von Bar (ed.), Property law in Europe, Vol. IV, p. 7 – 174.

– Danish: Ejendom[46].
– Swedish: egendom[47].
– Norwegian: eiendom[48].
– Polish: własność[49].
– Slowenian: nepremičnine[50].
– Greek: περιουσία[51].
– Esperanto: proprâjo.

For the Latin word *possession* there is given almost the same overall picture. Again, it is interesting that Esperanto accepts the key role of Latin and of the Roman Law.

Latin: possessio

– Italian: possesso.
– English: possession.
– French: possession.
– Spanish: posesión.
– Portuguese: posse.
– Romanian: posesiune.
– Luxembourgish: possession/Besitz[52].
– Belgian: possession.
– German/Austrian: Besitz.
– Dutch: bezit.
– Danish: besiddelse.
– Swedish: possession.
– Norwegian: besittelse.
– Polish: posiadanie[53].
– Slowenian: Posest.
– Greek: κατοχή.
– Esperanto: posedo.

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[45] To Dutch property law Franz Nieper/Hendrik Ploeger, The Netherlands, in: Christian von Bar (ed.), Property law in Europe, Vol. IV, p. 149–336.

[46] To Danish law Wolfgang Wagner, For the 300-year celebration of the Danish Code of King Christian V., in: Der Staat, Vol. 23 (1984), 106–115.

[47] To Swedish property law Gerhard Ring/Line Olsen-Ring: Introduction to the Scandinavian Law, 1999.

[48] To Norwegian property law Gerhard Ring/Line Olsen-Ring (footnote 47).

[49] To Polish property law Jerzy Poczobut, Poland, in: Christian von Bar (ed.), Property law in Europe, Vol. IV, p. 7 – 97.

[50] To Slowenian property law Ana Filipov, Acquisition of property in Slowenia, eastlex 2003, 13–16.

[51] To Greek property law: Evlalia Eleftheriadou, Greece, in: Christian von Bar (ed.), Property law in Europe, Vol. IV, p. 7–146.

[52] Cfr. footnote 42.

[53] In Polish slang there is the term *posesja* which seemingly is derived from Latin.

Of course, there is not only the influence of Roman Law on the national civil laws, but there are also cross-relations between the civil law of one country to that of another country, e.g. the influence of German civil law on Polish[54] civil law[55] vice versa. This may be called in some regard the post-reception of Roman law, if the influencing law is determined by the concept of Roman law.

V) The concept of abstraction

Roman legal maxims are frequently cited in short form. Thus the underlying legal concept may be simplified and therefore given a general meaning, which was not intended by the respective ancient author. There is hardly the Roman law, it has been determined by a group of writers whose sentences Iustinian had have collected. Sometimes, it is stubbornly believed that the Roman law had a clear preference for the concept of abstraction[56], i.e. the separation of obligation and transference of property. An accurate source analysis shows that there is not the concept of abstraction[57] in Roman law, but there are approaches to the concept that was demanded in the 19th century by Friedrich Karl von Savigny[58]:

Dig. 41.1.36

Iulianus 13 Dig[59].

Cum in corpus quidem quod traditur consentiamus, in causis vero dissentiamus, non animadverto, cur inefficax sit traditio, veluti si ego credam me ex testamento tibi obligatum esse, ut fundum tradam, tu existimes ex stipulatu tibi eum deberi. nam et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi creditam accipias, constat proprietatem ad te transire nec impedimento esse, quod circa causam dandi atque accipiendi dissenserimus.

[54] Tina de Vries, Justice law and justice reform in Poland, 24th of September 2004, Forschungsverbund Ost- und Südeuropa (Arbeitspapiere); Henry Olszewski, The so-called constitution of May as coronation of Polish constitutional law, in: Rudolf Jaworski (ed.), Kieler Werkstücke/Series F/Vol. 2. Beiträge zur osteuropäischen Geschichte. Nationale und internationale Aspekte der polnischen Verfassung vom 3. Mai 1791, 1993, 24–42.

[55] Jochen Korsch, German property law in Poland from 1920 to 1939. Interpretation of Book III of the Civil Code in Poland and Germany, ZEuP 2004, 1076–1079.

[56] Hans Wieling, The principle of abstraction in Europe, ZEuP 2001, 301–307.

[57] To this point cfr. Dorota Kempter, The influence of European law on the Polish Civil Code, 2007, p. 90.

[58] Iris Denneler, Friedrich Karl von Savigny, 1985.

[59] To Iulian as famous lawyer cfr. E. Bund, Investigations on the method of Julian, 1965. Lucius Octavius Cornelius Publius Salvius Iulianus Aemilianus (* ca. 108 AD) was also a rather successful politician.

When we indeed agree on the thing delivered but differ over the grounds of delivery, I see no reason why the delivery should not be effective; an example would be that I think myself bound under a will to transfer land to you and you think that it is due under a stipulation. Again, I give you coined money as a gift and you receive it as a loan, it is settled law that the fact that we disagree on the grounds of delivery and acceptance is not a barrier to transfer of ownership to you.

Here is given an obvious dissonance of the supposed obligations (*ex testamentu* vs. *ex stipulatu* and *donandi gratia* vs. *quasi creditam accipias*), but nevertheless property acquisition is assumed. However, this does only work, because there is objectively given an obligation objectively: If there is no obligation, there is no property acquisition, the *causa putativa* seems to be a nightmare.

In Roman law there are traces of the concept of abstraction and these traces deserve to be discussed for the project of a unified European civil law. For the concept of abstraction there is the argument that between the obligation (executory agreement) and the transference of property[60] (disposition) relevant changes may have occurred, which may have influenced the decision-making. The situation in Europe is today rather complicated:

– The concept of abstraction is there only in German civil law, nevertheless some German scholars[61] do demand, that the principle of abstraction should be overtaken in a presumable European civil law.

– French[62] civil law and Italian civil law do have the principle of consensual agreement, which means that the obligation is enough for the transference of property.

– Austrian civil law[63], Dutch civil law and Spanish civil law does have a modified concept of *traditio*[64]: If a *traditio* follows the obligation, transference of property is achieved.

[60]Andreas Wacke, Ownership by the purchaser by means of consensus or only by means of delivery, ZEuP 2000, 254–262.

[61] Hans Wieling, The principle of abstraction of Europe, ZEuP 2001, 301–307.

[62] Eugen Bucher, The effect of property transfer according to debt contracts – The "how" and "where" of this model of the Civil Code, ZEuP 1998, 615–669.

[63] Andreas Thier, 200 years Civil Code in Austria, ZEuP 2011, 805–819. Hermann Baltl, Influence of Roman law in Austria, in: Ius Romanum Medii Aevii, Pars V, 7–9, 1962.

[64] Hermann Blaese, Influence of Roman law in the Baltic countries, in: Ius Romanum Medii Aevii, Pars V, 7–9, 1962.

VI) The concept of access

Transference of property does not compulsorily mean that the owner has to have (always) own possession - so to speak with his own hands. Its is enough, if possession can be assigned to him:

Dig. 41.1.65pr.

Labeo 6 pith. a paulo epit[65].

Si epistulam tibi misero, non erit ea tua, antequam tibi reddita fuerit. paulus: immo contra: nam si miseris ad me tabellarium tuum et ego rescribendi causa litteras tibi misero, simul atque tabellario tuo tradidero, tuae fient. (…)

If I send you a letter, it will not be yours until it has been delivered to you. PAUL: Quite the contrary; for if you send your letter-carrier to me and I send you a letter in reply, it will become yours as soon as I hand it to the carrier. (…)

This testimony, which is presented in that chapter of the Corpus Iuris Civilis, where questions as well as cases of property and possession are illustrated, has another and really fascinating relevance: It is illustrating whether access of expressed will to the addressee can be assumed or not. This text makes clear that access does not necessarily presuppose the knowledge of the delivered will, it is enough, if the delivered will can be assigned to the sphere of influence of the addressee[66].

VII) The concept of acquisition in good faith in Roman Law

In Roman law there is very good evidence for the concept that no one can transfer a right he is not entitled to. First this means, that in Roman law immediate acquisition in good faith from the not-authorized person is not recognized.

Dig. 41.1.20pr.

Ulpianus 29 ad Sab.[67].

Traditio nihil amplius transferre debet vel potest ad eum qui accipit, quam est apud eum qui tradit. si igitur quis dominium in fundo habuit, id tradendo transfert, si non habuit, ad eum qui accipit nihil transfert.

Delivery should not and cannot transfer to the transferee any greater title than resides in the transferor. Hence, If someone conveys land of which

[65] To Marcus Antistus Labeo (54 BC – ca. 10/11 AD) cfr. Paul Jörs, Antistius 34, in: Paulys Realencyclopädie der classischen Altertumswissenschaft (RE). Vol. I/2, 1894, Col. 2548–2557.

[66] In German civil code there is the unsatisfactory situation that the terms >expression of will< and >access< do not occur.

[67] To Domitius Ulpian († 223 AD) cfr. Tony Honoré, Ulpian. Pioneer of Human Rights. 2. edition, 2002.

he is the owner, he transfers his title; if he does not have the ownership, he conveys nothing to the recipient.

In Dig.41.1.31pr. we find the above mentioned principle again, but there is presented another important aspect: There must be a legal reason (*iusta causa*) for the transference of possession and property.

Dig. 41.1.31pr.

Paulus 31 ad ed.

Numquam nuda traditio transfert dominium, sed ita, si venditio aut aliqua iusta causa praecesserit, propter quam traditio sequeretur.

Bare delivery of itself never transfers ownership, but only if there is a prior sale or other round on account of which the delivery follows.

But this does not mean that the legal interests of the acquirer are not taken into account. The aspect of legal certainty is insofar taken into account as the object can be acquired by *usucapio*[68] from the non-authorized person, for *mobilia* after one year, for *immobilia* after two years. The acquisition in good faith is not allowed in that point of time in which the transfer of possession is completed, the acquisition in good faith is postponed to the end of a given period of time that has expired:

Dig. 41.3.10pr.

Ulpianus 16 ad ed[69].

Si aliena res bona fide empta sit, quaeritur, ut usucapio currat, utrum emptionis initium ut bonam fidem habeat exigimus, an traditionis. et optinuit sabini et cassii sententia traditionis initium spectandum.

If a third person´s thing be bought in good faith, the question arises whether, for usucapion to run, we require good faith at the very inception of the sale or at the moment of delivery. The view of Sabinus and Cassius has prevailed that we look to the moment of delivery.

Whereas the *usucapio*-solution has not been taken over in German civil law, it has been taken over in the national civil codes of other European countries[70]. Therefore it is no question that the Roman *usucapio*-solution needs to be discussed, when a European Civil Code shall be prepared.

It is crucial for Roman law that the concept of acquisition in good faith is not only referred to property, but that it is already referred to

[68] Cfr. Max Kaser, The Roman law, 2. edition, München 1971 = Rechtsgeschichte des Altertums, im Rahmen des Handbuchs der Altertumswissenschaft Dritter Teil/Dritter Band/Erster Abschnitt, p. 418 ff.

[69] To Ulpian cfr. footnote 66.

[70] Werner Hinz, The development of the bona fide property acquisition in European legal history, ZEuP 1995, 398–422; Dirk Olzen, The history of the acquisition in good faith, Jura 1980, 505–510; Matthias Armgardt, The protection of the bona fide acquisition of lost things in the European legal systems and the so-called solution right, ZEeuP 2007, 1006–1019.

possession because without the acquisition of possession there is no property.

Dig. 41.2.3.22

Paulus 54 ad ed[71].

Vel etiam potest dividi possessionis genus in duas species,ut possideatur aut bona fide aut non bona fide.

Or, again, possession as such can be divided into two categories, according as it is held in good faith or in bad faith.

Other testimonies make clear that just possession needs to be title-bound which makes reference to the above-mentioned point:

Dig. 41.2.3.21

Paulus 54 ad ed.

Genera possessionum tot sunt, quot et causae adquirendi eius quod nostrum non sit, velut pro emptore: pro donato: pro legato: pro dote: pro herede: pro noxae dedito: pro suo, sicut in his, quae terra marique vel ex hostibus capimus vel quae ipsi, ut in rerum natura essent, fecimus. et in summa magis unum genus est possidendi, species infinitae.

There are so many kinds possessions as there are grounds for acquiring what does not belong to us, for example, possession as purchaser, on gift, legacy, dowry, inheritance, noxal surrender, as one`s own, as in the case of such things which we catch on land or sea or which we seize from the enemy or which we ourselves created. All in all, possession as such is one in nature, but its varieties are infinite.

Possession is worthless in a juridical sense, if there is no reason for the possession as such[72]. *Pro suo* is a rather difficult title, but not in this testimony as is referred to abandoned things and to things that can be appropriated in free nature.

As possession is the basis for property, it makes good sense that the reason on which possession is founded cannot be changed arbitrarily by the possessor:

[71] To Iulius Paulus cfr. George Long, Paulus, Julius, Roman jurist 2, in: William Smith (ed.): Dictionary of Greek and Roman Biography and Mythology. C. Little and J. Brown, 1870, Vol. III, p. 155–157,

[72] A very important title is given, when the responsible court has confirmed the given possession or assigned the possession. Dig. 41.2.11, Paulus 65 ad ed.: Iuste possidet, qui auctore praetore possidet. A man possesses lawfully who possesses by the praetor`s authority.

Dig. 41.2.19.1
Marcellus 17 Dig[73].

Quod scriptum est apud veteres neminem sibi causam possessionis posse mutare, credibile est de eo cogitatum, qui et corpore et animo possessioni incumbens hoc solum statuit, ut alia ex causa id possideret, non si quis dimissa possessione prima eiusdem rei denuo ex alia causa possessionem nancisci velit.

When the earlier jurists write that no one can change the round of his own possession, this may be tenable of one who, being already physically and with intent of possession, merely decides to possess by some other title; it does not apply to any one who, giving up his previous possession, intends to obtain a new possession by a different title.

The concept is not so inflexible as it appears to be at first glance. If possession is ended, but taken up anew and founded on another just title, there is no problem: The above-mentioned testimony does not give a concrete example; an example is the case that the former borrower becomes the bailee[74].

VIII) The Concept of >*superficies solo cedit*< in Roman Law

The legal proverb >*superficies solo cedit*<[75] is an abbreviation for property acquisition by the ground-owner who has used material for house building that belongs to someone else:

Dig. 41.1.7.10
Gaius 2 rer. cott.

Cum in suo loco aliquis aliena materia aedificaverit, ipse dominus intellegitur aedificii, quia omne quod inaedificatur solo cedit. nec tamen ideo is qui materiae dominus fuit desiit eius dominus esse: sed tantisper neque vindicare eam potest neque ad exhibendum de ea agere propter legem duodecim tabularum, qua cavetur, ne quis tignum alienum aedibus suis iunctum eximere cogatur, sed duplum pro eo praestet. appellatione autem tigni omnes materiae significantur, ex quibus aedificia fiunt. ergo si aliqua

[73] Ulpius Marcellus did belong to the juridical council of emperor Antonius Pius (138–161 AD) and emperor Mark Aurel (161–180 AD) and published >digestae< and >notae<.
[74] Dig. 41.2.30.4 Paulus 15 ad sab: *Item quod mobile est, multis modis desinimus possidere: si aut nolimus, aut servum puta manumittamus, item si quod possidebam in aliam speciem translatum sit, veluti vestimentum ex lana factum. - Then, again, a movable thing we may cease to possess in a variety of ways; it should be that we do not wish to possess it or we manumit a slave, for instance or that what we possess is converted in a new form, as when a garment is woven out of wool.*
[75] Hans Wieling, About setting, dormient and awakening property in case of tieing of things, JZ 1989, 511–518.

ex causa dirutum sit aedificium, poterit materiae dominus nunc eam vindicare et ad exhibendum agere.

When someone builds on his own site with another's materials, he is deemed to be owner of the building because all that is built on it becomes part of the soil. However, the owner of the materials does not thereby lose his ownership of them; but he meanwhile cannot bring a vindicatio for them or an action for their production by reason of the Law of the Twelve Tables which provides that no one is required to give up materials of another built into his premises but that he must pay double their value. The term used is "beam" hut, in fact, covers any building materials. Hence, if the house should collapse for some reason, the owner of the materials can have a vindicatio for them and have an action for their production.

This testimony illustrates that Roman Law has respect for a composite object and for labour that is invested in it. Nevertheless, the Roman jurists did work out differentiated solutions: The material that is used by the owner of the ground for house-building becomes his property although the installed material does belong to someone else. A claim of ownership is not granted to the owner of the material, but he has a claim for damages against the owner of the ground/house. A claim of ownership is granted to the owner of the material, if the house would collapse – admittedly a rather unlikely case[76]. However, the above mentioned solutions have to be discussed, if a unified European Civil Law is to be prepared.

IX) Latin as the language of the Roman Catholic Church

The language of the Roman Catholic Church for its own law is not Jewish, as in Palestine there are the historical roots of Christian belief. The language of the Roman Catholic Church is of course the language of the Imperium Romanum, whose emperors did pursue[77] the early Christians, but later on accepted the Christian belief out of political reasons[78].

In the first millennium (AD) there was no unified canon law, but only local church regulations and decrees of the Pope. In the Middle Ages Canon Law was gradually summarized in several collections that are written in Latin:

[76] Hans Wieling (footnote 75) uses the term >dormient ownership<**.**

[77] To the persecution of Christian people in the Imperium Romanum Jacques Moreau. The persecution of Christians in the Roman Empire. 2. edition, 1971. A compendium of literature to this subject-matter is found under the internet address http://www.theologie-systematisch.de/ekklesiologie/4altertum.htm.

[78] Klaus Martin Girardet, The Constantinian turning, 2006.

(1) >Decretum Gratiani< (1140)[79].
(2) >Decretales Gregorii IX< or >Liber Extra< (1234)[80].
(3) >Liber Sextus Bonifacii< (1298)[81].
(4) >Clementinae< (1314)[82].
(5) >Extravagantes Iohannis XXII<[83].
(6) >Extravagantes Communes<[84].

This six most important compilations constituted the corpus of Canon Law and in its revised modus of 1582 and 1917 formed unified Catholic Church Canon Law. The obvious link between Roman Law and Church Canon Law was and is the Latin language. Church Cannon Law cannot be detached form secular law: Canon Law is based on the case law in the Roman >Corpus Iuris Civilis< of Emperor Justinian. The >Corpus Iuris

[79] The >Decree of Gratian< (around 1140) was the main work of the monk Gratian (late 11th Century, † before 1160), who is regarded as the father of canon law. Gratian's sources were Roman law, the Bible, Decretals (papal letters), conciliar and synodal and elder law collections. The >Decree of Gratian< had a signalling effect, as is was soon thaught at the Law School of Bologna. Cfr. Mary E. Sommar, The Correctores Romani: Gratian's Decretum and the counter reformation humanists, 2009.

[80] The >Liber Extra< (Decretals of Gregory IX.) is a great collection of decrees by Pope Gregory IX. Author is Raymond of Peñafort (former Master of Bologna), who was entrusted with this work in 1230 by Pope Gregory IX. On 5th of September 1234 the >Liber Extra< was promulgated by the Bull >Rex pacificus< as an official collection of Canon law and sent to the universities of Bologna and Paris. The text of the Liber Extra can be found under the following internet address: http://www.hs-augsburg.de/~Harsch/Chronologia/Lspost13/GregoriusIX/gre_0000.html.

[81] The works for the so called >Liber Sextus< were initiated in the year 1296 by Pope Boniface VIII (1294–1303): William de Mandagoto (died 1321), Archbishop Berengar Fredoli (1250–1323) and Richard Petronius Siena (died 1314) were the authors of this collection of Canon Law, that was finished in 1298. The text of the Liber Sextus can be found under the following internet address: http://www.columbia.edu/cu/lweb/digital/collections/cul/texts/ldpd_6029936_002/pages/ldpd_6029936_002_00000507.html

[82] The compilation was initiated by Pope Clement V. After a revision that was made by his successor, John XXII., the >Clementinae Constitutiones< were published in October 1317. It is the last major piece of the >Corpus of Canon Law<.

[83] The extravagant >Iohannis< resulted from a revision of the first so-called annex to the >Constitutiones Clementines<. The original compiler was William of Montlezun who finished his work in 1317. In 1325 his collection was regrouped by Zenzelinus of Montpeiller and became an annex to the >Constitutiones Clementines<. In 1500 it was revised by Jean Chappuis and got its traditional form.

[84] The >Extravagant Communes< are part of the early church law, that was compiled in the 13th Century. It was published by Pope John XXII (1316–1334) as a collection of constitutions and decretals that until were not represented in official papal editions, hence there originates the name originates >Extravagant Communes<.

Civilis< did not only influence substantive law, but also procedural law; the formation of ecclesiastical courts is to be regarded in this context.

Here we have an excerpt from the >Codex Iuris Canonici< in the current text version of 1983, which was published during the pontificate of the very successful Polish Pope (John Paul II, 1978 – 2005); the excerpt refers to the acquisition of property, which seems to be for Roman Catholic Church of very great importance – Jesus of Nazareth himself would be surprised, if he read this text:

Can. 1259:

Ecclesia acquirere bona temporalia potest omnibus iustis modis iuris sive naturalis sive positivi, quibus aliis licet.

The Church can acquire temporal goods by every just means of natural or positive law permitted to others[85].

Can. 1260:

Ecclesiae nativum ius est exigendi a christifidelibus, quae ad fines sibi proprios sint necessaria.

The Church has an innate right to require from the Christian faithful those things which are necessary for the purposes proper to it.

It is interesting that Can. 1259 makes reference to the positive law as well as to the natural law; the guiding thought is obvious, that in any case it shall be made sure that the church can acquire property. Can. 1260 is church law that opens access to the worldly goods of the faithful people; the rules that are set by positive law are regarded as irrelevant, if the interests of Roman Catholic Church are referred to.

X) Latin as the language in universities and of European scholars

In today university rankings American universities do always hold the first places: To my mind this is not only the result of very good scientific work, but also due to English as the common language overseas and the leading language in the whole world. Latin has lost this position: Latin was the language in the European universities and of the European scholars. This was not only true for law faculties, but for all faculties[86]. Here might be given an impressing list of thousands of scholars that published in Latin; here is only given a very small, but no less impressing selection:

[85] The English version is an official translation by Vaticane; cfr. http://www.vatican.va/archive/ENG1104/_INDEX.HTM.

[86] To the cross-relations between Latin and the medievial literature Ernst Robert Curtius, European literature und Latin Middle Ages, 1993.

– Thomas Morus (1478 – 1535): >Utopia< (1516)[87].

– Nicolaus Cusanus (1401 – 1464): >Coniectura de ultimis diebus< (1446)[88].

– Erasmus de Rotterodamo (1466/1467/1469 – 1536): >De duplici copia verborum ac rerum< (1512)[89].

– Fricius Modrevius (1503 – 1572): >De re publica emendanda<[90].

– Thomas Hobbes (1588 – 1679): >De Cive< (1642)[91].

– Friedrich Spee (1591 – 1635) : >Cautio criminalis, seu de processibus contra sagas liber<[92].

Latin was the language of university examinations. Johann Wolfgang Goethe (1749–1832) is a European scholar with outstanding skills. Nevertheless, Goethe was as a rather bad student of law and thus he failed his main target of finishing his legal studies with the promotion (*Doctor iuris*): At Strasbourg university he could at least finish his legal studies with the licentiate of law. To attain this university degree he had to present to the faculty legal theses that were drafted in Latin; they are called >*Postiones* juris<[93]. Goethe`s work is full of allusions to Roman law, that dominated the curricula of the faculties of law from the early Middle Ages up to modern times: In his 36th thesis Goethe goes straight away into the core of property law, when he makes the following point: >*Dominium sine possessione acquiri non potest*<[94]. That no actual physical control of movables is necessary to have property is a concept of Roman Law[95]. Gaius (Inst. 2,90) illustrates in the following testimony that possession that is exercised by

[87] Ulrich Arnswald/Hans-Peter Schütt (ed.), Thomas Morus' >Utopia< and the genre of utopia literature in political philosophy, 2011.

[88] Klaus Jacobi (ed.), Nikolaus Cusanus. Introduction to his philosophical thinking, 1979.

[89] Guido Kisch, Erasmus and the jurisprudence in his age. Reflections on the humanistic legal thinking. Basler Studien zur Rechtswissenschaft 56, 1960, p. 69–89.

[90] Aleksander Luczak, The state law of the Polish Renaissance thinker Andrzej Frycz Modrzewski (Andreas Fricius Modrevius), 1966.

[91] Quentin Skinner, Freedom and duty. Thomas Hobbes' political theory, in: Institut für Sozialforschung an der Johann Wolfgang Goethe-Universität (ed.), Adorno-Vorlesung, 2005.

[92] Christian Feldmann, Friedrich Spee, Lawyer of the witches and prophet, 1993.

[93] Cfr. „Maxims and Reflexions" as Text 685) quoted after Richard Dobel (ed.) Lexikon der Goethe-Zitate, 1999 (dtv 3361; col. 920 f.): „*After accomplishing several academic years for which I expended the utmost of diligence in legal scholarship, the sizable legal faculty at Strasbourg honoured me with the gradus of Licentiati Juris, there is nothing more pleasant and desirable to use my acquired knowledge and science in my fatherland, and as a lawyer help my fellow citizens in their legal matters*".

[94] Cfr. D. 44, 2, 14 § 2; D. 31, 80; C 2, 3, 20; C 3, 32, 15; Inst. 2, 1, 40 (93).

[95] In Goethe´s work there are other theses that do refer to *proprietas* and *usucapio*: Franz-Rudolf Herber, >Positiones juris<. The poet and lawyer Johann Wolfgang von Goethe, in: Vox Latina 2010, Tomus 46, Fasc. 18o, 175–195.

others can be assigned to the owner, if there is a juridical link between possessor and owner:

Per eas uero personas, quas in manu mancipioue habemus, proprietas quidem adquiritur nobis ex omnibus causis sicut per eos, qui in potestate nostra sunt; an autem possessio adquiratur, quaeri solet, quia ipsas non possidemus.

Through this persons, however, which are who are in our power, property is in all cases acquired as it by those who are member of our family. Or is possession not sought - it is commonly asked - because we do not possess these persons.

Latin was the lingua franca of the ancient Europe[96], of the medieval Europe and in the further sequence up to the Enlightenment, whereas our European Union has as many official languages as it has member states. Nevertheless, the Latin language is not dead and the Roman law is not outdated.

XI) Roman Civil Law is the link between the national civil codes and the fundament for a unified European Civil Law

The soldiers of the Roman Empire were cruel, when they were conquering region by region. The leaders of the Roman Empire were rather intelligent, when they decided that non-Roman people should not be entirely excluded from the scope of Roman law, this was the beginning of International Private Law.

The following testimony makes clear that the *traditio* was a juridical procedure that was open to all people living in the Roman Empire, it was not necessary that the person that did transfer or that received was a Roman citizen.

Dig. 41.1.9.3
Gaius 2 rer. cott.

Hae quoque res, quae traditione nostrae fiunt, iure gentium nobis adquiruntur: nihil enim tam conveniens est naturali aequitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi.

Those things, again, which are delivered to us become ours under the law of nations; for nothing is so comfortable to natural equity as that effect should be given to the wishes of an owner wanting to transfer his thing to someone else.

This principle was called *ius gentium*, whereas the instruments of the *ius civile* were only reserved for Roman citizens[97]. The Roman law was the

[96] Still very impressing Carl Vossen, Latin as mother tongue of Europe, 1978.
[97] It has to be realised that the term *ius gentium* did not mean international law in that sense that is common to all nations.

ius gentium for the peoples living in the Roman Empire, it was the private international law that ruled the legal transactions of civil life.

The European Union is on the way for more unification of civil law in its member states, but there is still a very long distance to go – the way is rather stony, because the member states are in some respects fixed on their own codified civil law. The way is also stony, because there is no *lingua franca* in the European Union: The success of the Roman law was based on the success of the Latin language, whose writing, phonology grammar and syntax is rather easy.

Property is one of the fundaments of ancient, medieval and modern society; the relevant legislation is of eminent importance and is still dominated by concepts of Roman law[98]. It is no surprise that the European Court of Justice[99] and national high courts[100] quote Roman law.

Our conclusion is the following: There should be taught Latin[101] as well as Roman Law[102] at the faculties o f law. This may be very useful in the long process[103] of forming a unified European Civil Law[104]. This process has already started and Christian von Bar[105] is pushing this process ever since and therefore he was yesterday honoured in this university.

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