

THE CLASSIFICATION INTO BRANCHES OF MODERN LEGAL SYSTEMS AND ROMAN LAW TRADITIONS

[“La clasificación en ramas de los sistemas legales modernos
y las tradiciones del Derecho romano”]

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RESUMEN

El presente trabajo se basa en la lección inaugural del autor para su ingreso en la Academia Húngara de Ciencias; y en él examina las diversas divisiones en partes o ramas de que ha sido objeto el Derecho, a través de la historia, empezando por las formuladas por los juristas romanos, de Derecho público y privado y Derecho civil y pretorio (honorario). Es sobre todo la primera que ha tenido una influencia posterior, que el autor analiza entre los glosadores y comentaristas, en la jurisprudencia humanística y en diversas escuelas de la época posterior, con extensión al derecho escocés y al *common law*, y desde luego en la Ciencia jurídica de los siglos XIX y XX.

PALABRAS CLAVE: Derecho público - Derecho privado.

ABSTRACT

This paper is based on the author's opening lesson upon his entry into the Hungarian Academy of Sciences. He hereby discusses the various divisions in parts or branches of the Law throughout history, beginning with those formulated by Roman jurists of public and private Law, and of civil and praetorian (honorary) Law. The first one has undoubtedly some influence, which the author analyzes among the commentators, in the humanistic judicial practice, and in several later schools, with an extension to Scottish law and to the common law and, of course in the juridical science of the XIX and XX centuries.

KEY WORDS: Public law - Private law.

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I. THE CLASSIFICATION OF ROMAN LAW IN THE
CLASSICAL PERIOD: PUBLIC LAW (“JUS PUBLICUM”)
AND PRIVATE LAW (“JUS PRIVATUM”)

From the beginning of the imperial period, the legal system of the Roman Empire (*Reichsrecht*) shows certain signs of differentiation, and it could be divided into *jus publicum* and *jus privatum* rather than civil law and praetorian law. The designations *publicus-privatus* (meaning public and private [spheres]) existed as early as the late republican period. The appearance of *jus publicum* and *jus privatum* as categories of classification can only be demonstrated with certainty at the beginning of the era of principate.

The jurisconsult Ulpianus says the area governed by *jus publicum* is as follows: “Public law covers religious affairs, the priesthood, and offices of state” (“*Publicum jus in sacris, in sacerdotibus, in magistratibus consistit*” [D. 1, 1, 1, 2]). According to the definition given by Ulpianus in the *Digest*, Roman public law (*jus publicum*) regulates the organization of the state, and that included ecclesiastic organization. Questions of private life, i.e., relationships of citizens in the family and in business were therefore regulated by Roman private law (*jus privatum*).

Late classical and post-classical jurisprudence separated *jus publicum* from *jus privatum* with the introduction of the terms “public interest” (*utilitas publica*) and “private interest” (*utilitas privata*). It derives from a statement by Ulpianus:

“There are two branches of legal study: public and private law. Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals’ interests, some matters being of public and others of private interest” (“*Huius studii duae sunt positiones, publicum et privatum. publicum jus est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim*” [D. 1, 1, 1, 2])¹. The major part of the relevant literature² says these two “branches of law” were in existence throughout the whole era of the principate and of the dominate. However, some legal scholars state that the Roman jurists only used the terms *jus publicum-jus privatum* to describe the two areas of legal science or jurisprudence (*jurisprudencia*). According to that latter point of view, we cannot speak about

¹ Regarding the interpretation of the text of Ulpianus, see: FÖLDI A. - HAMZA G., *A római jog története és institúciói* (“History and Institutes of Roman Law”) (Budapest, 2006¹¹), 51 f.

² For a summary from earlier works, see: E. BETTI, *Diritto romano* (Padova, 1935), I, 62 ff.

the division of Roman law into two branches. Note that even in the above passage of Ulpianus the term *studium* and not *jus* is used.

Occasionally public law may cover both the organization of the state and private matters. The jurisconsult Papinianus says that making a will is a legal institution (*Rechtsinstitut*) regulated by public law (D. 28, 1, 3).

To this dual division of Roman law belongs the following thesis of Papinianus: "Public law cannot be changed by private pacts" ("*Jus publicum privatorum pactis mutari non potest*" [D. 2, 14, 38]). Hence it follows that a rule of law may either be compulsory (*jus cogens*) or concessive (*jus dispositivum*). The latter shall apply if the parties have not agreed otherwise. The rules of public law are of a compulsory character, e.g. the rules of elections. The rules of private law on the other hand are concessive, e.g. the provisions of the law of contract (*leges contractus*). It is true however that some of the rules of private law are of compulsory nature, e.g. the age limit of adulthood or the rules limiting the rate of interest.

In accordance with some sources, certain norms of *jus privatum* may not be changed similarly to those of *jus publicum*. On the topic of adverse possession (*usucapio*) one passage in the *Digest*, the author of which is jurisconsult Paulus, provides an *Edictum* commentary making a reference to Pomponius. ("*Quod opere facto consecutus sit domini capione promissor, non teneri eum eo nomine Pomponius ait, quia nec loci nec operis vitio, sed publico iure id consecutus sit*" [D. 39, 2, 18, 1]). When writing about manumission of slaves (*manumissio servi* or *servorum*), Papinianus refers to the invariable nature of *jus privatum* ("*Cerdonem servum meum manumitti volo ita, ut operas heredi promittat. non cogitur manumissus promittere: sed etsi promiserit, in eum actio non dabitur: nam iuri publico derogare non potuit, qui fideicommissariam libertatem dedit*" [D. 38, 1, 42]). Ulpianus describes the invariable character of the rules of private law in connection with the provisions of guardianship (*tutela*) ("*Patronus quoque tutor liberti sui fidem exhibere debet, et si qua in fraudem debitorum quamvis pupilli liberti gesta sunt, revocari jus publicum permittit*" [D. 26, 1, 8]). In the area of making a testament, the prohibition of free stipulations of private persons shall also apply. Papinianus justifies the prohibition related to the *testamenti factio* by saying that in this domain *jus publicum* applies ("*Testamenti factio non privati, sed publici juris est*" [D. 28, 1, 3]).

In our view Ulpianus' distinction ("*Huius studii duae sunt positiones [...]*") is not of a technical character, instead, it is a form of general classification. It has its roots in Greek thought. This opinion was pointed out by H. F. Jolowicz, author of *Roman Foundations of Modern Law*, published in 1957, a treatise of significance down to our days³.

³ H. F. JOLOWICZ, *Public Law and Private Law*, in H. F. JOLOWICZ, *Lectures on Jurisprudence* (London, 1963), 320-327.

Although that is merely a description (*descriptio*) and not a definition (*definitio*), nevertheless it is adequate with the realities of the Roman legal system. A good example from substantive law can be the acquisition of ownership. If the party concerned is the state (*res publica*), the acquisition of ownership is different from the one in the case of private persons, that is, Roman citizens (*cives Romani*). It is also important to underline that in case of acquiring ownership from the state neither *mancipatio* nor *traditio* is necessary. Quoting an example from procedural rules, a dispute can be taken between the state and a citizen which will be tried outside of the so-called ordinary private procedure. This specific character is also clear from the missing *formula* and that the decision (*sententia*) is made—both in theory and in practice—by a person who defends the interest of the state (*iudex*).

The main reason for the lack of separation or distinction between the areas of public law (*jus publicum*) and private law (*jus privatum*) is that Romans in general, and Roman jurists, in particular, showed little interest in either abstract academic theories or definitions.

It is worth observing from the point of view of our topic the following source by Ulpianus: “Private law is tripartite, being derived from principles of *jus naturale*, *jus gentium*, or *jus civile*” (“*Privatum jus tripartitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus*” [D. 1, 1, 1, 2]). It is difficult to establish the exact meaning of this description on the division of private law (*jus privatum*). It is highly questionable what motivated Ulpianus to make that statement. It is most likely that it was not his purpose to define subdivisions of private law (*jus privatum*).

The following interpretation of *jus civile* originating from Pomponius is important also from the aspect of the subdivision of the legal system. According to Pomponius, *jus civile* is equal to the law “[...] which is grounded without formal writing in nothing more than interpretation by learned jurists [...]” “[...] *quod sine scripto in sola prudentium interpretatione consistit* [...] [D. 1, 2, 2, 12]). In this statement about *jus civile* as put forward by Pomponius there is some kind of similarity to the distinction between positive law (*jus positivum*) and statute law (statutory law) conceived in modern legal systems. The interpretation by Pomponius in connection with *jus civile* does not contain any idea of subdivision. In our view it is attributable also to the fact that the term *jus civile* can be interpreted in a number of ways, i.e. it can be the subject of a kind of *interpretatio multiplex*.

Cicero’s statement has also great significance from the point of view of the division of *jus civile*. In Cicero’s opinion “[...] *jus civile, quod nunc diffusum et dissipatum esset, in certa genera coacturum et ad artem facilem redacturum*” (*De oratore* 2, 33, 142). The question is what does Cicero mean

by *in certa genera* division, or, to be even more accurate, what *genus* means to him. In our view the outstanding orator, philosopher and statesman, who had profound knowledge of law as well, used interpreting the *jus civile* the terminology of Greek logic, metaphysics, geometry and grammar when he made an attempt to describe the law applicable to Roman citizens⁴. Again what we have here is by no means an attempt to classify *jus civile*. It is simply a description (*descriptio*)⁵.

II. CIVIL LAW (“JUS CIVILE”) AND PRAETORIAN LAW (“JUS PRAETORIUM-JUS HONORARIUM”) IN THE POST-CLASSICAL PERIOD

The distinction between civil law (*jus civile*) and praetorian law (*jus praetorium*) –the original division between archaic and “developed” law– had practically disappeared by the end of the first century B.C. Yet the classical jurists made a distinction between civil law and praetorian law and their institutions. As a result of a gradual amalgamation, the rules of praetorian law are more and more closely connected to those of civil law (*jus civile*). In the classical period the difference between the two streams of the already merged law remained only in terms of their source. Civil law originated from the legislative authorities (popular assembly, *senatus*, the emperor, the jurists provided with *jus respondendi*) of the state (*res publica*), whereas praetorian law came from magistrates (*praetor*, *aedilis curulis*, *proconsul* of provinces), who had no formal powers to legislate.

The fusion of civil law and praetorian law or “magistrates’ law” (*jus honorarium*) is described by the jurist Marcianus. As he put it: “For indeed the *jus honorarium* itself is the living voice of the *jus civile*” (“*Nam et ipsum ius honorarium viva vox est iuris civilis*” [D. 1, 1, 8]). For Marcianus *jus honorarium* is a kind of law that is created in the first place by office holders i.e. magistrates (*magistratus*), mainly by praetors.

Jus civile means the body of law as crystallized in the works of the Roman jurists or, to use a modern term, jurisprudence as well. Law as

⁴ Cicero provides a detailed discussion to the questions of *res publica* (in a modern sense, the state) in his work *The State* (*De re publica*). In this dialogue –which only survived in fragments– Cicero analyses the state and numerous institutions of (public) law. The author of this treatise has translated *The State* into Hungarian. The volume includes his introductory essay, and notes. *Somnium Scipionis* has been translated by L. HAVAS (Budapest, 1995, second reprint, 2002).

⁵ We cannot rule out the possibility that Cicero adhered to the idea of preserving the unity of the legal system as motivated by his view about *jus naturale*. See A. D’AMATO, *Lon Fuller and Substantive Natural Law*, in *American Journal of Jurisprudence* 26 (1981), 202 ff.

applied in daily life can be studied best (in addition to the law contained in the decrees of emperors [*constitutiones, edicta*, called also *leges*])— on the basis of *jus civile*. *Jus civile* can be considered as a synonym for private law (*jus privatum*). The reason for it is that the major part of law as formed and interpreted by the Roman jurists is made up of civil law (*jus privatum*). *Jus civile* cannot be considered as a branch of law. In this context it is worth emphasising that *jus honorarium* and *jus praetorium*, which do not qualify as a branch of law either, are bound to lose their reforming effect on civil law. The distinction based on the dual categories *jus civile* and *jus praetorium* (*jus honorarium*) is gradually replaced by the distinction between public law (*jus publicum*) and private law (*jus privatum*).

The idea of the division of the legal system—which is different from splitting the legal system into branches— goes back to Greek, Hellenistic antecedents. It applies to the appearance of the paired categories of *jus civile* and *jus praetorium* as well as in the division to *jus publicum* and *jus privatum*. The distinction appearing at notable representatives of Hellenistic philosophy and rhetoric—first of all, Aristotle and Demosthenes— forms the basis for the distinction used for the classification of law or legal system appearing in the works of Roman jurists.

III. THE QUESTION OF CLASSIFICATION OF THE LEGAL SYSTEM AT THE GLOSSATORS

The question of classification of the legal system occurs already at some representatives of Glossator School, initiated by Irnerius⁶ in the beginning of medieval science of law⁷. In this context the famous dispute (*disputa*)⁸

⁶ For the connection between state and law in Irnerius's approach, see: A. ROTA, *Lo stato e il diritto nella concezione di Irnerio* (Milan, 1959).

⁷ For the significance of Glossator school, see: H. FITTING, *Die Anfänge der Rechtsschule zu Bologna* (Berlin, 1888); E. BESTA *L'opera d'Irnerio* (Torino, 1896), I; P. S. LEICHT, *Il diritto privato preirneriano* (Bologna, 1933); P. TORELLI, *La codificazione e la glossa, questioni e propositi*, in, *Atti congresso Internazionale di diritto romano* (Pavia, 1934), I, 329 ff.; B. BRUGI, *Il metodo dei glossatori*, in *Studi in onore di S. Riccobono* (Palermo, 1936), I; W. ENGELMANN, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre* (Leipzig, 1938); H. U. KANTOROWICZ, *Studies in the Glossators of Roman Law* (Cambridge, 1938); F. CALASSO, *Medioevo del diritto*, I: *Le fonti* (Milano, 1954); P. VINOGRADOFF, *Roman Law in Medieval Europe* (Oxford, 1961³); P. KOSCHAKER, *Europa und das römische Recht* (Munich-Berlin, 1966⁴); E. J. H. SCHRAGE, *Utrumque jus. Eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts* (Berlin, 1992); J. M. SAINZ-EZQUERRA, *La glosa y el texto jurídico, un análisis de historia y método*, in, *Estudios F. Hernández-Tejero* (Madrid, 1994), II, 505 ff.; HAMZA G., *Accursius és az európai jogtudomány kezdetei* ("Accursius and the Beginnings of European Legal Science"), in *Jogtudományi Közlöny* 54 (1999), 171-175; M. ASCHERI,

between the notable juriconsult, Placentinus⁹ (d. 1192), a follower of Bulgarus, and Azo Portius¹⁰ (d. 1230) has an outstanding significance. According to Placentinus, who gave the first formulation of the idea of the division (dichotomy) of the system of law (*ordo juris*) into branches: *jus publicum* and *jus privatum*, must be considered “*duae res*,” i.e. existing categories. Consequently, these two categories form two independent, autonomous subjects of *studium juris*. Contrary to that approach Azo¹¹, who insisted on maintaining the unity of the legal system, refused the thesis of *diversitas rerum vel personarum* and considered the distinction between *jus publicum* and *jus privatum* to be merely an issue of methodology. In the opinion of Azo, the distinction between the above categories is of relative character, consequently, it is always necessary in distinguishing between them to add the word “*principaliter*”¹².

The rejection on a theoretical level of the classification of the legal system by Roman juriconsults¹³ did not block the development of public law. This is why the claim made by some of the representatives of the German Pandectist School is incorrect which says that jurists of private law were insensitive towards the problems and questions of public life. It should be underlined in this context that the last three volumes of *Codex Iustinianus*, called *Tres libri (Tres libri Codicis)*, contained exclusively public law rules that came into the focus of interest of the notable representatives of the

I diritti del medioevo italiano, Secoli XI-XV (Rome, 2000).

⁸ For the connection between law (private law) and public law in the approach of Azo, see: J. W. PERRIN, *Azo, Roman Law and Sovereign European States*, in *Studia Gratiana* 15 (1972), 89-101.

⁹ For a Hungarian commentary on Placentinus, see G. HAMZA, *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), 56.

¹⁰ The exceptional prestige Azo had can be illustrated by a late-medieval saying, “*Chi non ha Azo, non vada a palazzo*”.

¹¹ Let us stress that Azo is the author of *Summa Codicis*, an analysis on *Codex Iustinianus* (also known as *Summa super Codicem*), which was used as an indispensable handbook of legal practice for a long time.

¹² On how the general legal principles appear in the works of Glossators and Commentators, see: P. STEIN, *Principi generali nel pensiero dei glossatori e commentatori medievali*, in *Principi generali del diritto. Atti dei convegni Lincei* 96 (1992), 129 ff.

¹³ Pomponius wrote, *quod sine ullo scripto in sola prudentium interpretatione consistit*, D. 1, 2, 12. *Interpretatio* in this case does not involve a clear distinction. That sheds light on the empirical phase of *jus civile* (For the definition of *interpretatio* in the latest Hungarian literature, see T. NÓTÁRI, *Summum ius summa iniuria. Comments on the Historical Background of a Legal Maxim of Interpretation*, in *Acta Juridica Hungarica* 44 (2004), 301-321.

Bolognese School, called Glossators¹⁴. It was an outstanding student of the Bolognese School, Andrea Bonello da Barletta (approx. 1190-1273), professor at the University of Naples, who wrote a commentary to the *Tres libri*. This *Studium (Generale)*, founded by Emperor Frederick II in 1224, was the first state university in Europe. In our opinion it cannot be a coincidence that the outstanding interest shown in the committed study of *jus publicum* occurred at this particular state university, where the education –using a modern term– of state office holders was a priority. The commentary made by Bonello da Barletta by genre stood between the *glossa* and *summa*.

Liber constitutionum, passed by the Parliament of Melfi in 1231, is a significant source also from the point of view of the classification of the legal system. This work can be regarded to be the most significant one dealing with the question of *jus proprium* in that era. *Liber constitutionum* deals with real legal questions of its age (*quaestiones de facto*) instead of simply describing *jus commune*. It also addressed the problem of the classification of law i.e. legal system.

The *glossa*, written by the notable jurisconsult Marino da Caramanico between 1270 and 1280, is also worth mentioning. Its author followed the example provided by the *Glossa ordinaria* of Accursius¹⁵. The author used the method of Accursius in his work in which the questions of the classification of law (legal system) also have a role.

IV. THE QUESTION OF CLASSIFICATION OF THE LEGAL SYSTEM AT THE COMMENTATORS

From the point of view of the classification of the legal system, the oeuvre of Bartolus de Saxoferrato¹⁶ (1313-1357) is outstanding. He wrote

¹⁴ We have to mention here that Irnerius in his glossae took into consideration the entire codification of Justinian (*Corpus Juris Civilis*). He gave no glossae to *Tres libri (Tres libri Codicis)* however, because he probably was not aware of them. Thus there was no way for Irnerius to write glossae on public law.

¹⁵ For the career of Accursius, see: E. GENZMER, *Zur Lebensgeschichte des Accursius*, in *Festschrift für L. Wenger* (Munich, 1945), II, and F. CAMACHO, *A propósito del VII centenario de la muerte de Acursio*, in *Anales Cátedra Francisco Suárez* 3 (Madrid, 1963), 131 ff. See also A. GARCIA Y GARCÍA, *Accurse et Jacques Balduin*, in *Studia Gratiani* 29 (1988), 795-814, and A. FERNÁNDEZ DE BUJÁN, *Sistemática y jus civile en las obras de Quintus Mucius Scaevola y de Acursio*, *Revista Jurídica* (Universidad Autónoma de Madrid, 2002), 57-80.

¹⁶ For Bartolus from earlier literature, see: W. RATTINGAN, *Bartolus*, in *Great Jurists of the World* (Ed. by Sir J. Macdonell and E. Manson, Boston, 1914, reprint, New Jersey, 1997), 45-57. From recent literature, see: *Bartolo da Sassoferrato. Studi e documenti per il VI centenario* (Milano, 1962), I-II.

comments on all parts of Justinian's *Corpus Juris Civilis*¹⁷. He is writing about several questions in his commentaries that are connected to public law. His attention was focused on the –even legally problematic– relationship of secular and ecclesiastical power, *imperium* and *sacerdotium*. Bartolus is the author of the following works on public law: *Tractatus repraesaliarum*, *Tractatus de Guelphis et Ghibellinis*, *Tractatus de tyrannia*, *Tractatus de regimine civitatis*, *Tractatus de statutis* and *Tractatus de insignis et armis*. In the *tractatus* listed above Bartolus dwells on important problems of public law: among other issues, the relationship between secular and ecclesiastical power, between *imperium* and *sacerdotium* is widely discussed, as well as the relationship between the sovereign (king or emperor) and their subjects.

We have to mention here the same topics were of high importance in works by St. Thomas Aquinas, Dante, Marsilio da Padova and Coluccio Salutati.

Baldus (1327-1400) also made commentaries on the *Tres libri*. The most extensive commentary on the *Tres libri* is made by Luca da Penne (1343-1382). We have to mention here that, according to Friedrich Carl von Savigny (1779-1861), beside Bartolus in the 14th century, the most outstanding expert of public law and at the same time a notable European scholar of jurisprudence, *scientia legum*, is Luca da Penne.

V. THE PROBLEM OF CLASSIFICATION OF THE LEGAL SYSTEM IN HUMANIST JURISPRUDENCE

The question of the classification of the legal system kept occupied the minds of most of the representatives of Humanist jurisprudence¹⁸. In the

¹⁷ For the significance of the Commentators, see: M. SMITH, *The Development of European Law* (New York, 1928); W. KUNKEL, *Das römische Recht am Vorabend der Rezeption*, in *L'Europa e il Diritto Romano. Studi in memoria di P. Koschaker* (Milano, 1954), I; G. ERMINI, *Corso di diritto comune* (Milan, 1989³); M. BELLOMO, *L'Europa del diritto commune* (Rome, 1994⁷); A. PADOA-SCHIOPPA, *Il diritto nella storia d'Europa. Il medioevo* (Padova, 1995), I; P. GROSSI, *L'ordine giuridico medievale* (Rome-Bari, 1996²).

¹⁸ For the Humanist School, see: H. D. HAZELTINE, *The Renaissance and the Laws of Europe* (Cambridge, 1926); G. KISCH, *Humanismus und Jurisprudenz* (Basel, 1955); D. MAFFEI, *Gli inizi dell'umanesimo giuridico* (Milan, 1956); G. KISCH, *Erasmus und die Jurisprudenz seiner Zeit* (Basel, 1960); H. E. TROJE, *Humanistische Jurisprudenz. Studien zur europäischen Rechtswissenschaft unter dem Einfluß des Humanismus* (Goldbach, 1993); H. HÜBNER, *Jurisprudenz als Wissenschaft im Zeitalter des Humanismus*, in *Festschrift für K. Larenz zum 90. Geburtstag* (Munich, 1993); P. THOMAS, *A Theoretical Foundation for Juridical Humanism*, in *Zeitschrift für Neuere Rechtsgeschichte* 16 (1994).

16th and 17th centuries we come across the principle of *jus universum* at most of the authors. The title of one of Jean Bodin's (1529/30-1596) works, *Juris universi distributio*, the first edition (*editio princeps*) of which was published in 1578, is of outstanding significance. Representatives of the Humanist jurisprudence –though examining the legal system in its unity and entirety– dealt also with the classification of *ordo juris*, also called *systema juris*. Such classification has its roots in Greek and Roman tradition. Their approach to classification of the legal system is influenced undoubtedly to a considerable extent by their education in classical studies.

Bodin himself refers to the system of Justinian's *Institutiones* several times. He criticizes the system of the *Institutiones* stating that its acceptance would result in dividing the legal system into branches, which in his view is not desirable. One of the tendencies in Humanist jurisprudence advocated the ideal of law as proposed by Cicero. The representatives of that camp state that law, as a form of *ars*, forms an organic whole, and it is created by the state. The creation of law therefore is inseparably connected to the sovereignty of the state. That view can be demonstrated, in addition to Bodin, by works of Guillaume Budé (Budaeus), [1467/68-1540]¹⁹ François Connan (Connanus) [1508-1551]²⁰, François Le Duaren (Duarenus) [1509-1559], Jean de Coras (Corasius) [1515-1572]²¹, François Baudouin (Balduinus) [1520-1573]²², Hugo Doneau (Donellus) [1527-1591]²³ and Loys Le Caron (Charondas) [1536-1614]²⁴.

Connan in his "*Commentariorum juris civilis libri X*" (1553) and Doneau in his "*Commentarii juris civilis*" (1587-1597) describes the legal

¹⁹ For the significance of Roman law in the oeuvre of Budé, see: M. L. MONHEIT, *Guillaume Budé, Andrea Alciato, Pierre de l'Estoile, Renaissance Interpreters of Roman Law*, in *Journal of the History of Ideas* 58 (1997).

²⁰ For the significance of the oeuvre of François Le Douaren or Franciscus Duarenus, see: E. JOBBÉ-DUVAL, *François Le Douaren (Duarenus s.v. "Duarenus"), 1509-1559*, in *Mélanges P. F. Girard* (Paris, 1912, réimpression, Paris, 1979), I, 573 ff. and W. VOGT, *Franciscus Duarenus, 1509-1559, sein didaktisches Reformprogramm und seine Bedeutung für die Entwicklung der Zivilrechtsdogmatik* (Stuttgart, 1971).

²¹ The author of *De iure civili in artem redigendo* is Jean Coras. It forms a part of his work, entitled, *Tractatus universi juris*.

²² For the scholarly oeuvre of François Baudouin, see: M. TURCHETTI, *Concordanza o tolleranza. François Baudouin e i «moyenneur»* (Genova, 1984) and H. E. TROJE, *Peccatum Triboniani. Zur Dialektik der 'interpretatio duplex' bei François Baudouin*, in *Studia et Documenta Historiae et Juris*, 36 (1970), 341-358.

²³ For the connection between Donellus and private law in the modern sense, see: P. STEIN, *Donellus and the Origins of the Modern Civil Law*, in *Mélanges F. Wubbe* (Fribourg, 1993), 439-452.

²⁴ For the connection between Loys Le Caron and French law (*jus patrium*), see: G. LEYTE, *Charondas et le droit français*, in *Droits* 39 (2004), 17-33.

system (*jus civile*) as arranged in a certain system. The purpose of the two legal scholars is a systematic description of the whole *Corpus Juris Civilis*. This systematisation apart, they fall short of drawing theoretical conclusions or setting up branches of law. That is a far cry from the Pandectist movement, though Friedrich Carl von Savigny and other German Pandectists respected it.

Inleidinge tot de Hollandsche Rechtsgeleerdheid, the famous work by Hugo Grotius (de Groot) [1583-1645], published in Dutch in 1631, over ten years after it had been written and based on the system of Justinian's *Institutiones*, was a coursebook (*tractatus*) describing and analysing the private law of the province of Holland, which contained several elements and ideas of natural law. Regarding the systematic description of divisions of law, the relevant work by Grotius is *De iure belli ac pacis libri tres*, first published in Paris in 1625. Though it is a *tractatus* dealing mainly with natural law (*jus naturale* or *jus naturae*), Grotius offers an analysis of international law (*jus gentium*) in the modern sense and an analysis of several institutions of private and criminal law. In the second volume of that work (which was published in several editions) he separates law existing in the "world" ("*magna generis humani societas*") into private and public law²⁵. That classification anticipates the modern division of legal systems.

In his work of basic significance Jean Domat (1625-1696), entitled *Les loix (lois) civiles dans leur ordre naturel, le droit public et le legum delectus*, also provides an introduction to the legal system undoubtedly with an intent of classification. Domat, who cannot be treated merely as a kind of "French *institutional writer*," complemented his work by writing four books on public law (*droit public*). Those latter works were published only posthumously in 1697. Domat uses the term *ordre* in the meaning of the Latin *ordo*, *ars* or *systema*. The term *loix (lois) civiles* means Roman law. The use of the term *ordre naturel* (in Latin: *ordo naturalis*) is a novelty in the title of Domat work. Earlier representatives of Humanist jurisprudence did not use the term "*naturel*" (*naturalis*) in the text or title of their works.

VI. THE CLASSIFICATION OF THE LEGAL SYSTEM AT SCOTTISH INSTITUTIONAL WRITERS

In Scotland the authors of legal textbooks (*institutional writers*) were consistent in maintaining the unity of the legal system. In a similar way to

²⁵ Grotius probably borrowed his idea of "universal law" from Francisco de Vitoria (1483/93-1546). Since it was Vitoria who wrote about "*totus orbis aliquo est una republica*". See: A. EYFFINGER, *Europe in the Balance. An Appraisal of the Westphalien System*, in *Netherlands International Law Review* 45 (1998), 186.

England and other common law countries, Scottish writers of textbooks (manuals) present the legal system as an undivided unity or “*seamless web*”.

James Dalrymple (First Viscount Stair) [1619-1695], who is Lord President of the Scottish *Court of Session* (i.e. Supreme Court) from 1671, expounds Scottish civil law (which is based on Roman law) without dividing it into branches. His *Institutions of the Law of Scotland* was published first in 1681.

That work of Stair served as an example and basis for the work of Sir George Mackenzie of Rosehaugh (1636-1691), entitled *Institutions of the Law of Scotland*, which was published three years later in 1684. Mackenzie does not describe the Scottish legal system as divided into branches either. The same is true for the work of John Erskine of Carnock (1695-1768), published in 1754, in which the author takes the system of the work of Sir Mackenzie of Rosehaugh as its example.

It is worth mentioning that the works of the Scottish *institutional writers* are regarded as sources of law (*fontes juris*) by Scottish courts down to our days.

VII. THE QUESTION OF CLASSIFICATION OF THE LEGAL SYSTEM IN COMMON LAW JURISPRUDENCE

The renowned and largely used work of the first English institutional writer, Sir Henry Finch (1558-1625), *Nomotechnia*, published in England in 1613 (in Law French), describes the whole legal system without any distinction of private and public law²⁶. In the first part of *Nomotechnia*, Finch deals with jurisprudence pointing out the difference between the natural law and positive law (*jus positivum*). The second part of *Nomotechnia* provides an analysis of the questions of common law, customs, royal privileges, prerogatives and statute law. The third part deals with procedural law. The fourth part analyses the law on special jurisdictions, in particular the law of the Court of Admiralty and church courts. This work of Sir Henry Finch was later, in 1627 i.e. two years after his death, published in English in an abridged version under the title *Law, or a Discourse thereof in Four Books*. Being a thorough exposition of the English common law, *Nomotechnia* had been the basic source of learning English law not having been superseded until the works of William Blackstone and John Austin.

John Cowell (1554-1611), professor of civil law at Cambridge Uni-

²⁶ Regarding the appreciation of the oeuvre of Sir Henry Finch, see: F. H. LAWSON, “Institutes”, in *Festschrift für I. Zajtay. Mélanges en l’honneur d’I. Zajtay* (Tübingen, 1982), 341 ff.

versity, who described English law in his *Institutiones juris Anglicani ad methodum et seriem Institutionum imperialium compositae et digestae*, published in 1605, within the system exposed in the *Institutiones* of Justinianus, made an attempt to construct a “bridge” between civil law and common law. Cowell makes no distinction between public law (*jus publicum*) and private law (*jus privatum*).

The first outstanding scholar of common law in Modern Times, Sir Matthew Hale (1609-1676) also considered Roman law suitable for systematizing English common law. In his *An Analysis of the Laws*, published in 1705, which to some extent follows the system exposed in Justinian’s *Institutiones*, he did not separate public from private law similarly to Sir Robert Finch and John Cowell.

Sir William Blackstone (1723-1780) –the first Vinerian Professor of English law in Oxford, who utilised a considerable amount out of Sir Matthew Hale’s above-mentioned work– described the English legal system in detail by providing historical background to various legal institutions in his four volume *The Commentaries on the Laws of England*²⁷. The first volume of the *Commentaries* analyses the law on persons (*Rights of Persons*). The famous introductory part of this volume, *Study Nature and Extent of the Laws of England*, provides an analysis of special features of English law (and legal system). The second volume introduces property law (*Rights of Things*) in which law of property is explained with particular attention to law of immovable pieces of property (*land law*). The third volume (*Of Private Wrongs*) analyses wrongdoing against citizens and possibilities of their judicial remedy. In the fourth volume (*Of Public Wrongs*) Blackstone deals with various criminal offences and their punishment. At the end of that volume we can find a part: entitled *Rise, Progress and Gradual Improvements of the Laws of England*, in which the author provides an overall picture on the historical development and formation of English legal system. The author of the *Commentaries* expounds the institutions of both public and private law without differentiating between them. Blackstone does not consider public and private law as separate i.e. autonomous branches of law²⁸.

²⁷ This work of Blackstone was thoroughly revised in 1841 and published with the title *New Commentaries on the Laws of England*. Another edition of the *Commentaries* came out as recently as the 20th century (lastly in 1938). For the significance of this work of Blackstone, see: J. CLITHEROW, *Preface to the Reports of William Blackstone* (London, 1828²) and G. JONES, *The Sovereignty of the Law* (London, 1973). Clitherow’s work provides a good overview on the sources of Blackstone’s principal work.

²⁸ In a shorter piece of work, published in 1756 with the title *An Analysis of the Law of England*, Blackstone, in a similar way to the *Commentaries*, introduces English law according to its sources and not its classification.

Sir Henry Sumner Maine (1822-1888), Regius Professor of Civil (Roman) law at Cambridge, considered institutions of Roman law to be of fundamental significance in the comparative analysis of English law in his work: *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas*, published in 1861²⁹. As an adherent of the German Historical School, Maine based jurisprudence on historical grounds. In *Ancient Law* Maine, as a pioneer of Historical Jurisprudence provides a historical overview on the development of law. In his view in early societies law gradually crystallizes from decisions into custom and then is formulated into early codes, of which –among others– the Twelve Tables are examples. Maine does not deem necessary making a distinction between various parts (branches) of law, i.e. making a division between public and private law within the legal system.

Frederic William Maitland (1850-1906), the creator of English legal history, professor at Cambridge, in his *Constitutional History of England*, which was published after his death in 1908, considered public law or constitutional law in many cases though not always as a kind of appendix to a basic institution of English law namely law of real property. As he put it: “Our whole constitutional law seems at times to be but on appendix to the law of real property”³⁰. Maitland does not consider constitutional law to be an autonomous branch of law when describing English constitutional system³¹.

Sir Thomas Erskine Holland (1835-1926), professor at Oxford, in his *Elements of Jurisprudence*, first published in 1880 and used as a textbook for half a century, emphasises the priority of private law³². In his view private law is “the only typically perfect law”. The highlighting of the dominant role of private law, however, does not prevent the notable English jurist

²⁹ For the oeuvre of Maine, in the Hungarian literature see: G. HAMZA, *Sir Henry Maine et le droit comparé*, in *Orbis Iuris Romani* 10 (2005), 7-21.

³⁰ F. W. MAITLAND, *Constitutional History of England* (Cambridge, 1908), 538.

³¹ This approach is reflected in the oeuvre of Maitland and others. The same is relevant to his work *History of English Law*, which he wrote as a co-author with Frederick Pollock, and first published in 1895. For the scholarly activity of Maitland, see: H. A. L. FISHER, *Frederic William Maitland* (Cambridge 1910); T. F. T. PLUCKNETT, *Frederic William Maitland*, in *Law Quarterly Review* 67 (1951) and H. E. BELL, *Maitland* (Cambridge, 1965).

³² Other significant works of Sir Thomas Erskine Holland, *Essay on Composition Deeds* (1864) and *Essays of the Form of the Law* (1870). He was the editor of Justinianus's *Institutiones* in English in 1873 (*Institutes of Justinian*). A significant part of his scholarly oeuvre is editing the works of great figures of international law. He published *De Jure Belli* by GENTILI in 1877, *Juris et Judicii Feccialis* by ZOUCHE in 1911 and *De bello* by LEGNANO in 1917.

from appreciating the significance of public law, which is based on hierarchical relationships. In his view the separation of private and public law is merely of relative character.

Albert Venn Dicey (1835-1922), a highly reputed author on English constitutional law emphasised the inseparability of constitutional law and private law in his works. Dicey is still a devotee of the necessity of maintaining the unity of the legal system even at the beginning of the 20th century³³. In his view the dividing into subcategories of the legal system is unnecessary or even dangerous³⁴.

Born in England, Sir John Salmond (1862-1924) moved to New Zealand at an early age. He was professor at the University of Adelaide then at the Victoria University of Wellington. In his *Jurisprudence*, first published in 1902, and *Torts*, first published in 1907, he deals with New Zealand common law³⁵. In both of his works, similarly to the English authors mentioned above, he does not accept the distinction between private and public law. He stresses the advantages of a private law approach. Referring to Roman (Civil) law several times, his approach is similar to that of Ulpianus. In Salmond's view public law covers mostly those rules and norms that relate to the organization and authority of the state, the rights due to the state and activity of the state in general.

VIII. THE QUESTION OF CLASSIFICATION OF THE LEGAL SYSTEM IN CONTINENTAL JURISPRUDENCE

In his work *Pandectae Justinianae in novum ordinem redactae* (1748-1752) Robert-Joseph Pothier (1699-1772) expounds the Pandects of Justinianus in a "new" rational and logical order (*novus ordo*), adapting them to the circumstances of his time³⁶. The highly esteemed royal profes-

³³ See: A. V. DICEY, *The Development of Administrative Law in England*, in *Law Quarterly Review* 31 (1915), 148 ff.

³⁴ For the oeuvre of Albert Venn Dicey, see: R. A. COSGROVE, *The Rule of Law, Albert Venn Dicey. Victorian Jurist* (London, 1980).

³⁵ Sir John Salmond's work, *Jurisprudence*, has been so far published in twelve editions (the most recent one in 1976); his other work *Torts* in eighteen editions (the most recent in 1981). Beside his activity as a university professor, his activity in public life is remarkable. In 1910, for instance, he was appointed Solicitor General of New Zealand.

³⁶ For the oeuvre in jurisprudence of Robert-Joseph Pothier, see: P. BER HARDEAU, *Vies, portraits et parallèles des juriconsultes Domat, Furgole et Pothier* (Paris, 1789); P. A. FENET, *Pothier analysé dans ses rapports avec le Code Civil* (Paris, 1826); L. H. DUNOYER, *Blackstone et Pothier* (Paris, 1827); L. THÉZARD, *De l'influence des travaux de Pothier et du chancelier d'Aguesseau sur le droit civil moderne* (Paris, 1866); A. PIRET, *La rencontre chez Pothier des conceptions romaine et féodale de la propriété foncière* (Diss.

sor of French law in the University of Orléans and holder of a number of honorary offices in the same town, whose *oeuvre juridique* was a significant contribution to the preparation of the French *Code civil*, described private law following the scheme of the *Institutiones* of Gaius and Justinianus. In the description of the various legal institutions he further developed the concepts elaborated in the works of Gaius and the compilers of the codification of Justinianus. He insisted fiercely on maintaining the unity of the legal system. The term *Novus ordo* did not mean that Pothier separated private law (*droit privé*) from public law (*droit public*) within the legal system.

Karl Friedrich Wilhelm Gerber (1823-1891), professor of the University of Erlangen, Tübingen and Leipzig, was an outstanding representative of the German Public Law Jurisprudence of the 19th century. In his outstanding *Grundzüge eines Systems des deutschen Staatsrechts*, published first in 1865, he dealt with public law by availing himself of categories and concepts of the *Pandektensystem*³⁷. In Berlin Gerber was a disciple of Georg Friedrich Puchta (1798-1846) –Puchta was considered as the most outstanding adherent of the German Historical School (*Historische Rechtsschule*) after Savigny– considered the state as a legal person in analogy with private law. Gerber did not separate private from public law conceptually. His theory had great influence on outstanding representatives of German public law scholarship. In particular Paul Laband and partly Georg Jellinek were drew upon his ideas.

Paul Laband (1838-1918), professor at the University of Königsberg, then of Strasbourg, described public law institutions of the German Empire (*Deutsches Reich*, “*Wilhelminisches Reich*”) with private law notions and categories in his three-volume work *Das Staatsrecht des deutschen Reiches*, first published between 1876 and 1882. Laband, who is considered as the founder of the trend of “*Reichsstaatsrecht*”, did not treat state law (*Staatsrecht*) as an autonomous branch of law (*Rechtszweig*). In his view strict separation of state law (public law) from private law is by no means

Paris, 1937); U. JAHN, *Die “subtilité du droit romain” bei Jean Domat und Robert-Joseph Pothier* (Diss. Frankfurt am Main, 1971); H. J. KÖNIG, *Pothier und das römische Recht* (Diss. Frankfurt am Main, 1976).

³⁷ Gerber’s work, *System des deutschen Privatrechts*, published first in 1848-1849, then altogether in 17 editions partly after the author’s death, has outstanding significance in the field of private law. For the oeuvre of Gerber, see: W. WILHELM, *Zur juristischen Methodenlehre im 19. Jahrhundert* (Frankfurt am Main, 1958), 88 ff.; P. VON OERTZEN, *Die soziale Funktion des staatsrechtlichen Positivismus* (Berlin, 1974), 163 ff. and M. G. LOSANO, *Der Begriff ‘System’ bei Gerber*, in *Objektivierung des Rechtsdenkens. Gedächtnisschrift für I. Tammelo* (Munich, 1984), 647-665.

practical. The serious counterargument against such distinction is firstly the private law origin of a number of public law institutions and secondly the striking similarity between the terminology and notions of the two branches of law³⁸.

In several works that are still quoted, Georg Jellinek (1851-1911), professor of the University of Vienna, Basel, then Heidelberg, did not deem it practical to divide the legal system. This view is in harmony with his idea related to the closed character of the legal system (*Rechtsordnung*). In his *Allgemeine Staatslehre*³⁹, first published in 1900, he did not separate the various branches of law from one another. In this approach does not play any role the relationship between law (*Recht*) or state (*Staat*) and ethics. The emphasis of the significance of private law theoretically may result from an ethical approach to law⁴⁰. We refer here to the fact that Georg Jellinek formulated his view about law as an ethical minimum (*ethisches Minimum*) in this explicit form only in an early work (*Die sozialetische Bedeutung von Recht, Unrecht und Strafe*), published in 1878. In his seminal *Allgemeine Staatslehre* and its various later editions explaining his views on the state he did not emphasize that idea any more.

German authors of the second half of the 19th century and the first decades of the 20th century considered the difference between state law (public law) or constitutional law (*Verfassungsrecht*) and private law in that private law regulates the relationship between persons who are equal. According to their view public law is based on hierarchical relationship pursuant to *autoritas* of the state (*Staat* or by a different term: *Gemeinwesen*). This authority (*autoritas*) of the state, however, is no reason for the separation of public law (*öffentliches Recht*) and private law (*Privatrecht*) from each other, i.e. the separation within the legal system. The spread of the idea of rule of law (*Rechtsstaat*) also played a certain role in it. Accord-

³⁸ Paul Laband was an excellent expert on Roman law and private law of his age. His name is connected e.g. with the separation of *Vollmacht* as an abstract fiction from mandate in the contractual representation. See P. LABAND, *Die Stellvertretung bei dem Abschluss von Rechtsgeschäften nach dem Allgemeinen Deutschen Handelsgesetzbuche*, in *Zeitschrift für das gesamte Handelsrecht* 10 (1866). See also, G. HAMZA, *Az ügyleti képviselőlet* ("Contractual Agency") (Budapest, 1997²), 18-20.

³⁹ Georg Jellinek's work, *Allgemeine Staatslehre*, was published twice during his life and several times after his death in unchanged editions.

⁴⁰ For Jellinek's concept on state, see: R. HOLUBEK, *Allgemeine Staatslehre als empirische Wissenschaft. Eine Untersuchung am Beispiel von Georg Jellinek* (Bonn, 1961); I. STAFF, *Lehren vom Staat* (Baden-Baden, 1981), 291-306; M. STOLLEIS, *Geschichte des öffentlichen Rechts in Deutschland. Zweiter Band. Staatsrechtslehre und Verwaltungswissenschaft, 1800-1914* (Munich, 1992), 450-455. and J. KERSTEN, *Georg Jellinek und die klassische Staatslehre* (Tübingen, 2000).

ing to the widespread view in the German public law dogma the essence of *Rechtsstaat* is closely related to self-restraint of the state.

One of the notable adherents of the 19th century Pandectist School, Ludwig Enneccerus (1843-1928) in his work *Lehrbuch des Bürgerlichen Rechts*, published in two editions⁴¹, refers to the relative character of the distinction between private and public law. Enneccerus, who taught Roman law in Göttingen and Marburg, presented the first two volumes of the second draft (*Zweiter Entwurf*) of the German Civil Code (*Bürgerliches Gesetzbuch*) in the German National Assembly. His accomplishments are outstanding also from the aspect of civil law codification in Germany. His view on the classification of the legal system deserves particular attention for this reason as well.

In the 20th century Hans Carl Nipperdey (1895-1968), a disciple of Lehmann and Hedemann, also emphasised the relative nature of the separation of public and private law⁴². Nipperdey, who elaborated the doctrine of the *Drittwirkung der Grundrechte* i.e. the doctrine of the influence of the Constitution (*Grundgesetz*) of the Federal Republic of Germany on the implementation of private law related rules, pointed to the relative character of such separation in his famous work: *Grundrechte und Privatrecht*, which was published in 1961.

According to Levin Goldschmidt (1829-1897), professor at Heidelberg, then Berlin, at least 17 theories are known to exist in relation to the separation between private and public law. In the opinion of Goldschmidt, who is regarded as the founder of the science of commercial law in the modern sense, the great number of frequently diametrically different theories *per se* point to the fact that separation of the two branches of law is extremely problematic.

Professor Erwin Riezler (1873-1953), in his study *Oblitération des*

⁴¹ *Lehrbuch des Bürgerlichen Rechts* was published first in 1900. The second edition, on which Enneccerus worked for three years, was published in two parts (*Abteilung*). The first part, published in 1928, in the year of the author's death, deals with the Introduction and General Part (*Einleitung, Allgemeiner Teil*) of BGB, the second part published in 1927, a year earlier, deals with Contract Law Part (*Recht der Schuldverhältnisse*) of BGB. None of the editions of *Lehrbuch des Bürgerlichen Rechts* embrace the entire civil law or the complete material of BGB because the introduction of property law, matrimonial law and the law of inheritance is missing.

⁴² For the oeuvre of Nipperdey in jurisprudence and for its significance, see: TH. MAYER-MALY, *Gedenkrede auf H. C. Nipperdey* (Krefeld, 1970); H. STUMPF, Hans, *Carl Nipperdey*, in, *Juristen im Portrait. Festschrift zum 225 jährigen Jubiläum des Verlages C. H. Beck* (Munich, 1988), 608 ff. and K. ADOMEIT, Hans, *Carl Nipperdey als Anreger für eine Neubegründung des juristischen Denkens*, in *JuristenZeitung* 61 (2006), 745-751.

*frontières entre le droit privé et le droit public*⁴³, published in 1938, analyses the question of the separation of private and public law in 20th century legal systems. He points out that in Germany after the National Socialists seized power⁴⁴, the politically influenced public law became prevailing. In his view the emphasis and particularly the exaggerated emphasis of the difference between the two branches of law in the past was inappropriate for both historical and legal doctrine related reasons. He considers, however, that the dominant theory making no difference between public and private law at all in English jurisprudence as anachronistic. Public law –he points out– must not be subordinated either to political or ideological considerations. This means that considerations of contemporary politics are not allowed to make an end to the unity of the legal system.

Léon Duguit (1859-1928), who is author, among other works, of the five-volume *Traité de droit constitutionnel*, is of the opinion that public law (*droit public*) cannot be treated as “perfect” law in other terms as area of law or branch of law. Therefore the correctness of the division (dichotomy) between public and private law is highly disputable. According to Duguit –who follows the Greek-Roman model– distinction between public and private law is having only classifying character.

Other French authors also highlight the relative nature of the difference between public and private law for which the reason should be found in the different historical traditions and the special characteristics of the development of law. Raymond Guillien, a professor of the University of Lyon, finds it necessary to emphasise that no “demarcation line” can be found between *droit public* and *droit privé*. Consequently, the elimination of the difference between the two branches of law –at least in the second half of the 20th century– cannot be expected⁴⁵.

It is worth mentioning from the point of view of the relationship

⁴³ E. RIEZLER, *Oblitération des frontières entre le droit privé et le droit public*, in *Recueil d'études en l'honneur d'E. Lambert*. Cinquième Partie - *Le droit comparé comme science sociale*, (Paris, 1938), 117-136.

⁴⁴ For the political and public law changes following the era of the National Socialist takeover (*Machtergreifung*), see: G. HAMZA, *Die Idee des „Dritten Reichs“ im deutschen philosophischen und politischen Denken des 20. Jahrhunderts*, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, ger. Abt.* 118 (2001), 321-336.

⁴⁵ As the French legal scholar puts it, *La distinction du droit public et du droit privé n'est donc pas sûrement en voie de véritable disparition. Si elle ne comporte aucune ligne de démarcation, elle correspond à des élans juridiques bien distincts qui sont en lutte permanente (sic! G. H.). Elle nous vient d'un immense héritage historique et juridique*” R. GUILLIEN, *Droit public et droit privé*, in *Mélanges offerts à J. Brethe de la Gressaye* (Bordeaux, 1967), 323.

between private and public law in the field of legislation the section 6 of the Swiss Civil Code under which federal private law does not limit the competence of the cantons in the area of public law. (“1. Die Kantone werden in ihren öffentlich-rechtlichen Befugnissen durch das Bundeszivilrecht nicht beschränkt. 2. Sie können in den Schranken ihrer Hoheit den Verkehr mit gewissen Arten von Sachen beschränken oder untersagen oder die Rechtsgeschäfte über solche Sachen als ungültig bezeichnen”) It would be inappropriate, however, to overemphasise the separation between private and public law solely on the basis of the section quoted above. This legislative provision is in relation exclusively with the competence of the cantons and the federal (central) state due to the federal (confederal) structure of the Switzerland.

The doctrinal problems of separating public and private law can be clearly seen in the French dominant doctrine under which the law of civil procedure (*droit de procédure civile*) in France is a part of private law (*droit privé*). On the other hand the prevailing doctrine in Italy classifies the law of civil procedure (*diritto di procedura civile*) as a part of public law (*diritto pubblico*).

There is no doubt that the *summa divisio* between public and private law, the logical and dogmatic basis of which is more than doubtful, is not implemented uniformly in judicial practice in some countries of the European continent. As an example we can refer to the variety in the field of implementation of law in the practice of high courts in France. In this regard, in particular, it deserves mentioning that while the application of law by the *Cour de Cassation* is primarily based on private law, the implementation of law by the *Conseil d'Etat* is mainly based on public law.

IX. CLASSIFICATION OF THE LEGAL SYSTEM AND LEGAL EDUCATION AT FACULTIES OF LAW IN THE MIDDLE AGES AND IN MODERN TIMES

We have to mention that the division of the legal system into branches of law played no role in the teaching of law either in the Middle Ages or in Modern Times. It is important to emphasise that the University of Halle (*Alma mater Halensis*), founded on 12th July, 1694 by Frederick III Elector of Brandenburg, who became Emperor of Prussia (*König in Preussen*) in 1701 as Frederick I, was considered to be the most modern and prestigious German university at the time.

The University of Halle had such notable professors as Christian Thomasius (1655-1728), Christian Wolff (1679-1754) and Johann Gottlieb Heineccius (1681-1741). All of them are outstanding representatives of the School of Natural Law and early German Enlightenment. Christian

Thomasius –who in 1690 was forced to leave the University of Leipzig (which had been founded in 1409)– was considered as the “spiritual father” of the University of Halle. It is primarily the merit of Thomasius that all faculties of the *kurbrandenburgische Landesuniversität* –the university was namely founded by Frederick III, Prince-elector (*Kurfürst*) of Brandenburg– became institutions in which reform ideas were prevailing. Moreover we have to mention that Thomasius received a mandate in 1713 from the Frederick I, king in Prussia, to start and complete the work of codification of law in the kingdom.

In spite of the fact that the University of Halle enjoyed outstanding reputation throughout Europe and was considered to be an exemplary reform university (*Reformuniversität*), that quality did not mean any change in legal education. The four professors at the Faculty of Law of the University exposed the legal system in a traditional scheme developed throughout the centuries. This scheme was characterised by the fact that law was taught following its sources (*fontes juris*) and not along the lines of its “branches”⁴⁶. This scheme was clearly reflected in the structure of chairs (*cathedrae*) of the law school. In the year of the foundation of the university the following professorships were set up: *Decretalis*, *Codex*, *Pandectae* and *Institutiones*. In this regard we could refer to Erich Genzmer, the notable legal historian, who emphasised the importance of the structure of faculties of law in European universities in his work entitled *Das römische Recht als Mitgestalter gemeineuropäischer Kultur*⁴⁷.

X. THE QUESTION OF CLASSIFICATION OF THE LEGAL SYSTEM IN LEGAL THEORY AND IN INTERNATIONAL LAW

It has to be stressed that jurists (*jurisperiti* or *jurisconsulti*) of ancient Rome and of the Middle Ages had their own particular approach to law which was different from the view of Hans Kelsen⁴⁸. One of the most important characteristics of Kelsen’s concept regarding law is that there is a close relationship between law (*jus*) and the state (*res publica*). Consequently, law and state are essentially inseparable categories from each other

⁴⁶ For the legal education method prevailing at the age of the Glossators, see: P. WEIMAR, *Die legistische Literatur und die Methode des Rechtsunterrichts der Glossatorenzeit*, in, *Jus Commune* 2 (1969), 47 ff.

⁴⁷ E. GENZMER, *Das römische Recht als Mitgestalter gemeineuropäischer Kultur*, in *Gegenwartsprobleme des internationalen Rechts und der Rechtsphilosophie. Festschrift für R. Laun zu seinem 70. Geburtstag* (Hamburg, 1953), 516 ff.

⁴⁸ See H. KELSEN, *Allgemeine Staatslehre* (Berlin, 1925). For Kelsen’s concept of state and law from recent literature, see H. DREIER, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (Baden-Baden, 1999²).

and cannot be analysed separately. However, it is proper to say that the validity of the general rules of law does not directly depend on the decisions of the state (*res publica*). For the Romans the following things belonged to the area of law: the customs of a legal community, resolutions passed by popular assemblies (*comitia*), legal acts issued by monarchs (kings and emperors), so-called *jus positivum*, and the legal principles (maxims) and ideas elaborated in the works of jurists, chiefly in their *responsa*. The latter, however, unlike the sources of law having the legal force by virtue of legislation, took effect *imperio rationis* rather than *ratione imperii*.

Anton Friedrich Justus Thibaut (1772-1840)⁴⁹ pointed out the aimlessness of the differentiation between public and private law in his essay *Über unnötige Unterscheidungen und Eintheilungen*⁵⁰, published in 1798. The famous German legal scholar of Heidelberg did not deal with the question of separating public law (*öffentliches Recht*) and private law (*Privatrecht*) from each other even in his *System des Pandekten-Rechts*⁵¹, published first in Jena in 1803. Thibaut's concept deserves special attention also because he dealt with theoretical questions of law several times in his works⁵².

Fritz Schulz (1879-1957)⁵³ states in his work *Prinzipien des römischen*

⁴⁹ For the significance of Thibaut within German and European legal science, see H. DORN, *Die Rechtslehre von Anton Friedrich Justus Thibaut* (Diss. Tübingen, 1958); H. KIEFNER, *Geschichte und Philosophie bei A.F.J. Thibaut* (Diss. Munich, 1959); H.-U. STÜHLER, *Die Diskussion um die Erneuerung der Rechtswissenschaft von 1780-1815* (Berlin, 1978), 177-196; D. TRIPP, *Der Einfluß des naturwissenschaftlichen, philosophischen und historischen Positivismus auf die deutsche Rechtslehre im 19 Jahrhundert* (Munich, 1983), 168-201; A. KITZLER, *Die Auslegungslehre des Anton Friedrich Justus Thibaut* (Frankfurt am Main, 1986); R. OGOREK, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert* (Frankfurt am Main, 1986), 126-144; J. RÜCKERT, *Heidelberg um 1804 oder die erfolgreiche Modernisierung der Jurisprudenz durch Thibaut, Savigny, Heise, Martin, Zachariä*, in *Heidelberg im säkularen Umbruch* (Hrsg. von F. Strack, Heidelberg, 1987), 83-116; H. HATTENHAUER, *Anton Friedrich Justus Thibaut und die Reinheit der Jurisprudenz*, in *Heidelberger Jahrbücher* 34 (1990), 20-35.

⁵⁰ A. F. J. THIBAUT, *Über unnötige Unterscheidungen und Eintheilungen*, in *Versuche über einzelne Teile der Theorie des Rechts* (Jena, 1798), I, 79 ff. The two-volume *Versuche über einzelne Teile der Theorie des Rechts* (the second volume of which was first published in 1801) came out in second edition in 1817.

⁵¹ *System des Pandekten-Rechts* served as a basis of teaching Roman law or *heutiges römisches Recht* at several German universities through decades. Its last, eighth edition was published in 1834.

⁵² His most significant works on the questions of legal theory, apart from the above-mentioned *Versuche über einzelne Teile der Theorie des Rechts* are *Juristische Encyclopädie und Methodologie* published in 1797 and *Theorie der logischen Auslegung des Römischen Rechts* first published in 1799 (second edition published in 1806).

⁵³ For the scholarly oeuvre of Fritz Schulz, see W. FLUME, *Fritz Schulz (1879-1957)*,

*Rechts*⁵⁴, published in 1934, that a kind of “imperialistic sense of mission” (*Sendungsbewusstsein*) was typical of the Romans. He based his view on the works of Cicero (first of all the theories expounded in dialogues *De oratore* and *De re publica*). Cicero emphasised that Rome, unlike other states in Antiquity, established both a legal system and a global empire. Schulz, who was professor of Roman law and civil law at the University of Innsbruck, Kiel, Göttingen, Bonn, Berlin and then, after his emigration in 1939, in Oxford, did not deal in his above-mentioned work with the division of Roman legal system (*ordo juris*). The way he saw it, the Roman legal system remained in essence unchanged throughout the various periods of the development of the Roman state⁵⁵.

In the context of international (public) law we refer to the fact that according to the above-mentioned Sir Henry Sumner Maine, international law equals “private law writ large”. In his view the terminology of international law is historically based on private law related notions. That is why the renowned English legal scholar approaches several institutions of international law from the aspect of private law related institutions. Maine writes in his work *Ancient Law, its Connection with the Early History of Society and its Relation to Modern Ideas* as follows: “[...] there are entire departments of international jurisprudence which consist of the Roman law of Property”. Hence it follows that the doctrine of international law is in close connection with the Roman law of property, which is a basic institution of the Roman legal system⁵⁶. In Maine’s opinion, the separation of public law from private law is not practical in relation to international (public) law either⁵⁷.

in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* rom. Abt. 75 (1958), 496-507. and M. BRETONI, *Postulati e aporie nella ‘History di Schulz’*, in *Festschrift für F. Wieacker zum 70. Geburtstag* (Göttingen, 1978), 37-49.

⁵⁴ This work of Fritz Schulz was published in English, Spanish and Italian translations.

⁵⁵ Fritz Schulz in his work *History of Roman Legal Science* published in 1946, also published in German in 1961 entitled *Geschichte der römischen Rechtswissenschaft*, took no notice of the problem of classification of Roman law. The same is true for his work *Classical Roman Law*, published in 1951.

⁵⁶ For the significance of Roman law in the scholarly oeuvre of Maine, see: G. HAMZA, *Jogösszehasonlítás és az antik jogrendszer* (“Comparative Law and Legal Systems of Antiquity”) (Budapest, 1998), 48 ff. Regarding Maine’s view on comparative law, see: G. HAMZA, *Sir Henry Sumner Maine et le droit comparé*, in *Orbis Iuris Romani* 10 (2005), 7-21.

⁵⁷ Maine was not only a theoretician of law; he had close connection with politics and *jus in praxi* as well. Maine’s contact with legal practice is analysed in detail by G. FEAVER, *From Status to Contract. A Biography of Sir Henry Maine 1822-1888* (London, 1969), and R. C. J. COCKS, *Sir Henry Maine. A Study in Victorian Jurisprudence*. Cambridge-New (York, 1988), 39-51.

Hersch Lauterpacht (1897-1960), in his famous work *Private Law Sources and Analogies of International Law*, published in 1927, emphasises the paramount role of private law and private law based analogies in international (public) law in the field of international arbitration. According to Kelsen's famous disciple, private law and private law analogies form sources of international (public) law. Hersch Lauterpacht, who was a disciple of Lord Arnold Duncan McNair in England, was a committed opponent of legal positivism⁵⁸. For him justice (*iustitia*) and equity (*aequitas*) constitute to a great extent the pillars of the enforcement of law⁵⁹. This concept of Lauterpacht, which is rooted in an ideal perception of law, explains his emphasis on the outstanding role of private law among the sources of international (public) law. Stressing the dominant role of private law therefore makes the distinction between public law—in this case international (public) law—and private law relative. In the 20th century and also in the first decade of 21st century, the problem of the classification of the legal system, often for political reasons, is connected to the question of public law attaining private law features, on the one hand, and private law attaining public law features, on the other⁶⁰.

⁵⁸ Hersch Lauterpacht explains his views on functions of international (public) law in *The Function of Law in the International Community* (Oxford, 1933).

⁵⁹ For the role of equity (*aequitas*, *equity*, *Billigkeit*, etc.) in the development of the legal system, see: V. MICELI, *Sul principio di equità*, in *Studi in onore di V. Scialoja* (Milano, 1905), II, 84 ff.; F. PRINGSHEIM, *Jus aequum und jus strictum*, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, rom. Abt.* 42 (1921); M. RÜMELIN, *Die Billigkeit im Recht* (Tübingen, 1921); E. OSILIA, *L'equità nel diritto privato* (Rome, 1923); C. TOBEÑAS, *La Equidad y sus tipos históricos en la cultura occidental europea* (Madrid, 1950); H. MAZEAUD, *La notion de 'droit', de 'justice' et d'equité*, in *Aequitas und bona fides. Festgabe zum 70. Geburtstag von A. Simonius* (Basel, 1955), 229-233; G. ALPA, *Modern Equity (spunti sul nuovo significato di equity nella evoluzione attuale del Common law)*, in *L'Equità, Atti del VII Convegno di Studio organizzato dal Centro Nazionale di Prevenzione e Difesa Sociale* (Milano, 1975), 263 ff.; M. ROTONDI, *Considerazioni sulla funzione dell'equità in un sistema di diritto positivo scritto*, in *Rivista Internazionale di Filosofia del Diritto* (1977), 666 ff.; V. PIANO MORTARI, *Aequitas e jus nell'umanesimo giuridico francese*, in *Atti della Accademia Nazionale dei Lincei, Anno CCCXCIV-1997, Classe di Scienze Morali Storiche e Filologiche, Memoria, Serie IX, volume IX, fasc. 2* (Rome, 1997), 143-279.

⁶⁰ From earlier literature, see H. HUBER, *Recht, Staat und Gesellschaft* (Bern, 1954), 32 ff. More recently, Jean Carbonnier is justified writing about the growing role of ideology, which is a fact to be taken into account from the aspect of the division of the legal system. See J. CARBONNIER, *Droit et passion du droit sous la V^e République* (Paris, 1996), 121 ff.

XI. CONCLUSIONS

We can draw the general conclusion that it would be inappropriate to identify the Roman term of *jus publicum* with the notion of public law in modern legal systems. The same is holding true for the Roman term of *jus privatum* which is by no means identical with the notion of private law in modern legal systems. The explanation for this difference is primarily to be found in the fact that these two “branches of law” in ancient Rome were in relation to specific economic, social and legal circumstances. In addition to that we have to mention that in contemporary legal systems the state may be, with almost no limitation, party in a private law relationship having no hiererchical nature.

For instance, if damage is caused by state agencies, the aggrieved party may sue the state treasury [*ffiscus*]). In contrast to that in ancient Rome *jus privatum* based on the equal status of both parties of the legal dispute did not exist in general. This particular phenomenon was due to the fact that Roman citizens (*cives Romani*) were subordinated to the state (*res publica*) due to the basically hierarchical relationship between state and citizen⁶¹.

Another example can be Roman “criminal law” (though no such branch of law was known to Romans). One of its areas, the so-called public offences (*crimina* or *delicta publica*) belonged to *jus publicum*, whereas the other sphere of Roman “criminal law”, the so-called private offences (*delicta privata*) belonged to *jus privatum*. Broad consensus has it that modern criminal law is part of public law governed by as public law related principles.

Furthermore in Roman law the rules of civil procedure –mainly in family and property affairs– form part of *jus privatum*. In modern legal systems, however, civil procedure belongs to public law (*öffentliches Recht*, public law, *droit public*, *diritto pubblico*, *derecho público*, *direito público* etc.) as interpreted broadly –except for the doctrine that is prevalent in France⁶².

The above analysis makes clear that the idea of division of public and private law in the modern sense was alien to Roman jurisprudence. In medieval jurisprudence the Glossators –Azo in particular– pointed out the disadvantages of the division of the legal system (*ordo juris* or *systema juris*).

⁶¹ For the specialization of Roman law based private law (*jus privatum*), see e.g. the study of Robert Feenstra. R. FEENSTRA, *Dominium and jus in re aliena, the origins of a civil law distinction*, in *New Perspectives in the Roman Law of Property. Essays for B. Nicholas* (Ed. by P. Birks) (Oxford, 1989), 111-112.

⁶² In their textbooks the French civil law specialists e.g. Jean Carbonnier (1909-2003), Phillippe Malaurie and François Terré handle the law on civil procedure (*droit de procédure civile*) as part of private law (*droit civil*).

They claimed that “breaking down” the uniform legal system according to artificial criteria might detrimentally influence the interpretation of legal rules, their enforcement, and even the development of law in general. The classification of the legal system, into “branches of law” might evoke the danger of undermining the unity of the legal system. The Commentators, namely Bartolus, Baldus and Luca da Penne⁶³, paid particular attention to the problems arising from the division of the legal system. Analysing various institutions of *jus publicum* in their writings (*tractatus*) they did not consider public law as an autonomous branch of law. An important role in their approach may have played the fact that they explained and interpreted concepts and institutions of *jus publicum* by using the terminology of *jus privatum*.

That approach of Glossators characterises European jurisprudence both in the Middle Ages and in Modern Times⁶⁴. This statement is true in our view despite the fact that in common law jurisdiction(s) in recent decades, the opinion is gaining ground that the separation of public law from private law may be advantageous to the development of law⁶⁵.

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⁶³ We refer here to the fact that the commentary written by Luca da Penne to the *Tres libri* was published in France only in 1509 in which the author uses the historical-philological method contrary to the traditional dialectic-scholastic one.

⁶⁴ With regard to recent view about the distinction between private law and public law in German literature see the paper of Walter Leisner. W. LEISNER, *Unterscheidung zwischen privatem und öffentlichem Recht*, in *JuristenZeitung* 61 (2006), 869-875.

⁶⁵ In our view it is a mistake to present public law without finding time to speak also of Roman public and private law. Such an error occurs, for instance, in the work of HERMANN Conrad, *Deutsche Rechtsgeschichte* (Karlsruhe, 1962-1966²), I-II, which is still occasionally quoted. In that book Conrad introduces the development of German public law without regard to its antecedents in Roman law and the relativity of the separation between public and private law.

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