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On beneficial ownership in the civil law

by W. Loof*

I. Ownership and transcendental nonsense

The concept of unitary ownership is a cornerstone of the civil law. Only one can be owner of a specific object and if one is owner of that object, the other is necessarily not. Nevertheless, the civil law has always been confronted with situations in which the benefit of an object and legal title or ownership of that object are separated, either by contract or by operation of the law, without any *ius in re aliena* being vested. These situations can be found where ownership is transferred for security or management purposes or in cases where a contract of sale has been concluded, but formal delivery is necessary to transfer the title. The transferor or purchaser does not have legal ownership but the object is held in his interest (either explicitly or implicitly) and he stands to benefit from any increase, or burden any decrease in value, while he may expect to become owner at some point. In such instances, jurisdictions are faced with the question whether or not to give any proprietary consequences to the position of - what we might call - the *beneficial owner* and the way in which to do so. In the common law, the system of Equity has done so and in such a way that it is now normal for a common lawyer to speak of beneficial or equitable ownership. Obviously, many jurisdictions in the civil law do – in some form – give legal consequence to the position of the beneficial owner as well, reinforcing what was first only a personal right or a moral claim. This has not led to a re-evaluation of the concept of ownership¹, though legal scholars have noted the rigidity of a unitary concept of ownership and have called for such a re-evaluation². Rather, it has led to a manipulation of the concept of ownership; to legal fictions intended to embed the desired result into the system of private law, or, as Cohen has irreverently put it, to ‘transcendental nonsense’:

‘..in every field of law we should find the same habit of ignoring practical questions of value or of positive fact and taking refuge in “legal problems” which can always be answered by manipulating legal concepts in certain approved ways.’³

Thus, in Germany the expectation rights of a purchaser has been held to be a ‘*quasi-dingliches recht*’, which is the ‘*wesensgleiches Minus*’⁴ of the right of ownership. In Scotland

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¹ Although the Supreme Court of Canada has held that the ownership of the trustee of a civil law trust is of a *sui generis* nature (Royal Trust Co. v. Tucker (1982) 1 S.C.R. 250).

² For instance, Crocq, *Propriété et Garantie* (Paris, 1995) : ‘Peut-on au regard du droit civil (et non plus seulement du droit fiscal ou du droit comptable) parler de ‘propriété de la valeur’ et de ‘propriété de l’utilité, d’une ‘nouvelle relation aux biens’?’

³ Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 *Colum.L.R.* 809, p. 820.

⁴ BGH 24 June 1959, BGHZ 28, 16 = *NJW* 1958, 113.

and France the beneficiary of a trust is protected from the private creditors of the trustee, which is often explained through the fiction of separate patrimonies. In The Netherlands the civil code bans any transfer of ownership for security purposes or transfer of ownership that does not aim to bring the object into the patrimony of the acquirer (art. 3:83 s. 3). Yet, with the introduction of fiduciary transfer of ownership through the implementation of the Financial Collateral Directive, it was simply stated that the ban on fiduciary transfers did not cover any financial collateral arrangements.

One could argue that these are independent legal concepts that are functioning quite well. The answer must be that it is probably true that they are functioning well and succeed in obtaining the desired results. Nonetheless, there are consistent ethical, social and legal-political values underlying these solutions that require us to question our concept of unitary ownership and it is the task of legal criticism to bring these questions to light, in order to provide for a more coherent explication of what the law is and a guideline as to how the law should be developed. As such, we do not merely aim to criticize the existing concepts on the basis of ethical, social and legal-political considerations -to the contrary, in the following we will mainly discuss different concepts of ownership - but rather offer an alternative, more informed, concept of ownership.

It seems that when there is a separation of the control that ownership gives, from the benefits of ownership, our sense of justice requires that he who stands to benefit is given that which is due to him. Hence the different piecemeal solutions offered by the different jurisdictions to protect the interests of the beneficial owner. Thus, the right of the beneficial owner cannot be characterized as an absolute right of ownership giving him 'sovereignty' or 'power' over that which is owned - naturally there can only be one sovereign owner with regard to an object. Rather, it can be held that what is owned, *objectively* 'belongs' to the beneficial owner and on this basis different remedies are made available to him. The beneficial owner shares in the '*proprietas*' (and therefore does not have a *ius in re aliena*) and as such it is justified to call him owner.

Traces of such an approach can be found in the development of the concept of divided ownership in history and particularly in the way natural lawyers such as Struve and Pufendorf treated the subject. In the following I will examine some of the historical roots of the concept of divided ownership, before going into the origins of our 'modern' concept of ownership as total and abstract. I will then shortly outline a few examples in Netherlands and German law that lead me to question the dogma of unitary ownership (without pretending to be exhaustive in this respect) and provide an outlook as to how that concept of ownership could be adapted, inspired by the historical examples of concepts of divided ownership.

II. Divided ownership in history: Bartolus, Molina and the German natural law scholars

The division of ownership between *dominium directum* and *dominium utile* was introduced in the Middle Ages, as the Glossators and Post-Glossators sought to explain feudal relations in Roman law terms. The term *dominium utile* was applied to the rights of the vassal, but also to that of the *superficiarius*, the *emphyteuticarius*, the *conductor ad longum tempus* and the *longi temporis praescriptor*.

The first definition of ownership was then formulated by Bartolus de Saxoferrato (1313-1357). Bartolus defined ownership as '*ius de re corporali perfecte disponendi nisi lege*

prohibeatur or 'the right dispose of a corporeal in the most complete way, unless forbidden by law to so'.⁵ According to Coing, traces of a subjective rights approach can already be found here. In the introduction to his article on Bartolus' concept of ownership Coing⁶ observes that,

'in dessen Bewältigung das Mittelalter Entscheidendes für die Entwicklung des kontinentalen Rechtes geleistet hat: die Definition der subjektiven Rechte, die den Aktionen zugrunde liegen. Es handelt sich um einen Abschnitt aus der großen Arbeit, die erforderlich war, um ein aktionenrechtlich aufgebautes Recht in ein System materieller Rechte und Ansprüche umzusetzen.'

Nonetheless, it is generally held that Bartolus did not mean *perfecte* to indicate absolute or unlimited exercise of the owner's powers.⁷ Bartolus contrasts his definition of ownership with his definition of possession as *ius insistendi rei*, literally 'the right to stand on a thing'.⁸ Van der Walt concludes that, therefore, Bartolus does not mean *perfecte* to indicate absolute or unlimited exercise of the owner's powers, but simply wants to contrast *dominium* with *possessio*. However, the right of the possessor was to be contrasted with the right of ownership not just as the right to dispose of an object⁹, but also as the right of an owner to have the use of the object and to receive the fruits of that object.¹⁰ Furthermore, Bartolus refers to the *lex In re mandata* which deals with the liability of the mandatory and mentions that anyone is *suae rei moderator et arbiter*.¹¹ For Coing¹², this statement confirms the "*Souveränität*" des Eigentümers in der Benutzung der Sache' and Willoweit¹³ states:

'Indem Bartolus zur Interpretation des Tatbestandsmerkmals perfecte disponendi ausdrücklich auf dies Quelle hinweist, will er wohl bekunden, daß auch der Eigentümer moderator und arbiter, also Herrscher und Richter seiner Sache sei. Das Adverb perfecte soll also den umfassenden Charakter der dem Eigentümer zukommenden Dispositionsbefugnis dartun.'

Bartolus distinguishes between three forms of ownership: '*Tria sunt dominia, directum et utile et quasi dominium*', which are all *species* of a *genus*, that is to say ownership in a wider sense.¹⁴ Interestingly, Bartolus applies his definition of ownership as *perfecte disponendi* to *dominium directum* as well as *dominium utile*. What, then, is the content of *dominium utile*? The powers of the *dominus utili* are no different then the powers of the owner in general. He is entitled to the use and benefits of the object and he may dispose of his right or burden

⁵ Bartolus on D. 41.2.17.1, nr. 4.

⁶ Coing, 'Zur Eigentumslehre des Bartolus' (1953) 70 *Sav.Z/Röm* 348, p. 349.

⁷ Willoweit, 'Dominium und Proprietas' (1974) 94 *Historisches Jahrbuch des Görres-Gesellschaft* 131, p. 145; Feenstra, 'Historische aspecten van de private eigendom als rechtsinstituut' (1976) *Rechtsgeleerd Magazijn Themis* 248, p. 270; Van der Walt, 'Bartolus se omskrywing van dominium en die interpretasies daarvan sedert die vyftiende eeu' (1986) 49 *THRHR* 305, p. 309-10.

⁸ Coing, *supra* note 6, p. 353.

⁹ Although that was seen as the most important characteristic of ownership, cf. Coing, *supra* note 6, p. 353.

¹⁰ *Ibid.* See also, Feenstra, *supra* note 7, p. 251-2.

¹¹ The *lex In re mandata* was later used by French jurists as an inspiration for article 544 of the *Code Napoléon*, cf. Garnsey, *Thinking about Property* (Cambridge, 2007), p. 178-9, 197-9.

¹² Coing, *supra* note 6, p. 354.

¹³ Willoweit, *supra* note 7, p. 145.

¹⁴ Bartolus on D. 21.2.39.1, nr. 4. Cf. Van der Walt, Kleyn, 'Duplex Dominium: The History and Significance of the Concept of Divided Ownership', in: Visser (ed.) *Essays on the History of Law* (Juta, 1989), p. 242, Feenstra, *supra* note 7, p. 255 ; Coing, *supra* note 6, p. 349;

it.¹⁵ Bartolus comments upon a text in the Digest (D 43. 18. 9)¹⁶ which allows for the *emphyteuticarius* to establish a servitude on the land. In classical times it was deemed possible for an *emphyteuticarius* to establish a pledge or servitude on the land, but only in such a way that the beneficiary would exercise his right as a *superficiarius*. By the time of the compilation of the Digest it was deemed possible to actually burden the ground.¹⁷ Bartolus then applies the specific text in the Digest to the concept of *dominium utile*. In case of a pledge, the pledge-holder must prove that the pledged object was owned by the debtor (*in bonis debitoris*).¹⁸ Bartolus states that in case of *directa hypothecaria* the debtor ought to prove *directum dominium* and in case of *utili hypothecaria* he ought to prove *utile dominium*.¹⁹ As such, any rights established by the person entitled to *dominium utile* could not go beyond that and would provide the beneficiary with an *actio in rem utilis*.²⁰ Although Bartolus does apply *perfecte disponere* to both types of ownership, it is clear that both rights do not have the same substance - as each owner has different types of remedies at his disposal - and can therefore coexist.

The definition of ownership by Bartolus was highly influential in the centuries to come. The Spanish Jesuit Luis de Molina, for instance, adopted the definition of *dominium* made by Bartolus, but criticized the fact that it is limited to corporeals.²¹ For Molina *dominium* is a *ius* but it is not analogous to *ius* in general, it is however the most important *ius in re*. Molina distinguishes between *dominium plenum* and *dominium non plenum*. The latter can be divided between *dominium directum* and *dominium utile*. However, only he who *potest de re perfecte disponere* has *dominium plenum*. According to Feenstra²², Molina - unlike Bartolus - thus understands *dominium plenum* to be the absolute power over an object.

Leonard Lessius (1554-1623) who was a fellow Jesuit from the southern Netherlands elaborates on the argument for the division of ownership. Lessius distinguishes between the *rei proprietates*, which entail *dominium directum*, and the *rei commoditates et utilitates*, which entail *dominium utile*.²³ Like Molina had done, Lessius distinguishes *dominium plenum* from rights that are labeled *dominium* but are not *dominium plenum*; rights such as *dominium directum* and *dominium utile*.²⁴ Van der Walt and Kleyn²⁵ remark that the Spanish scholastics 'saw ownership as a human *facultas* or power, which implies that ownership is fundamentally incapable of functional fragmentation. The rights of non-owners who may use

¹⁵ Bartolus on D 43. 18. 1. 9: 'Ille qui habet util dominium potest constituere ius in re, quod per utilem confessoriam petetur. Eodem modo poterit illam rem pignora et creditor haebeat utilem hypothecariam...', cited by Coing, *supra* note 6, p. 359.

¹⁶ 'Servitutes quoque praetorio iure constituentur et ipsae ad exemplum earum, qua ipso iure constitutae sunt, utilibus actionibus petentur: sed et interdictum de his utile competit.'

¹⁷ Coing, *supra* note 6, p. 359.

¹⁸ D 20. 1. 15. 1.

¹⁹ Bartolus on D 20. 1. 18: 'In directa hypothecaria debet probari directum dominium (*scilicet* actione), in utili hypothecaria debet probari utile dominium ut l. grege et in superficiariis supra eodem (D 20. 1. 13. 3) et infra eodem l. Lex vectigali (D 20. 1. 31)', cited by Coing, *supra* note 6, p. 360.

²⁰ *Ibid.*

²¹ Feenstra, 'Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelalterlicher und spätscholastischer Quellen', in: *Festschrift für Franz Wieacker zum 70. Geburtstag* (Göttingen, 1978), p. 225. Molina, and later Leonard Lessius, apply the term *quasi dominium* to ownership of incorporeals.

²² *Ibid.*, p. 223.

²³ *Ibid.*, p. 224-5.

²⁴ *Ibid.*, p. 225-6.

²⁵ Van der Walt, Kleyn, *supra* note 14, p. 246-7.

the thing in some way or another must therefore be subjected to that of the owner.' While the term *dominium* is still used to indicate these rights, they cannot be *dominium plenum*. Nonetheless, in a situation where ownership is split into *dominium directum* and *utile*, someone must be the 'real' owner and thus have *facultas* and *potestas* as to what is owned. To maintain otherwise would mean that the object in question would have no owner (in the sense of one having *facultas* and *potestas*) at all. The controversy as to who could be regarded as the 'real' owner in situations of divided ownership arose first in the 13th century in Italy²⁶ and centered around the question who had the *proprietas* or *dominium* that was talked about in Roman sources, but of which it was impossible to ascribe them to either the *dominus directus* or the *dominus utilis*. An answer to this question was reached by either emphasizing the ability to alienate the object, in which case the real owner would be the *dominus directus*, or emphasizing the right to use and enjoyment of the object, in which case one will consider the *dominus utilis* real owner.²⁷ A wholly different solution was reached by the natural law scholars of the 18th century in Germany.

With the reception of the Roman law in Germany in the 15th and 16th legal scholars were faced with the same difficulty as the Glossators had faced centuries before; how to apply the Roman law to the realities of the German Medieval ordering of rights in land? Again ownership was divided between *dominium directum* and *utile*, or *Obereigentum* and *Minder- or Nutz Eigentum*.²⁸ In the codifications of the Empire and the different states of the 16th century the term *dominium utile* was then retained, but restricted to the rights of the vassal and *emphyteuticarius* and seen as a species of *iura in re aliena*. However, the natural law scholar Georg Adam Struve (1619-1692) would offer a radically different theory that came to be very influential. In Struve's opinion *dominium* consists of the right of disposal and the right to use and fruits of what is owned. Like Molina, Struve distinguishes between *dominium plenum* and *minus plenum*. Where *dominium* is unrestricted it is *plenum*, where *dominium* is functionally divided it is however *minus plenum*. In the latter case the *dominus directus* is he '*qui retinet proprietatem ita restrictam et superiorem in re potestatem*' and the *dominus utilis* is he '*qui cum iure utendi fruendi concessio participat de proprietate*.'²⁹ Thus, the right of the *dominus utilis* must not be considered a *ius in re aliena*³⁰ but rather an actual right of ownership resulting from the *dominus utilis* partaking in the *proprietas*.

Samuel Pufendorf (1632-1694) adopts the definitions of Struve in his reflections on ownership. For Pufendorf, like many natural law scholars, ownership is an institution which is based on agreement between men, necessary where men live together in order to distinguish between *meum* and *tuum*. Therefore, Pufendorf accepts the text in the Digest (D 13.6.5.15) which states that there cannot be two rights of ownership in one object. However, where two such rights do not conflict with each other, natural law does not prevent them from existing in one object at the same time as such would not prevent men

²⁶ Boyer, 'La conception du fief chez Dumoulin', in: *Mélanges I: Mélanges d'histoire du droit occidental* (Paris, 1962), p. 44.

²⁷ Van der Walt, *supra* note 7, p. 311.

²⁸ Wagner, *Das geteilte Eigentum im Naturrecht und Positivismus* (Breslau, 1938), p. 28-9; Strauch, 'Das geteilt Eigentum in Geschichte und Gegenwart', in: *Festschrift für Heinz Hübner zum 70. Geburtstag am 7 November 1984* (Berlin, 1984), p. 278-79.

²⁹ Wagner, *supra* note 28, p. 36-7; Strauch, *supra* note 28, p. 279.

³⁰ As Grotius had more or less argued.

to live peacefully together.³¹ Thus, where the *dominus directum* retains *proprietas* and the right of disposal, the *dominus utilis* can share in the *proprietas* and have the right to use and fruits, without the two rights conflicting.

Interestingly, even Kant (1724-1804) allows for a division between *dominium directum* and *utile*³². For Kant, private law is based on two pillars; the internal mine and thine (which is the original right to freedom) and the external mine and thine.³³ With regard to the latter, Kant assumes that it is possible for an individual to have an object of choice as his, excluding all others. Kant³⁴ then asks himself the question: ‘*was ist das, was da macht, das Ich mich wegen eines äußeren Gegenstandes an jeden Inhaber desselben halten, und Ihn (per vindicationem) nötighen kann, mich wieder in Besitz desselben zu setzen?*’ To answer that question Kant assumes that there is an *a priori* universal will³⁵ to distribute the land to individuals which prevents conflict of choice of one with the choice of the other. It is this universal will that binds the people to respect the right of the person that takes possession and acquires an external object as his own, to use it to the exclusion of anybody else and as he pleases. In his turn, the individual has to recognize and respect any acquisition by another individual. Nonetheless also Kant allows for divided ownership;

‘Es kann ferner zwei volle Eigentümer einer und derselben Sache geben ohne ein gemeinsames Mein und Dein, sondern nur als gemeinsame Bestizer dessen, was nur einem als das Seine zugehört, wenn von den sog. Miteigentümern (condomini) einem nur der ganze Besitz ohne Gebrauch, dem Andern aber aller Gebrauch der Sache samt dem Besitz zukommt, jener also (dominus directus) diesen (dominus utilis) nur auf die Bedingung einer beharrlichen Leistung restringiert, ohne dabei seinen Gebrauch zu limitieren.’

It seems that Kant takes a somewhat different position as Struve and Pufendorf had taken. He recognizes that there can be two full owners, not because both can consider the property as ‘theirs’, but because both may consider themselves as possessing the property.

The fact that the natural law scholars, such as Pufendorf and Wolff, accepted divided ownership did not prevent them to adopt an understanding of ownership that was -what Wieacker³⁶ calls- ‘*bindungsloser und individualistischer*’ then that of their predecessors. In the view of these predecessors the essence of ownership is still characterized by – what Willoweit calls - the ‘*Proprietätsgedanken*’.³⁷ Ownership understood as such, is merely concerned with the assignation or ‘*Zuordnung*’ of what is owned and the actual substance of the right of ownership then follows from the ‘*objective Eigentumsordnung*’ and is not inherently unlimited.³⁸ The writings of the natural law scholars put the understanding of

³¹ Wagner, *supra* note 28, p. 41, 42; Wiegand, ‘Zur theoretischen Begründung der Bodenmobilisierung in der Rechtswissenschaft: der abstrakte Eigentumsbegriff’ in: Coing & Wilhelm (eds.), *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert III* (Frankfurt am Main, 1976), p. 129; Strauch, *supra* note 28, p. 280.

³² Kant, *Metaphysische Anfangsgründe der Rechtslehre* (1797), p. 95. See also, Wagner, *supra* note 28, p. 46.

³³ Byrd & Hruschka, ‘Duty to Recognize Private Property Ownership: Kant’s Theory of Property in his Doctrine of Right’ (2006) 56 *U. Toronto L.J.* 217, p. 246 ff.

³⁴ *Ibid.*, p. 80.

³⁵ Which is not the will of an actually existing people in the natural state of the world but rather the idea of an originally united will.

³⁶ Wieacker, *Wandlungen der Eigentumsverfassung* (Hamburg, 1935), p. 51 ff; Wiegand, *supra* note 31, p. 130.

³⁷ Willoweit, *supra* note 7, p. 147. In note 69 Willoweit refers to scholars such as Decius, Zasius, Vultejus and Thomasius. It must be noted, however, that according to Garnsey (*supra* note 11, p. 198), the understanding of *dominium* as *abusus*, where *abusus* means absolute control over an object, appears to be first present in the writings of Zasius.

³⁸ *Ibid.*, p. 154.

ownership on a new basis.³⁹ Willoweit points out the definition of ownership by the natural law scholar Wolff (1679-1754): '*Jus proprium disponendi de re pro arbitrio suo...dominium appellamus*'. In this definition the *Proprietätsgedanken* is not absent but the power of the owner to dispose of the object is primarily emphasized.⁴⁰ In title 8 of the first part of the *Preußische Allgemeine Landrecht (ALR)* of 1794, which was heavily influenced by natural law scholars, a comprehensive overview of the different types of ownership is given:

'§ 1: *Eigenthümer heißt derjenige, welcher befugt ist, über die Substanz einer Sache oder eines Rechts, mit Ausschließung Anderer, aus eigener Macht, durch sich selbst oder durch einen Dritten, zu verfügen.*

§ 10: *Das Recht, über die Substanz der Sache zu verfügen, wird Proprietät genannt.*

§ 16: *Das Eigenthum einer Sache ist getheilt, wenn die darunter begriffenen verschiedenen Rechte verschiedenen Personen zukommen.*

§ 19: *Wer nur die Proprietät der Sache ohne das Nutzungsrecht hat, wird Eigener genannt.*

§ 20: *Wer Miteigner der Proprietät ist und zugleich das Nutzungsrecht hat, dem wird ein nutzbares Eigenthum der Sache beigelegt.'*

Indeed, § 1 defines ownership as an absolute, subjective right, very similar to how the pandectists would define it and also very similar to how it is currently defined in § 903 of the German civil code.⁴¹ Despite such an understanding of ownership it is nonetheless deemed possible for multiple persons to have *proprietas* and, thus, ownership of an object. Although the emphasis lies on the power of the individual to dispose of the object, due to the '*Proprietätsgedanken*' rights of ownership can be assigned to multiple persons at the same time.

III. A 'modern' concept of ownership; total and abstract

Already in the 16th century it is Hugo Donellus (1527-1591) who rejects the division of ownership into *dominium directum* and *utile* and makes a fundamental distinction between ownership and *ius in re aliena*. It is also Donellus who makes the case for a system of subjective rights, as opposed to a system which gives centrality to action and remedies.⁴² In the first book of the digest (D 1.1.11) the different meanings of the word *ius* are summed up, being the natural law; the positive law of a state; or the place where the Praetor administers the law.⁴³ Donellus adds his own meaning of *ius* as an individual's right to the list. In general rights are 'things belonging as an individual possession to each person, assigned to him by law', such a right is 'a capacity (*facultas*) and power (*potestas*) assigned by law'.⁴⁴ Donellus refers to the famous definition of justice in D 1.1.10 as the 'constant and perpetual desire to render everyone his due' (*ius suum cuique tribuere*) and the definition of private law as

³⁹ Wiegand, *supra* note 31, p. 130.

⁴⁰ Willoweit *supra* note 7, p. 150-1.

⁴¹ § 903: 'Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen.'

⁴² Coing, 'Zur Geschichte des Begriffs "subjektives Recht"', in: Coing, Lawson, Grönfors (eds.) *Das subjektive Recht und der Rechtsschutz der Persönlichkeit* (Frankfurt am Main, 1959), p. 14-7; Garnsey, *supra* note 11, p. 201-2; Feenstra, 'Dominium and ius in re aliena: The origins of a civil law distinction', in: Birks (ed.) *New Perspectives in the Roman Law of Property, Essays for Barry Nicholas* (Oxford, 1989), p. 115 ff.

⁴³ Coing, *supra* note 42, p. 10.

⁴⁴ Donellus, *Commentariorum Iuris Civilis Libri* 1.3 on D 1.1.11 : 'ea quae sunt cuiusque privatim iure tamen illi tributa' ; 'facultas et potestas iure tributa'. Translation by Garnsey, *supra* note 11, p. 202.

relating to the advantage of individual citizens in D 1.1.1.2.⁴⁵ Private law, therefore, deals with assigning the individual that which is due to him.⁴⁶ As such it must not focus on actions, but primarily on the individual's subjective right, which the action or remedy merely seeks to protect.⁴⁷

Of course, for the famous French legal scholar Villey the meaning of *ius suum cuique tribuere* is quite different. According to Villey, in the classical world to give someone his right or due (*suum ius*) meant as much as giving someone what he deserves and what a just, natural society would give to him. Thus, the notion of subjective rights cannot be found in the classical world. Unsurprisingly, for Villey, natural law and natural rights are incompatible. Once the notion of subjective rights as a power (*potestas*) of an individual came into being - the roots of which Villey traces back to Ockham- there could be no place for objective right.⁴⁸ We will come back to this controversy but for now continue with the birth of the modern civil law concept of ownership in 19th century Germany.

As Wagner puts it⁴⁹, the concept of divided ownership was challenged from two sides by the end of the 18th century and the beginning of the 19th century: From the one side by the abolishment of social institutions in which the concept of divided ownership played such an important role, such as the feudal system, serfdom and the *Familienfideikommiss*; from the other side by historical scientific research performed by the pandectists. These scholars were first and foremost interested in the understanding of 'true' ownership as an abstract, total and undivided concept and as they interpreted it from the Justinianic sources. They were much less interested in the liberal ideals of the free individual:

*'Es kann keine Rede davon sein, daß die Romanistik einer individualistischen Eigentumsverfassung vorgearbeitet hätte. An der Beseitigung des geteilten Eigentums in seiner sozialen Erscheinung hat sie nicht mitgewirkt. Es gibt auch keinen anhalt dafür, daß bei der Bildung des absoluten Eigentumsbegriffes materielle individualistische Privateigentumsvorstellungen auch nur entfernt mit im Spiel gewesen wären. – Die Romanistik hat lediglich die rechtswissenschaftliche Tradition, das römische Recht zu bearbeiten, fortgesetzt.'*⁵⁰

⁴⁵ D 1.1.10: 'Iustitia est constans et perpetua voluntas ius suum cuique tribuere' ; D 1.1.1.2 : 'privatum quod ad singulorum utilitatem pertinet', cf. Coing, *supra* note 42, p. 15-6.

⁴⁶ Coing, *supra* note 42, p. 16: 'Er [Donellus] folgert daraus, daß es sich bei dem Privatrecht um dasjenige Recht handele, das den Privaten und einzelnen zuteile, was jeweils das Ihre sei [...].'

⁴⁷ *Ibid.*

⁴⁸ Van Duffel, 'Natural Rights & Individual Sovereignty' (2004) 12 *The Journal of Political Philosophy* 147.

⁴⁹ Wagner, *supra* note 28, p. 121.

⁵⁰ Busz, *Die historische Schule und die Beseitigung des geteilten Eigentums in Deutschland* (München, 1966), p. 219 ff. Cf. Wiegand, *supra* note 31, p. 138. Contra: Kroeschell, ('Zur Lehre vom "germanischen" Eigentumsbegriff', in: *Studien zum frühen und mittelalterlichen deutschen Recht von Karl Kroeschell* (Berlin, 1995), p. 224-5) who is of the opinion that the concept of ownership developed by the pandectists was in full unison with the reforms of the *Bauernbefreiung*. According to Kroeschell, the pandectists were aware of this and celebrated the abolishment of the divided concept of ownership as a victory over the feudal system of government of land. Kroeschell cites Pagenstecher and Windscheid to support his argument. Indeed Pagenstecher puts the efforts of the pandectists in such a perspective; 'Unsere Gesamtanschauung über das geteilte Eigentum geht dahin, daß dasselbe, im ursprünglichen deutschen Recht keineswegs belegen, die mittlere Epoche eines großartigen Kampfes charakterisiert, welcher zwischen feudaler und moderner staatlicher Ordnung, zwischen Hofrecht und Volksrecht geführt würde. Daß in diesem Kampfe die eine Partei sich auf mißverständenes römisches Recht berief, daß Reichsgesetze und neuere Landrecht gerade diese irrtümliche Terminologie auf das Verhältnis anwendeten: berechtigt uns nicht, die Tatsache selbst für einen Irrtum auszugeben, daß ein doppeltes Eigentum damals anerkannt war.' Nonetheless, the aim of the pandectists

Certainly, this seems to be the case for the scholar who can most prominently be credited for the disappearance of divided ownership in Germany: Anton Friedrich Justus Thibaut (1772-1840). Thibaut rejects the deductive methods applied by Pufendorf, but instead claims that the law and our concept of ownership can only be understood through historical research;

*'Die Untersuchung über den Begriff des dominii utilis muß [...] ebenfalls rein historisch sein, und die historia dogmatis kann allein auf den wahren Begriff führen. Den Begriff des dominii utilis im Naturrechte deduzieren (wie nach dem oberflächlichen Pufendorf getan haben) ist ein höchst lächerliches und sinnloses Verfahren, zumal wenn man erst geschichtlich den Begriff desselben ausgemittelt hat.'*⁵¹

Thibaut maintains that the distinction between *dominium directum* and *dominium utile* cannot be found in the Roman sources and was an invention made by the Glossators. Instead, one can find in the Roman sources what Thibaut calls '*das eigentliche Eigentum*'. That actual, true right of ownership can have many characteristics. The owner may take the fruits, may alienate the property and may alter its shape. When the owner separates the *ususfructus* from the ownership, what remains is called *proprietas*, taken together they form *plena proprietas*.

*'Solange der Eigenthümer die wesentlichen Proprietäts Rechte einem andern nicht gänzlich übertragen hat, und nur bloß erlaubt, daß ein anderer einzelne Rechte an seiner Sache ausübe, ist und bleibt er wahrer Eigenthümer, und die, welchen jene einzelnen Rechte concedirt sind, haben nicht weiter, als ein ius in re aliena.'*⁵²

Although in Roman law some limited real property rights such as usufruct and emphyteusis are referred to as forms of *dominium*, these are always very carefully distinguished from *dominium* as true ownership, according to Thibaut.⁵³ It is exactly this idea of what constitutes 'true' ownership that has been so influential, according to Wiegand:

'Nicht die historisch eindrucksvolle Begründung und auch nicht die gewiß überzeugende Polemik gegen die Literatur des 18. Jahrhunderts sind es, die der Abhandlung Thibauts so durchschlagenden Erfolg verschafft haben, sondern ganz allein die Tatsache, daß viele der zeitgenössischen Juristen und der kommenden Generation eben diese Auffassung teilen, daß es nur ein wahres Eigentum gebe und daß dieses Eigentum dasjenige sei, das sie in den römischen Quellen vorzufinden glaubten.'

It is Puchta who formulates this understanding of ownership in the most precise manner. According to Puchta it is possible to understand the system of law as a system of coherent

was certainly not the abolishment of the feudal system or the liberation of the serf, but primarily to define ownership as what they thought the correct historical definition should be.

⁵¹ Thibaut, *Versuche über einzelne Teile der Theorie des Rechts II* (Jena, 1817), p. 78. Nonetheless, Thibaut does recognize that it is possible to develop a system of natural law on the basis of a '*praktische Vernunft*'; Thibaut I, p. 134 f.: '...so kann natürlich nicht umhin, vor allen Dingen den Satz zu postulieren, daß es eine praktische Vernunft, eine Stimme über Recht und Unrecht im Menschen giebt, deren Vorschriften im Wesentlichen stets dieselben waren, im Wesentlichen stets auf denselben Gründen beruhten; daß ferner diese Vorschriften, zur wissenschaftlichen Einheit des Systems erhoben, aus höheren, dem gemeinen Verstande vielleicht immer klar, aber niemals deutlich vorschwebenden Gründen abgeleitet werden können; und daß endlich unsere gemeinen Überzeugungen von Recht und Unrecht nur durch diese systematische Verbindung allein durchgängige gewißheit, vollkommene Harmonie und Konsequenz erhalten.' Cf., Kiefner, 'A.F.J. Thibaut' (1960) 77 *Sav.Z/Röm* 304, p. 326 ff.

⁵² Thibaut, *supra* note 51, p. 86.

⁵³ *Ibid.*, p. 86 f.

conceptions, logically deducible.⁵⁴ The present system of law must be entirely based on Roman law, as that is the system of law that is common to civilized mankind. In this system of law ownership is the '*totale Unterwerfung der Sache*'. It is this characteristic of totality that precludes the existence of multiple rights of ownership in one object.⁵⁵ Interestingly Puchta does mention the existence of quiritary and bonitary ownership in Roman law, but maintains that these types of ownership existed in two different spheres of the law; the former in the *ius civile* and the latter in praetorian law. Therefore they do not infringe on the totality of ownership.⁵⁶ However, while it is true that the existence of these two types of ownership are due to the operation of two systems of law in one jurisdiction, it is also true that both types of ownership exist in the sphere of private law. Thus, whether or not the existence of these two types of ownership infringes on the totality of ownership is a question of perception.

Together with the idea of ownership as a 'total' right, which cannot be divided, the idea of ownership as an abstract right is developed. Ownership cannot be described in terms of the rights or powers that the owner has. Ownership does not cease to exist when some - or even all - of these powers are distributed to a third party. Where such is the case there can only be one owner, while the third party has a *ius in re aliena* at the most. The abstraction of ownership is therefore a rejection of the concept of divided ownership, but also a rejection of any type of purpose bound ownership.⁵⁷ Windscheid phrases it clearly⁵⁸:

'Das dominium utile ist in der Tat kein Eigentumsrecht, sondern ein Recht an fremder Sache, dessen (juristischer) Inhalt allerdings aus der (unjuristischen) Vorstellung heraus bestimmt worden ist, als sei der dominus utilis viel weiter als das irgend eines andern an fremder Sache Berechtigten; aber Eigentumsrecht kann es nicht werden, ohne daß der sog. dominus directus aufhörte, Eigentümer zu sein. Auch hier kann der Eigentumsbegriff nicht über seine eigene Konsequenz hinaus'.

IV. 'Beneficial ownership' in Roman law?

In classical Roman law we can already find several examples where the position of what we have called the beneficial owner is given legal consequences, reinforcing where first there was only a right *in persona* or a moral claim, for instance in cases where property was transferred without making use of the formalities prescribed by the *ius civile*. In such cases, ownership could be acquired after a prescription period of one or two years depending on the nature of the property. However, the would-be owner was quite vulnerable for he could lose possession to a third party or he could be faced with a vindication by the quiritary (legal) owner. By the time of the Later Republic, due to vast scale of commerce and commodity-turnover, the formal modes of acquisition of ownership had become obsolete and the need was felt to protect the anticipation of ownership by the acquirer. The praetor would grant actions to the would-be owner against any third party possessor but also against the quiritary owner. The legal status that was hereby created was referred to by the Romans as '*in bonis esse*' or '*rem in bonis habere*'⁵⁹, nowadays referred to as bonitary

⁵⁴ Wagner, *supra* note 28, p. 86.

⁵⁵ Puchta, *Vorlesungen über das heutige römische Recht I*, §144.

⁵⁶ *Ibid.*

⁵⁷ Wiegand, *supra* note 31, p. 143-47.

⁵⁸ Windscheid, *Lehrbuch des Pandektenrechts I*, § 169.

⁵⁹ For instance, Gaius, 2,40.

ownership.⁶⁰ Gaius speaks straightforwardly of *dominium duplex*, as ownership is divided in cases where one is the legal or quiritary owner but the other one may include the object into his patrimony.⁶¹

In cases of fiduciary transfers of ownership the transferee was originally only bound by his *fides* to reconvey the property to the transferor. From early on, failure to reconvey was made suable by the praetor on the basis of the *actio fiduciae*. In case of a transfer of ownership for security purposes the creditor was not allowed to retain the object in case of non-payment by the debtor, but was forced to sell and any surplus value would then benefit the debtor.⁶² Moreover, it seems that at some point the *fiducia* was treated as a formal pledge in order to prevent the creditor from deriving any unjust advantages over the debtor.⁶³ Noordraven lists some of the powers that the debtor retains, from which it is all the more obvious that the transferee was considered beneficially entitled to the object in cases of fiduciary transfer of ownership: His running prescription was not stopped by a fiduciary transfer; he could bequeath the object; he was entitled to the fruits of it.⁶⁴

Again, in the case of a *fideicommissum*, the *fiduciarius* was only bound by his *fides* to comply with the obligations arising out of his agreement with the trustor. It was emperor Augustus who made the rights of the beneficiary actionable:

“It was the late emperor Augustus who first instructed the consuls to interpose their authority [with regard to *fideicommissum*], after he had more than once been moved by personal reasons either because someone was said to have been asked ‘by the emperor’s safety or on account of the glaring perfidy of certain people’. Because this seemed just and was popular, it was gradually turned into a permanent jurisdiction; and trusts became so much favoured that at length a special praetor was appointed to give judgment on them and he was called the fideicommissary praetor.”⁶⁵

Of course, that history is remarkably similar to how the English Parliament was petitioned in 1402 for relief against disloyal feoffees to uses, because “in such cases there is no remedy unless one be provided by Parliament”.⁶⁶ In Roman law, the beneficiary could only sue the heir owner of the object, but the praetor could grant him possession of the property subject to the *fideicommissum*. This would enable the beneficiary to recover the property from any possessor except the purchaser in good faith for value. Additionally, in case of insolvency of the heir, the beneficiary had priority over ordinary creditors of the fiduciary.⁶⁷

It seems that every time parties created positions that effectively split the legal or quiritary ownership from the benefits of the object, the Romans have seen it fit to give some level of protection to the person beneficially entitled, sometimes to such an extent that they could speak of *dominium duplex*. Of course, one could argue, like Puchta did, that they could do so because of the existence of two systems of law in one jurisdiction. However, similar

⁶⁰ Kaser, ‘In bonis esse’ (1961) 78 *Sav.Z/Röm* 173, p. 184. See also, Ankum & Pool, ‘*Rem in bonis meis esse* and *rem in bonis meam esse: Traces of the Development of Roman Double Ownership*’, in: Birks (ed.), *New Perspectives in the Roman Law of Property* (Oxford, 1989) who distinguish between three categories of *in bonis* expressions.

⁶¹ Gaius, 1,54; *Ceterum cum apud ciues Romanos duplex sit dominium* [...]; Gaius, 2,40: *sed postea diuisionem accepit dominium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere*.

⁶² Van Oven, *Leerboek van het Romeinsch Privaatrecht* (Leiden, 1948), p. 172, Noordraven, *De fiducia in het Romeinse Recht* (Arnhem, 1988), p. 304.

⁶³ *Ibid.*, p. 42, 77-79; Gaius 2.60: *Sed cum fiducia contrahatur aut cum creditore pignoris iure* [...].

⁶⁴ Noordraven, *supra* note 62, p. 304

⁶⁵ I. 2.23.1. Translation by Johnston, *The Roman Law of Trusts* (Oxford, 1988), p. 30.

⁶⁶ Cited by: Ames, ‘The origin of uses and trusts’ (1907-1908) 21 *Harv. L. Rev.* 261, p. 264.

⁶⁷ Johnston, *supra* note 65, p. 51.

developments can be seen in modern jurisdictions that do not have two systems of law, but rely on interventions from the legislator and the creativity of their judges.

V. 'Beneficial ownership' in modern civil law?

In Germany, transfers of ownership for management purposes occur by way of a so-called *Treuhand* agreement. The contract separates legal ownership on the side of the *Treuhänder*, from the benefits of the object. In 1899 the *Reichsgericht* held the *Treuhand* to be;

*"[e]in Gegenstand, der dem Gemeinschuldner zwar zum Eigentum übergeben ist, jedoch mit der Abmachung, daß derselbe gleichwohl von ihm nicht wie sein Eigentum behandelt werden dürfte [...] gehört dem Gemeinschuldner zwar formell und juristisch, aber nicht materiell und wirtschaftlich."*⁶⁸

As it is, the contract of *Treuhand* has some third-party effects. Firstly, in case of insolvency of the *Treuhänder*, the *Treugeber* is given a counter-claim to stop the *Treuhänder's* creditors from seizing the object (paragraph 771 of the *Zivilprozeßordnung*). In addition to that, the *Treugeber* himself is entitled to claim the object from the insolvent estate of the *Treuhänder* (paragraph 47 of the *Insolvenzordnung*). Secondly, creditors of the *Treugeber* are entitled to seize the object of the contract of *Treuhand*. Nonetheless, the *Treuhänder* is still seen as the unitary owner of the *Treuhand* property. A doctrinal solution is found by distinguishing between the internal and the external effects of the *Treuhand*. Externally, there would only be one owner, whereas internally the *Treuhänder* is bound by the contract.⁶⁹ However, the reason for giving the abovementioned remedies to the *Treugeber* must be his position as being the one beneficially entitled to the property and the wish to protect his expectations of ownership.

In cases of transfer of ownership for security purposes (*Sicherungsvertrag*), unitary ownership is transferred to the creditor and the debtors is left with a personal claim. However, through case-law and on the basis of the provision on public morals (Paragraph 138 BGB), the rights of the creditor as owner have been limited and the rights of the debtor vis-à-vis the creditor have been reinforced. Consequently, analogous to the right of pledge, the creditor is forced to sell the object in case of non-performance by the debtor and he may not retain ownership. 'The object serving as security is therefore considered part of the set of assets and debts of the transferor to which the security owner has a preferential claim.'⁷⁰ In addition, in order to maintain a balance of power between the creditor and his debtor, but also with regard to third party creditors of the debtor, the value of the security object may not greatly exceed the outstanding debt and in cases where the value does exceed the outstanding debt, recourse may be had to it by the creditors of the debtor. Again, security ownership of the creditor is treated analogous to right of pledge and the object is not considered to have left the patrimony of the transferor completely.⁷¹

With regard to the transfer of ownership for security purposes, a similar development had been taking place in Netherlands case-law before the new civil code in 1992 introduced the ban on fiduciary transfers of ownership. As a result, that case-law has,

⁶⁸ See W. Wiegand, 'Die Entwicklung des Sachenrechts' (1990) 190 *Archiv für die civilistische Praxis* 112, p. 126, note 5.

⁶⁹ B. Akkermans, *The Principle of Numerus Clausus in European Property Law* (2008), p. 184-6.

⁷⁰ *Ibid.*, p. 188.

⁷¹ *Ibid.*, p. 186-91.

for the moment, become irrelevant.⁷² However, an interesting example of ‘beneficial ownership’ in the Netherlands can be found in the rights of the person who concluded a contract of sale for an immovable property, but to whom there has not been a formal conveyance. Following the example of Germany, The Netherlands has introduced the *Vormerkung* (priority notice), which enables the buyer to register his contract. The *Vormerkung* then provides a remedy for the acquirer against a number of instances that can harm his right to delivery of the property, in between the time of conclusion of the contract and the actual conveyance. The aim of introducing the *Vormerkung* has been the protection of the interests of the buyer and the provisions have consistently been explained by judges in light of that aim. As such, the buyer who has registered his contract is protected against i.a.: insolvency of the buyer; a later alienation of the property to a third party; seizure of the property by creditors of the seller. However, the ownership of the seller has not become completely meaningless. He is still very much able to alienate the object to another person, even though the registered buyer may be protected against such an instance.

VI. A proposal for a concept of beneficial ownership in the civil law

In the above, we have seen some examples of situations where ownership of an object is separated from the benefit of that object. In each instance, both in Roman law and modern civil law, the rights of the ‘beneficial owner’ have been reinforced, either by the praetor, emperor, legislator or judge. The reasons for providing that protection to the ‘beneficial owner’ have been of an ethical or legal-political nature. In the case of transfers of ownership for security purposes, protection has been given to balance the powers of the creditor and debtor. In case of protecting the expectation rights of a buyer, it has been because of a general concern for the interests buyers of immovable property.

How should we now characterize the right of what we have called the beneficial owner? The rights of the ‘beneficial owner’ cannot be characterized as *in rem* or *in personam*, as in some cases his right may affect third parties, but they surely do not work *erga omnes* in every case. Interestingly, when Gretton tries to explain the fact that the beneficiary of a trust is protected from the private creditors of the trust he remarks that such protection is possible by applying the concept of a special patrimonie, held by the trustee, separate from the trustee’s general patrimony. According to Gretton, ‘[t]here is thus no need to seek to classify the right of beneficiaries as being in some way privileged or quasi-real or as in some way “trumping” the rights of the creditors of a trustee in his personal capacity.’ The right of the beneficiary is a personal right and, therefore, divided ownership or equity is not needed to explain the trust. But surely the fiction of separate patrimonies would only exist to protect the interests of the beneficiary? Moreover, it seems that the fiction of separate patrimonies can not account for the range of remedies made available to the beneficiary.

In my view, we can rightfully speak of a division of ownership in legal ownership and beneficial ownership regardless of whether the rights of the beneficiary are of an *in personam* or *in rem* character. As stated above, it can be held that where ownership and benefit are separated, the property *objectively* ‘belongs’ to the beneficial owner and on this basis different remedies are made available to him. The beneficial interest is conveyed to the

⁷² See for instance, Hartkamp, “‘Werkelijke” overdracht...met een fiduciair karakter’, available through http://rechten.eldoc.ub.rug.nl/FILES/root/Tijdschriften/GROM/2010/Kortmann/5_kortmann.pdf.

beneficial owner and he shares in the *proprietas*. It is for this reason that the beneficiary of a trust is protected against insolvency of the trustee and it is for this reason that the expectations of the buyer are protected by a set of remedies against instances that could endanger his right to get the property conveyed to him.

In modern law the subjective right is the basis of a legal claim or remedy. Where there is a right, there is a claim, *ubi ius ibi actio*. This has not always been the case. In fact, in Roman law the opposite was true, *ubi actio ibi ius*. Schrage asks himself the question whether there is a real difference *in concreto*. 'Both, subjective rights as well as *actiones*, are heuristic categories, that serve no other purpose than a just appraisal of specific legal problems'.⁷³ However, if the criterion to grant someone a remedy is that of justice, namely to give someone what is due to him, it certainly does make a difference.

Villey held that where subjective rights exist there can be no natural law. In that model '[s]ubjective individual rights have filled the space resulting from the loss of natural law.'⁷⁴ There is no place for a '*Proprietätsgedanken*' in such a model, but only for a formal and rigid concept of ownership as it was for instance formulated by the pandectists in the 19th century. (It is in this context interesting to note that Thibaut argued divided ownership, though materially present, formally not to exist in Roman law.⁷⁵) However, as we have seen in the writings of Molina, Lessius, Struve, Pufendorf and even Bartolus (though it may have been just a glimpse), there is place for an approach of ownership as a subjective and absolute right, while still maintaining the '*Proprietätsgedanken*'. In such an approach, there can be multiple owners of an object, as long as their rights do not conflict with each other. If one, in such a system, is objectively held to be owner, he will be awarded a remedy to protect his ownership interests. This is precisely what is going on when the rights of the 'beneficial owner' in the above mentioned examples are protected by a suitable remedy. It is because objectively he may be regarded owner.

⁷³ Schrage, *Actio en Subjectief Recht* (Amsterdam, 1977), p. 6-7.

⁷⁴ Cited by Van Duffel, *supra* note 48.

⁷⁵ Thibaut, *supra* note 51, p. 78.

