Gábor Hamza

Approximation and Harmonisation of Private Law in Europe as a Means of Integration

Resolution EC OJ C 158.400 of the European Parliament of the European Union (EU), adopted on 26 May 1989, requires that Member States make steps toward the codification of private law (both civil and commercial law) of the Member States of the European Union.[1] Accordingly, the European Union, pursuant to this resolution, established a Commission whose task was to develop the framework for the codification of European contracts law or law of contracts.[2]

In 1994, another resolution of the European Parliament (EC OJ C 205.518, 6 May 1994), once again called on the Member States to standardise 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 emphasises the necessity of the harmonisation (approximation) of the Member States' private law regulations.[4]

The European Parliament passed another, third resolution (EC OJ C 255.1, 15 November 2001), relating to the harmonisation (approximation) of the civil and commercial law of the Member States of the European Union.[5]

1 With regard to the unification in the field of private law and the background of unification in classical i.e. Greco-Roman Antiquity, see Maroi 1933: 7 sq., 15. With regard to the importance of Theophrastos's *Peri nomon,* which, in essence, also serves the objectives of harmonisation as well as unification of the law of the Greek city-states, see Hamza 1991: 11 sqq.

2 Grossfeld–Bilda 1992: 426.

3 Staudenmayer 2001: 429.

4 Sonnenberger 2002: 489.

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 countries of Europe, which ultimately outweigh the differences between them. The authors

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In 1980, almost ten years prior to the adoption of the 1989 Resolution, a working group was formed called the Commission on European Contract Law led by Professor Ole Lando of Copenhagen, 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)* with its seat in Italy, namely in Pavia, consisting of mostly noted Roman law experts (including professors Peter Gonville Stein (1926–2016) of Cambridge, who was the Vice President of the Academy, late Professor Theo Mayer-Maly (1931–2007) from the University of Salzburg, late Professor Fritz Sturm (1929–2015) from the University of Lausanne, late Professor Dieter Medicus (1929–2015) from the University of Munich and late Professor Roger Vigneron (1937–2002) from the University of Liège), held its first session in Pavia more than three decades ago, in October 1990.

The Academy of Pavia, which became formally in November 1992 the *Académie des Privatistes Européens*, comprising European civil law specialists and Roman law scholars, enjoying great international reputation and working on the creation of a common European legal system (order), gives home to the *Group d'étude pour le droit européen commun* (GEDEC) which drafted a Code of European Contracts Law *(Code Européen des Contrats)*.[7] It has to be mentioned that the Code of European Contracts Law is a (Draft) Code in the proper sense of the term "code" i.e. *codex*.

The proposed Code is basically modelled after the Fourth Book (Libro Quattro), 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 Code[8] drafted in the 1960s and 1970s by Harvey McGregor (1926–2015), professor at the University of Oxford (ward of New College), for the English Law Commission.[9] Giuseppe Gandolfi, professor at the University of Pavia, whose achievements in the field of Roman law research are also significant, has played a substantial role in establishing the Academy of Pavia.[10]

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of this working paper are, however, aware of the fact that the large scale harmonisation of Member Sates' civil (private) law is a politically charged and sensitive issue (see VON BAR et al. 1999).

6 LANDO 1992: 261.

7 Gandolfi provides with an overview of the activities and achievements of the Academy of Pavia and the working group (see GANDOLFI 1992: 707; also cf. GAGGERO 1997: 113–120).

8 MCGREGOR 1993.

9 The debates i.e. discussions of the Academy and working group of Pavia were published in several volumes (see STEIN 1993; STEIN 1996).

10 The preliminary project plan of the Code Européen des Contracts (Avant-projet) was published in the edition of Professor Giuseppe Gandolfi (see GANDOLFI 2002a; also cf. GANDOLFI 2002b: 1–4).

Efforts to harmonise the legal system (order) of the Member States of the European Union, of course, are not without opposition. Peter Ulmer, professor at the University of Heidelberg, for example, is explicitly sceptical with regard to the question of urging harmonisation of law of the Member States of the EU.[11] Jean Carbonnier (1908–2003), late professor at Sorbonne (University Paris II), who doubted the urgency, and, even to some extent the necessity of harmonisation, expressed similar views with relation to France.

It seems that we are witnessing the codification dispute *(Kodifikationsstreit)* between Anton Friedrich Justus Thibaut (1772–1840) and Friedrich Carl von Savigny (1779–1861) – although the historical conditions substantially different from the social and legal realities of the second decade of the 19th century.

And, although it is, doubtlessly, undecided whether or not Europe, currently i.e. in the present moment, needs at all any sort of a unified legal system, it is obvious that harmonisation 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 realisation of law harmonisation is uncertain. It could take the form in particular of (Council) regulation, directive, etc. and it could also be realised via well prepared 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 countries does not contradict the tendency of efforts of harmonisation of law in the European Union.[13] Roman law, which constitutes the historical foundation of the unity of law ("unitas iuris") in Europe, might have a crucial role in this undeniably long-term process, which could require perhaps several decades of hard work.[14] We need to emphasise that the "unitas iuris" has to be distinguished from the "uniformitas iuris".

A circumstance that ensures 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] Doubtless, however, that these legal principles, stemming from Roman law, could become relatively important and relativised in certain areas. This is the situation, for example, in the field of consumer protection (*Verbraucherschutz* or *Konsumentenschutz*).

[11] Ulmer 1992: 1–8.
[12] Remien 1992a: 300–316; Remien 1992b: 277–284; also cf. Herber 1990: 269.
[13] Tilmann 1994: 441.
[14] Knütel 1994: 244–276.
[15] Hommelhoff 1994: 340.

The more emphasised and better founded legal protection of the consumer, who is the more disadvantaged participant of commercial relations, doubtlessly relativises private autonomy *(Privatautonomie)* and the legal principle of freedom of contract *(Vertragsfreiheit)* within a given legal system (order). That is, the directives and council regulations of the EU, without doubt, indicate certain tendencies that seem to jeopardise 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 the *ius commune,* a uniform "legal working method", the so-called *stilus curiae* ("way of sentence-making of judges") predominated precisely through Roman law, was considered the common language *(lingua franca)* of lawyers.

The uniform *stilus curiae* following the "nationalisation" of legal systems of different States became part of the past. The training of legal professionals, which is becoming more and more international once again, may eventually result in the harmonisation of the *stilus curiae*.[16]

Roman law played a significant, even dominant role in both secular and ecclesiastical sectors of medieval societies. Roman law served as a foundation for the 16th century Legal Humanism (in German: *Humanistische Schule*) and was a "goldmine" for the rationalist Natural Law doctrines. In the 19th century, Roman law is moulded in the spirit of legal positivism (in German: *Rechtspositivismus*) primarily through German *Pandektistik* or *Pandektenwissenschaft* (Pandectist Legal Science or Science of Pandects), and, finally, Roman law is also an eminent material of the great private (civil) law codices.

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 *(Parteiprogramm)* of the NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei,* the German National Socialist Labour Party) adopted on 24 February 1920, supported by the interpretation of Alfred Rosenberg which interpretation may be viewed as "interpretatio simplex". The reception of Roman law, characterised – or rather, stigmatised - 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 Germany in the 1930s.[17]

[16] Ranieri 1990: 10.

[17] With regard to the so-called "Drittes Reich" ("Third Reich") see Hamza 2001: 127–138.

It is worth mentioning that Carl Schmitt (1888–1985), 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, failed to support his rather peculiar i.e. awkward 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, Rusztem Vámbéry (1872–1948) 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".

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 (1874–1953), fail to consider the fact that for centuries, Roman law has had a major influence on the evolution of European law and jurisprudence.

In 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 of European law, more precisely, in the legal systems and jurisprudence of European nations. 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 evident especially clearly in the works of Ernst Schönbauer (1885–1966), 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 civilisation or were at least 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 of contemporary 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, professor at the Freie Universität in Berlin, polemised in his writing entitled "Aufklärungen über Recht", published in 1981, about the notion of legal structures, constructions reoccurring

time-to-time – Theo-Mayer-Maly wrote aptly about the "return of legal constructions" (in German: *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 professionelle* when lawyers overrate the fact, according to which legal transactions *(Rechtsgeschäfte)* - the expression legal transaction (*Rechtsgeschäft* or *negotium juridicum*) is attributed to Johannes Althusius (1557/63–1638) -, or at least a fairly substantial fraction of these legal 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 analysing the substantive differences and the prevailing economic functions. This is true, 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 public law *(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 – are doubtlessly intersect at certain points.[18]

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" (in German: *Verwissenschaftlichung*) of law. Reception cannot be connected neither to the Charter of the Imperial Chamber (in German: *Reichskammergerichtsordnung*), adopted in 1495, nor the mythical decree of emperor of the Holy Roman Empire *(Sacrum Romanum Imperium),* Lothar III (emperor from 1125 through 1137) fading in the dimness of legends.

The reception of Roman law *(receptio iuris Romani)* means an intellectual tradition built on Roman legal foundations that only to a small extent relates to a well-defined

[18] Regarding the classification into 'branches' of ancient Roman law see Hamza 2006: 5–40.

positive legal system *(ius positivum).* Reception, defined in this manner, could be traced back centuries, with the conveyance of German lawyers, i.e. lawyers from Germany, who studied at the universities *(studia generalia)* of Northern Italy.

The signs of different forms of reception (for instance *receptio in globo* or *receptio in complexu*), i.e. the subsidiary prevalence of Roman law, associated with positive law, appeared fairly early, in the 11th century. 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 *(commentatores)* appears in the latter area, while Roman law, defined as "legal literature", has already been accepted in Germany with the conveyance of the Glossators *(glossatores).*

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 *(postglossatores).*

Reception, however, was not limited to Roman law material, i.e. sources but also extended to the acceptance of canon law *(ius canonicum)* and feudal law *(ius feudale)* 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 on the European continent, but divergent from, and competing with, the local law *(Landesrecht).* The harmonisation of the hybrid law-like *ius commune* and local legal systems, or, with other words, the task of the adaptation of *ius commune* to local conditions was resolved by the so-called legal practitioners *(Rechtspraktiker).*

The readiness for 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. 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 king Alfonso X el Sabio, the "Wise" (reigned from 1252 through 1284).

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 the renovation of the empire *(renovatio imperii)* that attain extraordinary importance in the time of the sovereignty of the Hohenstaufen dynasty. Roman law, more precisely the Roman public law *(ius publicum Romanum),* is the instrument of the legitimacy of the Holy Roman Empire (*Sacrum Romanum Imperium* or *Heliges Römisches Reich*) to be ruler *(Herrscher)* of the world *(Weltkaisertum).* The work best representing the Cameralist school *(Kameralistik)* both in its title and substance is Samuel Stryk's (1640–1710) *Usus modernus pandectarum* from the turn of the 17th and 18th centuries.[19]

Although, on the one hand, a characteristics of the school of legal Practitioners is excessively focused on the German praxis - which results in the distancing from the original sources of Roman law -, on the other hand, another characteristics is the casuistic analytical methodology; nonetheless, we can talk about "Science of Pandects" (in German: *Pandektenwissenschaft*), for the first time, in connection with the Cameralists (in German: *Kameralisten*). Connecting the expression "Science of 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 Pandects" practiced by legal Practitioners (in German: *Rechtspraktiker*).

We have to point out that Roman (civil) law had an important role in the development of natural law doctrines. The evolution of non-ancient, "modern" natural law (*ius naturale* or *ius naturae*), aptly described by Max Weber (1864–1920) as "disenchantment of the world" (in German: *Entzauberung der Welt*), is inseparable from the concept of Natural Law *(ius naturale)* of the Romans.[20] The aspiration of Roman law scholars to trace back civil law *(ius civile)* to natural law (*ius naturale* or *ius naturae*) is a basic feature of the adherents of the School of Natural Law of the 16th and 17th century. The influence of Roman law can also be found in the Christian scholastic natural law.

In case of Hugo Grotius (1583–1645), who may be regarded as a follower of the rationalist natural law jurisprudence, the authority *(auctoritas)* of Roman law is associated with its "force based on reason" *(imperium rationis).* Roman law plays a cardinal role in the work of Samuel Pufendorf (1632–1694), the author of the highly influential *De iure naturae et gentium libri octo* (1672). Samuel Pufendorf can be regarded as a follower of another secularised school or trend of natural law.

[19] Hamza 2009: 185–186; Hamza 2005: 37–38; Hamza 2013: 59–64; Hamza 2022: 177–178.
[20] Regarding the Romans' concept of *ius naturale* see Hamza 1997: 349–362.

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 of natural law professors, a fact that could be demonstrated with the example of Christian Wolff (1679–1754) whose studies focused primarily on moral philosophy (in German: *Moralphilosophie*).

The fundamental conflict between *Usus modernus pandectarum* and the school of natural law (in German: *Naturrechtsschule* or *Schule des Naturrechts*) could have been only dissolved by the *Pandektistik* developed in the work of the followers of the Historical School of Law (in German: *Historische Rechtsschule*).

The characteristics of *Pandektistik,* the intention of which was the creation of the "philosophy of positive law" according to Franz Wieacker (1908–1994), include the historical point of view, building on the original sources of Roman law *(fontes iuris Romani),* the desire of systemisation, the development of legal theories, and, finally – as a hoped-for result of all the aforementioned – the partition from legal particularism (in German: *Rechtspartikularismus* or *Rechtszersplittertheit*). In the light of the aforementioned, the law of Pandects of the 19th century, "contemporary Roman law" (in German: *heutiges römisches Recht*), should be sharply separated from *Usus modernus pandectarum,* which was by no doubt dominated by the elements of particularism.

The law of Pandects (in German: *Pandektenrecht*) of the 19th century, which after the textbook of Georg Friedrich Puchta (1798–1846), *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 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 born and 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" (Paul 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 (1790–1859), who adopted Jeremy Bentham's (1748–1832) legal theory, in the analysis of legal terminology, follows the German *Pandektistik*. Characteristically, he regards Friedrich Carl von 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, entitled *System des Pandektenrechts* also had a great influence on him. This fundamental work of Anton Friedrich Justus Thibaut, which had eight editions between 1803 and 1834, influenced English legal scholarship tremendously.

Nathaniel Lindley's book entitled *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 James Sumner Maine's (1822–1888) *Ancient Law, its Connection with the Early History of Society and its Relation to Modern Ideas,* published in 1861, the influence of German *Pandektistik* could also be shown.[21]

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. In fact quite a few 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 Common law, which was formed as the result of unique historical conditions. One kind of attributes of Roman law is that it is "jurisprudential law" (in Italian: *diritto giurisprudenziale*)[22] that generally is not associated with the binding authority or force of previous judicial decisions ("law of precedents"). 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 "jurist's law" *(Juristenrecht)* is systematisation, or more precisely, a tendency-like aspiration for systemisation. This view is, especially clearly expressed in his work entitled *System des heutigen römischen Rechts.* Rudolf von Jhering (1818–1892), who is a declared opponent of legal positivism, examines this problem from a very different angle. At Jhering – primarily in his book entitled *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* – Roman law, viewed as jurisprudential law, has contemporary significance with regard to both methodology and ideology.

[21] Hamza 2007: 1217–1232.
[22] Lombardi 1967.

The jurisprudential law-characteristic feature of Roman law *(ius Romanum)* was pointed out by Paul Koschaker (1879–1951), in his work entitled *Europa und das römische Recht.* In Roman law, Koschaker sees a "counter ideal" to legal positivism (in German: *Rechtspositivismus*) "elevated to absolute heights". Paul Koschaker, viewing Roman law as *Juristenrecht,* stresses its sharp opposition to English law. English law, clearly, is judge made law, that makes an obvious difference between the two legal systems (orders). Roman law could never be viewed – in any of the phases of its evolution i.e. history – as law based on precedents. In the legal literature of the 20th century – mentioning only a few examples – this characteristic feature of Roman law was pointed out by Buckland, McNair, Schiller, Dawson, van Caenegem, Pringsheim and Peter.

The jurisprudential characteristic feature of Roman law (in German: *Juristenrecht*) can be seen in every phase of the development of this legal system (order).[23] The basis for this, among other things, is that there is an obvious continuity between the pontifical law or jurisprudence and the laic, i.e. secular jurisprudence (in Latin: *ius profanum* or *ius saeculare*).

Taking into consideration its judge-made or Common law-like attributes, we have to point out the specific features of its historical development as well as the unique ideological characteristics, i.e. 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 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 (1210–1268), the author of *De legibus et consuetudinibus Angliae* is in effect the first – although previously there are signs of this view at Ranulf de Glanvill (died in 1190) – to provide the theoretical support of the vigour 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 Common law is the Roman legal scholars' i.e. jurists' so-called *ars distinguendi,* expressed in some *responsa* ("legal opinions") of legal scholars (*iurisperiti* or *iurisconsulti*), the "art" that is capable of distinguishing between the relevant, the legally relevant and irrelevant.

[23] Regarding the Roman jurisprudence (legal science) see Földi–Hamza 2022: 84 sqq.

As a result of this *ars distinguendi,* i.e. the high level sensibility towards abstraction of Roman legal scholars or practitioners (in Latin: *iurisperiti* or *iurisconsulti*), was always denied or at least disputed in the *communis opinio.* In this regard we can refer to the fact that, in our view oddly enough, even the highly renowned Roman law scholar, Fritz Schulz (1879–1957) wrote about the Romans' aversion as far as abstraction was concerned.

In some of the legal opinions (in Latin: *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 "art of abstraction" (in Latin: *ars abstrahendi*), already affecting legal scholars working in the pre-classical era, i.e. during the last three centuries BC, makes a kind of "demarcation line" between the way of legal thinking of Romans i.e. citizens of ancient Rome and the legal thinking of Anglo-Saxons. We have to point out that in some relations – this is especially holding true for the doctrine of "stare decisis", arising with relation to providing binding legal opinions under imperial authority (in Latin: *ius respondendi*), that is clearly a characteristic feature of Roman law – even in the sphere of 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 Common law. We mention the significance of precedents based on both legal and non-legal sources. The law of inheritance – besides the law of gifts *(donatio)*[24] – is extremely important in this relation. In the domain of contract law we refer to the compensation (in Latin: *compensatio*), in which the opinions *(responsa)* of Roman jurists (jurisconsults, *iurisconsulti* or *iurisperiti*) originated in earlier times are given greater weight.

This weight, naturally, is expressed by means of the recognition of the normative authority of certain legal principles, i.e. legally binding rules. Furthermore, the problem of "particular law" (in Latin: *ius singulare*) is also significant with regard to the examination of judicial precedents. Namely, in case of *ius singulare* – for example, in relation with a privilege *(privilegium)* – in similar cases can be interpreted, cautiously, obviously, in light of previous cases, i.e. judicial precedents.

The doctrine of "stare decisis" plays a prominent role in the development of modern English Common law. Naturally, in modern judicature, there is a sharp distinction between *ratio decidendi* and *obiter dicta* that frequently allots judges

[24] Dawson 1980. Dawson is also the author of the book *The Oracles of the Law.*

a difficult task, which fact is often referred to in the legal literature by a significant number of reputed authors – for example, 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 Common law is the decision-making activity of the judge, whom John P. Dawson (1902–1985), professor at Harvard University, rightly called, in this respect, the "oracle of law".

In the development and process of the creation of European private law (in Latin: *ius commune privatum Europaeum*), convergence plays with no doubt a substantial and an ever increasing role. In recent legal literature, a number of noted authors, for example, H. Patrick Glenn (1940–2014)[25] James Gordley[26] and Paolo Gallo,[27] wrote and write about the relativisation of differences between Common law and civil, i.e. Roman law, and, what is more, about the phenomenon of disappearances in the sphere of many legal institutions (in German: *Rechtsinstiute*).

In the field of contract law, many institutions as well as constructions of continental law (legal systems of the countries located on the European continent) are subject to reception, i.e. adoption in English Common law. It deserves attention that with regard to terminology, certain English authors, in connection with English private law, explicitly refer to the significant role of Roman law i.e. civil law tradition.[28]

The private law *(ius privatum)* of European countries, no doubt, in different extent and building on different historical as well as cultural traditions, is in close relation with Roman law, i.e. deeply rooted in the tradition/s/ of Roman law. This becomes more and more, i.e. increasingly obvious in the period of decrease or even disappearance of differences between "legal families" based previously on quite often diametrically different ideological and political background. The process of the approximation and harmonisation of private law is with no doubt an essential element of European integration.

[25] Glenn 1993: 559–575.
[26] Gordley 1994: 559 sqq.
[27] Gallo 1994: 473–494.
[28] Birks 2000.

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