

GÁBOR HAMZA \*

## Legal Traditions and Efforts to Unify (Harmonize) the Private Law in Europe

**Abstract.** The present essay deals with the question of harmonization of private law in Europe. The author gives an overview of the efforts of European states to unify private law, also underlining the results and shortcomings of these activities. He highlights the importance of Roman law in the unification of private law. The author mentions — *inter alia* — the role of Roman law in the development of the non-antique, „modern” natural law by referring to the term of *Entzauberung der Welt* by Max Weber. In addition, he analyzes the influence of the historical school of jurisprudence (*Pandektistik*) on the development of European private law. The study presents a short summary on the activity of the Academy of Pavia. The members of this Academy, among whom one may find experts of Roman law, Common Law and private law make efforts to codify the European law of contracts, which should be regarded as a great step towards a unified European private law.

**Keywords:** private law, comparative law, harmonization of private law

### I. Recent efforts regarding unification (harmonization) of the private law in the Member States of the European Union

Resolution of the European Parliament (EC OJ 1989, C 158.400), adopted on May 26, 1989, requires that Member States make steps toward the codification of European private law (both civil and commercial law).<sup>1</sup> Accordingly, the European Communities, pursuant to this resolution, established a Commission charged with developing the framework for the codification of European

\* Professor of Law, Head of the Department of Roman Law, Eötvös Loránd University, H-1053 Budapest, Egyetem tér 1–3.

Fax: (36 1) 411-6515; E-mail: gabor.hamza@ajk.elte.hu

<sup>1</sup> With regards to the harmonization in the field of private law and the background of harmonization in classical antiquity, see, Maroi, F.: *Tendenze antiche e recenti verso l'unificazione internazionale del diritto privato*. Roma, 1933. 7 sq. and 15. With regard to the importance Theophrastos' *Peri nomon*, which, in essence, also serves the objectives of law harmonization, see, Hamza, G.: *Jogösszehasonlítás és az antik jogrendszerek* [Comparative Law and Legal Systems of Antiquity], Budapest, 1998. 17 sqq.

contracts law.<sup>2</sup> In 1994, another resolution of the European Parliament (EC OJ C 205.518, April 27, 1994), once again called on the Member States to harmonize certain sections of their private law to provide for a uniform internal market.<sup>3</sup> At its conference, held on 15–16 October, 1999 in Tampere, the European Council discussed the question once again. Article 39 of the declaration accepted by the European Council emphasizes the necessity of the harmonization of certain areas of the Member States' private law.<sup>4</sup> Resolution of the European Parliament (EC OJ 2001, C 327.255), adopted on November 15, 2001, reaffirmed the necessity of the approximation of the civil and commercial law of the Member States.

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 Communities, has undertaken the task of developing the principles of European contract law.<sup>5</sup> The Academy of European Private Lawyers (*Académie des Privatistes Européens, Accademia dei Giusprivatisti Europei*) with the seat in Pavia and consisting of mostly Roman law experts (including among others professors Peter Stein of Cambridge, who is the Vice President of the Academy, Theo Mayer-Maly of Salzburg, Fritz Sturm of Lausanne, Dieter Medicus of Munich, and Roger Vigneron of Liège), was founded in October 1990. Within this Academy, comprising European civilists and Roman law scholars, enjoying great international reputation and working on the creation of a common European private law system, exists the *Group d'étude pour le droit européen commun* (GEDEC) which is currently drafting the a Code of European Contracts Law (*Code Européen des Contrats*).<sup>6</sup> The proposed Code is modeled after the fourth book (regulating obligations) of the Italian *Codice civile* of

<sup>2</sup> See, Großfeld, B.—Bilda, K.: Europäische Rechtsangleichung, *Zeitschrift für Rechtsvergleichung Internationales Privatrecht und Europarecht* 33 (1992), 426.

<sup>3</sup> See, Staudenmayer, D.: Perspektiven des Europäischen Vertragsrechts. In: *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (hrsg. von R. Schulze und H. Schulte-Nölke), Tübingen, 2001. 419.

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

<sup>5</sup> See, Lando, O.: Principles of European Contract Law. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 56 (1992), 261 sqq.

<sup>6</sup> Gandolfi provides 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*, 1992. 707 sqq. Compare with, Gaggero, P. G.: Il progetto di un codice europeo dei contratti: l'attività del gruppo di lavoro pavese. *Rivista di diritto civile* 43 (1997), 113–120.

1942 (which incorporates many aspects of the tradition of the French *Code civil* and the of German *Bürgerliches Gesetzbuch*) and the *Contract Code*<sup>7</sup> drafted in the 1960s and 1970s by Harvey McGregor from Oxford for the *English Law Commission*.<sup>8</sup> Professor Giuseppe Gandolfi of Pavia, whose achievements in the field of Roman law research are also significant, has played a major role in establishing the Academy.<sup>9</sup>

Harmonization efforts, of course, are not without opposition. Professor Peter Ulmer of Heidelberg, for example, is quite skeptical regarding to the question of urging harmonization (unification) of law among the EU Member States.<sup>10</sup> Jean Carbonnier, who doubts the urgency and even the necessity of harmonization, expresses similar views with relation to France. It seems that we are witnessing the codification debate between Anton Friedrich Justus Thibaut (1772–1840) and Friedrich Carl von Savigny (1779–1871)—though, under historical conditions substantially different from the social and legal realities of the 1810s.

Although, it is, certainly, undecided whether Europe, at present, needs a unified legal system at all, it is obvious that harmonization in the field of civil (private) legislation—even if not to the same extent in every aspect of private law—is unavoidable. However, the way to realization of legal harmonization is uncertain. It could take the form of regulation or policy, and also could be realized via coordinated national legislation.<sup>11</sup> The failure of England and Scotland in 1970 to adopt the unified Law of Contracts that would have been binding in both countries does not contradict the tendency toward efforts of

<sup>7</sup> See, McGregor, H.: *Contract Code drawn up on behalf of the English Law Commission*. Milano–London, 1993.

<sup>8</sup> Until now, the debates of the Academy and working group of Pavia were published in two volumes. *Incontro di studio sul 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).

<sup>9</sup> The preliminary project plan of the Code Européen des Contrats (Avant-projet) was published in the edition of Professor Gandolfi. See, *Code Européen des Contrats–Avant-projet* (ed.: Gandolfi, G.), Milano, 2001. Compare with, Gandolfi, G.: Der Vorentwurf eines Europäischen Vertragsgesetzbuches, *Zeitschrift für Europäisches Privatrecht* 10 (2002), 1–4.

<sup>10</sup> See, Ulmer, P.: Vom deutschen zum europäischen Privatrecht. *Juristen Zeitung*, 47 (1992), 1 sqq.

<sup>11</sup> See, Remien, O.: Rechtseinheit ohne Einheitsgesetze? *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 56 (1992), 30. and Illusion und Realität eines europäischen Privatrechts. *Juristen Zeitung* 47 (1992), 277 sqq. Compare with, Herber, R.: Deutsche Zivilrechtskodifikation und internationale Rechtsvereinheitlichung. *Rechtsdogmatik und Rechtspolitik* (hrsg. von K. Schmidt), Berlin, 1990. 269.

European legal harmonization.<sup>12</sup> Roman law (*ius Romanum*), 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.<sup>13</sup> One circumstance ensuring that Roman law prevails is the application of the legal principles of private autonomy and freedom of contract, among other things, in European relations.<sup>14</sup> Doubtless, however, these legal principles, stemming from Roman law, could become relatively important and materialized 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 in civil legal commerce, doubtlessly materializes in private-autonomy and the legal principle of freedom of contract within a given private law system. That is, the *droit communautaire*, 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 standardized, or at least in a tendency toward standardization, of European jurisprudence, and, 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 became part of the past. The training of legal professionals, which is becoming international once again, may eventually result in a harmonization similar to the *stilus curiae*.<sup>15</sup>

## II. Roman law traditions and unity of private law in Europe in a historical context

Roman law played a significant role in both the secular and ecclesiastical sectors of medieval societies. It served as a foundation for the 16th century legal humanism and as a wellspring for the rationalist Natural Law doctrines.

<sup>12</sup> See, Tilman, W.: Kodifikation des Privatrechts in der Gemeinschaft. In: *Für Recht und Staat, Festschrift für H. Helmrich zum 60. Geburtstag*, München, 1994. 441.

<sup>13</sup> Knütel, R.: Rechtseinheit in Europa und römisches Recht. *Zeitschrift für Europäisches Privatrecht* 2 (1994), 244 sqq.

<sup>14</sup> See, Hommelhoff, P.: „Europarechtliche Bezüge“ im Zivilrecht, Überlegungen zur Gestaltung des akademischen Unterrichts. In: *Für Recht und Staat. Festschrift für H. Helmrich zum 60. Geburtstag*, München, 1994. 340.

<sup>15</sup> Ranieri, F.: Der europäische Jurist. Rechtshistorisches Forschungsthema und rechtspolitische Aufgabe, *Ius Commune* 17 (1990), 10 sqq.

In the 19th century, Roman law was molded in the spirit of scientific positivism primarily through *Pandektistik* (*Pandektenwissenschaft*), and, finally, was also an eminent material source of the great private law codices. The role of Roman law in the 20th century political sphere is not negligible, the most conspicuous sign of which is Article 19 of the party platform of NSDAP (*National-sozialistische Deutsche Arbeiterpartei*, the German National Socialist Labor Party) adopted on February 24, 1920 and supported by the interpretation of Alfred Rosenberg which may be viewed as an “*interpretatio simplex*”. The reception of Roman law, characterized—or rather, stigmatized—as foreign by the German people, and also seen as individualistic, cosmopolitan, materialistic, liberal, and advocating solely private interests, appeared as a 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 as something that 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 Ruzsem Vámbéry regarding the NSDAP’s proposed legislative reform, “the influence of Roman law had infected the puritan intellect of Teutons sipping *Meth* (honey-beer) sitting on bear hides in caverns of lost times.”

The trend of “antike Rechtsgeschichte” completely ignores the afterlife of both the jurisprudential and political aspects of Roman law. The advocates of the trend 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 that Roman law plays, as a consequence of *interpretatio multiplex*, in the development of European law, and more precisely, in the legal systems and jurisprudence of European nations. In essence, this view narrows the possibility of comparison of legal systems of states or peoples on the same socio-economic level, but reaches similar conclusions. The 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 with 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 schools of thought according to which certain institutions of Roman law are incomparable with certain institutions of modern legal systems, 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 of Berlin polemicizes in his writing titled *Aufklärungen über Recht*, published in 1981, about the notion of legal structures reappearing from time-to-time—Theo Mayer-Maly writes aptly about “*Wiederkehr von Rechtsfiguren*”. This viewpoint, concurring with the possibility of accepting reoccurring legal structures, is, naturally, not so radical as to deny the existence of legal structures exclusively linked to a single given socio-economic formation, such as, for example, feudal relationships, which, in itself excludes accepting Roman law as a timeless *ratio scripta*. Of course, it is the sign of *déformation professionnelle* when lawyers overstate the facts, according to which legal transactions—the expression, legal transaction (*negotium juridicum*), is attributed to Johannes Althusius (1557/63–1683)—, 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 the constructions as well as the 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 at 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*, 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.

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, or to the mythical decree of emperor Lothar III, fading in the dimness of legends. The reception of Roman law means an intellectual tradition built on Roman legal foundations that only marginally relates to a well-defined positive legal system, *ius positivum*. Reception, defined in this manner, can be traced back centuries, with a good example being the conveyance of German lawyers who studied law at the universities 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. And, in 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 as made evident by 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. Reception, however, was not limited to Roman law material but also extended to the acceptance of canon law and feudal law of the Langobards (or Lombards) 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 *ius commune* with local legal systems, or, in other words, the task of adapting the *ius commune* to local conditions was resolved by the so-called Practicals.

The readiness for the reception of Roman law, in the function of objective conditions, substantially differs in individual European countries. The level of sophistication of a given country’s (region’s) jurisprudence and political system is crucial with regard to reception. In significant parts of the Iberian peninsula, for example, the conditions in the 13th century were such that Roman law could become the subject of reception in the seven-volume codex, 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 (*reception in globo*) was out of the question. There is a close connection between Roman law and the so-called imperial law, *ius caesareum*, or *Kaiserrecht*. Roman law serves as the ideological foundation of *renovatio imperii*, which attains extraordinary importance during the reign of the dynasty of Hohenstaufen. 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 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 feature of the school of Practicals is that they put special emphasis on German legal practice—which results in a distancing from the original Roman sources—; on the other hand, another characteristic is the casuistic analytical methodology, nonetheless, we can talk about the "science of the Pandects", for the first time, in connection with the Cameralists. Connecting the expression "science of the Pandects" 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 the Pandects" implemented by the 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*" of the Romans.<sup>16</sup> The aspiration of Roman law scholars to trace *ius civile* back to *ius naturale* is a basic feature of the Natural Law of the 16th and 17th centuries. 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 of the rationalist Natural Law jurisprudence, the "*auctoritas*" of Roman law is associated with the *ius Romanum* as "*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 the Pandects" and Natural Law had not taken place, which could be explained, on the one hand, by the Common law-like approach of Natural Law, and, on the other hand, by the philosophical, in other words, non-legal, interests of Natural Law professors, a fact that demonstrated with the example of Christian Wolff (1679–1754), the only disciple of Gottfried Wilhelm Leibniz, whose studies focused primarily on moral philosophy.

<sup>16</sup> Regarding the Romans concept of *ius naturale*, see, Hamza, G.: A természetjog értelmezésének problémái: Cicero és a *ius naturale* [The Problems of the Interpretation of Natural Law: Cicero and the *Ius Naturale*], *Jogtudományi Közlöny* 50 (1995), 523–529.



### III. Historical school of jurisprudence (*Pandektistik*) and its role in the development of the European private law

The fundamental conflict between *Usus modernus pandectarum* and Natural Law could have been only resolved by the *Pandektistik* developed in the work of the followers of the school of historical jurisprudence. The characteristics of *Pandektistik*, the intention of which was the creation of “the philosophy of positive law” (Wieacker), include the historical point of view, building on the original, Justinianus’ sources, the desire for systematization, 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 pandect law of the 19th century, “heutiges römisches Recht”, should be sharply separated from *Usus modernus pandectarum*, which was dominated by the elements of particularism.

The pandectist law of the 19th century,<sup>17</sup> which after the work of Georg Friedrich Puchta (1798–1846), “Pandecten”, published in 1838, is also called “Pandects” (*Pandekten*), as phrased by the German legal scholar, is the general theory of German private law based on Roman law 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 i.e. trend is not equivalent only to the “doctrine of gemeines Recht” (Koschaker), but from the beginning of its development, it gained significant influence outside the borders of Germany.

In this respect, it is sufficient to consider the influence of *Pandektistik* in England. John Austin (1790–1859), who adopted Jeremy Bentham’s legal theories, in the analysis of legal terminology, follows the German *Pandektistik*. Characteristically, he regards Savigny’s *Das Recht des Besitzes* as a masterpiece and 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 great influence on him. This work of Thibaut, of which eight editions were published between 1803 and 1834, influenced English legal scholarship

<sup>17</sup> Regarding the *Pandektistik*, see, Hamza, G.: *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján* [Trends in the Development of Private Law in Europe. The role of the civilian tradition in the shaping of modern systems of private law], Budapest, 2002. 99 sqq. and *idem: Die Entwicklung des Privatrechts auf römischnormativer Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn*. Budapest, 2002. 85 sqq.

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* also seen.<sup>18</sup>

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 continental private law, and the contract constructions of Common law.

It is a fact that similarities may be found among numerous institutions and constructions of Roman law and English law. It is without doubt, at the same time, that essential differences appear between the views of Roman law and English law, which are the result of unique historical conditions. One of the attributes of Roman law is that it is jurisprudential law, so-called *diritto giurisprudenziale*<sup>19</sup> 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 systematization. This view is especially clearly expressed in his work titled *System des heutigen römischen Rechts*. Rudolph von Jhering (1818–1892), who is a declared opponent of legal positivism, examines this problem from a very different angle. According to Jhering—primarily in his book titled *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*—Roman law, viewed as basically jurisprudential law, has an contemporary significance with regard to methodology and ideology.

The jurisprudential law-quality of *ius Romanum* was given particular emphasis by 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*, which makes the difference between the two legal systems obvious. *Ius Romanum* could never be viewed—in any of the phases of its evolution—as precedent law. In the literature, this is pointed out—mentioning only a few examples—by Buckland, McNair, Schiller, Dawson, Van Caenegem, Pringsheim, and Peter.

<sup>18</sup> See, Lombardi, L.: *Saggio sul diritto giurisprudenziale*. Milano, 1967.

<sup>19</sup> See, Hamza, G.: Sir Henry Maine és az összehasonlító jog [Sir Henry Maine and the Comparative Law], *Jogállam*, 1998–1999. 326. sqq.

#### IV. The historical background of the convergence of Roman (civil) law and Common law

The jurisprudential quality of Roman law can be demonstrated in every phase of the development of this legal system.<sup>20</sup> 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, to the unique ideological characteristics of this legal system. With relation to the doctrine of *stare decisis*, we may refer to some characteristics of the English *ius consuetudinarium*. It deserves emphasis that in English law (see, e.g., leg. Henr. IX. 9.), the interpretation of statutes takes place in a fairly elastic manner. The judge is less bound by the statutes, or more precisely, by the texts thereof, than by previous judicial decisions. 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 vigor of binding precedent. This is shown studiously in the doctrine of “...*Si tamen similia evenerint, 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 *iurisperiti*'s so called *ars distinguendi*, expressed in some *responsa* of them as the “art” that is capable of distinguishing between the relevant, the legally relevant, and the irrelevant. As the result of this *ars distinguendi*, the high level abstraction capability of Roman *iurisperiti* (*iurisconsulti*), which was always separated from Roman law by the *communis opinio*, is 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 submerge, which is in diametric contrast to the relation of *ratio decidendi* and *obiter dicta* that melt together and are practically 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 for “*stare decisis*,” arising in relation to the *ius respondendi*, that is a clearly

<sup>20</sup> Regarding the jurisprudence of Roman law, see, Földi, A.—Hamza, G.: *A római jog története és intézményei* [The History and Institutions of Roman Law]. 8th, revised and extended edition, Budapest, 2003. 84 sqq.

*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 gift<sup>21</sup>—, is extremely important in this relation, and what is more, it has explicit paradigmatic significance. In the law of inheritance, the weight of previous decisions can especially be ascertained in connection with *querela inofficiosi testamenti*. In the domain of contract law we may mention *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. Furthermore, the problem of *ius singulare* is also important with regards to the examination 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.

*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 a difficult task to those applying the law, which fact is often referred to in the legal literature of for example, Montrose, Simpson, Derham, Allen, Cross, and Paton. *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.”

## V. Concluding remarks

In the development of European private law, convergence plays an increasing role. In the new legal literature, many authors, for example, James Gordley<sup>22</sup> and Paolo Gallo,<sup>23</sup> writes about the materialization of the differences between Common law and *civil law* (Roman law), and, what is more, about the disappearance of differences in the sphere of many legal institutions. In the

<sup>21</sup> See, Dawson, J. P.: *Gifts and Promises, Continental and American Law Compared*. New Haven–London, 1980.

<sup>22</sup> See, Gordley, J.: «Common law» v. «civil law» Una distinzione che va scomparendo? In: *Scritti in onore di R. Sacco I*. Milano, 1994. 559.

<sup>23</sup> See, Gallo, P.: La recezione dei modelli continentali nel diritto inglese delle obbligazioni. In: *Scritti in onore di R. Sacco I*. Milano, 1994. 473–494.

field of contract law, many institutions and constructions of continental law are subject to reception in English law. It deserves attention that with regards to terminology, certain English authors, in connection with *English private law*, explicitly refer to the role of Roman law tradition.<sup>24</sup>

The private law of European countries, no doubt, to a different extent and building on different historical traditions, is connected to Roman law. This is more and more obvious in a period of decreasing or even disappearing differences, often motivated by political interests, between certain “legal fields” and “legal families.” Not even differing traditions of culture and civilization constitute obstacles to the differing extent of the reception of Roman law. It follows from the foregoing that it is justifiable to consider the significant role of Roman law in the efforts to unify the private law in Europe.

<sup>24</sup> See, *English Private Law*. I–II. (ed.: P. Birks), Oxford, 2000.