

REFLECTIONS ON THE ROLE OF ROMAN LAW AND COMPARATIVE LAW IN THE PROCESS OF HARMONIZATION AND UNIFICATION OF PRIVATE (CIVIL) LAW IN EUROPE

GÁBOR HAMZA*

ABSTRACT

The private (civil) law of European countries is closely connected to Roman law which is in no contradiction that these countries have different historical and legal traditions. This is more obvious in the period of decrease or even disappearance of differences, often motivated by political and economic interests, between certain “legal fields” or “legal families.” Not even differing traditions of culture and civilization constitute hindrances to the differing extent of the reception of Roman law. In the formation of European private law, convergence plays an increasing role. Many noted authors write about the relativization of differences between common law and civil law based on Roman law. They emphasize the disappearance of differences in the sphere of many legal institutions. In the field of contract law, many institutions, constructions of continental law are subject to reception in English law. It deserves attention that with regard to terminology, certain English authors, in connection with English private law, explicitly refer to the role of Roman law tradition. In his article the author comes to the conclusion that Roman law i.e. Roman law tradition(s) in the comprehensive, comparative analysis in the lengthy process of the formation of European private law (*ius commune Europaeum*) has a significant role.

KEYWORDS: Académie des Privatistes Européens, common law. *Ius commune Europaeum*. Jurisprudential law. Reception of Roman law. Science of Pandect. *Stilus curiae*.

1. Resolution EC OJ C 158.400 of the European Parliament in Strasbourg, adopted on May 26, 1989, requires that Member States of the EC made steps toward the codification of European private law (both civil and commercial law).¹ Accordingly, the EC

* Professor of Law, ordinary member of the Hungarian Academy of Sciences “Eötvös Loránd” University of Budapest Faculty of Law
Email: gabor.hamza@ajk.elte.hu

1 With regard to the harmonization in the field of private law and the background of harmonization in classical i.e. Graeco-Roman Antiquity, see, F. Maroi, *Tendenze antiche e recenti verso l'unificazione internazionale del diritto privato*, p. 7 sq. and p. 15. (Roma, 1933). With regard to the importance of Theophrastos' *Peri nomon*, which, in essence, also serves the objectives of legal harmonization, see, G. Hamza, *Comparative Law and Antiquity*, p. 11 sqq. (Budapest, 1991) and idem, *Jogösszehasonlítás és az antik jogrendszerek* [Comparative Law and Legal Orders (Systems) of the Antiquity], p. 17 sqq. (Budapest, 1998).

pursuant to this resolution established a Commission whose task was to develop the framework for the codification of European contracts law.² In 1994, another resolution of the European Parliament (EC OJ C 205.518, May 6, 1994), once again called on the Member States to standardize certain sectors of their private law to provide for a uniform internal market.³ On its 1999 Tampere (Finland) conference, the European Council discussed the question once again. Conclusion 39 of the declaration accepted by the European Council in Tampere emphasizes the necessity of the harmonization of the Member States' private law regulations.⁴ The European Parliament passed another, third resolution (EC OJ C 255.1, November 15, 2001), relating to the approximation of the civil and commercial law of the Member States.⁵

In 1980, almost ten years prior to the adaptation of the 1989 Resolution, a working group, led by Professor Ole Lando of Copenhagen and called the Commission on European Contract Law, was formed, which, sponsored by the European Union, has undertaken the task of developing the principles of European contract law.⁶ An international academy (Accademia dei Giusprivatisti Europei) seating in Pavia and consisting of mostly Roman law experts (including professors Peter Stein of Cambridge, who is the

2 See, B. Großfeld and K. Bilda, *Europäische Rechtsangleichung*, Zeitschrift für Rechtsvergleichung Internationales Privatrecht und Europarecht 33, p. 426 (1992).

3 See, D. Staudenmayer, *Perspektiven des Europäischen Vertragsrechts*. In: Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts (hrsg. von R. Schulze and H. Schulte-Nölke), p. 429 (Tübingen, 2001).

4 See, H. J. Sonnenberger, *Privatrecht und Internationales Privatrecht im künftigen Europa: Fragen und Perspektiven*, Recht der Internationalen Wirtschaft 48, p. 489 (2002).

5 In the working paper drawn up by the Directorate-General for Research entitled *The Private Law Systems in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code*. In this working paper there is a clear reference to the similarities between the legal traditions of the peoples (nations) of Europe which ultimately outweigh the differences between them. The authors of this working paper are, however, aware of the fact that the large scale harmonisation of Member States' civil law is a politically charged and highly sensitive issue.

6 See, O. Lando, *Principles of European Contract Law*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 56, p. 261 sqq. (1992).

Vice President of the Academy, late professor Theo Mayer-Maly of Salzburg, late professor Fritz Sturm of Lausanne, late professor Dieter Medicus of Munich, and late professor Roger Vigneron of Liège), held its first session in October 1990. The Academy, which became formally in November 1992 the Académie des Privatistes Européens, comprising European civilists i.e. civil law specialists and Roman law scholars, enjoying great international reputation and working on the creation of a common European legal system, gives home to the Groupe d'Etude pour le Droit Européen Commun (GEDEC) which is currently drafting the a Code of European Contracts Law (Code Européen des Contrats).⁷

The proposed Code of European Contracts Law is modeled essentially after the Fourth Book (regulating obligations and contracts) of the Italian Civil Code (Codice Civile) of 1942 (which incorporates many aspects of the traditions of the French Civil Code (Code Civil) of 1804 and the German Civil Code (Bürgerliches Gesetzbuch) of 1896) and the Contract Code⁸ drafted in the 1960s and 1970s by Harvey McGregor of Oxford for the English Law Commission.⁹ Professor Giuseppe Gandolfi of Pavia, whose achievements in the field of Roman law related research are also significant, has played a major role in establishing the Academy.¹⁰

7 Gandolfi provides with an overview of the activities and achievements of the Academy of Pavia and the working group. G. Gandolfi, *Pour un code européen des contrats*, Revue trimestrielle de droit civil p. 707 sqq (1992). Compare with, P. G. Gaggero, *Il progetto di un codice europeo dei contratti: l'attività del gruppo di lavoro pavese*. Rivista di diritto civile 43 p. 113-120. (1997)

8 See, H. McGregor, *Contract Code drawn up on behalf of the English Law Commission* (Milano London 1993).

9 Until now, the debates of the Academy and working group of Pavia were published in two volumes. *Incontro di studio su il futuro codice europeo dei contratti* (Pavia, 20-21 ottobre 1990). A cura di P. Stein (Milano, 1993) and *Atti accademici* (1992-1994), A cura di P. Stein (Milano, 1996).

10 The preliminary draft (Avant-projet) of the Code Européen des Contrats was published in the edition of Professor Gandolfi. See, *Code Européen des Contrats-Avant-projet*, Livre premier, Ed. G. Gandolfi (Milano, 2002). Compare with, G. Gandolfi, *Der Vorentwurf eines Europäischen Vertragsgesetzbuches*, Zeitschrift für Europäisches Privatrecht 10, p. 1-4 (2002).

2. Efforts aiming at harmonization, of course, are not without opposition. Professor Peter Ulmer of Heidelberg, for example, is expressly skeptical with regards to the question of urging harmonization of law of the 28 Member States of the EU.¹¹ Jean Carbonnier (1908-2003), who doubted the urgency, and, even the necessity of harmonization, expressed similar views with relation to France. It seems that we are witnessing the codification debate between Anton Friedrich Justus Thibaut and Friedrich Carl von Savigny – although, in historical conditions substantially different from the social and legal realities of the 1810s.

And, although, it is, doubtlessly, undecided whether or not Europe, in the present moment, needs at all any sort of a unified legal system, it is obvious that harmonization in the field of civil (private) law related legislation – even if not in the same extent in every aspect of private law – is unavoidable. However, the way of realization of law harmonization is uncertain. It could take the form in particular of (Council) regulation, directive, etc. and also could be realized via coordinated national legislation.¹² The failure of England and Scotland in 1970 to adopt the unified Law of Contracts that would have been binding in both parts of the United Kingdom does not contradict the tendency of efforts of European legal harmonization.¹³ Roman law (civil law), which constitutes the historical foundation of the unity of European law, might have a crucial role in this undeniably long-term process, which could require perhaps decades of hard work.¹⁴ A circumstance that ensures

11 See, P. Ulmer, *Vom deutschen zum europäischen Privatrecht*, Juristen Zeitung 47, p. 1 sqq. (1992).

12 See, O. Remien, *Rechtseinheit ohne Einheitsgesetze?*, Rabels Zeitschrift für ausländisches und internationales Privatrecht 56, p. 30 (1992) and *Illusion und Realität eines europäischen Privatrechts*, Juristen Zeitung 47, p. 277 sqq. (1992). Compare with, R. Herber, *Deutsche Zivilrechtskodifikation und internationale Rechtsvereinheitlichung*, Rechtsdogmatik und Rechtspolitik (hrsg. von K. Schmidt), p. 269. (Berlin, 1990).

13 See, W. Tilman, *Kodifikation des Privatrechts in der Gemeinschaft*. In: Für Recht und Staat, Festschrift für H. Helmrich zum 60. Geburtstag, p. 441. (München, 1994).

14 R. Knütel, *Rechtseinheit in Europa und römisches Recht*. Zeitschrift für Europäisches Privatrecht, 2, p. 244 sqq. (1994).

the prevalence of Roman law is the application of the legal principles of private autonomy and freedom of contract, among other things, in European relations.¹⁵

With no doubt, however, that these legal principles or maxims, stemming from Roman law, could become relatively important and relativized in certain areas. This is the situation, for example, in the field of consumer protection. The more emphasized and better founded legal protection of the consumer, who is the more disadvantaged participant of commercial relations, doubtlessly relativizes private-autonomy and the legal principle of freedom of contract within a given private law system. That is, the laws of the EU, without doubt, indicate certain tendencies that seem to jeopardize the freedom of contract.

In our view, Roman law may play an important role in the uniform, or uniform at least in tendency, European jurisprudence, more precisely, in the development thereof. Throughout Europe, in the age of *ius commune*, a uniform “legal working method,” the so-called “*stilus curiae*” predominated precisely through Roman law, which was considered the *lingua franca* of lawyers. The uniform “*stilus curiae*” following the “nationalization” of legal systems (“*ius patrium*”) became part of the past. The training of legal professionals, which is becoming international once again, may eventually result in the harmonization of “*stilus curiae*”.¹⁶

3. Roman law played a significant role in both secular and ecclesiastical sectors of medieval societies. Roman law served as a foundation for the 16th century legal humanism and was a goldmine for the rationalist Natural Law doctrines. In the 19th century, Roman law is molded in the spirit of legal positivism (*Rechtspositivismus*) primarily through German *Pandektistik* or *Pandektenwissenschaft* (Science of Pandects), and, finally, Roman law is also an eminent material of the great, most significant codes of private law.

15 See, P. Hommelhoff, „*Europarechtliche Bezüge*“ im *Zivilrecht*, *Überlegungen zur Gestaltung des akademischen Unterrichts*. In: *Für Recht und Staat. Festschrift für H. Helmrich zum 60. Geburtstag*, p. 340 (München, 1994).

16 F. Ranieri, *Der europäische Jurist. Rechtshistorisches Forschungsthema und rechtspolitische Aufgabe*, *Ius Commune* 17, p. 10 sqq. (1990).

The role of Roman law in the sphere of 20th century politics is not negligible, the most conspicuous sign of which is article 19 of the party platform (program) of NSDAP (Nationalsozialistische Deutsche Arbeiterpartei, the German National Socialist Labour Party) adopted on February 24, 1920, supported by the interpretation of Alfred Rosenberg which interpretation may be viewed as “interpretatio simplex.” The reception of Roman law, characterized – or rather, stigmatized – as foreign (“fremd”) to the German people, individualistic, cosmopolitan, materialistic, liberal, advocating solely private interest, appeared as national catastrophe (“nationales Unglück”) and tragic event (“Tragik”) in the legal literature of the 1930s’ Germany. It is worth mentioning that Carl Schmitt, in his study entitled „Aufgabe und Notwendigkeit des deutschen Rechtsstandes” (Deutsches Recht 6/1936/), labels article 19 of the 1920 NSDAP party platform, demands the overshadowing of neglected Roman law through the initiation of “deutsches Gemeinrecht”, as „verfassungsrechtliche Bestimmung ersten Ranges” (sic! G.H). Carl Schmitt, however, fails to support his rather peculiar view with legal arguments. Reading the literature of the era in question, it might seem that, quoting the ironic lines of the noted Hungarian legal scholar, Ruzstem Vámbéry regarding the NSDAP’s proposed legislative reform, “the influence of Roman law had infected the puritan intellect of Teutons sipping meth sitting on bear hides in caverns of lost times.”

4. The school of “antike Rechtsgeschichte” completely ignores the afterlife of both jurisprudential and political aspects of Roman law. The advocates of the school of “antike Rechtsgeschichte,” hallmarked by the name of Leopold Wenger, fail to consider the fact that for centuries, Roman law has had a major influence on the evolution of European law and jurisprudence. In the case of Roman law, which can be rightly viewed as the “ius commune Europaeum”, the followers of this school, still represented by a few existing advocates today, completely disregard the role of Roman law that it plays, as a consequence of “interpretatio multiplex”, in the development and formation of European law, more precisely, in the legal systems and legal doctrines of European nations i.e. States.

In essence, the view that narrows the possibility of comparison of legal systems of states or peoples on the same socio-economic level, reaches similar conclusions. Undeniable advantage of this approach is, however, the sound foundation of the background of its synoptic view.

On the other hand, this concept limits the possibility of comparison in such a degree that it nearly reaches the outermost boundaries of rationality. The frustration of this view is manifested especially clearly in the works of Ernst Schönbauer, who restricted the possibility of comparison to the rather narrow territory of comparing the legal systems of ancient peoples that were on the same level of civilization or were ethnically related. This view relates in many aspects to the school of thoughts according to which certain institutions of Roman law are incomparable with certain institutions (Rechtsinstitute) of contemporary legal systems (orders), because the former is the legal system of a slave-holding socio-economic formation. The followers of this school tend to forget about continuity, which plays an especially important role in the sphere of legal phenomena.

In the last quarter of the 20th century, Professor Uwe Wesel polemized in his writing titled “Aufklärungen über Recht”, published in 1981, about the notion of legal structures, constructions reoccurring time-to-time – Theo-Mayer-Maly wrote aptly about “Wiederkehr von Rechtsfiguren.” The viewpoint concurring with the possibility of the acceptance of reoccurring legal structures, constructions is, naturally, not so radical as to denying the existence of legal structures exclusively linked to a single given socio-economic formation, such as, for example, the vassal relations, which, in itself excludes the acceptance of Roman law as timeless “ratio scripta”.

Of course, it is the sign of “déformation professionnelle” when lawyers overrate the fact, according to which legal transactions — the expression, legal or juridical transaction (negotium juridicum), is attributed to Johannes Althusius (1557/63-1638) —, or at least a fairly substantial fraction of these transactions could be performed by applying the same legal constructions regardless of the time factor. Fundamentally, however, this does not change the fact that the legislation and jurisprudence of recent years, in many countries

within and outside Europe, returned more than once even in concrete forms to constructions as well as institutions of Roman law.

The fact of the expanding influence of tradition should not excuse the scholar from the requirement of analyzing the substantive differences and the prevailing economic functions. This is true, for example, although it might seem extreme for the first sight, with respect to the examination of the regulations pertaining to cartels and monopolies or trusts. Roman cartel and monopoly or trust regulation, which is densely woven with the elements of *ius publicum* (public law), obviously differs, for example, from modern cartel law, yet, the socio-economic forces working in the background – independently from the socio-economic system – doubtlessly intersect at certain points.

5. The expression “reception”, as it relates to Roman law, the meaning of which, if interpreted correctly, is not some sort of “cultural occupation,” but, at least in Germany, more like a notion that is equivalent to some kind of a “scientification” (*Verwissenschaftlichung*) of law. Reception cannot be connected neither to the *Reichskammergerichtsordnung*, adopted in 1495, nor the mythical decree of emperor of the Holy Roman Empire (*Sacrum Romanum Imperium, Heiliges Römisches Reich*), Lothar III fading in the dimness of legends. The reception of Roman law means an intellectual tradition built on Roman legal foundations that only to a small extent relates to a well-defined positive legal system, *ius positivum*. Reception, defined in this manner, could be traced back centuries, with the conveyance of German lawyers (from Germany) who studied at the universities (*studia generalia*) of Northern Italy.

The signs of reception, i.e., the subsidiary prevalence of Roman law, associated with positive law, appeared fairly early, in the 11th century. During the 13th century, elements of Roman law can be found especially in the practice of ecclesiastical courts that often litigated disputes having the nature of private law. According to our view, the influence of the Commentators appears in the latter area, while Roman law, defined as “legal literature,” has already been accepted in Germany with the conveyance of the Glossators. Naturally, the division of the influence of Roman law into these two categories

does not mean the denial of the importance of the Commentators' work, that is, the acceptance of Savigny's concept of viewing them merely as post-Glossators (Postglossatoren). Reception, however, was not limited to Roman law material but also extended to the acceptance of canon law and feudal law of the Longobards as well. That is how the *ius commune* (gemeines Recht) evolved, as a body of law pertaining to both common law and private law, but divergent from, and competing with, the "Landesrecht". The harmonization of the hybrid law-like *ius commune* and local legal systems, or, with other words, the task of adaptation of *ius commune* to local conditions was resolved by the so-called Practicals (Rechtspraktiker).

The readiness for reception of Roman law, in the function of objective conditions, substantially differs in individual European countries.¹⁷ The level of sophistication of a given country's (region's) jurisprudence and political system is crucial with regard to reception. On significant parts of the Iberian Peninsula, for example, the conditions in the 13th century are such that Roman law could become the subject of reception in the seven-volume code, the *Siete Partidas*, of Alfonso X (the Wise). In Switzerland, in contrast, for reasons that could be attributed primarily to unique political conditions, reception of Roman law in its entirety ("receptio in globo" or "receptio in complexu") was out of question. There is a close connection between Roman law and the so-called "law of the emperor", "ius caesareum", or "Kaiserrecht". Roman law serves as the ideological foundation of "renovatio imperii" that attain extraordinary importance in the time of the sovereignty of the Hohenstaufen-dynasty. Roman law, more precisely the *ius publicum Romanum*, is the instrument of the legitimacy of "Weltkaisertum." The work best representing the Cameralist school both in its title

17 With regard to the reception of Roman law in the different countries of Europe see, G. Hamza, *Le développement du droit privé européen. Le rôle de la tradition romaniste dans la formation du droit privé européen*, (Budapest, 2005), idem, *Entstehung und Entwicklung der modernen Privatrechtsordnungen und die römischrechtliche Tradition*, (Budapest, 2009) and idem, *Origine e sviluppo degli ordinamenti giusprivatistici moderni in base alla tradizione del diritto romano* (Santiago de Compostela, 2013).

and substance is Samuel Stryk's "Usus modernus pandectarum" from the turn of the 17th and 18th centuries.

Although, on the one hand, a characteristic of the school of Practicals is excessive focus on German praxis – which results in the distancing from the original Roman sources –, on the other hand, another characteristic is the casuistic analytical methodology, nonetheless, we can talk about "Science of Pandect", for the first time, in connection with the Cameralists. Connecting the expression "Science of Pandect" to this school is correct in spite of the fact that the school itself – especially, because of the increasing prevalence of particularity in its views – is not capable for progress. Only natural law, unfolding in the 17th century, would be fit to further improve the unproductive "Science of Pandect" practiced by Practicals.

We have to emphasize that Roman law plays an important role in the development of natural law doctrines. The evolution of non-antique, "modern" natural law, aptly described by Max Weber as "Entzauberung der Welt," is inseparable from the concept of "ius naturale" or "ius naturae" of the Romans.¹⁸ The aspiration of Roman law scholars to trace back *ius civile* to *ius naturale* is a basic feature of the natural law of the 16th and 17th century.

The influence of Roman law also can be found in the Christian-scholastic natural law. In the case of Hugo Grotius, who may be counted as a follower i.e. adept of the rationalist natural law jurisprudence, the "auctoritas" of Roman law is associated with its "imperium rationis." Roman law plays a cardinal role in the work of Samuel Pufendorf, the author of the highly influential "De iure naturae et gentium libri octo" (1672), who may be regarded as a follower of another secularized school of natural law. The fusion of "Science of Pandects" and natural law had not taken place, which could be explained, on the one hand, with the common law-like approach of natural law, and, on the other hand, with the philosophical, in other words, non-legal, interests

18 Regarding the Romans' concept of *ius naturale*, see, G. Hamza, Bemerkungen über den Begriff des Naturrechts bei Cicero. In: *Nozione formazione e interpretazione del diritto dall'età romana alle esperienze moderne. Ricerche dedicate al prof. F. Gallo.* vol. I. Jovene Editore, Napoli, 1997. p. 349-362.

of natural law professors, a fact that could be demonstrated with the example of Christian Wolff whose studies focused primarily on moral-philosophy.

6. The fundamental conflict between *Usus modernus pandectarum* and natural law (*ius naturale* or *ius naturae*) could have been only dissolved by the Pandektistik developed in the work of the followers of the school of historical jurisprudence (*Historische Rechtsschule*). The characteristics of Pandektistik, the intention of which was the creation of “the philosophy of positive law” (Franz Wieacker), include the historical point of view, building on the original, Justinianus’ sources, the desire of systemization, the development of legal theories, and, finally – as a hoped-for result of all the aforementioned – the partition from particularism. In the light of the aforementioned, the law of pandects of the 19th century, “*heutiges römisches Recht*”, (“contemporary Roman law”) should be sharply separated from *Usus modernus pandectarum*, which was dominated by the elements of particularism.

The law of pandects of the 19th century, which after the book of Georg Friedrich Puchta, “*Lehrbuch der Pandecten*”, published in 1838, is also called “Pandects”, as phrased by the German legal scholar, is the general theory of German private law based on Roman principles, the function and importance of which is the development and expansion of the bases of the private law system.

Despite the fact that it was developed on German soil, it is not practical to talk about German Pandektistik exclusively, because this school is not equivalent only to the “doctrine of *gemeines Recht*” (Koschaker), but from the beginning of its developments, it gained significant influence over the borders of Germany.

In this respect, it is sufficient to consider the influence of Pandektistik in England. John Austin, who adopted Jeremy Bentham’s legal theory, in the analysis of legal terminology, follows the German Pandektistik. Characteristically, he regards Savigny’s “*Das Recht des Besitzes*” as a masterpiece and regards it as the most perfect among all legal works ever written. Thibaut’s work, the first edition of which was published in 1803, titled “*System des Pandektenrechts*” also had a substantial influence on him. This

work of Anton Friedrich Iustus Thibaut, which had eight editions between 1803 and 1834, influenced English legal scholarship tremendously. Nathaniel Lindley's book titled *Introduction to the Study of Jurisprudence*, published in 1845, is the translation of the general part of Thibaut's aforementioned work. We further refer to the fact that in Sir Henry Maine's "Ancient Law", published in 1861, the influence of Pandektistik could also be shown.¹⁹

7. The members of the Academy of Pavia, among whom we can find experts of Roman law, Common law, and modern codified private law, in their efforts to codify the European law of contracts, view as their mission the creation of a compromise between the Roman law-based on continental private law, and the contract constructions of Common law.

It is a fact that similarities may be found among numerous institutions, constructions of Roman law and English law. It is without doubt, at the same time, that there are essential differences appearing between the views of Roman law and English law, which was formed as the result of unique historical conditions. One of the characteristic features of Roman law is that it is jurisprudential law, so-called "diritto giurisprudenziale"²⁰ that generally is not associated with the binding authority of preceding juridical decisions (sentences). The interpretation of jurisprudential law, however, could differ depending on what scientific discipline the interpreting scholar follows. According to Friedrich Carl von Savigny, the unique notion of Juristenrecht is systematization, or more precisely, a tendency-like aspiration for systemization. This view is especially clearly expressed in his work titled "System des heutigen römischen Rechts". Rudolf von Jhering, who is a declared opponent of legal positivism (Rechtspositivismus), examines this problem from a very different angle. At Jhering – primarily in his book titled "Geist des römischen Rechts auf den verschiedenen

19 See, L. Lombardi, *Saggio sul diritto giurisprudenziale* (Milano, 1967).

20 See, G. Hamza, *Sir Henry Maine et le droit comparé*. In: *Philia*. Scritti per G. Franciosi. (A cura di F. M. d'Ippolito) vol. II. Napoli, 2008. p. 1217-1232.

Stufen seiner Entwicklung” – Roman law, viewed as jurisprudential law, has contemporary significance with regard to both methodology and ideology.

The jurisprudential law-quality of the *ius Romanum* was given emphasis pointedly by Paul Koschaker in his work titled “Europa und das römische Recht”. In Roman law, Koschaker sees an effective category of counter-ideal to legal positivism “elevated to absolute heights”. Koschaker, viewing Roman law as “Juristenrecht”, stresses its sharp opposition to English law. English law, clearly, is judge made law that makes the difference between the two legal systems obvious. *Ius Romanum* could never be viewed – in any of the phases of its evolution, history – as precedent (case) law. In the literature, this is pointed out – mentioning only a few examples – by Buckland, McNair, Schiller, Dawson, van Caenegem, Pringsheim, and Peter.

8. The jurisprudential quality of Roman law can be demonstrated in every phase of the development of this legal system.²¹ The basis for this, among other things, is that there is an obvious continuity between the pontifical law or jurisprudence and the lay jurisprudence. Examining its judge-made or common law-like attributes, we have to point to the unique historical development, and not the least, unique ideological characteristics, specificities of this legal system (order). With relation to the “doctrine of *stare decisis*”, we may refer to some characteristics of the English customary law (*ius consuetudinarium*). It deserves emphasis that in English law (see, e.g., leg. Henr. IX. 9.) the interpretation of statutes (*statuta*) takes place in a fairly elastic manner. The judge is less bound by the statutes, more precisely, by the texts thereof, than by previous judicial decisions. Henry Bracton, the author of “*De legibus et consuetudinibus Angliae*”, is in effect the first – although previously there are signs of this view at Glanvill – to provide the theoretical support of the vigour of binding precedent. This is shown studiously in the doctrine of “...*Si tamen similia evererint*,

21 Regarding the jurisprudence (*iurisprudentia*) of ancient Rome, see, A. Földi and G. Hamza, *A római jog története és intézményei* [History and Institutes of Roman Law]. 20th, revised and enlarged edition, p. 84 sqq. (Budapest, 2015).

per simile iudicentur, dum bona est occasio a similibus procedere ac similia” (De leg. f. 1 b).

An important difference between Roman law and English law is the Roman legal scholars’ so called “ars distinguendi”, expressed in some responsa (“legal opinions”) of legal scholars (iurisperiti i.e. iurisconsulti), the “art” that is capable of distinguishing between the relevant, the legally relevant, and irrelevant. As the result of this ars distinguendi, the high level abstraction capability of Roman iurisperiti (iurisconsulti), which was always denied from Roman law by the communis opinio, clearly demonstrable. Here, we wish to refer to the fact that, oddly, even Fritz Schulz writes about the Romans’ aversion to abstraction.

In some of the responsa, indeed, only the legally valuable elements emerge, which is in diametric contrast to the relation of “ratio decidendi” and “obiter dicta” that, in many cases, melt together and are practically almost inseparable in the decisions of Anglo-Saxon courts. The “ars abstrahendi,” already affecting legal scholars working in the last centuries of the pre-classical era, constitutes the real demarcation line between the mentality of Romans and the legal thinking of Anglo-Saxons. We have to point out that in some relations, – it is especially valid to the “doctrine of stare decisis,” arising with relation to the ius respondendi, that is clearly mutatis mutandis characteristic of Roman law – even within Roman law, there are certain signs of the guiding authority of precedent legal-scholarly opinions.

In the domain of Roman law, the question of judicial precedents is significant in the field of its comparison with English law. We may examine the significance of precedents based on both legal and non-legal sources. The law of inheritance – besides the law of gift²² –, is extremely important in this relation, what is more, it has explicit paradigmatic significance. In the law of inheritance (law of successions), the weight of previous decisions (sentences) can especially be ascertained in connection with querela inofficiosi testamenti. In the domain of contract law we may mention

22 See, J. P. Dawson, *Gifts and Promises*, In: *Continental and American Law Compared* (New Haven – London, 1980).

compensatio, in which the responsa originated in earlier times are given greater weight. This weight, naturally, is expressed through the recognition of the normative authority of certain legal principles, maxims or rules (*regulae iuris*). Furthermore, the problem of “*ius singulare*” is also important with regard to the examination i.e. taking into consideration of precedents. Namely, in the case of “*ius singulare*” – for example, in relation with a privilege – “*in aliis similibus*” can be interpreted, cautiously, obviously, in light of previous cases (*casus*).

The “doctrine of *stare decisis*” plays a prominent role in the development of modern English law. Naturally, in modern judicature, there is a sharp distinction between “*ratio decidendi*” and “*obiter dicta*”, that frequently allots appliers of law a difficult task, which fact is often referred to in the legal literature by a number of legal scholars – suffice to mention Montrose, Simpson, Derham, Allen, Cross, and Paton. The “doctrine of *stare decisis*”, after all, is attributable to the fact that the most essential element of English law is the decision-making activity of the judge, whom Dawson rightly calls, in this respect, the “oracle of law.”

9. In the development of European private law, convergence plays an increasing role. In the legal literature, many authors, for example, James Gordley²³ and Paolo Gallo²⁴, write about the relativization of differences between common law and civil law, and, what is more important, about the disappearance of differences in the sphere of many legal institutions. In the field of contract law, many institutions, constructions of continental law are subject to reception in English law. It deserves attention that with regard to terminology, certain English authors, in connection with English private law, explicitly refer to the role of Roman law tradition.²⁵

23 See, J. Gordley, « *Common law* » v. « *civil law* » *Una distinzione che va scomparendo?*
In: Scritti in onore di R. Sacco I, p. 559 sqq. (Milano, 1994).

24 See, P. Gallo, *La recezione dei modelli continentali nel diritto inglese delle obbligazioni*.
In: Scritti in onore di R. Sacco I, p. 473-494 (Milano, 1994).

25 See, *English Private Law*. I-II. Ed. by P. Birks (Oxford, 2000).

The private law (*ius privatum*) of European countries, no doubt, in different extent and building on different historical traditions, is closely connected to Roman law. This is more and more obvious in the period of decrease or even disappearance of differences, often motivated by political interests, between certain “legal fields” or “legal families.” Not even differing traditions of culture and civilization constitute obstacles to – and this is holding true for the influence of Roman law traditions in States outside Europe – the differing extent of the reception of Roman law. It follows from the foregoing that to consider the significant role of Roman law in the comprehensive, comparative analysis of the formation of European private (*ius commune Europaeum*) law is justified.