Abstract

The German Civil Code (BGB) has its 125th anniversary this year (2025). This is the reason for looking back to the roots of the BGB – the Roman Law. Therefore, the following analysis will compare the BGB with the Roman Law. This comparison focuses on ownership and possession as two fundamental concepts of Property Law.

Introduction

The *Corpus Iuris Civilis* (533 AD) as a codification of Roman Law, is one of the most influential legal works in world history. Furthermore, it is the foundation of the BGB and its principles. The *Corpus Iuris Civilis* goes back to the Law of the Twelve Tables from 450/451 BC. This law, which was first on ten tables with two additional tables, has stood for a long time in the central place in Rome, the forum. The XII Tables no longer existed at the time the *Corpus Iuris Civilis* was compiled. However, the jurist Gaius was able to publish a commentary on them 250 years later, which was presented to Emperor Justinian around 530 AD. – Emperor Justinian commissioned the *Corpus Iuris Civilis*.[1] The Roman Law took its so-called "classical" form between 150 BC and 250 AD. This development ended with the origin of the *Corpus Iuris Civilis*.[2] In the East, the Roman Law ended after the conquest of Byzantium by Mehmed II. With the renewal of legal scholarship in Italy, the *Corpus Iuris Civilis* experienced a tremendous upswing. This happened at the end of the 11th century in Bologna. There, the first school of glossators subjected the content of the compilation.[3] In the 13th century, the reception in Germany had gradually begun and found its conclusion in 1945 with the Imperial Chamber Court Ordinance.[4] The content of the Roman Law was added to the German Law in the way the glossators and the post-glossators presented it. [5] The *Corpus Iuris Civilis* was implemented as *ius commune* (common law), while the German Law was territorial and socially fragmented.[6] The Roman Law was applicable law in large parts of Germany until 1900, when the BGB came into force.[7] In this analysis, the Roman Law, especially the *Corpus Iuris Civilis,* will be compared with the BGB. Therefore, the focus will be on two concepts of Property Law – ownership and possession. Before that, the term 'thing' will be defined.

Things

Before possession and ownership can be compared, the main term of Property Law – thing – needs a definition. In both Roman and German Law is a thing (*res*) is a physical object.[8] The main difference is that the Romans had slaves who were seen as *res*. However, animals are similar in that position: the Roman law understood animals as *res,* while the German law states that animals are not things, but the rules of Property Law should be applied by analogy. This is relevant because in both civil laws, it is only possible to own things.

Differences of Possession of Two Eras

1. **Definition**

Possessio (= possession) is the intentional and actual power over a physical object. It was more likely seen as a *factum* (= fact) than a right.[9] Also, the German possession needs a property authority.[10]

1.2 Types of Possession

However, the Roman Law differs between *civilis possessio* and *naturalis possession*.[11] *Civilis possessio* is the legal possession and has two characteristics: the intent to possess as owner (*animus*) and the property authority (*corpus*).[12] This possession ends if the *possessor* loses *corpus et animo* or only *corpus*.[13] In contrast, *naturalis possessio* was not seen as legal possession, because the person who had actual power over a physical object is a detentor and possessed for someone else. In such cases, the *possessor* exercised his actual control over the thing through the detentors.[14] The BGB differs possession into mediate possession and immediate possession.[15] Additionally, German Civil Law has also detentors. That principle is similar to the *naturalis possessio* with one added characteristic: the subjection to the possessor's instructions. This means that the detentor must stand in a relationship to the possessor by virtue of which he is obligated to comply with the instructions of the other relating to the thing.[16] However, possessors may possess mediately or immediately. A mediate possessor stands in a relationship to the immediate possessor by virtue of which he is authorized or obligated to possess temporarily. Accordingly, tenants and leaseholders are immediate possessors, and the owner of such things is the mediate possessor.[17] Finally, immediate possession is the same as *civilis possessio* without the *animus*; the immediate possessor may possess for his own, but can

also possess for someone else.[18] The types of possession in the BGB are quite similar to the types of possession in Roman Law. The main difference is the mediate possession as an extension to immediate possession and detentors. While tenants and leaseholders in Roman Law are detentors, there are immediate possessors in the BGB.

2. Ownership for over 1000 years and now

2.1 Definition of Ownership

In Roman Law, ownership establishes the complete dominion over a thing (*plenam in re potestatem*).[19] It is the most comprehensive private right that one can have on a thing.[20] Moreover, ownership only exists for physical objects, because intangible objects are rights and rights cannot be owned.[21] However, complete dominion comes with responsibility. That means that the powers of dominion reach their limits when it comes to the protection of the public good.[22] One may not abuse one's authority to the detriment of the community.[23] Limitations on ownership in the interest of the public good already existed in the Law of the Twelve Tables.[24] Regardless of these, liberty and ownership are bound in the Roman perspective as one can see in Inst. 1,3,1: Liberty is the natural capacity to do that which one pleases to do. This liberty also finds its expression in ownership, not only in Roman ownership.[25] The § 903 sent. 1 BGB stands: The owner of a thing may […] deals with the thing as the owner wishes and exclude others from any interference. Only the last part of the sentence differs from the Roman definition of liberty, but overall, it corresponds to the understanding of liberty. Additionally, that part of the BGB limits ownership to things. Things are in § 90 BGB defined as physical objects. However, the § 903 sent. 1 BGB also limits the ownership; those are conflicts with lthe aw or the rights of third parties. The understanding of ownership in Roman Law and the BGB is quite similar. Also, regarding things that one may own and the limits of ownership.

2.2 Acquisition of Ownership

Not only is ownership itself multifaceted, but acquisition may also occur through various means. The two overarching categories are original acquisition and derivative.[26] Occupation (*occupatio*) is the primary form of original acquisition, for that which is unowned (*res nullius*) becomes the property of the person who occupies it. During

Late Antiquity, this principle likewise extended to immovable objects. An example of *occupatio* is the catching of wild animals, which include bees.[27] In Germany ,the occupation is regulated in § 958 BGB, which includes in subsection 2 restrictions due to prohibitions and occupations by third parties. Regarding the example above: The occupation of wild animals and bees is regulated in §§ 960-964 BGB. Thus, the fact that bees are wild animals has found its way from Roman Law to the BGB. Another form of original acquisition is the specification. Specification was a much-discussed issue in Roman Law. There were two groups – the Sabinians and the Proculians. The Sabinians said that the owner of the materials should get the ownership of the new thing, while the Proculians meant that the producer should become the owner of the new thing. Later, Justinian proposed a mediating solution: If a new thing can be transformed back into its original material, it belongs to the owner of the materials; if a thing cannot be restored, it belongs to the producer.[28] In contrast, § 950 BGB, which regulates the specification, focuses on the value added by the specification as a criterion: If the value added by the specification is not significantly less than the value of the material, the ownership belongs to the producer. For this reason, the § 951(1) BGB regulates that the owner of the material may claim indemnification. Otherwise, there is the derivative acquisition in Roman Law, which means that the acquisition of ownership is effected through the transfer of the previous owner (*auctor*). The new owner (*successor*) of a thing may only acquire a thing the *auctor* owned before. The *successor* cannot acquire a thing that the *auctor* does not own. The last point is different in German Civil Law. It is possible to acquire the ownership of a thing from a non-owner if the new owner does not know that the other person is not the owner.[29] *Mancipatio* was only for Roman Citizens to become owners of slaves, cattle, and immovable property. First, the ownership was acquired in exchange for payment. Later, the payment became symbolic (*mancipatio nummo uno*). The *mancipatio nummo uno* was independent of the legal basis (*causa*), so it was abstract.

Nevertheless, the *tradition*, an informal transfer of ownership, needs a *causa* to transfer the ownership. Furthermore, this form of acquisition of a thing could be used by every person in the Roman Empire,[30] and did not distinguish between movable property and immovable property.[31] However, it is not clear if the *causa* must be valid to have a valid transfer of ownership at the time of Justinian.[32] Further, *tradition* was the only option to transfer ownership at that time.[33] Additionally, there are two more characteristics: Firstly, a transfer of possession to the *successor* is necessary. Secondly, both parties need the intent

to transfer ownership.[34] The forms of derivative acquisition differ so far from German derivative acquisition that there is only a distinction between the transfer of ownership of movable property in § 929 BGB and of immovable property in §§ 873, 925(1) BGB. This distinction is fundamentally based on the fact that the transfer of ownership of an immovable property requires a conveyance; this means an entry into the land register,[35] and the agreement must take place at a competent institution.[36] Regardless of these differences, the transfer of ownership needs an agreement that includes the intention of transfer and a transfer of possession.[37] For the transfer of possession are also existing alternatives: the constructive delivery (the indirect possession) in § 930 BGB and the Assignment of the claim of delivery in § 931BGB. Furthermore, the process is abstract, and the following is not connected with the legal basis. These are only a few forms of the acquisition of ownership. However, it shows that the basic ideas of Roman Law can be found in the BGB, but the BGB is also sometimes more abstract and adapted to modern conditions, such as the transfer of possession and the transfer of ownership of immovable property. Moreover, problems in the Roman Law, such as with the specification, are solved with an abstract rule.

Conclusion

This analysis shows that the fundamentals of the principles of ownership and possession may be found in Roman Law. Furthermore, the definition of ownership is very similar to the Roman definition of freedom, with only small additions. However, the BGB is more abstract than the Roman Law and solves some problems like the specification on an abstract level. Moreover, there are further developed findings like the mediated possession or the different system of acquisition of ownership of an immovable property. The change in possession also leads to changes in the acquisition of ownership: Now, there are alternatives to the transfer of possession regarding mediated possession.

To conclude, the fundamentals and basic understanding of the Property Law in the BGB depend on Roman Law and have not changed until now. Regardless of these, the BGB has adapted to modern conditions and circumstances.

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Endnotes

[1] Meincke, *Römische Privatrecht* (Nomos 2021) 18.

[2] Ibid. 21.

[3] Kaser and others, *Römisches Privatrecht* (C.H.Beck 2021) § 1 rn 32, 33.

[4] Ibid. §1 rn 35.

[5] Endemann, *Römsiches Privatrecht* (DeGruyter 2017) §10 p. 25.

[6] Kaser (n 3) rn 36.

[7] Ibid. 20.

[8] § 90 BGB; Meincke (n 1) 71.

[9] Endemann (n 5) 102.

[10] § 854 BGB.

[11] See: Endemann (n 5) 103-104.

[12] Kaser (n 3) § 29 rn 8.

[13] Ibid. § 30 rn 7.

[14] Ibid. § 29 rn 17,18.

[15] Cf. § 3 rn 13.

[16] § 855 BGB.

[17] § 868 BGB.

[18] Cf. § 872 BGB; § 3 rn 23.

[19] Meincke (n 1) 72.

[20] Kaser (n 3) § 32 rn 1.

[21] Meincke (n 1) 71.

[22] Ibid. 72.

[23] Kaser (n 3) § 33 rn 1.

[24] Ibid. rn 2.

[25] Meincke (n 1) 71.

[26] Kaser (n 4) § 34 rn 1.

[27] Meincke (n 1) 65.

[28] Ibid. 66.

[29] § 932 BGB.

[30] Kaser (n 3) § 34 rn 10, 11.

[31] Meincke (n 1) 70.

[32] Kaser (n 3) § 34 rn 15.

[33] Meincke (n 1) 68.

[34] Ibid. 69.

[35] Cf. § 873 BGB.

[36] Cf. § 925(1) BGB.

[37] Cf. § 929 BGB.