| Chapter 1 |

Roman Law as *Ius Commune* in East Central Europe: the Example of the Lands of the Crown of Saint Stephen

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ABSTRACT

The aim of the chapter is to analyze the significance and role of Roman law as *ius commune* in East Central Europe (*Ostmitteleuropa*) from the Middle Ages up until today. The notion of East Central Europe will be pragmatically exemplified for the purposes of this contribution within the context of the Lands of the Crown of Saint Stephen. This territory was and is 'the very heart' of East Central Europe, as it comprises, in their entirety or partly, the following present-day states: Hungary, Croatia, Slovakia, Austria, Poland, Romania, Serbia, Slovenia, and Ukraine. The centrality and importance of the Lands of the Crown of Saint Stephen within East Central Europe also guarantee that the experience of Roman law as *ius commune* in these territories is not unimportant and has a certain level of paradigmaticity. The most important source of traditional pre-1848 law in the Lands of the Crown of Saint Stephen was undoubtedly the *Tripartitum* (1514), which represents one of the milestones of East Central Europe's legal tradition and culture. Despite the explicit declaration that Roman law and canon law are the very basis of the law of *Archiregnum Hungaricum* (*omnia fere iura regni huius originaliter ex pontificiis caesareique iuris fontibus progressum habeant*), this legal collection was, in reality, a compilation of customary law and a powerful legal practice forming work that hindered any major legal transfer. Regardless of the fact that European *ius commune* was not a direct source of law in the pre-1848 period, there were definitely some 'channels' through which Roman legal tradition exerted a considerable influence and impact in the Lands of the Crown of Saint Stephen (e.g., procedural law manuals like Kitonich's *Directio Methodica* and the inclusion of *Digesta 50,17* in *Corpus Iuris Hungarici*), creating the phenomenon called *tacita receptio*. Only since the second half of the 19th century onward has Hungarian judicial practice and doctrine – due to the withering away of feudal relations and consecutive failed attempts to pass a modern national civil code – gradually elevated Roman private law in the form of *ius commune* to the level of a subsidiary source of law. The last part of the contribution deals with the role and significance of Roman law as *ius commune* in the former Lands of the Crown of Saint Stephen in the last hundred years, emphasizing that a possible wider scope of the application of the *ius commune* rules in the national judicial practice, especially in the form of *regulae iuris*, would not just represent a nostalgic quest for the hidden treasure of the European legal tradition but rather a part of a long-term creative effort toward the non-legislative Europeanization of the contemporary legal orders on the firm foundations of the common legal culture.

KEYWORDS

Roman law, *ius commune*, East Central Europe, Lands of the Crown of Saint Stephen, *Tripartitum*, *Corpus Iuris Civilis*, *Corpus Iuris Hungarici*, legal tradition, legal maxims.

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1. Introductory remarks

As it is generally known, the term *ius commune* denotes the legal order that was the source of law across almost all of Europe in the medieval and early modern times. That legal order was formed through the reception of Roman law, that is, the process of gradual acceptance of the rules of Roman law contained in the Justinian codification (*Corpus Iuris Civilis*) as law in force and their integration with certain aspects of canon law and customary laws, with the adjustment of these rules to the needs of life and legal practice in the aforementioned periods.[1] Although *ius commune*, after centuries of continuous validity as *ius in subsidio*, ceased to be a formal source of law in most European countries due to the adoption of modern civil codes in the 19th and 20th centuries, the very essence of the aforementioned codes actually represented different codifications of Roman law, that is, national variations of the common European legacy. Thus, in these codified forms, the tradition of Roman law as *ius commune*, with all the principles, institutes, and solutions belonging to it, continued to exert a crucial impact on overall European legal development to the present day.[2] Moreover, it should be emphasized that the tradition of *ius commune* experienced its ultimate culmination during the period in which the idea of codification dominated, owing to the German Pandectist 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 European integration and of rendering uniform the European legal system largely renewed 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]

As the title makes apparent, this contribution is focused on Roman law as *ius commune* in East Central Europe. In order to avoid entering into a discussion about *vexata quaestio* in relation to East Central Europe (*Ostmitteleuropa*) and its precise borders, that notion will be pragmatically exemplified for the purposes of this contribution within the context of the Lands of the Crown of Saint Stephen. This territory was and is 'the very heart' of East Central Europe, as it comprises, in their entirety

1 For general information about *ius commune* as a legal system, see, e.g., Calasso, 1970; Coing, 1968; id., 1986; Bellomo, 1998; Van Caenegem, 2002, pp. 13 ff.

2 See, e.g., Stein, 1999, pp. 104 ff.; Zimmermann, 1997, pp. 259 ff.

3 For general information about the German pandectistic doctrine in the second half of the 19th century and the creation of the Pandect law system see, e.g., Wieacker, 1996, pp. 430 ff., with references to numerous further reading.

4 For general information about 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., Sturm, 1994, pp. 147 ff.; Knütel, 1994, pp. 185 ff.; Zimmermann, 2001.

or partly, the following present-day states: Hungary, Croatia, Slovakia, Austria (Burgenland), Romania (Transylvania), Serbia (Vojvodina/Délvidék), Slovenia (Prekmurje/Muravidék), Ukraine (Carpathian Ruthenia), and even Poland (Orawa/Árva and Spisz/Szepes counties).[5] It has to be emphasized that every part of East Central Europe has its own story regarding the significance of Roman law as *ius commune*, and thus, the Lands of the Crown of Saint Stephen surely cannot be treated as *pars pro toto* in that context. Nevertheless, the centrality and importance of the Lands of the Crown of Saint Stephen within East Central Europe also guarantee that the experience of Roman law as *ius commune* in these territories is not unimportant and has a certain level of paradigmaticity.

2. Roman law as *ius commune* in the Lands of the Crown of Saint Stephen

Starting with our previous research, which was conducted together with Hungarian colleagues, it must be pointed out that traditional, in other words, pre-1848 law in the Lands of the Crown of Saint Stephen "...was not free from the influence of Roman law. The formation of the Christian kingdom was connected with the organization of the Latin Church. Consequently, the Latin terminology was used for legal institutions in these Lands regardless of whether they appeared in statutory legal rules or their individual elements were referred to and expounded as customary law. However, this did not lead to the prevalence of Canon law and, through it, Roman law. It is possible to show some influences of or correspondences with Canon law and Roman law, but they did not have a crucial impact on the basic institutions that had developed..." in these territories within East Central Europe.[6] The examples of these medieval influences of Roman law (11th–16th C.) on the legal order(s) within the Lands of the Crown of Saint Stephen in nearly all fields of law were thoroughly researched and presented by György Bónis in his book *Einflüsse des römischen Rechts in Ungarn* (1964), which remained the most important and influential study of its kind.[7]

The most important source of traditional pre-1848 law in the Lands of the Crown of Saint Stephen was undoubtedly the *Tripartitum* (*Opus tripartitum juris consuetudinarii*), compiled by Stephen (István) Werbőczy and finished in 1514. This collection represents one of the milestones in East Central Europe's legal tradition and culture. Despite Werbőczy's explicit declaration that Roman and canon law are the very basis of the law of *Archiregnum Hungaricum* (Trip. II,6 pr.: *Omnia fere iura regni huius originaliter ex pontificiis caesareique iuris fontibus progressum habeant*), this legal collection is, in reality, a compilation of the customary law of the Lands of the Crown of Saint

5 On the Lands of the Crown of Saint Stephen and their dismantling after First World War, see, e.g., Macartney, 1937; cf. also Romsics, 2002.
6 Cit. Béli, Petrak and Žiha, 2012, p. 65.
7 Bónis, 1964, pp. 1 ff.

Stephen, especially nobiliary law.[8] Of course, there are some Roman law segments (e.g., in the prologue)[9] and institutes (e.g., guardianship)[10] in *Tripartitum*, but it should be emphasized that this famous customary law collection *"was a powerful legal practice forming work that hindered any major legal transfer."*[11]

Regardless of the fact that European *ius commune* was not a direct source of law in the Lands of the Crown of Saint Stephen in the pre-1848 period, there were definitely some 'channels' through which Roman legal tradition exerted a considerable influence and impact, paving the way for the phenomenon that János Zlinszky, a great Hungarian legal scholar from the last century, more than adequately called *tacita receptio*.[12]

For example, procedural law manuals – such as Ioannes Kitonich's prominent 1619 work *Directio methodica processus iudiciarii iuris consuetudinarii inclyti regni Hungariae* – point to the fact that some important elements of procedural *ius commune* were undoubtedly present in the 'law in action' of the time.[13]

Furthermore, it is very important to note that *Corpus Iuris Hungarici* contained the final title of the last book of Justinian's *Digesta* (D. 50,17), which is entitled *De diversis regulis iuris antiqui*. This title, undoubtedly one of the most significant parts of the Justinian codification (*Corpus Iuris Civilis*), contains 211 short fragments by Roman lawyers, summarizing in the form of *regulae* those basic Roman legal principles on which subsequent European legal culture and the European private law systems were based to a significant extent.[14] The aforementioned *Digesta* was included in the 1581 edition of *Corpus Iuris Hungarici* on the volition of its editor, Hungarian humanist Iohannes Sambucus (János Zsámboky),[15] and thus, the legal rules contained in it exerted a relevant impact by becoming a source of law in the Lands of the Crown of Saint Stephen.

The first wave of the great civil codifications in Europe at the beginning of 19th century (*Code Civil*, ABGB) as codified forms of *ius commune* exerted a certain impact in the Lands of the Crown of Saint Stephen, especially in the Croatian territories.

Regarding the *Code Civil*, it should be pointed out that Napoleon formed the Illyrian provinces on October 14, 1809, after the Peace Treaty of Schönbrunn, which ended yet

8 On Werbőczy's *Tripartitum*, see, e.g., Kadlec, 1902, pp. 17 ff.; Lanović, 1929, pp. 85 ff.; Hamza, 1998–1999, pp. 19 ff.; Rady, 2003. See also the fourth chapter of the present textbook, written by Vladár.

9 See, e.g., Rady, 2006, pp. 103 ff., with further references.

10 See, e.g., Béli, Petraka and Žiha, 2012, pp. 73 f., with further references; generally on the relationship between Roman law tradition and *Tripartitum*, see Bónis, 1964, pp. 68 ff.; Zajtay, 1954, pp. 197 ff.; Szabó, 2002, pp. 769 ff., with further references.

11 Cit. Béli, Petrak and Žiha, 2012, p. 65.

12 Cf. Szabó, 2002, p. 777.

13 On the influence of *ius commune* on Kitonich's *Directio methodica* see, e.g., Damaška, 2004, pp. I ff.; Szabó, 2002, pp. 773 ff., with further references.

14 On *De diversis regulis antiqui*, specifically its structure, contents, and significance in the European legal tradition, see, e.g., Stein, 1962, pp. 1 ff., with further references.

15 See Móra, 1964, p. 413; Hamza, 2002, p. 133.

1.1. The Illyrian Provinces (1814)

another war between Austria and France. Austria lost that war and had to cede to the French the remaining part of Istria (so-called Habsburg Istria) and all the parts on the right bank of Sava river up to the confluence of the Una river. The Illyrian provinces consisted of seven parts: Carinthia, Carniola, Istria with Gorizza, Gradiska and Trieste, Civil Croatia and the Croatian Military Frontier, and Dalmatia and Dubrovnik.[16] With the imperial decree regarding the organization of Illyria (*Décret imperial sur l'organisation de l'Illyrie*) on April 15, 1811, which came into force on January 1, 1812,[17] among other things, Napoleon prescribed the enactment of the French legal system – led by the *Code Civil* and his codifications of other fundamental branches of law (*Code de procédure civile, Code de commerce, Code pénal, Code d'instruction criminelle*) – to all territories belonging to the Illyrian provinces, with the aim of ending legal particularism.[18] Therefore on January 1, 1812, the *Code Civil* formally came into force in all Croatian territories under French rule (Istria, Civil Croatia and the Croatian Military Frontier, and Dalmatia and Dubrovnik), except Slavonia. Some of these territories (Civil Croatia, the Croatian Military Frontier, as well as – as historically seen – Dalmatia and Dubrovnik) were parts of the Lands of the Crown of Saint Stephen. Therefore it can be concluded that *Code Civil*, the most important and influential private law codification *bis dato*, also exerted a relevant influence within some of these lands.

Starting with the basic characteristics of this private law codification,[19] it should primarily be noted that the mere enforcement of the *Code Civil* marked a complete unification of civil law sources for the first time across the entire Croatian territory (except Slavonia) in an attempt to overcome former private law particularism.[20] Consequently, since most *Code Civil* provisions were adopted from *ius commune*, Roman legal tradition, with its legal principles, institutes, and individual provisions, became, for the first time, the dominant private law paradigm in the mentioned parts of the

16 See Maštrović, 1959, pp. 57 ff.; Čulinović, 1961, pp. 209 ff. and especially Ćosić, 2000, pp. 104 ff., with further references; cf. also Bundy, 1987.
17 *Recueil de lois, décrets et réglements à l'usage des provinces Illyriennes de l'Empire*, vol. V, pp. 8 ff.
18 See Maštrović, 1959, p. 58; Ćosić, 2000, pp. 119 ff.
19 About the crucial importance of the *Code Civil* for the French legal system as well as the origins, contents and influence of that codification on further development of civil law worldwide, see, e.g., Rehm, 2012, pp. 200 ff., with further references.
20 Cf. Coing, 1989, pp. 12 ff.; Rehm, 2012, p. 201.

Lands of the Crown of Saint Stephen, overcoming a wide range of local and customary legal traditions that were in force until that time.[21] In the context of the Roman foundations of the *Code Civil*, it must be emphasized that the general structure of Napoleonic codification was built on the Roman institutional system as the tripartition of basic legal categories (*personae*, *res*, *actiones*).[22] Finally, the provisions of the *Code Civil* are heavily imbued with the idea of citizens' rights and freedoms – in the sphere of private law primarily based on the Romanistic principles of private ownership, freedom of contract, and freedom of testation[23] – which means that their application in legal practice inevitably resulted in the certain social individualism and modernization of the entirety private law life as opposed to the various collectivist and traditional legal structures that had been present until that time. Therefore, thanks to the *Code Civil*, with its individualist anthropology based on the described Romanistic principles, the first considerable step toward the modernization of private law life was also made in some parts of the Lands of the Crown of Saint Stephen.

The *Code Civil* was formally in force in these territories for only few years. After the fall of Napoleon's empire, the Illyrian provinces were returned to the Habsburg empire via the Treaty of Paris and the Vienna Congress (1814–1815). Within several years, the *Code Civil* was replaced by another famous European codification, the Austrian ABGB. Thus, in the period from 1814 until 1820, the ABGB came into force in the Croatian Military Frontier (1814), Istria and Rijeka (1815), Dalmatia and Dubrovnik (1816), and finally in the part of Karlovac county that belonged to the Illyrian provinces (1820). At the beginning of the so-called period of Bach's absolutism (1853), the ABGB came into force via the emperor's patent in all the Lands of Crown of Saint Stephen: the Kingdoms of Hungary, Croatia, and Slavonia, the Serbian Voivodeship, and the Banate of Temes.[24] From that time up until today, the Croatian private law system has been under the dominant influence of the Austrian civil law tradition (i.e., the legal norms of the ABGB),[25] while the end of Bach's absolutism led, in 1861, to the removal of the ABGB from Hungary and the return to the *Tripartitum* and other legal sources contained in the *Corpus Iuris Hungarici*.[26]

21 On *ius commune* and its doctrine in France (e.g., Domat, Pothier) as the most important foundation of the *Code Civil*, see an excellent contribution from Gordley, 1994, pp. 459 ff.

22 The institutional system stems from classical Roman jurist Gaius; cf. Gai. Inst. 1.8: *Omne autem ius quo utimur vel ad personas pertinet vel ad res vel ad actiones*; on the institutional system and its philosophical and historical roots see, e.g., Wieacker, 1953, pp. 93 ff., with further references; on the institutional system's influence on the structure of the *Code Civil*, see, in brief, Coing, 1989, pp. 12 ff.

23 On the mentioned principles as basic characteristics of the *Code Civil*, see, e.g., Coing, 1989, pp. 12 ff.; Rehm, 2012, pp. 202 ff.

24 Regarding the exact dates of the enactment of the ABGB in these territories, see Gavella, 1993, pp. 336 ff.

25 Regarding the role of the ABGB in Croatian civil law tradition, see, in detail, Gavella, 1993, pp. 335 ff., with further references; cf. also Maurović, 1911, pp. 685 ff.; Gavella, 1994a, pp. 603 ff.; Josipović, 2011, pp. 157 ff.

26 On the removal of the ABGB from Hungary and the return to the *Tripartitum*, see, e.g., Péter, 2005, p. xx.

However, it could be concluded that the short-term application of the *Code Civil* – in an unpredictable historical dialectic – unquestionably paved the way for a considerably easier subsequent application of the ABGB in some parts of the Lands of the Crown of Saint Stephen, since the Austrian codification analogously implemented the unification, Romanization, and modernization of legal life.[27] Therefore, the tradition of Roman law as *ius commune*, with all the principles, institutes, and solutions belonging to it, has continued to live in these and other more modern codified forms (including the new Hungarian Civil Code of 2014) and has exerted a crucial impact on overall legal development up until today.

Although the Kingdom of Hungary, as it was seen, resisted the more profound reception of Roman law for several centuries, as well as removed the ABGB in 1861 and returned to the *Tripartitum* and the other legal sources contained in the *Corpus Iuris Hungarici*, the Hungarian judicial practice and doctrine has, since the second half of the 19th century onward – due to the withering away of feudal relations and consecutive failed attempts to pass a modern national civil code[28] – gradually elevated Roman private law in the form of *ius commune* to the level of a subsidiary source of law.[29]

It was mentioned above that *Digesta 50,17*, with its fundamental Roman legal principles and rules, represented the primary source of law in the Hungarian legal system from the time of Iohannes Sambucus' (János Zsámboky's) publication of the *Corpus Iuris Hungarici* in 1581. However, as was just seen, since the second half of the 19th century onward, the applicability of Roman law in the form of *ius commune* within the Hungarian legal system was not limited to rules from the *Digesta 50,17*; the rules of *Corpus Iuris Civilis* could be applied as *ius in subsidio* to a much wider extent. As *Corpus Iuris Hungarici*, after the Treaty of Trianon (1920), remained the law in force between two world wars, not only in Hungary, but also in Slovakia,[30] parts of Yugoslavia (the so-called 'former Hungarian legal area,' which included Vojvodina/Délvidék, Međimurje/Muraköz, Baranja/Baranya, and Prekmurje/Muravidék),[31] and even in the two abovementioned Polish counties (Orawa/Árva and Spisz/Szepes),[32] it should be pointed out that the situation with regard to *ius commune* as the subsidiary source of law did not change until the end of that period in these former Lands of the Crown of Saint Stephen. The understanding that *ius commune* is a subsidiary source of private law in the abovementioned territories is strongly supported by legal doctrine between the two world wars. Thus, for example, Ivo Milić (1881–1957), professor of

27 On the general characteristics of the ABGB, see, in more detail, e.g., Doralt, 2012, pp. 45 ff., with further references; especially on the Roman foundations of the ABGB, see Koschembahr-Lyskowski, 1911, pp. 211 ff.; Steinwenter, 1954, pp. 405 ff.; Ogris, 1974, pp. 153 ff.

28 On various attempts at as well as proposals and drafts of the codification of civil law in Hungary in the 19th century and the first half of the 20th century, see, e.g., Zlinszky, 1985, pp. 433 ff.; cf. Heymann, 1917, pp. 9 ff.; Hamza, 2002, pp. 135 ff.

29 On the gradual acceptance of *ius commune* as subsidiary law in the Hungarian private law system, see, e.g., Hamza, 2001, pp. 357 ff.; cf. Heymann, 1917, pp. 12 ff.; Földi, 1988, pp. 366 f.

30 See, e.g., Singer, 1924.

31 See, e.g., Milić, 1921; cf. Nikolić, 2011, pp. 525 ff.

32 See Pęksa, 2010, pp. 91 ff.

1.2. The Lands of the Crown of Saint Stephen (1914) and the Treaty of Trianon (1920)

Roman law, private international law, and civil procedural law at the Faculty of Law in Subotica and Zagreb, resolutely emphasizes in the very beginning of his work *Pregled madžarskog privatnog prava u poredjenju sa austrijskim građanskim zakonikom* [A Survey of Hungarian Private Law in Comparison with the Austrian Civil Code] that where "[...] *there are no positive regulations, the principles of ius commune, i.e. pandect law should be applied without hesitation, as they formed the basis of the Austrian civil code and* [...] *Hungarian private law.*"[33]

The private law regulations contained in *Corpus Iuris Hungarici* were derogated in Hungary, Slovakia, and Poland in the civil codes passed after the Second World War,[34] together with the possibility of the application of *ius commune* as the subsidiary source of law. Only in socialist Yugoslavia – due to the failed attempt to pass a civil code and owing to the acceptance of the legal–political principle of 'the unity of law'[35] – could individual segments of *Corpus Iuris Hungarici* be applied as subsidiary law across the entire state territory until its dissolution in 1991.

33 Cit. Milić, 1921, p. 1; cf. Nikolić, 2007, p. 100; on the life and work of Prof. Ivo Milić, see Apostolova Maršavelski, 1996, p. 237.
34 Civil code was passed in Hungary in 1959, in Czechoslovakia in 1950, and in Poland in 1964; cf. Hamza, 2002, pp. 139 ff., 151 f., and 184.
35 On the principle of 'the unity of law', see Gavella, 1993, pp. 358 f.

3. *Usus hodiernus* of Roman law as *ius commune* in the former Lands of the Crown of Saint Stephen: the case of the Republic of Croatia

To our knowledge, the only successor state of Yugoslavia where judicial practice continued to apply certain rules from *Corpus Iuris Hungarici* as the subsidiary law after 1991 is the Republic of Croatia.[36] Therefore this case would merit a deeper analysis that is undoubtedly connected to the question of the contemporary application of Roman law as *ius commune*.

The legal basis for the contemporary judicial use of the rules of *Corpus iuris Hungarici* in Croatia is 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 December 31, 1991. According to the provisions of the ZNPP, legal regulations that were in force on April 6, 1941 (i.e., the day when the Second World War started in the territory of Croatia, causing legal discontinuity in the occupied territories) are to be applied in the Republic of Croatia as legal rules to those relations that are not regulated by the positive legal order of the Republic of Croatia, provided that they are in conformity with the Croatian constitution. The basic purpose of the ZNPP is to fill in the legal gaps that exist in the legal system of the Republic of Croatia (e.g., no civil code has been passed) through the application of legal rules that were in force in the present-day territory of the Republic of Croatia on April 6, 1941.[37]

As seen, *Digesta 50,17* continued to be an integral part of the *Corpus iuris Hungarici*,[38] and thus, it was also a primary source of law until the Second World War in the Croatian territories belonging to the 'former Hungarian legal area' (Međimurje/Muraköz, Baranja/Baranya). Therefore, we assert that they should still be treated – taking into consideration the aforementioned principle of 'the unity of law' – as potential subsidiary law in the Republic of Croatia in the sense of the norms of the ZNPP.

In that context, it is particularly interesting to note that the Supreme Court of the Republic of Croatia – after Croatian independence – in their reasons for judgments explicitly referred to certain *regulae* contained in the aforementioned Justinian's *Digesta*, for example, *quod ab initio vitiosum est, non potest tractu temporis convalescere* (D. 50,17,29),[39] *nemo plus iuris ad alium transferre potest, quam ipse haberet* (D. 50,17,54)[40] or *res iudicata pro veritate accipitur* (D. 50,17,207),[41] which undoubtedly proves that the legal rules in question have been accepted as relevant normative content in the Croatian judicial practice. However, the aim of the analysis of the *Digesta 50,17* conducted

36 For example, in the land registry law, the Hungarian Act XXIX of 1886 was applied; see Gavella, 1994b, p. 130, n. 354.
37 On the ZNPP, see Gavella et al., 1994b, pp. 170 f.
38 Cf. Lanović, 1929, p. 96.
39 I Kž 545/1991-3; on the rule in question, see Petrak, 2010, p. 116.
40 II Rev 26/1993-2; Rev 2749/1993-2; Rev 1822/1993-2; cf. U-III-1107/1994; see Petrak, 2010, p. 90.
41 Rev 1396/1993-2; Revt-80/02-2; see Petrak, 2010, p. 120.

here is to point to the fact that Croatian judicial practice could certainly take a step further, meaning that the legal rules contained in the aforementioned title should not be applied as a mere argument in the explanation of judicial decisions, but that this part of Justinian's *Corpus Iuris Civilis* can – via *Corpus Iuris Hungarici* and under the conditions determined by the ZNPP – be applied as a source of positive law in the Republic of Croatia.

According to the authors' opinion, the applicability of Roman private law in the form of *ius commune* within the contemporary Croatian legal system – owing to the fact that the Hungarian private law system was in force in the Croatian territories on April 6, 1941 and that it therefore still represents a potential source of subsidiary law – is not limited to the rules from the *Digesta 50,17,* as the rules of *Corpus Iuris Civilis* could be applied to a much wider extent. As has been demonstrated, the *Digesta 50,17* represented the primary source of law, as it was directly contained in the *Corpus Iuris Hungarici*. It was also mentioned above that Hungarian judicial practice and doctrine have, since the second half of the 19th century onward, gradually elevated Roman private law in the form of *ius commune* to the level of a subsidiary source of law. Moreover, it was already pointed out that legal doctrine between the two world wars also supported the understanding that *ius commune* is a subsidiary source in the 'former Hungarian legal area,' and this fact should be emphasized in the context of determining the scope of the possible application of the rules of *Corpus Iuris Civilis* in the Republic of Croatia today. Such a situation with regard to the legal sources in the 'former Hungarian legal area' did not change until April 6, 1941, the day when the Second World War started in the territory of Croatia.

Based on the previously conducted analysis, it can be emphasized that the rules of *ius commune* – via the *Corpus Iuris Hungarici* and under the conditions determined by the ZNPP – could be applied as a source of contemporary law in the Republic of Croatia through two different 'channels.' Firstly, owing to the fact that the *Digesta 50,17* was a primary source of law on April 6, 1941 in the Croatian territories belonging to the 'former Hungarian legal area,' the principles contained in the aforementioned *Digesta* are still applicable in the Republic of Croatia – in the sense of the provisions of the ZNPP – and this was confirmed by the judicature of the Supreme Court. Secondly, since the ZNPP does not distinguish between the primary and secondary sources of the law on April 6, 1941 and proceeding from the fact that Roman private law in the form of *ius commune* was a subsidiary source of private law in the 'former Hungarian legal area of Croatia,' it should be concluded that the entire corpus of *ius commune* can represent a potential source of contemporary Croatian law. As the second 'channel' is much more extensive than the first one and given that it absorbs it in its entirety, it is necessary to finally conclude that all the *ius commune* rules – and not just the legal rules contained in the *Digesta 50,17* – can have the status of the source of Croatian law under the conditions defined by the ZNPP.

Based on the analysis conducted, it seems that sufficient arguments were offered to support the statement that the *ius commune* rules, according to the provisions of the ZNPP, can have the status of a source of contemporary Croatian private law. Their

application is possible, as has been demonstrated, primarily owing to the fact that *ius commune* was a legal source on April 6, 1941 as a subsidiary law in the territory of Croatia in the territories belonging to the 'former Hungarian legal area.' Although the *ius commune* rules only formally have the status of a subsidiary source of law, in terms of content, they can be regarded as being of fundamental importance for the contemporary legal system, as a series of these rules contain in themselves the basic legal principles upon which a range of the most important legal institutes are founded.[42] Therefore, the reception of the *ius commune* rules as subsidiary law by judicial practice and legal doctrine could to a relevant extent contribute to the correct interpretation and application of contemporary legal regulations, and legal practice could directly apply the legal principles contained in these rules to a much larger and more precisely defined extent than it has been the case so far, especially as it pertains to legal gaps.[43]

From the comparative law perspective, it should be pointed out that such *usus hodiernus* of the *ius commune* rules should by no means represent a *unicum* in the European or global context. Indeed, Roman law as *ius commune* today represents a subsidiary source of positive private law in a dozen European and non-European countries, and the decisions of those countries' judicial practice are often based directly on the sources of that law, starting with the Justinian codification.[44] Additionally, in countries in which *ius commune* no longer represents a source of positive law, judicial practice frequently refers to the numerous *ius commune* rules, particularly regarding the meaning of legal principles.[45] In the aforementioned context, it is particularly interesting to point out that the judicial bodies of the European Union (EU), as well as the international courts, directly refer to the legal principles of *ius commune* in a relevant number of their cases.[46] Therefore, it is indisputable that the national legal

42 Thus, for example, the *superficies solo cedit* rule as a fundamental principle of the contemporary Croatian law of real property is relevant for the legal regulation of almost all institutes of the law of real property today, including those that did not originate under the Roman legal tradition (e.g., *condominium*, land-registry books, etc.).

43 Generally on the significance of the *ius commune* rules that incorporate the general principles of law, see, e.g., Wacke, 1999, pp. 174 ff.; Kranjc, 1998, pp. 5 ff.; Petrak, 2010, pp. 1 ff.

44 Thus, with regard to the European countries, *ius commune* is a subsidiary source of positive private law in individual parts of the United Kingdom (Scotland, Channel Islands), Malta, San 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; on *ius commune* as a contemporary positive law in the form of a survey according to individual countries of the world, see Chorus, 1974, pp. 139 ff.; Evans-Jones (ed.), 1995 (for Scotland); Zwalve, 2002, pp. 379 ff. (for Channel Islands); Reinkenhof, 1997 (for San Marino); Reinoso Barbero, 1986, pp. 310 ff. (for Spain); Kaser/Knütel, 2003, pp. 14 ff. (for Germany); Zimmermann, 1983 (for South Africa); Van den Horst, 1985 (for Sri Lanka); Smits, 2002, p. 139 (for Guiana).

45 See, e.g., Carbonnier, 1982, pp. 107 ff. (for France); Micali, 1993, pp. 489 ff. (for Italy); Wolodkiewicz, 2003 (for Poland); cf. Astorino, 2001–2002, pp. 627 ff. (for the United States).

46 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 European Union (EU), see amplius Knütel, 1996, pp. 768 ff.; Rainer, 2002, pp. 45 ff.; Andrés Santos, 2004, pp. 347 ff.; on the application of these rules by international courts, see, e.g., Lesaffer, 2005, pp. 25 ff.; cf. Baldus, 2000.

practice, as is the case, can creatively apply the *ius commune* rules in concrete cases, especially those rules that contain general legal principles.

4. Concluding remarks

Proceeding from the fact that the *ius commune* rules formulated as Latin legal maxims represent a traditional concise expression of the very essence of the European legal tradition and culture, a final question arises: To what extent could their more extensive application contribute to the further Europeanization of national legal systems? In recent detailed analyses of the application of the *ius commune* rules by the judicial bodies of the EU, both in 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 emphasized 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 achieve further harmonization and/or unification of the European legal area.[47] Moreover, it should be mentioned that certain authors of the already famous *Principles of European Contract Law*, one of the most significant recent projects directed toward the Europeanization of private law, determined in their detailed analyses that the principles in question are, in essence, a modern reformulation of the traditional *ius commune* rules.[48] Considering all the aforementioned facts, a possibly wider scope of the application of the *ius commune* rules in the national judicial practice, as has been done for a long time in the former Lands of Crown of Saint Stephen, would not just represent a nostalgic quest for the hidden treasure of the European legal tradition, but also a part of a long-term creative effort for the Europeanization of the contemporary legal orders of these territories on the firm foundations of the common legal culture: *Corpus Iuris Civilis* and *Corpus Iuris Hungarici*.[49]

47 Thus, for example, the following rules were applied: *alterum non laedere*; *audiatur et altera pars*; *dolo petit qui petit quod statim redditurum est*; *ne bis in idem*; *nemo auditur propriam turpitudinem allegans*; *nemo censetur ignorare legem*; *non contra factum proprium*; *nulla poena sine culpa*; *nulla poena sine lege*; *nullum crimen sine lege*; *pacta sunt servanda*; *patere legem quam fecisti*; *venire contra factum proprium*; *vim vi repellere licet*; see Knütel, 1996, pp. 768 ff.; Rainer, 2002, pp. 45 ff.; Andrés Santos, 2004, pp. 347 ff., as these papers provide further analyses of the individual cases in which the *ius commune* rules were applied in the judicial practice of the EU; cf. also Wacke, 199, pp. 174 ff., who particularly emphasizes the role of Latin legal maxims and the legal principles contained in them in the process of the Europeanization of private law.

48 See Zimmermann, 2006, pp. 1 ff.

49 Cf. Zlinszky, 1994, pp. 61 ff.

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