PERSONS

ON THE ASCRIPTION OF LEGAL EFFECTS

Beijing Internet Court (北京互联网法院, *Beijing Hulianwang Fayuan*)

Case A

An AI has been used for the creation of contents shared on the net and it used the **voice of a professional voice actor without his consent**.

The **Court found out that a tort had been put in place** but **refused to ascribe the legal consequences of the tort to the AI** even if one of the parties required so…

Beijing Internet Court (北京互联网法院, *Beijing Hulianwang Fayuan*)

Case B

An AI has been used to create an artistic work and the **parties entered a dispute for the copyright of such a work**

The **Court excluded the possibility to ascribe copyright to the AI** given the fact that the AI is **not included in the list** of those who is possible to ascribe a copyright **provided at art. 11 of the Copyright Law** as well as in the **'subjects of law' system as outlined in the Civil Code**

The **structure of the China Civil Code** (as well as modern civil codes') is based on a **"legal subject"** (民事主体, *minshi zhuti*) defined by the 'objective law' …

… to which **"subjective rights"** (民事权利, *minshi quanli*) **are ascribed** (such as ownership, credit, intellectual property etc.)

Subject - Object

中华人民共和国民法典

（2020年5月28日第十三届全国人民代表大会第三次会议通过）

目　录

Among the 'legal subjects' listed in the Civil Code there is not any mention of an AI, nonetheless it is still necessary to try to find out how rights and duties, and more in general legal effects should be ascribed in case AIs are involved…

In particular **it is possible to notice, not only in China a trend where: if the AI is delivering positive effects human beings want these effects to be ascribed to themselves**, while **if it is delivering negative effects** (i.e. Moffatt vs Air Canada), human beings want these effects to be ascribed to the AI

The **AIs are posing an issue that human being did never met before: how to frame from a legal perspective things that are nonetheless in condition to make their own choices** and decisions potentially out of control of the human beings themselves…

… in order to **find a possible solution it is necessary to take the 'old legal grammar'** back and **see how the building blocks of the regime related to the ascription of legal effects may be used to give an answer to the current issues**

In the Civil Code we have the category of the 民事主体 (*minshi zhuti*), the "legal subject" – which is divided into "natural persons", 自然人 (*ziranren*), "legal persons" 法人 (*faren*), and "organizations without a legal personality" 非法人组织 (*feifaren zuzhi*).

Among the **自然人 (*ziranren*), we also find 'households' (户, *hu*)** undertaking small production or commerce activities as well as agriculture activities on rural lands received under concessions (个体工商户, *geti gongshang hu* e 农村承包经营户, *nongcun chengbao jingying hu*)

The legal persons, 法人 (*faren*), are divided into for-profit legal persons (营利法人, *yingli faren*), **no-profit legal persons** (非营利法人, *feiyingli faren*) and **special legal persons** (特别法人, *tebie faren*), such as the village economic collective organizations or other public legal persons

It is interesting to notice that there are **the "organizations without a legal personality"** 非法人组织 (*feifaren zuzhi*) to which it is hence **not applied the *fictio iuris* of the legal personality**, but that are nonetheless in condition to **have some 'external relevance' in undertaking certain activities and that are deemed entitled to some personality rights!**

It is clear that here the *fictio iuris* of the legal person aimed to the ascription of legal effects to activities put in place on the behalf of organizations of people has already been overridden

Actually, the current system is already **leading to paradoxes**:

If on the one hand we have **'legal but not natural persons' treated as objects**: they can be merged, split off, sold etc…

On the other hand, not only do we have 'legal but not natural persons' to which we ascribe personality rights… but those are **recognized to organizations without a legal personality as well!**

For instance, art. 1013 provides that: "法人、非法人组织享有名称权，有权依法决定、使用、变更、转让或者许可他人使用自己的名称" - **Legal persons and other organizations have the right of name** and to decide, use, change, transfer or license others' use of their names in accordance with the law.

For further examples we can also consider:

Art. 102: **非法人组织是不具有法人资格，但是能够**依法**以自己的名义从事民事活动的组织**。[par. 2] 非法人组织包括个人独资企业、合伙企业、不具有法人资格的专业服务机构等。- An **organization without legal personality is an organization without the status of a legal person** but **able to conduct civil activities in its own name** in accordance with the law. [par. 2] Organizations without legal personality include but are not limited to sole proprietorships, partnerships, and professional service organizations without the status of a legal person.

Art. 110 par. 2：法人、**非法人组织享有名称权、名誉权和荣誉权** - A legal person or an organization without legal personality enjoys the rights of name, reputation, and honor.

Even if those that we have just seen are **solutions reached from paths originated in Roman law** – in order to tackle the challenges we are facing in the XXI **century it is necessary to see how these solutions have been reached**, **which building blocks have been used** and **how they have been combined** in order to reach these results

The Philosophical path:

It has been remarked by scholars that starting from the **XVII century, the meaning of *subiectum* has been overturn**.

If in the Roman sources the ***subiectus* was referring to someone subject to someone else's power**, after the XVII century it started changing is meaning into its opposite.

The Latin *subiectum* was translating the Greek ὑποκείμενον which is basically referring to something that 'stays under' and this meaning was shown in Aristotles and still in the Scholastic philosophy where it was still used to refer to what we currently call "object"

The Philosophical path:

Even if Descartes was still using the word in the same meaning as the Scholastic philosophers did, with **Hobbes and Leibniz the word started being used to designate "the one who carries out sentient activity"** …

In such a meaning it will be then used in **Kant and in the German Idealism** and **is still used nowadays**

The Philosophical and the legal path:

From a legal point of view such an overturn in the meaning offered a conceptual basis to **substitute in the system the human being with a new 'subject' that could be the society, the State** etc. so that the **human beings became the objects that such a subject can qualify** (there may be human beings lacking the legal capacity because the State decided so etc.).

The *homo*, the human being, started being separated from the *persona*, and the person with the related personality becomes the prerequisite for the recognition (or the bestowing) of the subjective rights from the State.

The Philosophical and the legal path:

Therefore, we ended up in a situation where **"we do not have a law for the human being, but the human being for the law"**

A situation which is the **opposite** of the one already clarified by the **Romans,** where it was **not the person serving the public organization, but rather the public organization serving the** person for its natural and supernatural development

The Legal path:

As it has been clarified by legal scholars, even if in Iustinianus's Codes we find reference to some *corpora*, those are still conceived as the union of many (flesh and bones) individuals, who gather in order to pursue a common goal – as it is also quite clear in the definition of «people» provided by Cicero

(De re publica 1,25,39) *Est igitur, inquit Africanus,* ***res publica res populi, populus autem*** *non omnis hominum coetus quoquo modo congregatus,* ***sed coetus multitudinis iuris consensu et utilitatis communione sociatus***…

The Legal path:

… and even when these ***corpora*** **have people who are carrying out legal activities for them, and therefore it would be possible to notice an 'external relevance'**, however **these people are acting on the basis of a mandate contract** (and therefore on the basis of an obligation grounded relationship between themselves and the *corpus* coinvolto), **and not on the basis of an «organic» relationship** (so that for instance in case of lack of a specific mandate i do not have to perform specifis obligations towards the *corpus*)

Roman jurists did often deal with rules related to **the persons** and **these rules are** also from a **systematical point of view** located in a **prominent position**.

For instance we can read in the **Gai *Istitutiones***, (Gai. 1, 8) that *Omne autem ius, quo utimur,* ***vel ad personas pertinet vel ad res vel ad actiones***. *Et* ***prius*** *videamus* ***de personis***.

The **"*prius*"** used in this source is not only highlighting which could be a priority in the presentation of the topic, but rather **the relevance of the law on persons as a subject whose study and understanding** is a **priority in order to study, do research about, and understand the law**

Such an approach has been later on also confirmed by **Iustinianus in his *Institutiones*** where it is possible to read that (I. 1,2,12) *Omne autem ius, quo utimur,* ***vel ad personas pertinet vel ad res vel ad actiones****. Ac* ***prius de personis*** *videamus. Nam parum est ius nosse,* ***si personae, quarum causa statutum est,*** *ignorentur.*

This is a **further recognition of the central role of the person for the Law**, a recognition that is also remarked by the **very famous statement** put in place **by Hermogenianus** which has been **quoted in the Iustiniani *Digesta***

In the **Iustiniani *Digesta*** right after a further quotation of the Gaius' sequence for which (D. 1,5,1 Gaius *libro primo institutionum*):
Omne ius quo utimur ***vel ad personas pertinet vel ad res vel ad actiones***

It is possible to find quoted in D. 1,5,2 (Hermogenianus *libro primo iuris epitomarum*) the extremely clear, and importante, Hermogenianus' statement for which:
Cum igitur hominum causa omne ius constitutum sit, primo de personarum statu ac post de ceteris*, ordinem edicti perpetui secuti et his proximos atque coniunctos applicantes titulos ut res patitur, dicemus.*

This is not a mere opinion put forward by Hermogenianus, but it is a statement that **is providing the fundation of the systematic arrangement of the Law,** an assertion that **summarizes the thought of the previous jurists** and that is **stated as a paradigm**.

It seems probable that the Latin term **"*persona*"** is connected to the «teather mask» (**Etrurian phersu «mask» or Greek πρόσωπον «teather mask»**) **and together with the term "*homo*" may be used to represent "different aspects of the same tangible reality: the human being"**.

However even if "*persona*" is referring to the human being by also taking into consideration the «role» of a certain human being in a given community such as the family, the city etc… it was nonetheless recognized, for instance from the **perspective of the *ius naturale*, the existence of a common character deriving from the fact of being human beings**, that were **common even despite the further *divisiones*** put in place among the persons from the perspective of the *ius gentium* and *ius civile*

Based on this common character among all of the *personae*, the *homines*, the human beings, it has been in fact **possible to elaborate a legal device** to be used **to turn a slave into a citizen with full rights**

A feature of the Roman law and of the Roman society that was **deemed by Dyonisus of Alycarnassus** as **one of the main reasons for the success of Rome** in its expansion

After Rome, for instance in **Accursius Glossa** it was still kept the idea that "***universitas nihil aliud est, nisi singuli homines qui ibi sunt***".

- Digression: why are we called a «university»?!

Some steps towards a **more abstract usage of the term «*persona*»** can be found in the Canon Law scholar **Sinibaldo dei Fieschi**, who will later on become the Popo Innocent IV (1195-1254), who remarked that a **"*collegium in causa universitatis fingantur una persona*" even if he nonetheless explained that the *universitates* are "*nomina iuris [...] et non personarum*"**

Again the ***persona ficta* or *rapraesentata*, in the meaning of a person identified through an action of our mind will later on talk about the Canonists and the Commentators** (Baldus, Bartolus etc.) **although** they **continued remarking that those were fabricated notions teorized by the legal science**.

The shift towards the abstraction of the «*persona*» seems thus to be traced back to a more recent age: it will be with Duarenus (1509-1559) that we will read that "*universitas est hominum societas, ita contracta, ut una tantum persona esse appareat, a singulis diferens personis, ex quibus ea constat*"

… a new road was getting opened, a road leading to a solution that is quite different from the one that we saw adopted in the Roman Law, we read in Donellus (1527-1591) that: "*servus homo est, non persona; homo naturae, persona iuris civilis vocabulum*"

If around the XVII century, as we saw, an overturn of the philosophical notion of «subject» was taking place, **Pufendorf (1632-1694) teorized the notion of a *persona moralis* to which was possible to connect both, the *personae simplices*, and therefore the human beings, and the *personae compositae***.

In the **XVIII century**, under the **ideological pressure exerted by the Natural School of Law individualistic perspective**, the ***status hominis naturalis*** **and the** ***status hominis civilis*** **were equated**.

Therefore it has been put in place **a matching between the natural idea of person and the legal idea of person** in the light of the fact that **each person should be as such entitled to «subjective rights» descending from his power of will: a will** which is the **natural emblem of his personality** and the **'engine' for all the legal relationships ascribable to him**

For such a conceptualization the 'new', abstract, «*subiectum iuris*» was offering a providential fundation.

Arnold Heise, while tring to build in a systematic way a **general notion of «legal subject» put in a dialectical relationship with an «object»**, **used for the first time the expression "*juristische Personen*"**, «legal person» **so to include everything that, different from human beings, was recognized by the State as a "*Subject von Rechten*"**.

The "*Substrat*" of this legal person is not limited to the 'flesh and bones' human being, but it could be represented by **groups of people organized for a common purpose** "***universitates***" **or even "*aus Sachen*"**, by things.

However, an essential aspect to be considered is that these «things» potentially working as a Substrat for a legal person were 'inert', uncapable of self-determination

Problema dell'individuazione di centri di imputazione di diritti e doveri alla radice della costruzione della persona giuridica

GRUNDRISS EINES SYSTEMS

DES

GEMEINEN CIVILRECHTS

ZUM BEHUF

VON

PANDECTEN - VORLESUNGEN.

VON

ARNOLD HEISE,

EHEMALIGEM PROFESSOR DER RECHTE.

DRITTE VERBESSERTE AUSGABE.

ZWEYTER ABDRUCK.

HEIDELBERG,

BEY C. F. WINTER.

1822.

VIERTES KAPITEL.

Von den Subjecten und Objecten der Rechte.

I. Von den Subjecten, oder den Personen. §. 64.

A. Von den physischen Personen, den Menschen: (Dig. I, 5.)

1. Bedingungen ihrer Rechtsfähigkeit (Status), — 65.
2. Anfang und Ende derselben (Nasciturf, Tod, Rechtlosigkeit). — 66.
3. Verschiedenheiten der Menschen:

B. Von den juristischen Personen:

1. Aus der Succession mehrerer physischer Personen *), §. 82.
2. Aus deren gleichzeitiger Vereinigung, Corporationen: (Dig. III, 4.)
   a. Allgemeine Natur derselben, — 83.
   b. Besondere Verhältnisse:
      α. Innere, — 84.
      β. Aeussere, — 85.
      γ. Vom Verhältniss der Vorsteher insbesondere. — 86.
   c. Entstehung und Aufhebung, — 87.
   d. Wichtigste Arten (Collegia, res publicae, pia corpora). — 88.

C. Von der Verbindung mehrerer Personen:

1. Durch gemeinschaftliche Rechtsverhältnisse — Communio juriam, — 89.
2. Durch Zusammentreffen in demselben Individuum. — 90.

II. Von den Objecten der Rechte:

A. Von den Handlungen **), — 91.

B. Von den Sachen und deren Arten: (Instit. II, 1. Dig. I, 8.)

III. Von den juristischen Personen:

A. Begriff und verschiedene Arten [15], - 98.

Römischen Infamia u. d. Deutschen Ehrlosigkeit, in Hugo's Civilist. Magazin Th. 3. no. 8.

12) Donelli Commentar. jur. civil. lib. 18. cap. 8. — Cujacii Observation. lib. 10. cap. 26.

13) G. L. Boehmer Elect. juris civil. T. I. ex. 9. §. 10-12. — F. de Amaya Comment. ad lib. X. Cod. tit. 57. n. 7-15. (in Operib. Lugduni 1734. fol. pag. 384.).

14) Heineccii Diss. de levis notae macula (in Sylloge varior. Opuscul. Halae 1735. 4. exerc. 7.).

15) Die verschiedenen Arten juristischer Personen werden meines Erachtens fast niemals vollständig angegeben. Juristische Person ist Alles ausser den einzelnen Menschen, was im Staat als ein eignes Subject von Rechten anerkannt ist. Jede [illegible] muss aber irgend ein Substrat haben, welches die juristische Person bildet oder vorstellt. Dies Substrat kann nun bestehen: 1) aus Menschen, und [illegible] 2) aus einem Einzelnen zur Zeit (bey öffentlichen Beamten), oder b) aus einer gleichzeitigen Vereinigung Mehrerer, (universitates); 2) aus Sachen, nemlich a) aus Grundstücken (bey Servituten und unsern deutschen subjectiv-dinglichen Rechten) oder b) aus dem ganzen Vermögen einer Person (fiscus, hereditas), oder c) aus irgend einer Masse von Gütern, welche zu einem gemeinnützigen Zweck gewidmet, und unter eine besondere Verwaltung gestellt ist (venerabiles domus, legata pro redemtione captivorum, Wittwen-Cassen, Stipendien). Dergleichen Anstalten werden zwar, wenn man sie nicht ganz vergisst, meistens unter die universitates gerechnet, aber wohl mit Unrecht. Vergl. Dabelow Handbuch d. Privatrechts Th. 1. §. 47. — Für die nähere Erörterung dieser ganzen Classification ist jedoch hier der Ort nicht.

There is a risk of 'conceptual sliding' and a need of conceptual clarity that have to be adequately taken into account:

As it has been remarked by scholars, it could be dangerous to consider the AIs too close to the persons since it could:

'become difficult to justify why the 'artificial person' may not enjoy the same rights and privileges that natural persons do'

And the recognition in China of 'personality rights' to 'legal persons' and actually even then to entities without a legal personality can be a good evidence about it!

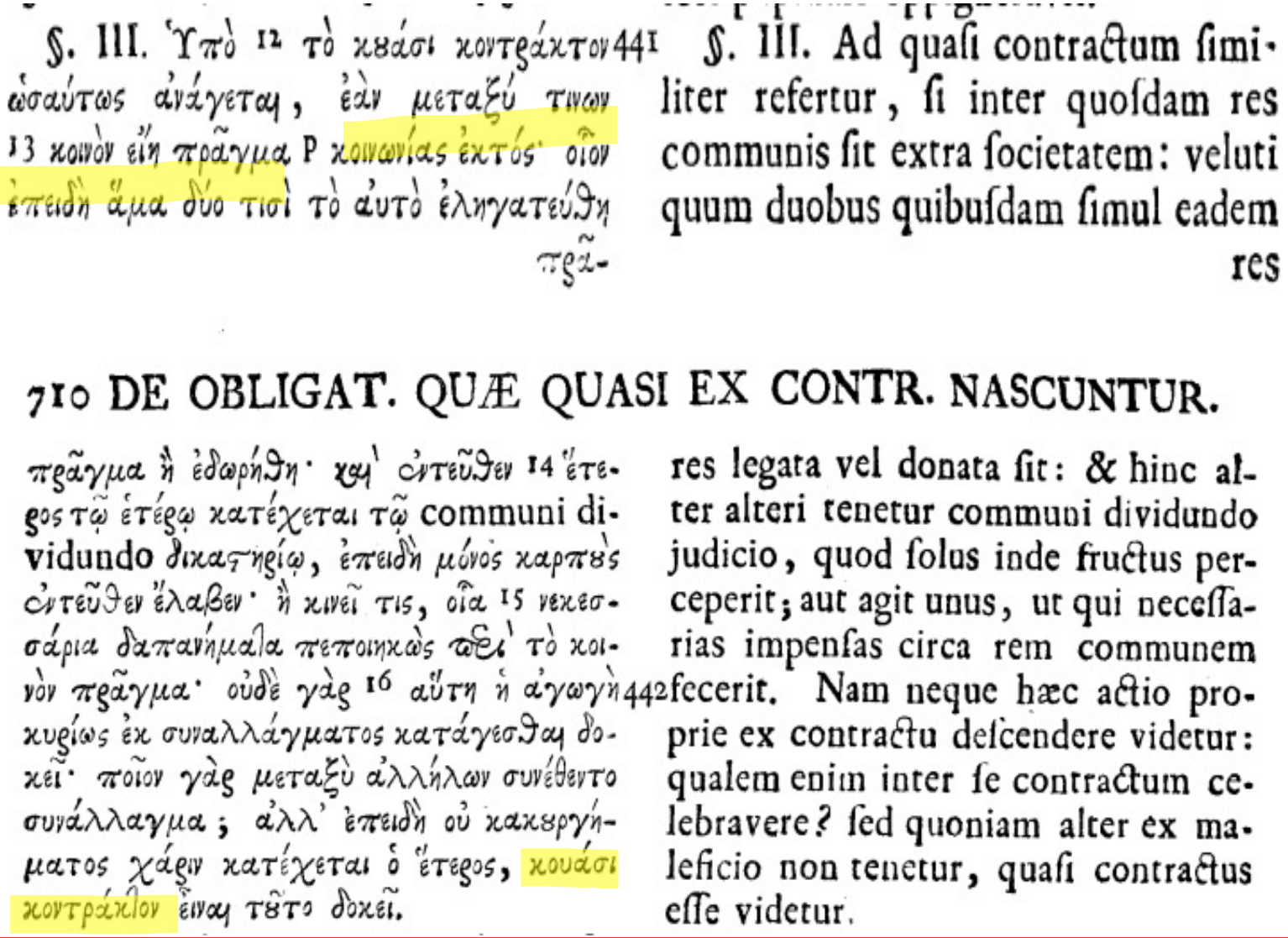
When exceeding in using analogy, there is always a risk for notions to 'slide': see for instance what happened in the Theophilus (Iustiniani Institutionum) Paraphrasis with regard to obligations from 3,13,2:

μ ἡ πρώτη διαίρεσις

§. II. Δευτέρα δὲ διαίρεσις αὕτη, ἥτις 238
εἰς τέσσαρα k τέμνεται· ἢ γὰρ ἀπὸ συναλ-
λάγματός ἐισιν, ἢ ὡσανεὶ ἀπὸ συναλλά-
γματος, ἢ ἀπὸ ἁμαρτήματος, ἢ ὡσανεὶ
ἀπὸ ἁμαρτήματος. Δεῖ δὲ πρότερον πε-
ρὶ τούτων διαλεχθῆναι, αἵτινες ἀπὸ συναλ-
λάγματός ἐισι· συνάλλαγμα l δέ ἐστι, δύο
ἢ καὶ πλειόνων εἰς τὸ αὐτὸ σύνοδός τε καὶ
συναίνεσις, ἐπὶ τὸ 10 συνίστασθαι ὀφλὴν,
καὶ τὸν ἕτερον τῷ ἑτέρῳ ποιῆσαι ὑπεύθυνον.
Τέσσαρες m δὲ ἐκ τῶν συναλλαγμάτων 11 τί-
κτονται ὀφλαί, re, verbis, litteris & con-
senſu· καὶ δεῖ περὶ ἑκάστης διαλεχθῆ-
ναι.

§. II. Altera autem diviſio hæc eſt, quæ ſcinditur in quatuor. Aut enim ex contractu ſunt, aut quaſi ex contractu, aut ex delicto, aut quaſi ex delicto. Sed primo de iis diſſerendum eſt, quæ ex contractu ſunt. Contractus autem eſt duorum vel etiam plurium in idem conventio & conſenſus, ad conſtituendam obligationem, & ut alter alteri fiat obnoxius. Quatuor autem ex contractibus naſcuntur obligationes, Re, Verbis, Litteris, & Conſenſu. Atqui de ſingulis diſſerendum eſt.

… to Theophilus (Iustiniani Institutionum) Paraphrasis 3,27,3:



§. III. Ὑπὸ 12 τὸ κβάσι κοντράκτου 441 ὡσαύτως ἀνάγεται, ἐὰν μεταξύ τινων 13 κοινὸν εἴη πρᾶγμα P κοινωνίας ἐκτός· οἷον ἐπειδὴ ἅμα δύο τισὶ τὸ αὐτὸ ἐληγατεύθη πρᾶ-

§. III. Ad quaſi contractum ſimiliter refertur, ſi inter quoſdam res communis ſit extra ſocietatem: veluti quum duobus quibuſdam ſimul eadem res

710 DE OBLIGAT. QUÆ QUASI EX CONTR. NASCUNTUR.

γμα ἢ ἐδωρήθη· καὶ ὀντεῦθεν 14 ἕτερος τῷ ἑτέρῳ κατέχεται τῷ communi dividundo δικαστηρίῳ, ἐπειδὴ μόνος καρπὸς ὀντεῦθεν ἔλαβεν· ἢ κινεῖ τις, οἷα 15 νεκεσσάρια δαπανήματα πεποιηκὼς περὶ τὸ κοινὸν πρᾶγμα· οὐδὲ γὰρ 16 αὕτη ἡ ἀγωγὴ 442 κυρίως ἐκ συναλλάγματος κατάγεσθαι δοκεῖ· ποῖον γὰρ μεταξὺ ἀλλήλων συνέθεντο συνάλλαγμα; ἀλλ' ἐπειδὴ οὐ κακουργήματος χάριν κατέχεται ὁ ἕτερος, κουάσι κοντράκτον εἶναι τοῦτο δοκεῖ.

res legata vel donata ſit: & hinc alter alteri tenetur communi dividundo judicio, quod ſolus inde fructus perceperit; aut agit unus, ut qui neceſſarias impenſas circa rem communem fecerit. Nam neque hæc actio proprie ex contractu deſcendere videtur: qualem enim inter ſe contractum celebravere? ſed quoniam alter ex maleficio non tenetur, quaſi contractus eſſe videtur.

These 'conceptual slidings' are dangerous and do violate the criteria on which our legal constructions should be based and that we already saw identified by the Roman jurists as the criteria differentiating the law from the other *artes*, human activities:

Iuri operam daturum prius nosse oportet, ***unde nomen iuris descendat. Est autem a iustitia appellatum: nam****, ut eleganter Celsus definit,* ***ius est ars boni et aequi****.*

The *aequitas* imposes to treat similar situations in a similar way and different situation in different ways otherwise we may reach a result that would be *iniquum*

Persons and things are different even in case we may have things capable of self determination

This difference should be taken into account by the law otherwise it may be grounded on an in *iniquitas* and therefore it may be unjust!