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Treasure trove in Roman law, in legal history, and in modern legal systems. A brief summary[**]

1. Introduction

Taking into consideration the numerous relevant sources in Roman law and in medieval legal history, treasure trove could be considered as a significant legal problem and, in addition, it bears great importance in modern legal systems as well.

As for the Roman law literature, a number of studies have been published on the one hand related to the general issues (cf., for instance, Pampaloni,[1] Perozzi,[2] Mayer-Maly,[3] Marchi,[4] Knütel[5]) and linked with certain details (see, for example, Schulz,[6] Nörr,[7] Scarcella,[8] Busacca,[9] Klingenberg[10]) of treasure trove on the other hand. The most specialised analysis of treasure trove in Roman law could be found in the great monograph of a Spanish romanist, Alfonso Agudo Ruiz, published in 2005.[11]

During the analysis of treasure trove patterns of Roman law, dogmatically as well as terminologically important questions appear which have not been clarified even today. Merely some examples need to be named here, such as only money or also other movables of any value could be regarded as treasure in classical Roman law? Can or cannot treasure trove be regarded as an autonomous way of acquiring ownership in classical Roman law? These questions should by all means be discussed. Since the word "treasure" does not exclusively appear in the Roman law sources as a technical term, problem of terminology is equally to be analysed. In addition, there are several additional, but not less important questions are to be studied, such as the different points of view by classical Roman jurists concerning the legal nature of treasure, the problems of treasure trove by a slave or a *filius familias*, and the development of the treasure trove regime in context of imperial constitutions.

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[1] M. PAMPALONI: *Il concetto giuridico del tesoro nel diritto romano e odierno*, in: Per l'VIII centenario della Università di Bologna, Roma 1888, pp. 101 ff.

[2] S. PEROZZI: *Contro l'istituto giuridico del tesoro*, in: Monitore dei Tribunali, 31, Milano 1890, pp. 705 ff.

[3] See, for instance, TH. MAYER-MALY: *Der Schatzfund in Justinians Institutionen*, in: P. Stein—A. D. E. Lewis (ed.): Studies in Justinian's Institutes in Memory of J. A. C. Thomas, London 1983, pp. 109 ff.; IDEM: *Thensaurus meus*, in: Studia in honorem Velimirii Pólay septuagenarii, Szeged 1985, pp. 283 ff.; IDEM: *Ducente fortuna*, in: R. S. Bagnall—W. V. Harris (ed.): Studies in Roman law in memory of A. Arthur Schiller, Leiden 1986, pp. 141 ff.

[4] E. C. S. MARCHI: *A 'fanciulla d'Anzio' e o instituto do tesouro*, Index 25 (1997), pp. 365 ff.

[5] R. KNÜTEL: *Von schwimmenden Inseln, wandernden Bäumen, flüchtenden Tieren und verborgenen Schätzen*, in: R. Zimmermann—R. Knütel—J. P. Meincke (hrsg.): Rechtsgeschichte und Privatrechtsdogmatik, Heidelberg 1999, pp. 549 ff.

[6] F. SCHULZ: *Fr. 63 D. 41, 1 (Zur Lehre vom Schatzerwerb)*, SZ 35 (1914), pp. 94 ff.

[7] D. NÖRR: *Ethik von Jurisprudenz in Sachen Schatzfund*, BIDR 75 (1972), pp. 11 ff.

[8] A. S. SCARCELLA: *Una nuova concezione del tesoro alla luce del C.I. 10.15.1*, Atti dell'Accademia Peloritana dei Pericolanti 58 (1989), pp. 188 ff.

[9] C. BUSACCA: *Qualche osservazione sulle innovazioni introdotte dai Divi Fratres nel regime giuridico del tesoro*, in: Studi in onore di Angelo Falzea, IV, Milano 1991, pp. 133 ff.

[10] G. KLINGENBERG: *Der „Angeber" beim Schatzfund*, in: F. Harrer—H. Honsell—P. Mader (hrsg.): Gedächtnisschrift für Theo Mayer-Maly, Wien 2011, pp. 237 ff.

[11] A. AGUDO RUIZ: *Régimen jurídico del tesoro en Derecho romano*, Madrid 2005.

After research in the sources and literature of Roman law, the subsequent fate of treasure trove systems needed to be likewise scrutinised. Therefore, the different treasure trove systems in the Medieval, as well as in the modern age, and in some modern legal systems have to be closely examined.

2. Treasure trove in Roman law

As for the Latin word "the[n]saurus"—originating from the Greek noun *thesauros*[12]—first appeared in non-legal writings in Rome. In several works from the time of the Republic, as well as of the Principate, the problem of treasure trove arose (see, for instance, the works by Plautus, Horatius, and Petronius).[13]

In the Roman legal texts the word *thesaurus* appeared only later. Originally, the Roman jurists did not distinguish the proprietor of the land from the owner of the treasure. According to the oldest Roman law tradition, represented even by the *fundatores iuris civilis* (Brutus and Manilius) in preclassical Roman law, treasure—as an *accessio* of the land—belongs to the owner of it (cf. Paul. D. 41, 2, 3, 3).[14]

The detailed rules of the treasure trove were only elaborated by classical Roman jurists. In this regard, the famous text by Paul (D. 41, 1, 31, 1)[15]—in which the original, classical, influential, but strongly discussed definition of treasure could be found—deserves an in-depth analysis. According to Paul, *"thensaurus est vetus quaedam depositio pecuniae, cuius non exstat memoria, ut iam dominum non habeat"* ("Treasure is an ancient deposit of a valuable movable object, the memory of which is no longer sustained, so that it now has no owner any longer.").

Concerning the term *depositio pecuniae*, we can emphasise that—in the light of other relevant sources (Paul. D. 47, 9, 4, 1; Paul. D. 50, 16, 5 pr.; Herm. D. 50, 16, 222)—not only money, but generally further movables of great value could be regarded as treasure, even in classical Roman law. On the basis of several postclassical sources—which contain the words *monile* and *mobile* in the scope of defining "treasure"—it could theoretically be concluded that only money could be regarded as treasure in classical Roman law, though it seems more likely that the above-mentioned term *depositio pecuniae* referred to each and every movable object of value even in classical Roman law.

As for the expression *iam dominum non habeat* mentioned in Paul's text: since treasure, in principle, has or may as well have an owner, it cannot be regarded as *res nullius*. The other observation by Paulus—*cuius non exstat memoria*—can be considered as a dogmatically more relevant element, because the owner of treasure seems to be in a "memory hole". As a result of practical considerations, treasure can be regarded as an object the ownership of which cannot be actually clarified.

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[12] See, for instance, W. H. GROSS, in: *Der kleine Pauly* (hrsg. von K. Ziegler—W. Sontheimer—H. Gärtner), 5, München 1979, s. v. *thesauros*; H. G. LIDDELL—R. SCOTT: *A Greek-English lexicon*, Oxford 1940, s. v. *thésauros*.

[13] See P. BONFANTE: *Corso di diritto romano. La proprietà*, II/2, Milano 1968, pp. 132 ff.; KNÜTEL: *op. cit.* p. 574; AGUDO RUIZ: *op. cit.* pp. 65 ff.

[14] *„Brutus et Manilius putant eum, qui fundum longa possessione cepit, etiam thensaurum cepisse, quamvis nesciat in fundo esse…"* Cf., for example, NÖRR: *op. cit.* p. 14.

[15] *„Thensaurus est vetus quaedam depositio pecuniae, cuius non exstat memoria, ut iam dominum non habeat: sic enim fit eius qui invenerit, quod non alterius sit. Alioquin si quis aliquid vel lucri causa vel metus vel custodiae condiderit sub terra, non est thensaurus: cuius etiam furtum fit."* Cf., for instance, F. SCHULZ: *Classical Roman law*, Oxford 1951, p. 362; V. ARANGIO-RUIZ: *Istituzioni di diritto romano*, Napoli 1960[14], p. 191; BONFANTE: *op. cit.* pp. 128 ff.; M. KASER: *Das römische Privatrecht*, I, München 1971[2], p. 426; MAYER-MALY: *Thensaurus meus* (cit.), pp. 283 ff.; MARCHI: *op. cit.* pp. 368 ff.; KNÜTEL: *op. cit.* p. 573; AGUDO RUIZ: *op. cit.* p. 31 ff.

Since treasure is not *res nullius* in a strict (technical) sense, the acquisition of its ownership cannot be regarded as *occupatio*—which is carried out as a result of *apprehensio*—but *inventio*. It is, however, questionable whether classical Roman jurists institutionalized an absolutely autonomous way of acquiring ownership, which is different from *occupatio*. In our opinion, treasure trove could be regarded as an autonomous way of acquiring ownership in Roman law, however, it is probable that this was so merely from Hadrian's time.

The *locus* of treasure trove is not disputed in Roman law literature since classical, postclassical, and even Justinian Roman law focused only the treasures which had been found in an immovable—contrary to the medieval and modern jurisprudence, in which treasure trove in any movable property is also dealt with.

Especially on the basis of texts by the early classical jurists (for instance Labeo), but even by the later classical jurists, it can be observed that the word *thesaurus* was not only used in strict legal (technical) sense but also in a non-technical sense. In these fragments *thesaurus*, of course, has nothing to do with treasure trove as one of the original ways of acquiring ownership (see, for instance, Pomp. D. 10, 4, 15; Ulp. D. 10, 2, 22 pr.; Iav. D. 34, 2, 39, 1; Pap. D. 41, 2, 44 pr.).

Lots of debates have arisen from a *filius familias* (under the authority of his father) or a slave finding treasure in an immovable property —neither of whom was able to acquire ownership for them. In this respect, the texts by Tryphoninus (D. 41, 1, 63) are relevant.[16]

Considering the imperial constitutions related to treasure trove, the most famous and significant regulation was introduced by Hadrian. His constitution can be described as a *media sententia* compared to the different prior opinions by classical jurists. Hadrian's constitution, equally cited in the Institutes of Justinian, is also known from an earlier, though not a legal source, *Historia Augusta* (*Vita Hadr.* 18, 6).[17] With regards to treasure trove, Hadrian ruled that if anyone made a find on their own property, they might keep it, if on another's land, they should turn half of the treasure over to the owner thereof, if on state premises, they should share the treasure equally with the *fiscus*.

Yet later—on the basis of the text by Callistratus (D. 49, 14, 3, 10)—the *divi fratres*: Marcus Aurelius and Lucius Verus fundamentally modified Hadrian's concept. According to their constitution, every treasure—which had been found in a non-negotiable thing—belonged to the emperor and, in addition, every treasure needed to be reported to the *fiscus* (cf. Call. D. 49, 14, 3, 11 and Call. D. 49, 14, 1 pr.)—which regulatory attitude implies a "public law-approach".[18]

The rather obscure constitution of Alexander Severus—which is often disregarded in Roman law literature—is only mentioned by *Historia Augusta* (*Vita Alex.* 46, 2).[19] According to this constitution, a part of the treasure belonged to the finder, but when the treasure was too precious, a part of it belonged to imperial authorities. Unfortunately, the background and the exact content of these rules are unknown, and as a result we cannot come to any well-founded conclusions on the basis of such an uncertain source.

As for the postclassical Roman law, the imperial constitutions concerning treasure trove are to be mentioned (cf. CTh. 10, 18 and C. 10, 15). In this respect, perhaps the most notable postclassical ruling related to treasure trove was created by the constitution by Leo and Zeno in the year of 474 AD which, on the one hand, reinstated the regime institutionalised by

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[16] Cf. SCHULZ: *Fr. 63 D. 41, 1…* pp. 94 ff.; AGUDO RUIZ: *op. cit.* pp. 92 ff.

[17] *„De thesauris ita cavit, ut, si quis in suo repperisset, ipse potiretur, si quis in alieno, dimidium domino daret, si quis in publico, cum fisco aequabiliter partiretur."* Cf. BONFANTE: *op. cit.* p. 131. KNÜTEL: *op. cit.* p. 571.

[18] Cf. BUSACCA: *op. cit. pp.* 133 ff.; AGUDO RUIZ: *op. cit.* pp. 95 ff.; KLINGENBERG: *op. cit.* pp. 242 f.

[19] *„Thesauros reppertos iis qui reppererant donavit et, si multi essent, addidit his eos quos in suis habebat officiis."* Cf. BONFANTE: *op. cit.* p. 135; BUSACCA: *op. cit.* p. 154; AGUDO RUIZ: *op. cit.* pp. 106 f., with summary of the relevant literature.

Hadrian and, on the other hand, established noteworthy and substantial new rules related to treasure trove, which often appear even in the modern era.[20]

It is well-known that Hadrian's regulations were implemented by Justinian, according to his Institutes (2, 1, 39).[21] It is worth mentioning that only Hadrian's constitution was cited in Justinian's Institutes, while the above-mentioned constitution by Leo and Zeno was disregarded in this law-book. According to Inst. 2, 1, 39, "if a man found a treasure in their own land, the Emperor Hadrian, following natural equity, adjudged to him the ownership of it, as he also did to a man who found one by accident in sacred or religious premises. If they found it in another man's land by accident, and without specially searching for it, he gave half to the finder, half to the owner of the land; and upon this principle, if a treasure was found in a land belonging to the Emperor, he decided that half should belong to the latter, and half to the finder. Consistently with this, if a man finds one in land which belongs to the imperial treasury or the people, half belongs to them, and half to the treasury or the State." This brief text consists of seven cases and—being a legal source—it is more accurate and precise than the above-mentioned text in *Historia Augusta*. Justinian also referred to the *naturalis aequitas* ("natural equity") which had not been mentioned in *Historia Augusta*, but which was referred to nonetheless in the text of Gratianus', Valentinianus', and Theodosius' imperial constitution, published in the year of 380 AD (cf. CTh. 10, 18, 2).

Nevertheless, another solution was in force in the Ostrogothic Kingdom at the same time. It can be assumed on the basis of a brief text by Cassiodorus (*Variae*, 6, 8, 6) that Theodoric the Great gave all treasure the *aerarium*.[22]

3. Treasure trove in the Medieval and in modern age

As compared to Roman law—especially to classical and Justinian's Roman law—utterly new regimes were created concerning treasure trove. Nevertheless, it is worth mentioning that Justinian's ruling was sometimes equally in force. In this respect, the *constitutio (Regalia sunt hec)* of the Holy Roman Emperor, Frederick Barbarossa (1158) could be referred to, in which the solution by Justinian appeared, that is half of the treasure belonged to the finder.[23]

However, the Constitutions of Melfi by Frederick II (*Constitutiones Regni Siciliae*, 3, 35, in the year of 1231) gave the whole treasure to the *fiscus*.[24]

According to the famous law-book of Eike von Repgow, the Mirror of the Saxons (*Sachsenspiegel*, 1, 35), "every treasure hidden in the ground" („al schat under der erde begraven") belongs to the Emperor.[25]

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[20] Cf. MAYER-MALY: *Ducente fortuna* (cit.), p. 142; AGUDO RUIZ: *op. cit.* pp. 108 ff.; KLINGENBERG: *op. cit.* p. 241.

[21] *„Thesauros, quos quis in suo loco invenerit, divus Hadrianus, naturalem aequitatem secutus, ei concessit qui invenerit. Idemque statuit, si quis in sacro aut in religioso loco fortuito casu invenerit. At si quis in alieno loco non data ad hoc opera sed fortuitu invenerit, dimidium domino soli concessit. Et convenienter, si quis in Caesaris loco invenerit, dimidium inventoris, dimidium Caesaris esse statuit. Cui conveniens est et si quis in publico loco vel fiscali invenerit, dimidium ipsius esse, dimidium fisci vel civitatis."* Cf., for instance, MAYER-MALY: *Der Schatzfund in Justinians Institutionen* (cit.), pp. 126 ff.; AGUDO RUIZ: *op. cit.* p. 85.

[22] *„Depositivae quoque pecuniae, quae longa vetustate competentes dominos amiserunt, inquisitione tua nostris applicantur aerariis, ut qui sua cunctos patimur possidere, aliena nobis debeant libenter offerre."* Cf. BONFANTE: *op. cit.* p. 127; MARCHI: *op. cit.* p. 369; KNÜTEL: *op. cit.* p. 573[88]; AGUDO RUIZ: *op. cit.* p. 37.

[23] „…dimidium thesauri inventi in loco cesaris, non data opera, vel in loco religioso…" Cf. TH. MAYER-MALY: *Der Schatz im Acker*, in IDEM: Rechtsgeschichtliche Bibelkunde, Wien—Köln—Weimar 2003, pp. 48 f.

[24] „Scire enim debet unusquisque inventiones regni nostri, quarum dominus non apparuerit, ad fiscum specialiter pertinere." Cf. MAYER-MALY: *Der Schatz im Acker* (cit.), p. 49. Whole context: W. STÜRNER (hrsg.): *Die Konstitutionen Friedrichs II. für das Königreich Sizilien*, Hannover 1996, p. 402.

However, according to the *Schwabenspiegel* (347), one fourth of the treasure belongs to the finder.[26]

In France, according to the *Établissements de Saint Louis* (I, 94), which summarised the thirteenth-century French customary law, no one but the king got a treasure consisting of gold, while silver treasures belonged to the baron, who had the so-called high justice in their lands (« Nus n'a fortune d'or, se il n'est rois. Celle d'argent est au seignor qui a grant joutise an sa terre. »). Obviously, this rule is closely related to the French law principle "nulle terre sans seigneur".[27] In the same work the definition of treasure could be discovered as well: "Treasure is when it is buried under the ground, and the earth has been disturbed" (« Fortune est don terre est effondrée. »).[28]

On the basis of the research of Coing,[29] it should be pointed out that not only in the medieval legal sources, but even in the modern age similar regulations can be found, albeit Justinian's treasure trove related rules were also in force. In the works by Hugo Grotius,[30] Simon van Leeuwen,[31] and Arnoldus Vinnius[32] again Justinian's regime was introduced. However, the rules stemming from the Medieval—according to which any treasure found should belong to the emperor—were still in force and were termed as a "ius commune et quasi iuris gentium" by Grotius and van Leeuwen, as well. For instance, van Leeuwen pointed out that any concealed treasures which a person may have found upon or in his own ground, belonged to themselves, but if any such treasure was found in the land of another person, one half thereof belonged to the owner of the premises, and the other half to the finder. In many countries, however, the treasure is appropriated by the government. As for Roman-Dutch Law, it can be regarded as uncertain, according to van Leeuwen's opinion.[33]

Concerning the French *droit coutumier* in the 17th century—on the basis of Jean Domat's famous *Les loix civiles dans leur ordre naturel*—we can refer to the rule according to which one third of the treasure belonged to the finder, one third to the landowner, and one third to the baron (« Seigneur haut Justicier »). When the finder was the landowner himself, the half belonged to them, and the other half to the baron.[34]

In the rules concerning treasure trove of the *Codex Maximilianeus Bavaricus Civilis* (1756)[35] and the *Allgemeines Landrecht für die Preußischen Staaten* (1794)[36]—which cannot

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[25] „Al schat under der erde begraven diepher den eyn pluch geit horet zu der koninclichen gewalt." Cf. K. ZEUMER: *Der begrabene Schatz im Sachsenspiegel I, 35*, Mitteilungen des österreichischen Instituts für Geschichtsforschung 22 (1901), pp. 420 ff.

[26] „…dem vinder sol daz vierteil werden." Cf. TH. MAYER-MALY: *Komponenten der Regelung des Schatzfundes im Schwabenspiegel*, in: D. Medicus—H.-J. Mertens—K. W. Nörr—W. Zöllner (hrsg.): Festschrift für Hermann Lange zum 70. Geburtstag, Stuttgart—Berlin—Köln 1992, pp. 185 ff.

[27] See F. BOURJON: *Le droit commun de la France et la coutume de Paris*, I, Paris 1747, p. 126: „il n'y a nulles terres… qui ne relèvent d'un Seigneur".

[28] Cf. J.-PH. LÉVY—A. CASTALDO: *Histoire du droit civil*, Paris 2002, p. 538. Whole context: P. VIOLLET: *Les Établissements de Saint Louis*, Paris 1883, p. 164; *The Établissements de Saint Louis. Thirteenth-century law texts from Tours, Orléans, and Paris* (translated and with an introduction by F. R. P. AKEHURST), Philadelphia 1996, pp. 60 f.

[29] H. COING: *Europäisches Privatrecht*, I, München 1985, p. 300.

[30] *De iure belli ac pacis*, 2, 8, 7; cf. H. GROTIUS: *Inleiding tot de hollandsche rechtsgeleerdheid*, Graven-Haghe 1631, p. 18.

[31] S. VAN LEEUWEN: *Het Rooms-Hollands-Regt*, Amsterdam 1708, p. 115.

[32] A. VINNIUS: *Institutionum imperialum commentarius*, Amsterdam 1665[4], p. 176.

[33] VAN LEEUWEN: *op. cit.* p. 115.

[34] J. DOMAT: *Les loix civiles dans leur ordre naturel*, I, Paris 1745, p. 268.

[35] 2, 3, 4: „Gefundener Schätzenhalber, welche solange Zeit vergraben, eingemaurt, oder sonst verborgen gewest, daß man den Eigenthümer nicht mehr davon weiß, wird das General-Mandat von Anno 1752 hiermit folgendermassen erneuert. Soll man den Schatz in deren Theile theilen, wovon dem Fisco zwey Drittel zugehen, der Überrest aber dem Erfinder, wenn er den Fund auf seinem Eigenthum thut, verbleibt. Falls aber derselbe in fremden geschiehet, so theilt der Erfinder sothanes Drittel mit dem Eigenthümer des Orts, ausser da der Schatz

be considered as civil codes in modern sense—reflects on the one hand Justinian's treasure trove system, and, in addition to all this, the influence of several medieval legal rules, as well.

4. Treasure trove in the modern legal systems

Justinian's Roman law regime of treasure trove, as well as the famous definition by Paul has survived in many contemporary civil codes.

In the modern French rules concerning treasure trove (see art. 716 of French *Code civil*[37]), the subsequent fate of the Roman law tradition could clearly be pointed out. Albeit the French *Code civil* achieved kind of a "symbiosis" between the earlier *droit écrit* and *droit coutumier*, the rules of the article related to treasure trove belong to the rules which prefer the Roman law solution to customary law. Regarding the new social order after the French Revolution, it is obvious that the solution of the earlier French customary law—according to which the one third of the treasure had belonged to the baron—was not allowed to be applied any longer. Since the French *Code civil* had greatly affected many subsequent civil law codifications, the treasure trove system of Roman law has survived in all legal systems inspired by French legal tradition (see, inter alia, the Chilean *Código civil* of 1855,[38] the Louisiana Civil Code of 1870,[39] the Spanish *Código civil* of 1889,[40] and the Québec Civil Code of 1994[41]).

The Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1811 maintained a solution till 1846, according to which one third of the treasure belonged to the treasury.[42] The Austrian system of treasure trove is now based to a considerable extent on the treasure trove system of Justinian's rules.[43]

Since the German *Bürgerliches Gesetzbuch* of 1900 is a result of the researches of the Pandectist legal scholars, the liberal Hadrian-Justinian regime of treasure trove got into the

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nicht von ungefehr gefunden, sondern ohne des Eigenthümers Wissen und Willen mit Fleiß darauf nachgesucht oder gegraben worden, welchenfalls das ganze Drittel dem Proprietario Loci allein zugehört. Gebraucht man sich aber etwan gar Aberglaubischer Dingen hierunter, so verfallt man dadurch nicht nur in malefizische Straf, sondern der Antheil, welchen man sonst dabey gehabt hätte, gehet verlohren, und kommt dem Fisco zu, jedoch ohne Præjuditz des Eigenthümers, wenn er bey der Sach unschuldig ist."

[36] 1, 9, 86: „Wer zur Nachsuchung von Schätzen vermeintlicher Zaubermittel, durch Geisterbannen, Citiren der Verstorbenen, oder anderer dergleichen Gaukeleyen, es sey aus Betrug oder Aberglauben, sich bedient; der verliert, außer der sonst schon verwirkten Strafe, sein Anrecht auf einen etwa zufälliger Weise wirklich gefundenen Schatz." Cf. MAYER-MALY: *Ducente fortuna* (cit.), p. 144.

[37] „La propriété d'un trésor appartient à celui qui le trouve dans son propre fonds ; si le trésor est trouvé dans le fonds d'autrui, il appartient pour moitié à celui qui l'a découvert, et pour l'autre moitié au propriétaire du fonds."

[38] Art. 626: „El tesoro encontrado en terreno ajeno se dividirá por partes iguales entre el dueño del terreno y la persona que haya hecho el descubrimiento."

[39] Art. 3420: „One who finds a treasure in a thing that belongs to him or to no one acquires ownership of the treasure. If the treasure is found in a thing belonging to another, half of the treasure belongs to the finder and half belongs to the owner of the thing in which it was found."

[40] Art. 351: „El tesoro oculto pertenece al dueño del terreno en que se hallare. Sin embargo, cuando fuere hecho el descubrimiento en propiedad ajena, o del Estado, y por casualidad, la mitad se aplicará al descubridor." Cf. J. M. FARRÉ ALEMÁN: *Código civil comentado y concordado*, Barcelona 2001, pp. 421 ff.; A. ROMA VALDÉS: *La ley y la realidad en la protección del patrimonio arqueológico español*, International Numismatic Council, Compte rendu 48 (2001), pp. 69 ff. (= http://www.muenzgeschichte.ch/downloads/laws-espana.pdf).

[41] Art. 938: „Le trésor appartient à celui qui le trouve dans son fonds; s'il est découvert dans le fonds d'autrui, il appartient pour moitié au propriétaire du fonds et pour l'autre moitié à celui qui l'a découvert, à moins que l'inventeur n'ait agi pour le compte du propriétaire."

[42] Cf. U. FLOßMANN: *Österreichische Privatrechtsgeschichte*, Wien 2008[6], p. 175.

[43] Cf. 399. §: „Von einem Schatze erhalten die Finder und der Eigentümer des Grundes je die Hälfte." See, for instance, G. DEMBSKI: *Münzfunde und Münzsammlungen — die gesetzlichen Bestimmungen in Österreich*, International Numismatic Council, Compte rendu 48 (2001), pp. 66 ff. (= http://www.muenzgeschichte.ch/downloads/laws-oesterreich.pdf).

German Civil Code due to the respect of the Roman law tradition.[44] In this regard Wieacker's opinion seems to be highly relevant: „Insbesondere das Bürgerliche Gesetzbuch von 1896 ist das spätgeborene Kind der Pandektenwissenschaft und der nationaldemokratischen, insoweit vor allem vom Liberalismus angeführten Bewegung seit 1848".[45] Since the BGB—besides the French *Code civil*—had an essential impact on many succeeding civil law codifications (see, inter alia, the Italian *Codice civile* of 1942, the Portuguese *Código civil* of 1966, and the Brazil *Código civil* of 2002), the Roman law regime of treasure trove has survived in these legal systems due to the French and the German legal tradition as well.[46]

The Swiss *Zivilgesetzbuch* of 1907 had a great effect, for example, on the new Italian *Codice civile*, and on many more civil codes. Still, the approach of treasure trove in Swiss law—according to which the treasure belongs to the owner of the property in which a hidden treasure has been found, while the finder has only a claim for an equitable fee[47]—had no influence on any later codifications.

As for the treasure trove system of the Hungarian Civil Code of 1959, a socialist legal approach was institutionalised, according to which the treasure ought to be offered to the state. In contrast to this, the prior Hungarian private law gave one third of the treasure to the finder, one third to the owner of the property in which the hidden treasure had been found, and one third to the Treasury. According to Section 132 of current Hungarian Civil Code, if a person finds a valuable object which has been hidden by unknown persons, or the ownership of which has otherwise been forgotten, he is obliged to offer it to the state. If the state fails to claim the object, it shall become the property of the finder; otherwise the finder shall be entitled to a finder's fee proportionate to the value of the object found. However, if the object found is a relic of great value or historic importance, its ownership may be claimed by the state. In the future the same rules are sustained, with regards to the relevant provisions of the new Hungarian Civil Code (5:64. § [1]—[3]).

English law—which has developed separately compared to continental civil law practices—maintains its old legal tradition[48] concerning the rules of treasure trove as well. According to the old common law and the *Treasure Act* of 1996—in accordance with the general principles of the English Law of Property as well—the treasure belongs to the Crown or to the franchisee, if there is one.[49]

The leitmotiv of Scottish law—which belongs to the mixed jurisdictions—happens to be the same. According to the principle "quod nullius est, fit domini regis", treasure, as a kind of "bona vacantia", belongs to the Crown.[50]

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[44] 984. §: „Wird eine Sache, die so lange verborgen gelegen hat, dass der Eigentümer nicht mehr zu ermitteln ist (Schatz), entdeckt und infolge der Entdeckung in Besitz genommen, so wird das Eigentum zur Hälfte von dem Entdecker, zur Hälfte von dem Eigentümer der Sache erworben, in welcher der Schatz verborgen war." Cf. H. J. WIELING: *Sachenrecht*, Berlin—Heidelberg—New York 2007[5], pp. 160 ff.; M. K. HERMANS: *Der Schatzfund. Eine Gegenüberstellung der Rechtsverhältnisse an einem Schatz im deutschen und niederländischen Recht unter Berücksichtigung öffentlich-rechtlicher Sonderbestimmungen*, Münster 2011, pp. 10 ff.

[45] F. WIEACKER: *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft*, in: UŐ: Industriegesellschaft und Privatrechtsordnung, Frankfurt am Main 1953, p. 15.

[46] See *Codice civile*, art. 932; *Código civil port.*, art. 1324; *Código civil bras.*, art. 607.

[47] *Schweizerisches Zivilgesetzbuch*, art. 723.

[48] Cf. H. BRACTON: *De legibus et consuetudinibus Angliae* (ed. G. E. Woodbine), New Haven 1922, pp. 338 ff.; W. BLACKSTONE: *Commentaries on the laws of England*, 1, Oxford 1765, pp. 285 f. Regarding the whole problem of treasure trove in English legal history see CH. R. BEARD: *The romance of treasure trove*, London 1933; G. F. HILL: *Treasure trove in law and practice from the earliest time to the present day*, Oxford 1936.

[49] *Treasure Act*, Section 4 (1). See, for example, R. BLAND: *The Development and Future of the Treasure Act and Portable Antiquities*, in: S. Thomas—P. Stone (ed.): Metal Detecting and Archaeology, Woodbridge 2008, pp. 63 ff. (= http://www.muenzgeschichte.ch/downloads/Development%20Roger%20Bland.pdf).

[50] Cf. J. ERSKINE: *An institute of the law of Scotland, in four books, in the order of Sir George Mackenzie's institutions of that law*, I, Edinburgh 1824, p. 224; A. SAVILLE: *The law and practice regarding coin finds. The treasure trove system in Scotland*, International Numismatic Council, Compte rendu 55 (2008), p. 13; A. C.

The "treasure trove systems" of the United States[51] are quite heterogeneous. Since Louisiana and Puerto Rico belong to the so-called mixed legal systems, their rules considering treasure trove are based on Roman law. As for the case law of treasure trove, it is very divergent in the Member States of the USA. It is worth mentioning that the principle of equitable division can also be found in the legal literature. As for some treasures of great importance, federal acts ought to be applied (cf., for instance, the *Antiquities Act* of 1906, the *National Historic Preservation Act* of 1966, and the *Archeological Resources Protection Act* of 1979).

5. Conclusions

The original concept by Hadrian related to treasure trove is currently amended with numerous "public law elements"[52] even in those legal systems which are based on the Roman law tradition, since it is obvious that nowadays the treasures of great archeological and cultural importance would not to be exclusively awarded to the finder or, for instance, the landowner. Hadrian's regime is to be evaluated in its own time and context, that is in classical Roman law. The individualist and liberal approach of classical Roman law is also reflected in classical law, as well as Justinian's regime of treasure trove. An exclusively "private law approach" seems to be unsustainable today, as the ruling of treasure trove deserves a complex approach according to which any treasure could be regarded as a national heritage or even a kind of "common heritage of mankind" (of course not in the "technical" sense of modern international law). The regulation of treasure trove has only to serve this fine purpose.

NORMAND: *Review of treasure trove arrangements in Scotland*, Edinburgh 2003 (= http://www.scotland.gov.uk/Resource/Doc/47063/0023827.pdf), p. 5.

[51] Cf. R. H. HELMHOLZ: *Equitable division and the law of finders*, Fordham Law Review 52 (1983), pp. 313 ff.; J. M. KLEEBERG: *The law and practice regarding coin finds. Treasure trove law in the United States*, International Numismatic Council, Compte rendu 53 (2006), pp. 13 ff. (= http://www.muenzgeschichte.ch/downloads/laws-usa.pdf).

[52] See to the problem of the distinction between private law and public law G. HAMZA: *Reflections on the Classification (divisio) into 'Branches' of Modern Legal Systems and Roman Law Traditions*, in: Fides Humanitas Ius. Studii in onore di Luigi Labruna, IV, Napoli 2007, 2449—2476.