GÁBOR HAMZA

# Comparative Law and Antiquity

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by
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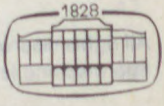


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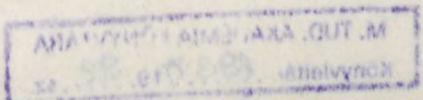

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# INTRODUCTION

Jurisprudence is still at fault for the analysis of the ancient antecedents of comparative law, moreover of the history of research into these on the basis of the Roman law. In respect of the domain of ancient laws the international economic and political relations - as preconditions of comparability - have not yet been studied. In addition to this, the field in which comparative law may have any importance or role in analyzing some institutions of ancient laws, is cleared up not even in its outlines in literature. And finally, neither the experts of ancient laws nor the scholars dealing with comparative law have built a **bridge** connecting the study of the institutions of ancient and modern laws.

In our opinion, all the problems mentioned in the above could in themselves become the objects of comprehensive analysis. On the other hand, these problems are organically intertwined. If we investigated the questions enumerated - belonging to the scope of comparative research - **in se**, separated from one another sharply, then we could not decide whether it is useful and justified to apply the comparative method. In that case we would fail to see that the socio-economic basis of comparative analysis in antiquity is essentially the same as that of the justification of the comparative method in the scope of ancient laws. It originates from the necessity of a complex investigation that most scholars adopt an **"ignoramus et ignorabimus"** attitude with regard to the connection between comparative law and antiquity. The basis of this scepticism is unquestionably created by the lack of complex analyses. It is characteristic of the degree of ignorance that e.g. even Jhering and Rabel do not take into consideration the ancient antecedents of comparative law though they emphasize the necessity of comparison relating to modern laws.

We may also mention Wenger, who can be considered as the dominant personality of the trend of **"antike Rechtsgeschichte"** concentrating exclusively on the laws of antiquity. He isolates the constructions of ancient laws from the system of institutions of modern laws in an almost perfect way. This "splendid isolation" is nearly complete. It is well reflected by the fact that René David, Constantinesco, Rheinstein, Schnitzer, Kötz or Zweigert - though not consciously - refrain from analyzing the totality of ancient law or its sub-systems (sometimes Roman law is exception). The fact that the above scholars avoid dealing with ancient law was disadvantageous both for scholars of ancient laws and scholars who considered comparing modern and ancient laws.

Undoubtedly, the analysis of ancient laws by the help of the comparative method - which is a precondition of investigating the institutions of the modern law in terms of the antiquity - is more difficult on two accounts than comparative research analyzing the institutions of the modern legal systems. On the one hand - even in the Mediterranean world - the often considerable difference between the levels of the individual ancient laws is obvious. On the other hand, the question of documentation also gives much trouble. The difficulty of documentation appears fundamentally in the fact that each ancient law has sources of very different character. Only as an illustration we may mention that while in relation to Egypt only the practice is known almost exclusively, in Mesopotamia the code in non-technical sense already appears. Relating to Hebrew law, the Bible being closely interwoven with the sacral element, is the source.

As regards Greek civilization the sources come from the still existing works of the philosophers and rhetors. It is alone Roman law, serving as an excellent object for the **interpretatio multiplex** of later centuries, in which law as jurisprudence is the basis of information. Moreover it would not be right to forget, either, that the cuneiform laws do not form a uniform legal system; the Greek or Hellenistic laws do not give a concept referring to a given positive law either. It would obviously be erroneous, also for methodological reasons, or as a quasi "working hypothesis" to assume the existence of **"droit commun de l'antiquité"** which could be the basis for comparing modern and ancient law.

Only the relative stability of ancient laws may support the assumption of the existence of a **"droit commun de l'antiquité"**. However, even this stability is far from being a general phenomenon. Stability is also contra-

dicted by the fact that the history of the peoples and states of the ancient Mediterranean cannot be interpreted in terms of Braudel's concept of **"longue durée"**. The rejection of the category of **"longue durée"** necessarily raises the question of model both in the field of macro- and of micro-comparisons. The problem of model is fundamentally connected with the question, which phase of development - and this applies to both Roman and Greek law - is taken into consideration by the researcher in case of comparison. The time factor determined by socio-economic factors - whose importance is by no means impaired by the fact that, in analyzing ancient laws, it is the **laws in books** and not the **laws in action** which are compared - is connected with the problem of **tertium comparationis**. The question of **tertium comparationis** is basically related to the authentic character of the dogmatics and terminology of the Roman law. In our opinion, in analyzing archaic law we cannot completely dispense with a system of concepts even if it is anachronistic in the given relation. However, the need for careful analysis is obvious. If we analyze the institutions and systems of ancient laws by giving up the use of a crystallized dogmatic and terminology this would ensure the victory of Carusi's thesis according to which the comparison of ancient laws is not at all connected with the modern law. The danger of the unlimited comparison of laws presents itself in a much higher degree in the "comparative" analysis of the laws of some ancient States providing a basis for comparison than in case the terminology of modern law is used. This implies primarily the use of Roman law.

It is not by chance that we have exclusively limited our analysis to the laws of the peoples and States of the Mediterranean region. This is the geographical area where the economico-political relations, necessary for comparison, are more or less given. We should also be aware of the fact, and this is a different question, that research into interstate economic relations with all the corresponding legal regulation is a very difficult task. This is to a great extent attributable to the fact that even as regards the states of antiquity the relation between economic life and its legal reflection has not yet been clarified. It follows from this that - particularly in connection with the ancient commercial law and the ancient private law - comparative analyses should be preceded by analyses concentrating solely on the law of one state. Following this, the application of the comparative method may already be fruitful.

The analysis of certain institutions of ancient laws in terms of legal categories alien to a given system - here we should use the concept of the legal institution rather cautiously - may be useful for both Roman law studies and the investigation of the dogmatically or theoretically controversial institutions of modern law.

In this work we have endeavoured to call attention in a paradigmatic way to the absolute **necessity** of the use of the comparative method, by analyzing the germs of comparative outlook in antiquity, by the comprehensive analysis of the connection between the comparative law and antiquity in European jurisprudence and by a survey of the international economico-political relations of the ancient Mediterranean region.

# CHAPTER 1

# COMPARATIVE LAW AND THE GRAECO-ROMAN ANTIQUITY

## 1.1. INTRODUCTION

1. The works, surveying also the history of comparative law - we think here primarily of the works of Rheinstein, René David, Ebert, Constantinesco, Gutteridge, Schnitzer, Zweigert and Kötz,[1] of the comparative investigations to be found in the antiquity - do not show any signs of analyzing. But not only the authors, dealing generally with the questions of comparative law, pay no attention to the age of antiquity. We cannot find even in the monographs, treating expressly the history of comparative law, any investigation of the ancient antecedents. It is declared rightly by Hug that "there has never been a comprehensive attempt to trace the history of comparative law".[2] René David only establishes shortly that comparison of laws on the basis of their geographical difference may be traced back just as long as jurisprudence itself. In order to illustrate this thesis, he refers to Aristotle's "Politics", Solon and to the **decemviri** compiling the Twelve Tables, patterned after Greeks.[3] Schnitzer is satisfied with establishing about antiquity that the first work of legal comparison is the **Collatio legum Mosaicarum et Romanarum.**[4] We may say that it is a general opinion in literature that the beginnings of comparative law go back to the early 19th century.[5] It is another question that the scholars explain the origin of the comparative law with the influence of different intellectual trends.[6]

It is characteristic of the neglect of the ancient antecedents of legal comparison that even Dawson does not take into consideration the comparative tendencies, manifesting themselves in antiquity - thus, e.g. the connection between the Roman law and the ancient Greek law.[7]

The fact that so little attention is paid to the ancient antecedents is, in our opinion, primarily connected with the fact that - as referred to by Fikentscher in the recent literature[8] - there is no work in this field which would make an attempt to describe the general history of jurisprudence with a claim to completeness. The statement that, in respect of a legal institution or a legal norm, there are signs of an investigation of universal claim,[9] has no due relevance just in the scope of the analysis of the comparative method. Fritz Schultz's book of great influence, the **History of Roman Legal Science**[10] was originally a part of series, started by De Zulueta and Kantorowicz, describing the comprehensive history of jurisprudence. With the exception of G.M. Calhoun's work published in 1944 under the title **Introduction to Greek Legal Science**,[11] this is the only work analyzing the legal thinking of a people (State) in a comprehensive way. This, however, does not change the fact that the work, describing the history of legal thinking with a comprehensive, universal demand has not yet been written. Although Fikentscher's comprehensive work of huge size, **Methoden des Rechts**, endeavours to achieve universality, it rather strives to uncover the universal traits of the **"Geist des Rechts"** than the **peculiarities** of jurisprudence and legal thinking. It is therefore not a mere chance that - apart from one or two fragmentary remarks, referring to Theophrastus[12] - the comparison of laws remains in debt for exploring the historical roots, antecedents of the comparative method.

2. In the ancient antecedents of legal comparison the Roman jurisconsults did not show any particular interest, either. Even the Romanists who otherwise - as e.g. Jhering - strongly emphasized the necessity of the comparison of laws, in relation to modern laws, did not pay any particular attention to the comparative tendencies in the Graeco-Roman antiquity.[13] It is characteristic of the lack of interest that in his paper which is of fundamental importance from methodological point of view even Wenger does not deal with the history of comparative law in antiquity.[14] In this relation, the standpoint of Romanists reminds us in several respects of the **"Isolierung"** of the Roman **iurisperiti** themselves, inspecting law **in se**.[15]

The investigation of the institutions of the other ancient laws is, at best, a kind of **"façon de parler"** - as Zweigert and Puttfarken write about the rather only "accidental" comparison occurring in the sphere of the study of modern laws.[16] On the other hand, the lack of the analysis of phenomena referring to the ancient comparative law may also be explained with a kind of relativistic conception concerning the **method**. This is particularly

characteristic of the approach of Ernst Rabel, one of the most famous scholars of European comparative jurisprudence and of Roman law.[17] Rabel regards comparative law based on methodology as superfluous. Being indifferent to the method, which is even today very much characteristic of Romanists, leads almost necessarily to the result that there is no interest in the history of the method and the antecedents of its application. Therefore, even in works of scholars, dealing with the **par excellence** Roman law or with the ancient laws of the Mediterranean regions, the exploration of the marks of the "archaic" comparative "method" (we avoid deliberately the attribute "primitive" which has a pejorative overtone) is not treated adequately. Taking this into consideration, in the following we analyze the essential elements of legal comparison, presenting themselves in the Graeco-Roman antiquity.

## 1.2. COMPARATIVE LAW AND THE THINKERS OF ANCIENT HELLAS

1. The comparative tendencies manifested in the Greek laws are connected with specific political conditions. The diversity and the specific structure of the **polis** (**koinonia ton homoion**) almost inevitably offer the basis for comparison. As opposed to the **Imperium Romanum**, of which the prevalence of **civilitas** is already characteristic, in the world of **poleis** there are hardly any signs of the unity of public and private laws.[18] It follows from the **polis**-system, making no unitary **imperium**, that - and this applies primarily to the public law - the law of **poleis** is characterised by **plurality**. The unity of the law of **poleis** only relates to the "law of nature", what may be concluded from the works of Aristotle.[19] There follows from the so-called **morcellement politique** (Dareste)[20] that the concrete and actual possibility of comparison is called into existence. Comparison has a role primarily in the field of the constitutions of the individual **poleis**. This is confirmed by the fact, as well, that in case of Greeks - in contrast to the attention of the Roman **iurisconsulti** whose attention is directed much more to the **ius privatum**[21] - the interest is concentrated on the sphere of **public law.**[22] Another peculiarity of the polis-system is in legal relation; there is no connection of hierarchical nature between the laws of the individual **poleis**. Plato, Aristotle or Theophrastus do not distinguish - in respect of evaluation - the laws of city-states from one another.[23] The fact

that the laws of the different **poleis** mutually complete one another, i.e. they should not be considered as foreign laws, is primarily attributable to the equality of **poleis**.[24]

It may be explained with this that Demosthenes regards it as a quite natural phenomenon[25] that also other city-states "receive" the Athenian laws.
The same is characteristic of Charondas' legislation, as well, which is valid not only in the Sicilian Catena but in other city-states, as well (thus in the other Chalcidian **colonide** to be found in Italy and Sicily, as well as in the **poleis** Kos, Teos, Lebedos, etc.).[26] We are informed by Ephoros (from Kyme), the contemporary of Aristotle that in the Code of the **polis** Epizephyrioi of South Italy - whose drafting was connected with the name of Zaleukos - the elements of Cretan, Lakonian and Areopagitic laws may be found.[27] Therefore, the laws of the city-states of **Magna Graecia** mutually complete one another.
It is characteristic of the taking over of laws from other **poleis** that even in the second century A.D., Gaius refers to Solon's legislation in connection with the **actio finium regundorum**.[28]

2. In investigating the ancient Greek comparative law, the reliability of sources from legal point of view is an important question. In a concrete form this means, in which degree the works of Plato, Aristotle, and Theophrastus may be regarded as **relevant** in legal relation, as well. According to Dareste, the Greek philosophers mentioned are, at the same time, also **iurisconsulti**.[29] This statement is based on the fact that the Roman **iurisperiti** found Plato' works to be interesting in the relations of law, as well.

Aulus Gellius (**Noctes Atticae**, 20, 1) refers to the dialogue of Sextus Caecilius Africanus (very probably a disciple of Julian)[30] and of the rhetor-philosopher Favorinus. In this, he draws a parallel between Plato's **Nomoi** and the Twelve Tables. Plato has some authority for Callistratus,[31] too, originating very probably from the Greek Orient.
In the titulus **"De nundinis"** of the **Digesta**, the jurisconsult emphasizes the necessity of a kind of mutual division of labour between the "producers" and "growers" as well as **"negotiatores"** in the second book of Plato's **Politeia**: "... **denique summae prudentiae et auctoritatis apud Graecos Plato cum institueret, quaemadmodum civitas bene beate habitari possit, in primis istos negotiatores necessarios duxit.**" (D. 50, 11, 2). It is worth mentioning that the reference to Plato's works does not depend on the fact whether the jurisconsult originates from a Roman family (thus, in case of Sextus Caecilius Africanus) or from Hellenic surroundings (as Callistratus).
Cicero similarly considers the works of Aristotle and Theophrastus as a source of information, though in his work the legal relation falls somewhat into the background: **"Ab Aristotele omnium fere civitatum non Graeciae solum, sed etiam Barbariae mores, instituta, disciplinas, a Theophrasto etiam leges cognovimus."** (**Ad fam.** 5, 11).

It is generally characteristic of the theories of Plato, Aristotle, and Theophrastus, connected with law - as Beauchet[32] refers to it - that there was not enough time for exerting their effect. The reason for this is that at the end of the IVth century Athens experienced a growing crisis which led to the Macedonian, later to the Roman, conquest. The necessary concomitant of this is the **interruption** of the development of law. The interruption of the development of law based on political independence, explains the fact that the works of Attic authors on primarily legal objects - thus the works of Dioscorides, Duris, Aristoxenos, Crateros, Callimachus and Asclepiades, dealing mainly with laws[33] - cannot be compared with the works of the Roman **iurisconsulti** exerting a very great influence as early as in their own age. And even it is true - and this opinion is ranked in literature as a **communis opinio**[34] - that in Greece, and this concerns even Athens, there is no jurisprudence which could be measured with the standard of the Roman law: the **fact** of the interest which is taken in the law (Biscardi writes about **coscienza giuridica**)[35] cannot be denied. In our opinion, the attention paid to the law is of autonomous character. Consequently, we cannot agree with Villers according to whom the great representatives of Greek philosophy investigate the law exclusively as a function of the political ideas, conceptions.[36]

3. Within the Greek comparative law, Plato's work, the **Nomoi** is the first which calls for an analysis. And as both in the **Politeia** and in the **Nomoi** the **nomos** is what became important in comparing the "constitutions" and laws of more than one **polis**, we should survey the characteristics of this much debated category.

The **nomos** plays a particular role among the sources of the Greek law because - in contrast to literary sources containing only information on the law of one city-state - it does not confine itself only to one **polis**.[37] MacDowell points out that the **nomos** is an essentially wider concept in the Hellenic world than e.g. the concept of the English law.[38] We may also add that this category is even wider than the concept of legal acts (statutes) known in the legal systems of the Continent, because the **nomos** includes customs, as well.

The **nomos** should be distinguished both from the concept of **thesmos**, and from that of **psephisma**. The **thesmos** is a source of law to be restricted to a very narrow scope because it exclusively means - if we speak of the law of the archaic age - a norm created by a person having a kind of **auctoritas** (e.g. a **basileus**). And the **psephisma** goes back, as to its origin, to

the **psephos**, i.e. a resolution, accepted in a public meeting. The **nomos** is known not only in the terrain of **Vetus Graecia** but it is a source of law in the **poleis** of **Graecia Magna**, as well.

It is worth mentioning that with the Act (statute), as a phenomenon, even the Roman **iurisconsulti** deal - as referred to by Honsell[39] - only a little.There remained no work entitled **"De legibus"** by any jurisconsult. It is a very important question for the study to decide whether Plato deals in the **Nomoi** - as well as in the **Politeia** - with a kind of ideal Acts (statutes), i.e. those prevailing actually neither in Athens nor in the other **poleis**: or, on the contrary, he chooses for the subject-matter of his analysis a positive law of his age. It is a general opinion in the recent literature that Plato does rely in the **Nomoi** largely on the positive law of his age.[40] Bekker represents a peculiar point of view. The aim of his book, as declared by the author himself, is to demonstrate the conformity (from time to time the differences) between the **Nomoi** and the positive law of the different Greek **poleis** in the family law (of domestic relations).[41] Klingenberg demonstrates about the rules of the **Nomoi** on the legal regulation of the agricultural area that they show - in a very high number of cases - a perfect agreement with the positive laws of the Greek city-states of the age (**nomoi georgikoi**).[42]

In the **Nomoi** Plato compares not only the "historical" laws of **Vetus Graecia** and their single institutions but he takes into consideration the laws of peoples and States alien to the Hellene ethnic group, as well. In this way, in addition to the Attic law, he also analyzes the law of Crete and Sparta - proclaiming his critical comments on them - as well as the laws of Egypt (here speaking, of course, about the autochtonous law), Carthage, Scythia and Persia. In terms of methodology the comparison, including criticism, presented by Plato, cannot be considered to be deliberate. The comparison of the laws of different **poleis** and States serves very often for the aims of legitimation. This comparison is, in fact, rather a means serving a particular purpose. Thus, comparison serves for **idealizing** the law. It is another question that - in contrast to **Politeia** - this idealization already aims at raising the positive law into "the world of ideas". The Platonic comparison, lacking any methodical basis, brings the **Nomoi** nearer to the **Politeia**.

4. In contrast to the Platonic ideal theory of the State, Aristotle's works, the **Athenaion politeia** and the Politics are characterized by an approach founded on empiricism.[43] This empirical approach is also characteristic of his other works, giving information on

legal issues. Pringsheim[44] points out that in the **Ethica Eudemeia** and the **Ethica Nicomacheia**, the philosopher takes into consideration the positive Attic law when writing, e.g., about the two concepts of **hekousia synallagmata - akousia synallagmata** (**Eud. Eth.** 1243a and **Nic. Eth.** 1164b).[45]

The **Athenaion politeia** of Aristotle, which is the only one of a collection of the "constitutions" of 158 States that has been preserved,[46] is important for us in terms of being a part of collection that was meant to serve a comparison. Though the collection and systematization of the material concerning the constitutions of the other **poleis** is rather the task of the pupils,[47] nevertheless, the idea of collecting the huge material originates from Aristotle. The undertaking, even in itself, accurately reflects the empirical working method, characteristic of the philosopher (in this case, we use the term "method" not in a technical sense). The aim of the **Politeia** is to look for the constitution (statute, **nomos**), characterized as being **kata physin**. Aristotle follows in this work the laws of more than one **polis** with attention.[48]

Thus, he does not omit, e.g., in the course of treating of the Platonic community of goods to mention Charondas' statutes (**Pol.** 1274b 9). For the philosopher, finding the **kata physin nomos**, supposes a kind of relative and not an absolute interpretation. The comparative investigation which is fundamentally a form of expressing reliance upon empirism, renders a very essential aid and support just to this relative interpretation.[49]

5. Theophrastus, the disciple of Aristotle,[50] who becomes after the death of his master the leading representative of the Peripatetical school, is - according to certain authors - the only jurist (jurisconsult) **par excellence** of Greek antiquity.[51] In Pringsheim's opinion, the "really academic approach to the law" (**"echte wissenschaftliche Betrachtung"**) begins with Theophrastus.[52] In his opinion, the famous fragment **"Peri symbolaion"** includes the elements of comparative law, politics of law as well as legal criticism.[53] Undoubtedly, Theophrastus' work proves his fundamental erudition in the dogmatics of law. Treating of the acquisition of property, taking place in connection with sale and purchase (Stob. **Flor.** 44, 22),[54] he refers to the fact that the acquisition of property has two preconditions: on the one hand, the price has to be paid, on the other, the necessary forms of publicity have to be taken into account.[55] In addition, he generally gives valuable information on the registration of real estates,[56] which offers further evidence of the fact that the author of the fragment is a serious expert of the dogmatics of law.

The Theophrastus-fragment, the **Peri symbolaion**, preserved for us by Stobaeus, is a part of the work **Peri nomon** which did not remain in full content.[57] The creation of the **peri nomon** as a literary (legal literary) genre is, of course, not the merit of Theophrastus. Plutarchus (**Solon**, 20, 22, 31, 32, and 34) refers to the fact that Herakleides Pontikos and Demetrios from Phaleron are the authors of the works entitled **Peri nomon**. An additional valuable information originates from Diogenes Laertios (**Vitae** 9, 50 ff): in his work Herakleides Pontikos takes into consideration the laws (constitutions) of other city-states, thus that of the **polis** Thurioi, as well.

In Theophrastus' **Peri symbolaion**[58] the expression **symbolaion** is unambiguously used in the sense of "contract" between citizens (private persons), with the terminology of the Roman law: **contractus**. We think it is necessary to emphasize this since the word **symbola** (**symbolai**) also means the so-called interstate conventions, as it may be inferred on the basis of Aristotle (**Pol.** 2, 1, 3 - 1275[a]g). This interstate convention - which legitimizes the institution of an action - will be the basis of the **dike apo symbolon**.[59]

It should also be mentioned that, on the other hand, **symbolaion** is no exclusive term for contract. The expressions **synallagma**, **homologia**, **syntheke** etc. are also to be found in the meaning of **contractus** in the sources.[60] The word **symbolaion** refers in one case - Aristotle (**Eth. Nik.** 9, 1, 9 - 1164b) - to legal relations originating, similarly to the synallagma, from a delict.[61]

In this fragment Theophrastus takes into consideration not only the Attic law, when analyzing sale and purchase (Stob. 44, 20), he refers in an emphatic form to the obligation of the vendee to pay the price to the vendor (seller). If the vendor credited, i.e. did not stick to the instant payment of the price, then he has no legal possibility - action at law (**dike**) - to bring a suit for paying ("... **ean de tis pisteuse, me einai diken...**").[62] Theophrastus deems necessary to refer to the statute of Charondas and, at the same time, to Plato.[63] The philosopher repeatedly refers in the sphere of "publicity" - which is in case of immovable property, necessary for the validity of the contract of sale - to the law of the **polis** Thurioi. In addition to this, he also regards it necessary to refer to the law (statutes) of Mytilene, governed by the tyrant Pyttakos (Stob. 44, 21).[64]

Theophrastus is an important philosopher also in "legal political" matters. The idea of **corruptissima republica plurimae leges**, formulated by Tacitus (**Ann.** 3, 27, 3) goes back even to Theophrastus. The philosopher considers the too rapid growth in the number of statutes an adverse phenomenon and proposes - using Nörr's expression - a "pragmatical" legislation (Stob. 37, 20).[65] The idea of the "pragmatical" legislation, taking into consideration the typical cases, is mediated just by Theophrastus for the Roman **iurisconsulti**, as much as this could be concluded in a direct form, on the basis of several sources, too [D. 1,3,6 (Paulus), D. 5,4,3 (Paulus), D. 1,3,4 (Celsus), D. 1,3,5 (Celsus) and D. 1,3,3 (Pomponius)], which are connected with the interpretation of **id quod plerumque fit**.[66]

This conception of legal-political nature of Theophrastus which had a great influence on Roman jurisprudence as well, may also justify to consider him as an important representative of jurisprudence. Owing to his openness to the questions of details of legal nature and to the problems of general character, the philosopher is connected in more than one ways with the jurisprudence in Roman sense. This openness is the reason for the fact that Theophrastus examined the laws of the different (**poleis**) in a **comparative** perspective. And though the assumption of Dareste which regards him as the direct "precursor" of the **législation comparée**[67] is somewhat exaggerated and though Pringsheim's thesis, according to which the philosopher was the partisan of the "comparative jurisprudence" is similarly not quite right,[68] the role of Theophrastus in the use of the comparative method is unquestionable.[69] The importance of Theophrastus in legal comparison is explained by the fact that, by breaking with deductive theory as regards the contract, which is a highly important institution in a dogmatic respect, he refers to the minor differences in the legal solutions of several **poleis**.

## 1.3. COMPARATIVE LAW AND ROMAN JURISPRUDENCE

1. In connection with analyzing the tendencies, presenting themselves in the works of Greek philosophers and going in the direction of comparing the laws of more than one **polis**, we have already referred to Sextus Caecilius Africanus drawing a parallel between the Platonic **Nomoi** and the Twelve Tables and to Callistratus, referring to the **Politeia** of the great philosopher and even citing it in the original. Sextus Caecilius takes into consideration not only the Roman law but he studies also the law of foreign States (the city-states).[70] And Callistratus, owing to his theoretical interest, takes as a basis Plato's work, in connection with the necessity of the division of labour between the "producers" and the **negotiatores**.

The Roman jurisconsults take into consideration the foreign law primarily in theoretical relation. The comparative outlook in this direction is well illustrated by the fact that Marcianus relies in the scope of defining the **lex** on the statements of Demosthenes and Chrysippus.

"Nam et Demosthenes orator sic definit: touto esti nomos, ho pantas anthropous prosekei peithesthai die polla, kai malista hoti pas esti nomos heurema men kai dora theon, dogma de anthropon phronimon, epanorthoma de ton hekousion kai akousion hamartematon, poleos de syntheke koine, kath'en hapasi prosekei dsen tois

en te polei, sed et philosophus summae stoicae sapientiae Chrysippus sic incipit libro, quem fecit peri nomou: ho nomos panton esti basileus theion te kai anthropinon pragmaton, dei de auton prostaten te einai ton kalon kai ton aiskhon kai arkhonta kai hegemona, kai kata touto kanona te einai dikaion kai adikon kai ton physei politikon dzoon, prostaktikon men hon poiethon, apogoreutikon de hon ou poieteon." (D. 1,3,2).

The definition, originating from Demosthenes and the stoic Chrysippus, is rather general and it has a philosophic flavour. It is given from this that severe problems of adaptation may originate from these definitions of statute, both in respect of the age of the republic and of the period of principate. The jurisconsult Marcianus cites very probably the definitions of the rhetor and philosopher because both of them are illustrious representative of Greek intellectual life.[71] This, however, does not affect, according to the meaning, the considerable value of the comparative investigation.

In the domain of theory Cicero,[72] who has a considerable "authority" also in jurisprudence, took into consideration both Roman and foreign laws. When defining **ius naturae** he also refers to the **"lex Athenis"** in **De re publica**.

"(Lael.) est quidem vera lex recta ratio, naturae congruens, diffusa in omnis, constans, sempiterna, quae tamen neque probos frustra iubet aut vetat, nec improbos iubendo aut vetando movet, huic legi nec obrogari fas est, neque derogari aliquid ex hac licet, neque tota abrogari fas est, neque derogari aliquid ex hac licet, neque tota abrogari potest, nec vero aut per senatum aut per populum solvi hac lege possumus, neque est quaerendus explanator aut interpres Sextus Aelius, nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et imperator deus: ille legis huius inventor, disceptator, lator; ipse fugiet, ac naturam hominis aspernatus hoc ipso luet maximas poenas, etiamsi cetera supplicia quae putantur effugerit (3,22,33).

Following essentially the doctrines of Chrysippus, Cicero emphasizes in this part of the text the "unhistorical" character of the **ius naturae**. The **ius naturae** is **everlasting** in the sense that its rules cannot be set aside either by the **senatus** or by the **populus** (the **comitia**). In the scope of "natural law" there is no difference in respect of whether it is valid in Rome or in Athens. In order to illustrate the **omnes gentes**, Cicero confines himself to referring to Attic law.

However, we should emphasize the fact that Cicero makes an exception in one respect for the rule of "immutability" of the **ius naturae**. This exception we can find at the provision of **depositum est reddendum**.

"Quid? si is, qui apud te pecuniam deposuerit, bellum inferat patriae, reddasne depositum? No credo; facias enim contra rem publicam, quae debet esse carissima. Sic multa, quae honesta natura videntur esse, temporibus fiunt non honesta." (**De off.** 3,95).

Cicero categorically denies the predominance of the norm **depositum est reddendum** in case if the matter in question is the repaying of a sum deposited earlier which

would be used by the depositor for the purpose of a war to be declared against Rome.[73]
In our view, Cicero relies on Plato, too, at invalidating the thesis of natural law in question. Plato (**Politeia** 331C), namely, is of the opinion that the weapon, got from the furious friend, should not be given back.

2. We may find references to Greek law in other works of Cicero, as well. Thus, in the **De oratore** the laws of Lycurgus, Draco and Solon obtain an illustration like comparison with the Roman **leges**. In connection with this, we may find few sentences containing a negative declaration about the **ius civile** outside the Roman law.

**"Percipietis etiam illam ex cognitione iuris laetitiam et voluptatem, quod, quantum praestiterint nostri maiores prudentia ceteris gentibus, tum facillime intelligetis, si cum illorum Lycurgo et Dracone et Solone nostras leges conferre volueritis. Incredibile est enim, quam sit omne ius civile praeter nostrum inconditum ac paene ridiculum; de quo multa soleo in sermonibus quotidianis dicere, cum hominum nostrorum prudentiam ceteris omnibus ex maxime Graecis antepono. His ego de causis dixeram, Scaevola, iis, qui perfecti oratores esse vellent, iuris civilis cognitionem esse necessariam."** (1,44,197).

The expression **omne ius civile praeter nostrum inconditum ac paene ridiculum** is an unusually **strong** and necessarily exaggerating. However, we have to take into account that it is not unknown in the history of jurisprudence that somebody declares an institution of a foreign law to be ridiculous. In the course of making the Code civil, Tronchet similarly regarded the regulation of presumption of death in German law as a **"ridicule"**[74] provision. With the criticism of Solon's statutes we may meet elsewhere, too, in Cicero's works, though it is true that only in connection with a concrete question, namely the **parricidium**.

**"Prudentissima civitas Atheniensium, dum ea rerum potita est, fuisse traditur: eius porro civitatis sapientissimum Solonem dicunt fuisse, eum, qui leges, quibus hodie quoque utuntur, scripserit. Is cum interrogaretur, cur nullum supplicium constituisset in eum, qui parentem necasset, respondit, se id neminem facturum putasse. Sapienter fecisse dicitur, cum de eo nihil sanxerit, quod antea commissum non erat, ne non tam prohibere quam admonere videretur. Quanto nostri maiores sapientius! qui cum intelligerent, nihil esse tam sanctum, quod non aliquando violaret audacia, supplicium in parricidas singulare excogitaverunt; ut, quos natura ipsa retinere in officio non potuisset, magnitudine poenae a maleficio summoverentur. Insui voluerunt in culleum vivos atque ita in flumen deiici."** (Or. Pro S. Roscio Amerino 25,70).

Primarily the ultra-modum criticism of Cicero, touching upon the Greek law, appears to contradict the general respect of Greek culture, civilization because calling the laws outside the Roman law **inconditum and paene ridiculum** takes place in connection with mentioning the laws of Lycurgus, Draco, and Solon.

> **"Adsunt Athenienses unde humanitas, doctrina, religio, fruges, iura, leges ortae in omnes terras distributae putantur; de quorum urbis possessione propter pulchritudinem etiam inter deos certamen fuisse proditum est; quae vetustate ea est, ut ipsa ex sese suos civis genuisse dicatur et eorum eadem terra parens, altrix, patria dicatur: auctoritate autem tanta est, ut iam factum prope ac debilitatum Graeciae nomen huius orbis laude nitatur."** (Or. pro Flacco 26,62).

The ignorance of the values and importance of other contemporary ancient laws, in addition to the Roman law, cannot be explained with an attitude hostile to Greek civilization. As mentioned also by Nörr,[75] the probable explanation of this **negative** attitude to any other known law, more exactly to its norms may probably be explained by the fact that Cicero considered the **ius Romanum**, based on the **usus** and **vetustas**, as an ideal-type of law, "standing over and beyond time and nations". This approach of antiquity is naturally characteristic not only of Cicero. Nörr calls attention to the fact that Philon identified the **dikaiosyne kai pasa arete** with the Jewish law, i.e. with the **nomos patrios kai thesmos archaios.**[76] For Cicero and Philon domestic law means both the eternal and unalterable law. And although the formulation in the **De oratore** really seems to be too strong, it nevertheless reflects really the view of its author. Taking this into consideration, we do not share Balogh's opinion according to whom the passage quoted cannot be regarded as the representative either of Cicero or of the **communis opinio** of his age.[77]

> According to Elemér Balogh - referring to the **De orat.** 1,44,197 - : "We rather feel that in this passage Cicero wished to express neither the opinions of his time nor his own convictions. It is probably case of the rhetorical exaggeration. Cicero was concerned here less with accuracy than with rhetorical effect. He regarded his subject-matter as nothing more than a material for employing and displaying his eloquence."[78] In contrast to Balogh's opinion, we believe Cicero represents adequately the opinion of his age and - more importantly - of the views of jurisconsults on foreign laws. And even if the expression **ridiculum** is too strong, the word **inconditum** - referring, according to Pringsheim, to the lack of studying the foreign laws with scholarly claims[79] - already reflects a real content. It is characteristic of the "afterlife" of Cicero's opinion that - as referred to by Beauchet[80] - it has probably largely contributed to the underestimation of the importance of studying Hellenic and other ancient laws.

It is obvious for Cicero that in the **Imperium Romanum** there were several laws, systems of law effective. The rhetor writes of the peoples living in Africa, Hispania and Gallia as **immanes ac barbarae nationes** (Ep. ad Qu. fr. 1,1,27), having no righteous statutes. However, his assumption, which may be concluded from his **oratio pro L. Murena** ("**Sapiens existimari nemo potest in ea prudentia, quae neque extra Romam usquam neque Romae rebus prolatis quiquam valet**" (28)) saying that the territory of the predominance of Roman jurisprudence was restricted only on Rome,[81] is exaggerated. In Cicero's opinion, a righteous **lex** and **ius** should be ensured to all inhabitants of the **Imperium**.[82]

> Cicero deals in the **De legibus** with the requirement of diffusing the law: "**Sequitur igitur ad participandum alium alio communicandumque inter omnes ius nos natura esse factos. Atque hoc in omni hac dispositione sic intellegi volo, quod dicam naturam,... esse, tantam autem esse corruptalam malae consuetudinis, ut ab ea tamquam igniculi extinquantur a natura dati, exorianturque et confirmentur vitia contraria. Quodsi, quomodo est natura, sic iudicio homines humani - ut ait poeta - nihil a se alienum putarent, coleretur ius aeque ab omnibus. Quibus enim ratio a natura data est, isdem etiam recta ratio data est; ergo et lex, quae est recta ratio in iubendo et vetando; si lex, ius quoque. Et omnibus ratio: ius igitur datum est omnibus, recteque Socrates exsecrari eum solebat qui primus utilitatem a iura seiunxisset; id enim querebatur caput esse exitiorum omnium. Unde enim illa Pythagorea vox.**" (1,33).
>
> In **De legibus**, Cicero considers as a "political question that Roman law should be easily accessible to the peoples living on the territory of the **Imperium**, as well, permitting them to separate surely right and wrong and, generally, to know the "perfect" laws: "**Quid? quod multa perniciose, multa pestifere sciscuntur in populis, quae non magis legis nomen adtingunt, quam si latrones aliquas concessu suo sanxerint? Nam neque medicorum praecepta dici vere possunt, si quae inscii inperitique pro salutaribus mortifera conscripserint, neque in populo lex cuicuimodi fuerit illa, etiam si perniciosum aliquid populus acceperit. Ergo est lex iustorum iniustorumque distinctio ad illam antiquissimam et rerum omnium principem expressa naturam, ad quam leges hominum diriguntur, quae supplicio inprobos adficiunt, defendunt ac tuentur bonos.**" (2,13)

In addition to emphasizing the absolute priority of the norms of Roman law, interpreted as **ius naturae**, Cicero - recognizing the plurality, prevailing in legal respect in the **Imperium Romanum**[83] - does, of course, not leave entirely out of consideration the laws being valid outside Rome. This interest in foreign laws is documented - among others - by the fact that in connection with the ritual, regulated in the Twelve Tables, he deals in details with Solon's laws, as well (**De leg.** 2,59 and 2,64).

Cicero's "ambivalent" approach may be assumed to be characteristic of the mentality of the Roman jurisconsult in the question of comparative law. There are no comprehensive works, including the investigation of more

than one institution, taking into consideration several ancient laws. On the other hand, similarly to Cicero's ideas on **parricidium** and burial-customs, we may come across the institutions of the ancient non-Roman law. In connection with the interpretation of **actio finium regundorum** and the origin of the **lex Collegii** Gaius refers to Solon's laws.[84]

> **"Sciendum est in actione finium regundorum illud observandum esse, quod ad exemplum quodammodo eius legis scriptum est, quam Athenis Solonem dicitur tulisse: nam illic ita est: ean tis haimasian par' allotrio khorio orytte, ton horon me parabainein, ean teikhion, poda apoleipein, ean de oikema, dyo podas, ean de taphon e bothron orytte, hoson to bathos e, tosouton apoleipein. ean de phrear, orgyian. elaian de kai syken ennea podas apo tou allotriou phyteuein, ta de alla dendra pente podas."** (D. 10,1,13).
>
> **"Sodales sunt, qui eiusdem collegii sunt; quam Graeci hetaireian vocant. his autem potestatem facit lex pactionem quam velint sibi ferre, dum ne quid ex publica lege corrumpant. sed haec lex videtur ex lege Solonis tralata esse, nam illuc ita est; ean de demos e phratores e hieron orgion e nautai e syssitoi e homotaphoi e thiasotai e epi leian oichomenoi e eis emporian, hoti an touton diathontai pros allelous, kyrion einai, ean me apagoreuse demosia grammata** (D. 47,22,4).

To comparison, presenting itself on "historical" level, a reference may be found in Justinian's **Institutiones**. This reference to Athens and Sparta in relation to the "origo" of the **ius civile** proves the fact that even in the age of **civilitas**, the interest in the laws of **civitates** outside Rome, did not as yet disappear, though at this time this interest has already assumed a historical nature.

> **"Et non ineleganter in duas species ius civile distributum videtur. nam origo eius ab institutis duarum civitatium, Athenarum scilicet et Lacedaemonis, fluxisse videtur: in his enim civitatibus ita agi solitum erat, ut Lacedaemonii quidem magis ea, quae pro legibus observarent, memoriae mandarent, Athenienses vero ea, quae in legibus scripta reprehendissent, custodirent."** (1,2,10).

Investigating the signs of the comparative law in Roman law and jurisprudence, we may conclude that the outlines of a comprehensive analysis, relating to more than one law, did not develop.[85] The fundamental cause of this is, in our opinion, to be looked for in the **Selbständigkeitstrieb** of the Romans (Jhering).[86] The Roman **iurisconsultus** started, at bottom, from the same fundamental thesis, **mutatis mutandis**, as most representatives of the intellectual life in the 19th century who regarded the civilization of their century as **the civilization**.[87] There follows from the "regional" outlook a reluctance, to take over the institutions of foreign laws. Pringsheim

formulates this - in connection with the **arrha** - in the way that "Romans do not take over anything foreign (i.e. no institution of a foreign law, G.H.), without being compelled to do so."[88]

In spite of this, we regard the above view, originating from Pringsheim, as exaggerated.

> **"Der Gedanke der Rechtsvergleichung lag den Römern so fern wie der der Rechtsphilosophie.Der Geltungsanspruch ihres Rechtes wurde ihnen niemals fraglich."**[89]

We base our contrary opinion on two facts. First, several legal and non-legal sources illustrate the Romans' theoretical and practical interest in foreign (primarily Greek) laws; second, as already referred to, in connection with Cicero, the requirement to "spread" the law, formulated in the **De legibus**, refers as a matter of fact, to a Roman law, "purified" from the rules of details and conceived of in the sense of **ius naturae**, which owing to its nature, and contains also foreign (Greek, etc.) elements.

## 1.4. CHARACTERISTICS OF GREEK AND ROMAN LEGAL COMPARISON

1. The major reason for the lack of comparative analyses of comprehensive character in Athens is that there did not develop a **iurisprudentia** in Roman sense.[90] Apart from Plato's **Politeia**, the works of Plato, Aristotle and Theophrastus are usually characterized by loyalty to the positive law. As referred to by Triantaphyllopoulos,[91] the idea of **nomos** is "sacrosanct" for the Greeks, and consequently even its interpretation is not permitted. This in itself is a significant obstacle to comparative studies. It is therefore quite natural that with the Greeks' comparative law - in the absence of an adequate aim, system and method - cannot be considered as a part of jurisprudence or of any science or philosophy of law.[92] Law of the comparison might have created a possibility for disengagement from the positive law, and this could have created, at the same time, **one** of the bases of the development of jurisprudence in the Roman sense of word. This is proved by the fact that it is just Theophrastus, paying so much attention to comparison, who may also be considered as a representative of jurisprudence in Athens.

2. Comparative law plays a different role in Rome, where a mature jurisprudence had emerged. In contrast to the Greeks, the importance of

studies did not consist in the fact that they had contributed to the making of jurisprudence. Comparison could have been much more important in the critique of existing law. Although not in relation to the Roman jurisconsults, Rabel already mentions that comparative law leads to the critique of law.[93] The critique of positive law by the Roman jurisconsults is a remarkably rare phenomenon.[94] This is mostly connected with the fact that the exploration of the historical and philosophical bases of the existing law is generally uninteresting for the Roman **iurisconsulti**.

> It is another question that in Cicero's works the necessity of exploring the philosophical bases of law is seriously considered.This is shown by the question of Atticus in the **De legibus: "Non ergo a praetoris edicto, ut plerique nunc, neque a duodecim tabulis, ut superiores, sed penitus ex intima philosophia hauriendam iuris disciplinam putas?"** (1,5). It is a remarkable phenomenon that, in the Christian age, in connection with some theses of the Roman law, we may meet remarkably insightful critical comments on the part of the Church fathers who otherwise did not deal rather profoundly with law (e.g. Lactantius and Tertullianus).[95]

Even without a claim to analyzing more deeply the connection between the Roman **iurisconsulti** and the critique of law we may preclude the possibility that the comparison of laws had contributed to the growing edge of critique. Already with the Romans the conditions for a deliberate critique would have been given only if the jurisconsults had also known other laws than the **ius Romanum**. It is not only the matter of mere chance that just the **Collatio legum Mosaicarum et Romanarum**, mentioned as a prototype of the ancient legal comparison[96] preserves the criticism of Ulpian on Hadrian's rescript in connection with the **abigei**.[97]

NOTES

1 **Rheinstein** (1974); **David** (1977); **Ebert** (1978); **Constantinesco** (1971-1973); **Gutteridge** (1948); **Schnitzer** (1961); **Zweigert-Kötz** (1969-1971).

2 **Hug** (1931-1932), p. 109.

3 **David** (1977), p. 11.

4 **Schnitzer** (1961), p. 8.

5 **Constantinesco** (1971-1973), pp. 90 ff.

6 Cf. in this respect summarily **Constantinesco** (1971-1973), pp. 90 ff.

7 **Dawson** (1968), pp. 1 ff.

8 **Fikentscher** (1975-1977), Vol. V, p. 27.

9 As to the investigation of analogy of universal claim, cf. Steinwenter's studies. **Steinwenter** (1953), Vol.I, pp. 345 ff; **Idem** Vol. II, pp. 105 ff and **Idem** Vol. III, pp. 169 ff.

10 The 2nd English-language edition came out in 1953 and the German-language (**Geschichte der römischen Rechtswissenschaft**) edition in 1961.

11 **Schultz** (1961), p. VII.

12 **Fikentscher** (1975-1977), Vol. I, pp. 264 and 343.

13 Jhering wrote in 1852: "Der comparativen Jurisprudenz der Zukunft wird es möglich werden,... eine zusammenhängende Theorie der Alterstufen des Rechts aufzustellen." This is the task of the "general physiology of law", living, as yet, its childhood. Cf. **Jhering** (1894), p. 74.

14 **Wenger** (1920), p. 106 ff.

15 As to "Isolierung" in general, cf. **Schulz** (1934), pp. 13 ff.

16 **Zweigert-Puttfarken** (1978), pp. 1 ff.

17 **Rabel** (1924), pp. 4 ff. Cf. also **Fikentscher** (1975-1977), Vol. I, pp. 10-12 and **Kunkel** (1954), pp. 1 ff.

18 As to the pair of opposites, "politicitas" based on the polis-system, and "civilitas", built on the imperium, cf. **Frezza** (1979), pp. 326 ff.

19 Cf. Aristotle, Eth. Nic. 1134b 18-1135a 5 and Eth. Meg. 1194b 30-1195a 7. Cf. also **Triantaphyllopoulos** (1973), p. 647.

20 **Dareste** (1968), p. 1.

21 **Giuffrè** (1977), pp. 1 ff.

22 **Pringsheim** (1960), pp. 1 ff.

23 **Pringsheim** (1950), p. 5 f. n. 3.

24 **Weiss** (1923), Vol. I, pp. 7 ff.

25 **Dem.** 24.210.

26 Cf. **Arist.**, Pol. 1274a 23 and **Plato**: Pol. 599c.

27 Cf. **Strab.** 6,1,8.

28 Cf. D. 10,1,13 (Gaius).

29 **Dareste** (1983), p. 2.

30 As to Sextus Caecilius Favorinus, **Kunkel**, pp. 172 ff.

31 As to Callistratus, cf. **Kunkel** (1952), p. 235.

32 **Beauchet** (1897), Vol. I, p. xi.

33 Summarized by **Beauchet** (1897), Vol. I, p. xvii.

34 **Biscardi** (1961), p. 17.

35 **Biscardi** (1961), p. 17.

36 **Villers** (1977), pp. 1 ff.

37 **Biscardi** (1961), pp. 14 ff.

38 **MacDowell** (1978), pp. 54 ff.

39 **Honsell** (1982), p. 130.

40 As to the survey of the literature, cf. **Pringsheim** (1950), p. 128, n. 2, 3.

41 **Bekker** (1932), p. xiv.

42 **Klingenberg** (1976), pp. 1 ff. K.L. **Hermann** (Disputatio de vestigiis institutorum veterum, imprimis Atticorum per Platonis de Legibus libros indagandis, Marburg, 1836) refers to the conformity of the "agricultural legislation" with positive law already in the first half of the last century.

43 **Coing** (1976), pp. 16 ff.

44 **Pringsheim** (1950), pp. 132 ff.

45 Cf. also **Dareste** (1893), p. 4.

46 Jaeger rightly names the missing of the collection in question the "**unheilbare Wunde**" of our knowledge concerning the Greek history, cf. **Jaeger** (1955) Aristoteles, p. 273.

47 **Michelakis** (1968), p. 166.

48 Taking this into consideration, Triantaphyllopoulos writes that Aristotle, dealing with the **politeia** of the different city-states, proceeds in a descriptive - and even comparative - way. Cf. **Triantaphyllopoulos** (1973), p. 663.

49 **Troje** (1971), pp. 25 ff.

50 The fact that Theophrastus is the disciple of Aristotle manifests itself in many respects. By assuming the existence of **proairesis**, necessary for the validity of the contract for the sale of goods, he obviously starts out from the Aristotelian **proairesis**-theory. Cf. Simonetos (1968), p. 461.

51 **Triantaphyllopoulos** (1973), p. 690. We remark here that the name of Theophrastus has been preserved for posterity primarily by his work entitled **Ethikoi Characteres.**

52 **Pringsheim** (1960), p. 5.

53 **Pringsheim** (1960), p. 5.

54 **Hermann-Thalheimer** (1895), pp. 145 ff. and **Arangio-Ruiz-Oliveri** (1925), pp. 240 ff.

55 **Pringsheim** (1950), pp. 134 ff. From recent literature cf. **Herrmann** (1976), pp. 616 ff and **Simonetos** (1939), pp. 185 ff.

56 **Pringsheim** (1950), pp. 233 to 238, and **idem** (1960), p. ii.

57 **Weiss** (1923), Vol. I, p. 122.

58 As to the right interpretation of the **Peri symbolaion**, cf. **Kunkel** (1952), pp. 192-194.

59 **Lipsius** (1905-1915), p. 965.

60 Cf. in sum **Beauchet** (1897), Vol. IV, pp. 15 ff.

61 **Coing** (1952), p. 38, n. 55.

62 For interpreting the passage, cf. **Pringsheim** (1950) pp. 156 ff; **Beauchet** (1897), Vol. IV, pp. 125 ff, and **Gernet** (1968), p. 404, n. 94.

63 Plato knows in the **Nomoi** only the purchase of goods (Nomoi 742 c; 915 d-e).

64 **Dareste** (1893), pp. 305 ff.

65 **Nörr** (1974), p. 32.

66 As to the interpretation of the sources indicated, cf. **Nörr** (1974), pp. 135 ff, and **Dareste** (1893), p. 301.

67 **Dareste** (1893), p. 7.

68 **Pringsheim** (1950), p. 3.

69 In our opinion, Triantaphyllopoulos comes near to the truth as he names Theophrastus' method "**eine mit persönlichen Ideen angereicherte Rechtsvergleichung**". Cf. Triantaphyl-

lopoulos (1973), p. 690. Rheinstein also regards Theophrastus as the precursor of comparative law beside Aristotle. Cf. **Rheinstein** (1974), pp. 40 ff.

70 Cf. Noct. Att. 20,1,4. Cf. also **Bretone** (1978).

71 **Honsell** (1982), p. 130. As to the connection between Rome and the Hellenic culture, a summary is given in recent literature by **Christes** (1975), pp. 150 ff.

72 On the connection between Cicero and jurisprudence cf. **Hamza** (1983), pp. 59 ff; **idem**, pp. 139 ff. and **idem**, pp. 57 ff.

73 Cf. the interpretation of the source in **Llompart** (1976), p. 19.

74 **Rabel** (1924), p. 91.

75 **Nörr** (1974), pp. 27 ff.

76 **Nörr** (1974), p. 28.

77 **Balogh** (1948), p. 1.

78 **Balogh** (1948), pp. 1-2.

79 **Pringsheim** (1950), p. 502.

80 **Beauchet** (1897), Vol. I, p. ix.

81 **Kaser** (1971), pp. 214-221.

82 **Knoche** (1968), pp. 17 ff.

83 In respect of the reflection of plurality in the relation of the provinces, cf. **Pugliese** (1964), pp. 972 ff. Pugliese writes descriptively saying that provinces could obtain, owing to the change in the edict, on principle every year different laws (p. 986).

84 **Magdelain**, pp. 47 ff.

85 Here we refer to the fact that, in spite of this, it is not right - in our opinion - to investigate the signs of comparison (Cicero, Gaius) quite simply in terms of the mutual interrelation between Roman and Greek laws, as done e.g. by Gutswiller. Cf. **Gutswiller** (1958), pp. 2 ff.

86 **Jhering** (1852-1865), Vol. II, pp. 19 ff.

87 **Crouzet** (1963), p. vii.

88 **Pringsheim** (1960), p. 10.

89 **Pringsheim** (1960), p. 3.

90 In this respect cf. summarily **Jones** (1956), p. 223.

91 **Triantaphyllopoulos** (1973), p. 689.

92 **Ebert** (1978), p. 34.

93 **Rabel** (1924), pp. 7 f.

94 On the critique of ancient Roman law, cf. Nörr (1974). This is the only comprehensive elaboration of this problem.

95 **Nörr** (1974), p. 11.

96 **Schnitzer** (1961), p. 8.

97 **Nörr** (1974), p. 12 and 125, and **idem** (1974), p. 381. The place of the source is: D. 47,14,1 (Ulpianus).

# CHAPTER 2

# COMPARATIVE LAW AND ANTIQUITY IN EUROPEAN JURISPRUDENCE

## 2.1. LEGAL HUMANISM AND ANCIENT LAWS

1. The exponents of legal Humanism took a particularly strong interest in antiquity. This, of course, did not mean that in the preceding centuries Graeco-Roman Antiquity - as far as comparison between various kinds of law was concerned - had entirely been left out of consideration. It is sufficient to mention here the **Collatio legum Mosaicarum et Romanarum**, referred to as **Lex Dei** in the Middle Ages; this collection, which may have originated at the turn of the fifth century A.D. is an often cited example of the comparison of law, used for practical purposes in particular.[1]

The real title and author of this collection containing Hebrew as well as Roman legal material is unknown.[2] This may explain the fact that Boucaud described the aim of the **Collatio** as expressly mystical.[3]

Even in the works of Glossators and Commentators, we may often see - primarily as a function of practical aims - certain rules of the Justinianean Roman law, German law and canon law compared. Without aiming at an analysis in depth, we are referring to the fact that, in the thirteenth century, Ferretti of Ravenna made a comparison between Longobard law and Roman law.[4] In the field of comparative law, namely in comparative studies based on Roman law, the exponents of medieval European jurisprudence also had a part to play. It is, of course, quite another matter that - for lack of an appropriate method - it is sufficient to refer here to the fact that they investigated the law of various peoples without regard to the connections in time and place. Thus, their analyses hardly complied with the basic criteria of comparative law, elaborated centuries later.

The lack of being well-grounded in methodology was the reason why the Glossators and Commentators united the "historical" and "comparative" studies on a certain primitive level.This interpenetration was referred to appropriately by Baratta: **"E altrettanto ovvio che... senza tener conto della vigenza a meno di tale ordinamento in determinati paesi ed epoche si può giungere ad affermare che glossatori e postglossatori attuarono une "felice" combinazione dello studio "storico" a "comparato"...**[5]

2. The first expression of the need for analyzing the connection between Roman law and the law of the other peoples of the ancient Mediterranean world can be found in the works of jurisconsults of legal Humanism. In the sixteenth and seventeenth centuries, the age of the Renaissance, the interest in antiquity, in the works of classical authors became keen all over Europe. As far as Europa was concerned, this interest could first be observed in Italy. It was Burckhardt who called attention to this fact, in a highly vivid descriptive form, in the last century.[6] The signs of interest in Greek antiquity had already been manifest in the age of Boccaccio and Petrarca. Boccaccio was the first to translate the Homeric epics into the vernacular of his country. The most famous university towns, such as Pavia, Bologna and Padova, ranked among the **"poleis"** of "cultic" importance, where attention was paid to Greek culture.

The interest in Greek culture became soon coupled with Oriental studies. The realization of the importance of Arabic as well as Hebrew literature and science can be illustrated in Italy by the activity of the Florentine Gianozzo Mannetti or of the neo-Platonist Pico della Mirandola, another Florentine thinker.[7] The interest directed towards classical antiquity, the most important exponent of which, in the domain of literature, was Petrarca,[8] who could practically be considered as the "discoverer" of Cicero for his age,[9] was completed by the need for knowing the whole **"orbis terrarum"** as known to that age; and the same need was also the starting point of the jurists' interest on the same lines. It may also be attributed to Petrarca's influence that the great **iurisconsulti** of the sixteenth century, Alciatus, Cuiacius, Coveanus, Hotomannus - and perhaps also Dionysios Gothofredus may also be ranged among them - devoted great attention to analyzing Cicero's works.[10]

Volterra[11] argued that, through the mediation of biblical scholarship - under the impact of research into canon law - the investigations not restricting themselves to Roman law alone were gaining importance even in the field of civilistics, as early as the Renaissance. Attention was focussed on the comparison between Roman law, the other types of ancient

law not lost yet without a trace, and Hebrew law still retaining its personal effect. As early as the sixteenth and, particularly, the seventeenth centuries, a considerable number of works on certain institutions of the Hebrew law were published; some of them even aimed at finding the principal characteristics of this law.[12]

3. In these centuries, a considerable number of Romanists did no longer restrict their investigations to the analysis of the **Corpus Iuris Civilis** and of the Canon law alone; as compared to the earlier phase, they extended their studies over an almost extraordinary range by investigating the sources of the law of both the Roman and the non-Roman worlds.[13] As early as the sixteenth century, it was generally accepted that an antiquity-oriented philosophy and philology whose attention was attracted by antiquity, and late antiquity in particular, should also include **iurisprudentia**. It was a mark of the age that in the fifteenth century the philologists - e.g. Lorenzo Valla and Angelo Poliziano - having fully mastered the Greek language and employing philological methods, were the first to tackle the **Corpus Iuris**.[14] This approach manifested itself in a particularly conspicuous form in the activity of Alciatus; it was from him that the proposal to connect jurisprudence to "**bonae litterae**" originated.[15]

Of course, the scholarly study of Roman law itself was part of the Renaissance, too,[16] and jurisprudence became all the more an integral part of the Renaissance when the field of legal investigations had been considerably extended. The extension of the field of study had been basically caused by the appearance of the comparative approach. The preconditions of this extension, however, had been the availability of Bacon's inductive method and, also, the fact that the Mediterranean world came to be considered by scholars - including also the practitioners of jurisprudence - as a cultural and geographical unity.[17] It is sufficient to refer here to Melanchton's work entitled **Oratio de legibus**, on the subject of "reception": Melanchton supposed the Athenians to have taken over Egyptian law and the Romans to have done the same to Greek law.[18]

In all probability, the broader outlook characterizing legal Humanism and jurisprudence may explain why it could have occurred to François Hotman to criticize the Justinianean Roman law as early as the second half of the sixteenth century. Hotman - as well as Leibniz who equally stressed the need for codification[19] - set a very high value on Roman law, in its Justinianean form.[20] But in his work published under the title "**Antitribonianus sive dissertatio de studio legum**" he was a "**nationalpolitisch engagierter Kritiker des justinianischen Rechts**".[21] Hotman, a legal scholar who had come to Paris from Bourges, wrote the above-mentioned project, inspired by

his conversations with L'Hôpital, in his capacity of court historian.[22] The "**Antitribonianus**" was a major political monograph dealing with the reform of legal studies and of the then prevailing statutes. What Hotman's proposal was essentially about was that Roman law, modified by the local customary law, should be the starting point of national codification; this also suggested that, for him, Roman law kept its importance even following its codification.[23] As a "spontaneous" thinker and adversary of the **mos italicus**, Hotman's[24] principal aim was to explore classical Roman law, using, as means to this end, his papers on Cicero, as well.[25] For Hotman, there were, in fact, two kinds of Roman law: one was the classical Roman law to be explored by detailed analysis, the other was the Justinianean law characterized by "**inconstantia et invarietas**". Consequently, in his view, comparison was needed **within** the field of Roman law itself. A devotee of the **mos gallicus**, Hotman whose works, and the "**Antitribonianus**" above all, exerted such a great influence on the scholars of **Iurisprudentia** a few decades later, was encouraged exactly by this "inner" comparison of the laws of ancient peoples to criticize the prevailing law.[26]

Hotman supported his critique of the Justinianean Roman law by referring to its archaic norms. As his critique concerned, basically, the form of Roman law such as it had found expression in the **Corpus Iuris**, Riccobono's opinion according to which Hotman "... **condamne toute la direction de l'enseignement et la substance même du droit romain** (sic! G.H.) **pour ce motif que ce droit, étant tout imprégné de notions et de doctrines archaïques serait tout à fait étranger au monde contemporain**"[27] seems to be exaggerated.

## 2.2. NATURAL LAW AND LEGAL COMPARISON

1. The crucial concept of natural law, which was increasingly gaining ground, was that there was a "**ius commune**" independent of positive law; this implied a need for comparative studies. The scholars studying natural law in the sixteenth and seventeenth centuries thought to have discovered the traces of this "**ius commune**" in the Old and New Testaments.

The Justinianean law and the Old and New Testaments, can first be found compared in Raguellus on the basis of the study of natural law. Raguellus, stressing it as early in his work as the preface to **Leges politicae ex Sacrae iuris prudentiae fontibus collectae ad formam Iustinianei codicis ex libris Veteris et Novi Testamenti digestae** (Frankfurt, 1577), undertook the analysis of the material of legal character in the Old and New Testaments and the comparison between this and the **ius civile** which he regarded as equivalent to Justinianean law. In England, it

was Selden who - in a number of works - dealt in detail with Hebrew law (**De successionibus in bona defunctorum ad leges Ebraeorum** (published in 1631), **De successione in Pontificatum Ebraeorum** (published in 1636/, **De iure naturali et gentium juxta disciplinam Ebraeorum** (published in 1640), **Uxor Ebraica seu de Nuptiis et divortiis veterum Ebraeorum libri tres** (published in 1646) and **De Synedriis veterum Ebraeorum** (1650 to 1653).[28] Selden is generally considered by English authors as the founder of comparative studies in legal history.[29] It is also worth mentioning of Selden that in addition to Hebrew law in two of his studies (**De diis Syriis** (1617) and **Eutyochii Aegyptii patriarchae orthodoxorum Alexandrini ecclesiae sua origines** (1642)) he also examined other types of Oriental law.

The fact that comparative studies had been extended to ever wider spheres of the laws of the Mediterranean world, or rather that they had drawn an ever greater part of positive law into their field of interest did not necessarily mean that the role of Roman law as **ius commune Europaeum** was challenged.

It was not inconsistent with the above that Hermann Conring, in his work published in 1643 under the title "**Commentarius historicus de origine iuris Germanici**", where he set out to prove the survival of certain institutions of the Germanic law, raised the question of the legitimation of the reception of Roman law in Germany.[30] Conring, very much like Beyer, basing his statement on the comparison made between Roman law and the **Landrechte** of special validity (i.e. as Hotman had done before, with the difference, however, that he did not raise the question of codification), called into question the supremacy of Roman law.[31]

We should, however, bear in mind that these criticisms, moving necessarily on the academic level of the age, were not the rule as yet, but the exception. Arthur Duck, for instance, in his work published in 1652 (**De Usu et Authoritate juris civilis Romanorum in Dominiis Principum Christianorum Libri duo**),[32] presenting a kind of comprehensive history of reception, legitimized Roman law, without reservations. Roman law - despite the plan of the **Corpus Iuris Reconcinnatum** - did not lose its importance for Leibniz,[33] though he had become aware of its shortcomings, apparent in certain cases. In his opinion, on the one hand, the **Corpus Iuris** contained certain norms not unconditionally advantageous to the States of his age, on the other hand, certain rules of the Justinianean law were not in accordance with natural law.[34] Leibniz was aware of the importance of comparative studies.

For Leibniz, comparative analysis was justified from two aspects. On the one hand, he realized how important the plurality of the ancient law was. One passage of the **Nova methodus discendae docendaeque iurisprudentiae** refers expressly to this: "**Habemus leges Mosaicas in Sacra Scriptura, quarum cum Romanis comparationem**

**paulo post Justinianum Graeculis aliquis instituit, hodie verum diligentiorum ea in re operam Zepperus navavit. Legum Aegyptiarum, Persicarum, Scythiarum exstant reliquiae apud Herodotum, in fragmentis Ctesiae et Diodori Siculo. Graecorum instituta diligentissime persecutus est Pausanias, et nostri aevi velut alter Pausanias Meursius. Jura Romanorum satis cognosci ex variis eorum monumentis possunt, de quo mox."**[35] On the other hand, the plan of the "**Theatrum legale**" in itself presupposed the survey of a number of types of positive law or, at least, the comparison between Roman law and the precepts and rules of **ius naturae**.

In Leibniz's works, Roman law continued to preserve its character of **ratio scripta**. It also followed from the character of Roman law as "**emanatio rationis**" investigation; a sentence in the above citation refers expressly to that ("**Jura Romanorum satis cognosci ex variis eorum monumentis possunt...**").

In Grotius - and this particularly applies to his works entitled **Florum sparsio ad ius Iustinianeum** and **De iure belli ac pacis** - Roman law and the law of foreign peoples can often be seen compared. The same applies - though to a lesser extent - to Pufendorf who in his work entitled "**De iure naturae et gentium**" referred to parallel legal phenomena. In the works of the most active exponents of the School of Natural Law we can find the traces of comparison independently of the fact whether they carried out their investigations empirically (like Grotius), or rather used the deductive method.[36] Grotius in his works grasped the opportunity of referring to the law of a great variety of peoples over a wide range. Investigations of this type - as Naber put it[37] - did not only take place **obiter**, but also collected a "**verus thesaurus**" of the institutions of the different kinds of law, which were so similar to and, at the same time, so dissimilar from one another. The comparison, however, was for Grotius only a means to an end. The comparison between the institutions of the law of various peoples served, as a matter of fact, only for legitimizing the theory of natural law.[38] Another characteristic of the School of Natural Law was that the historical factor had completely lost its importance in it. It may be mentioned in passing that for the exponents of the new School of Natural Law the historical factor has again some importance.[39]

The ahistorical outlook of the exponents of natural law was well illustrated by Grotius' and Pufendorf's opinion, wherein the basis of statutory succession was the testator's presumed will or (to put it more precisely) his will to be presumed (**De iure belli ac pacis** II,7,3 and **De iure naturae et gentium** IV,11,1). It follows logically from the opinion tracing back the claim to legal succession to the will of the deceased to suppose that testamentary succession should enjoy priority over statutory succession, because of its origin.

For the exponents of the School of Natural Law - as well as, incidentally, for the Humanists - the function of comparative analysis was not clear. This may be the reason why, when making comparisons between individual institutions of Roman law and those of other ancient peoples, the only problem they managed to formulate was that of the so-called **derivation**, of disputable value.

The typical, **expressis verbis** representative of this approach was Heineccius in his work **De utilitate litterarum orientalium in iurisprudentia** .[40] It is worth mentioning that Heineccius paid considerable attention, even in his textbook published several times as **Elementa iuris civilis secundum ordinem Pandectarum** (Lipsiae, 1727 - First ed.), among others, to Greek philosophy. This can be proved by the great number of citations taken by him from Aristotle's **Ethica Nicomacheia**.

In the investigations carried beyond the horizon of the Roman law, the search for analogy was, in most cases, only of secondary importance and, even this way, it was only exceptionally that it gained significance. What mattered was, generally, to establish the similarity between individual institutions, without analyzing the causes in detail. In some cases, the "assimilation", attained indirectly, through mediation, was taken into consideration. Heineccius's above-mentioned work, **De utilitate litterarum orientalium in iurisprudentia**, where mention was made of the fact that Hebrew law had become an integral part of Roman law via Greek mediation, was an example of this approach.[41]

2. The beginnings of the Comparative School which followed practical objectives in particular and was qualified, above all, to realize these objectives and laid stress on the search for analogy, went back to the late period of natural law. The best-known representatives of this School - which was actually no more than a kind of research trend - were Johann Stephan Pütter and August Friedrich Schott.

About the main phases of the life and professorial activity of Johann Stephan Pütter (1725-1807) his two-volume Autobiography provides information (**Selbstbiographie zur dankbaren Jubelfeier seiner 50jährigen Professorstelle zu Göttingen**, I-II. Göttingen, 1798).[42] Pütter had studied in Halle, under Heineccius.[43] Then, some years later, he became Gustav Hugo's professor and colleague in Göttingen. From the autumn of 1747 on, at first as associate professor, Pütter had been delivering lectures in Göttingen.[44] As Göttingen was at this time part of the Electorate of Hannover, in "personal union" with England at this time, the University of Göttingen was generally more open to new ideas than were the other universities in Germany.[45]

Pütter, in addition to being with Gustav Hugo, the precursor of the Historical School[46] - proved by the fact that the historical and methodological approach was kept separate in his work **Entwurf einer juristischen Enzyklopädie und Methodologie** (1757) - accepted the validity of the so-called historical and comparative approach[47] as well as the arguments for customary law and for the so-called **Natur der Sache.**[48] Pütter, who was first and foremost a Germanist, dealt with the problems of the theory of the sources of law principally in Vol. II of his **"Beyträge zum Teutschen Staats- und Fürstenrecht"**, published in 1779. In this work, the author formulated the requirement of applying the law in terms of the "comparative" approach. The theoretical foundation of the investigations into the comparisons made between several kinds of law and legal systems was obviously provided by the fact that, following the example of his predecessors, he considered the **ius commune** of Germany, to which he attributed an autonomous existence, as of equal importance as an equivalent to post-Reception Roman law.

Already in his inaugural lecture, delivered in 1748, early in his academic career, Pütter criticized the custom or practice of jurisconsults to mix the rules of Roman and German law.[49] The previously prevailing approach the so-called **Usus juris Romano-Germanicus**, characterized by mixing without discrimination the classical and Justinianean Roman law with the rules of Medieval law, was alien to Pütter. In his work entitled **Neuer Versuch einer Juristischen Encyklopädie und Methodologie**, published in 1769,[50] giving a programme which reflected a change in outlook, he made the demand that **pure** Roman law should be taught at the University. This meant that Roman law should be taught "purified" of the elements of German and Canon law, that archaic law (which was to be made into an independent system) should be distinguished from Justinianean law. This programme, formulated clearly, included the requirement of comparison. For Pütter, Roman law meant the **ius peregrinum** which had to be opposed at all costs to **ius patrium.**[51] Pütter paid particular attention to the question, whether there existed, besides Roman law another, "common" German private law.[52] In his opinion, there was originally a general customary (unwritten) law valid for the whole of Germany, which, had the reception of Roman law not taken place, might have been the **ius commune**. In this way - as Ebel put it[53] - Pütter was the first to try and find a way to **"deutsches Privatrecht"**, the reconstruction of which was, incidentally, a mere **opus desperatum**, because of its particularism.[54] The fact that in the effort to reconstruct German

private law, which is anyway rather problematic, the rules of Roman law could not be involved in, does not mean that the possibility of comparison is totally out of the question.

The first formulation of the idea of distinguishing Roman law received in Germany from the autonomous German **ius commune**, considered as equivalent to the first, was due to Johann Schilter. As early as the second half of the seventeenth century, Schilter (1632-1705), whose activity indicated the approaching end of **Usus modernus**, was of the opinion, that in Germany two kinds of "common law" existed, independently of each other.[55]

From the point of view of distinguishing Roman law from German law, the **Praxis iuris Romani in foro Germanico** (Jena, 1675) and the textbook-like **Institutiones iuris ex principiis iuris naturae, gentium et civilis, tum Romani tum Germanici, ad usum fori hodierni accomodatae** (Leipzig, 1685) may come into consideration. It was due to Schilter that, contrary to the **Usus modernus** discussing the institutions of Roman law and German law side by side, directly juxtaposed, he was the first to treat the institutions of the German law as an independent system. Besides, he also sought to point to the antecedents and sources - as e.g. with the **lex Salica.**
In this way, he was able to document the hypothesis according to which German private law had independent existence. Schilter's conception was soon to find followers, of whom the names of Samuel Stryk and Christian Thomasius should be mentioned. His disciple, Christian Thomasius was in all likelihood the first - prior to 1705 - to announce a lecture in Halle, under the title **Institutiones iuris Germanici** on the German **ius commune.**[56] Following him, his disciple, Georg Beyer (1665-1714) gave lectures on the same subject in Wittenberg from 1707 on, the text of which was published after his death in 1718, by J.M. Griebner[57] under the title **Delineatio iuris Germanici ad fundamenta sua revocata.**

Apart from the activity of Heineccius, it was Pütter that, following in Georg Beyer's steps, undertook to elaborate, as far as possible, the details of the German **ius commune**, considered as being autonomous. Pütter assumes that in Germany the reception of foreign law had been founded on an error and, for this reason, should be regarded as not inevitable at that time. He had to face, however, the fact of reception and, for that reason, he gave up the idea of "banishing" Roman law from Germany. However, he firmly called the attention to the fact that the "ancient" Germanic law had not ceased to exist after the reception of Roman law and, consequently, its existence should be taken into consideration. The views of his contemporary, Friedrich Runde, were basically the same.[58] It was, of course, a different matter that, compared to Roman law, the "ancient" Germanic "**gemeines Recht**" was far from being systematized law; it was only a framework, a summary of the rules relating to individual legal institutions.

3. August Friedrich Schott was in fact, as he himself stressed in the preface to his work entitled **Entwurf einer juristischen Encyclopädie und Methodologie zum Gebrauch akademischer Vorlesungen,**[59] Pütter's follower.

> The critical evaluation of Schott's activity is, in our opinion, too summary and even one-sided.[60] A clear indication of this negative appreciation was that Wieacker failed to mention Schott's name in the **Privatrechtsgeschichte der Neuzeit**, his name was absent from each edition, even from the Italian one.[61] Schott's importance cannot be limited to the edition of **Unparteiische Kritik**, issued in Leipzig between the years 1768 and 1790. Besides having a thorough knowledge of Saxon law (**ius Saxonicum**),[62] he also offered a detailed discussion of methodological questions in his work entitled **Entwurf einer juristischen Encyclopädie...** .

Schott was also Pütter's follower in emphasizing that the German **ius commune** existed independently of Roman law. This is proved, among others, by the fact that, when analyzing the individual legal institutions, he referred **expressis verbis** to the German peculiarities, stating that the reception of Roman law had never taken place. Examining the **patria potestas**, he referred, for instance, to the fact that its form, so well known in Roman law, did never exist in the **ius Saxonicum.**[63] When studying certain parts of private law, he divided this into two parts: in his view, it was made up, on the one hand, of the **ius Germanicum privatum universale** and, on the other, of the Roman law.[64] In the course of analyzing the **ius Germanicum privatum universale**, he suggested that this should be clearly distinguished from the "foreign law introduced into the German courts of law".[65] When treating the Roman law, he stressed that Roman law was effective law not only for the German law courts but it was equally current in most European countries.[66] The fact that he laid stress on the difference between the two kinds of law (legal systems) valid in Germany, which even in itself anticipates the possibility of comparative investigations, was completed by mentioning "Mosaic law" contained in the Old Testament which was part of the so-called **Göttliches Positivrecht.**[67] The positive character of the "Mosaic law" was supported, on the one hand, by its effectiveness among the Jews themselves, in their interrelationships, on the other hand - particularly with reference to the so-called Mosaic matrimonial law -, by its prevalence among Christians.[68]

In addition to referring to the Mosaic laws considered as positive law, and to distinguishing the German **ius commune** from the Roman law, mention must be made of the fact that contemporary European law or its survival from earlier ages in the collective memory may have exercised

influence on the development of German **iurisprudentia.**[69] Schott argued that this influence could not be thought of as universal; the influence of the "Italian, English, Dutch, Swedish and Danish" law manifested itself only in the individual legal institutions, i.e., in a concrete form and way.[70]

## 2.3. THE GERMAN HISTORICAL SCHOOL AND COMPARATIVE LAW

1. The endeavour to compare the rules of various types of legal systems - appearing late in the development of natural law, under hitherto unexplained circumstances - did not find any followers among the representatives of the German Historical School. It may even be stated without exaggeration that the prominent figures of the Historical School, which started to develop at the turn of the eighteenth and early in the nineteenth centuries, most of all Savigny himself, were openly against all types of comparison in legal studies. The principal reason of this phenomenon may be found in the fact that, for them, Roman law again obtained exclusive authority. It was out of the question that the **ius Germanicum universale**, which could not be reconstructed or only with difficulty, in an indirect way, should be equivalent to Roman law performing, in Savigny's conception, the function of the **ius commune Europaeum.**[71] But Savigny's conception was a novelty, not only compared to Pütter or Schott's comparative tendencies of a practical kind. His views meant also a break with Gustav Hugo's ideas unambiguously proclaiming the need for comparison between a number of positive legal systems as a condition for making a new, up-to-date **ius naturae**, in harmony with the demands of the age.[72]

> Of the sources of Gustave Hugo's theory, set up with the aim of creating a "new natural law", Kant's philosophy had great importance as the means to crushing the "old natural law". In Landsberg's view, the novelty of Hugo's teaching consisted in his wish to formulate the "new natural law" not by deduction, but by induction, i.e. by comparing all kinds of positive law.[73]

2. To stress the overall importance of Roman law - which thereby can be interpreted as a kind of **"Kryptonaturrecht"** - may, even in itself, lead to the loss of the importance of comparative law. The reason for the Historical School's hostility against comparison, was stated by Del Vecchio in a highly expressive form, early in this century. According to the above Italian philosopher of law, for the exponents of this school, the "cult" of

Roman law replaced the defeated, surpassed natural law.[74] The dislike for comparison led Savigny to extreme conclusions.[75] This aversion was the reason why he denied the necessity of both the so-called vertical and of the so-called horizontal comparisons. As a consequence of his ignoring the need for vertical comparison, doctrinal historical studies were pushed to the background. This is proved by the fact that one can scarcely find any indication of such a comparison in his work.

Nothing is more characteristic of the total eclipse of the comparative approach than the fact that it had no importance for the study of Roman law, either. Let us refer here to the fact that though Roman law had survived to the Middle Ages and, even, to modern times, no comparisons were made between this and post-classical Roman law. Savigny's extremely hostile attitude can to a great extent be explained by the fact that comparative studies were of a rather poor academic quality in the second half of the eighteenth century and even in the early decades of the last century. However, the reason why such studies should be completely ignored may have been basically the consistent emphasis of and the stress laid on the outstanding importance of Roman law. In contrast to Gustav Hugo who could not get rid of the bonds of natural law, Savigny believed that the problem of raising **iurisprudentia** to a high standard could be solved by concentrating his studies upon Roman law alone. We should, of course, not lose sight of the circumstance that, for Savigny, Roman law was more than just positive law, it implied also a given intellectual tradition.

3. The negative attitude of the Historical School towards the comparative approach tended to discourage the Romanists from dealing with the law of other ancient peoples, besides Roman law. It is typical of the almost unlimited influence of the Historical School that, although the two above-mentioned manuscripts of the **Collatio legum Mosaicarum et Romanarum** had not been found before the last century, publications on this topic - in contrast to the literature of the seventeenth century - entirely ignored the the connections between Roman and Hebrew law and dealt exclusively with the person of the author of the **Lex Dei**, and with the circumstances of its emergence.[76] Even Ludwig Mitteis who had studied the law of the peoples of the ancient Mediterranean world dismissed, at the end of the nineteenth century, the possibility of any connection whatsoever between the rules of statutory succession as recorded in the **Collatio** and the corresponding rules of Hebrew law.[77] The exponents of the Historical School tended to limit their investigations to the sources of Roman and German law alone.

The refusal by the Historical School to conduct comparative investigations caused a break in the development of European jurisprudence. The break is obvious, because the "predecessors" of the German Historical School, i.e. the School of Natural Law from which the Historical School took over the striving to form a closed system, the so-called "**systematischer Trieb**" as well as the Humanistic School, from where the criticism of the sources was borrowed,[78] were all "open" to the comparative approach.[79]

## 2.4. THE GENERAL LEGAL HISTORICAL TREND AND COMPARATIVE LAW

1. Traces of the historical approach could be detected, in the first decades of the last century, not only in the works of the exponents of the Historical School. Anselm Feuerbach in his inaugural lecture delivered at the University of Landshut in 1804, and published in the same year, entitled **Über die Philosophie und Empirie in ihrem Verhältnis zur positiven Rechtswissenschaft**,[80] made an effort to reconcile experience with theory, and positive law with natural law.[81] In this work, he still referred expressly to the need for employing the historical approach. Feuerbach severely criticized those paying no attention to how the law took shape and developed. Dealing with the sources, the antecedents of the legislation of his age, he laid stress on the importance of the thousand-year-old past, and this might be considered as an indication of a historical approach. The foundations of his approach to history, given expression in the above-mentioned lecture - and as referred to by Wieacker[82] - could evidently be traced back to the view that the openly ahistorical natural law was by no means suitable for laying the theoretical foundations of jurisprudence.

Anselm Feuerbach, however, was abandoning more and more his views. The fact that he got increasingly under the influence of the so-called "**Universaljurisprudenz**" as conceived by Leibniz[83] may had a part in this. In his approach the historical element plays a less significant role and this may be attributed to his dislike for the adoption and further development of the idea of general legal history (an idea propagated, above all, by Gustav Hugo)[84] as well as for the legal solutions of questionable value, considered to be legitimate in the spirit of the legal historical idea. It is worth mentioning that the universal legal history, the so-called **Universalrechtsgeschichte** almost inevitably entailed the diminishing role of

studies exploring a given legal system in detail. The growing significance of the legal historical trend may be closely followed in Feuerbach's works. He increasingly committed himself to the trend that drew parallels between institutions of the current, valid law. However, it is worth mentioning that it took a comparatively long time till the ethnological approach of general legal history fade into insignificance in his works.

Feuerbach who had originally been Kant's follower and who had endeavoured to arrive at a synthesis of the historical and practical approach in his work entitled **Vorrede zu der Schrift des Bamberger Stadtgerichtsassessors Nepomuk Borst, über die Beweislast im Civilprozess,**[85] broke spectacularly with the historical approach. To have declared that "what belongs to history, has already ceased to exist"[86] is an idea with grave implications. But it should be added that, being a polemical treatise, this work of Feuerbach's may not reflect exactly the real intention of the author.[87]

His posthumous work entitled **Idee und Notwendigkeit einer Universaljurisprudenz**, edited and published by his son, Ludwig Feuerbach, was conceived in the spirit of universal legal history.[88] In this work, Feuerbach dealt with the problems raised by the comparative approach. It is no exaggeration to consider Anselm Feuerbach - on the appraisal of his entire scholarly oeuvre -, the regard him, following Radbruch, as a **"précurseur du droit comparé".**[89]

2. On analyzing the connection between universal legal history and comparative law, it would not be proper to leave unmentioned that not all of jurisconsults of the German Historical School, who declared their adherence openly, followed servilely Savigny's anti-comparative approach, which was nevertheless representative of his age. In this connection, Gustav Hugo's standpoint has already been mentioned. Owing to his conception, which was considered to be insightful and original even by the standard of his contemporaries, Karl Theodor Pütter's (1803-1875) activity deserves particular attention.[90]

Unlike Anselm Feuerbach, Karl Theodor Pütter was not Kant's disciple but Hegel's follower. His Hegelianism manifested itself, in its purest form, in his monographs on international law.[91] The historian's approach played an important role in his works. A telling indication of the above was his treatment of the doctrines of various medieval international legal systems, e.g. of Islamic doctrines, among others.[92] His interest in comparative law is well exemplified by his work, published in 1831, comparing the concept of ownership in German law with the principles of Roman law.

In his work entitled **Der Inbegriff der Rechtswissenschaft oder juristische Encyclopedie und Methodologie** (Berlin, 1846), considered as the greatest achievement of his academic activity, the historian's approach is intertwined with the Hegelian doctrines. His definition of law and of the State, as well as the discussion of their line of development are both suggestive of Hegel's influence.

> The development from the "**Urrecht**" and the "**Naturstaat**" through the "**Freistaat**" and "**menschliches Recht**" to the "**christliches Recht**" and "**freier Staat**" was - even in itself - a reflection of Hegelianism.
> The description of the development of law and the State, in these terms, gave an encyclopedic survey of the principal characteristics of the States and law of the ancient Orient, as well as of the peculiarities of the major European State and law systems. The actual form of the treatment bore, eventually, the essential marks of the typical mode of presentation current in universal legal history. However, when discussing the individual systems of positive law, Pütter was writing in the spirit of the Historical School. The fact that in this respect he was Savigny's follower did not prevent him from applying in his work with the ideas of the **Universalrechtsgeschichte**.

Karl Theodor Pütter himself formulated the essence of his theory, in the preface to his work. He argued that the historical approach in itself was not sufficient for studying the law. In the domain of encyclopaedic or, to put it differently, scholarly studies, the treatment of law should be "perfect", i.e. it should cover all the phases and forms of legal development.[93]

Following in Anselm Feuerbach's footsteps, once even referring to him expressly,[94] Pütter raised the question, whether the law of **all** peoples really needed to be analyzed, in his view, this type of analysis was justified, because neither Roman law - especially in its archaic phase - nor the German law - including to a certain extent also the advance phases of German law - were suitable to be presented as "model development" of the law.[95] He argued that considering this the "perfect development" of law could only be presented in terms of universal world history. Nevertheless, he admitted that the sources and documents which should serve as a basis for reconstructing the law of the various "**Urstaaten**", were missing and unavailable. There were, however, certain means - mostly descriptive works written by the students of the customs and morals of the so-called primitive peoples - that could be used to get an idea of the "ancient" law.

Pütter went so far as to make an attempt at setting up a kind of "typology". He distinguished the so-called "**morgenländische Naturstaaten**" from the "**abendländische Naturstaaten**".[96] The so-called "**Weltrechtsge-**

**schichte**" was necessarily universal for him. Consequently - just as in Anselm Feuerbach's view - none of the types of law could have a privileged role. In this way, neither the Roman nor any other legal system could become a kind of "**guide de comparaison**".

3. Hegel's philosophy is particularly suitable for serving as the basis for a comparative analysis of various legal systems, each seen as a whole, or of their individual institutions. Thus it was no accident that it was Hegel's follower Eduard Gans (considered by some scholars, e.g. by Mitchell Franklin,[97] as the founder of German comparative law, in his work entitled **Erbrecht in weltgeschichtlicher Entwicklung** (Berlin, 1824-1835) who made a survey of the rules of statutory succession in various legal systems.

> It was Unger who called attention to the fact that, as regards the history of a certain institution, Gans's "**Erbrecht**" was virtually the only example of the adoption of Hegel's doctrines.[98] In the preface to Volume I of his work, Gans himself stressed the great and even decisive effect of Hegel's doctrines on his intellectual development.[99] Only a few lines of the text referring to Hegel's influence, selected at random, is cited below: "**... namentlich ist mir seit dem Erscheinen der Rechtsphilosophie zuerst ein heller Tag geworden, wo ich mir nur eines dunkeln Herumtappens bewusst war**". It is another matter that Hegel, in his late work entitled **Vorlesungen über die Philosophie der Weltgeschichte** was writing sceptically about comparative analysis, in connection with the development of the notion of liberty. Thus, he considered the parallels drawn between the Chinese, Indian, Greek and modern metaphysics to be ill-founded, because of the essential, substantial differences between them, resulting from the different standards of development.[100]

The subtitle of the **Erbrecht - Eine Abhandlung der Universalrechtsgeschichte** is, even in itself, a helpful point of reference for us to decide where, into which trend of the legal literature to classify the work. A citation from Thibaut, Gans' master, and the epigraph to the work, also helps us to get a better insight into the author's point of view.

> "**Das ist nicht die wahre, belebende Rechtsgeschichte, welche mit gefesseltem Blick auf der Geschichte eines Volkes ruht, aus dieser alle Kleinigkeiten engherzig herauspflückt, und mit ihrer Mikrologie der Dissertation eines grossen Praktikers über das et cetera gleicht. Wie man den europäischen Reisenden, welche ihren Geist kräftig berührt und ihr Innerstes umgekehrt wissen wollte, den Rat geben sollte, nur ausserhalb Europa ihr Heil zu versuchen; so sollten auch unsere Rechtsgeschichten, um wahrhaft pragmatisch zu werden, gross und kräftig die Gesetzgebungen aller anderen alten und neuen Völker umfassen. Zehn geistvolle Vorlesungen über die Rechtsverfassung der Perser und Chinesen würden in unsern Studierenden mehr wahren juristischen Sinn wecken, als hundert über die jämmerlichen Pfuschereien** (sic! G.H.), **denen die Intestaterabfolge von Augustus bis Justinianus unterlag.**"[101]
> Thibaut who, unlike Savigny, laid stress upon the need for legislation, in this

polemical treatise - and the polemy was the reason why he gave such a peculiar formulation to what he was to say - was referring to the demand that the law of **all** the peoples of the world should be subjected to comparison. Gans thought it important to make an epigraph of this citation, because this made his programme clear.

Gans, in his work conceived in the spirit of the **Universalrechtsgeschichte**, made a survey of the rules of succession in Indian, Chinese, Hebrew ("**Mosaisch-Talmudisches Erbrecht**"), Islamic, so-called Oriental, Attic and Roman law, as well as in Romanistic (Italic, Spanish, Portuguese, French), English, Scandinavian (Icelandic, Norwegian, Danish, Swedish) and, finally, Scottish law. In his preface to Volume I, written with the aim of justifying the comparative method of this work, Gans made a remark on the impossibility of distinguishing between the law of individual peoples, in terms of the development level of law, i.e., the so-called legal skill.[102] It followed directly from this that the legal history of the so-called **Virtuosenvölker** should not be given priority over the legal history of the so-called **nicht Virtuosenvölker**. Furthermore, he denied that the so-called **unbedingte Rechtsvirtuosität** was characteristic of the Roman people.[103]

On the other hand, Gans admitted that the Romans had attained to the highest standard of abstract law, especially in the doctrine of ownership and contracts.

According to Gans, a professor of jurisprudence at the University of Göttingen and, later, of Berlin, of legal history - if not wanting to be restricted to the mere formulation of abstractions - by studying the development of law in its **totality**, would inevitably become **Universalrechtsgeschichte**. The **Universalrechtsgeschichte**, in Gans's interpretation, implied that no exclusive importance should be attributed to the law of any people or to any period of legal development.[104] History, in Gans's interpretation, was not confined to the past; he extended it to the study of the present, as well.[105] For Gans, the comparative approach did not mean a levelling of the law of different peoples. Levelling would be equal to denying the particular characteristics of different types of law and would mean leaving the "identity" of the individual types of law out of consideration.[106] Although in contrast to the Historical School, Roman law was no **Kryptonaturrecht** for Gans, he considered Roman law particularly important. The crucial reason why he chose Roman law as **Standpunkt** was that this had been the law of Rome, of the centre of the entire universal history.[107]

And it was not only with reference to tradition that Gans, the legal scholar stressed the outstanding role of Roman law. He also pointed to the fact that Rome - mainly by virtue of its Empire - had exerted decisive influence upon the development of European history and this fact justified that the rules of Roman law should be studied in depth.[108] Therefore, it may not be going too far to state that Gans - unlike Thibaut - launched his attack, in the first place, against the "**mikrologische Altertumsforschung**" of the Historical School which, in itself, was far from meaning that Roman law had been definitively "dethroned".

4. The point of view of Gans's "**Erbrecht**" found its continuation in Unger's first work, written in his youth, entitled **Die Ehe in ihrer welthistorischen Entwicklung** (Wien, 1850). And though it is true that Gans failed to found a school,[109] his views made their influence felt even a decade after his death. In his work on the history of the institution of marriage, not even the traces of the views of the Historical School could be detected. This has to be stressed because, later, Unger had much in common with the doctrines of the Historical School. His work, analyzing marriage as part of the "development of world history" was the author's reaction to the circumstance that, what mattered in his studies was only the examination of the articles of the ABGB, i.e. that of the rules of a kind of positivism.[110] Soon after the publication of his above-mentioned work, under the influence of Savigny's **System**, Unger got estranged from the comparative approach and, in his later works comparative examinations could no longer be found.[111] A survey of the principal characteristics of the views reflected in his book will follow below.

In the preface, Unger mentioned his intention to pay special attention to Hegel's ideas (his philosophy of history) in his analysis.[112] He found it regrettable that Gans's **Erbrecht** should be the only example of adopting Hegel's doctrines in the analysis of individual legal institutions. Describing Gans's work, he stated that it was a work actually based on the idea of **Universalrechtsgeschichte** and was only in the second place a contribution to the philosophy of history. Unlike Gans, Unger's survey, focussed on the institution of marriage; it did not cover the characteristics of all peoples and periods. Relying on the thesis of "**caeca sine historia iurisprudentia**", originating from Balduin, the Austrian scholar underlined the importance of historical ("genetic") analysis in the study of individual legal institutions.[113] Unger also stressed that the so-called "peoples without history" were excluded from his studies.

He argued that it was pointless and, also, an impossible task to reconstruct the real history - full of tribal wars - of certain Oriental peoples. "**Wir scheiden deshalb diese Völker als nicht geschichtliche aus, begnügen uns mit dieser Gesamt-Schilderung ihrer ehelichen Zustände und gehen zu denjenigen Völkern des Orients über, welche sich zu weltgeschichtlichen herausgebildet haben.**"[114]

The reference to the peoples playing a role in "universal history" implied that the above legal scholar had the intention of analyzing only the marriage laws of specific peoples and States. Within the sphere of paradigms, the importance of Roman law was outstanding. However, because of the conception of **Universalrechtsgeschichte**, it was not exclusive. For Unger, the regulation of Roman law had lost its character of "**Standpunkt**", which it had still had for Unger. This was shown by the fact that Unger studied the institution of marriage in the chronological order of succession and development - i.e. it was not the law of Rome that he set out to analyze in the first place. He made a prallel examination of Graeco-Roman Antiquity, the Muslim and the so-called Oriental law (the law of China, India, Persia, Egypt and Judea).

5. Studying the connections between universal legal history and comparative law, we can sum up our conclusions in the statement that the advocates of this trend had differing ideas on the role and place of the law of ancient peoples - and within these -, those of Roman law in particular. One extreme was represented by Feuerbach who, under the influence of **Universaljurisprudenz**, regarded the study of those types of law which could no longer be taken for anything else than historical phenomena superfluous. Thus neither Attic law nor "pure" Roman law had any importance for him. At the other extreme was Gans's work. For Gans, Roman law and, in general, the laws of historical importance alone, e.g. Attic law had still been the objects of detailed analysis. And Roman law played even the role of "compass", though it must be admitted that this was a function of the subject and, in the given case, of the law of succession. As to Karl Theodor Pütter's and Unger's work, the adjective "neutral" is the most suitable for characterizing their opinion of how to judge the various kinds of ancient law. The demand to compare the law of **all** the peoples implied that Hellenic (Greek) law as well as Roman law should be an object of study; and there was no need to stress it especially.

In the works of the exponents of the Universal Legal Historical School, the comparative approach was extended to a very wide range. For most of the scholars belonging to this School - and if the whole oeuvre of

Feuerbach were taken into consideration, for all - both the valid and the no longer valid legal systems of law were taken into account in the comparison. To compare the law of all the peoples was, of course, not possible in most cases, without overcoming first a number of difficulties. Thus Unger - at least as far as modern law is concerned - did not analyze the law of **all** the peoples. And even Gans, though handling a uniquely wide-ranging material, was not able to study the law of every people. The characteristic trait of this School was that it was patterned after a kind of hierarchy based, by preference, on the subjective evaluation of the studied law. And this standpoint, given particularly clear expression in Thibaut's polemical essay, was the reason why - obviously as a reaction to the conception of the Historical School considering Roman law as a prototype - Roman law could not perform the function of "**guide de comparaison**" in these legal studies.

## 2.5. THE CONNECTIONS BETWEEN ROMAN LAW (ANCIENT LAWS) AND THE DEVELOPING ORIENTALISM

### 2.5.1. COMPARATIVE LAW BASED ON ETHNICAL CONNECTIONS

1. In the above survey of the activity of the major exponents of the trend of universal legal history, mention has been made of the fact that the anti-comparative standpoint of the Historical School was not to become a **communis opinio** in European jurisprudence. Anselm Feuerbach, Thibaut, Karl Theodor Pütter, Gans and Unger - some of whom admitted to be Savigny's followers (e.g. Pütter and, in the years following the publication of **Die Ehe in ihrer welthistorischen Entwicklung**, Unger) - were of the opinion that comparative studies were indispensable. The Historical School could not make its standpoint prevail in the question of comparison between the types of "modern" law, either. This is proved by the very existence of the **Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes**, started in 1829, with 26 volumes published up to 1853, containing rich material in comparative law,[115] though - it should be added - mainly such material as concerned penal and criminological aspects and the aspects of criminal procedure.

The publication of the **Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes** enabled the German jurists to get acquainted with the foreign law and, in this sense, the journal performed a mostly informative role. The publication of the **Kritische Zeitschrift**, a major opinion-leading organ was - in our opinion - an "open" declaration of war upon the Historical School ; its edge was blunted only by the fact that civil law was not among the concerns of the journal. It is the anti-comparative approach of the Historical School that can explain the following quote, taken from Karl Salomo Zachariae, which was meant to justify the launching of the journal: **"Wenn nun aus dieser Übersicht des jetzt unter den europäischen Völkern bestehenden literarischen Verkehrs und des dermaligen Rechtszustandes der europäischen Staaten der Schluss gezogen werden darf, dass da, was in irgendeinem europäischen Staate für die Gesetzgebung oder für die Rechtswissenschaft geschehe, auch die übrigen europäischen Staaten und Völker mehr oder weniger interessiere, so bedarf wohl der Plan der vorliegenden Zeitschrift, der Versuch, dem deutschen Publikum die Bekanntschaft mit den Rechten und den rechtswissenschaftlichen Schriften des Auslandes zu erleichtern, nicht erst einer Entschuldigung."**[116]

The views of the Historical School, focussing attention upon Roman law and the medieval German law, could not gain absolute ascendancy over the study of ancient law, either. We can find traces of the comparative approach in Bunsen's book published in 1813, on the connections between Manu's laws and Roman law.

In his work entitled **De iure hereditario Atheniensium** (Göttingen, 1813), Bunsen was the first to examine the connection between Roman law and the law of other Indo-European peoples. He stated that the order of succession was essentially the same for the Indians, the Athenians and the Romans: **"sic igitur hoc ex omnibus perspicuum eandem fuisse apud Indos, Athenienses Romanosque iuris hereditari rationem..."**.[117]

By the mid-nineteenth century, the camp of those studying the connections between Roman law and the law of the Indo-Europeans had already gained considerable strength.[118] The emergence of interest in this real or only supposed connection may be traced back to the revival of Oriental philological and historical studies. In 1824, the competition under the auspices of the Academy of Berlin was the initiator of the systematic surveying of the Attic law of procedure and also contributed, among others, to the revival of studies of this kind.[119] The ideological foundations of the comparison in terms of the ethnical connection can be traced back - and the same can be said of the exponents of the Universal Legal Historical School - to Hegel's and Fichte's philosophy.

As mentioned above, concerning the analysis of Gans's **"Erbrecht"**, Hegel in his work entitled "**Vorlesungen über die Philosophie der Weltgeschichte**" analyzed in detail, how and by what process the development of mankind had taken place.

The so-called "Aryan" or **alias** the Indo-German school, which over-emphasized the importance of similar ethnic groups and originated with Bunsen, was created by the so-called philological school, relying, to a high degree, on the findings of comparative linguistics. It has to be emphasized that in German philology Bopp's and Jacob Grimm's works[120] played an outstanding role.

The general philosophical connections and those of the theory of learning of the "Aryan" theory do not concern us here. What we would wish to observe is that Treitschke for instance also made use of this theory that had taken shape early in the nineteenth century and became full-fledged by the end of the century.

It should be stressed, however, that the rise of Oriental studies did not necessarily lead to one or another type of some "Aryan theory" in the field of legal analysis. Oppert's work, **De iure Indorum criminali**, published in 1847, was a case in point. Oppert was a prominent scholar expert in cuneiform legal texts. In his work no trace of unscholarly hypotheses could be found, nor did he look for artificial analogies with Roman law.[121] Thus this German orientalist was rather a name-giver than the creator of the "Aryan theory" of a dubious value. Concerning the increased role of this theory Volterra connected the new trend, as a by-product of Oriental studies, with the publication of Oppert's above-mentioned work.[122]

We may mention in this connection Karl Theodor Pütter's work published in 1846, i.e. one year before the publication of Oppert's book, where we can also find a great number of references to Indian law. This "Aryan" or, to put it differently, Indo-German trend had, in several respects, much in common with the Universal Legal Historical School. As a matter of fact, the only difference between them was that the former over-stressed the importance of the common ethnic group.

2. The Aryan or, by another name, Indo-German theory gained ground also in the sphere of studies relating expressly to the individual institutions of Roman law. This advance is illustrated well by Rossbach's work entitled **Untersuchungen über die römische Ehe** (Stuttgart, 1855). In the section on "comparative law", the author - studying the different ways of marriage - analyzed the Indian, Greek and German law.

Rossbach called emphatically the attention - as early as the first part of his work - to the fact that, among the Indo-German peoples the **manus** was the best indication of the status of women. As he put it: **"Die hausherrliche Gewalt und mit ihr die Manus ist so alt wie die erste indogermanische Familie."**[123]

In Rossbach's view the foundations of matrimony were basically the same for the various Indo-Germanic peoples. According to him, there were no historically authentic facts available in this relation, only hypotheses (sic! G.H.); nevertheless the analogies were evident.[124] Rossbach justified the possibility of comparison by pointing to the kinship between the Indo-Germanic peoples, to the existence of close bonds between them. Comparison was also justified because of **"derselbe Entwicklungsgang"**.[125]

Roman law had a different function in Henry Maine's **Ancient Law.**[126] Compared with that in Rossbach's work, this change in function can be explained by the fact that, in Maine's opinion, Roman law was only one among the several types of "ancient law".

On the other hand Maine, who had started his career as a specialist in Roman law, held Roman law - or more exactly Roman jurisprudence - in high esteem. This can be documented by a paragraph taken from his first paper entitled **Roman Law and Legal Education: "We are driven to admit that the Roman jurisprudende may be all that its least cautious encomiasts have ventured to pronounce it, and that the language of conventional panegyric may even fall short of the unvarnished truth."**[127] The importance of Roman law lies fundamentally in the fact that as a highly advanced law, it serves as a guide for all of modern law.[128]

Maine in the above seminal work - inspired mainly by the findings of comparative linguistics, in progress at the time - restricted the comparative studies to Indo-European or, to put it differently, Aryan peoples. He based his studies almost exclusively on written sources and limited his investigations to Roman and, to a lesser extent, to English law, with casual references to the Greek and Indian law.[129] In his studies of the so-called Ancient Codes, the Twelve Tables, Solon's Code and Manu's laws carried identical authority, had equal importance. Even the fact that Roman law - unlike Indian law - was the product of a "typical progressive society"[130] left his interpretation unchanged.

3. In the last two decades of the nineteenth century, the demand for the reconstruction of an Indo-Germanic **"Urrecht"** was formulated. Leist, the author of the **Graeco-italische Rechtsgeschichte** undertook to reconstruct the Aryan **ius gentium** (**Alt-arisches Ius gentium**, 1899) and the Aryan **ius civile** (**Alt-arisches Ius civile**, I-II, 1892). The insistence on

Indo-Germanic ethnical community was the reason why - adopting indiscriminately as he did the methods of comparative linguistics - he had nothing to say about the legal institutions of the Semitic, Hamitic and other peoples. Even the title of his work indicates that Leist used the terminology of Roman law even to reconstruct the ancient Aryan law.

It is characteristic of how common the theory of looking for the sources of Roman law in the law of Aryan peoples was that even Jhering who, in the last year of his life, pursued comparative studies, basically followed this trend in his work entitled **Vorgeschichte der Indoeuropäer.**[131] It should be stressed that we are not supposed to establish in detail the connection between Jhering's theory and comparative law.[132] In this sphere, we are confining ourselves to the statement that Jhering, by criticizing the dogmatic Romanist legal studies, underlined the instrumental character of the law; as Wilhelm put it, Jhering looked for the **law** (in general) in Roman law.[133] In this way, he had become the precursor fo the so-called modern functional comparison of law, the twentieth-century founders of which were Rabel and Lambert.[134]

> Jhering, however, clearly recognized the originality of the outlook of the Romans which might best be conveyed with the expression "**Selbstständigkeit**". He wrote about the "Roman cosmogony", when studying the characteristic traits of the Roman outlook: **"Alles, was Rom ist, erwirbt und leistet, verdankt es sich selbst und seiner Kraft; alles wird gemacht und organisiert, in allem ist Planmässigkeit, Absicht, Berechnung... Nichts wird von aussen entlehnt mit Ausnahme des Völkerrechts; Staat, Recht, Religion, alles produziert Rom aus sich heraus."**[135] But it was actually the systematic break with this outlook so characteristic of the Romans that enabled Jhering's oeuvre to become, in many respects, seminal for comparative law.

An integral part of Jhering's critical opinion of positive law was his historical approach so intensely characteristic of his works. The change that was inevitable in positive law - a change rooted in "**Zweckdenken**",[136] as far as Jhering was concerned - presupposed an analysis of the law in historical terms. This analysis of a historical type, where - as Bierling put it - the most important was to adhere to the so-called "**Kausalitätsgedanke**",[137] involved the analysis of the inner as well as the outer impulses. In the domain of the outer impulses - as far as legal development was concerned - the law of the peoples and States supposed to have exerted an influence on the development of the law under examination was to be analyzed. In Jhering, therefore, the views about "internal causality" were replaced by the conception of "external causality".[138] The study of external im-

pulses induced Jhering - when he was writing the history of the development of Roman law (**Entwicklungsgeschichte des römischen Rechts**)[139] - to analyze the law of the "**arisches Muttervolk**".

The guideline of the **Vorgeschichte der Indoeuropäer** was an analysis of the law and customs of the "**communauté originaire indo-européenne**" (Gaudemet).[140] It is typical of how great a stress was laid on the Aryan tradition that Jhering took the legal traditions of the Semitic peoples (Babylonians, Phoenicians, Carthaginians) only so far into consideration as these had been conveyed to the Romans by Aryan peoples.

> It was Ehrenberg, the editor of the posthumous work, who called the attention to the deficiencies of the book originating, not least, from the fact that Jhering had not been able to finish it, because of his death.[141] Jhering pointed to the impossibility of the task of reconstructing the law of the "Aryan mother people", for the very reason that, at that time, there had as yet been no State to give this law a frame.[142]

For Jhering, Roman law had crucial importance, even in the field of comparison in ethnical terms. This is suggested by the fact that it was his analysis of the history of Roman law that made him realize the need for the study of the archaic law of the Indo-European peoples, because - as it has already been mentioned - the **Vorgeschichte der Indoeuropäer** was conceived as an introduction to a work aiming at presenting the history of Roman law.[143] For Jhering the Aryan theory - as the basis of comparison - was a means to mapping out the history of Roman law.

4. The Aryan school, rooted first and foremost in philology, has survived to our century and is still influential. It was by stressing the common Indo-European past that Amaduni, a specialist of Armenian law, was able to compare the Armenian State with the Roman State of the monarchy.

> Starting from the common Indo-European past, Amaduni was drawing a parallel between the Armenian State, organized along the lines of Archaic clanship and the Roman State of the monarchy. The parallel legal institutions of Rome and Armenia stemmed, in his view, from the ground of a common Indo-European ethnic origin. As he put it: "**Fra il diritto romano e quello armeno vi fu certo un fondo comune, di provenienza etnica comune indo-europea... Un fondo comune tra due diritti fu l'identità etnica...**"[144]

The stress on common ethnic origin can be the basis of the analysis of parallel legal institutions of a number of peoples, but it can also be extended to other investigations. The common ethnic origin had also crucial importance in the study of Roman legal institutions. In the Germany of the 1930s the stress on common ethnic origins in Roman legal studies gained a direct political overtone. In order to prevent that the Roman law be accused of individualism, Schönbauer strongly underlined its so-called **Gemeinschaftsbezogenheit.**[145] He also made efforts to bring Roman law nearer to German law, the unambiguously "positive" qualities of which could appropriately protect the most advanced law of the ancient world. This narrowing down of the distance between Roman and German law was achieved by referring to the "**indogermanische Blutsverwandschaft**".[146]

> Schönbauer's aim was to demonstrate in his paper that in Rome - at least till the age of the Principate - the interest of the community had been given unconditional preference over individual interest. Besides, the Roman communities were so-called "**Führungsgemeinschaften**" and even in themselves were a kind of guarantee that the interest of the community would be taken into consideration. References to the arguments based on "**indogermanische Blutsgemeinschaft**" were to a considerable extent motivated by the consideration that this gave protection against the attack of the new political system that was hostile to the "cosmopolitan" Roman law.[147] Here we are just mentioning in passing Paragraph 19 of the National Socialist Party Programme, to be analyzed below when we discuss "**antike Rechtsgeschichte**". It is also worth mentioning that such arguments as Schönbauer's were not acceptable to Germanists (e.g. to Schwerin) who kept referring to the deep, essential difference between Germanic and Roman law.[148]

Thus, the Aryan theory found connections between the law of certain related or supposedly related peoples, in terms of ethnic origin. On the other hand, this politically motivated Aryan theory went so far as to deny even the possibility of comparison between the law of peoples not related to one another ethnically. Schönbauer dismissed all possibility of comparison between Germanic and Egyptian law in similar racist terms.[149] Schönbauer's conception met with vehement opposition by Koschaker, in whose opinion no particular attention should be paid to race in legal historical studies.[150] The so-called **Kulturkreis** involved in the study of ancient law, rooted most of all in ethnic kinship could not explain - argued Koschaker - the bail or guarantee known to Germanic, Slavic, Greek and Babylonian law. In the course of actual investigations into the history of institutions, attention to ethnical kinship might, of course, also be present without any politically motivated racist overtones. Thus e.g. Condanari-Michler discussed the "**arisches Prinzip der Verschuldenschaftung**" and "**semitische Er-**

**folgshaftung**" in his paper about the concepts of guilt and damage in Classical Antiquity.[151]

It should be mentioned here that Bernhöft, as early as the 1880s recognized the highly relative value of the ethnic connection in his treatise on the history of European family law.[152] Realizing that connections not based on ethnic kinship may also be of importance, he wrote: **"Basken und Magyaren stehen uns in ihren Sitten und ihrem Recht viel näher als die indogermanisch sprechenden Inder".**[153]

5. In the second half of the twentieth century, the theory of a common Indo-European law made its effect felt especially in the field of ancient Roman legal studies. The exponents of this theory identified Roman legal institutions that could no longer be reconstructed with the legal institutions known from original sources of certain Indo-European peoples. Raymond Bloch was of the opinion that, in order that the ancient Roman legal institutions might be reconstructed, a comparative analysis of the law of the Indo-European peoples was indispensable.

Bloch considered comparative studies not only as expedient, but also as expressly necessary. He put it as follows: **"Les problèmes qui se posent, divers, dans le mond du plus ancien droit romain doivent... être envisagés en comparaison avec ce qui passe à haute époque, chez les peuples indo-européens."**[154]

The theory of the Italo-Celtic unity restricting the law of common origin to a narrower range, viz. to the peoples living in the Italian peninsula was, essentially, a branch of the conception of the so-called Indo-European common fate. The theory of the "**unité italoceltique**", hallmarked with Antoine Meillet's name,[155] was actually a more nuanced, more polished version of the vague idea of a common Indo-European law, a version emphasizing the need for stratification, classification by areas within Indo-European unity.

The conception of a common "prehistoric" law in the form of the idea of a common Indo-European law - leaving in this case its possible, politically retrograde content out of consideration (cf. Schönbauer) - was mistaken, because it presupposed a necessarily uniform, homogeneous historical development.

Volterra thought the supposed so-called prehistoric law to be of relative value and, often, even harmful from the point of view of reconstructing the Roman legal institutions, because this hypothesis was built upon the unstable basis of the standardized historical development of all the ancient peoples.[156]

Dumezil compared the **confarreatio, coemptio** and **usus**, current in ancient Rome with certain marriage rites common in India, leaving the entirely different lines of historical development completely out of consideration; he thought to have discovered the identity of the institutions of the two legal systems, grown out of entirely different bases.[157] Another exponent of the theory, insisting on the identical forms of marriage contracts in both legal systems was Devoto, though he "revealed" only the parallels to **confarreatio** and **coemptio** in Indian law, which - incidentally - was itself far from being homogeneous.[158]

6. The authors of the works inspired by the idea of a comparative ancient law in terms of ethnic connections differed in their opinions about the importance of Roman law. In Bunsen and Oppert's works - though it should be added that a shift in the centre of interest of these authors stems partly from the nature of the subjects treated - Roman law acted as **tertium comparationis** and no more. But in Rossbach's work on Roman marriage, it was the analysis of Roman law as a basis for study that was completed and extended by a survey of the law of the Aryan peoples. Maine's main concern was also Roman law, and in **Ancient Law** the analysis of Roman legal institutions was predominant. This predominance was not altered even by the fact that Maine also cast a glance at the rules and traditions of Greek and Indian law. For him the importance of hypotheses was, still, comparatively slight. The analysis of ancient law - that of Roman law excepted - served as a research tool for Jhering, and he admitted it quite frankly. We may conclude that, in the nineteenth century, for the representatives of this school, Roman law still preserved its central significance. It follows from the above that, basically, it was only the **domain** of the analysis that showed considerable extension. As a matter of fact, this was a reflection of the narrow outlook of the Legal Historical School, tendentiously refusing to have anything to do with the comparative approach.

The ethnical school rooted in the findings of comparative linguistics is still existing in our century. Under peculiar historical conditions, - this school even acquired a political overtone mostly reflected by Schönbauer's works - motivated partly by the effort to legitimate Roman law. In addition to stressing the outstanding role of Roman law, the Aryan theory, with certain political overtones, led in the end, to a considerable dwindling of the domain of comparative analyses, in so far as it excluded the law of non-Aryan peoples from the scope of possible analysis. In the study of archaic Roman law (cf. Devoto, Dumezil, Bloch and Meillet) this

theory has kept its importance even in recent decades, though, it should be admitted, it has been limited to the area of Italy alone. The theory of the "Italo-Celtic Unity" was only a version of the ethnic school; as to its origin, this conception was also rather philologically motivated.

### 2.5.2. THE INFLUENCE OF THE EXTENSION OF THE SOURCE-BASIS OF COMPARATIVE STUDIES

1. In the first half of the nineteenth century, it was for the most part the development of comparative linguistics that provided the basis of comparative study of ancient law. In addition to the incentives manifest in the other branches of academic studies (including historiography), it was the body of papyri found and successively published during the second half of the nineteenth century that gave an impulse to scholars analyzing Roman law and the law of other ancient peoples on a comparative basis. As Rabel insightfully suggests,[159] the fact that a sizable body of papyri came to light had the same importance to those studying ancient law as the discovery of manuscripts had had to the Humanists of the Renaissance. The analysis of papyri gave a result, surprising in two respects. On the one hand, it became quite clear that some patterns and principles of ancient Greek law, the legal **koine**, were nearer to Germanic legal thinking than to the classical Roman law. On the other hand, the close connections between the legal material of the Egyptian demotic and the Greek papyri became manifest as a result of the similarities in the drawing up and "style" of the documents.[160] Besides the finding and processing of the body of papyri - and, of course, the discovery of the cuneiform sources should not be left out of consideration, either - the growing role of the historical approach also had an important role.

> Kaser referred to the fact that the historical approach, universally accepted today in Roman legal studies, had not emerged before the second half of the nineteenth century, except for the traces discernible in the works of the Humanists.[161]

The historical approach, supposing an unprecedented extension of the source-basis, called for new methods. The demand for the comparative analysis of ancient law also emerged on the theoretical level. It became more or less clear that the study of the institutions of various legal systems, based on juxtaposition alone, was not in itself comparative study. This

meant that e.g. the parallel treatment of certain Roman and ancient Greek legal institutions should not in itself be equated with comparative law.

> It was as early as the end of the nineteenth century that Bekker realized that the fundamental precondition of the comparative study of law was the so-called **gemeinsame verbindende Betrachtung.** The criterion of this was the objective with which in view the institutions of various legal systems - and this applied to ancient law as well - were compared.[162]

The considerable extension of the source-basis in various fields - to a great extent widening the horizon of ancient legal studies - contributed to bringing into prominence the historical approach. Owing to the lack of "**gemeinsame verbindende Betrachtung**", however, the extension does not inevitably lead to the universal victory of a comparative approach, not limited to the mere statement of formal similarities and parallelisms. By this, we want to indicate that most of the works to be analyzed below were not comparative works, except in a formal sense.

2. For those investigating the Oriental origin of certain Roman legal institutions, a decisive impulse was given by the so-called **Syrisch-römisches Rechtsbuch** discovered by Land, and published for the first time in 1862.[163] The origin of this **Rechtsbuch**, recorded by unknown authors, containing rules governing mostly the marriage bond, the law of marital property and the law of statutory succession, may in all probability be traced back to the fifth century.[164]

> The **Syrisch-römisches Rechtsbuch** was later translated into Syrian, Arabic, Armenian and Georgian, which was clear proof of its repute. The first translation into German and the commentary on the **Rechtsbuch** were due to Bruns, a jurist and Sachau, an Oriental scholar.[165] In the literature of the subject there has been no uniform opinion as to the question, under which type of law source the **Rechtsbuch** may be grouped. Taubenschlag and Hermesdorf were expressly writing about codification, Bossowski and Maridakis, on the other hand, called the **Syrisch-römisches Rechtsbuch** a **codex**, while Mitteis and Maningk named it, on the analogy of the **Sachsenspiegel**, simply **Rechtsspiegel**. There is a difference of opinion in another respect, as well, i.e. as regards the "law of origin" whose influence is reflected in the **Syrisch-römisches Rechtsbuch**. Ferrini, Karst, Mitteis and Rabel emphasized the Greek influence. T.H. Müller stressed the importance of cuneiform and Hebraic law, while Bruns and Rindorff underlined the influence of Hebraic law alone.[166]

Surveying the particularly ample literature on the Code Book, Selb rightly referred to "the example of the chameleon".[167] For each author, depending on the aims they had in view, considered the **Syrisch-römisches Rechtsbuch** either as a collection of Syrian law, or as a **codex** of, princi-

pally, Greek law or, perhaps, as a source of law recording the "common" law of the peoples of the ancient Mediterranean. The fact whether the **Rechtsbuch** contained the rules of **"Reichsrecht"** or those of **"Volksrecht"** was also a moot point. Narrino, Volterra and Selb[168] deserve credit for having proved - in contrast to Mitteis's supposition considered earlier as the prevailing theory[169] - that the **Rechtsbuch** registered for the most part, the rules of **"Reichsrecht"**. Moreover, Selb was the first to emphasize in his work - this time unlike Narrino and Volterra - that the Code Book had been more than the promulgation of a few tenets of the **ius civile** and the imperial constitution with a certain "didactic" aim, it had also taken the entire Roman legal system into consideration, including the **ius honorarium**.[170]

3. The discovery and scholarly treatment of the **Syrisch-römisches Rechtsbuch** gave an impetus to the studies of connections and interaction between Roman law and ancient (Oriental) law.[171]

A new impulse was imparted to comparative studies by the discovery (in 1884) of a **"codex"** with the text of the law of Gortyn; this text was interpreted by the comparative method in the broadest sense, i.e. by making use of the analogies between Roman, Germanic, Slavic etc. legal institutions.[172] This revival which might be taken, in itself, for a positive phenomenon, carried in itself the seeds of unscientific theories, based solely on bold hypotheses.

Of the late nineteenth-century exponents of the theories based on fictitious assumptions, a prominent role is placed by a number of French Oriental scholars in whose opinion Roman law was a kind of amalgam of ancient legal tenets. In the view of the famous Egyptologist of the turn of the century, Revillout, the **ius civile** was of Egyptian origin, while the **ius praetorium** was of Babylonian origin.[173] And the **ius gentium** developed, in his view, where Chaldean, Phoenician and Egyptian law met, at their "intersection".[174] Revillout thought to have discovered in the development of Roman law a concatenation of, basically, successive borrowings.

> Revillout put it unambiguously:"".. **l'histoire du droit romain n'est plus que l'histoire d'emprunts successifs..."**[175] It would not be problem in itself that the Egyptologist called the attention to the formal analogies discernible between certain ancient legal institutions, e.g. between **sponsio** and the oath in Egyptian law.[176] The problem was that Revillout, on the basis of mere formal agreement, brought up the idea of **derivation**, in almost every case, without exception.

Revillout's conception, otherwise consequent **in se**, bore a close resemblance to the theory of the so-called diffusionist school which had originated in England, in the nineteenth century. The exponents of this school - starting from the motto "**ex oriente lux**" - considered every kind of advanced civilization as of Egyptian or of, directly, Babylonian origin.[177]

Another prominent French orientalist scholar of the late 19th century, Lapouge, was in many respects of the same opinion. Lapouge, who stressed the influence of Assyrian law upon the development of Roman law, argued that the **praetor** in Rome had applied the law of **peregrini** to the Roman citizens. It follows from this statement that Roman law, interpenetrated by the elements of peregrine law, actually contained the major components of Oriental law.

> The fact that this thesis is based upon a very slight source basis is a telling indication of how forced Lapouge's assumption is. He came to this conclusion on the basis of the analysis of a single cuneiform tablet, in his paper entitled **Le dossier de Bunanitum.**[178]

The "amalgamlike" character of Roman law was also supported - argued Lapouge - by the fact that the bulk of **iurisconsulti** came from a foreign ethnic background (such as Papinian, Paulus, Ulpian etc.). Lapouge's work was rightly compared by Mitteis to Revillout's. Mitteis observed with irony, when presenting Lapouge's "findings", that "**auch E. Revillout hat auf diesem Gebiet Erhebliches geleistet**".[179] It would, of course, be mistaken to consider the comparative approach, based on an ultimately "illusory" conception, as typical of French scholars, because scholars who considered the whole of Roman law or, at least, some of its tenets, as a derivative and foreign law can also be found among the academics of other nations. Thus Casatti dwelled on the Etruscan origin of Roman law.[180] For the trend viewing sceptically the formulation of hypotheses based on "unbridled" comparison was gaining force, even in French literature. Glasson in his work running to several editions, **Le mariage civil et le divorce dans l'Antiquité et dans les principales législations modernes de l'Europe**[181] mixed the historical approach with comparative analysis. He allowed adequate autonomy to the various kinds of ancient law, including Roman law, and he did not stress the borrowings.

> Glasson's work is worth mentioning in that respect that no trace of the Aryan theory, supposing ethnic kinship, can be found in it. He explained the possible similarity between the law of various peoples by the agreement of the legal historical element. As suggested by Constantinesco, Glasson's oeuvre is of great importance, even for modern comparative law; what explains this is mainly his typology, based on objective criteria.[182]

Gilson actually followed Glasson when he emphasized the autonomous character of Roman law.[183] And though he repeatedly underlined the international character of Roman law, he also made references to an "organic assimilation" which, however, did not change the autochtonous Roman law in its entirety.

> The essence of Gilson's conception can best be conveyed with a few sentences taken from the introduction of his work, **"L'étude du droit romain comparé aux autres droits de l'Antiquité": "Né en Italie** (sc. Roman law, G.H.), **il s'est étendu sur d'autres pays, qui, tous, avaient subi et conservé l'empreinte profonde de législations anciennes et d'idées traditionnelles. Au contact de ces idées juridiques étrangères dont la persistance est aujourd'hui nettement établie, il a renouvelé sa substance. Mais, comme les organismes, il s'est assimilé ces éléments étrangers. Ceux-ci n'ont pas déformé le système romain, ils l'ont, au contraire, vivifié et rajeuni."**[184]

There is no trace of insistence on bringing up the idea of derivation in Lambert and Appleton's works either. Lambert, examining the "fortune" in store for certain forms of the last will and testament, as developed in Roman law, did not regard Roman law as an "amalgam" of ancient laws from the point of view of comparative history (**"histoire comparée"**).[185] The same views, stressing the autonomous character of Roman law, can be found in Appleton's work on the will, where the problem of the authentic character of the Twelve Tables is also discussed.[186]

4. The extension of the source material - we wish to point to the fact that this statement refers to the period preceding the discovery of the Code of Hammurabi - in the German literature of the turn of the century did not lead to the rise of unscholarly theories to the extent of what could be seen in French Oriental studies hallmarked by the names of Revillout and Lapouge.

Mitteis in his work, seminal to this day, entitled **Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs** (1891), where he compared Greek "public law" with Roman "imperial law", attributed crucial importance to the Greek influence upon the growth and development of post-classical Roman law.

Mitteis justified the necessity of investigating the **Volksrechte** by the fact that this investigation would make discernible the influence of the Hellenistic ideal upon Roman law. In the introduction to his work he put it as follows: **"Ist die Erkenntnis des fortdauernden Volksrechts schon an und für sich lehrreich, so ist es doch ein noch höheres Ziel, die befruchtende Rückwirkung dieser hellenistischen Ideen auf die allmähliche Umbildung des römischen Rechts zu verfolgen. Hier vollzieht sich ein weltgeschichtlicher Prozess; der griechische Rechtsgedanke verbindet sich mit dem römischen, und beide treten gemeinsam den Weg in die Zukunft an."**[187]

The essential component of Mitteis's conception is that the law of other ancient peoples was equivalent to Roman law. Equally, unlike e.g. Revillout and Lapouge, he did not - using Koschaker's simile - "dethrone" Roman law, when raising the law of other ancient peoples to a level with Roman law.[188] Though Mitteis' main concern was what the situation of Roman law had actually been like in the Oriental provinces of the Empire, in the period following the issue of the **Constitutio Antoniniana**, yet, by transcending the limits of the traditional Romanistic studies, he was to become the initiator of the school of **Antike Rechtsgeschichte**, the discussion of which will follow later in this book.

Goldschmidt in the first part of the third edition of his book entitled **Handbuch des Handelsrechts** (1891) sharply criticized the so-called **dogmatische Isolierungsmethode** whose exponents regarded the codified positive law as a closed totality and the available historical material as a **"statistisches Interpretationsmittel"**, at best.[189] Though Goldschmidt was not committed to **"vergleichende Jurisprudenz"**, which he considered as ahistorical,[190] his work was actually a comparative analysis, and this applied especially to the section on ancient law. The author stressed that the ancient Mediterranean world had formed a kind of economic whole,[191] and this justified the use of the historical ("genetic") method in the analysis of the institutions connected with the "commercial law"[192] of the Egyptian, Babylonian, Assyrian, Greek - primarily Attic - and Roman legal systems.

Mittermeyer's disciple, Goldschmidt regarded Roman law as the only kind of ancient law that was distinguished by the so-called **"feste Rechtsgestaltung"**.[193] He criticized Revillout severely - citing as an example Revillout's work, **Les obligations en droit Egyptien** - because he had not realized that law-making (**"Rechtsschöpfung"**) was peculiar to the Roman genius.[194]

> Goldschmidt did not contest the appearance of the germs of certain institutions of "commercial" law in the Babylonian, Egyptian, Phoenician and Greek legal systems. Nevertheless, these institutions and transactions were given an actual, adequate legal form in Roman law alone.[195] The fact of borrowing from ancient foreign law - i.e. a kind of reception - did not detract in the least from the value of Roman legal regulation. On the other hand, to establish the extent of borrowing met by then with difficulty, because the ancient legal institutions which fell beyond the scope of Roman law could no longer be reconstructed, or only with difficulty. As to the hypothesis connected with the names of Revillout and Lapouge, arguing that Roman law in the second and third centuries A.D. may have received Babylonian and Egyptian element through Phoenician mediation, he referred it straight to the domain of "dreams and fairy tales".[196]

It must be mentioned, however, that Goldschmidt did not deny the assimilation of "elements of the Hellenistic culture" to Roman law, this being an inevitable result of territorial expansion.[197] Thus Goldschmidt did not "dethrone" Roman law, but he stressed its outstanding importance in a highly consistent manner. As a legal scholar who has been regarded as one of the founding fathers of modern commercial law and who, as the founder of the journal **Zeitschrift für das gesamte Handelsrecht**, had also a part in promoting comparative studies,[198] he propagated the primacy of Roman law over the law of the other ancient peoples of the Mediterranean world.

5. The stele of Susa (at present in the Louvre) found in 1901, with the text of the Code of Hammurabi on it, gave further impetus to comparative studies.[199] Even Mommsen - who was otherwise not interested in comparative studies - may have felt hismelf prompted by the recent, considerable extension of sources to deal with the problem of comparative law.

> Mommsen, in his posthumous work - **Zum ältesten Strafrecht der Kulturvölker**, published with Karl Binding's foreword - dealt with the problems of comparative law in the form of questions put to contemporary Oriental scholars (among others, to Ignatius Goldziher!).[200] This change in Mommsen's attitude in favour of comparison can be undoubtedly traced back to the extension of the source basis which, by then in possession of an adequate comparative material, did no longer refer the study of archaic law to the domain of fiction.[201]

The discovery leading to the substantial extension of the horizon of ancient law resulted in the rise of fresh, daring hypotheses.[202] The leading figure of the pan-Babylonian school, Müller,[203] reviving in his work published in 1903[204] the conception of a common Mediterranean law, thought to discover parallel institutions, legal constructions in the Code of Hammurabi, the laws of Moses and the Twelve Tables. To explain the analogies, he looked for a common archetype of the three "collections of laws".[205]

A great number of authors dealt with the connections between the Code of Hammurabi and the laws of Moses, in works published immediately after the discovery of the stele. Monographs by Cook,[206] Grimme,[207] Jeremias,[208] Oettli,[209] and Davies[210] included detailed analyses - broken down by individual legal constructions - of the interconnection between the two sources of law. The close connections between the Code of Hammurabi and the laws of Moses were universally acknowledged. The situation, however, was quite different as far as the connection between the Code of Hammurabi and the Twelve Tables was concerned. The Romanists refused Müller's theory - the most vehement opponents of Müller's theory were Zocco-Rosa[211] and Bonfante[212] - regarding the conception as an unfounded and idle hypothesis.

Zocco-Rosa and Bonfante's objections were based, above all, on the fact that the parallelisms of the Code of Hammurabi and the Twelve Tables were of a rather formal nature and did not stem from the content. What both Italian Romanists actually objected to was the absence of a substantial basis of comparison.

The discovery of the Code of Hammurabi seemed to create almost new prospects for those studying ancient law. Typically, it was the problem of derivation again - e.g. a supposed common archetype - that was in the forefront of the studies. The "euphoric" mood of the years immediately following the discovery inevitably led to the eclipse of the "traditional" Roman law retaining only his role of **"guide de comparaison"**. The ethnical peculiarities came to the fore again; this is what the "obligatory" comparison between the Code of Hammurabi and the laws of Moses suggests.

6. The discovery of the **Syrisch-Römisches Rechtsbuch** and of the Code of Hammurabi, as well as the surfacing of a vast body of papyri and cuneiform tablets, inevitably brought about a boom in the comparative analysis of the laws of Antiquity. Roman law lost some of its importance in comprehensive studies - this was the first reaction. The activity of a few French orientalists (above all, that of Revillout and Lapouge) can well document this shift in importance. Roman law, though losing some of its importance, still kept its autonomous character in the works by Glasson, Gilson, Lambert, and Appleton. In the German literature no uniform trend could be observed. While Mitteis regarded Roman law - its autochtonous development (not denying, of course, the fact of foreign influences and of a kind of assimilation process) - as equivalent to the law of other ancient peoples, Goldschmidt pointed unambiguously to the supremacy of Roman law. The discovery of the Code of Hammurabi, besides promoting comparative studies,

foreboded the eclipse of Roman law, on the one hand and, on the other, the construction of hazy theories.

## 2.6. THE TREND OF COMPARATIVE LAW AND THE INVESTIGATION OF ANCIENT LAWS

### 2.6.1. THE DEVELOPMENT OF COMPARATIVE LAW

1. The representative exponents, of European standing, of comparative law (in German **"vergleichende Rechtswissenschaft"**) were Cohn, Bernhöft and Kohler, who gave a programme and orientation to the journal **Zeitschrift für vergleichende Rechtswissenschaft**, started in 1878. With reference to the analysis of the interconnection between ancient law and comparative law, emerging with an almost elementary force while becoming specialized at the same time, an important question of a terminological kind was raised. It was problematic, what the relations were actually like between comparative law, trying to unify comparative studies on a given level and the history of law (comparative history of law with a serious interest in comparative analysis). Before answering this question, we should point to the fact that the advance of comparative law, its triumph over legal history in the second half of the nineteenth century, became increasingly evident. This advance was well illustrated by the fact that, in Germany, the reception of Roman law, which previously had been a **par excellence** historical subject, a part of the history of law, became linked to the comparison of law - as a field of study -, i.e. to the domain of comparative law.[213]

> This fact merits particular attention, because this "annexation of domain" took place in such an early period - i.e. as early as the second half of the nineteenth century - when the complex problem of the interaction between different legal systems (reception, assimilation, adoption etc.) had not been made clear as yet - a fact mentioned by Gaudemet.[214]

Among others, this circumstance also documents that it would not be right to make a clear distinction between comparative law and the history of law, depending on the role played by the time factor.[215] Another way of putting it would be that we cannot speak here of a kind of monopoly in the comparative or historical approach.[216] But comparative jurisprudence, pushing ahead with elementary force, endeavoured to **expropriate**, at least temporarily, the historical approach. An example of this "expropriation" of

domain was that even the influence of Greek law upon Roman law was placed within the sphere of comparative law.[217]

The competent authorities of the developing trend of comparative law did, by no means, adopt a uniform standpoint in the question of historicity. While Kohler was of the opinion that reception, assimilation - i.e. the subjects that had previously been part of the historical studies - by now fell within the scope of comparative law,[218] Lambert made the horizon of comparative law much narrower. The French scholar felt it essential to distinguish the **"droit commun législatif"** from the comparative history of law, in which latter category analysis was not bound by space or time.[219] Moreover - argued Lambert, modifying but slightly Bernhöft's classification - within the **"vergleichende Rechtslehre"** the so-called dogmatic trend should be clearly distinguished from the ethnologico-historical school.[220] By his dualistic views Lambert actually made practically two "branches" of comparative law, endowing the comparative history of law with "autonomy". Yntema, following Bufnoir's opinion, also saw a relative difference between **"législation comparée"** and the history of law.[221] The general currency of this conception was proved by the fact that even Rabel - taking the historical comparison of law for a part of comparative law - practically admitted the autonomous character of the comparative history of law.[222]

It is clear from this survey of the literature and of the opinions of the authors that to separate comparative law from the comparative history of law was out of the question - and this applied particularly to the second half of the nineteenth century. The reason why this was so was - as suggested by Pál Horváth[223] - actually that the vast-ranging extension of the domain of comparative analysis took place at a time (the last decade of the nineteenth century), when only a form of the general history of law, based upon advanced, detailed part-researches, existed, and the rise of an autonomous **"vergleichende Rechtslehre"** had still been out of the question. It follows from the above that it would be aimless to suppose a break between the **"vergleichende Rechtslehre"** and the comparative history of law. Therefore, we are not going to treat these two categories separately below.

It was only the superficial observer who believed that the development of comparative law - which incidentally emerged because of the triumph of the historical approach - could push the history of law (the comparative history of law) itself to the background. This assumption could have been based only on Bastian's theory of the **"Elementar- und Völkergedanke"**, an evolutionist theory; this theory starts out from the equality of men as its starting point, making a rigorously sharp distinction between the history of law, restricted to the study of unique events that happened only once and **"vergleichende Rechtslehre"**, postulating a development governed by "natural laws".

2. The effort to "synchronize", to unify comparative studies, fed by a great number of sources and rooted in various theoretico-philosophico-ideological grounds, could first be observed in the activity of comparatist jurists. The requirement of making an autonomous branch of knowledge of **"vergleichende Rechtswissenschaft" eo ipso** raised the question of its absorbing somehow the comparative history of law. As mentioned in the above, the exponents of comparative jurisprudence took no notice of the existence of the comparative history of law, when the "new branch of knowledge" emerged.

The "founding fathers" of comparative jurisprudence, in Germany especially Bernhöft and Kohler, considered the publication of Bachofen's **Das Muterrecht. Eine Untersuchung über die Gynaikokratie der alten Welt nach ihrer religiösen und rechtlichen Natur** (Stuttgart, 1861)- as the **Geburtsstunde** of comparative jurisprudence.[224] The novelty of Bachofen's book was that Roman law lost its central significance in it. This was a peculiarity considering that e.g. it had still been the Roman law that formed the pivot of Rossbach's work analysed above (**Untersuchungen über die römische Ehe**, 1853).[225] The reason why Roman law lost much of its importance for him was that Bachofen looked for archaic elements in Roman law.[226] It follows by implication that Savigny's **ius commune Europaeum** lost its prominence, too. This was quite natural, because the author of the **Mutterrecht** limited his investigations exclusively to the sources of the Graeco-Roman world, unlike Henry Maine in his **Ancient Law**, published in the same year. In this sense, the **Mutterrecht** was not a typical product of comparative jurisprudence. Another peculiarity of the work was that even the statement of the general legal historical conception was not exempt from inconsistencies in the Swiss author's work. The French Giraud-Teulon[227] and the British McLennon[228] went beyond the confines of Classical Antiquity in their comparative analyses and made the whole **"universum"** their concern. They also took care in their works to analyze the law of the so-called primitive peoples leaving, of course, the grave problems caused by the difficulties in reconstructing primitive law out of consideration.

We wish to mention here that the Graeco-Roman world also had its importance for the first great ethnologist of modern times, J.F. Lafitau (1670-1740). In the introduction to his work, **Moeurs des sauvages Américains, comparées aux Moeurs des Premiers Temps** (Vol. 1, Paris, 1724), on the law and customs of the Iroquois Indians, he referred to the fact that he had consulted, among others, the works of classical authors, profiting much by this.[229]

3. From the time of the publication of Post's work,[230] two branches could be distinguished within the school of general legal history which at the time was gradually merging with comparative jurisprudence. One of these was the branch taking the study of ancient law for its subject, the other the scientifically exact "ethnological jurisprudence"[231] - as Post put it: **"Die Naturwissenschaft des sozialen Lebens ist die Ethnologie"** - or, perhaps, with a more adequate expression: "an ethnological school of investigation" (**"ethnologische Rechtsforschung"**). This ethnological jurisprudence - we are going to stick to this expression hereafter - soon started on the road of further differentiation. The exponents of one of the branches (e.g. Bastian[232] and Fritz Ratzel[233] - Frobenius's teacher - and Bernhöft, early in his career) upheld the view that there was no point in studying the law of the so-called non-civilized peoples[234] and, consequently, this did not fall within the range of ethnological jurisprudence.

> It is another matter that the founder of the **Zeitschrift für Ethnologie**, Bastian, elaborated the conception of world history in ethnological terms by drawing all the peoples of the world into the orbit of his investigations. He came to the conclusion that the **Naturvölker** showed a tendency to join the culturally most advanced peoples. Bastian did not actually follow in his work the tenets of world history in ethnological terms; he adopted his own so-called **"Primärgedanke"** (**"Völkergedanke"** and **"Elementargedanke"**)[235] in his studies.

The other school, which had been steadily gaining authority and influence and of which Kohler himself was an exponent did not think it justified that the ethnological studies should be restricted to the analysis of the law of the so-called historic peoples (**"Geschichtsvölker"**).[236]

It was highly typical of this conception of the ethnological school that it cast strong doubts on the viability of the so-called historical method. Post's work **Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend-ethnologischer Basis** was a typical case of this approach; the sole basis for comparison between the individual types of law was the supposed or real similarity.The historical interconnections - exactly because this school focussed its attention upon the present - were left out of consideration. To justify this opinion we can, of course, mention that for the so-called primitive peoples - for lack of actual documents - it is important to reconstruct the distinctive stages of historical development. It may also be due to the lack of authentic facts that Post paid no attention to details and concerned himself with the general laws of development alone.[237] From a methodological point of view,Kohler was certainly right to point to

the fact that it was impossible to get to know the "most primitive" peoples (whose law, for want of records, could very probably not be reconstructed in any form) or, to put it more exactly, to get to know their customs and legal rules.[238] The so-called **Naturvölker**, on the other hand, were up to a certain standard, documented by certain records and, consequently, their law could, more or less, be understood. Because of this, to outline merely the general interconnections was wrong and not enough.

It is worth mentioning that the term **"Naturvölker"** is a concept also accepted in modern ethnography free from any value judgement.[239] For Max Weber, the value of the category of **"Naturvolk"** was far from being unambiguous, because he established a connection between the "primitive" legal culture - as a type of legal development - and the people living under natural conditions. On the other hand, he used the term "archaic" to indicate a more advanced legal culture.[240] Post's opinion of the study of the law of the **"Naturvölker"** was basically right. This becomes particularly evident, if we recall that certain historians of culture - such as Jacob Burckhardt[241] - excluded the non-Western peoples, e.g. China and Japan, as **"Naturvölker"** from the sphere of the **"Geschichte im höheren Sinne"**.

4. In contrast to the neo-Hegelian Post, Kohler, an exponent of the school of **"Geisteswissenschaft"**, attached a crucial importance to the concept of the so-called **"Kulturrecht"**[242] which, besides including the law of the ancient "civilized peoples", also covered the law of the Near East (the Talmud and Islamic law) and the law of other Asiatic peoples.The term **"Kulturrecht"** in Kohler's works means a kind of law responding to the aims of cultural growth, in harmony with it. The concept resembles in several respects the category adopted by the exponents of natural law, **ius naturae**, because - and Manigk was the first to point to this fact[243] - it presupposed a legal system which was not actually positive but "above-state" (**"überstaatliche Rechtsordnung"**).[244] Kohler's natural lawlike conception was not much altered by the fact that this **"Kulturrecht"** was not supposed to be a kind of "eternal law", but rather a "collection of legal postulates corresponding to the cultural atmosphere of a period and to a given people".

Kohler's conception is well conveyed by the following citation: **"Je mehr wir in dem Studium der Menschheit hinaufreichen, um so klarer wird es uns, dass die ganze Menschheit trotz nationaler Eigenheiten nicht nur von gleichartigen Trieben geleitet, sondern speziell im Recht und in der Entwicklung der Volkseinrichtungen und Volksgebräuche von gleichartigen Bildungskräften beherrscht wird."**[245]

Kohler's concept of **"Kulturrecht"** implied the possibility of distinguishing the history of law - the comparative history of law - from comparative law. For, if the law of a given people contains several cultural strata, the exploration of these cultural strata must inevitably be the task of the history of law. In this conception, the domain of comparative jurisprudence extends to the study of the law of the peoples of Asia, on the one hand, and to that of the not yet "civilized" peoples of Europe and America, on the other. In addition to this, the domain of comparative law also includes the comparison between the institutions of positive law in the modern "civilized" States (**"Kulturstaaten"**). This type of comparison is related, as to its essence, to the so-called comparative legislation (such as the **"législation comparée"** in France).

In this connection, it should be emphasized that the "systemization" of the contents of comparative jurisprudence in the above form shows striking contrast with its starting point. Comparative jurisprudence - or at least its exponents - originally formulated a claim to investigating the law of every people, presupposing, of course, that these peoples were up to a certain standard of "civilization", which would make the analysis easier to carry out. Of course, there are certain limits or, to put it more exactly, conditions, which must be considered if we want to make a comparative analysis. For example, Bernhöft in his pioneering introductory essay, - laying down guidelines for the journal **Zeitschrift für vergleichende Rechtswissenschaft**, entitled **Über den Zweck und Mittel der vergleichenden Rechtswissenschaft**[246] - presented in a concrete form the conditions governing comparative studies. In Bernhöft's view, the task of comparative jurisprudence was to analyze how peoples of a common stock - in ethnical kinship with one another! - had elaborated categories which were simultaneously present in the law of several peoples; moreover, the other task was to analyze how one legal system adopted the institutions of another and transformed them and, finally, in what way trends common to all presented themselves in the law of different peoples.[247] Comparative jurisprudence searches for the idea of law (**"Rechtsidee"**) in the different kinds of law and legal systems. This idea of law cannot be brought to light by investigations limited to the German **ius commune** and the Roman law. If the analysis were restricted to these two kinds of law alone, we could not speak of comparative law, at all.[248] Bernhöft wrote expressly about "rigid one-sidedness" (**"starre Einseitigkeit"**), if only the institutions of these two types of law were the objects of comparative study.[249] The analysis focussed on

these two kinds of law was hindered by the fact that the institutions of the **ius commune** and institutions of Roman law were almost inseparably intertwined.

5. The legal-philosophical grounding of comparative jurisprudence can, to a great extent be credited to Dahn who, even as a very young man, in his "sample lecture" delivered before "habilitation" - **"Über das Verhältnis der Rechtsphilosophie zur Philosophie und zur Rechtswissenschaft"** (1857) - analyzed the connections between philosophy and jurisprudence.[250] In his work, **"Vom Wesen und Werden des Rechts"**[250a] Dahn, who also dealt with the study of the philosophy of law, did not only create the theoretical foundations of comparative jurisprudence but he also established a link between the Historical School and comparative law.

The everlasting merit of the Historical School has been the consistent struggle against aprioristic - i.e. inevitably artificial - constructions.[251] In this respect, the role of the Historical School can be compared to that of the experimental sciences. After Savigny's retirement, the possibility of creating artificial constructions withered away in the same way as the philosophy of nature lost its importance owing to the rise of experimental sciences.[252] Stressing the importance of the historical method (**"historische Methode"**), he wrote that the comparative history of law which - in his works was practically equivalent to comparative jurisprudence - was "an indispensable precondition of all philosophies of law" (**"unerlässliche Voraussetzung aller Rechtsphilosophie"**).[253] In addition to replacing the category of comparative jurisprudence, the concept of the comparative history of law was, for him a technical term in close relation with the universal history of law. For Dahn laid particular stress on the fact that the law of all the peoples should be the object of study.[254] He pointed, nevertheless, to the fact that the law falling within certain "cultural spheres" - such as Greek, Roman and Germanic law - should have priority over the others. This priority would not mean, however, the complete overshadowing of the law of other peoples. He argued that, in order that legal philosophy might be more than a kind of **"Phrasensammlung"**, comparative studies in the widest sense of the term were needed.[255] A really scholarly philosophy of law should be built upon the findings of comparative studies grounded in the historical method.

Felix Dahn's contribution to the grounding of comparative jurisprudence, developing with elementary force, in the theoretical philosophy of law was significant. However, in the process of establishing the foun-

dations, it was realized that the delimitation of this "new" field of study was highly controversial. It also emerged that comparative law did not spring "fully armed" from the head of its creator, but originated at the intersection of various trends. These legal historical antecedents were of great help in delimiting comparative jurisprudence from the comparative history of law. Within the scope of the comparative history of law fall the comparisons between such types of law as are up to and represent a certain cultural standard. As regards its scope, this field is substantially narrower than universal legal history or the so-called ethnological jurisprudence.

### 2.6.2. COMPARATIVE JURISPRUDENCE AND THE INVESTIGATION OF ANCIENT LAWS

When setting out to study the questions of the comparative analysis of jurisprudence and ancient law, we should first start from the concept of comparative jurisprudence, as defined above. The prerequisite of the above-discussed universal legal history is that the law of each people should be the object of analysis, reducing the role of Roman law - as the possible basis of comparison - to a minimum. As regards the question of how to judge the importance of Roman law, comparative jurisprudence shows in many respects similarities to the universal history of law.

> The realization of the fact that the domain of comparative jurisprudence (comparative legal history) was rather narrow came relatively soon, because this school did not regard the analysis of the law of all the peoples as its task, as the universal legal history had done before.[256] We are mentioning it here that neither the exponents of the school of the universal legal history, nor those of the comparative legal history were willing to undertake the task of writing a monograph about the archaeology of ancient law. Sittl's work - **Die Gebärden der Griechen und Römer**, published in 1891 - was about legal symbolism alone.

The fact that Roman law did no longer play the role of **ius commune Europaeum** for the exponents of the school of comparative jurisprudence sprang from the peculiarities of comparative jurisprudence. As soon as the first attempts to create **"Universaljurisprudenz"** had been made - e.g. in Anselm Feuerbach and Thibaut's works - the focussing on the problems of the present came to the fore. Focussing on the present was the cause of the rise of ethnological studies, and the existence of the school of **"législation comparée"** which kept advancing in France was also the result of that orientation. Bernhöft himself who, otherwise, was against comparison limited to the study of ethnological kinship,[257] stressed expressly that compara-

tive jurisprudence - the framework of comparative legal history - considered the comparative analysis of the **modern** systems of law as its task (but took the historical aspect equally into consideration).[258] An indication of this focussing on the present was also that the subject of comparative jurisprudence was the comparison between the types of law and legal systems effective within given countries or States.[259]

The "interest" in history of the exponents of comparative jurisprudence sprang from the realization that individual kinds of law and legal systems were rather slow to change. Consequently, comparative studies were expected to cover historical aspects, if possible. This peculiarity can make us understand why the comparative history of law had such a serious importance within comparative law. Of course, we ought to remember that the stress on continuity - often in terms of Hegel's doctrine - may, in many respects, involve theoretical difficulties. To interpret continuity as "unchangeability" may result in an emphasis on the present while thinking of continuity as relative can lead to the adoption of Spengler and Toynbee's well-known ideas. Though Braudel's conception of the **"longue durée"** can be a useful working hypothesis, as far as comparative studies are concerned - and moreover it requires the adoption of the historical method, in an illuminating manner - because of the inevitable discontinuity, it is certainly retrograde.

The close intertwinement of comparative law and the historical method led to the impossibility of distinguishing comparative law from comparative legal history which - as referred to above - had still retained the conceptual traits of universal legal history. In this respect, Bierling's opinion deserves attention. In his work entitled **Juristische Prinzipienlehre** (1894-1917) he dealt in detail with the connections between comparative jurisprudence and comparative legal history. In Bierling's view, there was no independent comparative jurisprudence; but this did not lead him to deny the scholarly character of the comparative analyses.[260] In his opinion, comparative law did not form an independent branch or field within jurisprudence.[261] It was only due to an external reason that he found it expedient for comparative studies to have a "focus" - and this function was performed by the journal **Zeitschrift für vergleichende Rechtswissenschaft**.[262] In his opinion, **"vergleichende Rechtswissenschaft"** was, on the one hand, an instrument of legal history (sic! G.H.), on the other hand, an instrument of the politics of law. It was the history of law, in the first place, which could be considered as an autonomous branch of jurisprudence - supposing it served also other than practical objectives - interconnected with comparative law.[263] Within legal history general legal history was the field that presupposed comparative study. He argued that general legal history was nothing else than **"vergleichende Rechtsgeschichte"**. He criticized Meili severely, because Meili was a partisan of an independent comparative jurisprudence. In his view, comparative jurisprudence was only a so-called collection of documents, and no academic study.[264] The basic task of universal legal history, interpreted as comparative legal history, should be to throw light upon the idea of development (**"Entwicklungsgedanke"**) and call the at-

tention to the parallel traits in the law of different peoples.[265] To show the parallel traits did not, however, mean that the law of each people was supposed to have basically common traits. For this reason, Bierling sharply criticized Post's attempt to distinguish **"ethnologische Jurisprudenz"** from legal history.[266]

2. In comparative legal studies, Roman law lacks the importance of being a paradigm. Nevertheless, the loss of importance cannot be thought of as absolute. It would be mistaken to leave out of consideration the fact that Roman law had a certain importance even for the exponents of the ethnological school, as a basis for comparison.[267] The way of adopting Roman law as a "paradigm" was peculiar and, for this reason, deserving particular attention. It was in comparing individual legal institutions that Roman law was given attention. The "standard-of-value" function had to remain in the background, because if entire legal systems were compared, Roman law would not get the attention it had been given earlier. If the question of the comparative analysis of the law of a given group of peoples came up, it was not even considered to find parallels between this and Roman law.

In the works of comparatists of law, Roman law was discussed among the studies of minor problems and details. E.g. Bernhöft in his work entitled **Staat und Recht der römischen Königszeit im Verhältnis zu verwandten Rechten**[268] attached almost central importance to Roman law. As to the appraisal of the importance of Roman law, this work did not differ in its opinion from that of e.g. Rossbach's above-mentioned work, except in trifles.[269] In his work, Bernhöft drew parallels between the corresponding Indo-Germanic conceptions and the various forms of the Roman constitution. Thus the work mixed comparison with the historic approach. As a result of making a comparative analysis, the author also formulated certain general conclusions. For example, he argued that the hereditary kingship of the Indo-Germanic peoples had developed inevitably into an elective monarchy, where the dominant role was to fall to the nobility. Bernhöft adopted Roman law as a standard in his other works, as well.[270] Thus the conception of his above-mentioned work cannot be regarded as an individual phenomenon. He took an authoritative stand upon the question that Roman law, in certain cases - particularly when the study of archaic law was involved, the reconstruction of which was far from being easy - was a **par excellence** basis for comparison.[271] On the other hand, he did not fail to mention, either, that Roman law - owing to its peculiar terminology and system of ideas - may, in other cases, such as the analysis of Indian law, have no importance except, at most, in accentuating the differences.[272]

3. However, Bernhöft's standpoint on Roman law as an adequate basis for comparison was not consistent, as to the "standard-of-value" role. E.g. the comparison between the law of Gortyn and Justinianean law led to a surprising statement, to the effect that, as far as family law was concerned, the law of Gortyn was more advanced than Justinianean law.[273] The reference to Roman law implied, in this particular case, a negative appreciation. Even so, the importance due to Roman law as "a basis for comparison" (**"Vergleichsbasis"**) in comparative analysis is incontestable. This "basis-for-comparison" role of Roman law is unambiguously objective and is not a function of whether a scholar analyzing certain legal institutions regards the regulation current in Roman law as ideal or not.

The reason why Kohler thought it necessary to adopt Roman law as a basis for comparison was that Roman law itself was penetrated by foreign elements, primarily Greek, but to a considerable extent Oriental, as well.[274]

> Incidentally, Kohler saw the "greatness" of Roman law not least in the fact that Roman law - owing to its peculiarities in the field of procedural law - became **"Weltrecht"** by developing so-called **"Schleichwege"** (such as fiction).[275]

The theory that Roman law was at the point of "intersection" between the law of several peoples was, by the way, not something new; somewhat earlier, in Bernhöft's works it had already had an important role of legitimation. For Bernhöft did not fail to emphasize, either, that even the Romans were not adverse to borrowing certain institutions and legal constructions from the law of other peoples. It was the Greek law that came first into one's mind.[276] Even Roman law had nothing against the reception of certain institutions and this was exactly what became the **real** basis of the reception of Roman law. The objective use of Roman law by comparatists was, in the last analysis, determined by the fact that its material was clear-cut, it was well arranged into a system, i.e. - in Kohler's words - it was **"verwerthetes Material"**.[277]

4. From the above, it is evident that Roman law played an important role in the investigations of comparatists from the rise of comparative law on. But it should be admitted that this role was almost exclusively confined to the domain of analyzing individual legal institutions and constructions. When comparison of a general kind was involved, the importance of this role was much less and, for certain institutions, Roman law did not even come into consideration at all. The standard of the studies taking no notice of

Roman law was set, implicitly and disadvantageously, by this lack of interest. Kohler himself severely criticized Post for having paid all his attention to universal tendencies of development and neglecting the study of details.[278] To tell the truth, this universalist and, consequently, too general approach is peculiar to Post's other works, as well.[279] The underestimation of the significance of Roman law was not the least reason why Bastian's works also presented a peculiar **"embarras de richesse"**, i.e. an artificially uniform conception drawn from various sources and built upon a ramifying and even tangled documentary basis.[280]

The mere acceptance of Roman law, its adoption as a "basis for comparison" should be distinguished from the instance when Roman law also performs a standard-of-value function. The scope where the standard-of-value function of Roman law can be taken into consideration is much more restricted than the above. The reason why this is so is that standards of value are meaningless, unless there are established legal institutions with a given, high standard. The law of obligations is a case in point, its institutions cannot function without the preexistence of an advanced legal standard. The importance of Roman law was even more considerable in the field of terminology, in comparative studies. In this respect, it would be expedient to mention Karl Friedrich, who pointed to the fact that the highest degree of vagueness prevailed in the works of the comparatists with reference to terminology.[281] It was no mere chance that even Bernhöft himself - as referred to above - used the technical terms of Roman law in his analyses of ancient legal institutions. The technical terms of Roman law are in several respects indispensable to the study of ancient law and, let us add, to that of modern law, as well. Hitzig in his paper discussing the relationship between the ancient Greek law and comparative jurisprudence - entitled **Die Bedeutung des altgriechischen Rechts für die vergleichende Rechtswissenschaft**[282] - pointed expressly to the fact that abstract legal norms had been unknown to ancient Greek law. This statement, even in itself, was indicative of the primary importance of Roman law in comparative legal studies.

To accept the terminology of Roman law is, in many respects, indispensable for comparative studies, to such a degree that, without this, even the possibility of the analysis is doubtful. The rightness of the above statement is well illustrated by the fact that in Post's work - entitled **Über die Aufgaben einer allgemeinen Rechtswissenschaft** (Oldenburg, 1882) - summarizing the findings of the analyses from the field of comparative

jurisprudence, the sphere of commerce was not even mentioned among the so-called parallel phenomena (**"Parallelerscheinungen"**). And this is no mere chance. For Post was one of those scholars who left Roman legal parallels out of consideration, in most cases. In a field requiring a sophisticated law of obligations, such as commercial law, it would be rather hard to obtain results without adopting the terminology of Roman law. The essential problem for the comparatists - most of whom did not accept the opinion of the extremist side hallmarked with the name of Post, above all - was not that Roman law had no longer been a kind of law equivalent to the law of nature.

In this respect, Ludwig Mitteis should be mentioned who, in his above-mentioned work, seminal from a methodological point of view, - entitled **Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs** - allowed Roman law a role of **"primus inter pares"**, at best. However, to surmount "aprioristic pan-Romanism" - as Wenger put it[283] - did not mean the belittling or complete dismissal of Roman legal concepts.

Comparative legal studies presuppose - and this also applies to the studies in comparative jurisprudence - the adoption of an advanced legal **terminology** from which Roman law must not be left out. It is the necessary precondition of effective comparative legal studies - at least that of the study of certain legal institutions - that the system of Roman legal concepts should be adopted as a "compass".

5. Concerning the relationship between comparative jurisprudence and Roman law it was important to consider to what extent the method of comparatists could be used in the study of certain Roman legal institutions. We enumerate a number of institutions for whose study this approach could be successfully applied.

As regards the much-discussed problem of where to look for the beginnings of the freedom to make one's will, Erdmann, in his paper published early in this century - entitled **Die Entwicklung der Testierfreiheit im römischen Recht**[284] - with the aid of comparative analysis came to the conclusion that, in Rome, right from the start, the order of statutory succession had been the only norm, and the freedom to make one's will was the product of a later period. Fritz Schulz also made use of the opportunities offered by comparison in his studies on the liability for **custodia**. Schulz, in his paper entitled **Rechtsvergleichende Forschungen über die Zufallshaftung in Vertragsverhältnissen**[285] regarded comparative analysis as generally

useful and he found nothing exceptionable in the approach of comparative jurisprudence, even from a methodological aspect. He mentioned the fact that the interpretation of the interpolated texts in the Pandects was at least as "vague" as were certain other fields of comparative jurisprudence. Though this approach of the **"a contrario"** type to justify the comparative method may seem rather peculiar, it is, all the same, plausible. Comparative analysis may be a reason, why Roman legal studies are not limited to a given period alone - and especially not to the period of Justinianean law - but cover all of its stages. The "widening of the horizon" in Roman law (a result of the comparative approach) was clearly documented by Huschke's paper, **Avitum et patritum und der ager vectigalis.**[286] In order to prove that the Germanic institution of **"Zinsgut"** was not alien to Roman law, either, Huschke did not restrict his studies to the period of Justinianean law, but extended his analysis to the classical and to post-classical law, as well. A survey of the above-mentioned examples confirms that the activity of comparatists had considerably contributed to the effort to present a "full cross-section" of Roman law.

6. Compared to the high priority accorded to it by the Historical School in the works of the comparatists "triumphing" over other trends in the second half of the nineteenth century, Roman law lost its primacy. However, the declining "authority" of Roman law had been relative. It was only for the exponents of ethnological jurisprudence, a trend which may have been considered to be the successor of the universal legal historical school, that Roman law had completely lost its importance as **tertium comparationis**. The works reflecting the "repercussions", detectable from time to time, though less and less often, of the universal legal historical approach were those - such as Vincent Doucet-Bon's work, **Le mariage dans les civilisations anciennes**[287] in French legal literature - not attaching particular importance to the conceptual system and institutions of Roman law. For comparative jurists in general, the system of Roman legal concepts and institutions, which were to a considerable extent above the level of those of the other ancient peoples, occupied an important position. And in the actual studies of institutions and of the history of dogmas - and this applied to the law of obligations, in particular - Roman law also kept its **"standard-of-value"** function, in addition to its importance to terminology. Ancient Greek law was not left out of consideration, either, with special reference to the connections between ancient law and comparative jurisprudence in general. The most illuminating example of the above - not con-

sidering certain minor studies whose first concern was to attract attention to Hellenic law - was Hitzig's above-mentioned paper on the importance of ancient Greek law for comparative jurisprudence.

## 2.7. THE TREND OF "ANTIKE RECHTSGESCHICHTE"

1. The direct antecedents of the trend of **"antike Rechtsgeschichte"**, connected especially with Leopold Wenger's name, can be traced back to the efforts - and in this respect Mitteis' above-mentioned work can be cited first - aiming at freeing Roman law from "splendid isolation". Breaking through the limits of orthodox Romanist studies was the manifest aim of the exponents of this trend, named after the title of Wenger's inaugural lecture delivered to the Academy of Sciences in Vienna, on the October 26, 1904.[288] Wenger who, it should be added, persisted in his opinion even decades later,[289] studying Roman law together with and parallel to the law of other ancient peoples and stressing the primacy of Roman law, postulated for the ancient law of the peoples of the Mediterranean world a development stemming from common roots and based on interconnections, and showing several common traits with reference to general tendencies.

Wenger's theory, owing to its purely historical basis, cannot be classed under the heading of comparative jurisprudence. It was only much later that he began to bring the idea of **"antike Rechtsgeschichte"** closer to comparative studies.[290]

The section on Greek and Roman law, by Wenger in **Allgemeine Rechtsgeschichte** (Berlin, 1914), published as part of the series **Die Kultur der Gegenwart** is worthy of notice in this respect. In this section, even the slightest hint that Wenger conducted the analysis with a comparative method, is missing.

Following mostly Bastian, though refraining from carrying out a general analysis, i.e. also covering the law of "primitive" peoples which could not be reconstructed, unless in a hypothetical form, Wenger at first set up the programme of **"antike Rechtsgeschichte"** insisting on the "equality" between the law of all the peoples of Antiquity. Volterra rightly pointed to the fact that the school of **"antike Rechtsgeschichte"**, at the time of this proclamation, could be regarded as no more, as yet, than the programme of the "general legal historical" trend for studying ancient law - i.e. **"Universaljurisprudenz"** applied to Antiquity - and it would only much later,

when several years, even several decades had elapsed, call for the study of ancient law on a comparative basis.[291] This programme had an important function in Germany, after the **"Machtergreifung"** by the Nazi Party, because it was owing to this programme that Roman law, which was branded as alien to the German people, "individualist", "cosmopolitan" - and which, from poilitical considerations, was exiled from the Universities of the **"Drittes Reich"**[292] - could continue to be taught at the University as an academic subject, under disguise.

The nineteenth paragraph of the programme given by the Nazi Party on the 24th of February 1920 anathematized Roman law (**"Wir fordern Ersatz für das der materialistischen Weltordnung dienende römische Recht durch ein deutsches Gemeinrecht"**), and demanded that German **"Gemeinrecht"** should take its place. Alfred Rosenberg, interpreting the above paragraph of the party programme, put it as follows: **"Dieses seelenlos und unvölkisch** (sic! G.H.) **fortgebildete Erzeugnis des späten syrisch-römischen Zersetzungsprozesses hat den ungeheuerlichsten Volksausbeutungen noch den Titel des Rechts verliehen. Das Interesse des einzelnen wurde zum Götzen erhoben und ihm alle Möglichkeiten der Verteidigung zur Sicherstellung seiner sogenannten "Rechte" gewährleistet. Ob die Rechte der Allgemeinheit dadurch gefährdet waren, war gleichgültig."**[293]
There was no room for the "materialistic", "liberal" Roman law, caring for nothing except "private interests", among the subjects taught at the University. Even the reception of Roman law was considered as an **"Unglück"** and **"Tragik"** by the legal literature of the Nazis in the 1930s.[294] Rusztem Vámbéry was writing ironically of the reform of legislation planned by the NSDAP, proposing to purify "... the BGB and the StGB from all foreign trappings that had stuck to them during their development, and to remove all sentimentality, through which the **Roman** (emph. added by G.H.) influence... contaminated the puritanical mind of the Teutons, who had formerly sipped mead sitting on bearskins in caves".[295]

2. As a consequence of the Antiquity-oriented approach of the trend of **"antike Rechtsgeschichte"**, Wenger and his followers drew parallels between the ancient legal institutions alone. Wenger did not believe in "boundless" comparison, not limited in time, because this could generally lead to nothing more than to finding sensational parallels without particular academic merit.

For example, Wenger criticised severely Fehr's book - entitled **Hammurabi und das salische Recht** (1910) - where the author had drawn a parallel between the Code of Hammurabi and the law of the Salian Franks. In his review of Koschaker's work, published two years later, and offering an analysis of Babylonian law in terms of the Germanic law - entitled **Rechtsvergleichende Studien zur Gesetzgebung Hammurabis** (1912) published in the 1918 issue of the **Münchner kritische Vierteljahresschrift** - Wenger, rather inconsistently, approved of the choice of Germanic law for **"tertium comparationis"**.[296] This wavering in his opinion seems to support Giuffrè's statement, who argued that the exponents of **"antike Rechtsgeschichte"** were free from chronological restraint.[297]

Schönbauer, who had much in common with the trend of **"antike Rechtsgeschichte"**, at least early in his career, limited the opportunities for comparison even more, this time in the field of ancient law itself. For Schönbauer limited possible comparison to the law of the peoples who were on an identical level of civilization or ethnically related.[298] The theory developed by De Zulueta, a follower of Wenger's programme was a reaction to the narrowing down of the field of comparison in both directions - i.e., on the one hand, toward modern law, on the other hand, toward certain kinds of ancient law. This theory, forwarded in 1929, insisted on the need for drawing parallels between ancient and modern law.[299] De Zulueta's conception was basically reminiscent of Rabel's theory, in whose opinion it was essential to find parallels between a large variety of legal systems, both ancient and modern.[300] Thereby he had become Wenger's precursor who, later - though it should be admitted not with reference to expounding the programme of **"antike Rechtsgeschichte"** - expressly stated that, unless modern law was also dealt with, legal historical studies could not be considered as comparative.[301]

3. The trend of **"antike Rechtsgeschichte"**, irrespective of the fact, whether it still bore the marks of the universal legal historical approach or had already been closer to the differentiation, comparative trend of jurisprudence, implied an overshadowing of the European traditions of Roman legal doctrine. The idea - as referred to by Biscardi[302] - that the analysis of the law of various ancient peoples gave rise to a uniform ancient legal history, formed the theoretical background. Vinogradoff's conception is a good example of the lessening importance of Roman law. For, in his opinion, in the so-called civil law - considered to be the third stage of the typified development of law (following the former stages of totemistic and tribal law) - the analysis of Greek law had the same importance as the study of Roman law had. What is more, it was Greek law that was regarded explicitly as the paradigm, because Roman law had lost its character of "civil law", when Rome the **polis** had grown into an Empire.[303]

Koschacker took the right view of the trend of **"antike Rechtsgeschichte"** as a kind of neo-Humanist trend, drawing in its orbit - as its predecessor, the Humanist school had done before - the study of every kind of ancient law that could be reconstructed, irrespective of the differences in level.[304] In San Nicolò's opinion, the principal peculiarity of **"antike Rechtsgeschichte"** was that, in terms of its programme, Roman legal history ceased to be the Pandectistic doctrine of Roman civil law.[305]

An incontestable merit of the "equalizing" tendency of this programme was that, by lessening the importance of both the unscholarly theory of Aryan (Indogermanic) superiority - though making exception for Schönbauer, who had much in common with the trend of **"antike Rechtsgeschichte"** - and of the Orientalist trend, based on vague hypotheses (cf. Revillout, Lapouge), it made the analysis of the manifold relationship between the Roman law and the law of other ancient peoples clearly indispensable. This applies even to the Romanists who, because of the obvious excesses of the above-mentioned schools, had doubts from the outset as to the viability of studying the law of other ancient peoples.

4. Nevertheless, the spread of the ideas of **"antike Rechtsgeschichte"** failed to lead to the disappearance of theories based, for the most part, on hypotheses; far from this, Carusi, whose works are worth analyzing, even from the aspect of the general theory of comparative jurisprudence (we are primarily referring to his paper entitled **Il problema del diritto comparato, sotto l'aspetto scientifico, legislativo e coloniale**, Roma, 1917)[306] approached the problem of comparative law practically in terms of the comparative analysis of ancient law. For him - as observed by Constantinesco[307] - comparative law was actually a kind of comparative legal history that he thought equivalent to jurisprudence itself. This opinion, which was in many respects in agreement with Bierling's theory, was criticized by Constantinesco because, he argued, the basis Carusi had provided for comparative law proved to be too narrow.[308]

Carusi's view gained no adherents. For example, De Francisci - in his paper entitled **La scienza del diritto comparato secondo recenti dottrine**[309] - rejected Carusi's doctrine **a limine**. The reason why he did so was, preponderantly, the fact that De Francisci refused to admit the autonomous character of comparative jurisprudence. He argued that comparison was no more than a method. He admitted, however, that there was such a phenomenon as a comparative history of law - a fact which had also been proved by his work published earlier (**I presupposti teoretici e il metodo della storia giuridica**).[310]

In the matter of comparison between the law of the ancient peoples of the Mediterranean world, Carusi was an adherent of the trend of **"antike Rechtsgeschichte"**. He argued that the law of Antiquity should be analyzed as a whole. Carusi regarded the influence of Greek and Near Eastern law upon Roman law slight.[311] Consequently, he was no partisan of Revillout's or even Lapouge's theses changing Roman law into a conglomerate of the tenets of other ancient peoples' law. Nevertheless, we can find in his

works several borrowed hypotheses which can be traced back to the undiscriminating adoption of the findings of linguistics. Such a hypothesis is - with Volterra's illuminating expression - "pan-Semitism".[312] Carusi assumed that the origin of Hebraic, Babylonian and Egyptian law could be traced back - on the analogy of a Semitic parent language - to a common Semitic "parent" law. This theory was based on the parallel legal institutions these peoples actually had.[313] With this theory Carusi came quite close to Müller, because of the virtual identity of their "methodological" starting point. Carusi's works contributed to our awareness that **"antike Rechtsgeschichte"** might set bounds to the theories of the otherwise "boundless" comparison, shrouded in the dim mists of bygone days.

5. This was one of the reasons, and not the least one, why Mitteis criticized the trend of **"antike Rechtsgeschichte"**, in his paper published in 1917 (**Antike Rechtsgeschichte und romanistisches Rechtsstudium**).[314] Mitteis said, by way of comparison, that the assumption, according to which there was a **uniform** history of ancient law, was just as mistaken as if science reckoned with the existence of a single stellar system alone. Of course, he did not deny that ancient law had certain parallel institutions. He argued, however, that it would be mistaken if these similarities were made universal and absolute. He regarded as particularly dangerous the efforts to prove the derivation of an entire legal system of Antiquity or of a certain institution from the law of another ancient people (the problem of derivation), on the basis of unfounded hypotheses. It was with special reference to the theories concerning the weakly documented period of primitive law - and we are referring here specifically to Carusi's above-mentioned pan-Semitic theory - that Mitteis called the attention of jurists to the dangers inherent in regarding the parallels based, for the most part, on **indicia** as absolute.

Wenger, in his answer to Mitteis' critique, pointed to the fact that the primary objective of **"antike Rechtsgeschichte"** was not to give an answer to the manifold and rather vague problems of derivation - in this respect, he disavowed any community with Carusi's ideas - but to disclose the elements included in the texts (legal material) of the imperial constitutions of the Roman Empire.[315]

> It was basically with reference to this programme, formulated by Wenger, that Koschaker named the trend of **"antike Rechtsgeschichte" "ein echter Spross der geschichtlichen Orientierung der neuesten, namentlich der deutschen Romanistik"**, which - despite the fact that its conception seemed to give high priority to Roman law - actually delegated it to the background.[316]

It seems probable that the programme formulated by Wenger may have underwent a change under the influence of, among others, Mitteis' critique into a trend stressing the need for comparing the different types of ancient law. Wenger agreed with Mitteis that the **"antike Rechtsgeschichte"** should be interpreted as comparative jurisprudence.[317]

> Wenger admitted that there was no such thing as ancient law, as there was no ancient language, either. He put it as follows: **"Ein antikes Recht im Sinne eines international gültigen Rechts hat es ebensowenig gegeben, wie etwa eine antike Sprache. Gerade die antiken Rechte sind von Haus aus grundsätzlich national geradeso wie die Religionen der heidnischen Staatenwelt. Wohl hat es internationale Vereinbarungen innerhalb der Mittelmeerstaaten gegeben; wohl hat es gemeinsame Rechtsbräuche gegeben, aber sie bedeuteten nur faktisch gemeines Recht."**[318] Even the **ius gentium**, current in Roman law, cannot be considered as documentary proof of the existence of a homogeneous ancient law. The following citation is again from Wenger: **"Wohl kennen die Römer ein international gedachtes ius gentium, und bilden es aus, aber wie sich die anderen Völker und Staaten zu diesem von römischen Standpunkt aus erprobten ius gentium verhielten, wissen wir kaum und werden es kaum je ergründen könne."**[319]

6. The **"antike Rechtsgeschichte"** is not a trend in the sense of being based upon a homogeneous, integrated conception. This trend, hallmarked by the name of Wenger, can be regarded, in broadest outline, as the section of the **"Kulturgeschichte des Altertums"** concerned with the problems of the law and the State.[320] This trend which had originally been politically neutral turned out to be, in Germany, from the 1930s on, the means for saving Roman law. It must be admitted that the performance of this means-function presupposed - and it is Schönbauer we have particularly in mind - concessions made to the Aryan-Indogermanic theory. These concessions were in diametrical opposition to the peculiarities of **"antike Rechtsgeschichte"** in its early stage. In the original view of this trend, founded by Wenger, the importance of ethnic affiliation was supposed to be reduced to zero. The fact that certain scholars (such as Carusi) citing the findings of comparative linguists had formulated hypotheses about common ethnic peculiarities, did not change the situation considerably, either. For the exponents of this school, the comparative approach had an increasing importance; as a result, the significance of Roman law as **tertium comparationis** grew significantly. The stress on the primacy of Roman law bridged the gap - it was De Zulueta that put this the most clearly and unambiguously in his paper - between **"antike Rechtsgeschichte"** and the comparison of modern legal institutions. In this sense, it is no exaggeration to state that the **"antike Rechtsgeschichte"**, which had originally formulated a claim to analyzing the

law of all the ancient peoples and had chosen the comprehensive study of the ancient law of the Mediterranean[321] for its programme, was transformed into a trend putting the emphasis on the primacy of Roman law and on the importance of analyzing the ancient law in terms of the comparative method.[322]

## 2.8. RECENT TRENDS IN COMPARING ANCIENT LAWS

1. In this section of the present work, where the author's aim has been to give an overview, we could, of course, not undertake to analyze each work dealing with some aspect or other of Graeco-Roman Antiquity. The reason for the author's decision has been that, in the following chapters, when individual institutions are discussed, the literature of the past few decades, i.e. predominantly modern literature has been made use of. Our aim in this section has been rather to study what conceptions are reflected in the comprehensive works written during the last forty or thirty years, especially in those whose authors propose to give a survey of the law of ancient peoples. In the introduction of the present work, the monographs on comparative jurisprudence in general were mentioned in passing accompanied by the general remark that the law of ancient peoples was not analyzed in these works at all or, at best, only in hints.

Even in the post-World War II era, Wenger's **"antike Rechtsgeschichte"** (a trend adopting the comparative method and, therefore, lending itself to be considered as a kind of "comparative law of Antiquity") could exert an influence on the authors comparing the legal systems of ancient Rome , the East Mediterranean and ancient Greece. The works which can be grouped under the collective name of **"l'histoire des droits de l'Antiquité"** paying particular attention to the law of ancient peoples, fall basically within the scope of two trends. The two separate trends remind us essentially of the fact that **"antike Rechtsgeschichte"** was also made up of various trends.

The first branch considered the analysis of the law of **all** the peoples of the Mediterranean as its task. The textbooks by Ellul,[323] Monier-Cardascia-Imbert,[324] Gaudemet,[325] and Gilissen[326] can be grouped under this heading. The exponents of the other branch made a study of ancient law with a view to stressing the primacy of Roman law. Seidl's[327] activity can be grouped there. The approach of the authors in the socialist countries (such as Taubenschlag,[328] Korányi,[329] and Turaček[332]) is closer to the first-men-

tioned trend, stressing the need for a universal analysis. Despite methodological differences, the exponents of both trends agree upon the fact that Roman law can be considered to have been the most advanced law of Antiquity and, for this reason, it should have a prominent place. As Roman law plays the role of "proto-type", it is also a **"guide de comparaison"** or, in other terms, the **tertium comparationis**; Volterra aptly argued that the technical term **"le droit comparé de l'Antiquité"**[331] should be substituted for the term **"l'histoire des droits de l'Antiquité"**.

2. The reason why Roman law has gained such prominence can be traced back to the fact that the comparative history of ancient law is, essentially, also a comparison between doctrines.[332] A comparison between doctrines - even if restricted to the field of ancient law - postulates the existence of a standard with decisive influence upon the development of European law, and which can, therefore, be regarded as the **ius commune Europaeum**. Owing to its objective qualities, Roman law has been marked out for this role, this being the only ancient law the full system of which survived and is known to us, and this is where jurisprudence first emerged in a form that could be reconstructed in all its details.

> The significance of Roman law is by no means reduced, if certain scholars demand a more extensive knowledge of the legal institutions of other ancient peoples may also be needed. It is not by chance that e.g. Fuenteseca in his paper surveying the findings in Roman law of Spanish literature during the last thirty years - entitled **Un treintenio de derecho romano en España: reflexiones y perspectivas** - stressed the need for a more detailed study of Greek law, with special reference to the fact that the history of European law had started in ancient Greece. He put it as follows: **"Finalmente, no conviene olvidar que algunos de los grandes temas juridicos tienen ya su planteamiento en Grecia: asi la problematica de la ley (nomos) y de la justicia del Estado-ciuded (polis)."**[333]

The high priority given to Roman law by the authors of the past three or four decades, who felt it their task to make a comprehensive study of the laws of ancient peoples, was not inspired by the view that Roman law was a kind of modern natural law. The point was, rather, that Roman law, which represented a kind of intellectual tradition - thus it is not the once positive character of Roman law that is involved here - offered a basis for comparison. The importance of Roman law for comparison is well illustrated by the following text by Yntema, pointing to the essence of its outstanding role: "The law of Rome is not **the** law, but **a** law, the value of which to legal science depends upon the extent of its continuity, the variety of its experience, and its correspondent historical or international influence".[334]

NOTES

1 **Diósdi** (1968), p. 134; **Hohenlohe** (1937), p. 112; **Schnitzer** (1961), p. 8.

2 **Guarino** (1958), pp. 146-148.

3 **Boucaud** (1938), p. 302.

4 **Schnitzer** (1961), p. 136.

5 **Baratta** (1953), p. 17.

6 **Burckhardt** (1928), Cf. particularly: Chap. III of the book (**Die Wiedererweckung des Altertums**) and within this the section under the title: **"Die alten Autoren"**.

7 **Burckhardt** (1928), pp. 196 ff.

8 **Brandi** (1913), pp. 47 ff.

9 Klinger connects Cicero and Petrarca with the humanist spirit. **Klinger** (1965), pp. 684 ff. Cf. also **Classen** (1968), pp. 198 ff.

10 Cf. summed up in **Costa** (1980), p. 4.

11 **Volterra** (1937), p. 3.

12 For the enumeration of these cf. **Volterra** (1961), pp. 4-5, n. 1.

13 **Volterra** (1963), p. 6.

14 **Savigny** (1831), pp. 374 ff.

15 **Vogt** (1971), p. 38, n. 3. Cf. also: **Hübner** (1973), pp. 44 ff.

16 **Coing** (1966), p. 116.

17 **Schnitzer** (1961), p. 9.

18 **Schnitzer** (1961), p. 9.

19 It is worth mentioning that the arguments advanced by Leibniz in support of the codification of law are very similar to those of Hotman. Cf. **Sturm** (1968), p. 13.

20 **Vogel** (1960), p. 32.

21 **Wieacker** (1967), p. 167.

22 **Vogel** (1960), pp. 11 and 114.

23 In opposition to e.g. Dumoulin who emphasized the exclusive role of the local customs from the point of view of codification. Cf. **Hug** (1978), p. 116.

24 **Hübner** (1973), p. 48.

25 For the connection between Hotman and Cicero, cf. Vogel (1960), pp. 30 ff and 70 ff.

26 In addition to the above-mentioned Leibniz, Conring (**De origine iuris Germanici**) and Burchard (**De hodiernae iurisprudentiae naevis et remediis**) are the most important legal scholars who got inspiration by Hotman's Antitribonianus to codification or rather to critique of Roman law (or more exactly the prevailing law). Cf. **Vogel** (1960), p. 110.

27 **Riccobono** (1938), p. 240.

28 For Selden's evaluation, cf. **Hug** (1978), pp. 119-120 and **Schnitzer** (1961), p. 9.

29 **Hazeltine** (1910), p. 105 and **Hug** (1978), pp. 119 f.

30 On the importance of the activity of Conring, cf. **Wieacker** (1967), p. 206.

31 **Lambert** (1905), p. 38.

32 Duck certainly does not know Conring's work about a similar subject, published a few years earlier. Cf. **Horn** (1972), p. 171.

33 **Sturm** (1968), p. 13.

34 **Sturm** (1968), pp. 14 f.

35 Cf. "Nova Methodus discendae docendaeque iurisprudentiae" In: **Leibnitii Opera omnia**, vol. IV. (Dutens ed.), Genève, 1768, p. 191.

36 The difference between the empirical approach and the so-called **a posteriori** method is well illustrated by the oeuvres of Grotius and Pufendorf. Cf. Stein (1980), pp. 4 ff.

37 **Naber** (1928), p. 51.

38 **Hug** (1978), p. 120.

39 Cf. the works of A. Kaufmann; Naturrecht und Geschichtlichkeit (Göttingen, 1957) and Die ontologische Bedeutung des Rechts (Darmstadt, 1965).

40 **Volterra** (1937), p. 10, n. 1.

41 **Volterra** (1937), p. 21, n. 1.

42 For Pütter's life, cf. **Ebel** (1975), pp. 7-12.

43 **Pütter** (1798), pp. 40, 42.

44 For the scholarly evaluation of Pütter's activity, cf. **Landsberg-Stintzing** (1890), pp. 331 ff, and **Marx** (1967), pp. 4 ff.

45 **Stein** (1980), p. 53.

46 **Wieacker** (1967), p. 355, n. 1, and **Fikentscher** (1975-1977), vol. III, pp. 52 ff.

47 Wieacker writes about the so-called "historische und vergleichende Betrachtung". Cf. **Wieacker** (1967), p. 380.

48 For the foundations of the arguments in the "Natur der Sache", Marx's work mentioned in n. 44 is an excellent survey.

49 Cf. J. St. Pütter: Programma de necessaria in academiis tractanda rei iudiciariae imperiae scienciae, Göttingen, 1748. Cited by **Ebel** (1975), p. 62.

50 The work was first published in 1757. The 1769 edition is a considerably revised, enlarged form of the 1757 edition. **Ebel** (1975), p. 61.

51 Cf. the several editions of "Elementa iuris Germanici privati hodierni in usum auditorum" and the "Neuer Versuch einer Juristischen Encyclopedie und Methodologie".

52 Cf. J. St. Pütter: Beyträge und Erläuterung etc. des Teutschen Staats- und Fürstenrechts. Theil 2. Göttingen, 1779, pp. 68 ff.

53 **Ebel** (1975), p. 88.

54 **Pütter** (Elementa) 68, 7, cf. note 51.

55 **Landsberg-Stintzing** (1890), p. 54; **Wieacker** (1967), p. 208 and **Ebel** (1975), p. 86.

56 **Landsberg-Stintzing** (1890), pp. 90 and 137, and (Noten), p. 55.

57 **Landsberg-Stintzing** (1890), pp. 137 ff.

58 **Marx** (1967), p. 17.

59 A Fr. Schott: Entwurf einer juristischen Encyclopedie und Methodologie zum Gebrauch akademischer Vorlesungen. Hrsg. von Rees, J. Fr. 6, vermehrte und verbesserte Ausgabe. Leipzig, 1794, p. 7. Edited for the first time in 1772.

60 **Landsberg-Stinzing** (1890), pp. 481 f.

61 **Wieacker** (1980).

62 The proof of this is his work, entitled "Institutiones iuris Saxonici electoralis privati", published first in 1778 (3rd ed. Haubold, Chr. G. Lipsiae, 1795).

63 **Schott** (1794), p. 151.

64 **Schott** (1794), p. 15.

65 **Schott** (1794), p. 79.

66 **Schott** (1794), p. 63.

67 **Schott** (1794), p. 26.

68 **Schott** (1794), p. 26.

69 **Schott** (1794), p. 204.

70 **Schott** (1794), p. 204.

71 **Wieacker** (1955), p. 36.

72 **Koschaker** (1938), p. 254 and **Wolf** (1963), p. 484.

73 **Landsberg-Stintzing** (1890), pp. 40 ff.

73 **Del Vecchio**, G. (1914), p. 6.

75 **Hamza-Sajó** (1980), p. 105.

76 **Volterra** (1937), pp. 24 ff.

77 **Mitteis** (1891), pp. 24 ff.

78 The assumption that Savigny might be averse to the **Interpolationenkritik**, is erroneous. Cf. Wesenberg (1952), pp. 430 ff. Cf. also **Volterra** (1963), pp. 265 f.

79 **Schwarz** (1960), pp. 100 f.

80 **Feuerbach** (1833).

81 **Manigk** (1914), p. 30.

82 **Wieacker** (1967), p. 369.

83 **Rheinstein** (1974), p. 42.

84 **Koschaker** (1953), p. 254.

85 The work was first published (in Bamberg-Leipzig) in 1816. In its original form, this was a book review but was also published as an independent paper, entitled **Einige Worte über die historische Rechtsgelehrsamkeit und einheimische deutsche Gesetzgebung** (likewise in Bamberg-Leipzig). The complete text of the paper can be found in a new edition, published in 1973. Cf. Thibaut and Savigny: Ihre programmatischen Schriften, Einleitung v. H. Hattenhauer. München, 1973.

86 **Feuerbach: Einige Worte**, cf. note 85.

87 **Manigk** (1914), p. 31.

88 Cf. Anselm von Feuerbachs Biographischer Nachlass. Nürnberg, 1853, Bd. II, p. 378 ff.

89 **Radbruch** (1938), p. 291.

90 For the summing up of Theodor Pütter's life, scholarly activity cf. **Landsberg-Stintzing** (1910), pp. 648 ff.

91 **Landsberg-Stintzing** (1910), p. 649.

92 **Landsberg-Stintzing** (1910), p. 649.

93 **Pütter** (1846), pp. IX ff.

94 **Pütter** (1846), p. XII.

95 **Pütter** (1846), pp. X ff.

96 **Pütter** (1846), p. XIII.

97 **Franklin** (1954), p. 145.

98 **Unger** (1850), pp. V f.

99 **Gans** (1824-1835), Vol. I, p. XXXIX.

100 Cf. G.W.F. Hegel: Vorlesungen über die Philosophie der Weltgeschichte. Ed. I: Die Vernunft in der Geschichte. Hrsg. von J. Hoffmeister, 1970, pp. 174 ff. Cf. also **Bichler** (1968), pp. 4 f.

101 A. Fr. J. Thibaut: Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland Civilistische Abhandlungen, 1814, p. 404.

102 **Gans** (1824-1835), Vol. I, p. XXIII.

103 **Gans** (1824-1835), Vol. I, p. XXIV.

104 **Gans** (1824-1835), Vol. I, p. XXXI.

105 For Gans's historical outlook, cf. **Constantinesco**: Einführung, p. 103.

106 **Gans** (1824-1835), Vol. I, p. XXIV.

107 **Gans** (1824-1835), Vol. I, p. XXV.

108 In the introduction entitled "Römische Geschichte und Römisches Recht" of the first volume Gans deals in greater detail with the outstanding importance of Roman law (**Gans** (1824-1835), Vol. I, pp. 1 ff).

109 Pólay writes that Gans "dies without leaving successors". Cf. **Pólay** (1976), p. 51 and **Pólay** (1981), p. 59.

110 **Landsberg-Stintzing** (1890), pp. 917 f.

111 **Constantinesco** (1971-1973), p. 125.

112 **Unger** (1850), pp. V-VI.

113 **Unger** (1850), pp. 1 ff.

114 **Unger** (1850), p. 13.

115 **Constantinesco** (1971-1973), p. 113.

116 Cf. **Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes.** I. 1829, p. 25.

117 Cited by **Bucci** (1969), pp. 348 ff.

118 **Bucci** (1969), p. 349, n. 29.

119 Meier-Schömann: Der attische Prozess, Halle, 1824 and Eduard Platner: Der Prozess und die Klagen bei den Attikern, I-II. Darmstadt, 1824-1825 were published as a result of this competition. Cf. **Biscardi** (1961), pp. 7 ff.

120 Cf. summarily **Schnitzer** (1961), pp. 13 ff.

121 Gilson therefore puts it rightly: "... M. Oppert joint la plus scrupuleuse conscience scientifique..." Cf. **Gilson** (1899), p. 28.

122 **Volterra** (1853), p. 27.

123 **Rossbach** (1853), p. 37.

124 **Rossbach** (1853), p. 192.

125 **Rossbach** (1853), p. 198.

126 The complete title of the work is: Ancient Law: Its Connection with the Early History of Society and its Relations to Modern Ideas (London, 1861).

127 Cf. Roman Law and Legal Education. Cambridge Essays. London, 1856, p. 29.

128 **Stein** (1980), pp. 86 ff.

129 Maine acquired his knowledge of the Indian law during his years of service in India. Cf. **Stein** (1980), p. 92.

130 **Maine** (1861), pp. 13 ff.

130a Cf. **Leist** (1884). Leist draws a parallel between the institutions of ancient law in this work. As a result, the comparison of law in a technical sense - the emphasis on parallel traits and the identification of differences - loses much of its importance.

131 **Jhering, R.**: Vorgeschichte der Indoeuropäer. Aus dem Nachlass hrsg. von V. Ehrenberg. Leipzig, 1894.

132 Zweigert dealt in greater detail with the connection between Jhering and the comparative method. Cf. **Zweigert** (1966), pp. 238 ff.

133 **Wilhelm** (1970), pp. 230 ff.

134 **Rheinstein** (1974), p. 44.

135 **Jhering** (1858-1865), p. 93.

136 **Fikentscher** (1975-1977), Vol. III, p. 277. Cf. also **Wieacker** (1973), pp. 77 ff.

137 **Bierling** (1917), p. 35, n. 26.

138 **Bierling** (1917), pp. 36 ff.

139 Cf. Ehrenberg's foreword to the "Vorgeschichte der Indoeuropäer": **Jhering** (1894), p. I.

140 **Gaudemet** (1970), p. 141.

141 Bucci's remark, according to which Jehring would not have published his work in this form, relates to the shortcomings in the contents of the work, as well. Cf. **Bucci** (1969), p. 351, n. 30.

142 **Jhering** (1894), p. IX.

143 According to Fikentscher, the "Vorgeschichte der Indoeuropäer" can be regarded as a contribution to legal anthropology or, to historical sociology which - it should be added - "is still to be created". Cf. **Fikentscher** (1975-1977), Vol. III, p. 250. No matter where we group this work, - in our opinion - its principal characteristic is that it follows the Aryan theory.

144 **Amaduni** (1935), pp. 244 and 257.

145 This thesis recurs in several of Schönbauer's papers. Cf. **Schönbauer** (1926a), pp. 181 ff, idem (1926b), pp. 264 ff, idem (1929), pp. 345 ff, and idem (1932), pp. 195 ff.

146 Schönbauer formulated the idea of the common basis of Roman and Germanic law in his lecture delivered at the Deutscher Rechtshistorikertag in 1936. Cf. Conrad, H.-Dulckeit, G.: Bericht über den 5. Deutschen Rechtshistorikertag in Tübingen vom 12-15. Oktober 1936, pp. 539 ff. ZSS (Rom. Abt.) 57, 1937. Cf. also: **Kaser** (1939). Cited by: **Stolleis** (1973), pp. 35 ff.

147 **Kaser** (1939). On the evaluation of this paper of **Stolleis** (1973), pp. 35-37.

148 **Stolleis** (1973), p. 35.

149 **Schönbauer** (1932), pp. 211 ff.

150 **Koschaker** (1936), p. 147.

151 **Condanari-Michler** (1948), pp. 28 ff.

152 **Bernhöft** (1889a), pp. 1-27 and **Bernhöft** (1899b), pp. 161-221.

153 Bernhöft (1889a), I, p. 19.

154 **Bloch** (1968), p. 233.

155 **Bloch** (1968), p. 234.

156 **Volterra** (1961), p. 530.

157 **Dumezil** (1966), pp. 585 ff.

158 **Devoto** (1962), p. 323.

159 **Rabel** (1944), p. 868.

160 **Rabel** (1944), pp. 868 ff. For the summing up of the importance of the document - and generally of writing - in the legal practice of Hellenistic Egypt and of ancient Greek **poleis**, cf. **Wolff** (1978), pp. 3-7.

161 **Kaser** (1965), p. 3.

162 **Bekker** (1885), p. 90.

163 **Koschaker** (1938), pp. 276 ff; **Land** (1862), pp. 1 ff, and **Volterra** (1937), p. 35.

164 **Nallino** (1930), p. 222.

165 **Bruns-Sachau** (1880).

166 **Selb** (1964a) pp. 350 ff.

167 **Selb** (1964b), p. 331.

168 **Selb** (1964), pp. 5 ff.

169 **Mitteis** (1891), pp. 1 ff.

170 **Nörr** (1968), p. 565. Guarino, on the other hand - like Nallino and Volterra -is of the opinion that this collection does not include the rules of **ius honorarium**. Cf. **Guarino** (1958), p. 149.

171 Volterra considers the **Syrisch-römisches Rechtsbuch** as an example of the fusion of Roman law and the ancient Oriental law. As he puts it: "... il Libro fu considerato ... come un esempio dei connubio fra il diritto romano e diritti orientali". Cf. **Volterra** (1937), p. 37.

172 G. Zitelmann in **Zweigert** (1973), p. 12.

173 Revillout puts it this way: "A l'Égypte, les Quirites empruntèrent d'abord leur droit civil primitif; à Babylone leur droit prétorien et commercial." Cf. **Revillout** (1897), p. 2.

174 **Revillout** (1886), pp. 1 ff.

175 **Revillout** (1886), p. 79. This very productive Egyptologist creates the "unity" of the law of the ancient world in his following works, as well: Les rapports historiques et légaux des Égyptiens et des Quirites jusqu'aux emprunts faits par la loi des XII tables au Code d'Amasis. Paris, 1902; Précis du droit égyptien comparé aux autres droits de l'Antiquité. Vol. I. Paris, 1903, and Les origines égyptiennes du droit civil romain. Paris, 1912.

176 **Revillout** (1903), p. 1184 and (1912) pp. 4 and 63 ff. Cf. also: **Seidl**(1949), pp. 168 ff.

177 **Haider** (1978), p. 185.

178 For the evaluation of Lapouge's activity cf. (1891), p. 13, n. 1, and **Volterra** (1937), pp. 45 ff.

179 **Mitteis** (1891), p. 13, n. 1.

180 Casatti, C.: Etruria. Nouvelle éd. I. - Origines étrusques du droit romain. Paris, 1888, pp. 35 ff. and 49 ff. II. - Éléments du droit étrusque. Extrait de l'ouvrage du ius antiquum. Vegoia. Droit papirien. Lex Regiae. Lex XII tabularum. Gai Institutionum commentarii. Paris, 1895.

181 The second edition of the work was published in Paris, 1880.

182 **Constantinesco** (1971-1973), p. 126.

183 **Gilson** (1899).

184 **Gilson** (1899), pp. 10 ff.

185 **Lambert** (1900).

186 **Appleton** (1902).

187 **Mitteis** (1891), pp. 8 ff.

188 **Koschaker** (1938), p. 274.

189 **Goldschmidt** (1891), p. 41.

190 **Goldschmidt** (1891), p. 16.

191 In his opinion, a system similar to the "world economy" was characteristic of the Imperium Romanum. Cf. **Goldschmidt** (1891), pp. 43 ff.

192 The problems of the ancient "commercial law" will be treated in another Chapter of this work.

193 **Goldschmidt** (1891), p. 38.

194 **Goldschmidt** (1891), p. 38, n. 72.

195 **Goldschmidt** (1891), p. 38.

196 **Goldschmidt** (1891), p. 52.

197 **Goldschmidt** (1891), p. 63.

198 For the importance of Goldschmidt's activity for comparative studies, cf. **Constantinesco** (1971-1973), p. 127.

199 For a survey of the literature concerning the Code of Hammurabi, cf. **Ferenczy** (1962), pp. 317-322 and **Volterra** (1937), pp. 47-49.

200 In the work, published in 1905, according to Bierling, an "universalhistorische (rechtsvergleichende) Tendenz" presents itself. Cf. **Bierling** (1917), p. 34, n. 25.

201 In the foreword Binding refers to the fact that Mommsen earlier - when writing about Roman criminal law - did not believe that archaic law could be reconstructed by way of comparing it with the law of other ancient peoples. Cf. **Mommsen** (1905), p. VI.

202 The scholars who had not pursued Oriental studies, were surprised to find that the norms of the Code of Hammurabi were not primitive; on the contrary the rules were reflecting the legal aspect of a prospering civilization. Cf. **Volterra** (1937), pp. 48 ff.

203 Volterra gives to the school, represented, among others, by Müller, the name of "pan-Babylonism". Cf. **Volterra** (1963), p. 266.

204 **Müller** (1903).

205 **Müller** (1903), pp. 175-188, 193 ff, 209-221. Cf. also **Diósdi** (1961), p. 135 and **Volterra** (1937), p. 51.

206 **Cook** (1903).

207 **Grimme** (1903).

208 **Jeremias** (1903).

209 **Oettli** (1903).

210 **Davies** (1905).

211 **Zocco-Rosa** (1915), pp. 349 ff.

212 **Bonfante** (1926), pp. 119 ff.

213 **Bekker** (1885), pp. 78 and 84 ff.

214 **Gaudemet** (1979), pp. 411 ff.

215 **Schnitzer** (1961), p. 22.

216 Meili - defending comparative law - refers to the fact that it would be wrong for the history of law to monopolize the comparative method. Cf. **Meili** (1888), pp. 1 ff.

217 **Bekker** (1885), pp. 84 ff.

218 **Kohler** (1901), p. 24.

219 **Lambert** (1903), p. 919.

220 **Lambert** (1903), pp. 32 ff.

221 **Yntema** (1937), pp. 175 ff.

222 **Rabel** (1924), pp. 86 ff.

223 **Horváth** (1974), pp. 36 ff, and idem (1979), pp. 226 ff.

224 **Kohler** (1899), p. 148.

225 We should mention here that later the analysis of the structure of the family will be of central importance in comparative researches. Cf. **Schnitzer** (1961), p. 16.

226 **Engel-Jánosi** (1947), pp. 55 ff.

227 **Giraud-Teulon** (1874).

228 Cf. Studies in Ancient History, comprising a reprint of Primitive Marriage and inquiry into the origin of the form of capture in marriage ceremonies. London, 1876. Work containing a number of writings by McLennon. For the evaluation of McLennon's activity, cf. **Stein** (1980), pp. 82-86.

229 For the evaluation of Lafitau's oeuvre, cf. **Haider** (1978), pp. 171 ff.

230 **Post** (1876), (1878), (1880), (1884).

231 **Post** (1880), p. 13.

232 **Bastian** (1860), (1871), (1881), (1884a), (1884b), (1886), (1895).

233 **Ratzel** (1885-1888), Vols I-III, (1891), (1898).

234 The terms for the concept of "nicht-Kulturvolk" are in modern literature the expressions: archaic law and the law of illiterate people ("droits des peuples sans écriture"). Cf. **Gilissen** (1979), p. 33.

235 **Haider** (1978), pp. 174 ff.

236 The major works of the ethnological jurisprudence of the recent decades are: **Brown** (1952), **Hoebel** (1954), **Diamond** (1971), **Pospisil** (1974). Claude Levi-Strauss's works can also be mentioned here. Cf. **Levi-Strauss** (1949).

237 This approach is particularly apparent in **Post** (1889). Cf. also **Kohler** (1887), pp. 460 ff.

238 **Kohler** (1923), p. 378.

239 **Haider** (1978), p. 171. Haider points to the fact that the "Naturvölker" do have a civilization even if it stands on a primitive level.

240 **Weber** (1966), pp. 197 ff.

241 **Burckhardt** (1957), p. 2. Cited by **Bichler** (1968), p. 18.

242 For a summing up cf. **Adam** (1920), pp. 10 ff.

243 Cf. Kohler's reflections on this. (**Kohler** (1914), pp. 463 ff.). Kohler refers here to Manigk's Kohler-critique in the Juristisches Literaturblatt.

244 **Adam** (1920), pp. 10 ff.

245 **Kohler** (1901), p. 19.

246 ZfvR. I., pp. 1 ff.

247 **Bernhöft** (1878), pp. 36 ff.

248 **Bernhöft** (1878), pp. 1 ff.

249 **Bernhöft** (1878), p. 1.

250 For the life of the writer and poet Dahn, and his scholarly activity, cf. **Wohlhaupter** (1957), pp. 285 ff.

250a ZfvR. 2. 1879.

251 **Dahn** (1879), pp. 5 ff.

252 **Dahn** (1879), p. 6.

253 **Dahn** (1879), p. 8.

254 **Dahn** (1879), p. 9.

255 **Dahn** (1879), p. 5.

256 **Schmidt** (1920), pp. 351 ff.

257 **Bernhöft** (1889a), p. 1 ff. and idem (1889b), pp. 161 ff.

258 **Bernhöft** (1879), pp. 254 ff.

259 **Bernhöft** (1879), pp. 254 ff.

260 **Bierling** (1917), pp. 11 and 85.

261 In Bierling's opinion, jurisprudence has five branches: the "juristische Prinzipienlehre", the history of law, the "Darstellung des geltenden Rechts", the philosophy of law, and legal politics. Cf. **Bierling** (1917), p. 3.

262 **Bierling** (1917), p. 11, n. 9.

263 **Bierling** (1917), p. 29. He himself felt the need for emphasizing that it may not be expedient to dwell on the idea that the history of law was an end in itself ("Selbstzweck").

264 **Bierling** (1917), p. 10, n. 10.

265 **Bierling** (1917), pp. 30 ff.

266 **Bierling** (1917), pp. 32 ff. n. 24.

267 For example Maine compares the Celtic law with certain institutions of Roman law. Cf. **Maine** (1874).

268 **Bernhöft** (1882).

269 **Rossbach** (153).

270 **Bernhöft** (1908), pp. 142 ff, idem (1912), pp. 145 ff.

271 **Bernhöft** (1879), p. 325.

272 **Bernhöft** (1879), p. 267. It is, however, also imaginable, depending on the subject of the investigation, that Roman law should not come into consideration, at all. This is the case, e.g., in Bernhöft's monograph, entitled "Verwandtschaftsnamen und Eheformen der nordamerikanischen Volksstämme". Cf. **Bernhöft** (1888), pp. 3 ff.

273 The statement is worth citing verbatim: "... das Familienrecht von Gortyn schon vor den 12 Tafeln einen moderneren Charakter trägt, als das justinianische Recht." Cf. **Bernhöft** (1888), p. 283.

274 **Kohler** (1884), pp. 321 ff.

275 **Kohler** (1901), p. 23.

276 **Bernhöft** (1878), pp. 28 ff.

277 **Kohler** (1884), p. 321.

278 For this cf. Kohler's book review of Post's work entitled "Die Grundlagen des Rechts und die Grundzüge seiner Entwicklungsgeschichte" cited above in footnote 237. **Kohler** (1887), pp. 460 ff.

279 In this connection cf. **Post** (1876).

280 For the evaluation of Bastian's oeuvre, cf. **Kohler** (1883), pp. 277-279.

281 **Friedrich** (1892), p. 189.

282 **Hitzig** (1906), pp. 1 ff.

283 **Wenger** (1928), p. 26.

284 **Erdmann** (1909), p. 1 ff.

285 **Schulz** (1911), p. 463.

286 **Huschke** (1878), pp. 160 ff.

287 **Doucet-Bon** (1975). For the evaluation of the work, cf. **Bucci** (1980), p. 12.

288 **Wenger** (1905).

289 **Wenger** (1930), pp. 463 ff, and idem (1927), pp. 1 ff, and pp.104 ff.

290 **Volterra** (1955), p. 237.

291 **Volterra** (1955), pp. 137 ff.

292 **Koschaker** (1938), p. 46, idem (1953), p. 311, and **Volterra** (1955), p. 135. Of the recent literature cf. **Stolleis** (1973), pp. 30 ff.

293 Cited by **Stolleis** (1973), pp. 30 ff.

294 These are Hans Meier's expressions for the reception of Roman law in Germany. Cf. **Stolleis** (1973), p. 31.

295 **Vámbéry** (1933) (Hyderabad).

296 **Koschaker** (1938), p. 275, n. 4.

297 **Giuffrè** (1977), p. 28.

298 **Wenger** (1936), p. 199. Cited by **Koschaker** (1938), p. 275, n. 3.

299 **De Zulueta** (1929), p. 791. For the evaluation of De Zulueta's conception, cf. **De Koschembahr-Lyskowski** (1938), p. 257.

300 Rabel formulates this requirement in the preface of his work, entitled "Die Verfügungsbeschränkungen des Verpfänders" (1909). Cf. **Koschaker** (1938), p. 276.

301 **Wenger** (1934), p. 1.

302 **Biscardi** (1961), p. 6.

303 **Vinogradoff** (1920), Vols I-II, p. 2.

304 **Koschaker** (1953), p. 300. Cf. also **Wieacker** (1967), p. 421, n. 26.

305 San Nicolò (1931), pp. 1 ff.

306 For the evaluation of the paper, cf. **Constantinesco** (1971-1973), p. 175.

307 **Carusi** (1917), p. 38.Cf. **Constantinesco** (1971-1973), p. 175.

308 **Constantinesco** (1971-1973), p. 176.

309 For the evaluation of the work, cf. **Constantinesco** (1971-1973), pp. 177-179.

310 The paper was published in No. XX of the Rivista italiana di sociologia. However, De Francisci claimed that his standpoint was universal both in the question of comparative jurisprudence and that of the comparative history of law.

311 **Carusi** (1923), **Carusi** (1935).

312 **Volterra** (1937), p. 63.

313 **Carusi** (1916), p. 579, and Carusi (1913), p. 29.

314 **Volterra** (1937), pp. 67 ff, **Koschaker** (1938), p. 43, n. 5, and **Wenger** (1927), pp. 3 ff.

315 **Wenger** (1930), pp. 465 ff.

316 **Koschaker** (1938), p. 45.

317 **Wenger** (1927), pp. 4 ff.

318 **Wenger** (1927) p. 4.

319 **Wenger** (1927), p. 4.

320 **Wenger** (1927), p. 5.

321 For the evaluation of the Mediterranean world cf. **Wenger** (1927), pp. 6 ff.

322 **Volterra** (1955), p. 137.

323 **Ellul** (1955).

324 **Monier-Cardascia-Imbert** (1956).

325 **Gaudemet** (1967).

326 **Gilissen** (1979).

327 **Seidl** (194).

328 **Taubenschlag** (1955).

329 **Korányi** (1961).

330 **Turaček** (1963).

331 **Volterra** (1955), p. 337.

332 **Genzmer** (1954/55), pp. 342 ff.

333 **Fuenteseca** (1978), p. 145.

334 **Yntema** (1937), p. 176.

# CHAPTER 3

# INTERNATIONAL ECONOMIC, POLITICAL RELATIONS AND THEIR REFLECTION IN THE ANCIENT MEDITERRANEAN WORLD

## 3.1. INTRODUCTION

1. When analyzing the economic connections of the ancient world, it is not our task to point out the existence of some ancient "world law". It is worth mentioning in this relation that Zweigert, considered as one of the leading figures of European comparative jurisprudence (**in spite of** the obvious fact of the interstate economico-political connections of the modern age), rejects the possibility or even necessity of a **"world law"**.[1] The unifying of law means - as referred to by Kötz[2] - a process of very fragmentary nature. It seems to us that this unification of law only relates to the uniform regulation of certain fields of law what is documented in a clear form also by the "Progressive Codification of International Trade Law", elaborated by the UNIDROIT.[3] In the world of modern law, too, the domain of international trade connections is a field in which unification has a conspicuous role. The situation was similar in the world of the ancient Mediterranean, too, the long history of which can, by no means be pressed in Braudel's concept of **"histoire lentement rhythmée"**.[4]

The exploration of the economic connections of the ancient Mediterranean is one of the preconditions for analyzing the peculiarities of the system of legal institutions, creating the basis of principle for the comparability of the concrete ancient legal systems. It is, of course, not an easy task to investigate the system of legal institutions. In this relation, we should agree with Wieacker, in whose opinion we are informed much more about the trade and commercial connections of the ancient world than about their legal reflections.[5] The problem is, fundamentally, in this relation that the real, effective connection between the economy and law has remained in obscurity. The consequence of this unexplained connection is, that in the

sphere of the ancient legal systems, in that of **origo**, the sacral character of the law is generally very vigorously emphasized.[6]

> It is peculiar enough that the problem of economics - economic relations - and their reflection in law is not dealt with even by those many-sided, comprehensive scholars of the ancient legal systems who, otherwise, in their theoretical papers recognized the close connection between "social reality" and legal regulation. Ellul writes directly about the fact that in certain ages - and this relates mainly to Antiquity - there is a full harmony between **"réalité sociale"** and the prevailing **"système juridique"**.[7] It is, in his opinion, rather the modern age, in which this **"plein accord"** has disintegrated. Thus, it is not accidental that for most scholars, dealing also with Antiquity, the problems of legal reflections - particularly in respect of international economic relations - are simply without any interest.

2. The exploration of the relations between economic connections and legal regulation is rendered more difficult by two facts. On the one hand, in the investigations an anachronistic approach plays a considerable role. This means that some categories prevailing in a different socio-economic formation are used for the interpretation of Antiquity. On the other hand, the lack of adequate **sedes materiae** is also a serious problem. This may be attributed to the fact that the ancient authors - primarily the Romans - attached no great importance to trade and even the social prestige of merchants was rather low. Let us examine first the problem of anachronistic approach.

Pekary - who, otherwise, underrates the role of trade in the economic life of the Mediterranean[8] - calls the attention emphatically to the dangers and the sources of errors which are the consequences of flashing back modern categories (thus, e.g., capitalism, socialism, planned economy, etc.) to ancient Antiquity.[9] As to literature, Finley[10] deals with the problem of anachronism, taking into consideration the historical antecedents, as well. Flashing back the modern categories of the modern jurisprudence and sociology to Antiquity is, to a certain extent, of course, unavoidable. The comparison, even in itself, necessitates some degree of "anachronism". We wish only to indicate that Max Weber in his works on ancient economic history also uses modern political and economic categories. His reliance on the conceptual system of 19th century capitalism in the description of the economic bases of the slave-holding community the market does not appear to be unjustified because Weber also refers to the differences of the two socio-economic formations.

In contrast to Karl Bücher's opinion, emphasizing the **oikos**-economy[11] the significance of Max Weber's works on economic history **Die römishce Agrargeschichte in ihrer Bedeutung für das Staats- und Privatrecht**[12] and **Agrarverhältnisse im Altertum**[13] is explained by the fact that he emphasizes the importance of traffic and trade. Both products and slaves change hands as wares. And the slave workshop reminds us very much of the capitalistic industrial works. Weber recognizes the peculiar structural traits of the economic life of the Graeco-Roman Antiquity which can form also the bases of comparison.

While Max Weber uses the modern economic terminology very carefully, Eduard Meyer and Pöhlmann use the concepts of their age in their works without any restriction. Meyer makes a distinction between feudal, slave-holder and capitalist periods.[14] Already in itself this peculiar concept documents this anachronistic approach. The activity of Pöhlmann - who, as referred to by Bichler,[15] is a zealous advocate of the comparative study of ancient history - is in the field of social categories an example for the anachronistic outlook.[16] The anachronistic approach - which prevails in the sphere of historiography in the works of Eduard Meyer and Pöhlmann - may exert a strong effect on the investigation of legal connections, too, reflecting the economic relations.

It is worth-while to cite in this relation the idea of Georg Lukács about the organic meshing of the economic and legal spheres. **"Der Aufbau der Gesellschaft nach Kasten, Ständen usw. bringt es mit sich, dass in der objektiv wirtschaftlichen Struktur der Gesellschaft die wirtschaftlichen Elemente mit den politischen religiösen usw. Elementen unentwirrbar vereinigen."... "Ökonomische und juristische Kategorien sind sachlich, dem Gehalte nach, unzertrennbar ineinander verflochten."**[17]

## 3.2. THE CONNECTION BETWEEN THE ECONOMIC AND LEGAL REGULATIONS IN THE WORKS OF THE ANCIENT PHILOSOPHERS

1. The analysis of the relation of economic relations with legal regulation is rendered highly difficult by the lack of an adequate source-material. The cause of this should be looked for decisively in the fact that, for the Roman **iurisperiti**, as documented well by the Digest or the Codex of Justinian, law is in a kind of "splendid isolation" from the economico-social reality. The sources of Roman law can be the paradigms of abstraction, as referred to by Schulz[18] and Wieacker.[19] Only in exceptional cases do we meet the description of a socio-economic environment, considered by **iurisconsulti** as **"obiter-dicta"**.Mitteis refers to the fact that

several **responsa** - given primarily in legal cases to be found in the Digest - are the products of the "phantasy" of **iurisconsulti.**[20] This isolationist tendency is the root of the outlook - in the age of Pandectistics - which surveyed the law abstracted from the economico-social reality.[21] The characteristic of the isolation is, at the same time, that is - as referred to by Kaser[22] - does not present itself particularly rich in terminological projection: the system of legal concepts does not "become estranged" from social reality.

The exploration of the connection between economics and law was namely delayed by the negative conception of Romans (at least of the outstanding representatives of intellectual life), first of all in connection with maritime trade. The outstanding exponent of this opinion was Cicero who was consistently against the activity of trade, considering it as irreconcilable with the social authority of the **civis Romanus.**

> Cicero was opposed in general to pursuing trading activity. He considers it, nevertheless, as reconcilable with the authority of the **civis Romanus** on two conditions: on the one hand, the commercial activity should present itself in whole-sale trade, on the other, it should only be temporary, in so far as it is the means of procuring the material goods serving for subsistence. He writes in the **De officiis**, as follows: **"mercatura autem, si tenuis est, sordida putanda est, sin magna et copiosa, multa undique apportans, multisque sine vanitate impertiens, non est admodum vituperanda. Atque etiam, si satiata quaestu vel contenta potius, ut saepe ex alto in portum, ex ipso portu in agros se possessionesque contulerit, videtur iure optimo laudari."** (1, 150-151).
> In the **De re publica**, Cicero writes about the **"immorality (immoralitas)** of the seaside towns (colonies). **"Est autem maritimis urbibus etiam quaedam corruptela ac mutatio morum; admiscentur enim novis sermonibus ac disciplinis, et importantur non merces solum adventiciae sed etiam mores, ut nihil possit in patriis institutis manere integrum, iam qui incolunt eas urbes, non haerent in suis sedibus, sed volucri semper spe et cogitatione rapiuntur a domo longius, atque etiam cum manent corpore, animo tamen exulant et vagantur."** (2, 4, 7).

It is to be emphasized that the **negative** estimation of the mercantile activity in Antiquity reflects not only the opinion of the representatives of Roman spiritual life. As referred to by Rougé,[23] the mental life of the ancient Greeks may also have had an influence on the refusing standpoint of Romans, represented by Cicero above. Homer, Hesiod or Xenophon considered agriculture to be much more valuable, from both ethical and political points of view than any form of trade.

2. However, on the basis of the limited number of sources it cannot be precluded that all the same, certain outstanding philosophers of the Graeco-Roman Antiquity have not dealt - at least to a certain extent - with

the connection between economics and law. Plato, in the **Politeia**, considers the economic sphere as one of the "serving" members of the State, essentially on the basis of the principle of **"ta heautou prattein"**. The agriculturist, the handworker and the trader become useful members of the State by the fact of devoting themselves exclusively to their own activity (**Politeia** 369e-370).[24] Some data from the domain of agrarian relations are contained in the **Nomoi** which in contrast to the **Politeia** and the **Politikos**, deals in detail with problems of economic nature. The separation of the State from the economic sphere presents itself in Aristotle. In his "Politics" Aristotle excludes (**Politika**: 1328a 34) the possession (the ownership relations) from the concept of State. In contrast to Plato, those employed in the economic field, are no participants of state life. It follows from this automatically that, for the Stagirite, the legal regulation of the economic life is no question of principle to be solved.

According to the meaning, it is a different question that also Aristotle deals with problems of economic relation. Thus, e.g., in the **Ethica Nicomacheia** (1133a 27), he mentions the general function of the money as a measure-of-value. The question of the connection between the economic sphere and the state (legal) regulation remained, however, outside his interest.[25]

3. The only text of especially economic nature, that has been preserved from the Graeco-Roman Antiquity, entitled **Expositio totius mundi et gentium**, originating from the 4th century A.D.[26] does not analyze the influence exerted by the legal regulation upon the economics. And even, the picture mediated by the **"Expositio"** about the economic situation of the **Imperium** cannot be considered as complete. The author of the work takes into consideration almost exclusively the Oriental part of the Empire. Thus, e.g., the **"Expositio"** informs us about the Province **Gallia** - in economic projection - only in such an extent that there are "plenty of wares though the prices are high" (**omnia in multitudine abundant, sed plurimi pretii**).[27]

On the basis of the **"Expositio totius mundi et gentium"**,[28] it can be established that even at the middle of the 4th century A.D., there were strong links between the various parts of the Empire. Trade proved to be a strong cementing force. However, particularly in the Western part of the **Imperium**, the symptoms of the economic disintegration grew in number. This work, too, fails to integrate the economic sphere and its legal reflection. This reflects the fact that the influence of legal organization on economic

life was not recognized as a necessity, although this was a period when the crisis of the Empire manifesting itself also in legal relations, became more and more evident.

It is to be noted here that the isolation of law is not yet equivalent with the absence of any planning. A good example for this is given by Augustus' marriage legislation whose aim was - according to Tacitus - in addition to increasing the number of marriages - "to fill up" the **fiscus** (Ann. 3,25 ff)[29] and thus, apart from its social function, its economic role is not insignificant, either. The historian established in connection with this that **"utque ante hac flagitiis, ita tunc legibus laborabatur"**- The law - in the form of **leges** - becomes directly equal to a "wicked deed" (**flagitium**) for Tacitus. Tacitus formulated in Rome also the idea of **"corruptissima re publica plurimae leges"** (Ann. 3,27,3). It is proved by this that the attempt of legal organization was opposed.[30] The cause of this undoubtedly **ultra modum** criticism was just Augustus' marriage legislation which does not content itself with formulating a kind of conception, existing rather only in the sphere of a theory - as, e.g., Cicero did in the **De re publica** and the **De legibus** - but it wished to regulate certain relations in a sanctioned form. In the centre of Augustus' marriage-law legislation stands obviously the idea of realizing a kind of social planning.

## 3.3. THE ECONOMIC SPHERE AND LEGAL REGULATION IN ROME AS REFLECTED BY LEGISLATION

1. The law of Romans obviously regulated the economic sphere if it had serious **political** bearings, too. The regulation of economic ties in a concrete form if they were important in terms of politics could not be avoided either. The corn supply of Roma and of several other important towns on the basis of "international" commercial connections required an intervention of particularly similar character. The supply of great towns with food - though in this case we speak of a fundamentally state task - was the task of private merchants, united in various societies (**societates**).

It is to be mentioned that the fact of uniting in companies does not contradict the statement that in Rome, there were no commercial companies in the technical sense of the word. We have to speak about societies, divided according to occupations and not about "trading corporations" or "commercial associations".[31] In the 2nd and 3rd centuries A.D., as well, trade preserves its "individualistic" character. Rostovtzeff points out: "Business life throughout the history of the Graeco-Roman world remained wholly individualistic."[32] It was a very-very rare exception if somebody obtained within such an association an exclusive part, influence, because these associations had, as a matter of fact, almost no influence upon the concrete activity of their members. It is probable - though it cannot be proved entirely - that the commercial associations, being active in Palmyra, meant some exception.[33] An exceptional case to be documented was that of Cato Censorius who - with the aid of a **persona interposita** - began a

shipping undertaking and, in this way, evaded the prohibition contained in the **lex Claudia de nave senatorum.**[34]

The organizations which remind us of the trading corporations of later ages were suitable for aiding the State which otherwise could not have solved in itself alone the prominently important political task of corn supply. It is, otherwise, worth mentioning that the State considered as its very important task to create the conditions of maritime trade, manifesting itself in building up seaports.[35] It may be ascribed to the role of the State that between the trade corporations (primarily those which were engaged in long-distance commerce) and the State close ties had emerged by **munus, leitourgeia**, and in other ways.[36]

2. By the **societates**, functioning in commerce, the basis of the monopoly of corn supply was created. The forcing back of the monopolistic tendencies - i.e., the influencing of the economic sphere with the means of law - manifested itself in a kind of "Anti-Trust Law". The existence of a Roman "Anti-Trust Law" - even if it did not evolve in the fullest detail - documents the fact that in the Antiquity the possibility of regulating the economy with legal means was recognized. The authors of works dealing with the history of monopolistic endeavours, phenomena, refer to the fact that the cartels, trusts of modern capitalism have some historical antecedents.[37] These antecedents go back to Antiquity. The mechanism of cartels, i.e. the endeavour of certain societies, associations to get a decisive influence on the markets may already be observed in Graeco-Roman Antiquity.

Until now, among the Romanists the question of cartels has been followed only with a little attention. This is explained by the fact that cartels are fundamentally considered to be the products of modern times. It is not the exponents of legal Romanistic who (e.g. Menzel, Steinbach, Pohl, Stieder, Lehnich, Isay,[38] Stied and Herlitzka) pay attention to the Roman law of cartels, as well. The lack of the interest of Romanists is explained also by the fact, that the number of sources relating to "cartels" is rather limited. Leaving out of consideration Plautus' comedy, entitled **"Captivi"**,[39] the traces of the regulation relating to cartels can be found at the beginning of Principate at the earliest.

We have three sources of Roman law containing some data concerning cartels. Two of these can be found in the Digest (D. 47,11,6) (Ulpian) and D. 48,12,2 (Ulpian) and one in the **Codex Justinianus** (CJ. 4,59,2). The Ulpian-fragment to be found in the **titulus** entitled **De lege Iulia de annona** of the Digest - a fragment in the ninth book of Ulpian's **De officio proconsulis**[40] - refers to a certain **lex Iulia de annona**, the making of which can

be traced back to the reign of Caesar or, at the latest, of Augustus. The fragment did not survive in its original form.[41]

> **"Lege Iulia de annona poena statuitur adversum eum, qui contra annonam fecerit societatemve coierit, quo annona carior fiat. Eadem lege continetur, ne quis navem nautamve retineat aut dolo malo faciat, quo magis detineatur: et poena viginti aureorum statuitur."** (D. 48,12,2).

Ulpian, who in the time of the monocracy of Severus Alexander was himself the **praefectus annonae**[42] - although he performed the duties of this office only for a few months - analyzes the sanctions contained in the **lex Iulia de annona.**[43] According to this **lex**, persons who engaged in corn usury or those who became members of a company wanting to raise the price of corn are to be punished. In addition to this, nobody should retain by force a ship or shipman and should not participate in another way, either, in doing this in any form. The punishment was equal to twenty gold coins.[44]

As the **res publica** herself was responsible for the corn supply of Rome and of the other great towns, it is not accidental that she paid a lively attention to the fluctuation of corn prices. Similar signs of state intervention could be found in Athens as well, as mentioned by Vélissaropoulos.[45]

> The corn supply of Rome rested fundamentally on two sources.[46] Supplies were based on deliveries from Egypt in kind or on state purchases to the debit of the **fiscus.** Here we are interested in the latter form of corn supply. The corn purchase and the transitions connected with it, took place through **negotiatores frumentarii** who were independent in forming prices. The source, speaking for forming prices freely, is a place in Plinius iun.'s Panegyricus (Paneg. 29,3-5).[47] Plinius iun. attributes the flowering of the Roman State and the excellent supply of Rome to Trajan's "grandiosity" (**"Emit fiscus quidquid videtur emere"**) (Paneg. 29,5). The basis of **"satietas"** is the plenty of **annona.** The fixing of the price of **annona** - said Plinius - was the object of free bargaining by the seller and purchaser (**"... annona, de que inter licentem vendentemque conveniet..."**) (Paneg. 29,5) at auction, at the so-called **licitatio.**[48] The mentioned **lex** restricts this free bargaining.

The **lex Iulia de annona** prohibited the joining of a commercial association, the purpose of which was to raise the price of corn artificially. But concerning this association the **lex** gives no more data. According to Mommsen, this **societas** reminds us of a kind of **"Ringbildung zum Zwecke der Preissteigerung";**[49] it could be an association of occasional character but also a more stable organization. But, at any rate, it was a company related to a kind of cartel, prohibited by the **lex.**

After the detailed analysis of the source, we can come to the conclusion that the legislator takes essentially a **corn cartel** into consideration whose concrete form is a **price cartel**. The expressed prohibition and punishing of a joining in the form of a **societas** is related to the fact that the interest of the Roman State was to ensure the **annona** which would have been unfavourably influenced by the artificial raising of corn prices.

It is worth mentioning that in respect of **annona**, in another relation, a regulation different from the general one, prevailed. A good example for this is D. 14,5,8 (Paulus). In this source, a fugitive slave is mentioned who, as an **institor**, dealt with corn trade, without having authorization to that. The **praefectus annonae** gave action in the form of **actio institoria** to the third person - and this means the essential difference from the general rule - **directly** against the owner, for compensation.[50]

3. The other is an Ulpian-fragment, to be found in book 8 of the **"De officio proconsulis"**. This extends the effect of the **lex Iulia de annona**, relating originally only to corn, to **all** products.[51]

**"Annonam adtemptare et vexare vel maxime dardanarii solent: quorum avaritiae obviam itum est tam mandatis quam constitutionibus, mandatis denique ita cavetur: "Praeterea debebis custodire, ne dardanarii ullius mercis sint, ne aut ab his, qui coemptas merces supprimunt, aut a locupletioribus, qui fructos suos aequis pretiis vendere nollent, dum minus uberes proventus exspectant, annona oneretur." poena autem in hos varie statuitur: nam plerumque, si negotiantes sunt, negotiatione eis tamen interdicitur, interdum et relegari solent, humiliores ad opus publicum dari."** (D. 47,11,6, pr.)

Ulpian refers, at first, to the **dardanarii**, i.e. to the corn-buyers.[52] The jurisconsult goes on to say that some measures have already been taken in the form of imperial **mandata** and **constitutiones** in order to curb the activity of **dardanarii**. **Mandata** provided that corn should not become more expensive either by being collected or by missing the favourable possibility of buying it. It is worth taking into consideration that **dardanariatus** is prohibited by these **mandata** in case of every ware (**"... ne dardanarii ullius mercis sint..."**). The reference to **merx** means the extension of the **lex** to all wares. In the last part of the source, Ulpian writes about sanctions. If the **dardanarii** were merchants (**negotiantes**), the punishment was mostly only the ban from trading. If some persons fell within the category of **humiliores**, the sanction was labour service.

It should be noted that the latter case of the **dardanariatus** is **crimen extraordinarium** because it does not fall within the sphere of the **lex Iulia.**[53] Here we mention, for the sake of completeness, that also the case was to be punished if the usurers used in the field of trade fraudulent measures and weights and as a result the commodity became more expensive. In case of using **staterae adulterinae**, the **lex Cornelia de falsis** was applied. Ulpian refers to (in D. 47,11,6,1) the fact that in one of his edicts Trajan drew the use of **staterae adulterinae** into the sphere of **falsum.** Owing to this those using fraudulent balances, were to be punished as falsifiers of wills. **Dardanarii** were punished, as well, if they used fraudulent measures what can be concluded from two sources: D. 47,11,6,2 (Ulpian) and D. 48,19,37) (Paul). The falsification of measure and weights was punished more mildly than **falsum** in a proper sense.[54]

It is proved by this source that state intervention into the sphere of economic life did not restrict itself, after a certain time, to ensuring the smooth corn supply of Rome and the other great towns but it included the exchange of goods generally, as well.

4. The third source, being at our disposal, the constitution of the emperor Zeno, originating from 483 A.D., is to be found in the Codex-titulus, entitled **"De monopoliis et de conventu negotiatorum illicito vel artificium ergolaborumque nec non balneatorum prohibitis illicitisque pactionibus."**

**"Iubemus, ne quis cuiuscumque vestis aut piscis vel pectinum forte aut echini vel cuiuslibet alterius ad victum vel ad quemcumque usum pertinentis speciei vel cuiuslibet materiae pro sua auctoritate, vel sacro iam elicito aut in posterum eliciendo rescripto aut pragmatica sanctione vel sacra nostrae pietatis adnotatione, monopolium audeat exercere, neve quis illicitis habitis conventionibus coniuraret aut pacisceretur, ut species diversorum corporum negotiationis non minoris, quam inter se statuerint, venumdentur, 1 Aedificiorum quoque artifices vel ergolabi aliorumque diversorum operum professores et balneatores penitus arceantur. pacta inter se componere, ut ne quis quod alteri commissum sit opus impleat aut in iunctam alteri sollicitudinem alter intercapiat: data licentia unicuique ab altero inchoatum et derelictum opus per alterum sine aliquo timore dispendii implere omnique huiusmodi facinora denuntiandi sine ulla formidine et sine iudiciariis sumptibus. 2 Si quis autem monopolium ausus fuerit exercere, bonis propriis spoliatus perpetuitate demetur exilii. 3 Ceterarum praeterea professionum primates si in posterum aut super taxandis rerum pretiis aut super quibuslibet illicitis placitis ausi fuerint convenientes huiusmodi sese pactis constringere, quinquaginta librarum auri condemnatione multando, si in prohibitis monopoliis et interdictis corporum pactitionibus commissas forte, si hoc evenerit, saluberrimae nostrae dispositionis condemnationes venalitate interdum aut dissimilatione vel quolibet vitio minus fuerit exsecutum."** (CJ. 4,59,2).

The source[55] contains full particulars about the facts that may result in the formation of cartels. The first part touches upon the question of monopoly. Monopoly means, in this sense, trade, concentrated in the hands of a person. Monopolistic trade was prohibited by the **constitutio** in an expressed form. The sources prescribing the prohibition of monopoly are

also enumerated. These are: the **rescripta** earlier issued **"pro sua auctoritate"** or the **rescripta, pragmaticae sanctiones** and imperial **adnotationes**, issued during Zeno's reign or to be issued (following that time). Agreements according to which certain products were not to be sold cheaper than at a commonly fixed price, was also prohibited. It was prohibited for the master builders and entrepreneurs, as well as for the other practising masters and managers of the baths, to finish a work already begun by others or to take upon themselves some charges which fall upon somebody else. The **constitutio** disposes of the case, as well, where the work, already begun, was uncompleted. In this case, it was not prohibited to complete the **opus** by somebody else. Everybody was also authorized to give up the "criminal acts" (**facinora**) that were in connection with the monopoly: in this case the expenses of procedure did not charge the complainant. In case of violating the prohibitions contained in the constitutions, the retribution is confiscation of property or everlasting exile. The principals of handworkers, as well, are obliged to pay a fine if they convene in order to fix the prices of certain products to conclude other illicit agreements. Emperor Zeno's intention to force back the monopolies is enhanced by the fact that the prefects were also to be punished if, owing to bribing, **dissimulatio** or other failure in duty, they failed to enforce the sentences delivered in connection with illicit monopolies or illicit fixing of prices.

The very ramifying facts in the **constitutio** contain important data on the reduction of monopolies and on the ban of cartels. It is a well-known fact that the **Imperium Romanum** - in contrast to the Middle Ages - does not know giving **monopolia**. This source, as well, reflects the tendency hostile to monopolies. Monopoly is prohibited both in mercantile trade and handicraft industries. Emperor Zeno, in the **pars Orientis** of the **Imperium**, considered the liquidation of all **privilegia** as his task.He also ensured that no monopoly be given even in the future, even though it is highly doubtful whether this can be successful. In the sphere of cartel bans, the word **coniuratio** deserves attention. The technical term of conspiracy in the Anti-Trust Law exactly corresponds to this **coniuratio.**[56] In the **constitutio**, we can meet the essential criteria of price-cartel. It is namely forbidden to conclude an agreement for the sale of goods at a lower price than it was agreed between them.

The activity in building trade is regulated in detail in the **constitutio**. We may draw the conclusion that this is primarily the domain in which the agreements prohibited between entrepreneurs (master builders) were con-

cluded. Emperor Zeno forbade not only the agreements in respect of price but he also sanctions entrepreneurs who finished works begun by others. It is no exaggeration to conclude that in this field even those agreements are not rare which are aimed at excluding a third person, containing essentially a boycott. To determine a "generally obligatory" price was forbidden even for the superiors of handicraftsmen and for their organizations. This proves, in our opinion, that we can find some endeavours of such nature on the organizational level (**corpora**) of handicraftsmen, as well. Comparing the **constitutio** of Emperor Zeno with the other two sources, it may be established that the decrees of emperors impose severe sanctions generally against the agreements, aimed at forming cartels, and not only in relation to price-cartels.

5. On the basis of analyzing the three sources, documenting state intervention in the economy, it is to be established that there are serious signs of the formation of a law of price. While in the Ulpian-fragments price regulation had only a role in the field of the sale, in the 5th century A.D. this regulation of prices is connected not only with one type of contracts. The restriction of private autonomy had a part in the scope of contracts for work, labour and materials. This fact is particularly important because the law of price is, in the European development of law essentially only the product of the 20th century development of law.[57] It is the particularity of the Roman system of the law of price regulation that in it, the elements of **ius publicum** become a very serious part. The sanctions of price manipulation, constructed as **delictum publicum**, mean elements like these, belonging to the sphere of **ius publicum**. In Zeno's **constitutio** we can find, in addition, sanctions of "administrative" nature, as well. The prefects were also responsible for the implementation of sentences in an adequate way in connection with the prohibited fixing of prices. The fact that in the field of price regulation - from the side of sanctioning - even public law has some significance, is not the peculiarity of Roman law. It is satisfying to refer, in this relation, to Article 1059 of the Austrian Civil Code (**Allgemeines Bürgerliches Gesetzbuch**). This article provides that the price exceeding certain sum is qualified as illegal, and the buyer may turn to the "political authority" for the compensation of his damages.[58]

The cartels named by Friedrich Kleinwächter as the "children of need"[59] had in Rome no economic function. While in the 19th century, a considerable percentage of economists attributed a serious economic func-

tion to cartels, which perform this function under particularly difficult economic conditions,[60] in the **Imperium Romanum** the cartels were forbidden from the beginning. The ban on forming cartels presented itself the first time in the field of corn trade which was of great importance for politics, as well. And the prohibition of price cartel included, before long, all the wares. The prohibition of a price cartel, of absolute character, appeared, however, at first in the 5th century A.D.

It is a rightful question whether we can speak - in respect of Roman law - about a separated "cartel law". In our opinion, it would be an anachronism, to write on the basis of the stringent prohibitions, relating to the creation of cartels, about a kind of independent Roman "cartel law". The regulation, connected with cartels, is very one-sided, containing exclusively various prohibitions. Within the sphere of **ius publicum**, it is to be attributed to these prohibitions that the fitting in of this "group of rules" into the framework of Roman private law is in dogmatic respect not possible. It is not possible to perform the task which is considered as necessary by more and more scholars of fitting modern private law into cartel law in a legal dogmatic respect.[61] The provisions and prohibitions on cartels and monopolies, set a limit on the private autonomy of contracting parties. The intervention in the private autonomy was made necessary by **economic** factors, which were also motivated by **political** points of view. It is proved by the analysis of sources, forbidding the formation of cartels and coming into being of monopolia, that the possibility of the legal regulation of economic life was **not** at all **unknown** in Rome. As proved by the **lex Iulia de annona**, the requirement for legal regulation asserted itself by elementary force in an economic life, which was crucially important in terms of politics. Legal regulation, motivated politically, as well, served as a paradigm for state intervention. This is well documented in a particularly clear form by Zeno's **constitutio**, originating from the end of the 5th century A.D. In sum we can point out that even if theory there is no particular trace of recognizing the possibility that the economy influenced by legislation - in practice the possibility and necessity of economic legal regulation - was recognized. We may conclude that in comparing the laws of the ancient Mediterranean and in investigating the international or just the inter-provincial connections the economic background (manifesting itself in international trade and politics) cannot be ignored.

## 3.4. THE INTERNATIONAL ECONOMIC AND POLITICAL RELATIONS IN THE ANCIENT MEDITERRANEAN WORLD

1. When analyzing the international economico-political connections of the ancient Mediterranean world, we should above all emphasize that in estimating the actual volume of the economic connections, the survey of political connections plays an essential role. This is not changed by the fact the beginning of the political connections - their institutionalization in the form of interstate agreements - can often be demonstrated only following the establishment of actual commercial ties.

This time-lag between the economy and politics is well illustrated by the connection between Rome and Rhodes.[62] The Island of Rhodes which rendered itself independent of the Macedonian Empire - of the **diadochos** States[63] - after the death of Alexander the Great, is the first Greek State getting into lasting friendly connection with Rome. Rome's interest in Rhodes was considerably increased by the fact that Athens which was in the 4th century B.C. still the most important merchant town in the Greek world, lost after the appearance of the Hellenistic monarchies her earlier significance and that her other concurrent, Tyres, was destroyed by Alexander. According to Polybios, however, a contract binding between Rome and Rhodes took place **after** a friendly connection of about 140 years.[64] Polybios refers to this very long period after mentioning the efforts of the envoys of Rhodes sent to Rome for the sake of creating a treaty of confederation. In literature it is debated whether in 306 B.C. was concluded a commercial agreement, independently of the **foedus amicitiae**.[65] For us, it is alone important of this literary debate that the creation of economic connections is possible even without a political agreement. It is also unessential, punctually in which year - in 306 B.C. or hundred years later - the commercial agreement was made.[66] Rhodes, as an independent State, was at any rate, in a close connection with Rome, though not necessarily in a connection of political nature. This connection altered after 164 B.C. - when Rhodes essentially became the part of the **Imperium Romanum** and, owing to this, its connection with Rome also became of other character.[67]

2. Before surveying the economic and political connections of the ancient Mediterranean, we should answer the question, how much ancient authors became aware of the unity of the geographical region. We should, first of all, emphasize that the authors, using the concepts **"mare nostrum"**, **"mare magnum"** or just **"mare internum"**, do generally not take into consideration the inner geographical peculiarities of the Mediterranean.[68]

In the Graeco-Roman Antiquity, the Mediterranean world contained fundamentally 21 units. These were, going from Occident towards Orient, the following: **mare Ibericum, mare Balearicum, mare Gallicum, mare Ligusticum, mare Sardoum, mare Tyrrhenum vel inferum, mare Africum, mare Adriaticum vel superum, mare Ionium vel Adriaticum, Syrtae, mare Thradcicum, mare Aegeum,**

**mare Myrtoum, mare Icarium, mare Creticum, mare Carpathicum, mare Libycum, mare Aegyptiacum, mare Phoenicium vel Syriacum, mare Cypricum** and **mare Pamphylium vel Lycium**. In certain cases, it is not entirely clear to which sea a part of the coast belongs. Thus, e.g., Burr thinks that the whole African coast falls under the concept of the **mare Lybicum**.[69] The extent of the **mare Adriaticum** is likewise debated.[70] On the basis of analyzing the "enclosed seas" of the Mediterranean, we can draw a conclusion in respect of the intensity of the maritime commercial connections of a certain coastal region. The fact that the African coastal region - in spite of its great length - has only five enclosed seas (**mare Sardoum, mare Africum, Syrtae, mare Lybicum** and **mare Aegyptiacum**), leads us to the conclusion that there maritime commercial connections are comparatively small. The fact, however, that the Oriental part of the Mediterranean is indented very much - the present-day Aegean Sea alone has five enclosed seas: **mare Thracicum, mare Aegeum, mare Myrtoum, mare Icarium** and **mare Creticum** - refers to the very intensive maritime commercial relations of this area. It is to be mentioned, as well, that in the name of the single seas does not follow any change even after that the Mediterranean had become a Roman "enclosed sea". The main reason for that is the fact that already in the age preceding the Roman **Imperium** very important maritime commercial connections emerged between the Greek **poleis**.[71]

The concept of **"mare nostrum"**, developed in Rome, was rooted, in the last resort, in the centuries-old mutual maritime commercial connections, but it also implied an ideological-political content aimed at the creation of **Imperium**. This concept, referring to the unity of the Mediterranean world, is not so much the reflection of the Vergilian conception of **"regere imperio populos"**[72] - which can, otherwise, be interpreted in more than one ways - but rather the formulation of the universal and ecumenical nature of the Mediterranean world, fundamentally resting on economic connections, as well.

As to its content, the expression **"mare nostrum"** - including in geographical sense the whole of the Mediterranean, extending from the **mare Ibericum** until the **mare Phoenicium (Syriacum)**, refers, to the fact that the power of Rome was not restricted to the **Urbs** or to the territory of Italy but it extended - independent of ethnical affiliation, to all the peoples and States of the region. As to its content, this idea, expressed so clearly by Ovid (**"Romae spatium est urbis et orbis idem"**),[73] was, in the age of Principate the synonym of **Imperium Romanum**, emphasizing universality. The term **"mare nostrum"** is essentially related to the name **Imperium Romanum**,[74] in which the word **"Romanum"** had no ethnical content but refers to universality.

3. Our task is hereinafter to survey the economic relations, developing in the ancient Mediterranean, often in the form of connections of political nature, as well.

Rome became the economic centre of the Mediterranean world in the period between the end of the first Punic War and the conquest of the Hellenistic Monarchies of **Asia Minor.**[75] The process of becoming an **Imperium**, inducing also radical inner social changes,[76] was the cause of structural changes in economic relations, as well. In the economic sphere, the most important change was that Italic agriculture became of secondary importance, in addition to the fact that the "Roman imperialism" had no favourable effect on the development of trade, either (Besnier).[77] The beneficiary of conquest was commerce, within which the maritime commerce became more and more important. Rome needed, of course, still a long time, until her central role was recognized and the conquered peoples became aware of this. An excellent example for this awareness was the address, delivered by Aelius Aristides in Rome, in 154 A.D. (**Eis Rhomen**) which - as referred to by Rostovtzeff[78] - was a profound analysis of the political, social and economic relations of the **Imperium Romanum.**[79] The author of the **Oratio**, containing the many-sided, profound analysis of the age of the Antoninian dynasty, considers as an essential characteristic of the **Imperium** that it is (and here Aelius Aristides obviously considers the Hellenic world) the integration of city-states having self-government.[80] Rome is, in the rhetor's opinion, the centre of the civilized world (**oikumene**) which achieved - in contrast to the Hellenistic Monarchies and Greek **poleis**, unsuccessful in this aspiration - the unification of the Mediterranean. The World's commerce, having a solidified background in the Mediterranean region in the middle of the second century A.D., even if it was not the single source of welfare,[81] undoubtedly contributed to the economic prosperity of the States in the Mediterranean world.

The 2nd century A.D. meant the period of the economic flowering not only for the **Urbs** and Italy. The conquered provinces were not excluded from this prosperity, either. Trajan, e.g., had a road built from Syria as far as the Red Sea. This period meant the "Golden Age" for the merchants of Palmyra, Petra or just Ctesiphon, as well. The inter-provincial commercial connections, functioning unhindered, meant important pillars for the prosperity of the maritime cities and the centres of the overland trade.[82]

It is, however, to be emphasized that the maritime and overland trades look back to a centuries old past. We refer only as an indication to the fact that in the so-called Hellenistic-Roman central region, already in the age **before** the Roman conquest, there were very lively commercial connections.[83] "International" commerce can be well documented, in the Diadochus-States. In the Empire of Antigonides the military and commercial road, connecting Pydna with the **mare Adriaticum** is of very great importance. In the Seleucid Empire, the old military and commercial roads, still built in the Persian and Assyrian Ages, were reinforced.[84] Already in the age of Ptolemies, Egypt became the main corn exporter of the Mediterranean basin. The intensity of "international" commercial connections is well reflected by the fact that the economic crisis of Egypt in the 230s B.C. had a direct and unfavourable influence on the corn supply of the whole of the Mediterranean and, correspondingly, the formation of corn prices, as well.[85]

As a result of changes in politics the long-distance commerce of the ancient Mediterranean region underwent an important change both in terms of intensity and of structure. A change like this was that the founding of Alexandria greatly decreased the importance of Athens, Syracuse and Carthage which were earlier considered as first rate centres of world commerce. Rhodes got outstanding importance, pushing Delos very much into the background. In Greece, Athens' role was taken over by Corinth and Ambracia. While the commercial importance of Tarentum decreased, that of Syracuse, Neapolis, Massilia, Kyrene and Carthage grew further even after the rise of the Hellenistic Monarchies, at least in the Western basin of the Mediterranean.[86]

By the 3rd century B.C., a long-distance commercial network, having determined centres, had developed in the Mediterranean. This system was changed by the Roman conquest. The increase in the political power of Rome led to the fact that Carthage and Corinth ceased to exist and also Syracuse, Neapolis, as well as Massilia lost much of their importance. In the Eastern basin of the Mediterranean, the importance of Rhodes, Byzantium, Ambracia and in Mesopotamia that of Seleuceia decreased. The importance of the Greek colonial cities of the Pontus Euxinus, as well as that of Alexandria, Antiochia, Apameia and Ephesus was unimpaired even in the time of the **Imperium Romanum**. In the 2nd century B.C., Delos and Pergamus - at least for a few decades - flourished again. Puteoli - named by Heichelheim as the Delos of the West - became very much important.[87]

This partial rearrangement of the commercial centres of the Mediterranean is obviously the result of the changed political relations. This politically motivated mutation in the equilibrium before the creation of the **Imperium Romanum** is an obvious necessity.

> Heichelheim - polarizing this question excessively - formulates this as follows: "Roms politisches Eingreifen zerstörte dieses wirtschaftliche Gleichgewicht völlig, ohne eine bessere Kräfteverteilung an seine Stelle setzen zu können."[88] In our opinion, only the first part of the statement - namely the destroying of the earlier equilibrium - is true. The existence of the **Imperium Romanum** for long centuries in itself proves that, as a result of the change in the role of the commercial centres, a new equilibrium developed. In respect of the age of Principate, also Heichelheim recognizes the creation of a uniform field of "world's economy" for the Mediterranean.[89] This is not changed even by the fact that **"das einheitliche und ausbalancierte Weltwirtschaftsgebiet"** - as Heichelheim writes - disintegrated in the last decades of the 1st century A.D.[90] The new, balanced system of commercial connections in the ancient Mediterranean, built upon the Roman bureaucracy, civilization, army, and mainly - and just this premise is missing in Heichelheim - upon the real economic connections is, in this way, undeniable.

4. The means of creating the economic equilibrium, realized by the mediation of the commercial sphere are often the interstate agreements, taking into consideration the economic agreements, as well. This applies also to the period, when Rome was not yet the master of the Mediterranean world. As the ancient Mediterranean finally became a unit in political sense under the rule of Rome, we shall primarily survey the "international" agreements, one of the subjects of which was Rome.

> In the Antiquity, "international" agreements assumed a particularly important role in the Greek world. Naturally, the reason for this was rather of objective than of subjective nature. Schneider, e.g., attributes the contractual system of the ancient Greek world, which can be considered as rich and even complicated, in an idealistic way, to subjective causes. In his opinion, the Greeks suspected an inimical mood, relation where the connections were not arranged in the form of agreements.[91] Seen from another side, however, even he himself refers to the fact that the agreements, regulating the commercial connections, are frequent.[92] Commercial agreements include agreements regulating the use of a harbour and the conditions of marketing. There were also accords on transit trade and the transport of goods (primarily of corn) as well as the contracts connected with import and export and currencies.[93]

When analyzing the main international connections of Rome, we should take into consideration that Rome, never becoming an **Urbs graeca**, got into connection already very early - in the archaic age - with a foreign ethnic unit. As it may be inferred from the writings of Livy (1,56,1) and Pliny

sen. (Nat. Hist. 3,5,154), it was the Etruscan immigrants who taught the Romans various craftmanships.[94] This direct connection with the Etruscans - or at least, the fact that there are some documents indicating this - are of very great importance in relation to the formation of the economic connections. On this basis the conclusion can be drawn that the importance of a connection with a foreign ethnic group, with foreign States became known already very early.

In this connection, the question of the origin of **sponsio** is also worth mentioning. While, according to one of the opinions (e.g. of Frezza), **sponsio** originated from the ancient "international law",[95] according to another standpoint (e.g. of Pastori), this institution was an autochthonous Roman category.[96] It is a fact that **sponsio** had a role in concluding the "international" agreements, as well. It is written by Gaius: **"Unde dicitur uno casu hoc verbo** (viz. **spondere** G.H.) **peregrinum quoque obligari posse, velut si imperator noster principem alicuius peregrini populi de pace ita interroget: PACEM FUTURAM SPONDES? vel ipse eodem modo interrogetur, quod nimium subtiliter dictum est quia pactionem fiat, non ex stipulatu agitur, sed iure belli res vindicatur."** (**Inst.** 3,94).
We can find the signs of using **sponsio** in the field of "international" relations, apart from Gaius also in the works of Cicero (pro Balbo 18,29), Aulus Gellius (Noct. Att. 6,9) and Livy (9,5,1; 9,5,15; 9,8,5; 9,9,5 and 9,10,9). It is a common trait of the **sponsio** of "international" character that it belongs, similarly to **foedus**, to the field of **sacrum**, while in the field of **ius civile** this sacral character, after a certain time, grows blurred. Independently of the question of the origin of **sponsio** - this in our view cannot be decided with absolute certainty - we have serious documents relating to the fact that the legal regulating system of the international relations of Rome developed very early.

5. In the sphere of the interstate conventions of the ancient Mediterranean world, these between Rome and Carthage were particularly important. Polybios knew three conventions like these from the period prior to the First Punic War.[97]

The literature of the conventions, concluded between Rome and Carthage is almost immense. The first author dealing with these conventions, was Perizonius (**Perizonii animadversiones historicae**, 1685).[98] In Polybios, we meet the reference to the first two conventions in the scope of analyzing the causes of the Second Punic War. Philinos from Akrogs (Polyb. 3, 26) reproached the Romans for having violated - before the First Punic War - a convention concluded with the Carthaginians, in so far as they had supported the **Mamertini**.[99] With his reference to the two conventions Polybios' aim was to legitimatize the invasion of Messana by the Romans. In connection with this, he refers to the fact that the procedure of Rome - for lack of any convention, forbidding the intervention - did not commit any offence of the "international" law. The historian connected the reference to the Carthaginian conventions to the so-called Lutatius-convention, citing its contents, too. All these took place in order to prove that Hannibal's procedure against Saguntum did not really mean any violation of a convention. Though only the conventions concluded in 241 and 226 B.C. are debated, Polybios gave a general survey of all the conventions which existed between Rome and Carthage at any time.

According to the opinion, regarded as prevailing in historiography, the conclusion of the first convention may be put to the end of the 6th century B.C. (508/07 B.C.?).[100] The peculiarity of this convention is that the regulation of trade relations had a very important role in it. According to Polybios (3,22,4-13), the parties of the convention fixed the possibility of Roman commerce in the Western Basin of the Mediterranean in a concrete form. The task of supervising Roman commerce was performed in Libya, in the Island of Sardinia and in the part of Sicily under the rule of Carthage - according to the Greek text of the convention - by the **keryx** or **grammateus**.[101] According to the standpoint, prevailing in literature,[102] a provision touching the field of commerce was, also the rule prohibiting the Romans and their allies from navigating beyond the so-called **Promontorium Pulchri**. It is a characteristic particularity of this convention, as well, that the transactions, concluded under state supervision, enjoyed also state guarantee. In connection with this, it is questionable according to which law this state guarantee was applied because the convention itself contained no directive at all - e.g. a reference to a conflict - in this relation.[103]

The second Roman-Carthaginian convention, originating from 348 B.C., contained similar and even a more severe restriction on the freedom of navigation.[104] In contrast to the previous convention, Rome was prohibited (Polyb. 3,24,3-13) from mooring with her trading vessels on the territory of Sardinia and Libya, even in a strongly restricted way, for trading and even for taking in some food. Trade remained, anyway, further on possible between Rome and Carthage. The second convention between Rome and Carthage, regarded by Hoffmann as the confirmation of the prevailing position of Carthage,[105] ensured the **commercium** to the Romans in Sicily and to the Carthaginians in Rome, without any state supervision (control).[106]

The restriction of mutual commercial connections is contained in the third Roman-Carthaginian convention the exact date of which is given by certain authors for 306 B.C. but by others for the time of the Pyrrhic Wars.[107] Thus in this respect there is no uniform standpoint in historiography.

The fourth Roman-Carthaginian convention, documented by more than one source (Polyb. 3,25; Diod. Sic. 22,7,5; Val. Max. 3,7,10; Justin. 18,2,1), and originated between 280-278 B.C., was exclusively of political character. This manifests itself in the fact that it contains a kind

of "mutual assistance" and, therefore, it does not touch, at all, the commercial sphere.[108]

6. The following group of the "international" relations of Rome was formed by the conventions, concluded with the Latin cities. The central position of Rome in **Latium** is an essential fact in this relation.

> Rome had - as it seems to be confirmed by a scene of the painting of the so-called François's grave[109] - had a great political and commercial importance already, in the 6th century B.C. Several Etruscan cities tried to occupy Rome, as documented by the battle-scene mentioned expressively. In connection with this, Heurgon writes as follows: **"une vaste koiné de culture qui associait Rome dans un même effort de rénovation politique aux peuples de son entourage".**[110] This central position of Rome remained unchanged in the age of the conventions concluded with the Latin cities.

As regards the connection with the Latin cities the most important convention was the **foedus Cassianum**, originating from 493 B.C. This **foedus** laid the foundation of the defensive alliance between Romans and Latins which a few years later (486 B.C.) was joined by the **Hernici** as well.[111] Although the convention, which remained in force essentially until the Latin war (338 B.C.), does not contain any rules relating to commercial relations, in personal relations (in respect of the **civitas**) its content of private international law cannot be left out of consideration.

7. The third scope of the "international" relations of Rome is formed by the conventions, concluded with the Greek **poleis** and with the Egypt of the Lagides.

> According to Carcopino, from the end of the 4th century B.C. on, Rome forced the States of the Hellenistic Orient into a network of conventions which he considered as one of the outward forms of the Roman imperialism.[112] In this way, some imperialistic aims were served by the commercial convention with Rhodes, mentioned above (**"traité de commerce"**), the pact of mutual friendship" (**"traité d'amitié"**) with Egypt, originating from 273 B.C., the alliance with Apollonia, concluded in 233 B.C. ("alliance avec les Apolloniates"), the agreement with Seleukos II ("entente avec Séleucos II de Syrie") in 237 B.C. In our opinion, however, Carcopino unduly simplifies the many-centuries-long procedure of the **orbis Romanus** becoming **orbis terrarum**, by seeing unambiguously an imperialistic tendency in every phase of it. Werner formulates much more differentiatedly as he points at the considerable changes in the politics, followed by Romans towards the Oriental Greeks in the period between 200-146 B.C.[113]

The cultural and economic connections between the Roman and Greek worlds were established even before being fixed in legal frames. It would be a mistake, e.g., to follow from the fact that the conventionary relation

between Rome and Egypt was established in 273 B.C. (Livy 27,4,10) that in the previous fifty-sixty years any connection between Rome and the Ptolemaian Egypt had failed.[114] Rome, otherwise, obviously lies within the Greek **"Ausstrahlungsbogen"** (Boyer) what necessitates, in itself, certain connections.[115] Rome probably organized certain commercial connections with Cymae and the Sicilian Greek **poleis**. These are documented by the fact of the Roman corn import in the 5th and 6th centuries B.C.[116] The connection of Rome with the Greek world in the age of **expansio** is very particular. This is shown by the fact that Rome - in contradiction with the practice, followed in the Western Basin of the Mediterranean, ensured comprehensive concessions to the Greek **poleis**. While, e.g., in **Hispania**, following the Roman conquest, the language of jurisdiction became Latin (as an official language), the Greek **poleis** and the former Hellenistic Monarchies could continue preserving the Greek as an official language.[117]

Rome got at the first time into a conventionary connection with the world of the Greek **poleis** in 326 B.C. The **foedus aequo iure** between Rome and Neapolis, described by Livy in detail (8,25,8), was concluded that year.[118] The convention, resulting in a federal relation, contains no information - at least on the basis of the text preserved for us - in commercial-economic relations. The convention, otherwise favourable for Neapolis, ensured autonomy to the **polis**, containing only certain duties of assistance of military nature, in the form of putting some ships at the disposal of Rome.

The year 273 B.C. meant - in the opinion of certain historians (thus, e.g., of Droysen) - a turning-point in the international relations of Rome.[119] The basis of this supposition is that Rome and Egypt sent at first that year ministers (legates) mutual to each other (in the time of the rule of Ptolemy II).[120] The convention, concluded this year - the basis of which is **amicitia** - has not only political importance. This can be concluded from the fact that the members of the deputation of the Roman Senate, sent to Egypt, were not the prominent personalities of the Roman political life.[121] The most prominent member of the Roman deputation primarily took into consideration points of view of commercial policy at beginning the connections formally.[122]

8. It is to be seen even on the basis of this brief survey that Rome organized a wide system of international agreements already in the period **before** the conquest of the Mediterranean Basin, this being important means for conquering the Mediterranean in several directions. This system of

agreements territorially embraces first of all Italy, later the Western part of the Mediterranean and, finally, the Eastern part of the Basin of the Mediterranean.[123] There is no trace of any restriction of ethnic character what is proved by the fact that the Latin cities are partners in the same way as the Greek **poleis** or the **diadochos** States.

These international agreements were already concluded very early. The essential particularity of the Roman-Carthagian agreements was that they also contained some agreements of expressly commercial nature - though expressed, first of all, in the form of different restrictions. Even in the agreement originating from the archaic age, trade, the commercial sphere got so much the more part, the more evident the independence of the contracting parties, i.e. their **equality of rank** was. In our opinion, it can be explained not only by accident that in the agreements concluded with partners being geographically much nearer to Rome - Latin cities, Greek **poleis** the stipulations of politico-military character prevail.

At investigating the ancient international agreements, it would be a mistake to neglect a fact which was, until now, taken into consideration only a little or not at all: this fact is the so-called additional clause, annexed to the agreements - or, at least, to the great part of them - referring to their change, modification.[124] Through inserting this clause - the turn: **"prostheinai kai aphelein"** to be found in the Greek agreements - it became possible to modify, change the text of the agreement with **consensus**, without violating an oath.

Livy writes, in connection with the **Apameia**-agreement (188 B.C.): **"adscriptum est et ut, si quid postea addi demi mutarive placuisset, ut id salvo foedere fieter"** (38,38,18). The formulation, taking place in Livy, truly renders the content of the Greek term **"prostheinai kai aphelein"**.[125]

On the basis of a clause of this sense, taking alrady place in the **foedus Cassianum**, as well, it is in principle possibly to modify an agreement of **any** content. Taking this into consideration, it is not excluded that using this clause - which is unaccustomed, although extremely serviceable in the modern world, the agreements being not concluded **sub specie aeternitatis** - the contracting parties widen the agreement, concluded earlier, with dispositions concerning trade and commerce. We consider as possible that an "expansion" of the Roman-Egyptian agreement, concluded in 273 B.C. of this character, made possible the corn transport some decades later, extending the agreement to a wider and wider explained field of com-

merce. This clause is very important from the point of view as well, that it vividly documents the idea of concluding the agreements **uniformly** on the **whole** territory of the Mediterranean. This is proved by the fact the clause in question can be found in the mutual agreements of the Greek **poleis** as in the "international" conventions of Rome. The uniform practice of concluding agreements - putting here aside the problem of derivate because it is not possible to take a part in the question of **receptio** with absolute certainty[126] - gives in itself proof of the interaction.

### 3.5. THE INTERNATIONAL RELATIONS AND THE INTERACTION OF ANCIENT LAWS -THE PROBLEM OF THE UNIVERSAL CHARACTER OF ROMAN LAW

1. The practice of concluding interstate agreements can be an important source of the reciprocal effect of the law of different ancient peoples. It does not seem groundless, therefore, to suppose that the manyfold documented connection of Rome and Carthage serves for a basis of the influence of the Carthaginian (Semitic) legal constructions, exerted on Roman law.[127] The analysis of the effect of the Carthaginian legal ideas, constructions - it is another question that their reconstruction, for lack of a due **sedes materiae**, is not possible even in a fragmentary form - is therefore particularly important because just the commercial connections, fixed in the agreements mentioned, would lead to this "effect - reciprocal effect". The cultural elements, peculiar to civilized communities, which were the decisive factors of receiving certain institutions, constructions of the Greek legal **koine**, have in this relation but a very little part. According to Yaron, as well, there were the international relations which may have exerted a certain influence in this respect on Roman law. In his opinion, after all, the clause **"prostheinai-aphelein"**, to be found earliest in the **foedus Cassianum**, was transferred to Italy through Punic mediation. The **origo** of the clause goes, however, back to the contract between Yahveh and the people of Israel, taking place in the Deuteronomy (4,2), to be modified with consent.[128] The indication of the **consul** as **iudex** in Varro (De lingua latina 6,88) was similarly the result of Carthaginian (i.e. Semitic) influence.

The cited part of Varro's "De lingua latina" originates from an earlier work of his, **Commentarii Consulares**. It is also worth mentioning that the apostrophing of the **consul** as **iudex** can also be found in Livy (3,55,7; 11; 12) and Cicero (**De leg.** 3, 8).[129]

The mentioning of the highest Roman magistrate as a **iudex** may be evaluated as a kind of reminiscence of the sphere of jurisdiction of the so-called **sufes**, known in Carthage.

It is to be established, therefore - though we can mostly refer only to hypotheses - that the influence of the non-autochthonous Carthaginian conventionary praxis and of the constitutional order on Roman law is probable. The Carthaginian conventional practice, precipitated in "international" agreements, leads us to the very controversial sphere of problems of the interaction to be seen on the whole territory of the Mediterranean. It can, however, be established - even in default of the possibility of proving in a concrete way that the bases of interaction were primarily the commercial relation which often reached even the political level relations.

2. The international agreements created the basis of interaction of mutual reception, establishing the possibility of the commercial connections. In this connection, it is unquestionable that Rome cannot be considered as a paradigm of the autochthonous development of the law in the Mediterranean.[130] The Greek legal **koine** has an influence on the formation of Roman law as e.g., on the development, formation of the law of the Ptolemaic Egypt. As referred to by Pringsheim, the greatest influence on the development of Roman law was made by Greek legal ideas, constructions.[131] The result of these effects is universalism. In the most obvious form, this presents itself in the fact that in the classical law - more exactly, we speak here about the second half of the age of Principate - the **ius civile** (which is in the same category as the **ius civium Romanorum**) has no longer the peculiarities, containing the difference from the **ius gentium**.

Gaudemet writes rightly in connection with this: **"L'absence de toute opposition entre droit civil et ius gentium témoigne d'une évolution infiniment plus importante."**[132] It shows the "loosening" of **"ius civile"** that, beginning from the age of Augustus, some typically Roman institutions as, e.g., **manumissio vindicta** and **lex Plaetoria**, were applied in case of **peregrini**, as well. And we might mention here the rescript of Septimius Severus and Caracalla, as well, according to which the **praescriptio longi temporis** is valid, and applies, both to Roman citizens and **peregrini**.[132a]

It is another question that Justinian, due to his neoclassic tendencies - what means taking into consideration the theory, prevailing in the first half of Principate - emphasizes the difference between the two categories again.[133] The return to the original distinction is - as referred to

by Gaudemet - of no practical importance.[134] The meaning of the concept **"civilis"** gets a new content. The cause of this is, fundamentally, that almost all inhabitants of the **Imperium** won **civitas Romana** and, therefore, this concept was transformed - in addition to the **ius militare** and the sacral sphere - into a concept designating the scope of occupation, profession and activity.

The cause of this is - in our opinion - that the **Corpus Iuris Civilis**, originating from Dionysius Gothofredus, does not reflect actually the intentions of Justinian (resp. of the compilators). The **ius civile** is only in the Mediaeval jurisprudence the counterpart of the **ius canonicum**. The differentiation between **causae civiles** and **causae episcopales** (Nov. 11,1) refers only to the competence of the **praefectus** of Sirmium and the reference to the **civilis iudex** in another Novella (Nov. 123.c 22 ) is similarly in connection with a question of competence, in criminal cases.[135] The **ius civile** is no synonym of the comprehensive concept of law generally (meaning by the concept of law all the sources of law and not alone positive law) but it is no more than a minor segment of it.

3. The sign of universality is the functioning of courts consisting of **xenokrites** (senates of courts) in the ancient Greek world and on the territory of Egypt.[136] The members of the senate of a court, consisting mostly of three or five members, belong to a **politeuma** the member of which is no party to the suit.[137] This system is qualified to ensure the impartiality of **xenokritai**. This **iurisdictio**, bulwarked with suitable personal guarantees, got a new considerable role on the basis of the Greek traditions, practice in Egypt, after this had become a Roman Province. The sending of cases to the senate, consisting of **xenokritai**, took place on the basis of a demand, in the Hellenistic age to the **poleis** or the Monarch, in the time of the Roman Empire on the basis of an apply to the **praeses provinciae**. The **xenokritai** should not be identified with the **recuperatores**, known in Rome (Parsons' thesis).[138]

The important sources of our knowledge relating to the functioning, competence of **xenokritai** are P. Erez Israel 8,51 and P. Oxy. 3016.[139] About the persons belonging to the foreign **Politeuma** and able to be nominated for **xenokritai**, the **praeses provinciae** had an album or separate registers, in the age of the **Imperium Romanum**. The **xenokritai**-senates could otherwise be claimed in most cases, but decided more frequently in the legal disputes, relating to the scope of **status personarum**, the amount claimed not reaching a determined value.[140] On the basis of the P. Oxy. 3016, it is to be concluded that the **xenokritai** were, without any exception, persons having **civitas Romana**. It is proved by this fact that - the papyrus originating from 148 A.D. - the **iurisdictio** of **cives Romani** (at least a number of whose must have been, very probably, a **veteran** and another number a provincial inhabitant, to whom the citizenship was already granted) had already the necessary confidence. It is, otherwise, not at all surprising that - as re-

ferred to by Biscardi - the naming of Roman citizens as **xenokritai** also occurs.[141] This is supported by the fact the **praetor peregrinus**, vested with **iurisdictio** in the law-suits between **cives Romani** and **peregrini**, also obtained his designation after the **peregrini** who were alien, as compared with him.

It is also an important fact in Antiquity, that the concept of **xenos** - at least on a determined stage of its development - had no pejorative sense. The word **xenos** refers actually only to that somebody is no member of the city-state in which he lives. **Xenoi** have otherwise generally their own **politeuma** in the **polis**, on the territory of which they live.[142] The word **xenos** actually occurs in the sources in the meaning of the counterpart, contrary of **endemos** or **epichorios.**[143] As the senates, formed by **xenokritai**, formed just in the practice of the Greek **poleis** an instance of administrating justice, the supposition that in this region, too - i.e., in the ultimate analysis, in the process of the law becoming universal through several centuries - the **origo** is formed in more than one variation by the international economic, commercial and, as a function of these, by political relations.

### 3.6. THE QUESTION OF THE EQUALITY OF ANCIENT LAWS

1. The problem of the equality of rank of the law of the ancient peoples of the Mediterranean presents itself on two levels. This question can be investigated in the relation of the independent States of the Mediterranean world and it can be analyzed in the relation of the "component parts" of the **Imperium Romanum**, which mostly lost, in content, their statehood and only have more or less autonomy. In literature, for a long time, the prevailing conception was to emphasize the primacy of Roman law; in this, last but not least, the opinion of the representatives of the Historical School had a part, giving to Roman law the rank of natural law. Cicero's statement, analyzed in the First Chapter, which is necessarily exaggerating, is in more than one respect related with this conception. According to this, **"... omne ius civile praeter nostrum inconditum ac paene ridiculum..."** (**De orat.** 1,44,197). The phrase, otherwise reflecting the stylistical characteristic of **ars oratoria**, is adequate to the view which prevailed in the days of Cicero. This supposition is fundamentally supported by the fact that - as Pringsheim called the attention to this[144] -

the Romans were aware of their "merits" in the domain of their **erudite** work in jurisprudence. It is, of course, not contradictory to this that Cicero in another place (**De leg.** 2, 59 and 2, 64) - or Gaius from among the jurisconsults (D. 10,1,13) refer to foreign sources of law (to Solon's **Nomoi**). The latter fact mentioned shows, at any rate, that Romans didn't ignore the law of ancient nations in addition to Roman law. In the question of the coequality of the law of ancient nations, traced back already to Antiquity, the problem of jurisprudence plays a central role.

The problem of the possibility of interpreting **lex** and norms is closely connected with jurisprudence. The possibility of interpretation - in the sense of Cicero's **"obscuram (rem) explanare interpretando"** (Brut. 41,152) - should be known in every law, having got into a determined phase of development.[145] This is decisively given from the contrast of the norm, formulated (constructed) in an abstract way and of a concrete fact (administering the law). It would be mistaken - in principle - to establish that in the ancient Greece or in the Ptolemaian Egypt the **interpretatio legis (iuris)** was unknown. This establishment is true, in spite of that outside Rome there are no documents, regulating the question of interpretation. But the fact that there is no source, containing any rules relating to the "interpretation of **leges**", similar to the constitution to be found in the **Codex Iustinianus** (CJ. 1,14,3-5), e.g. in the law of the Greek **poleis**, does not mean, in itself, the full ignoration of interpretation. In Greece - documentably in Athens - the subject matters of **interpretatio** are not so much the **nomoi** but rather the actions, aiming at enforcing the law. The explanation of this is that interpreting the statute itself would, at the same time, also mean some modification in its content what, however, would mean its violation, too. The modification of the **nomos** itself can take place in two ways: either with the aid of another statute or with a so-called **psephisma**.[145a] There spoke several points of view for that, in the last centuries of the Republic, just the Greek thinking (philosophy and rhetoric) exerted its influence on the development of Roman law (Stroux's thesis),[146] which influence presents itself in the sphere of **interpretatio**, as well. And if this is really so, it would be difficult to deny that e.g. the rhetors in Attica, as well, could interpret the statutes in practical relations.[147] We should not forget that in Rome just the "leading principles exerted an effect on the formation of **interpretatio legis (iuris)** in not a small degree (thus **humanitas, aequitas, benignitas**) which had some Greek "antecedents", as well.[148] On the basis of an exposition of concep-

tual nature, like this, we may come to the conclusion - here cannot be our task, either, to survey even in outlines the rich literature of **interpretatio** - that the necessarily known nature of the interpretation of law, being according to the Roman paradigm in a close connection with the development of jurisprudence, quasi "replaces" it or in an embryonal form, at least, substitutes for it in the ancient laws. It follows from this that the existence or failing of jurisprudence does not mean generally the exclusion of the possibility of the coequality of the law of ancient nations - what, of course, does not mean at all the equivalence of these.

The lack of a jurisprudence, in Roman sense, does not mean at all, in itself, a kind of primitive state. As referred to by Hoebel,[149] primitive societies are characterized by a kind of anarchy, the full disorder of legal life. It speaks for coequality, too, that the common particularity of the law of ancient peoples in the Mediterranean - quasi one of the conceptual signs - is, differently from the law of modern peoples, the lack of the absolute supremacy of the State.[150] The supremacy of the State in absolute sense is missing in the domain of Roman law in the same way as in the law of Greek **poleis.**[151] In the law of all the ancient peoples self-help plays a comparatively great role. The initiator of criminal investigation is the State itself only in exceptional cases. The procedural rules of concrete cases prevail. Formalism predominates and thinking in symbols is very considerable.

These peculiarities of the law of ancient peoples, mentioned only as a mark, did, however, not lead to anarchy. Indeed, this was formulated in an expressed form outside Rome, as well as we can conclude it on the bases of the analysis of the P. Tebt. 703 - that the whole country (in the given case the Ptolemaic Egypt)should stand under the rule of **dike.** The guarantee of this is the duty of all the state officials, to repress the **adikema**, any forms of illegality.[152] This order of ethical content of the **dioiketes** of the Hellenistic Egypt was of paradigmatic significance for the whole ancient Mediterranean.

2. The question of coequality of the law of ancient peoples raises not a few problems in the Mediterranean becoming the **Imperium Romanum.** In this sphere, it means a central problem, what kind of state formations is the system of Principate, grounded by Augustus.

The answer was made more difficult by the opinion, prevailing in Antiquity, considering the State as a kind of **corpus** (organic theory). It was written already by Béranger: **"L'antiquité gréco-romaine représente volontiers l'État comme un ensemble organique, aux parties étroitement solidaires."**[153] The formulator of this organic theory - in the Epitome - is Florus, writing as follows: **sociale bellum ... illud civile bellum fuit, quippe cum populus Romanus Etruscos, Latinos Sabinosque sibi miscuerit et unum ex omnibus unus est."** (2,6,1). This idea, considering the **Imperium Romanum** as a **corpus**, was formulated by others, as well (e.g. by Augustinus) (**De Civ. Dei** 3,10), it can, therefore, be considered to be general enough.

When analyzing the political system of Augustus, the question arises, how far this system can be considered as the "heir" of monarchies. This question is justifiable so much the more as the **Imperium Romanum** developed in the age of Augustus without taking into consideration any ethnical and geographical points of views as the Hellenistic monarchies, succeeding Alexander the Great.[154] Two fundamental differences are to be seen between the political systems of the Principate of Augustus and the Hellenistic Monarchies. One of the differences is meant by the conception of **res publica**, the other - and we speak here, of course, only about fundamental differences - by the position of the **civis Romanus**, defended by some guarantees.

The conception of **res publica** is connected very closely with the category of **civitas**. The peculiarities of the conception of **res publica** can be explored in fact in the way if we compare the **civitas** concept of Romans with the concept of the Greek **polis**. In this respect, it is sufficient to compare the concepts of **civitas** and **polis** of Cicero and Aristotle. In Cicero's definition (**De rep.** 6,13,13) the **legal** element predominates, Aristotle, however, defining the **polis**, as the mass of **polites** (Pol. 1274b 41), emphasizes rather a kind of "human" points of view. In the Hellenistic State, using this concept in the sense of State, the conception regarding **res publica** as **res populi** does not occur at all. The concept of the State, in the same way as every power, becomes concentrated in the person of the **basileus**.[155] The other essential difference is connected with the "object" of power. In Rome, even in the time of Principate, the **civis Romanus** does not become "lawless" opposite to the State. The sign of this unchanged status is that Augustus proceeds as **vindex libertatis** (**"Rem publicam a dominatione factionis oppressam in libertatem vindicavi."** - **Res gestae** 1,2-3). It is, of course, another question that certain **imperatores** - on the basis of different motives - organizing a despotic system, break away from this practice, this tradition going back even to the age of **res publica**. But the political system of the Principate itself has fundamentally respect for the traditional rights of the **civis Romanus**.[156]

The very heterogeneous state structure of the **Imperium** can be traced back to the particular political system of the Principate, grounded by Augustus. We survey below in outline this internal state structure primarily not on the basis of investigating questions of non-formal nature - as e.g. the analysis of the difference between **deditio in fidem** and **deditio in potestatem**[157] - but in respect of its **contents.**

Mommsen called at first the attention to the fact that the history of the Roman **Imperium** is actually the history of Provinces.[158] It is the merit of Mommsen to recognize that the **Imperium Romanum** was really a kind of "communities of States" and not an Empire which would have been uniform in every respect. At analyzing the plurality of the **Imperium**, it is particularly informative to investigate the problem of the connection between Rome and the **poleis.**

The opinions in literature, relating to the connection between the **Imperium** and the **provinciae** can fundamentally be classed in two groups. According to one of the opinions, following the Roman conquest, the **poleis** gave up their independence essentially in every respect. According to Magie, who can be considered as the representative of this opinion - he formulates namely perhaps in the most polarized form - owing to the **redactio in provinciam**, the **polis** ceased to be autonomous.[159] The full autonomy of the **poleis**, having got into the Roman **Imperium**, is emphasized - this in the other pole of the opinions - by Lemosse.[160] According to him, the **redactio in provinciam** is not connected with any change. His conception is illustrated by the following sentence: **"Juridiquement les rapports entre Rome et un autre peuple** (not only the **poleis** are in question, G.H.) **ne changent pas de nature lorsque ce peuple, jusqu'alors indépendant, est vaincu mais conserve sa personalité juridique antérieure, gardant ses compétances et ses organes, sa législation et ses tribunaux pour l'appliquer."**[161] Nörr has a mediating standpoint between the two extreme views. According to him, in the age of Principate all **polies** preserved their liberty, independently of the fact if they were **poleis foederatae** or **poleis stipendiariae.**[162] But it is shown by the practice that the degree of this freedom, autonomy depended of the **imperator**. Nörr's opinion and Lemosse's conception meet with each other in so far as both authors deny that the **Imperium** would have ceased integrating in the age of Principate. The research work in this direction was rendered considerably more difficult by the fact that the literary sources available are very contradictory and inconsistent. Nörr calls the attention to the fact that while the Greek authors considered the **Imperium Romanum** as a kind of federation, in Rome according to the prevailing conception, the **Poleis** were the integral parts of the **Imperium.**[163] In our opinion, at analyzing the connections between the **Imperium** and **poleis**, the conception of the representatives of the ancient Greek spiritual life weighs very much. The fact that Aelius Aristides[164] or Plutarchos[165] emphasized the idea of the independence of **poleis** in the 2nd century A.D. speaks in the favour of autonomy. Aelius Aristides considers in **Eis Rhomen** (35) as an outstanding virtue of Romans that, differently from the other conquering peoples, they had no domination over the conquered peoples. And though Aristides' work in question, being panegyric, should be read carefully, we should evaluate it, at any rate, as a document speaking in the favour of the plurality of the **Imperium.**

The analysis of the connections between Rome and all the administrative units of the **Imperium Romanum** cannot be our task. We refer only as a notice to the fact that plurality, based on autonomy, can be demonstrated not alone in the relation of **poleis**. Egypt, having a fine inner structure, is in several respects also an autonomous, "exempt" territory.[166]

Egypt preserves, following the Roman conquest, as well, its state structure, developed in the age of Lagides. It is without any doubt that Egypt continued to remain a **regnum**, under the leading of the Roman **principes** as **reges**.[167] The visible sign of continuity is, as well, that even after Egypt became a Roman province, the **leges** (**prostagmata**), made in the age of Ptolemaei, remained in force.[168] This originally Hellenistic monarchy was, of course, transformed corresponding to the conception of the Roman **res publica** (the despotic traits weakening).[169] An important document of the autonomy of the Egyptian Greek **poleis** is the Gnomon, a commentary, compiled by Idios Logos, originating from the 2nd century A.D.[169a] The Gnomon, otherwise of "mixed" contents, contains some information relating to the law of Greek cities, being in effect in that time, as well. The parts of this collection, composed for the officials of the imperial **fiscus**, are the restrictions in connection with wills. As referred to by Seidl, the provisions, reflecting the ancient Greek tradition, often affect those belonging to the Greek ethnic group expressly disadvantageously.[169b] The fact, therefore, that the inhabitants of Alexandria may live according to their own law even 200 years later than the Roman conquest, does not mean unconditionally an advantage, privilege for them. The fact that the **Volksrecht** has remained in force, enabled the **"versteinertes Recht"** to survive further on, though the survival of **Volksrecht** has, in this connection, not more than political importance. At any rate, at analyzing the connection between **Reichsrecht** and **Volksrecht**, the investigator should pay a greater attention to this point of view.

Egypt is not alone a **regnum** on the territory of the **Imperium Romanum**. The **regna**, falling under the power of Rome, can fundamentally be divided into two groups. One of these groups is made up by the ancient **regna** the ruler of which is the **princeps** himself. In the other the **regna** can be included, the rules of which are the so-called **reges amici**.[170] To the inner state organization of the **Imperium** belonged - in addition to **civitates** and the **regna** having more or less autonomy - the so-called templar-communities of theocratic direction, the tribal communities, districts, organized on ethnical basis, as well as the "political" organizations (**koina**), between the generally single **poleis**.[171]

The extremely heterogeneous state structure of the **Imperium** appears even from this necessarily outlined survey. And even if the opinion (Fabbrini), according to which the **Imperium Romanum** was characterized by "supernationality" ("ordinamento sovrannazionale"), it is unquestionable that in the relation of public law it was a State in which some ethnically

extremely differentiated units took place, enjoying an autonomy of the most different contents.

3. This extremely heterogeneous structure is the basis of the peculiar "trialism" of **Reichsrecht-Provinzialrecht-Volksrecht**. In the age of Principate, for a long time, a kind of symbiosis could be observed between the **Provinzialrecht** of changing contents according to provinces and the **Volksrecht**, containing the law of **"peregrini"**.[172]

Schönbauer sees in the recognition of the institutions of the **Volksrecht** and in the formation of the **Provinzialrecht**, changing according to provinces, a conscious Roman legal policy.[173] Schönbauer extended the concept of **Provinzialrecht** to the **Volksrecht**, as well.[174] According to him, it consists partly of the elements of the local **Volksrecht**, partly of the norms, issued by Rome, applied only to the given province. Schönbauer identifies the **Provinzialrecht** with the concept of the autonomous provincial system of law, closed **in se**. This conception is strongly debated in literature, even in two relations. On the one hand, the **communis opinio** inclines more and more towards the separation of the category of the **Provinzialrecht** from the concept of **Volksrecht**.[175] On the other hand, the opinion becomes stronger that in case of the **Volksrecht**- this being, however, not valid to the civitates of greater autonomy - we can only speak rather about some toleration from the side of Rome.[176] H.J. Wolff formalizes in the way that in the **Imperium Romanum "Ein konsequent verfolgtes Prinzip der Liberalen Toleranz"** is unknown."[177]

In our opinion, this newer doctrine, hall-markable with the name of Wolff, does not contrast with supposing legal pluralism. The fact that Schönbauer's thesis - i.e. the supposition of a compact provincial system of law - finds hardly any followers in modern literature, does not at all mean rejecting the legal autonomy of the **provinciae**. The legal autonomy of the **provinciae** may be followed from the fact, as well, that a number of imperial constitutions were not issued with validity to the territory of the whole **Imperium Romanum**.

Literature cannot form a uniform standpoint in this question, either. A number of authors (thus Orestano[178] and De Robertis[179], think that these **constitutiones** apply to the whole territory of the Empire. According to others, thus to Volterra[180] and Luzzatto,[181] the **constitutiones** only apply to the territory of a province. On the basis of analyzing the edicts of Augustus, issued to the inhabitants of Cyrenaica[182] and of the letters of Pliny Jr., written to Trajan (**"Quod** (i.e. **edictum**, G.H.) **ad omnes provincias sit constitutum"** - Ep. 10,66), it seems to be proved that in addition to the **constitutio** of general territorial validity also the edict, issued only for a given **provincia** was known.

The much debated question of the **edictum provinciale**, not coming to a rest until the present day, is in connection with the territorial effect of

the imperial **constitutiones.**[183] While the earlier **communis opinio** in the question of the **edictum provinciale** was on the standpoint that it is different according to provinces or, at least, that it applied only to senatorial provinces,[184] the modern literature accepts the universal territorial effect of the **edictum**. This opinion relies on the papyrus material which can only give, mainly in this question, ambiguous information.[185] In our opinion, the representatives of this conception ascribe too great importance to the analogies, based sometimes only on haphazard. The fact that in the sphere of certain edictal **formulae** - as referred to by Biscardi[185a] - in the edicts of the different provinces - some similarity can be demonstrated, is in itself not to be evaluated as an unquestionable proof, excluding any doubt in respect of the uniform **edictum provinciale**.

In the first centuries of the age of Principate, the fact of the recognition of autonomous rights is undeniable. This autonomy, supposing legal pluralism, lasted - according to an opinion, hall-marked by the name of Mitteis - till the **Constitutio Antoniniana**. Following this **Constitutio**, the central government endeavoured - according to Mitteis - to restrict the rights of **peregrini** and even, if possible, to liquidate their development. Had this really happened - refers Dantzenberg[186] to it - then more **rescripta** should have existed much in connection with private-law questions, for the sake of forcing back the legal constructions prevailing in the local laws of peoples.

But not more than three **constitutiones** of such contents are known. One of these sanctions the practice in case of negligence, developed in Egypt (CT. 11,39,9); the other forbids the material principle of "necessary consideration" of certain liabilities from being applied in onerous contracts (CJ. 3,1,7) and, finally the third one contains the prohibition of levirate (CJ. 5,5,8).

It can be concluded from literary sources, as well, that the **Constitutio Antoniniana** does not mean any decisive change in connection with **Reichsrecht-Volksrecht**. The work of Menandros, from Lykos, entitled **"Diairesis ton epideiktikon"**, originating from the 270s A.D.,[187] deserves particular attention in this relation. In connection with **dikaiopragia**, the rhetor wrote that the Greek **poleis** were "governed" by the common **Nomoi** of Romans (**"kata gar tous koinous ton Rhomaion nomous politheuometha"**; 363,11-12) and only the customs changed in the different **poleis** (**"ethesi d'alle polis allois chretai..."**; 363,12).[187a] In connection with the **koinoi nomoi ton Rhomaion**, however, no mention is made of the **Edictum Caracallae**, what, otherwise, is in harmony with the fact that the **constitutio** got only a little attention in the "literary life" of the 3rd century A.D. The interpretation of the term **nyn, en tois nyn kronois**, occurring in several sites of the source, is of decisive importance. The caesure between the glorious Greek past

and the real relations of the days of the rhetor is not the **Constitutio Antoniniana** but the "loss of liberty" in the past of several centuries.
The pair of contrasts: **nomoi-ethe** (**leges-mores**) refers really only to the fact that the Greek city-States have no more the right of legislation. This, however, does not mean pushing the **Volksrecht** into the background (**ethe** being a category belonging not only to the sphere of **mos**). The **Volksrecht** preserves local law even after that the Greek **poleis** were integrated into the **Imperium Romanum** and in this the **Edictum Caracallae** did not mean an essential change, either.

The institutions, constructions of the **Reichsrecht**, **Provinzialrecht** and **Volksrecht** have demonstrably exerted their effect parallel for centuries. Even the **Constitutio Antoniniana** meant no decisive change in this field because the endeavour to push back the local **Volksrecht** was realized in the **constitutiones** only very rarely even in the times following that. The precondition of the pluralism, existing on the territory of the **Imperium Romanum**, is the recognition of coequality between the institutions of the **Reichsrecht, Provinzialrecht** and **Volksrecht**. Taking into consideration the lack of hierarchic connection, Niederer's opinion, according to which the legal pluralism prevailing in the **Imperium Romanum** would have been related with the many-coloured legal system of the British Empire, as it existed before World War I, calls for criticism.[188]

4. Summing up, it is to be established that the coequality of the law of ancient peoples is recognized both on international level (in the scope of the law of **"externae nationes"**) and on **"interprovincial"** one. In the period before the creation of the **Imperium Romanum** there were neither objective nor subjective obstacles to this coequality. Only the **iurisprudentia** could mean a problem. The question of the **iurisprudentia** is, however, not of central importance. The possible lack of this is compensated - in addition to the presence of **interpretatio iuris (legis)** on a certain level - among others by the common traits which are generally characteristic of the law of the ancient peoples of the Mediterranean, as, e.g. by the lack in absolute state supremacy and by the rule of **dike**. The fact of legal **"trialism"**, prevailing within the conglomerate of peculiar structure of the **Imperium Romanum**, is, in itself, an evidence of coequality, prevailing in the field of practice. In the scope of coequality, presenting itself on "interprovincial" level, we should, of course, take into consideration, whether we speak about legal relations, containing law of persons, family law, law of things, of obligations or just law of succession on death. For the fact that Romans considered as coequal e.g. the Greek law (which was a foreign law for them), both on international and

"interprovincial" levels, the fact of the Roman "international" jurisdiction, based on the Greek pattern, furnishes sufficient evidence.[189]

## 3.7. THE SYSTEM OF PRIVATE LAW IN THE ANCIENT LAWS

1. The law of the States in the ancient **Mediterraneum** - though certain common traits, owing to interact, are undeniable - cannot be pressed into the frames of a uniform "Mediterranean law". The supposition of the uniform ancient law could only be suggested by some aprioristic outlook of natural law. The ancient law of the Mediterranean cannot be considered as a kind of **"lex sempiterna"**; its institutions are formed, develop in their own way. On the basis of Bachofen's **Mutterrecht** or Henry Maine's **Ancient Law**, at least in the sphere of **origo**, the conclusion can be drawn as if the law of the peoples of Antiquity - here we speak primarily of the Graeco-Roman Antiquity - had gone on a common way in respect of the main lines of its development. Zweigert, investigating Bachofen's activity, writes rightly, referring to Bachofen's **"naturrechtliche Endvision"**, though this does not consider himself as an adherent of natural law.[190] It is characteristic of the gaining ground of the supposition of a uniform ancient law that it occurs - of course, not at all **expressis verbis** - even in Mommsen's **postumus** (posthumous) work (**Zum ältesten Strafrecht der Kulturvölker, Fragen zur Rechtsvergleichung**).[191] In connection with the comparative value of the establishments, considering the part-researches only as of secondary importance and marking out the lines of development of general character, Maine's thesis, looking for the development of law in the direction "from status to contract" may be paradigmatic. The reality of this thesis - apart from the unjustified dereliction of the part-researches relating to the law of ancient peoples - is rendered very strongly debatable by the fact that in the modern European State the freedom of contract becomes restricted to a larger and larger extent.[192]

2. The technical term of the system of private law does not suppose the separation of private law and public law in the Roman sense. Apart from the Roman law, we cannot meet in any ancient law a definition which would remind us of the definition of **ius privatum** and **ius publicum**, originating from Ulpian (D. 1,1,2). This,however, in itself, does not mean that, e.g. in the ancient Greek (Attic) law, there were no signs of the separation, or at least of the differentiation, of the two fields.

A sign referring to this differentiation is the fact that in Demosthenes' **nomos**-definition (Kata Arist. 1,16) the achievement of the **sympheron** is also an aim, in addition to the **dikaion**. The fact that utility is also an aim of the **nomos**, can unquestionably be interpreted as a kind of "public-law" elements.[193] The importance of **sympheron** is shown by that because of the lack of this, the **nomos** itself can be attacked (Dem.Kata Timokr.24,33). The distant signs of the caesura between **ius publicum** and **ius privatum** can also be found in Aristotle. In the Rhetoric (**Techne rhetorike**, 1373b 19 ff) he differentiates between the activities connected with the community and with its singular members (**pros to koinon - pros hena ton koinonounton**). It should be attributed to the supremacy in systematization that a sharp limit between **ius publicum** and **ius privatum** presents itself just in Roman law.[194]

It does not follow from the doubtless priority of Roman law, being manifested in systematization and classification, that the Greek law were to be regarded as only one of the forms of legal thinking from which the concept of the system - and thus that of the private-law system - should be separated sharply.[194a] The rigid separation of the system, private-law system and the **koine** of Greek law from one another would be a mistake quite as much as to separate the Common Law from the legal system (Roscoe Pound).[195]

3. Before surveying the particularities of the private law of the peoples of Antiquity, we should clear the concept of the Greek law (Hellenic legal **koine**), having a central part in this circle.

The concept of the "positive Greek law", originating from Mitteis,[196] did not meet with a whole-hearted agreement in literature. While a number of authors - Weiss,[197] Pringsheim,[198] or Jones[199] - agree with this technical term, others - thus Finley[200] and Triantaphyllopoulos[201] - see in the law of **all** the Greek **poleis** and autonomous law. Triantaphyllopoulos considers the assumption of one positive Greek law as erroneous for three reasons. The opinion, named by him as "Einheitstheorie" does not take into consideration the public law. On the other hand - referring to Aristotle (Eth. Nic. 1134b 18 - 1135a 5 and Eth. Meg. 1194b 30 - 1195a 7) - also the Greeks themselves use the "comparative method" and a uniform Greek law is only in connection with the natural law. Thirdly, the customary law - which would be destined to ensure this unity of law - is no source of the law of the Greek **poleis**.[202] Triantaphyllopoulos - though he is right in certain details - does not take into consideration the particularities which can be demonstrated in the law of the Greek **poleis**.

The investigation of the law of the Greek **poleis** is made more difficult by the fact that the **sedes materiae** is very incomplete. The legal order of the Greek city-States cannot be reconstructed in its entirety.[203] As a matter of fact, we know only the law of Athens, of the Hellenistic Egypt and Gortyn.

In the terminological question of the uniform positive Greek law and the Hellenic laws, the decision of the debate is possible in the way of the right interpretation of the Hellenic laws (Hellenic legal **koine**). As H.J. Wolff[204] and Modrzejewski[205] call the attention to it, the source of the debate between the two camps is, in not a small part, a kind of misunderstanding. The Greek legal technical term, originating from Mitteis means, according to the right interpretation, a legal **koine** and not the synthesized system of the positive law ("a unified system of positive law" - Wolff).[206]

Even Mitteis himself referred to the possible misunderstanding in connection with the concept of the "Greek law".[207] He refers to that the Greek law never achieves the "formal concentration" of Roman law which would, in principle, exclude the local legal customs (**"lokale Rechtsgewohnheit"**). The Greek law means, on the basis of Mitteis's interpretation, **"... dass die zahlreichen einzelnen Statutarrechte der griechischen Städte im Wesentlichen auf den gleichen juristischen Anschauungen ruhten und die gleichen Institutionen mit nur geringen Nuancen entwickelten."** Mitteis draws a parallel between the concept of the Greek law and the mediaeval German development of law: As well as the "colourful" law of the towns are interwoven in the consciousness of the nation into the German private law just in the age of reception, the Greek private law - even if not consciously - is administered as a dangerous rival of Roman law.

The concept of the Greek law takes, therefore, place in the recent literature as a legal **koine**. The particularity of the "local law" of the single **poleis** is, according to such an interpretation only "the differently formed concretization of identical legal ideas" (**"verschieden gestaltete Konkretisierungen gleicher Rechtsgedanken"** - Wolff)[208] and "variations of the same theme" (**"variations sur un même theme"** - Gernet).[209]

The acceptance of the technical term of Greek law, interpreted as Hellenic legal **koine**, cannot mean giving up the analysis of the concrete positive law of each **polis**.[210] It is contradictory in this connection that just Triantaphyllopoulos, adhering in every relation to the thesis **"tot iura quot civitates"**, does restrict his research work to the sources of the Attic law in his study, investigating the connection of the philosophy of law with the positive law in Greece.[211]

Wolff identifies the concept of Greek law not inaptly with the **"kulturgeschichtliche Abstraktion"**.[212] This "abstraction of cultural history" means a spiritual community, connecting the law of the single peoples with one another and, at the same time, delimitating them "typically" from the law of other peoples. The existence of the Hellenic legal **koine** is unquestionable. That is proved by the common legal institutions, dogmatic concepts of the Hellenic world like **dike, blabe, kyrios, epitropos, systasis, hybris**, etc.[213] The degree of identity (conformity) or similarity of the single institutions is, of course, different. Véllissaropoulos refers to that, at the institutions belonging to the maritime trade, the unity is almost complete.[214]

In respect of the bases of Greek law (legal **koine**), the opinion, according to which the subjective element plays an outstandingly important part, is to be considered as predominating. This subjective element means that it is known that in the circle of the citizens belonging to the Hellenic ethnic groups of **poleis** the State and legal institutions were common in the whole Hellenic world. This applies to **Graecia Vetus** and **Graecia Magna**, as well.

This common character presents itself in a particularly expressive form in Herodotos: **"to Hellenikon ean homaimon te kai homoglosson, kai theon id rymata te koina kai thysiai ethea te homotropa"** (Hist. 8,144).[215] The consciousness of the ethnic, linguistic, religious community, presenting itself in common rituals and customs, as well, and being expressed in Herodotos, is doubtlessly an important form of the legal **koine**. It would, however, be a mistake to forget the historical and commercial connections, presenting themselves in relations of hierarchic nature, as well- referred to recently by Ruschenbusch[216] - and to forget the economico-commercial relations. In the latter relation it is satisfying to refer repeatedly to the exceptionally uniform system of legal institutions, formed in the scope of maritime commerce, in which the interaction is of greatest degree.

4. At first sight, the question of terminological nature of the Hellenistic law of a people or peoples seems to be similar to the problem - also of terminological nature - of the Hellenistic law of a people or peoples.[217] Taking into consideration the peculiar ethnical relations of the Hellenistic monarchies and the peculiarity of their state arrangement, it is more expedient to use the technical term: the Hellenistic laws (in plural). The concept of the Hellenistic law does, namely, not take into consideration the fact that the law of Hellenistic monarchies - owing to the mixed ethnical group of the inhabitants - is not built only on the institutions, constructions of the Hellenic legal **koine**. In the sphere of

the local laws, the effect of the Greek law is not significant. It is another question - as the attention is drawn to this by Wolff[218] - that e.g. in Egypt the Greek documentary practice is the standard in the field of demotic contracts (cf. e.g. the **anagraphe**) (here plays a part primarily the activity of the **agoranomos**). The concept of the Hellenistic law, however, contains - apart from the exceptions, being manifested mainly in Egypt - only the common law of the Greek ethnical group, living in the diadochos States.

5. When analyzing the private-law system in the law of the ancient peoples of the **Mediterraneum**, it means a problem that the circle, character of the available sources of the single laws is very different. This is proved by the fact that in respect of Egypt the practice is known (this relating to all periods of the history of Egypt) while in Mesopotamia (which is the field of the cuneiform-written laws) the codification is the main source of our knowledge (an important source is given, of course, also by the about half a million clay tablets).[219] In the sphere of Hebrew law, primarily the sacral sphere forms the basis of our knowledge concerning the law - thus, e.g., this is shown by the origin of the above already analyzed clause **"prostheinai kai aphelein"**, rooted in the Deuteronomy (4,2).

In case of the ancient Greek law, the bases of our information are philosophy and rhetoric. For Roman law, the main source of knowledge is doubtless jurisprudence and the actual legal practice is the basis of our knowledge only in a very small degree.[220] We only notice that, as to the practice of concluding a contract, we have hardly any knowledge. Meyer-Termeer refers to that we do not know even a single contract of affreightment in the circle of **Reichsrecht**.[221]

This difference appearing in the scope of legal sources is, last but not least, also an obstacle to the **"praesumptio similitudinis"**, the cause of which is - we do emphasize - not the fortuitousness of "finds". With regard to this, the use of the concept of the "ancient law" is faulty.[222] The technical term "ancient law" induces the erroneous idea as if there had been no essential differences between the systems of the ancient law - in addition to the very essential differences in levels, appearing between them. While the technical term Hellenic law, interpreted rightly, is justified, the concept of ancient law - similarly to the category of Hellenistic law - is theoretically faulty.

In addition to the differences, presenting themselves in the field of the sources of the law, we should take into consideration the fact, as

well, that the categories differ from each other also from the point of view of their contents and this is important at investigating the system of private law, too, because of the intertwining of the categories **ius publicum - ius privatum**, mentioned above. This difference in the contents manifests itself in a particularly clear way at comparing the concept of the Greek **nomos** with the category of the Roman **lex**.

6. In the Greek (Hellenic) world - and this applies primarily to the Attic law which is the decisive link of chain of the Greek legal **koine**[223] - the importance of **nomos** is accepted even by the investigators who otherwise challenge the possibility of connecting the legal system with the Greek law.

Among the Graecists, the view is, otherwise, spread enough, according to which the Attic law - and generally the law of the Hellenic **poleis** - is nothing else than the "mass" of some **nomoi**, without being in a particular connection with one another. In the literature of this century, this theory is hallmarked by the names of Vinogradoff,[224] Paoli[225] and Jones.[226] It would further follow from the conglomerate-character of **nomoi** that the provisions - contained in them and considered unequitable - have no force of binding the legal courts, either. It is the merit of Meyer-Laurin, to contradict this theory, supposing some artificial contrast between the **nomos** and equity.[227] Wolff refers to that the conceptual sign of **nomos** is the **unconditional** submission to it.[228] It follows from this that the importance of the **dikaiotate gnome** among the sources of law - beginning from the oath of Attic judges until the **diagramma** of the Ptolemaic Egypt - is only of secondary, more exactly of subsidiary, character. The **dikaiotate gnome** is, therefore, no device for correcting the **nomos**.

The concept of **nomos** in the Attic law should be separated in essence - applying the Roman technical term - from the norms of archaic origin which are - according to tradition - the **"nomoi"** of mystical legislators.[229] It is worth mentioning that the Greek thinkers themselves - thus Aristotle (Polit. 1287b), Plato (Nomoi 680a) and Plutarch (Lyk. 13,3), as well, sharply differentiate between the written **nomoi** and the **ethe** or **patria**, also of legal content. The customs, named by Plutarch **"akineta ethe"**, have obliging force in the same way as **nomoi**.

In the world of the Greek **poleis**, Sparta has a particular place. In this city-State - distinctly from the majority of the Greek **poleis** - the concept of **nomos** is unknown.[230] The **ephoroi**, in the course of passing their judgement, do not refer to **nomoi** or just to the **ethe** but they decide on the basis of their personal conviction as it may be concluded on the basis of Artistotle (Politics 1270b 28 ff. and 1272a 38 ff). It is worth mentioning that for Triantaphyllopoulos this Spartan particularity serves for proving - more exactly for supporting - the fact that, in the world of the Greek **poleis**, the customary law does generally not take place among the sources of law.[231]

The interpretation of **nomos** is made difficult to a large extent by the fact that this expression has a very wide content of meaning in the sources. The **nomos** is, partly, very closely connected to the democratic polis-arrangement. The rule of **nomos** is the **differentia specifica** of the democratic life of State.[232] The nomocracy is, however, a requirement even for a thinker of the same mentality as that of Plato who in the **Nomoi** (715a-d and 729d 4) regards the obedience to **nomoi** as a condition of becoming a statesman.[232a] The concept of **nomos** can be analyzed, on the other hand, in relations like the connection of **themis** and **dike** (Hirzel),[233] or like the relation of the **nomos** to the unambiguously philosophical **physis** (Heinimann)[234] or it may be connected generally with the concept of law.[235]

> Analyzing the concept of **nomos**, presenting itself in Herodotos and Thukydides, Herrmann refers to the fact that this concept, which is otherwise documentably of extremely wide semantical content, is, in respect of its variants, far-reachingly similar in both historians.[236] In respect of the concept of **nomos**, the only difference is the effectiveness. While Herodotos emphasizes the absolute validity of **nomos**, Thukydides accentuates - as a result of the **physis**-category of sophists - the criteria of usefulness in the political sphere.[237]

MacDowell writes rightly, analyzing the concept of the Greek **nomos**, that it is an essentially wider category than the concept of the English law.[238] He pointed to the fact, as well, that the separation of the concepts of **nomos** and **thesmos** from each other in respect of the archaic age was expedient. **Thesmos** is narrower than the category of **nomos** because it generally contains only the "norm" created by the person having **"auctoritas"** (thus, e.g., the **basileus**). From this follows the conclusion, with which MacDowell actually follows the assumption of Martin Ostwald[239] that the appearance of the concept of **nomos** in the days of Kleisthenes - what means the falling of **thesmos** into background - refers to a kind of the tendency of democratization.[240] This seemingly plausible hypothesis has no basis in the sources.

In addition to **nomos**, also **psephisma** appears early, the origin of which goes back to the **psephos**, i.e. to a norm accepted by **plebiscitum**. The connection between the two concepts is debated in literature.[241] According to Quass,[242] the two categories are different semantically. According to this theory, **nomos** relates to **contents** and **psephisma** to the **way** of creating **nomos**. This basis of differentiating **nomos** and **psephisma** is denied by Frezza who draws this conclusion after analyzing the multifold meaning of **nomos**.[243] The exact determination of contents and of the meaning of the two

concepts is rendered difficult to a large extent by the circumstance that the literary and epigraphic sources do not generally differentiate between these two categories. The way in which Andocides uses the concept of nomos,[244] may be a representative of this almost inseparable intertwinement. The rhetor who, otherwise, in his words (1, 96-99) considers the concept of **nomos** and that of **psephisma** as norms, independent of one another, draws **psephisma**, as well, under the concept of **nomos**. In the philosophical literature, we already find a much more unambiguous delimitation in respect of the concepts of **nomos** and **psephisma**. In Aristotle, **nomos** is identical with the concept of the norm of general validity, while **psephisma** means the norm administered to individual cases (Eth. Nic. 1134b and 1137b). Writing about the degenerated democracy in which the **plethos** rules, Aristotle establishes in his Politics (1292a), that in this form, the decisive role is not of **nomos** but of **psephismata** (**"touto de ginetai hotan ta psephismata kyria e, alla me ho nomos"**). **Politeia**, considered as ideal by him, is characterized by the dominance of **nomos**: if **nomoi** get no role, we can only speak about democracy and not about **politeia** (**"hopou gar me nomos archousin ouk esti politeia"**). It merits mentioning that **politeia**, in this context, does not mean the concept of "constitution" but it refers to the "perfect" state arrangement. This is therefore important because, in this way, the **psephimsa** is not eliminated from the legal sources of the "constitutional" State. It is only the **politeia**, interpreted in a narrower sense, with which **psephisma** cannot be harmonized.

In literature, the opinion is to be considered as predominating, that **nomos** and **psephisma** are not in a connection of hierarchical nature with each other. This theory, hall-marked in the recent literature mainly with the names of Triantaphyllopoulos[245] and Wolff,[246] sees in these two categories legal sources of practically equal rank.[247] An essential difference between **nomos** and **psephisma** manifests itself only in philosophical relations. The cause of the difference, manifested on philosophical level, is that **nomos** - as referred to above - means the general norm while **psephisma** is not identical under any circumstances with a "decision",[248] containing an obligation "for ever". On the other hand, in legal relation, there is no difference of a substantial nature, any more. In the 5th century B.C. - the period, anticipating the beginning of **nomothesia** - there was not yet any difference in the **way** of arising. The procedure connected with the way of accepting **nomos** and **psephisma** in Athens, divides only in the 4th century B.C.[249] The acceptance of **nomos** is the result of a very

lengthy, complicated procedure while, in case of **psephisma**, the acceptance is much simpler and is not subjected to any temporary restriction (the acceptance of **nomos** is possible only once a year).There is some difference in the sphere of guarantees, as well. While the institute of **graphe paranomon** serves for "attacking" psephisma, in case of the not regularly created **nomos** the device of remedy is the **graphe nomon me epitedeion einai**. But these differences, manifested on the level of procedure, cannot be considered as essential ones. It follows from this that in the relation to law, we cannot speak about a difference of hierarchical nature between **nomos** and **psephisma**. The two categories mean the two sources of law, "concurring" with each other.[250] We should not forget, of course, that in the relation of **origo** there is a very close connection between **nomos** and **psephisma**. In the scope of the Athenian law, based on the principle of personality, this concurrence, not supposing any connection of hierarchical nature, manifested in the domain of the concept of **"nomos"**, is a natural phenomenon. In our opinion, this redoubling of legislation in the way of a different procedure is also a phenomenon being in connection with the flexibility of the Greek law (legal **koine**), represented by the Attic law. **Nomos** cannot be identified with the concept of statute (Act) in the modern law, taking into consideration its peculiar connection with **psephisma**.

A kind of plurality is characteristic of the concept of the Roman **lex**, as well, taking place among the sources of law in a comparatively smaller degree.[251] It is questionable, what kind of common particularity actually joins the variants of the archaic Roman law (**lex publica, lex templi, lex censoria**). According to Magdelain, the uniform, imperative way of drafting which is an essential characteristic of the "international" conventions, too, means the "common denominator".[252] The French author, investigating the question of imperative way of formulation, equally characteristic of the different types of **lex**, establishes that means the caesura between **lex** and **senatusconsultum** resp., the edicts of magistrates. This difference of stylistic nature is, therefore, not an empty formalism but an essential criterion. We never meet e.g. in the praetorian edict with an imperative formulation.

In the praetorian edict we cannot find at all a formulation of the type **"pacta conventa rata sunto"**. The lack of the imperative style explains - among others - the fact why the **senatusconsultum** and the edicts of magistrates were built in the sphere of **ius** resp. of the widely interpreted **lex** only comparatively late (D. 1,3,9; Ulpian and Gai. Inst. 1,4). The norms, built on the **potestas** of magistrates and the **auctoritas** of the **senatus**, took place, in this way, for a long

time - formally - only on the confines of the law. The edict became only in the second half of the Republic the source of **ius honorarium**, and the **senatusconsultum** that of **ius civile**.

The origin of **lex** itself goes back until the age of kingdom. In this period, however, this source of law had no general effect, as yet. Its task was alone to regulate certain living conditions. In the age of **res publica**, **lex** lost its character of **lex dicta** and became more and more - as a result of the activity of **comitiae** - a kind of **iussum populi**.

In connection with **lex**, the signs, reminding us of contracts, played more and more role. Papinian defines **lex publica** as **"communis reipublicae sponsio"** (D. 1,3,1) and **foedus** is similarly based upon agreement. The basis of **lex collegii** is essentially a **pactio** (cf. already the Twelve Tables 8,27).[253] The formula of the **rogatio "velitis iubeatis** also points to the fact that **lex** became **iussum populi**.
In addition to the "democratic" **lex rogata** a type of **lex**, unknown until then, the **lex censoria** also appears - probably as a result of the Hellenistic influence. This lex censoria reminds us of the **lex dicta** of the age of kingdom.

The plurality of the concept of **lex** does not mean that a kind of commonly known common denominators would not be known in the sphere of **leges** - as already referred to above. The theory, according to which the dichotomy of **lex publica - lex privata** would have been known already in the archaic age is not acceptable in our opinion, either.[254] It is much more - though that is, too, a hypothesis - the way of creating them which can form the basis of classification. It seems to be probable that the foundation of categorizing was formed by the triad of the concepts; **leges dictae - leges rogatae - leges datae**. It speaks - in our opinion - for the correctness of this classification that the **lex dicta**, pressed strongly back after the downfall of monarchy and surviving only in the form of **lex templi** and **lex censui censendo** (as a **genus**) again becomes more important in the form of **lex censoria**.

Comparing the concept of **nomos** in the Greek law with the concept of **lex** in Roman law, it can be established - even on the basis of this outlined survey - that there manifest themselves certain common signs. To these belongs primarily the **complexity** of the two concepts. It is also an essential common trait that the classification of the sources of law happens - in respect of Roman law at least as regards **origo** - in neither of the cases according the **contents** of regulation. As to the question of the system of private law, this circumstance is important in so far as that

- independently of the fact in the Greek law the **nomos** is the most important source of law while, in Rome, the **lex** did not have at all such a role, in the whole of the history of Roman law - the **ius privatum** cannot be separated in the sense of Roman law from the **ius publicum**, even on the basis of the sources of law. At analysing the system of private law, from time to time it is indispensable, to take into consideration the structure of public law, as well, what supports, in itself, too, the supposition of the autonomy of the systems of the ancient private laws.

7. Let us survey with paradigmatic significance the particularities of the system of the Greek private law. First of all, we should depart from the fact that in the Greek law, the pair of categories: law of obligations (**obligationes**) - law of things is unknown. The main cause of this is, according to Wolff,[255] that the necessary "institutional" conditions (**"institutionelle Voraussetzungen"**) are lacking. The conception of an absolute law can only develop where the construction of **rei vindicatio** is known, what means, measures of the defence **of general character** of the single legal situations in a lawsuit. This particularity of the Greek legal **koine** is well demonstrated by the **dike klopes** and **dike biaion**, known in the Attic law which - as "actions" of delictual nature, presented against the doer violating the law - serve unambiguously for punishing the offender. In these cases, it is not of interest, which right of the offender is connected with the thing, taken away illegally.[256] The basis of commencing the **dike klopes** and **dike biaion** in question is, actually, the minor entitlement of the doer to the thing. A similar outlook takes places in case of **dike exoules** which serves for means in the defence of justifiable self-help.[257]

To initiate **dike exoules**, defined by Rabel as **"Deliktsklage zum Schutze berechtigter Selbsthilfe"**,[258] the following persons are entitled:
a) he who has the right of disposing of a piece of ground, adjudicated by a judgement and the pawnee, entitled to a pledge;
b) the pledgee (whose person is not unconditionally identical with the holder of debt claim);
c) the **suus heres**;
d) the tenant of the State and the person buying from the State.[259] From etymological point of view (**exeillein, exagein**), the **dike**, connected with expulsion - as the fact sued for - is for the person entitled the basis of being legitimated to acquire possession (according to Kaser, even to acquire ownership).[260] In the case, if the legitimation of plaintiff was not substantiated, the power position of the defendant was confirmed, independently of the fact whether he was or was not the proprietor of the landed property. Schönbauer's thesis which traces back the suing with **dike exoules** generally to the fact that somebody "expells", "hunts" another person from his legal position illegally (**"unrechtmässig"**) in the way that he, retaining that right - possession, owner's position - to him-

self, curtails it.[261] Schönbauer, consequently, does not persist in the fact of **exagoge** - what is, in our opinion, a supposition, seeming to be plausible. Schönbauer - who attributes the **dike exoules** to the fixed Athenian relations of landed property - considers this action at law as a kind of "Bussklage", being destined to defend the private interest and not the injured interest of the **polis** because, in the later case, a criminal trial would take place.[262] Rabel sees in the **dike exoules** the archetype of taking justice into one's own hands.[263] Kaser refers to that in Roman law - and this already relates to the archaic law, as well - this way of enforcing rights is unknown.[264]

In the scope of the entitlement to commence the action of the three **dikai**, mentioned as examples, the criterion is not some absolute legitimacy (in the sense of Roman law). There prevails exclusively the following point of view: which party to the action is comparatively more entitled to the thing. The idea of the defence of absolute character of the property (possibly possession) in the sense of Roman law did not even arise. It is a consequence of this that in the field of the Greek legal **koine** the system of the rights **in rem**, distributed hierarchically, was unknown.[265]

The exploration of the concepts of property and possession is made considerably more difficult by the high degree of terminological uncertainty.. This uncertainty is well illustrated by the very varied contents of the meaning of **kyrieia**.[266] **Kyrieia** means a kind of the "right of ruling" or, otherwise, the "entitlement to dispose" in a considerable part of the sources of Greek law. It, however, does not follow from this alone that **kyrieia** and property unconditionally coincide with each other. Kränzlein refers to that in a few texts, originating just from Athens, these two categories are directly separated.[267] The situation is the same in the circle of papyri, as well.[268] According to the evidence, given by certain sources, the formulae **kyrieuein kai despodzein** or **kratein kai kyrieuein** refer to property.[269] This changing meaning should actually be ascribed to the fact that, in the Greek law, no concept of property, having exact borders developed. This, on the other hand, may be led back - in the ultimate analysis - to the unsufficient development of the system of the **ius in rem**.

The **dike blabes** is in close connection with ignoring both the system of the law of things (**ius in rem**) and that of the law of obligations (**ius in personam**). As noted above, the basis of the possibility of the injured person to take action is not a law of things, manifested in the form of **rei vindicatio**. The cause of this is that the Greek law approaches the problem of violating the law not on the basis of **ius in rem**- let us add to this: in the field of contractual responsibility, not on the basis of the law of obligations - but delictually. According to Partsch's opinion, the basis of the duty (liability) of restitution is the **adikema**.[270] Partsch sees the cause of this in the fact that "the consciously conceived concept" of prop-

erty (**"der bewusst erfasste Begriff des Eigentums"**), as that of an absolute law, is missing.[271] In the ancient Greek law, the existence of substantive rights did not become conscious, as yet - this relates to the rights falling within the scope both of the **ius in rem** and the **ius in personam** (personal or obligatory law) - and these have no independent existence within the rules of procedure. It is far from being accidental therefore, that in Greek law, the entitled person was defended essentially only in an indirect way. Such an indirect device for the defence of the injured or, otherwise, offended person was the **dike blabes**, defined by Wolff as the retaliation of the delict.[272] The Greek legal thinking never got so far, to connect the legal defence with a situation not offending the legal order but being in harmony with it.[273] This outlook prevails in the field of contracts, as well. It is an unknown view in the Greek law, according to which the basis of the responsibility originating from the omission of an obligation, undertaken voluntarily, is the consensus of partners or a formal promise (e.g. **stipulatio**). According to Wolff, he who does not perform an obligation undertaken, frustrates the purpose of his partner, connected with the "sacrifice", taken over in the hope of a return service (theory of **Zweckverfügung**).[274] Seen from legal point of view, **dike blabes** - independently of its amount - is a purely penal delictual punishment. It is another question that this **dike, in ultima analysi**, in addition to the penal elements, contains a kind of compensation, as well.

As referred to by Maschke, Plato is the first one among the Greek philosophers,[275] in whom the idea of a compensation, lying upon a non-delictual basis, emerged. Plato, dealing with **adikema**, places himself in opposition to the conception, regarding the **blabe** as clearly a delict. He differentiates between the damage of objective nature (**blabai**) and the "wrongful act" of subjective nature (**adikiai**). An **akousion adikema** is, in his opinion, not equal, as yet, to **adikia** (Nomoi 862a 2-7). In case of damages of objective nature (**blabai**), the compensation for the damages induced is primary and the penal character falls into the background (Nomoi 862b 6- 862c 2).[276] The amount of damages, collectable with the **dike blabes**, is debated in literature.[277] In settling this question, the institution of **arrha** gets an important part. On the basis of **arrha**, the creditor, getting no compensation in return, should not require a compensation for his complete damage but the **arrha**, having the function of guarantee, fixes the measure of his legal claim. As a result of this, in the scope of **dike blabes**, the so-called **Entgeltsprinzip** does not get an exclusive importance.

The cause of the fact that the fundamentally delictual character of the law of obligations continued in existence, is probably that the ancient Greek thinkers did not analyze intensively the process of contract bind-

ing.[278] In our opinion, this may be concluded from the fact that the **actio auctoritatis**, known in Roman law, which originally was an institution, reflecting the responsibility for **blabe**, as the result of the development of law, lost its delictual character.[279] It may be attributed to this that the concept of "responsibility" is unknown in the ancient Greek legal terminology. The term **enoche**, referring to this, appeared only in the 6-7th centuries A.D., and reflected Roman influence.[280]

It may be evaluated as a sign of the lack of differentiation within the law of obligations that in the field of the Hellenic legal **koine** the concept both of the general and of the special framework of contracts is unknown.[281]

Pringsheim refers to Attic law, - but his statement applies to the Hellenic law generally - that the "general" action of "contracts" is unknown, and the **dike blabes** cannot be categorized here, either, as a concept. The number of actions, related to enforcing the single transactions (e.g. **dike karpou, dike engyes, dike proikos** etc.) is very low. In literature, Tsatsos is of the opinion that the **dike synthekon parabaseos** was an actually existing action.[281a]

The missing actions are substituted by the practice of implementing them, the basis of which is the provision of a statute or the agreement of the party of conflicting interest.[282] The legitimation of the practice, endeavouring a financial - possibly personal - implementation, is the result of the procedure at law which begins, as a rule, on the basis of the **dike blabes**. The judgement, which is delivered as the result of the lawsuit, obliges the party losing the suit not to perform but to tolerate the right of the prevailing party relating to the practice. The execution by the creditor will then be possible also by the mere insertion of the clause of **praxis**. The result of this will be that the implementation will be possible even if the behaviour of the debtor cannot be considered as a **blabe**. Thus, it is possible to establish responsibility, even if on the basis of actions (**dikai**), led back to **nomoi**, this were not possible at all.[283] As to its function, the clause **kyria**,[284] is very similar to the **praxis**-clause, the fundamental form of which is the **formula "he singraphe kyria esto"**.[285] The **kyria** resp. **kyrion**, relating to the **syngraphe** or **cheirographon**, invest the content of a document with absolute probative force, in so far as it makes impossible the counter-evidence. The **kyria** - as a **formula**, excluding the possibility of counter-demonstration, i.e. documenting in an absolute way those contained in the document - appears in

Demosthenes in the scope of **homologia** in the same way,[286] as in other Attic **rhetors** (Hyperides).[287] The use of **kyria** is, therefore, not restricted to papyri but it already appeared in the Athens of the 4th century B.C.[288]

Owing to the **praxis**-clause and the **kyria**-clause, it was possible to sue for an agreement of any contents, i.e. for sanctioning it. In addition to this, with mainly the **praxis**-clause playing a role, it is possible to construct some legal institutions, known only in the more developed Roman law or to be found not even in that. Such an institution was the contract for the good of a third person and the **cessio**, realized by the **praxis**-clause.[289] These were used in the Hellenic law because the **obligatio**, supposing a connection of personal nature between the debtor and creditor was unknown. In the Hellenic legal **koine**, the emphasis is on responsibility and can be of abstract character, as well. It is a consequence of this that it is actionable even if there is no **dike** relying on a **nomos**. To the replacement of the person on the creditorial side the possibility is ensured in a concrete form by the drafting of documents. There is, namely, nothing to prevent the insertion of a third person. The institution of **parachoresis**, relating to the delegation of **praxis**, should be ascribed to this.[290] The agreement of the contracting party, being in the position of debtor, is not needed for the delegation of the right of execution. The delegation of the right of execution which is - regarding its consequences - equal to the transfer of the claim itself, means practically the acceptance of the construction of **cessio**.

Some institutions, constructions, known in the Greek law, remind us of the institutions of Roman law. But it follows from this by no means that the private-law system of the Greek law would not have autonomy. It does, of course, not belong to the bases of autonomy, of how high degree the difference in the circle of legal institutions is. The matter in question is here much more whether the **bases** of the system itself - from which a construction logically follows - are different. As to the difference in bases, the highly developed state of dogmatics plays only a minor role. Wolff refers to the fact that a civilization, after achieving a certain level, cannot be without any dogmatic ideas.[291]

We remark here that - seen from another side - it is no decisive point of view, how high in some fields the degree of similarity is. Rabel, analyzing the question of the so-called **nachgeformtes Rechtsgeschäft**, reaches the establishment that in the domain of ancient laws - and this refers to Roman law, as well- there is no qualitative, essential difference in respect of using the so-called **Operationsmittel**.[292] This similarity in the sphere of the so-called **Operations-**

**mittel** is - as referred to by Pringsheim[293] - well illustrated by the fact that the so-called **offene Fiktion** is known both in Hellenic and Roman laws. Such as **offene Fiktion** is seen, e.g., in the P. Lille 29, reflecting the life of law in the Ptolemaic Egypt.[294] According to the source, in favour of the passive legitimation, the slave should be considered as free. The conformity to the fiction **"civitas Romana peregrino fingitur"**, to be found in Gaius (Inst. 4,37), is obvious, both in respect of contents and function.

It is a common trait of Roman and Greek laws that the symbols in modern sense do not play any part in them, or only a very slight part.[295] The symbol in connection with **pars pro toto** - Gai. Inst. 4,17 - is almost the unique outward form of a symbol, assuming the form of legal construction. Latte[296] sees the cause of this in the fact that the symbol is in a very close connection with the sacral forms which fade away or are, at least, on the wane early. Latte's assumption which is based upon the rigid separation of **ius** and **sacrum** from one another. In our opinion, this antinomy is very constrained. In this relation, it would perhaps be better to follow the conception of **"prédroit"**, connected with Gernet's name.

Gernet[297] defines in his work entitled **"Droit et société dans la Grèce ancienne"**, in a precise form the concept of "prédroit": **"... certain conduites traditionelles où les gestes et les verba ont une vertue... dont la signification et les effets sont analogues à ceux qui transparaissent dans le droit lui-même".**[298] The **"prédroit"**, **"une technique autonome"**, which presupposes certain institutions, reminding us of the concept of the State (**"un minimum d'État"**).[299] The opposite between the concepts of law and **"prédroit"** is of not essential nature but it is rather of technical character. Gernet consistently rejects, in other papers, too, the opposite between **ius** and **sacrum** which is, in his opinion, unfounded.[300]

The symbol, as a legal construction, is very probably in connection with a norm of sacral nature or just of sacral origin but much more with the sphere of the **"prédroit"**. This supposition explains the fact, how the parallel emergence, appearance of certain archaic constructions in the scope of the law of different ancient peoples was possible.

The similarity of certain institutions, constructions in the law of the different ancient peoples is, in this way, fundamentally determined by the **"prédroit"** or it is at least, a phenomenon, fastened to a similar level of development.

In the scope of the ancient Greek law, as well, some serious signs of systematization, classification concerning the basis of legal claims manifest themselves. In this relation, the classification, ascribed to Hippodamos is worth of a particular attention (Arist. **Pol.**1267b).[301] The town-planner and politician (philosopher) from Miletos sees, according to

Aristotle, the bases of enforcing law in the **hybris, blabe**, and **thanatos**. We should agree with Wolff,[302] who regards this trichotomia of Hippodamos to be inconsistent with the Aristotelian division of **synallagmata hekousia - synallagmata akousia (Eth. Nic.** 1131a). For us, it is in a given case an uninteresting problem whether Aristotle's classification is connected in a form - possibly through several mediating elements with the Gaian classification of obligations (**obligationes ex contractu - obligationes ex delicto**) (**Inst.** 3,88). Whether we investigate the **"summa divisio obligationum"** of Hippodamos or that of Aristotle, something can be established: we can observe a kind of attempt, endeavour in the ancient Greek thinkers. And this means a serious value in relation to the law. Taking this into consideration, it would be - in opposition to the establishment of Wolff[303] - a mistake to regard these a fact, having no relevance or, more exactly, no value.

In the question of the private-law system, the terminological uncertainty in the scope of certain institutions of the Greek law, given for the lack of abstraction of corresponding level, gets an important law.

This terminological uncertainty is well-illustrated by the right content of **hybris**. It can be established, even without a detailed analysis of **hybris**,[304] that this concept has a fundamentally double meaning. According to Gernet, the **hybris** is, on the one hand, a concept of objective nature, in so far as it shows the fact of injuring a person (**"atteinte à la personne"**), on the other hand, as a technical term of subjective character,[305] it means responsibility in connection with the injury of a person. Gernet - in his work of the sub-title **"Étude sémantique"**, approaches the concept of **hybris** from the side of etymology. This semantic approach - which meant in Gernet's days by all means modern method of investigating - is outstandingly suitable[306] to emphasize the stratified meaning of the single categories of legal contents.

A further proof of the terminological uncertainty is **bebaiosis**.[307] On the basis of **bebaiosis** which can be considered as a fundamentally evictive clause, the seller takes - in the scope of sale and purchase - responsibility (guarantee) for the case of eviction.

From this **bebaiosis** we should separate the so-called non-aggression clause (**Nichtangriffsklausel**). This latter clause means, according to Rupprecht's formulation,[308] the declaration of one of the parties to the contract that he won't go to law against his contracting partner. In literature, there is no uniform standpoint in respect of the connection of the two clauses with one another. While A. B. Schwarz,[309] Pringsheim[310] or in the recent literature Rupprecht[311] emphasize the difference between the two clauses, Woess does not see any essential difference[312] - being restricted not only to formality - between these two clauses. On the basis of the recent research work, the difference between the two clauses concerning their contents and legal consequences can be established.[313] It is to attributed to this that the so-called non-aggression-clause means, in fact, only a kind of restricted responsibility, as compared with **bebaiosis**. The fact of the separation of the **bebaiosis**-clause and of the so-called non-aggression-clause proves that the enforcement of the claim for guarantee cannot take place in the

way of a uniform category. This pair of categories is the result of the lower level of legal abstraction. This is supported by the fact that in the documents, containing these clauses, there isn't even the slightest trace of the consistent distinction.

It can be led back, in our opinion, to the lack of abstraction that there is an uncertainty in respect of the legal nature of **hypomnema** and **syngraphe**. In the scope of **hypomnemata**, the difficulty in interpreting manifests itself primarily in the scope of **hyppographai** containing the term **"memisthonai hos prokeitai"**, connected with the signature of the tenant. The question is, namely, whether these are simply only requests (Kränzlein's thesis),[314] or they are documents, documenting the contract binding (Herrmann's supposition).[315] In case of **syngraphe**, it is obvious on the basis of a recent research work, that this category - in the sign of **homologia** - may have been connected with entering into a contract, on the other hand, it can simply mean a document.[316] In the scope of both categories, the final cause of the lack of the delimitation of the concept of this can be led back, in our opinion, to the slight role of legal abstraction.

8. On the basis of the above analysis, we may draw the conclusion that in the question of the private-law system, in the scope of the law of ancient peoples, the **praesumptio similitudinis** is unambiguously a missupposition. Seen from the other side - and this is valid particularly to the most reconstructible Greek law (Hellenic legal **koine**) - the private-law system is not only the peculiarity of Roman law. On the basis that in a legal system the rigid separation of **ius publicum** and **ius privatum** is unknown, it would not be right to conclude from these the lack of the private law system. In the same way, it is not in contradiction with the supposition of the private-law system that certain categories are characterized, in respect of contents, by plurality. It is sufficient to refer to that - in connection with analyzing the concept of the Hellenic **nomos** - the Roman **lex** is no category, either, which could be delimited with full preciseness.

Summarized, as parts of the particularity of the private-law system of the Hellenic legal **koine**, the following elements can be mentioned: the delimitation of the law of obligations and the law of things in unknown (in contrast to Roman law); on the basis of analyzing the **dike blabes**, it is evident that the violation of law is generally approached on delictual basis (**adikema**); within the law of obligation, only a very few signs of differentiation appear what can be illustrated by the fact that the concept of the so-called general contractual action (i.e., that relating to the single types of contracts) is unknown; the peculiar institutions of the Hellenic legal **koine** are the **praxis**- and **kyria**- clauses, serving for means of suing for all agreements, rendering possible to sanction legally such transactions, too, as e.g. the contract in favour of a third person, which

are in Roman law not at all recognized; in the Hellenic legal **koine**, the number of the so-called legal **"Operationsmittel"** is low, what is, otherwise a particularity, conformable with that of Roman law; there present themselves some signs of a classification, relating itself to the basis of the enforcement of law, what is necessarily a fact - independently of Hippodamos's differences and of those, presenting themselves in Aristotle's classification - in the direction of creating a kind of system; the terminological uncertainty, which can be documented on the basis of more than one institution, is a peculiar trait, attributable to the slight importance of asbtraction.

### 3.8. THE PROBLEM OF ANCIENT INTERNATIONAL PRIVATE LAW

1. Whether in Antiquity we can speak about international private law, is one of the questions in the legal literature of Romanistic, qualified as the **"crux interpretum"**. With regard to this, it is not surprising that the scholars of Roman law can be ranged in this question into two camps. According to the Romanists, belonging to one of the camps, in the Roman law - and this applies to the law of the ancient peoples in the **Mediterraneum** generally - the international private law, taken in the modern sense of the word, is not known even in traces. This is the standpoint of Savigny,[317] Jörs,[318] Theodor Kipp,[319] Jolowicz,[320] Buckland,[321] Fritz Schulz,[322] Schönbauer,[323] Lübtow,[324] Schwind,[325] and Hans Julius Wolff.[326] The adherents of this rejecting opinion refer to the fact that in Rome, the mental and - what is particularly important - the political conditions of the law of collision were missing. Apart from Roman law, the knowledge of the law of ancient peoples has namely been from the beginning very imperfect and, in addition, the particular politico-administrative structure of the **Imperium Romanum** excluded from the beginning the assumption of the law of peoples, equal in rank. The opinion of Maridakis is worth mentioning, as well, in this relation. According to this, the international private law, in the modern sense of the word, is not known in the mutual connection of the Greek **poleis**, either.[327] The most supreme cause of this is perhaps to be looked for in the circumstance that the ancient Greek legal **koine** - excluding the essential differences between the law of the single city-States - hardly enables the norms of collision to be created.

The conception which ignores the existence of the ancient international private law, rests fundamentally upon three pillars. On the one hand, it presupposes the more or less complete isolation of the law of the single ancient peoples from each other. On the other hand, it emphasizes the lack of the necessary political conditions, and finally - though this is only valid for the world of Greek **poleis** - it emphasizes the considerable similarity of the legal norms of the single ancient peoples to one another.

The number of the scholars, according to whom the concept of the international private law is not unknown for Antiquity, is also considerable. The adherents of this conception are: G. Beseler,[328] Silber,[329] Volterra,[330] Wesenberg,[331] Triantaphyllopoulos,[332] Kaser,[333] Santana,[334] Lewald,[335] and Sturm.[336] The scholars mentioned refer to the fact that the possibility of the conflict of the norms of the law or systems of law of the different peoples was known in Antiquity. Lewald treated the problems of the international private law in greatest detail, restricting his investigations not only on the field of Roman law. According to his supposition, in the world of the Greek **poleis**, in the Ptolemaic Egypt and in the **Imperium Romanum**, the claim and requirement of using the foreign law presents itself in a much too concrete form. In a particular way, however, none of the investigators analyzes the causes, having led to the formation of the ancient international private law. While the representatives of the negative standpoint mostly pay a major attention to the international factors which do not make possible the formation of the international private law, the partisans of the positive opinion do not deal with these economic, social and political preconditions, meaning unquestionably an important factor.

2. The condition of creating the modern international private law is - according to the standpoint to be considered as prevailing in literature[337] - the formation of a well-developed international exchange of commodities, of the turnover of goods and persons, presenting itself in the relation of the States of different systems of private law, mutually recognizing the law of one another as co-equal. According to our assumption, in the Graeco-Roman Antiquity the mentioned premises of the formation of the international private law do exist and are to be found. The existence of the international economico-political connections is, namely, on the basis of the above analyses, an undebatable fact. On the other hand, there are considerable signs of the recognition of the equality of rank of different States (political units). And finally, owing to the fact that the

concept of the private law is not connected exclusively with Romans, the different system of the private-law systems of the various ancient States is also a given fact. It is, further on, our task to investigate also some questions from which - though possibly in an embryonal form - the conclusion can be drawn that their was an international private law (law of conflicts).

3. The signs of a Roman law of conflicts can be demonstrated in more than one source. One of the fields where the so-called law of conflicts presents itself, is the scope of the personal and real securities having a great practical role. Particularly a few sources, taken from Ulpian's work, entitled **"Fragmenta disputationum"**, give a valuable information concerning this question.[338] In the fragments, edited and commented upon by Lenel,[339] the matter in question is, whether the **sponsor** and the holder of a pledge may refer to the **exceptio annalis Italici contractus**, later revoked by Justinian and replaced by the **exceptio longae possessionis**, known in the **Provinzialrecht** which took into consideration the local particularities.[340]

The question is, concretely, who is entitled to refer to the **exceptio**. As it became clear on the basis of the analysis of the D. 44,3,5,1 (Ulpian), it is by no means the pledger himself who has the active legitimation. The situation is different if the **exceptio** is referred to by the successor in right (heir) of the pledger. Owing to the **exceptio**, the exemption from the prescription of the seize of something as a pledge becomes possible. The problem of collision presents itself just in connection with the duration of **exceptio**. In Italy, the legal successor could, namely, acquire the exemption from pledge already after the passing of one year (this is the so-called **exceptio annalis**) and - on the basis of **lex Furia** - he could also be exempted from the obligation of security, as well. Now, it is questionable, on the basis of which criteria it can be decided whether the right of pledge was created in Italy or in a province (in provinces). On the basis of Ulpian we may conclude that the **lex loci solutionis** - as a link-principle of the law of conflicts - does not come into consideration. The **lex loci actus** - and, in case of **sponsio**, the **lex loci sponsoris accepti**, and in cases of **pignus** the **lex loci pignoris contracti** applies in the form of **exceptio**, as an enforceable exemption. It is worth mentioning, as well, that if the right of pledge is renewed, the effective connecting principle is, consistently, the **lex loci renovatae pignerationis**. It is, therefore, decisive in the sphere of the personal and real guarantees of obligation equally, where the law of security or pledge came into being at first, in Italy or

in the **provinciae**. It is, therefore, obvious that, from the point of view of referring to the **exceptio**, the place, where the basic obligation came into being, is uninteresting.

On the basis of the above facts, it can be established that Ulpian connects the effectiveness of the norms of law with the place which comes - in his opinion - into consideration with particular emphasis. In this way, it is not the site of making the basic obligation or just that of the **lex loci solutionis** which comes into consideration but the site where the securities of the **obligatio** have been created. This solution, even measured with the measure of the modern international private law, means a norm of collisions. It is, of course, another question - as it follows from the particular constitutional structure of the **Imperium Romanum** - and not a norm of international but of interprovincial character.

It is to be noted here that - as in the recent literature Sturm refers to this[341] - as a result of the Justinian conception - what was, as a matter of fact, in a number of regards intolerant, forcing at any price the uniformity of law - several norms of collisional nature fell very probably victim to the codifying activity of the **Compilers** of the Justinian Codification.

4. The **conflictus legum** plays also a role in the law of inheritance, having a background of personal law. A place of the Institutions of Gaius is, in this respect particularly noteworthy:[342]

**"Itaque si civis Romana peregrino, cum quo ei conubium est, nupserit, peregrinus sane procreatur et is iustus patris filius est, tamquam si ex peregrina cum procreasset. Hoc tamen tempore e senatusconsulto quod auctore divo Hadriano sacratissimo factum est, etiamsi non fuerit conubium inter civem Romanam et peregrinum, qui nascitur iustus patris filius est.-"** (Gai. Inst. 1,77).

This source contains two facts. In one of the cases the matter in question is that a **civis Romana** contracts a marriage with such a **civis Romanus** who has **ius conubii**. The child, originating from this marriage does, namely, not obtain the **civitas Romana** but he is legitimate and is to be considered as a child whose mother is a **peregrina**. But what is the situation - Gaius continues - if the **peregrinus** father has no **ius conubii**?! Hadrian decided in the way that, apart from the necessity of **conubium**, the child is, in this case, too, of legitimate birth. This **senatusconsultum**, originating from the ruler himself, is something particular because the marriage, seen **stricto iure**, is null and void (a non-marriage or an apparent marriage) in lack of the **conubium**.[343]

The novelty of Hadrian's disposition is in the fact that, ignoring the principle of **personalitas** entirely, and regardless of the **ius conubii**, it considers as valid every **conubium**, one of the subjects of which is no Roman citizen, in regard of the hereditary right of the child, originating from the marriage. It was totally uninteresting for Hadrian, to what ethnical group the partner in marriage, having no **civitas Romana**, belonged, the citizen of which **polis** she was, and which **Volksrecht** applied to her. The **Imperator** created, in this way, a kind of "supernational" law. The **lex originis**, **ius civitatis** of the wife had no part at all. It is true that this regulation - as distinguished from the Ulpian-fragment, investigated above - has fundamentally not the nature of the collisional law. This **senatusconsultum** has contents of law of conflicts only inasmuch as that leaving **a limine** out of consideration the regulation by the many-coloured **Volksrecht,** differing from one another, it created a uniform rule of law which was diametrally **opposed** to the norm (norms) of the local law (law of the land). Creating this uniform rule which broke with the principle of personality, and obtained such a great part in Antiquity - in the legal-political background of which the point of view of creating a hereditary law, which is favourable to the child, conceals itself - Hadrian renders unnecessary the law of conflicts itself.

5. It cannot be our task here, to analyze the very complex problem of the ancient (Roman) international private law comprehensively, with a demand on fullness. The aim of this excursion is to refer to the fact which serve or can serve, in principle, for basis in the Mediterranean world to the appearance of the international private law on a certain level. It is to be established on the basis of the sources cited that, within the **Imperium Romanum**, having a heterogeneous structure of public law, the outlines of an **interprovincial** private law developed. As it can be led back to the striving of the compilers for making the unity of law, the number of sources at our disposal is unfortunately very low for giving to us in this question any information. The well-developed interchange of commodities, the almost entirely undisturbed **symbiosis** of **ius civile** and of the local **Volksrecht** which manifested itself within the **Imperium Romanum** - and from which the heterogeneous structure of law originated - at any rate needed a supranational regulation, with collisions of larger volume, and exceptionally without any collision. This regulation, however, cannot be reconstructed today any more in its full extension and we cannot even take a short survey of it, because of the lack of sources.

## 3.9. COMMERCIAL LAW AND THE GRAECO-ROMAN ANTIQUITY

1. On the basis of the fact of the commercial connections, established in international conventions, between the States of the Mediterranean world, the question rises rightfully, whether we can speak - judged by the standard of the modern law - about commercial law in Antiquity. Investigating the connection between economy and legal regulation in ancient thinkers, we already referred to that in the writings of several prominent representatives of the Roman and Greek spiritual life (Cicero, Homer, Hesiod, Xenophon), the performance of a commercial activity was the object of a fundamentally negative evaluation. Further problem was caused by the fact that in Rome - as also referred to - there were no commercial companies in a technical sense. In the associations of persons, being active in the commercial sphere, we can only speak rather about associations, divided or more exactly formed according to profession or kind of activity, than about a "trading company" in the modern sense.

After mentioning in advance these particularities of outlook and structure, making doubtless more difficult the formation of a commercial law, let us survey the conditions of the formation of a commercial law in the modern sense. Eörsi, dealing with the question of commercial law, emphasizes its three particularities, that of contents, of person, and finally of the procedure.[344] The particularity of contents is meant by the enterprises, commercial companies. A particularity of personal character is partly the belonging of parties to different communities, partly their connection with some associations. And, finally, the particularity of procedure is formed by certain instances, established for deciding the legal disputes, connected with the commercial sphere (e.g. the court of arbitration).

It is necessarily worth of mentioning that in the European literature the tendency which opposes to, or at least sees with criticism, the isolation of the commercial law - in the form of a Code - from private law.[345] This trend is represented well by Caemmerer, according to whom the independence of commercial law, its separation from the body of private law - more exactly the autonomy obtained - is actually only "the problem of drafting the Bills".[346] On the other side, of course, we should not leave out of consideration that, e.g., even Bucher - a representative of the jurisprudence of such a country (Switzerland) which has no commercial Code - emphasizes the autonomy of commercial law in jurisprudential and practical relations.[347] The existence of monistical and dualistical doctrines in connection with the systematization of private law proves that the independence of commercial law is dogmatically debatable.

This dogmatical uncertainty is, in our opinion, the consequence of the fact that the regulation of commercial law in an independent Code is but fragmentary. Müller-Freienfels refer to that the German HGB does not include the rules relating to the Bill of Exchange, the Cheque, the banking and Stock Exchange transactions, etc.[348] A further contradiction - and here of ideological nature - is that the codification of commercial law, animated so much following the French Bourgeois Revolution, confronted the principle of **"égalité"**. It is another question, of course, that this autonomous codification was doubtlessly necessary in the age of the outfolding relations of the capitalistic production. To this may be led back the basis of Goldschmidt's famous establishment: **"Das Handelsrecht nimmt dem allgemeinen bürgerlichen Recht gegenüber eine bahnbrechende Reformstellung ein."**[349] It is obvious on the basis of the opinions in connection with the modern commercial law but contrasted diametrically with one another that the conception of the independent commercial law is dogmatically debatable.

2. Further on, we survey - mostly by taking into consideration the traits, characterizing modern commercial law - the social, economic, structural and dogmatic conditions of the formation of the ancient commercial law.

The question of the commercial law can be investigated even in two relations. This problem can be raised partly in a so-called supranational projection and, partly, it can be analyzed in the sphere of the single "national" legal norms. Let us see, at first, the question of commercial law as a "supranational" law.

Wieacker refers to that in the world of the Mediterranean, there may be fundamentally three ways to arrange the unsettled questions, connected with the international commerce.[350] On the one hand, there is known - both in the world of the ancient Greek **poleis** and in Rome - a specific instance, thus the **polemarchos xenios kosmos**, the "harbour courts" of certain Greek **poleis**, as well as the **praetor peregrinus** whose function is to administrate justice between a **polites-civis Romanus** and a **xenos-peregrinus (hostis)**. On the other hand, there are known several bilateral interstate conventions between the Hellenic **poleis**, as well as between Rome and other, more or less sovereign, States of the Mediterranean which regulate the problem of legal disputes connected with the international commerce in respect of the procedural law.

It is worth of serious consideration that in the circle of the Greek **poleis** the decisive majority of the so-called agreements on judicial assistance in civil matters (**symbolai, symbola**)[351] contain no data at all in respect of the material law to be applied.[352] In these agreements, the idea of assuring the legal defense of foreigners has the decisive part. The extent of the legal defense of foreigners is very different. On the basis of certain agreements, granting **asylum**, there is only possible to revoke the acts, violating the agreement (the concrete transaction). By means of other agreements, containing the mutual **isopoliteia**, as

well, the foreigner quasi became - in respect of his legal possibility - the **polites** (citizen) of the city-State. As to the contents of **isopoliteia**, Szanto's establishment, according to which - approaching this concept from the negative side - it cannot be identified either with the double citizenship or with the honorary **civitas**, is right today, as well.[353] **Isopoliteia** is something very serious. It is, therefore, not only nominal but it means the acquisition of authorizations of content, as well, for **xenoi**, for the case - and, therefore, this category cannot be identified with the dual citizenship - if they (by settling or transaction) get in touch with the foreign **polis** or its **polites**. It is to be emphasized, as well, that **isopoliteia** can be granted to the inhabitants of a foreign **polis** - as referred to by **Gauthier**[354] - not only on the basis of an interstate agreement but by a unilateral act, as well - as it may be concluded from several epigraphic sources - i.e., it may be granted in the way of single decrets, too, to the inhabitants of the foreign **polis**. In connection of **isopoliteia**, fixed in the convention, it is to be emphasized, as well, that its **origo** does not go back necessarily - as supposed in the recent literature by Graham[355] - to the connection between the **metropolis** and the **colonia**.[356]
This hypothesis - and this is therefore important for us - separates the institution of **isopoliteia** from international connections, fundamentally not supposing any state of subordination because it would be based on a hierarchical connection.

And finally, the third way of arranging the debated questions is the "supernational" uniform practice formed by the mediation of the **lex contractus (homologia)** resting on private autonomy.

Wieacker emphasizes that only this thirdly mentioned possibility of settling the legal debates, connected with the international commerce, can serve for the basis of the **lex mercatoria**, containing the norms of the **par excellence** substantive law. With regard to this, we investigate in short the institutions suitable for documenting which contain some information in connection with the **lex contractus**.

A particularly important role is due, in this scope, to the **lex Rhodia de iactu mercium**, debated so much.

The opinions in literature vary in respect of the **lex Rhodia**. According to one of the opinions,[357] the **lex Rhodia de iactu** is a real Rhodian lex (Bremer,[358] Kreller,[359] Goldschmidt[360]), while, according to others, it is a Roman **lex**, resting evidently upon a Hellenistic pattern (Osuchowski[361]). The representative of a particular opinion is De Martino, in whose view the **lex Rhodia** is of postclassical origin.[362] At the same time, he recognizes himself that the institution itself is already known in the last century of the Republic.[363] Kaser did not take stand in the question of the nature of the **lex Rhodia**.[364] He writes only so much that the **lex Rhodia de iactu** which was made in Hellenistic domain ("im hellenistischen Bereich"), in Rome was applied on the basis of customary law. It is indisputable that the **lex Rhodia** was known in Rome already in the first century B.C. This is shown by the fact that Alfenus Varus (D. 14,2,7 - Paulus), Servius (D. 14,2,2,pr. - Paulus and D. 14,2,3 - Paulus), Ofilius (D. 14,2,3 - Paulus) and Labeo (D. 14,2,3 - Paulus) know that **lex**. De Robertis,[365] Kaser[366] and Wieacker call the attention to the reference taking place in Tertullian's work, entitled **Adversus Marcionem** (3,6), in which **lex Rhodia** takes place in the sense of a registration of institutions in connection with the maritime law. This doubtlessly

supports the supposition, according to which the **lex Rhodia** is not equal to a **lex** in technical sense of the word - independently of whether we emphasize the Rhodian or Roman origin - but it means much more - this is Wieacker's thesis[367] - the agreed law (**lex contractus**) of the commercial partners, being in connection with one another in the Mediterranean area. In the legal regulation of the damages connected with the wares thrown into the see, on the basis of **bona fides**, the construction of the Roman **locatio-conductio** prevails.The **nomos Rhodion nautikos**, originating from the time of the rule of Leo VI (The Wise), means - in our opinion - much help to solving the problems of interpretation in connection with the **lex Rhodia**.[368] The **nomos Rhodion nautikos** which can be considered essentially as a small Code of maritime law is, namely, of mixed composition, alike to the **lex Rhodia**, in so far as it includes in addition to the Justinianean law also local or more exactly provincial rules, customs. This is not changed by the fact, either, that - according to the supposition of Goldschmidt[369] - it was possibly issued in the form of an imperial **constitutio**.

It is a further problem in connection with the **lex Rhodia** whether it only relates to the regulation of damages, originating from throwing out certain wares or it can be interpreted as a kind of the "collection of the norms of maritime law", including a comprehensive regulation. In Atkinson's view,[370] the "Rhodian law" incorporates a comprehensive code of the maritime commercial law. The cause of this is that the Rhodian law is in a very close "genetic" connection with the Athenian law in which the comparatively exhaustive regulation of commercial connections - with regard to the sphere of maritime commerce - is doubtless known. In relation to the Athenian maritime "commercial law", Atkinson ascribes a particularly great importance to the **Corpus Demosthenicum** /thus to the Dem. XXXV (Adv. Lacr.) 10-13, and to the Dem. XXXII (Adv.-Zenoth.) 8 and 14/.[371] In the opinion of the English author, the "maritime-law character" of the **lex Rhodia** is supported by the fact that it has even a "Criminal content".[372] The "criminal-law" relations of the lex Rhodia is documented by the fragment of Volusius Maecianus (D. 14,2,9), containing the rescript or **responsum** of Emperor Antoninus - about the damages of the Nikomedian Eudaemon in connection with a shipreck and increased by the behaviour of **demosioi** what can be regarded as delictual. Antoninus answered the **petitum** of Eadaemon, according to this source, as follows: **"ego men tou kosmou kyrios, he de nomos tes thalasses to nomo ton Rhodion krinestho to nautiko en hois me tis ton hemeteron auto nomos enantoutai."** According to this, the lex Rhodia was extended - the only limit was in case of the confrontation with the **"lex ex nostris"** - over **all** the disputes at law, even if the basis of this was an offence.

The extension of the **lex Rhodia** over the case of **direptio ex naufragio** can, of course, not be regarded as a document of a codification, taken in some modern sense of the word. Certain authors - thus Tarn and Griffith[373] - consider the **lex Rhodia** directly as a "code of maritime law", "received" by the Romans in the age of Antonines (an obvious reference to the fragment of Volusius Maecianus). This standpoint is a hypothesis, relying on no documents. According to Rougé,[374] if such a code had existed, Cicero - who already treated of the problem of **iactus in mari ("... quaerit, si in mari iactura facienda sit, equine pretiosi potius iacturam faciat an servuli vilis? hic alio res familiaris, alio ducit humanitas."** De off. 3,23) - would necessarily have referred to it.

Another argument for the character of **lex Rhodia** as a **lex-codex** in non-technical sense originates from De Martino.[375] According to De Martino, it would have been very odd if the **compilators** had studied Volusius Maecianus' work, entitled **"Ex lege Rhodia"**, only for the sake of inserting from it a single fragment into the Digest. These arguments are convincing for us, too. In the case of the **lex Rhodia**, we cannot speak of a Code, of a **lex** in the technical sense of the word. This is supported by Tertullian's work, cited above in another connection. The author of the **"Adversus Marcionem"** (3 ,6) mentions, apart from the **lex Rhodia** , a certain lex Pontica, as well: **"Scilicet nauclero illi non quidem Rhodia lex, sed**

**Pontica caverat, errare Iudaeos in Christum suum non potuisse".** The **lex Pontica**, similarly to the **lex Rhodia**, cannot be considered as a Code in the technical sense of the word. The fact that the **lex Rhodia** means the conventional law of partners, being in commercial connection with one another, does not at all imply the plurality, supposed by Rougé, in the scope of commercial conventions.[376] The conception, connected with Rougé's name which presupposes the plurality of commercial conventions (viz. **lex Rhodia, lex Pontica**), as well as the regulation by Roman law, independently of these - but Rougé sees the signs, referring to integration in this field, only beginning from the age of the dynasty of the Severi[377] - does not take into consideration the central role of the island Rhodes in the field of trade and commerce, as referred to above in the course of analyzing the commercial connections.[378]

The **lex Rhodia** - the use of which cannot be restricted to the case of **"iactus mercium"** - is an important document of the legal regulation of the "supernational" uniform - though not necessarily exclusive - maritime commerce. In this connection it is not very important through which threads the **lex Rhodia** is - or, contrarily, is not - connected with the Athenian law.[379] It is decisive for us that the **lex Rhodia** - which cannot be considered as a **lex (nomos)**, taken in a technical sense, either on a Roman or on a Hellenic standard - was the conventional law, i.e. **lex contractus** of the merchants of the various States in the area of the **Mediterraneum** (their connection of hierarchical nature with Rome is in this relation uninteresting).

3. Investigating the sphere of problems of the supranational commercial law, we should not leave out of consideration that the **lex Rhodia**, interpreted as a **lex contractus**, regulates a sphere of commerce, having particular traits, namely the maritime commerce. The maritime commerce leads - in addition to the **lex Rhodia** - to the formation of other institutions, as well, in which the decisive motive is the **"consensus omnium civium"**. There belong here partly the **arrha**, partly the maritime loan.

The **arrha** is - according to the **communis opinio** - of Semitic origin and is known primarily among the Hellenic laws.[380] The **arrha**, known in the circle of Hellenic laws, - of which, differently from the **arrha**, known in Roman law, the function of fulfilling the guarantee of an obligation assumed is characteristic (Visky)[381] - has a role documentably in more than one Greek **polis**, as well. The **arrha** is thus known, according to Aristotle (Pol. 1259a) and Isaeus (8,23), in Athens, and according to Theophrastos (Stob. 44,22), in Thurioi.

Pringsheim refers to the fact that the term (**didonai arrabona**), relating to giving the **arrha**, is uniform in the sources being at our disposal. This term (**dare arrabonem**) was used by Aristotle, Theophrastos, Isaeus, Harpokration, Plautus, Varro, the classical Roman **iurisconsulti** and Justinian and, similarly, this technical term took place on the Ptolemaic papyri and on those of the Romanized Egypt, as well as in the New Testament. This fact is the proof of the uniform practice in connection with the **arrha**.

In no document, available to us, is to be found any reference to that this institution was expressly formed in the sphere of the maritime commerce. And even, the sources including the Roman ones, too (in this relation, it is uninteresting to us, whether the comedies of Plautus were connected with the system of concepts of the Greek or Roman law)[383] seem to indicate that the **arrha** obtained a role in other sectors of the economic life. It is very probable, nevertheless, that the function of assuring the obligation developed in the sphere of the connections of **maritime** commerce. This supposition is supported by the fact that the matter in question is here an institution which was current in the whole area of the basin of the Mediterranean. Taking into consideration only the Greek territories. It was in Athens known in the same way as in Thurioi in South Italy. And this excludes almost every doubt in respect of that this is only possible by the mediation of very intensive maritime commercial connections. A further support of this supposition is - in our opinion - that the **arrha** is extremely suitable to ensure certain commercial transactions on a large scale and containing credit-connections which very often occur just in the field of the maritime commerce (we think primarily of corn trade).

In respect of the Semitic origin of **arrha**, there is no source at our disposal, which would contain any direct information. In connection with the expression **erabon**, taking place in the Old Testament (Gen. 38,17), it is questionable whether it meant a **depositum** (i.e. a sum) paid as security for the performance of a contract and which may be forfeited if the contract is not completed, or it means the thing pledged. In Pringsheim's opinion a ring handed over is **arrha**.[384] On the other hand, Wolff interprets this word as a pledge.[385] In addition to the place of source mentioned - in connection with which some difficulties of interpretation arise - there is no cuneiform script at all on the basis from which we could conclude the Semitic origin of **arrha**.[386] In this way, it is not accidental that Boeckert[387] and Rabinowitz[388] do not at all deal, even reference-like, with the problem of **arrha**, in their works comparing the institutions of the Hebrew law with the other ancient (and from time to time modern) law of the peoples of the Mediterranean world. This problem of documenting in connection with the Semitic law can, however, not be an argument for the statement that **arrha** was an institution not so much wide-spread (Finley's thesis)[389] as it is generally supposed.

The maritime loan (**fenus nauticum, pecunia traiectitia**) is unambiguously an institution, developed in the sphere of the maritime commerce. According to the **communis opinio**, the maritime loan is doubtless exclusively of Hellenic origin.[390] It is a particular trait of the **daneion nautikon** that its conceptual signs can exactly be reconstructed on Attic sources (**Corpus Demosthenicum**). Paoli refers to that the **daneion nautikon** is known not only in Athens but it is a prospering institution of every Mediterranean **polis** participating in the maritime commerce.[391]

According to Paoli, the source of the regulation in connection with the maritime commerce is the scope of commercial customs, even if we speak in certain cases about measures on the level of **leges ("Fonte di questo diritto, anche se in alcuni luoghi consacrato dalla legge, è la consuetudine commerciale...")**.[392]

For a higher interest, the lender - who generally gives the loan to the buyer of wares - bears the risk of the perils of the sea. Pringsheim traces back the basis of bearing the damages by the lender to the idea of surrogation (**Surrogationsgedanke**).[393] In the sense of the idea of surrogation, the borrower is not obliged to repay the loan in case of loosing the wares bought by the sum of the loan because the liability is restricted exclusively to the wares, taking the place of the borrowed money. Pringsheim's thesis relies, in our opinion, on Matthias's supposition, though this is not formulated by him **expressis verbis**. This author, dealing with the maritime loan not so much in legal but rather in historical relations, writes in the scope of the wares bought by the sum of the loan (**"merces comparatae"**) about replacing the money ("**nummus**").[394] In respect of the result, this standpoint is accepted by Biscardi,[395] as well. The latter one, criticising first of all De Martino,[396] and analyzing the regulation of the maritime loan, known in Roman law, writes that the **merces ex ea pecunia comparatae** (i.e. **pecunia traiectitia**) are also objects of this loan transaction. It is very probable that the maritime loan, known in Rome already at the beginning of the first century B.C.[397] - in respect of the actual practice relating to the loan transactions of a type like this - documented only in a very slight degree.

As to the Roman practice of the **pecunia traiectitia**, we have only a place of source, ascribed to Q. Cervidius Scaevola (taken from bk. 28 of his Digest (D. 45,122,1), originating from the second century A.D., if we don't count P. Vindob. G. 19,972, published by Biscardi.[398] The exact interpretation of the source, containing information relating to the loan transaction, concluded be-

tween Callimachus, in the position of debtor, and the slave Stichus, as creditor, being fixed in writing, as well (**cautio**), is made difficult to a high degree by the several inaccuracies resp. **interpolationes**.[399] The transaction, concluded by the nautical entrepreneur, Callimachos, and the slave of a Roman **argentarius**, reflects very probably a Hellenic practice,[400] though the transaction was managed by a Roman **iurisconsultus**. This supposition is supported by the fact, as well, that the **responsum** comprehends both loan constructions, relating to the out-and-home voyages (**amphoteroploun daneion**) and those relating only to one of the two voyages (**heteroploun daneion**).

In our opinion, Cervidius Scaevola's fragment is a document - even if it cannot be considered as a proof of decisive force - of the fundamentally uniform practice of the legal regulation, relating to giving maritime loans in the Mediterranean area. This is not changed by the fact, either, that the construction **pretium periculi**, which is doubtlessly the main characteristic of the **daneion nautikon**, did possibly not got an unambiguously decisive significance (this much debated thesis originates from De Martino)[401] in the sphere of the **pecunia traiecticia**. In case of the institution of the maritime loan, it seems to be particularly justified, not to separate rigidly from one another the legal institutions of the Greek and Roman peoples.[402] We may speak, therefore, in case of this institution rightly - apart from casuistry - about the common category of the "Mediterranean law" of integrating character.

The **lex Rhodia**, **arrha**, and the maritime loan are undoubtedly an important evidence, quasi paradigms of the legal regulation of the ancient Mediterranean, in connection with the uniform maritime commerce or with that, striving to be uniform. In the sphere of Hellenic **poleis**, on the basis of these three institutions, the regulation is likewise uniform just as in the Mediterranean under the rule of Rome. In the scope of the maritime commerce, there are created, in this way, the conditions of a "supranational" commercial law, as **institutions** of law. The decisive obstacle of the creation of the ancient "supranational" commercial law was the structure of the **Imperium Romanum**, founded on the political supremacy of Rome. A further drawback of the formation of a "supranational" commercial law was that - as we shall later see - in the law of the ancient peoples did not develop any group of norms, separated according either to the occupation of the subjects of law (in this case: the persons being active in the commercial sphere) or to the role played by them in the social hierarchy. It can be traced back to these two causes that all the three institutions, accepted in the imperial law continue developing further in their own, particular, independent way and in their field the regulation, exerting its

effect in the direction of differentiation has the decisive part. This differentiating legal regulation, or more exactly that of **differentiating type** - which has, on the above-mentioned basis both political and social motives - is the cause of the fact that the classical or the post-classical Roman law regulates the **arrha**, the maritime loan and the **iacture mercium** in a different way from the Attic law of the days of Demosthenes. It is of course not possible, either, to leave out of consideration the "time factor" itself, which has influence on the function of the development - possibly of retrogression of the economic connections on the legal regulation of the institutions, connected with the maritime commerce. The cause of regulating in another way is, in addition to this, the fact of organic reception as well. In the case of the **lex Rhodia**, this organic reception means that the legal problems of the **iactura mercium** were settled on the basis of the construction of the especially Roman legal institution, the **locatio conductio operis** or the **locatio conductio rei.**

4. The problem of the "national" or - as formulated in another way - "internal" commercial law is connected in a very close form with the problem of the above-mentioned "supranational" commercial law. The decisive cause of this is to be looked for in the fact that the basis of the formation of the "national" **lex mercatoria** is also, in a very considerable part, the maritime commerce. With regard to this, in the scope of analyzing the autonomy of the "inner" commercial law, as well, we should pay a particular attention to the sphere of the maritime commerce.

The investigation of the institutions falling within the scope of the maritime commerce is considerably facilitated by the circumstance that in this field a high degree of stability is generally noticeable. Vélissaropoulos[403] refers to that in the domain of the maritime commerce the changes of political nature are of a very slight importance. Let us think here of the development from the classical **polis** until the Hellenistic monarchy. This is the sphere in which the **"unité du droit"** or, formulated in another way, the **"coincidences juridiques"** in the world of Hellenic **poleis** can particularly be observed.[404] Within the scope of the institutions of the maritime commerce, the traditions of the single **poleis** have but a little importance what undoubtedly follows from the conception of **"he koine thalassa"**, as well, in an ideological projection.

Schneider[405] considers this conception as having a very early origin. In his opinion, it can be traced back to this - among others - that e.g. in the mutual

relation of the member-States of the Corinthian federation the so-called **Seeräuberei** (piracy) was prohibited. In our opinion, bringing this concrete case into connection with the conception of **"he koine thalassa"**, he narrows down considerably the actual extent of it, the circle of its efficacity.

As compared with the other spheres of activity, the analysis of the uniform (or at least comparatively uniform) legal reflection is rendered more difficult by certain problems of terminological nature. Thus, particularly the interpretation of the **naukleros** which has a central role in the field of the maritime commerce and has really no modern equivalent, is questionable.

The interpretation of the technical term **naukleros** presupposes the clearing of the concept **emporion**. The **emporion** should not be considered simply as a commercial harbour or - in an anachronistic enough way - as a kind of an ancient Exchange.[406] It is another question, of course, that the word **emporion** means, in the decisive majority of cases, a seaside-town or a part of it.[407] A typical example of **emporion**[408] - used in the Latin language as **emporium** - was Narbonne (Diod. Sic. 5,38,5 and Strabon 4,181). According to Rougé,[409] emporion means the place of the commercial activity (**"la place du commerce"**) and not simply only the market. The French author defined the concept of **emporion** as follows: **"... le lieu où l'on apport la production d'une région économique assez vaste pour la vendre en vue de l'exportation et, où, inversement, arrivent les produits d'une exportation lointaine pour être vendus aux acheteurs régionaux."**[410] Rougé's definition - as referred to by Vélissaropoulos[411] - as a consequence of the development of **emporion** - manifested itself as too narrow. The **emporion** - as it can be concluded from Aristotle's work (Pol. 1327a), in several cases identifies itself with the **polis**.[412] In our opinion, as to the **emporion**, taken as a technical term, the definition, originating from Rougé, is decisive. This definition, approaching this concept from economic side, reveals its essential traits.

The **naukleros** belongs to the persons performing their activity in the sphere of the **emporion** and, therefore, named by Aristotle, with a common name, **emporikon** (Pol. 1291b).[413] At first the delimitation of **naukleros** from **emporos** arose. It seems, on the basis of the Athenian practice, that the boundary line between the two categories is the ownership of the ship (this being in the maritime commerce of decisive importance: apart in the maritime commerce of decisive importance: apart from the problems in connection with the ownership in the Greek law): according to this, the **naukleros** would be the owner of the ship, while the **emporos** would have a definite quantity of wares for selling at his disposal.[414] At this delimitation, the uncertainty of the concept means a problem. A sign of this is that, in some sources, the **emporos** is essentially a synonymous concept to the **phortegos**.[415]

The practice of **naukleria** may take place by the **naukleros** in several forms (ways). On the one hand, the **naukleros** can be the owner of the ship, on the other hand, he can be the charterer of the ship or simply the "employee" of the owner of the ship. He can also be - from the point of view of the maritime commercial activity - the freighter of his own wares, as well, and as an enterpreneur - the freighter of the wares of another proprietor.[416] In addition to this, a "mixed" construction is not excluded, either, when e.g. the **naukleros** - as the owner of the ship - ships both his own goods and those of somebody else (Dem. c. Dionosydoros 56,3 and 23).

It deserves attention that the **naukleros** can be a slave (**doulos**), as well. This supposition is supported by the case, documented in the **Ps.-Dem. 34 (c. Phormio)**. According to the facts of the case, contained in the oration, Lampis - as stated by Phormio - received 120 gold coins from Phormio. At this act, Lampis, the slave, proceeded entirely independently. His owner, Dion, did not give him earlier any instruction concerning the taking over the 120 gold coins. The fact that Lampis had really the status of a slave can be concluded from articles 5 and 10 of the **oratio**.[417] In art. 5 of the **oratio**, Lampis appears as the **oiketes** of Dion, and in art. 10 he appears as Dion's **pais**. According to Paoli,[418] art. 8 of the **oratio**, fixing the words of a person named Chrysippos, is of importance, as well. On the basis of this place of the source, the **pais**, appearing as the synonym of **doulos**, can also be active in the sphere of maritime commerce, and this part of the **oratio** is an indirect proof of the fact that Lampis was a **doulos**. The adherents of the opposite literary standpoint (in the second half of the last century Schäfer[419] and Blass,[420] and in our century Lipsius[421]) can essentially only to refer to the fact that slaves did not have in Athens so great independence. This conception, however,[422] reminds us, in my opinion, of the argumentation **petitio principii**.

The uncertainty in connection with the concept of **naukleros** can, in our opinion, be traced back to the commercial activity of very ramifying, complex nature. It can be explained with this complexity - in addition to the above-mentioned causes - that on the basis of the Egyptian papyri, mentioned above, more than one ship can have only a single **naukleros** (P. Oxy. XVII, 2125) and also one ship more than one **naukleros** (**synnaukleroi**) (P. Vindob. 19792).[423] The uncertainty in connection with the concept of the **naukleros** is also connected with the fact that, in the case of **naukleros**, the position of the owner is often pushed into the background by the recognition of the professional knowledge in connection with shipping by third persons - mandators.

Following the analysis of the concept of the **naukleros** and of the "ambivalence" connected with that concept, it is necessary to survey the category of **dike emporike** which is so important in the domain of the legal regulation of the maritime commercial connections of the Hellenic world.

The analysis of **dike emporike** is inseparable from investigating the much debated sphere of concepts of **nomoi emporikoi**. A number of investigators see in the **nomoi emporikoi** a kind of the ancient commercial lawbook, Code. Others, on the other hand, consider as unfounded the identification of the concept of the **nomoi emporikoi** with the ancient (Greek) legislation in the field of commercial law.

We can meet with the concept of **nomoi emporikoi** in the **Corpus Demosthenicum.** Demosthenes (c. Lacritos 35,3) uses the term **"kata tous emporikous nomous"** in connection with a transaction. Lipsius writes[424] in connection with the **nomoi emporikoi** - at any rate, referring exclusively to the above **oratio** - about **"umfassende attische Handelsgesetzgebung"**. Within the sphere of the **nomoi emporikoi**, the arrangement of the beginning of the **dikai emporikai**, regarded as "Handelsklagen", was entrusted to a statute, taken in the strict sense of the word (**"Das Gesetz, das in der Zeit dieser Reden, d.i. in der zweiten Hälfte des vierten Jahrhunderts, die Zuständigkeit der Handelsklagen regelte... liegt uns nur in den Zitaten der Redner vor..."**).[425] The concepts of the **nomoi emporikoi** is also interpreted as positive statutes also by Paoli[426] and Ziebarth.[427] Partsch who, approaching this category to the concept of the Alexandria **nomos politikos**, regards it as a "law of merchants", is of a similar opinion, as well.[428] Partsch - writing of a so-called **Kaufmannsrecht** and not of **Handelsrecht** - considers the "law of merchants" as a kind of "counterpair" of the **ius civile**. Other authors, on the other hand, - whose opinion is also supported by us - restrict the concept of the **nomoi emporikoi** to the sphere of regulating the legal problems connected with the maritime loan. Haselbroek limits this concept to the field of **"Bodmerei"**.[429] Gernet, however - similarly denying the character of some "commercial code" - emphasizes the decisive role of the **"intérêt public"** and of the law of procedure.[430]

The category of the **nomoi emporikoi** does not form any unified legislative work or Code. If we supposed a unified code, the features and the use of the **dike emporike** would obviously not be problematic. When determining the **dike emporike** a decisive role is due to art. 1 of the **oratio** in Ps. Demosthenes c. Zenothemis: **"Hoi nomoi keleousin... tas dikas einai tois nauklerois kai tois emporois ton Athenadze kai ton Athenethen symbolaion, kai peri hon an osi syngraphai."** (34,1)

Some authors, thus Beauchet,[431] Lipsius,[432] Paoli[433] and Wolff,[434] interpreting this place of sources, emphasize three important elements of the **dike emporike**: partly, one of the parties (possibly both parties) should be **naukleros** or **emporos**; partly, the basis of the legal dispute should be an agreement, the object of which is the transport of goods to Athens (or from Athens into a third **polis**; and finally - on the basis of the reference to **syngraphe** - the agreement should be set down in writing. From the negative side, it is worth mentioning that the transaction itself needn't have been concluded in Athens (in the Athenian **emporion**).

The opinion of Hitzig,[435] Partsch[436] and Gernet[437] is diametrically opposed to this view. On the basis of this latter conception, the transaction, serving for the object of the legal dispute, should necessarily be separated from the action, commenced on the basis of the **syngraphe**. In the first case, litigation is possible in every case where a **naukleros** or **emporos** concludes a "contract" with somebody in respect of a transport of wares from Athens to another **polis** or from another **polis** to Athens, independently of its form. In the second case, the **syngraphe** serves as basis of the **dike emporike**. In this case, the only condition is that one of the contracting parties should be a **naukleros** or an **emporos**. In the latter case, it is uninteresting whether the place of destination of the transfer of wares is or is not Athens.

The above-mentioned **oratio** is not the only source of our knowledge, relating to the **dikai emporikai**. The **dikai emporikai**, named by Lipsius[438] **"Handelsklagen"**, can also be investigated on the basis of the **oratio** contra Apatourios, the or.c. Phormion, the or. c. Lacritos and the or. c. Dionysodoros, survived erroneously under the name of Demosthenes. Among these, it is particularly worth mentioning the oratio c. Apatourios. In the sense of the first article of the **oratio ("tois men emporois kai tois nauklerois keleuei ho nomos einai tas dikas pros tous thesmothetas, ean ti adikontai en to emporio e enthende noi pleontes e heterothen deuro, kai tois adikousi desmon etaxe toupitimion heos an ektisosin ho ti an auton katagnosthe")** it is possible to enter an action before the **thesmothetes** if there was an **adikema** of **any** kind against the **naukleros** or the **emporos** in connection with a transport of goods to Athens, or from Athens into another **polis**. We can conclude the very wide content of the **dike emporike** from the **oratio c.** Phormion, as well **("tas dikas einai tas emporikas ton symbolaion ton Athenesi kai eis to Athenaion emporion, kai ou monon ton Athenesion, alla kai hos'an genetai heneka tou plou tou Athenadze")**. Independently of the possible interpolation,[439] on the basis of this place of source, the **dike emporike** can be commenced in any case where the place of the agreement, relating to the transport of goods, was Athens or the Athenian **emporion**.

It would follow from the delimitation of the **dike emporike**, mentioned in the first place, that the scope of the use of this **dike** is practically restricted only to maritime loans. The cause of this is to be looked for - according to the adherents of his view - in the fact that, in the days of Demosthenes, the **daneion nautikon** meant the only form of the maritime commerce which had a form more or less independent in legal projection. It should be explained with this that the maritime loan was alone fixed in a written form. It is not accidental, therefore, that Paoli analyzes the **oratio** c. Zenothemis in his paper dealing with the maritime loan.[440] The literary opinion, mentioned as second one, does not see any necessary connection between the **dike emporike** and the **daneion nautikon**. This fundamen-

tally follows from the fact that Hitzig, Partsch and Gernet do not at all adhere to concluding the transaction in written form (**syngraphe**). The adherents of this opinion do, of course, not deny, either, that the **dike emporike** begins very often in the scope of the transactions being in connection with maritime loans. It seems to be improbable in our opinion, as well, that in the scope of the **dikai emporikai** the **daneion nautikon** would serve for an exclusive impulse.

Last but not least, in the course of analyzing the mutual connection between the **dikai emporikai** and the **daneion nautikon**, the question arises whether the **dikai emporikai**, considered in literature almost uniformly as "commercial actions",[441] form an autonomous group of actions or the **generally** known actions serve actually for means of bringing a suit. On the basis of investigating the pseudo-Demosthenian texts, meaning the source of our knowledge connected with the **dikai emporikai**, we should conclude that a special action, either a **dike exoules**, or a **dike engyes** or a **dike blabes** serves for means of enforcing **all** the **dikai emporikai**.

In the case of the **oratio** c. Zenothemis, investigated at first, it is debated in literature, whether the tool of enforcing the **dike emporike** is **dike blabes** or **dike exoules**. According to Lipsius,[442] the action due to Zenothemis against Protos resp. Demon is the **dike blabes**. The basis of the **dike blabes** is the fact that Protos, as he gives Demon the possession of a corn consignment - which he considers as the property of Zenothemis - causes a damage to Zenothemis. The same is the standpoint of Meyer-Laurin, as well.[443] Wolff[444] and Harrison,[445] on the other hand, consider the action due to Zenothemis as **dike exoules**.

Taken as a function of analyzing the "inner" commercial law, it is not particularly important whether the **dike emporike**, playing a role in the **oratio** c. Zenothemis, is actually a **dike blabes** or a **dike exoules**. It is important for us in this case that none of the authors writes, in connection with the given context about a **sui generis dike emproike**. The **dike emporike**, referred to in the **oratio** contra Apatourios is, as to its contents, a **dike engyes**. And the basis of the action, commenced in connection with the **dike emporike** of the **oratio** c. Phormion, **oratio** c. Lacritos and, finally, **oratio** c. Dionysodoros is the **dike blabes**.

The importance of this circumstance is very great in respect of that the **dike emporike** cannot be interpreted as an action **sui generis in se**. On the other hand, we should not forget that in case of the **dikai emporikai** the personal circle is very heterogeneous. An Athenian **polites** can take part in the position of a plaintiff or a defendant in the same way as a **metoikos** or just a **xenos** can. But this fact is - in **our** opinion - quasi the

"essential" of the group of actions, falling within the sphere of this commercial activity and, therefore, we cannot attach to this fact any great importance.

There is in the scope of the maritime commerce also a problem to be analyzed, in which degree some specific traits, differing from the general rules, present themselves in the practice of contracts. In this scope, a particular attention is due to the institution of **misthoprasia** which reminds us - relying, **per analogiam**, upon the modern French commercial law - of one of the types of the charter contract, the **affrètement coque-nue.**

The charter contract and the contract relating to the maritime transport are in the practice - mainly in the French one - very often interwoven with each other.[446] The two categories of contracts are separated from each other by Loi No. 420 (passed on 18 June, 1966), serving for the basis of the revision of Bk. II of the Code of commerce, and by Decret No. 1078 (31 December). One of the sub-types, known within the charter contract, is the **affrètement au voyage.** The **affrètement coque-neu** - meaning the lease of a ship, having no suitable rigging - is very close to the lease-contract of the Code civil.

The **affrètement coque-nue** is a **sui generis** contract type of the modern French commercial Code (commercial law). It is questionable, in which degree the autonomy, motivated in principle by the maritime commercial activity, presents itself in case of **misthoprasia.** The question to be analyzed is, therefore, in another formulation, whether in case of **misthoprasia** the general rules, relating to contracts, get on or the signs of some kind of autonomy manifest themselves.

On the basis of **misthoprasia**, the owner of the ship put his ship at the disposal of the charterer for a very long time - 50-60 years. The charterer's legal position reminds us very much of the position of an owner. Pringsheim[447] writes, therefore, about the **misthoprasiai** that these may, in fact, be considered as "lease-sales of boats".

At establishing the rent, the contracting parties take into consideration the full period (50 to 60 years).[448] The rent (Pringsheim) should be paid in advance. Taking this into consideration, the rent contains the element of the purchase price. Pringsheim writes rightly: "Boats are in some respects treated like land."

The **misthoprasia** - as to its contents - is, therefore, to be regarded essentially as a sale. The contracting partners, however, do not consider as expedient to use the construction of sale. In the earlier literature (De Ruggiero),[449] the opinion prevailed, according to which this Hellenic

construction reflected the influence of Roman law. Since the rule of Claudius, namely, certain advantages were due to ship-owners who, just because of that, did not want to relinquish the ownership of their ships.

The papyrus, analyzed by De Ruggiero (P. Lon. III, 1164),[450] summarized in short, contains the following facts: Pbecis, the owner of the Greek ship (**ploion Hellenikon**), leased his ship to Harmirymius for 60 years. The ship-rent was one talent - to be paid at once - and 2000 **drachmai**, to be paid later. In the contract, documented by the papyrus, the terminology of the charter takes place (**memisthokenai, memisthoka, memisthomai, memisthomenos**, etc.). But Harmirymios, who was formally in the position of a charterer, became actually the owner. We may conclude this from the fact that, on the basis of the contract, the rights and licences originating from the proprietorship, were exercised by him (e.g. **kratein, kyrieuein, dioikein, epitelein, metamisthoun**, etc.). De Ruggiero tries to solve this contradiction of the **misthoprasia** by considering the transaction as a "fictive charter". Pbecis, the person to be considered as **navicularius** - who is very probably the member of a **corpus naviculariorum** - endeavours to retain the advantages, originating from the munus **naviculare**, by preserving **formally** the property of the ship.[451]

De Ruggiero's hypothesis, however - inasmuch as the Italian author traces back the **raison d'être** of the **misthoprasia** to the advantages in connection with the **munus naviculare** - lost its basis by the discovery of BGU 1157, originating from 10 B.C.[452]

BGU 1157 contains all in all four contracts, more exactly, four legal facts. The four transactions, taking the form of **synchoresis**, are in connection with the "selling" of a bark by Ammonios. In the first contract (we speak here of a transaction, concluded earlier, in 27-26 B.C., named **daneion** in the source) Ammonios handed over the bark for 1032 **drachmai** to three persons. The second contract, originating from the same time, was a promise by Ammonios to the **misthoprasia**, as soon as he gets the sum mentioned above (together with its interests). In this transaction, the fictive character of the loan is obvious. There is no word any more about the delivery of the bark or of the money. After 15 years, two of the three receivers pay 300 **drachmai** to Ammonios - this is fixed by the third transaction - who delivers one-third of the bark (on the basis of **misthoprasia**) to the third person who, otherwise, did not pay anything. The question is, why Ammonios delivers one-third of the bark just to the third person fulfilling nothing, on the basis of **misthoprasia**.[453] Nine months later - this is the matter of question in the fourth contract - the two partners, having performed earlier, as well, deliver Ammonios the 700 **drachmai** still outstanding. On this basis, Ammonios concludes with them a new **misthoprasia**-contract, relating to the two-thirds of the bark. Ammonios also undertakes to consider as null and void the loan-contract and the first **misthoprasia**.

The papyrus, containing a very complicated matter of fact, implies a loan transaction (Ammonios receives from the three contracting parties a promissory note, due on the basis of a **daneion**-contract, relating to the delivery of 1032 **drachmai**, two **misthoprasiai** which can be considered - with

a modern term - as a preliminary agreement (being payable as depending on the fact whether Ammonios received the 1032 **drachmai**), and it contains also two **misthoprasiai** (in the first case, relating to one-third of the bark, in the second case, relating to two-thirds of it). At any rate, in this short summary, we cannot touch upon all the debated questions.

The **misthoprasia**, containing a sale - where the concrete transaction can take even the form of **daneion**, i.e. even the construction of the charter is not effective necessarily, - cannot be considered, as a consequence of its dogmatic uncleanness, as a **sui generis** institution of the commercial law. The **misthoprasia** is only a sign of the particularities of the commercial practice. Partly, we should agree with De Ruggiero - who investigates in detail the P. Lon. III,1164 - that the activity of the **navicularius** should be considered more and more as **munus publicum**, partly, the commercial activity is performed not necessarily by the **navicularius**. The fact that the theory of the so-called disposition tending to an aim(**Zweckverfügung**), connected with the name of Wolff, or Herrmann's so-called authorization to disposition (**Verfügungsermächtigung**), considered as one of the variants of the former one, are in a close connection with the construction of the **misthoprasia**:[454] only confirms our standpoint relating to the denial of the transaction-character of the **misthoprasia**, as a **par excellence** institution of the commercial law.

At analyzing the "inner" commercial law, it seems to be expedient to survey in short the bank-system, banking transactions, being in a close connection both with the maritime and terrestrial commercial activities. The golden age of the banking activity, based on the money circulation, taking a more and more prominent part, was in the **Imperium Romanum** - according to the view prevailing in historiography[455] - presumably in the 2nd and 1st centuries B.C. In Greece, however, the signs of banking activity appeared already centuries earlier.

The authors of the works of the 19th century, dealing with the banks of the ancient **Hellas**, treated the question of banks relying almost exclusively on the **sedes materiae**, mediated by the Attic **oratores**.[456] The investigators of the first decades of our century are those who extended their analyzations to the papyrus material and to epigraphic sources. Hasebroek[457] analyzes the Hellenic banking activity in the classical age, and Preisigke[458] the endorsement-transactions in the Hellenistic Egypt.

Bogaert[459] refers to the fact that the Greeks used exclusively one word for the concept of the bank, namely the word **trapedza**. This technical term originally meant the table of exchangers and later, as the exchangers became bankers, it took up the meaning "bank". The **trapedza** was mentioned by the Attic **rhetors** (Andicides 1,130, Isocrates 17,2, and Lysias 9,5) in the sense of "bank". It shows the differentiation of the banking activity that the word **trapedza** - making a composed word with the adjective connected with it - equally comprehends the banks of private persons (**trapedza argyramoibike**), the banks maintained by the **polis** (**trapedza demosia**) and the banks connected with certain temples (**he tou theou trapedza**).[460] The term **trapedzites**, referring originally only to the exchanger, was already at the beginning of the 4th century B.C. a concept referring to the banker, as well.[461] There fall within the scope of the terminology, connected with banking activity, the expressions, as well, referring to the performance of the single banking activities. The words **diagraphein, paragraphein** and **synistanai** - though their exact meaning is debated in literature - indicate different types of a particular banking activity. Thus the word **diagraphein** is - in Hasebroek's opinion[462] - very probably the technical term referring to the book-keeping of the sums of money, taken over by the banker. The word **paragraphein** means the delivery certificate.[463] The word **synistanai** is an expression being in connection with banking transactions, as well. In respect of its general meaning, the **synistanai** as "presentation"[464] only has such a role in the scope of banking transactions that partly the debtor may present the other person, performing instead of him, partly - in case of his absence - the substituting person can also be presented to the banker who is obliged to pay.

On the basis of a short analysis of a terminology, illustrated on the basis of a few examples and connected with the banking activity, we can come to the conclusion that there is no question **in ultima analysi**, of a crystallized technical term, connected exclusively with banking activity, what is proved, in a particularly expressive form (at least in the scope of the above-cited **sedes materiae**) by the word **synistanai**, having especially several meanings.

At analyzing the Hellenic banking activity (and, we should add to this, generally: that of the ancient world) it gives a serious problem to know, what the exact meaning of the concept "bank" be. It seems to be paradoxical (nevertheless it is true) that certain concrete forms of the banking activity, which are bound to money circulation and, therefore, of especially international character: are con-

siderably different in the various modern States. It can be attributed to this decisively that the definition of the general concept of the bank is not yet solved. In connection with the banking activity, observed in the ancient States, it has[465] been a standing problem that the authors - as it was referred to by Bogaert - do not differentiate between the "capitalists", disposing only of their own capital and the foreign bankers, turning not only their own money. The **differentia specifica** means, in this sense, that the banker disposes not exclusively of his own money. It may be explained with this that the bank, as an institution, is in the sphere of **origo**, in a close connection with the deposit, to the importance of[466] what the attention was called in the Hellenistic legal life. In literature, it[467] is a **communis opinio** that the Greek temples undertook already in the 6th century B.C. the custody of money and precious things. This was, therefore, the earliest[468] known form of the banking activity. In this connection, we have to refer to[469] that several authors (thus Boyer, Cuq,[470] Kohler-Peiser,[471] Kohler-Ungnad[472] and Petschow[473] wrote, with attention exactly to the financial activity of temples, already in connection with investigating the cuneiform sources, about the banking activity. According to Bogaert,[474] however, this supposition is anachronistic, because it bases on the undifferentiatedness of the concepts of the words "capitalist" and "banker". Bogaert's opinion is supported by the fact that in Mesopotamia the terminology, connected with the banking activity was not yet formed, even in its embryo. About the cause of this he writes summarily, as follows: **"La banque y** (namely in Mesopotamia, G.H.) **est restée une activité secondaire de capitalistes privés, publics ou sacrés et ceci explique pourquoi l'opération qui est l'essence même de la banque de dépôt, prêter l'argent des dépôts, n'y a pas vu le jour."**[475]

The fact that the system of concepts, connected with the banking activity, has no exact boundaries is, in our view, in connection with the thin caesura between the banker and the exchanger.

The earliest literary source, mentioning the exchanger, is the **Agamemnon** of Aeschylos where (473 f.) the word **chrysamoibos** first occurs. The word "exchanger of gold" which is only very rarely to be found in Greek sources, was replaced by[476] the word **argyramoibos** (Plato, **Pol.** 289e).

Bogaert sees in the process of the turning of the exchanger into a banker three degrees of development.[477] The first phase is where the debtor first hand over the money to the **trapedzites** who passes it to the creditor. Thus, the exchanger partly performs the role of the witness, partly he guarantees that the money given to the creditor is not falsified. The following phase is that the debtor gives the **trapedzites** more money for the aims of a future transaction. The latter becomes, in this way, a depositee. In the third phase, the **trapedzites** already takes over some money or articles of value from more than one depositor and, being improbable that each of the parties will liquidate the deposit at the same time, he can dispose of the money deposited to him. This third phase leads to the beginning of the so-called commercial bank which type of banks came into general

use in the most **poleis** of **Hellas** in the 4th century B.C. This hypothesis, however, which is probable in our opinion, as well, cannot serve alone as a basis for an "inner" commercial law, having some kind of autonomy. Quite the contrary, the line of development, outlined by Bogaert, even emphasizes more - referring to the roots of the banking activity - in which degree this depends upon money exchange, which hasn't even the minimum of autonomy in respect of legal reflection.[478]

5. The question of the autonomous character of the "inner" commercial law can be raised in the scope of analyzing the sources of Roman law, as well. In this field, the **actio exercitoria** and the **actio institoria**, named by Valiño[479] **"actiones mercantiles"**, can be regarded as particularly remarkable. De Martino[480] regards in his work, dealing with the economic history of Rome, the introduction of the two **actiones** mentioned as an explicit sign ("segno espressivo") of the development of commercial activity.

> The following establishment of De Martino refers both to the **actio exercitoria** and to the **actio institoria**: **"Il fatto che si riconosca la necessità di disciplinare i negozi giuridici contratti da terzi con persone preposte ad una determinata impresa prova chiaramente che ormai il commerzio ara uscito dalla sua fase elementare e che aveva avuto inizio l'estensione dell'impresa oltre i limiti ristretti della famiglia."**[481] Then, characterizing the **institor**, he writes: **"L'institor indica che si era passato dall'economia domestica ad un' economia mercantile".**

The beginning of the two **actiones** falling within the scope of **actiones adiectitiae qualitatis** is connected with the fact that the commercial relations, developing particularly following the end of the second Punic War, require, very probably, the widening of the legal possibility of making transactions at first be the shipping entrepreneur (**exercitor navis**) then by the interpreneur being active on land.[482] The approach from the side of demands, made by the developing commercial connections, is decisive in my opinion, at determining the chronological connections of the **actio institoria**.

> It may be attributed to chance that the **actio institoria** is mentioned by the sources earlier than the **actio exercitoria**. The mentioning of **actio institoria** could already be found in Servius (D. 14,3,5,1 - Servius-Ulpianus), while the **actio exercitoria** is mentioned at first by Servius' pupil, Ofilius (D. 14,1,1,9 - Ofilius-Ulpianus).[483] It is worth mentioning and can be adduced **per analogiam** as an argument of general nature in the question of priority that the institutions, developed in the sphere of the maritime commerce are taken over by the "terrestrial" legal practice only later. Goldschmidt[484] refers to that the **Wechselbrief** (**cambio traiettizio terrestre**) goes back to the **Seedarlehensbrief**

(**cambio traiettizio marittimo**). The opinion of the majority, formed in literature, is reflected by De Martino's following statement concerning the connection of the two actions: **"L'azione institutoria fu introdotta nello stesso periodo di dell'actio exercitoria, forse dopo che questa era stata già riconosciuta nell'editto del pretore, estendendo ai raporti del commercio per terra gli stessi principi di quelli applicati al commercio per mare."**[485] The priority of the **actio exercitoria** refers to the "law-making" force of the particular field of the economic activity, of the maritime commercial relations. The terrestrial commercial relations **in se**, serving for basis of the **actio institutoria**, even if they go on an untrodden way, are not able to create the legal possibility of obliging **in solido** the undertaking **institor** of free status owing to his transaction. The utilitarian point of view of the security of traffic, motivated by the **necessitas contrahendi**, has obviously a very considerable role in the case of both **actiones**.[486]

The further ways of development of the two actions of "commercial nature", taking place within the scope of **actiones adiectitiae qualitatis** separate from each other. To this separation - the cause of which is decisively the fact that the **actio institoria** lost more and more its commercial character - is to be attributed the role of this **actio**, played consistently even in the theory of direct representation.[487] Because of this separation, we cannot speak about any autonomy. The two constructions are - at any rate - in accordance with the general rules. This is shown by the fact that on the basis of the transactions of the **magister navis** or of the **institor**, they are directly actionable by the third person, provided, of course, that this is made possible by their legal status. It is, of course, another question that the third person commences the action, upon economic consideration, directly against the **dominus negotii**. Wunner[488] and Valiño[489] refer rightly to that, taking this into consideration, the emphasis on the accessory character of the two **actiones** may be misleading, having the appearance as if those had only a strongly secondary role, taking place behind some "basic action".

In Rome, the banking activity - the traces of which go back, on the basis of Livy (7,21,5) till the middle of the 4th century B.C.[490] - plays an important part. It is a particular trait of the Roman banking activity that it was under a very strong Hellenic influence, having obvious terminological connections, too. Livy named the members of the 5-member committee, organized for arranging the financial crisis, presenting itself in 352 B.C., **mensarii**, which is the verbatim adequate term to the Greek word **trapedzitai**. The **taberna argentaria** is known in Rome documentedly beginning from 310 B.C. (Livy 9,40,16). The banking activity was, at any rate, a branch of profession, exercised in a wide circle - according to Tenney Frank - already before that date, as well.[491] The activity of bank-banker

lead to the formation of several Roman legal institutions, or more exactly of those, known in Roman law, as well (thus, the literal contract, the **constitutum debiti**, and the **receptum argentarii**.[492] It refers to the "organic" Roman reception of the banking activity - as Tenney Frank[493] and Rostovtzeff[494] called the attention to this in their works, analyzing the life in the provinces of the **Imperium Romanum** from the point of view of the economic history - showing that in the Western parts of the Empire the activity of Roman **argentarii** and **nummularii** is documented.

On the basis of the Roman banking activity, the practical side of which is known only a little - we may conclude, as well, that it can serve for the basis of the autonomous "inner" commercial law just as slightly as the above analyzed banking activity of the Hellenic **poleis**. The fact itself that an institution was connected in the sphere of **origo** unquestionably just with the banking activity, does not result in the autonomy of the "inner" commercial law, mediated or, more exactly, influenced by the banking activity.

6. In the problem of the autonomy of the "inner" commercial law, an important role is played by the circumstance that both in the Hellenic **poleis** and in Rome maritime commerce (even if it has a considerable role in economic life) keeps lagging much behind the institutions of family or just of property in the field of legal reflection. In addition, the cultic unity of the **polis**, built on clannish bases (Wolff writes[495] of **"Exklusivität jeder einzelnen Kultgemeinschaft"**) is worth of attention; this is connected with the tendentious self-assertion of the indifferentiate nature of the law.[496] In terms of politics, the indifferentiatedness, manifesting itself in the scope of "inner" commercial law as well, may be attributed to the fact that - as written by Gernet in connectionn with Athens[497] - no **"classe commerçante"** was formed which could have played a considerable role in the life of the State. This is not inconsistent with the fact that in Rome's political life the **ordo equester** played a growing role;[498] this particularly applies to the time following the second Punic War. The **equites** are, namely, on the one hand, not necessarily interested in the commercial sphere, on the other hand, they differ fundamentally from the strata of **negotiatores** and **mercatores**, being in connection directly, too, with commerce.

The fact that the "stratum of merchants" got no particular part in the political life of the Hellenic **poleis** and in Rome, is to be attributed last but not least to ethnical fundamentals. As to the world of Greek **poleis**,

the activity of associations (societies), including persons on the territory of Delos belonging exclusively to foreign ethnical groups who were active in the domain of commerce (primarily maritime commerce) (**emporoi, naukleroi, egdocheis**), is of paradigmatic importance.[499] In respect of Rome, Goldschmidt[500] is of the opinion that there, in the archaic age, the circulation of commodities was decisively mediated, by those, belonging to non-Latin ethnical groups (Phoenicians, Etruscans, Hellenes). In the age of the **Imperium Romanum**, as well, a very considerable number of **negotiatores**, being active in the Eastern half of the Empire - as it may be concluded from epigraphs - were not of Roman origin but originated from the Greek **poleis** of the Southern part of Italy.[501] In addition to the ethnical group of **negotiatores**, the fact that commercial law did not become autonomous was undoubtedly brought about also by the fact that the social evaluation of the persons, dealing with commercial activity **in praxi**, is unfavourable. This unfavourable social evaluation has two sources: on the one hand, in the large majority of those who are active in the sphere of commerce, the concrete activity fell within the scope of **banausoi technai**, mentioned already by Aristotle (Pol. 1277b);[502] on the other hand - as already referred to above in connection with the **naukleros, emporos**, as well as the **institor** and **magister navis** - the considerable number of **negotiatores** were **servi** or **libertini**.[503]

In sum, we may say that - in contrast to the **lex mercatoria**[504] which was a relatively autonomous part of th legal system - in the law of Greek **poleis** and in Roman law, the norm-groups formed according to the determined types of economic activity (in the given case: commerce), are not separate entities. The reason for this is not the absence of a regulation of autonomous character in each field.Taking here into consideration modern law, it is enough to refer to the fact that e.g. also the German **Handelsgesetzbuch** does not regulate banking activity which does not at all mean the contestation of the importance or even the reason for the existence of the whole of commercial law. The reason is rather that the social precondition for "personal particularism" is missing.

NOTES

1 **Zweigert** (1966), pp. 333 ff. Zweigert does not omit to mention that in certain fields we can observe some interaction in the scope of national legal traditions. The task is in no way to construct a "world law" but rather to perform the unification of law in certain fields - thus particularly in the sphere of commerce.

2 Cf. Kötz, p. 481. The unification of law is characterized by Kötz as **"ein Geschäft von fragmentarischem Charakter"**.

3 **Bonell** (1978), pp. 413 ff.

4 **Braudel** (1949), p. 11.

5 Cf. **Wieacker** (1979) p. 8. Wieacker drafts, taking into consideration the comprehensive works of Tenney Frank, Rostovtzeff, Heichelheim and Finley, dealing with economy.

6 In this respect, we may consider Newman's opinion as characteristic. His view is valid also for the law of other ancient Mediterranean peoples: "In primitive societies law is the Divine will, demonstrated by divination and auspices." Cf. **Newman** (1973), p. 327.

7 **Ellul** (1962), p. 36.

8 **Pekary** (1976), p. 100.

9 **Pekary** (1976), pp. 1 ff.

10 **Finley** (1980), pp. 7 ff.

11 **Bücher** (1893).

12 **Weber** (1891).

13 The work, written in 1897, was published in: **Weber** (1924).

14 **Meyer** (1910), pp. 79 ff, and pp. 169 ff.

15 **Bichler** (1968), p. 32.

16 **Pöhlmann** (1912). It is to be noted that the title of the first edition of the work in two volumes is: "Geschichte des antiken Kommunismus und Sozialismus" (Vol. I was published in 1893, Vol. II in 1901). As to the evaluation of Pöhlmann's life-work cf. **Brockmeyer** (1979), p. 27.

17 **Lukács** (1923), pp. 66 ff.

18 **Schulz** (1934), pp. 13 ff.

19 **Wieacker** (1961), p. 143.

20 **Mitteis** (1989), p. 199.

21 Windscheid's legal conception is particularly characterized by this idolating outlook. The document of Windscheid's legal conception which reminds us to Kelsen's **"Reine Rechtslehre"** is his inaugural lecture as university rector in 1884, about the tasks of jurisprudence. Cf. Windscheid (1904), pp. 100 ff.

22 **Kaser** (1972), p. 52.

23 **Rougé** (1966), pp. 13 ff.

24 **Andreae** (1959) pp. 178 ff.

25 As to Aristotle's conceptions, ideas in connection with economics, summarily cf. **Gelesnoff** (1923), pp. 28 ff.

26 **Sinko** (1904), pp. 531 ff.

27 Expositio 58.

28 As to the importance of the **expositio**, summarily cf. **Rougé** (1966), pp. 485-487.

29 **Nörr** (1977), pp. 310 ff.

30 In the ancient world, Tacitus is not alone with this opinion. It is worth mentioning that Poseidonios (cf. Sen. **Ep**, pp. 90,4 ff) also dislikes the legislation.

31 **Pekary** (1976), p. 98.

32 **Rostovtzeff** (1957), p. 171.

33 **Rostovtzeff** (1957), p. 171. As to the beginnings of the **collegium mercatorum** or **collegium Mercurialium**, cf. **Waltzing** (1970), pp. 35, 41, 74, 82, 101, and 203.

34 Plut. Cato, 21, 6-8. Cf. **Honsell** (1976), pp. 115 ff. Cf. as well, with **Heichelheim** (1969) II, pp. 502 ff. **Heichelheim** (1970), pp. 77 and 84.

35 **Rougé** (1966), pp. 456 ff.

36 Cf. with the survey of the secondary literature by **Heichelheim** (1969), Vol. III, p. 1150.

37 Cf. summarily **Herlitzka** (1963), pp. 116 ff, and **Pohl** (1979),pp. 206 ff.

38 Cf. the survey of literature in **Brunn** (1958), pp. 47 ff.

39 Captivi 3,1,32 ff. This Plautus-comedy is, in our opinion, not of decisive importance in respect of the Roman cartel-prohibition because it probably reflects the Hellenic practice.

40 This work of Ulpian can be reckoned among the so-called **"Handbücher für den Dienstgebrauch"** (Kaser) which mostly originate from the days of the Severi. The works made about the extent of the scope of the duties of the "statesmen" in higher offices were, in that age, frequent. Cf. Kaser (1967), pp. 184 and 196. In connection with Ulpian's official career cf. **Kunkel** (1952), pp. 245 ff.

41 **Rotondi** (1962), p. 448. Cf. as well, **Carnazza-Rametta** (1972), pp. 192 ff, and **Ferrini** (1902), p. 411.

42 **Kunkel** (1967), p. 246.

43 This source is treated, in regard of criminal law by Visconti. Cf. **Visconti** (1932), pp. 7 ff.

44 This is corresponding to about 2000 **sestertius**. Cf. **Mommsen** (1887), p. 852, n. 7. Mommsen assumed, otherwise, the point of view that the **lex Julia de annona** had still originated from the days of Caesar. Cf. **Mommsen** (1887), pp. 853 ff.

45 **Vélissaropoulos** (1980), pp. 137 ff.

46 **Rougé** (1966), pp. 466 ff.

47 **Rougé** (1966), pp. 466 ff.

48 The term found in the text **"... inter liceum..."** leads ut to conclude **"licitatio"**. **Heumann-Seckel** (1958), pp. 316 ff.

49 **Mommsen** (1887), p. 851.

50 **Hamza** (1982), p. 156.

51 This source is analyzed in connection with sanctions by Visconti. Cf. **Visconti** (1932), pp. 10 ff.

52 The origin of the word is likely to be in connection with the famous corn-merchant, named Dardanarius. Relating to **dardanariatus** cf. **Hitzig**'s (1901), p. 2154 and **Luden**'s (1844), pp. 221-227. Cf. also: **Visconti** (1982), pp. 5 ff.

53 As to the criminal investigation, falling within this category, cf. **Mommsen** (1955), p. 862. From the old literature cf. **Rein** (1844), p. 829.

54 **Rein** (1844), p. 788.

55 As to the social relations of the **constitutio** - taking into consideration the differences between **humiliores - honestiores** cf. **Visconti** (1932), pp. 25 ff.

56 Cf. with the text taking place in the Sherman Act 1,7, passed in 1890.

57 As to the Austrian development of law, cf. **Mayer - Maly** (1973), p. 147.

58 **Mayer-Maly** (1973), pp. 140 ff.

59 **Kleinwächter** (1883), p. 143. As to the evaluation of Kleinwächter's activity, cf. **Grossfeld** (1979), p. 259 and **Pohl** (1979), pp. 206 ff.

60 In Kleinwächter's opinion, the cartels are suitable to clarify the chaotic economic situation; they are able to reconcile the production and demand, and perform essentially the function of the mediaeval guilds. Cf. **Kleinwächter** (1883), p. VI.

61 **Rinck** (1978), pp. 476 ff.

62 The connection between Rome and Rhodes is analyzed in detail by Schmitt. Cf. **Schmitt** (1957), pp. 1 ff.

63 Cf. Diod. 18,8,1.

64 Cf. Polyb. 30,5,6-8.

65 Droysen is the first one who, on the basis of Polybios supposes that between Rome and Rhodes commercial conclusion was concluded in 306 B.C. Cf. **Droysen** (1878) vol.II, p. 154, n. 2. In literature, this supposition passed for **communis opinio** until the publication of Holleaux's papers. As to the rich secondary literature, cf. summarily: **Schmitt** (1957), pp. 3-5.

66 The opinion, connected with Holleaux's name, will shortly be in the literature of the 1930s - **consensus universorum.** Some authors of importance, like Beloch and Täubler, attach themselves already on the basis of Holleaux's paper, published in 1902, to the views of the French author. Cf. **Holleaux** (1902), pp. 183 ff; **Holleaux** (1921), pp. 30 ff; **Beloch** (1904) III, 1, p. 229, n. 2; and **Täubler** (1913), pp. 204 ff.

67 It is to be mentioned here that Rhodes, owing to "its integration" into the Roman Empire, obtained considerable positions in cultural relations. This is proved, among others, by the settling down of Poseidonios, the pupil of Panaitios, in Rhodes. Cf. Cic. De orat. 1,17,75; 2,1,3. Cf. **Schmitt** (1957), p. 180.

68 **Burr** (1932), pp. 1 ff, and **Rougé** (1966), pp. 41 ff.

69 **Burr** (1932), pp. 51 ff.

70 We may conclude from literary sources that the **mare Adriaticum** extended - already since the coming into existence of the **Imperium Romanum** - over the middle part of the Mediterranean, as well. Cf. Acta Apost. 27 ff. Contrarily cf. **Besnier** (1976), pp. 12 ff.

71 **Rougé** (1966), p. 45.

72 Verg. Aen. 6, 851.

73 Ovid. Fasti 2, 683.

74 As to its meaning in the age of Principate of the **Imperium Romanum**, cf. **Fabbrini** (1974), pp. 304 ff.

75 Cf. in the recent literature: **Besnier** (1976), p. 33.

76 **Maskin** (1951), pp. 152 ff.

77 Cf. **Besnier** (1976), pp. 152 ff. According to Besnier, Rome ceases to be **"une fédération**

**de cités"** in this period. In our opinion, Besnier attributes too great role to the Roman "imperialism" and, therefore, does not follow with attention the particularities of conquest. The forced application of formal signs - like the formulation **"entre vainqueurs et vaincus il n'y a pas de foedus aequum"** - makes the process of bringing the Mediterranean world under de influence of Rome a stereotyped cliché.

78 **Rostovtzeff** (1957), pp. 130 ff.

79 In the given case it is a question of secondary importance, to which extent Aelius Aristides relies on the works of Hellenic rhetors and historians.

80 De Martino writes that Aelius Aristides - as generally the Greek thinkers of the age of the Antonines - praises the connections with Rome and the integration realized. Cf. **De Martino** (1979) I, p. 439.

81 Rostovtzeff strongly overrates the part of commerce in economic life: the historian regards namely commerce as the main source of "economy". Cf. **Rostovtzeff** (1957), pp. 150 ff. Cf. also: **Pekary** (1976), p. 100.

82 Summarily: **Rostovtzeff** (1957), pp. 150 ff.

83 **Heichelheim** (1969), Vol. II, pp. 458 ff.

84 **Heichelheim** (1969), Vol. II, pp. 460 ff.

85 **Heichelheim** (1969), Vol. II. p. 463.

86 **Heichelheim** (1969), Vol. II, pp. 890 ff.

87 **Heichelheim** (1969), Vol. II, p. 492.

88 **Heichelheim** (1969), Vol. II, pp. 491 f.

89 **Heichelheim** (1969), Vol. II, p. 691.

90 **Heichelheim** (1969), Vol. II, p. 691.

91 **Schneider** (1969), II, p. 515.

92 **Schneider** (1969) II, p. 517.

93 As to the "international" conventions of the Hellenic world, cf. summarily: **Bender** (1901); **Bengtson** (1962-1969) vols. II-III; **Dahlheim** (1968); **Calabi** (1953);and **Täubler** (1913), Vol.I.

94 **Alföldy** (1975), p. 8.

95 **Frezza** (1939), Vol. II, pp. 185 ff.

96 **Pastori** (1961), pp. 47 ff.

97 Cf. summarily: **Bengtson** (1962), Vol. II, pp. 16 ff.

98 **Petzold** (1975), pp. 364 ff.

99 **Hampl** (1975), p. 422.

100 Certain historians - e.g. in the recent literature Petzold, Alföldy, and Aymard - put the date of the conclusion of the first Roman-Carthaginian Convention to the 4th century B.C. According to Petzold, the earliest such convention originated from 348 B.C. Cf. **Petzold** (1975), p. 410.

101 On the basis that the **keryx** and the **grammateus** - who are state "functionaries" - are mentioned, Ferenczy is of the opinion that the convention does fundamentally not relate to **commercium** owing to the state supervision. Cf. **Ferenczy** (1969), pp. 275 ff.

102 **Bengtson** (1969), Vol. II, p. 19.

103 **Ferenczy** (1969), p. 272.

104 Cf. Bengtson (1962), Vol. II, pp. 308 ff. Taking this into account,

Rougé writes that both conventions are essentially in connection with the subject-matter of shipwreck. Cf. **Rougé** (1966), p. 460.

105 **Hoffmann** (1975), p. 352.

106 **Ferenczy** (1969), p. 281.

107 **Bengtson** (1969), Vol. III, pp. 54 ff. We mention here that Polybios ignores ( 3,26,3) the third Roman-Carthaginian convention.

108 **Bengtson** (1969), Vol. III, pp. 102 ff.

109 The literature, connected with the François-grave in Vulci, is very extensive. Cf. **Alföldi** (1965), pp. 212 ff; **Heurgon** (1972), pp. 222 ff; **Mazzarino** (1945), p. 184; and **Pallottino** (1968), pp. 151 ff. As to the spread of Etruscans cf. **De Francisci** (1959), pp. 701, 709 and 713.

110 **Heurgon** (1972), p. 100.

111 As to **foedus Cassianum** (the source is: Dion. Hal. 6,95,2) cf. in the recent literature: **Ferenczy** (1969), pp. 279 ff; **Galsterer** (1976), pp. 84 ff; **Nieto** (1981), p. 281.

112 **Carcopino** (1961), pp. 69 ff.

113 **Werner** (1972), pp. 561 ff.

114 **Peremans - van't Dack** (1972), p. 664.

115 **Boyer** (1972), p. 310.

116 **Boyer** (1972), pp. 320 ff.

117 **Bellido** (1972), p. 469.

118 **Bengtson** (1969), Vol. III, pp. 22 ff.

119 **Peremans - van't Dack** (1972), p. 663.

120 **Holleaux**, on the other hand, calls attention to the fact that it would be exaggeration to attribute to this event an extreme importance. Cf. Holleaux (1921), p. 81.

121 **Cassola** (1962), p. 196, n. 160.

122 Last but not least, this convention is the basis of the fact that Rome turned to Ptolemaios IV for corn-support during the second Punic War (Polyb. 9 ,11a,1). Cf. **Heinen** (1972), p. 640.

123 Rome got into a close connection with the Eastern part of the Mediterranean world essentially from the 3rd century B.C. As Peremans and van't Dack wrote: (Rome before the 3rd century B.C.) **"... n'avait pas encore fait son entrée dans le monde oriental"**. Cf. **Peremans - van't Dack** (1972), p. 665.

124 As to this clause, cf. in greater detail: **Nieto** (1981), pp. 275 ff.

125 As to the **apameia**-convention, cf. summarily: **Maskin** (1951), pp. 142 ff.

126 **Nieto** (1981), p. 286.

127 **Yaron** (1974), pp. 343 ff.

128 **Yaron** (1974), pp. 349 ff.

129 **Yaron** (1974), pp. 351 ff.

130 Summarily: **Dekkers** (1953), pp. 153 ff.

131 **Pringsheim** (1968), pp. 58 ff.

132 **Gaudemet** (1970), p. 52.

132a **De Visscher** (1957), pp. 171 ff.

133 Cf. CJ. 1,2; D. 1,1,1,4; 1,1,9.

134 **Gaudemet** (1979), p. 52.

135 **Berger** (1935), pp. 139 ff.

136 Collegiality is generally characteristic of judiciary functioning on the territory of Egypt (in the **chora**: **chrematistai, laokritai, koinodikion, dikastai**). Cf. **Mitteis - Wilcken** (1912), Vol. II (1), pp. 3 ff.

137 **Biscardi** (1973), pp. 181 ff; Idem (1971), pp. 111 ff; and Idem (1975), pp. 16 ff.

138 **Parsons** (1974), p. 59.

139 Cf. in the recent literature: **Biscardi** (1975), pp. 15 ff.

140 In the recent literature, according to the evidence of P. Erez Israel 8, 51, this sum - more exactly limit of value - is 2500 **denarii**. Cf. **Biscardi** (1973), pp. 209 ff, and Idem (1971), pp. 136 ff.

141 **Biscardi** (1975), p. 21.

142 **Taubenschlag** (1955), p. 584.

143 **Biscardi** (1937), p. 17.

144 **Pringsheim** (1950), p. 502.

145 **Gaudemet** (1970), pp. 89 ff.

145a **Meinecke** (1971), pp. 275 ff.

146 **Stroux** (1926), pp. 1 ff. There are, at any rate, some authors who consider the degree of this effect as little. Cf. **Schulz** (1961), pp. 73 ff, and **Paoli** (1953), p. 198. An extremist opinion is represented by Wesel: according to him, the works of the Greek **rhetors** did not exert any effect on the development of the Roman jurisprudence. The cause of this is the comparatively advanced state of Roman jurisprudence in the 2nd century B.C. Cf. **Wesel** (1967), **passim**.

147 Cf. **Gaudemet** (1970), p. 96.

148 It is a different question, of course, that in the works of the Greek **rhetors**, these categories have hardly any contents.

149 **Hoebel** (1964), pp. 8 ff.

150 Last but not least this is connected with the fact that in Rome the **lex** generally only reacts to the situation already ensued. Cf. **Honsell** (1982), p. 134.

151 **Latte** (1968), pp. 363 ff.

152 **Huss** (1980), p. 71.

153 **Béranger** (1953), p. 273.

154 **Gaudemet** (1978), pp. 168 ff.

155 Cf. summarizingly: **Gaudemet** (1978), pp. 168 ff.

156 **Gaudemet** (1978), p. 169.

157 **Flurl** (1968), **passim**.

158 **Mazza** (1973), p. 127, and **Mazzarino**: Storia romana, p. 44.

159 **Magie** (1950), particularly pp. 55 ff and 635 ff.

160 **Lemosse** (1967), **passim**.

161 **Lemosse** (1967), p. 14.

162 **Nörr** (1974), pp. 11 ff.

163 **Nörr** (1974), pp. 68-103.

164 **Oliver** (1953), pp. 861 ff.

165 **Jones** (1971), **passim.**

166 Cf. summarily: **Fabbrini** (1974), pp. 307 ff.

167 **Bureth** (1964), **passim.**

168 **Lenger** (1949), pp. 69 ff.

169 With regard to this the continuity between the Ptolemaic Egypt and the Egypt which became Roman province, is called in doubt - among others - by Lewis. Cf. **Lewis** (1970), pp. 3 ff.

169a **Riccobono** (1950), **passim.**

169b **Seidl** (1967), pp. 114 ff.

170 As to the classification of regna, cf. **Fabbrini** (1974), pp. 411 ff.

171 Cf. summarily: **Fabbrini** (1974), pp. 417 ff. As to the life in the Roman Provinces in the age of Augustus cf. **Maskin** (1953), pp. 380-410.

172 **Mitteis** (1891), **passim.**

173 **Schönbauer** (1937), pp. 309 ff.

174 The **Provinzialrecht** includes, namely, in his opinion the institutions of the **Volksrecht**, by Romans only tolerated. **Schönbauer** (1937), pp. 351 ff.

175 **Kupiszewski** (1964), pp. 69 ff; **Modrzejewski** (1982), p. 330, and **Wolff** (1956), p. 4.

176 **Ankum** (1971), pp. 377 ff, and **Modrzejewski** (1970), p. 330.

177 **Wolff** (1980), p. 805.

178 **Orestano** (1937), pp. 219 ff.

179 **De Robertis** (1953), pp. 1 ff.

180 **Volterra** (1938), pp. 449 ff.

181 **Luzzatto** (1946), pp. 265 ff.

182 **De Visscher** (1940), **passim.**

183 Cf. in the recent literature, summarizing: **Martini** (1969), pp. 265 ff.

184 The survey of literary opinions is given by Martini. **Martini** (1969), pp. 8 ff.

185 **Martini** (1969), p. 130.

185a **Biscardi** (1971), p. 113.

186 **Dantzenberg** (1971), pp. 203 ff.

187 This work of Menandros does not take place in Sasse's book which enumerated the ancient sources, mentioning the **Constitutio Antoniniana**. Cf. Sasse (1958), p. 9-11.

187a As to the interpretation of sources, cf. **Modrzejewski** (1982), pp. 335, and **Talamanca** (1953), pp. 433 ff.

188 **Niederer** (1952), p. 118.

189 **Lemosse** (1966), pp. 341 ff.

190 **Zweigert** (1966), pp. 375 ff.

191 To the posthumous work, edited in Leipzig in 1905, the foreword was written by Binding.

192 **Coing** (1976), p. 125.

193 **Triantaphyllopoulos** (1973), pp. 664 ff.

194 Klami attributes the outstanding role of Roman law within the law of ancient peoples to the systematic supremacy. Cf. **Klami** (1981), pp. 26 ff.

194a The degree of effort for making a system is different in the law of ancient peoples. Thus, e.g., in the relation of the Old Testament - owing to emphasizing the concreta - we cannot meet even any traces of systematization. Cf. **Jackson** (1973), pp. 5 ff.

195 According to Roscoe Pound, the Common Law is not so much a legal system than rather on of the forms of legal thinking. Cf. **Pound** (1947), pp. 1 ff.

196 **Mitteis** (1891), p. 61.

197 **Weiss** (1923), pp. 3 ff.

198 **Pringsheim** (1950), p. 5.

199 **Jones** (1956), pp. 34 ff.

200 **Finley** (1951), pp. 72 ff.

201 **Triantaphyllopoulos** (1968), pp. 1 ff, and Idem (1973), pp. 647 ff.

202 **Triantaphyllopoulos** (1973), p. 647, n. 1.

203 **Triantaphyllopoulos** (1973), p. 648.

204 **Wolff** (1965), col. 2515, and Idem (1974), pp. 316 ff.

205 **Modrzejewski** (1970), pp. 160 ff.

206 **Wolff** (1974), p. 320.

207 **Mitteis** (1891), p. 62.

208 **Wolff** (1965), col. 2516.

209 **Gernet** (1968), p. 278.

210 The requirement of investigating the law of all **poleis** is formulated by Wolff. Cf. **Wolff** (1973), pp. 131 ff.

211 **Triantaphyllopoulos** (1973), pp. 647 ff.

212 **Wolff** (1975), p. 21.

213 **Wolff** (1975), p. 21.

214 **Vélissaropoulos** (1980), p. 7.

215 A great importance is attached to the place of sources cited by Biscardi and Wolff. Cf. **Biscardi** (1974), p. 3, Idem (1971), p. 352, and **Wolff** (1975), p. 21.

216 **Ruschenbusch** (1970), pp. 474 ff.

217 **Amelotti** (1979), pp. 362 ff.

218 **Wolff** (1978), p. 12 and p. 35 ff.

219 **Klima** (1969), pp. 191 ff.

220 As to the sources of knowledge of the law of certain ancient peoples, cf. summarily: **Gilissen** (1979), pp. 53 ff.

221 **Meyer-Termeer** (1978), p. 171.

222 E.G. Düll writes about the **"antikes Recht"**, investigating the question of condemnation in the law of the various ancient peoples. Cf. **Düll** (1948), pp. 211 ff.

223 **Dekkers** (1953), p. 185.

224 **Vinogradoff** (1920-1922), Vol. II, p. 71.

225 **Paoli** (1930), pp. 33 ff.

226 **Jones** (1956), p. 135.

227 **Meyer-Laurin** (1965), **passim.**

228 **Wolff** (1962), p. 18.

229 **Wolff** (1962), pp. 1 ff.

230 **Triantaphyllopoulos** (1968), p. 55 and Idem (1973), p. 655.

231 **Triantaphyllopoulos** (1973), p. 655.

232 **Ehrenberg** (1957), Vol. I, pp. 74 ff, and Idem (1961), pp. 17 ff and 41 ff.

232a **Herrmann** (1974), pp. 148 ff.

233 **Hirzel** (1907), **passim.**

234 **Heinimann** (1965), **passim.**

235 **Ehrenberg** (1921), **passim.**

236 **Herrmann** (1975), pp. 116 ff.

237 **Herrmann** (1975), p. 124.

238 **MacDowell** (1978), pp. 47 ff.

239 **Ostwald** (1969), pp. 2 ff.

240 **MacDowell** (1978), pp. 51 ff.

241 Cf. summarily: **Lepri-Sorge** (1974), pp. 307 ff.

242 **Quass** (1971), pp. 23 ff.

243 **Frezza** (1939), p. 15.

244 **Lepri-Sorge** (1979), pp. 309 ff.

245 **Triantaphyllopoulos** (1973), pp. 657 ff.

246 **Wolff** (1970), pp. 74 ff.

247 The hierarchical connection between **nomos** and **psephisma** is emphasized by Lepri Sorge. Cf. **Lepri-Sorge** (1978), p. 317. And Paoli about the localization of the **nomos** "on a higher level" (compared with the **psephisma**). Cf. **Paoli** (1953), p. 134. Rhodes has a kind of mediating standpoints; according to him, the authority of the **nomos** is higher. Cf. **Rhodes** (1972), pp. 280 ff.

248 Triantaphyllopoulos writes in connection with the **psephisma** about **"Beschluss"**, and Paoli about **"décret"**. Cf. **Triantaphyllopoulos** (1973), pp. 657 ff, and **Paoli** (1953), pp. 137 ff.

249 From the rich literature cf. **Harrison** (1969), pp. 26 ff; **Kahrstedt** (1938), Vol. II, pp. 1 ff; **Swoboda** (1890), **passim**, and **Woodhead** (1959), pp. 36 ff.

250 **Behrend** (1974), p. 557.

251 **Magdelain** (1978), pp. 9 ff and 86 ff.

252 **Magdelain** (1978), pp. 10 ff and 23 ff. As to the international conventions - still in the age before the Latin wars - cf. **Bengston** (1962), Vol. II, **passim**, and **Täubler** (1913), Vol. I, **passim.**

253 **Frezza** (1939), pp. 18 ff, and **Magdelain** (1978), p. 11.

254 **Magdelain** (1978), pp. 89 ff. The French author writes in connection with the distinction of **lex publica - lex privata** about **"division artificielle"**.

255 **Wolff** (1981), p. 18.

256 **Wolff** (1981), p. 19.

257 The exploration of the essence of the **dike exoules** is the merit of Rabel and Paoli. Cf. **Rabel** (1915), pp. 340 ff; Idem (1915), pp. 296 ff, and **Paoli** (1937), pp. 318 ff.

258 **Rabel** (1915), p. 346.

259 **Rabel** (1915), p. 374.

260 **Kaser** (1944), p. 196.

261 **Schönbauer** (1953), p. 25.

262 **Schönbauer** (1953), p. 25.

263 **Rabel** (1915), pp. 385 ff, and Idem (1917), pp. 313 ff.

264 **Kaser** (1944), pp. 199 ff.

265 Wolff writes about ignoring the **"System der hierarchisch gestaffelten dinglichen Rechte"**. Cf. **Wolff** (1981), p. 19.

266 **Kränzlein** (1963), p. 76.

267 **Kränzlein** (1963), p. 100.

268 According to the evidence of the P. Eleph. 14 or of the BGU IV 992, the terms **kyrieuein** and **kyrios** mean just the non-owner. Cf. **Kränzlein** (1972), p. 217.

269 Cf. P. Mich X 583 and P. Mich X 584. Cf. **Kränzlein** (1972), p. 217.

270 **Partsch** (1920), p. 50.

271 **Partsch** (1920), p. 50.

272 **Wolff** (1964), p. 338.

273 **Wolff** (1964), p. 339.

274 **Wolff** (1973), p. 762, and Idem (1981), p. 14.

275 **Maschke** (1968), p. 119.

276 **Klingenberg** (1976), pp. 22 ff.

277 **Wolff** (1981), pp. 14 ff. Cf. also **Mummenthey** (1971), pp. 8 ff.

278 **Wolff** (1973), p. 763.

279 Wolff mentions the **actio auctoritatis** in another connection. Cf. **Wolff** (1973), p. 20, n. 25.

280 **Wolff** (1973), p. 17.

281 **Pringsheim** (1950), pp. 49 ff.

281a **Tsatsos** (1966), p. 81.

282 **Wolff** (1961), pp. 102 ff, Idem (1967), p. 696, Idem (1966), p. 575, Idem (1973), p. 79, Idem (1962), pp. 35 ff.

283 As to the importance of the **praxis**-caluse, cf. **Kränzlein** (1975), pp. 12 ff.

284 As to the **kyria**-clause, cf. comprehensively: **Hässler** (1960), **passim**.

285 **Wolff** (1978), pp. 145 ff, and 155 ff.

286 Cf. Dem. 56,2.

287 Cf. Hyper. Ath. 13.

288 The survey of the sources originating from this age is given by Pringsheim. Cf. **Pringsheim** (1950), p. 35.

289 **Wolff** (1952), p. 72.

290 Wolff names the **parachoresis** the "**individuelle Abtretung des Rechts**". Cf. **Wolff** (1978), p. 166.

291 **Wolff** (1980), pp. 557 ff.

292 **Rabel** (1906), pp. 290 and 299.

293 **Pringsheim** (1961), pp. 390 ff, and 399.

294 **Pringsheim** (1969), p. 391.

295 **Pringsheim** (1961), p. 392.

296 **Latte** (1920), p. 101.

297 **Gernet** (1955).

298 **Gernet** (1955), p. 2.

299 **Gernet** (1955), p. 2.

300 With the problem of "**prédroit**", Gernet deals, at first, in his paper "Droit et prédroit en Grèce ancienne". This conception assumes an important role in his paper, as well, analyzing canto XXIII of the Iliad from legal point of view ("Droit et société: Jeux et droit").

301 **Wolff** (1981), p. 13.

302 **Wolff** (1981), p. 13.

303 According to Wolff, the contradictory classification of Hippodamos and Aristotle on how to assert claims has no **legal** value. Cf. **Wolff** (1981), p. 13.

304 **Gernet** (1917), pp. 1 ff.

305 In Chap. 2 of his work Gernet deals with the objective phenomenon of **hybris**; in Chap. 3 he analyzes the concept in a subjective context.

306 The merits and novelty of the work, analyzing the development of the "**pensée juridique et morale**" in the ancient Greece are particularly obvious, compared with the earlier literature. In connection with **hybris**, this modern outlook presents itself in a very expressive form, if compared with Thonissen's work (**Thonissen**, 1875).

307 In literature, in respect of the **bebaiosis**, cf. **Mitteis-Wilcken** (1912), Vol. II, p. 188 and **Partsch** (1909), pp. 340 ff.

308 **Rupprecht** (1982), p. 235.

309 **Schwarz** (1920), pp. 171 ff.

310 **Pringsheim** (1950), pp. 357 ff.

311 **Rupprecht** (1982), pp. 237 ff.

312 **Woess** (1924), pp. 278 ff.

313 **Rupprecht** (1982), p. 245.

314 **Kränzlein** (1982), p. 317.

315 **Herrmann** (1975), pp. 321 ff.

316 In recent literature, summarily: **Bianchini** (1979), pp. 245 ff.

317 **Savigny** (1840-1849), Vol. VIII, p. 29.

318 **Jörs** (1988), p. 141.

319 **Kipp** (1930), p. 103.

320 **Jolowicz** (1952), p. 101.

321 **Buckland-McNair** (1952), p. 25.

322 **Schulz** (1951), pp. 75 ff.

323 **Schönbauer** (1929), pp. 327 ff.

324 **Lübtow** (1955), p. 491.

325 **Schwind** (1965), pp. 311 ff.

326 **Wolff** (1979), pp. 7 ff.

327 **Maridakis** (1939), pp. 575 ff.

328 **Beseler** (1920), Vol. IV, pp. 82 ff.

329 **Silber** (1928), p. 9.

330 **Volterra** (1955), p. 15.

331 **Wesenberg** (1957), pp. 227 ff.

332 **Triantaphyllopoulos** (1957), pp. 13 ff.

333 **Kaser** (1971), pp. 202 and 214 ff.

334 **Santana** (1974), pp. 341 ff.

335 **Lewald** (1968), pp. 666 ff.

336 **Sturm** (1978), pp. 323 ff and Idem (1979), pp. 155 ff.

337 **Mádl-Vékás** (1981), p. 49.

338 Cf. Ulpiani Fragmenta disputationum III,3; III,4; and III,6. Cf. in the recent literature, summarily: **Sturm** (1978), pp. 325 ff.

339 **Lenel** (1904), pp. 368 ff, and Idem (1906), pp. 71 ff.

340 The **annalis exceptio** is quashed by Justinian, with attention to the several **"moles altercationum"**. Cf. CJ. 7,40,1.

341 **Sturm** (1978), pp. 327 ff.

342 The sources are analyzed in detail. Cf. **Sturm** (1979), pp. 155 ff.

343 As to the specifics of Hadrian's legal policy, motivated by his method of power wielding cf. **Hübner** (1975), pp. 61 ff, and **Just** (1972), pp. 71 ff.

344 **Eörsi** (1975), pp. 169 ff.

345 As to the historical antecedents dogmatic bases and changing meaning of commercial law - and of its codification, cf. summarily **Raisch** (1965), **passim**.

346 As to this conception of Caemmerer, cf. **Müller-Freienfels** (1978), pp. 583 ff.

347 **Bucher** (1972), pp. 1 ff.

348 **Müller-Freienfels** (1978), p. 594

349 **Goldschmidt** (1891), p. 11.

350 **Wieacker** (1979), pp. 8 ff, and Idem (1981), p. 580.

351 In case of the **symbolon** and **symbole**, the identity of contents is not complete. Gauthier, himself, investigating the two concepts simultaneously, refers to the fact that it would be wrong to regard the two types of contract as contradictory because the possibility of distinction only originates from the particular position of the **poleis** concluding treaties with each other. Cf. **Gauthier** (1972), pp. 62 ff, 100 ff, and 375 ff.

352 **Wolff** (1979), p. 38.

353 **Szanto** (1892), pp. 71 ff.

354 **Gauthier** (1972), p. 348.

355 **Graham** (1964), p. 117.

356 In this connection, Graham looks for the basis of **isopoliteia** of hierarchical nature only indirectly and generally only on the basis of some documents originating from the archaic age, without mentioning **isopoliteia**. However, the connection between **metropolis** and **colonia** is generally mentioned. Cf. **Gauthier** (1972), pp. 348 ff.

357 **Bremer** (1879), p. 48.

358 **Kreller** (1921), pp. 257 ff.

359 **Goldschmidt** (1891), p. 56.

360 **Osuchowski** (1950), p. 292.

361 **De Martino** (1938), Vol. I, pp. 335 ff; II, pp. 3 ff, and III, pp. 180 ff.

362 **De Martino** (1938), Vol. I, p. 130.

363 **Kaser** (1971), p. 522.

364 **De Robertis** (1942), pp. 153 ff.

365 **Kaser** (1971), p. 572, n. 94.

366 **Wieacker** (1981), p. 581.

367 **Wieacker** (1981), p. 581.

368 As to the **nomos Rhodion nautikos**, cf. **Zachariae v. Lingenthal** (1870), pp. 292 ff; **Ashburner** (1909), pp. 1 ff, and **Atkinson** (1974), pp. 93 ff.

369 **Goldschmidt** (1891), p. 56. It is to be noted here that Goldschmidt puts the **nomos Rhodion nautikos** - following Zachariae v. Lingenthal - still to the time of the reign of Leo (Isaurian) III.

370 **Atkinson** (1974), p. 88 ff.

371 **Atkinson** (1974), p. 89.

372 **Atkinson** (1974), pp. 92 ff.

373 **Tarn-Griffith** (1952), p. 176.

374 **Rougé** (1966), p. 408.

375 **De Martino** (1938), I, p. 341.

376 Rougé uses the term **"multiplicité"** in the scope of the ancient commercial law. Cf. **Rougé** (1966), pp. 411 ff.

377 **Rougé** (1966), pp. 412 ff.

378 In connection with analyzing the **lex Rhodia**, Atkinson refers to the central importance of Rhodes in the field of commerce. Cf. **Atkinson** (1974), pp. 75 ff.

379 For Atkinson, the connection of the **lex Rhodia** with the Athenian law is a problem of central importance. Cf. **Atkinson** (1974), pp. 89 ff.

380 Cf. summarily: **Kaser** (1971), p. 548.

381 **Visky** (1979), p. 428. and Idem (1981), p. 481. Cf. also **Pringsheim** (1950), pp. 333 ff, and **Talamanca** (1953), passim. As to the further fate of the **arrha** in Roman law, cf. **Visky** (1975), pp. 393 ff, and pp. 426 ff.

382 **Pringsheim** (1950), pp. 399 ff.

383 In connection with analyzing the **arrha**, Pringsheim deals with this question, as well. Cf. **Pringsheim** (1950), pp. 419 ff.

384 **Pringsheim** (1950), p. 403.

385 **Wolff** (1967), p. 175.

386 **De Vaux** (1960), p. 276, and **San Nicolò** (1929), pp. 52 ff.

387 **Boeckert** (1976).

388 **Rabinowitz** (1956).

389 **Finley** (1951), pp. 80 ff.

390 Cf.summarily: **Kaser** (1975),p. 532.

391 **Paoli** (1930), p. 15.

392 **Paoli** (1930), p. 15.

393 **Pringsheim** (1916), pp. 143 ff.

394 **Matthias** (1881), pp. 14 ff.

395 **Biscardi** (1937), pp. 345 ff.

396 **De Martino** (1935), pp. 224 ff.

397 **De Martino** (1979), p. 130. Based on Plutarch (**Cato Maior 21**), Litewski puts the "reception" of maritime loan at an earlier date. **Litewski** (1973), p. 119.

398 **Biscardi** (1974), p. 211.

399 Recently Lübtow analyzes in detail the source. Cf. **Lübtow** (1976), pp. 329 ff. Lübtow (p. 330, n. 5) criticises De Martino who suggests that this fragment (Sul foenus nauticum, pp. 242 ff) should be the subject of a very radical textual criticism.

400 **Lübtow** (1976), p. 334.

401 **De Martino** (1935), pp. 226 ff.

402 This "integrating" approach does, of course, not exclude the independent investigation of the characteristic traits of the **daneion nautikon** and **foenus nauticum**. Thus, e.g. when analyzing the connection between the penalty (a sum of money payable as compensation or as punishment) and the **pecunia traiectitia**, obviously only the regulation by Roman law comes into consideration. Cf. **Visky** (1969), pp. 389 ff, and **Idem** 81979), pp. 432 ff.

403 **Vélissaropoulos** (1980), p. 6.

404 **Vélissaropoulos** (1980), p. 7.

405 **Schneider** (1969), Vol. II, p. 520.

406 Cf. in the ample literature relating to the **emporion**: **Gernet** (1955), p. 185; **Hasebroek** (1928), p. 418; **Revere** (1975), p. 82; **Rougé** (1966), pp. 107 ff, and **Vélissaropoulos** (1980), pp. 29 ff.

407 **Rougé** (1966), pp. 108 ff.

408 Liv. 35,10,12 (**"emporio ad Tiberim adiecto"**).

409 **Rougé** (1966), p. 108.

410 **Rougé** (1966), p. 108.

411 **Vélissaropoulos** (1980),p. 31.

412 We meet the widest interpretation of the **emporion** in Strabon who considers Alexandria as the **emporion** of the whole world (Strab. 17, 1,13,798).

413 **Vélissaropoulos** (1980), pp. 34 ff.

414 **Paoli** (1930), pp. 9 ff, and **Vélissaropoulos** (1980), pp. 36 ff.

415 As to **phortegos**, cf.: **Vélissaropoulos** (1980), pp. 37 ff.

416 Concerning these variations cf.: **Vélissaropoulos** (1980), pp. 48 ff.

417 To this conclusion came in the literature: **Beauchet** (1969), Vol. II, p. 447; **Gernet** (1954), Vol. I, p. 152, n. 2, and p. 153, n. 1; and **Paoli** (1930), pp. 106 ff.

418 In this connection, Paoli attributes considerable significance to the term **paracheimadzein**, as well, which refers to the residence of the persons being active in the sphere of commerce between two shipping periods. Cf. **Paoli** (1930), p. 106.

419 **Schäfer**: Demosthenes und seineZeit III, 2. Beilage VII, 4, pp. 305 ff. Cited by **Paoli** (1930), p. 107, n. 1.

420 **Blass**: Die attische Beredsamkeit, 2. ed. 1893, vol. III, p. 577, Cited by **Paoli** (1930), p. 107, n. 1.

421 Lipsius does not establish **expressis verbis** as if Lampis were a **doulos**. But the fact that Lampis, taking place in the **oratio** in question, was mentioned in connection with the wider scope including the transacting capacity of slaves, doubtless approximates Lipsius to Schäfer's and Blass's conception. Cf. **Lipsius** (1915) Vol. III, p. 797, n. 28.

422 **Calhoun** (1926) pp. 63 ff and **Vélissaropoulos** (1980), p. 51 consider Lampis as the delegate of Dion. According to their assumption, which seems to be plausibel to us, as well, Dion is only in the position of a committer because he had not the suitable experience or interest in the field of the maritime commerce.

423 **Vélissaropoulos** (1980), p. 53.

424 **Lipsius** (1915), p. 631, n. 15.

425 **Lipsius** (1915), p. 631.

426 **Paoli** (1930), pp. 115 ff.

427 **Ziebarth** (1929), pp. 120 ff.

428 **Partsch** (1920), p. 40.

429 **Haselbroek** (1928), p. 182.

430 **Gernet** (1955), p. 186.

431 **Beauchet** (1897), Vol. IV, pp. 90 ff.

432 **Lipsius** (1915), Vol. II, pp. 631 ff.

433 **Paoli** (1930), p. 126.

434 **Wolff** (1966), pp. 142 ff.

435 **Hitzig** (1907), p. 227.

436 **Partsch** (1909), p. 153.

437 **Gernet** (1955), pp. 112 and 188.

438 **Lipsius** (1915), Vol. II, pp. 631 ff.

439 According to certain authors - thus Meier, Schömann and Lipsius - the second part of the place cited of the text (**a kai ou nomon ... tou Athenadze**) is interpolated. Cf. Meier-Schömann-Lipsius 2nd ed. Berlin, 1883-1887, p. 636. Cited by **Beauchet** (1969), Vol. IV, p. 90, n. 2.

440 **Paoli** (1930), p. 126.

441 Some authors, as well, who do not consider the **nomoi emporikoi** as a commercial code, having autonomy, write about commercial **actio** in connection with **dike emporike**. Cf. e.g.

Vélissaropoulos (1980), pp. 240 and 241.

442 **Lipsius** (1915), Vol. II, pp. 656 ff.

443 **Meyer-Laurin** (1965), pp. 5 ff.

444 **Wolff** (1966), p. 35, n. 32.

445 **Harrison** (1971), Vol. II, p. 113.

446 In this respect, cf. **Vélissaropoulos** (1980), p. 268.

447 **Pringsheim** (1950), p. 262.

448 **Pringsheim** (1950), p. 262.

449 **De Ruggiero** (1908), pp. 48 ff.

450 The matter in question is the papyrus, published in Vol. II (n. 1164) of the Greek Papyri in the British Museum.

451 **De Ruggiero** (1908), pp. 60 ff.

452 The papyrus is analyzed in detail by Pringsheim. Cf. **Pringsheim** (1950), 262 ff. Here we mention that the third papyrus, speaking about **misthoprasia**, originated form 291 A.D. (P. Oxy. 2136).

453 The not performing third person is very probably the **kybernetes** of Ammonios whose work means the equivalent. Cf. **Vélissaropoulos** (1980), p. 276.

454 In the last Chapter of our work, treating the ancient construction of contracts, we deal with the **Zweckverfügung** and the **Verfügungsermächtigung** in detail.

455 **Heichelheim** (1969), Vol. II, pp. 550 ff. In the time of Principate - though in this period the various banking transactions still have a large part, and even certain transactions achieve their definite legal form just in this period - the shortage of capital (**"die gesamte Kapitalmenge"**) leads tendentiously to a comparative pushing into the background of the banking transactions. Cf. **Heichelheim** (1969), Vol. II, p. 726.

456 The comprehensive evaluation of the literature on the subject, and originating from the last century (the works of Lattes, Perrot, Cruchon, Bernardakis), was given by Bogaert. Cf. **Bogaert** (1968), pp. 28 ff.

457 **Hasebroek** (1920), pp. 113 ff.

458 **Preisigke** (1910), **passim**.

459 **Bogaert** (1968), pp. 37 ff.

460 **Bogaert** (1968), pp. 38 ff.

461 As to the meaning of the word **trapedzites**, cf. summarily: **Bogaert** (1968), pp. 39 ff.

462 **Hasebroek** (1920), pp. 128 ff.

463 **Bogaert** (1968), p. 54.

464 As to the general meaning of the word **synistanai** (**syntasis**), cf. **Hamza** (1982), pp. 190 ff.

465 **Bogaert** (1966), pp. 30 ff.

466 **Schneider** (1969), p. 531.

467 Cf. **Beauchet** (1969), Vol. IV, pp. 336 ff, and **Lipsius** (1915), Vol. II, p. 737.

468 As to the comparison of the Hellenic and Roman **deposita**, cf. in the recent literature: **Vigneron** (1979), pp. 22 ff.

469 **Boyer** (1928), p. 48, and Idem (1954), p. 93.

470 **Cuq** (1929), p. 170.

471 **Kohler-Peiser** (1890-1898), Vol. I, pp. 30 ff and II, p. 65.

472 **Kohler-Ungnad** (1907-1911), Vol. III, p. 262.

473 **Petschow** (1954), p. 145.

474 **Bogaert** (1966), pp. 126 ff.

475 **Bogaert** (1966), p. 129. It is to be mentioned here that, apart from Bogaert, it is also Calhoun who traces back the origin of the institution of the bank not to **Mesopotamia** but to **Hellas**. Cf. **Calhoun** (1926), pp. 82 ff.

476 **Bogaert** (1966), pp. 138 ff.

477 **Bogaert** (1966),pp. 138 ff.

478 This is the main reason for the fact that it would be wrong to assume in the scope of the law of the **poleis** of the ancient **Hellas** the autonomy, as Paoli did. Cf. **Paoli** (1935), pp. 36 ff. This paper was published in the volume entitled "Altri studi del diritto greco et romano" (Milano, 1976, pp. 461 ff), as well.

479 Valiño (1967), p. 339.

480 **De Martino** (1967), Vol. I, p. 132.

481 **De Martino** (1967), Vol. I, p. 133.

482 **Albertario** (1934), p. 8; **Corrêa** (1970), pp. 79 ff; and **Riccobono** (1930), p. 394.

483 As to the origin of the two actions, cf. in the recent literature, summarily: **Hamza** (1982), pp. 144 ff.

484 **Goldschmidt** (1891), p. 28, n. 42.

485 **De Martino** (1937), Vol. I, p. 133.

486 **Mayer-Maly** (1976), p. 139.

487 **Hamza** (1982), pp. 150 ff.

488 **Wunner** (1964), pp. 105 ff.

489 **Valiño** (1967), pp. 340 ff.

490 **Mommsen** (1955), Vol. II, pp. 640 ff.

491 **Frank** (1933-1940), Vol. I, p. 206.

492 **Kaser** (1971), pp. 179, 544 ff and 584 ff.

493 As to Africa and Hispania, cf. **Frank** (1933-1940), Vol. III, pp. 200 and IV, p. 27.

494 As to Germania, cf. **Rostovtzeff** (1957), pp. 152 and 226.

495 **Wolff** (1967), pp. 180 ff.

496 As to the criticism of Wolff's conception, cf. **Nörr** (1963), pp. 564 ff.

497 **Gernet** (1955), p. 181.

498 Cf. summarily: **De Martino** (1938), Vol. I, pp. 135 ff.

499 Cf. in the recent literature: **Baslez** (1976), pp. 343 ff.

500 **Goldschmidt** (1891), pp. 62 ff.

501 As to the various literary opinions, cf. **De Martino** (1938), Vol. I, p. 134.

502 As to the concept of **banausis, banausia**, cf. **Christes** (1975), pp. 79 ff.

503 **Goldschmidt** (1891), p. 57.

504 It is to be noted here that Goldschmidt traces back the mediaeval **lex mercatoria** to the vulgar law - last but not least, however, to Roman law. Cf. **Goldschmidt** (1891), p. 89.

# CHAPTER 4

# THE POSSIBILITIES AND LIMITS OF LEGAL COMPARISON IN ANALYZING THE LAWS OF ANTIQUITY

## 4.1. THE CONCEPTS OF ROMAN LAW AND THE ANCIENT LAWS

1. In the camp of those who investigate the law of ancient peoples, the debate, connected with applying the comparative method, has not been settled up to this very day. This is primarily due to the fact that so far we lack even a sketchy survey in which the comparative method has led to genuine results and not only to the demonstration of certain similarities exerting their influence by the force of "surprise".

In this chapter, we attempt to outline a number of fields, in which the use of a similar method can be useful for works of scholarly value. We also attempt to answer the question whether - in the field of investigating the law of ancient peoples - the concepts of Roman law - taken for the basis of comparison - are not of arbitrary, subjective character. The question to be decided is, therefore, whether it is essentially expedient to uphold the primacy of Roman law, its role of a kind of prototype or, more exactly, to adhere to this in analyzing the single institutions of the law of ancient peoples.

The fact that Roman law is the best-developed law of Antiquity is, of course, beyond any dispute even. It is characteristic that this outstanding role of Roman law was not doubted even by Pringsheim, who is not only an excellent of Roman law but also a prominent scholar of Graecistic. His standpoint is characterized well by the sentence: **"Bei aller Wichtigkeit, die den Studien im griechischen und orientalischen, im nachklassischen und byzantinischen Rechte zukommt, werden wir niemals vergessen, dass Rom aus römischem Geiste das römische Recht und damit das Recht der Welt geschaffen hat."**[1]

2. It is still a moot question, whether at analyzing the law of ancient peoples in the course of elaborating a legal institution with monographic claim, or at investigating the whole of the system of a given ancient law the terminology and dogmatics of Roman law should be decisive or the author should confine himself to the often obscure system of tenets of the ancient law studied, available to the researcher generally in a fragmentary form in the course of processing the data.[2]

The almost unconditional adherence to the system of concepts of Roman law characterized the work of Beauchet (**Histoire du droit privé de la république Athénienne**, I-IV), in which the author - who otherwise takes upon himself to analyze the Athenian **nomoi** for the sake of enriching the results of the investigations performed by the school of **"histoire comparée des législations"**[3] - describes the Attic law in the conceptual system of Roman law, Steinwenter considers Beauchet's book as a **"misslungener Versuch"**, in which the correctionless use of the dogmatics of Roman law plays a decisive role.[4] In addition to Roman law, Beauchet attributes, in our opinion, a too great part to the dogmatics of the French Code civil, at analyzing certain legal institutions (thus, e.g. to art. 1108[5] of the Code civil within the scope of the conditions of validity of a contract.

In the field of investigating the law of the other ancient peoples, to use the dogmatics of Roman law does not necessarily contribute to any achievement. In addition to dogmatics, we should also take into consideration certain outlooks of general character upon life, which are characteristic of the Roman **iurisconsulti**, quasi completing dogmatics. Simshäuser[6] refers to the fact that the outlook of the Roman **iurisperiti** is characterized by a kind of isolationist tendency, the degree of which is, of course, varies in the various phases of the development of Roman law. This isolation is, e.g., reflected in emphasizing the **exemption** of ownership from any social concern which particularity later precipitated in the Pandectistics of the 19th century, as well.

At the same time, it is unquestionable, too, that we should not give up entirely the description of dogmatic character of an ancient law, at least in a **minimum degree**, owing to the real danger that the legal principles, maxims, fastening together the institutions of the law (legal system) studied, fall into the background, and even remain hidden.

Lipsius' work, analyzing the Attic law (**Das attische Recht und Rechtsverfahren**, I-III) in which the author ignores completely the outlook of positive law as a kind of approaching, should serve as an illustration of this outlook. It is a direct consequence of this that the work restricts itself to present the single legal institutions only descriptively.

It seems to be the right solution if we reject the two diametrically opposite conceptions, in their rigidity, and accept an intermediary, compromising standpoint, the exact delimitation of which is, of course, no easy task. On the one hand, adapting the dogmatics of Roman law to another law, is quite dangerous because it brings up the danger of anachronism. This is mentioned by Kunderewicz who criticized Koschaker. In his work analyzing the Code Hammurabi (Rechtsvergleichende Studien zur Gesetzgebung Hammurabis, Königs von Babylon, Leipzig, 1917), Koschaker deals with the Babylonian law on the basis of the tenets of Roman law.[7] On the other hand, the opinion accepting unconditionally the dogmatics, and generally the system of the concepts of Roman law, is confirmed by the fact that the system of a considerable part of the law of ancient peoples is known only in fragments.

Wolff refers to that a number of authors - Paoli belongs to these, as well - qualify even the Attic law, which is comparatively well-documented, as a law depending on the discretion of judges, in respect of which the **nomos** plays only a slight part.[8] It is a consequence of this standpoint that a number of the scholars of Hellenic law take as their basis the terminology and dogmatics of Roman law.

We have to take into account the fact that the picture formed about the given ancient law does not rely on an adequate conception but on a subjective one. This influences unfavourably the satisfactory elaboration of the whole of this legal system or that of certain institutions.[9] At the same time, we want to emphasize that - as mentioned by Wieacker[10] - in legal history, it is generally indispensable to take into consideration the constructions of the modern law to a certain extent. It follows from this that in our analysis the use of modern legal concepts, containing mostly the elements of Roman law, should not be precluded.

When investigating the laws of ancient peoples, we consider the "counterposing" of the constructions of Roman law and of a modern law to be unjustified. Such a "counterposing" can be found in the works of Pringsheim who intends to deal with the problems of the Hellenic transaction of sale and purchase without a "Romanistic prejudice".[11] It is, of course, another question that, as regards certain problems, the constructions of English law are in fact closer to the concepts of ancient Greek (Hellenic) law.

3. Applying the terminology of Roman law not with due care in investigating the law of ancient peoples, misguides or may misguide the investigator in some cases. The reason for this is that the scholar may attribute some legal institutions, and even legal precepts, to the law of an ancient

people, although these are quite unknown in the legal system investigated or have a content differing from the parallel institutions of Roman law.[12] This anachronistic approach may present itself in two forms: on the one hand, the author may consider the two institutions as analogous ones on the basis of a faulty translation; on the other, he may draw a parallel between the legal institutions of different peoples, setting out from a merely formal similarity between them.

Although not consciously, quite a few authors assume erroneously that ancient law was more or less uniform and homogeneous.[13] This is an erroneous assumption at least to the same extent, as if we assumed the existence of a uniform mediaeval law or a **homogeneous modern law**. We should not leave out of consideration in this connection that it is, indeed, more difficult to compare the law of ancient States than to compare the law of modern peoples with one another. The reason for this is to be looked for in the considerable difference of the law of ancient peoples in their mutual relation. It is just the more advanced nature of Roman law which may render questionable the application of the terminology and dogmatics of Roman law in the study of the law of other ancient peoples.

4. The terminology and dogmatics of Roman law have a double meaning. They can refer partly to the **"Begriffswelt"** which is the conceptual province of Roman jurisconsults; it can mean, on the other hand, the terminology and dogmatics of the law of modern peoples, going back essentially to the Roman roots, bases of law, unknown by the Roman **iurisconsulti** who were averse to any abstraction.[14]

> The difficulties of comparison are originating not from the specific particularity of Roman law. In certain cases, the comparison of the single institutions is made complicated by the differences between the ancient and modern worlds in social relations. Let us refer in this regard to the problem, connected with the concept of widow. David[15] called the attention to the fact that the concept of widow has a very considerable economico-social content, as well. In the Assyrian law, or in the Old Testament, the woman surviving her husband and returning to the house of her parents, meaning for her the financial safety, cannot be considered as a widow.

The right adaptation of the terminology and dogmatics of the latter meaning may particularly be questionable because the possibility of using the conceptual system of modern positive law can be a source of problems, debates particularly as a result of the triumph of the historical outlook, in the sphere of studying the institutions of Roman law, too.

In the literature of Roman law is, at the same time, **communis opinio** - Hoetink,[16] Kaser,[17] and Steinwenter[18] deal with this problem - that Roman law cannot be investigated - either as a whole or in respect of its single institutions - without taking as a starting point, at least to a minimum degree, some technical terms of "anachronistic" nature.

We may say that in the field of the investigations in the law of ancient peoples the **degree** of taking into consideration the terminology and dogmatics of Roman law should not exceed the degree of modern legal terminology and dogmatics which can be used in the investigations of Roman law. This degree is, according to its meaning, only a kind of **framework.** This means that the degree of applicability of Roman law as a **"guide de comparison"** is decided by the development level of the whole of the ancient law together with its institutions.

## 4.2. THE USE OF THE TERMINOLOGY AND DOGMATICS OF ROMAN LAW IN ANALYZING THE INSTITUTIONS OF ANCIENT EGYPTIAN AND PERSIAN LAWS

1. When investigating the law of the Egyptian Old Empire, known only in a very fragmentary form, the success of looking for parallels with Roman law is questionable. It may, however, be expedient to compare certain institutions or precepts of Egyptian law with Roman law. It is not uninteresting, e.g., from the point of view of understanding the role of the Egyptian state officials, to compare them with the system, function of Roman magistrates. It does not exclude the possibility of comparison that the difference between the two ancient legal systems - even if owing to the difference given by the public law structure - is in this relation very considerable. It is, at any rate, a common trait in the law of both peoples that - in the interest of legal security - the sphere of authority of state officials is limited. This limitation presents itself in a form that they are bound by the law to their edicts or orders, issued earlier. It is a very essential difference between Egyptian and Roman officials that Egyptian law did not recognize for a very long time within a division of labour according to functions, accepting for very long the division of labour resting on the quantity of cases.[19]

The idea of binding the representatives of state administration to their directions, issued earlier, can be already discovered in the famous collection, entitled Ptahhotep's Maxims, originating from about 2450 B.C.[20] In Rome, the praetor's **"amplissimum ius"** (Gai. **Inst.** I,6) was limited in 67 B.C. by the **lex Cornelia de edictis.** This **plebiscitum** provides **"ut praetores ex edictis suis perpetuis ius dicerent"** (Ascon. **in Corn.** 52). This binding of the **praetor** to his edict, published as a programme, gave rise to several discussions. Kaser regards as probable that this restriction was already of earlier origin and it became, therefore, only confirmed by the **lex Cornelia.**[21] Other authors - thus, in the recent literature, Giomaro[22] - see in the **plebiscitum**, initiated by the people's tribune Gaius Publius Cornelius, the reflection of the particular political situation. Just with regard to the comparison, it would not be right to leave out of consideration the fact that the limit of the authority of the magistrate is not alone the **lex Cornelia.** The **intercessio** and **fides** are limits of the **"amplissimum ius"**, as well[23] - and this already means necessarily a difference from the Egyptian system.

Based on this comparison, we may conclude that the prohibition of the violation of the edicts of magistrates having also the character of a source of law, aimed at legal security and the prevention of abuses is not only a Roman or an Egyptian particularity.

In another relation, however, the description of similarities between the Egyptian law in the age of Lagides (Ptolemies) and Roman law, seems to be superficial and unfounded. For example, it does not at all follow from a statement originating from the 3rd century B.C. and included in the "directive" of the regent of Alexandria to his subordinate, remitting the debts of debtors who suffered elementary damages (P. Tebt. 703) that the precept: **"suum cuique tribuere"**, ascribed to Ulpian, in the law of the Hellenistic Egypt would have been known.[24] In this case, the hypothesis, referring to the parallel, is unacceptable to an author with a scholarly claim.

2. One of the forms of ancient Persian law, concerning leasehold and known by the mediation of Polybios (10,28,3), is in several respects similar to **emphyteusis**, having emerged in Hellenic law. However, in respect of its essence, **"emphyteusis"**, having taken shape in Persia in the 5th century B.C., differs from the **emphyteusis** in Greek law and from **ius emphyteuticarium** and a **sui generis** institution of law, constructed by Emperor Zeno owing to the **omission** of the obligation of paying rent.

In addition to the omission of paying **canon**, it is a characteristic of this form of leasehold in Persian law, as well, that it is always the ruler who gives up the land.[25]

Since in the law of Persians, Greeks, and postclassical Romans, the institutions, appearing parallel at first sight, differ from one another just in respect of their essence (the comparison manifested in the form of looking for analogies), whose consequence is the indication of this particular form of leasehold in the Persian law with the technical term **"emphyteusis"**, is not justified.

Furthermore, it is aimless to investigate the legal meaning of the **Kara**-people in the field of Persian law, as well, because there is no category of Roman law which, on the basis of its similar contents, could be used.[26] Bucci refers to the fact that in ancient Persian law it can only be a source of errors if - in addition to adapting the terminology of Roman law - we use the terminology of the modern positive law, originating from Roman law.[27] In the investigating of ancient Persian law we should not use e.g. the concepts of legal relation, legal capacity and disposing capacity.

3. The basis of false analogies often stems from the fact that orientalists take the terminology of Roman law as their basis in translating the various sources of law. On the basis of these text-translations which are faulty from philological point of view, the historians of law consider single institution of ancient law studied as parallel to the corresponding institutions of Roman law and they fall in this way into the error of "nominalism".[28] It also occurs very often that the name of an institution is translated with the help of more than one technical terms of Roman law. The **"tirhatum"**, occurring in the Code Hammurabi repeatedly, is considered by the authors either as an earnest-money of engagement (**arrha sponsalicia**) or as a gift before marriage (**donatio ante nuptias**) or directly as the purchase price of the woman.

Koschaker has a particular standpoint. According to him, **tirhatum** is fundamentally the purchase price of the woman but also the **arrha sponsalicia** and **donatio ante nuptias** are incorporated in it.[29]

It may be pointed out with general validity that the source of mistakes or just of debates of terminological nature is mostly to be looked for in the **unconditional** adherence to the system and dogmatics of Roman law.

The use of the terminology of Roman law is connected with a question a linguistic nature i.e. to what extent language is connected with the socio-legal reality. In this relation let me refer to Gernet who deals with this question, as well, in his work, entitled **Recherche sur le développement de la pensée juridique et morale en Grèce (Étude sémantique)** mainly on the basis of Durkheim's sociology. Gernet[30] regards language as **"une réalité objective"** which obeys certain necessary laws. This opinion, considering language as **"un fait social"** implies that legal terminology cannot be abstracted from **one** given social reality. On the basis of this doubtlessly "antiphilological attitude" the validity of general character of the legal terminology of a **single** State becomes **eo ipso** doubtful.

The use of the terminology and dogmatics of well-developed Roman law is questionable for two reasons. Its adaptation is controversial partly because this law is based on a development having lasted through centuries. In addition to that, its use is problematic because the development level of ancient law was also not taken into consideration.

In the course of searching for some analogies of the institution of **tirhatum** within Roman law (incidentally, the same problem of interpretation presents itself when analyzing the institution of **mohar** (dos?) of the Hebrew law)[31] the faulty scheme manifests itself in the fact that the authors leave out of consideration the fact that the structure of ancient Roman law is not known, since the Twelve Tables contain no expressed reference more to buying a wife.

In Volterra's opinion, the **coemptio**, belonging to the forms of the contract of marriage, does not imply the purchasing of the wife and did not include, even at its appearance, the price of the woman. Archaic Roman law knew only the dowry and, accordingly to this, the **donatio propter nuptias** and **arrha sponsalicia** were naturalized in post-classical Roman law as a result of Oriental influence.[32] Volterra's opinion is, however, not generally accepted among Romanists. According to Kaser, e.g., **coemptio** can be traced back to buying the bride (future wife).[33] In our opinion,[34] Kaser's view - confronting that of Volterra - is more plausible.

On the other hand, the authors consider as irrelevant that Hammurabi's Code does not contain, the archaic law but rather the result of the centuries-long development of law.

A comparative analysis of law which does not adhere to the **guide de comparaison** and to the requirement of the identical level of development of the compared legal systems can bring only very dubious results. Such a scientific "result" of dubious value is e.g. to demonstrate that the legal institution of **adoptio** resp. **arrogatio** is known in the ancient Babylonian or Egyptian law.[35] As regards these legal institutions, it is clear that

superficial similarities have had a great influence on scholars who - on the basis of formal analogies - regard certain institutions as parallel although in fact they are different in terms of their functions. This difference in function is reflected by the fact that in the Babylonian law adoption - as a living institution - probably served - among others - as substitute for the testament.[36]

4. If we consider the categories of Roman law as a kind of ideal type of all the forms of legal thinking and incorporate the law of these peoples into a system on the pattern of the Roman law, this can involve a particularly serious danger in the field of investigating the law of the ancient Oriental peoples.

> In this regard, the establishment of Heinrich Mitteis is valid even today: "... **es war ein Fehler die Kategorien des römischen Rechts für die Idealtypen aller juristischen Denkformen anzusehen und alle anderen Rechte nach ihnen systematisiern zu wollen.**"[37]

The use of the terminology of Roman law without due precaution may lead in this field to mistakes about so grievous as if we pressed the concept of the Germanic **Gewere** into the Procrustes-bed of **usucapio** in Roman law or possibly of **praescriptio** or the likewise Germanic institution of **Gesamthand (coniuncta manus)** into that of the co-propriety, known in Roman law.

### 4.3. "INTERPRETATIO ROMANA" AND THE ANALYSIS OF GREEK LAW

1. The **"interpretatio Romana"** raises several problems within the scope of studying Greek law, as well. The use of the term, borrowed from Roman law uncritically, leads to exploring Greek law only in "philological" and not in legal respect. Torrent, evaluating Wenger's **"antike Rechtsgeschichte"**, writes very rightly that, in the study of Greek law, this school, emphasizing the primacy of Roman law, achieves not so much legal results but rather philological findings.[38]

When studying the role of **"interpretatio Romana"** in the analysis of Hellenic law, we cannot survey, even in outlook, the influence of the Hellenic culture (**paideia**) - and within this, particularly that of philosophy - exerted on Roman law. In this respect, we limit ourselves to estab-

lishing simply that the fact of this influence is undeniable. M. Antistius Labeo's work, entitled Pithana (D. 46,4,8,2 - Ulpian and D. 50,16,246,pr. - Pomponius), whose literary "genre" is hard to determine, is obviously a category based on the concept of **pithanos logos**, "accepted" in Greek philosophy, having relevance in the world of law, as well. This work illustrates the effect of the Greek philosophy on Roman law - Roman jurisprudence.[39]

2. In respect of public law, we want to emphasize that the public position, being more or less parallel to the function of **praetor** or of **aedilis curulis**, provides in itself no basis of adapting within the institutions of Greek law the terminology of Roman law. As regards their essence and function, drawing a direct parallel between the institutions of Roman law and the formally similar but essentially different ancient Greek ones, it would be a mistake at least as great as if we drew conclusions on the institutions of Roman law from the rules of Hellenic procedural and substantive law which may be found in the comedies of Plautus and Terentius.[40]

The author should reply above all to the question whether in these comedies the technical terms of Roman law are only the translations of the single Hellenic concepts or they correspond in their content, as well, to the institutions of Roman law. If our thorough research showed that solely "philological" parallels can be pointed out, it will not be possible to look for analogies.

Let us illustrate this problem with an example from two comedies of Plautus. In the comedy entitled "Aulularia" (**Aulularia** 760) Euclio threatens the young Lyconides (of whom he supposes that he stole his mug filled with gold) with citing him before the **praetor** and taking a "written" action against him (**dicam scribere**). The author of the comedy uses in his comedy entitled **"Poenulus"** the traditional term **"in ius te voco"** in the sense of "bringing a suit", "taking an action" against somebody. It is questionable whether we can conclude from the quoted comedy of Plautus that in Rome (**apart** from the oral action), on the Greek model, a lawsuit was also known on the basis of an action submitted in writing. This is questionable because the technical term **"dica"** is the translation of the Greek **"dike"** and the word **"scribere"** that of the Greek word **graphein (grapheisthai)**. With the expression **"dicam scribere"**, the author of the comedy must have referred not to the **"receptio"** of carrying on a lawsuit with a written **"actio"**, known in the Greek law, but he uses this concept only in the sense of "taking an action". In this way, the matter in question is not the conformity of the contents of the words but only of the translation of an institution of the Hellenic law of procedure.[41]

3. This problem is, of course, in a close connection with one of general nature, i.e. to what extent literary sources are trustworthy in studying Roman law. Only as a kind of indication, we refer to the fact that Pringsheim,[42] e.g. pays a great attention to the comedies of Plautus (**Curculio, Pseodolus, Mostellaria**) when investigating the **arrha**.

> We strongly believe that in terms of methodology Pringsheim's conclusions on the legal relevance of Plautus (and other literary sources) are fully adequate and valid even today: "The question: Greek or Roman has to be considered in regard of each comedy. In all, the Greek original is transformed ot a certain extent, but that extent varies and must be accented in each case; if Greek conceptions seem to prevail it must be explained how Plautus was able to amuse his audience with un-Roman cases."[43]

As regards the utilization of literary sources in studying Roman law, more exactly the Latin comedies in the earlier literature (we think here of the works of Costa,[44] Bekker,[45] Pernard,[46] and Fredershausen[47]) no attempts were made. We emphasize that the problem of th legal relevance of literary sources presents itself in a quite different way when analyzing Attic law in which case the **sedes materiae** is formed in a considerable percentage just by literary sources.[48]

In methodological respect, D'Ors[49] attributes a special role to the question of literary sources. In his opinion, and we agree with this, the role of literary sources should not be underestimated in the analysis of certain institutions of Roman law. At the same time, however, we should not forget that these sources do not possess the **"auctoritas"** of a technical source. The advantage of literary sources reveals itself as primary in two respects. On the one hand, they are suitable in certain cases - owing to the reflection **in complexu** of life - to present the practical side of law; on the other hand, the possibility of modifying the text with legal relevance in the scope of these is excluded.[50]

4. The connection between Greek and Roman law, the question of the influence of Greek law exerted on Roman law presents itself in a very differentiated way. In connection with this, we refer to the fact that with the Romans themselves, it was a **communis opinio** that the Twelve Tables were patterned after the Solonian **nomoi** (Livy 3,31; 34). On the basis of this legend - the falseness of which has been proved by the modern historiography[51] - it was a predominant opinion for centuries, according to which the influence of Greek law can be demonstrated in Roman law already at a very early time. A direct consequence of this approach is the assumption, ac-

cording to which the Roman law of the age of the Twelve Tables is to be considered as a derivative of Hellenic - primarily Attic - law.[52]

> Literature is today already uniform in the question that the norms of the Twelve Tables cannot be considered as a servile transplantation of the Solonian **nomoi**, as their adaptation to Roman circumstances. But it is a discussed question, to what **degree** the Hellenic influence prevailed in the age of the early Republic and whether this effect presented itself more strongly in the field of **ius publicum** or **ius privatum**. According to Kaser, the basis of their form and style, the Twelve Tables can be traced back to Hellenic patterns.[53]

The influence of Greek law can be more strongly documented in the period following the Twelve Tables. According to Volterra,[54] the infiltration of the elements of Greek law into Roman law can rather be proved only in the period following the creation of the "legislative work" (**"in epoca assai più avanzata"**). It is a generally acceptable assumption that some institutions of Roman law are of Greek origin or that they got into Roman law with Hellenic mediation.

> Criticizing Savigny's conception, Jhering writes that the legal institutions of foreign (i.e. not autochthonous) origin (mainly Greek ones) may be demonstrated in Roman law not only in the heroic (prehistoric) times and in the age of the Twelve Tables but in later periods, as well.[55]

But the fact in itself that a legal institution has got into Roman law by "reception" from Greek law, does not mean assimilation in respect of construction. A good illustration of this is the maritime loan which is original in Rome, as well, i.e., it presents itself in the form, construction, having developed still in Hellenic law. The **fenus nauticum** includes - according to the classical conception - three essential elements: first, the handing over of a definite sum of money which serves for buying wares and the returning of which becomes due following the arrival of the ship at the place of destination; second, undertaking the danger by the lender, even tacitely; third, the agreement about interests (**pactum usurarum**), conforming to the degree of the **periculum creditoris**.[56] In contrast to the **mutuum** of Roman law, the maritime loan does not part into two transactions, namely in the contract of lending and the pact, including the claim of interests. This means that the **fenus nauticum** maintains its character of a

transaction **sui generis**, developed in the Hellenic law, including **both** lending and stipulating interests. This stipulation is, namely, an integral part of this type of loans, regulated in this specific - Hellenic - way; it is quasi an **attributum** of it.

> It is a **communis opinio** in literature that at maritime loan, it is no condition of the actionability of interests that they should be included in a separate **stipulatio.**[57] According to Biscardi's definition - which is right in our opinion, as well - the maritime loan is **"un contratto sui generis, che non rientra in alcuna delle categorie classiche di contratti** (sic! G.H.), **ma risulta costituito, nella sua struttura, dalla giustaposizione di una serie di convenzioni non formali (pactum periculi, pactum usurarum) alla traditio di una certa quantità di pecunia numerata, convertibile in merci."**[58]

In Roman law, therefore, the appearance of maritime loan upsets the regulation of lending and of the construction of loans, uniform till then, and it depends upon the **destination** of loan whether the law considers the stipulation of interests as a part of the transaction or not.

5. Except for a few researchers at the turn of the century the falling into the background of the Romanist outlook, characteristic of the 19th century, which left generally out of consideration the Hellenic law from the point of view of the development of Roman law, is not connected with the growing interest of Romanists in Greek law.[59] Only from the side of studying **Volksrecht**, prevailing in the Eastern Provinces of the **Imperium Romanum** is attention generally paid by the students of Roman law to certain institutions of Hellenic law, surviving during the Roman rule, as well. It is, however, obvious that it would be expedient, at any rate, to compare Greek law, considered as "amorphous", as well as its sources and, particularly, the practical implementation of the single precepts of this law and their performance with the corresponding - but not necessarily parallel - institutions of Roman law, and with the role of jurisprudence (**iurisconsulti**). This is important since the determination of the possible analogies or, just on the contrary, of the obvious differences would be of great importance for the investigation of the law of both peoples.

Owing to the crudeness of the various legal maxims, legal precepts, we can be sure, e.g., that the Hellenic implementation of the law is in certain sense much more flexible, "supple-minded" then the Roman administration of law, generally rigidly adhering to the positive rules of law.[60] This particularity of the ancient Greek law, which is (as mentioned earlier) in the same way uniform as mediaeval German law does not preclude

the possibility that the concept of legal order can be applied to this, as well. On the other hand, this law has an immanent dogmatics, as well. Owing to this, it is worth paying attention to Greek (Attic) law which is extremely rich in documents.[61]

> There are fundamentally two reasons why Greek law is not taken into account in solving this task. Romanists refuse to draw Greek law into the sphere of their investigations aimed at reconstructing archaic Roman law, because it is no easy task to press this law into the "conceptual scheme" of Romanistic. The other factor in this neglect is the already cited yet still influential assumption which considers the **nomos** as something strongly secondary. May it suffice to mention here briefly that Meinecke[62] proves with concrete examples, taken from the Attic law of procedure, that the Athenian judges should pass their judgements or sentences exclusively on the basis of **nomoi**.

6. The analysis of Hellenic law would lead to serious results in respect of delictual or, contrarily, contractual origin of the concept of obligation, known in Roman law. The Greek law of contracts can, namely, lead back to demonstrably delictual roots,[63] and, consequently, the source of the obligation is to be looked for, with great probability in the scope of crimes. The detailed elucidation of this problem would mean a considerable help for the investigations in the domain of Roman law, as well.

Seen from another side, however, as referred to earlier, the superficial comparison may also be the basis of grave mistakes. Thus, e.g., it would not be expedient to trace back the concept of servitude, known in Roman law (**servitus**) to the categories of the law of neighbourhood, taking place in Plato's **Nomoi**, as well.[64] It would be, further on, a mistake, as well, if in marriage, connected with formalities, known in the Attic law, we looked for the analogies of the Roman **matrimonium** without **manus**. The cause of this is that in the two legal systems the bases of these types of marriages differ from one another considerably.[65] While, namely, in Rome the basis of the marriage form is the husband's power, in Athens the basis of the "dualism" of the institution of marriage is the belonging of the wife to political and sacral community, i.e. to the **oikos** led by the husband or - on the contrary - just the wife's independence of it.[66] Analyzing the similarities and essential differences, Wolff refers to the fact how the ways of the (at first sight similar) institutions can separate, owing to the circumstance that the social and economic institutions are increasingly separated.[67]

When analyzing certain institutions of Roman law, it is expedient to take into consideration the categories of Greek rhetoric and philosophy. Without a claim to completeness we refer to the fact repeatedly that particularly the tenets of Greek philosophy have an influence - in a very concrete, immediate form, on the development of Roman law. The ethical categories - which can be found in Antiphon, Aristotle (**Nic. Eth.**) and Demosthenes - and more or less correspond to **dolus, culpa, casus** in Roman law - form, even if not in a quite direct way - the basis of the grades of responsibility, known in the responsibility system of Roman law - though we cannot meet with a major effect, legal connection of these in Greek law.[68] In the Greek law these categories of fundamentally ethical nature are irrelevant because there the system of obligations which would be similar to that in Roman law, is unknown.[69] It can be established, on the basis of this example too, that the development of Roman law is not exclusively a function of the effect of the Greek law (causing difficulties in interpretation) but in the given case (and this exists just in the scope of the grades of responsibility) the **philosophy** may be regarded as the immediate carrier of the Greek effect. The mentioned grades of responsibility were namely naturalized in the responsibility system of Roman law not by the mediation of the Hellenic **law** but in a direct way, under the influence of Philosophy. This may essentially be attributed to the fact that the Greek philosophers - as already mentioned - approach and contemplate the law from ethical and political sides. They deal with the law in an abstract way and, consequently, they cannot influence the jurisdictional activity of judges (courts of law), either. It is not accidental, therefore, that the Greek philosophy exerts its effect on the formation of the single institutions of Roman law in the mentioned, immediate form - i.e. **without** any effect on its own legal system.[70]

## 4.4. IMPERIAL LAW AND THE LAW OF HELLENISTIC EGYPT

1. The use of comparative method raises several problems as regards the connection between Roman law (**Reichsrecht**) and the local law of the **provinciae** (**Volksrecht** and **Provinzialrecht**) and of studying their possible "symbiosis". It is particularly important to study in the field of these investigations the law of the romanized Egypt (or, more exactly, of Egypt under Roman rule). The Romans were generally tolerant following the con-

quest of a **provincia** in the sense of deciding, the norms of which law should regulate the living conditions of inhabitants who are not Roman citizens and, therefore, they did not force their own law on the inhabitants of the **provinciae** who have no Roman citizenship. This tolerance can particularly be observed in Egypt which strongly adhered to her Hellenistic traditions.[71] The law of Egypt was not uniform even in the age of Lagides, i.e. in the Hellenistic period. Taubenschlag,[72] studying the law of the Hellenistic Egypt, comes to the conclusion that it is a legal system, "... composed of both Greek and Egyptian elements...".

> In recent literature, Wolff[73] refers to the fact that the principle of personality (supposed before by Mitteis),[74] did not at all prevail with exclusive character in the Ptolemaic Egypt. The separation of the two ethnical groups presented itself only in the field of the judicial organization. The P. Tebt. I,5, 207-220 which is a document about **laokritai**, containing the **prostagma**, organizing jurisdiction, is very informative in this relation.[75] It gives proof of the fact that the judicature of the court of law which, otherwise, accepts the **lex fori** and was originally created taking into consideration the ethnical differences, is open to other ethnical groups, as well. It is also a circumstance, furthering the unification of law that the form and type of the transactions of the inhabitants belonging to different ethnical groups are quasi tendentiously identical.[76]

The frequent similarity between the institutions of the Greek and the indigenous Egyptian rules of law, being juxtaposed in the age of Lagidae (Ptolemies) led a part of authors to the supposition that the parallel institutions of the two, fundamentally differing legal systems originate either from the Greek legal system or from the ancient Egyptian law.[77] This approach reminds us strongly of the outlook, concentrating on derivation, thereby becoming the source of several mistakes. This concept which regards the similar or supposedly similar institutions of law as institutions taken-over of "copied" in a servile way, leaves out of consideration the possibility of **interaction** i.e. that both legal systems develop quasi simultaneously, in a constructive way, the institutions which are known to the investigator only in their quite developed form. A good example of the interaction, realized between the different systems of law, is the case of sale and purchase, formed equally under the influence of both the Hellenic and the archaic Egyptian legal orders.[78]

The dualism of the so-called demotic law, based on the traditions of the period before the Ptolemaic dynasty and of the Hellenistic law, going back mostly to the Attic traditions, is not at all influenced by the institutions, formed on the interlocking surface of the two legal systems.

Modrzejewski refers to the fact that on the basis of the technical term **"griechisch-ägyptisches Recht"**, originating from the papyrologists, the opinion was formed as if in the Empire of the Ptolemies - we use here the word "Empire" intentionally - a uniform, independent Ptolemaic legal system had been existed. The survival of the opinion supposing a uniform legal system is indicated by the view, according to which in the Egypt under Roman rule a homogeneous legal system must have developed.[79] (In this connection, we emphasize that we can only speak about certain signs, indicating unification (Wolff's conception).) The examination of the ramifying connections between demotic and Hellenistic legal system in the Egypt of the Ptolemaic age will be possible only after the thorough study of the sources.[80]

There is also much debate concerning the fact that the monarchs of the Hellenistic Egypt do not even attempt a kind of codification of the heterogeneous law. Préaux[81] attributes the fact of the missing unification of law to two causes. On the one hand, she emphasizes the "narrow-minded" traditionalism which prevents any kind of efforts of codification from happening. On the other hand, she explains with the ruling ideology that all attempts at the unification of law are foredoomed to failure. In her opinion the ambiguous notions of **philantropia** and **epieikeia** push into background the quite rationally performed codification or - more exactly - the idea of codification. Préaux's obviously subjectivist view is strongly criticized by Wolff.[82] He attributes the lack of codification to the peculiar constitutional ideas of the rulers of the Ptolemaic dynasty. In the period, following Alexander's death, the concept of the State in a modern sense, as well as every category, presupposing unity in legislation, is unknown for the monarch of the diadochos-States.

Préaux[83] otherwise recognizes, and even emphasizes, even herself, this particular trait of the Hellenistic monarchies. In her opinion: **"Les royaumes ne sont ni des "États", ni des "nations" et encore moins des "patries". Il y a des rois, leurs "affaires" (ta pragmata) et ceux qui leur sont soumis ou alliés."** The matter in question is, therefore, not as if Préaux had not known the particularities of the Hellenistic States but only that she sees no connection between the particular state organization and the problems of codification. The Belgian scholar does not restrict her studies to the Hellenistic Egypt but she also deals with the problems of the Empires of the Seleucids and Antigonids.

2. The following examples illustrate the interaction between Roman law and the "dualistic" law of the Egypt which became part of the **Imperium Romanum**, in so far as it can be taken into consideration in the field of the comparative method.

Similarly to sale and purchase in Hellenistic Egypt the **misthosis** (which practically corresponds to the **locatio-conductio** in Roman law the

only difference being that it is homogeneous) including the **locatio-conductio rei**, the **locatio-conductio operis** and the **locatio-conductio operarum** should be considered, as a real contract.[84] Following the Roman Conquest, however, **misthosis** lost more and more its character as a real contract and it was transformed - very probably with the mediation of the **locatio conductio**, known in Roman law - into a consensual contract.[85] The **"metamorphosis"** of the **misthosis**, known in the law of the Hellenistic Egypt originally as a real contract, can thus be an example for showing how decisively an institution of a foreign legal system may influence the functionally similar institution of the "receptor" legal system. (We speak, of course, not of the **chora**.)

On the papyri of Hellenistic Egypt, containing contracts and agreements in Greek, we may often find the so-called **praxis**-clause.[86] The **kyria**-clause, as a clause connected with the probative force of a document, should be separated sharply from this. This, similarly to the **demosiosis**-clause, even geographically, does not occur everywhere and became in the Hellenistic law tendentiously a mere formality.[87] According to Wolff's plausible view, the **praxis**-clause refers to the fact that the obligation-concept of the "dualistic" Hellenistic law debt (**Schuld**) is separated from liability (**Haftung**).[88] It is, therefore, not enough in itself if the debtor promises to fulfil an engagement. The creditor can raise a claim to sanctioning his demand legally only on the basis of a contract having the **praxis**-clause, i.e. quasi "warranted". Only the claims of treasury (State) and those originating from types of transactions, recognized by **leges**, can be validated without the basis of the **praxis**-clause. In these transactions, namely, the sanction is ensured by the provision of the **lex** (**diagramma**) itself; therefrom comes the name" **"praxis kata to diagramma"** clause. We may also say that the "legal" **praxis** substitutes for the **praxis**-clause which is the precondition of implementation or, more exactly of the other **praxis**-clause.[89]

The **praxis**-clause, belonging to the transaction types, not sanctioned **ipso iure**, as well as that, taking place in contracts to be considered as atypical, can be, in our opinion, the means of the typical freedom of standard contract, known in the law of the Hellenistic Egypt. On the basis of the **praxis**-clause, namely, not only the creditor, legitimized originally (as referred to in Chap. III of our work, in another relation), but another person, too, indicated in the clause, can lay claim to implementation. In this way, this clause becomes also suitable for sanction-

ing contracts concluded in favour of a third party.[90] The intensive analysis of the **praxis**-clause, rooted in the traditions of the classical Greek (primarily Attic) law can provide a basis for studying the means of releasing the parties from the obligatory types of contracts in the Roman law. The idea, too, may be raised in the form of a hypothesis, that in the contracts, provided with this clause, the construction of a direct form of representation can possibly have a part, as well.[91]

3. The law of Egypt which became a Roman province, should be studied in a very differentiated way. According to Wolff's formulation, it is namely a consequence of the **"ungewollt unvollkommene Romanisierung"**[92] that all the forms of the local law have survived. The surviving forms of local law include the laws originating from the Ptolemaic age, legal practice preserved in the **chora**, as well as the rules of the three (since Hadrian four) Greek cities, being in a privileged position.[93] It is theoretically not opposite to the fact of the survival of the local law that the **praefectus Aegypti** as the depositary of the **Imperium** had an almost unrestricted power.

> Ulpian writes about the **officium** of the **praefectus augustalis: "Praefectus Aegypti non prius deponit praefecturam et imperium, quod ad similitudinem proconsulis lege sub Augusto ei datum est, quam Alexandriam ingressus sit successor eius..."** (D. 1,17,1). As referred to by Wolff[94] the unrestricted jurisdiction of the **praefectus** (documented by P. Wisconsin II 81, as well) legally implies that the **praefectus Aegypti** - as far as he in the sphere of jurisdiction personally proceeds - is not bound by the prescribed procedural norms which should otherwise be strictly followed.

The surviving of the norms of the local law can otherwise be considered as essentially a situation **"de facto"** because these norms are not confirmed by the statutes of the conquering Augustus or by the constitutions of the Emperors, following him, or by the edict of the provincial **proconsul** or **procurator**. Modrzejewski writes, therefore, only about the **"survie coutumière"**.[95] Roman law appeared in Egypt in two forms: the Romans partly extended the effect of their **leges, senatusconsulta** and **constitutiones**, made during the time of the Republic to the conquered provinces (imperial law); on the other hand, they issued ordinances, valid only to Egypt (provincial law).[96] The Roman law, valid to the province Egypt can be divided into two parts: it applies, on the one hand, to the Greek-Egyptian inhabitants, on the other hand, to the living conditions of the inhabitants of the province,having a Roman citizenship. The decisive majority of the norms falling within the scope of the provincial law applies to all the in-

habitants of the province, i.e. also to **cives Romani**. In several cases, however, the norms of the imperial law are effective, as well, for the living conditions of the Egyptians, having no Roman citizenship.[97]

With regard to the heterogeneous character of the legal forms, the provincial **procurator** (**praefectus Aegypti**) plays a double role in Egypt. According to Pólay,[98] two legal systems are valid: the local law (**Volksrecht**), consisting of ancient Egyptian law and of the Hellenic (Hellenistic) law, developed owing to Hellenization, as well as imperial law (**Reichsrecht**). The **praefectus Aegypti** partly supports the expansion of the norms of the imperial law but partly defends the rules of the law of the **"peregrini"**.[99]

With the increase in the number of Roman citizens, Roman (imperial) law gradually penetrates Egyptian legal practice.

> As referred to in the previous Chapter, in respect of the period following the **Constitutio Antoniniana**, the question of the connection between imperial law and the local people's laws (**Volksrecht**) is controversial in literature. According to the school, hallmarkable with Mitteis's name, the **Edictum Caracallae** "liquidates" the **"Volksrecht"**,[100] while the school, representing the other pole (thus, e.g., De Visscher),[101] on the other hand, considers as the aim of this **constitutio** only the enhancement of the prestige of jurisdiction. Pólay's conception, according to which the **Constitutio Antoniniana** "brought to a standstill the development of the **'ius peregrinum'**, quasi stiffening it, is very plausible".[102]

We believe that the growing influence of imperial law is reflected by the fact that in the 3rd century A.D. the provincial inhabitants provide their contracts, which are according to the imperial law only **"nuda pacta"** more and more often with a clause of stipulation which was the precondition of legal sanctioning. In respect of its function and meaning (**interrogatus promisi**), the Greek formula **"eperotetheis homologesa"** corresponds to the Roman **stipulatio.**[103] The "adaptation" of this particular institution of Roman law is characteristic inasmuch as this clause can be found in transactions (e.g. testament) as well, in which **stipulatio** was not at all used by Romans.[104] In connection with the spreading of the formula of **"eperotetheis homologesa"**, Oven writes "degeneration".[105]

The adapted clause of **stipulatio** must have considerably influenced the development of the system of the law of contracts, primarily because with the insertion of this clause every **nudum pactum** could be sued. At the same time, it is not excluded, either, that in the postclassical age the "change in function" of the clause of stipulation - thus, the considerable

increase in its scope of application - exerted an influence on the decline of the type-constraint of Roman contracts. These question can be investigated on the basis of a deeper analysis of the connection of **Reichsrecht** and **Volksrecht**.

> In this connection, we refer to the fact that Wolff[106] considers the provision of contracts with a clause of stipulation as a first station of the long process leading to the concept that the mere agreement results in an obligation. In its Greek form the clause of stipulation is also suitable for being included in some institutions, which originally did not fall within the scope of **ius privatum** (e.g. the **hypomnemata**).[107]

It is local, provincial traditions which explain why the vulgar law, coming to the forefront in the eastern and western parts of the **Imperium Romanum** differs so considerably. In a very paradoxical way, the acceptance of the legally binding force of the mere, formless agreement in the Eastern Part of the Empire is to be explained by the falling into the background of the **stipulatio** to a great extent serving a departure from the obligatory types of contracts.[108] In the Romanized Hellenistic Orient - the measure of Romanization being, of course, considerably different - the victory of the freedom of contracts is considerably promoted by the "peregrinous" law of the **provinciae** of this district; the expression of the will of the contracting parties was not bound to similar formalities as those of the **stipulatio** in Roman law.[109] At the same time, the first departure from the obligatory type of contracts in the imperial law was made by the formula **"eperotetheis homologesa"** which is similar to the **stipulatio** linguistically and functionally and appears in Romanized Egypt. Since the 4th and 5th centuries A.D., however, just as in Occident with the **stipulatio**, it was gradually less uncommon to meet with this formula.

It follows from the strong superficiality of the reception of Roman law that in the Hellenistic Orient the stipulation-clause could not become the organic part of the heterogeneous Egyptian law and, therefore, it disappeared from practice in a comparatively short time. Andreas Bertalan Schwarz[110] refers to the fact that the reception of Roman law in the **pars Orientis** cannot scarcely be considered as a complete one. Certain institutions of the imperial law - thus, e.g. that of unjust enrichment - could not become established on foreign soil (negative assimilation). It is highly probably that this was the fate of the **stipulatio**, as well. The comparatively frequent occurrence of the stipulation-clause in sources can perhaps

be attributed to the fact that (being an institution borrowed from Roman law) it would have hardly been recognized in legal practice without the decision of the Roman jurisdictional authority, the **praefectus Aegypti.**

From the **cessio bonorum, bonorum possessio** and **in integrum restitutio**, frequently appearing in the decisions of praefects in connection with the affaires of the Egyptian inhabitants having no Roman citizenship, the conclusion can be drawn that these institutions, belonging obviously to the imperial law, were only recognized in provincial legal practice, as a result of the decisions of "Roman authorities".[111] The reason why the stipulation-clause frequently appears on the papyri is only partly attributable to the recognition of authorities because in the spreading of this formula a serious part may also have been played by voluntary reception.

The exploration of legal institutions of the peoples living in the neighbourhood of one another in Egypt is rendered more difficult by the fact that the **praefecti** were generally tolerant towards the "peregrinous" law and applied the precepts of Roman law only in cases in which required the protection of the interests of the Roman State, as well ás for the sake of enforcing equity (**aequitas**).[112]

In Chapter III, in connection with effect of the imperial **constitutiones**, we referred to the much debated problem of the **edictum provinciale.** In connection with this, it is questionable whether it was in Egypt an edict, valid only for this province.[113] In our opinion, a plausible standpoint is represented by Ankum who raises the possibility that the **praefecti Aegypti**, heading the province, issue their edict under their own name, copying from time to time - or modifying only slightly - following the example of the **praetor** - the edict of their official predecessor. This concept presupposes, of course, the existence of an edict, being effective **only** on the territory of Egypt.

Following from this, in several cases it cannot be clarified which law the institutions, known on the basis of the sources, originate from. These difficulties, however, cannot question the investigation of the connection of simultaneously effective legal systems with the aid of comparative method.

## 4.5. GENERAL CONCLUSIONS ON THE USE OF THE COMPARATIVE METHOD

Having attempted, by the aid of the **interpretatio Romana** the comparative analysis of some of the institutions of hieratic Egyptian, Persian, Hellenic and the Hellenistic Egyptian legal systems, we may now formulate the general conclusions applicable for the study of the law of ancient peoples.

1. The fact in itself, that in two or more ancient legal systems the same or similar institutions or an **"usage juridique"** take place, cannot be considered as a proof of the origin of these institutions (legal customs) from one another or of their traceability to one another.[114] As to Roman law, we refer only to the fact that in case of the Twelve Tables there are in all probability only very few norms of Greek origin. It is characteristic both of the preclassical and classical legal norms that the immediate reception can be considered as sure only in specific cases.[115] It follows from this "premise" that every legal institution should primarily be investigated separately in the legal system in which it appears as reflected by the sources. It is, consequently, not satisfying to analyze the formal side of an institution and its similarity to the corresponding (parallel) institution of another legal system but we should always follow with attention also the role, occupied by this institution in the studied system of law.

It also follows from this, that the institutions of Roman law, considered as being of a foreign origin, are not necessarily institutions transferred into Roman law in a servile way. It is justified to assume that Roman law elaborated an institution (which was foreign in denomination) primarily under the influence of a progressive tendency, prevailing in the field of **ius gentium** and **ius praetorium**.[116]

2. For the studies of Roman law, it may be useful in many ways to know the whole of other legal systems or some institutions of them. A thorough comparative analysis may clarify whether an institution of Roman law had a progressive or, on the contrary, a retrograde role. As referred to by Watson,[117] in connection with "early law", this is possible because the law of ancient nations underwent different development. Apart from this, in the basis of the known and documented institution of the other law, a hypothesis can be set up about the actual role of an institution of Roman law which may be obscure for a scholar.[118] A very circumspect comparative

analysis relying on a **guide de comparaison** may help settle problems which could otherwise be hardly clarified for lack of sources. An analysis of such a type is particularly important in the domain of Roman law, as - in contrast to Greek law - the archaic period of this law has generally remained in obscurity.[119]

3. The use of the comparative method in the field of investigations should be preceded by the **izolated** study of the institution chosen for the object of analysis. This means that in respect of its place and role, the legal institution in question should be primarily analyzed in a given legal system.[120] Only after having done this, may we start to look for some parallel institutions, i.e. for expanding the "horizon" of research. This requirement can be traced back to the fact that the various elements, institutions of the law have a specific function, originating from their place in the legal system; the primary task of the investigator is to explore this role.

4. It is an important requirement in the investigations using the comparative method, to clear the question of terminological nature satisfactorily.[121] The comparison of the terminologically debated concepts of the various ancient legal systems or the use of concepts which did not exist at all in Antiquity would be a source of several mistakes. The so-called conceptual anachronism - what is obvious for the student - should not be necessarily eliminated in advance because it may mean a heuristic help in certain cases. Noetlichs[122] refers to the fact how useful the "anachronistic" use of modern administrative and criminal law may be when analyzing concepts of officials and of the breach of official duty in Antiquity. As referred to by Wieacker,[123] we should not leave out of consideration that in the late Antiquity jurisdiction and administration were structurally much closer to the corresponding phenomena of the modern State than to the corresponding constructions of the age of the Principate or Republic. The use of "anachronistic" terminology is also justified by the fact that certain institutions can only be analyzed in that way. In this relation, we should refer to the category of the ancient Greek law, the "abstract" concept of which is unknown but reminds us of ownership.[124]

5. In connection with projecting the precepts and institutions of Roman law[125] (which rightly play a prominently important role among the ancient legal systems)[126] we should not ignore the fact that in its own era also Roman law was a **positive** law of normative force and, therefore (even if it contained well-developed solutions, constructions) it does not possess an absolute and universal validity. It would therefore lead to an ana-

chronism to regard it, without due control as the basis for investigating other institutions of the ancient legal system.

6. When investigating the contents of laws of ancient peoples through the comparative method, it is absolutely important that laws whose development level is similar or identical be compared. Naturally, we should not ignore that even within Roman law, playing usually the role of **guide de comparaison**, several phases of development can be distinguished. It was Lübtow[127] who has emphasized the necessity for the "evolutional" analysis of the single institutions of Roman law. If the sources are defective and therefore this requirement cannot be realized, we should keep in view that we are comparing systems standing on various levels of development. We emphasize that the comparative analysis of the ancient legal systems does not lessen the necessity of taking into consideration the autonomy of the single ancient legal norms and institutions. The importance of isolated research is not diminished. Correspondingly, it is more correct to connect the comparative method with the requirement of historicity. This connection precludes the possibility of anachronism in a double sense: on the one hand, owing to the connection the correction of modern legal terminology assumes a greater role, on the other hand, we shall not leave out of consideration the factors, originating from the different levels of ancient legal phenomena and thereby we eliminate an important source of mistake. The connection of the comparative method with the requirement of historicity is necessary both in the field both of micro-comparison (**Mikrovergleichung**) and macro-comparison (**Makrovergleichung**).[128]

7. With using the comparative method, the analysis of Roman law and of the law of the other ancient legal systems is suitable for criticising and revaluating the ossified, petrified opinions. The comparison necessarily contains evaluating and critical elements.[129] Even the scholars comparing the law of ancient peoples on the basis of the comparative method cannot renounce a critical attitude. The "critico-theoretical investigation", named by Ebert[130] **"reine Rechtsvergleichung"**, is connected with a certain general approach. The critical attitude among scholars dealing with the law of ancient peoples can become possible only when several ancient systems of law are familiar for them. It is not accidental that in the 16th century the critique of the Justinianean law was undertaken by François Hotman, who, in the wake of Humanist School, extended his investigations to both the Roman and non-Roman sources of the law of the ancient world.

Closely connected with the requirements of the historical outlook, the use of the comparative method in investigating Roman law and the law of the ancient peoples of the Mediterranean area does not generally lead to "sensational" results. However, comparison is absolutely suitable for the Romanist and the scholar of ancient law to form a more balanced picture of several institutions and tenets of ancient law.

## NOTES

1 **Pringsheim** (1934), p. 453. In his paper published in 1960, Pringsheim considers as valid this establishment some decades later as well. Cf. **Pringsheim** (1960), p. 12.

2 From the Hungarian literature cf. **Móra** (1960), p. 108, and Idem, p. 57.

3 **Beauchet** (1897) Vol. I, p. LIII.

4 **Steinwenter** (1956), p. 205.

5 **Beauchet** (1897), Vol. IV, pp. 28 ff.

6 **Simshäuser** (1982), p. 361.

7 **Kunderewicz** (1956), p. 429.

8 **Wolff** (1969), p. 2.

9 **Polaček** (1968), p. 215, n. 24.

10 **Wieacker** (1982), p. 369.

11 **Pringsheim** (1950), pp. 510 ff.

12 Here we remark that there is among the Romanists, too, a scholar whose outlook cannot be characterized by the Romanistic preconception. Cf. **Orestano** (1961) **passim.**

13 **Meinecke** (1971), pp. 275 ff.

14 Cf. summarily in respect of this scope of problems: **Maschi** (1978), pp. 3 ff.

15 **David** (1937), p. 21.

16 **Hoetink** (1955), pp. 5 and 15, and Idem, pp. 40 and 52.

17 **Kaser** (1971), p. VII.

18 **Steinwenter** (1956), p. 205.

19 **Polaček** (1968), p. 29.

20 **Polaček** (1968), pp. 28 ff.

21 **Kaser** (1971), p. 206, n. 6.

22 **Giomaro** (1974-1975), pp. 269 ff.

23 In a paper analyzing the question of legal security and Roman law, in recent literature, Esteve deals with the delimitation of the power of the magistrates. Cf. **Esteve** (1978), pp. 412 ff.

24 **Polaček** (1964), pp. 201 ff.

25 **Bucci** (1973), pp. 189 ff.

26 **Bucci** (1968), pp. 362 ff.

27 **Bucci** (1972), pp. 157 ff.

28 **Volterra** (1937), p. 89.

29 **Koschaker** (1917), pp. 130 ff.

30 **Gernet** (1917), pp. IV-V.

31 **Bickermann** (1956), pp. 81 ff.

32 **Volterra** (1955), pp. 366 ff, and Idem (1937), pp. 110 ff.

33 **Kaser** (1971), p. 77.

34 **Diósdi** (1968), p. 138.

35 **Volterra** (1937), pp. 97 ff, and pp. 107 ff.

36 **Volterra** (1937), p. 157.

37 **Mitteis** (1947), p. 25.

38 **Torrent** (1974), pp. 109 ff.

39 As to Labeo's Pithana, cf. from the recent literature **Bretone** (1973), pp. 170 ff.

40 **Witt** (1971), pp. 258 ff; **Costa** (1890), **passim**, and **Ferenczy** (1971), pp. 519 ff.

41 **Witt** (1971), pp. 220 ff. and pp. 250 ff.

42 **Pringsheim** (1950), pp. 419 ff.

43 **Pringsheim** (1950), pp. 419 ff.

44 **Costa** (1890), **passim.**

45 **Bekker** (1892), pp. 53 ff.

46 **Pernard** (1900), **passim.**

47 Fredershausen (1906), passim.

48 **Paoli** (1958), pp. 175 ff.

49 **D'Ors** (1943), pp. 14 ff.

50 **Hernandez-Tejero** (1978), p. 217.

51 **Volterra** (1937), p. 176.

52 **Ciulei** (1944), pp. 350 ff.

53 **Kaser** (1971), p. 21.

54 **Volterra** (1937), p. 180.

55 **Jhering** (1852-1865), p. 9.

56 **Biscardi** (1937), p. 370.

57 **Kaser** (1971), p. 532, n. 35.

58 **Biscardi** (1937), p. 370.

59 **Wolff** (1970), p. 161.

60 **Wolff** (1970), pp. 155 ff.

61 **Wolff** (1969), p. 2.

62 **Meinecke** (1971), pp. 280 ff and pp. 354 ff.

63 **Wolff** (1952), pp. 67 ff, and Idem (1966), pp. 567 ff.

64 **Klingenberg** (1976), pp. 201 ff.

65 **Wolff** (1961), pp. 158 ff.

66 **Wolff** (1952), pp. 164 ff.

67 **Wolff** (1961), p. 160.

68 **Kübler** (1938), pp. 175 ff.

69 **Kübler** (1938), p. 179.

70 **Meinecke** (1971), p. 360.

71 **Ankum** (1970), p. 377, and **Volterra** (1937), p. 276.

72 **Taubenschlag** (1955), p. 27.

73 **Wolff** (1981), pp. 313 ff.

74 **Mitteis** (1891), p. 51.

75 As to the interpretation of the lines in question (207-220) of P. Tebt. I,5, known since 1902. Cf. in the recent literature **Modrzejewski** (1982), pp. 375 ff.

76 **Wolff** (1981), p. 314.

77 **Préaux** (1961), pp. 188 ff.

78 **Préaux** (1961), p. 189.

79 **Modrzejewski** (1982), pp. 75 ff.

80 **Modrzejewski** (1966), p. 139.

81 **Préaux** (1958), pp. 365 ff.

82 **Wolff** (1981), pp. 314 ff.

83 **Préaux** (1978), Vol. II, p. 681.

84 In literature the opinion prevails, according to which in both the Greek and Hellenistic legal systems, the sale and purchase are equally real contracts. Cf. **Pringsheim** (1955), pp. 18 ff, and **Taubenschlag** (1955), pp. 317 ff.

85 **Wolff** (1961), p. 148.

86 **Wolff** (1961), pp. 102 ff, and in the recent literature: **Kränzlein** (1976), pp. 629 ff.

87 **Wolff** (1976), pp. 196 ff, and Idem (1978), pp. 155 ff.

88 **Wolff** (1961), p. 114.

89 **Wolff** (1961), pp. 117 ff.

90 **Wolff** (1961), pp. 102 ff.

91 **Wenger** (1906), pp. 246 and 248.

92 **Wolff** (1974), pp. 1 ff.

93 **Ankum** (1971), p. 369, and **Modrzejewski** (1970), pp. 322 ff.

98 **Pólay** (1960), pp. 16 ff.

99 **Modrzejewski** (1970), pp. 337 ff.

100 **Mitteis** (1891), pp. 159 ff.

101 **De Visscher** (1949), pp. 159 ff.

102 **Pólay** (1976), p. 30.

103 **De Visscher** (1960), pp. 19 ff, and **Simon** (1969), pp. 3 ff.

104 **Katzoff** (1969), p. 421, and **Seidl** (1973), pp. 173-175.

105 Oven (1958), pp. 409 ff.

106 Wolff (1974), p. 100.

107 Simon (1964), pp. 17 ff.

108 Levy (1956), pp. 41 ff.

109 Wolff (1974), p. 99.

110 Schwarz (1960), p. 154.

111 Ankum (1971), p. 369.

112 Ankum (1971), p. 379.

113 Ankum (1970), p. 364.

114 Volterra (1937), p. 209; Préaux (1961), p. 189, and Kübler (1938), p. 175.

115 Kaser (1971), p. 175; Pringsheim (1960), p. 12.

116 Modrzejewski (1970), pp. 360 ff; Wenger (1938), p. 143.

117 Watson (1974), pp. 12 ff.

118 Watson (1975), pp. 7 ff.

119 The comparative difficulties of investigating the archaic Roman law are referred to by Wenger in the scope of analyzing the connection between law and religion. Cf. Wenger (1927), p. 57.

120 Volterra (1955), p. 153, and Idem (1963), p. 266.

121 Witt (1971), pp. 254 ff.

122 Noetlichs (1979), pp. 1 ff.

123 Wieacker (1964), passim.

124 Simonetos (1939), pp. 173 ff, and Herrmann (1976), p. 615.

125 Wenger (1920-1921), p. 304.

126 Volterra, reviewing Yaron's book calls the attention to the fact that the authors, investigating the institutions of the law of ancient peoples, endeavour to make evident, at any cost, analogies to the various institutions, known in Roman law. Cf. Volterra (1961), p. 331.

127 Lübtow (1954), p. 51.

128 From the literature, dealing with comparative law in respect of the scope of the problems of micro-comparison and macro-comparison, cf. Rheinstein (1974), pp. 31 ff, and Zweigert (1974), p. 303.

129 In the scope of comparative law, the problem of critical evaluation obtains a comprehensive elaboration only in Zweigert's monograph. Cf. Zweigert (1973), pp. 403 ff.

130 Ebert (1978), p. 163.

# CHAPTER 5

# THE CONCEPT OF CONTRACT AND THE LAWS OF THE ANCIENT MEDITERRANEAN WORLD

## 5.1. THE CONCEPT OF LEGAL INSTITUTION AND ANTIQUITY

1. As shown by Zweigert,[1] the comparative approach to law is by nature a "functional" and "anti-dogmatic" method. However, in the process of adopting this "functional" and "anti-dogmatic" method, we cannot do without certain dogmas in the broadest sense of the term. This applies especially to the concept of legal institution, a category widely used in the studies analyzing entire legal systems as well as individual legal institutions within the frame of these systems. It might be asked whether the use of the term "legal institution" is justified, and if so, to what extent. In this connection, it should be mentioned in passing that certain scholars, such as Ebert,[2] substituted the concept of **legal norm** (as a so-called **Sammelbeziehung**) for the category of legal institution.

As a fundamental concept in addition to legal relation, the concept of legal institution in Savigny's conception was closely connected with the legal system.[3] Savigny considered contract, marriage, representation and other major categories of substantive law as parts of the concept of legal institution, going back, basically, to Kant's Privatautonomie.[4] A peculiarity of this concept of legal institution was that within this - in contrast to the concept of legal relation -, Savigny did not distinguish between formal and material elements. It was characteristic of the legal institution that it was not only the reflection of social reality, but also a legal category with an "independent existence".[5] It resulted from the nature of the legal institution as an independent legal category that it could serve as the basis of a system detached from or, to say the least, alienated from reality. Legal relation as a category subordinated to legal institution

("... so erkennen wir, dass jedes Rechtsverhältnis unter einem entsprechenden Rechtsinstitut, als seinem Typus, steht...")[6] was, by implication, an inherent part of the "organic" system.

A prominent French representative of the so-called institutional approach focussing his attention on institutions, was Hauriou.[7] Hauriou used the term institution in the sense of the actual, objective elements of a given legal system. The so-called institutions **in rem** - which do not fall completely within the sphere of the law **in rem** - such as the categories of contract and property are part of civil law. A peculiarity of this conception is that the legal norms are represented by institutions.

2. Rüthers[8] argued that a trait common to all the views attributing particular importance to the idea of legal institution (institutional approach) was a kind of "transcendental" outlook. No analysis in depth is needed to find out that the concept of legal institution is an artificial construction and, as a product of nineteenth-century jurisprudence, inevitably bears the marks of certain general legal conceptions. It is another matter, however, that the legal institution, in the broadest sense of the term, won acceptance in modern jurisprudence and legal literature as a technical term. Such an objective but flexible legal institution[9] is e.g. the contract. And though what is under discussion here is generally known and flexible category, we would better examine the question, whether and to what extent this technical term denoting in modern law an institution of the law of obligations can be used in an analysis of the laws of Antiquity.

In legal historical studies, the problem of discontinuity on the one hand, and that of legal dogmatics, on the other, arise with reference to the concept of legal institution. Wieacker[10] suggested that the historical analysis of legal institutions - and of legal tenets, as well -, even where recorded legal documentation was the richest, could be but discontinuous, a kind of "snapshot". The task of the legal historian was to make these "snapshots" into a homogeneous picture. He described this task as follows: **"Offenbar stützt dabei oft nur der wirkungsgeschichtliche Zusammenhang späterer Rechtssätze und Institute mit den vorausgehenden, bis in die Gegenwart hinein, die Vorstellung, als hätten jene als solche eine durchlaufende Geschichte "aus eigenem Recht"**. It was Schnorr v. Carolsfeld[11] who called attention to a problem relating to dogmatics, namely to the fact that certain "problems of life" (**Lebensprobleme**) especially those with an economic background, could generally be recognized in terms of the law only at a later stage. Therefore, it was not by chance that certain abstract legal categories were formulated at a relatively later date and so, for previous stages of development, they were perceptible from the functional aspect, alone. As in the field of legal historical studies, it was the so-called **Institutionen- und Dogmengeschichte** that prevailed.[12] These were, undoubtedly, general problems; they did not only appear in the study of the laws of Antiquity.

We believe that to adopt the concept of contract as a "working hypothesis" for analyzing ancient legal constructions closely related to or reminiscent of this concept, is indisputably right. However, in contrast to Diósdi's views,[13] it should be stressed that the contract, in this connection, did not denote (as a technical term) a legal institution within the framework of a more or less artificially constructed legal **system**, but a neutral category. It follows from the above that, in our view, Kaser's opinion, that the terminology of modern jurisprudence should not be applied to the study of archaic Roman law, is to be rejected.[14]

## 5.2. THE QUESTIONS OF THE CONCEPT OF CONTRACT IN GENERAL

1. There is a rather close connection between the construction of the contract in current use in modern European legal systems and the Roman legal concept of **contractus**. An exception to this rule is the construction of contract based on the doctrine of consideration in English law.[15] Naturally, it does not follow from this statement that the modern concept of contract is a homogeneous construction.[16] Projecting the problem back to Antiquity it is not surprising to find that, even in the field of ancient law, a **homogeneous** conception of contract is non-existent.

The question of a homogeneous conception of contrast did not come up even in Fikentscher's works.[17] This may seem rather surprising, because Fikentscher was otherwise much given to generalizing. In his view, it was the so-called **"fragmentierte Gesellschaft"**, where the so-called **"Austauschbeziehungen kurzfristiger Art"** emerged. These "exchange relations" were actually substituted for the fully-fledged contracts. The period he called **"organisierte Gesellschaft"** was the time when contractual relations in the modern sense of the term were first seen to emerge. He described the period of **"fragmentierte Gesellschaft"** as follows: **"Bindungen auf die Zukunft oder gar Kreditgeschäfte sind nicht vorhanden oder begegnen nur in rudimentären Formen."** From the aspect of terminology, the otherwise highly idealistic fundamental conception of the author of the **Methoden des Rechts**, especially with reference to contracts as means of property transactions, can be accepted as quite reasonable.

As regards the concept of contract in the law of Continental nations, we indicate that the Swiss and German legal systems indicate a synallagmatic construction for performance and compensation, while French law prefers the doctrine of condition.[18]

We would like to know how the concept of contract continuing, for the most part, Roman traditions, can be related to the law of the other peoples of the ancient Mediterranean world. We wish to remark that there would be no point in analyzing the legal transaction bearing the obvious marks of modernity, though its Roman origins can easily be proved, at least as far as its contents are concerned.[19] To cast light on the formal properties and contents of the concept of contract in the law of ancient peoples, where (similarly to modern law) a **homogeneous**, universally valid construction of contract could not be found, has grave implications. Another essential task is the analysis of the social background of the contract (in this connection we refer to the **amicitia** in Roman law) a task which has hitherto not come to the fore.[20]

2. The present analysis is not aiming at studying the construction of certain actual contracts, e.g. whether in ancient Greek law sale and purchase or lease took the form of consensual or real contract.[21] The relative quality of putting the question this way is shown by the fact that, in Greek law, with chattels - as Theophrastos said - the acquisition of property or, to express it more exactly, obtaining "mastery" of a piece of property was not subject to the delivery of the thing; the fact that it was not a kind of consensual contract (as one may have inferred) was indicated by the necessity of the continued observance of the appropriate "form of publicity".[22]

The aim of our analysis is to shed light on the ancient antecedents of the modern concept of contract. The circumstance that - because of the outstanding quality of Roman law - the laws of the ancient Mediterranean world did not usually exert any influence upon the growth of the European legal systems, does not lessen the importance of an analysis of this kind.

In this analysis, our investigations has been restricted to the peoples living within the confines of the ancient Mediterranean world. That is the reason why we do not wish to refer, even in passing to the concept of contract in e.g. ancient Persian law. We are just touching upon the fact that in the opinion of certain scholars - such as Bucci[23] - ancient Persian law made the same distinction between **"pactum"** and **"contractus"** as we can see in Roman law.

The analysis of the concept of contract in the ancient laws of the Mediterranean world becomes rather easy since these laws may be regarded to be "intact". By this we mean that one need not pay any attention to mediaeval and modern survivals while, on the other hand, this is a major problem of Roman legal studies.

## 5.3. THE PROBLEMS OF THE CONCEPT OF CONTRACT IN ROMAN LAW

1. As Diósdi has clarly shown,[24] the majority of authors in their works on the Roman contract regard a given modern theory of contract as a guideline. Consequently, apart from a few exceptions, what takes place is the ahistorical projection of modern theories on the past. Thereby the clear line dividing the **concept** of the contract from its **history** gets blurred. Owing to the method of approach, from a dogmatic historical aspect, a false, inadequate notion is formed of the contract in Roman law. It should be added, however, that the danger of forming an inadequate notion, because of the prevalence of the dogmatic historical approach, has not been confined to Roman legal studies.[25]

Preconceptions were an important consideration especially for pandectists focussing their attention on codification, in particular. As the pandectists acted within the frame set by the age they lived in on the one hand, they drifted further and further from modern law,[26] on the other hand, by forming modernist conceptions, they relegated the study of the legal institutions of other ancient peoples to the fringes of investigation. Factors contributing to preconceptions can, incidentally, be discovered in the legal literature of most countries - this feature is not confined to "German" scholarship.

2. In the view current on the European Continent the principal attribute of the contract has been the concurrence of the contracting parties' will.

> The practice of the mediaeval German towns is most instructive in this respect. Ebel[27] referred to the fact that the concept of **"das gewillkürte Recht"**, in general use in the law of German towns, was based on private autonomy and on a concept of contract in terms of the freedom to enter into a contract. Analyzing the technical term **"Verwillkürung"** he put it as follows: **"Die alte Verwillkürung war in einer Rechtswelt zu Hause, in der das Recht noch kein ius cogens war und Rechtsfolgen keineswegs mit zwingender Berechenbarkeit automatisch eintraten. Die Selbstbindung durch Selbsturteil ersetzte weitgehend den noch nicht vorhandenen staatlichen Rechtszwang und Rechtsschutz. Ihre Kraft lag in der Bindung an das eigene Wort."**[28] A rather special circumstance (and, it should be added, one left hitherto entirely out of consideration by the works on contract) is that the growing in importance of legislation and of a well-ordered legal system in general is in direct ratio to the loss in importance of **"Verwillkürung"** in certain contracts. Urban law in Germany was beginning to give up and lose the peculiarities related to the legal transactional character as early as the Middle Ages.[29]

The concurrence of the will of the contracting parties as an element constituting the transaction itself had difficulties in gaining acceptance in mediaeval jurisprudence. Hübner[30] suggested that the explanation of the reluctance to accept the binding force of **pactum nudum** should be sought, essentially, in the striving for so-called **Objektivierung**. This view, going back virtually to the thirteenth century (Duns Scotus, Occam), motivated in terms of natural law (Grotius, Pufendorf, Thomasius) considering the contract as the concurrence of will of the contracting parties, was basically built on ideological foundations.[31] Pandectists based this type of construction of contract (**"ex nudo pacto actio oritur"**) on Kant's thesis of the autonomy of the will. It was typical of the triumph of consensualism that, in certain cases, **not even** a positive rule was required for the **assertion** of consensus. Thus e.g. the French **Code civil** did not formulate this requirement expressly, this could be inferred only from the so-called "indirect" sources (in terms of Cc. §1138, §1583 and §1703 etc.).[32]

In modern law, irrespective of social system, this concept of contract based on the concurrence of the will of the parties has become more and more problematic and controversial.[33] The contract was frequently based on a kind of **fictitious** concurrence of will. However, a circumstance contributing to the fact that the concurrence of will grew in importance and authority was, undoubtedly the fact that in most contracts the circumstance of being onerous (which could be regarded as a kind of objectivation) was not at all taken into account. Thus, it was not by chance that the concurrence of will became to be considered as the **par excellence** criterion of the contract.[34]

It is in this connection that Mauss's theory[35] is worth mentioning. In sharp contrast to **communis opinio**, Mauss believes that onerous transactions (sale and purchase, barter etc.) can be traced back to donation. Mauss's doctrine passed unnoticed by the literature of the subject. It was Michel[36] alone of the Romanists that reflected in full on the above thesis. In Michel's view, primitive society - where the concept of legal action (**"acte juridique"**) was unknown - did not make any distinction between **"titre gratuit"** and **"titre onéreux"**.[37] Only advanced society will be able to make this distinction between the two kinds of transactions, the gratuitous and the onerous. In the above two theories which, in some respects, show considerable affinity, **synallagma** was no requirement, not even in the sphere of **origo**; for the law of the archaic period. Moreover, owing to the considerable importance of **donum**, it cannot seriously be taken into consideration.

3. In the sources of Roman law, concurrence of will as an indispensable precondition of making a contract was formulated in general terms by Ulpian.

**Conventionis verbum generale est ad omnia pertinens, de quibus negotii contrahendi transigendique causa consentiunt qui inter se agunt ... adeo autem conventionis nomen generale est, ut eleganter dicat Pedius nullum esse contractum, nullam obligationem, quae non habeat in se conventionem, sive re sive verbis fiat: nam et stipulatio quae verbis fit, nisi habeat consensum, nulla est** (D. 2,14,1,3 - Ulpian).

Paulus et Venuleius, moreover, thought it expedient to stress, in particular, the importance of **consensus** as a necessary prerequisite.[38]

**Si Stichum stipulatus de alio sentiam, tu de alio, nihil actum erit, quod et in iudiciis Aristo existimavit: sed hic magis est, ut is petitus videatur, de quo actor sensit, nam stipulatio ex utriusque consensu valet, iudicium autem etiam in invitum redditur et ideo actori potius credendum est: alioquin semper negabit reus se consensisse** (D. 45,1,83,1- Paulus).
**Si hominem stipulatus sim et ego de alio sensero, tu de alio, nihil acti erit: nam stipulatio ex utriusque consensu perficitur** (D. 45,1,137,1 - Venuleius).

Moreover, Paulus referred to the great importance of **animus** as part of real contracts.

**Non satis autem est dantis esse nummos et fieri accipientis, ut obligatio nascatur, sed etiam hoc animo dari et accipi, ut obligatio constituatur, itaque si quis pecuniam suam donandi causa dederit mihi, quamquam et donantis fuerit et mea fiat, tamen non obligabor ei, quia non hoc inter nos actum est** (D. 44,7,3,1 - Paulus).

4. Concurrence of will have given rise to a controversy, continuing in literature to this day, on the antinomy of **voluntas** and **verba.**[39] The controversy carried on by the exponents of the objective and subjective theories, on the importance of **voluntas** in various periods of Roman legal development, points to the fact, how problematic it was to attach **decisive** importance to concurrence of will in contracts (**pactum**). The objective theory prevailing at the turn of the century regarded the principle of **voluntas mater contractuum** - in Greek **meter gar estin ton synallogmaton he diathesis** (Stephanos scholion in D. 17,1,5,2 - Paulus)[40] -as valid for the post-classical Justinianean law **alone.** And though certain exponents of this trend - such as Fritz Schulz,[41] among others, - did not entirely doubt the importance of **voluntas** in classical law, all the same,they considered the rule **semper vestigia voluntatis sequimur**[42] as valid without limitation for post-classical Justinianean law alone.

The subjective theory hallmarked by Riccobono's name in particular, attributed serious importance to the role of the will from as early as the

end of the Roman Republic on. In one of his papers,[43] Riccobono came to the conclusion that not even the **pontifices** in the archaic period had fully adopted the rule **uti lingua nuncupassit, ita ius esto**, because the individual will of the contracting parties had also been taken into consideration.

Pringsheim, arguing that Servius's construction of **id quod actum est** was a clear proof of the close and even inextricable interpenetration between transactional will and transactional declaration,[44] tried to "bridge" the gap between the two, diametrically opposed opinions. In his view, it followed from the organic relationship between the two elements that **voluntas**, even in Justinian's Codification, had not turned into an absolutely standard-setting factor. The construction **id quod actum est**, by taking into consideration both the objective and the subjective elements of the contract, was a kind of alternative to the doctrine of the will which had never succeeded in growing into a fully-fledged, expressly formulated theory. It is also worth mentioning that the arguments advanced against the subjective theory illustrate well that forcing the contract within the bounds of the concurrence of will of the parties led to a deadend.

5. The main point of the contract was not, even in Roman sources of law, the concurrence of will of the contracting parties alone. Actually, it was of no consequence to the subject under examination that the validity of the contract - and, it should be added, of the legal transaction in general - presupposed the existence of well-defined forms.[45] We would point out that the opinion in recent literature voiced by Sargenti, believing to have identified a shift in the centre of gravity of the contract,[46] should be accepted as plausible. This shift in the centre of gravity is manifest in the gradual eclipse of the bilaterality of the contractual obligation, to the benefit of **consensus**. In Cicero, contractual obligations could still be classed in two categories: on the one hand, there were unilateral obligations, protected by the **iudicium certae pecuniae**, on the other hand, there were bilateral obligations sanctioned by the **arbitrium bonae fidei**.

In Cicero's **oratio pro Q. Roscio** we can find the following: **"Hic ego si finem faciam dicendi, satis fidei et diligentiae meae, satis causae et controversiae, satis formulae et sponsioni, satis etiam iudici fecisse videar, cur secundum Roscium iudicari debeat. Pecunia petita est certa: cum tertia parte sponsio facta est. Haec pecunia necesse est aut data aut expensa lata aut stipulata sit. Datam non esse Fannius confitetur; expensam latam non esse codices Fannii confirmant; stipulatam non esse taciturnitas testium concedit."** (5,14)

The classification of contractual obligations, originating with Labeo, was similar in many respects, though the division had already been based on trichotomy.

> **Labeo libro primo praetoris urbani definit, quod quaedam "agantur", quaedam "gerantur", quaedam "contrahantur": et actum quidem generale verbum esse, sive verbis sive re quid agatur, ut in stipulatione vel numeratione: contractum autem ultro citroque obligationem, quod Graeci synallagma vocant, veluti emptionem venditionem, locationem conductionem, societatem: gestum rem significare sine verbis factam.** (D. 50,16,19 - Ulpian)

In the classification by **agere, contrahere** and **gerere**, the first category corresponded basically to unilateral obligations, while **contrahere**,[47] placed second, corresponded virtually to contracts.[48] The systemization of this type of obligations, in its influence, extended far beyond Labeo's work, and could be detected in traces even centuries later.[49] The main point of Labeo's systemization - and before him, of the one documented by Cicero - was not primarily the concurrence of the will of the contracting parties. The considerations behind this systemization were much more objective in nature.

The problematic quality of the approach to contracts, from the sole direction of the concurrence of will, is also shown by the fact that the contract - and this applied even to formless agreements or, to put it more exactly, to agreements not classable in well-defined types - could be a source of law **in se**. Kaser pointed to the fact that the agreement of the contracting parties could create law not only for the contracting parties but also for a third party.[50] The entitlement of and obligation to a third person had obviously nothing to do with a construction based, relatively, on the concurrence of will. The **lex rei suae dicta** could be binding - e.g. when a piece of property was pawned - on third persons who were originally no parties to the contract. Thus, it was no mere chance that in certain non-legal sources[51] the concept referring to contracts (**pactum**) was a category the influence of which was not restricted to the persons of those concluding the contract. The contract became a source of law either simply through the agreement of the parties, by **consuetudo**, or through having been recorded in an edict. In these terms, it should be out of the question that the basis of a contract - which can be taken for an indirect source of law - could be private autonomy alone.

It is a common attitude towards Roman legal regulation of contracts that holds that **conflicts**, and not the settling of the content of contracts was what was peculiar to this regulation.[52] In Klami's opinion, if the object of legal regulation was a conflict in the abstract, this meant the limitation of the regulation to a conflict situation.[53] Consequently, the so-called primary function of the contract was either not given any attention at all or, at least, it lost much of its importance. To be sure - and even Klami himself has to agree - there are indications, even in Roman law, of the efforts of the State to specify the contents of the contracts individually, in each case, in addition to defining the type of the contract. The indications of this delimitation as well as of interfering with private autonomy were the ban put on the rate of interest (e.g. **lex Genucia**), the interdictions by law of contracts offending against moral precepts, as well as Diocletian's edict fixing maximum prices for commodities.[54]

The liberalist doctrine of contracts, putting so great stress on following Roman legal tradition, paid no particular attention to these rules restricting within strict bounds the freedom to enter into a contract.[55] Such an inadequate concept of the legal regulation of contracts in Roman law, could be traced back to the absence of detailed studies. A reference[56] to the rather questionable backwardness of Roman State apparatus cannot be given as an excuse for failing to analyze e.g. the regulations of the Roman "Anti-Trust Law", discussed in another connection in Chapter III of our book.

## 5.4. THEORIES ON THE CONSTRUCTION OF CONTRACT IN ANCIENT LAWS AND THEIR CONNECTION WITH ROMAN LAW

1. Our statement, to the effect that the private autonomy of the contracting parties was not the exclusive basis of contracts, is far from meaning that the author implies that the factor of will lost its importance and authority. Greek philosophy had a major role in having the legal relevance of **voluntas** accepted. Greek philosophy can be regarded as laying the theoretical foundations of the doctrine of the will. This, of course, does not mean that Plato, Aristotle[57] or Theophrastos in fact took the will factor into consideration over the **whole** range of jurisprudence.[58] In this connection, we wish to mention that even Theophrastus[59] himself did not speak expressly e.g. of **error**.

It was a major component of Aristotle's conception of contract that it was the **pistis** that served for the basis of the contract (**Eth. Nic.** 1164b). For him, the contract was a kind of community - **philia nomike** - provided that the contracting parties agreed upon performance **following** the entering into force of the contract (**Eth. Nic.** 1162b). The **philia nomike** can, of course, be also interpreted as "legalized relationship (friendship)". Services should be balanced, as one service is done because of the other (i.e. **anti tinos**) (**Eth. Nic.** 1132a; 1162b).[60]

It is because of this that Pringsheim observed that the doctrine of will had no importance in Greek law or in archaic Roman law.[61] It is worth mentioning here that another medium of exerting influence on Roman law was the rhetoric of pleading that was also destined to transmit the achievements of Greek culture. This is the field where the beginnings of the interpretation of contract through the clarification of individual will can be traced back to, from the period of the late Republic on.[62]

2. The idea current in modern systems of law that he who offers, in the form of promise, to perform a service, is also responsible for keeping the promise (meaning the concurrence of will of the contracting parties) can be traced back to Roman law. This approach or view is quite unknown to Greek law. In accordance with the theory of **Zweckverfügung**, linked with Hans Julius Wolff's name,[63] in Greek law, it was not the **promise** or any definite form that served for the basis of establishing the debtor's liability. For recorded documents, this principle meant that they had no constitutive force, but only documented the actual realization, i.e. "transacting" of the necessary **Zweckverfügung** and the undertaking of an obligation based on it.[64] It was a peculiarity of Greek law that, unlike Roman law, legal actions (**dikai**) classed by individual types of contracts were unknown to it. We would argue that this was closely connected with the fact that, in terms of Roman terminology, Greek legal transactions did not differ in their construction or, to put it differently, in their structure. In this respect, Simon's paper[65] on **kresis**, **parakatheke** and **daneion** is highly informative. Simon, starting from his analysis of the transactions of which **datio** and **restitutio** were parts, came to the conclusion that these transactions had a standard pattern for the construction of contract. He stressed that these transactions did not differ in their structure.

**General** action for enforcing the promise involved in the contract was also unknown to the Greeks. To enforce the claim presupposed an instruction by the creditor, with an objective in view. As the objective failed to be achieved, because of the debtor's behaviour (meaning a breach of contract), the creditor could claim that the debtor should perform his obligation on a

delictual basis, i.e. in terms of the construction of loss sustained. Doing damage is an act of material nature and thus it referred to harm done to or loss siffered by the creditor's property (not in the technical sense of the term "property").

By way of illustration, we wish to sum up concisely, the main points of the approach of Attic law to the loan (**daneion**). In the rhetors' speeches, above all in those made by Demosthenes (Dem. 35,39 and 56,16), the lender was spoken of as robbed by the debtor, if the debtor failed to perform his obligation.[66] In contrast to Roman law, what mattered here was not that the object of loan, money or perhaps some other piece of property would become the debtor's property and, this way, the liability would be expressed in terms of obligation. With Seidl's apt expression, it was the "position of power" (**Machtlage**) alone that underwent a change.[67]

> This "position of power" was closely connected with the much-discussed problem of the Greek law of property. Seidl's category of **"Machtlage"** also proved the thesis right that though the abstract idea of property was obviously unknown to the Greeks, property (the law of property) was nevertheless not an unknown category, as far as its **meaning** was concerned.[68] In Greek law, the counterpart of property, the law of property was a kind of "law of dominance" **("Herrschaftsrecht")**. The literary controvery - as suggested by Herrmann[69] - was given rise to by the question, which kinds of rights and licences constituted the so-called positive aspect of property, on the one hand, and on the other, whether the theoretical distinction between property and possession was known to the Greeks or not.[70]

The harm, damage (**blabe**) in Attic sources meant actually damage, loss sustained by the creditor's property. Thus the **dike blabes** offered a **general** opportunity for enforcing the 'contractual' claims arising from loss sustained, i.e. claims delictual in character. The approach peculiar to ancient law was, therefore, not basically the real transactional view, because it was not the delivery of the thing that mattered, as a basis for the obligation.[71]

The difference between Greek and Roman law was not that in Greek law a kind of real transactional approach had exclusive validity. The domain of innominate contracts was the one closest to the Greek legal concept of contract. However, significant differences can be observed even in this domain, owing to the delictual character of the category of obligation in Greek law. The **actio in factum** and the **praescriptis verbis actio** lacked the very basis in delict that was peculiar to the **dike blabes**. It is typical that no special action (**dike**) existed against damages done to property outside the

terms of contracts; in these cases, suit could be brought on **dike blabes**, i.e. on the basis that a delict had been committed.

In Greek law, there were other means to enforce a claim without sueing on **dike blabes**. This was the case, e.g. when the debtor, by a separate agreement to this effect, transferred the right of direct execution - for default of performing or not satisfactorily performing the obligation - to the creditor. The **praxis**-clause rendered the action brought on **dike blabes**, on a delictual basis unnecessary. The **praxis**-clause in itself was in no particular connection with the creditor's claim arising from loss sustained by his property. However, considering that the **praxis**-clause was an institution related expressly to performance, supposing a separate agreement between the contracting parties, it had virtually no effect upon the debtor's delictual liability.

3. Liability for committing a delict presupposes an interconnection between contract and property (or "position of power", "power status"), the traces of which can also be detected in Roman law. On the basis of certain sources of classical law, we are led to the conclusion that **in the public mind**, in public opinion the object of **mutuum** - which could be money as well as a piece of property - continued to be the lender's property. A fragment containing the text of a receipt of money made out for the creditor also suggests this conclusion.

> **Quidam ad creditorem littera eiusmodi fecit: "Decem, quae Lucius Titius ex arca tua mutua acceperat, salve ratione usurarum habes penes me, domine", respondit secundum ea quae proponerentur actione de constituta pecunia eum teneri.** (D. 13,5,26 - Scaevola)

Another fragment with a promissory note (**epistola**) by a **libertus-praepositus** shows a similar attitude.

> **Lucius Titus mensae nummulariae quam exercebat habuit libertum praepositum: is Gaio Scio cavit in haec verba: "Octavius Terminalis rem agens Octavii Felicis Domitio Felici salutem, habes penes mensam patroni mei denarios mille, quos denarios vobis numerare debebo pridie kalendas Maias", quaesitum est, Lucio Titio defuncto sine herede bonis eius venditis an ex epistula iure conveniri Terminalis possit, respondit nec iure his verbis obligatum nec aequitatem conveniendi eum superesse, cum id institoris officio ad fidem mensae protestandam scripsisset.** (D. 14,3,20 - Scaevola)

The attitude reflected in the two fragments, connecting loan as a **contractus**, beyond doubt, to **property**, may very probably have been a view common in general practice. This assumption was based on the fact that the person making out the receipt (**littera** in one source and **epistula** in another) was not a jurisconsult. This fact clearly indicated that in everyday practice it was the view closer to realities and not the theoretical tenets elaborated in minute detail that **tended** to prevail. In our view, the body of Egyptian papyri also seems to be a proof of this assumption, as far as transactional representation is concerned.[72]

The means of enforcing one's right, in the above-discussed two cases, may have been the proprietor's action, the **rei vindicatio**. And, in the last analysis, a **delictum** was to serve for the basis of **rei vindicatio**, provided that default of repaying the loan qualified as **furtum**. Summing up the above, it can be stated that, even in the imperial age, the approach in many respects strongly reminiscent of Greek law was not foreign to the minds of lay people, though, it should be acknowledged that this cannot be proved, except for one type of contract, the **mutuum**. We would argue that the concept of **unilateral** obligation discernible in litteral and real contracts and which was given vivid expression in the tenet **alius obligat - alius obligatur**[73] was related to this approach.

Roman jurisprudence shows no indication of the fact, either, that the legal cause of contractual claims could be traced back to some **delictum** or other. The **contractus**, the meaning of which was incidentally rather "unspecified" (as suggested above with reference to Cicero and Labeo's classifications of obligations) in a single respect seems to be unequivocal: this technical term acted as a collective notion **usually** denoting the non-delict-based obligations.[74] The concept of contract underlined this way the **basically** differing character of penal and **actiones rei persecutoriae**. To base the claim arising from the violation of the **contractus** on delict can be, therefore, dismissed as a possibility out of the question in Roman legal sources.

4. Wolff's above-defined theory of **Zweckverfügung** had much in common with the **Surrogationsgedanke**,[75] linked with Pringsheim's name as well as with Seidl's **Prinzip der notwendigen Entgeltlichkeit**.[76] We wish to refer only in passing to the fact that (and this seems to be particularly advisable when speaking of the **Prinzip der notwendigen Entgeltlichkeit** and **Surrogationsgedanke**) principle (**principium**), a category (**primum capere**) referring otherwise to beginnings (**arche**), in this connection is a technical

term employed in a general sense.[77] The reason why this is so is that a principle connected with the **entire** history of Greek law is involved here. We wish to emphasize that the **"Prinzip"** in Seidl's formulation was not identical with a legal principle (**Rechtsprinzip**) in the sense of a technical term - such as the tenet of **pacta sunt servanda** - or with a maxim, perhaps a legal axiom or the idea of a legal institution.

The **Surrogationsgedanke** or, to express it differently, the **Surrogationsprinzip** was valid to the law of most ancient peoples. San Nicolò[78] regarded this principle as also valid for the neo-Babylonian law in cuneiform script. Petschow also joined to the supporters of this view, analyzing in a number of papers how this principle was brought into effect.[79] For Pringsheim[80] the main point of the **Surrogationsgedanke** was that money deriving from alien property created for the proprietor a right **in rem** or, to put it more exactly, a right of an objective type.[81] This way the party acquiring property by means of alien property - which may include money or other items of property - procured right over the chattels replacing the alien property not for himself, but for the proprietor of these means, - hence the name "surrogation". This procuring right over something which very often meant actually acquiring property, in many cases led to nothing more than to the acquisition of some legal title. It was in this respect that Pringsheim spoke of the acquisition of "some title, if not ownership", in his analysis of sale and purchase.[82] The **Surrogationsprinzip** has been a technical term, also in common use by other authors - though not necessarily as a universally valid one. For example, Kränzlein[83] discussed how this principle functioned in his analysis of the so-called Greek liberation epigraphs.

A more detailed version of **Surrogationsgedanke** was the **Prinzip der notwendigen Entgeltlichkeit** which, in Seidl's opinion, was particularly valid for Egyptian law under the pharaohs and the Lagidae. This validity, however, was not absolute because, in certain cases - as Seidl himself mentions[84] - the authority of this principle was not absolute in the law of obligations. Seidl thought that the owner of a piece of property no longer in his possession had continued to be the owner as long as he did not get compensation for it.

Seidl in his work entitled **Aegyptische Rechtsgeschicte der Saiten- und Perserzeit**[85] gave the following definition of this principle: "Das Recht will im 'Eigentum' vor allem den Kapitalwert für den Eigentümer schützen. Diesen soll er nicht verlieren. Gibt er also eine Sache aus der Hand, so bleibt sie solange sein

Eigentum, bis er ein richtiges Entgelt dafür in sein Vermögen bekommen hat. Und gibt er Geld oder andere Ware aus der Hand, so bleiben sie sein Eigentum, bis er den gleichen Wert zurückhält..." In Herrmann's view[86] - and this seems to be fair criticism - Seidl gave a far too general formulation to this principle. Therefore, his work is ill-qualified to explain e.g. how property in chattels could be acquired **without** transference.

We feel Kaser to be right when he states that the **Surrogationsgedanke** and the **Prinzip der notwendigen Entgeltlichkeit** can virtually be regarded as synonymous categories.[87] These two principles can also be considered to be the **general principles** of the law of obligations. This is the reason why the concurrence of will of the contracting parties did not mean in itself a change in the property nexus (position of power). Legal relations continued to adapt themselves to ownership (position or power), employed here not in the technical sense of the term. The contract - by broad definition - might be, at most, a motive of the change in ownership.

In conclusion, it can be stated that the **Surrogationsgedanke**, the **Prinzip der notwendigen Entgeltlichkeit** and the **Zweckverfügung** are basically not inconsistent with one another.[88] A common feature, a common trait to each is that these principles stipulated the performance of compensation, in some form or other, as a precondition for acquiring right over something. The difference is discernible in that alone that, according to the theory of **Zweckverfügung**, on the one hand, the agreement of the contracting parties was more important than according to the other theories, at least in a formal sense, and, on the other hand, the basis of the debtor's liability was the construction of doing damage.

5. As regards its essence the theory of **Zweckverfügung** has found positive response in the literature of the subject as the generally valid principle of Greek law. It is another matter of course, that certain authors modified this principle in certain respects. For example, Herrmann corrected Wolff's principle by constructing **Verfügungsermächtigung**, so that he laid a greater stress on the role of the party in the position of debtor.[89] The scope of action by the principle of **Verfügungsermächtigung** was governed by the type of the actual transaction. In this way, the principle could be applied to the acquisition of possession as well as to the acquisition of property, though it should be emphasized that only as far as contents were concerned. In **Verfügungsermächtigung**, **condition** replaced **end.** Therefore, this principle should rather be called **Verfügungsermächtigung unter Auflage.**[90] Behrend's theory of **bedingte Verfügung**[91] seems basically identical

with this construction. In our opinion neither of these technical terms is particularly apt, because they make it seem possible that service and compensation (return service) be disguised under the dogmatic cover of **condition.**

> We wish to mention here that condition as a legal construction has also been employed to solve other legal problems, at an "academic" level. For example, Grotius, Pufendorf, Thomasius and Wolff all wished to disguise even the motivation by will under the cover of the construction of condition - wanting this way to assert the doctrine of the will.[92] It is worth mentioning that the Romans themselves put the condition (which incidentally allowed free play to subjectivism) to a very restricted use indeed (D. 50,17,77 - Papinian).

Van den Daele's critical comments on the efforts to explain the synallagmatic connection through the construction of conditional transaction - including Keller's views in the nineteenth century and those of Blomeyer in ours - are also valid for these highly artificial proposals for making legal constructions.[93] For, in Van den Daele's view, the condition can be the **form**, at most, but it never can be the basis of the **onerousness** of an agreement between contracting parties. Moreover, it should be noted that the "disposal" (**Verfügung**) itself - keeping in mind the so-called "disposing transactions" (**Verfügungsgeschäfte**) - cannot be interpreted in terms of modern legal dogmatics, either.

Kränzlein's doctrine, the **Überlassung zu anerkanntem Zweck**,[94] served for elaborating and refining the theory of **Zweckverfügung**. On examining the deeds included in the body of papyri, Kränzlein came to the conclusion that the nature of some of the deeds - and this applied particularly to the transactions **not** taking effect immediately - cast doubt upon the very grounds of **Zweckverfügung**. Moreover, he laid great stress on the fact that Greek law had never quite got to construct a contract by **consensus**, but persisted in upholding the idea of the "real(istic) basis". Kränzlein's **Überlassung zu anerkanntem Zweck** was, actually, a kind of specification of the **Zweckverfügung**, altering Wolff's theory only in respect of the nature and peculiarities of certain agreements.

## 5.5. CONCLUSIONS

1. In conclusion, it can be stated that there is no fundamental difference between opinions on the nature and essence of the contract in Greek law. Actually, the differences concern rather the form of the dogmatic construction. The merit of the above-discussed constructions was, that they took into consideration a number of circumstances - such as the so-called position of power (**Machtlage**) - that might guide us in solving individual problems on a dogmatic level.[95] Wolff's view according to which a **"System von Zugriffsbefugnissen"**[96] characterized the laws of **all** the ancient peoples (including ancient Roman law) seems to belong here, too. The dominant legal procedural approach followed inevitably from this view. The transition to a substantive legal approach presupposed that the State (or **polis**) should not only ensure legal peace but it also should regard to be its duty to make law and order prevail.

2. A general remark should be made here: it was **basically** the property nexus (the position of power) or, to express it another way, the conditions governing the law **in rem** that had **decisive** influence upon the agreement and transactions between the contracting parties. This statement can be proved valid for the law of most ancient peoples in the Mediterranean world, in addition to the fact that the germs of this view could also be detected in the sources of Roman law.[97] The approach from the aspect of law **in rem**, prevailing among laymen, points to this fact in connection with **mutuum**. We consider this thesis right, despite the fact that the concept of consensual contract has certainly to be undoubtedly regarded as a peculiar Roman legal institution, i.e. an autochthonous Roman construction.[98]

3. Though this might seem surprising at first glance, the concept of contract in the various laws of the Antiquity analyzed with the aid of the comparative method may be worthy of serious attention even for the analysis of the contract of **modern** legal systems. The construction of consensual contract in Roman law has been undoubtedly an achievement of great consequence and has rightly been influencing the rise and development of the law of contracts for centuries. It is, nevertheless, only **one** possible construction.[99] The construction of contract that was in general use in the law of the ancient peoples of the Mediterranean, and that contained some elements of the law **in rem**, has not been alien to the concept of contract current in modern legal systems. Wilburg's thesis, in modern law, holding that property can also be a factor influencing the making of contracts, has

had important antecedents in Antiquity. The **comparative** analysis of ancient laws by illuminating alternatives may also have a serious importance for the practitioner of present-day civil law, who quite often focusses his attention on a single alternative alone, although he may choose from among several concepts which often have a many-thousand-year old past.

NOTES

1 **Zweigert** (1969), p. 448.

2 **Ebert** (1978), p. 23.

3 **Savigny** (1840-1849), Vol. I, pp. 9 ff.

4 **Fikentscher** (1975-1977), Vol. III, p. 62.

5 **Stühler** (1978), p. 35, and **Coing** (1964), pp. 19 ff.

6 **Savigny** (1840-1849), Vol. I, p. 10.

7 Cf. **Stühler** (1978), p. 35. and **Coing** (1964), p. 19 ff.

8 **Rüthers** (1968), p. 292. He writes as follows: **"Der Begriff des Rechtsinstituts enthält also in diesem Verständnis einen ausserjuristischen, transzendentalen Bezug. Er ist eingefügt in einen übergeordneten, wertbestimmten Zusammenhang. Der Institutsbegriff wird damit zum Instrument einer metajuristischen Ganzheitsdeutung des Rechts."**

9 From the recent literature cf. **Diósdi** (1981), p. 27.

10 **Wieacker** (1982), p. 372.

11 **Schnorr v. Carolsfeld** (1975), p. 134.

12 **Wieacker** (1982), p. 221.

13 In Diósdi's view, we may speak of contract even in ancient Roman law, though up to this period the concept of contract has not been developed, as yet. Diósdi employed the term **contractus** in the sense of "legal institution". Cf. **Diósdi** (1981), p. 27, n. 7.

14 Kaser, with reference to archaic law, adopted the term **"Haftungsgeschäft"** for the concept of contract. Cf. **Kaser** (1971), pp. 165 ff. Diósdi's criticism (cf. **Diósdi** (1981), p. 27, n. 7) is not right insofar as Kaser approached thereby the institution of contract from a functional aspect and, for this reason, an anachronistic approach (**"Haftung"** was an anachronism) should have been, by implication, out of the question.

15 With reference to the peculiar interpretation of contract in Anglo-American law, Finley called attention to the specific semantic content of this technical term. Cf. **Finley** (1951), pp. 72 ff.

16 Cf. from present-day bourgeois comparative legal literature: **Constantinesco** (1971-1973), Vol. II, pp. 102 ff.

17 **Fikentscher** (1975-1977), Vol. I, pp. 109 ff.

18 **Esser** (1964), pp. 355 ff. In French law, for the development in the field of contracts, cf. **Esmain** (1883), **passim**, and **Castaing-Sicard** (1959), **passim**.

19 **Zajtay** (1966), pp. 358 ff.

20 In recent literature, Bürge has pointed to this problem. Cf. **Bürge** (1980), pp. 133 ff.

21 As regards this much discussed complex subject cf. from literature **Simonetos** (1968), pp. 459 ff; **Pringsheim** (1960), p. 10, and Idem (1955), p. 29, n. 62; **Wolff** (1956), p. 22, etc.

22 Of recent works cf. **Herrmann** (1976), pp. 615 ff.

23 **Bucci** (1977), pp. 73 ff.

24 **Diósdi** (1981), pp. 17 ff.

25 Wolff was discussing - with special reference to the study of ancient Greek law, in the first place - **"die Gefahr einer Verzerrung des geschichtlichen Bildes..." Wolff** (1967), p. 688.

26 **Hamza** (1978), pp. 478 ff.

27 **Ebel** (1953), pp. 7 ff.

28 **Ebel** (1953), p. 76.

29 **Ebel** (1953), **passim**

30 **Hübner** (1976), pp. 717 ff.

31 Of recent works, cf. **Mayer-Maly** (1976), pp. 91 ff.

32 For the development of consensualism in modern law, in French law cf. **Tison** (1931), **passim**, and **Sautel-Boulet** (1958), pp. 507 ff.

33 Summed up, it can be found in **Diósdi** (1981), pp. 21 ff.

34 The criterion of the contract - which in this case is the **consensus** (agreement) - does not correspond to the concepts: **natura, contractus, physis ton synallagmaton.** For these concepts of Greek origin are the translation of the general philosophical idea of the concept of essence into legal terminology. Cf. **Coing** (1952), pp. 32 ff.

35 **Mauss** (1965), pp. 153 ff.

36 **Michel** (1960), **passim.**

37 **Michel** (1960), p. 593.

38 For the relation between **stipulatio** and **pactum** cf. **Knütel** (1976), pp. 201 ff. Knütel, unlike the presently prevailing opinion, as reflected in the literature of the subject, did not regard the phrase **"Pacta in continenti facta stipulationi inesse creduntur"** (D. 12,1, 40), taking place in the lex Lecta, as interpolated. Kaser was only writing still of the requirement of the **"erneute Überprüfung"** in connection with this source.

39 A review of the recently published literature is to be found in: **Archi** (1980), pp. 1 ff.

40 Bas. 2,71. With reference to the **diathesis**, taking place in the source of law we wish to mention that it can be considered as a synonym of **proairesis** in the recorded documents of the period. Cf. **Coing** (1952), p. 55.

41 **Schulz** (1961), pp. 135 ff, and pp. 371 ff.

42 Cf. CJ. 6,27,5,1.

43 **Riccobono** (1951), pp. 302 ff.

44 **Pringsheim** (1961), pp. 1 ff. Of recent works, for the importance of this construction cf. also **Knütel** (1976), pp. 201 ff.

45 **Dulckeit** (1951), pp. 160 ff.

46 **Sargenti** (1976), pp. 490 ff.

47 In respect of **contrahere**, it is problematic whether Labeo tended to use this technical term often in a sense that was not a "bilateral transaction". Sargenti regarded the sources of such content as interpolated ones. Cf. **Sargenti** (1976), pp. 470 ff.

48 According to Sargenti, the meaning of **gerere** cannot be fully expounded. Cf. **Sargenti** (1976), pp. 485 ff.

49 Cf. D. 12,4,16 - Celsus; CJ. 4,64,1, and CJ. 4,64,7.

50 **Kaser** (1978), p. 122.

51 Cf. Rhet. Her. 2,19; Cic. de inv. 2,67; 2,162; Cic. part. 130; Cic. de orat. 2,116, and Quint. inst. or. 7,4,5; 7,4,6. For the interpretation of these, cf. **Végh** (1980), pp. 61 ff.

52 A representative exponent of this view is Klami. Cf. **Klami** (1978), pp. 4 ff, 30 ff, and 69 ff.

53 **Klami** (1978), pp. 6 ff.

54 We are mentioning here that Diocletian - in addition to this Edict - may very probably have limited by means of edicts still further the opportunities of setting prices freely. Even the fact that the CJ. 4,44,2; 4,44,8 and 4,62,2, containing information about the above, did probably not survive in their original form, does not confute the above. Cf. **Mayer-Maly** (1973), pp. 145 ff.

55 This, of course, does not mean that the enlightened codifications of the 18th century may not have included qualifications concerning the amount of the purchase price. Cf. the Codex Theresianus (III,9, §57) and Horten's Draft (III,9,§25). Cf. **Mayer-Maly** (1973), pp. 145 ff.

56 Klami speaks - in our opinion too broadly - of the **"unentwickelte Lage der staatlichen Maschinerie"**. Cf. **Klami** (1978), p. 7.

57 Coing suggested that the emergence of the doctrine of the will could not be traced back to Aristotle alone. Aristotle's influence - under the Byzantine emperors - was particularly strong in the schools of jurisprudence. This is the reason why this dogma has been linked definitely with the Stagirite's name and work. Cf. **Coing** (1952), p. 53, and **Dareste** (1893), pp. 206 ff.

58 **Maschke** (1926), pp. 1 ff.

59 As to **Theophrastus**, cf. **Beauchet** (1897), Vol. IV, p. 7.

60 **Coing** (1952), p. 56.

61 **Pringsheim** (1950), pp. 501 ff.

62 **Kaser** (1975), p. 86.

63 **Wolff** (1976), pp. 27 ff, and Idem, pp. 567 ff.

64 **Wolff** (1976), p. 581, and **Simonetos** (1968), p. 257.

65 **Simon** (1965), pp. 46 ff.

66 For the interpretation of the sources, cf. **Wolff** (1957), pp. 65 ff.

67 The lender's position of power may force the borrower to write out a promissory note **before** receiving the object of loan. Cf. **Seidl** (1973), pp. 373 ff; Idem (1973), pp. 120 ff, and Idem (1976), pp. 609 ff.

68 Of the works about the subject, cf. Kaser (1944), pp. 134 ff; **Pringsheim** (1950), pp. 9 ff, and **Simonetos** (1939), pp. 173 ff.

69 **Herrmann** (1976), p. 615.

70 **Kränzlein** (1963), pp. 11 ff, and **Wolff** (1971), p. 337.

71 **Wolff** (1952), pp. 65 ff.

72 **Hamza** (1982), pp. 180 ff.

73 **Grosso** (1951), pp. 172 ff.

74 **Diósdi** (1981), pp. 101 ff.

75 **Pringsheim** (1916), pp. 101 ff, and Idem (1950), pp. 194 ff.

76 **Seidl** (1962), pp. 3 ff. We wish to observe that Seidl in his work has still been discussing the **"Prinzip der notwendigen Gegenleistung"**. The **"Prinzip der notwendigen Entgeltlichkeit"** was first formulated in the second edition of the "Ptolemäische Rechtsgeschichte".

77 For the meaning (interpretation) of **principium**, in legal literature, cf. **Llompart** (1976), pp. 4 ff.

78 **San Nicolò** (1929), p. 51.

79 **Petschow** (1954), pp. 125 ff, and Idem (1959), pp. 65 ff.

80 **Pringsheim** (1916), pp. 48 and 168 ff.

81 In our view, Aristotle's **dikaion diorthotikon** (**iustitia commutativa**), which, in Coing's opinion, if related to "fairness in contracts and exchange" (**Vertrags- und Austauschgerechtigkeit**) presupposed the payment of an appropriate equivalent, was in connection or, at least, could be brought into connection with the **Surrogationsgedanke**. Cf. **Coing** (1976), pp. 15 ff.

82 **Pringsheim** (1950), p. 205.

83 **Kränzlein** (1975), p. 141.

84 **Seidl** (1939), pp. 47 and 57.

85 **Seidl** (1956), pp. 40 ff.

86 **Herrmann** (1976), p. 617.

87 **Kaser** (1974), pp. 148 ff.

88 From the recent literature cf. **Modrzejewski** (1981), pp. 264 ff.

89 **Herrmann** (1975), pp. 321 ff.

90 **Herrmann** (1975), pp. 323 ff.

91 **Behrend** (1970), p. 25, n. 80.

92 **Hübner** (1976), pp. 722 and 729 ff.

93 **Van den Daele** (1968), p. 52.

94 **Kränzlein** (1981), pp. 187 ff, and Idem (1975), pp. 10 ff.

95 In the civilistic literature, Müller-Erzbach refers at first to the significance of the "position of power". **Müller-Erzbach** (1950), pp. 48 ff.

96 **Wolff** (1954), pp. 403 ff.

97 In Romanist legal studies, it was Seidl who realized how important the "position of power" was in terms of dogmatics in the jurisconsults's **responsa**. Cf. **Seidl** (1954), pp. 104 ff, and Idem (1966), pp. 359 ff. Cf. also **Betti** (1966), pp. 379 ff.

98 **Diósdi** (1981), pp. 26 ff.

99 In Seidl's expression, the consensual contract was **"die Krönung einer internationalen antiken Entwicklung"**. Cf. **Seidl** (1955), p. 56.

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# INDEX OF TEXTS

## LEGAL SOURCES

### SOURCES OF ROMAN LAW

LITERARY SOURCES

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Until recently legal scholars have not examined the antecedents of comparative law in ancient legal systems. The same applies to the scholarship of comparative law using Roman law as the basis for comparison. The volume thoroughly surveys the extent to which ancient legal concepts are reflected in modern legal thinking. A separate chapter is devoted to the concept of contract in Greek philosophy and Roman jurisprudence. It traces the links between the ancient idea of contract and the concept of contract in modern legal systems. The book examines the extent and the limits to the application of concepts and terminology of Roman law to the analysis of other legal systems of antiquity. However, the author believes that a knowledge of non-Roman legal institutions is essential to the understanding of Roman law. A separate chapter is devoted to international economic and political relations and their impact on the legal systems of the ancient Mediterranean world. The mutual influence of different institutions of law is traceable to those surprisingly intensive contacts in that geographical region. The elements of private international law also emerged in the antiquity. However, a private international law in the modern sense of the word, could not develop because of the specific structure of the *Imperium Romanum*. A number of legal institutions appear which may be regarded as the antecedents of modern commercial law. The links in European jurisprudence between comparative law and ancient legal systems are furthermore thoroughly analyzed. The author gives an overview of the most important schools of thought dealing with the comparative analysis of ancient legal systems. The comparative trends within Greek and Roman jurisprudence are also exhaustively surveyed.

1828

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# Comparative Law and Antiquity