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**Theoretical and dogmatic questions of the inexistence, invalidity,
and ineffectiveness of juridical acts in Roman law and in modern
legal systems**

Theses

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I. A brief summary of the research task

Our dissertation is a contribution to the disputed dogmatic and terminological questions of inexistence, invalidity, and ineffectiveness of juridical acts (in this regard the terms “act in law”, “act in the law”, “juristic act”, “legal act”, and “legal transaction” are also used in English terminology) in Roman law and in modern legal systems.

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

As for Roman law literature, Mario TALAMANCA emphasized that the relation of invalidity and effectiveness/ineffectiveness of juridical acts and, in addition, the relation of invalidity and existence/inexistence of juridical acts is problematic and chaotic. Inexistence, invalidity, and ineffectiveness of legal transactions, and the dogmatic and terminological problems related to these concepts are analysed by many other researchers of Roman and private law even today.

Regarding the various interpretations of the above-mentioned concepts, our purpose has been—following a brief historical analysis of the concepts of juridical act and that of contract—to clarify and to systematize the concepts of inexistence (existence), invalidity (validity), and ineffectiveness (effectiveness) of juridical acts. In addition, special scientific problems related to these concepts were treated (e.g. the applicability of the modern concept of the inexistence of contract in Roman law; the *raison d’être* of the dogmatic construction of contractual inexistence; the formation of the modern concepts of nullity and annulment and the applicability of these legal categories in Roman law; the problems of elimination of the causes of invalidity in Roman law as well as in its subsequent fate; the dogmatic questions of partial invalidity; the theoretical problems of the ineffectiveness of juridical acts; the dogmatic problems of the revocation of will).

The reader may conceive that it can be hardly added anything new to the virtually boundless literature. Notwithstanding, during our researches in Roman law, in history of private law, and in modern legal systems we identified uncertain as well as inconsequent dogmatic and terminological solutions. Therefore, in our thesis we have tried to develop a clear and consequent conceptual system and terminology.

As for antecedents of our researches, the earlier literature of Roman law often dealt with the general theoretical, dogmatic, and terminological questions of invalidity of juridical acts (e.g. we can refer to the books and studies of Otto GRADENWITZ, Friedrich HELLMANN, and Herbert SCHACHIAN). Apart from these works—which are still significant—the modern authors of Roman law usually treat of special scientific questions instead of elaborating the general dogmatic and terminological problems of invalidity. In 20th and 21st century many important studies and books were published e.g. on the details of contracts in violation of a legal rule (e.g. KASER), of mistake (e.g. FLUME, ZILLETI, WOLF, BIONDI, WINKEL, and HARKE), of simulation (e.g. PARTSCH, PUGLIESE, and DUMONT-KISLIAKOFF), of partial invalidity (e.g. SEILER, ZIMMERMANN, and STAFFHORST), of *laesio enormis* (e.g. DEKKERS, VISKY, HACKL, SIRKS, PENNITZ, ZILLOTTO, CARDILLI, HARKE, and FINKENAUER), of conversion (e.g. GIUFFRÈ and KRAMPE), of convalescence (e.g. WACKE, SCHANBACHER, and POTJEWIJD), of *actio de dolo*, and of *exceptio doli* (e.g. GUARINO, ALBANESE, WACKE, BURDESE, and MERUZZI). Naturally, in the famous and important monographs and handbooks treating general questions of juridical acts (see, for instance, the works of SCIALOJA, ÁLVAREZ SUÁREZ, ALBANESE, and FLUME), invalidity and ineffectiveness of juridical acts were discussed, too. However, from the modern Italian literature of Roman law—which often distinguishes between invalidity and ineffectiveness in a strict sense—we can refer e.g. to the monograph of Santi DI PAOLA (published in 1966) treating the problems of invalidity (*invalidità*) and ineffectiveness (*inefficacia*) of juridical acts in Roman law. A lengthy study of TALAMANCA (published in 2005) deserves a special mention. Here, the Italian scholar distinguishes between inexistence (*inesistenza*), invalidity (*invalidità*), and ineffectiveness (*inefficacia*) of juridical acts in context of Roman law.

As for Hungarian legal literature, the most specialised analysis of invalidity of contracts can be found in the great monograph of Emilia WEISS, published in 1969, which did not lose much from its scientific significance. Since 1998, András FÖLDI has been deeply analysing the theoretical problems of validity and effectiveness of juridical acts on the basis of provisions of the current Hungarian Civil Code but with also regard to Roman law, legal history, and comparative private law. Földi's studies induced a serious scientific debate in the Hungarian literature (see the studies of András BESSENYŐ and Iván SIKLÓSI). In 2000, a monograph on invalidity due to the faults of contractual will and in 2004, another excellent treatise on contracts against good morals was published by Attila MENYHÁRD who also scrutinized these questions in a comparative manner. In the year of 2008, a monograph treating the problems of invalidity of contract in Hungarian private law was published by

Gábor KISS and István SÁNDOR. The problems of contracts in contradiction to good morals were analysed in legal historical and comparative context by Gergely DELI in his doctoral thesis (defended in 2009).

II. A brief description of the studies, analyses, and methods

As for the structure and content of our dissertation, following the Introduction (Chapter 1) on the topic, purpose, and methods of our doctoral thesis, in Chapter 2 we analysed some important questions related to the history of concept of juridical act and contract in Roman law and in its subsequent fate as well. This relatively brief summary seemed to be necessary since concepts of Roman law and modern private law often differ and the analysis of inexistence, invalidity, and ineffectiveness of juridical acts should be based on the exact definitions of juridical act, contract, and their conceptual elements.

In Chapter 3 we dealt with the problems of inexistence of the contract in Roman law and in modern legal systems as well. On the basis of numerous relevant Roman law sources we inquired whether the modern concept of inexistence of contract was applicable in Roman law, and differentiated between inexistence and invalidity. In addition, the legal consequences of the inexistence of contracts in Roman law and in its subsequent fate were also addressed.

In Chapter 4 some dogmatic and terminological questions related to invalidity of contracts were investigated. Regarding, *inter alia*, the virtually boundless Roman law and modern private law literature on the invalidity of juridical acts, only some problems could be dissected. In this chapter the modern concept of invalidity of juridical acts, its applicability to Roman law, the formation and development of the distinction between nullity and annulment, the well-debated questions of the elimination of the causes of invalidity, and the problems of partial invalidity were treated.

In Chapter 5 we dealt with some theoretical, dogmatic, and terminological problems of ineffectiveness of juridical acts with special regard to the revocation of will from the point of view of legal dogmatics.

Finally, in Chapter 6 the most important conclusions and the possible utilization of our scientific results were summarized.

As for the methods of the researches in our thesis, our quite complex choice of topic—with special regard to the Roman law researches—needed the application of a complex scientific method which is dogmatic on the one hand and historical on the other. Although the dogmatic method has enjoyed priority, a kind of “mixed” methodology of dogmatic and historical approach was applied.

During our Roman law researches we often applied modern concepts in order to describe and to analyse the Roman law institutions. First and foremost, the legal sources of classical and Justinian Roman law have been considered.

Since the main concepts in our thesis were created to a considerable extent in the Pandectist legal science, some important works from the German jurisprudence of 19th century have been taken into account (e.g. the books of Friedrich Carl von SAVIGNY, Georg-Friedrich PUCHTA, Heinrich DERNBURG, Bernhard WINDSCHEID, and Rudolf von JHERING). Prominent handbooks as well as important and often cited textbooks of Roman law were also reflected. In addition to the studies and monographs in which the problems of inexistence, invalidity, and ineffectiveness of juridical acts were exclusively dealt with, we made use of the great German, Italian, and Spanish monographs treating the general problems of juridical acts.

Considering the sources of Roman law, legal history, and modern legal systems as well, we always attempted to go back to the original, primary sources. As for the interpretation of Roman law sources, we usually did not search for interpolations, regarding the mainstream scientific approach of modern Roman law researchers according to which the textual critic (*Textkritik*) can only be regarded as the last instrument during the interpretation of a given text. To specify the relevant Roman law sources, we turned to the well-known dictionaries, encyclopaedias, and the different modern databases of Roman law. It is to be noted that the full material of the relevant Roman sources (especially the Roman non-legal writings, the epigraphic sources, and the sources of legal papyrology) could not be scrutinized fully.

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

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

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

As for the Hungarian private law, the latest developments were also taken into account. In this respect we mention, first of all, the Expert proposal from the year of 2008, edited by

Lajos VÉKÁS, and the new Hungarian Civil Code (Act V of 2013) which will come into force only in 2014.

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

III. A brief summary of the scientific results and their possible utilization

1. History of the concepts of juridical act and contract

We would like to briefly summarize our scientific results of our researches concerning the concept and history of juridical act and contract in Roman law and in its subsequent fate.

The essence of the concept of juridical act—which was not elaborated by Roman jurists—was described with terms “agere”, “gerere”, and “contrahere” in Roman law. In this regard, for instance, a famous text by Ulpian (D. 50, 16, 19) has been deeply analysed. This text contains the well-disputed definition of contract by Labeo.

As for the formation of the modern concept of juridical act, we emphasized that its roots can be traced back before the Pandectist legal science (see the definitions of ALTHUSIUS, NETTELBLADT, and HARPPRECHT from the earlier centuries).

Regarding Roman law sources we focused, inter alia, on the importance of contractual form and will, on the distinction of *contractus* and *pactum*, and on the development of the concept of contract in Roman law sources, giving an overall summary of the virtually boundless literature. It has to be emphasized that the earliest appearance of the principle “pacta sunt servanda” might be found in Byzantine jurisprudence (see Theophilus, *paraphr. inst.* 3, 13, 2 and a *scholion* of Stephanos to Paul. D. 17, 1, 5, 2, according to which the contractual will is the mother of all conventions [“météρ gar estin tón synallagmatón hé diathesis“]).

Following that the formation and development of modern concept of contract, the principle of contractual freedom, and the roots of *pacta sunt servanda* principle in canon law (see e.g. the relevant discussions of Bernardus Papiensis, Vincentius Bellovacensis, and Hostiensis; cf. furthermore the statement “pax servetur, pacta custodiantur” in *Liber Extra* [1, 35, 1 *de pactis*: “Pacta quantumcunque nuda servanda sunt”]) as well as in Dutch (GROTIUS, „De iure belli ac pacis”, 2, 11 [“De promissis”]) and French (DOMAT and POTHIER) jurisprudence were treated, with also regard to the modern legal systems. Furthermore, the well-disputed concept of *causa*—as the essential element of contract in French *Code civil* of 1804 and in some legal systems based on French legal tradition (see e.g. the Italian *Codice civile* of 1942, the Spanish *Código civil* of 1889, and the Civil Code of Québec of 1994)—and

the consideration—which provides the reason for enforcing a promise in English law of contracts since 1602 (Slade’s case)—were analysed. In regard of consideration, inter alia, the discussions of BLACKSTONE were studied. From the point of view of legal dogmatics the following statement of Blackstone is especially important: „A consideration... is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay anything on one side, without any compensation on the other, is totally void in law.”

2. Inexistence of contract

As for the problems of inexistence of contract in Roman law and in modern legal systems, we have to emphasize that the *raison d’être* of the category of inexistence of contract and its applicability in Roman law were and still are heavily disputed both in Roman law and private law literature. In this respect a kind of ontological approach was needed. We cited, inter alia, the famous question of Martin Heidegger: “Warum ist überhaupt Seiendes und nicht vielmehr nichts?” As starting point of our Roman law researches—following the theory of Ludwig MITTEIS—served the famous text of Gaius (3, 176) which we analysed thoroughly. Certain statements of DI PAOLA and TALAMANCA concerning the *raison d’être* of the category of inexistence and its applicability to Roman law were also criticised. After scrutinizing the casuistic Roman law sources (see Ulp. D. 12, 1, 18 pr.; Ulp. D. 12, 1, 18, 1; Ven. D. 45, 1, 137 pr.; Iul. D. 41, 1, 36; Ulp. D. 2, 14, 1, 3; Iav. D. 44, 7, 55; Ulp. D. 18, 1, 2, 1; Pomp. D. 18, 1, 8 pr.; Paul. D. 18, 4, 7; Gai. 3, 140; Gai. 3, 142; Pap. D. 24, 1, 52 pr.; Inst. 3, 24 pr.; Paul. D. 44, 7, 3, 2) we laid down that one can find the roots of this category in Roman law already. However, the modern concept of inexistence of contracts and the modern distinction of inexistence and invalidity of juridical acts are not applicable without restrictions to Roman law sources. In these sources the terms are often irrelevant (see for instance, Paul. D. 17, 1, 22, 3; Pap. D. 13, 7, 40 pr.; Iav. D. 41, 3, 21; C. 4, 38, 2; Ulp. D. 24, 1, 32, 24; Ulp. D. 41, 3, 27).

It is worth mentioning that—contrary to invalidity—the inexistence of contract is not to be regarded as an unlawful situation. The “inexistence” of a contract in the contractual sphere means inexistence regarding the lack of the so-called *äußerer Tatbestand*. This consideration could help us to distinguish between inexistence and invalidity of juridical acts, which problem was also investigated in the context of modern legal systems, with special regard to Hungarian private law.

3. Invalidity of contract

Considering the dogmatic and terminological questions related to invalidity of contracts, first of all, the dogmatic nature of invalidity was analysed. It deserves mention that invalidity always has a punitive character (cf. the view of László ASZTALOS).

According to Bernhard WINDSCHEID, an invalid legal act is a body without soul and it does not exist in the sphere of law. On the basis of a famous phrase of Anatole France (“l’Âme est la substance; le corps l’apparence”) we pointed out that an invalid juridical act has a body but—without having a soul—it is not able to produce any legal effect. Contrary to the invalid juridical act, the valid legal transaction can be regarded as a “mens sana in corpora sano” (Iuvenalis).

It is well-known that the abstract term of invalidity, inter alia, had not been composed by Roman jurists. With ZIMMERMANN’s words “the Roman lawyers were unconcerned about dogmatic niceties”. This remark is especially relevant concerning invalidity since there are more than hundred different expressions describing inexistence, invalidity, and ineffectiveness of juridical acts in Roman law sources. See e.g. the terms *nullum esse*, *nullum* (or *non*) *fieri*, *nullum stare*, *nullius momenti esse*, *non* (or *nec*) *valere*, *nullam vim* (or *nullas vires*) *habere*, *effectum non habere*, *inefficax esse*, *ad effectum perducere non posse*, *sine effectum esse*, *pro non facto haberi* (or *pro non facta est*), *pro non scripto haberi*, *non videri factum*, *non intellegi*, *nec facere potest*, *non esse*, *non consistere*, *non subsistere*, *neque* (or *nisi*) *constat*, *non contrahi (obligationem)*, *non videtur contrahi*, *contrahi non potest*, *nihil agere*, *inutilis*, *utile non esse*, *irritus*, *imperfectus*, *ratum non* (or *nullo tempore*) *haberi* (or *ratum non est*), *inanis* (or *inane factum*), *vitiosum esse*, *vitiari*, *frustra facere*, *non posse* (or *non potest fieri* etc.), *non licere*, *illicitus*, *non permitti*, *non* (or *nihil*) *est permissum*, *prohiberi*, *impedire* (or *impediri*), *obstare*, *corrumpere*, *infirmare* (or *infirmari*), *infirmum*, *non nocere*, *non prodesse* (or *non [nihil] proficere*), *non sequi* (or *nec sequenda est*), *non teneri*, *non tenere*, *iuris vinculum non optinet (obtinere)*, *non obligari* (or *non est obligatorium*, *non [nec] nascitur obligatio*, and *nulla obligatio nascitur*), *non* (or *nullo modo*) *deberi* (or *debere*), *non acquirere*, *actio non datur* (or *actio denegatur*, *actio non competit*, *actio peti non posse*), *compelli non posse* (or *cogendum non esse*, *ne cogatur*), *ius* (or *facultatem*, *potestatem*) *non habere (faciendi)*, *recte* (or *iure*) *non fieri* (or *facere*), or *non iure factum*, *iustum non haberi* (or *iniustum*), *coiri non posse*, *evanescere*, *nihil esse*, *nihil posse*, *nihil momenti habere*, *submoveri*, *supervacuum*, *pro infecto haberi*, *pro non adiecto*

haberi, invalidus, vanum, impedimentum adferre, perimi, remitti, tolli, rescindere, and rumpere (cf. the results of researches of MITTEIS, HELLMANN, BETTI, DI PAOLA, and STAFFHORST). Bringing these expressions into a logic order turned out to be hopeless but important scholars (from the earlier Roman law literature e.g. SAVIGNY and HELLMANN, from the modern Roman law literature e.g. MARRONE and FÖLDI) find signs of a consequent terminology in case of a few expressions (see for instance, *infirmari, pro non scripto haberi, irritum fieri, rumpitur, and rescindere*).

The terminological inconsistency and the great variety of Roman law sources concerning invalidity deeply affected the modern legal terminology in this respect. As for terminology of invalidity in modern legal systems we distinguished between a “German-type” and a “French-type” terminology. The characteristic terminology of the French *Code civil* of 1804 concerning invalidity had an essential impact e.g. on the terminology of Spanish *Código civil* of 1889 and of Civil Code of Québec of 1994 concerning invalidity. The terminology of Italian *Codice civile* of 1942 and the Portuguese *Código civil* of 1966 concerning invalidity is based, however, both on the German and French legal tradition.

As for “nullity” and “annulment” of contracts in Roman law, the applicability of modern concept of annulment to Roman law sources was explored with particular care. On the basis of casuistic sources and vast literature we laid down that the Roman law roots of the concept concerning annulment can mainly be found in the legal constructions related to the “annulment” according to *ius civile* (see e.g. the rescission of *testamentum inofficiosum*, the rescission of sale in case of *laesio enormis*, and the *exceptio* based on *senatus consultum Velleianum*).

Regarding the distinction of nullity and annulment, it is generally accepted and emphasized in the literature that the modern concept of annulment (*Anfechtbarkeit* in German legal terminology) and the distinction of nullity and annulment had been created by Friedrich Carl von SAVIGNY in the 19th century and that the distinction of nullity and annulment within the context of the invalidity was used for the first time by German scholars of the Pandectist legal science. In this regard, however, we also have to take into consideration the achievements of the earlier jurisprudence. Scrutinizing the Dutch and French antecedents of the distinction of nullity and annulment before the 19th century, we emphasized, first and foremost, the significance of the œuvre of Arnoldus VINNIUS, Jean DOMAT, and Robert-Joseph POTHIER. With special regard to DOMAT’s *Les loix civiles dans leur ordre naturel* the distinction of nullity and annulment seems to be known in the French jurisprudence even at the end of 17th century. Therefore, the traditional view, according to

which the distinction of nullity and annulment was first elaborated in the German Pandectist legal science, needs to be revised.

Role and significance of the distinction of nullity and annulment in modern legal systems were also treated. Although this distinction has a great importance nowadays, taking into account the new Hungarian developments (cf. for instance, the Expert proposal of 2008 and the provisions of the new Hungarian Civil Code, especially 6:88. § [3]) we can state that the fate of this distinction is quite uncertain.

As for elimination of the cause of invalidity, the legal construction of *laesio enormis*—which can be regarded, in our opinion, as one of the cases of annulment according to *ius civile* in Roman law—and then the legal constructions of convalescence and conversion of juridical acts were investigated in Roman law as well as in its subsequent fate. Since invalidity can be normally regarded as a “final verdict on the fate of a transaction” (ZIMMERMANN), the elimination of cause of invalidity is always exceptional in Roman law (cf. the so-called *regula Catoniana* in Roman law) and in modern legal systems.

In contrary to *convalescentia*, which means convalescence of an originally invalid transaction in the same form (see e.g. Ulp. D. 44, 4, 4, 32; Ulp. D. 6, 1, 72; Pomp. D. 21, 3, 2; Paul. D. 13, 7, 41; Mod. D. 20, 1, 22), *conversio* could be considered as a transformation of an invalid juridical act into another valid one (see the definition of Christian Ferdinand HARPPRECHT, published in 1747: “*traductio vel commutatio unius negotii in alterum*”). The applicability of modern concept of conversion elaborated according to subtle dogmatic distinctions is much disputed in the Roman law literature. We took a view on the different theories (see for instance, Vincenzo GIUFFRÈ from the Italian and Christoph KRAMPE from the German bibliography) concerning the problem of dogmatic nature of conversion. After due consideration of the most important sources (cf. Gai. 2, 197; Ulp. 24, 11a; Paul. D. 17, 1, 1, 4; Ulp. D. 29, 1, 3; Ulp. D. 29, 1, 19 pr.) we argued that the modern concept of conversion may be—with certain restrictions—equally applicable in Roman law.

In the next step the dogmatic questions of partial invalidity of contracts were treated in Roman law and in its subsequent fate. Although—according to Vittorio SCIALOJA—the distinction of total and partial invalidity is very simple, the reason for existence of partial invalidity is highly contested both in Roman law and private law literature (see, for instance, the works of Hans Hermann SEILER and Reinhard ZIMMERMANN; recently see the excellent monograph of Andreas STAFFHORST, published in 2006; from the recent Hungarian private law literature see the essays of Lénárd DARÁZS). In the light of the most

relevant Roman law sources, partial invalidity of contracts was already known by the classical Roman jurists, who often applied the legal instrument of fiction in this regard (cf. Paul. D. 18, 1, 57 pr.; Marci. D. 18, 1, 44; Gai. 3, 103; Paul. D. 13, 6, 17 pr.; Ulp. D. 24, 1, 5, 5; Pomp. D. 24, 1, 31, 3; Pap. D. 24, 1, 52 pr.; Ulp. D. 45, 1, 1, 5; Ulp. D. 45, 1, 1, 4; Pomp. D. 45, 1, 109). However, partial invalidity was only expressly formulated by the scholars of *ius commune* (see Accursius, gl. *Per hanc inutilem*, ad. D. 45, 1, 1, 5; *Liber Sextus decretalium D. Bonifacii Papae VIII., De regulis iuris, regula XXXVII*).

Following the analysis of sources, we also dealt with the *raison d'être* of partial invalidity. In our opinion, partial invalidity of a juridical act can only be recognized when the contractual will and, therefore, the juridical act itself can be divided into different autonomous parts and, additionally, when it is backed by the interests of the parties.

4. Ineffectiveness of juridical acts with special regard to the dogmatic problems of the revocation of will

As for ineffectiveness of juridical acts, we focused first and foremost on the revocation of will from the point of view of the legal dogmatics (from the Hungarian literature see the essays of András FÖLDI and András BESSENYŐ).

In our interpretation, validity is merely a theoretical possibility of producing legal effects. Effectiveness means, however, the actual production of the intended legal effects. The relation of invalidity and ineffectiveness can be described through various theoretical models. Nevertheless, a strict interpretation of ineffectiveness seems to be useful according to which only valid juridical acts are regarded as effective or ineffective. In this sense, ineffectiveness only means the state of a valid juridical act when it cannot produce the intended legal effects actually. Due to the achievements of our comparative legal researches we distinguished among various interpretations of ineffectiveness in the modern literature. Modern German lawyers generally use the word “Unwirksamkeit” in the sense of invalidity, without differentiating between invalidity and ineffectiveness of juridical acts. There is a similar situation, for instance, in the French jurisprudence which does not distinguish dogmatically and terminologically between invalidity (*invalidité*) and ineffectiveness (*inefficacité*) in strict sense. However, in Italian, Spanish, and Hungarian literature, the strict distinction of invalidity and ineffectiveness is well-known.

We focused later on the Hungarian law of succession. In addition to the examination of that relatively limited subject, the revocation of a will is in Roman law and in some modern

legal systems was also briefly considered. We gave a detailed discussion to whether or not, theoretically speaking, it is justified to speak of retroactive invalidity. Discussing the legal aspects of revocation of will, our point of departure was that a will cannot induce the required legal consequences before the testator's death (*vivente testatore*), only thereafter (*mortuo testatore*), although the will can produce certain legal effects before the testator's death (e.g. the revocability of the will itself) too. However, these cannot be regarded as intended legal effects. In this regard we paid attention to the different intensities of effectiveness.

Related to the provisions of the current (650. § [1]) and the new Hungarian Civil Code (7:41. § [1]), the revocation of will results in its subsequent ineffectiveness. This terminologically problematic provision served as the starting point for the researches of András FÖLDI who strongly criticized the legal provisions of the current Civil Code, proposing the application of the retroactive invalidity in this context. We attempted to prove, however, that the dogmatic category of retroactive invalidity of juridical acts is untenable. The undisputable fact that a testator's intentions are changeable right to the end of his or her life cannot justify the retroactive nullity of a revoked will. If that were the case, the parties could annul their contract by mutual agreement with a retroactive effect (e.g. the Roman *novatio*, the French *novation*, or the Italian *novazione* do not cause the retroactive invalidity but the termination of the contract). It is unacceptable to consider a Roman law source (Ulp. D. 34, 4, 4) as an evidence for the theoretical justification of retroactive invalidity in modern legal systems. Revocation is an act for which the category of retroactive invalidity cannot be used because invalidity always has a punitive character. To put it briefly, invalidity is always a sanction. As for the revocation of a will, it seems appropriate to introduce a third category: the fall of the will. It expresses the idea that a revoked will is incapable of inducing legal effects. (In Roman law the terminology for it is *rumpitur*, cf. Inst. 2, 17 pr.)

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

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

because it has a great importance in legal science but also because of its indirect or direct influence on law in action.

5. Possible utilization of the researches

As for the possible utilization of our researches in legal education, we can refer to the two chapters of the textbook entitled “Összehasonlító jogtörténet” [Comparative Legal History; ed. András FÖLDI; published in 2012) in which some results of our researches concerning the concepts of juridical act and contract on the one hand, and the inexistence, invalidity, and ineffectiveness of juridical acts on the other hand were published.

Apart from the theoretical importance one may ask whether the results of our researches could be applied in law-making or in legal practice.

We hope that the results of our researches have not only theoretical but also practical significance. From the point of view of theory, it is unquestionable that consequent application of legal concepts is of great importance. The main purpose of our dissertation was to emphasize that existence, validity, and effectiveness are concepts based on each other in a logical order. In our thesis we distinguished four levels of ability for producing legal effects:

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

At the first level, the “juridical act” is not able to produce any “typical” legal effects (cf. *effetti tipici* in Italian literature). At the fourth level, however, the existing, valid, and effective juridical act is able to produce actually and in fact is producing the “typical” and intended legal effects. Naturally, it is a simplified model and the reality is much more difficult. At the second level, for instance, the juridical act can be partial or relatively invalid, and at the third and fourth level ineffectiveness or effectiveness can have different intensities.

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

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

As for the factors violating the validity of the contracts, we have to note that the traditional division of the causes of invalidity into faults of contractual will, of declaration, and of intended legal effect can be regarded as schematic. Therefore, the importance of this model is not to be overestimated. In regard to a famous text of Paul (D. 18, 1, 57 pr.)—which has been analysed in the context of partial invalidity in our dissertation—we came to the following conclusion: the invalidity of the sale of a house which has been partially burnt can be based either on mistake (as a fault of contractual will) or on impossibility (as a fault of intended legal effect). There can be different argumentations and approaches in this case, but the result will be the same: invalidity. As for the dogmatic nature of *emptio mixta cum donatione* in context of Ulp. D. 24, 1, 5, 5, the invalidity of the legal transaction might be explained by simulation (as a fault of contractual will) or by an evasion of a legal rule (as a fault of intended legal effect) since the purpose of simulation is always to evade a legal rule.

As for invalidity due to legal incapacity, the lack of legal capacity belongs traditionally to the faults of intended legal effects. In our opinion, however, the lack of legal capacity causes invalidity based on a fault of contractual will in a right dogmatic approach.

Both in Roman law and private law literature it is usual and generally accepted to distinguish between physical and legal impossibility. In our opinion, however, the application of the dogmatic category of legal impossibility has no *raison d'être* since a legally impossible contract is always against the law that is always illegal. Everywhere in law-making, in practice of law, and in legal education a simple and transparent legal terminology is to be applied.

Regarding the reasons for the existence of the partial invalidity the interest of the parties is to be mentioned rather than abstract dogmatic considerations. It means the application of

the so-called “principle of interest” (see the German term “Utilitätsprinzip”) which is known and applied in the sphere of contractual liability.

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

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

IV. List of publications on the topic of dissertation

SIKLÓSI I.: *A jogügyleti hatályosság elméleti problematikája, különös tekintettel a végrendelet visszavonásának jogdogmatikai megítélésére* [= Theoretical problems of the effectiveness of legal transactions with special regard to the revocation of will], Acta Facultatis Politico-iuridicae Universitatis Budapestinensis 41 (2004), 73—111

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SIKLÓSI I.: *Az érvénytelenségi ok kiküszöbölésének néhány kérdése a római jogban és annak továbbélése során* [= Some questions of the elimination of the cause of invalidity in Roman law and in its subsequent fate], Acta Facultatis Politico-iuridicae Universitatis Budapestinensis 42 (2005), 65—100

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SIKLÓSI I.: *Észrevételek a konverzió problémájához a római jogban és a modern jogokban* [= Contributions to the problem of conversion in Roman law and in modern legal systems], *Jogtudományi Közlöny* 63/10 (2008), 509—516

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