

# Principles of Roman Law absorbed in the New Dutch Civil Code.<sup>1</sup>

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1. In this lecture I want to discuss principles of Roman law which have been absorbed in the new Dutch Civil Code. It will be clear that, before I can begin to examine these principles, I will have to give some information about the development of Dutch private law since its first codification and to explain the exact meaning of the words "the New Dutch Civil Code". At the end of this essay I will make a few remarks on the importance of a good knowledge of Roman private law for the comparison and the unification of private law systems in Europe.

This paper will therefore be divided into the following three parts:

- I. Some data concerning the development of Dutch private law since 1809 and about the revision of the Dutch Civil Code since 1947.
- II. Principles, rules and institutions of Roman law which can be found in the books on Patrimonial Law in General, on Real Rights, on Obligations and on Special Contracts of the Dutch Civil Code, which were introduced in 1992.
- III. Some observations on the value of a good knowledge of Roman private law for lawyers of the 21st century who want to study in a comparative way the European systems of private law and to unify parts of private law in Europe.

## I.

### Some data concerning the development of Dutch private law since 1809 and the revision of the Dutch Civil Code since 1947.

2. Before I will be able to speak about the new Dutch Civil Code and especially about the Books 3, 5, 6 and a part of Book 7 which are implemented since January

<sup>1</sup>Elaborated text of a lecture given at the Faculty of Law of the Masaryk University in October 1994. I thank Professor Dr. Dalibor Jílek, Vice-dean, for his invitation and my colleagues of Roman Law Dr. Michaela Židlická and Dr. Renata Veselá for their kind hospitality.

1st 1992, I will have to give some information about the development of Dutch private law since the first codification of the civil law in 1809<sup>2</sup>.

The first code of a part of private law, viz. civil law, the 'Wetboek Napoleon ingerigt voor het Koninkrijk Holland' came into being for the Kingdom of Holland in 1809 by order of King Louis Napoléon, brother of Napoléon. It was partly based on the French Code civil, partly on the old private law of the province of Holland, from which the general community of property as the legal system of matrimonial property and the requirement of delivery for the transfer of ownership, had been taken. From 1811 till the end of 1813 the Netherlands were part of the French Empire. In 1811 the five French codes entered into force. Two of them are relevant for us here: the French 'Code civil' of 1804 in its version of 1807, called "code Napoléon" and the French 'Code de Commerce' of 1807. Four of these five codes, among them the two last mentioned, remained in force until 1838; the 'Code pénal' was not replaced by a Dutch penal code until 1886; the latter is still in force, though many provisions have been modified.

In 1838 the Dutch Civil Code ('Burgerlijk Wetboek') came into force together with the Dutch Commercial Code ('Wetboek van Koophandel'). Parts of the Civil Code, viz. the regulation of the law of successions and the main part of the law concerning special contracts, are still applied today. When it came into force, the 'Wetboek' of 1838 was, roughly estimated, for 70 % a translation and an adaptation of the French Civil Code. Important differences came from Roman-Dutch law, e.g. the general community of property between spouses and the rule that ownership was transferred not by contract but by an act of delivery. From the beginning of this century the Civil Code became less and less apt to deal with the changed and changing social and economic circumstances. It was no longer in accordance with social and political opinions. Many partial changes of the contents of the code took place. I will only mention a few of them: the introduction of parental instead of paternal authority in 1905, the introduction of an extended, fundamentally

<sup>2</sup>See on the history of codified Dutch private law A.J.M. Kunst in Introduction to Dutch law for foreign lawyers, ed. by D.C. Fokkema, J.M.J. Chorus, E.H. Hondius and E.Ch. Lisser, Deventer 1978, p. 11; E. Holthöfer in Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, III. Band. Das 19. Jahrhundert, 1. Teilband, Gesetzgebung zum allgemeinen Privatrecht, München, 1982, pp. 1191-1400 en III. Band. Das 19. Jahrhundert, 3. Teilband, Gesetzgebung zu den privatrechtlichen Sondergebieten, München 1986, pp. 3402-3472; A.S. Hartkamp, The civil code revision in the Netherlands 1947 - 1992, in New Netherlands Civil Code. Patrimonial Law (Property, Obligations and Special Contracts) /Nouveau Code Civil Néerlandais. Le Droit Patrimonial (Les Biens, Les Obligations, Les Contrats Particuliers) /Nieuw Nederlands Burgerlijk Wetboek. Het Vermogensrecht (Zakenrecht, Verbintenissenrecht en Bijzondere Overeenkomsten), translated by /traduit par/ vertaald door P.P.C. Haanappel, E. Mackaay, Deventer 1990, (hereafter: New Netherlands Civil Code. Patrimonial Law, 1990), pp. XIII - XIV; J.M.J. Chorus, in Introduction to Dutch Law for foreign lawyers, second revised edition, ed. by J. Chorus, P.H. Gerver, E. Hondius, A. Koekoek, Deventer 1993, (hereafter: Introduction, 1993) p. 12.; A.S. Hartkamp, Das neue niederländische Bürgerliche Gesetzbuch aus europäischer Sicht, in: *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 57(1993), pp. 665-667.

different regulation of the labour contract, with numerous rules of *ius cogens* to protect the socially weak labourers, in 1909, the creation of a much better position of the surviving spouse in the law of intestate succession in 1923, the introduction of a regulation of the hire purchase contract (with rules tending to the protection of the hire purchaser) in 1936 and the abolishment of the incapacity of married women and the introduction of adoption both in 1956. All these partial modifications of the Civil Code harmed its consistency.

At the end of last century another important phenomenon came into being for many subjects: particularly but not exclusively, in the fields of intellectual and industrial property many statutes were introduced independently from the Civil Code. Often these statutes contained rules of private law, of procedure, of penal law and of administrative law. An example of this type of statutes is the Act concerning the lease of land for agricultural purposes of 1937. As a consequence of these statutes numerous statutory rules of private law on many legal institutions cannot be found in the Civil Code.

Another even more important reason why the Civil Code became less and less the source of the main principles and rules of civil law was the huge growth of the number of new rules of law created by decisions of the Supreme Court. Important parts of this judge-made civil law had but a small, if any, point of contact with the code. Whole branches of civil law were almost totally created and developed by the Supreme Court. I give as examples the law concerning unlawful act (tort), ownership of movables, fiduciary security of movables and natural obligations. Constitutionally this creation of new law by the Supreme Court, especially in cases of political interest, was not without its problems: the judges of the Supreme Court, though not responsible to Parliament, assumed the role of legislator. There were also practical problems: many questions for which the Civil Code did not give a satisfactory solution were not even brought before the Supreme Court.

Finally, there were numerous titles and articles in the Civil Code that were defective. As early as 1928, in a famous paper, prof. E.M. Meijers (1880-1954) published a list of one hundred points on which the Code was *omnium consensu erroneus*<sup>3</sup>.

It was prof. Meijers in particular who maintained, before and after the Second World War, that, for all the reasons mentioned above, a recodification of private law was necessary. The Commercial Code of 1838 too, although parts of it (e.g. the title on insurance law) are still in force had begun to be antiquated already at the end of the last century. In 1896 the law of bankruptcy was taken out of the Commercial Code and put into a special statute, to wit the Bankruptcy Act, which was applicable to merchants and non-merchants alike. Important parts of the Commercial Code were modernized in our century, e.g. the law of transport by sea

<sup>3</sup>See E.M. Meijers, *Het fellooze deel van ons Burgerlijk Wetboek* (The faultless part of our Civil Code) in *Weekblad voor Privaatrecht, Notarisambt en Registratie*, 1928, nr.3031 = *Verzamelde Privaatrechtelijke Opstellen*, I, Leiden 1954, pp. 93 - 98.

(1924), the law concerning limited companies (1929) and the law concerning bills of exchange and cheques (1932 and 1933). In 1934 the existing special rules for acts of commerce and for merchants were abolished, and in the opinion of most lawyers there was no longer any reason to have a special Commercial Code. This unity of private law is in accordance with the 17th and 18th century Dutch law, which did not know a separate commercial law. The distinction between civil and commercial law was introduced in the Netherlands in 1809, under the influence of French law.

3. After the Second World War prof. Meijers got adherence with his idea that a new Civil Code should be made. By Royal Decree of 1947<sup>4</sup> Meijers, professor of civil law at Leyden University from 1910 till 1950, was entrusted with the mandate to make a draft for a new Civil Code divided in 9 books. Since it had to be a "codice unico" as existed in Switzerland and Italy, the rules of commercial law had to be incorporated in the new Code<sup>5</sup>. Meijers worked seven years on his draft for the new Civil Code. In 1954 the Books 1-4 with Explanatory Commentary were published. Then, unexpectedly Meijers died in June 1954. His work was continued by others. I only will mention here the names of four eminent jurists who drafted parts of the new Code and defended them in Parliament as governmental commissioners: Prof. J. Drion, Meijers' successor as professor of civil law at Leyden University, Dr. G.E. Langemeijer, "Procureur-generaal" at the Supreme Court, Mr. W. Snijders, judge in the Supreme Court (all three for the books 3, 5 and 6) and professor H. Schadee (for book 8). An important part of the work of recodification has also been done by Dr. A.S. Hartkamp, who was a member of the Civil Code Revision Office of the Ministry of Justice for many years (he is now "Advocaat-Generaal" at the Supreme Court and professor of private law at the University of Utrecht). The basis was always a draft made by an individual lawyer or a group of lawyers. Based thereon, bills were presented in Parliament, containing books or parts of books.

According to Meijers the new Civil Code had to consist of 9 Books<sup>6</sup>:

1. Law of Persons and Family Law (including the law of matrimonial property).
2. Law of Legal Persons.
3. Patrimonial Law in general.
4. Law of successions.
5. Real Rights.
6. General Part of the Law of Obligations.

<sup>4</sup>On the revision of the Civil Code, see A.S. Hartkamp, Civil code Revision in the Netherlands 1947-1992, in *New Netherlands Civil Code. Patrimonial Law*, translated by P.P.C. Haanappel and S. Mackaay, Deventer 1990, pp. XIII-XXVI, and articles by Hartkamp, Hondius and Snijders mentioned in Introduction, 1993, p.440.

<sup>5</sup>They can now be found in Book 2 (legal persons), Book 7 (special contracts) and Book 8 (law of transport).

<sup>6</sup>See on the classification of the new Dutch Civil Code, Hondius, in Introduction 1993, pp. 33-35, the works mentioned in Introduction, 1993, p.440, and A.S. Hartkamp, *Das neue niederländische Bürgerliche Gesetzbuch aus europäischer Sicht*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 57(1993), pp. 668-670.

7. Special Contracts.
8. Law of Transport.
9. Law of Products of the Mind (Intellectual and Industrial Property).

Books 1-6 and parts of Books 7 and 8 have been enacted<sup>7</sup>. Book 1 came into force in 1970, Book 2 in 1976; the main part of Book 8 (containing already more than 1830 articles) in 1991 and 1993. The Books 3,5 and 6 and four titles of Book 7 were implemented in January 1992, three other titles of this Book followed suit on December 31, 1992 and September 1, 1993. No work was done concerning Book 9 till the autumn of 1993; recently professor J.J. Brinkhof was appointed as a governmental commissioner for this Book, and it is possible that some general rules on patrimonial aspects of the institutions of industrial and intellectual property will be drafted. Finally, the possibility of the drafting of a Book 10, containing a codification of rules of private international law is discussed. Though excellent specialists in this field of law are not in favour of such a codification, it seems probable that a draft will be made in the future.

4. We will now return to the Books 3,5,6 and 7; we will go into some more details about them<sup>8</sup>, since, as we will see, these books are the relevant ones for the subject of this paper.

Fundamentally new is Book 3, giving rules of Patrimonial Law in general. It is not an "Allgemeiner Teil" in the sense of the German Civil Code, which contains provisions applicable to the whole body of private law, but it contains provisions which are applicable to all subsequent books of the Code. The first title: General Provisions contains definitions and provisions on entries regarding registered property. Decisive for the whole classification of the Code are the definitions of the articles 1 and 2 of Book 3. The Code makes a distinction between "goederen" (property) and "zaken" (things). According to art.1 property is comprised of all things and of all patrimonial rights<sup>9</sup>. Art.2. defines "things" as "corporeal objects susceptible of human control"<sup>10</sup>. Provisions on "goederen" are incorporated in Book 3, provisions on "zaken" in Book 5. As in the German BGB a rather extended title is dedicated

<sup>7</sup>Book 4 on the Law of Successions was enacted already in 1969, but has still not been put into force, because of a dispute between the Ministry of Justice and the public notaries on the intestate position of the surviving spouse.

<sup>8</sup>See about the law of these four Books, which were almost entirely put into force in 1992: F. Bydinski, Th. Mayer-Maly, J.W. Pichler (Hrg.), *Renaissance der Idee der Kodifikation. Das neue Niederländische Bürgerliche Gesetzbuch 1992*, Wien, usw. 1991, pp. 23-157 (articles by D. van Dijk, E.H. Hondius, A.S. Hartkamp and J.B.M. Vranken); chapters 7, 8 and 9 of Introduction, 1993, pp. 63-124 and the works mentioned in this book on pp. 440-442, and lastly Hartkamp, *Das neue niederländische Bürgerliche Gesetzbuch aus europäischer Sicht*, in *Rabels Zeitschrift* 57(1993), pp. 670-684.

<sup>9</sup>For all provisions which entered into force on the first of January 1992 we use the English translation made by Haanappel and Mackaay mentioned above in note 2.

<sup>10</sup>Our Civil Code was influenced here by the German Civil Code; see § 90 BGB: "Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände." To indicate property the German legal terminology uses the word "Güter" or "Gegenstände".

to juridical acts. The subjects of the remaining titles of Book 3 are: Procuration (title 3); Acquisition and loss of property (title 4); Possession and detention (title 5); Community (title 6); Usufruct (title 8); Rights of pledge and hypothec (title 9); The right of recourse on property (title 10) and Rights of action (title 11). It has to be noted that the rights of the titles 8 and 9, which were traditionally known as "real rights", are treated separately from the real rights of Book 5. The "absolute rights" of the titles mentioned above, called "restricted rights" in the Code, are regulated in Book 3 since they can be vested in things as well as on patrimonial rights.

Book 5, entitled "Real rights", contains provisions on ownership and the other real rights, viz. servitudes, emphyteusis, the right of superficies and apartment rights. These rights can only have things for their objects.

An enormous amount of profound legal thinking has been invested in Book 6: "General Part of the Law of Obligations". It is divided into five titles, to wit: Obligations in general (title 1), Transfer of claims and debts and renunciation of claims (title 2), Unlawful act (title 3), Obligations arising from sources other than unlawful act or contract (title 4) and Contracts in general (title 5). There has been much discussion about the first article of Book 6: "Obligations can only arise if such results from the wet". Haanappel and Mackaay translate "if such results from the law". The Dutch word "wet" however has the meaning of 'statutory law'. The intention of the legislator was to establish that obligations can only exist in accordance with statute law. This seems too restricted to me. Obligations can certainly arise from international treaties and it seems tenable that they also arise from unwritten law and custom. It is impossible to give here even an impression of the extreme variety of subjects of the five titles of Book 6. Subjects regulated are among others: plurality of debtors or creditors, alternative and conditional obligations, performance of obligations, rights to suspend performance, the effects of non-performance of an obligation, creditor's default, legal obligations to repair damage, obligations to pay a sum of money and compensation.

On the first of January 1992 four titles of Book 7: "Special Contracts" were put into force. These are the titles on sale and exchange, mandate, deposit and suretyship. In Book 7A were incorporated those titles from the old Dutch Civil Code for which no new regulation had been as yet enacted, e.g. hire-purchase, lease, labour contract, undertaking for a work and loan for consumption.

Since the first of January 1992 some new titles have been incorporated into Book 7 and have been put into effect. Since the 31st of December 1992 we have a new regulation of the travel contract (title 7A). On the first of September 1993 the title on "lastgeving" has been replaced by the title on "opdracht", the contract by which one party obliges himself to the other party to perform activities for him not within the framework of a labourcontract ("dienstbetrekking"); if these activities are legal acts the contract is called "lastgeving" (mandate). Finally on the same date a new title on the contract of settlement ("vaststellingsovereenkomst") has been put into force.

If we examine the contents of the Books 3, 5, and 6 and of those titles of Book 7 that already have become law, the words of Justinian as they were phrased in the constitution Tanta<sup>11</sup> by which he introduced the Digest in 533: multa et maxima transformata sunt come to mind. Meijers had the intention to re-codify the law that had developed mainly outside the Code. Since Meijers' death nearly forty years have passed, during which excellent lawyers worked continuously on the improvement and modernization of the Dutch civil law. In 1992 and 1993 many important changes of the law were introduced, of which I will only mention the important increase of cases in which someone is held liable for an unlawful act whether it was his fault or not, and the introduction of a new regulation of the law concerning general conditions in contracts, regulation by which persons are protected when stipulations in general conditions are deemed to be unreasonably onerous.

## II.

### Principles, rules and institutions of Roman law which can be found in the books on Patrimonial Law in General, on Real Rights, on Obligations and on Special Contracts, which were introduced in 1992.

5. We will now examine principles, institutions and rules of Roman law which are absorbed by the new Dutch Civil Code. Before going into this subject I will put forward some limitations and will make an observation which tends to put the importance of Roman law in this context into perspective.

First of all we will confine ourselves to those Roman principles to be found in the Books 3,5,6 and 7 that were recently introduced. I will speak neither about the Books 1 and 2 which are already in force since 1970 and 1976, nor about Book 8. Parts of the new Civil Code which are not enacted or are not yet implemented equally will not be taken into consideration. Furthermore I will only mention new influences of Roman law, which cannot be found at all or at least not expressed in a clear way in the old Dutch Civil Code of 1838. There are of course numerous points on which the old and the new Dutch Civil Code are influenced by principles of Roman law; these will not be discussed.

It is certainly striking that in a rather large number of cases legal solutions have been adopted into the new Dutch Civil Code which are more or less identical with those accepted by Roman law. Sometimes rules of Roman law are explicitly invoked in the "Explanatory Commentary". In many other cases no such remarks can be found. If a strong parallelism between the rules of the new Civil Code and those of

<sup>11</sup>In § 10 of the constitutio "Tanta" Justinian writes: multa et maxima sunt, quae propter utilitatem rerum transformata sunt ("many and most important are the things, which have been altered in consequence of the general utility")

Roman law can be established, we can suppose that the drafting jurists, consciously or unconsciously, have been influenced by Roman law, because all lawyers who cooperated in the preparatory work concerning the new Civil Code studied law back when Roman law still had an important place in the curriculum. With a last remark however I want to put the importance of Roman law in this context into perspective. In private law the number of possible solutions to legal problems is not unlimited. In many cases the solutions incorporated in the new Dutch Civil Code would probably have been the same even had they not been accepted in the legal system of the Romans.

6. Now I will begin the examination of the cases in which I have found a clear parallel between provisions of the new Dutch Civil Code and rules of Roman law<sup>12</sup>. I cannot guarantee that my list is exhaustive<sup>13</sup> but I think that the most important cases<sup>14</sup> are mentioned here.

The old Dutch Civil Code contained in art. 1297, paragraph 1 the provision that the fulfilment of a suspensive condition had retroactive effect in the field of obligations. In Roman law a general principle to this effect did not exist. In many texts no retroactive effect was given to the fulfilment of a *condicio*. The new Civil Code provides for juridical acts in art. 3:38, par. 2:

"The fulfilment of a condition does not produce retroactive effect"<sup>15</sup>. With this provision Dutch civil law has come nearer to Roman law.

Roman law has known several cases of what in modern legal systems is called "conversion". I mention as examples the case in which an invalid formal renunciation of a right to claim a debt by a creditor (*acceptilatio*) was considered as an informal renunciation (*pactum de non petendo*) and the case, where an invalid legacy with real effect (*legatum per vindicationem*) was considered as a legacy with only personal effect (*legatum per damnationem*). The new Civil Code does acknowledge conversion in a general way in art. 3:42, that runs as follows:

<sup>12</sup>See for Roman private law, M. Kaser, *Das römische Privatrecht* II, München 1971 and II, München 1976 and for the Roman law of Obligations, R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Deventer 1993.

<sup>13</sup>My friend and colleague Arthur Hartkamp sent me a list of cases "in which the new Civil Code causes a change of the law that dates more or less back to Roman law" in a letter of December 16th 1990. When preparing this paper I found several other cases. I express my profound gratitude to Arthur Hartkamp, with whom I could also discuss some of the cases mentioned by him.

<sup>14</sup>There is also much influence of Roman law in title 4 of Book 5: "Rights and obligations of owners of neighbouring properties".

<sup>15</sup>For all the articles belonging to the part of the Civil Code introduced on the first of January 1992 I make use of the translation of Haanappel and Mackaay mentioned before in note 1.

"Where the necessary implication of a null juridical act corresponds to such a degree to that of another juridical act, which is to be considered as valid, so as to imply that the latter juridical act would have been performed had the former been abandoned because of its invalidity, then the former shall be given the effect of the latter juridical act, unless this would be unreasonable to an interested person not party to the act."

In Justinian law<sup>17</sup> creditors were protected against legal acts, made by their debtors though they were not obliged to do so and by which they diminished their patrimony, with the so called *actio revocatoria* or *Pauliana*. As early as in the Middle Ages an enlarged application of the *actio Pauliana* has been defended by Baldus and later romanists<sup>18</sup> in cases in which there was no question of an adverse effect of the creditor's recourses on the debtors patrimony, but a violation of a duty in relation to a special thing by a solvent debtor. For the Dutch civil law, as based on the Civil Code of 1838, also such an "enlarged *actio Pauliana*" has been defended by authors like Eggens and Schoordijk. According to these authors the buyer of a thing could invoke the invalidity of the second sale and the delivery of the same thing made by a seller to a purchaser who knew that the thing had already been sold to someone else. The legislator of 1992 has not followed these authors, but has returned to Roman law, prescribing in art. 3:45, par. 1:

"If a debtor, in the performance of a juridical act to which he is not obliged, knew or ought to have known, that this act would adversely affect the recourses of one or several of his creditors against his patrimony, the act may be annulled...."

In the Roman law texts we find several cases of what we call, in modern legal systems, "convalescence". I will give a few examples. If a buyer of a *res mancipi* has received the possession of a thing by *traditio*, and the seller who was a non dominus later on acquired the ownership of the thing because he has been instituted as the owner's heir, the buyer was protected as bonitarian owner by praetorian remedies<sup>19</sup>. If a debtor had constituted a right of *pignus* on a thing not belonging to him and later on he became owner, then the pledge creditor was protected by an *actio Serviana utilis*<sup>20</sup>. Finally, according to an oratio of the emperor Septimius Severus held in 206 AD, a gift between spouses becomes valid if the donator dies without having invoked the invalidity of the gift<sup>21</sup>. In these cases the *postfactum* of the acquisition of ownership by the seller and the debtor and of the death of the

<sup>16</sup>This could be e.g. the person towards whom a unilateral act is addressed.

<sup>17</sup>In classical law, in case of *fraus creditorum* the creditors had at their disposal a *restitutio in integrum* and an *interdictum fraudatorium*; the relation between these two legal remedies is not clear.

<sup>18</sup>See my dissertation, *De geschiedenis der "Actio Pauliana"*, Zwolle 1962, pp. 182-186.

<sup>19</sup>See Pomp. D.21.3.2 and Ulp. D.6.1.72 and D.44.4.4.33.

<sup>20</sup>Cf. Afric. D.20.4.9.3 and Paul D.13.7.41. Modestinus proposes even (in D.20.1.22) that an *actio Serviana utilis* ought to be given to the pledge creditor, if the debtor has died and the owner of the pledged thing has become the debtors heir.

<sup>21</sup>Cf. Ulp. D.4.1.32.pr-2.

donator had the result of giving legal effect to a former invalid legal act.

The new Dutch Civil Code contains a general provision for "convalescence" in art. 3:58 par.1, which runs as follows:

"Where a legal condition for the validity of a juridical act is fulfilled only after its execution, but all directly interested parties who could have invoked this defect have regarded the act as valid during the period between the act and the fulfilment of the legal condition, the juridical act will thereby have been regularized."

In classical Roman law the delivery of a thing by the transmission of possession (traditio) was a "causal"–juridical act: ownership only passed on to the acquirer when the traditio was based on a valid title (sale, gift, dowry, etc.). The Justinian legislation is not clear as to the necessity of a *iusta causa*. For the Dutch civil law based on the Civil Code of 1838 the Supreme Court had decided, in May 1950<sup>22</sup>, that for the transmission of ownership a valid title was necessary. The new Dutch Civil Code has explicitly chosen the rule in force for the traditio of classical Roman law in the title on acquisition and loss of "goederen" (corporeal and incorporeal things"). Art.3:84 par.1 prescribes:

"Transfer of property requires delivery pursuant to a valid title by the person who has the right to dispose of the property."

In classical Roman law *fiducia cum creditore* and *fiducia cum amico* were frequently used. Both have been abolished by Justinian. These two legal institutions were recognized as valid by the Dutch Supreme Court in this century when the old Civil Code was operative. The new Civil Code banned both forms of fiduciary ownership in art. 3:84, par.3:

"A juridical act which is intended to transfer property for purposes of security or which does not have the purpose of bringing the property in the patrimony of the acquirer, after transfer, does not constitute valid title for transfer of that property."

In Justinian's legislation a prescription of three years for movables and of ten or twenty<sup>23</sup> years for immovables existed. In the old Dutch Civil Code prescription of movable things was unknown. The new Civil Code contains a provision which resembles the Justinian law very much<sup>24</sup>. Art. 3:99 prescribes:

"Rights in movable things which are not registered property [...] are acquired by a possessor in good faith by an uninterrupted possession for three years; other property is acquired by uninterrupted possession for ten years."

Since the end of the Republic Roman law has known the possibility of pledge on any thing without possession of the thing by the creditor. During at least three

<sup>22</sup>See Hoge Raad, 5th May 1950, *Nederlandse Jurisprudentie* 1951, nr.1.

<sup>23</sup>For *longi temporis praescriptio* the lapse of a period of ten years was required *inter praesentes* (when the owner and the possessor lived in the same province) and the lapse of a period of twenty years *inter absentes* (when owner and possessor lived in different provinces).

<sup>24</sup>A difference between the new Dutch law and Justinian law is that a *causa* of the prescription is no longer required.

centuries this right of pledge existed at the side of *fiducia cum creditore*. According to art. 1196 of the old Dutch Civil Code a right of pledge could only be constituted by the transmission of the pledged movable thing into the detention of the creditor or of a third person. In practice there existed a need for real security on movable things remaining in the detention of the debtor. The Supreme Court accepted, in 1929, the possibility of a transmission *fiduciae causae* of a movable thing to the creditor by means of *constitutum possessorium*. As we saw above, in art.84, al.3 the new Civil Code does not consider the juridical act which is intended to transfer property for purposes of security as a valid title for the transfer of property any more. It is comprehensible in the light of this prohibition that the new Civil Code recognizes the possibility of a pledge on movable things without transfer of detention to the creditor. Side by side with the right of pledge on a movable thing, that is established by bringing the thing under the control of the pledgee, the new Civil Code recognizes the validity of a right of pledge on a movable thing which remains in the detention of the debtor. Art. 3:237, par.1 runs as follows:

"The right of pledge on a movable thing [...] can also be established by an authentic deed or a registered deed under private writing, without the thing [...] being brought under the control of the pledgee or of a third person."

The old Dutch Civil code contained no explicit provision about the transfer of possession by means of *constitutum possessorium* and mentioned the possibility of *traditio brevi manu* in art.667, dedicated to the transfer of ownership of movables. In the new Dutch Civil Code art.3:115<sup>25</sup>, incorporated in the Title on Possession and Detention, recognizes *constitutum possessorium* and *traditio brevi manu* as modes of the transfer of possession, as they were in Roman law.

Professor Meijers explicitly refers to the Roman *actio Publiciana* in his Explanatory Commentary<sup>26</sup> on the last article of the Title on Possession and Detention, art.3:125. Meijers stresses that there is a need for the protection of the possession by someone towards other persons, "who have, in any case, less to do with the property than he, viz. persons who can neither invoke any right or any possession, or

<sup>25</sup>Art. 3:115: "A bilateral declaration without material acts is sufficient for the transfer of possession: a. where the alienator possesses the thing and henceforth detains it for the acquirer by virtue of a stipulation made at the time of the delivery; b. where the acquirer was detentor of the thing for the alienator." The article adds a third case of transfer of possession without material acts", viz. c. "where a third party detained the thing for the alienator and detains it for the recipient after the transfer." This case is called by modern lawyers *traditio longa manu*. In D.46.3.79 Iavolenus examines the case in which a thing was put before the eyes of another person and it was stated that it was acquired by him and that *res quodammodo manu longa tradita existimanda est* (that the thing has to be considered as a thing which is transferred by *longa manu traditio*). In textbooks of Roman law this and comparable cases of transfer of possession, in which there is hardly any corporeal element in the acquisition by the acquirer, are considered as examples of *traditio longa manu* and not the case mentioned in art.3:115 under c.

<sup>26</sup>See *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek*, Boek III, Algemeen Geedeelte van het Vermogensrecht, ed. by C.J. van Zeben and J.W. du Pon with the collaboration of M.M. Oltorf, Deventer 1981, p.456.

only possession which has been acquired at the cost of the earlier possessor". For the protection of this possessor the new Dutch Civil Code contains the following provision in art.3:125:

"1. He who has acquired possession of property, can, on the basis of a subsequent loss or disturbance in the possession, institute the same action against third persons to recover the property and remove the disturbance as the titleholder of the property. Nevertheless, these actions must be instituted within the year following the loss or disturbance.

2. The action is rejected if the defendant has a better right than the plaintiff to the detention of the property or if he has performed the disturbing act pursuant to a better right, unless the defendant has taken possession from the plaintiff or has disturbed his possession in a violent or surreptitious way."

Clear differences with the *actio Publiciana* are that good faith of the plaintiff is no requirement for the success of the action and that the action has to be brought within a period of one year after the loss of the possession or its disturbance. There is also some resemblance with the *interdictum uti possidetis* which had a restitutory function as well as a prohibitory one. In the case of the *interdict* the defendant had the *exceptio vitiosae possessionis* if the plaintiff had taken possession from him with force or in a surreptitious manner. According to par. 2 of art. 3:125 the plaintiff has a kind of *replicatio vitiosae possessionis*: the action is rejected if the defendant had a better right to the detention of the property, unless he had taken possession from the plaintiff in a violent or surreptitious way.

According to the old and new Dutch Civil Code a debt can be pledged. In classical and Justinian Roman law a debt could be the object of a right of pledge (*pignus nominis*). The new Civil Code contains an explicit provision on the capacities of the pledge creditor, on which the old Civil Code was not clear. In accordance with Roman law<sup>27</sup> the pledgee is – as art. 3:246 par. 1 provides – "entitled to demand the performance of the pledged debt judicially and extrajudicially and to receive payment".

In Roman law ownership was the most comprehensive private right that a person could have on a corporeal thing. For the Dutch civil law under the Civil Code of 1838 some authors – of whom J. Eggen was the most authoritative – defended that one could also be owner of an incorporeal thing. The new Dutch Civil Code stipulates explicitly in art.5:1, par.1 that the object of ownership can only be a corporeal thing. The mentioned paragraph runs as follows:

"Ownership is the most comprehensive right which a person can have in a thing."

As in Book 3, there are numerous principles and provisions of Roman origin in Book 6 of the new Dutch Civil Code.

<sup>27</sup>In Roman law the pledge creditor could bring an *actio in personam* against the debtor of the pledged claim; this action followed the example of the real *actio Serviana*.

In Roman law the majority of contracts led to *actiones bonae fidei*; in lawsuits in which these actions were brought the judge had to condemn the defendant to *quidquid dare facere oportet ex fide bona* (all he had to give and to perform in accordance with the requirements of reasonableness and equity). The formation and execution of these contracts was dominated by "good faith". This "good faith" could have a supplementary or limitative, derogating<sup>28</sup>, effect. There were several other legal relations, on which *actiones bonae fidei* could be based e.g. the managing of someone else's affairs and the relations between co-heirs and co-owners who wanted the judge to make a partition. The old Dutch Civil Code contained only a provision (in art.1374, par.3) according to which contracts had to be performed in good faith. There was, before 1992, a discussion as to the question whether a limitative or derogating effect of good faith could be accepted alongside the supplementary effect. The Supreme Court had the field of "good faith" broadened to some other juridical relations, amongst others those between co-heirs and those between parties still in their pre-contractual period. With its provisions on reasonableness and equity the new Dutch Civil Code lies, concerning their field of application as well as to their effects, very near to Roman law. The important role which the Code has given to "redelijkheid en billijkheid" (reasonableness and equity) is one of the most characteristic features of this new Code. A general provision, applicable to all obligations, is incorporated in Section 1 (General provisions) of Title 1 (Obligations in General) of Book 6. Art.6:1.1.2 par.1 runs as follows:

"A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and equity."

The derogating effect of reasonableness and equity is explicitly acknowledged in art.6:1.1.2 par.2:

"A rule binding upon them by virtue of law, usage or a juridical act does not apply to the extent that, in the given circumstances, this would be unacceptable according to the standards of reasonableness and equity."

The Code contains special provisions concerning reasonableness and equity for contracts. Art.6:248, par.1 is concerned with the supplementary<sup>29</sup>, and art.6:248, par.2 is concerned with the derogatory effect<sup>30</sup>. As a consequence of art.6:216<sup>31</sup> these provisions also apply to other multilateral patrimonial juridical acts, e.g. to the partition of a community. Though they are not identical, there is in this important

<sup>28</sup>In relations of *strictum ius* (strict law) the *exceptio doli* had a comparable function. The defendant could oppose the *exceptio doli* with success when bringing an action was unjust in the given situation.

<sup>29</sup>Art.6:248, par.1: "A contract has not only the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, result from the law, usage or the requirements of reasonableness and equity".

<sup>30</sup>Art.6:248, par.2: "A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and equity".

<sup>31</sup>This article stipulates, that the provision of the sections 1–4 of title 5 (contracts in general) apply in principle *mutatis mutandis* to other multilateral patrimonial juridical acts.

field of patrimonial law much similarity between Roman law and Dutch law as being in force since 1992.

Several provisions, such as those concerning creditor's default (art.6:58), "imprévision" (art.6:258) and the right to suspend performance in case of non-performance by the other party of a synallagmatic contract (art.6:262) are applications of the principles of reasonableness and good faith. Mora creditoris, already existing in Roman law, will not be examined here, since the old Civil Code already contained a provision on this institution (art.1440). The exceptio non adimpleti contractus of art. 6:262, which has a starting point in Roman law, will be discussed *infra*.

The articles 81-87 give a much better and more extensive regulation of debtor's default (mora debitoris) than the old Civil Code and contains numerous reminiscences of Roman law. Art. 6:81 lays down that the debtor is in default during the period that the prestation is not rendered, once it has become exigible and the requirements of articles 82 and 83 have been met. In art. 6:82, par.1<sup>32</sup> the reader will immediately recognize the Roman *interpellatio*. According to art. 6:83a there is, in principle, no necessity to put the debtor into default when the parties agreed on a term for payment<sup>33</sup>. This provision is nothing but the principle *dies interpellat pro homine* (the term puts into default instead of the person of the creditor) of the romanistic tradition<sup>34</sup>. During the default the debtor is strictly liable: even if performance is made impossible for him by an act of God (*vis maior*), this impossibility is imputed to the debtor - if there is no *mora creditoris* - and he must repair the damage<sup>35</sup>. Roman law had the same regulation, expressed for the contracts dominated by *strictum ius* by the maxim: *mora debitoris perpetuat obligationem*<sup>36</sup>. An exception of this unlimited responsibility of the debtor is made for the case where the creditor would have suffered the damage even if the debtor had performed promptly. The exception is inserted in most modern codes<sup>37</sup>. Though it is often

<sup>32</sup>Art.6:82, par.1: "Default commences when the debtor is put into default by a written warning granting him a reasonable period for the performance and when there is no performance within this period." In Roman law the *interpellatio* was not necessarily a written warning, it could also be an oral warning.

<sup>33</sup>Art.6:83: "Default commences without the formality of putting into default: a. where a term which has been set for payment lapses without the obligation having been performed, unless it appears that the term has another purpose."

<sup>34</sup>Cf. D. Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter* 5, 1991, D. 39. Though the maxim is of later origin, it voices a principle of Roman law.

<sup>35</sup>Art.6:84: "Every impossibility to perform which has arisen during the default of the debtor and which cannot be imputed to the creditor, is imputed to the debtor; the latter must repair the damage resulting therefrom, unless the creditor would have suffered the damage even in the case of proper and prompt performance."

<sup>36</sup>See on the impossibility of performance during the debtor's default in Roman and modern German law the recent article of R. Knütel, *Zum "Zufall" in § 287 S.2 BGB in Neue Juristische Wochenschrift* 46(1993), pp. 900-901.

<sup>37</sup>See e.g. § 287, S.2 BGB: "Er (viz. the debtor) ist auch für die während des Verzugs durch Zufall eintretende Unmöglichkeit der Leistung verantwortlich, es sei denn, daß der Schaden auch

thought to have a Roman origin, the texts of the legislation of Justinian<sup>38</sup> do not add it to the expression of the principle that the debtor in *mora* is responsible even if he can no longer perform as a consequence of *vis maior*. For the obligation to deliver a thing we even find the statement that the creditor could have prevented suffering the damage by alienating it as an argument for the heavy responsibility of the debtor.

Before 1992 it was disputed, whether in Dutch law *purgatio morae* was permitted. The Supreme Court had not given a decision on this point. In Roman law Celsus' opinion was accepted, who stated "eum, qui moram fecit in solvendo Stichum quem promiserat, posse emendare eam moram postea offerendo (that the debtor who was in default as to the delivering of slave Stichus, who had been promised by *stipulatio*, could "purge" this default by offering him afterwards)<sup>39</sup>. The New Dutch Civil Code accepts the possibility of *purgatio* (or *emendatio*) *morae* under the condition that the debtor pays costs and damages to the creditor<sup>40</sup>.

Some of the articles of the new Civil Code in the field of pluriform causation have their startingpoint in the Roman *lex Aquilia* on damage to things and the elaboration thereof by the jurists. In Section 10 (Legal obligations to repair damage) of Book 6 we find the following provision on alternative causation in art.6:99:

"Where the damage may have resulted from two or more events for each of which a different person is liable, and where it has been determined that the damage has arisen from at least one of these events, the obligation to repair the damage rests upon each of these persons, unless he proves that the damage is not the result of the event for which he himself is liable."

On the basis of art.6:102 the persons mentioned in art.6:99 are solidarily responsible. The experienced Romanist will immediately think of the decision of the Republican lawyers and of Julian, followed by later lawyers, according to which several persons who wounded a slave were all liable for killing him if it could not be established by whose act he died<sup>41</sup>. As a result of the penal character of the *actio legis Aquiliae* in classical Roman law, and the mixed character of this action in Justinian's law, these persons were all cumulatively liable.

bei rechtzeitiger Leistung eingetreten sein sollte", and art. 1221 of the Italian Codice Civile: "Il debitore che è in mora non è liberato per la sopravvenuta impossibilità della prestazione derivante causa a lui non imputabile, se non prova che l'oggetto della prestazione sarebbe ugualmente perito presso il creditore".

<sup>38</sup>Solely Sabinus and Cassius decided, according to Gai. D.16.3.14, that the deposittee is freed if the deposited thing perished because of a natural phenomenon after the *litis contestatio* but before the sentence of the judge, *cum interitura esset ea res et si restituta esset actori* (because the thing would have perished even if it had been rendered to the plaintiff).

<sup>39</sup>See Cels.-Jul.-Paul D.45.1.91.3.

<sup>40</sup>See art.6:86: "The creditor may refuse performance offered after the beginning of the default, so long as the offer does not also comprise the payment of damages which have, in the meantime, become due, as well as costs."

<sup>41</sup>See *Iul.D.9.2.51.1* and *Ulp. D.9.2.11.2*.



The first section (General provisions) of Title 3 (Unlawful act) of Book 6 contains in art.166, par.1 a special provision on unlawful acts committed by persons belonging to a group. It runs as follows:

"If a member of a group of persons unlawfully causes damage and if the risk of causing this damage should have prevented these persons from their collective conduct, they are solidarily liable if the conduct can be imputed to them."

Who, having studied the Digest title 9.2 Ad legem Aquiliam, will not be reminded immediately of the case where a group of persons, playing with javelins, caused the death of a slave? Ulpian examined this case in D.9.2.9.4 and held that all players were liable for the killing of the slave. For the reasons mentioned above in the case of alternative causation we see here a cumulative responsibility of the group of persons *iusum iaculantes*.

In Roman law there were legal remedies for the recovering of unjustified enrichment in several particular cases; in Justinian's law these conditions had special names, like *condictio indebiti*, *condictio ob rem dati*, *condictio ob turpem causam*, etc. Numerous authors of the *ius commune* and of natural law, like Hugo Grotius and Ulrich Huber, have defended a general enrichment action. For the old Civil Code the Amsterdam professor of civil law M.H. Bregstein was the great defender of such an action. In an even more general way than the German BGB did in § 812 Abs.1, the new Dutch Civil Code introduced a general remedy for the restitution of an unjustified enrichment in art.6:212, par.1:

"A person who has been unjustifiably enriched at the expense of another must, to the extent this is reasonable, make reparation for the damage suffered by that other person up to the amount of his enrichment."

We now come to two fundamental articles of the new Dutch Civil Code which are concerned with synallagmatic contracts. They contain provisions on the right to suspend performance in case of non-performance by the other party (art.6:262) and on the right in that case to set aside the contract (art.6:265).

In Roman law the *bona fides* of the *actio empti* and of the *actio venditi* had the result that the seller and the buyer were absolved if the buyer, respectively the seller, did not perform or offer to perform in his turn at the same time. Probably a comparable defense based on the *bona fides* was given to the parties of a contract of *locatio conductio*. The medieval canonists and commentators gave this defense, called *exceptio non adimpleti contractus*, to the party of any synallagmatic contract whose performance was claimed by the other party when the latter party had not yet performed his obligation. The old Dutch Civil Code did not contain a provision on this subject. The Supreme Court recognized the *exceptio non adimpleti contractus* for contracts of sale and for labour contracts. The new Dutch Civil Code followed § 320 of the German BGB and in art.6:262, par.1 provided:

"Where one of the parties does not perform his obligation, the other party is entitled to suspend performance of his correlating obligations."

According to art.1302 of the old Dutch Civil Code, which was an adaptation of art.1184 Code Civil<sup>42</sup>, the non-performance by one of the parties of a synallagmatic contract was constructed as a resolutive condition with retroactive and real effect; the rescission of the contract had to be asked in court. Roman law never knew a solution like this one. In some cases of *locatio conductio* of a thing one party could bring the contract to an end in case of non-performance by the other party, e.g. if the tenant did not pay the rent or the lessor did not give the use of the house or the land. The new Civil Code abolished the construction of non-performance as a resolutive condition and gave the other party the right to set aside the contract<sup>43</sup>. The main disposition in this field can be found in art.6:265, par.1:

"Every failure of one party in the performance of one of his obligations gives the other party the right to set aside the contract in whole or in part, unless the failure, given its special nature or minor importance, does not justify the setting aside of the contract and the consequences flowing therefrom."

In the regulation of the contract of sale in Book 7 of the new Code several reminiscences of Roman law can be found. The responsibility of the seller for eviction of the buyer has been abolished, and has been replaced by the obligation of the seller to transfer ownership of the thing sold, free of all special charges and encumbrances<sup>44</sup>. We find, however, as in Roman law, that on the seller an obligation lies to defend the buyer in a lawsuit in which a real action is brought against him. The Roman buyer of a *res mancipi* to whom the thing had been transferred by a *mancipatio* could sue the seller for this help with the *actio de auctoritate*. The Roman buyer to whom the thing sold had been transferred by *traditio* could bring the *actio empti* against the seller to reach the same result. Art.7:16 contains a similar provision:

"Where an action is brought against the buyer for eviction or for the recognition of a right which should not have encumbered the thing, the seller must be joined in the action in order to defend the interests of the buyer."

Continuing my investigation in the field of sale I find a striking parallel between the so-called *exceptio evictionis imminens* (based on *bona fides*) and art.7:27 of the Dutch Civil Code. In D.18.6.19(18).1 it is decided that a buyer who did not yet pay the purchase price cannot be condemned to pay it at all, if someone who asserts to be the owner has brought the *rei vindicatio* against him, unless he offers solvent personal sureties<sup>45</sup>. The Dutch legislation of 1992 chose the same solution in art.7:27. This provision runs as follows:

<sup>42</sup>The origin of this article can be found in medieval canon law and old French law.

<sup>43</sup>The new Dutch regulation has been influenced by the provisions about "Rücktritt" in §§ 325-327 BGB.

<sup>44</sup>See art.7:9 and art.7:15.

<sup>45</sup>The compilers have taken this text from the third book of Papinian's *Responsa*. This fragment of Papinian is also transmitted to us by an anthology of texts of classical jurists made in the fourth century, to wit the *fragmenta Vaticana*. If we compare *Fragm. Vat. 12* with D.18.6.19(18).1 we can establish that the compilers modified Papinian's text. According to this jurist the buyer can even suspend the payment of the price, if he offers sureties. The balancing of the interests of the seller and the buyer led Papinian and the compilers to a different result.

"Where the buyer is disturbed, or has good reason to fear that he will be disturbed by an action for eviction or for recognition of a right which should not have encumbered the thing, he may suspend the payment of the purchase price, unless the seller furnishes sufficient security to cover the loss which the buyer risks suffering."

The title on sale contains a special provision on sale for the purpose of execution. This sale can be compared with the sale effected in Roman law by a pledge creditor whose debtor did not pay his debt. If the creditor sold the pledged thing *iure creditoris*, he was not liable in case of eviction of the thing from the buyer; cf. Julian-Ulpian D.19.1.11.16. The new Dutch Civil Code contains a comparable provision in art.7:19, par.1:

"In the case of a sale for the purpose of execution, the buyer may not invoke the fact that the thing is subject to a charge or encumbrance which should not have encumbered it [...]."

At the end of this article the legislator added the words "unless the seller knew of it", and invokes in the Explanatory Commentary<sup>46</sup> explicitly the last words of the mentioned Digest text D.19.1.11.16: *sed et si... sciens... sibi non obligatam vel non esse eius qui sibi obligavit vendiderit, tenebitur ex empto, quia dolum eum praestare debere ostendimus* (but also if he sold the thing knowing that it had not been pledged to him or that it did not belong to the person who had pledged it to him, he will be liable on the basis of the contract of sale, because we have proved that the seller is responsible for *dolus*). The Explanatory Commentary argues that a selling creditor who knows that the thing sold by him did not belong to his debtor ought to be held liable and stresses that Ulpian D.19.1.11.16 was already of the same opinion.

Lastly, on the first of September 1993 the Dutch Civil Code came nearer to Roman law in the field of mandate. The title 7 on mandate *stricto sensu* ("lastgeving") which was in force since the first of January 1992 was abolished and a new title on mandate in a large sense ("opdracht") entered into force. Art.7:400, par.1 gives the following definition of the contract of "opdracht":

"The contract of "opdracht" is the contract by which one party, the "opdrachtnemer", obliges himself towards the other party, the "opdrachtgever", to perform activities not within the framework of labour contract,<sup>47</sup> which consist in something else than the making of a work of material character, the keeping of things, the edition of works or the transporting or the having transported of persons or things."

This contract of "opdracht" (mandate in a larger sense) is distinguished from the contract of "lastgeving" (mandate *stricto sensu*), which contract is defined in

<sup>46</sup>See Explanatory Commentary of the Government to art.7:19 in *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek, Invoering Boeken 3,5,6,7, Boek 7, Bijzondere Overeenkomsten Titels 1,7,9 en 14*. (Final redaction C.J. van Zeeben), by W.H.M. Reehuis and E.E. Slob, Deventer 1991, pp. 131-132

<sup>47</sup>My translation.

art.7:414 par.1 as "the contract by which one party, the mandatory, obliges himself to the other party, the mandator, to perform one or more legal acts at the account of the mandator"<sup>48</sup>.

Dutch law comes very near to Roman law here. In Roman law *mandatum* had a large field of application. The contract by which someone obliged himself to do something for someone else could concern just as well legal acts as non-legal acts. The French Civil Code of 1804 and the Dutch Civil Code of 1838 only permitted to form a contract of mandate by which someone obliged himself to perform legal acts for someone else. As to non-legal acts the remembrance of the services of the serf of the "ancien régime" led to the prohibition of a mandate to perform non-legal acts. Now the contents of the contract of "opdracht" are just as broad as those of the Roman contract of *mandatum*<sup>49</sup>. As in Roman law, the contract has also much practical importance. It covers e.g. contracts with barbers, brokers, advocates and musicians.

We can conclude as follows from this second part of our paper: the legislator of Books 3,5,6 and 7 of the new Dutch Civil Code took inspiration largely from Roman law and the European *ius commune*, based on Roman law, which dated back to the time before the modern national codifications. The drafters of these books of the new Dutch Civil Code have drawn, partly consciously, partly unconsciously, on numerous points, principles, institutions and rules with their origin in Roman law, which had not been accepted (in such a clear way) in the Dutch Civil Code of 1838. That this can be so in the case of a Code which was made nearly fifteen centuries after Justinian's legislation is striking proof of the incomparable richness of legal ideas and solutions of the *Corpus Iuris Civilis*.

### III.

#### Some observations on the value of a good knowledge of Roman private law for lawyers of the 21st century.

7. The conclusions to which we have come concerning the importance of Roman law for a good understanding of the newest codification of private law in Europe could already be seen as an element in favour of the thesis that a good knowledge of Roman private law is very useful for European jurists of the coming century. At the end of this paper I would like to add some arguments in favour of that thesis.

<sup>48</sup>My translation.

<sup>49</sup>A difference with Roman law is that the contract by which someone promised to perform legal or non-legal acts for another person has the same name, *mandatum*, which corresponds with "opdracht". Roman law did not have a special term for the contract concerning the performance of legal acts, as the Dutch "lastgeving".

- Nearly all the older European codifications of civil law – I give as examples the French Code civil of 1804, the Austrian ABGB of 1811, the Spanish Civil Code of 1889, the German BGB of 1900 and the Italian Codice Civile of 1992 – are, to a greater or lesser extent, influenced by Roman legal concepts, rules and principles. As knowledge of Latin is useful to one who wants to learn French, Italian, Spanish or Portuguese, so a good knowledge of Roman law is of great value for the lawyer who wants to orientate himself on one of the systems of private law of which I mentioned the Civil Codes<sup>50</sup>.
- At the beginning of the next millennium there will be an urgent need for comparative study of the European systems of private law. For the comparatist who wants to study the numerous points the private law systems of the European continent have in common and the many differences between them, the best way of research seems to me to compare the provisions of the different codifications as well as their later elaborations with the *ius commune* of the great authors on Roman law of the eighteenth and nineteenth century, and with the works of the Pandectists<sup>51</sup>. If one wants to understand why provisions in modern codes or interpretations of similar provisions are alike or different, historical research is necessary. This is what comparatists expect legal historians to do<sup>52</sup>.
- In the Digest many maxims, in which legal wisdom and experience having a broader field of application than only that of private law, e.g. about the interpretation of legal sources can be found, especially in the titles 1.3, 50.16 and 50.17. They can still direct and inspire modern lawyers<sup>53</sup>. As examples I mention only: Celsus' advice to lawyers in D.1.13.17: *Scire leges non hoc est verba earum tenere, sed vim ac potestatem* ("Knowing laws is not a matter of sticking to their words but a matter of grasping their force and tendency") and Ulpian's words in D.50.17.134.1: *Nemo ex suo delicto meliorem suam condicionem facere potest* ("No one is allowed to improve his own condition by his own wrongdoing")<sup>54</sup>.

<sup>50</sup>See on the value of the study of Roman law for comparatists, A. Watson, *Roman law and Comparative Law*, Athens (Georgia) 1991.

<sup>51</sup>Knowledge of Roman law is also helpful for the understanding of many systems of private law in countries outside Europe. I mention here Japan, Louisiana, Quebec, South Africa, Sri Lanka and the countries of South and Central America.

<sup>52</sup>See H. Kötz, "Was erwartet die Rechtsvergleichung von der Rechtsgeschichte?" in *Juristenzeitung* 47(1992), pp. 20–22.

<sup>53</sup>See on some maxims that have their origin in medieval Roman and canon law and were applied by the "Beschwerdekammer" of the European "Patentamt", R. Knütel, "Rechtseinheit in Europa und römisches Recht", in *Zeitschrift für Europäisches Privatrecht* 1994, pp. 251–255. The importance for modern lawyers of the Roman values of *libertas* and *bona fides* was stressed by G. Brogini, "Le droit romain et son influence actuelle" in *Vers un droit privé européen commun? Skizzen zum Gemeineuropäischen Privatrecht*, Hrsg. von B. Schmidlin, Basel 1994, pp. 46–123.

<sup>54</sup>Numerous maxims both of a general and of a more restricted relevance have been collected and explained by D. Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter*, München 1991.

- The systematization of modern Codes is strongly influenced by historical precedents. Some knowledge of the order of Gaius' and Justinian's Institutes and of the works of legal writers such as Donellus, Grotius and Heyse makes the classification of most modern codes easier to understand.
- For the reason last mentioned it also seems right if European law schools would all give an introductory course in Roman law on the basis of Justinian's Institutes. The mobility of European law students has to be stimulated. Such an introductory course in Roman law could excellently be followed in another country, and the originating faculty could easily acknowledge the examination passed at the foreign faculty.
- In many European countries both older and more recent Codes leave an enormous amount of free discretionary power to the judges in their general clauses. For the new Dutch Civil Code we stressed, in part II, this phenomenon by underlining the great importance of reasonableness and equity. The Supreme Courts especially do elaborate and develop important parts of private law by the so-called method of comparison of cases<sup>55</sup>. In this method the classical Roman lawyers are masters unequalled. The study of their works is therefore formative for modern private lawyers.
- For me the most important contribution of Roman law to the education of today's lawyers is the formation that results from the study of the methods used by the classical Roman lawyers to form the law. It is most instructive to study how jurists as Labeo, Celsus, Julian and Papinian, as well as Paul and Ulpian, interpreted teleologically *leges*, *senatusconsults*, the praetorian edict and imperial constitutions, and how they found the law in refined casuistical decisions, if no rules given by state authorities existed. Often they found a just solution for a new and difficult case by comparing it with a case for which an opinion formed by jurists already existed, sometimes underlining the elements because of which the new case had to be seen in the same way as the previously decided case, sometimes stressing the differences of the new case compared to previously decided cases which caused a new decision to be given. Often they made, both explicitly and implicitly, an excellent evaluation of the interests of the persons involved in a legal situation. And finally, it is fascinating to see how they applied – explicitly and implicitly – social values like *aequitas*, *humanitas*, *benignitas* and *utilitas*. If there had not been any reception of Roman law, this excellent way of lawfinding would have led modern jurists to study the *Corpus Iuris Civilis*. The equity and practicability of the legal solution applied by the classical Roman jurists are of course the main reason for the reception of the Justinian legislation.

<sup>55</sup>See for Dutch private law, H.C.F. Schoordijk, "Typologiseren en moduleren in de rechtsvinding (1972)" in *Verspreid werk*, Deventer 1991, pp. 177–196.

— Lastly, my friends and colleagues Reinhard Zimmermann and Rolf Knütel underlined, in several publications<sup>56</sup>, the role Roman law will be able to play for the unification of European legal science and European private law. Zimmermann writes that the period of one or two centuries during which national codes exist in continental European countries is relatively short and that the common basis of all European systems of private law are the Roman-canon *ius commune* and the works of the Pandectists, to which we have to fall back for the formation of a future European private law and legal science<sup>57</sup>. For Knütel, who agrees with Zimmermann in this point of view, the antique Roman law is a big reservoir and source of legal experience and just solutions which we will be able to use in the formation of a future unified European law. I do not deny that Roman law, European *ius commune* and German Pandectism can be of importance in this field, but in my opinion their role ought not to be overestimated. In this context I would like to make the three following remarks. A) For those who study the history of private law in Europe *specie aeternitatis* the period of one or two centuries of codified legal systems of private law in Europe is certainly short. For modern lawyers however this period of the development of the law in their countries is of crucial importance and nobody can contest that during this period the law changed more than in all the centuries preceding the French revolution. This has the result that side by side with the numerous principles and institutions that the private law systems of continental Europe have in common many cardinal differences do exist. B) The possibility of a 'bridging' role of Roman law is still more problematic, when we take into account that the English Common Law is an important European legal system. Nobody will deny the influence of Roman Civil Law on English jurisprudence and positive law<sup>58</sup> and Zimmermann

<sup>56</sup>Of both authors I only mention here R. Zimmermann, 'Das römisch-kanonische *ius commune* als Grundlage europäischer Rechtseinheit', in *Juristenzeitung* 47(1992), pp. 8-20 and R. Knütel, 'Rechtseinheit in Europa und römisches Recht', in *Zeitschrift für europäisches Privatrecht* 1994, pp. 244-276.

<sup>57</sup>Zimmermann's approach has been criticized by Pio Caroni, 'Der Schiffbruch der Geschichtlichkeit. Anmerkungen zum Neo-Pandektismus', in *Zeitschrift für Neuere Rechtsgeschichte* 16(1994), pp. 85-100 and by the authors mentioned by Caroni, l.c. p.86, note 4. I agree with Caroni on two points. Because the research into the works of the *ius commune* has to serve the aim of creating a new uniform European private law, Zimmermann is inclined to underestimate the differences which exist between authors like Johannes Voet, Bruunemannus, Leyser and Pothier. Secondly, Zimmermann's method implies necessarily a large extent of 'abstraction', of isolation from social, economic and ideological phenomena. It will however provide a decrease of the isolation of the work of legal historians from that of modern lawyers.

<sup>58</sup>See Peter Stein, *The Character and influence of the Roman Civil Law. Historical Essays*, London, etc. 1988. In this volume Peter Stein inserted 13 papers dedicated to "The influence of the Roman Civil Law in Britain and the USA"; see pp. 151-442. Besides the Roman influence on English jurisprudence there was Roman influence on principles of positive law. So it cannot be accidental that the common law has, for instance, the maxim: *nemo dat quod non habet*, which is

rightly underlined the European character of English law<sup>59</sup>. It is, however, indisputable that in fields of private law such as the law of contracts, where the results are often rather similar, the reasoning and the concepts are rather different, and that in other fields of private law, such as property law and the law of torts, enormous differences as to rules, institutions and concepts exist. C) A last argument for my supposition that the role which Roman law will be able to play in future unified European law will be rather limited is the following. Many new branches of private law, such as those of industrial and intellectual property and company law, have hardly any link with Roman private law at all. This will certainly hold true for many parts of European private law of the next millennium.

— Nevertheless, there are many other good reasons for (future) modern lawyers to study Roman law.<sup>60</sup>

a striking parallel to the Roman rule *Nemo plus iuris ad alium transferre potest quam ipse habet* (cf. Ulpian D.50.17.54).

<sup>59</sup>R. Zimmermann, 'Der europäische Charakter des englischen Rechts. Historische Verbindungen zwischen civil law und common law', in *Zeitschrift für Europäisches Privatrecht*, 1993, pp. 4-51.

<sup>60</sup>I want to express my gratitude to my friend and colleague Mrs. Marjolijn van Gessel-de Roo, who made valuable remarks as to the contents of this paper and corrected its English style.