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The Classification (*divisio*) into 'Branches' of Modern Legal Systems (Orders) and Roman Law Traditions

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The author emphasizes the contemporary significance of Roman law traditions. He points out that the idea of classification (*divisio*) of the Roman legal system originated in ancient Greek philosophical thinking. He also emphasizes that the classification or partition (*divisio*) of *ius civile* is in no way related to the present-day classification of the legal order (system) into various 'branches' of law, particularly in civil law jurisdictions. Referring to a number of examples, the author shows that Roman law did not recognize a separation between public and private law as it is recognized today in many jurisdictions. He points out, in compliance with the thoughts of Azo, the 'danger' of this separation. The division is hardly able to provide any contribution to an adequate interpretation and development of law, since it evokes the 'danger' i.e. the negative consequences, of the disintegration of the legal system.

A. The Classification of Roman law – Public Law (*ius publicum*) and Private Law (*ius privatum*) – in the Classical Period

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 *ius publicum* and *ius privatum* rather than civil law and praetorian law. The designation *publicus-privatus* (meaning public and private [spheres]) existed as early as the late republican period. The appearance of *ius publicum* and *ius privatum* as categories of classification can only be demonstrated with certainty at the beginning of the era of the principate.

The jurisconsult Ulpianus says the area governed by *ius publicum* is as follows: "Public law covers religious affairs, the priesthood, and offices of state."(*"Publicum ius 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 (*ius 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 (*ius privatum*).

Late classical and post-classical jurisprudence separated *ius publicum* from *ius privatum* with the introduction of the terms "public interest" (*utilitas publica*) and "private interest" (*utilitas privata*). This has been derived from a statement by Ulpianus:

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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 ius 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 literature[2] says these two "branches of law" existed throughout the whole era of the principate and of the dominate. However, some legal scholars state that the Roman jurists only used the terms *ius publicum – ius privatum* to describe the two areas of legal science or jurisprudence (*jurisprudentia*). According to the latter point of view, we cannot speak about the division of Roman law into two branches. Note that even in the above passage of Ulpianus the term *studium* and not *ius* 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." ("*Ius publicum privatorum pactis mutari non potest*" [D. 2, 14, 38]). Hence it follows that a rule of law may either be compulsory (*ius cogens*) or concessive (*ius 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 a 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 *ius privatum* may not be changed similarly to those of *ius publicum*. On the topic of adverse possession (*usucapio*) one passage in the *Digest*, authored by jurisconsult Paulus, provides an *Edictum* commentary making a reference to Pomponius. ("*Quod opere facto consecutus sit dominii 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 *ius 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 ius publicum permittit*" [D. 26, 1, 8]). In the area of making a testament, the prohibition of free stipulations of private persons shall

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[1] Regarding the interpretation of the text of Ulpianus, *see* A. Földi & G. Hamza, A római jog története és institúciói. [History and Institutes of Roman Law] (2006), at 51.

[2] For a summary of earlier works, *see* E. Betti, Diritto romano. I. (1935), at 62 *et seq.*

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also apply. Papinianus iustifies the prohibition related to the *testamenti factio* by saying that in this domain *ius 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 nature, it is rather 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 still in our days.[3]

Although it is merely a description (*descriptio*) and not a definition (*definitio*), nevertheless it is adequate for the realities of the Roman legal system. A good example from substantive law is 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 the fact 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 (*ius publicum*) and private law (*ius 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 *ius naturale*, *ius gentium*, or *ius civile*." ("*Privatum ius tripertitum 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 about the division of private law (*ius 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 (*ius privatum*).

The following interpretation of *ius civile* originating from Pomponius is important also from the view of the subdivision of the legal system. According to Pomponius, *ius 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 *ius civile* as put forward by Pomponius there is some kind of similarity to the distinction between positive law (*ius positivum*) and statute law (statutory law) conceived in modern legal systems. The interpretation by Pomponius of *ius civile* does not contain any idea of subdivision. In our view this is attributable also to the fact that the term *ius civile* can be interpreted in a number of ways, i.e. it can be the subject of a kind of *interpretatio multiplex*.

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

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Cicero's statement has also great significance from the point of view of the division of *ius civile*. In Cicero's opinion "*... ius 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 does *genus* mean to him? In our view, the outstanding orator, philosopher and statesman, who had profound knowledge of law as well, used the terminology of Greek logic, metaphysics, geometry and grammar when he made an attempt to interpret *ius civile* and to describe the law applicable to Roman citizens.[4] Again what we have here is by no means an attempt to classify *ius civile*. It is simply a description (*descriptio*).[5]

B. Civil Law (*ius civile*) and Praetorian Law (*ius praetorium-ius honorarium*) in the Post-Classical Period

The distinction between civil law (*ius civile*) and praetorian law (*ius praetorium*) – the original division between archaic and 'developed' law – had practically disappeared by the end of the first century B.C. Yet the classical jurisconsults 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 (*ius 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 *ius 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" (*ius honorarium*) is described by the jurisconsult Marcianus. As he put it: "For indeed the *ius honorarium* itself is the living voice of the *ius civile*." ("*Nam et ipsum ius honorarium viva vox est iuris civilis*" [D. 1, 1, 8]). For Marcianus *ius honorarium* is a kind of law that is created in the first place by office holders i.e. magistrates (*magistratus*), mainly by praetors.

Ius civile means the body of law as crystallized in the works of the Roman jurisconsults or, to use a modern term, jurisprudence as well. Law as 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 *ius civile*. *Ius civile* can be considered as a synonym for private law (*ius privatum*). The reason for it is that the major part of law as formed and interpreted by the Roman

[4] Cicero provides a detailed discussion about 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 article 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 *ius naturale*. *See* A. D'Amato, *Lon Fuller and Substantive Natural Law*, 26 American Journal of Jurisprudence 202 (1981).

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jurists is made up of civil law (*ius privatum*). *Ius civile* cannot be considered as a branch of law. In this context it is worth emphasising that *ius honorarium* and *ius 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 *ius civile* and *ius praetorium* (*ius honorarium*) is gradually replaced by the distinction between public law (*ius publicum*) and private law (*ius 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 *ius civile* and *ius praetorium* as well as in the division of *ius publicum* and *ius privatum*. The distinction made by distinguished 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 jurisconsults.

C. The Question of Classification of the Legal System in the Work of the Glossators

The question of classification of the legal system occurs already in the work of some representatives of the Glossator School, initiated by Irnerius[6] in the beginning of the medieval science of law.[7] In this context the famous dispute (*disputa*)[8] between the notable jurisconsult, Placentinus[9] (d. 1192), a follower of Bulgarus, and Azo Portius[10] (d. 1230) is of outstanding significance. According to Placentinus, who was the first to formulate the idea of the division (dichotomy)

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

[7] For the significance of the Glossator school, *see* H. Fitting, Die Anfänge der Rechtsschule zu Bologna (1888); E. Besta, L'opera d'Irnerio (1896); P.S. Leicht, Il diritto privato preirneriano (1933); P. Torelli, "*La codificazione e la glossa, questioni e propositi, in* Atti congresso Internazionale di diritto romano 329 *et seq.* (1934); B. Brugi, *Il metodo dei glossatori bolognesi*, *in* Studi in onore di S. Riccobono I. 21-31 (1936); W. Engelmann, Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre (1938); H. U. Kantorowicz, Studies in the Glossators of Roman Law (1938); F. Calasso, Medioevo del diritto I. Le fonti (1954); P. Vinogradoff, Roman Law in Medieval Europe 1961)[3]; P. Koschaker, Europa und das römische Recht (1966[4]); E. J. H. Schrage, Utrumque ius. Eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts (1992); J. M. Sainz-Ezquerra, *La glosa y el texto jurídico, un análisis de historia y método*, *in* Estudios F. Hernández-Tejero. II (1994), at 505; G. Hamza, *Accursius és az európai jogtudomány kezdetei*, [Accursius and the Beginnings of European Jurisprudence], 54 Jogtudományi Közlöny 171-175 (1999); M. Ascheri, I diritti del medioevo italiano, Secoli XI–XV (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*, 15 Studia Gratiana 89-101 (1972).

[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] (2002), at 56.

[10] The exceptional prestige of Azo can be illustrated by a late-medieval saying, *Chi non ha Azo, non vada a palazzo*.

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of the system of law (*ordo juris*) into branches: *ius publicum* and *ius privatum*, it 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 Azo,[11] who insisted on maintaining the unity of the legal system, refused the thesis of *diversitas rerum vel personarum* and considered the distinction between *ius publicum* and *ius privatum* to be merely an issue of methodology. In the opinion of Azo, the distinction between the above categories is of a relative nature, consequently, it is always necessary to add the word "*principaliter*" when distinguishing between them.[12]

The rejection on a theoretical level of the classification of the legal system by Roman jurisconsults[13] did not preclude 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 the *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 Bolognese School, called Glossators.[14] 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 *ius publicum* occurred at this particular state university, where the education – using a modern term – of state office holders was a priority. The commentary of Bonello da Barletta as a 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 as the most significant one dealing with the question of *ius proprium* in that era. *Liber constitutionum* deals with real legal questions of its time (*quaestiones de facto*) instead of simply describing *ius commune*. It also addressed the problem of the classification of law i.e., the legal system.

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[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, at 129 (1992).

[13] Pomponius wrote, "quod sine ullo scripto i*n sola prudentium interpretatione consistit*", D. 1, 2, 2, 12. *Interpretatio* in this case does not involve a clear distinction. That sheds light on the empirical phase of *ius 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*, 44 Acta Juridica Hungarica 301-321 (2004).

[14] We have to mention here that Irnerius in his glossae took into consideration the entire codification of Iustinian *(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.

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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 Accursius.[15] In this work the author used the method of Accursius in which the questions of the classification of law (legal system) also play a role.

D. The Question of Classification of the Legal System in the Work of the Commentators

From the point of view of the classification of the legal system, the oeuvre of Bartolus de Saxoferrato[16] (1313-1357) is outstanding. He wrote comments on all parts of Iustinian'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*, as well as the relationship between the sovereign (king or emperor) and their subjects.

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

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

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[15] For the career of Accursius, *see* E. Genzmer, *Zur Lebensgeschichte des Accursius*, *in* Festschrift für L. Wenger. II. 223-241 (1945), and F. Camacho, *A propósito del VII centenario de la muerte de Acursio*, 3 Anales Cátedra Francisco Suárez 131 (1963). *See also* A. Garcia Y Garcia, *Accurse et Jacques Balduin*, 29 Studia Gratiani 795-814 (1988) and A. Fernandez De Bujan, *Sistemática y ius civile en las obras de Quintus Mucius Scaevola y de Acursio*, 34 Revista Jurídica de Navarra 57-80 (2002).

[16] For Bartolus from earlier literature, *see* W. Rattingan, *Bartolus, in* Sir J. Macdonell and E. Manson (Eds.), Great Jurists of the World. (1914; reprint 1997), at 45-57. From recent literature, *see* Bartolo da Sassoferrato, Studi e documenti per il VI centenario. I-II (1962).

[17] For the significance of the Commentators, *see* M. Smith, The Development of European Law (1928); W. Kunkel, *Das römische Recht am Vorabend der Rezeption*, *in* L'Europa e il Diritto Romano. Studi in memoria di P. Koschaker I. 1-20 (1954); G. Ermini, Corso di diritto comune (1989[3]); M. Bellomo, L'Europa del diritto commune (1994[7]); A. Padoa-Schioppa, Il diritto nella storia d'Europa. Il medioevo (1995); P. Grossi, L'ordine giuridico medievale (1996[2]).

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E. 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 jurisprudence.[18] In the 16th and 17th centuries we come across the principle of *ius universum* in the work of most of these 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 Iustinian'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 school 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 Daren (Duarenus) (1509-1559), Jean de Coras (Corasius) (1515-1572),[21] François

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[18] For the Humanist School, *see* H. D. Hazeltine, The Renaissance and the Laws of Europe (1926); G. Kisch, Humanismus und Jurisprudenz (1955); D. Maffei, Gil inizi dell'umanesimo giuridico (1956); G. Kisch, Erasmus und die Jurisprudenz seiner Zeit (1960); H. E. Troje, Humanistische Jurisprudenz. Studien zur europäischen Rechtswissenschaft unter dem Einfluß des Humanismus (1993); H. Hübner, *Jurisprudenz als Wissenschaft im Zeitalter des Humanismus*, *in* Festschrift für K. Larenz zum 70. Geburtstag 41 *et seq.* (1973); P. Thomas, *A Theoretical Foundation for Juridical Humanism*, 16 Zeitschrift für Neuere Rechtsgeschichte 2-10 (1994).

[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*, 58 Journal of the History of Ideas 21-40 (1997).

[20] For the significance of the oeuvre of François Le Douaren or Franciscus Duarenus, *see* E. Jobbé-Duval, *François Le Douaren (Duarenus), 1509-1559*, *in* Mélanges P. F. Girard I. 573-621 (1912 (reprinted 1979)) and W. Vogt, Franciscus Duarenus, 1509-1559, sein didaktisches Reformprogramm und seine Bedeutung für die Entwicklung der Zivilrechtsdogmatik (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*.

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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) describe the legal system (*ius civile*) as arranged in a certain system. The purpose of the two legal scholars is a systematic description of the whole *Corpus Juris Civilis*. Apart from this systematisation, 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, more than ten years after it had been written and based on the system of Iustinian'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 (*ius naturale* or *ius naturae*), Grotius offers an analysis of international law (*ius 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 law.[25] That classification anticipates the modern division of legal systems.

In his work of basic significance, entitled *Les loix* (*lois*) *civiles dans leur ordre naturel, le droit public et le legum delectus*, Jean Domat (1625-1696) 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.

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[22] For the scholarly oeuvre of François Baudouin, *see* M. Turchetti, Concordanza o tolleranza. François Baudouin e i "moyenneur" (1984) and H.E. Troje, *"Peccatum Triboniani". Zur Dialektik der "interpretatio duplex" bei François Baudouin*, 36 Studia et Documenta Historiae et Juris 341-358 (1970).

[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 439-452 (1993).

[24] For the connection between Loys Le Caron and French law *(ius patrium*)*, see* G. Leyte, *Charondas et le droit français*, 39 DROITS 17-33 (2004).

[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*, 45 Netherlands International Law Review 186 (1998).

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F. The Classification of the Legal System by 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 English and other common law authors, 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.

The 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 up until now.

G. The Question of Classification of the Legal System in Common Law Jurisprudence

The renowned work of the first English institutional writer, Sir Henry Finch (1558-1625), *Nomotechnia,* published in England in 1613 (in French), has been largely used and it describes the whole legal system without any distinction between private and public law.[26] In the first part of *Nomotechnia*, Finch deals with jurisprudence pointing out the difference between natural law and positive law (*ius 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 published in an abridged English version under the title *Law, or a Discourse thereof in Four Books* in 1627, i.e. two years after his death. *Nomotechnia* is a thorough exposition of English common law and has been the basic source of learning of English law until it had been superseded by the works of William Blackstone and John Austin.

John Cowell (1554-1611), professor of civil law at Cambridge University, who described English law in his *Institutiones juris Anglicani ad methodum et seriem Institutionum imperialium compositae et digestae,* published in 1605,

[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 341 *et seq.* (1982).

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within the system exposed in the *Institutiones* of Iustinianus, made an attempt to construct a "bridge" between civil law and common law. Cowell makes no distinction between public law (*ius publicum*) and private law (*ius 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 Iustinian'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 used a considerable amount 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 of the historical development and formation of English legal system. The author of the *Commentaries* describes 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 law.[28]

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 1861.[29] 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 of 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 orhers – the

[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 (1828[2]) and G. Jones, The Sovereignty of the Law (1973). Clitherow's work provides a good overview on the sources of Blackstone's principal work.

[28] In a shorter piece, 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.

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

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Twelve Tables are examples. Maine does not deem necessary to make a distinction between various parts (branches) of law, i.e. to make 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 the English constitutional system.[31]

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 law.[32] 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 from appreciating the significance of public law, which is based on hierarchical relationships. In his view the separation of private and public law has merely a 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 century.[33] In his view the dividing of the legal system into subcategories is unnecessary and even dangerous.[34]

Born in England, Sir John Salmond (1862-1924) moved to New Zealand at an early age. He was professor at the University of Adelaide and later 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 law.[35] In both of his works, similarly to the English authors mentioned above, he does not accept

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30 F. W. Maitland, Constitutional History of England 538 (1908).

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 which was first published in 1895. For the scholarly activity of Maitland, *see* H. A. L. Fisher, Frederic William Maitland (1910); T. F. T. Plucknett, *Maitland's View of Law and History*, 67 The Law Quarterly Review 179-194 (1951) and H. E. Bell, Maitland (1965).

32 Other significant works of Sir Thomas Erskine Holland are: Essay on Composition Deeds (1864) and Essays of the Form of the Law (1870). He was the editor of Justinianus' 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 Fecialis* by Zouche in 1911 and *De bello* by Legnano in 1917.

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

34 For the oeuvre of Albert Venn Dicey, *see* R. A. Cosgrove, The Rule of Law, Albert Venn Dicey. Victorian Jurist (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). Besides 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.

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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.

H. The Question of Classification of the Legal System in Continental Jurisprudence

In his work *Pandectae Iustinianeae in novum ordinem redactae* (1748-1752) Robert-Joseph Pothier (1699-1772) describes the Pandects of Iustinianus in a 'new' rational and logical order (*novus ordo*), adapting them to the circumstances of his time.[36] The highly esteemed professor of French law at 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 Iustinianus. 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 Iustinianus. 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 exceptional *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 pupil of Georg Friedrich Puchta (1798-1846). Puchta was considered as the most outstanding adherent of the German Historical School (*Historische Rechtsschule*) after Savigny. Gerber considered the state as a legal person in analogy with private law. He did not separate private from public law

[36] For the oeuvre in jurisprudence of Robert-Joseph Pothier, *see* P. Berhardeau, Vies, portraits et parallèles des jurisconsultes Domat, Furgole et Pothier (1789); P. A. Fenet, Pothier analysé dans ses rapports avec le Code Civil (1826); L. H. Dunoyer, Blackstone et Pothier (1827); L. Thezard, De l'influence des travaux de Pothier et du chancelier d'Aguesseau sur le droit civil moderne (1866); A. Piret, La rencontre chez Pothier des conceptions romaine et féodale de la propriété foncière. Diss. 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*, was first published first 1848-1849, and later in 17 editions, partly after the author's death. It has outstanding significance in the field of private law. For the oeuvre of Gerber, *see* W. Wilhelm, Zur juristischen Methodenlehre im 19. Jahrhundert 88 (1958); P. von Oertzen, Die soziale Funktion des staatsrechtlichen Positivismus 163 (1974) and M.G. Losano, *Der Begriff 'System' bei Gerber*, *in* Objektivierung des Rechtsdenkens. Gedächtnisschrift für I. Tammelo 647-665 (1984).

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conceptually. His theory had great influence on outstanding representatives of German public law scholarship. In particular Paul Laband and partly Georg Jellinek were drawn to his ideas.

Paul Laband (1838-1918), professor at the University of Königsberg, and later 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 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 law.[38]

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 the relationship between law (*Recht*) or state (*Staat*) and ethics does not play any role. The emphasis of the significance of private law theoretically may result from an ethical approach to law.[40] 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 sozialethische 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 a hierarchical relationship pursuant to *auctoritas* of the state (*Staat* or *Gemeinwesen*). This authority (*auctoritas*) 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

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[38] Paul Laband was an excellent expert on Roman law and private law in his time. 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 Rechstgeschäften nach dem Allgemeinen Deutschen Handelsgesetzbuche*, 10 Zeitschrift für das gesammte Handelsrecht 184 *et seq.* (1866). *See also*, G. Hamza, Az ügyleti képviselet [Contractual Agency] 18-20 (1997[2]).

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

[40] For Jellinek's concept on state, *see* R. Holubek, Allgemeine Staatslehre als empirische Wissenschaft. Eine Untersuchung am Beispiel von Georg Jellinek (1961); I. Staff, Lehren vom Staat 291-306 (1981); M. Stolleis, Geschichte des öffentlichen Rechts in Deutschland. Zweiter Band. Staatsrechtslehre und Verwaltungswissenschaft, 1800-1914 (1992), at 450-455; and J. Kersten, Georg Jellinek und die klassische Staatslehre (2000).

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of the rule of law (*Rechtsstaat*) also played a certain role in it. According 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 editions,[41] 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 for civil law codification in Germany. His view on the classification of the legal system deserves particular attention as well.

In the 20th century Hans Carl Nipperdey (1895-1968), a student of Lehmann and Hedemann, also emphasised the relative nature of the separation of public and private law.[42] 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 opposed 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 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 power,[44] the politically

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[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 the year of the author's death in 1928, deals with the Introduction and General Part *(Einleitung. Allgemeiner Teil*) of BGB, the second part published a year earlier in 1927, deals with Contract Law Part *(Recht der Schuldverhältnisse*) of BGB. None of the editions of *Lehrbuch des Bürgerlichen Rechts* embraces 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 (1970); H. Stumpf, *Hans Carl Nipperdey*, *in* Juristen im Portrait. Festschrift zum 225 jährigen Jubiläum des Verlages C. H. Beck (1988), at 608 *et seq.* and K. Adomeit, *Hans Carl Nipperdey als Anreger für eine Neubegründung des juristischen Denkens*, 61 JuristenZeitung 745-751 (2006).

[43] E. Riezler, *Oblitération des frontières entre le droit privé et le droit public*, *in* Recueil d'Etudes en l'honneur d'E. Lambert. Cinquième Partie – Le droit comparé comme science sociale (1938), at 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*, 118 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanistische Abteilung) 321-336 (2001).

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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, which makes no difference between public and private law at all in English jurisprudence, is anachronistic. He point out that public law 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 words, as area of law or branch of law. Therefore the correctness of the division (dichotomy) between public and private law is highly disputed. According to Duguit, who follows the Greek-Roman model, a distinction between public and private law only has a classifying character.

Other French authors also highlight the relative nature of the difference between public and private law. The reason for this can 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 expected.[45]

From the point of view of the relationship between private and public law it is worth mentioning that in the field of legislation Section 6 of the Swiss Civil Code stipulates that 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 deals 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 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*).

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[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 323 (1967).

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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 uniformally in judicial practice in some countries of the European continent. As an example we can refer to the variety in the field of the implementation of law in the practice of the high courts in France. In this regard, in particular, it should be mentioned 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.

I. Classification of the Legal System and Legal Education at Faculties of Law in the Middle Ages and in Modern Times

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 12 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 was forced to leave the University of Leipzig (which had been founded in 1409) in 1690, 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 an outstanding reputation throughout Europe and was considered to be an exemplary reform university (*Reformuniversität*), it did not mean any change in legal education. The four professors at the Faculty of Law of the University explained 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,

[46] For the legal education method prevailing in the age of the Glossators, *see* P. Weimar, *Die legistische Literatur und die Methode des Rechtsunterrichts der Glossatorenzeit*, 2 Ius Commune 47 (1969).

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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]

J. 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 Kelsen.[48] One of the most important characteristics of Kelsen's concept regarding law is that there is a close relationship between law (*ius*) and the state (*res publica*). Consequently, law and state are essentially inseparable categories 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 issues 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 *ius positivum*, and the legal principles (maxims) and ideas elaborated in the works of jurisconsults, 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 Iustus Thibaut (1772-1840)[49] pointed out the aimlessness of the differentiation between public and private law in his essay *Über unnöthige Unterscheidungen und Eintheilungen*,[50] published in 1798. The famous German legal scholar of Heidelberg did not deal with the question of separating public

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[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 516 *et seq.* (1953).

[48] *See* H. Kelsen, Allgemeine Staatslehre (1925). For Kelsen's concept of state and law from recent literature, *see* H. Dreier, Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen (1999[2]).

[49] For the significance of Thibaut within German and European legal science, *see* H. Dorn, Die Rechtslehre von Anton Friedrich Iustus 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 (1978), at 177-196; D. Tripp, Der Einfluß des naturwissenschaftlichen, philosophischen und historischen Positivismus auf die deutsche Rechtslehre im 19 Jahrhundert (1983), at 168-201; A Kitzler, Die Auslegungslehre des Anton Friedrich Iustus Thibaut (1986); R. Ogorek, Richterkönig oder Subsumtionsautomat? Zur Iustiztheorie im 19. Jahrhundert (1986), at 126-144; J. Rückert, *Heidelberg um 1804 oder, die erfolgreiche Modernisierung der Jurisprudenz durch Thibaut, Savigny, Heise, Martin, Zachariä*, *in* Heidelberg im säkularen Umbruch 83-116 (1987); H. Hattenhauer, *Anton Friedrich Iustus Thibaut und die Reinheit der Jurisprudenz*, 34 Heidelberger Jahrbücher 20-35 (1990).

[50] A. F. J. Thibaut, *Über unnöthige Unterscheidungen und Eintheilungen*, *in* Versuche über einzelne Teile der Theorie des Rechts, Vol. I. (1798), at 79. 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.

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law (*öffentliches Recht*) and private law (*Privatrecht*), not even in his *System des Pandekten-Rechts*,[51] first published in Jena in 1803. Thibaut's concept deserves special attention also because he dealt with theoretical questions of law several times in his works.[52]

Fritz Schulz (1879-1957)[53] states in his work *Prinzipien des römischen 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 set out in the 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 later on, 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 state.[55]

In the context of international (public) law we refer to the above-mentioned Sir Henry Sumner Maine, who said that 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 view 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 closely connected with the Roman law of property, which is a basic institution of the Roman legal system.[56] In Maine's opinion, the separation of public law from private law is not practical in relation to international (public) law either.[57]

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[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 Enzyclopädie 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)*, 75 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung) 496-507 (1958) and M. Bretone, *Postulati e aporie nella 'History' di Schulz*, *in* Festschrift für F. Wieacker zum 70. Geburstag 37-49 (1978).

[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, which was 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 jogrendszerek [Comparative Law and Legal Systems of Antiquity] 48 (1998). Regarding Maine's view on comparative law, *see* G. Hamza, *Sir Henry Sumner Maine et le droit comparé*, 10 Orbis Iuris Romani 7-21 (2005).

[57] Maine was not only a theoretician of law; he had close connection with politics and *ius in*

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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 student, private law and private law analogies form sources of international (public) law. Hersch Lauterpacht, who was a student of Lord Arnold Duncan McNair in England, was a committed opponent of legal positivism.[58] For him iustice (*iustitia*) and equity (*aequitas*) constitute to a great extent the pillars of the enforcement of law.[59] 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 other.[60]

K. Conclusions

We can draw the general conclusion that it would be inappropriate to identify the Roman term of *ius publicum* with the notion of public law in modern legal systems. The same is true for the Roman term of *ius privatum* which is by no means identical to 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

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 (1969), and R.C.J. Cocks, Sir Henry Maine. A Study in Victorian Jurisprudence 39-51 (1988).

58 Hersch Lauterpacht explains his views on functions of international (public) law in *The Function of Law in the International Community* (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 II. (1905), at 84 *et seq.*; F. Pringsheim, *Jus aequum und jus strictum*, 42 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung) 643-668 (1921); M. Rümelin, Die Billigkeit im Recht (1921); E. Osilia, L'equità nel diritto privato (1923); C. Tobeñas, La Equidad y sus tipos históricos en la cultura occidental europea (1950); H. Mazeaud, "*La notion de 'droit', de 'justice' et d''equité'*", *in* Aequitas und bona fides. Festgabe zum 70. Geburtstag von A. Simonius 229-233 (1955); 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 (1975) at 263 *et seq*.; M. Rotondi, *Considerazioni sulla funzione dell'equità in un sistema di diritto positivo scritto*, 54 Rivista Internazionale di Filosofia del Diritto 666 (1977); V. Piano Mortari, *Aequitas e ius 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 (1997), at 143-279.

60 From earlier literature, *see* H. Huber, Recht, Staat und Gesellschaft 32 *et seq.* (1954). 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 Ve République 121 *et seq.* (1996).

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law" were related to specific economic, social and legal circumstances in ancient Rome. In addition, 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 (*fiscus*). In contrast, in ancient Rome *ius 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 citizen.[61]

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 *ius publicum*, whereas the other sphere of Roman "criminal law", the so-called private offences (*delicta privata*) belonged to *ius privatum*. Broad consensus has it that modern criminal law is part of public law governed by public law related principles.

Furthermore, in Roman law the rules of civil procedure – mainly in family and property affairs – form part of *ius 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 France.[62]

The above analysis makes clear that the idea of a division between 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*). 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 Penne,[63] paid particular attention to the problems arising from the division of the legal system. Analysing various institutions of *ius publicum* in their writings (*tractatus*) they did not consider public law as an autonomous branch of law. The fact that they explained and interpreted concepts and institutions of *ius publicum* by using the terminology of *ius privatum* may have played an important role in their approach.

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

[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*).

[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 historico-philological method contrary to the traditional dialectic-scholastic one.

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The approach of Glossators characterises European jurisprudence both in the Middle Ages and in modern times.[64] 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 law.[65]

[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*, 61 JuristenZeitung 869-875 (2006).

[65] In our view it is a mistake to present public law without finding time to speak also about Roman public and private law. Such an error occurs, for instance, in the work of Hermann Conrad, Deutsche Rechtsgeschichte I-II. (1962-1966) 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.