Some Thoughts on the Inexistence, Invalidity and Ineffectiveness of Juridical Acts in Roman Law and in its Subsequent Fate*

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Abstract

Our study can be considered as a brief contribution to the well-disputed questions of the so-called inexistence, invalidity, and ineffectiveness of legal transactions in Roman law and in its subsequent fate.

As a theoretical starting point, we emphasize that there are four levels of ability for producing legal effects: 1. inexistence (when a legal transaction is not able to produce any typical legal effect; 2. invalidity (when a legal transaction exists but it is not able to produce the intended legal effects); 3. ineffectiveness (when an existing and valid juridical act could produce the intended legal effects, but only potentially and not actually); 4. effectiveness (when an existing, valid, and effective legal transaction is actually producing the intended legal effects).

After the Introduction, the problem of inexistence of legal transactions, some questions of the invalidity of legal transactions (e.g. terminological questions; elimination of the cause of invalidity; partial invalidity), and the problem of the ineffectiveness of legal transactions will be analysed.

Finally, our most important conclusions will be summarized.

Keywords: *juridical act; inexistence; invalidity; ineffectiveness; punitive character of invalidity; terminological inconsistency and the great variety of Roman law sources concerning invalidity; nullity and annulment of contracts; convalescentia; conversio; partial invalidity; revocation of will.*

1. Introduction

a) Our study is a brief contribution to the disputed *dogmatic and terminological questions of inexistence, invalidity, and ineffectiveness of juridical acts*[1] in Roman law and in modern legal systems.

Inexistence, invalidity, and ineffectiveness of legal transactions, and the dogmatic and terminological problems related to these concepts are analysed by many researchers of Roman and private law even today.

In 2014, we published already an autonomous book in Hungarian language regarding these questions, too.[2]

In this short essay, summarizing several scientific results of our book, only few questions can be analysed from the numerous problems of the inexistence, invalidity, and ineffectiveness of legal transactions. Following the Introduction, we would like to deal briefly with the *problems of inexistence of legal transactions* (2). Then to some *dogmatic and terminological questions related to invalidity of contracts* will be referred (3) – regarding, inter alia, the virtually boundless Roman law and modern private law literature on the invalidity of juridical acts, only some important problems can be mentioned. Last but not least, we deal with several *theoretical, dogmatic, and terminological problems of ineffectiveness of juridical acts* with special regard to the *revocation of will* from the point of view of legal dogmatics (4). Finally, our most important conclusions will be summarized (5).

b) According to an ironic observation of Kant, a definition of the concept of law has been searched by the jurists for centuries without any success.[3] This statement can be regarded as current not only for the concept of law in general, but for its components, too, including inexistence, invalidity, and ineffectiveness of legal transactions as well.

Regarding the various interpretations of these concepts, *our purpose is to clarify and to systematize the concepts of inexistence, invalidity, and ineffectiveness of juridical acts*. In addition, special scientific problems related to these concepts will be mentioned (e.g. the raison d'ętre of the dogmatic construction of contractual

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1 In this regard the terms "act in law", "act in the law", "juristic act", "legal act", and "legal transaction" are also used in English terminology. See e.g. J. H. Merryman, *The civil law tradition*, Stanford 1985[2], 75 ff. Therefore, in our study we use these terms as synonyms.

2 I. Siklósi, *A nemlétező, érvénytelen és hatálytalan jogügyletek elméleti és dogmatikai kérdései a római jogban és a modern jogokban* [Theoretical and dogmatic questions of the inexistence, invalidity, and ineffectiveness of juridical acts in Roman law and in modern legal systems], Budapest 2014. As a kind of summary of the research see Idem, *Quelques questions de l'inexistence et l'invalidité des actes juridiques dans le droit romain*, in: A. Földi / I. Sándor / I. Siklósi (ed.), Ad geographiam historico-iuridicam ope iuris Romani colendam. Studia in honorem Gábor Hamza, Budapest 2015, 327–336.

3 I. Kant, *Kritik der reinen Vernunft*, 1787[2], 759: „Noch suchen die Juristen eine Definition zu ihrem Begriffe vom Recht".

inexistence; the applicability of the modern concept of the inexistence of contract in Roman law; the formation of the modern concepts of nullity and annulment and the applicability of these legal categories in Roman law; the problems of elimination of the causes of invalidity in Roman law as well as in its subsequent fate; the dogmatic questions of partial invalidity; the theoretical problems of the ineffectiveness of juridical acts; the dogmatic problems of the revocation of will).

c) The reader may conceive that it can be hardly added anything new to the literature. Notwithstanding, during research in Roman law, in history of private law, and in modern legal systems one can identify *uncertain as well as inconsequent dogmatic and terminological solutions*. Therefore, we would like to try to apply a clear and consequent conceptual system and terminology.

From the point of view of theory, it is unquestionable that consequent application of legal concepts is of great importance. The main purpose of our study is to emphasize that *existence (inexistence), validity (invalidity), and effectiveness (ineffectiveness) are concepts based on each other in a logical order*. Therefore, we distinguish *four levels of ability for producing legal effects*:

1. *Inexistence* – when the "legal transaction" is not able to produce any typical legal effect; it does not exist in the contractual sphere.
2. *Invalidity* – when the legal transaction exists but it is not able to produce the intended legal effects.
3. *Ineffectiveness* (in strict sense) – when the existing and valid juridical act (without any legal fault) could produce the intended legal effects, but only potentially and not actually.
4. *Effectiveness* (in strict sense) – when the existing, valid, and "effective" legal transaction is actually producing the intended legal effects.

d) As for *antecedents* of our research, the earlier literature of Roman law often dealt with the general theoretical, dogmatic, and terminological questions of invalidity of juridical acts (e.g. we can refer to the books and studies of Gradenwitz,[4] Hellmann,[5] and Schachian[6]).

Apart from these works – which are still significant– the modern authors of Roman law usually analyses special scientific questions instead of elaborating the general dogmatic and terminological problems of invalidity. In 20th and 21st century many important studies and books were published e.g. on the details of contracts in violation of a legal rule (e.g. Kaser[7]), of mistake (e.g. Flume,[8] Zilletti,[9] Wolf,[10] Winkel,[11] and Harke[12]), of simulation (e.g. Partsch,[13] Pugliese,[14] and Dumont-Kisliakoff[15]), of partial invalidity (e.g. Seiler,[16] Zimmermann,[17] and Staffhorst[18]), of *laesio enormis* (e.g. Dekkers,[19] Hackl,[20] Sirks,[21] Pennitz,[22] Cardilli,[23] Harke,[24] Ziliotto,[25] Westbrook,[26] Finkenauer,[27] Platschek,[28] Grebieniow;[29] from the Hungarian literature Visky,[30] Jusztinger,[31] and Pókecz Kovács[32]), of

4 O. Gradenwitz, *Die Ungültigkeit obligatorischer Rechtsgeschäfte*, Berlin 1887.
5 F. Hellmann, *Terminologische Untersuchungen über die rechtliche Unwirksamkeit im römischen Recht*, München 1914.
6 H. Schachian, *Die relative Unwirksamkeit der Rechtsgeschäfte*, Berlin 1910.
7 M. Kaser, *Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht*, Wien 1977.
8 W. Flume, *Irrtum und Rechtsgeschäft im römischen Recht*, in: Festschrift Fritz Schulz, Weimar 1951.
9 U. Zilletti, *La dottrina dell'errore nella storia del diritto romano*, Milano 1961.
10 J. G. Wolf, *„Error" im römischen Vertragsrecht*, Köln–Graz 1961.
11 L. Winkel, *Error iuris nocet*, Zutphen 1985.
12 J. D. Harke, *Irrtum über wesentliche Eigenschaften*, Berlin 2003; Idem, *„Si error aliquis intervenit" – Irrtum im klassischen römischen Vertragsrecht*, Berlin 2005.
13 J. Partsch, *Die Lehre vom Scheingeschäfte im römischen Rechte*, SZ 42 (1921), 227 ff.
14 G. Pugliese, *La simulazione nei negozi giuridici*, Padova 1938.
15 N. Dumont-Kisliakoff, *La simulation en droit romain*, Paris 1970.
16 H. H. Seiler, *Utile per inutile non vitiatur. Zur Teilunwirksamkeit von Rechtsgeschäften im römischen Recht*, in: Festschrift für Max Kaser zum 70. Geburtstag, München 1976, 126 ff.
17 R. Zimmermann, *Richterliches Modifikationsrecht oder Totalnichtigkeit?* Berlin 1979.
18 A. Staffhorst, *Die Teilnichtigkeit von Rechtsgeschäften im klassischen römischen Recht*, Berlin 2006.
19 R. Dekkers, *La lésion énorme*, Paris 1937.
20 K. Hackl, *Zu den Wurzeln der Anfechtung wegen „laesio enormis"*, SZ 98 (1981), 147 ff.
21 B. Sirks, *La « laesio enormis » en droit romain et byzantin*, TR 53 (1985), 291 ff.; Idem, *Laesio enormis again*, RIDA 54 (2007), 461 ff.
22 M. Pennitz, *Zur Anfechtung wegen „laesio enormis" im römischen Recht*, in: Iurisprudentia universalis. Festschrift für Theo Mayer-Maly, Köln–Weimar–Wien 2002, 575 ff.
23 R. Cardilli, *Alcune osservazioni su leges epiclassiche e interpretatio: a margine di Impp. Diocl. et Maxim. C. 4, 44, 2 e C. 4, 44, 8*, in: Molnár Imre Emlékkönyv [Studies in honour of Imre Molnár], Szeged 2004, 115 ff.
24 J. D. Harke, *Laesio enormis als „error in negotio"*, SZ 122 (2005), 91 ff.
25 P. Ziliotto, *La misura della sinallagmaticitŕ: buona fede e 'laesio enormis'*, in: L. Garofalo (cur.), La compravendita e l'interdipendenza delle obbligazioni nel diritto romano, 1, Padova 2007, 597 ff.
26 R. Westbrook, *The origin of laesio enormis*, RIDA 55 (2008), 39 ff.
27 Th. Finkenauer, *Zur Renaissance der „laesio enormis" beim Kaufvertrag*, in: Festschrift Hans Peter Westermann, Köln 2008, 183 ff.
28 J. Platschek, *Bemerkungen zur Datierung der „laesio enormis"*, SZ 128 (2011), 406 ff.
29 A. Grebieniow, *La 'laesio enormis' e la stabilitŕ contrattuale*, RIDA 61 (2014), 195 ff.
30 K. Visky, *Appunti sulla origine della lesione enorme*, Iura 12 (1961), 40 ff.; Idem, *Spuren der Wirtschaftskrise der Kaiserzeit in den römischen Rechtsquellen*, Budapest–Bonn 1983, 24 ff.
31 E.g. J. Jusztinger, *The principle of laesio enormis in sale and purchase contracts in Roman law*, in: Studia iuridica auctoritate universitatis Pécs publicata 149 (2011), 107 ff.
32 A. Pókecz Kovács, *Laesio enormis and its survival in modern civil codes*, in: E. Štenpien (ed.), Kúpna zmluva – história a súčasnost' II, Košice 2014, 219 ff.

conversion (e.g. Giuffrč[33] and Krampe[34]), of convalescence (e.g. Wacke,[35] Schanbacher,[36] and Potjewijd[37]), of *dolus* (*actio de dolo* and *exceptio doli*; e.g. Guarino,[38] Albanese,[39] Wacke,[40] Burdese,[41] and Meruzzi[42]), and of *actio quod metus causa* (e.g. Kupisch[43] and Calore[44]) Naturally, in the famous and important monographs and handbooks treating general questions of juridical acts (see for instance the works of Scialoja,[45] Álvarez Suárez,[46] Albanese,[47] and Flume[48]), invalidity and ineffectiveness of juridical acts were discussed, too.

However, from the modern Italian literature of Roman law – which often distinguishes between invalidity and ineffectiveness in a strict sense – we can refer e.g to the monograph of Di Paola (published in 1966[49]) treating the problems of invalidity *(invaliditŕ)* and ineffectiveness *(inefficacia)* of juridical acts in Roman law. A lengthy study of Talamanca (published in 2005[50]) deserves a special mention, too; here, the Italian scholar investigates the inexistence *(inesistenza)*, invalidity *(invaliditŕ)*, and ineffectiveness *(inefficacia)* of juridical acts in context of Roman law.

As for Hungarian (Roman law as well as private law) literature, the most specialised analysis of invalidity of contracts can be found in the great monograph of Emilia Weiss, published in 1969,[51] which did not lose much from its scientific significance. Since 1998, András Földi has been deeply analysing the theoretical problems of validity and effectiveness of juridical acts on the basis of provisions of the (old) Hungarian Civil Code of 1959 but with also regard to Roman law, legal history, and comparative private law. Földi's studies[52] induced a scientific debate in the Hungarian literature (e.g. see the studies of András Bessenyő[53] and Iván Siklósi[54]). In 2000, a monograph on invalidity due to the faults of contractual will[55] and, in 2004, another excellent treatise on contracts against good morals[56] was published by Attila Menyhárd who also scrutinized these questions in a comparative manner. In the year of 2008, a monograph treating the problems of invalidity of contract in Hungarian private law was published by Gábor Kiss and István Sándor (2nd edition: 2014).[57] The problems of contracts in contradiction to good morals were analysed in legal historical and comparative context by Gergely Deli in several studies[58] and an excellent book (published in 2013).[59]

e) Since this short essay has been written on the basis of our above-mentioned book on inexistence, invalidity, and ineffectiveness of legal transactions in Roman law and in its subsequent fate, here are some words on the *methods of our research*.

Our quite complex choice of topic – with special regard to the Roman law research – needed the application of a *complex scientific method which is dogmatic on the one hand and historical on the other*. Although the dogmatic method has enjoyed priority, a kind of "mixed" methodology of dogmatic and historical approach was applied.

During our Roman law research we often applied modern concepts in order to describe and to analyse the Roman law institutions. Since *the main concepts investigated in our book were created to a considerable extent in the Pandectist legal science*, some

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33 V. Giuffrč, *L'utilizzazione degli atti giuridici mediante 'conversione' in diritto romano*, Napoli 1965.
34 Chr. Krampe, *Die Konversion des Rechtsgeschäfts*, Frankfurt am Main 1980.
35 A. Wacke, *Die Konvaleszenz der Verfügung eines Nichtberechtigten*, SZ 114 (1997), 197 ff.
36 D. Schanbacher, *Die Konvaleszenz von Pfandrechten im klassischen römischen Recht*, Berlin 1987.
37 G. H. Potjewijd, *Beschikkingsbevoegdheid, bekrachtiging en convalescentie. Een romanistische studie*, Deventer 1998.
38 A. Guarino, *La sussidiarietŕ dell' 'actio de dolo'*, Labeo 8 (1962), 270 ff.
39 B. Albanese, *Ancora in tema di sussidiarietŕ dell' 'actio de dolo'*, Labeo 9 (1963), 42 ff.
40 A. Wacke, *Zum „dolus"-Begriff der „actio de dolo"*, RIDA 27 (1980), 349 ff.
41 A. Burdese, *L'eccezione di dolo generale in rapporto alle altre eccezioni*, Diritto @ Storia 5 (2006) (= http://www.dirittoestoria.it/5/Tradizione-Romana/Burdese-Eccezione-dolo-generale.htm).
42 G. Meruzzi, *L'exceptio doli dal diritto civile al diritto commerciale*, Padova 2005. In addition, see e.g. L. Garofalo (cur.), *L'eccezione di dolo generale*, Padova 2006; G. Finazzi, *L'exceptio doli generalis' nel diritto ereditario romano*, Padova 2006.
43 B. Kupisch, *Überlegungen zum Metusrecht: Die „actio quod metus causa" des klassischen römischen Rechts*, in: Festschrift für Bruno Huwiler zum 65. Geburtstag, Bern 2007, 415 ff.
44 E. Calore, *'Actio quod metus causa'. Tutela della vittima e azione in rem scripta*, Milano 2011.
45 V. Scialoja, *Negozi giuridici*, Roma 1933.
46 U. Álvarez Suárez, *El negocio jurídico en derecho romano*, Madrid 1954.
47 B. Albanese, *Gli atti negoziali nel diritto privato romano*, Palermo 1982.
48 W. Flume, *Allgemeiner Teil des bürgerlichen Rechts, II. Das Rechtsgeschäft*, Berlin–Heidelberg–New York 1992[4].
49 S. Di Paola, *Contributi ad una teoria della invaliditŕ e della inefficacia in diritto romano*, Milano 1966.
50 M. Talamanca, *Inesistenza, nullitŕ ed inefficacia dei negozi giuridici nell'esperienza romana*, BIDR 101–102 (1998–99), 1 ff.
51 E. Weiss, *A szerződés érvénytelensége a polgári jogban* [Invalidity of contracts in private law] Budapest 1969.
52 Especially see A. Földi, *Zur Frage der Gültigkeit und der Wirksamkeit im modernen Zivilrecht*, in: Festschrift Ferenc Benedek, Pécs 2001, 73 ff. (= *Zur Frage der Gültigkeit und der Wirksamkeit im modernen Zivilrecht*, in: G. Hamza [ed.], Hundert Jahre Bürgerliches Gesetzbuch, Budapest 2006, 20 ff.).
53 Especially see A. Bessenyő, *A jogügyletek érvényessége és hatályossága* [Validity and effectiveness of legal transactions], Jura [Pécs] 2001/2, 5 ff.
54 See for instance I. Siklósi, *Zu den privatrechtsdogmatischen Fragen des Widerrufs des Testaments*, in: Constans et perpetua voluntas. Pocta Petrovi Blahovi k 75. narodeninám, Trnava 2014, 539 ff.
55 A. Menyhárd, *A szerződés akarathibák miatti érvénytelensége* [Invalidity of contract due to the faults of will], Budapest 2000.
56 A. Menyhárd, *A jóerkölcsbe ütköző szerződések* [The contracts against good morals], Budapest 2004.
57 G. Kiss G. / I. Sándor, *A szerződések érvénytelensége* [Invalidity of contracts], Budapest 2014[2].
58 See for instance G. Deli, *„Nec facere nos posse credendum est". Ein Interpretationsversuch zur Papinian D. 28, 7, 15*, Journal on European History of Law 3 (2012/2), 165 ff.; Idem, *How did good morals become a general clause?*, in: F. Reinoso Barbero (ed.), Principios generales del derecho: antecedentes históricos y horizonte actual, Madrid 2014, 11 ff.
59 G. Deli, *A jó erkölcsökről* [On the good morals], Budapest 2013.

important works from the German jurisprudence of 19th century have been taken into account (e.g. the books of Savigny,[60] Puchta,[61] Dernburg,[62] and Windscheid[63]).

Prominent handbooks as well as important and often cited textbooks of Roman law were also reflected.

In addition to the studies and monographs in which the problems of inexistence, invalidity, and ineffectiveness of juridical acts were exclusively dealt with, we made use of the above-mentioned great German, Italian, and Spanish monographs treating the *general problems of juridical acts*.

Considering the sources of Roman law, legal history, and modern legal systems as well, we always attempted to go back to the original, primary sources. As for the interpretation of Roman law sources, *we usually did not search for interpolations*, regarding the mainstream scientific approach of modern Roman law researchers according to which the textual critic ("Textkritik") can only be regarded as the last instrument during the interpretation of a given text.[64]

The definition of existence (inexistence) of juridical acts, the axiological approach of invalidity, and the analysis of the relation of existence (inexistence), validity (invalidity), and effectiveness (ineffectiveness) deserved a *legal theoretical and legal philosophical approach*.

Since the above-mentioned dogmatic constructions in some modern legal systems were also within the scope of our research, we also applied a *comparative legal approach*.

Roman law solutions were always scrutinized in the first place, the modern legal constructions were analysed later on the basis of the Roman law tradition. In this respect we have to refer to the method of Zimmermann, elaborated in his famous book entitled "The law of obligations". His work considerably inspired the approach as well as the method of our research.[65]

Hereafter, we would like to briefly summarize the essence of our scientific results.

2. Inexistence of legal transactions

a) As for the problems of inexistence of contract in Roman law and in modern legal systems, we have to emphasize that *the raison d'ętre of the category of inexistence of contract and its applicability in Roman law were and still are heavily disputed both in Roman law and private law literature*. In this respect a kind of ontological approach would have to be needed. We can cite the famous question of Heidegger: "Warum ist überhaupt Seiendes und nicht vielmehr nichts?"[66]

b) As a starting point of the research of the construction of "inexistence" in Roman law – following the theory of Mitteis[67] – serves the famous text of Gaius (3, 176)[68] which can be described as a good example of the Roman law roots of the distinction between inexistence and invalidity of legal transactions. On the basis of the casuistic Roman law sources (see Ulp. D. 12, 1, 18 pr.; Ulp. D. 12, 1, 18, 1; Ven. D. 45, 1, 137 pr.; Iul. D. 41, 1, 36; Ulp. D. 2, 14, 1, 3; Iav. D. 44, 7, 55; Ulp. D. 18, 1, 2, 1; Pomp. D. 18, 1, 8 pr.; Paul. D. 18, 4, 7; Gai. 3, 140; Gai. 3, 142; Pap. D. 24, 1, 52 pr.; Inst. 3, 24 pr.; Paul. D. 44, 7, 3, 2) *we can find the roots of the modern category of inexistence of contract in Roman law*. However, *the modern concept of inexistence of contracts and the modern distinction of inexistence and invalidity of juridical acts are not applicable without restrictions to Roman law sources*. In the sources the terms are often irrelevant (see for instance Paul. D. 17, 1, 22, 3; Pap. D. 13, 7, 40 pr.; Iav. D. 41, 3, 21; C. 4, 38, 2; Ulp. D. 24, 1, 32, 24; Ulp. D. 41, 3, 27).

c) It is worth mentioning that – contrary to invalidity – *the inexistence of contract is not to be regarded as an unlawful situation*. The "inexistence" of a contract in the contractual sphere means inexistence regarding the lack of the so-called "äußerer Tatbestand". This consideration can help us to distinguish between inexistence and invalidity of juridical acts in the modern legal systems, too.

3. Invalidity of legal transactions

a) Considering the dogmatic and terminological questions related to invalidity of contracts, first of all, the dogmatic nature of *invalidity* – which *always has a punitive character* (contrary to the inexistence and ineffectiveness) – has to be analysed.

According to Windscheid, *an invalid legal act is a body without soul and it does not exist in the sphere of law*.[69] On the basis of a famous phrase of Anatole France ("l'Âme est la substance; le corps l'apparence") we can emphasize that *an existing but*

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[60] E.g. F. C. von Savigny, *System des heutigen römischen Rechts*, IV, Berlin 1841.

[61] E.g. G. F. Puchta / Th. Schirmer, *Pandekten*, Leipzig 1877[12].

[62] E.g. H. Dernburg, *Pandekten*, I, Berlin 1900[6].

[63] E.g. B. Windscheid / Th. Kipp, *Lehrbuch des Pandektenrechts*, Frankfurt am Main 1906[9].

[64] See W. Kunkel / M. J. Schermaier, *Römische Rechtsgeschichte*, Köln–Weimar–Wien 2001[14], 309: „Textkritik ist heute nicht das erste, sondern das letzte Mittel bei der Textauslegung."

[65] However, we could not forget about the importance of ancient Greek laws, for they had influence on certain categories of Roman law. Furthermore, results of the legal papyrology concerning the contractual practice of Rome are also to be taken into consideration. The tradition of *ius commune* has also a great importance, especially the canon law which serves as a basis of many modern legal principles and categories (e.g. the principle "pacta sunt servanda", the doctrine of cause, the construction of transformation from one legal act into another [*conversio*]). In these respects further researches should follow.

[66] M. Heidegger, *Was ist Metaphysik?* Frankfurt am Main 1975, 42.

[67] L. Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians I. Grundbegriffe und Lehre von den juristischen Personen*, Leipzig 1908, 249.

[68] *„Nam interventu novae personae nova nascitur obligatio et prima tollitur translata in posteriorem, adeo ut interdum, licet posterior stipulatio inutilis sit, tamen prima novationis iure tollatur; veluti si quod mihi debes, a Titio post mortem eius vel a muliere pupillove sine tutoris auctoritate stipulatus fuero. Quo casu rem amitto: nam et prior debitor liberatur et posterior obligatio nulla est. Non idem iuris est, si a servo stipulatus fuero; nam tunc proinde adhuc obligatus tenetur, ac si postea a nullo stipulatus fuissem."* From the literature of this text see for instance Di Paola, *op. cit.* passim; F. Bonifacio, *La novazione nel diritto romano*, Napoli 1959[2], 19 ff.; Talamanca, *op. cit.* passim, especially 32; M. Girolami, *Le nullitŕ di protezione nel sistema delle invaliditŕ negoziali. Per una teoria della moderna nullitŕ relativa*, Padova 2008, 46 f.

[69] Cf. Scialoja, *op. cit.* 234[1].

invalid juridical act has a body but – without having a soul – it *is not able to produce any intended legal effect, even potentially*. Contrary to the invalid juridical act, the valid legal transaction can be regarded as a *mens sana in corpora sano*; *an existing and valid juridical act is able to produce potentially the intended legal effects*.

It is well-known that *the abstract term of invalidity*, inter alia, *had not been composed by Roman jurists*. With Zimmermann's words, "the Roman lawyers were unconcerned about dogmatic niceties".[70] This remark is especially relevant concerning invalidity since there are *more than hundred different expressions* describing inexistence, invalidity, and ineffectiveness of juridical acts in Roman law sources. See e.g. the terms *nullum esse*, *nullum* (or *non*) *fieri*, *nullum stare*, *nullius momenti esse*, *non* (or *nec*) *valere*, *nullam vim* (or *nullas vires*) *habere*, *effectum non habere*, *inefficax esse*, *ad effectum perduci non posse*, *sine effectu esse*, *pro non facto haberi* (or *pro non facta est*), *pro non scripto haberi*, *non videri factum*, *non intellegi*, *nec facere potest*, *non esse*, *non consistere*, *non subsistere*, *neque* (or *nisi*) *constat*, *non contrahi (obligationem)*, *non videtur contrahi*, *contrahi non potest*, *nihil agere*, *inutilis*, *utile non esse*, *irritus*, *imperfectus*, *ratum non* (or *nullo tempore*) *haberi* (or *ratum non est*), *inanis* (or *inane factum*), *vitiosum esse*, *vitiari*, *frustra facere*, *non posse* (or *non potest fieri* etc.), *non licere*, *illicitus*, *non permitti*, *non* (or *nihil*) *est permissum*, *prohiberi*, *impedire* (or *impediri*), *obstare*, *corrumpere*, *infirmare* (or *infirmari*), *infirmum*, *non nocere*, *non prodesse* (or *non* [*nihil*] *proficere*), *non sequi* (or *nec sequenda est*), *non teneri*, *non tenere*, *iuris vinculum non optinet (obtinet)*, *non obligari* (or *non est obligatorium*, *non* [*nec*] *nascitur obligatio*, and *nulla obligatio nascitur*), *non* (or *nullo modo*) *deberi* (or *debere*), *non acquirere*, *actio non datur* (or *actio denegatur*, *actio non competit*, *actio peti non posse*), *compelli non posse* (or *cogendum non esse*, *ne cogatur*), *ius* (or *facultatem*, *potestatem*) *non habere (faciendi)*, *recte* (or *iure*) *non fieri* (or *facere*), or *non iure factum*, *iustum non haberi* (or *iniustum*), *coiri non posse*, *evanescere*, *nihil esse*, *nihil posse*, *nihil momenti habere*, *submoveri*, *supervacuum*, *pro infecto haberi*, *pro non adiecto haberi*, *invalidus*, *vanum*, *impedimentum adferre*, *perimi*, *remitti*, *tolli*, *rescindere*, and *rumpere* (cf. e.g. the results of research of Mitteis,[71] Hellmann,[72] Di Paola,[73] and Staffhorst[74]). Bringing these expressions into a logic order turned out to be hopeless but important scholars (from the modern Roman law literature e.g. Marrone[75] and Földi[76]) find signs of a consequent terminology in case of a few expressions (see for instance *infirmari*, *pro non scripto haberi*, *irritum fieri*, *rumpitur*, and *rescindere*).

The terminological inconsistency and the great variety of Roman law sources concerning invalidity deeply affected the modern legal terminology in this respect.[77]

b) As for "nullity" and "annulment" of contracts in Roman law, the *applicability of modern concept of annulment to Roman law sources* is disputed even in the modern literature of Roman law. On the basis of casuistic sources and vast literature we can lay down that *the Roman law roots of the concept concerning annulment can mainly be found in the legal constructions related to the "annulment" according to ius civile* (see e.g. the rescission of *testamentum inofficiosum*, the rescission of sale in case of *laesio enormis*, and the *exceptio* based on *senatus consultum Vellaeanum*).

Regarding the distinction of nullity and annulment, it is generally accepted and emphasized in the literature that the modern concept of annulment (*Anfechtbarkeit* in German legal terminology) and the distinction of nullity and annulment had been created by Savigny[78] in the 19th century and that the distinction of nullity and annulment within the context of the invalidity was used for the first time by German scholars of the Pandectist legal science. In this regard, however, we also have to take into consideration the achievements of the earlier jurisprudence. Scrutinizing the Dutch and French antecedents of the distinction of nullity and annulment before the 19th century, we would like to emphasize the significance of the śuvre of Vinnius,[79] Domat,[80] and Pothier.[81] With special regard to Domat's "Les loix civiles dans leur ordre naturel" the *distinction of nullity and annulment seems to be known in the French jurisprudence even at the end of 17th century*. Therefore, *the traditional view, according to which the distinction of nullity and annulment was first elaborated in the German Pandectist legal science, needs to be revised*.

c) As for *elimination of the cause of invalidity*, the legal constructions of *convalescence* and *conversion* of juridical acts have to be mentioned. Since invalidity can be normally regarded as a "final verdict on the fate of a transaction" (Zimmermann),[82] the elimination of cause of invalidity is always exceptional in

[70] R. Zimmermann, *The law of obligations. Roman foundations of the civilian tradition*, Oxford 1996³, 680.
[71] Mitteis, *op. cit.* passim.
[72] Hellmann, *op. cit.* passim.
[73] Di Paola, *op. cit.* passim.
[74] Staffhorst, *op. cit.* passim, especially 17 f.
[75] M. Marrone, *Istituzioni di diritto romano*, Palermo 1994², 128 f.
[76] Földi, *op. cit.* 75 f.
[77] As for the terminology of invalidity in modern legal systems, in our book we distinguished between a "German-type" and a "French-type" terminology. The characteristic terminology of the French *Code civil* of 1804 concerning invalidity had an essential impact e.g. on the terminology of Spanish *Código civil* of 1889 and of Civil Code of Québec of 1994 concerning invalidity. The terminology of Italian *Codice civile* of 1942 and the Portuguese *Código civil* of 1966 concerning invalidity is based, however, both on the German and French legal tradition.
[78] F. C. von Savigny, *System des heutigen römischen Rechts*, IV, Berlin 1841, 536 ff.; cf. from the modern German literature e.g. S. Mock, *Die Heilung fehlerhafter Rechtsgeschäfte*, Tübingen 2014, 10 ff.
[79] A. Vinnius, *Institutionum imperialum commentarius*, Amsterdam 1665⁴.
[80] J. Domat, *Les loix civiles dans leur ordre naturel*, I, Paris 1745.
[81] R.-J. Pothier, *Traité des obligations*, I, Paris 1764.
[82] Zimmermann, *The law of obligations* (op. cit.), 682. Cf. H. Honsell / Th. Mayer-Maly / W. Selb, *Römisches Recht* (aufgrund des Werkes von P. Jörs / W. Kunkel / L. Wenger), Berlin–Heidelberg–New York 1987, 128: „die Unwirksamkeit eines Rechtsgeschäfts war für die Römer im Grundsatz eine endgültige".

Roman law (cf. the so-called *regula Catoniana* in Roman law[83]) and in modern legal systems. Contrary to *convalescentia*, which means *convalescence of an originally invalid transaction in the same form* (see e.g. Ulp. D. 44, 4, 4, 32; Ulp. D. 6, 1, 72; Pomp. D. 21, 3, 2; Paul. D. 13, 7, 41; Mod. D. 20, 1, 22), *conversio* could be considered as a *transformation of an invalid juridical act into another valid one* (see the definition of Harpprecht, published in 1747: "traductio vel commutatio unius negotii in alterum"[84]). The applicability of modern concept of conversion elaborated according to subtle dogmatic distinctions is much disputed in the Roman law literature (see for instance Giuffrč[85] from the Italian and Krampe[86] from the German bibliography, concerning the problem of dogmatic nature of conversion). After due consideration of the most important sources (cf. Gai. 2, 197; Ulp. 24, 11a; Paul. D. 17, 1, 1, 4; Ulp. D. 29, 1, 3; Ulp. D. 29, 1, 19 pr.), we think that *the modern concept of conversion may be—with certain restrictions—equally applicable in Roman law*.

d) Although – according to Scialoja – the *distinction of total and partial invalidity* is very simple, the reason for existence of partial invalidity is highly contested both in Roman law and private law literature (see for instance the above-cited works of Seiler and Zimmermann; recently see the excellent monograph of Staffhorst). In the light of the most relevant Roman law sources, *partial invalidity of contracts was already known by the classical Roman jurists, who often applied the legal instrument of fiction* in this regard (cf. Paul. D. 18, 1, 57 pr.; Marci. D. 18, 1, 44; Gai. 3, 103; Paul. D. 13, 6, 17 pr.; Ulp. D. 24, 1, 5, 5; Pomp. D. 24, 1, 31, 3; Pap. D. 24, 1, 52 pr.; Ulp. D. 45, 1, 1, 5; Ulp. D. 45, 1, 1, 4; Pomp. D. 45, 1, 109). However, partial invalidity was only expressly formulated by the scholars of *ius commune* (see Accursius, gl. *Per hanc inutilem*, ad. D. 45, 1, 1, 5; *Liber Sextus decretalium D. Bonifacii Papae VIII.*, *De regulis iuris*, *regula* XXXVII). As for the raison d'ętre of partial invalidity: in our opinion, *partial invalidity of a juridical act can only be recognized when the contractual will and, therefore, the juridical act itself can be divided into different autonomous parts and, additionally, when it is backed by the interests of the parties*.

4. Ineffectiveness of legal transactions

a) As for *ineffectiveness of juridical acts*, we would like to focus on the revocation of will from the point of view of the legal dogmatics (from the Hungarian literature see the above-cited essays of Földi and Bessenyő).

First of all, however, some words on the various interpretations of the notion "ineffectiveness".

In our interpretation, *validity is merely a theoretical possibility of producing legal effects*. *Effectiveness means, however, the actual production of the intended legal effects.* The relation of invalidity and ineffectiveness can be described through *various theoretical models*. Nevertheless, *a strict interpretation of ineffectiveness seems to be useful according to which only valid juridical acts are regarded as effective or ineffective*. In this sense, *ineffectiveness only means the state of a valid juridical act when it cannot produce the intended legal effects actually*.

However, modern German lawyers generally use the word "Unwirksamkeit" in the sense of invalidity, without differentiating between invalidity and ineffectiveness of juridical acts.[87] There is a similar situation for instance in the French jurisprudence which does not distinguish dogmatically and terminologically between invalidity ("invalidité") and ineffectiveness ("inefficacité") in strict sense.[88] However, in Italian (using the term of "inefficacia in senso stretto"[89]), Spanish (using the term of "ineficacia en sentido estricto"[90]), and Hungarian[91] literature, the strict distinction of invalidity and ineffectiveness is well-known.

b) As for the legal aspects of *revocation of will*, our point of departure is that *a will cannot induce the required legal consequences*

[83] *„Quod initio vitiosum est, non potest tractu temporis convalescere."* (Paul. D. 50, 17, 29). See e.g. J. Lambert, *La règle catonienne*, Paris 1925; H. Hausmaninger, *Celsus und die regula Catoniana*, TR 36 (1968), 469 ff.; J. M. Sainz-Ezquerra Foces, *La regula catoniana y la imposibilidad de convalidación de los actos jurídicos nulos*, Madrid 1976; I. Buti, *'Regula Catoniana' e convalidazione*, Index 12 (1983–1984), 230 ff.; W. Flume, *Die regula Catoniana – ein Exempel römischer Jurisprudenz*, in: Festschrift für Hubert Niederländer, Heidelberg 1991, 17 ff.; M. Wimmer, *Das Prälegat*, Wien–Köln–Weimar 2004, passim; F. Pergami, *'Quod initio vitiosum est non potest tractu temporis convalescere.' Studi sull'invalidità e sulla sanatoria degli atti negoziali nel sistema privatistico romano*, Torino 2012.

[84] Cf. Krampe, *op. cit.* 29 f.; Zimmermann, *The law of obligations* (op. cit.), 683; Flume, *Allgemeiner Teil* (op. cit), 590.

[85] Giuffrč, *op. cit.*

[86] Krampe, *op. cit.*

[87] See e.g. Staffhorst, *op. cit.* passim; Flume, *Allgemeiner Teil* (op. cit), 58; R. M. Beckmann, *Nichtigkeit und Personenschutz*, Tübingen 1998, 17, contrary to the German literature of the beginning of the 20th century in which the term "Unwirksamkeit" was used in a strict sense (i.e. contrary to the term "Ungültigkeit"; see e.g. W. Figge, *Der Begriff der Unwirksamkeit im BGB*, Diss. Rostock 1902; E. Zitelmann, *Die Rechtsgeschäfte im Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich*, Berlin 1889–1890, II, 69 ff.; E. Till, *Fehlerhafte Rechtsgeschäfte*, Grünhuts Zeitschrift 40 [1914], 209 ff.). See Földi, *op. cit.* 73 ff.

[88] Cf. e.g. F. Terré / Ph. Simler / Y. Lequette, *Droit civil. Les obligations*, Paris 1996[6], 75, describing the inexistence as a third form of the ineffectiveness of a legal transaction („troisičme forme d'inefficacité de l'acte juridique").

[89] See e.g. Scialoja, *op. cit.* 234; A. Guarino, *Diritto privato romano*, Napoli 2001[12], 68 f.; Talamanca, *op. cit.* passim; G. Spoto, *Le invalidità contrattuali*, Napoli 2012, 19 ff. Nevertheless, according to Sacco the distinction between *invalidità* and *inefficacia* can only be regarded as a possible approach (R. Sacco, *Modčles français et modčles allemands dans le droit civil italien*, Revue internationale de droit comparé 28/2 [1976], 225 ff.). On the whole problem, see from the modern Italian bibliography A. La Spina, *Destrutturazione della nullità e inefficacia adeguata*, Milano 2012.

[90] See e.g. Álvarez Suárez, *op. cit.* 41. There are, however, different approaches in this respect, too (see e.g. M. J. García Garrido, *Caducidad de los efectos del contrato y pretensión de restitución. La experiencia española*, in: L. Vacca [cur.], Caducazione degli effetti del contratto e pretese di restituzione, Torino 2006, 135).

[91] In Hungary, the dogmatic and terminological distinction between invalidity („érvénytelenség") and ineffectiveness („hatálytalanság") can be considered is a generally accepted and applied one, especially in the law of obligations. In this sense, "érvénytelenség" means that an existing legal transaction is *potentially* not able to produce the intended legal effects, contrary to "hatálytalanság" which means that an existing and valid legal transaction is *actually* not able to produce the intended legal effects. See e.g. Földi, *op. cit.* 73 ff.; Siklósi, *A nemlétező, érvénytelen és hatálytalan jogügyletek* (op. cit.), passim.

before the testator's death (vivente testatore), only thereafter *(mortuo testatore)*, although the will can produce certain legal effects before the testator's death (e.g. the revocability of the will itself) too. However, these cannot be regarded as intended legal effects.

Related to the provisions of the Hungarian Civil Code of 1959 (650. § [1]) and the new Hungarian Civil Code of 2013 (7:41. § [1]), the revocation of will results in its *subsequent ineffectiveness*. This terminologically problematic provision served as starting point for the investigation of András Földi who strongly criticized the legal provisions of the Civil Code of 1959, proposing the application of the *retroactive invalidity* in this context.

In our opinion, however, *the dogmatic category of retroactive invalidity of juridical acts is untenable*. The undisputable fact that a testator's intentions are changeable right to the end of his or her life cannot justify the retroactive nullity of a revoked will. If that were the case, the parties could annul their contract by mutual agreement with a retroactive effect (e.g. the Roman *novatio*, the French *novation*, or the Italian *novazione* do not cause the retroactive invalidity but the termination of the contract). It is unacceptable to consider a Roman law source (Ulp. D. 34, 4, 4: *„ambulatoria enim est voluntas defuncti usque ad vitae supremum exitum"*) as an evidence for the theoretical justification of retroactive invalidity in modern legal systems. Revocation is an act for which the category of retroactive invalidity cannot be used because invalidity always has a punitive character. To put it briefly, *invalidity is always a sanction*. As for the revocation of a will, it seems appropriate to introduce a third category: the *fall of the will*.[92] It expresses the idea that *a revoked will is incapable of inducing legal effects*. (In Roman law the terminology for it is *rumpitur*, cf. Inst. 2, 17 pr.[93])

We cannot share Bessenyő's opinion, that the problem can be solved by differentiating between "institutional" and "normative" theories. We would recommend instead the determination of an appropriate frame of reference and its consistent adherence. The various meanings and levels of effectiveness need to be kept apart, and the relationship between validity and effectiveness has to be clarified.

c) From the point of view of a practical lawyer, however, it does not make a substantial difference which approach (the subsequent ineffectiveness, the retroactive invalidity, or the fall of the will) is accepted. The essence of all above-mentioned theories is, of course, that the heir is not able to acquire the "inheritance" before the testator's death. However, legal theory delivers further arguments in favour of a consequent, logic, and clear terminology not only because it has a great importance in legal science but also because of its indirect or direct influence on law in action.

5. Conclusions

a) As a starting point, we distinguished *four levels of ability for producing legal effects*: 1) *inexistence of a legal transaction* (when it is not able to produce any typical legal effect); 2) *invalidity of a legal transaction* (when it exists but it is not able to produce the intended legal effects; 3) *ineffectiveness* (in strict sense) *of a legal transaction* (when the juridical act without any legal fault could produce potentially the intended legal effects); and finally 4) *effectiveness* (in strict sense) *of a legal transaction* (when the valid legal transaction is actually producing the intended legal effects).

b) At the first level, the "juridical act" is not able to produce any "typical" legal effects. At the fourth level, however, the existing, valid, and effective juridical act is able to produce potentially as well as actually and in fact is producing the "typical" and intended legal effects. Naturally, it is a simplified model and the reality is much more difficult. At the second level, for instance, the juridical act can be partial or relatively invalid, and at the third and fourth level ineffectiveness or effectiveness can have different intensities.

c) It has been pointed out that a consequent application of legal concepts is of great importance from the point of view of theory. Apart from the theoretical importance one may ask whether the results of this system could be applied in law-making or in legal practice. Here are some examples in this respect.

This conceptual system serves not only for educational purposes but it *can have significance in legal practice and in law-making, too*. For instance, i*n case of inexistence the consequences of invalidity cannot be applied*; an *in integrum restitutio* is not possible; the fault cannot be eliminated since there is no juridical act and, therefore, convalescence or conversion is not possible because no legal transaction exists. In case of inexistence, the rules of extra-contractual liability for damages or the norms of unjustified enrichment are applicable.

As for the discussions concerning the dogmatic nature of the revocation of will, we have to stress the point that (on the basis of the critic of the Hungarian legal experiences) *ineffectiveness must have the same sense in law of contracts and in law of succession as well*. This opinion might be considered in law-making, too.

As for the factors violating the validity of the contracts, we have to note that *the traditional division of the causes of invalidity into faults of contractual will, of declaration, and of intended legal effect can be regarded as schematic*. Therefore, the importance of this model is not to be overestimated. In regard to a famous text of Paul (D. 18, 1, 57 pr.[94]) – which is in the context of partial invalidity relevant – we can lay down that the invalidity of the sale

[92] See the term "caducité" in French law (cf. e.g. F. TERRÉ / Y. LEQUETTE: *Droit civil. Les successions. Les libéralités*, Paris 1997[3], 325 ff.). "Caducité" cannot be identified with "nullité" which always has a punitive character. In addition, see *Código civil brasileiro* (art. 1939ão_III_Da_Caducidade_dos_Legados, *Caducidade dos Legados*); *Nieuw Burgerlijk Wetboek* (4:112, "vervallen").

[93] *„Testamentum iure factum usque eo valet donec rumpatur irritumve fiat."*

[94] *„Domum emi, cum eam et ego et venditor combustam ignoraremus. Nerva, Sabinus, Cassius nihil venisse, quamvis area maneat, pecuniamque solutam condici posse aiunt. Sed si pars domus maneret, Neratius ait hac quaestione multum interesse, quanta pars domus incendio consumpta permaneat, ut, si quidem amplior domus pars exusta est, non compellatur emptor perficere emptionem, sed etiam quod forte solutum ab eo est repetet: sin vero vel dimidia pars vel minor quam dimidia exusta fuerit, tunc coartandus est emptor venditionem adimplere aestimatione viri boni arbitratu habita, ut, quod ex pretio propter incendium decrescere fuerit inventum, ab huius praestatione liberetur."* See for instance M. J. SCHERMAIER, *Auslegung und Konsensbestimmung*, SZ 115 (1998), 235; M. PENNITZ, *Das „periculum rei venditae". Ein Beitrag zum «aktionenrechtlichen Denken» im römischen Privatrecht*, Wien–Köln–Weimar 2000, 224 f.; HARKE, *„Si error aliquis intervenit"* (op. cit.), 188 f.; STAFFHORST, *op. cit.* 94 f.

of a house which has been partially burnt can be based either on mistake (as a fault of contractual will) or on impossibility (as a fault of intended legal effect). There can be different argumentations and approaches in this case, but the result will be the same: invalidity. As for the dogmatic nature of *emptio mixta cum donatione* in context of Ulp. D. 24, 1, 5, 5,[95] the invalidity of the legal transaction might be explained by simulation (as a fault of contractual will) or by an evasion of a legal rule (as a fault of intended legal effect) since the purpose of simulation is always to evade a legal rule.

Both in Roman law and private law literature it is usual and generally accepted to distinguish between physical and legal impossibility. In our opinion, however, *the application of the dogmatic category of legal impossibility has no raison d'ętre since a legally impossible contract is always against the law that is always illegal*.[96]

Regarding the reasons for the existence of the partial invalidity the interest of the parties is to be mentioned rather than abstract dogmatic considerations. It means the application of the so-called "principle of interest" (see the German term "Utilitätsprinzip") which is known and applied in the sphere of contractual liability.[97]

d) The above-mentioned examples clearly show that *dogmatic analysis and dogmatism do not mean the same*. Jurisprudence has to serve, first and foremost, the legislative process and the legal practice.[98] This general statement is also valid for our research concerning the inexistence, the invalidity, and the ineffectiveness of juridical acts.

e) Finally, we hope that the system of concepts of existence (inexistence), validity (invalidity), and effectiveness (ineffectiveness) of legal transactions can be useful for lawyers working both in theory and practice, and not only for private lawyers but also for the experts of other legal branches (e.g. constitutional law, administrative law, law of civil procedure). Since the contract itself can be regarded as a "special norm", inexistence, invalidity, and ineffectiveness of a "special" norm and of a "general" one can be examined in a similar manner. On the basis of this consideration we can speak about, for instance, "non-existing", invalid, ineffective act, judgement, and administrative decision. Placing this assumption in a wider context, the importance of the traditional distinction of private and public law[99] – which is fundamental for lawyers in civil law jurisdictions but unimportant for common lawyers – can also be revised.

[95] *„Circa venditionem quoque Iulianus quidem minoris factam venditionem nullius esse momenti ait. Neratius autem (cuius opinionem Pomponius non improbat) venditionem donationis causa inter virum et uxorem factam nullius esse momenti, si modo, cum animum maritus vendendi non haberet, idcirco venditionem commentus sit, ut donaret: enimvero si, cum animum vendendi haberet, ex pretio ei remisit, venditionem quidem valere, remissionem autem hactenus non valere, quatenus facta est locupletior: itaque si res quindecim venit quinque, nunc autem sit decem, quinque tantum praestanda sunt, quia in hoc locupletior videtur facta."* See for example Seiler, *op. cit.* 54 f.; Zimmermann, *Richterliches Modifikationsrecht oder Totalnichtigkeit?* (op. cit.), 128 f.; Staffhorst, *op. cit.* 83 ff.; R. Scevola, *Negotium mixtum cum donatione. Origini terminologiche e concettuali*, Padova 2008, 178 ff.

[96] Nevertheless, e.g. A. M. Rabello, *The „impossible contract": From Roman law to the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law*, in: Libellus ad Thomasium. Essays in Roman Law, Roman-Dutch Law and Legal History in Honour of Philip J. Thomas, Pretoria 2010, 349 distinguishes between physical and legal impossibility without reservation.

[97] See e.g. B. Kübler, *Das Utilitätsprinzip als Grund der Abstufung bei der Vertragshaftung im klassischen römischen Recht*, in: Festgabe für Otto von Gierke, II, Breslau 1910, 235 ff.; D. Nörr, *Die Entwicklung des Utilitätsgedankens im römischen Haftungsrecht*, SZ 73 (1956), 68 ff.; J.-H. Michel, *Gratuité en droit romain*, Bruxelles 1962, 325 ff.; Zimmermann, *The law of obligations* (op. cit), 198 ff.; M. Navarra, *'Utilitas contrahentium' e sinallagma*, in: L. Garofalo (cur.), La compravendita e l'interdipendenza delle obbligazioni nel diritto romano, 2, Padova 2007, 223 ff.

[98] In respect of the relation of theory and practice see Ph. le Tourneau / L. Cadiet, *Droit de la responsabilité et des contrats*, Paris 2000–2001, 7: « La pratique est la réalité de la théorie ; la théorie est la nature intime et mystérieuse de la pratique. ».

[99] On the problem of distinction between private law and public law see e.g. G. Hamza, *Reflections on the Classification (divisio) into 'Branches' of Modern Legal Systems and Roman Law Traditions*, in: Fides Humanitas Ius. Studii in onore di Luigi Labruna, IV, Napoli 2007, 2449-2476.