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IUS COMMUNE AND CROATIAN PROPERTY LAW*

The purpose of paper is to analyse the significance of the ius commune in the contemporary Croatian property law system and the potential role of its rules in the Europeanization of national property law. The first part of the paper will prima facie comment on the use of ius commune rules as an indirect source of property law, par ticularly in the Croatian judicial practice. Subsequently, the paper explores the pos sibility of treating the ius commune rules as a direct source of property law in the contemporary Croatian legal system. Author concludes thet ius commune rules, ac cording to the provisions of the Law on the Application of Legal Rules passed before April 6, 1941 (Zakon o načinu primjene pravnih propisa donesenih prije 6. travnja 1941. godine), can have the status of a source of contemporary Croatian property law. Their application is possible, as it was seen, primarily owing to the fact that ius commune was in force on 6 April 1941 as a subsidiary law on the territory of Croatia in the areas belonging to the former Hungarian legal area. The final part of the pa per especially questions can a more intense application of those ius commune rules that contain principles of property law common to almost all European legal systems contribute to a further Europeanization of the contemporary national property law. In the view of author, one of the possible ways to improve the process of Europeiza tion of the national property law systems is to recognize the harmonising effect of property law rules of ius commune which are to be found in the judicial acts of the European Court of Justice or the European Court of Human Rights (e.g. accesorium sequitur principale; beatus possidens; bona fides praesumitur; in pari causa melior est condicio possidentis; *nemo plus iuris ad alium transferre potest quam ipse habet; prior tempore potior iure; superficies solo cedit) and to use them systematically in the national judicial practice. Such an approach could prove in concreto that one '... can use the results of the legal historical analysis as a starting point for harmonisa tion in areas where there exists a clear need for a European system of propety law'.*

Key words: *Ius commune*. Property Law. Croatia.

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1. INTRODUCTORY REMARKS

The purpose of this paper is to analyse the significance and role of the *ius commune* tradition as a source of contemporary property law in the Republic of Croatia.

As it is generally known, the term *ius commune* denotes the legal system that was source of law in almost entire Europe in the medieval and early modern times. That system was formed through the reception of Roman Law, i.e. the process of gradual acceptance of the rules of Roman law contained in Justinian's code (*Corpus iuris civilis*) as a positive law and their integration with the certain elements of canon law and costumary laws, with the adjustment of these rules to the needs of life and legal practice of the aforementioned periods.[1] Although *ius commune*, after the centuries of continuous validity, ceased to be a formal source of law in most European countries due to the passage of modern civil codes in the 19th and 20th century, in their very essence the aforementioned codes actually represented different codifications of received Roman law, i.e. the national variations of the common European topic. Thus, in these codified forms the tradition of *ius commune*, with all the principles, institutes and solutions belonging to it, has continued to have a crucial impact on the overall European legal development to the present day.[2] Moreover, it should be emphasised that the tradition of *ius commune* experienced its ultimate culmination during the period in which the idea of codification dominated, owing to the German pandectistic school, the doctrines of which significantly influenced the legislation, science and practice of private law in practically all European countries in the second half of the 19th century and in the 20th century. These doctrines still form the basis of the common European private law dogmatics.[3] In addition to that, in the most recent times the process of the European integration and of making uniform European legal

[1] For general information on *ius commune* as a legal system, see e.g. F. Calasso, *Introduzione al diritto commune*, Milano 1970; H. Coing, *Die ursprüngliche Einheit der europäischen Rechtswissenschaft,* Wiesbaden 1968; *idem*, *Europäische Grundlagen des modernen Privatrechts*, Opladen 1986; M. Bellomo, *L'Europa del diritto comune*, Roma 1998; R. Van Caenegem, *European Law in the Past and the Future*, Cambridge 2002, 13 etc.

[2] See e.g. P. Stein, *Roman Law in European History*, Cambridge 1999, 104 etc.; R. Zimmermann, "The Civil Law in European Codes", in: D. Carey Miller/ R. Zimmer mann (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, Ab erdeen 1997, 259 etc.

[3] For general information on the German pandectistic doctrine in the second half of the 19th century and the creation of the Pandect law system see e.g. F. Wieacker, *Pri vatrechtsgeschichte der Neuzeit*, Göttingen 1996, 430 etc., with references to numerous further reading.

system largely renewed the interest in *ius commune* as a predecessor of this process in itself, whereby Roman legal tradition, as a common denominator of the European legal culture, became an important factor in the formation of contemporary European identity.[4]

Within this context, the purpose of paper is to analyse the significance of the *ius commune* for the contemporary Croatian property and the potential role of *ius commune* rules in the process of its Europeanization, starting from the point of view that fruitful and continuous academic discussion on the possibility of creating the European property law system started more than fifteen yers ago.[5] Before focusing on the topic of *ius commune* as a source of law in the contemporary Croatian property law system, it is necessary to briefly explain what exactly the notion of '*ius commune* rules' refers to in the context of this paper. It primarily refers to maxims or brocards of property law contained in the sources of ancient Roman Law (*dicta et regulae iuris*) or formulated in the medieval and early modern Roman legal tradition on the basis of those ancient sources. These maxims are particularly important due to the fact that they concisely express the millenarian Roman and European experience in the field of property law, ranging from the fundamental legal principles to concrete solutions, and their content is incorporated into the modern systems of property law in Europe to a large extent even today.[6]

Starting from the statement above, and bearing in mind the usual division of the sources of law to direct and indirect sources,[7] the following part of the paper will *prima facie* briefly comment on the use of *ius commune* rules as an indirect source of property law, particularly in the

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[4] For general information on Roman law tradition as a "common denominator" of European (private) law systems in the context of the creation of the European civil law legislation see e.g. F. Sturm, "Droit romain et identité européenne", in: *Droit romain et identité européene*, RIDA. Supplément au tome XLI (1994), 147 etc.; R. Knütel, "Römis ches Recht und Europa", in: *Droit romain et identité européene*, op. cit., 185 etc.; R. Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today*, Oxford 2001.

[5] One of the starting points was undoubtly the *opus magnum* of W. J. Zwalve, *Hoofdstukken uit de Geschiedenis van het Europese Privaatrecht I: Inleiding en zaken recht*, Deventer 1993; for the further discussion see e.g. special issue on European prop erty law of *European Review of Private Law* (vol. 11, no. 3/2003), edited by R.van Rhee & S. van Erp.

[6] On the significance of Latin legal maxims as one of the basic elements of the European legal tradition and legal culture see *amplius* A. Wacke, "Sprichwörtliche Prin zipien und europäische Rechtsangleichung"*, Orbis iuris romani* 5/1999, 174 *etc.*; cf. D. Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter*, München 1991, 9 *etc.*; J. Kranjc, *Latinski pravni reki* [Latin Legal Proverbs], Ljubljana 1998, 5 etc.

[7] On the division in question, see e.g. M. Alinčić et al., *Obiteljsko pravo* [*Family Law]*, Zagreb 2001, 8 *etc.*

Croatian judicial practice. Subsequently, the paper explores the possibility of treating the *ius commune* rules as a direct source of property law in the contemporary Croatian legal system. The final part of the paper especially questions can a more intense application of those *ius commune* rules that contain principles of property law common to almost all European legal systems contribute to a further Europeanization of the contemporary Croatian property law.

2. *IUS COMMUNE* RULES AS AN INDIRECT SOURCE OF CROATIAN PROPERTY LAW

In order to analyse the use of *ius commune* rules as an indirect source of the contemporary Croatian property law, the author has conducted a brief research of the application of these rules in the judicial practice, starting from 1991, i.e. the year when Republic of Croatia is recognized as an independent state. Based on such a research, conducted exclusively through researching the electronic bases of the judicature available on the Internet, only those decisions will be mentioned in which the court literally cites in the Latin language an individual *ius commune* rule.

In the judicature of Croatian courts, from 1991 to date, in the alphabetical order, the following five property law rules that belong to the *ius commune* tradition are mentioned in their Latin formulation in the reasons for judgments or decisions: *accessorium sequitur principale*;[8] *nemo plus iuris ad alium transferre potest quam ipse habet*;[9] *petitorium absorbet possessorium*;[10] *prior tempore potior iure*;[11] *superficies solo cedit.*[12]

[8] See e.g. Municipial Court of Varaždin, Case P 1799/98 47; on the rule *acces sorium sequitur principale*, formulated in *Liber Sextus*, 5,13,42 and based on Gai. D. 33, 8, 2 and Paul. D. 50, 17, 129, 1 and 178, see D. Liebs, 22.

[9] See e.g. Constitutional Court of the Republic of Croatia, Cases U III 1107/1994; U III 919/1997; Supreme Court of the Republic of Croatia, Cases Rev 26/1993 2; Rev 1822/1993 2; Rev 2749/1993 2; on the rule *nemo plus iuris ad alium transferre potest quam ipse habet*, originally contained in Ulp. D. 50, 17, 54, see D. Liebs, 132; J. Kranjc (n. 7), 165.

[10] See e.g. Supreme Court of the Republic of Croatia, Cases Rev 892/1990 2; Gzz 30/1999 2; Gzz 91/00 2; on the rule *petitorium absorbet possessorium*, see D. Lie bs, 154.

[11] See e.g. Commercial Court of Zagreb, Case P 2/2002; on the rule *prior tempore potior iure*, formulated in *Liber Sextus*, 5,13,54 (cf. already Ant. C. 8, 17, 3), see D. Liebs, 162; J. Kranjc (n. 7), 191.

[12] See e.g. Constitutional Court of the Republic of Croatia, Case U III 3214/2005; Supreme Court of the Republic of Croatia, Case Rev 1584/1997 2; on the rule *superficies solo cedit* rule, originally contained in Gai. 2, 73., see D. Liebs, 204; J. Kranjc, 236.

The theme of the referral of the Croatian courts to the *ius commune* rules, including the rules of property law, would definitely deserve a special monographic analysis. Such a research would have to take into consideration all the decisions of the Croatian courts, regardless of their instance, which explicitly mention the *ius commune* rules in the Latin language; the decisions in which the courts implicitly referred to particular *ius commune* rules; and finally, based on the sources obtained, analyse in detail every such case of referring to the *ius commune* rules in the Croatian judicial practice, i.e. precisely determine the legal context in which they were used, and compare the original meaning of a particular rule with its contemporary use for the purpose of providing a critical analysis of all the cases of the application of the '*ius commune* substratum' in the Croatian judicial practice. It is understandable that such a comprehensive research cannot be conducted within the framework of this paper, but it is believed that even on the basis of the modest property law fragment of this future research that was presented here, it is possible to point out that referral to the property law rules of *ius commune* in the Latin language is not a rare or unusual occurrence in Croatian judicial practice. It leads to the conclusion that certain property law rules of *ius commune* are accepted as valid normative contents in the Croatian legal practice.

In that context, it is interesting to emphasise that there are also cases in which the Cabinet of the Republic of Croatia as a sponsor of a bill, or individual Members of Croatian Parliament in the legislative procedure directly refer to property law rules of *ius commune*. Thus, for example, in the argumentation of the final version of the *The Law on Ownership and other Real Property Rights* of July 1996, the sponsor explicitly mentions the principle *superficies solo credit* in the Latin language, explaining the necessity of its reintroduction into the Croatian real property law system with the reasons of "following the European legal tradition" and the needs of "entrepreneurship and market economy". The principle in question has been incorporated in the Article 9, Par. 1 of the aforementioned Law.[13]

Taking the comparative law perspective, it should be pointed out that the direct application by the contemporary legal practice of the *ius commune*, including its property law aspects, represents by no means an *unicum* on the European, or the world scale. Indeed, *ius commune* today represents a subsidiary source of law in a dozen European and non-European countries, and the judicial practice in those countries often bases their decisions directly on the sources of that law, starting from the Justinian's codification.[14] Additionally, in the countries in which *ius commune*

[13] See the argumentation of the final proposal of the Law on Ownership and Oth er Real Property Rights, in: M. Žuvela (ed.), *Zakon o vlasništvu i drugim stvarnim pravi ma* [Law on Ownership and Other Real Property Rights], Zagreb 1997, 312.

[14] Thus with regard to the European countries, *ius commune* is a subsidiary source of law in individual parts of the United Kingdom (Scotland, Channel Islands), Malta, San

no longer represents a source of law in the formal sense, the judicial practice frequently refers to the numerous *ius commune* rules, including the property law ones, particularly in the meaning of legal principles.[15] In the aforementioned context, it is particularly interesting to point out that the EU judicial bodies directly refer to the legal principles of *ius commune*, not excluding the property law ones, in a relevant number of their cases.[16] Therefore it is indisputable that the Croatian legal practice, as is the case, can creatively apply the *ius commune* rules in concrete cases, especially those rules that contain principles and generally accepted legal rules. However, unlike the legal systems in which *ius commune* still represents

Marino, Andorra, and in a strictly limited scope in Spain and Germany. With regard to non European countries, *ius commune* is *in subsidio* applied in the entire area of South Africa (South African Republic, Zimbabwe, Botswana, Lesotho, Swaziland, Namibia), as well as in Sri Lanka and Guiana; generally on *ius commune* as a source of contemporary law in the form of a survey according to individual countries of the world see J. M.J. Chorus, "Romeins Recht op de Zuidpool en Elders", in: J. E. Spruit, (ed.), *Coniectanea Neerlandica Iuris Romani. Inleidende Opstellen over Romeins Recht*, Zwolle 1974, 139 *etc.*; see also R. Evans Jones (ed.), *The Civil Law Tradition in Scotland*, Edinburgh 1995 (for Scotland); W. Zwalve, *Snell v. Beadle. The Privy Council on Roman law, Norman customary law and the ius commune*; in: L. de Ligt (ed.), *Viva vox iuris romani. Essays in honour of J.E. Spruit*, Amsterdam 2002, 379 *etc.* (for Channel Islands); M. Reinkenhof, *Die Anwendung von ius commune in der Republik San Marino. Einführung in die Grund lagen und Erbrecht*, Berlin 1997 (for San Marino); F. Reinoso Barbero, "España y el de recho romano actual", *Labeo. Rassegna di diritto romano* 32/1986, 310 *etc.* (for Spain); M. Kaser & R. Knütel, *Römisches Privatrecht*, München 2003, 14 *etc.* (for Germany); R. Zimmermann, *Das römisch holländische Recht in Südafrika. Einführung in die Grundla gen und usus hodiernus*, Darmstadt 1983 (for South Africa); M. H. J. Van den Horst, *The Roman Dutch Law in Sri Lanka*, Amsterdam 1985 (for Sri Lanka); J. M. Smits, *The Ma king of European Private Law. Towards a Ius Commune Europaeum as a Mixed Legal System*, Antwerpen 2002, 139 (for Guiana).

[15] See e.g. J. Carbonnier, "*Usus hodiernus Pandectarum*", in: *Festschrift für I. Zajtay*, Tübingen 1982, 107 *etc.* (for France); G. Micali, "Il diritto romano nella giurispru denza della Corte Suprema di Cassazione", *Giurisprudenza italiana*, Parte IV, 145/1993, 498 *etc.* (for Italy); W. Wolodkiewicz, *Czy prawo rzymskie przestało istnieć?*, Kraków 2003 (for Poland); cf. S. J. Astorino, "Roman Law in American Law: Twentieth Century Cases of the Supreme Court", *Duquesne Law Review* 40/2001 2002, 627 *etc.* (for the USA); for general information on *ius commune* rules that incorporate general principles of law and their function in contemporary law systems see *amplius* S. Schipani, *La codi ficazione del diritto romano comune*, Torino 1999, 83 *etc.*, with references to further read ing; cf. F. Reinoso Barbero, "El derecho romano como desideratum del derecho del tercer milenio: los principos generales del derecho", *Roma e America. Diritto romano comune. Rivista di diritto dell'integrazione e unificazione del diritto in Europa e in America Lati na*, 3/1997, 23 *etc.*

[16] On the application of the Roman legal rules or *ius commune* rules and the legal principles contained in them by the judicial bodies of the EU see *amplius* R. Knütel, "*Ius commune* und Römisches Recht vor Gerichten der Europäischen Union", *Juristische Schulung* 36/1996, 768 *etc.*; J. M. Rainer, "*Il Diritto romano nelle sentenze delle Corti europee", in: D. Castellano (ed.), L'anima europea dell Europa*, Napoli 2002, 45 *etc.*; F. J. Andrés Santos, "Epistemological Value of Roman Legal Rules in European and Com parative Law", *European Review of Private Law* 12/2004, 347 *etc.*

a source of law or the national and supranational legal systems in which the legal basis for the application of the general principles of law as the source of law is explicitly defined (including the *ius commune* rules which incorporate those principles), the Croatian courts have not explicitly mentioned some positive Croatian regulation as the legal basis for the application of the *ius commune* as a relevant normative content. We consider that the Croatian practice of referring to the rules of *ius commune*, including the property law ones, as the legal principles or normative contents – which serve to fill in the legal gaps or provide a more precise interpretation of the existing legal norms – is completely justified and unquestionable. However, in order for that practice to expand to even wider and more precisely defined proportions with the purpose of improving the Croatian law system, taking into consideration its further Europeanization,[17] it is our belief that it would be useful to attempt to answer the question is there a legal basis for the direct application of *ius commune* rules in the Croatian legal system.

3. *IUS COMMUNE* RULES AS A DIRECT SOURCE OF THE CROATIAN PROPERTY LAW

In order to provide an adequate answer to that question, the only possible way is to start from the text of the *Law on the Application of Legal Rules passed before April 6, 1941* (*Zakon o načinu primjene pravnih propisa donesenih prije 6. travnja 1941. godine*) (hereinafter: ZNPP), which came into force on 31 December 1991.[18] According to the provisions of the ZNPP, legal regulations that were in force on April 6, 1941 are to be applied in the Republic of Croatia as legal rules in the relations that are not regulated by positive legal order of the Republic of Croatia, provided that they are in conformity with the Croatian constitution, and if they have been applied in the Republic of Croatia until the day on which the ZNPP came into force (Arts. 1–2 ZNPP). The basic ratio of the ZNPP is to fill in the legal gaps that exist in the legal system of the Republic of Croatia by the application of legal rules that were in force on the present-day territory of the Republic of Croatia on 6 April 1941.[19] The ZNPP actually defined that all legal regulations from all legal orders that were

[17] On the application of the property law rules of *ius commune* as a manner of Europeanization of the contemporary national property law see *infra* under 4.

[18] *Narodne Novine* [The Official Gazette of Republic of Croatia] 73/91.

[19] 6 April 1941 was the day when the Second World War started on the territory of Croatia, causing the legal discontinuity in the occupied territories; on ZNPP see P. Klarić & M. Vedriš, *Građansko pravo* [*Civil Law*], Zagreb 2006, 19 *etc.*; N. Gavella (ed.), *Hrvatsko građanskopravno uređenje i kontinentalnoeuropski pravni krug* [*Croatian Civil Law Order and Continental European Legal Family*], Zagreb 1994, 170 *etc.*

in force in Croatia on 6 April 1941 can become a subsidiary law if they fulfil the following three conditions: 1) that they were applied on the territory of the present-day Republic of Croatia until 31 December 1991; 2) that there is a legal gap on which an individual legal regulation can be applied; 3) that they are in conformity with the Constitution and the laws of the Republic of Croatia.

Out of these three conditions, only the meaning of first of them seems to be disputable. In our opinion, the only sensible interpretation is that all the rules that were positive law on April 6, 1941 can be applied as a subsidiary source of law if they were in force in any period of time between 6 April 1941 (*dies a quo*) and 31 December 1991 (*dies ad quem*) on the territory of the present-day Republic of Croatia. Through the application of any other criterion, as it was explained in more detail elsewhere,[20] the ZNPP could not fulfil its purpose at all.

However, with regard to the central subject of the paper, i.e. the question can the *ius commune* rules be a source of property law in the Republic of Croatia, either for the purpose of filling in the legal gaps or to enable a more precise interpretation of the existing legal norms, it is of far greater importance to consider the issue does the ZNPP enable the application of the property law rules of *ius commune* as the source of law in any way?

In the aforementioned context, the attention should primarily be drawn to the fact that the traditional Hungarian legal system – based on Werbözy's *Tripartitum* from 1514, as well as on the numerous later regulations that together formed *Corpus iuris hungarici*, as a collection of entire Hungarian law[21] – was still law in force in certain areas (Međimurje, Baranja) of the present-day Republic of Croatia on 6 April 1941.[22] In the time of socialist Yugoslavia (1945–1991), owing to the acceptance of the legal-political principle of 'the unity of law',[23] individual segments of

[20] See *amplius* M. Petrak, "Rimska pravna pravila kao izvor suvremenog hrvatskog obiteljskog prava" [Roman Legal Rules as a Source of Contemporary Croatian Family Law], *Zbornik Pravnog fakulteta u Zagrebu* [*Collected Papers of the Faculty of Law in Zagreb*] 55/2005, 602 *etc.*

[21] On the origin, significance and structure of the *Corpus iuris hungarici* see M. Lanović, *Privatno pravo Tripartita* [*Private Law of Tripartitum]*, Zagreb 1929, 93 *etc.*

[22] On the six different legal areas in interwar Kingdom of Yugoslavia, see G. Benacchio, *La circolazione dei modelli giuridici tra gli Slavi del sud*, Padova 1995, 126 *etc.*; generally about the sources of Hungarian law applied in certain areas of interwar Yugoslavia, see e.g. I. Milić, *Pregled madžarskog privatnog prava u poredjenju sa austrijskim građanskim zakonikom* [*A Survey of Hungarian Private Law in Comparison with the Austrian Civil Code],* Subotica 1921, 7 *etc.; D. Nikolić, Uvod u sistem građanskog prava [An Introduction to the System of Civil Law], Novi Sad 2007, 99 etc.*

[23] On the principle of 'the unity of law', see M. Konstantinović, "Stara 'pravna pravila' i jedinstvo prava" [*Old "Legal Rules" and the Unity of Law*], *Anali Pravnog*

Hungarian law were applied as subsidiary law on the entire Croatian territory until the independence of the Republic of Croatia in the year 1991. Following the Croatian independence, the judicial practice continued – based on the ZNPP – to apply certain rules of Hungarian law as the subsidiary law (e.g. in the area of land-registry law), still using the principle of 'the unity of law' as the relevant criterion.[24] In this context, it is interesting to note that the Republic of Croatia is the only state in which it is still possible to apply *Corpus iuris hungarici*, since regulations contained in the collection in question have been derogated long ago in Hungary and Slovakia by the codifications passed after World War II.[25]

Where lies the connection between the fact that the old Hungarian law can still be applied as Croatian *ius in subsidio* and our quest of a legal basis for the applicability of the property law rules of *ius commune* in the contemporary Croatia? Although Hungarian law resisted the direct reception of Roman law for several centuries,[26] the Hungarian judicial practice and doctrine has since the second half of the 19th century onwards – due to the withering away of the feudal relations and consecutive failed attempts to pass modern national civil code[27] – gradually elevated *ius commune*, including its property law elements, to the level of a subsidiary source of law.[28] The Croatian doctrine between the two World Wars also supported the understanding that *ius commune* is a subsidiary source of

fakulteta u Beogradu [Annals of The Faculty of Law in *Belgrade] 3 4/1982, 540 etc.;* N. Gavella, "*Građansko pravo u Hrvatskoj i kontinentalno europski pravni krug*" [*Civil Law in Croatia and Continental European Legal Family], Zbornik Pravnog fakulteta u Za grebu* [*Collected Papers of the Faculty of Law in Zagreb*] 43/1993, 358 *etc.*

[24] N. Gavella (ed.), 130, note 354.

[25] Civil code was passed in Hungary in 1959, and in the Czechoslovakia in 1950; cf. G. Hamza, *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn*, Budapest 2002, 139 *etc.* & 184.

[26] On the reasons for resisting the reception of Roman Law in Hungary, see e.g. I. Zajtay, "Sur le rôle du droit romain dans l'évolution du droit hongrois", in: *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker*, Vol. II, Milano 1954, 183 *etc.*; G. Bónis, *Einflüsse des römischen Rechts in Ungarn*, *Ius romanum medii aevi*, Pars V, 10, Mediolani 1964, 1 *etc.*, especially 111 *etc.*; A. Földi, "Living Institutions of Roman Law in Hungarian Civil Law", *Helikon* 28/1988, 364 *etc.*

[27] On different attempts to codify Hungarian civil law in the 19th century and the first half of the 20th century, see e.g. J. Zlinszky, "Die historische Rechtsschule und die Gestaltung des ungarischen Privatrechts im 19. Jahrhundert", in: *Studia in honorem Velim irii Pólay septuagenarii. Acta universitatis Szegediensis. Acta juridica et politica, Fas ciculus 1 31,* 33/1985, 433 *etc.*; cf. E. Heymann, *Das ungarische Privatrecht und der Rechtsausgleich mit Ungarn*, Tübingen 1917, 9 *etc.*; G. Hamza, 135 *etc.*

[28] On the gradual acceptance of *ius commune* as subsidiary law in the Hungarian legal system, see e.g. G. Hamza, "Sviluppo del diritto privato ungherese e il diritto ro mano", in: *Ivris vincvla. Studi in onore di M. Talamanca*, Napoli 2001, 357 *etc.*; cf. E. Heymann, 12 *etc.*; A. Földi, 366 *etc.*; G. Hamza, 134 *etc.*

law in the former Hungarian legal area, and this fact should be especially emphasised in the context of determining the scope of the possible application of the property law rules of *ius commune* in the Republic of Croatia today. Thus, for example, Ivo Milić, the well-known legal scholar of the time, resolutely pointed out in the year 1921 that where '... there are no positive regulations, the principles of *ius commune*, i.e. pandect law should be applied without hesitation ...'.[29] Such a situation with regard to the legal sources of the Hungarian law did not change until 6 April 1941.

Since the ZNPP makes no difference between the primary and secondary sources of the law in force on 6 April 1941, and proceeding from the fact that the *ius commune* was a subsidiary source of law in the former Hungarian legal area of Croatia, it should be concluded that the entire corpus of property law rules of *ius commune* – under the conditions defined by the ZNPP – can represent a potential source of contemporary Croatian law.

4. CONCLUDING REMARKS

Based on the conducted analysis, it seems that sufficient arguments were offered to statement that the *ius commune* rules, according to the provisions of the ZNPP, can have the status of a source of contemporary Croatian property law. Their application is possible, as it was seen, primarily owing to the fact that *ius commune* was in force on 6 April 1941 as a subsidiary law on the territory of Croatia in the areas belonging to the former Hungarian legal area. Although the property law rules of *ius commune* have, in the formal sense, only the status of a subsidiary source of law, in the terms of the content they can be of fundamental importance for the contemporary property law system, as a series of these rules contain in themselves the basic principles on which a range of the most important institutes of property law are founded on. Therefore the reception of the property law rules of *ius commune* as a subsidiary law by the judicial practice and legal doctrine could to a relevant extent contribute to a correct interpretation and application of contemporary regulations, and the legal practice could directly apply the principles of property law contained in these rules to a much larger and more precisely defined extent than it was the case so far. Such an application of the property law rules

[29] I. Milić, 1; cf. D. Nikolić, 100; on the life and work of Ivo Milić (1881 1957), professor of Roman Law, Private International Law and Civil Procedural Law at the Fac ulties of Law in Subotica and Zagreb, see M. Apostolova Maršavelski, "Rimsko i pan dektno pravo na Pravnom fakultetu u Zagrebu" [Roman and Pandect Law at the Law Faculty in Zagreb], in: Ž. Pavić, *Pravni fakultet u Zagrebu II* [*Law Faculty in Zagreb II*], Zagreb 1996, 237 *etc.*

of *ius commune*, as it was already said – should by no means represent a *unicum* in the European or global context.[30] It is to point out that some of the leading authorities of property law doctrine and practice in Croatia recently accepted these arguments – explained in more detail elsewhere[31] – on applicability of *ius commune* rules in Croatian context.[32]

Proceeding from the fact that the *ius commune* rules formulated as the Latin legal maxims represent a traditional concise expression of the very essence of the European legal tradition and culture,[33] the final question arises to what an extent could more extensive application of *ius commune* contribute to the further Europeanization of the Croatian property law system? In the recent detailed analyses of the application of the *ius commune* rules by the European judicial bodies, both in the cases of the existence of legal gaps in the European legal order, as well as with the aim of providing a more precise interpretation of its existing legal norms, it is particularly emphasised that a systematic application of those rules as general legal principles common to all national European legal systems that belong to the *ius commune* tradition represents, together with the different types of legislative acts, one of the ways to further harmonisation and/or unification of the European legal area.[34]

With regard to the property law structures of *ius commune*, it was already pointed out that "....underneath the historical differences between common law and civil law and hidden behind their wholly different legal techniques there is more common ground than one might think".[35] For example: "in both civil and common law, two leading maxims are applied: *nemo plus juris ad alium transferre potest quam ipse habet* and *qui prior est tempore potior est jure*".[36]

In our view, one of the possible ways to improve the process of Europeization of the national property law systems is to recognize the harmonising effect of property law rules of *ius commune* which are to be found in the judicial acts of the European Court of Justice or the Euro-

30 See *amplius supra* under 2.

31 See *amplius* M. Petrak, 602 *etc.*

32 See M. Žuvela, *Vlasničkopravni odnosi* [Property Law Relations], Zagreb 2009, 5 etc.

33 Cf. e.g. J. Kranjc, 5; A. Wacke, 174 *etc.*

34 R. Knütel, 768 *etc.*; J. M. Rainer, 2002, 45 *etc.*; F. J. Andrés Santos 2004, 347 *etc.*, which papers provide further analyses of the individual cases in which the *ius com mune* rules were applied in the judicial practice of the EU; cf. also A. Wacke, 174 *etc.*, who particularly emphasises the role of Latin legal maxims and the legal principles con tained in them in the process of the harmonisation and/or unification of the European legal area.

35 Cit. S. van Erp, "Different Degrees of Convergence: A Comparison of Tort Law and Property Law", *Electronic Journal of Comparative Law* 63/2002, 5.

36 Cit. S. van Erp, 6.

pean Court of Human Rights (e.g. *accesorium sequitur principale*;[37] *beatus possidens*;[38] *bona fides praesumitur*;[39] *in pari causa melior est condicio possidentis*;[40] *nemo plus iuris ad alium transferre potest quam ipse habet*;[41] *prior tempore potior iure*;[42] *superficies solo cedit*[43]) and to use them systematically in the national judicial practice. Such an approach could prove *in concreto* that one '...can use the results of the legal historical analysis as a starting point for harmonisation in areas where there exists a clear need for a European system of propety law'.[44]

Taking into consideration all the aforementioned facts, a possible wider scope of the application of the property law rules of *ius commune* in the Croatian judicial practice would not represent just a nostalgic quest for the hidden treasure of the European legal tradition, but a part of a long-term creative effort for the Europeanization of the contemporary national property law systems on the firm foundations of the common legal culture.

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IUS COMMUNE UND KROATISCHES SACHENRECHT

Zusammenfassung

Gegenstand des folgenden Textes ist die Rolle und Bedeutung des ius commu ne als Quelle des heutigen Sachenrechts in der Republik Kroatien. Im einleitenden

[37] See e.g. judgment of the Court of Justice, Case C 6/01; cf. *supra* note 8.

[38] See e.g. judgment of the European Court of Human Rights, Case *Nuutinen v. Finska*, No. 32842/96; on the rule *beatus possidens*, based on Horatius, Carmina, 4, 9, 45, see D. Liebs, 33.; J. Kranjc, 36

[39] See e.g. judgment of the European Court of Human Rights, Case *Florescu* v. *Romania*, No. 41857/02.; on the rule *bona fides praesumitur,* originally contained in Glo ssa *Qui bona fide* on Inst. 2, 6, pr. (Accursius), see D. Liebs, 34.; J. Kranjc, 38.

[40] See e.g. dissenting opinion of Judge Ferrari Bravo on judgment of the European Court of Human Rights, Case *Beyeler* v. *Italy*, No. 33202/96; on the rule *in pari causa melior est condicio possidentis*, based on Ulp. D. 50, 17, 126, 2. and Paul. D. 50, 17, 128, see D. Liebs, 95.

[41] See e.g. order of the Court of Justice, Case C 174/96; cf. *supra* note 9.

[42] See e.g. opinion of Advocate General Trstenjak C 569/08; cf. *supra* note 11.

[43] See e.g. decision of the European Court of Human Rights, Case *Rogoziński and others v. Poland*, No. 13281/04; cf. *supra* note 12.

[44] Cit. R.van Rhee & S. van Erp, "Introduction to the Special Issue on Property Law", *European Review of Private Law* 11/2003, 281.

Teil wird zunächst die Anwendung der Rechtsregeln des ius commune seitens der kroatischen Rechtspraxis als indirekte Quelle des Sachenrechts untersucht. Dabei wird gezeigt, dass einige Prinzipien des ius commune auf dem Gebiet des Sachen rechts in der Rechtspraxis zweifellos als geltendes Recht betrachtet wurden. Sodann wird die Anwendbarkeit des ius commune als einer direkten Quelle des heutigen kroatischen Sachenrechts analysiert. Der Autor kommt zu dem Ergebnis, dass die Anwendung gemeinrechtlicher Prinzipien nach Maßgabe des Gesetzes über die Art der Anwendung der Rechtsvorschriften vom 6. April 1941 möglich ist, und zwar vor allem auf Grund des Umstandes, dass das ius commune in Kroatien an diesem Stich tag jedenfalls in den Gebieten, die zum ehemaligen ungarischen Rechtskreis gehör ten, als subsidiäres Recht in Geltung war. Anschließend wird die Anwendbarkeit der konkreten Rechtsgrundsätze des ius commune innerhalb des kroatischen sachenrecht lichen Systems (e.g. accesorium sequitur principale; beatus possidens; bona fides praesumitur; in pari causa melior est condicio possidentis; *nemo plus iuris ad alium transferre potest quam ipse habet; prior tempore potior iure; superficies solo cedit usw.) anhand von Beispielen im einzelnen vorgeführt. Der Autor kommt zu dem Schluss, dass die Zugrundelegung bestimmter Rechtsprinzipien des ius commune als subsidiäres Recht zur richtigen Auslegung und Anwendung der heutigen sachenrecht lichen Vorschriften beitragen könnte. In einigen Fällen wäre sogar die direkte An wendung solcher Prinzipien bei den Bemühungen um eine Europäisierung des kroa tischen Sachenrechts nützlich.*

Schlüsselwörter: *Ius commune*. Sachenrecht. Kroatien.