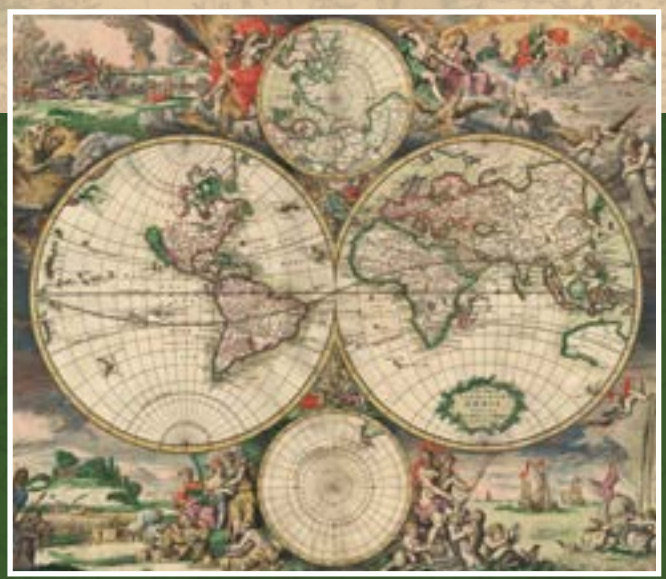
Gábor Hamza

Trends in the Development of Private Law in Europe from the Beginning to the End of the 20th Century



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Volume I

The Origins of European Private Law
and its Development in the Middle Ages

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Preface

The Preface refers to all volumes of the Work

Trends in the Development of Private Law in Europe. The Role of the Civilian Tradition in the Shaping of Modern Systems of Private Law may count on the interest of law students and lawyers in countries having either common or civil law or mixed jurisdictions. This book has also been written to accommodate social historians, particularly students of medieval and modern history. The book traces the development and reception of Roman law back to Western and Eastern European systems, the nature and practice of feudalism, the practice of canon law and the appearance of the *ius commune* throughout Europe. It also introduces the growth of Scottish, French, and German law; English legal development is considered in its European context. An account of these legal developments' political, economic and cultural background is taken to some extent. The book also discusses the process of the codification of private law in the 18th and 19th centuries and the foundations of those areas of modern law which have grown in response to trade, i.e., business relations and the desire for harmonisation of law in Europe.

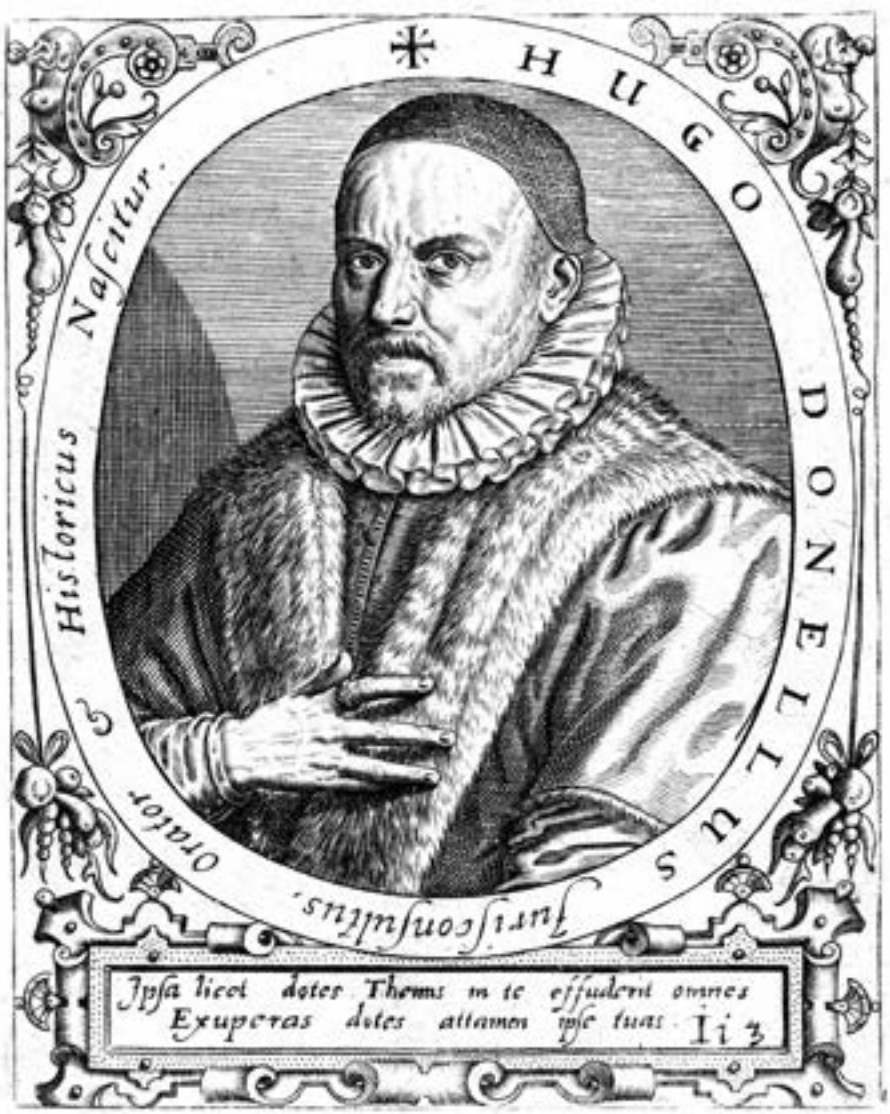
Despite the title of this work, the text also addresses the private law systems of several extra-European countries. In particular, this book examines extra-European countries whose legal systems are rooted in continental European legal traditions. However, the book also addresses countries where common law legal traditions predominate. The predominance of common law traditions does not exclude the presence of continental European legal traditions based on Roman law, i.e. *civil law.* This is particularly true for the United States of America. Special attention is devoted to mixed jurisdictions, such as Scotland in Europe, the Republic of South Africa, Sri Lanka in Asia and Louisiana in the United States of America.

The basic idea of the author is to follow the legal development on two levels: firstly, the doctrinal level (i.e., jurisprudence) and secondly, the codification (i.e., compilation) of private law from the age of codification. The analysis of business law has a more limited role. Business law is dealt with exclusively in relation to the law of contracts.

There is a clear need for a comprehensive survey of European legal history. This pioneering study serves as an introduction to the sources of European legal systems. From this foundation, readers can advance to a more detailed exploration of comparative law or legal history.

This book is also intended as a work of reference and a useful and valuable tool for law students to prepare themselves in disciplines such as Roman legal history, Roman

private law, and comparative legal history. The book is also intended for practitioners aiming to enhance their professional competence. This book serves as a concise legal encyclopaedia, offering guidance in navigating various legal systems, both European and non-European. Students and scholars of history will also find it beneficial, as it discusses the history of the codification of Justinian and the contemporary significance of Roman law traditions. It is intended for anyone interested in the history of private law and comparative law.



HUGO DONELLUS

Attempts to Codify Civil (Private) Law in the Countries of the European Union with Regard to Unification of Law

1. Resolution EC OJ C 158.400 of the European Parliament of the European Union (EU), adopted on May 26, 1989, requires that Member States take steps toward codifying European private law (civil and commercial law).[1] Accordingly, the EU, pursuant to this resolution, established a Commission whose task was to develop the framework for the codification of European law of contracts.[2] In 1994, another resolution of the European Parliament (EC OJ C 205.518, May 6, 1994) called on the Member States to standardise certain sectors of their private law to provide for a uniform internal market.[3] At its 1999 Tampere (Finland) conference, the European Council again discussed the question. Conclusion 39 of the declaration accepted by the European Council in Tampere emphasises the necessity of harmonising the Member States' private law regulations.[4] The European Parlament passed another, third resolution (EC OJ C 255.1, November 15, 2001), relating to the approximation of the civil and commercial law of the member states.[5]

The efforts to harmonise private law (both civil and commercial) were primarily undertaken by private groups. Particularly notable are the efforts of such groups as Lando, Gandolfi, Trento, and Spier/Koziol.

2. In 1980, almost ten years prior to the adoption of the 1989 Resolution, a working group led by Professor Ole Lando of the Business School in Copenhagen, called the

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[1] Regarding the harmonisation in the field of private law and the background of harmonisation in classical antiquity, see, F. Maroi, *Tendenze antiche e recenti verso l'unificazone internazionale del diritto privato*, 7 sq. and p. 15. (Roma, 1933); Regarding the importance Theophrastos' Peri nomon, which in essence also serves the objectives of law harmonisation, see, G. Hamza, *Jogösszehasonlítás és az antik jogrendszerek* [Comparative Law and Legal Systems of the Antiquity], p. 17 sqq. (Budapest, 1998).

[2] See B. Groβfeld and K. Bilda, *Europäische Rechtsangleichung*, Zeitschrift für Rechtsvergleichung Internationales Privatrecht und Europarecht 33, p. 426 (1992).

[3] See D. Staudenmayer, *Perspektiven des Europäischen Vertragsrechts*. In: Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts (hrsg. von R. Schulze and H. Schulte-Nölke), p. 429 (Tübingen, 2001).

[4] See H. J. Sonnenberger, *Privatrecht und Internationales Privatrecht im künftigen Europa: Fragen und Perspektiven*, Recht der Internationalen Wirtschaft 48, p. 489 (2002).

[5] In the working paper drawn up by the Directorate-General for Research entitled *The Private Law Systems in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code*. In this working paper, there is a clear reference to the similarities between the legal traditions of the peoples of Europe, which ultimately outweigh the differences between them. However, the authors of this working paper are aware that the large-scale harmonisation of Member Sates' civil law is a politically charged and sensitive issue.

Commission on European Contract Law, was formed and sponsored by the European Communities. It has undertaken the task of developing the principles of European contract law.[6]

Of the various private efforts at harmonising private law in Europe, Ole Lando's Commission on European Contract Law is undoubtedly one of the best known. The Commission started its work in the 1980s. It resulted in the publication of the first part of its Principles of European Contract Law, consisting of General Provisions, Terms and Performance of the Contract, Non-Performance and Remedies in General, and Particular Remedies for non-Performance.[7] In 2000, Part II followed, which was integrated with Part I.[8] Meanwhile, in 2001, a third part was completed. Part III consists of chapters on assignment, assumption of debt, compound interest, conditional obligations, illegality, joint liability, prescription and set off. This part, which will once again be integrated with Parts I and II, was published in 2003.

One of the weaknesses of the Lando project is that it is predominantly a one-man undertaking. With the Commission on European Contract Law having held its final meeting in Copenhagen in February 2001, the question was raised as to how to deal with practical issues such as copyright. For this purpose, a four-member commission has been appointed, consisting of Eric Clive (Scotland), Ole Lando (Denmark), André Prüm (Luxembourg) and Claude Witz (France).[9] More importantly, another group has presented itself – and been accepted – as the spiritual heir to the Lando Commission.

3. An international academy (*Accademia dei Giusprivatisti Europei*) sitting in Pavia and consisting of mostly Roman law experts (including professors Peter Stein of Cambridge, who is the Vice President of the Academy, Theo Mayer-Maly of Salzburg, Fritz Sturm of Lausanne, Dieter Medicus of Munich, and Roger Vigneron of Liège), held its first session in October 1990. The Academy, which formally became the Académie des Privatistes Européens in November 1992, comprising European civilists and Roman law scholars, enjoying a great international reputation and working on the creation of a common European legal system, gives home to the Groupe d'étude pour le droit européen commun (GEDEC), which is currently drafting the Code of European Contracts Law (Code Européen des Contrats).[10] The proposed

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[6] See O. Lando, *Principles of European Contract Law*, Rabels Zeitschrift für ausländisches und internationales Privatrecht 56, p. 261 sqq. (1992).

[7] O. Lando, H. Beale (eds.), *Principles of European Contract Law/Part I* (Dordrecht, 1995).

[8] O. Lando, H. Beale (eds.), *Principles of European Contract Law/Parts I and II* (The Hague, 2000).

[9] The group also serves as the Editing Group.

[10] Gandolfi provides with an overview of the activities and achievements of the Academy of Pavia and the working group. G. Gandolfi, *Pour un code européen des contrats*, Revue trimestrielle de droit civil p. 707 skk (1992). Compare with P. G. Gaggero, *Il progetto di un codice europeo dei contratti: l'attività del gruppo di lavoro pavese*, Rivista di diritto civile 43 p. 113-120 (1997).

Code is modelled after the Fourth Book (regulating obligations and contracts) of the 1942 Italian Codice civile (which incorporates many aspects of the traditions of the 1804 French *Code civil* and the 1900 German *Bürgerliches Gesetzbuch*) and the Contract Code[11] drafted in the 1960s and 1970s by Harvey McGregor of Oxford for the English Law Commission.[12] Professor Giuseppe Gandolfi of Pavia, whose achievements in the field of Roman law research are also significant, has played a major role in establishing the Academy.[13] Meanwhile, civil law specialists of Central European countries like Hungary, which joined the European Union on May 1 2004, also participated in the preparation of the above-mentioned Draft Code. The Italian Civil Code of 1942, rather than the more modern Dutch Civil Code, was taken as a model because the Dutch Code had not yet generated case law. In 2002, the Academy published its Draft Code (*Avant-projet*).[14] The subject matter is close to what the Lando Principles deal with. In one respect, the Gandolfi Draft Code is similar to the Lando Principles in that both drafts are the result of a collaborative effort.

4. The Commission on European Contract Law was not the only group to embark upon a harmonisation project. Among the better-known entities working toward unification is UNIDROIT (International Institute for the Unification of Private Law), located in Rome. The Institute has among its objectives the coordination and harmonisation of private law between participating states and the gradual preparation and adoption of a uniform civil code. Indeed, there is a growing tendency within the European community to consider and absorb legal ideas from other member states, resulting in the development of "community law"[15]. "In short, with the help of the comparative method, a new *jus commune* is thus in the making"[16].

In Rome, the Institute for the Unification of Law (UNIDROIT) started a very similar project, which in 1994 resulted in the publication of Principles for International

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[11] See H. McGregor, *Contract Code drawn up on behalf of the English Law Commission* (Milano-London 1993).

[12] Until now, the debates of the Academy and working group of Pavia were published in two volumes. *Incontro di studio su il futuro codice europeo dei contratti* (Pavia, 20-21 ottobre 1990). *A cura di P. Stein* (Milano, 1993) and *Atti accademici* (1992-1994), *A cura di P. Stein* (Milano, 1996).

[13] The preliminary project plan of the Code Européen des Contracts (Avant-projet) was published in the edition of Professor Gandolfi. See G. Gandolfi (ed.) *Code Européen des Contrats–Avant-projet*, Livre premier, (Milano, 2002). *Compare with* G. Gandolfi, *Der Vorentwurf eines Europäischen Vertragsgesetzbuches*, Zeitschrift für Europäisches Privatrecht 10, p. 1-4 (2002).

[14] G. Gandolfi (ed.), *Code européen des contrats/Avant-projet, Livre premier*, p. 576 (Milan, 2001); See: H.J. Sonnenberger, *Der Entwurf eines Europäischen Vertragsgesetzbuchs der Akademie Europäischer Privatrechtswissenschaftler – ein Meilenstein*, Recht der Internationalen Wirtschaft p. 409–416 (2001).

[15] Contributing to this effort in Portugal is the Gabinete de Documentaçãao e de Direito Comparado. Operating under the auspices of the Procuradotia-Geralda República, the Gabinete has a significant role in studying and developing comparative and community law.

[16] B. S. Markesinis, *Foreign Law and Comparative Methodology: a Subject and a Thesis* p. 209. (Oxford, 1997).

Commercial Contracts.[17] There has always been some competition between the two projects. However, the most striking conclusion from a comparison of the two is their obvious similarity. Not only are the adopted solutions often the same or similar, but the choice of the subjects addressed, the drafting style and the order of the chapters are all remarkably alike. This in itself is not so strange, if only because of the personal connections (at least five members served on both Commissions). Two formal aspects on which the two sets of Principles differ pertain to their scope of application. The UNIDROIT Principles only deal with commercial contracts, whereas the PECL are applicable to all contracts, including consumer transactions and private contracts. An obvious difference is that the Lando Principles only cover (Western) Europe, while UNIDROIT has a global scope of application. This geographical feature perhaps explains why the PECL's highly acclaimed system of national Notes could not work in the case of UNIDROIT.

In one regard, the UNIDROIT Principles have met with more success than PECL has: UNIDROIT and the President of its Working Group, Michael Joachim Bonell, have always succeeded in having better publicity. This, and the fact that ultimately, the UNIDROIT Principles were published first, may explain the apparent edge they still have regarding their practical application.[18] Indeed, an increasing number of arbitral awards are based on the Principles for International Commercial Contracts, and they have also influenced new legislation in Central and Eastern Europe.[19]

5. In 1997, under the then-Dutch presidency of the European Union, a conference on a European Civil Code was held in Scheveningen. Although the conference was not in favour of drafting a European Code that would be binding upon all Member States, it was precisely that which Christian von Bar from the University of Osnabrück agreed to investigate. The Study Group that Christian von Bar has set up includes several members of the former Lando Commission. Christian von Bar succeeded in

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[17] Principles of International Commercial Contracts, Rome: UNIDROIT, 1994, also available in many other languages, including Arabic, Dutch, French, German, Italian and Spanish. See M. J. Bonell, *A New Approach to International Commercial Contracts/The UNIDROIT Principles of International Commercial Contracts*, (The Hague, 1999).

[18] Regarding the characteristic features of the UNIDROIT Principles in a global context, see: M.J. Bonell, *Soft Law and Party Autonomy: The Case of the UNIDROIT Principles*, Loyola Law Review, 2, p.229-252 (2005), J.A. Estrella Faria, *The Relationship between Formulating Agencies in International Legal Harmonisation: Competition, Cooperation or Peaceful Coexistence?*, Loyola Law Review, 2, p. 253-285 (2005), H. Kronke, *Methodical Freedom and Organizational Constraints in the Development of Transnational Commercial Law*, *Loyola Law* Review, 2, p. 287-299 (2005) and C.R. Reitz, *Globalization, International Legal Developments, and Uniform State Laws*, Loyola Law Review, 2, p. 301-327 (2005).

[19] See for Lithuania: V. Mikelenas, *Unification and Harmonisation of Law at the Turn of the Millennium: the Lithuanian Experience*, Revue de droit uniforme p. 243–260 (2000).

securing sufficient funds to set up several teams of young researchers in Germany and the Netherlands.[20]

6. Another private project is the Trento Common Core of European Private Law, directed by Mauro Bussani and Ugo Mattei. The project is based on the ideas of Rodolfo Sacco and the late Arthur Schlesinger. Every July, a large group of young lawyers gathers in Trento. Each meeting begins with a plenary session.[21] However, then it is back to the core issue, i.e., the development of a common core of private law. Two volumes have so far been published. The first volume to be published as a result of the project is the one on Good Faith, edited by Zimmermann and Whittaker.[22] The volume comprises thirty cases, which are all dealt with from the point of view of sixteen jurisdictions – the fifteen EU jurisdictions, including Norway and Scotland, but excluding Luxembourg. This analysis is preceded by a general introduction by the two Editors, historical surveys by Schermaier, formerly in Münster, now in Bonn, on Roman law and Gordley on *ius commune,* and a comparative paper on the American reception of *good faith* by Summers. The book ends with concluding remarks by Zimmermann and Whittaker.

A disadvantage of teamwork, such as that in the Trento project, is that it may take a long time to finish. This is apparent from the fact that the national reports in the Zimmermann/Whittaker volume were concluded in 1997. Fortunately, the general report does reflect later developments. The disadvantage is also discernible in the second volume, which was published on *Enforceability of Promises*.[23] The Editor of this volume is the American comparatist and legal historian James Gordley. The volume investigates the question of to what extent promises are binding. In modern continental law, this question is usually answered in the affirmative, as opposed to Roman law and the *common law* with its *consideration* requirement. The book comprises fifteen cases dealt with from the point of view of twelve European jurisdictions (Denmark, Finland, Luxembourg and Sweden are missing, but Scotland once again receives special attention). The differences are greater than anticipated by the Editor. An example is the gift. In most European jurisdictions, its validity is still dependent upon the fulfilment of a form requirement. Usually, the form required is a notarial deed, but an ordinary deed is sufficient in Portugal, Scotland and Spain. In England and Wales, the promisor should make a "deed under seal" – it is sufficient

[20] See C. von Bar, *Die Study Group on a European Civil Code*, in: Festschrift Dieter Henrich, p. 1–12 (Gieseking, 2000).

[21] See the collection of papers read at plenary sessions in M. Bussani, U. Mattei (eds.), *Making European Law/ Essays on the "Common Core" project*, Università degli Studie di Trento, (2000).

[22] R. Zimmermann, S. Whittaker, *Good Faith in European Contract Law*, p. 720 (Cambridge, 2000).

[23] J. Gordley (ed.), *The Enforceability of Promises in European Contract Law*, p. 478 (Cambridge, 2001).

(but not in Ireland) that he declares the deed to have the object of being such a deed, or he must establish a trust. Gordley did find *something* in common.

7. One of the more active private groups that are engaged in the development of "Principles" of European Private Law is the Helmut Koziol (Vienna) – Jaap Spier (Tilburg/Maastricht) group.[24] Before publishing a set of Principles, the group sets out to discover any common ground between the various jurisdictions. The questionnaire method used is very much akin to that of the Trento Common Core project. It is highly commendable that the group does not keep the results of the questionnaire approach to itself but is willing to share the findings with others through publication. By 2002, another four had been published. No. 4 deals with causation.[25] It contains ten national reports and a comparative analysis. The national reports deal with the same 24 cases each. The ten jurisdictions covered are Austria (Koziol), Belgium (Cousy, Vanderspikken), England and Wales (Rogers), France (Galand-Carval), Germany (Magnus), Greece (Kerameus), Italy (Busnelli, Comandei), South Africa (Neethling), Switzerland (Widmer) and the United States (Schwartz). The comparative analysis demonstrates how much the jurisdictions have in common but also how much they differ on other points.

8. Principles have also been developed for the Law of Trusts by the Kortmann group.[26] We also mention that a set of draft directives on Procedural Law has been drafted by a group chaired by Marcel Storme.[27]

9. Harmonisation efforts, of course, are not without opposition. Professor Peter Ulmer of Heidelberg, for example, is expressly sceptical regarding the question of urging harmonisation of the law of the Member States of the EU.[28] The late French professor Jean Carbonnier (1908–2003), who doubted the urgency, and, even to an extent, the necessity of harmonisation, expressed similar views in relation to France. It seems that we are witnessing the codification debate between Anton Friedrich Justus Thibaut and Friedrich Carl von Savigny – although, in historical conditions, substantially different from the social and legal realities of the 1810s.

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[24] See J. Spier and O. A. Haazen, *The European Group on Tort Law ("Tilburg Group") and the European Principles of Tort Law*, *Zeitschrift für Europäisches Privatrecht* 1999, p. 469–493. Meanwhile, the centre of the group has gravitated to Vienna (Helmut Koziol).

[25] J. Spier (ed.), *Unification of Tort Law: Causation*, European Centre of Tort and Insurance Law, The Hague: Kluwer, 2000, 161 p.

[26] D.J. Hayton, S.C.J.J. Kortmann, H.L.E. Verhagen (eds.), *Principles of European Trust Law*, The Hague: Kluwer Law International – W.E.J. Tjeenk Willink, 1999.

[27] M.L. Storme (ed.), *Approximation of Judiciary Law in the European Union*, Dordrecht: Kluwer 1994.

[28] See P. Ulmer, *Vom deutschen zum europäischen Privatrecht*, Juristen Zeitung 47, 1 sqq. (1992).

And, even though it is undoubtedly, undecided whether Europe, at the present moment, needs any sort of a unified legal system at all, it is obvious that harmonisation in the field of civil (private) legislation (even if not in the same extent in every aspect of private law) is unavoidable. However, the way of realisation of law harmonisation is uncertain. It could take the form in particular of (Council) regulation, directive, etc., and could also be realised via coordinated national legislation.[29] The failure of England and Scotland in 1970 to adopt the unified Law of Contracts that would have been binding in both countries does not contradict the tendency of efforts of European law harmonisation.[30] Roman law, which constitutes the historical foundation of the unity of European law, might have a crucial role in this undeniably long-term process, possibly requiring decades of hard work.[31] A circumstance that ensures the prevalence of Roman law is the application of the legal principles of private autonomy and freedom of contract, among other things, in European relations.[32] There is no doubt, however, that these legal principles, stemming from Roman law, could become relatively important and relativised in certain areas. This is the situation, for example, in the field of consumer protection. The more emphasised and better-founded legal protection of the consumer, who is the more disadvantaged participant in commercial relations, doubtlessly relativises private autonomy and the legal principle of freedom of contract within a given private law system. That is, the laws of the EU, without doubt, indicate certain tendencies that seem to jeopardise the freedom of contract.

10. We believe that Roman law can significantly influence the development of a more uniform European jurisprudence. Throughout Europe, in the age of *ius commune*, a uniform "legal working method," the so-called *stilus curiae* predominated precisely through Roman law, which was considered the lingua franca of lawyers. The uniform *stilus curiae* following the "nationalisation" of legal systems (*ius patrium*) became part of the past. The training of legal professionals, which is becoming international once again, may eventually result in the harmonisation of *stilus curiae*.[33]

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[29] See O. Remien, *Rechtseinheit ohne Einheitsgesetze?*, Rabels Zeitschrift für ausländisches und internationales Privatrecht 56, p. 30 (1992) and *Illusion und Realität eines europäischen Privatrechts*, Juristen Zeitung 47, p. 277 sqq. (1992). *Compare with*, R. Herber, *Deutsche Zivilrechtskodifikation und internationale Rechtsvereinheitlichtigung*, Rechtsdogmatik und Rechtspolitik (hrsg. von K. Schmidt), p. 269. (Berlin, 1990).

[30] See W. Tilman, *Kodifikation des Privatrechts in der Gemeinschaft. In: Für Recht und Staat*, Festschrift für H. Helmrich zum 60. Geburtstag p. 441. (München, 1994).

[31] R. Knütel, *Rechtseinheit in Europa und römisches Recht. Zeitschrift für Europäisches Privatrecht*, 2, p. 244 sqq. (1994).

[32] See P. Hommelhoff, *„Europarechtliche Bezüge" im Zivilrecht, Überlegungen zur Gestaltung des akademischen Unterrichts*. In: Für Recht und Staat. Festschrift für H. Helmrich zum 60. Geburtstag p. 340 (München, 1994).

[33] F. Ranieri, *Der europäische Jurist. Rechtshistorisches Forschuingsthema und rechtspolitische Aufgabe*, Ius Commune 17, p. 10 sqq. (1990).

Roman law played a significant role in both the secular and ecclesiastical sectors of medieval societies. Roman law served as a foundation for the sixteenth-century legal humanism and was a goldmine for the rationalist Natural Law doctrines. In the 19th century, Roman law was moulded in the spirit of legal positivism (*Rechtspositivismus*) primarily through German *Pandektistik* or *Pandektenwissenschaft* (Science of Pandects), and, finally, Roman law is also an eminent material of the great private law codices. The role of Roman law in the sphere of twentieh-century politics is not negligible, the most conspicuous sign of which is Article 19 of the party platform of NSDAP (*Nationalsozialistische Deutsche Arberteipartei*, the German National Socialist Labor Party) adopted on February 24, 1920, supported by the interpretation of Alfred Rosenberg which interpretation may be viewed as *interpretatio simplex*. The reception of Roman law, characterised (or rather, stigmatised) as foreign to the German people, individualistic, cosmopolitan, materialistic, liberal, advocating solely private interest, appeared as a national catastrophe (*nationales Unglück*) and tragic event (*Tragik*) in the legal literature of the 1930s' Germany. It is worth mentioning that Carl Schmitt, in his study titled *Aufgabe und Notwendigkeit des deutschen Rechtsstandes* (Deutsches Recht 6/1936/), labels Article 19 of the 1920 NSDAP party platform, demands the overshadowing of neglected Roman law through the initiation of "*deutsches Gemeinrecht*", as „*verfassungsrechtliche Bestimmung ersten Ranges*" (sic! G.H). Carl Schmitt, however, fails to support his rather peculiar view with legal arguments. Reading the literature of the era in question, it might seem that, quoting the ironic lines of the noted Hungarian legal scholar Rusztem Vámbéry regarding the NSDAP's proposed legislative reform, "the influence of Roman law had infected the puritan intellect of Teutons sipping meth sitting on bear hides in caverns of lost times."

11. The school of *antike Rechtsgeschichte* completely ignores the afterlife of both jurisprudential and political aspects of Roman law. The advocates of the school of *antike Rechtsgeschichte*, hallmarked by Leopold Wenger, fail to consider that Roman law has had a major influence on the evolution of European law and jurisprudence for centuries. In the case of Roman law, which can be rightly viewed as the *ius commune Europaeum*, the followers of this school, still represented by a few existing advocates today, completely disregard the role of Roman law that it plays, as a consequence of *interpretatio multiplex*, in the development of European law, more precisely, in the legal systems and jurisprudences of European nations. In essence, the view that narrows the possibility of comparison of legal systems of states or peoples on the same socio-economic level reaches similar conclusions. An undeniable advantage of this approach is, however, the sound foundation of the background of its synoptic view. On the other hand, this concept limits the possibility of comparison to such a degree that it nearly reaches the outermost boundaries of rationality. The frustration of this view is manifested especially clearly in the works of Ernst Schönbauer, who restricted the

possibility of comparison to the rather narrow territory of comparing the legal systems of ancient peoples that were on the same level of civilisation or were ethnically related. This view relates in many aspects to the school of thought, according to which certain institutions of Roman law are incomparable with certain institutions of contemporary legal systems because the former is the legal system of a slave-holding socio-economic formation. The followers of this school tend to forget about continuity, which plays an especially important role in the sphere of legal phenomena.

In the last quarter of the tweniteth century, Professor Uwe Wesel polemises in his writing titled "*Aufklärungen* über *Recht*", published in 1981, about the notion of legal structures, constructions reoccurring time-to-time – Theo Mayer-Maly writes aptly about *Wiederkehr von Rechtsfiguren*. The viewpoint concurring with the possibility of the acceptance of reoccurring legal structures and constructions is, naturally, not so radical as to deny the existence of legal structures exclusively linked to a single given socio-economic formation, such as the vassal relations, which, per se excludes the acceptance of Roman law as timeless *ratio scripta*. Of course, it is the sign of *déformation professionelle* when lawyers overrate the fact, according to which, legal transactions (the origin of the expression, (legal) transaction (*negotium*), is attributed to Johannes Althusius (1557/63–1638))[34], or at least a quite substantial fraction of these transactions could be performed by applying the same legal constructions, regardless of the time factor. Fundamentally, however, this does not change the fact that the legislation and jurisprudence of recent years, in many countries both within and outside Europe, have returned more repeatedly, even in concrete forms, to the constructions and institutions of Roman law.

The fact of the expanding influence of tradition should not excuse the scholar from the requirement of analysing the substantive differences and the prevailing economic functions. This is true, for example, although it might seem extreme at first sight, with respect to the examination of the regulations pertaining to cartels and monopolies or trusts. Roman cartel and monopoly or trust regulation, which is densely woven with the elements of *ius publicum*, obviously differs, for example, from modern cartel law, yet, the socio-economic forces working in the background – independently from the socio-economic system – undoubtedly intersect at certain points.

12. The expression "reception", as it relates to Roman law, the meaning of which, if interpreted correctly, is not some sort of "cultural occupation," but, at least in Germany, more like a notion that is equivalent to a type of "scientification"

[34] The term *negotium iuridicum*, like the notion *actus iuridicus* is used first by Daniel Nettelbladt (1719–1791), who was a student of Christian Wolff. The conceptualisation of legal transactions (*Rechtsgeschäfte*) contributed greatly to the creation of the General Part (*Allgemeiner Teil*) of the civil codes in Germany during the 19th century.

(*Verwissenschaftlichung*) of law. Reception cannot be connected to either the *Reichskammergerichtsordnung*, adopted in 1495, or the mythical decree of the emperor of the Holy Roman Empire, Lothar III, fading in the dimness of legends. The reception of Roman law means an intellectual tradition built on Roman legal foundations that only to a small extent relates to a well-defined positive legal system*, ius positivum*. Reception, defined in this manner, could be traced back centuries, with the conveyance of German lawyers (from Germany) who studied at the universities (stu*dia generalia*) of Northern Italy.

The signs of reception, i.e., the subsidiary prevalence of Roman law, associated with positive law, began to appear quite early on, in the 11th century. Later, in the 13th century, elements of Roman law can be found especially in the practice of ecclesiastical courts that often-litigated disputes having the nature of private law. According to our view, the influence of the Commentators appears in the latter area. At the same time, Roman law, defined as "legal literature," had already been accepted in Germany with the conveyance of the Glossators. Naturally, the division of the influence of Roman law into these two categories does not mean the denial of the importance of the Commentators' work, that is, the acceptance of Savigny's concept of viewing them merely as post-Glossators. Reception, however, was not limited to Roman law material but also extended to the acceptance of canon law and feudal law of the Longobards as well. That is how the *ius commune = gemeines Recht* evolved as a body of law pertaining to both common law and private law, but divergent from, and competing with, the *Landesrecht*. The harmonisation of the hybrid law-like *ius commune* and local legal systems, or, in other words, the task of adaptation of *ius commune* to local conditions, was resolved by the so-called Practicals (*Rechtspraktiker*).

The readiness for the reception of Roman law, in the function of objective conditions, substantially differs in individual European countries. The level of sophistication of a given country's (region's) jurisprudence and political system is crucial regarding reception. In significant parts of the Iberian Peninsula, for example, the conditions in the 13th century were such that Roman law could become the subject of reception in the seven-volume codice, the *Siete Partidas*, of Alfonso X (the Wise). In Switzerland, by contrast, for reasons that could be attributed primarily to unique political conditions, the reception of Roman law in its entirety (*receptio in globo* or *receptio in complexu*) was out of the question. There is a close connection between Roman law and the so-called law of the emperor, *ius caesareum*, or *Kaiserrecht*. Roman law serves as the ideological foundation of *renovatio imperii* that attained extraordinary importance in the time of the sovereignty of the Hohenstaufen Dynasty. Roman law, more precisely the *ius publicum Romanum*, serves as the instrument of the legitimacy for "*Weltkaisertum*." The work best representing the Cameralist school both in its title and substance is Samuel Stryk's *Usus modernus pandectarum* from the turn of the 17th and 18th centuries.

13. Although, on the one hand, a characteristic feature of the school of Practicals is excessive focus on German praxis – which results in the distancing from the original Roman sources – , on the other hand, another characteristic is the casuistic analytical methodology. Nonetheless, we can talk about the "Science of Pandects" for the first time in connection with the Cameralists. Connecting the expression "Science of Pandects" to this school is correct even though the school itself – especially because of the increasing prevalence of particularity in its views – is incapable of progress. Only natural law, unfolding in the 17th century, would be fit to improve the unproductive "Science of Pandects" practised by Practicals further.

It must be emphasised that Roman law has played an important role in developing natural law doctrines. The evolution of non-antique, "modern" natural law, aptly described by Max Weber as "*Entzauberung der Welt*," is inseparable from the concept of *ius naturale* of the Romans.[35] The aspiration of Roman law scholars to trace back *ius civile* to ius naturale is a basic feature of the natural law of the 16th and 17th centuries. The influence of Roman law can also be found in the Christian-scholastic natural law. In the case of Hugo Grotius, who may be counted as a follower of the rationalist natural law jurisprudence, the "*auctoritas*" of Roman law is associated with its *imperium rationis*. Roman law plays a cardinal role in the work of Samuel Pufendorf, the author of the highly influential *De iure naturae et gentium libri octo* (1672), who may be regarded as a follower of another secularised school of natural law. The fusion of "Science of Pandects" and natural law had not taken place, which could be explained, on the one hand, with the common law-like approach of natural law, and, on the other, with the philosophical, in other words, non-legal, interests of natural law professors, a fact that could be demonstrated with the example of Christian Wolff, whose studies primarily focused on moral-philosophy.

14. The fundamental conflict between *Usus modernus pandectarum* and natural law could have been only dissolved by the *Pandektistik*, developed in the work of the followers of the school of historical jurisprudence (*Historische Rechtsschule*). The characteristics of *Pandektistik*, the intention of which was the creation of "the philosophy of positive law" (*Wieacker*), include the historical point of view, building on the original, Justinian's' sources, the desire for systemisation, the development of legal theories, and, finally – as a hoped-for result of all the aforementioned – the partition from particularism. In the light of the previously mentioned, the law of Pandects (*Pandektenrecht*) of the 19th century, *heutiges römisches Recht*, ("contemporary

[35] Regarding the Romans' concept of ius naturale, see G. Hamza, *A természetjog értelmezésének problémái: Cicero és a ius naturale* [The Problems of the Interpretation of Natural Law: Cicero and the *ius naturale*], Jogtudományi Közlöny 50, pp. 523-529. (1995).

Roman law") should be sharply separated from *Usus modernus pandectarum*, which was dominated by the elements of particularism.

The Law of Pandects of the 19th century, which after the book of Georg Friedrich Puchta, *Lehrbuch der Pandecten*, published in 1838, is also called "Pandects". As phrased by the German legal scholar, it is the general theory of German private law founded on Roman principles, the function and importance of which are the development and expansion of the bases of the private law system.

Even though it was developed on German soil, it is not practical to talk about German *Pandektistik* exclusively because this school is not equivalent only to the doctrine of *gemeines Recht* (*Koschaker*), but from its early onset, it gained significant influence beyond the borders of Germany.

In this respect, it is sufficient to consider the influence of *Pandektistik* in England. John Austin, who adopted Jeremy Bentham's legal theory in the analysis of legal terminology, follows the German *Pandektistik*. Characteristically, he regards Savigny's *Das Recht des Besitzes* as a masterpiece, considering it the most perfect among all legal works ever written. Thibaut's work, the first edition of which was published in 1803, titled *System des Pandektenrechts,* also had a great influence on him. This work of Thibaut, which had eight editions between 1803 and 1834, influenced English legal scholarship tremendously. Nathaniel Lindley's book titled Introduction to the Study of Jurisprudence, published in 1845, is the translation of the general part of Thibaut's above work. We further refer to the fact that in Sir Henry Maine's Ancient Law, published in 1861, the influence of *Pandektistik* could also be shown.[36]

15. The members of the Academy of Pavia, among whom we can find experts of Roman law, Common law, and modern codified private law, in their efforts to codify the European law of contracts, view as their mission the creation of a compromise between the Roman law based on continental private law, and the contract constructions of Common law.

It is a fact that similarities may be found among numerous institutions and constructions of Roman law and English law. It is without doubt, at the same time, that there are essential differences appearing between the views of Roman law and English law, which was formed as the result of unique historical conditions. One kind of attribute of Roman law is that it is jurisprudential law, so-called "*diritto giurisprudenziale*"[37] that generally is not associated with the binding authority of preceding juridical decisions. The interpretation of jurisprudential law, however, could differ depending on what scientific discipline the interpreting scholar follows.

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[36] See L. Lombardi, *Saggio sul diritto giurisprudenziale* (Milano, 1967).

[37] See G. Hamza, *Sir Henry Maine és az összehasonlító jog* [Sir Henry Maine and the Comparative Law], Jogállam, p. 326 sqq. (1998-1999).

According to Friedrich Carl von Savigny, the unique notion of *Juristenrecht* is systematisation, or more precisely, a tendency-like aspiration for systemisation. This view is especially clearly expressed in his work titled Sy*stem des heutigen römischen Rechts*. Rudolf von Jhering, a declared opponent of legal positivism, examines this problem from a different angle. At Jhering – primarily in his book titled *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* – Roman law, viewed as jurisprudential law, maintains its relevance in terms of both methodology and ideology.

The jurisprudential law quality of ius Romanum was given and pointedly emphasised by Koschaker in his work titled *Europa und das römische Recht*. In Roman law, Koschaker sees an effective category of counter-ideal to legal positivism "elevated to absolute heights." Koschaker, viewing Roman law as *Juristenrecht*, stresses its sharp opposition to English law. English law is clearly judge-made law, which makes the difference between the two legal systems obvious. *Ius Romanum* could never be viewed – in any of the phases of its evolution – as a law of precedents. In the literature, this is documented (to mention just a few examples) by Buckland, McNair, Schiller, Dawson, van Caenegem, Pringsheim, and Peter.

16. The jurisprudential quality of Roman law can be demonstrated in every phase of the development of this legal system.[38] The basis for this, among other things, is that there is an obvious continuity between the pontifical law or jurisprudence and the lay jurisprudence. When examining its judge-made or common law characteristics, we must consider the unique historical development and the unique ideological characteristics and specificities of this legal system. Regarding the doctrine of *stare decisis*, we may refer to some characteristics of the English *ius consuetudinarium*. It deserves emphasis that in English law (see, e.g., leg. Henr. IX. 9.) the interpretation of statutes occurs in a rather elastic manner. The judge is less bound by the statutes, or rather the texts thereof, than by previous judicial decisions. Bracton, the author of *De legibus et consuetudinibus Angliae*, is in effect the first – although previously there are signs of this view at Glanvill – to provide the theoretical support of the vigor of binding precedent. This is shown studiously in the doctrine of "…*Si tamen similia evenerint, per simile iudicentur, dum bona est occasio a similibus procedere ac similia*" (De leg. f. 1 b).

An important difference between Roman law and English law is the Roman legal scholars' so-called *ars distinguendi*, expressed in some *responsa* ("legal opinions") of legal scholars (*iurisperiti* i.e. *iurisconsulti*), the "art" that is capable to distinguish between the relevant, the legally relevant, and the irrelevant. As a result of this, *ars*

[38] Regarding the jurisprudence of Roman law, see A. Földi and G. Hamza, *A római jog története és insitúciói* [The History and Institutes of Roman Law]. 14th, revised and extended edition, p. 84 sqq. (Budapest, 2009).

distinguendi, the high-level abstraction capability of Roman *iurisperiti* (*iurisconsulti*), which was always denied from Roman law by the *communis opinio*, is clearly demonstrable. Here, we wish to refer to the fact that, oddly enough, even Fritz Schulz writes about the Romans' aversion to abstraction.

Indeed, in some of the *responsa*, only the legally valuable elements emerge, which is in diametric contrast to the relation of *ratio decidendi* and *obiter dicta* that, in many cases, melt together and are practically almost inseparable in the decisions of Anglo-Saxon courts. The *ars abstrahendi*, already affecting legal scholars working in the last centuries of the pre-classical era, constitutes the real demarcation line between the mentality of Romans and the legal thinking of Anglo-Saxons. We must point out that in some relations, it is especially valid to the doctrine of *stare decisis*, arising with the *ius respondendi*, which is clearly *mutatis mutandis* characteristic of Roman law. (Even within Roman law, there are certain signs of the guiding authority of precedent legal-scholarly opinions).

In the domain of Roman law, the question of judicial precedents is significant in the field of its comparison with English law. We may examine the significance of precedents based on both legal and non-legal sources. The law of inheritance (along with the law of gift[39]), is extremely important in this relation. Moreover, it has explicit paradigmatic significance. In the law of inheritance, the weight of previous decisions can especially be ascertained in connection with *querela inofficiosi testamenti*. In the domain of contract law, we may mention *compensatio*, in which the *responsa* originated in earlier times are given greater weight. Naturally, this weight is expressed through recognising the normative authority of certain legal principles, i.e., rules. Furthermore, the problem of *ius singulare* is also important, with regard to the examination of precedents. Namely, in the case of *ius singulare* – for example, in relation to a privilege – in *aliis similibus* can be interpreted cautiously, obviously, regarding previous cases.

The doctrine of *stare decisis* plays a prominent role in the development of modern English law. Naturally, in modern judicature, there is a sharp distinction between *ratio decidendi* and *obiter dicta*, which frequently allots lawyers a difficult task, a fact that is often referred to in the legal literature of many, such as Montrose, Simpson, Derham, Allen, Cross, and Paton. The doctrine of *stare decisis*, after all, is attributable to the fact that the most essential element of English law is the decision-making activity of the judge, whom Dawson rightly calls, in this respect, the "oracle of law."

17. Although the first International Congress of Comparative Law did not occur until l900, there were numerous historical precursors to recognising comparative law as

[39] See J. P. Dawson, *Gifts and Promises*, Continental and American Law Compared (New Haven–London, 1980).

a separate legal discipline[40]. Indeed, the value of the comparative method in matters involving the law was recognised even in ancient times. Plato's three protagonists in *The Laws – an Athenian, a Cretan, and a Spartan* – discuss the form, meaning, and purpose of the law. During their conversation, it is suggested that a city's guardians should send out observers to survey "the life lived by foreigners". After having been abroad for no more than ten years, each emissary should return to their home city and "present themselves before the council which muses on legislation". There he should make his report concerning what he has learned from those in foreign lands who were able "to give him some information about any problems of legislation". The council, in turn, should be attentive to any information provided by the observer that "throw(s) light on legislative problems that would otherwise remain difficult and obscure"[41].

Similarly, Aristotle commended the comparative method relative to the law. In *The Politics,* he states that it is important to "investigate the process of law-making"[42]. He goes on to state that, "for the purpose of making laws, it is necessary to start with knowledge of the number of constitutions and their differences one from another[43]. To that end, Aristotle directs the reader to his other work, the Collected Constitutions, in which he details how knowledge of the law can be obtained by comparing the constitutions and systems of government of approximately 158 different city-states and tribes[44]. He hoped to "see from these what kind of procedures do in fact keep states and separate constitutions in going order, and what are those which tend to bring them to a standstill; also, what are the reasons why some states are well-run while some are not"[45].

It is sufficient here to suggest three main headings under which the uses of comparative law may be organised and evaluated[46]. Firstly, comparative law as a means for

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[40] The English-speaking comparatist must consider the Jack of clarity, if not possible confusion, which arises from his tendency to speak simply of the "law", even though contextually a more precise meaning is called for. Unlike our continental colleagues, we do not always articulate the different concepts reflected in the terms "*droit*", "*loi*", and "*legislation*" (or, alternatively, "*direito*", "*lei*", and "*legislação*"). The English speaker must thus be prepared to think in terms of the law as general legal theory, legal rules (developed from various sources such as custom and decisional law) and statutes or legislation. Only when we parse these several categories' "law" can we meaningfully engage in a comparative dialogue. On avoiding linguistic and terminological confusion in comparative law, see Rudolf B. Schlesinger, et al., *Comparative Law*, 5th ed. (Minneola, N.Y.: Foundation Press, Inc., 1988), pp. 868-872 (linguistic difficulties), and Peter de Cruz, *Comparative Law in a Changing World*, 2nd ed. (London: Cavendish Publishing Limited, 1999), pp. 214-216 (linguistic and terminological differences) and pp. 216-219 (cultural differences between legal systems).

[41] Plato, *The Laws* (Trevor J. Saunders, trans.) (Baltimore: Penguin Books, 1970), pp. 501-503.

[42] Aristotle, *The Politics* (T. A. Sinclair, trans.) (Baltimore: Penguin Books, 1964), introduction, Book 1, p. 24.

[43] *Ibid.*, Book IV, Chapter 1, p. 151.

[44] See Aristotle, *Constitution of Athens and Related Texts* (Kurt Von Fritz and Ernst Kapp, trans.) (New York: Hafner Publishing Company, 1966). Unfortunately, Aristotle's extraordinary catalogue of constitutions did not survive intact, although a large portion of his work concerning the constitution of Athens is still extant.

[45] Aristotle, *The Politics*, *supra*, p. 24.

[46] See generally, David and Brierly, *supra*, pp. 6 f. See also, Carlos Ferreira de Almeida, *Direito Comparado: Ensina e Método*, *supra*, pp. 66-71.

developing legal history and formulating general legal theory; secondly, comparative law as a means for understanding and improving the laws of one's own nation; and thirdly, comparative law, as a means to promote understanding between nations and to develop a framework for international cooperation.

18. As previously noted, comparative methodologies were used by thinkers such as Montesquieu even before comparative law was recognised as an independent field of study. Surveying a variety of legal traditions concerning the governance of the state, Montesquieu sought to discern the principles of good government that different societies hold in common. In a sense, he and others like him used the comparative method to divine an *ius commune* lying just beneath the surface of different legal traditions[47]

Such an inquiry was not merely intended to identify common elements in various legal systems but also to indicate the highest and best principles upon which the law should operate.

In more recent times, the historical approach to the law has been complemented by a sociological consideration of the law. In this context, comparative law aims to "uncover the relationship between legal rules, institutions, and structures on the one hand and the society in which they operate on the other"[48]. Such an approach can be valuable in determining the interrelationship between law and society and evaluating their symbiotic development.

There are a number of factors that in the 21st century continue to support a comparative approach to the improvement of the law. These include: (a) The technological foundation exists for accessing the statutes, decisional law, legal treatises and academic commentaries of virtually any nation. The storage and retrieval potential of the internet are seemingly without limit, facilitating the process of obtaining information from other jurisdictions. (b) The same electronic and computer medium by which information can be stored and retrieved provides a means for virtually instantaneous communication between interested parties in different nations. (c) As air transportation and international travel have become routine, the opportunities for exchange have multiplied, permitting visits, conferences and other "in person" exchanges that traditionally would not have been possible. (d) As the process of globalisation continues, there is a certain natural convergence of cultures, at least within certain limits. This fact facilitates communication and understanding and produces various common points of reference. These may range from common social trends to shared social problems concerning issues such as privacy rights, drug abuse and juvenile crime.

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[47] „The result of the (comparative) process, it seems to have been supposed, would be a system of universal principles of positive law." Pollock, *supra* at p. 1.

[48] *Ibid.*, p. 107.

Associated with these is the fact that shared problems may lend themselves to similar approaches, if not common solutions.

Yet, the comparative method is not without its challenges. Differences in language and terminology and dissimilarities in legal structures and procedures can make it difficult to compare legal systems. The resolution of this problem is to use a "functional" approach[49]. Viewed by some as "a basic methodological principle of all comparative law"[50], functionality presumes that "the legal system of every society essentially faces the same problems, and solves these problems by quite different means though very often with similar results."[51]

The issue concerning which a comparison is to be made must thus be stated, at least initially, in terms of its operational or functional aspects, unadorned by characteristics in relation to a particular legal system. To give an example: A comparatist may wish to determine how the credibility of witnesses is evaluated within different legal traditions. If, coming from an American perspective, the student puts the question in terms of the scope given to counsel in the cross-examination of witnesses, the inquiry will be unproductive. This is so primarily because the question contains a faulty premise: that all judicial systems utilise an adversarial system in which counsel is relied upon for the production and examination of evidence at trial. Rather, the question must be put in terms of the function under consideration, which is not cross-examinations, but rather how the credibility of witnesses is evaluated. "The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concepts of one's own legal system."[52]

An awareness of the laws of other nations provides an important context for the analysis of legal issues within one's own country. The comparative approach and the methodological principles upon which it is based can thus be of significant value to the lawmaker, leading to a better understanding of the law and assisting in its improvement.

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[49] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 3d. ed. (Tony Weir, trans.) (Oxford: Clarendon Press, 1998), p. 34 f. See Basil S. Markesinis, *Foreign Law and Comparative MethodoLogy: a Subject and a Thesis* {Hart Publishing, Oxford, 1997), pp. 196 f. See also, *Justice across the Atlantic ll: The Criminal Process in Portugal and the United States: Two Lega! Systems in Pursuit of Justice*, *supra*, Foreword by Rui Chancerelle de Machete, p. ll ("This is how one of the primary objectives of the comparative scholars is achieved, the goal of functional equivalence allowing us to see our own institutions in another light, not only from a dogmatic but also from a sociological point of view").

[50] Konrad Zweigert and Hein Kötz, *supra*, p. 34.

[51] *Ibid*. See also, Carlos Ferreira de Almeida, *supra*, p. 23 ("A soluçãao do problema parece ter encontrado... razoável convergencia em torna do critélio da aproximação funcional (*functionl approach)*. Comparáveis seriam os institutos que, em ordens jurídicas diferentes, dão resposta jurídica a necessidades semelhantes, resolvendo o mesmo problema social, político ou económico. Esta fórmula permite solucionar a maior parte das dúvidas de comparabilidade..."). (English and emphasis in original).

[52] Zweigert and Kötz, *supra*, p. 34.

19. The comparative method can not only help to advance and develop the law in individual nations but also to facilitate international transactions and build a broader framework for international cooperation. In this regard, comparative law can help bring greater coherence to private international law and provide a context work toward international legal unification. Lastly, the comparative approach leads to a better understanding of other peoples from both a legal and a cultural perspective, thus assisting in bringing about better relations between nations.

Private international law consists of a varied set of conflict rules employed in cases that contain an element involving foreign law, interests or judgments. As such, it deals with how courts in different countries decide to exercise jurisdiction, apply foreign law and recognise (or enforce) foreign judgments[53]. Although these issues have traditionally been resolved by each nation consistent with its own practices, an analysis of such practices from a comparative perspective would suggest how these issues could be resolved with greater consistency based on how common problems are resolved elsewhere. Whether achieved on a bilateral or multilateral basis, the development of a uniform set of rules would be of tremendous international significance[54].

There is another approach to achieving consistency between nations other than developing coherent conflict rules. That approach is to achieve consistency by unifying, or at least harmonising, the substantive law of different nations. Any such effort would, of course, require the extensive use of comparative law. Numerous such initiatives are currently in operation, all designed to achieve international legal unification through the adoption of uniform laws or codes rather than by means of multilateral treaties[55].

The final international area in which the comparative method can be of value is the development of international public law; the understanding between peoples – which necessarily follows from an appreciation of their legal systems and traditions – is an important tool in facilitating international cooperation. With globalisation as the prevailing trend in international affairs, increased interdependence and interaction between nations will likely be the norm for the foreseeable future. The tools made available through the comparative method will be more intense in demand, and the appreciation of their value will become even more widespread. As Roscoe Found commented, "In legal history, periods of growth and expansion call for and rely upon philosophy and comparative law[56].

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[53] Michael Akehurst, *A Modern introduction to international Law*, 4th ed. (George Allen and Unwin, London, 1982), pp. 48–50.

[54] See David and Brierly, *supra*, pp. 9–10.

[55] See João de Castro Mendes, *supra*, pp. 101–107.

[56] 34 Harvard L.Rev. 227, 228 (1921).

20. In developing European private law, convergence plays an increasing role. In the new legal literature, many authors, for example, James Gordley[57] and Paolo Gallo[58], write about the relativisation of differences between common law and civil law, and, what is more, about the disappearance of differences in many legal institutions. In the field of contract law, many institutions and constructions of continental law are subject to reception in English law. It is noteworthy that regarding terminology, certain English authors explicitly acknowledge the role of Roman law tradition in English private law.[59]

The big debate of the moment among legal historians and lawyers, in general, is about the new *ius commune,* the new common law of Europe, and at its core are the two themes of this paper: the codification as a break with the past and a national monument. Advocates of the new *ius commune* generally adhere to the thesis of continuity between the old *ius commune* and the codifications, denying the latter any "national" character, thus effectively disarming codifications as obstacles for the new *ius commune.* Their opponents have a different view, stressing the originality of national codes[60].

The private law (*ius privatum*) of European countries is undoubtedly connected to Roman law, albeit to varying extents and building on different historical traditions. This is increasingly obvious in the decrease or even disappearance of differences, often motivated by political interests, between certain "legal fields" and "legal families." Not even differing traditions of culture and civilisation constitute obstacles (as this will become especially evident in the chapter of this book examining the influence of Roman law traditions in states outside Europe), to a various extent – to the reception of Roman law. It follows from the foregoing that considering the significant role of Roman law in the comprehensive, comparative analysis of the evolution of European private law is justified.

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[57] See J. Gordley, *« Common law » v. « civil law » Una distinzione che va scomparendo?* In: Scritti in onore di R. Sacco I, 559 sqq. (Milano, 1994).

[58] See P. Gallo, *La recezione dei modelli continentali nel diritto inglese delle obbligazioni.* In: Scritti in onore di R. Sacco I, pp. 473-494 (Milano, 1994).

[59] See *English Private Law*. I-II. Ed. By P. Birks (Oxford, 2000).

[60] For other political aspects of this discussion, see D. Heirbaut, *De europeanisering van het recht: verkoopsargument of misbruik van de rechtsgeschiedenis* in Billiet, B., Cassiman, P. and V Anspeybrouck, M., *Het verleden in het heden*, Ghent, Academia press, 2002, pp. 131-141.

Part I
The Origins of European Private Law

1. Roman Law after the Demise of the Western Roman Empire[61]

After the fall of the (Western) Roman Empire in 476 AD and even earlier[62], barbarian states were established on its territory, whose inhabitants were partly Germanic (e.g., Goths and Burgundians) and partly Roman or the descendants of Romans. Based on the principle of personality, the Germanic inhabitants of these kingdoms applied their own customary law. At the same time, the legal relations of the citizens of the fallen *Imperium Romanum* were governed by Roman law. The barbarian monarchs later considered the codification of the laws relating to their Roman subjects necessary, so they issued several codices for them in Latin, collectively called *Leges Romanae barbarorum*.

Separate codices were issued for the Germanic population. Such a code was, for example, the *Codex Euricianus* (475) in the Visigothic Kingdom. Its 350 chapters practically contained Roman vulgar law in the mid-seventh century. This code was replaced by the *Lex Visigothorum Reccesvindiana* (also called *Liber iudiciorum* or *iudicum*), which already followed the territorial principle rather than that of personality, thus being valid for both the Goths and the Romans.

The *Lex Romana Visigothorum* came into force in the western Gothic kingdom in 506, on the order of King Alaric II (484–507). From the 16th century onward, the code is referred to as the *Breviarium Alaricianum* in his honour. It was compiled from the text of the Theodosian Code, Gaius's Institutes, the Sententiarum libri attributed to Paul, some imperial decrees, and a passage by Papinian. The *Lex Romana Visigothorum* is an extract of classical and post-classical legal texts adapted to the simpler way of life in the

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[61] For the Visigothic kingdom, see A. d'Ors, *El Código de Eurico* (Roma–Madrid, 1960); J Gaudemet, "Le Bréviaire d'Alaric et les Epitome", *IRMAE* I 2 b aa b (1965); P. D. King, *Law and Society in the Visigothic Kingdom* (Cambridge, 1972). For the Burdundian kingdom, see G. Pieri, "La loi romaine des Burgondes", *IRMAE* I 2 b aa d (1969). For the Ostrogothic kingdom see G. Vismara, *Romani e Goti di fronte al diritto nel regno ostrogotico*, *I Goti in Occidente* (Spoleto, 1956), and "Edictum Theoderici", *IRMAE* I 2 b aa a (1967).

[62] The Burgundian kingdom was established in 413, the Visigothic in 414, and that of the Vandals in 429. Later on the first two also formally broke loose from the Empire. The Vandals even sacked, occupied and captured Rome for two weeks. Previously Alaric, the King of the Visigoths, occupied the City (Urbs) for three days in 410.

days of the so-called Gothic Kingdom of Toulouse (including Hispania and Aquitaine), regulating the life of former Roman citizens and their descendants living there.

The Breviarium Alaricianum remained in effect in Aquitaine for another six centuries after the territory's coming under Frankish rule in 507. The eighth-century *Lex Romana (Raetica) Curiensis,* consisting of 27 law books, was the re-writing of the Breviarium and got its name from the Swiss town of Chur (the Roman Curia).

The *Lex Romana Burgundionum* was introduced in the Burgundian Kingdom by King Gundobald (475–516) in the late 5th century for former Roman citizens and their descendants. The law book consisted of forty-seven titles and, unlike the *Breviarium Alaricianum*, it was composed as a unified whole based on the *Codex Gregorianus*, the *Codex* Hermogenianus, and the *Codex Theodosianus*, as well as the *Sententiarum libri*, and a work by Gaius.

After the Frankish occupation of Burgundy in 534, the *Lex Romana Visigothorum* gradually replaced the Burgundian law book that was still preserved in some manuscripts as the appendix of the former. In the 9th century, the Lex Romana Burgundionum was, therefore, mistakenly taken for the continuation of Papinian's text to be found at the end of the Breviarium, and the whole work came to be known as Papianus.

The Edictum Theodorici was prepared on the order of the eastern Gothic King Theodoric the Great (497–526) around the year 500. and was in use mainly in the Eastern Gothic Kingdom, primarily in Italy. Consisting of 154 chapters, this law book referred no longer to former Roman citizens only but to all subjects of the kingdom. Apart from Gaius's work, its sources were basically the same as those of the *Lex Romana Burgundionum*. Its text was unified and, like the Burgundian codex, it also lacked quotations.

According to some distinguished scholars, the fact that the *Edictum Theodorici* was intended for all citizens of the kingdom indicates that the code was, in fact, by Theodoric II, King of the Visigoths (453–466). The question is still unsettled.

2. Justinian's Compilation (Codification)

a) The Aim of Justinian Regarding the Codification

Emperor Justinian I (527–565) was born around 482 in Tauresium, Moesia, of a Thracian-Illyrian peasant family under the name Petrus Sabbatius.[63] Once his uncle

[63] Formerly, Justinian was thought to have been of Slavic origin but recent research seems to prove his Thracian-Illyrian ancestry. What is quite important is that his birthplace belonged to one of the Latin-speaking territories of the eastern part of the empire (speaking mostly Greek). This explains why the emperor insisted

and adoptive father, Justinus, became emperor in 518, Justinian quickly rose through the ranks as a soldier and civil servant (serving as *comes*, *magister militum*, and *consul* 520). As the co-emperor and successor of Justinus, his primary political aim was to restore the unity of the empire (*Imperium Romanum*). This is the reason why he launched successful campaigns to recover Italy, North Africa, southern Hispania and other important regions of the Mediterranean. For the same reason, he wished to unite the whole material of Roman law into a vast, comprehensive work of compilation, i.e., codification.[64] He intended it to be valid throughout the empire. The old glory of the Roman Empire seemed to return during his lifetime.

In his compilation (codification), Justinian essentially relied on the two most famous schools of law of the Byzantine (Eastern Roman) empire, the one at Beirut (*Berytos*) and the one at Constantinople.[65] The teachers of law at these schools (*antecessores*) took great pains to study the legal literature of the classical era and raised the generation of jurists active during Justinian's reign in this spirit. So, their pupils were well-qualified to solve this unprecedented task.

b) The Course of the Codification

The course of the compilation (codification) can be divided into four stages, each of which is marked with the book of laws prepared during that particular period: a) the *Codex Justinianus*, b) the *Digesta*, c) the *Institutiones*, and d) the *Codex Justinianus repetitae praelectionis*. A later addition was e) the containing the laws made by Justinian and his successors, mainly in Greek.[66]

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on codifying Roman law in Latin, even though most of his jurists would have preferred Greek. Posterity must be very grateful for his decision, for only a few in medieval Europe knew Greek, which would have sealed the later fate of Roman law.

64 The authors of this study do not aim to address the complex issue concerning the differentiation between compilation, codification, and consolidation of law. The terms "compilation" and "codification" are used interchangeably.

65 For teaching Roman law in the days of the empire, see P. Collinet, *Histoire de l'école de droit de Beyrouth* (Paris, 1925); Gy. Diósdi. *A jogtanítás nyomai Pannoniában* [Traces of Teaching Law in Pannonia], *Antik Tanulmányok* 8 (1961); D. Liebs, *Rechtsschulen und Rechtsunterricht im Prinzipat*, *Aufstieg und Niedergang der römischen Welt. Geschichte und Kultur Roms im Spiegel der neueren Forschung*, hrsg. von H. Temporini-W. Haase, Berlin-New York II 15, 1976.

66 See from the abundant literature: E.-H. Kaden, *L'Église et l'État sous Justinien*, in: Mémoires publiés par la Faculté de Droit de Genève, no. 9. (Genéve, 1952); H. Ankum, *La 'codification' de Justinien était-elle une veritable codification?*, in: Liber amicorum J. Gilissen (Anvers, 1983); D. Osler, *The Compilation of Justinian's Digest*, *Zeitschrift der Savigny-Stiftung (Rom. Abt.)* 102 (1985); F. Gallo, *La codificazione giustinianea*, *Index* 14 (1986); G. Pugliese, *Spunti e precedenti romani della moderna codificazione*, *Index* 14 (1986); B. Sirks, *From the Theodosian to the Justinian Code*, in: Atti dell'Accademia romanistica Costantiniana, VI. Convegno (Perugia, 1986); G. L. Falchi, *Sulla codificazione del diritto romano nel V^e^ e VI^e^ secolo* (Roma, 1989); G. G. Archi, *La critica romanistica attuale e l'esegesi del Codex Iustinianus*, *Labeo* 40 (1994).

a) In the year 528, the emperor appointed a commission of ten members to make a compilation of all imperial decrees (leges) (*constitutio Haec quae necessario*). One of its members was the eminent jurist Tribonianus (Tribonian), the future leader of the compilation, and Theophilus, a professor at the law school in Constantinople. Their task was to amalgamate the material of the *Codex Gregorianus, Codex Hermogenianus,* and *Codex Theodosianus*, as well as the decrees issued subsequently, into a unified work of compilation. At the same time, they prepared the way for the further steps in the process of codification. The result was the *Codex Iustinianus,* which came into force in 529. At the same time, the emperor declared that the earlier three codes were not to be relied on in the future (*constitutio Summa rei publicae*). The text of this code has not survived to the present day.

b) Two years later, Justinian assigned Tribonian (*a quaestor sacri palatii* from 529 onward) and the commission to be set up by him the task of collecting the writings of the jurists (*ius*) and compiling them into a unified code (*consitutio Deo auctore*). To support the commission's activities, which consisted of professors of law from Constantinople and Berytos, judges of higher-ranking courts, and the *sacrarum largitionum*. The emperor issued several decrees concerning the arrangement of the material. The most important fifty decrees were published separately in an official collection in 531, under the title *Quinquaginta decisiones* (Fifty Decisions), which unfortunately have also been lost.

Without regard to the limitations imposed by the Law of Citations (*Lex citationis*) of 426, the commission dealt with all jurists invested with the *ius respondendi* and several other *iurisconsulti* from Pontifex Q. Mucius Scaevola to the post-classical jurist Arcadius Charisius. The material eventually covered about two thousand books by thirty-nine jurists. One-third of it came from Ulpian, one-sixteenth from Paul, and one-eighteenth from Papinian.

The imperial order invited the compilers to avoid discrepancies and repetitions and even authorised them to change the original texts if they thought necessary and leave out all outdated regulations. This function of the compilers resulted in *interpolatio* (*interpolare* = to alter). Despite the carefulness of the scholars, there are passages that are included twice in the final text (*leges geminatae*), while others are not under the right heading (*leges fugitivae*).

This most ambitious task was fulfilled in three years, an extremely short time, and came into force together with the *constitutio Tanta* and *constitutio Dedóken* at the end of 533 under the title *Digesta seu Pandectae* (*pan dekhesthai* = to embrace all).

It is a mystery how the compilers managed to create the largest code of all time in such a short period out of the huge body of legal literature that they had to master. F. Bluhme (1820) believes that they arranged the excerpts taken from the works of the jurists into four groups ('masses') (*Sabinus*-, *Papinian*-, *edicta*- and

appendices- 'masses') and the relevant subcommittees worked on them separately (*Massentheorie*). Others (such as F. Hofmann, H. Peters, and V. Arangio-Ruiz) presume that there must have been a *praedigesta* that was merely rewritten by the compilers. Gy. Diósdi and A. Honoré maintain that, however difficult the task was, it was not a "mission impossible". The compilers must have had some collections made for educational purposes that contained allusions to the other sources of the period. Their use must have made the work of the compilers of the Digesta significantly easier.[67]

The Digest consists of seven parts (*pars*), fifty books (*liber*) independent of the parts, several titles (*titulus*) within the books, and several fragments (*fragmentum*) within the titles.[68] In the Middle Ages, jurists called the fragments leges and subdivided them into further units or paragraphs. The fragments often consist of only one single sentence, but the longer ones can be divided into an introduction (*principium*) and further paragraphs. At the beginning of the fragment, the name of its author and the book from which it had been taken was always indicated.[69] However, these citations often contain a text other than the original due to post-classical or Justinianic interpolations.

As regards its content, the Digest is divided into: a) general regulations (Book 1), b) private law, roughly corresponding to the structure of the *Edictum perpetuum,* resembling the system of institutes (Books 2–46), c) "criminal law" (in Justinian's words (*constitutio Tanta* 8a): *duo terribiles libri*) (Books 47 and 48), and d) public law and miscellaneous regulations (Books 49 and 50).

The usual way of quoting from the Digest is the following: D (or Dig.) 50, 17, 110, 4 = Digesta Book 50, title 17, fragment 110, § 4. Books 30 to 32 belong to a single common title (*De legatis et fideicommissis*), so the second figure refers here to the number of the fragment. If the author of the text is also indicated, the name comes before the passage of the source in an abbreviated form (never after it), e.g., Paul. D. 50, 17, 110, 4. If several fragments are quoted from the same title, the letter "D" and the first two figures are replaced by "eod." meaning *eodem titulo* = "in the same title": Ulp. D. 38, 6, 1, 7; Pomp. eod. 5, 2. If more than one paragraph is quoted from the same fragment, it is separated by full stops: Marci. D. 39, 4, 16, 2. 6. 9. The beginning of a fragment divided into parts is indicated by the letters "pr." (*principium*): Ulp. D. 15, 4, 1 pr.

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[67] See Gy. Diósdi, *Das Gespenst der Prädigesten*, *Labeo* 17 (1971) and A. N. Honoré, *Tribonian* (Oxford, 1978).

[68] This division of the material served primarily the purposes of education, so it does not correspond to the arrangement of the material. Some parts (Parts VI and VII) do not even have titles of their own. Part I (*próta*) contains books 1–4, Part II (*de iudiciis*) contains books 5–11, Part III (*de rebus*) contains books 12–19, Part IV (the 'middle' of the compilation [*umbilicus*]) contains books 20–27, Part V (*de testamentis*) includes books 28–36, Part VI contains books 37–44, and Part VII contains books 45–50.

[69] This fact enabled Otto Lenel to reconstruct the works of jurists that had been lost. His work, titled *Palingenesia iuris civilis*, puts the fragments into their inferred context and is, therefore, an indispensable means of source analysis.

Since all works by former jurist included in the Digest have been lost with few exceptions, it is needless to refer to their titles and even less so to the number of the books cited (e.g. *Ulpianus libro XXIX ad edictum*) in simple quotations.

During the preparation of the Digest (in 533), Justinian commissioned Tribonian, the jurists Dorotheus and Theophilus, to compile an official textbook (*constitutio Omnem*). The work was done in the same year and relied mostly on Gaius's *Institutiones* in its structure (*de personis, de rebus, and de actionibus*) and often also in its text. The book was titled *Institutiones seu Elementa* ("Basic Teachings or Rudiments") and and gained legal authority (*constitutio Imperatoriam maiestatem*).

The *Institutiones* consist of 4 books (*libri*) subdivided into titles (*tituli*), which in turn fall into paragraphs. The usual way of quoting it is the following: I. (or Inst.) 2, 22, 1 = Institutiones Book 2, Title 22, § 1.

d) With the *Consitutio,* beginning with the words *Cordi nobis Justinian*, issued in 534, a new collection of imperial decrees under the title *Codex Iustinianus repetitae praelectionis* ("a code accepted in a second reading", abbreviated as *Codex*). The *Codex* was compiled by a commission of four members. Out of the two codes promulgated by Justinian, only this latter one survives. Put into force in late 534, its twelve books contain the imperial decrees issued from Hadrian to Justinian in chronological order and according to their subject matter.[70]

Book 1 deals with: a) ecclesiastical law, b) the state, and the law of procedure, Books 2 to 8 with c) private law, Book 9 with d) criminal law, and Books 10 to 12 with e) administrative law. The constitutions are arranged in chronological order within the individual titles. Apart from Justinian's decrees, the earlier ones were thoroughly rewritten and abridged by the compilators by means of interpolation. This had been made necessary by the verbosity of former decrees, especially from the 4th century onwards.

Like the Digest, the Codex Iustinianus was also divided into four levels except that instead of fragments, it contains decrees, i.e., more or less full texts. It is quoted as C. (or Cod. [*Iust.*]) 6, 1, 4, 2 = *Codex Iustinianus* Book 6, Title 1, Decree 4, § 2. The name of the emperor issuing a particular decree can be indicated before the source in an abbreviated form, for instance, Const. C. 1, 3, 2 pr. The *Codex Theodosianus* is quoted similarly, usually abbreviated as *CTh* or *Cod. Theod.*

Justinian's aim with the compilation was to forestall the revival of the disputes of earlier years. As he was convinced that he could settle all debated questions by the compilation serving legal (and political) unity within the empire, he forbade commenting on the Digest and referencing works by jurists not included in it. He allowed only

[70] The *Codex Iustinianus* contains over 4600 *constitutiones*, 150 of which are in Greek. The earliest one dates to the reign of Hadrian (the only one originating from that emperor); approximately 880 come from the era of the Severi, over 1,200 from Diocletian, and over 400 from Justinian.

translations, references to parallel passages, and indexing. In the *constitutio Cordi nobis* he reserved, however, the right to issue new decrees to amend prevailing law.

e) Some 168 surviving constitutions were actually issued after the preparation of the three codes. Most of these are in Greek, rarely in Greek and Latin or only in Latin. These constitutions primarily came from Justinian. They were collected by private persons and are called *Novellae* ([*constitutiones* or *leges*] (Novels) from the word *novus*). These Novels are not arranged into books but are subdivided into chapters (*caput*). They are quoted as follows: Nov. (or N.) 18, 4 = Novella 18, Chapter 4.

Justinian's *Novellae* are not to be mistaken for the Novels added to the Codex Theodosianus that survive in fragments. The items belonging to the so-called *Novellae posttheodosianae* are numbered according to the emperors issuing them, so the name of the emperor has to be indicated after the abbreviation "Nov." as follows: *Nov. Val.* (or *Nval*) = Novellae Valentiniani III.

c) Classical Jurisprudence and Justinian's Codification

Justinian's commission worked at the same high level as the jurists of the classical period (from 27 BC through 284 AD), whose work represented the peak of the development of Roman jurisprudence (*iurisprudentia*). This achievement is even more remarkable. Justinian's compilation was prepared at the time when some signals of crisis, i.e., decline, could be observed in the Roman Empire.

a) The very fact of compiling so much material was a large step forward in the development of Roman law, as the huge material had successfully resisted arrangement and compilation before.

It is still debated whether Justinian's compilation can be viewed as a codification at all or whether it is simply an unsystematic compilation, as, for instance, Gottfried Wilhelm Leibniz (1646-1716) maintained.[71] Measured by the standards of modern codes (codifications)[72], with their strict demands for logic and structure and with their

[71] Regarding Leibniz' relationship to Roman law (*ius Romanum*, i.e. *ius civile*), see F. Sturm, *Das römische Recht in der Sicht von Gottfried Wilhelm Leibniz*, in: Staat und Recht in Geschichte und Gegenwart (Tübingen 1968).

[72] The term "codification" stems from Jeremy Bentham (1748-1832). Prior to Bentham, Greek terms as *pannomion* and *pandikaion*, were in use to denote the codification. See J. Vanderlinden, *Le concept de Code en Europe occidentale du XIII^e au XIX^e siècle* (Bruxelles, 1967); J. H. Michel, *Quelques observations sur la notion de Code synthétique*, in: Liber amicorum J. Gilissen (Anvers, 1983); J. Gaudemet, *La codification. Ses formes et ses fins*, in: Estudios en homenaje al prof. J. Iglesias (Madrid, 1988); J. Gaudemet, *Codes, Collections les leçons de l'histoire. De Grégorius à Jean Chappuis*, DROITS Revue Française de Théorie, de Philosophie et de Culture Juridique 24 (1996) and Ph. Schofield, *Jeremy Bentham, Legislator of the World*, *Current Legal Problems* 57 (1998).

level of abstraction, Justinian's work can hardly be qualified as codification. However, according to the standards of its own time, it was of outstanding importance and an unprecedented step forward.

b) Justinian's compilers did not only compile the material but contributed their own creativity to it. Within the framework of the case law presented by the classical jurists and under the impact of Greek philosophy, they formulated general principles of law and offered new definitions; by simplifying classical legal institutions, they created highly refined abstractions, and they integrated a great variety of solutions offered by the classical jurists.

c) The quality of the work of the compilers did not lag behind the work of classical jurists. This assertion is justified by their brilliant abstractions and broad theoretical knowledge. After all, several of them were professors at the law schools in Constantinople and Beirut, so they were capable of summing up, systematising, and integrating the development of the law in the previous millennium.

d) Impact of Justinian's Codification on the Contemporary Legal Life of the Roman Empire

The impact of Justinian's compilation on legal life was considerable. The material contained in this work of compilation did not become generally and exclusively applied law at all courts of the Byzantine (Eastern Roman) empire due to the following three circumstances: a) Justinian's codes regulated highly developed economic conditions, while in most parts of the empire outside the cities, economic life was largely backward; b) the codes were written in Latin, while the language used in most parts of the empire was Greek; c) the local rules of the law of persons, family law, and the law of succession continued to be used by local courts of lower instance even after the *constitutio Antoniniana*, or the *Edictum* Caracallae (212 A. D.).

It would, however, be a mistake to conclude from this that Justinian's codes did not become prevailing law because: a) economic life in the towns and especially in the big cities was flourishing and demanded a refined legal regulation, b) urban lawyers preferred Latin to Greek, and c) despite the imperial prohibition, the Digest was commented on and indexed from the very beginning and summaries, and commentaries were extensively written on it even in later centuries.[73]

[73] As to the significance of Roman law in the Middle Ages and in modern times see G. Hamza, *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn* (Budapest, 2002) and idem, *Az európai magánjog*

e) Corpus Iuris Civilis

From the age of the Glossators, Justinian's compilation (codification) was generally called *Corpus iuris civilis*, but its structure significantly differed from that of the original.

In the Middle Ages, the Digest was divided into three volumes, the origin of the titles of which is still debated: a) the *Digestum vetus* (D. 1, 1–24, 2), b) the *Digestum infortiatum* (D. 24, 3–38, 17), and c) the *Digestum novum* (D. 39–50). They were followed by: d) the greater part of the *Codex* with the omission of the decrees written in Greek (C. 1–9), and finally, e) the so-called *Volumen parvum* that contained 1) the *Institutiones*, 2) the *Novellae* arranged into ten volumes in Latin (*Authenticum*), and 3) the rest of the Codex (C. 10–12).

The *Authenticum* consists of the "ordinary" material of ninety-seven Novels arranged into nine collections (*i*) under the title *Authenticae ordinariae*, and "extraordinary." Novels not included in the above collections called *Authenticae extraordinariae* or *extravagantes*. As an appendix to the original (Decima collatio) the *Volumen parvum* contains 4) the decrees of the medieval Roman emperors and 5) Lombard feudal law titled *Libri feudorum*.

The first printed editions followed this division that had become fixed by the Modern Age. The Code was published in separate volumes. The whole body of the material – together with the *Novellae* – was first published under the common title *Corpus iuris civilis* in Geneva in 1583 by Dionysius Gothofredus (Denis Godefroy) [1549-1622], a French outstanding humanist jurist of the era. This title soon became generally accepted. The usual structure of the modern editions of the *Corpus iuris civilis* is the following: Volume I: *Institutiones* and *Digesta*, Volume II: *Codex Iustinianus*, Volume III: *Novellae*.[74]

The most outstanding of the learned editors of the source publications accepted today is Theodor Mommsen, who is responsible, among others, for the best critical editions of the *Digesta* and the *Codex Theodosianus*. Mommsen's achievement in Roman law, Roman history, and classical ancient studies in general (and even in certain fields of medieval studies) is fundamental and lasting. He even received a Nobel Prize for literature in 1902 for his literary achievement. W. Kunkel, one of the greatest

fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján [Trends in the Development of Private Law in Europe. The Role of the Civilian Tradition in the Shaping of Modern Systems of Private Law] (Budapest, 2002).

[74] The whole *Corpus iuris* was translated into several languages since the 19th century. At the time of Napoleon, it was translated into French, followed by German, Italian, and Spanish. In the 20th century, it was translated into English. A new German edition and the first Dutch translation are under preparation, as well as a selection in Chinese and Russian. In Hungarian translation, several fragments of Justinian's codification are available; however, to its whole extent, only the *Institutiones* have been translated.

Romanists of the 20th century, acknowledges his merits as follows: "In solving these problems, the science of Roman law rests on the shoulders of Theodor Mommsen, who, as a lawyer, had been trained by nineteenth-century jurisprudence to grasp knowledge exactly and deal with it systematically. In full possession of the totality of Roman tradition, he placed all branches of Roman studies on new foundations and pointed out the tasks they had in common."[75]

[75] "Mit ihrer Bemühung um die Lösung dieser Aufgaben steht die Wissenshaft vom römischen Recht auf den Schultern Theodor Mommsens, der, von Hause aus Jurist und von der Rechtswissenschaft des 19. Jahrhunderts in der scharfen Erfassung und systematischen Verknüpfung seiner Erkentnisse geschult, mit umfassender Beherrschung der gesamten römischen Überlieferung alle Zweige der römischen Altertumswissenschaft auf neue Grundlagen gestellt und auf ihre gemeinsamen Aufgaben hingewiesen hat" (W. Kunkel, *Römische Rechtsgeschichte* [Köln–Wien, 1971], p. 169.)

Part II
The Development of European (Private) Law in the Middle Ages

1. Introduction

Based on the impact of Justinian's laws in whole Europe, three main types of survival can be distinguished though numerous combinations ofthese exist. There was A) a continuous survival in territories where Roman law continued to be in use; B) a revival at places where it had been in effect earlier; and C) a reception of Roman law into other legal systems either through a) a single act of codification or b) continuous infiltration.

Justinian's codification did not lead to the end of the development of law or the concept of the *ius civile*. In fact, its development continues even today. In the Middle Ages, *ius civile* was primarily interpreted as Roman law, but secondarily, it was used to denote private law (*ius privatum*), the most important component of Roman law. For example, in the *Corpus iuris civilis,* the term *ius civile* meant Roman law. However, during the 18th century, when modern codes started to replace the formerly prevailing *ius commune* in most European states, the meaning of *ius civile* was narrowed down to the old meaning it had in the last centuries of the Roman empire (*Imperium Romanum*). The meaning of civil law in the modern era is identical to that of the notion of private law. This change in terms of meaning occurred at the same time when the concept of "citizen" (*citoyen*) gained fundamental importance as a result of the French Revolution.

It deserves mentioning that the *Codex Maximilianeus Bavaricus Civilis* of 1756, called a "Code of Bavarian Civil Law", was not yet a civil code in the classical sense of the term. This Bavarian code also encompassed materials in no connection with the traditional material regulated by a civil code in the modern sense of the term. According to the generally held view, Napoleon's *Code civil* of 1804 was the first modern civil code. Even the Napoleonic Code, due to its provisions regulating the law of citizenship (i.e., the law of the *cives*), is to some extent rooted in the Roman concept of *ius civile.*

The commercial law-related relations necessitated the distinction between civil law (*droit civil*), properly speaking and commercial law (*droit commercial*). This distinction appeared first in France and French mediation became generally accepted in most European countries. This distinction was, still is reflected in private law-related codifications.

Later, during the period of the formation of socialist law, some branches of the traditional body of private law became separated by means of ideological reason. In most socialist countries, first in Soviet Russia and later in the Soviet Union, separate codes regulating labour law, family law and agricultural law-related matters were promulgated.

In relation to the term *code unique*, based on the monistic concept (*concept moniste*), it must be outlined that this notion applies in the case when both civil and commercial law-related matters are regulated in one legislative act. The first code the drafters adopted the civil code of Parme from 1820 (*Codice civile per gli Stati di Parma Piacenza e Guastalla*). In this code, companies, i.e., business organisations existing at that time, were regulated in one code. Notably, the various forms of companies were not regulated in a separate book but under the title of commercial companies (*Della società di commercio*) as a subtype of companies. The first *code unique*, in which companies (i.e., business organisations) are regulated separately in an autonomous book, is the Civil Code of Modena (*Codice civile per gli Stati Estensi*) of 1851. In this code, companies are regulated in the last (fourth) book. Companies are regulated in the last (fourth) book in that code.

Contrary to the development of law on the European continent, the Anglo-Saxon world followed a different path regarding the use and meaning of civil law. In those countries, the concept of civil law, having the Roman meaning *ius civile* had been unchanged since the Middle Ages. In British and American usage, civil law still means firstly a) Justinian's Roman law, secondly b) modern legal systems based on Roman law (civil law jurisdictions), and thirdly c) private law since the term "civil law" in the modern sense of the word has not developed within the Common law. In this regard, it should be emphasised that in Common Law, there was and still is no distinction between private law (*ius privatum*) and public law (*ius publicum*).

2. The European Ius Commune

Through the works of the Commentators, the Italian jurists of the 14th century, Lombardian feudal law[76] and elements of canon law have infiltrated the Justinian law. This mixture of laws was called common law or ius commune in Latin and soon spread throughout Europe.

[76] Besides glossed Roman law, Lombardic feudal law played an important part in Northern Italy and was compiled into a systematised whole by Obertus de Orto, Consul of Milan, around 1150. The Glossator Hugolinus completed a similar work in 1250, and his achievement became part of volume 5 of the *Corpus iuris civilis* under the title *Decima collatio novellarum*.

The medieval interpretation of the concept of *ius commune* has no universal acceptance. It is generally identified with the common European law developed by the Commentators. Others maintain that the *ius commune* was already around in the 12th or 13th century through the impact of the Glossators' activities. Its subject matter is similarly debated. F. Wieacker, for example, does not consider Lombardian feudal law and municipal statutory law as its elements. The root of the problem is most clearly pointed out by F. Calasso and H. Coing, who both maintain that in the Middle Ages, the term originally meant a universally valid Roman law in contrast with statutory local (municipal) law. Later, mostly from the days of the Commentators, other locally applied legal norms were also included, giving rise to common regional or territorial law. Important within the *ius commune* is the canon law that developed through the impact of Roman law. German legal scholars even use the term *römisch-kanonisches* (Roman–canon) *ius commune*.

In Coing's view, the *ius commune* became so complex in terms of its meaning that it can only be interpreted through a time and country-specific examination. In Spain, for example, it was a subject of debate in the 16th century whether Roman law or canon law should be considered *ius commune*. In France, the *droit commun de la France* developed during the 17th and 18th centuries through the amalgamation of local customs (*costumes*), recent legislation, judicial practice, and Roman law still generally implemented in the southern territories of the country. In Germany, the *Gemeines Recht* officially accepted in 1495 by the *Reichskammergerichtsordnung* was the *ius commune* of the country. A simplifying but still acceptable and widespread concept of the *ius commune* considers it to be a survival of Roman law functioning as the common law of medieval and early modern Europe with its diverse local legal systems. This was gradually replaced by the civil codes and other codes or provisions of the nation-states from the middle of the 18th century and mainly throughout the 19th century. From these, we can emphasise the importance of the Italian civil codes. The first Italian *Codice civile,* promulgated in 1865, explicitly makes reference to the general principles of law (*principî generali del diritto*) as a source of law to be applied. The new Italian Civil Code of 1942, according to Article 12 on the interpretation of the law to be applied (*Interpretazione della legge*), the judge is authorised in the case of the lack of appropriate norms or analogies (*analogiae iuris*) to apply the *principî generali dell'ordinamento giuridico dello Stato,* which also meant Roman law (as national tradition).[77]

The counterpart of the *ius commune* is the *ius proprium* or *ius municipale* ("law implemented in the autonomous towns"), the application of which is limited to certain

[77] The text of the second part of Article 12 of the Italian Civil code of 1942 is as follows: "Se una controversia non può essere decisa con una precisa disposizione, si ha riguardo alle disposizioni che regolano casi simili o materie analoghe; se il caso rimane ancora dubbio, si decide secondo i principî generali dell'ordinamento giuridico dello Stato."

territories due to the political fragmentation of Italy. The commentators called also *ius singulare* the *ius municipale*. The *ius commune* became a generally implemented law. This particular feature of the *ius commune* does not contradict the fact that its contents were identical in the various countries. The *Cortes* of Barcelona, for instance, between 1409 and 1599, set up a hierarchical order regarding the sources of law (*fontes iuris*) to be referred before the various courts: among these, the *dret comú* has priority. An act adopted in 1499, which was repealed by the *Leyes de Toro*, enumerates those authors who (i.e., whose works) can be referred to. These authors are Bartolus, Baldus, Johannes Andreae (Juan de Andrès) and the canonist Abad Panormitano.

3. Canon Law

Besides Roman law, canon law (*ius canonicum*) greatly impacted legal life in medieval Europe. The customary law of the ancient Church, the "Christian peoples' law" ("*christliches Volksrecht*"), which manifested itself primarily in episcopal jurisdiction, was set down in various collections (*collectiones*) as early as the 2nd and 3rd centuries.[78] The *Didakhé,* which very likely has its origin in Syria and dating back to the second quarter of the 2nd century AD, contains the commands and directions of the apostles. Nor can the *Didakhé* be considered an official ecclesiastical law collection.

The provisions of the various collections (*collectiones*) concerning Church discipline, named canons after the Greek term *kanón* (meaning "scale", "measure", or "rule"), regulated both the internal relations of the Church and certain legal relations of private persons, such as marriage, adoption, and cases of ownership arising between Christians, among others. The legal material contained in the canons originally came from Jewish law, but later it incorporated certain elements of Roman law as well. In the period of the imperial Church (*Reichskirche*) in the 4th to 5th centuries, the role of the primary legal sources was assumed by the provisions of the ecumenical and local synods or councils (*synodi* or *concilia*) and complemented by the episcopal decrees as local sources of law. From the late 4th century, papal decretals concerning legal matters (*litterae* or *epistulae decretales*) were issued with increasing frequency. These legal regulations were imbued with elements of Roman law both in their content and their form.

In the Roman Catholic and Orthodox Churches, several private collections were issued, incorporating in chronological order the sources of law (*fontes cognescendi*

[78] For a comprehensive treatment of the subject, see P. Erdő, *Az egyházjog forrásai. Történeti bevezetés* [Sources of Canon Law: A Historical Introduction] (Budapest, 1998). For the centuries-long development of the *Corpus Iuris Canonici*, see G. Hamza, *A Corpus Iuris Canonici kialakulásának történetéhez* [To the History of the Fevelopment of the *Corpus Iuris Canonici*], JK 53 (1998).

iuris canonici), the provisions of the ecumenical and local councils, the *decretales* and canons attributed to the apostles. The first *decretalis* was sent in 395 to the bishop Himerius of Tarragona by the successor of Pope Damasus, Pope Siricius (384–399).

That part of Roman law deemed useful for the Church was summarised in separate collections. The canons issued at synods and the papal decretals were published in private collections in the first half of the Middle Ages and often proved fake. The *Lex Romana canonice compta* from the 9th century constituted, for instance, this kind of collection. Canon law was first summarised by the Gratian, called *lector divinae paginae*, a disciple of Irnerius, who used the method of Scholastic dialectics. A contemporary of the *quattuor doctores* ("four doctors"), Gratian, lived in Bologna and published his work titled *Concordia discordantium canonum* around 1140, becoming later known as *Decretum (magistri) Gratiani*.

The *Collectio canonum*, the work of the bishop Anselm of Lucca composed between 1081 and 1086, very likely after 1083, was of fundamental importance for Gratian. Another important collection was the *Decretum* of bishop Ivo of Chartres, with its 17 books comprising no less than 3,760 fragments, along with another work of his, the *Collectio tripertita* with provisions of councils and papal decretals in the first two parts and with quotations from ecclesiastical works, as well as an extract of Roman law in 29 titles (*tituli*). The *Decretum* contains about 3,500 fragments and is divided into three parts. This work represents the matter of law through its doctrinal elaboration at the scientific standard the matter of law: the sources (*auctoritates: Sacra Scriptura*, the natural law, the provisions of the councils, the papel decisions and somewhere Roman law elements) fit into the discussion between master and disciples *(dicta et explicationes Gratiani).* The first part of this work (*Pars prima)* is articulated in 101 distinctions and further chapters (*capitula;* later *canones*). The second part (*Pars secunda*) treats through definite cases (*causae* and *questiones* within) the questions concerning ecclesiastical goods and questions in relation to marriage and monastic life. It is quite possible that Gratianus did not edit the *Decretum* in its final version. This is also maintained by the absence of a commentary in the third part.

Although the *Decretum Gratiani* was never put into effect, it constituted the first part of the *Corpus iuris canonici,* a base for the text of implementation of canon law before the promulgation of the C*odex iuris canonici* in 1918. In the modern Lutheran Church, the *Decretum* of Gratianus acts – at least in theory – as a supplementary source of law in certain areas.

This was the beginning of the scholarly research of canon law. The Commentators of the *Decretum*, known as Decretists (primarily Gratian's pupils such as Paucapalea, Rolandus, Rufinus, and Huguccio of Pisa), wrote interpretations and summaries to Gratian's work, as well as glosses. The final version of the *Glossa ordinaria* was prepared by Bartholomaeus Brixiensis.

During the flourishing Middle Ages, the most important sources of canon law were the *decretales*, which had been added to the *Decretum Gratiani* as novels. In the domain of canon law, important reforms were due to Pope Innocentius III (1198–1216), who convened the Fourth Lateran Council in November 1215. The adoption of the 71 constitutions served as a legal basis for ecclesiastical reform throughout the Middle Ages. These constitutions were published by Johannes Teutonicus in 1217 in the *Compilatio IV*. It was accepted by the University of Bologna in 1220 and added to the collection of *Decretalis* of Pope Gregory IX.

As they were included in five collections in the early 13th century (accepted as a material to be taught at the Bologna school of law (*Quinque compilationes antiquae*)), in 1234, Pope Gregory IX issued a universal and exclusive version to be implemented with the beginning of *Rex pacificus,* prepared by St. Raimundus de Pennaforte (about 1175–1275) and titled *Liber extra* (*abbr. X*), later complemented by the *Liber Sextus* of Pope Bonifatius VIII (*abbr. VI*). The Decretalists wrote notes and explanations to the decretals and their collections. Both the *Liber extra* and the *Liber Sextus* were complemented by a *glossa ordinaria*. We must also mention the English scholar Alanus, who is typically regarded as the author of the Apparatus *ius naturale*. The *Liber Sextus,* compiled between 1296 and 1298, was the first collection to have not only one but several authors. Pope Bonifatius VIII ordered that the decretals issued after the pontificate of Pope Gregory IX and not previously incorporated into the *Liber Sextus* be all repealed. The *Liber Sextus* had an exceptionally high reputation. Notably, the appendix of the *Liber Sextus* contained 88 *regulae iuris*. It was probably the civilist Dino da Mugello who composed these *regulae*. The elements of Roman law had a particularly substantial influence on the *Appendix*. The Appendix can be viewed as a document of the close relationship between Roman law and ecclesiastical law. Decretalists wrote commentaries and notes to the decretes and later to their collections (*Liber Extra, Liber Sextus* and *Glossa Ordinaria*). The *Liber Sextus* was commented on by renowned jurists, such as the canonist Johannes Andreae (Giovanni d'Andrea) and the civilist Alberico da Rosata. The *Summa aurea*, the work of Henricus de Segusio, was an outstanding achievement of the contemporary school of Decretalists.

Further collections of decretals were also prepared in the late Middle Ages. In 1317, Pope John XXII issued one under the title *Clementinae* (abbreviated as *Clem.*) encompassing the *decretales* of Clement V, while the decretales issued later (*decretales posteriores*), such as the *Extravagantes Iohannis XXII* (1325–1500) and the *Extravagantes communes* (1500 and 1503) containing the decretals of the pontificate of Urban IV (1221–1264) and Sixtus IV (1471–1484) were only private collections (abbreviated as *Extravag. Iohann XXII* and *Extravag. comm.*) This is how a synopsis of canon law developed from six autonomous works into a single unit by the end of the Middle Ages and was called *Corpus iuris canonici,* modelled after the notion *Corpus iuris civilis*. This codification work included the *Decterum Gratiani*, the *Liber extra*,

the *Liber sextus*, the *Clementinae*, and the two *Extravagantes*. Its authentic text was promulgated by Pope Gregory XIII in 1582.

The reception of Roman law by the Church began in Italy in the 9th century and in France in the 11th century. From late antiquity, the Church had been an advocate of the significance of Roman law for Christians, primarily clerics, living in the barbarian kingdoms. (This is visible through the following meaning in principle: *Ecclesia vivit lege Romana*, meaning that 'The Church lives by Roman law [*lex Ripuaria*].) The formal reception of Roman law, as codified by Justinian, took place only after its revival.

The subsidiary character of the *leges* (i.e., secular or Roman law) in canon law was already recognised by Gratian (D. 10, p.c. 6; C. 15, q. 3, p. c. 4) and several statements by popes in the 12th and 13th centuries (e.g. X. 5, 32, 1; X. 5, 33, 28) took a similar stance. The actions of the Canonists were often closely connected to those of secular lawyers who applied *ius civile*. From this point forward, secular law increasingly influenced ecclesiastical courts. Canonists largely contributed to developing the theories of *bona fides*, *aequitas*, the *iustum pretium*, the *nudum pactum*, and legal entity, as well as the modern system of evidence based on concepts and institutions known to Roman law.

At that time, canon law was considered one of the branches of law existing parallel with the *ius civile*. This is indicated by the term doctor in *utroque iure* (or *doctor utriusque iuris*) (the phrase "both laws" later meant the duality of political and legal science) and the *adage "legista sine canonibus parum valet, canonista sine legibus nihil*", attributed to Ludovicus Romanus (1409–1439), meaning that "a civilian is not worth much without canon law and a Canonist without secular law is "worthless".

4. The Development of Law in the Roman (Byzantine) Empire after Justinian's Compilation[79]

Despite Justinian's prohibition of scientific elaboration on his monumental legislation, word-for-word Greek translations *(kata podas)*, along with indices and references to parallel places *(paratitla)*, which were permitted, provided an opportunity for

[79] For the Byzantine Empire, see C. E. Zachariae von Lingenthal, *Geschichte des griechisch-römischen Rechts* (Berlin, 1892)[3]; E. H. Frestfield, *A Manual of Eastern Roman Law. The Procheiros Nomos* (Cambridge, 1928); A. Bergen, *Studi suiBasilici IV: La legislazione de Giustiniano ed i Basilici, Iura* 5 (1954); H. J. Scheltema, "Über die Natur der Basiliken", TR 23 (1955); A.G. Chloros, "The Hexabiblos", AJ (Cape Town, 1958); L. Burgmann, *Ecloga. Das Gesetzbuch Leon III. und Konstantinos' V.* (Frankfurt a. M., 1983); A. Schminck, *Studien zu mittelbyzantinischen Rechtsbüchern* (Frankfurt a. M., 1986); J. Triantaphyllopoulos, "Le droit romain dans le monde grec", JJP 21 (1991); A. E. Laiou, D. Simon, ed., *Law and Society in Byzantium: 9th and 12th Centuries* (Washington, 1994); G. Hamza, *A jusztiniánuszi kodifikáció és a bizánci jog* [Justinian's Codification and Byzantine law], JK 53 (1998). For Greece, see P. J. Zepos, *Greek Law* (Athens, 1944); J.M. Sontis: *Das griechische Zivilgesetzbuch im Rahmen der Privatrechtsgeschichte der Neuzeit, ZSS* 78 (Rom. Abt.) (1961).

commentary and scientific treatment. It also contributed to a further Hyalinisation of early Byzantine law. Additionally, the Novellae of Justinian, primarily written in Greek, along with those of his successors, which were entirely in Greek, as well as the iconoclastic legislation from the Isaurian dynasty in the 8th century, were based on an unofficial Greek law that continued to exist as customs. Direct connection with the Greek legal tradition was particularly apparent in the *Ecloga* (AD 740) of Emperor Leo III and in three collections titled Soldier's Law, Farmer's Law and Sea Law, respectively, attributed to the same emperor. Though later repealed as heretic, the "Isaurian" legislation continued to influence all further Byzantine legislation. Justinian allowed only a literal translation (*kata poda*) of his work of codification into Greek and the preparation of references to parallel passages (*paratitla*), as well as short tables of content (*indices*). Certain parts of his code were still synopsised and commented upon during his lifetime. These extracts and commentaries (*paragraphai*), written in Greek, were used as official law books from the 8th century onwards.

One of the earliest versions was the *Eklogé tón nomón* ("law extracts"), which consisted of eighteen titles and prepared under the order of Emperor Leo III the Isaurian (717–741) based on Justinian's compilation.

Three private collections of law, which were law books only in name, come from the same period: a) the *Nomos geórgikos* (agrarian code), b) the *Nomos nautikos* (maritime code), and c) the *Nomos stratikos* (military code).

The Greek synopsis of the total text of Justinian's work of codification was ordered by Emperor Basil I (Macedo) (867–886), but only an introduction called *Procheiron* or *Encheiridon* ('Manual'), consisting of forty titles, was prepared during his reign.

The whole work was completed during the reign of Leo VI the Wise (886–911). The emperor wished to replace Justinian's codification by publishing "a total work of codification consisting of sixty books". This huge compilation called Basilica ("imperial laws" or *Res regiae/imperatoriae*) contained the text of the *Digesta*, the *Codex*, the *Institutiones*, and the *Novellae* on the basis of their Greek versions, as well as extracts and explanations in a revised and partly altered form. Besides the *Basilica*, a new revised version of the *Procheiron* was also prepared at that time titled *Epanagógé tuo nomuo scholia* ("guide to the law book"). Byzantine jurists later added scholia or explanatory notes to the text of the Basilica.

The official character and exclusive validity of the Basilica were questioned in the 11th and 12t centuries, as the enforcement of legal regulations was not necessarily linked with their official validity or termination. Laws were considered valid only for the lifetime of the monarch that issued them.

Due to the difficulties of the practical application of the Basilica, mostly extracts and tables of content were used, such as the *Synopsis tón Basilikón* (the Synopsis

of the Basilica) and the (from the phrase *ti pu keitai*, meaning "where to find what"). The last of these was a work by Harmenopulos, judge of Salonica, consisting of six books. It was issued in 1345 under the title *Hexabiblos* (Six Book-Work) and was in many respects a forerunner of the Pandectists. It also greatly impacted the development of law in Greece, the Balkans and Russia.

5. Italian Territories (Italy)

After the fall of the Eastern Gothic Kingdom in 553, Justinian extended the implementation of his codification to Italy. The application of the codification of Justinian was strongly related to and rested on the Byzantine conquest, so once the Byzantines were forced to withdraw, they remained in effect only in certain territories (in the territory of Ravenna, Venice, and Southern Italy). The Digest remained unknown not only in Italy but also in the territory of Western Europe. Social and economic conditions in early medieval Europe did not make the reception of Justinian's law possible until a) adequate economic and social conditions prevailed and b) the Roman imperial concept was revived first by Charlemagne, then by the kings of the German territories. Justinian's law survived only in the form of vulgar law (*Vulgarrecht*). The rediscovery of the Digest took place only after nearly five centuries: a manuscript copy of the *Codex Florentinus* turned up around 1050, rendering the revival of Justinian's law possible. There are some written documents that testify to the application of Roman law in everyday legal practice. For instance, a document from Tuscany, dating to 1076, contains quotations from the Digest. The Investiture Struggle (1075–1122) between the Holy See and the Holy Roman Empire (*Sacrum Romanum Imperium*) was also, to a considerable extent, related to the application of Roman law. The growing practical importance of Roman law contributed to the spreading of the necessity of scientific cultivation of Roman law.

The starting point of the scientific cultivation was the foundation of the University (*studium generale*) of Bologna[80], also called the cradle of *legalis scientia* or *lucerna iuris*, where Irnerius (d. around 1140) explained during his courses Justinian's codification as early as the 1080s. The knowledge of Roman law gradually spread through university education at first in Italy and later also in Southern France. Irnerius did not

[80] The date of foundation of the Bologna university cannot be ascertained. One thing is, however, sure, namely that the municipal school (*studium civile*) was established in 1088 and can be considered the forerunner of the university. One of its professors was the outstanding grammarian Irnerius (his name was probably Wernerius, Guarnerius or Garnerius [Theutonicus]), who left Rome to teach in Bologna. The university was formally founded only in 1119.

write works (books). He added glosses[81] to certain passages of Roman *leges found* in the *Codex Iustinianus,* and to the *responsa* of Roman jurisconsults, included in the *Digesta*. This method gave rise to the Bologna School of Glossators. The Glossators later also added summaries *(summae)* and conceptual definitions *(distinctiones)* to the various parts of the codification of Justinian. Moreover, they compiled collections of case law *(casus)* and various other monographs. The Glossators also collected contradictory passages from the sources and the writings of outstanding jurists *(dissensiones dominorum).* Lacking a sense of historical perspective, The Glossators treated the *Corpus iuris civilis* as if it had been authored in a single period. The apparent inconsistencies of the *Corpus iuris civilis*, resulting from the fact that the passages originated from different periods of time, were, according to them, to be eliminated.

The teaching method *(mos [iura docendi] Italicus)* of the Glossators was the meticulous grammatical and legal analysis of the texts. They also encouraged their students to learn the passages by heart. It deserves mentioning that the Glossators elaborated the concept of positive law (*ius positivum).* At the same time, professors at various faculties of law in France (in particular those in Orléans and Montpellier) used dialectics to come to concrete conclusions from general concepts. The method used by them was called *mos [iura docendi] Gallicus.*

The most outstanding representatives of the School of Glossators, disciples that later became successors of Irnerius, were the *quattuor doctors,* or "four doctors": Bulgarus (d. around 1166), Martinus Gosia (d. 1158 or 1166), Iacobus (d. 1178), who authored between 1130 and 1140 the first work of criminal law in the Middle Ages titled the *Tractatus criminum*, and Hugo de Porta Ravennate (d. 1168). Bulgarus was the author of the earliest work on the law of "civil" procedure. He used a special mosaic-like method of collecting and connecting words from various passages (texts). He also introduced several new genres of dealing with legal texts. He and his successors interpreted the texts literally, while Martinus was the forerunner of attributing importance to the application of equity (*aequitas*). Bulgarus's approach prevailed later in Bologna, while Martinus's gained ground mostly in France.

According to Hostiensis (Henricus de Segusia [Susa] d. 1271), a teacher of canon law at the University of Paris who studied both in Italy (Bologna) and England, Martinus Gosia, could be viewed as a kind of *homo spiritualis.* Martinus Gosia was more devoted to divine law (*ius divinum*) than to the strict interpretation of civil law (*divinae legi adhaerebat contra rigorem iuris civilis*). At the Imperial Diet of Roncaglia

[81] The word "*glóssa*" means "language" and figuratively also "speech different from general usage and, therefore, needing explanation", hence "note" or "explanation". There were two types of glosses: a) interlinear (*glossa interlinearis*), written above the lines and b) marginal (*glossa marginalis*), the forerunner of modern footnotes, written in the margin.

in 1158, the "Four Doctors" established, at the request of Emperor Frederick I, the list of imperial prerogatives (*iura regalia*). This list was an important step forward for the development of constitutional law. Therefore, the work of glossators cannot be viewed as being limited to the field of private law (*ius privatum*).

Besides the *quattuor doctores*, Placentinus (d. 1192), Hugolinus, Iohannes Bassianus, and Azo Pontius, one of the greatest jurists of the time, (d. 1230)[82] gained a high reputation. Accursius (1183?–1263), a pupil of Azo, synopsised his predecessors' glosses in his *Glossa ordinaria* (Standard Gloss), consisting of nearly 100,000 glosses. The exact number of glosses can only be estimated. However, some authors, such as Emil Secker, estimate the number of glosses at 96,260, whereas others put their number at 94,940.

Accursius was born in around 1185 in Central Italy, in the town of Certaldo, near Florence. As a pupil of Azo Portius, he studied law at the University of Bologna. Unlike Irnerius, who originally was a specialist in grammar, Accursius studied law from very early on. Accursius was about thirty years old when he started to teach at the University of Bologna after having received his doctor's degree. Accursius compiled his glosses in the *Glossa ordinaria*. These glosses were, in fact, commentaries added to various legal sources.

The *Glossa ordinaria* can be viewed as an original work, although during the elaboration of this collection (consisting of almost one hundred thousand glosses), Accursius drew upon the works of his predecessors. Along with the above names, we also need to mention the name of Placentinus (1132–1192), member of the School of Glossators, Hugolinus, Pilius (around 1150–1207) and Iohannes Bassianus. A particular merit of Accursius was that he also considered the legal literature during his work.

From the middle of the 13th century, they gained growing authority in the circle of legists and canonists. The *Glossa ordinaria* was almost regarded as a source of law (*fons iuris*) in the time of Accursius. Moreover, the *Glossa ordinaria* served as a fundamental source of legal culture.

Its paramount authority is well reflected in the maxim "Whatever is not accepted by the Glossa will not be accepted by the court, either" *(Quidquid non agnoscit Glossa, non agnoscit curia).*

The activity of Accursius was by no means limited to compiling the glosses. He is also the author of the *Summa authenticarum,* which was published together with the *Summa* of Azo, and of the *Summa feodorum,* which used to be attributed to Hugolinus,

[82] Azo was the first to articulate the principle of lex fori, which states that a case should be decided based on the local law of the jurisdiction where the litigation occurs. His extreme authority is reflected in the late medieval saying "Chi non ha Azo, non vada a palazzo" [Those who do not have Azo, i.e., Azo's *Summa*, should not go to the city hall where the *syndicus*, a magistrate judge versed in Roman law, decided cases.], meaning "Do not go to court without Azo".

and which presented the novels of Justinian and the feudal law (*ius feudale*). In these works, he emphasised both practical application and legal science.

An outstanding contemporary of Accursius was Odofredus (d. 1265), his colleague, who frequently challenged his ideas and was the first to apply the *mos [iura docendi] Italicus* as his working method.

Aldricus, a Glossator working around 1200, contributed to solving cases arising from conflicting municipal statutes (*statuta*) by his interpretation of the statute *Cunctos populos*. Consequently, the Glossators concluded that statutes were valid only for their given communities *(subditi).* The significance of the problem is indicated by the fact that this passage of the *Codex* continued to be commented on for a long period to come (see Bartolus in the 14th century and Dumoulin in the 16th).

The Holy Roman Empire (*Sacrum Imperium Romanum*), as a successor of the *Imperium Romanum,* provided the basis for the Glossators to take the codification of Justinian as law to be implemented.[83] With the decline of the Holy Roman Empire, the role of municipal statutes and local feudal law gained ground again, so the demands of the local courts gave rise to the school of the Commentators (*commentatores*), called *consiliatores* or, by an earlier name, Post-Glossators. The work of Commentators aimed at reform comprised first those fields which were not regulated by Roman law, such as the law of the bill of exchange, the law of corporations (*corporationes*) and private international law. conciliator" The term *consiliator* referred to the role of jurists in influencing the development of legal science during the Middle Ages. Their activity was primarily aimed at practice. As a result, their activity in legal practice was their primary contribution to the development of legal science.

Beginning in the 13th century., these legal experts, educated mostly at the universities of Perugia and Pavia, added extensive explanations to the marginal notes of the Glossators, giving rise to the maxim that their work was "glossing the glosses of the Glosses" *(glossare glossarum glossas).* At the same time, they practised law at a high level while also providing legal councils. Even if the scholarly value of their work remains somewhat below that of the Glossators, the creators of modern European legal science, their practical achievement is highly important as they applied classical Roman law to the conditions of their time and created a common basic law that they would spread almost everywhere in Europe.

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[83] The term "Germano-Roman Empire" used in Hungarian historiography is out of place. It lacks any support in the sources and creates the false impression that this state consisted of two main parts, one German and one Roman (cf. Austro-Hungarian (Dual) Monarchy). The Holy Roman Empire actually included lands of four crowns: a) the Roman Empire of Charlemagne, including the b) German, c) Italian, and d) Burgundian kingdoms. Its first official name was *Romanorum* or *Romanum Imperium*. From the 12th century, it was called *Sacrum Imperium*, and finally *Sacrum Romanum Imperium*. This latter form is preserved in the various European languages, e.g., *Heiliges Römisches Reich*, *Sacro Imperio Romano*, *Saint-Empire (Romain)*, *Holy Roman Empire*, and *Sviashchennaya Rimskaya Imperiya*. The name *Heiliges Römisches Reich deutscher Nation* first appeared in the Modern Age but was never officially used between 962 and 1806.

The author of the most outstanding work on the law of procedure in medieval legal science was Wilhelmus Durantis (1235–1296) of Southern France, bishop of Mende, who paved the way for the work of the Commentators. He is the author of the most prestigious work on procedural law of the Middle Ages, the *Speculum Iudiciale, also* called *Speculum Iuris*. The first version of this work came about between 1271 and 1276, while the second one was between 1287 and 1291. By means of the *Speculum Iudiciale,* Roman law-based doctrines and principles became known in Europe, along with those territories, for instance, in Northern Europe, where there had been no reception of Roman law. The founder of the school of Commentators, Cinus (Cino da Pistoia) (1270–1336), a professor in Perugia, sharply attacked the Gloss for its possible false conclusions and distorting simplifications. His pupil, Bartolus de Saxoferrato (1313–1357), also called the *lumina et lucerna iuris* by his contemporaries, was the most brilliant Commentator and who can be seen as the founder of both private international and commercial law. However, Bartolus returned to the Gloss, the authority of which was superseded by his own. His works were considered as having binding legal force, and his name became so closely tied to legal science that "only those who follow Bartolus are considered good lawyers.", went the maxim *(Nemo (bonus) iurista, nisi Bartolista).* His commentaries on Roman law were reflected primarily in the needs of citizens.

The distinguished Commentator, Baldus de Ubaldis (1327–1400), was also a Bartolist renowned for his comprehensive legal knowledge *(in iure nihil ignorabat).* Since then, the views of legal scholars, and eventually most of them, became standard in legal practice. The principle of *communis opinio doctorum habet vim consuetudinis* is the medieval version of the *ius respondendi,* which was the direct model of the German *Spruchkollegium*. Paul de Castro (d. 1441), a pupil of Baldus, was influenced by the intellectual trends of his own era. Paul de Castro's authority was nearly equal to that of Bartolus *(si Bartolus non fuisset, eius locum Paulus tenuisset).* Iason de Mayno (1435–1519), a professor at the University of Pavia and professor of Alciatus, along with Philippus Decius, was one of the last outstanding representatives of the School of Commentators. Paul de Castro and Iason de Mayno were pioneers of the trend known as *Usus modernus pandectarum*, which applied Roman law to contemporary needs. This trend primarily gained acceptance in Germany.

The stagnation and decline of Roman law studies coincided with the flourishing of Humanism, i.e., Humanist studies. It was particularly the philosophy that had a predominant position in the Platonic academies. The relationship between jurists and Humanists was eventually overshadowed by a number of disputes. While jurists often based their research on confronting *thesis* and *antithesis,* in compliance with the method of late scholastic representatives, the Humanists favoured the implementation of the platonic dialectics while trying to find a synthetical analysis. The Humanists rejected the teaching method of jurists, which focused solely on the interpretation

of certain texts, i.e., sources, instead of embracing the entirety of the law. In the view of the Humanists, this method led to considerable cultural insufficiency, evoking the danger of a trend of simplification. Humanists also ridiculed the simplified and often distorted Latin used by jurists. Petrarca and Lorenza Valla called themselves "Antibartolists" and viewed jurists as *homines illiterati.* They appear to haveforgotten the fact that medieval Latin underwent a continuous development and became the spoken language used in every praxis. The individualistic approach of Humanists, which focused solely on individuals, led to a disdain for jurists working within corporations. (*ordines iurisperitorum*). They viewed the *ordo iurisperitorum* not as a form of expressing autonomy but as an institutional adherence to outdated traditions.

6. France[84]

In the Middle Ages, the land of the Western Franks was divided into two regions based on the law they adhered to. A) In the south, in the territory of the former Western Gothic and Burgundian kingdoms, the vulgar law of the *Breviarium Alaricianum* was officially in effect until the 12th century and continued to provide the region with a unified legal system even thereafter. Thus, this territory was eventually named the "land of written law" *(pays de droit* écrit*).* The impact of Roman law could thus be felt in Gascogne, Rousillon, and Navarra, as well as in Béarn, Guyenne, Saintonge, Limousin, Lyon, Languedoc, Provence, and most parts of Burgundy. Although Savoy did not belong to the French kingdom, it was also a *pays de droit* écrit. At the same time, B) the northern part of the country was governed by Germanic feudal law, the so-called *coutume* (there were 360 varieties), so this region was called "the region of customary law" *(pays de droit coutumier).*

Within the several types of *coutume,* there were local laws that were valid a) in a whole province *(coutumes générales)* or b) only locally *(coutumes locales).* The term *coutume* was also applied to c) compilations of local law for towns in Southern France based on Roman law.

The students of the Glossators brought from Italy respect for Justinian's law, which influenced both written and customary law. The universities of Montpellier, Toulouse and Orléans played an outstanding role in teaching Roman law. Certain French jurists of the second half of the 13th century can be considered forerunners of the Italian

[84] P. Ourliac, J. Malafosse, *Histoire du droit privé*, vols. 1–3. (Paris, 1957–1969); P. Petot, *Le droit commun selon les coutumiers*, *RHD* 38 (1960); V. Piano-Mortari, *Diritto romano e diritto nazionale in Francia nel secolo XVI* (Milan, 1962); M.-L. Carlin, *La pénétration du droit romain dans les actes de la pratique provençale* (Paris, 1967); A.-J. Arnaud, *Les origines doctrinales du Code civil français* (Paris, 1969); A. Gouron, *La science juridique française aux XI^e et XII^e siècles*, *IRMAE* I 4 d (1978).

School of Commentators. Two of their outstanding representatives were the *doctores ultramontani Iacobus de Ravanis* (Jacques de Révigny, c. 1210-15–1296) and Petrus de Bellapertica (Pierre de Belleperche, c. 1250–1308), whose lectures at the Law Faculty in Orléans (École d'Orléans) were said to have also been audited by Cinus. Important works of Petrus de Bellapertica were the commentaries written to the *Digesta vetus* and the *Digesta novum*. He gave up teaching in 1296 and continued his activity as the *clericus regis* in the court of Philippe IV (1285–1314).

The University of Montpellier also had an outstanding importance at all European levels. Its first professor of law was Placentinus (Placentin), considered a pupil of Bulgarus at the University of Bologna. Placentinus, who offered courses at the University of Montpellier from the middle 1160s, left this university after 1180 and went on to teach at the University of Bologna and then in Piacenza. He returned to Montpellier in 1190 and died two years later, in 1192. He wrote glosses on the whole *Corpus iuris civilis*. One of his major works is the interpretation of Bulgarus' commentary of the last title of the last book of the Digest, *De diversis regulis iuris antique* (D. 50. 17.). His work on procedural law (*actiones*) *(Libellus de actionum varietatibus),* authored around 1160, is also significant. He wrote *summae* to the *Codex* and the *Institutiones* of Justinian, both published in 1536. After his return to Montpellier in 1191, he wrote *summa* to the last three books of the *Codex Iustinianus*, under the name *Summa trium librorum*. This *Summa* remained unfinished. Pilius intended to complete this work during his stay in Modena. The *Summa trium librorum* remained uncompleted. This *Summa* was printed with the *summae* of Azo in the 16th century. Among Placentinus's works, his *Distinctiones* and *Questiones Disputatae* are especially noteworthy.

The School of Law at Orléans (École *d'Orléans*) traces its origins to the constitution *Super speculam* issued by Pope Honorius III in 1219. The third part of this constitution forbids the teaching of Roman law *(ius civile)* at the University of Paris. Although the University of Orléans started in 1306, it received papal permission to teach Roman law in 1234/1235. The elaboration of the concept of *ius ad rem* is attached to the name of Jacobus de Ravanis, who was an outstanding scholar of the School of Orléans between 1260 and 1280. In his concept, Jacobus de Ravanis views possession as a real right (*ius ad rem*), even when the possessor does not physically have the thing (*res*). According to the Longobard understanding of possession, there is no need for direct physical control (*investitura propria*) over the item in question.

Petrus de Bellapertica (Pierre de Belleperche) continued his studies in Orléans; his master was Raoul d'Harcourt, the pupil of Jacobus de Ravanis. Petrus de Bellapertica (1247–1308) was a professor at the University of Orléans, where, according to traditions, Cinus attended his courses. After offering his services to King Philippe IV in 1296, he first became a member of the Parliament of Paris before being ordained as the bishop of Auxerre in 1306. At the end of his career, he became chancellor of France.

Among his works, the most important one is the *Commentaria,* containing his lectures dealing with the titles (*tituli*) of the Digest. He also wrote *repetitiones* to some of the *tituli* of the Digest and to the *Codex Iustinianus*. His lectures on the *Institutiones* of Justinian, dedicated in particular to their procedural part *(De actionibus),* are also considered very significant.

7. The Iberian Peninsula[85]

After the fall of the Visigothic kingdom in 714, most of the Iberian Peninsula came under Arab (Moorish) control, putting an end to the official use of Roman law for a certain period. It survived primarily in the territory of the Christian kingdoms of the region.

a) Spain

Today, the principal sources of Roman law tradition in the territory of Spain are the *Breviarium Alaricianum* and the *Liber iudiciorum*. Roman law and canon law (*ius canonicum*), as elements of the *ius commune,* were viewed as subsidiary law along with local customs (*fueros,* i.e., *customs*). Starting from the 13th century, a process of romanisation of both written and unwritten customary law became evident.[86] In both Spain and Portugal, the Roman *lex citationis*, adopted in 426 AD, served as a model for resolving conflicting provisions from different sources of law.

The collections of Latin-language *customs* of several towns in Catalonia (e.g. Barcelona, Gerona, and Tortosa) were fundamentally based on Roman law. At the very beginning of the 15th century, the official compilation commissioned by the Parliament

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[85] For Spain, see J. M. Ríus, *La Recepción de Derecho Romano en la Península Ibérica durante da Edad Media* (Montpellier, 1967); R. Gibert, *Historia General del Derecho Español* (Granada, 1968); A. García y García, *Derecho Común en España. Los Juristas y sus obras* (Murcia, 1991); J. Baró Pazos, *La codificación del derecho civil en España 1808–89)* (Santander, 1992). For Portugal, see N.J. Espinosa Gomes da Silva, *História do direito portugues [e]*, vol. 1: *Fontes de Direito* (Lisboa, 1985).

[86] For a long time, Spanish legal historians could not agree on the extent of the influence of Germanic and Roman law in the legal development of the Iberian Peninsula. Today, the overwhelming importance of the latter is emphasised. Examining the spread of Roman law in Europe, Arthur Duck emphasised as early as the 17th century that Roman law, i.e., the law of the Holy Roman Empire, was received due to its inherent *iustitia* and *ratio*. See also J. Sanchez, Arcilla Bernal, *A római jogi tradíció továbbélése és a közönséges jog (ius commune) recepciója Spanyolországban* [The Survival of Roman Legal Tradition and the Reception of the Ius Commune in Spain]. *Tanulmányok a római jog és továbbélése köréből* IStudies on Roman Law and its Survival], vol. 1 (Budapest, 1987–88)

(*Generalitat*) of Catalonia of the law (*dret general)* was also based on Roman law traditions. This compilation, carried out at the proposal of the *Generalitat*, also aimed at the unification of law. The redactors of this compilation, which embraced the customs of Barcelona (*Usatges de Barcelona*), Catalonian laws and the decisions (sentences) of the Supreme Court in Barcelona, took the system of the *Codex Iustinianus* into consideration while also having in mind the chronological order of the different Catalan legal sources. The laws of King James I of Aragon (1213–1276) mandated "the use of natural reason" in place of appropriate custom (*usatges*), implementing Roman law even before its formal reception in 1409. In Castile and León, the law book of King Alfonso X (the Wise), known as the "Spanish Justinian" (1252–1284), consists of seven books and is entitled *Siete Partidas*, which serves as a significant document illustrating the extensive use of Roman law. The *Ordenamiento de Alcalá* (1348) directly ordered the application of Roman law as subsidiary law. The collections of customs titled *Fuero General* in Navarra and *Furs de Valencia* in Valencia are clear evidence of a thorough knowledge of Roman law.

b) Portugal

In Portugal, both customs (*customes*) and municipal statutes contained many elements of Roman law. The Portuguese versions/translations of the *Codex Euricianus* and the *Siete Partidas* were also implemented, but contrary to Spain, no formal reception of Roman law (*receptio in globo,* i.e., *receptio in complexu*) ever took place in Portugal. Roman law still greatly influenced the *Ordenaçôes Afonsinas* (1446–1447) a work summarising the various sources of Portuguese law. According to his work, courts should refer to Accursius's *Glossa ordinaria* and Bartolus's works should doubts arise regarding the solution of a particular case.

Similar dispositions can be found in the *Ordenaçôes Manuelinas* (1521) and in the *Ordenaçôes Filipinas* (1603). The authority of the *Glossa ordinaria* of Accursius and the commentaries of Bartolus were not diminished by the fact that the aforementioned two collections authorise only restricted use of these norms, provided they do not contradict the *communis opinio doctorum*.

8. The Holy Roman Empire[87]

a) Introduction

The revival of Roman law in Europe was significantly encouraged by the imperial beliefs of the Eastern Frankish monarchs, who considered their state the continuing legacy of the West Roman Empire through Charlemagne's lineage. The idea of recreating the Roman Empire (*renovatio imperii*) emerged at the end of the 10th century, but it achieved lasting results only starting from the reign of Emperor Frederick I (Barbarossa) (1152–1190). By this time, a new (Roman) legal science had emerged, with the Roman emperors as its greatest supporters. Consequently, Roman law was most influential on the territory of the Holy Roman Empire during its existence from 962 to 1806.

b) The German Territories

At first, Justinian law penetrated medieval Germany gradually. Then, in the 15th century, it gained general reception through an act of legislation. The concepts of Roman law can already be found in German legal sources in the 12th and 13th centuries. The increased influence of the *Breviarium Alaricianum* can be attributed to two main factors. First, it was taught in German monasteries, which helped spread its principles. Second, during the legal conflicts between the emperors and the papacy, Roman public law was frequently cited, contributing to its acceptance and integration into legal practices. At the same time, there arose a trend in German intellectual life

[87] For general information, see G. Wesenberg, *Der Privatrechtsgesetzgebung des Heiligen Römischen Reiches von den "Authenticae" bis zum jüngsten Reichsabschied und das römische Recht*, *Studi P. Koschaker*, vol. 1 (Milan, 1954). For Germany, see H. Krause, *Kaiserrecht und Rezeption* (Heidelberg, 1952); W. Trusen, *Anfänge des gelehrten Rechts in Deutschland. Ein Beitrag zur Geschichte der Frührezeption* (Wiesbaden, 1962); H. Coing, *Römisches Recht in Deutschland*, *IRMAE* V 6 (1964). For the Netherlands, see P. Hermesdorf, *Römisches Recht in den Niederlanden*, *IRMAE* V 5 a (1968); R. C. van Caenegem, *Le droit romain en Belgique*, *IRMAE* V 5 b (1966); J.A. Ankum, *Principles of Roman Law Absorbed in the New Dutch Civil Code*, *Časopis pro právní vedu a praxi* (Brno) 2 (1994). For Switzerland see H. R. Hagemann, *Basler Stadtrecht im Spätmittelalter*, *ZSS GA* 78 (1961); P. Walliser, *Römisch-rechtliche Einflüsse im Gebiet des heutigen Kantons Solothurn vor 1500* (Basel, 1965). For Austria, see H. Baltl, *Einflüsse des römischen Rechts in Österreich*, *IRMAE* V 7 (1962); J. Koschembahr-Lyskowski, *Zur Stellung des römischen Rechts im ABGB*, *Festschrift für Jahrhundertfeier des ABGB*, vol. 1 (Vienna, 1911); A. Steinwenter, *Der Einfluss des römischen Rechts auf die Kodifikation des bürgerlichen Rechts*, *Studi P. Koschaker* (Milan, 1954). For Bohemia see S. von Bolla, *Hergang der Rezeption in den böhmischen Ländern*, *Studi P. Koschaker*, vol. 1 (Milan, 1954); M. Boháček, *Einflüsse des römischen Rechts in Böhmen und Mähren*, *IRMAE* V 11 (1975); R. Seltenreich, *Römisches Recht in Böhmen*, *ZSS GA* 110 (1993).

that manifested itself in legal life in the application of Justinian "scholarly/learned law", introduced by the pupils of the Glossators. From the 13th century onward, Roman law began to influence the activities of ecclesiastical courts. However, it was only in the latter half of the 15th century that provinces started adopting it as a supplementary legal system alongside their municipal and provincial laws.[88]

This process culminated at the imperial diet in Worms in 1495, where the Court of the Imperial Chamber issued a statute (*Reichskammergerichtsordnung*) ordering the imperial and common law (*gemeines Recht*, i.e., the *ius commune* meaning Roman law) to be applied as subsidiary law in cases when the supreme imperial court (*Reichskammergericht*) could not decide a case on the basis of municipal or provincial laws (*Stadtrecht* and *Landrecht*, resp.).

Most judges of the *Reichskammergericht* were familiar only with the glossed version of Justinian law rather than with local feudal customs. This lack of knowledge made it difficult for them to address legal disputes that required an understanding of more modern private law rules. As a result, the courts often applied Justinian law not just as a subsidiary source but also as the primary source of law.

The reception of Roman law in 1495 encompassed the following sources of law: a) parts of Justinian's *Corpus iuris civilis*, glossed by Accursius in his *Glossa ordinaria*; b) the Latin translation of the *Novellae* (*Authenticum*); c) the laws passed by Emperors of the Holy Roman Empire Frederick I and Frederick II (*Authenticae Fridericianae*); and d), a codex containing some other laws issued by other emperors of the Holy Roman Empire and Lombard feudal law (*Libri feudorum*).

c) Austrian Hereditary Provinces

The term *Ostarrichi,* from which the name Österreich is derived, was first mentioned in a document from 996. The name "Austria" derived from the Latin synonym for Österreich*,* which first appeared in the 12th century. The Austrian Duchy's territory expanded into the present provinces of *Oberösterreich* and *Niederösterreich*, located on either side of the Enns River. Having freed itself from its feudal relation with Bavaria in 1156, the Duchy remained a vassal of only the emperor of the Holy Roman Empire and the German King. These extensive liberties of the Austrian duke extended to the old Austrian provinces that belonged to the Duchy. The expanding

[88] According to the Lothar legend of the early 16th century, it was Emperor Lothar III who received Roman law in his edict of 1137. H. Conring (1606–81), the "father" of German legal history, proved the legend false in his *De origine iuris Germanici*, published in Helmstedt in 1643. Cf. L. O. Stobbe, *Hermann Conring, der Begründer der deutschen Rechtsgeschichte* (Berlin, 1870) and M. Stolleis, *Hermann Conring und die Begründung der deutschen Rechtsgeschichte; Hermann Conring: Der Ursprung des deutschen Rechts* (Frankfurt am Main–Leipzig, 1994).

territory of Austria formed a legal unity from the 12th century. This territory was first recognised as legal unity (*ius illius terrae*) in 1125.

From the 15th century, Austria consisted of the following regions: a) Inner-Austria, consisting of Styria, Carinthia, and Krain; b) Low-Austrian provinces, i.e., the duchies under and over the river Enns; c) Upper-Austrian provinces comprising Vorderösterreich (territories of Swabia, Alsace, Breisgau and Vorarlberg certain parts of which became parts of Austria from 1363 to 1523) and Tyrol.

We must mention that the so-called administrative district, the "Austrian circle" of the Holy Roman Empire, was established in 1512, even though this name was officially adopted a few years later, in 1521.

The Austrian and hereditary provinces largely adopted the local customary law (*Landrecht*) in the form of law books (*Rechtsbücher*), which greatly strengthened legal particularism. The consolidation of these *Landrechte,* based mostly on customs, began in the 13th century. These *Landrechte* were laid down in law books authored by private individuals. The trend of unification was essentially facilitated by the similarity of the customary laws of different provinces. The first notice on the provincial customs, whose author was a private person, dates back to ca.1280. This *Landrecht* consists of two parts: one related to provincial customary law and another to feudal law. The collection of the customary law of Styria from the middle of the 14th century was also implemented within the territory of Karintia and had striking similarities with the Austrian *Landrecht*. Another source of law describes municipal laws (*Stadtrechte*). The municipal law (*Stadtrecht*) of Vienna (written around 1350 and having undergone modifications several times) had outstanding importance and significantly influenced the neighbouring regions (*Wiener Stadtrechtsfamilie*). It is important to note the municipal law of the town of Pettau, which dates back to 1376. This local law was enacted in the town of Pettau, located in the province of Salzburg of Low-Styria, presently in Slovenia as Ptuj.

The *Summa legum Raymundi*, authored by Raymund of Naples (in German: Raymund von Neapel; in Latin: Raymundus Neapolitanus or Parthenopeus), written in 1310, is considered an important step towards the reception of Roman law. Raymund of Naples intended this work to serve as a popular textbook upon its publication. It is likely that his *Summa* underwent a major revision in Wiener Neustadt between 1310 and 1340, taking largely into account the law in Austrian provinces.

Due to the presence of elements of Roman law in the most important sources of old Austrian provincial laws (both in collections of formulae (*libri formularum*), legal opinions, law books and acts), the unification of the particular laws of the provinces became possible in the late Middle Ages. Emperor Frederick III (1440/42–1493) made the first attempts to unify the legal order of all Austrian territories. For instance, in compliance with the autonomous status of the Austrian provinces, from 1460 onward,

no differences were permitted in Styria, Carynthia, Krain and Austria regarding the legal regulation of marital property law for nobles.

Although Roman law was no more than subsidiary law in the legal life of Austrian provinces, its elements are frequently found in numerous books and collections, including formulae, legal opinions, law books and acts. Municipal courts, particularly Vienna, refer directly to Justinian Roman law or draw on the works of the commentators in procedures relating to marital property law and the law of succession.

A Chair of Roman law was established at the University of Vienna (*Universität Wien*), founded in 1494, which was founded in 1365. The first head of the Roman law department was the famous jurist and humanist Hieronymus Balbus (Girolamo or Geronimo Balbi, around 1460–1535). He was born in Venise and presumably learned law in Padova, eventually leaving Vienna in 1499. His successor was Johannes Sylvius Siculus in 1497, who also pursued his studies in Padova. The new head of the department was Johannus Stephanus Reuss from Constance in 1499. A year later, Wolfgang Pachaimer from Gründen became his successor. These scholars were outstanding representatives of humanism and showed predilection towards Roman poetry rather than Roman law. The introduction of Roman law in the University of Vienna took place thanks to the devotion towards humanism of the emperor Maximilian I (1493–1519).

d) The Low Countries

Besides feudal law and canon law, medieval legal practice in the Low Countries was generally based on Roman law. The impact of Roman law remained rather limited until the 14th century. Since then, however, its expansion through the mediation of legists marked the development of law, particularly in the jurisdiction of the councils with juridical competence.

The effect of Roman law differs from province to province. Its presence was most felt in Friesland and in the Holland province. It was also received in the provinces of Zeeland, Groningen, Gelderland and Utrecht, whereas others, such as Overijsel and Drenthe, remained untouched by its influence.

In the southern provinces, the activity of Roman law experts, or legists, dates back to the 13th century. Besides the work of these jurists, the foundation of the *De Groote Raad* (1446) by the Burgundian Duke Philipe the Good and the Count of the Netherlands contributed greatly to the reception of Roman law. This court, with its seat in Malines (presently on the territory of Belgium), gained its final form between 1473 and 1503. This forum, which was held up until the War of Spanish Independence, applied Roman law in its practices to unify the jurisdiction across the territories under the authority of the Burgundian duke.

The judges of the *Hof van Holland* frequently referred to Roman law in their verdicts, which contributed to the expansion of Roman law. Similarly, this practice was observed in the courts of the *Hooge Raad van Holland (en Zeeland)*, which were associated with the *Hof van Holland* and *De Groote Raad*, founded in 1581 in The Hague. Its jurisdiction expanded to Zeeland only in 1587. The earliest main representative of Roman-Dutch law was Nicolaus Everardus (1462–1532), who received his doctorate in Leuven. He was first the president of the *Hof van Holland* from 1509 and later the president of the *De Groote Raad* from 1528. Among his works are of utmost importance, the *Topicorum seu de locis legalibus liber* (Leuven, 1577), dealing with legal dialectics and the *Consilia sive response iuris* (Leuven, 1554, 1577).

The reception of the *ius commune*, starting in the mid-15th century, also contributed to the increasing role of Roman law. The foundation of universities in Leuven and Leiden in 1425 and 1575, respectively, also contributed to this process. The lengthy process of the increasing role of Roman law was completed by the emergence of Roman-Dutch law in the 17th century. It needs to be emphasised that the Roman-Dutch law was adopted in the northern provinces that had seceded from the Holy Roman Empire (*Sacrum Romanum Imperium*).

The *Oud-Vaderlandsch Burgerlijk Recht* contains local customary law and numerous elements and institutions of Roman law.

Additionally, in present-day Belgium, local customary law was compiled into collections in the 16th and 17th centuries.

e) Switzerland

Although it formally Switzerland belonged to the Holy Roman Empire (*Sacrum Romanum Imperium*) until the Peace Treaty of Westphalia (1648), and its system of law was characterised by particularism (*Rechtspartikularismus*), no official reception of Roman law occurred in the state. Consequently, only a few Roman law institutions were able to gain application, even though their acceptance would have been rather reasonable, given that local customary law was not sufficient to regulate certain fields. Roman law could penetrate legal practice only as a subsidiary, mostly in the episcopates of Basel, Schaffhausen, Tessin and Sitten. The faculty of law, founded in 1459 in Basel, was an important step towards the expansion of Roman law. The publication of verdicts by the university professors influenced the practice of other cantons, too.

In French-speaking cantons like Geneva, Vaud, Valais, Neuchâtel and Fribourg, Roman law traditions survived. In the episcopate of Geneva – where Protestantism was accepted in 1536 – the General Council (*Conseil general*) of the citizens adopted a private law collection under the title of *Edits civils* in 1568. Legist Germanus

Colladon, who emigrated from France, contributed greatly to the edition of this collection, primarily to family law.

On the territory of the canton of Vaud, which was under the authority of the House of Savoy, independence was gained, albeit gradually. The orders of Vaud (*Etats de Vaud*) had their own independent parliament from the 13th century where, along with feudal honours, deputies of independent towns were represented. where Roman law was present in legal practice through the mediation of the Duchy of Savoy.

In the canton of Valais, which was for centuries under the influence of Burgundian kings, Roman law gained acceptance through the *lex Romana Burgundionum*.

Initially, Neuchâtel belonged to the Burgundian Kingdom before becoming the vassal of the Duchy of Savoy. Its county town gained independence in the April of 1214. This independence was then granted to further towns and places. The county of Neuchâtel became a duchy in the 17th century. Following the extinction of the Longueville Dynasty in 1707, the Prussian King obtained the title of the Prince of Neuchâtel. Roman law infiltrated the legal life through the Burgundian Kingdom and the Duchy of Savoy.

Fribourg (modern-day Freiburg im Üechtland) was founded in 1157 by the future founder of the town of Bern (1188), Prince Bechtold IV, offspring of the House of Zähringen. This rapidly developing town was first under the authority of the Zähringens, then the Kyburgs and finally the Habsburgs. The citizens of Fribourg gained their independence through a charter in 1240. In 1481, Fribourg became part of the confederation of the 13 cantons. German traditions, French customary law (*droit coutumier*) and legal traditions of Savoy marked the law of the canton of Fribourg, the so-called sentinel of the German-speaking French territory (*avant-poste du germanisn en pays romand*). The abovementioned document from 1240 included several regulations with respect to private law, such as succession, marital property law, and the duties of the wife. In the 13th century, the council of Fribourg adopted laws in the German language (*Edikte*) about the testament. In Fribourg and in the ancient territories (*Anciennes Terres*), the Kraut Mirror (*Schwabenspiegel*) served as a subsidiary. To have a separate legal system, the two chancellors of the town issued a municipal lawbook (*Stadtbuch*) in 1579. This law book, the *Ordnung der* üblichen *Stadt Fryburg im Uechtland* was promulgated in 1648. Its effect extended to the entirety of private law, ultimately replacing the Kraut Mirror.

Legal humanism also experienced significant development in Switzerland. Claudius Cantiuncula (Claude Chansonette, around 1490–1549), a professor in Basel, was a prominent figure of this movement. In this regard, professors Bonifacius Amerbach (1495–1562) and his son Basilius Amerbach (1533–1591) were especially important. Their expert opinions were highly respected nationwide. All the two jurist consults belonged to the humanist school of thought. They were both engaged in the *gelehrtes Recht*, which contained Roman law and canon law.

Despite the Swiss particularism, even in matters of law, Roman law did not gain acceptance in most parts of Switzerland. Some of its provisions prevailed only when local custom was no longer able to govern a case. Roman law in its entirety was applied as subsidiary law only at Basel, Schaffhausen, the governorship of Ticino, and the episcopacy of Sitten. Aeneas Sylvius Piccolominus, future pope Pius II, writes the following in his *Laudatio* of Basel: *Consuetudine magis quam lege scripta utuntur. Lacedemoniis quam Atheniensibus similiores. Nec jurisperito nec Romanis legibus locus*. In his first writing about Basel, he says: *Vivunt sine certa lege, consuetudine, magis quam scripto iure utentes, sine iuris perito, sine notitia Romanorum legum*. Roman law exerted a considerable effect on the law of Basel after its reception. Several pupils pursued their studies in Bologna, serving as mediators for the Roman law they learnt there.

The Faculty of Law, established at the University of Basel in 1459, played a decisive role in disseminating the knowledge of Roman law. Legal opinions provided by its professors based on Roman law influenced legal practice in most cantons. At the Faculty, Roman law was taught alongside canon law from the very beginning. Sebastian Brant (1457–1521) from Alsac, author of the "Ship of the Fools" worked at this university. Brant follows the system of the glossators in his book on Roman law (1490), the *Expositiones sive declarationes omnium titulorum iuris tam Civilis quam Canonici*. This work was widely known and had had 12 publications by 1518. This book summarised his lectures on the titles of the *Corpus Iuris Civilis* and the *Decretalis*. He describes the most important notions and gives the main definitions. This work was recognised even by his rival, Stinzing: *das Werk ist als einleitendes Lehrbuch nicht ohne Wert*.

Especially important in this respect were professors Bonifacius Amerbach (1495–1562) and his son Basilius Amerbach (1533–1591), whose expert opinions were respected all over the country. Bonifacius Amerbach, who was a student of Zasius in Freiburg and of Alciatus in Avignon, became a professor of the pandects (*ordinaries legume*) from his doctorate (1525) at the University of Basel. He worked there for almost a quarter of a century and promoted François Hotmanin 1558. Many of students attended his lectures on the *Institutiones, Digesta and Codex*, all of which still exist. His merit lies in the harmonisation of the *mos italicus* and *mos gallicus*; moreover, he put an end to the dispute between the two tendencies in Swiss jurisprudence.

f) Bohemia and Moravia

In Bohemia and Moravia, the monarchs of the Pzremyśl dynasty urged the application of certain Roman legal institutions. It was during the reign of King Wenceslas II (1278–1305) that the code of mining law (*Ius regale montanorum*, or

Constitutiones iuris metallici) containing elements of Roman law was issued. During the same period, an Italian author published a private collection of laws under the title *Constitutiones iuris metalli*, which was the first in Europe to summarise procedural law based on Roman and canon law.

In Bohemia and Moravia, municipal custom (*ius municipale*) proved favourable conditions for the reception of Roman law. This is documented by the so-called *Brünner Schöffenbuch* of the 14th century containing decisions brought by the judges of Brünn (Brno).

The *Maiestas Carolina* (1346), which summarised local law under the reign of Charles IV of Luxemburg, borrowed primarily formal elements from Roman law.

At the first University in Central Europe (1348), Roman law was taught from the beginning. This played a decisive role in the spread and reception of Roman law.

In the 16th century, humanism contributed greatly to the spread of Roman law. In cases taken before the Supreme Court of Prague, established in 1548, Roman law played a dominant role while also gaining more influence in municipal law.

A lawbook written in Bohemian language (*Práva městská království* Českého *a markrabství moravského*, 1579), issued by the chancellor P.K. Koldín and aiming for the unification of municipal law, was based on Roman law as for a great number of its institutions.

K. Kyblin, professor of Roman and canon laws at the University of Prague, compares Roman law to the law in force in Bohemia, pointing out the similarities and differences in his voluminous book titled *Tractatus novus de differenciis iuris communiis et boemici*.

V. X. Neumann (1670–1743), professor of Roman and canon laws at the University of Prague, emphasised the subsidiary nature of Roman law. The dissertation of J. S. Zencker, the *Problema juridico-practicum: an et qualis ad fora regni Boemiae in casibus jure boemico non decisis sit juris communis usus et observantia* served as a propos for his commentary, whose subject matter is the role of Roman law in Bohemian legal practice. However, no formal reception took place due to the resistance to native law, and from the 18th century onward, also natural law.

9. Hungary

a) Roman Law and Medieval Hungarian Customary Law[89]

Although Hungary maintained connections with the Byzantine Empire, the fact that King Stephen I [St. Stephen] (1000-1038) and his country adopted Western (Latin) Christianity, making the penetration of Byzantine law into Hungary impossible. It was only Justinian's codification, especially the *Codex* and some novels that made its impact felt in the laws of St. Stephen, even if indirectly.[90]

The Transdanubian part of Hungary was under Roman control for almost four centuries. The provinces of *Pannonia prima* and *secunda, Savia* and *Valeria* belonged to the western part of the Roman Empire. Romanisation also included the sphere of law, as testified by several inscriptions.[91]

a) The direct influence of Roman law appeared in Hungary only in the age of the Glossators. Hungarian students had already attended the University of Bologna by the 13th century. There was even a separate "Hungarian nation" (*natio Hungarica*) in the framework of which about eighty Hungarian students attended the lectures of the Glossators before 1301. Damasius, from the end of the 13th century (who probably had Hungarian origins), studied in Bologna and is noted for his studies on canon law. We also owe him the creation of the concept and terminological distinction of positive law *(ius positivum).*

Other Hungarian students learned canon law in Paris and became acquainted with Roman law. A small number of Hungarians attended the faculty of law at the

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[89] T. Vécsey, *A római jog története hazánkban és befolyása a magyar jogra* [The History of Roman Law in Hungary and its Impact on Hungarian Law], MS (Budapest, 1877–78); Z. Pázmány, *Il diritto romano in Ungheria* (Pozsony, 1913); Zajtay, I., *Sur le rôle du droit romain dans l'évolution du droit hongrois*, Studi in memoria P. Koschaker, vol. 2 (Milano, 1954); Gy. Bónis, *Einflüsse des römischen Rechts in Ungarn*, IRMAE V 10 (1964); idem, *A jogtudó értelmiség a Mohács előtti Magyarországon* [Hungarian Intelligentsia Versed in Law in the Period prior to Mohács] (Budapest, 1971): idem, *Középkori jogunk elemei* PElements of Hungarian Medieval Law](Budapest, 1972); J. Zlinszky, *Ein Versuch der Rezeption des römischen Rechts in Ungarn*, Festgabe A. Herdlitczka (München–Salzburg, 1972); I. Kapitánffy, *Römisch-rechtliche Terminologie in der ungarischen Historiographie des 12–14. Jh.*, *AAntHung* 23 (1975); B. Szabó, *Die Rezeption des römischen Rechts bei den Siebenbürger Sachsen*, PUM IX (1994). For the role of Roman law in the medieval Hungarian See J. Gerics, *A korai rendiség Európában és Magyarországon* [The Early Feudal State in Europe and in Hungary] (Budapest, 1987).

[90] See G. Hamza, *Szent István törvényei és Európa* [The Laws of Saint Stephen and Europe], Szent István és Európa ed. G. Hamza (Budapest, 1991) and idem, *Szent István törvényei és a iustinianusi jog* [The Laws of Saint Stephen and Justinian's Law], JK 51 (1996). Cf. M. Jánosi, *Törvényalkotás Magyarországon a korai Árpád-korban* [Legislation in Hungary in the Age of the Árpád Dynasty] (Szeged, 1996).

[91] See K. Visky, *A római magánjog nyomai a magyar földön talált római kori feliratos emlékeken* [Traces of Roman Private Law on Roman Inscriptions Found on Hungarian Soil], JT 5 (1983).

universities of Padova, Oxford, and Cambridge, among others. Hungarian students continued to go to universities abroad under the Angevin kings. The first Hungarian university operated in Pécs from 1367, where Roman law was probably taught as well.[92]

Consequently, the books of *formulae* by János Uzsai, rector of the Bologna University around 1340, and Bertalan Tapolczai reflected the influence of Roman law to a certain extent. The terminology of the diplomas issued at that time also showed the influence of Roman law, as well as the chronicles written during the Árpád and Angevin dynasties, especially the *Gesta Hungarorum* of Kézai Simon at the end of the 13th century. The impact of Roman law was much less marked in the *ius scriptum*, i.e., the royal statutes and decrees. At the same time, certain principles of Roman public law can be observed, for example, in references to the *plenitudo potestatis*, serving as a justification for the preponderance of royal power at the time of the Anjous and later in the days of King Sigismund (1387 – 1437) and King Matthias (1458 – 1490).

b) From the 15th century, only the wealthier class of intellectuals (churchmen) could afford to study in Italy. The less well-to-do students went to Cracow or Vienna to study canon law and become acquainted with Roman law. Tradition has it that King Matthias himself took up the question of the reception of Roman law in Hungary.

King Matthias attempted to codify the Hungarian law by issuing Act VI of 1486 (*Decretum maius*), the preamble of which follows the structure and terminology of the *constitutio Imperatoriam maiestatem* and contains several elements and terms of Roman law. The Spanish humanist Juan Luis Vives (1492–1540) maintains that the Hungarian king wished to place native law on new foundations through the reception of Roman law. Seeing, however, the difficulties inherent in this process, he gave up his plan. Although Imre Kelemen still found this view credible in the early 19th century, Ignác Frank denied it as a statement lacking any foundation in the sources. However, it cannot be doubted that King Matthias's attempt at strengthening royal power, especially in the last decade of his reign, was theoretically based on the principles of Roman law.

Also, a few Hungarian law books surviving from the Middle Ages contain technical terms of Roman law and refer to its institutions, especially those of Buda and Pozsony (now Bratislava in Slovakia) written in German in the 15th century.

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[92] For the Hungarian *peregrinatio academica* directed at the faculties of law at European universities, see B. Szabó, *Előtanulmány a magyarországi joghallgatók külföldi egyetemeken a XVI–XVII. században készített disputatióinak (dissertatióinak) elemzéséhez* [Preliminary Study to the Analysis of Dissertations Prepared by Hungarian Students of Law Studying Abroad in the Sixteenth and Seventeenth Centuries], *PUM* VIII 5 (Miskolc, 1993). For the beginnings of Hungarian higher education, see A. Csizmadia, *A pécsi egyetem a középkorban* [The University of Pécs in the Middle Ages] (Budapest, 1965).

b) István Werbőczy and the *Tripartitum*

The law book of Chief Justice István Werbőczy (c. 1450–1541) systematising feudal customs in the native language of learning, i.e., in Latin (*lingua patria*), was titled *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae.* -Demonstrating the impact of Roman law in many respects, this general and comprehensive *decretum* was the first to codify native custom. It was accepted by the Diet of 1514 and sanctioned by the king. However, it was never promulgated and thus never formally became a source of law, with the sole exception made in the case of Transylvania, where the *Tripartitum* gained the force of law on the 4th December 1691 by means of the third article of the *Diploma Leopoldinum*. However, Werbőczy's *Tripartitum* achieved authority despite its failure to be enacted.

A law book nonetheless, Werbőczy's work contained contemporary feudal customary law and the royal decrees using the terminology of Roman law. However, the passages taken from Justinian's codification were probably included only to increase the prestige of the *Tripartitum*. The links between the *Tripartitum* and Roman law are conspicuous in the following aspects[93]:

α) The division of the book into chapters on *de personis, de rebus,* and *de actionibus* follows the Roman law tradition of the Institutions. Werbőczy still had to admit that it was useless to try to force feudal Hungarian law into the framework of *personae–res–actiones.*

β) Similarly, the general terms known to Roman law (such as *ius naturale*, *ius publicum*, *ius privatum*, *ius civile*, and *ius gentium*) and its legal principles (e.g., *ius est ars boni et aequi*) were taken over only formally, mostly in the *Prologus*, but are not incorporated into the concrete regulations concerning the Hungarian *ius consuetudinarium* contained in the *Tripartitum.*

γ) The impact of Roman law on the *Tripartitum* can also be observed in its legal terminology, not always used according to its original meaning and in several legal institutions taken over from Roman private law (e.g., the division of guardianship into testamentary, statutory, and commissioned versions, certain rules concerning wills, paternal power, etc.).

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[93] See A. Földi, *A római személyi és családi jog hatása a Tripartitumra* [The Impact of the Roman Law of Persons and Family Law on the *Tripartitum*], JK 48 (1993) and idem, *Werbőczy és a római jog* [Werbőczy and Roman Law] *Degré A. Emlékkönyv* ed. G. Máthé (Budapest, 1995); G. Hamza, *Werbőczy Hármaskönyvének jogforrási jellege* [Werbőczy's Tripartitum as a Source of Law], JK 48 and idem *A Tripartitum mint jogforrás* [The Tripartitum as a Source of Lw] Degré A. Emlékkönyv ed. G. Máthé (Budapest, 1995).

Where Werbőczy studied Roman law and from where he took the texts of Roman law included in the *Tripartitum* is still a subject of debate. His source must have been the textbook of Roman and canon law written by Master Raymundus[94] at Naples in the 13th century that must have been taken to Hungary and Poland during King Louis I the Great's campaign to Naples. In Poland, it even became a national statute. The so-called *Summa legum Raymundi* contained the customary law of the South Italian towns and the penal laws of the Angevin kings and became part of the law books of several royal free cities in Upper Hungary (such as Bártfa and Eperjes). Manuscript versions of it were also at Cracow and Wiener Neustadt. Recent research maintains that Werbőczy's source must have been the one from Cracow, concluding that he must have studied there.

The matter of the *Tripartitum* became partly completed and partly revised in 1553 by the *Quadripartitum*. This new collection of customary law testifies to the presence of Roman law in its regulations about procedural law, contrary to Werbőczy's claim that these were borrowed from French sources (*Tripartitum*, II. pars 6. tit. 12.§).

10. Poland and Lithuania[95]

Although the territories inhabited by the Western Slavs (such as Poles, Polabs, Sorbs, Czechs, and Slovaks) had not previously belonged to the West Roman Empire, neither were they incorporated into the Holy Roman Empire (with the exception of Bohemia and later also Silesia and Lusatia) the German influence they were exposed to resulted in an impact of Roman law greater than the one experienced by Britain, a former Roman province not in direct contact with continental Europe.

Polish students studying at Italian universities introduced Roman law in Poland as early as the 12th century. The statutes of King Casimir III the Great (1333–1370)

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[94] Experts are in doubt as to the author of the textbook, as the name Raymundus appeared first only as late as 1506 in a Cracow manuscript. See E. Seckel, *Über die »Summa legum« des Raymund von Wiener Neustadt*, Beiträge zur Geschichte beider Rechte im Mittelalter, vol. 1 (Tübingen, 1898); A. Gál, *Die Summa legum brevis, levis er utilis des sog. Doktor Raymundus von Wiener Neustadt* (Weimar, 1926); Gy. Bónis, *Der Zusammenhang der »Summa Legum« mit dem »Tripartitum«*, Studia Slavica Hungarica XI (Budapest, 1965).

[95] For Poland, see R. Taubenschlag, *La storia della recezione del diritto romano in Polonia alla fine del secolo XVI, in Studi P. Koschaker*, vol. 2 (Milan, 1954); idem. *Einflüsse des römischen Rechts in Polen*, *IRMAE* V 8 (1962); W. Uruszczak, "Essai de codification du droit polonais dans la première moitié du XVIe siècle" *RHD* 59 (1981); L. Pauli, *Le droit des villes dans l'ancienne Pologne et son rapport avec le droit romain*, *Mestské pravo v 16–18. století v Evrope* (Praha, 1982); S. Kutrzeba, *Il diritto romano in Polonia fino alla fine del secolo decimo ottavo in Scritti A. Guarino* (Napoli, 1984); W. Wolodkiewicz, *Il dritto romano nella cultura giuridica polacca*, ibid. For Lithuania, see H. Blaese, *Einflüsse des römischen Rechts in den baltischen Gebieten*, *IRMAE* V 9 (1962).

already reflect the impact of Roman law besides feudal customs, the former later penetrating the law of marriage and the law of succession. In the towns flourishing from the second half of the 15th century, the courts tended to refer to the law of the Glossators that was almost entirely absent from the practice of feudal noble courts applying native customs (*ius terrestre*). This is because the Polish estates considered Roman law the imperial law of the Holy Roman Empire (*ius Caesareum*) and believed that its reception would promote their kingdom becoming a German vassal. Roman law spread in Poland, therefore, only by means of a slow infiltration, just like in Hungary.

A personal union first united Lithuania and Poland in 1386 and by a Realunion (Union of Lublin) in 1569. The structure and, to a smaller extent, the subject matter of the Lithuanian statutes issued in the 16th century show the influence of Roman law. The most important of them was the Third Lithuanian statute of 1588 that provided that Roman law should gain acceptance as a subsidiary "Christian law" (*ius Christianum*) and which can be regarded as the formal reception of Roman law in the Grand Dutchy of Lithuania, similarly to Germany.

From the early 18th century, the rest of the Baltic states, later also Poland and Lithuania, came under Russian rule. This union was divided between Austria, Russia and Prussia three times (1772, 1793 and 1795). Therefore, their legal development will be discussed in later chapters.

11. England, Wales and Scotland[96]

a) England

While the development of law on the European continent was characterised by the varying degrees of influence of Roman law, the legal system of the British Isles brought about by a synthesis of Saxon, Frank, and Norman law retained its feudal formalities and even at the time of bourgeois development did not adapt to Roman law. This so-called common law (to be distinguished from the *ius commune* for all the identity of their linguistic form) primarily refers to the law created through the

[96] For England, see T.E. Scrutton, *The Influence of the Roman Law on the Law of England* (Cambridge, 1885); P. Vinogradoff, *The Roman elements in Bracton's treatise*, *Yale Law Journal* 32 (1923); H. Peter, *"Actio" und "writ"* (Tübingen, 1957), idem. *Römisches Recht und englisches Recht* (Wiesbaden, 1969); *J. L. Barton, Roman Law in England*, *IRMAE* V 13 a (1971); P. Stein, *Roman Law, Common Law, Civil Law TLR* 66 (1992), idem. *The Vacarian School*, *JLH* 13 (1992); F. Winkler, *Roman Law in Anglo-Saxon England*, *JK* 48 (1993); Tóth, Á., *Vacarius, az angliai glosszátor* [Vacarius the English Glossator], JK 48 (1993); R. Zimmermann, *Der europäische Charakter des englischen Rechts*, *ZEuP* 1 (1993); P. Stein, *The Future of Roman Law in a Britain that is Part of Europe*, *RIDA* 41 suppl. (1994). For Scotland see P. Stein, *Roman Law in Scotland*, *IRMAE* V 13 b (1968).

practice of English royal courts and is to be distinguished from the statute law of parliamentary legislation and equity created by the practice of the Court of Chancery.

Comparison between the institutions of Roman law and English common law is made easy by the similarities of the two legal systems at several points. Actions play a central part in both (*actio* in Latin, "writ" in English and *brieve* or *breve* in Scottish). Both are characterised by casuistics, the lack of abstraction and by a formalism that manifests itself in rejecting certain legal institutions such as direct representation (agency). The role of the praetorian edict and equity in the development of law is quite similar. Additionally, there is a resemblance between the English legal institutions known as the Inns of Court, which are focused more on practical experience than on academic study, and the Roman *scholae*.

Roman law (civil law) applied in England was based on the "native" Anglo-Norman law but presented only light effect on its development, as shown in the declaration of *"Nolemus leges Angliae mutare"* of the Parliament of Merton (1236). Although native law was predominant, Roman law continued to be developed and taught in England.

Common law was first made well-known in England by the Lombardian Vacarius (c. 1120–1198), who had studied at Bologna and wrote "The Book of the Poor" *(Liber Pauperum)*. He was asked to teach Roman law in England by the archbishop of Canterbury. His work titled *Liber Pauperum* (1149) provided students of law with legal sources through cases taken from the *Codex Iustinianus* and the *Digesta*. This book by Vacarius was regarded as a fundamental work on Roman law during the late 12th century and early 13th century.

In the years preceding the arrival of Vacarius, England was not left unscathed by Roman law. There lived an archbishop of Canterbury called Lanfrancus (d. 1085) of Lombardy, who is believed to have had a foundation in Roman law. Roman law *(ius civile)* was probably taught in schools that worked on the side of the cathedrals of Exeter, Herford, and Lincoln. Teaching Roman law at universities in England dates back to the foundation of the University of Oxford (1169) during the reign of Henry II (1154-1189). The famous work of Sir Ranulff de Glanvill (d. 1190) titled *Tractatus de legibus et consuetudinibus regni Angliae* (written between 1187 and 1189) proved decisive to the development of English law for centuries to come and was also strongly influenced by Roman law.[97]

Henricus de Bracton (1200–1268) applied developed concepts of Roman law to systematise the evolving English law in his book *De legibus et consuetudinibus*

[97] The "Leis Willelme", written in the early 12th century, the impact of which cannot be compared to that of Glanvill's work, also contained elements of Roman law. According to the thirteenth-century sources, the teaching of Roman law in England was based on Justinian's *Institutiones* and the doctrine developed further by the Glossators.

Angliae written around 1250, the introduction of which shows the influence of the Glossators. Glanvill and Bracton's authoritative texts introduced knowledge of Roman law in England.

Despite the lack of a formal reception[98] of Roman law, through the mediation of canon law, it made an impact on the jurisdiction of the Court of Chancery (consequently on equity), which was in the hands of clergymen until 1529. Certain institutions of Roman law assumed an important role in commercial and maritime law as well, as deciding such cases went beyond the possibilities of the rigid common law courts. Commercial special courts used, therefore, the *lex mercatoria* (law merchant), based on Roman law, and the Courts of Admiralty, established by the monarch, basically applied Roman law (civil law). During the reign of King Henry VIII (1509–1547), the possibility arose for a reception supported by the Court. Consequently, Roman law, called civil law, was granted a *regius professorship* at the universities of Oxford and Cambridge. Roman law elements were present in the law governing the Church of England.[99]

b) Wales

Wales was conquered and annexed to England after the victory of Edward I (1272-1307) over the Gwynned dynasty in 1283. He also divided the territory of Wales into counties. Interestingly, the tradition of the heir to the English throne being called the Prince of Wales dates back to 1284, first used for Edward II before his coronation.

The Welsh legal system *(cyfraith)* was considered highly developed even by European standards in the 10th century, especially as it underwent continuous enrichment and renewal with new rules and interpretations in the coming centuries. According to Frederic William Maitland (1850-1906), this system of law was a "lawyer-made law, glossators' law, Text-writers' law". Through means of the Statute of Wales, declared by King Edward and the Council in Rhuddland after the conquest in March 1284, Wales was able to partially preserve its law by keeping it in force.

English law was formally adopted by the signing of the Acts of Union in 1536 and 1543; however, English common law had already seeped into customary law by that time.

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[98] The reason for this was partly the training of lawyers at the Inns of Court instead of universities, partly the fact that the system of courts was centralised relatively early in British history, and the judges became acquainted with Roman law only through the mediation of Bracton's work.

[99] See F. W. Maitland, *Roman Canon Law in the Church of England* (London, 1898).

c) Scotland

Elements of Roman law, i.e., the *ius commune*, appeared in Scotland as early as the wake of the activity of the Commentators, primarily through the work of Bartolus and Baldus, as indicated by texts of Roman law in the earliest written source of law, the private collection titled *Regiam maiestatem* (c. 1255). This is because Scottish law was less rigid than common law and better suited to adapt to changing circumstances. The same adaptability made equity unnecessary in Scotland. The lack of codification and case law (precedent) led to the reception of Roman law by practitioners and to the acceptance of the works of institutional writers as sources of law.

The education of civil law at Scottish universities such as the Universities St. Andrews (1411), of Glasgow (1450) and Aberdeen (1495) heavily contributed to the reception of Roman law. Over time, the University of Edinburgh came under the influence of Roman law.

The judges of the College of Justice (1532), which later became the Court of Session of Edinburgh, pursued their studies at foreign universities in France and the Netherlands, mostly during the development of the reformation, particularly in Leiden. After attaining their degrees, they contributed to the reception of Roman law through their way of thinking along Roman law.

12. Northern Europe[100]

The countries of the northern part of the European continent are all separate from common law and Roman law. Based on the degree of the impact of Roman law, they can be divided into two groups: a) the Danish and Norwegian and b) the Swedish and Finnish legal systems. Roman law was not considered *ius commune* in Northern Europe, and thus, it did not gain such reception as in Germany.

The union of the three Scandinavian kingdoms (Denmark and Norway from 1380, then Sweden from 1397) served as a basis for the parallel development of laws. The Swedish independence movements began to manifest in Sweden under the reign of Christian I (1448-1481), and in 1523, the expulsion of Christian II contributed to the formation of the independent Swedish kingdom.

[100] For general information, see J. Sundberg, *Civil Law, Common Law and the Scandinavians*, Scandinavian Studies in Law 13 (1969); O. Fender, *L'influence du droit romain dans la Scandinavie médiévale*, *IRMAE* V 14 (1981). For Sweden, see S. Jägerskiöld, *Roman Influence on Swedish Case Law in the 17th Century*, Scandinavian Studies in Law 11 (1967). For Finland see H.T. Klami, *A római jog recepciójának kérdése Finnországban* [The Question of the Reception of Roman Law in Finland], *JK* 38 (1983).

In Danish territories (Denmark and Iceland), the impact of Roman law on the Jutland law (*Jyske lov*) of 1241, issued during the reign of King Valdemar II, is noticeable but minor. Its preamble contained some general legal theses, mostly taken from the Decretum Gratiani. The commentary added to *Jyske Lov* in the form of a gloss in the 15th century discussed the differences between native and Roman law. *Jyske lov* was in force in Denmark and in the Duchy of Schleswig. In the case of Denmark, this was true until 1683 – the year of the enforcement of the *Danske lov* – and in the case of the Duchy of Schleswig, until the enforcement of the German BGB on 1 January 1900.

Roman law had been taught at the University of Copenhagen since its foundation in 1479, but its impact on the decisions of the courts could only be felt in the law of obligations. From 1539 onward, the statutes of the University of Copenhagen explicitly noted that Roman law was, though not deemed legally binding, due to its alignment with natural law (*ius naturale*). Roman law is the source of natural law, even if the particular law and natural law harmonise with each other in a different way.

In Sweden, King Magnus II (1319–1364) put an end to legal particularism in the mid-14th century. The codices compiled in the later decades of the Middle Ages did not rely on Roman law, and by summarising municipal and rural law separately from the second half of the 17th century – with regard to the social and economic development – they were no longer suitable for regulating legal life properly.

13. The Balkan States and the Danubian Principalities[101]

a) Introduction

The Balkan states and the Danubian Principalities (Wallachia and Moldavia) received Roman law through the mediation of the Byzantine Empire and its legal system. In present-day Bulgaria, Serbia, and Romania, the *Eklogé tón nomón* and the *Nomos*

[101] For general information, see A.V. Soloviev, *Der Einfluss des Byzantinischen Rechts auf die Völker Osteuropas*, *ZSS* 76 (1959); N.J. Pantzapoulos, *Church and Law in the Balkan Peninsula during the Ottoman Rule* (Thessaloniki, 1967). For Bulgaria, see V. Ganeff, *Le droit byzantin et l'ancien droit d'obligeance bulgare in Studi A. Albertoni*, vol. 3 (Padova, 1938); R. Čolov, *Le droit romain en Bulgarie médiévale: diffusion, pénétration, confusion in Roma, Costantinopoli Mosca*, vol. 1 (Naples, 1983); V. Tăpkova-Zaimova, *Les idées de Rome et de la Seconde Rome chez les Bulgares*, ibid. For Serbia, see A. Zocco-Rossa, *Influssi di diritto romano su una legislazione slavo-serba* in *Mélanges G. Cornil*, vol. 2 (Gand–Paris, 1926); J. Péritch, *L'influence du droit germanique sur le droit privé des peuples yougoslaves in Recueil E. Lambert*, vol. 2 (Paris, 1938); B. T. Blagojević, *L'influence de Code civil sur l'établissement de Code civil serbe*, *RIDC* 6 (1954); J. Szalma, *Geltung und Bedeutung der Kodifikationen Österreichs, Serbiens und Montenegros im ehemaligen Jugoslawien*, *ZfNR* 16 (1994). For Romania, see N. Iorga, *La survivance byzantine dans les pays roumains* (Bucharest, 1913); L.J. Constantinescu, Roumanie, *Le Code civil français et son influence en Europe* (Paris, 1954); G. Cronț ,,*La réception du droit romano-byzantin dans les Pays Roumains*", Nouvelles *Études d'Histoire* IV (Bucharest, 1970).

geórgikos exercised great influence on the development of law, and from the 14th century onward, a similar role was played by the *Hexabiblos* and the so-called *nomocanon* (compilation of both secular and ecclesiastical law) of a Greek friar called Matthaios Blastarés, as well as by the *Syntagma kata stoicheion* (alphabetical collection of legal texts), compiled in 1335 and containing the most important laws of the *Procheiron* and the *Basilica* in alphabetical order.

The reception of the Byzantine law books in the Balkan states and the Danubian Principalities was facilitated by their general nature – that is, by the fact that substantive law was not separated from the law of procedure and the rules determining the system of jurisdiction. Moreover, private law was addressed in conjunction with financial, criminal, and canon law.

b) Bulgaria

Even though Pope Saint Nicholas I sent Roman statutes *(Responsa Nicolai I papae ad consulta Bulgarorum)* to the Bulgarian people that had converted to Christianity during the reign of the first tsars of Bulgaria (681–1018), it was still the influence of Byzantine law that prevailed, namely an old Bulgarian translation of the *Eklogé*, the source of the oldest compilation of law in a Slavic language, titled *Zakon szudnij ljudem* (Law book for the people, *Liber iudicialis de laicis* in Latin), written in the 9th century under the reign of tsar Simeon I (893-927), and Ióhannés Scholasticos's *nomocanon* titled *Synagógé* (Collection). During the second Bulgarian tsardom (1185–1396), besides native custom, it was primarily the Bulgarian version of the *Syntagma* that was applied.

Simeon I (893–927) assumed the title of tsar on the occasion of his coronation as emperor in 913, still as the co-regent of the Byzantine Empire, but the later tsars of Bulgaria considered themselves direct successors of Byzantium (and indirectly of Rome), naming their capital city Trnovo, or the "New Rome".

c) Serbia

Serbia gained independence in around 1180 and applied Byzantine law to a great extent. Roman law showed its impact primarily in public law. The Serbian *nomocanon*s also contained the *Procheiron*, which dealt mostly with private law. The first two parts of the law book, promulgated by Tsar Stephen Dushan (1331–1355) in 1349 under the title *Dušanov Zakonik,* are Matthaios Blasterés's *Syntagma* and the Serbian extract of the *Nomos geórgikos*. The penal provisions of the *Zakonik* are also based on the *Procheiron*. Most of its text remained valid even after the Ottoman conquest in 1459.

The survival of public law traditions is demonstrated by the fact that the title of emperor (or, more precisely, that of *samodržac*, corresponding to the Byzantine *autokratór*) was used by Serbian rulers as early as the 13th century. Stephen Dushan even had himself crowned "emperor of Serbia and Greece" in 1346.

d) Wallachia and Moldavia

In the Danubian principalities of Romania that emerged by the 13th century, the influence of Byzantine Roman law was felt later but remained relatively strong. After the expulsion of the Mongols, Wallachia became the vassal of the King of Hungary, while Moldavia became a vassal of the King of Poland. From the 15th and 16th centuries onward, their role was assumed by the Sultan.

On the territory of Wallachia and Moldavia, the *Eklogé tón nomón* and the *Nomos geórgikos* exerted influence on the development of law. This influence was continuously exerted in the 14th century by the *Hexabiblos* and the *nomocanon* of Matthaios Blastarés, which contained ecclesiastical and secular legal matters. The *Syntagma kata stoicheion* (1335), which contains the most important novels of the *Procheiron* and the *Basilika* in alphabetical order, also got an important role in the jurisdiction.

Both principalities applied Manuél Malaxas's *Nomokanón* (1561–1563), the enlarged and revised, thematically arranged version of Blastarés's *Syntagma*, as an authentic source of law.

The Romanian princes expressed their claims to autocracy very early. The voivode of Moldavia referred to himself as the Slav equivalent of the word *autokratór*, following the Byzantine example mediated by the Bulgars.

14. The Russian Principalities (Russia)[102]

It was partly due to the Roman law's commercial relations with Byzantium that reached Russia. The other factor was the activity of the Orthodox Church. In the

[102] A. Rozhdesvenski, *Razhzushdenie o vlianii greko-rimskogo prava na rossiyskie zakoni* (Moscow, 1843); D. Oblonesky, *Russia's Byzantine Heritage* (Oxford Slavonic Studies 1, 1950); A. V. Solovyev, *L'influence du droit byzantin dans les pays orthodoxes, Atti del Congresso internazionale di scienze storiche*, vol. 6 (Florence, 1956); D. P. Hammer, *Russia and the Roman Law, American Slavonic and Eastern European Review* 16 (1957); J. N. Shchapov, *Vizantiyskoye i yuzhnoslavanskoye pravovoye naslediye na Rus XI-XIII vv.* (Moscow, 1978); D. H. Kaiser, *The Growth of the Law in Medieval Russia* (Princeton, 1980); J. Quigley, *The Romanist Character of Soviet Law, The Emancipation of Soviet Law* (Dordrecht, 1992); V. A. Dozortsev, *The Trends in the Development of Russian Civil Legislation during the Transition to a Market Economy, Review of Central and Eastern European Law* 19 (1993). For the idea of the "Third Rome", see I. D.

Grand Dutchy of Kyiv, elements of Byzantine Roman law became known primarily through the Zakon sudni ludem (*Liber iudicialis de laicis*, Law-book for the people). Still, there were no translations of Byzantine legal literature, except for Ióannés Scholastikos's comprehensive *Synagógé*. Phótios's *Nomokanón*, which contains both the *Procheiron* and the *Eklogé,* was promulgated at a synod held at Vladimir in 1272, at the time of disunity following the Mongol invasion. The Russian translation of the *Nomos geórgikos* was issued in the early 14th century. It is, however, probable that these Byzantine sources of law were applied only by ecclesiastical courts. Since the marriage and the procedure of succession fell under the jurisdiction of the Church, a significant portion of the relations between *subditi* was regulated ecclesiastically. The Russian equivalent for *nomocanon* is *Kormtsaja Kniga*, meaning "book governing the boat of the Church".

This *Kormtsaja Kniga,* containing the *Ekloga,* was edited in 1653 and revised by patriarch Nikon. With its promulgation, the *Stoglav* from 1551 remained in force. Curiously, the conservative Russian historian, M. N. Karamzin (1766-1826) takes nomocanon as a subsidiary on the private law field.

The *Stoglav* contains the decisions of the synod of the Orthodox Church of 1551 and harmonises them with the *Sugebnic,* issued by Ivan in 1550. One of the oldest sources of the *Stoglav* is the *nomocanon,* through which it inherits Roman law roots.

The title of the Tsar of Russia was first used in international relations by Ivan III (1462–1505) in 1473 after he married Sophia Palaiologa, niece of Constantine XI, the last Byzantine emperor in 1472. The man who outlined the idea of Moscow being the successor of Byzantium was a monk called Philotheos (Filofej) of Pskov in the early 16th century. Based on Justinian's Novel, he worked out the principle of caesaropapism, the unity (*symphónia* or *sviashchennaya sugubitsa*) of ecclesiastical (*sacerdotium* or *hierosyné*) and political power (*imperium* or *basileia*), which entitled the subordination of the Church to the monarch. The title of the tsar was already recognised by Holy Roman Emperor Maximilian I during the reign of Vasily III (1505–1533), but the patriarch of Byzantium made the Byzantine-style coronation of Ivan IV, the Terrible (1533–1584), a precondition for his approval. This took place in 1547.[103] In 1589, the patriarch of Moscow was established, which was the birth of the

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Strémooukhoff, *Moscow the Third Rome. Sources of the Doctrine*, *Speculum* 28 (1953); N. M. Zernow, *Moscow, the Third Rome* (London, 1937); H. Schaeder, *Moskau, das dritte Rom* (19572) W. Goez, *Translatio imperii* (Tübingen, 1958); W. Lettenbauer: *Moskau, das dritte Rom* (1961).

[103] Moscow, the capital city where the first Russian *metropolite* was elected in 1448, became an independent ecclesiastical capital in 1589 when the patriarch of Byzantium signed the so-called Constitutional Charter, passed at the synod there. Moscow was nevertheless recognized as the fifth Orthodox patriarchate *de iure* in 1593. From that time on, Moscow considered herself the "Third Rome", i.e., the successor of the "Second Rome", namely, Byzantium, though the European powers, in particular the emperors of the Holy Roman Empire, and the Holy See did not recognise the legality of the transfer of the Byzantine legacy to Russia (*translatio imperii)*. This idea was still predominant in Russian political thinking and public law until 1917.

autocephale Russian Orthodox Church. The first *metropolite* of Moscow was elected in 1448. The Constitutional Charta *(Gramota Ulozennaja)*, adopted in a synod by the participation of Russian and Greek prelates, was equally signed by the patriarch of Constantinople.

Byzantine Roman law made its impact felt in the Russian tsardom as well. Ivan IV ordered the Russian translation of the *Codex Iustinianus*. The law book of Tsar Alexis Mihailovich (1649–1676) of 1649, titled *Sobornoe Ulozhenie* (law book adopted by the parliament), contained texts by the Fathers of the Church, the orders (*ukazy*) of the tsars, and Byzantine law in the *preambule*, as compiler Nikita Odolevski had been ordered to select the most suitable provisions of private law issued by Byzantine emperors *(Gradskije Zakoni)* and review the Russian law accordingly. The law book is largely based on Russian customary law and the Third Lithuanian Statute of 1588. The impact of Byzantine Roman law (*Procheiron* and *Eklogé*) can be felt only in criminal law and even there it is mostly vague.

List of Abbreviations

Reviews

AcP	Archiv für die civilistische Praxis, Heidelberg, 1820sqq, New series Heidelberg, 1868sqq, Tübingen and Leipzig, 1878sqq, Tübingen, 1923sqq
AHDE	Anuario de Historia del Derecho Español, Madrid, 1924sqq
AJ	Acta Juridica, Cape Town, 1985sqq
ÁJ	Állam- és Jogtudomány, Budapest, 1985sqq
AJCL	The American Journal of Comparative Law, Ann Arbor, 1952sqq
AnnUB (AUB)	Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae, Budapest, 1959sqq
AUSz	Acta Universitatis Szegediensis de Attila József nominatae. Acta Iuridica et Politica, Szeged, 1955 sqq.
BIDR	Bullettino dell'Istituto di Diritto Romano <<Vittorio Scialoja>> (1st series: Roma, 1888-1933, 3rd series:) Milano, 1959sqq.
BMCL	Bulletin of medieval canon law, 1971sqq.
DROITS	Revue Française de Théorie de Philosophe et de Culture Juridique, Paris, 1985 sqq.
Glossae	Glossae. Revista de Historia de Derecho Europeo, Murcia, 1988sqq.
IJ	The Irish Jurist, Dublin, 1935sqq
Index	Index. Quaderni camerti di studi romanistici—International Survey of Roman Law, Camerino, 1970sqq
IRMAE	Ius Romanum Medii Aevi, Milano (Mediolani), 1961sqq
Iura	Iura. Revista internazionale di diritto romano e antico, Catania, 1950sqq
JC	Ius Canonicum, Pamplona 1961sqq
JJP	Journal of Juristic Papirology, Warszawa, 1946sqq
JK	Jogtudományi Közlöny (Bulletin of Legal Science), Budapest, (1866skk, new series:) 1946sqq
JLH	Jorurnal of Legal History, London, 1980sqq
JZ	Juristenzeitung, Tübingen, 1945sqq
Labeo	Labeo. Rassegna di diritto romano, Napoli, 1955sqq

LHR	Law and History Review, Ithaca, 1983sqq
LLR	Loyola Law Review, New Orleans, 1920sqq
LaLR	Louisiana Law Review, Baton Rouge, 1910sqq
MIÖG	Mitteilungen des Instituts für österreichische Rechtsgeschichte, Innsbruck, 1888-1944, Wien-Köln-Graz, 1948sqq
MJ	Magyar Jog (Hungarian Law), Budapest, 1954sqq
PUM	Publicationes Universitatis Miskolciensis. Series Iuridica et Politica, Miskolc, 1985sqq
QF	Quaderni Fiorentini per la storia del pensiero giuridico moderno, Milano, 1972sqq
RDFDSJ	Revue d' Histoire des Facultés de Droit et de la Science Juridique, Paris, 1987sqq
Rechtsgeschichte	Rechtsgeschichte, Frankfurt am Main, 2002sqq
RHD	Revue historique de droit français et étranger, Paris, (1st series: 1855-1877, 4th series:) 1922sqq
RIDA	Revue internationale des droits de l'antiquité, Bruxelles, (1st series: 1948sqq, 3rd series:) 1954sqq
RIDC	Revue internationale de droit comparé, Paris, 1949sqq
RISG	Rivista italiana per le scienze giuridiche, Roma, (1st series: 1886sqq, 3rd series:) 1946sqq
RIW	Recht der Internationalen Wirtschaft
RJ	Rechtshistorisches Journal, Frankfurt am Main 1982-2001
ROW	Recht in Ost und West
RSDI	Rivista di storia del diritto italiano, Roma 1928sqq
SDHI	Studia et Documenta Historiae et Iuris, Roma, 1935sqq
SG	Studia Gratiana, Roma, 1953sqq
SJH	Scandinavian Journal of History 21 (1966), Stockholm, 1975sqq
SSL	Scandinavian Studies in Law, Stockholm, 1957sqq
TECLF	Tulane European & Civil Law Forum, New Orleans, 1986sqq
TLR	Tulane Law Review, New Orleans, 1926sqq
TR	Tijdschrift voor Rechtsgeschiedenis, (Revue d'Histoire du Droit; The Legal History Review) Haarlem, 1918sqq
WiRO	Wirtschaft und Recht in Osteuropa,
ZEuP	Zeitschrift für Europäisches Privatrecht, München, 1993sqq

ZR	Zeitschrift für Rechtsgesichte, Frankfurt am Main, 2000sqq
ZSS RA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung, Weimar, 1880sqq
ZSS GA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung, Weimar, 1880sqq
ZSS KA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung, Weimar, 1911sqq
ZfNR	Zeitschrift für Neuere Rechtsgeschichte, Wien, 1979sqq
ZfRV	Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht, Wien, 1990sqq (Zeitschrift für Rechtsvergleichung 1960-1989)
ZfVglRW	Zeitschrift für vergleichende Rechtswissenschaft, Stuttgart, 1878-1942; 1953-sqq

Editions of Sources and Serials

ANRW	Aufstieg und Niedergang der römischen Welt. Geschichte und Kultur Roms im Spiegel der neueren Forschung, hrsg. von H. Temporini – W. Haase, Berlin – New York, 1972sqq
IC	Ius Commune. Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte, Frankfurt am Main, 1967sqq
IRMAE	Ius Romanum Medii Aevi, Milano (Mediolani), 1961sqq
JT	Jogtörténeti Tanulmányok, Budapest, 1966sqq
PubInst	Publicationes Instituti Iuris Romani Budapestinensis, Budapest, 1970sqq

Other Abbreviations

ABGB	Österreichisches Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code, promulgated in 1811; put into force in 1812)
BGB	Bürgerliches Gesetzbuch (German Civil Code, promulgated in 1896; put into force in 1900)

Csjt.	A házasságról, családról és gyámságról szóló 1952: IV. tv. (Act nr. IV on Family, Marriage and Tutelage (considerably modified in 1974, 1986, 1990, 1995, 1997 and 2002)
Mtj.	Magyarország Magánjogi törvénykönyvének javaslata (1928) (Draft on the Hungarian Civil Code)
OR	Schweizerisches Obligationenrecht (Swiss Law on Obligations, promulgated in 1881; put into force in 1883; revised in 1911; the revised version went into force in 1912)
Ptk.	A Magyar Köztársaság Polgári Törvénykönyvéről szóló 1959: IV. tv. (Hungarian Civil Code; Act nr. IV promulgated in 1959 (substantially revised in 1977, 1991 and 1993)
UCC	Uniform Commercial Code promulgated in 1952)
ZGB	Schweizerisches Zivilgesetzbuch (Swiss Civil Code, promulgated in 1907; put into force in 1912)

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The volume contains three parts: Attempts to Codify Civil (Private) Law in the Countries of the European Union with Regard to Unification of Law, The Origins of European Private Law and The Development of European Private Law in the Middle Ages.

The first part of the volume is dealing with the origin of the European private law. The author analyzes the fate of Roman law after the demise of the Western Roman Empire. This part contains also a comprehensive analysis on the codification (compilation) of Roman law in the Roman (Byzantine) Empire during the reign of emperor Justinian I.

The author gives a thorough analysis of the *ius commune* in the framework of the analysis of the legal development in Europe in the Middle Ages. The legal development in Italy, France, in the countries of the Iberian Peninsula, in the Holy Roman Empire, in Hungary, in Poland and Lithuania, in England, Wales and Scotland, in the countries of Northern Europe, in the Balkan States and the Danubian Principalities as well as in the Russian Principalities is thoroughly analyzed.

The book is useful for law-students, experts of Roman law and comparative legal history as well as practicing lawyers. It has to be pointed out that the book deserves particular attention with regard to common roots based on Roman Law in the doctrine and codification in the era of the formation of the *ius commune (privatum) Europaeum* in the first half of the 21st century.

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