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Living Institutions of Roman Law in Hungarian Civil Law

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1. Why is it timely to search for the Roman roots of modern law? A general answer to this question can be given by the common-place: historical approach helps to solve present-day problems. This statement is undoubtedly true. On the other hand, however, Roman law is not merely the most important historical root of modern privat laws. It is something more: Roman law is one of the fundamental elements of European culture. Of course, in this connexion Europe does not mean a geographic region but a common culture based upon Jewish-Christian religion, ancient Greek philosophy and Roman law. Without Roman law we could be neither jurists, nor European. And nowadays, I think, the importance of searching the European identity can hardly be exaggerated.[1]

2. Searching for the living institutions of Roman law, first of all, we have to face a problem of - so to say - prejudicial nature: what does Roman law properly mean? In my opinion there are at least two meanings to be considered: a historical and a functional one. Roman law is, on the one hand, the legal system of ancient Rome coronated by the codification of Emperor Justinian in the 6th century A.D.; and Roman law means, on the other hand, the classical dogmatical bases upon wich the modern private laws of continental Europe rely.

It must not be forgotten that the codification of Justinian was, even though it is characterized by the endeavour to systematization and abstraction,[2] not much more than a grandious compilation of the more or less casuistic Roman jurisprudence. Well, actually, the Institutes of Justinian, going back to those of Gaius, were already composed on the basis of the famous system *personae - res - actiones* and in the chapter treating *res* the law of things, the law of succession and that of obligations were separarely dealt with. Nevertheless, considering the modern requirements, this system was not sufficiently elaborated. Distinction of property and possession, distinction of real and obligatory rights, creation of contractual types and consensual contracts were undoubtedly enormous achievements of ancient Roman law and modern law could hardly exist without this valuable dogmatical heritage. Ancient Roman law, however, did not reach a level of systematization and abstraction being immediately utilizable for the posterior development of private law.

Namely the active and creative collaboration of legal scholars in the legal life of ancient Rome made it possible, to some extent, to leave the law in a plastic state; modern times, however, request a certain fixation of law, namely creation of abstract concepts, categories, technical terms or briefly: creation of a theoretic system. In this respect ancient Roman law was more live than living modern law is. From the point of view of this flexibility even the common law of England is more similar to Roman law than the European legal systems are; surviving Roman law remained so flexibile in South Africa only.[3]

3. This fixation of law was already begun by the glossators and post glossators of the late Middle Ages who analyzed and commented the texts of ancient Roman law. On the basis of their activity in most countries of Europe a modified Roman law was born and was admitted (received) as effective, the so-called *ius commune*. In the last century the modern civil codes of Europe were created on the basis of the *ius commune*.[4]

4. It is well-known that the common law of England is quite different from the private laws of continental Europe based upon Roman law. It is less known, however, that until the middle of the last century Hungary did not belong to romanist laws, either. This similarity of Hungarian law to English common law was formerly emphasized with a certain proud, nowadays, it is, however, justly regarded as a deffectiveness and a disadvantage.[5]

In Hungary, apart from Roman times, Roman law has never been effective. The Hungarian law of the Middle Ages and also later, like the common law of England, was very conservative and stongly characterized by feudalistic features and traditions. Hungarian jurists of the Middle Ages knew Roman law due to the fact that they had studied at Italian, German, Dutch universities and that they knew Latin very well because this language was in fact official in Hungary until 1844. Moreover, Roman law was admired in Hungary as an ideal, perfect law, just like *ius naturale* was respected by the Romans themselves.[6] But neither the efforts of Hungarian humanists of the 16th century,[7] nor the continuous university education of Roman law since 1667 could achieve the reception or a direct and significant impact of Roman law. At most an indirect influence, an infiltration through citations of Roman legal sources can be proved[8] and a subsidiary application of Roman law can only be demonstrated at the level of concerning efforts.[9]

As to the reasons of aversion from the reception of Roman law, the conservative view regarded the feudalistic Hungarian private law as one of the fundaments of national independence against the Roman law of the Holy Empire. These ideas were stronger than those of the adherents of Roman law because the social and economic background was not developed enough to demand the reception of Roman law.

Nevertheless an essencial modification of the fundamentally feudalistic and customary Hungarian private law was inevitable in the first half of the last century. The forces of developing capitalism, however, were still too weak and the country was busy with the political and public law problems of national independence. Even if there were efforts in order to create a civil code and the patterns were given by the French *Code civil* of 1804 and the Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1811, at that time, namely in the first half of the last century only some acts on commercial law could be passed.[10]

After the tragical ending of the revolution and the liberation war of 1848/49, among other forced reforms, the Austrian Civil Code was made effective through an imperial letter patent in Hungary as well. It is quite characteristic that the creation of modern private law and in this way the first significant - though indirect - impact of Roman law in Hungary was due to an external compulsion.

Some years later, in connection with political changes, the Austrian Code was repealed and the Provisory Rules of Judicature elaborated by the so-called *Judexkurialkonferenz* were substituted for it. The new solutions of the ABGB, however, remained in a considerable degree effective.[11] Later on new acts passed by the Hungarian parliament were partly substituted for these Provisory Rules of Judicature. These acts relied upon Austrian and mainly German patterns. Regarding the significance of influence of the German law in this period the Act of Commerce of 1875 is very characteristic as it was almost a mere translation of the German *Handelsgesetzbuch* , in spite of the fact that there was such a code in Hungary at that time and the Austrian Code of Commerce had also been effective before.[12] In this way economic and social relations of developing Hungarian capitalism found their corresponding expression in the sphere of private law, even if this process was not devoid of contradictions.

This situation did not change significantly in the first half of our century, either. In this period the Project of Private Law Code of 1928 had to be emphasized. After the unsuccessful German-inspirated codification efforts of the first years of the 20th century this Project, elaborated otherwise also under the influence of Swiss law, was not far from being tacitly recognized by the judicature, even if it had, of course, no binding authority.[13]

After this short survey can be ascertained that from the second half of the last century an increasing but indirect influence of Roman law can be observed: not the Roman law itself but Roman law mediated by the pandectistics and by the German and Austrian law had an impact on the development of the Hungarian private law. In this way Hungarian private law became a romanist one.

5. After the Second World War the conditions of the social, political and economic background in Hungary have changed, as it is well-known, suddenly and fundamentally. As far as the legislation is concerned, the abolishment of the capitalist

private law was regarded as one of the most important tasks. The place of private law has been taken mainly by the socialist civil law, while family law, labour law and land law became independent, finally an entirely new branch of law, the law of cooperatives came into being. At the same time a number of institutions regarded at that time as capitalistical were ceased or pushed into the background, *e.g.* those of commercial law. The new conception of law rejected the law making activity of the courts and provided an overall codification. In this way in 1951 Labour Code, in 1952 the Act on Family Law and in 1959 the Civil Code of the Hungarian People's Republic were passed.

It may be surprising that these changes made Hungarian law, from a number of points of view, more similar to Roman law, namely to ancient Roman law than it had ever been. The socialist Hungarian legislation wanted to abolish the feudalistic and pandectistical features of the previous private law and this intention favoured indirectly the reception of some original solutions of ancient Roman law.[14]

6. At general level it can be observed that both ancient Roman law and present-day Hungarian civil law is characterized by a certain aversion from abstractions. This fact is clearly reflected by the lack of a General Part in the Digest of Justinian and in the Civil Code of Hungary as well. Namely according to the Preamble to Civil Code the Law of Persons has to be substituted for the traditional General Part because the rest of it is nothing else but contentless abstractions having nothing to do with actual (*i.e.* economic and social) relations.[15]

In Civil Code of Hungary the term *Law of Property* is applied instead of the *Law of Things* because - as it is explained by the preamble - the system of law should not be determined by abstractions as an absolute structure of legal relations but by the actual relations: and the relations of property are the most important actual relations in the Law of Things. The so-called *iura in re aliena (beschränkte dingliche Rechte)* regarded as being of secondary importance are regulated in the framework of the Law of Property (servitudes, usufruct etc.) or in the Law of Obligations (pledge), depending upon their actual connection with the respective field of civil law. This solution, however, is not a new one at all. On the one hand, concept of *Law of Things* was not known by Roman law, either. On the other hand, the fact that instead of Law of Things *Law of Property* is the title of the respective chapter of the Hungarian Code, is of no account: in fact there are rules concerning property, rights of use and possession in this part of the code. Not even the separate placing of rules on pledge in the Law of Obligations is a new solution, on the contrary, it can be regarded as a return to the original conception of ancient Roman law.[16]

In this way the classical Roman system of *institutiones* might be almost entirely admitted by the Hungarian Civil Code consisting of Introductory Provisions containing some general principles, Law of Persons, Law of Property, Law of Obligations and Law of Succession.

As the Civil Code of Hungary is essentially a romantist one, it seems superfluous to enumerate its institutions of Roman origin. Similary to other civil codes of Europe, the overwhelming majority of provisions of the Hungarian Civil Code can be led back to Roman law. In this respect it would be much easier to mention the few original creatures. Still it can be interesting to refer to: 1) resurrection of certain institutions of Roman law; 2) survival of some casuistic Roman rules; 3) cases of misunderstanding the Roman tradition; 4) possibilities of subsidiary application of certain institutions of Roman law. Further on these aspects will be surveyed one by one through examining some concerning examples.

7. *Resurrection of institutions of ancient Roman law in the socialist Hungarian civil law.*

a) A law-decree in 1976 (nr. 33) stopped the sale of lands owned by the state (and by the cooperatives as well) and, at the same time, has introduced the institution of long-term use of these lands by individuals.[16/a] Use of land was known in Hungarian civil law earlier, too, the law-decree in question, however, safeguarded a stronger position to the user, granting *e.g.* the right of disposing.

This institution is regarded by J. Veres as a peculiar mixture of Roman *superficies* and *emphyteusis*.[17] In my opinion, however, the long-term use of land is very far from Roman *superficies* as the property of the building built by the user is not acquired by the owner of the land (*i.e.* by the state) but by the user himself. This institution may be similar to *emphyteusis* indeed, but rather to the Roman regulation of *fundus provincialis*. Land in the Roman provinces was owned by the Roman state and could not be sold to individuals: that is why a special regulation of provincial land was developed in order to safeguard to the actual user such a strong position as if he were the owner himself. The reason of ancient Roman and modern Hungarian institution is the same: nominal property of the state has to be preserved. (The mentioned law-decree has been repealed in 1987.)

b) The Hungarian Civil Code of 1959 has introduced new rules on the protection of possession through establishing the administrative way of protection, too. According to this regulation in the case of a trespass the possessor can appeal to the local administrative organ within a year. The authority has to decide within 30 days. After the administrative decision both parties are entitled to bring an action at the court against the former decision.[18]

This system is quite similar to the Roman possessory and petitory proceedings. If someone in Rome was ejected from possession, he could request *interdictum unde vi* within a year. This meant an administrative procedure at the *praetor*. This possessory protection based merely upon questions of fact could be followed by a petitory trial at the judge in order to ascertain who was legally entitled to possess.

The similarity is almost perfect but there is a fly in the ointment: in Hungarian Civil Code the elements of possessory and petitory protection are mixed up: also the

administrative organ can decide in the question of the lawfulness if it is clear, and, on the other hand, protection garanted by the court cannot be regarded as a protection of possession in proper sense as the decision of court relies upon the lawfulness of possession.[19] The new principle of division of administrative and judicial protection is not the judgement of fact or lawfulness any longer but the level of complication of the case.[20]

c) A decree of government in 1951 (nr. 206) introduced strict liability of socialist economic organisations (*i.e.* enterprises) as far as their services were necessary for fulfilling the economic plan. This exception to the general rule of exculpation liabiblity filled the Hungarian apostle of strict liability, G. Marton with enthusiasm so much that he published an article in an Italian review with the title:*Rinascita della dottrina classica della responsabilita per custodia*, regarding the new provision as a first sign of the resurrection of general strict liability of Roman law in Hungary.[21]

Finally, however, the Civil Code of 1959, in spite of the energetic efforts of G. Marton, declared the general rule of exculpation liability (s. 339). But the conception of G. Marton has practically got across as accepted by the judicature.[22]

d) A decree of government in 1967 (nr. 7) provided for an administrative assent to contracts of maintenance. This institution, which may look modern, is not a new achievement at all: Emperor Marcus Aurelius' decree concerning the administrative assent to such contracts had been promulgated almost two thousand years ago.[23] *Nihil novi sub sole!*

8. *Survival of some casuistic Roman rules.* At general level, as it was already referred to, the Civil Code of Hungary tries to avoid abstractions regarded as contentless, therefore a General Part both of the whole Civil Code and of the Law of Obligations is lacking in it. Considering the concrete legal institutions, however, the Hungarian Code, similarly to foreign civil codes, endeavours to be as abstract (and as concise) as possible. Nevertheless there are some casuistic provisions in the code going back to Roman law. This phenomenon shows on the one hand that it is not easy at all to rise above the level of dogmatical constructions elaborated by jurists of ancient Rome. On the other hand, there are some traditional rules which cannot be explained with the inner logic of law or the social necessity of regulation but with the direct or indirect influence of Roman law.

a) Civil Code of Hungary regulates the acquisition of ownership of fruits fallen off branches spreading over the neighbour's ground.[24] In a relatively concise code as the Hungarian Civil Code is, this specified provision seems to be superfluous because it can be deduced from the general rules as well. Other rules concerning the relations of neighbours and the acquisition of ownership are similarly more detailed than the rules of the Hungarian Civil Code generally are.[25]

These phenomena can be explained first of all, in my opinion, with romanist tradition, *i.e.* with an indirect influence of ancient Roman law. Being originally the law of Roman peasants, ancient Roman law elaborated a detailed casuistic regulation of neighbour' rights. Since then this problem has lost much of its significance and legal regulation has become much more abstract, but the concerning rules have not been pushed into the background in the course of the survival of Roman law.[25/a]

b) Although the system of the Law of Obligations in Hungarian Civil Code is developed on the basis of the fundamental institutions of contract and responsibility, the regulation of responsibility is far from being uniform. The distinction of strict and exculpation liability, is as characteristic as the dualism of contractual and delictual liability. Exceptions to the general rule of exculpation liability, namely cases of strict liability and responsibility for third persons are regulated more or less casuistically. In this respect the patterns were given, for the most part, by Roman law. Only the liability for dangerous activity (ss. 345f) can be regarded as an actually original creature of modern law, while the strict liability of hotels and restaurants (ss. 467ff) and responsibility for damage caused by objects falling down from buildings (ss. 352f) are nothing else but servile copies of the corresponding Roman institutions. Regarding these rules no special development can be seen since Antiquity.[26]

The reason of the casuistic regulation of responsibility is, however, quite different in modern law and in Roman law. In Roman law no general rule on damages was known and the particular provisions in question were simply elements of the entirely casuistic regulation. Owing to the general rule of responsibility in modern civil laws the casuistic Roman rules of responsibility have been absorbed, some of them, however, have survived and have been even promoted as exceptions. In this way the casuistic regulation of responsibility has not disappeared in modern civil law, either.

9. *Cases of misunderstanding the Roman tradition*

a) It is well-known that *locatio conductio* was not a homogenous contract in ancient Roman law, either. In the course of survival of Roman law it has been divided into three entirely independent contractual types: lease, labour contract and undertaking have been distinguished. At the same time a new triad of similar contracts has become conspiciuous, namely that of contracts contcerning working activity: 1) labour contract (on the basis of the *locatio conducio operarum*); 2) undertaking (on the basis of the *locatio conducio operis*); 3) agency (on the basis of the *mandatum*).

In the Hungarian law all of these contracts are known, labour contracts come, however, under the ruling of Labour Code (Act II of 1967), in accordance with independence of the labour law. It is obvious that in cases of contracts containing working activity collisions may arise between Civil Code and Labour Code on the

one hand, and between undertaking and agency on the other hand. In my opinion difficulties of distinction can be led back, first of all, to misunderstanding the Roman tradition. Namely the economic and social basis of distinguishing the ancient Roman antecedents of the contracts in question were entirely different from their present-day economic and social background and the modifications of modern law aiming at solving this problem are not very successful.

It is not possible to analyze these problems thorougly in this study. I would like to refer to the problem of distinction of undertaking and agency only. In Hungarian legal literature A. Harmathy emphasizes that the requirement of result - going back to the German pandectistics - is not a suitable *principium divisionis* concerning the distinction between undertaking and agency any longer.[27] It can be added that misunderstanding the Roman tradition and not the Roman law itself is responsible for this incorrect distinction.It is true that *mandatum* of Roman law was merely an obligation requiring due diligence but no result, while *locatio conductio operis* was a typical case of the *"obligation de résultat"*. The contract of *mandatum* in Rome was, however, gratuitous (*mandatum nisi gratuitum nullum est*) being a special legal reflection of special social relations existing in ancient Rome. In the case of compensation the contract in question would not be a *mandatum* but a *locatio conductio* and in this way occasionally also the result would have been required. In the course of the survival of Roman law agency became *generally* an onerous contract but the mentioned consequence of this modification has not been considered. Nevertheless, even the conservative solution of BGB preserving the gratuitous character of agency is highly problematical insofar as an actual background of this archaic construction hardly exists nowadays.[28]

b) As already mentioned, the Hungarian Civil Code, similarly to foreign civil codes, relies upon the general principle of exculpation liability[29] and strict liability is only exceptionally admitted. Also this problem is connected with misunderstanding the Roman tradition.

As it was explored by G. Marton, *lex Aquilia* of Roman law is incorrectly regarded as a basis of modern law of damages. *Lex Aquilia* was merely a criminal act providing penalty it relied upon subjective responsibility. This construction of private delicts is not known in modern laws. Delictual responsibility in modern civil laws is quite different. The purpose is not the punishment of the wrong-doer any more but the redress of wrongs by compelling compensation or restitution. That is why subjective responsibility going back to the criminal conception of damages is not corresponding with the present-day conception of damages any more. There is no actual difference between contractual and delictual responsibility, in view of the consequences. Therefore a unified system of strict liability is necessary. The pattern is given by Roman law, namely by responsibility for *custodia*. This was the final conclusion of G. Marton.[30]

10.*Possibilities of subsidiary application of certain institutions of Roman law.* Comparing the size of a modern civil code (and the Hungarian one is rather concise!) with the huge quantity of the sources of Roman law it can be easily realised that modern civil codes are merely slender extracts of the former sources. In this way there is a number of solutions of Roman law which would be utilizable but are not at our disposal in the civil codes. So Roman law may remain a source of living civil law for ever.[31]

There are also cases in which problems of regulation are caused by more or less deliberately omitting the reception of certain institutions of Roman law. In Hungarian Civil Code examples of both phenomena can be found.

a) Every jurist knows the famous hexameter about the requirements of usucaption in classical Roman law: *res habilis, titulus, fides, possessio, tempus.* From these traditional conditions of usucaption actual possession during ten years is *expressis verbis* declared by the Hungarian Civil Code in the legal definition of usucaption.[32] The requirement of *res habilis* concerns the things of socialist ownership only.[33]

A special kind of usucaption was also known in Roman law which did not demand *res habilis (praescriptio triginta vel quadraginta annorum)* but its *tempus*, as attested by its denomination itself, was considerably longer (30 or even 40 years) than that in the Hungarian Civil Code (10 years). Therefore it seems suitable to consider a generalization of the requirement of *res habilis* or a differentiation (*i.e.* partial raising) of the term of usucaption in the Hungarian Code.

According to the preamble to Civil Code the expression in the legal definition of usucaption *"possession as his own"* refers to the requirement of a suitable title while *bona fides* is not necessary. In my opinion this interpretation is inconsistent with the spirit of the general socialist principles of civil law formulated in the Introductory Provisions of the Code. Nevertheless, from the mentioned general principles the conclusion cannot immediately be drawn that the lack of *bona fides* would preclude the possibility of usucaption. Well, it is true that *bona fides* was presumed in Roman law. But in the Hungarian law even the proof of *mala fides* does not help. Notwithstanding, this conception reminds of Roman law, though not of the classical Roman law but of the law of Twelve Tables.

Nowadays, however, the prevailing view in Hungary regards *bona fides* as a necessary condition of usucaption.[34] In this way the legal conditions of usucaption should be defined more precisely by the Civil Code itself. As far as the notion and meaning of *bona fides* is concerned, Roman law can be taken into consideration as a basis.

b) The so-called real contracts of Roman law (*mutuum, commodatum, depositum, pignus*) have been made consensual contracts by the Civil Code of Hungary. This artificial unification, however, is not sufficiently grounded under

theoretical as well as practical aspects, either. This is clearly shown by Gy. Diósdi.[35] The legal clauses *rebus sic stantibus* supplementing the rules on deposit (par. 2 of the s. 462), on loan (par. 1 of the s. 524) and on loan for use (par. 2 of the s. 583) reflect the imperfection of this solution and can be regarded as corrections of that. In this way the solution of Roman law can be taken into consideration also in this respect.

As far as the contractual system is concerned, there is a further problem, too. In the Hungarian Civil Code a special kind of undertaking, namely the contract of carriage (ss. 488ff) has been made an independent contractual type. This differentiation is in itself justifiable. On this basis, however, also other economic relations might obtain corresponding actual types, *i.e.* industrial services for population. As far as the reflection of this group of services is concerned, they are expressed by contracts of undertaking, carriage and by some other ones. Consequently there is no independent *sedes materiae* of these services in the Hungarian Civil Code and even the general notion of services cannot be found in it. This is the case in the foreign civil codes, too, with the exception of the Czechoslovakian one.[36]

The system of contractual types has to reflect, in my opinion, the corresponding economic relations. Just this is why it is doubtful, whether the Roman system of contractual types modified inconsequently and supplemented with the independent contract of carriage reflects the economic relations. After the differentiation of *locatio conductio* a certain integration seems to be necessary, reflecting the importance of the services and of the consumers' protection. *Locatio conductio* of Roman law reflecting uniformly the industrial services for population can be regarded as a utilizable model, with special regard to the uniform strict liability of the servicing contractors.

In connection with the contractual system can be remarked that it is a wide-spread view among experts of civil law in Hungary that Roman law lives on in the traditional private relations only a and is not reflected by the relations of economic law. This view is convincigly refuted by K. Visky exploring the Roman antecedents of institutions of present-day Hungarian economic law.[37]

c) Personal rights likewise human rights are very timely nowadays. Also in this respect Hungarian civil law could utilize some Roman solutions.

Roman law regarded offences to personality as private delicts and provided penalty which was to be paid to the damaged person. This penalty (*poena*) was not regarded as compensation, though it covered occasionally damages as well.

In the Hungarian Civil Code for these rules the protection of personal rights is substituted (ss. 75ff). As far as compensation is concerned, one of these provisions[38] refers to the general rule of responsibility. In this respect first of all the rules on liability for non-financial loss are concerned.

The institution of liability for non-financial loss was originally rejected by socialist civil law. It was regarded as a typically capitalistic institution degrading human values simple goods.[39]. This institution has still been introduced by a modification of the Civil Code in 1977. According to the new section 354 non-financial loss can be claimed if the life of the damaged person has become much more difficult or permanently difficult.[40] This cautious provision has been even restricted by a Principal Decision of the Supreme Court of Hungary.[41]

The present-day regulation of personal rights in Hungary cannot be regarded as sufficient at all. It is problematical *e.g.* what the protection of right of piety means. Civil Code refers to this right through a procedural provision only.[42] Moreover it is a more important problem that non-financial loss of an innocent person suffered criminal procedure is not admitted by the judicature and only actual damage (*damnum emergens* and *lucrum cessans*) is redressed. But the most significant problem is, in my opinion, that there is no sufficient solution at disposal concerning various cases of *annoyance*. In a number of cases it is not the value of a lost thing but the accompanying annoyance, which touches the damaged person seriously. Or just the annoyance itself can be a grave problem. Cardiac infarcts are caused in a number of cases by permanent annoying.

In Roman law this problem was solved by the *actio iniuriarum* and by other remedies of private delicts. Higher amounts of penalty to be paid to the damaged person were effective means of both prevention and compensation. Regarding the present-day Hungarian civil law, however, Rudolf von Ihering's words are still worth considering. Ihering wrote in his *Der Kampf um's Recht* more than one hundred years ago:

"It is really a compensation if after a long struggle I shall not get more than I was entitled to already in the beginning? But apart from this desire of compensation, which I admit just without hesitating, how much natural balance is lacking in the relation of the two parties! The danger of the disadvantageous result of the trial means for one of them losing his own, for the other party, however, it means merely that he has to give back the thing retained unlawfully. And, on the other hand, the advantage deriving from the fortunate result of the trial means for one of them that he would have no damage , for the other party, however, that he enriches at the costs of the damaged person. This sounds as if lying impudently were encouraged and as if acting immorally were rewarded, does not it?"[43]

11. Finally I would like to touch upon the method of developing the law. It is true, now I am surprassing in a way the bounds of civil law, but comparing the Hungarian civil law with Roman law this problem has to be mentioned.

It was a characteristic feature of both ancient Roman law and the feudalistic and capitalist Hungarian civil law that they were developed not as much by acts but by administrative and judicial (in Rome jurisprudential) decisions. The socialist

theory of law generally rejected the judicial developing of law and also in Hungary it has been forbidden. However, this method follows in a way from the mature of law. Also Roman emperors wanted to forbid *desuetudo* but they did it vain. This is the case in Hungary, too. The judicial developing of law - having otherwise great traditions - has got across in the last decades as well. Nowadays law-making activity of the Supreme Court of Justice is tacitly recognized. Moreover, a number of rules devloped by the judicature became part of the Civil Code on the ocasion of its modification in 1977.[44]

It was a striking feature of the socialist Hungarian legislation reminding of ancient Roman law: very few acts were passed by the parliament and they contained rather frames than concrete rules. The overwhelming majority of thousands of effective legal rules is constituted by decrees of different level. This high number of legal rules of low level perhaps points to the fact that a part of them is of tentative character.

The Romans were more sincere. Also Roman law was characterized by a few number of *leges* and a high number of lower provisions. The latter ones (*e.g.* the praetorian edicts), however, were not regarded as real legal rules and their tentative character was acknowledged.

NOTES

1. *Cf. Koschaker*, P., Europa und das römische Recht, München, 1966, *p.* 348.
2. See *e.g. Pólay, E.*, The Justinian codifiacation and abstraction, Studi in onore di Arnaldo Biscardi, Milano, 1982, II, *pp.* 105 *et seqq.* and Ankum, H., La 'codification' de Justinen était-elle une véritable codification? In: Liber amicorum John Gilissen, Antwerpen, 1983.
3. See *Zimmermann, R.*, Das römisch-holländische Recht in Südafrika, Darmstadt, 1983, *Kaser, M.*, Das römische Recht in Südafrika, ZSS Rom. Abt. 81(1964).
4. *Dulckeit, G. Schwarz, F. Waldstein, W.*, Römische Rechts geschichte, München, 1975, *pp.* 276 *et seqq.*
5. *Zlinszky, J.*, Die Rolle der Gerichtsbarkeit in der Gestaltung des ungarischen Privatrechts vom 16. bis zum 20. Jahrhundert. Ius commune X, Frankfurt am Main, 1983, *p.* 49.
6. *Cf. Bónis, Gy.*, Einflüsse des römischen Rechts in Ungarn. Ius Romanum Medii Aevi, Pars V. 10. Mediolani, 1964.
7. *Zlinszky, J.*, Ein Versuch zur Rezeption des römischen Rechts in Ungarn, Festgabe für Arnold Herdlitczka, München-Salzburg, 1972, *pp.* 313 *et seqq.*
8. *Zlinszky*, Die Rolle der Gerichtsbarkeit, *pp.* 56 *et seqq.*
9. *Zlinszky*, Ein Versuch, *p.* 323.

10. See Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, hrsg. H. Coing, III. Bd. Das 19. Jahrhundert, Zweiter Teilband, *pp.* 2157 *et seqq.*, *pp.* 2208 *et seqq.*

11. *Zlinszky, J.*, Die historische Rechtsschule und die Gestaltung des Ungarischen Privatrechts im 19. Jahrhundert. Studia in honorem Velimirii Pólay septuagenarii, Szeged, 1985, *p.* 441.

12. *Zlinszky*, Die historische Rechtsschule, *pp.* 435 *et* 441.

13. *Zlinszky*, Die Rolle der Gerichtsbarkeit, *p.* 65.

14. *Cf. Pólay, E.*, Abschaffung des Pandektensystems in der Rechtswissenschaft und Gesetzgebung in Ungarn in den letzten drei Jahrzehnten, Szeged, 1975, *pp.* 12 *et seqq.*

15. So *e.g.*, according to the Preamble to Civil Code, the notion of the legal transaction (i.e. of the Rechtsgeschäft) is a result of an artificial connection of the abstract elements of contract and of the exceptional cases of unilateral legal transaction and it means the contract actually.

16. The chapters treating the *pignus* and *hypotheca* are placed in a part treating the obligations in the Digest as well as in the *Codex Iustinianus* (see D. 20 and C. 8, 13-34).

16/a. "Land owned by the State or by a cooperative may be given, for the purposes of economic activity or building, for long-term use to juristic and to private persons." (paragraph 1 of the section 150 of the Civil Code modified by Act IV of 1977) "Buildings, equipment and implements established, and plants cultivated by the user in the land give for use, as well as the yield of the production pass into the property of the user." (par. 2 of the s. 151) These rules are not effective any more.

17. *Veres, J.*, Fortleben römischer Rechtsinstitute im ungarischen Bodenrecht. Studia in honorem Velimirii Pólay septuagenarii, Szeged, 1985,*p.* 426.

18. "Any person who has been deprived of his possession or disturbed in the pursuit thereof may, within a year require the respective special body of administration to restore the former state of possession or to stop the disturbance thereof. The special body is obligated to give a decision in 30 days." (par. 1-2 of the s. 191) "The party who considers the decision of the special body of administration to be prejudicial, may, in 15 days from the service thereof ask the court to revise the decision." (par. 1 of the s. 192)

19. "The special body of administration shall restore the former state of possession ... except where it is evident that the person who has applied for the protection of possession is not entitled to possession or is bound to tolerate the disturbance thereof." (par. 3. of the s. 191) "In a lawsuit for possession the court shall decide with regard to the legal title of possession." (par. 3 of the s. 192)

20. *Cf. Diósdi, Gy.*, Sul conservatorismo della giurisprudenza, INDEX 2 (1971), *p.* 174.

21. *Marton, G.*, Rinascita della dottrina classica della responsabilità per custodia, IURA 7 (1956), *pp.* 124 *et seqq.*

22. As for the theory of Marton, see his Les fondements de la responsabilité civile, Paris, 1938 and his posthumous Versuch eines einheitlichen Systems der zivilrechtlichen Haftung, Archiv für die civ. Praxis 162 (1963). It can be remarked that also the Soviet Russian Civil Code of 1922 declared the principle of strict liability but later on this rule has been repealed. These facts show that socialist civil laws sometimes prefer the pandectistical solutions to those of the ancient Roman law, in spite of the fact that the pandectistical solutions were elaborated

by the bourgeois jurisprudence of the last century and the modern western jurisprudence often regards them as out-of-date solutions.

23. *Brósz, R.*, Die behördliche Bestätigung der Unterhaltsverträge im römischen Recht, Annales Univ. Sc. Budap. Sectio Iur. 16 (1974), *pp.* 3 *et seqq.*

24. "The owner may keep such windfall as has dropped off from branches overhanging his property, provided the owner of the tree does nor pick them" (par. 2 of the s. 101).

25. See the sections 101-105 and 133-135.

25/a. *Cf. Földi, A.*, Sulla responsabilità per fatto altrui in diritto romano. Publ. Jur. et Pol. Miskolc 3 (1987).

27. *Harmathy, A.*, A vállalkozási szerződésről (About the contract of undertaking), Jogtudományi Közlöny 31 (1976). *pp.* 57 *et seqq.*

28. A comprehensive analysis is given by *Csanádi, Gy.*, A megbízási jogviszony (Agency), Budapest, 1959, 258 p. *Cf.* Visky, K., Geistige Arbeit und die "artes liberales" in den Quellen des römischen Rechts, Budapest, 1977, *pp.* 146 *et seqq.*, *Vékás, L.*, A szerződési rendszer fejlődési csomópontjai (The crucial phases in the development of the contractual system), Budapest, 1977, *p.* 85.

29. "Whoever unlawfully causes damage to another person shall be bound to compensate it. He shall be relieved of responsibility if he proves having acted in such way as might reasonably be expected in the given situation." (par. 1 of the s. 339)

30. See *opp. cit.* of Marton and his Un essai de reconstruction du développement probable du système classique romain de responsabilité civile, Revue int. des dr. de l'ant. 3 (1949), *pp.* 177 *et seqq.*

31. This is attested by the application of Roman law in South Africa, see the *opp. cit.* in *nt.* 3.

32. "Any person who has held a thing in possession as his own for ten years without interruption acquires the ownership of the thing by usucaption." (par. 1 of the s. 121) Although, as demonstrated by F. Benedek (Zur Frage des "diabolischen Beweises", Studi in onore di Arnaldo Biscardi, Milano, II, *p.* 467, *nt.* 65), usucaption of Hungarian civil law is not equivalent with Roman *usucapio*, the comparison of their conditions seems suitable and justifiable.

33. "No ownership by usucaption can be acquired over things that are in social property, nor over things that the State or a cooperative has wrongfully been dispossessed of." (par. 3 of the s. 121)

34. This view is represented *e.g.* by Deputy Minister of Justice, Dr. F. Petrik, see A Polgári Törvénykönyv magyarázata (A Commentary to the Civil Code), Budapest, 1981, I, *p.* 526.

35. "The coming about of the contract of the loan (*mutuum*), loan for use (*commodatum*), deposit (*depositum*) and pawn (*pignus*) was bound to the tradition of the thing because it would have been senseless to make actionable the mere agreement. The *mutuum* was primarily a friendly, courtesy loan. And on the basis of loan promises, like this, it is not customary to bring a suit against the promiser for giving the sum or credit ... Taking all these into consideration, we have strong doubts because of the solution of the Hungarian Civil Code making all these contracts of consensual character. It is problematic if it was worth to pay a late homage, by disregarding the practical points of view, to the theory of the autonomy of will." "The most grotesque is,doubtless, the definition of the loan for use ...: 'On the basis of a contract for loan for use, the lender is obligated to put the thing, for the time determined

in the contract, gratuitously, into the use of the borrower ...' I do not believe that there has occured since the coming into force of the Act even a single lawsuit in the judicial practice in which somebody would have required the promised loan for use." (*Diósdi, Gy.*, Contract in Roman Law, Budapest, 1981, *p.* 44 *et nt.*, *cf.* Schulz, F., Classical Roman Law, Oxford, 1951, *p.* 513.)

36. For details see *Földi, A.*, A lakossági szolgáltatóipar jogi fogalmáról (About the Legal Notion of Industrial Service for Population), Acta Fac. Pol.-Iur. Univ. Sc. Budap., 24 (1982), *pp.* 344 *et. seqq.*

37 *Visky, K.*, Tracce della tradizione romana nelle norme ungheresi concernenti i contratti d'economia, Studi in onore di Arnaldo Biscardi, Milano, 1982, II, *pp.* 537 et *seqq.* (Visky was otherwise an eminent expert of both Roman law and economic law.) *Cf. Visky, K.*, Spuren der Wirtschaftskrise der Kaiserzeit in der römischen Rechtsquellen, Budapest, 1983 and *Hamza, G.*, Wirtschaft und Recht im römischen Reich, Annales Univ. Sc. Budap., Sectio Iur. 23 (1981), *pp.* 87 *et seqq.*

38. "The party aggrieved in any of his personal rights ... may, according to the special circumstances of the case ... claim indemnity according to the rules of responsibility under the civil law." (par. 1/e of the s. 84)

39 See *Világhy, M.*, Ideiglenes tananyag a polgári jog általános részéből (Civil Law, General Part, university text-book), Budapest, 1977, *pp.* 153 *et seqq.*

40. "The person who has caused a non financial loss to another person shall be bound to give compensation to the injured person where the damage produced has raised difficulties in the participation in social life or otherwise in his ways of living for longer duration or aggravates it or has influenced the participation of a juristic person in economic life for the worse."

41. See *Zlinszky, J.*, Haftung für immateriellen - Nichtvermögens - Schaden im ungarischen Recht, Acta Jur. Acad. Sc. Hung., 25 (1983), *p.* 219.

42. "For outraging the memory of a deceased person an action may be brought by a family member of kin of the deceased, or by a person to whom the deceased has left any property by will. Where the conduct violating the good reputation of the deceased person (defunct juristic person) is contrary to public interest, the public prosecutor is also entitled to bring an action." (par. 3 of the s. 85)

43. *Ihering, R.* von, Der Kampf um's Recht, Wien, 1872, *p.* 81. Marton's criticism concerning the criminal conception of civil responsibility, does not oppose, in my opinion, the theory of Ihering. ("Aux yeux du créancier, le débiteur défaillant n'est qu'un fourbe, pouvant être considéré *prima facie* et traité à l'égal d'un homme qui a perpétré un attentat contre le patrimoine d'autrui. C'est la manière de voir non seulement de l'homme primitif des temps anciens (on en retrouve les traces dans maintes institutions du droit ancien: *manus iniectio*, etc.), mais aussi celle de l'homme primitif d'aujourd'hui, touché sérieusement dans ses intérêts par la défaillance de son débiteur." *Marton*, Les fondements, *pp.* 328 *et seq.*)

44. See *Zlinszky*, Die Rolle der Gerichtsbarkeit, *pp.* 66 *et seqq.*, and his Richterliche Rechtsentwicklung als lebendige Tradition im ungarischen Privatrecht, in: 23. Deutscher Rechtshistorikertag, Wissenschaftliche Mitteilungen, Augsburg, 1980, *pp.* 76 *et seqq.*

FÖLDI ANDRÁS

ÉLŐ RÓMAI JOGI INTÉZMÉNYEK POLGÁRI JOGUNKBAN

Összefoglalás

A magyar magánjog és polgári jog fejlődésére a római jog közvetlenül sohasem hatott, jogunk európai identitása szempontjából azonban a közvetett római jogi hatások vizsgálata nem lehet érdektelen. A magyar jog valamannyi római jogra visszavezethető elemének feltérképezése önmagában véve kétségtelenül nem járna különösebb haszonnal, egy ilyen vizsgálat azonban bizonyos konkrét irányokban igen tanulságos lehet. A szerző a jelen tanulmányban éppen ezekkel a releváns aspektusokkal foglalkozik.

A szerző a római jog és a magyar magánjog-fejlődés viszonyának rövid történeti elemzése és értékelése után bemutatja a szocialista magyar polgári jogban újjáéledő római jogi intézményeket, foglalkozik a római jogra visszavezethető kazuisztikus szabályok problémájával, a római jogi hagyomány félreértéséből, a mai viszonyoknak nem megfelelő alkalmazásából adódó nehézségekkel, végül megvizsgálja a római jog szubszidiárius alkalmazásának lehetőségeit. Elemzésének középpontjában a kötelmi jog intézményei (elsősorban a *locatio conductio* továbbélése és a felelősség kérdései) állanak, de foglalkozik a római dologi jog intézményeinek (birtokvédelem, *usucapio* stb.) és egyéb római jogi intézmények továbbélésének problémáival is. Végül röviden érinti a római és a szocialista magyar jogalkotás módszerének kérdését.

ANDRÁS FÖLDI

LEBENDE RÖMISCHE RECHTSINSTITUTE IM UNGARISCHEN ZIVILRECHT

Zusammenfassung

Geschichte des Verhältnisses des römischen Rechts und des ungarischen Privatrechts. Auflebende Institute des antiken römischen Rechts im sozialistischen ungarischen Zivilrecht. Fortleben einiger römischen Rechtsregeln kasuistischer Natur. Missverständnisse der römischrechtlichen Tradition. Möglichkeiten der subsidiären Anwendung gewisser römischrechtlichen Rechtsinstitute. Methode der Rechtsschaftung im antiken Rom und in Ungarn.

ANDRÁS FÖLDI

LES INSTITUTIONS VIVANTES DU DROIT ROMAIN DANS LE DROIT CIVIL HONGROIS

Sommaire

L' histoire de la liaison du droit romaine et du droit civil hongrois. Les institutions du droit romain apparues dans le droit civil socialiste hongrois. La survivance de certains reglements casuistiques du droit romain. Les cas du malentendu de la tradition du droit romain. Les moyens d'applications subsidiaires de certaines institutions du droit romain. Les méthodes de la législation à Rome ancienne et en Hongrie.

АНДРАШ ФЕЛДИ

СУЩЕСТВУЮЩИЕ РИМСКОПРАВОВЫЕ ИНСТИТУТЫ В ВЕНГЕРСКОМ ГРАЖДАНСКОМ ПРАВЕ

Содержание

История связи между римским правом и венгерским частным правом. Римск правовые институты возраждавщиеся в венгерском социалистическом праве. Развивание некоторых казуистических римских юридических правил. Случаи недоразумения римских юридических традиций. Возможности субсидиарного применения некоторых римс коправовых институтов. Способ создания права в древнем Риме и в Венгрии.

PUBLICATIONES
UNIVERSITATIS MISKOLCIENSIS

SERIES JURIDICA ET POLITICA

TOMUS IV
FASCICULUS 1-7.

4

MISKOLC
1990.

Redigunt

Dr. Horváth Tibor
Dr. Gáspárdy László

Szerkesztik

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Dr. Ruszoly József
felelős szerkesztő

Nota

Publ. Jur. et Pol. Miskolc

Rövidítés

A kézirat lezárva 1987. június 30.

Kiadja a Miskolci Egyetem
Kiadásért felelős: *Dr. Cselényi József* rektorhelyettes
Miskolci Egyetem Sokszorosító Üzeme
Nyomdaszám: KSZ-1720
Miskolc-Egyetemváros, 1990.
Sajtó alá rendezte: *Dr. Farkas József* egyetemi tanár
Technikai szerkesztők: *Bánóczy Árpád, Márkus Lászlóné, Németh Zoltánné*
Megjelent a Miskolci Egyetem Közleményei Szerkesztőségének gondozásában
Kézirat szedése: 1990. júl. 15. — 1990. nov. 13-ig. Sokszorosítóba leadva: 1990. november 21.
Példányszám: 300+25
Készült HVP szedéssel, rotaprint lemezről
az MSZ 5601-59 és MSZ 5602-55 szabványok szerint 20 B/5 ív terjedelemben
A sokszorosításért felelős: *Kovács Tiborné* üzemvezető

TARTALOMJEGYZÉK