

POINTS OF CONTACT BETWEEN ROMAN LAW AND THE MODERN HUNGARIAN PRIVATE LAW ON THE OCCASION OF THE 18TH EDITION OF 'HISTORY AND INSTITUTES OF ROMAN LAW' TEXTBOOK

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*'History and Institutes of Roman Law'*¹, a textbook by András FÖLDI, university professor and head of institute, and Gábor HAMZA, university professor, head of institute and ordinary member of the Hungarian Academy of Science, is now available in its 18th, revised and enlarged edition. The textbook, awarded with Quality Prize in 2000, has been praised in several previous reviews² as it presents the history and the institutes (i.e. the classical material) of Roman law in a precise and detailed way, making it essential for law studies. The treatise, which is also intended as a work of reference, can also be consulted as an encyclopaedia of general legal culture and a multilingual vocabulary.

Roman law continues to play an important role in modern times. A vast scale of textbooks, monographs and commentaries dealing with civil law still make a reference on the thesis of Roman law, especially during the presentation of the historical and dogmatic background of legal institutes.

¹ A. Földi – G. Hamza: *A római jog története és intéstitúciói*. (History and institutes of Roman law) Nemzeti Tankönyvkiadó, Budapest, 2013. 18th revised and enlarged edition. p. XL+715

² L. Kelemen: *Ügyvédek Lapja* 1997/2 p. 61; I. Sándor: *Az új római jogi tankönyv bemutatása*. (Presentation of the new textbook of Roman law) *Magyar Jog* 44 (1997) p. 503; Á. Tóth: *Közjegyzők Közlönye* I (1997) p. 9-10; idem: *Az új római jogi tankönyv jogászegyleti vitája*. (Debate on the new textbook of Roman law) *Magyar Jog* 44 (1997) p. 504-506; L. Burián: *Jogállam* (1998) p. 117-121; L. Dömötör: *Magyar Felsőoktatás* 1998/12 p. 54; idem: *Magyar Tudomány* 43 (1998), p. 1396-1398; A. Pókecz Kovács: *Magyar Jog* 47 (2000) p. 445-448; M. Gedeon: *AETAS* 2001/3-4 p. 311-313; I. Sándor: *Debreceni Szemle* 9 (2001) p. 299-302; T. Nótári: *Jogtudományi Közlöny* 58 (2003) p. 65-68; Á. Boóc: *Katekhón* 2 (2005) p. 401-403; T. Nótári: *JogOk* 1 (2005) p. 60-63; T. Nótári: *Romániai Magyar Jogtudományi Közlöny* 4 (2007) p. 99-103; I. Sándor: *Gondolatok a római jogi tankönyvről*. (Reflexions on the textbook of Roman law) *Magyar Jog* 57 (2010) p. 508-509; I. Sándor: *RUBICON* 1997/3-4 p.46-47; Á. Tóth: *Belügyi Szemle* 45 (1997) 1, p. 123; I. Sándor: *Collega* 1998/10 – 1999/1 p. 68-70

Furthermore, Roman law is also present in modern case-law: several court decisions contain reference to Roman law and to its general and widely accepted thesis.

In the textbook, the authors present the institutes of Roman law still used nowadays within the framework of civil law. Since its first edition in 1996, the textbook continuously evolved; the 18th edition – without any limitation – refers to e.g. the notion of *ius inter gentes* developed by Francisco de Vitoria and still used in international law as well as to the dispositions of the new Hungarian Civil Code and the dispositions related to the *lex Fabia de plagiariis*.

The in-depth presentation of the characteristics of Roman institutes persisting in modern civil law would go beyond the limits of the present review; therefore we would like to point out only the issues showing the importance of this handbook and textbook to practising lawyers, as it bridges several institutes originating from Roman law but still in use nowadays.

The treatise gives a detailed analysis of the principle of good faith and fair dealing, denoting the difference between the subjective and the objective good faith (*Treu und Glauben, guter Glaube*).³ This distinction is of a great importance in modern civil law. Good faith itself represents the judgment of a person over the legality of his/her acts while the principle of good faith and fair dealing refers to the general diligence that may be expected in a given situation. The principle of good faith and fair dealing was introduced into the Hungarian Civil Code in force today by Act XIV of 1991 and it was originally referred to as ‘*good faith and fair dealing*’.⁴ This changes the previous wording of the Hungarian Civil Code, which defined the obligation of co-existence introduced by the socialists. As of 1 March 2006, in base of the amendments brought by Act III of 2006, the legislator clarified that the principles of good faith and fair dealing are not meant to be interpreted separately, but jointly, as they are the equivalent

³ A. Földi A. – G. Hamza: idem p. 177, n. 8.

⁴ Naturally, our previous legislation also regulated this principle. According to article 2 of the Draft Private Law Act of 1928 (in Hungarian: 1928. évi Magánjogi törvényjavaslat): ‘*Good faith and fair dealing should be safeguarded while exercising rights and fulfilling obligations.*’

of the German principle of *Treu und Glauben*. This is the purpose of the substitution of the wording ‘*követelményeinek megfelelően*’ (according to its requirements) with ‘*követelményének megfelelően*’ (according to its requirement) in Article 4 (1) of the Hungarian Civil Code in force. Article 1:3 of the new Hungarian Civil Code regulates the principle of good faith and fair dealing in conformity with this view, completing it with the following sentence: ‘*the requirement of good faith and fair dealing is violated also by those who exercise their rights in a way that is in conflict with their previous behaviour; on which the other party may have relied on with reasons*’⁵. It pertains to objective good faith not only that the principles of good faith and fair dealing are inseparable, but also that these ‘*Siamese twins*’ are in a strong correlation with the requirement of co-operation, forming their core content.⁶

During Roman enforcement procedures, in case of *in fraudem creditorum*, i.e. in case of a transfer of property with intent to defraud creditors, an action might have been taken with reference to *actio Pauliana*. This action made it possible to claim damages against the beneficiary collaborating with the debtor or to claim the delivery of the enrichment from any third party unilaterally acquiring the debtor’s property. These dispositions are still present in the Hungarian civil law through Article 203 of the Hungarian Civil Code in force and article 6:120 of the new Hungarian Civil Code, which declares the invalidity of agreements aiming to draw off funds.

With regard to foetus, the treatise indicates that the legal status of a *nasciturus* in Roman law was similar to the one in force in Hungarian civil law. Although Roman law did not recognise the legal capacity of foeti, in case their interests required it, they were considered as if they were already born and alive.⁷ According to the Hungarian regulation in force, the legal capacity of individuals persists as of their live births and from the day of their conceiving. Both the current and the future Hungarian Civil Code

⁵ Article 1:3 paragraph 2 of Act V of 2013 on the Hungarian Civil Code (in Hungarian): ‘*A jóhiszeműség és tisztesség követelményét sérti az is, akinek joggyakorlása szemben áll olyan korábbi magatartásával, amelyben a másik fél okkal bízhatott*’.

⁶ A. Földi: *A jóhiszeműség és tisztesség elve. Intézménytörténeti vázlat a római jogtól napjainkig*. (Principle of good faith and fair deal. History of the institute from Roman law till nowadays.) Budapest, 2001. p. 106.

⁷ A. Földi – G. Hamza: idem p. 204.

invest individuals with legal capacity retrospectively, as of the day of their conceiving, on the condition that they were born alive. Although the two regulations are different, their legal consequences aim at the protection of the same interests. It has to be mentioned that both Roman law and the Hungarian law in force considers the 300th day previous to birth as the presumptive conceiving date of foetus. We would also like to mention that Article 35 (2) of the Hungarian Family Act in force (Csjt.) as well as article 4:92 (2) of the new Hungarian Civil Code adds a further presumption with regard to conceiving date, considering it to be between day 182 and day 300 (including the due dates) prior to the birth day of the child. Although Roman law medical science considered this an irrebuttable presumption, today counter-evidence may be provided.

Similarly to modern civil law, Roman law allowed the establishment of independent organisations in order to handle amounts of money offered with the aim of implementing a gracious purpose.⁸ *Pia causa* was therefore considered a property having legal personality and legal capacity. This institute of the Roman law is considered to be the ancestor of modern funds; the regulation of this institute in the new Hungarian Civil Code will be more detailed than in the present one.

With regard to curatorship and tutorship, it may be interesting to mention that this dual classification is subsisting even nowadays. Modern civil codes taxonomically regulate these institutes in different ways: the German BGB discusses them in book IV, together with family law dispositions. In Hungary, it is the Civil Code that discusses curatorship while the dispositions on tutorship may be found in the Family Law Act. The new Hungarian Civil Code maintains this differentiation both from substantive and taxonomical point of view: curatorship is discussed in book II while tutorship is regulated in book IV.⁹ Furthermore, it should be mentioned that the Hungarian regulation of tutorship – which transposes the name of the categories known from Roman law – maintains the trichotomy present in the *Tripartitum* of István Werbőczy (testamentary, statutory, appointed by the court). As for the rights of persons, paternal authority regulated by

⁸ A. Földi – G. Hamza: idem p. 235.

⁹ A. Földi – G. Hamza: idem p. 261 n. 1.

Roman law was first replaced by parental authority, then later by the right of custody,¹⁰ similarly to the German BGB.

In the book related to *in rem* rights, the delimitation of accessories and fixtures may be reconsidered with regard to the developments of science and mechanics as well as to everyday needs. The spare wheel of a vehicle – considered as *pertinentia* in Roman law – today should be regarded as fixture.

Rights deriving from ownership were differentiated in Roman law; however, modern civil law refers to them as the ‘*trichotomy of ownership*’.¹¹ The same applies to the use of the institute of easement as defined by Justinian.

Within the framework of law of obligations, the definition of *naturalis obligatio* is still used in relation to the claims for which no action is provided. In Roman law, services – in case of no agreement providing for the contrary – had to be performed at medium quality (*mediae aestimationis*); this rule is still in force in the German law. Article 288 of the Hungarian Civil Code in force, however, requests the ordinary good quality (*szokásos jó minőség*) of delivery, while Article 6:123 (1) section c of the new Hungarian Civil Code indicates that ‘*ordinary quality*’ (*szokásos minőség*) should be attained.

The antecedents of insurance contracts might be found in Roman law through certain dispositions on the share of claims. In case of maritime loan (*pecunia traiectitia*), in the event of the loss of the ship due to *vis maior*, lender and borrower shared the risks: the former lost his capital and the interests he could have earned while the latter lost the freight and/or the profit he had expected to make on the goods. However, as a consequence of this rule, the interest rate of the loan was not maximised.

¹⁰ A. Földi – G. Hamza: idem p. 267 n. 3.

¹¹ This classification is contested by some jurists. A. Földi – G. Hamza: idem pp. 267 and 289.

Here it should be mentioned that the notion of *vis maior* is still used in the Hungarian Civil Code as a synonym of unavoidable causes. Furthermore it is interesting to remark that the expression used for bail (*kaució*) significantly differs from the original institute of the Latin *cautio*. The latter namely was promised by the debtor through a *stipulatio* in case he was not able to perform the payment of a debt (usually originated from a non-contractual relationship).¹²

The treatise also deals with fiduciary pledge.¹³ *Fiducia* in Roman law was a qualified *mancipatio* action, essentially involving a sale to a person coupled with an agreement that the purchaser should sell the property back upon the fulfilment of certain conditions; in case the seller did not pay back the purchase price within the deadline stipulated to the buyer acting as a pledgee, the latter was entitled to keep the goods and become the owner. To some extent, the Hungarian case law accepts the use of the transfer of ownership and options as a means of guarantee, on condition that this institute should be harmonised with the dispositions on pledge. The Hungarian Supreme Court determined the options stipulated as a guarantee as ancillary in its decision no. BH 2009/46 while it denied this fact in its decision no. BH 2008/48. The new Hungarian Civil Code – although several drafts were submitted in relation to the regulation of *lex commissoria* – considers the transfer of ownership null and void and options as a means of guarantee (with the exception of the agreements stipulated in accordance with the EU directive on financial guarantees) under Article 6:99.

Under Roman law novation (*novatio*) there was an institute very similar to nowadays' practice for the amendment of contracts. In case the parties referred to the old obligation in the *stipulatio*, the *delegatio obligandi* brought to novation, which substituted a new debt or obligation for an old debt or obligation thereby cancelling and replacing the old debt. This institute is regulated by the new Hungarian Civil Code under the name of transfer of contracts in Chapter XXXI.

¹² A. Földi – G. Hamza: idem p. 438.

¹³ A. Földi – G. Hamza: idem pp. 443, 489 and 658.

Roman *societas* may be considered as the predecessor of modern civil associations and even of partnerships having no legal personality.¹⁴ This ancient company – being basically a consensual contract – was not an individual legal entity, it did not have individual capital or organisation etc. However, it allowed its members to gather for the purpose of commercial activity; furthermore, *societas publicanorum* already showed some of the distinctive marks of modern legal entities. Naturally, the detailed dispositions regulating Roman *societas* are very different from the ones related to nowadays' civil associations as they could be established for commercial activity purposes and their members shared liability towards third persons for the debts of the *societas*. A variant of the interdiction of *societas leonina* – known from Aesop's fable – is still in force in modern corporate law today: it forbids both excluding someone from the profit gained and excluding him/her from the liability for losses.

As for the law of succession, it must be underlined that Roman law already developed the system and the dogmatic basis of testamentary and statutory succession as well as of the inheritance against testament. The principles of liability for debts related to legacy – liability *viribus, pro viribus* and *ultra vires hereditatis* – are still a valid reference, although the latter might be considered exceptional.¹⁵ It is important to mention that the new Hungarian Civil Code introduced – even if only for a limited number of cases – the possibility of having a substitute heir, as it was possible under Roman law with regard to the dispositions on *substitutio pupillaris* and *quasi pupillaris*.¹⁶

It would be possible to add many items to the present list: the difference between *ius adcrendi* and *accessio*, the difference between a null and void contract and an avoidable contract, the development of fallback guarantee following joint and several liability, the development of mortgage, the institutes of suggestive behaviour and settlement (*transactio*), the rules of selling alien goods, the warranty of title, the *in rem* lease, the *locupletatio iniusta*, the Roman antecedents for the compensation of non-patrimonial

¹⁴ A. Földi – G. Hamza: idem p. 533 sqq.

¹⁵ Article 680 of the Hungarian Civil Code in force, article 7:98 paragraph 3 of the new Hungarian Civil Code. A. Földi – G. Hamza: idem p. 651.

¹⁶ Article 7:28 paragraph 3-4 of the new Hungarian Civil Code.

damages, the similar dispositions of law of succession or the characteristics of some contracts.¹⁷ The authors of this textbook and treatise undertook not only to study and present Roman law at a scientific level but also to inform every reader of the relationship between ancient and modern institutes.

¹⁷ A. Földi – G. Hamza: *idem* p. 295 fn 7, p. 391 fn 13, p. 441 fn 5, p. 446 fn 11, p. 470 fn 2, p. 506 fn 5, p. 511 fn 3, p. 517 fn 10, 11, p. 523 fn 16, p. 550 2a, p. 557 fn 4, p. 611 fn 14, p. 633 fn 6, p. 648 fn 1., p. 649 fn 3, p. 663 sqq, p. 470 fn 2, p. 506 fn 5, p. 511 fn 3, p. 517 fn 10, 11, p. 523 fn 16, p. 550 2a, p. 557 fn 4, p. 582 sqq, p. 611 fn 14, p. 633 fn 6, p. 648 fn 1, p. 649 fn 3, p. 651 fn 5, p. 663 sqq.