

## ROMAN PRINCIPLES – FOUNDATIONS OF THE EUROPEAN LEGAL CULTURE AND THEIR POSITION IN THE CHANGING WORLD<sup>1</sup>

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**Abstract.** Roman law is considered to be one of the most influential elements of the continental legal culture. However, rapid technological development and changing social and economic situation bring new challenges for principles tested during the centuries. Consumer protection; fight against corruption and money laundering; data protection and other new fields of law emerge a fundamental question: Are the ancient Roman principles still valid and required?

**Keywords:** Roman law, legal principles, justice, bona fide, EU law, consumer protection.

### INTRODUCTION

In 1994, William B. Ewald asked the following question: „*And what of the future? There are encouraging signs that Europe is drawing together, and that it may once again get a unified system of laws. If it does, those laws will be necessarily based on Roman patterns. It is no accident that the European Community was created by the Treaty of Rome.*“ (Ewald, 1994, p. 29).

From European Community became European Union and the legal system of its member states is in 2020 in many fields unified. However, is this unification in some form based on the Roman legal principles? Are the Roman legal principles still valid? May be these principles at least a source of inspiration for EU law?

This paper does not aim to analyse in deep the connection between institutes of private law and Roman law. It would be counterproductive, as there are numerous high quality researches made on this topic. This paper aims to point on the position of the selected general and also specialised principles in EU legal system and their possible evolution in the future.

All of the analysed Roman principles arise from the justice (*aequitas*), which was understood as the most fundamental principle - the base stone of the Roman legal system. The author applies the Roman principles on selected fields of EU law and by using the comparative method, he tries to find out, whether the Roman principles are applied in the EU regulation and if not, if their use may be a fruitful source of inspiration for the future development. With use of the analogy, the selected examples may be used also for a bigger picture, but due to limited scope of the article and broad topic, it is not possible to cover all aspects of the analysed topic.

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## 1. ROMAN INFLUENCE ON THE EUROPEAN LEGAL CULTURE AND RECENT CHALLENGES

For a long period, the Roman law was the most influential element for many European legal orders (Ewald, 1994, p. 341). After rediscovery of Justinian's *Coropus Juris Civilis* in approximately 1100, the Roman law spread throughout Europe and became the foundation of the continental legal systems. It is indubitable, that reception of the Roman legal system had a major impact on development of the whole Europe.<sup>3</sup> Recapitulation of this process would result only into bringing more owls to Athens.

However, everything has changed with the adoption of new civil codes in 19<sup>th</sup> and 20<sup>th</sup> century. German Civil Code came into force in 1900 and with it, the Roman law ceased to be directly applicable in any substantial European state, even in a modernised form (Stein, 2004, p. 128). Was it also the end of indirect impact of Roman law?

Zimmermann states, that Roman law has both nothing and everything to do with the modern law. Rather than laws or norms themselves, we can speak of a shared legal culture, based on the legal science (Zimmermann, 2011). This legal culture is notable not only in the shared institutes, but mainly in the preserved principles and legal maxims. Although the term "legal culture" is quite undefinable,<sup>4</sup> we can say for sure that without Roman contribution, the European law would be no better than a heap of rubble (Ewald, 1994, p. 24).

Relevance of these fundamental principles for EU law is often overlooked, but the European countries, which experienced the rule of communist regime already know results of strict denial of Roman legal heritage. The tension between communist and Roman approach to legal principles may be probably the best illustrated on the element of "justice", respectively *aequitas*.

In Roman law, the scholars identified two aspects of the justice - *aequitas naturalis* and *aequitas civilis*. This division is characterised by famous lawyer Antistius Labeo,<sup>5</sup> who describes that *aequitas naturalis* arises from the natural law, while the *aequitas civilis* is expressed in norms of the civil law (i.e. *ius civile*). Finding the just solution was characterised as the main aim of the legal order. Tryphoninus described it as the effort to give to "everyone his own, in such a way that any person who has a better claim may not be deprived of it."<sup>6</sup> In other words, acting in accordance with the legal regulations (*ius*) was not enough to fulfil the element of justice. In order to correct the insufficiency of formal application of *ius*, it was necessary to apply *ius naturale* and *aequitas naturalis* arising of it, i.e. the law which nature teaches to all living creatures.<sup>7</sup> This perception of justice has been broadly incorporated into modern European legal systems (Compare with: Blaho, 1993).

3 As the European legal culture influenced basically the whole world, we can say that also impact of the Roman law has been spread all over the world (Illustration on Chinese legal system may be found in: Wang, 2006).

4 Zimmermann states that only from 1920 until 1950 arose more than 150 definitions of the concept of "culture" (Compare with: Zimmermann, 2007, p. 341).

5 Ulp. D. 47,4,1,1: *Haec autem actio, ut Labeo scripsit, naturalem potius in se quam civilem habet aequitatem, si quidem civilis deficit actio (...)*.

6 Tryph. D. 16,3,31: *Et probo hanc esse iustitiam, quae suum cuique ita tribuit, ut non distrahatur ab ullius personae iustiore repetitione.* (Translation: Scott, 1932).

7 Ulp. D. 1.1.3.

Communist regime, on the other hand, refused the Roman law as individualistic, cosmopolitan, materialistic and egocentric. Socialist legal theory tied the ancient principles with “bourgeoisie” and its aim to oppress working class. Along with the aforementioned was refused also the concept of *aequitas* or *ius naturale*, which was replaced by “higher” form of justice, which can be denominated as class justice. The legal orders of countries influenced by communist legal theory were therefore based on the principle of inequality before law for several groups of people - enemies of the communist ideology. These people were supposed to be eliminated (Gregor, 2018; Vojáček, Kolárik, Gábris, 2013).

After the fall of the communist regime in the Eastern Europe, numerous countries were concerned to re-establish their legal order in accordance with the tradition of Western legal culture. In order to succeed in these efforts, it was required to turn back to Roman legal principles.<sup>8</sup> The element of justice is the base stone, however, there are numerous other principles following it. Namely, it is needed to mention good faith, respectively *bona fide*.<sup>9</sup>

As it was outlined hereof, basics of the Roman legal system are grounded on the philosophical values, which can be identified in Ulp. D. 1.1.10<sup>10</sup> and which were derived by Ulpian most likely from Cicero’s *De Officiis* - to live honestly, to give everybody his due and to harm nobody (Thomas, 2004, p. 190). By reception of the Roman law, these principles were incorporated into medieval legal orders, *ius commune* and afterwards also into modern European legal systems (Compare with Foldi, 2014).

Good faith as a legal principle is now recognized also in several fields of European private law. With implementation of Directive on Unfair Terms in Consumer Contracts, all member states of EU have incorporated terms with a general notion of *bona fide* in their contract law (Zimmermann, 2000, p. 13). There are also several other indicators that influence of the good faith is growing in the supranational private law during the past decades.<sup>11</sup>

The aforementioned principles have also reflected into more specific once, which have undoubted impact on the recent European legal culture.<sup>12</sup> Due to scope and limited extent of this paper, we can point mainly on the division between private and public law as described by Ulpian<sup>13</sup> or the maxim that “the laws of the vigilant are written”.<sup>14</sup> It is these principals, which conflict probably the most with recent challenges for EU legal regulation, such as consumer protection, anti-money laundering, fight against corruption, data protection and the others.

8 Stein, P. (1999), ‘Roman law in European History’, Cambridge University Press, Cambridge, p. 129.

9 It is needed to say that the origins of the most principles may be found in the ancient Greece, or other ancient nations. Only few of them were originally elaborated in Rome, however, the Roman legal science influenced them all (Domingo, 2017).

10 Ulp. D. 1.1.10: *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*

11 E.g. Art. 1:201 of Principles of European Contract law

12 Touber Muniz determines that there are eight categories of legal principles, starting with the very general norms up to maxims, which help to categorize the legal system (Muñiz, 2002).

13 Ulp. D. 1.1.1.2.: *Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim.* (Author’s translation: Public law is that which has reference to the administration of the Roman government; private law is that which concerns the interests of individuals.)

14 The maxim *vigilantibus iura scripta sunt* arises mainly from the Scaevola’s fragment D 42.8.24: *ius civile vigilantibus scriptum est.* (Fellmeth, Horwitz, 20009, p. 293).

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Division of the public and private law in Roman understanding is based on so-called “interest” theory. Ulpian differs between interest (benefit) of the state and the individuals. In case the area of legal relations does not interfere with the state interests, there is no need for public intervention and such area of legal relations shall be understood as private law. This theory is the basis for legal dualism, which is broadly accepted in the European legal culture, although there are numerous more recent theories justifying division between the public and private law (Fábry, Krošlák, 2007, p. 48).

It is obvious that the legal dualism is in strict opposition to consumer protection, where the state, respectively EU authority broadly interfere to purely private relations. This intervention is justified by protection of the weaker contractual party and nowadays it seems as undoubtedly reasonable step.<sup>15</sup> Multiple regulations focused on the anti-money laundering, fight against corruption, or fair market competition also highly exceed the dualistic division. Purely private contracts between two private entities are regulated by public law.<sup>16</sup>

Consumer protection also contradicts with the protection of the vigilant contractual party, as there are numerous situations, in which the law favours the consumer, although he has not protected its rights duly. The same intervention in favour of the thoughtless actions may be recognized in the regulation of data protection and other fields of law.

All these examples show that the EU law is grounded on Roman heritage, but the ancient Roman principles and maxims are facing huge challenges arising from the modern social and economic relationships. Therefore, we come to a fundamental question: Despite of the role of Roman principles in the history of the European legal culture, what is their position in the modern world?

## 2. FUTURE PARTICIPATION OF ROMAN LAW IN EUROPEAN LEGISLATION

EU law is often associated and compared with the medieval *ius commune* (Compare with: Smits, 2002), which was in decisive way connected with Roman law. If there were significant connections between EU law and *ius commune*, it would seem rational to expect that the influence of Roman law shall increase once more. Nevertheless, there are not only similarities and connections, but also differences.

Some differences between *ius commune* and EU law are obvious; however, one is often overlooked. Peter Stein states that the medieval *ius commune* was adopted throughout Europe voluntarily, through the recognition of its superiority to any alternative, whereas the European legal regulation,

<sup>15</sup> It is needed to point on the power of transnational conglomerates and their resources. In the era of virtual purchases and countless number of contracts concluded each day, it seems that the consumer protection is inevitable. In the next chapter, we will try to analyse this situation more deeply.

<sup>16</sup> We may at least mention regulations under competition law, or identification of the beneficial owners under Directive (EU) 2015/849 of the European parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC and the most recent Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

such as, for example, the rules of product liability, is imposed from above in the interest of uniformity (Stein, 1999, p. 130).

Stein's notice seems to be still actual, perhaps even more than at the time of its formulation. European Union is a unique, but complicated concept. Recent data show that EU citizens are still not tightly connected with this supranational unit.<sup>17</sup> EU is often seen as an organization far from national understanding, which over-regulates common life situations. Brexit could be in this sense a trigger factor for other "exits", which would possibly lead to the collapse of the whole EU project.

Strict legal positivism is in many cases also the reason of deviation from the Roman legal principles as we have described it in the first chapter hereof. In our opinion, the EU needs to find as many natural unifying factors as possible in order to stay connected with the real life of the ordinary EU citizens. Perhaps, it is needed to step back and search for the principles common for the whole European legal culture.<sup>18</sup> In this form, "new *ius commune*" might be easier to build.

Roman heritage, based on the *ius naturale* may be in this sense an appropriate source of inspiration. *Ius naturale* was considered as a balancing element in contradiction to rigid and inflexible *ius civile*.<sup>19</sup> Nowadays, it may be used as a balance to the over-regulated legal positivism, which tries to solve all possible problematic situations, but it also comes hand in hand with opacity of legal regulation, alienation to citizens and after all, there are always new forms, how to abuse the rules. Postmodern legal theory understands these challenges and therefore increasingly leads to use of the legal principles (Kasinec, 2015, p. 85).

On the first sight, the above-described idea may seem contradictory to recent challenges arising in the EU, as we have already identified numerous discrepancies between the Roman legal principles and modern legal regulation. However, a bit deeper analysis on some selected examples may bring different outcome.

Let us begin with the consumer protection regulation, which mostly defines the consumer as a "*natural person who is acting for the purposes which are outside his trade, business and profession.*"<sup>20</sup>

17 This may be illustrated on the several examples. In 2019 EU parliamentary elections, the average turnout in the EU was the highest as of 1994, however it did not reach even 51%. Ten countries had turnout 40% or lower. More than half countries had turnout less than 50%. Some of these countries are well-established democracies, where participation in the elections is a matter of course. For instance, the Netherlands had in the EU parliamentary elections in 2019 turnout 41.93, however in national parliamentary elections in 2018 it was more than 81. Similar example may be found in Finland, where EU elections had in 2019 turnout 40,8%, however national average was in the same year 72%. This trend may be also seen in other countries like Czech Republic, Estonia, Latvia, Slovakia, Slovenia, Sweden, United Kingdom, etc. (Compare with 2019 European election results).

However, this is only one point. There are numerous other signs that the EU is remote for its citizens. The most obvious example is the referendum concerning Brexit and its result - Great Britain leaving the EU project. Another one may be seen in the Eurobarometer of 2019, in which more than one third of those surveyed answered that their first feeling associated with EU is "doubts" (2019 European election results) (Flash Eurobarometer, Emotions and political engagement towards the EU).

18 Obviously, there are required plenty of other steps to make the EU more substantial and understandable for the EU citizens. The legal system is, however, the base stone, on which this effort shall be grounded.

19 Compare with: Paul. D. 44,4,1: *Ideo autem hanc exceptionem praetor proposuit, ne cui dolus suus per occasionem iuris civilis contra naturalem aequitatem prosit.*

20 The consumer protection regulation arises mainly from Articles 4(2)(f), 12, 114(3) and 169 of Treaty on the Func-

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The main aim of the legal protection is to safe the weaker party of contractual relationships and to legally correct the imbalance in factual situation.<sup>21</sup>

Consumer protection in EU focuses mainly on unfair terms in consumer contracts; protection of individuals with regard to the data protection; product safety, quality and product guarantees; consumer protection with regard to services in the internal market; unfair access to dispute resolution; challenges connected with the digital market and financial services (Compare with: Valant, 2015). The regulation is therefore broad and it strictly opposes the Roman understanding of contractual liberty, legal dualism, protection of vigilant party and other principles.

On the other hand, we have already outlined that the consumer law is strictly connected with *bona fide* and it aims to remove the factual imbalance arising from the social and economic situation of the contracting parties. Without this protection, strict legal regulation would favour large enterprises, in conflict with *aequitas* (not everyone is given what he is entitled to). Consumer protection therefore complies with the general principles of Roman law, but the specific principles contradict with the strict regulation by *ius positivum*. As we will try to outline, this conflict does not always support the benefit of the modern law.

Even after decades of application, the consumer law is not widely understood among the EU citizens. The most recent Consumer Survey executed by the European Commission shows that only 45,5% of the EU citizens have at least general knowledge about their consumer rights (The Consumer Survey 2018, 2019). This means that majority of the population is not able to duly exercise its rights due to lack of their knowledge. The inequality between the contractual parties therefore remains preserved, despite of the legislators intentions. From the Consumer Surveys arises another interesting fact that the situation with the general level of knowledge is not changing positively in the last decade.

Another significant disadvantage of the over-regulating approach is decreasing public vigilance in the contractual relationships, as the consumer always expects the law to be on its side. This habit is dangerous as it may result in decrease of the general legal knowledge. Inadequate reliance on the state authorities may also result in mistrust in public institutions in case they do not provide the expected protection.

The aforementioned issues may be solved by an appropriate use of *ius naturale*, mainly in form of *bona fide* protection in *ad hoc* cases. It is important to mention, that disadvantage of this approach would be the time required for creation of an applicable case law and in some extent possible decrease of legal certainty. It is also needed to think about the future development and rapid

tioning of the European Union and Article 38 of the Charter of Fundamental Rights of the European Union. The primary legislation is followed by a number of secondary legal regulations and legislation on national level.

The aim of the regulation may be well illustrated by Article 169 (1) TFEU, which states: "*In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.*"

21 Protection of a weaker party under EU law applies also to other groups, such as employees. However, for the purposes of this paper, we will use the consumer protection as the most suitable example (Cherednychenko, 2007, p. 9; Micklitz, 2004, p. 340-356).

involvement of the digital technologies, which may change current situation. This may paradoxically, lead to strengthening of the Roman principles.

With regard to the digitalization, mainly the threats and dangers are emphasised. However, modern technologies, arising availability of the online space and the possibility to dispose with so-called “smart technologies” bring also unthinkable opportunities. It is highly probable, that within next decades, the legal services will be increasingly provided in an automatic form by a software. It is possible that such software may be in the future able to identify potentially unfavourable issues in the consumer contracts. May this technological advantage help the consumer to protect its rights better than very broad legal protection?

In our opinion, huge amount of commodities and services used in everyday life cause, that the consumer does not have a chance to acquire expertise in all of the contractual relationships, he is entering into. Legal guarantee of the product liability, possibility of returning the goods and other rights shall be protected by mandatory legal regulation. On the other hand, we can easily imagine that recognition of unfair terms and conditions will be better guaranteed by caution of the consumer in connection with technical advantages. From this point of view, it would be unwise to bury the Roman principles in consumer law such as *vigilantibus iura scripta sunt* or legal bipolarity too early.

The above-discussed issue is closely connected with the data protection. General Data Protection Regulation empathises that natural persons increasingly make their personal information available publicly and globally as well as the information obligation towards the data subjects (Regulation (EU) 2016/679). However, it is questionable, whether the information obligation serves its purpose and whether data subjects actually read these provisions. Survey executed in 2018 by GDMA shows, that only 38 percent of the global consumers think that they should be ultimately responsible for their data protection. On the other hand, vast majority of global consumers (77%) show no fundamental objection to engaging in the data economy (Global data privacy: What the consumer really thinks, 2018). Even in this case it seems as appropriate to pay more attention to *bona fide* and vigilance. It is so, because lack of caution in the online environment by the consumer causes irreparable losses, which can be hardly protected by rigid legal regulation.

To sum up, these issues were actual for a long time, but the recent pandemic crises caused by the coronavirus COVID-19 may bring them to the forefront. We can expect increasing automation, which is possible answer to the blackouts of human labour; more limited globalization and even more dominant environmental issues. As we have outlined in this chapter, the Roman heritage, based on the *aequitas*, which gives everyone what is his own, may be useful source of inspiration and may serve as a unifying factor in Europe, which faces various forms of internal alienation.<sup>22</sup> It is so, because the legal positivism used by the EU in the last decades seems to be insufficient.

In order to demonstrate our ideas in wider scale, we shall also focus on the second analysed principle, which is law division theory. Ulpian’s interest theory faces other types of conflict, which

<sup>22</sup> We have already outlined the situation concerning Brexit and other possible “exits”, but the alienation from European concept is also obvious from arising support of EU sceptical parties in both European and national elections.

may be illustrated on the competition law; fight against corruption; money laundering and other similar public interventions to purely private legal sphere.

Main disadvantage of Ulpian's division is that the law shall always protect the interests of the state and the community. The law prevents the fight of all against all and therefore it is not possible to clearly determine, which regulation is solely private and which is solely public (Fábry, Krošlák, 2007, p. 48). On one hand, it is obvious that the analysed definition did not aim to determine exact boundaries of public/private sphere,<sup>23</sup> but it is also needed to mention that the complexity of contemporary cross-border and online relations require state interventions far beyond acceptable level in Roman perception.

Globalization and possibilities for cross-border links in ownership structures of private enterprises create unprecedented possibilities for legalisation of criminal activities, which are much more condemned than it used to be in Roman times (such as nepotism or corruption (For more about perception of corruption in the Roman Empire see: Gregor, 2018; Šurkala, 2017, p. 144)), or that were totally unknown (e.g. money laundering). These criminal activities require aggressive state interventions into private law, such as registers of beneficial owners, anti-trust regulations and controls, mandatory publication of contracts and other state interferences, far beyond limits of Ulpian's conception (For more about the EU combat against money laundering see: Mitsilegas, Vavoula, 2016, p. 261-293).

At this point, we must state, that if the Roman law and its principles were bound only to age of their creation, they would have lost their significance long time ago. Adaptability of *ius naturale* may be illustrated by a fragment from *Constitutio Tanta*, by which *Digesta* were published in 533. In Art 18, we can find the following words: "*Now whatever is divine is absolutely perfect, but the character of human law is to be constantly hurrying on, and no part of it is there which can abide forever, as nature is ever eager to produce new forms, so that we fully anticipate that emergencies may hereafter arise which are not enclosed in the bonds of legal rules.*"<sup>24</sup>

In this sense, the "interest theory" in its original meaning arising from the Roman law may be easily considered outdated, but *ius naturale* shall be used to adopt it for contemporary situation. Although it is very difficult to predict what would Roman lawyers say about their rules in the modern age, we can expect that the state interest is also evolving. Decreasing the criminal actions and fight against tax evasion are legitimate aims and may be considered as the state interest. The overlap between public and private is from our view justified, but in each individual case, it is required to seek for the balance.

With regard to the above quoted fragment therefore arises a substantial question: may be *ius naturale* used as a corrective also in highly regulated fields of law, such as competition law or money-laundering regulations? May be *bona fide* used as the instrument, which softens the edges of strict legal regulation as we have pointed out in case of consumer protection?

23 The Roman law avoided closed definitions as much as possible. Compare with: Iav. D.50.17.202: *Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti posset.*

24 Art 18 of *Constitutio Tanta*: "*Sed quia divinae quidem res perfectissimae sunt. humani vero iuris condicio semper in infinitum decurrit et nihil est in ea. quod stare perpetuo possit (multas etenim formas edere natura novas deproperat), non desperamus quaedam postea emergi negotia, quae adhuc legum laqueis non sunt innodata.*" (Translation: Monro, 1904, p. 25).

It looks like a valid idea, but we must always bear in mind the challenges, which we have outlined hereof - mainly the time required for creation of relevant case law, possible decrease of legal certainty and most of all requirement of morally unquestionable decision makers.<sup>25</sup> On the other hand, wider involvement of *bona fide* may better achieve the purpose of legal regulation, because even the best-written mandatory provisions may be circumvented.

## CONCLUSION

In the last decades, the EU regulation came a long way of unification in selected fields, which aims to fulfil the main objectives, as described in the primary legislation. May we say that the forecast of W. B. Ewald has come true?

In some extent yes, because the Roman legal thinking, based on the fundament of *aequitas* is undoubtedly present in the EU legal system. On the other hand, direct impact of the Roman maxims and more specialised legal principles is decreasing, which is caused also by the fact that the EU legal regulation is highly oriented on *ius positivum*.

This approach may not always be the most appropriate, as it is strictly connected with several not insignificant shortcomings such as over-regulation, connected with the alienation from the national states and their citizens; but also vulnerability towards new forms of abuse. Arising challenges, such as pandemics caused by the coronavirus COVID-19; Brexit and increasing Euroscepticism may accelerate the need for unifying legal elements and regulation that is more flexible.

As we have tried to outline hereof, the Roman approach was based on *ius naturale*, which corrected the sharp edges of strict *ius civile*. Application of this law by various magistrates, but mainly the *praetor*, created from Roman law endless source of inspiration, which (in some extent) may be useful also for EU law in the future. On the other hand, strict application of some more specialised principles and maxims is no longer entirely possible, due to development of difficult, often virtual, legal relations that were unimaginable in the Roman era.

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<sup>25</sup> We must take into the account the judicial activism, with which has Europe in recent decades considerable experiences. Unlike the decisions based on *ius naturale*, judicial activism often does not have any legal grounds.

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