

## THE PHENOMENON OF MEDIEVAL *IUS COMMUNE*: THE PAST OF EUROPE'S LEGAL FUTURE?

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**Abstract.** The historical approach enables us to perceive the specific legal phenomenon as continuous and to study the antecedents of current (or even future) legal challenges. This article discusses the possibilities of invoking the historical notion of *ius commune* (and various new concepts based on it) in a contemporary legal discourse on the future of the European Union (EU) law. Since issues of integrity and homogeneity remain central to the consideration of further legal developments of the EU legal framework it is especially relevant to look back at one of the most prominent phenomena in the Western legal tradition – *ius commune*, which to some extent united legal thought throughout pre-modern Europe. By analysing inherent characteristics related to its sources, methods and interaction with other (local) legal systems, we attempt to define the limits of such historical analogy. This may allow answering the questions as to whether and to what extent the model of medieval-originated *ius commune* could inspire further development of the EU legal framework (as a new *ius commune*).

**Keywords:** Roman law, canon law, medieval legal systems, legal history.

*What has been will be again,  
what has been done will be done again;  
there is nothing new under the sun.  
Is there anything of which one can say,  
“Look! This is something new”?  
It was here already, long ago;  
it was here before our time.  
(Ecclesiastes, Ch. 1:9--10)*

### INTRODUCTION

It is often said, both seriously or with humour, that history tends to repeat itself. Even without arguing about the specific theoretical concepts of historic recurrence or cyclical nature of history, such a statement – transferred in the context of Western law – at least reminds us about the important link between the historical approach and consideration of the future. The historical perspective enables researcher to perceive the specific legal phenomenon as continuous, to study the antecedents of current legal challenges and to draw new scenarios of how the law could (or sometimes should) develop. The claim that the history of law is the basis of legal prediction should not be reduced to a mere beautiful-sounding phrase (which allegedly has no real value). As some scholars note, the lat-

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ter approach of undermining the benefits of historical analysis is dangerous and makes a significant contribution to the spread of legal nihilism (Machovenko, 2013, p. 11).

Historical analogies are being widely used in contemporary legal discourse on today's and future's law. One of the most prominent examples in this field is a historical concept of *ius commune* – a Latin term that refers to the common European legal culture and ideas that once existed. In recent decades this historical notion has been extensively applied in a variety of legal contexts. There were calls for the EU jurists to pay more attention to comparative studies to successfully recreate the European *ius commune* (Pennington, 1997, p. 1115). Ius Commune Research School has been established in Maastricht where researchers combine their efforts in a search for a common ground of various national legal systems in Europe<sup>2</sup>. Legal scholars employ this historical concept when talking about the initiatives of harmonising Europe's private law (Caenegem, 2004, 28-30), discussing the future of legal education (Padoa-Schioppa, 2017, p. 687) or the need of closer legal and academic co-operation between the national states (Markesinis, 1994, p. 2). Such are just a few of many examples. Moreover, the historical concept of *ius commune* inspired scholars to coin even new terms. For instance, administrative law researchers talk about the development of transnational *ius commune proceduralis* (Pünder, 2013, p. 960-961), constitutional law researchers examine the concept of *ius constitutionale commune* (Soley et al., 2017). Eventually, to highlight the differences from the historical *ius commune*, terms such as “new *ius commune*” (Koopmans, 1992, p. 49), “*ius commune 2.0*” or “*ius commune 3.0*” (Giesen, 2013, p. 159-161) were introduced in the contemporary legal lexicon.

Since historical *ius commune* was associated with European legal developments, this term (in various forms) nowadays is mostly used to justify the need for further harmonisation (or even unification) processes within the European legal framework. Thus, the pre-modern *ius commune Europaeum* may become a convenient point of reference for historical analogy when considering possible future scenarios for the EU law. Moreover, the ideas of “ever closer union” are still reverberating across Europe. Few years ago, in 2017 the European Commission published its White Paper on the Future of Europe, where five possible future scenarios for EU by 2025 were indicated (White Paper on the Future..., 2017). One of the most noticeable – the fifth scenario – was called “Doing much more together” where the cooperation between all Members States goes further than ever before in all domains, without excluding the legal one. In this context it may seem tempting to portray *ius commune* as a historical precedent that can be “revived” in a strengthened, more cohesive and unified future legal framework of the EU. As if the history should repeat itself once again. However, the inaccurate application of historical analogies may pose additional problems. It could not only undermine the argumentation (for which such historical analogy was applied) but also encourage the teleological approach to history, meaning that the complexities of the past could sometimes be ignored to justify the present purpose (when history is read “backwards”).

This paper analyses the possibilities of applying a historical concept of *ius commune* in contemporary legal discourse. The purpose of this article is to estimate whether and to what extent the

<sup>2</sup> More information about the activities of Ius Commune Research School is presented in the website [www.iuscommune.eu](http://www.iuscommune.eu).

concept of historical *ius commune* could be used in discussions on the future development of the EU legal framework (as a new *ius commune*). For this aim the study is divided in four parts. The first part analyses preconditions for an analogy between the historical *ius commune* and EU legal framework. The second part then introduces the very notion of historical *ius commune*. Finally, the third and fourth parts examine the distinctive features of historical *ius commune* (as regards its sources, methods and interplay with other legal systems) which determine the spectrum of application of this historical concept in contemporary legal discourse on the future of EU law.

In the research analysis we present our views that the historical referral to *ius commune* (or any usage of new legal concepts based thereon) must take into account the peculiarities of this legal phenomenon and simultaneously should not be loosely applied to substantiate any harmonisation or unification efforts within the EU legal framework.

### 1. PRECONDITIONS FOR A HISTORICAL ANALOGY

Every analogy between two phenomena requires some common ground as a basis for comparison. Naturally, the question may first arise whether the juxtaposition of centuries-old legal phenomena of *ius commune* to the 21<sup>st</sup> century law of the EU is valid at all.

There is no doubt that the EU has created a unique legal framework that operates at the supranational level and has no analogies in the contemporary world. Some scholars highlight the EU's legal system as a striking example of the post-modern type of law that is gradually emerging and that could be described as a global, based on common human values, developed at the transnational level with its application mostly by national authorities (Machovenko, 2013, 37-38). Indeed, the challenges that the EU and its legal system have been facing lately may be described as new, unique and even worldwide. The development of new technologies vs. the need for the adequate protection of personal data; fostering the single market and economic growth vs. coping with climate change; safeguarding the human rights vs. managing the migration crisis or fighting the current coronavirus pandemic - such and many more complex questions had not been encountered by any previous legal system.

On the other hand, the issues of integrity and homogeneity remain central to the consideration of the future of EU law. Despite the fact, that the EU has created a unique *sui generis* legal order – a model of shared sovereignty where relations between the Member States and EU levels constantly develop – deep-rooted tensions between national and supranational (EU) legal systems have not vanished anywhere. Moreover, such tensions are periodically reflected in the legal institutes of the EU itself.

One of the most eloquent examples is the doctrine of supremacy of EU law, where both European Court of Justice and national courts emphasise different legal grounds for the supremacy of EU law (Craig, Búrca, 2015, p. 313-314). Issues pertaining to the boundaries of EU competence is another example. There is an ongoing problem of so called “competence creep” with regard to the “flexibility” clause (Article 352 of the Treaty on the Functioning of the European Union (TFEU)) or harmonisation clause (Article 114 of the TFEU) which also raise concerns about over extensive of EU's legislative

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competence (Craig, Búrca, 2015, p. 93). Finally, tensions between national and supranational legal systems leave their traces in various political issues, such as the constant rise of nationalist rhetoric, Brexit or lasting non-compliance by some Member States with the general principles of the EU law.

However, as the abovementioned tensions in recent years have led to a rethink of the future development of the EU, one should remember that the same EU legal system has emerged and continues to function in the context of a long-standing Western legal tradition.

The latter has formed as an outcome of the Investiture Controversy – a revolutionary process of late 11<sup>th</sup> and early 12<sup>th</sup> centuries, during which secular and ecclesiastical spheres finally separated from one another throughout Catholic Europe (Berman, 1999, 121-124). As prominent legal historian Harold J. Berman has emphasised, a Western legal tradition for many centuries has been characterised by certain inherent characteristics. The most distinctive of them was named as “coexistence and competition within the same community of diverse jurisdictions and diverse legal systems” (Berman, 1999, 26). In the context of the contemporary EU legal framework, such feature strongly resonates with the aforementioned tensions between the national and supranational levels. A constant struggle between the ideals and realities (the dynamic qualities and stability) – another typical feature of Western legal tradition (Berman, 1999, 27) – also reflects the current state of affairs for the EU. As European Commission indicated in its White Paper on the Future of Europe, “change in all things may be inevitable, but what we want from our lives and the European values that we hold dear remain the same.” (White Paper on the Future..., 2017). This struggle encourages the constant process of renewal, but its mismanagement could lead to the collapse of the whole legal system.

Finally, Western legal tradition presupposes the conviction of ongoing character of law. Moreover, all changes in Western law do not occur simply random – they are results of constant (re)interpretation of the past in order to meet the needs of today and tomorrow (Berman, 1999, 25-26). Accordingly, the future development of the EU legal system should not be considered as a process that is somewhat “beyond” of or simply “unrelated” to the legal past. As the EU law develops it (either consciously or unconsciously) employ legal concepts and models that were created many years ago. Some scholars notice, that in order for the facts of legal history to speak to us today more clearly, they should be “cleaned” from the specifics of their time (e.g. from the specific historical language, conjuncture, etc.), leaving only a “pure”, essential legal concept (Machovenko, 2013, 11). It may then become clear that the old legal institute, established many centuries ago, is essentially analogous to today’s legal constructs.

Since *ius commune* also arose within the Western legal tradition (as it will be seen in the later part of this paper), the latter could serve as a common denominator for the historical analogy between this *ius commune Europaeum* and contemporary EU’s legal order. Despite the significant time-period gap between the two, both such legal phenomena faced the fundamental challenges inherent in the entire Western legal tradition. Thus, the historical analogy of centuries-old *ius commune* could lead to a fruitful consideration of the future development of the EU law.

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## 2. THE NOTION OF THE HISTORICAL *IUS COMMUNE*

Some of the authors, who invoke the concept of *ius commune* in contemporary legal analysis, as well as other legal scholars often tend to characterise *ius commune* by assigning to it short good-sounding labels. Among some of the most common are “shared legal culture”, (Heirbaut, Storme, 2010, p. 21), “common law of continental Europe” (Mousarakis, 2015, p. 23), “common legal heritage of European countries” (Giesen, 2013, 160) or even “a law potentially common to all” (Herzog, 2018, p. 87). Without a proper context, these simplified labels may give the impression that Europe once lived under the sole legal framework and was legally united. However, that would be completely contrary to historical reality.

As a European legal phenomenon, *ius commune* emerged from the revival of legal thought in the late 11<sup>th</sup> and 12<sup>th</sup> centuries. Legal historians sometimes refer to this period as to “Renaissance of law” to highlight significant progress from the previous era (which is sometimes gloomily called as “an age without jurists”) (Bellomo, 1995, 34, 52). During this time two unique European legal systems – medieval Roman law and canon law – began to form.

Following the rediscovery of the pivotal sources of Roman law (*Corpus Iuris Civilis*) and the establishment of the first European universities (starting with the University of Bologna), Roman law – which was a “dead” legal system at that time (!) – has become an independent subject taught at universities. Almost at the same time (starting from around the middle of the 12<sup>th</sup> century when the monk named Gratian finished his *magnum opus* named in its abbreviated form as *Decretum*) the canon law of the Catholic Church has emerged as a separate legal system. Even though canon law has existed for centuries until then, the early law of the Church in the first millennia has never been systematised (Berman, 1999, p. 268-273) and differed in significant degree from what it became in 12<sup>th</sup> and later centuries (historians who specialise in the subject often contrast this *ius novum* (“the new law of the Church”) or *classical canon law* era with the *ius antiquum* (“the old law of the Church”) that preceded it) (Helmholz, 2010, p. 4-5).

Medieval Roman law and new canon law systems had some distinctive features. Unlike other medieval legal systems of that time, both of them were not “enframed” by the criteria such as territory, estate and (or) subject matter. On the contrary, Roman law and canon law were recognised as extraterritorial (in their applicability) and universal (in their scope) legal systems. They were not limited to a particular estate of the realm. Moreover, for centuries both Roman and canon law were taught in universities as separate subjects.

Probably one of the most important features that led to the formation of *ius commune* was a close interaction between the two systems from the very outset. Civil and canon lawyers studied each other’s sources and exchanged ideas between themselves, the title *Iuris utriusque doctor* (i.e. the doctor of both Roman and civil law) was being bestowed at universities by the end of 12<sup>th</sup> century. In fact, it ultimately became impossible to thoroughly understand canon law without studying Roman law and vice versa – such circumstance is well reflected in a centuries old maxim “*legista sine canonibus parum valet, canonista sine legibus nihil*” (i.e. a civil lawyer without knowledge of canon

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law is worth little, a canon lawyer without knowledge of Roman law is worth nothing) (Pennington, 2017, p. 249-255).

Thus, throughout the Middle Ages this convergence of Roman and canon law gave a start to *ius commune* – a law common to all university-trained jurists (Helmholz, 2010, p. 20). Some scholars also tend to enrich the definition of *ius commune* (which was centred around roman-canon law) by adding the main elements of other legal systems that were perceived as common throughout Europe at that time. Such examples include feudal law (Bellomo, 1995, p. x) (*Libri Feudorum* – a collection of feudal customs of Lombardy – was even integrated as part of the *Corpus Iuris Civilis* (Stein, 2004, p. 61)) or royal law of secular territorial kingdoms, which was characterised everywhere by its nine distinctive features (Berman, 1999, p. 537-539). During the times of legally fragmented Europe (before the emergence of nation-states with their own national law), *ius commune* proposed some common ground for jurists: it functioned as a platform for sharing legal concepts, terminology and techniques between legal scholars and students. After all, it was thought that *ius commune Europaeum* was based directly on reason (*ratio iuris*) and thus could be applied as a criterion for judging things as right or wrong (Helmholz, 2010, p. 87).

The scale of *ius commune* could also be portrayed by determining its position with reference to other legal phenomena. As a part of larger Western legal tradition *ius commune* simultaneously was more general, greater than particular legal systems and terrestrial legal practices that existed at the same time (so-called local laws of the land). Thus, as a legal phenomenon, *ius commune* could be depicted somewhere between the whole Western legal tradition and various local legal systems of different cities, counties, duchies, principalities or kingdoms.

*Ius commune* dominated the European legal landscape for centuries until the slow process of separating Roman and canon law has commenced in the 16<sup>th</sup> and 17<sup>th</sup> centuries. Protestant Reformation, a rise of nation-states and the increasing focus on teaching national law gradually diminished the significance of *ius commune*. By the end of 18<sup>th</sup> century Roman law and canon law finally detached from one another (Pennington, 2017, p. 257) and *ius commune* – once presented as *ratio iuris* – had to concede its influence to new rationalism and “codistic” vision of law (Bellomo, 1995, p. 4-6, 32). As some scholars notice, in today’s Europe the same vision, which encourages “one nation, one state, one code of law” and which does not tolerate any legal fragmentation, still prevails (Caenegem, 2004 p. 22-23). These peculiarities must be borne in mind when comparing legal phenomena from different eras.

### 3. SOURCES AND METHODS OF *IUS COMMUNE*

*Ius commune* centred around the pivotal texts of Roman and canon law. For medieval Roman law it was Justinian’s codification which was put together in the middle of 6<sup>th</sup> century by the Eastern Roman emperor Justinian I (later, in 16<sup>th</sup> century such codification was named as *Corpus Iuris Civilis*). *Corpus Iuris Civilis* consisted of 4 parts: Codex (collection of imperial enactments), Digest (collection of juristic writings), Institutions (student textbook) as well as Novellae (new imperial laws enacted

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after the Codex). From the beginning it was supposed to be a comprehensive codification, meaning that no law could exist outside such *corpus*. To ensure the “purity” of the original text, Justinian even prohibited any elaboration of legal commentaries (Herzog, 2018, p. 32). Thus, medieval jurists who studied Roman law, confronted with texts of *Corpus Iuris Civilis* that not only were old (and as such no longer corresponded to realities of new era) but also were “frozen in time”: once collected, adjusted and adopted in the 6<sup>th</sup> century, they were no longer substantially changed. It can be concluded, that rediscovered Roman law was in principle a “departed” legal system that took a lot of effort to revive.

Canon law, on the contrary, was a functioning legal system. It was not only applied at the canonical courts and other church institutions throughout the Catholic Europe but also constantly developed through the adoption of new papal acts. Nevertheless, the *ius novum* (new law of the church) that emerged in the 12<sup>th</sup> century, was also based on some crucial texts, such as collections of papal decretals (*litterae decretales*), i. e. papal decisions on specific practical issues, that formed new common rules of conduct (papal decretals could be considered as legal precedents (Machovenko, 2013, p. 241)). Such collections were formed during the period of the 12<sup>th</sup> – 15<sup>th</sup> centuries. Finally, in the 16<sup>th</sup> century, these canonical texts were officially sanctioned by the pope and printed under the title of *Corpus Iuris Canonici* (to distinguish it from secular *corpus* of Roman law).

It could be said, that both *Corpora Iuris* formed a “backbone” of the *ius commune* and marked a *static aspect* of its sources. The text of these secular and ecclesiastical collections and the legal provisions contained therein have not changed over time.

At the same time, *ius commune* was shaped by the *dynamic properties* of its sources. The revival of law in medieval Europe was marked by the common understanding that in order to achieve justice, there must be something outside the *lex*. Otherwise – in the words of Cicero – *summum ius, summa iniuria*, i. e. the rigorous law could only lead to rigorous injustice. Moreover, some centuries old legal texts needed additional explanations in order to bring them to the new realities. Thus, starting from the outset of the *ius commune*, the civil and canon law jurists (*legista* and *canonista*) have created numerous commentaries (jurisprudence) that allowed to interpret the letter of law in a new perspective. Most importantly, the emerging jurisprudence allowed the interaction between civil and canon law and paved the way for *ius commune* to be taught at the universities (e.g. in the middle of the 12<sup>th</sup> century Gratian, who is titled as the father of the science of canon law, wrote his famous work *Decretum* as a textbook for students (Pennington, 2014, p. 683)).

More and more synonyms for *ius commune* appeared in the national languages: learned law, droit savant, Juristenrecht or das gelehrte Recht, el derecho docto (Bellomo, 1995, p. 81), just to mention a few examples. All of the above mentioned names highlight the scientific character of this legal phenomenon, which was first associated with scientific law. Some authors even describe it as a “law of professors”, emphasizing that at least in civil-law countries the professors in the Law Faculties for centuries were the most important makers of the law (Caenegem, 2004, p. 45).

Moreover, the longevity and viability of *ius commune* were ensured by the unique interpretative methods. Although legal grammar (*Corpora Iuris*) mainly remained the same for centuries,

interpretative methods constantly differed. For example, different schools for commenting Roman law sources have emerged, developed, coexisted and overshadowed each other over time. After the rediscovery of Roman law texts, they were seen from the perspective of scholastic method, i.e. as *libri legales* par excellence, which must be interpreted as if they do not (and cannot) contain any internal contradictions. Such a view was adopted by the first legal school of glossators (end of 11<sup>th</sup> – 14<sup>th</sup> centuries) (Urbanavičiūtė, 2009, p. 110-111). The latter was gradually replaced by the new school of commentators or post-glossators (14<sup>th</sup> – 15<sup>th</sup> centuries), which also emphasised the need for practical adaptability of legal texts to changing realities (Urbanavičiūtė, 2009, p. 129). Finally, in 15<sup>th</sup>, 16<sup>th</sup> and later centuries new methodological trends emerged and European jurisprudence began to branch off from one another: e.g., humanistic jurisprudence, the “Secunda Scholastica” (Bellomo, 1995, p. 204-206, 223-226), *Usus modernus Pandectarum* and topical method used by protestant jurists (Berman, 2006, p. 100-102, 108-111) ensured that attitudes toward the *ius commune* legal texts would undergo constant review. Numerous legal commentaries, written by *ius commune* jurists, not only enabled to study them in universities all across Europe but gradually became indispensable in the practical application of both Roman and canon law. Given the importance of jurisprudence, *ius commune* can in no way be considered only from a positive legal perspective alone.

Thus, one of the most striking features of *ius commune* is that for centuries this legal phenomenon derived its authority from its own scientific character and not from political power – be it secular or ecclesiastical (Coing, 1986, p. 489). *Ius commune* jurisprudence was constantly developed, changed and rebuilt by the initiative of private jurists who believed that *ius commune* texts (mainly both *Corpora Iuris*) reflect objective reason (*ratio iuris*). This eloquent characteristic rejects any direct connections between *ius commune* and state-centred legal positivism. It also presupposes that historical analogy of *ius commune* concept cannot be invoked in order to justify the process of uniforming the Member States’ law by simply adopting new positive legal instruments – such as EU regulations, directives or court decisions – “from above”. On the other hand, a model of *ius commune* may serve as an inspiring example of how EU legal thought (with its principles, terms, concepts, and techniques) could strengthen its influence in harmonising certain areas of national legal systems by the means of promoting the development of EU legal science and common legal education based on it.

#### 4. RELATIONSHIP BETWEEN *IUS COMMUNE* AND *IURA PROPRIA*

The idea that *ius commune* embodied a unifying legal thought throughout Europe does not mean that medieval and pre-modern Europe itself was legally unified. On the contrary, at the local (land) level Europe lived under broad variety of heterogeneous jurisdictions. Moreover, local legal systems coexisted, overlapped and competed with one another within the same territory. Such pluralistic legal constellation of different kingdoms, principalities, cities or corporations are often called by legal historians as *iura propria* (i.e. particular laws, as opposed to *ius commune*). *Iura propria* encompassed different secular legal systems (or parts thereof), such as feudal, manorial, mercantile, urban or royal law, that often varied depending on different locations (Mousarakis, 2015, p. 52-53).



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At first sight the interaction between *iura propria* and *ius commune* may resemble the contemporary cohesion of national (Member States') and supranational (EU) legal systems. However, such an assessment would be too hasty.

There is no doubt, that *ius commune* was tightly related to *iura propria*. The first strongly affected the second: after all, *ius commune* was extraterritorial, universal in its scope of regulation, comprehended as more perfect and more rational than a wide variety of local legal practices. Moreover, since *ius commune* was taught at universities (unlike *ius proprium*), more and more students received knowledge of the same legal principles, terminology, institutes, and, more generally, the way of thinking about law. After graduating from universities, and returning to their homeland, these jurists worked with local laws by developing, modifying, interpreting and applying them in the light of *ius commune* concepts. And despite the fact, that *ius commune* was used in local secular courts only as a residual law, where the local laws did not provide with any specific solutions (e.g. Roman-canon legal provisions were used to fill the gaps of the particular local system (Coing, 1986, p. 489)), *ius commune* retained its influence on *iura propria*. The eloquent example of such influence is legislation of King Roger II (first part of the 12<sup>th</sup> century), ruler of Norman Kingdom of Sicily and founder of the first modern system of royal law (Berman, 1999, p. 551). King Roger's Constitutions already contained multiple conceptual and verbal borrowings from Roman law texts references to the Roman law texts and terminology – this shows that King Roger's jurists even at that early stage had access and understanding about the main Roman law texts (Pennington, 2006, p. 40). In the words of the famous Italian legal historian Manlio Bellomo, *ius commune* influences terrestrial *iura propria* just like the sun affects its planets: they orbit around the sun but at the same time the latter does not suppress their unique local environments (Bellomo, 1995, p. 192-193).

However, the relationship between *ius commune* and *iura propria* was not simply one-sided. Such interaction was highly reciprocal and dialectical. First of all, apart from universities (and in part church institutions that developed and directly applied canon law), *ius commune* itself did not have any institutional framework, such as courts or legislative bodies. As mentioned above, it was driven by medieval-originated academic tradition based on private scholarly initiative and in this sense was viable and dynamic. Secondly, *ius commune* ideas spread unevenly throughout Europe due to local specificities. For example, the reception of *ius commune* in France was not uniform, since the whole country was divided into two regions: northern part was long dominated by the local customs (*pays de droit coutumier*) while the southern part was strongly influenced by written Roman law (*pays de droit écrit*) (Mousarakis, 2015, 54-55). Or unlike English law, Scots law was more open to *ius commune* and its concepts, since many Scots jurists until the 18<sup>th</sup> century acquired their legal education in Continental universities (MacQueen, 2000). Finally, *ius commune* itself was strongly affected by different local legal cultures in different territories. For instance, in the Grand Duchy of Lithuania, a highly intense legal pluralism and coexistence of a wide variety of legal systems determined a unique and creative interpretation of *ius commune* provisions: *inter alia*, it allowed to secure a democratic regime for the nobility and to ensure a highly flexible model of legal regulation (Machovenko, 2014, p. 111-112).

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And even though some “version” of *ius commune* by the 16<sup>th</sup> century was present almost everywhere in Europe (Herzog, 2018, p. 88), the above mentioned different local legal panoramas meant that interpretation, applicability and even further development of *ius commune* also varied. Thus, it could be said that over time *ius commune* became fragmented. In other words, *ius commune* cannot be perceived as a centralised, seamless, consistent and monolithic legal order, that simply “covered” highly jurisdictionally fragmented pre-modern Europe over centuries. Even though *ius commune* maintained its uniting elements, it has also become pluralistic in its nature (like the *iura propria*).

In our view, the notion of *ius commune* cannot serve as a historical argument for promoting further uniformity within the EU legal framework and at the same time reducing heterogeneity of different (national) legal systems. *Ius commune* may appeal to the legal harmonisation provided that such harmonisation is limited to the level of legal ideas, principles, concepts terminology and the way of legal thinking (most importantly – legal science). At the same time, the notion of *ius commune* highlights the continuous (never-ending) dialectical interplay of unity (an ambition to create common legal culture) and diversity (legal polycentricity), where neither of these elements completely eliminates the other. Interestingly, this balance is also clearly reflected in the current official motto of the EU – *in varietate concordia* (unity in diversity). Therefore, when considering those future scenarios of the development of EU and its legal framework where legal unity is not built solely at the expense (and denial) of legal diversity, the historical concept of *ius commune* can serve as an antecedent model for the creation (or revival) of the new *ius commune*.

## CONCLUSIONS

1. The common ground of the Western legal tradition provides the justification for the historical analogy between the two legal phenomena of different eras – *ius commune* and current EU legal system. Such historical juxtaposition (both direct or indirect, i.e. through new concepts and terminology constructed based on historical notion of *ius commune*) may be invoked in the contemporary legal discourse as a source of inspiration.
2. However, the distinctive features of historical *ius commune* presuppose certain limitations of the use of this concept (or its derivatives) in the contemporary discourse about the future of EU law. At least the following caveats must be heeded:
  - 2.1. *Ius commune* indicates that to achieve a viable, lasting and balanced legal framework the emphasis must be shifted from political authorities to legal science (jurisprudence) and legal education. Thus, the use of such a historical model cannot substantiate the aspirations for strengthening the EU legal framework through the instruments of positive law.
  - 2.2. *Ius commune* may only serve as a model of legal harmonisation which is limited to its extent. Far from being uniform legal phenomenon itself, *ius commune* reflects the idea of legal polycentricity (legal pluralism) which is not compatible with the legal monopoly of state (or EU) cantered legal order.

- 2.3. The notion of historical *ius commune* does not implicate the reduction (or elimination) of dialectical interaction (which at some point may turn into tensions) between supranational and local legal systems. On the contrary, the reciprocal relationship between *ius commune* and *iura propria* (local laws of the land) highlights the continuity of such interplay, where neither of these elements completely eliminates the other.
3. Even though the pre-modern concept of *ius commune* may serve as an antecedent model for the discussions on further developments of EU legal framework (or parts of it, such as legal education, private law, etc.), such historical analogy can by no means justify legal unity without diversity in Europe.

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