know that the influence of Roman law and of *ius commune* was not very strong on Polish legal system until the 19th century and after this moment it was felt only in some regions of your country. But we need that you study our common historical tradition because we need your contribution and help as future Polish jurists in the construction of a new continental legal system. I wish you a good academic year 2008 – 2009.

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# HISTORICAL ROOTS FOR THE FOUNDATION OF AN EUROPEAN PRIVATE LAW*

1. We all know the actual difficulties in a more strong integration of the countries of the European Union. While many problems were resolved or are going to be resolved in economic fields, in the circulation of people among the different countries, in foreign politics, many other problems didn't find a good resolution yet. We all know the consequences deriving from the refusal of the ratification of the second treaty of Rome by the French and Dutch people, the discussions about the survival of the treaty of Lisbon after the refusal of ratification by Irish people. There are several causes of such difficulties, but the most important one is probably the distance that the European peoples feel between a new Europe built by the Governments and by the bureaucracy in Brussels, *id est* built by the Authorities, and the real necessities of every day

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life and welfare. Many times rules coming from European organisms in Brussels are in contradiction to traditions of the different countries or to the social exigencies of them.

Well, as I am not a politician, but a professor of law, I don't want to make hypothesis about political issues, I can just try to make some considerations with reference to the legal field, in order to put the bases of a common European legal system. In fact, to avoid the above mentioned difficulties and people's enemy feelings, it is necessary to remark the common elements that already exist in the European legal systems. Only if European peoples can judge a new European legal system as the result of their own legal traditions, they can consider it as their own legal system. This is why we must study and teach our common historical roots in the Law Faculties of our continent. Otherwise we should face a situation where the new European law will be only a bureaucratic creation far from the reality, misunderstood or probably hated by the most of the persons. We can already see many regulations coming from E.U. and concerning agriculture, food, fishing and other important aspects of our lives, which we don't understand because their content



law, allowed the creation of a *ius commune*, spread all over the Continent independently from the national borders and with a great influence, in not few legal fields, even on the common law of the British Islands. This peculiar and specific experience of the *ius commune* can represent a good historical example of the coexistence of a common private law and of *iura propria*, *id est* specific rules to each State or city communities, and it isn't casual that many modern scholars speak of a new *ius commune Europaeum*, when they take in consideration the projects of a future European common private law.

Finally even an historical study of the modern civil Codes of the 19th and the beginning of the 20th century can bring profitable results. In fact, in a perspective of a future uniform private law, it can let us understand all the damages caused by a strictly nationalistic view of legal systems, that for more than a century stopped the normal circulation of rules among countries with a same cultural and social development, and hindered not only a formation of an united law, but even each kind of ideas and projects thereon.

I end my speech inviting you not to consider the historical subjects of your legal studies as something useless or boring. I

right solutions to people's needs and litigations. So we can learn why Roman law was considered as their own law by all the peoples of the Roman Empire, even when they didn't have a Latin origin.

But in the knowledge and the understanding of the historical roots of our private law an essential role is played even by the study of the legal science in the Middle Age and in modern times before the codification movement. It is impossible now to make a long speech thereon. I limit myself to few short observations.

The survival of private law in the early Middle Age, between the 6th and the 11th century, shows us a very peculiar situation, where it existed a law without a 'State', which could impose it. It means that the legal system consisted in usages, coming from Roman law and from Germanic traditions, and people felt them as their own rules they have to respect and apply even if there were no State authorities to fill such task.

The rediscover of Roman law in late Middle Age, from 11th to 15th century, the development of a common European legal science on the base of a new study of the Roman texts, the birth and the development of the law of the Catholic Church, the Canonical



looks very strange to our eyes and for this we are not used to respect.

Studying and teaching our common legal roots in Law Faculties have a central role, because it concerns the moment of new legal experts' formation. Only if we have judges, lawyers, public officials and, generally speaking, jurists, that learnt such roots, we will be able to give a strong contribution to the birth of this new European law, for the reason that, in my opinion, such birth must be the product of their work more than of theoretical ideas of Governments or European bureaucratic organisms.

2. Well, in this research of common elements in our legal tradition, we all know that it is much easier to find them in private law than in public law. The causes of this are several. First, private law can develop independently from political and constitutional changes because of its close ties to social and economic necessities. Such circumstances allow a common development among legal systems. For example, if we consider the history of Germany, France and Italy in the 19th and 20th centuries, we can see that all the changes from Empire to Republic, from liberal governments to dictatorships (as concerns Italy

and Germany) didn't have great effects on their private law, that went on being expression of the necessities of the capitalistic system born from the Industrial Revolution.

Secondly, a considerable part of private law is linked to market and to the circulation of goods and commodities. During many periods of the European history there were close economic relations among the different regions and countries and such a context favoured the formation and the application of common rules in private law. If we look at the present situation of Europe, we can easily realize that the increasing economic integration represents an exceptional push towards the creation of uniform regulations in many important sectors of private law: this happened for some parts of contract law, for company law, for patent law, for some rules about the protection of consumers, etc.

Thirdly, private law in Europe has a very long common tradition, that played a fundamental role in determining the identity of many of its features and in making it possible to create the bases of a future unification. I would like to focus our attention thereon, considering that this is a matter concerning specifically the legal teaching in Universities.



simple development of the Roman one. We must start our legal studies from this great tradition just to understand what we have inherited of it and what we have changed during the gap between Roman times and us. In this way we can discover many basic categories, concepts, divisions and ideas coming from Roman private law, that are still in use in continental countries, and understand their common core beyond some differences in the concrete regulations of each country. We can also realize the changes introduced by the following legal science basing on the Roman sources and adapting them to a new reality. This method is valid even for some aspects of the common law legal systems and permit to find the points of contact with the civil law countries, that are essential in the perspective of an unified European private law.

In addition the study of Roman law offers us many opportunities of reflection on the reasons of its success. We can see an unbelievable capacity of the Romans to adapt quickly their legal system to the concrete reality and therefore to satisfy new social exigencies and economical necessities; we can understand their clever use of general clauses, such as *bona fides* (good faith and fairness), *aequitas* (equity), *ratio* (reasonability), to give

British legal system of the main block of continental contractual law of Roman origins.

These short historical reflections can let us understand why, in spite of some differences, it was possible to find not few common principles and rules in the contractual law both in Anglo-Saxon and continental legal systems and to make it possible to realize the above mentioned projects and drafts.

3. Even if we leave the important, but limited sector of contract law, we can remark how the research of the common historical roots in the European private law is necessary to contribute to a new uniform law that can be considered by the peoples as their own law, deriving directly from the same peoples and their social exigencies and not only from the Authorities.

For this purpose the study of Roman law is very useful because in it we can find not only the origins of many institutions of modern private law in our countries, but even the keys that allowed its long duration and fortune.

As concerns the origins, I don't mean, of course, that all modern rules of private law were born in the Roman times nor that the whole modern discipline is nothing than a



My basic idea is that the formation of new European jurists cannot be separated from the study and the know-ledge of our legal history, from Roman law until modern Codes. This idea could appear very obvious because in the Universities of many European countries we already make it. But actually, at least in my opinion, we have to preserve this traditional teaching against new dangers. We all know that in many countries all over the world (above all in the common law system) legal studies are considered as technical studies: a jurist must be simply a good technician, whose humanistic knowledge (historical, philosophical, sociological) has no importance for the reason that it isn't esteemed necessary.

Well, I am strongly against this model of jurist, of legal studies and of legal teaching. On the contrary I think that a good jurist must have a good formation even in humanistic aspects for two main reasons: first, because legal science is not based on scientific or mathematic rules, but on human behaviours, that cannot be closed in automatic mechanisms; secondly, because it is impossible to understand the meaning of many actual rules in private law without knowing their historical background.

As concerns the latter, I would like to make just one example. You all know that there are at least four projects of a future unification of contractual law in the E.U. countries: the UNIDROIT Principles of international commercial contracts of 1994 (a new edition was made in 2004), that really aim to have a world wide application; the European Code of Contracts, a project made by the Academy of private law professors and experts of the E.U. countries, having seat in Pavia (Italy), the draft of the first book was published in 2001; the Common Core project of European private law, that also includes tort law and property law and is still in progress by an international group of professors and experts having seat at the University of Trento (Italy); and the project of the Principles of European Contract Law, made by the Commission Lando (the name of its chief) and published in 2001, the content of which we have already discussed about one year ago here in this University. The most of principles and rules included in such projects and drafts derive from continental civil Codes and from English and Irish common law and the making of them was possible in a relatively short time thanks to the common historical roots. I try to explain better.



If we consider the legal tradition, we can realize that continental Codes and British common law have many points of contact and similar rules in the contractual law. The explication thereof is merely historical.

The first step is of course Roman Law and, more specifically, Roman law created mainly by the Roman praetors and by the work of jurisprudence between the 2nd century B.C. and the beginning of the 3rd century A.D. All this legal discipline was then transmitted into Justinian's great codification and rediscovered in the 11th century by the scholars of the University of Bologna. Their teaching was spread all over Europe and put the bases of the formation of the civil law tradition developed by the legal science of Jusnaturalism, Domat and Pothier in the 17th and 18th centuries, which deeply inspired the first modern Codes (the Code Napoleon and the ABGB). In the meanwhile even British common law had received from the Continent many rules in the contractual field through the Court of Equity, and this can be explained because in the law of contracts, opposite to the property law, the common law had not developed very specific and original lines. So thanks to Lord Mansfield's intervention in the 18th century, there was the reception into the