Roman Law, Medieval Jurisprudence and the Rise of the European *Ius Commune*: Perspectives on the Origins of the Civil Law Tradition

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Abstract

The civil law tradition is the oldest and most prevalent legal tradition in the world today, embracing the legal systems of Continental Europe, Latin America and those of many African and Asian countries. Despite the considerable differences in the substantive laws of civil law countries, a fundamental unity exists between them. The most obvious element of unity is the fact that the civil law systems are all derived from the same sources and their legal institutions are classified in accordance with a commonly accepted scheme existing prior to their own development, which they adopted and adapted at some stage in

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their history. The civil law tradition was the product of the interaction among three principal forces: Roman law, as transmitted through the sixth century codification of Emperor Justinian; Germanic customary law; and the canon law of the Church, which in many respects derived from Roman law but nevertheless constituted a distinct system. Particularly important in this process was the work of the medieval jurists who systematically studied, interpreted and adapted Roman law to the conditions and needs of their own era. From the fifteenth century onwards the relationship between the received Roman law, Germanic customary law and canon law was affected in varying degrees by the rise of the nation-state and the increasing consolidation of centralized political administrations. The present paper traces the common history of European civil law from its beginning in the High Middle Ages to the emergence of national codifications in the eighteenth and nineteenth centuries. A significant part of the work will be devoted to the discussion of the historical factors that facilitated the preservation, resurgence and subsequent reception of Roman law as the basis of the 'common law' (*ius commune*) of Continental Europe.

Introduction: the Heritage of Roman Law

Roman law is both in point of time and range of influence the first catalyst in the evolution of the civil law tradition. The history of ancient Roman law spans a period of more than eleven centuries. Initially the law of a small rural community, then that of a powerful city-state, Roman law became in the course of time the law of a multinational empire that embraced a large part of the civilized world. During its long history,

Roman law progressed through a remarkable process of evolution. It advanced through different stages of development and underwent important transformations in substance and form as it adapted to the changes in society, especially those derived from Rome's expansion in the ancient world. During this long process the interaction between custom, enacted law and case law led to the formation of a highly sophisticated system gradually developed from layers of different elements. But the great bulk of Roman law, especially Roman private law, derived from jurisprudence rather than legislation. This unenacted law was not a confusing mass of shifting customs, but a steady tradition developed and transmitted by specialists who were initially members of the Roman priestly class and then secular jurists. In the final stages of this process when law-making was increasingly centralized, jurisprudence together with statutory law was compiled and codified. The codification of the law both completed the development of Roman law and evolved as the means whereby Roman law was subsequently transmitted to the modern world.

A turning point in the history of Roman law was the emergence, in the later republican age (3rd century BC-late 1st century BC), of the first secular jurists (*iurisconsulti* or *iurisprudentes*). The main focus of their activities was presenting legal advice on difficult points of law to judicial magistrates, judges and parties at law, and the drafting of legal documents. Towards the end of this period the first systematic treatises on civil law emerged-a development reflecting the influence of Greek philosophy and science on Roman legal thinking. The legal history of this period is marked also by the development of the *ius honorarium*, or magisterial law, as a distinct source of law. Early Roman law was rigid, narrow in scope and resistant to change. As a result of the changes

generated by Rome's expansion, the Romans faced the problem of how to adjust their law to address the challenges created by the new social and economic conditions. In response to this problem the law-dispensing magistrates, and especially the praetors, were granted the power to mould the law in its application. Although the magistrates had no legislative authority, they extensively used their right to regulate legal process and thus in fact created a new body of law that was progressive, flexible and subject to continual change and development.

Roman law reached its full maturity in the early imperial epoch (late first century BC-late third century AD), often referred to as the 'classical' period of Roman law, and this emanated mainly from the creative work of the jurists and their influence on the formulation and application of the law. From the early years of this period the emperors customarily granted leading jurists the right to present opinions on questions of law (*ius respondendi*) and deliver them by the emperor's authority. In the later half of the second century it was recognized that when there was accord between the opinions of the jurists who had been granted this right, these opinions operated as authoritative sources of law. Besides dealing with questions pertaining to the practical application of the law, the jurists were also engaged in teaching law and writing legal treatises. The main fabric of Roman law, as we know it today, was established upon the writings of the leading jurists from this period. During the same period, the resolutions of the Roman senate and the decrees of the emperors came to be regarded as authoritative sources of law.

In the later imperial age (late third century AD-sixth century AD) the only effective source of law was imperial legislation, largely concerned with matters of public law and economic policy. Moreover, as jurisprudence had ceased to be a living source of law, earlier juristic

works were regarded as a body of finally settled doctrine. During this period, as the body of imperial legislation grew, there emerged the need for the codification of the law. In addition, direction was required for the use of the classical juridical literature-a vast body of legal materials spanning hundreds of years of legal development. The process of codification commenced with the publication of two private collections of imperial law, which appeared at the end of the third century AD: the *Codex Gregorianus* (AD 291) and the *Codex Hermogenianus* (AD 295). These were followed by the *Codex Theodosianus*, an official codification of imperial laws published in AD 438. The process of codification ceased in the middle of the sixth century AD with the great codification of Roman law, both juristic law and imperial enactments, by Emperor Justinian.

Through the codification of the law Justinian sought to produce, on the basis of the legal inheritance of the past, a complete and authoritative statement of the law of his own day to replace all former statements of law in both juridical literature and legislation. In this way he hoped to create a uniform law throughout the empire and, at the same time, to preserve the best of classical jurisprudence, displacing the diffuse mass of legal materials that had caused so much confusion in the past. The commissions of jurists and state officials appointed by Justinian to execute the codification sought to achieve the following goals: (a) the collection and editing, with a view to their current applicability, of all imperial laws promulgated up to that time; (b) the gathering and harmonization of the Roman jurists' opinions; and (c) the creation of a standard textbook that would clearly and systematically introduce the first principles of the law to students.

In February 528, Justinian assigned to a commission composed of high officials and jurists the task of consolidating into a single code all the

valid imperial enactments. The work was published under the name *Codex Iustinianus* and acquired the force of law in April 529. However, the mass of new legislation issued by Justinian after 529 soon rendered the Code obsolete and in 534 it was superseded by a revised edition.

After the publication of the first Code, Justinian attended to the goal of systematizing the law derived from the works of the classical jurists. Like the compilers of the Code, the members of the commission appointed to perform this work were granted wide discretionary powers. They determined which juristic writings to include or omit as superfluous, imperfect or obsolete; they could shorten the relevant texts, eliminate contradictions, and correct and update matters taking into consideration current legal practice and changes in the law introduced by imperial legislation. The compilation was to assume the form of an anthology of the writings of the classical jurists with exact references. Although the material relied upon spanned hundreds of years of legal development, the compilation was devised as a correct statement of the law at the time of its publication and the only authority in the future for jurisprudential works (and the embodied imperial laws). The work was published under the name *Digesta* or *Pandectae* and came into force in December 533. From that date, only juristic writings contained within it were regarded as legally binding; references to the original works were now deemed superfluous and the publication of critical commentaries on the Digest was prohibited.

As an authoritative statement of the law, the Digest was intended for use not only by legal practitioners and state officials, but also by those engaged in the study of law. However, even before it was published, it was obvious that the work was far too long and complex for students to use, especially for those in their first year of their studies. An

introductory textbook was required that would allow students to grasp the basic principles of the law before progressing to the more detailed and complex aspects of legal practice. This idea inspired Justinian to order, in 533, the preparation of a new official legal textbook for use in the empire's law schools. The work was published under the name *Institutiones* or *Elementa* and came into force as an imperial statute, together with the Digest, on 30 December 533.

After the publication of the second edition of the Code, Justinian's legislative activity continued unabated as political and social developments necessitated changes in the law unforeseen by earlier legislation. Although most of these new laws, or 'Novels' (*Novellae constitutiones*), addressed matters of administrative and ecclesiastical law, Justinian also introduced important innovations in certain areas of private law, such as family law and the law of intestate succession. These were intended to be officially collected and published as part of a new edition of the Code, but this never happened. Knowledge of them derives mainly from three later compilations based upon a few private and unofficial collections produced during and after Justinian's reign: the *Epitome novellarum Iuliani*, the *Authenticum* and the *Collectio Graeca*.

The Code, the Digest, the Institutes and the Novels constitute the bulk of Justinian's legislative work. All four compilations together are known as *Corpus Iuris Civilis*.[1]

The influence of the Justinianic codification has been tremendous.

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1 The term '*Corpus Iuris Civilis*' did not originate in Justinian's time; it was introduced in the late sixteenth century by Dionysius Godofredus, author of the first scholarly edition of Justinian's work, in contradistinction to the codification of the canon law (referred to as *Corpus Iuris Canonici*).

In the Byzantine East, it prevailed as a basic document for the further evolution of the law until the fall of the empire in the fifteenth century. In Western Europe, it remained forgotten for a long period but was rediscovered in the eleventh century. Initially treated as the object of academic study, it later experienced a far-reaching reception-a reintegration as valid law that led to its becoming the common foundation upon which the civil law systems of Continental Europe were built.

The Revival of Roman Law in Western Europe

In the years following the demise of the Roman Empire in the West (476 AD), the once universal system of Roman law was replaced by a plurality of legal systems. The Germanic tribes, which settled in Italy and the western provinces, lived according to their own laws and customs, whilst the Roman portion of the population and the clergy were still governed by Roman law. To facilitate the administration of the law in their territories, some Germanic kings ordered the compilation of legal codes containing the personal Roman law that regulated the lives of many subjects. Among the most important compilations of Roman law that appeared during this period were the *Lex Romana Visigothorum*, the *Edictum Theodorici* and the *Lex Romana Burgundionum*.[2] In parts of Italy

2 In AD 506, the King of the Visigoths Alaric II promulgated the *Lex Romana Visigothorum*-hence, it is also known as the Breviary of Alaric (*Breviarium Alarici*). It contains extracts from the Gregorian, Hermogenian and Theodosian Codes; a number of post-Theodosian constitutions; an abbreviated version of Gaius' Institutes (*Epitome Gai*); sections of the *Sententiae* by Paulus; and a short *responsum* of Papinianus as a conclusion.

under Byzantine control the Roman law of Justinian continued to apply until the middle of the eleventh century, when the last of the Byzantine possessions in Southern Italy were lost to the Normans. Elsewhere in Italy, Gaul and Spain, Roman law was preserved, even though in a vulgarized form, through the application of the principle of the personality of the laws. It also existed through the medium of the Church whose law was imbued with the principles and detailed rules of Roman law. Moreover, Roman law, either directly or through canon law, exercised an influence on the various codes of Germanic law that emerged in the West during the early Middle Ages, although this influence varied greatly from region to region and from time to time.[3]

Some of the texts are accompanied by interpretations (in the form of paraphrases or explanatory notes) aimed at facilitating their understanding and application. The *Lex Romana Visigothorum* remained in force in Spain until the seventh century; in Southern France, its application prevailed (even though no longer as an official code) until the twelfth century.

The *Lex Romana Burgundionum* was composed during the reign of King Gundobad of the Burgundians and was promulgated by his son Sigismund in AD 517 for use by the Roman inhabitants of his kingdom. It is based on the Gregorian, Hermogenian and Theodosian Codes; a shortened version of the Institutes of Gaius; and the *Sententiae* of Paulus. Unlike the Visigothic Code mentioned above, it does not contain any extracts from the original Roman sources. Instead, the materials are incorporated into a set of newly formulated rules that are systematically arranged and distributed over forty-seven titles.

In the late fifth century, King Theodoric II (AD 453-466), ruler of the Visigothic kingdom of Southern France, enacted the *Edictum Theodorici* that was applicable to both Romans and Visigoths. It has 154 titles and contains materials distilled from the *Sententiae* of Paulus; the Gregorian, Hermogenian and Theodosian Codes; and post-Theodosian legislation.

3 The most important Germanic codes embrace the *Codex Euricinianus*, enacted about 480 by Euric the Visigothic king and drafted with the help

In the course of time, as the fusion of the Roman and Germanic elements of the population progressed, the division of people according to their national origin tended to break down and the system of personality of the laws was gradually superseded by the conception of law as entwined with a particular territory or locality. As a result, Roman law as a distinct system of law applicable within a certain section of the population fell into abeyance in most of Western Europe. A considerable degree of integration of the Roman and Germanic elements first occurred in the Visigothic territory in Spain. In this region, the *Lex Romana Visigothorum* of Alaric ceased to possess any force and a new code was introduced in 654 under King Recceswinth: the *Lex Visigothorum* (also known as *Forum Iudicum* or *Liber Iudiciorum*: Book of Judicial Actions).[4] In the course of the ninth century the shift from the principle of personality to that of territoriality was further precipitated by the growth of feudalism. The predominant feature of feudalism was an estate or

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of Roman jurists; the Salic Code (*Pactus legis Salicae* or *Lex Salica*) of the Franks, composed in the early sixth century; the *Lex Ribuaria*, promulgated in the late sixth century for the Franks of the lower and middle Rhine region; and the *Lex Burgundionum*, issued in the early sixth century for the inhabitants of the Burgundian kingdom. Of the above codes, the Visigothic and Burgundian Codes reflect a stronger Roman influence than the Salic and Ripuarian Codes. Other law codes that exhibited a Roman influence include the Lombard Edict (643), the Alammanic Code (*c*. 720), the Bavarian Code (*c*. 750), the Frisian Code (*c*. 750) and the Saxon Code (*c*. 800).

4 The *Lex Visigothorum* follows the structure of the Theodosian Code. It is based on early legislation (especially on a revised edition of Euric's Code issued by King Leovigild) and laws issued by the current monarch (King Recceswinth). Alaric's code continued to be used in southern France, especially in the territory of the Burgundians, and in some countries north of the Alps.

territory dominated by a great lord (duke, count, baron or marquis) who was often the vassal of an emperor or king. Since the domain of a great lord constituted a quasi-independent unit in economic and political terms, the area that was controlled by a particular lord was decisive as to the form of law that should prevail. However, the intermixture of races meant that the laws recognized in a territorial unit could no longer be those of a particular race. Instead, all persons living within a given territory were governed by a common body of customary norms that varied in regions and periods. In this way, the diversity of laws no longer persisted as an intermixture of personal laws but as a variety of local customs. In all the territories, however, the customary law that applied was a combination of elements of Roman law and Germanic customary law.

By the end of the tenth century, vulgarised versions of Roman law were so intermingled with Germanic customary law that historians tend to describe the laws of this period as either 'Romanised customary laws' or as 'Germanised Roman laws'. Moreover, Roman law exercised a strong influence on the legislation (capitularies) of the Frankish emperors, as well as on the development of the law of the Roman Catholic Church. Thus, Roman law throughout Western Europe sustained its existence and served both as a strand of continuity and as a latent universalising factor. Yet, in comparison with classical Roman law the overall picture of early medieval law is one of progressive deterioration. The study of law, as part of a rudimentary education controlled largely by the clergy, was based simply on abstracts and ill-arranged extracts from older works. As the surviving literature from this period exhibits, legal thinking was characterised by a complete lack of originality.

From the eleventh century, improved political and economic

conditions created a more favourable environment for cultural development in Western Europe. At the same time, a renewed interest in law was prompted by the growth of trade, commerce and industry, and the increasing secularism and worldliness of urban business life.

The legal revival began in Northern Italy. Among the earliest centres of legal learning was the law school of Pavia established in the early tenth century. Roman law and the customary and feudal law of the Lombard kingdom were taught and developed at this school. As the capital of the Italian Kingdom and the seat of a supreme court with a corps of judges and lawyers, Pavia was the centre of vigorous legal activity. Although legal growth was fostered largely by practical needs, it encouraged the systematic study and interpretation of legal sources and improved standards of legal culture. Indeed, studies were not based solely on practical interests, but were carried out according to the processes of formal logic that were then being developed by the first scholastics. The study of Lombard law was based primarily on the *Liber Papiensis*, a work composed in the early years of the eleventh century.[5]

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5 The Lombards, like other Germanic peoples, had originally no written law. The first compilation of Lombard law was the *Edictum* of King Rothari, published in 643. This work is considered to be the most complete statement of the customary law of any of the Germanic peoples in the West. The entire body of Lombard law, consisting of the Edict of Rothari and the additions introduced by his successors, is known as *Edictum regum Langobardorum*. Even after the annexation of the Lombard kingdom by the Frankish Empire during the reign of Charlemagne, Lombard law continued to be applied in Northern Italy, where it coexisted with Roman law and the customary laws of other Germanic peoples. To deal with the inevitable inconvenience that the presence of diverse legal systems entailed, the Frankish kings of Italy promulgated a large number of laws referred to as *capitula* or *capitularia*. A private collection of these laws, known as

Other important works of the same period were the *Lombarda* or *Lex Langobarda* and the *Expositio ad Librum Papiensem*, an extensive collection of legal commentaries that embodied materials drawn from both Lombard and Roman sources. The chief source for the study of Roman law was the *Lex Romana Visigothorum*.

By the end of the eleventh century the *antiqui*, the jurists dedicated to the study of ancient Germanic sources, had been superseded by the *moderni*, who were interested primarily in the synthesis of Roman law and Lombard customary law. While the *antiqui* regarded Roman law as a system subordinate and supplementary to Lombard law, the *moderni* sought to rely on Roman law as a basis for the improvement and development of native law. But the Lombard capital of Pavia was not the only Italian city where law was studied and legal works were produced. At Ravenna, the former centre of the Byzantine Exarchate in Italy, there existed in the eleventh century a school of law where Justinian's texts were known and studied. Moreover, Southern Italy remained for a considerable period of time under Byzantine rule and thus Roman legal learning was preserved in this area through the influence of the Byzantine law.

Towards the end of the eleventh century, Roman law studies experienced a remarkable resurgence. It is difficult to assign a single reason for this development, although some writers place central importance on the discovery of a manuscript in Pisa during the late

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Capitulare Italicum, was permanently joined to the Lombard Edict in the early eleventh century. This *corpus* of Lombard-Frankish law, referred to in early sources as *Liber Legis Langobardorum*, is commonly known today as *Liber Papiensis*.

eleventh century. The material contained the full text of Justinian's Digest that had remained largely unknown throughout the early Middle Ages (when the Florentines captured Pisa in 1406 the manuscript was transferred to Florence and hence it is designated *Littera Florentina* or *Codex Florentinus*). A second manuscript seems to have been unearthed around the same time but has since been lost. This is referred to as *Codex Secundus* and is believed to have furnished the basis for the copies of the Digest produced at Bologna. The rediscovery of the Digest occurred at a time when there was a great need for a legal system that could meet the requirements of the rapidly changing social and commercial life. The Roman law of Justinian had essential attributes that offered hope for a unified law that could in time replace the multitude of local customs: it possessed an authority as a legacy of the ancient *imperium Romanum* and existed in a book form written in Latin, the *lingua franca* of Western Europe. As compared with the prevailing customary law, the works of Justinian comprised a developed and highly sophisticated legal system whose rational character and conceptually powerful structure made it adaptable to almost any situation or problem irrespective of time or place.

The revival of interest in Roman law was also fostered by the conflict between the Holy Roman Empire of the German Nation and the Papacy, which was from the outset a conflict of political theories for which the rival parties sought justification and support in the precepts of the law. The supporters of the Papacy argued that, as spiritual power was superior to secular power, the Pope was supreme ruler of all Christendom and temporal affairs were subject to the final control of the Church. Relying on the despotic principle of Roman law, opponents of the papal views argued that the power of the state was absolute and could

override the opposition of any group within the state. Roman law was thus construed to uphold secular absolutism-a view utterly at variance with the papal claims to primacy. The Holy Roman emperors were receptive to this law because its doctrine of a universal law founded on a grand imperial despotism provided the best ideological means to support the theory that the emperor, as heir of the Roman emperors, stood at the pinnacle of the feudal system.[6]

The School of the Glossators

The principal centre of Roman law studies in Italy was the newly founded (*c.* 1084) University of Bologna, the first modern European university where law was a major subject.[7] By the close of the thirteenth century, a number of similar schools had been established at Mantua, Piacenza, Modena, Parma and other cities of Northern and Central Italy, as well as in Southern France. The law school of Bologna owed its fame to the grammarian Irnerius (*c.* 1055-1130), who around 1088 began

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6 Charlemagne had been the first to assert that he was in fact heir to the throne of the Western Roman emperors and this claim was again made by Otto when he became German emperor in 962.

7 By the middle of the twelfth century about ten thousand law students from all over Europe were studying at Bologna. The students had the right to choose their own teachers and to negotiate with them matters such as the place and manner of instruction and the amount of tuition. The students and teachers organized themselves into guilds (*societates*) for purposes of internal discipline, mutual assistance and defence. The various *societates* formed a larger body termed *universitas scholarium*, within which students were grouped by nations.

lecturing on the Digest and other parts of Justinian's codification. This jurist came to be regarded as the founder of the school, although he does not appear to have been the first teacher at this institution (the first public course of law at Bologna was delivered in 1075 by the Pavian jurist Pepo (Joseph), who was probably a teacher of Irnerius). Irnerius's fame attracted students from all parts of Europe to study at the Bologna school that had around ten thousand students by the middle of the twelfth century.[8] The jurists of Bologna set themselves the task of presenting a clear and complete statement of Roman law through a painstaking study of Justinian's original texts (instead of the vulgarised versions of Roman law contained in the various Germanic compilations usually relied upon in the past). Their object was to re-establish Roman law as a science-a systematic body of principles and not simply a tool for practitioners. However, the ancient texts were unwieldy as they contained an immense body of often ill-arranged materials and dealt with a multitude of institutions and problems that were no longer known. Therefore, the first task to accomplish was the accurate reconstruction and explanation of the texts.[9]

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8 Irnerius's success is attributed to three principal factors: first, his excellent edition of the Digest, known as *Litera Bononiensis* or the *Vulgata*; second, the new approach to the study of Roman law, which viewed the *Corpus Iuris Civilis* as living law; third, the separation of the study of Roman law not only from the study of rhetoric, but also from the study of canon law and feudal law.

9 The most important part of their work was the reconstruction of Justinian's Digest. According to tradition, the materials were divided into three parts: the *Digestum Vetus*, embracing the initial twenty-four books; the *Digestum Novum*, covering the last twelve books from books 39 to 50; and the *Digestum Infortiatum*, encompassing books 25 to 38. These three parts of

The work of interpretation was closely connected with the Bolognese jurists' methods of teaching and performed by means of short notes (*glossae*) explaining difficult terms or phrases in a text and providing the necessary cross-references and reconciliations without which the text would be unusable. These notes were written either in the space between the lines of the original text (*glossae interlineares*), or in the margin of the text (*glossae marginales*). The extended glosses of a single jurist formed a connected commentary on a particular legal topic and this continuous glossing of the texts entailed the emergence of entire collections or apparatuses of glosses that addressed individual parts or the whole of Justinian's codification. By employing the general pattern of scholastic reasoning, the Bolognese jurists (designated Glossators, *Glossatores*) sought to expose the conceptual and logical background of the various passages under consideration and to ascertain the consistency and validity of the principles underlying the legal material upon which they commented. They initiated the process by comparing different passages from various parts of Justinian's work dealing with the same or similar issues, explaining away the inconsistencies and harmonizing any apparent contradictory statements (this method was by no means new as it had been engaged by earlier medieval scholars and

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the work were contained in three volumes. A fourth volume comprised the first nine books of Justinian's Code, and a fifth embodied the Institutes, the last three books of the Code and the Novels as found in the *Authenticum*. The fifth volume also incorporated several medieval texts, the *Libri Feudorum* (containing the basic institutions of feudal law), a number of constitutions of the emperors of the Holy Roman Empire and the peace treaty of Constance (1183). These five volumes became known as *Corpus Iuris Civilis*.

resembled the approach used by the jurists of the Constantinople and Beirut law schools during the later imperial era). These successive processes corresponded to the medieval progression in the curriculum of the *trivium* from grammar and rhetoric to logic or dialectic-the content of Justinian's works first had to be understood, and so explanatory notes were used; then the consistency of the texts had to be established through the application of the dialectical method. Logic was the most important element of medieval education. Based on works such as Aristotle's *Organon*, it became the dominant technique of medieval scholasticism.[10]

Apart from the *glosses*, several other types of juristic literature were developed, partly from the teaching of the *Corpus Iuris Civilis* at the law schools. Some deal with the issues in the order in which they are found in Justinian's legislation (*ordo legum*), such as the *commenta* or

10 Scholasticism as a system of philosophy was based on the belief that reality exists in the world of abstract ideas, generally independent of the external sensual world. Its chief assumption was that truth is discoverable if pursued according to the norms of formal logic. From this point of view, the only path to wisdom was the avoidance of logical fallacies rather than observation of commonplace nature. The formal logic that was applied was largely based on the work *Sic et non* ('Yes and No') of the French philosopher Peter Abelard (1079-1142), composed around 1120. In this work Abelard applies the principles of logic, as laid down by Aristotle, to texts of the Church fathers. The relevant texts are grouped by reference to their similarity (*similia*), or contrariety (*contraria*) and reasoning *per analogiam* or a *contrario* is applied, while distinctions (*distinctiones*) are introduced explaining the differences between the texts. This so-called scholastic method, which could be applied to any authoritative text, whether in the field of theology, philosophy, medicine or law, prevailed throughout the Middle Ages and remained influential even after the end of this period.

lecturae, reports written down by assistants or experienced students and sometimes revised by the teacher himself.[11] Another form of literature is the written record of a *quaestio disputata*, an exercise in which a teacher posed a question, either a theoretical one or one derived from legal practice, and his students offered opposing views. This was meant to teach students to analyse a legal problem and to argue their case in a logical and structured way. A further type of commentary, which did not originate in the classroom, was the *summa*. The *summae* are synopses or summaries of contents of particular parts or the whole of Justinian's work.[12] Unlike the above-mentioned *commenta* or *lecturae*, these are systematic works that do not follow the order of the issues in the original texts but establish their own order with respect to the fragments within the title they treat. Other forms of juristic literature included: works clarifying conceptual distinctions arising from the texts (*distinctiones*)-these comprised a series of divisions of a general concept into subcategories that were carefully defined and explained until all the implications of the concept were elucidated; collections of conflicting juristic interpretations (*dissensiones dominorum*-the term *domini* referred to medieval jurists); anthologies of opinions on various legal questions connected with actual cases (*consilia*); cases constructed to exemplify or illustrate difficult points of law (*casus*); collections of noteworthy points (*notabilia*) and statements of broad legal principles drawn from the texts (*brocarda* or *aphorismata*); and short monographs or treatises (*summulae* or

11 The *commentum* was rather condensed, whilst the *lectura* was a full report on the lecture that included all that was said and done in the lecture hall.

12 The *summae* were similar to the *indices* composed by the jurists of the law schools in the East during the late imperial era.

tractatus) on specific legal topics, such as the law of actions and legal procedure.[13]

The interpretation and analysis of Justinian's legislative works was the exclusive preoccupation of the Bolognese jurists until the late thirteenth century. Among the successors of Irnerius, the most notable were Bulgarus,[14] Martinus Gosia,[15] Jacobus and Ugo (renowned as the 'four doctors of Bologna'), Azo, Rogerius, Placentinus, Vacarius, John Bassianus, Odofredus and Accursius. Azo became famous for his influential work on Justinian's Code, known as *Summa Codicis* or *Summa Aurea*.[16] In the late twelfth century, Rogerius founded a law school at

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13 Of particular importance were works dealing with the law of procedure (*ordines iudiciarii*). Since the *Corpus Iuris Civilis* does not contain a comprehensive section on the law of procedure, these works sought to record and compile all the relevant material on legal procedure in general and on specific actions, and to provide guidance on how to initiate a claim in law. One of the best-known works of this kind is the *Speculum iudiciale* of Wilhelmus Durantis (*c.* 1270).

14 Bulgarus advocated the view that Roman law should be interpreted according to the strict, literal meaning of the text. From the beginning of the thirteenth century, this approach seems to have prevailed. Among Bulgarus's followers were Vacarius, who went to teach in England, and Johannes Bassianus, the teacher of Azo.

15 In contrast to Bulgarus, Gosia held that the Roman law texts should be interpreted liberally, that is, according to the demands of equity and the needs of social and commercial life. Bulgarus also recognized the role of equity, which for him pertained to the 'spirit' of the law or the intent of the legislator; Gosia, on the other hand, understood equity in the Aristotelian sense, that is as a corrective principle of the law in exceptional cases. Gosia's followers included Rogerius and Placentinus, who had been students of Bulgarus.

16 The importance of Azo's *Summa Codicis* was reflected in the popular saying: '*Chi non ha Azo, non vada a palazzo*', which means that in some places

Montpellier in France (probably together with Placentinus) and this institution became an important centre of legal learning. Vacarius, a Lombard, travelled to England around the middle of the twelfth century and commenced teaching civil law at Oxford. In 1149 he composed his famous *Liber pauperum* that comprised a collection of texts from the Code and the Digest of Justinian accompanied by explanatory notes. The aim of this work was to introduce the Roman law of Justinian to the poorer students in England.[17]

The greatest of the late Glossators was the Florentine Franciscus Accursius, a pupil of Azo's, who dominated the law school of Bologna during the first half of the thirteenth century. Accursius produced the famous *Glossa Ordinaria* or *Magna Glossa*, an extensive collection or *apparatus* of glosses from earlier jurists covering the entire Justinianic codification and supplemented by his own annotations.[18] The *Glossa Ordinaria* both summarised and made obsolete the whole mass of glossatorial writings from the preceding generations of jurists. It represented the culmination of the Glossators' work and gained rapid acceptance in Italy and other parts of Europe as the standard commentary on Justinian's texts, providing guidance for those engaged in the teaching and practice of law.[19] The *Glossa Ordinaria* was regularly

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a man could not be admitted as an advocate unless he possessed a copy of Azo's *Summa*.

17 See F. de Zulueta (ed), *The Liber Pauperum of Vacarius*, Publications of the Selden Society 44 (London 1927).

18 The work comprised about 96,000 glosses.

19 The importance of Accursius's gloss was manifested in the popular saying: '*Quod non adgnovit glossa, non adgnoscit curia*', which means that a rule unknown to the *Glossa Ordinaria* was also not recognized by a court.

published with editions of the *Corpus Iuris Civilis*, so that they were received together throughout the Continent. With the publication of Accursius's Great Gloss, the contribution of the School of the Glossators to the revival of Roman law ceased but their methods were still applied in the teaching of law at Bologna and elsewhere for a long time.

The Glossators' approach to Roman law is characterised by its lack of historical perspective. Neither the fact that Justinian's codification had been compiled more than five hundred years before their own time, nor the fact that it comprised extracts of an even earlier date meant much to them. Instead, they perceived the *Corpus Iuris Civilis* as one body of authoritative texts and paid little attention to the fact that the law actually in force was very different from the system contained in Justinian's texts. This attitude was reinforced by the theory that the Holy Roman Empire was a successor to the ancient Roman Empire-a theory that the Glossators tended to support.[20] It was also associated with the fact that the Glossators' interest in law was chiefly academic and their learning was quite remote from practical affairs.[21] Being true medieval men, the Glossators regarded Justinian's texts in much the same way as theologians regarded the Bible or contemporary scholars viewed the works of Aristotle. Just as Aristotle was treated as infallible and his statements as applicable to all circumstances, the texts of

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20 This is evidenced by the fact that the Glossators added to the *Codex* constitutions of the German Emperors Frederick Barbarossa and Frederick II.

21 The general attitude of the Glossators was not affected by the fact that their teachings exercised an influence on the statutory law of Italian cities and entered the practice of law through their graduates who were appointed to the royal councils or served as judges in local courts.

Justinian were regarded by the Glossators as sacred and as the repository of all wisdom. The Glossators have been subjected to the criticism that they neglected both the developing canon law and the statutory law enacted by local political bodies, especially in the Italian city-states. They were entirely preoccupied with the study of Roman law, which for them represented a system of legislation more fully developed than either the nascent canon law or the contemporary statutory law. Nevertheless, the Glossators did succeed in resurrecting genuine familiarity with the whole of Justinian's codification and their work prepared the ground for the practical application of the legal doctrines it contained. Their new insight into the workings of Roman law led to the development of a true science of law that had a lasting influence on the legal thinking of succeeding centuries.[22]

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22 On the school of the Glossators see O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London 1994), 42 ff; P. Vinogradoff, *Roman Law in Medieval Europe* (Oxford 1929, repr. 2001), 32 ff; J. A. Clarence Smith, *Medieval Law Teachers and Writers* (Ottawa 1975); R. L. Benson and G. Constable (eds), *Renaissance and Renewal in the Twelfth Century* (Cambridge Mass. 1982); D. Tamm, *Roman Law and European Legal History* (Copenhagen 1997), 203-6; P. Stein, *Roman Law in European History* (Cambridge 1999), 45 ff; E. Cortese, *Il rinascimento giuridico medievale* (Rome 1992); W. Kunkel and M. Schermaier, *Römische Rechtsgeschichte* (Cologne 2001), 230 ff; H. Lange, *Römisches Recht im Mittelalter,1: Die Glossatoren* (Munich 1997); H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte, Rechtsentwicklungen im europäischen Kontext* (Heidelberg 2005), 36-53.

The Commentators or Post-Glossators

By the close of the thirteenth century, the attention of the jurists had shifted from the purely dialectical analysis of Justinian's texts to problems arising from the application of the customary and statute law and the conflicts of law that emerged in the course of inter-city commerce. The enthusiasm for the study of the ancient texts that had enticed many students and scholars to Bologna in the twelfth century now waned, and the place of the Glossators was assumed by a new kind of jurists known as Post-glossators (***post-glossatores***) or Commentators (***commentatores***). The new school with chief centres at the universities of Pavia, Perugia, Padua and Pisa, reached its peak in the fourteenth century and remained influential until the sixteenth century.

The rise of the Commentators' school was not unrelated to the new cultural and political conditions that emerged in the later part of the thirteenth century. Of particular importance was the gradual erosion of the traditional dualism of a universal Church and a universal Empire as a result of the crises affecting both institutions;[23] and the growing strength of nation and city-states in Europe, which were able to develop their political structures with little interference from higher universal entities. During the same period, scholastic philosophy reached its

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23 The last emperor of this period who was able to maintain a unitary view of the Empire was Frederick II of Swabia (1194-1250). His successors concentrated their efforts on consolidating their rule in Germany rather than on governing the Empire as a universal political entity. The crisis that affected the Church is evidenced by, among other things, the transfer of the papal seat to Avignon, where the Pope remained subject to the control of the French kings for about seventy years (1309-1377).

pinnacle with the work of the catholic theologian Thomas Aquinas (1225-1274), who synthesized Aristotelian philosophy and Christian theology into a grand philosophical and theological system. The new dialectic that this philosophy forged was not restricted to theological-metaphysical speculation but permeated the study of both public and private law.

Unlike the Glossators, the Commentators were not concerned with the literal reading and exegesis of Justinian's texts in isolation but with constructing a complete legal system by adapting the Roman law of Justinian to contemporary needs and conditions. The positive law that applied in Italy at that time was a mixture of Roman law, Germanic customary law, canon law, and the statute law of the empire and the various self-governing Italian cities. The Commentators endeavoured to integrate these bodies of law into a coherent and unitary system. In executing this task, they abandoned the excessive literalism of the early Glossators and sought to illuminate the general principles of law by applying the methods of rational inquiry and speculative dialectics-thereby building an analytic framework or 'dogmatic construction' of law. Furthermore, in their roles as legal consultants and administrators, they contributed significantly to the development of case law, which also provided a fertile ground for the progressive refinement and testing of their concepts and analytical tools. Indeed, many of their theoretical propositions and dogmatic constructions evolved out of the pressures of actual cases. On the other hand, since the Commentators were mainly concerned with the development of contemporary law, they tended to pay scant attention to the primary sources of Roman law. Thus, the synthesis that occurred was between the non-Roman elements and the Roman law of Justinian as expounded by the Glossators. Systematic treatises and commentaries were written based on this body of law, especially in areas

of the law where there was a need for the development of new principles for legal practice.[24]

Among the earliest Commentators was Cino of Pistoia (1270-1336), a student of the French masters Jacques de Revigny and Pierre de Belleperche, professors at the Orleans law school in the second half of the thirteenth century. Cino began his teaching career at Siena, having been for about ten years active in practice, and moved to Perugia in 1326. There he composed his great commentary, the *Lectura super Codice*, which continued to be read and cited for more than a century.[25] At Perugia Cino was the master of Bartolus of Saxoferrato, the most influential of the Commentators and one of the great jurists of all time.

Bartolus (1314-1357) obtained his doctorate at Bologna and lectured at Perugia and Pisa, where he also served as judge. He produced a monumental commentary on the entire *Corpus Iuris Civilis*, which, like

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24 The increased attention to the needs of legal practice is evidenced in the development of the *quaestio disputata*: from the middle of the thirteenth century onwards, jurists increasingly based their *quaestiones* on local statute law or even local custom, which were then analysed by means of the methods of the civil law.

25 Cino's method consisted of several successive stages: (a) the literal rendition of a legislative text (*lectio literae*); (b) the subdivision of the text into its component provisions (*divisio legis*); a summary of the content of the text (*expositio*); examples of practical cases to which the text was relevant (*positio casuum*); significant observations derived from the law (*collectio notabilium*); possible counter arguments (*oppositiones*); and, finally, an exposition of the problems that might arise (*quaestiones*). By applying this method, Cino sought to subject a legislative enactment to a dialectical process and a systematic analysis that would bring to light the rationale of the relevant law, while being aware that the pursuit of logic could lead to arguments irrelevant to the actual application of the law.

Accursius's Great Gloss, was acknowledged as a work of authority and extensively used by legal practitioners and jurists throughout Western Europe. Bartolus also dictated legal opinions and composed a large number of monographs on diverse subjects. His reputation among his contemporaries was unsurpassed and his writings came to dominate the universities and the courts for centuries. In Italy, where the doctrine of *communis opinio doctorum* operated (whereby the solution supported by most juristic authorities should be upheld by the courts), the opinions of Bartolus were regarded to possess the same weight as the Law of Citations had accorded to the works of Papinian.[26]

Another influential jurist of this period was Baldus de Ubaldis (*c.* 1327-1400), a pupil of Bartolus. Baldus taught at Bologna, Perugia and Pavia and was also much involved in public life. Unlike Bartolus, he was a canonist and a feudalist as well as a civilian.[27] He was best known for his opinions (*consilia*) that proposed solutions for problems arising from actual cases, especially cases involving a conflict between Roman law and local laws and customs.[28]

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26 In Portugal, his writings were declared to have the force of law in 1446. Moreover, lectures on his work were established at Padua in 1544 and at Ferrara in 1613. The extent of Bartolus's influence is expressed in the saying: '*nemo jurista nisi Bartolista*', which means one cannot be a jurist unless one is a follower of Bartolus.

27 His work includes commentaries on the Decretals of Gregory IX and the *Libri Feudorum*. In this connection, it should be noted that in the time of Baldus there was a closer connection between civil law and canon law. It was customary for a student to engage in the study of both subjects and thus become doctor of both laws (*doctor utriusque iuris*).

28 The *consilium*, the advice given by a law professor on a practical problem, evolved as the most important form of legal literature during this period, as judges were often obliged to obtain such advice before delivering

The Commentators were remarkably flexible in their interpretation and application of the Roman texts regardless of the original context. They did not hesitate to apply a text to address a current issue, no matter how obsolete they might know its real meaning to be, if its use could be fruitful. However, when they derived arguments from materials that had little or no relation to current affairs, they were not recklessly distorting Roman law to fit their own needs but were consciously adopting its principles to develop new ideas. Their use of the Roman texts was partly due to a feeling that it was important to support a conclusion by reference to some authority, no matter how reasonable in itself the conclusion might have been.

The reconciliation of the scholarly Roman law and local law that was achieved though the Commentators' work produced what is referred to as 'statute theory', the notion that in the fields of legal practice local statutes were the primary source, while Roman and canon law were supplementary. However, in spite of the priority bestowed on statutory law, the Roman law-based civil law could prevail in various ways. First, a statute might expressly embody elements of Roman law, and to that extent Roman law shared in the statute's primary authority. Second, a statute might contain technical terms or concepts, which would in almost all cases be construed in the civilian sense, especially since it was accepted that statutory enactments had to be interpreted in such a way as to involve the least possible departure from the civil law. Even when a statute required strict interpretation of its text, it could often be

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their decision. In the *consilia* problems caused by the interplay between diverse sources of law (local statutes, customs, etc) are tackled through the Roman law jurists' techniques of interpretation and argumentation.

argued that it required declaratory interpretation in light of other available legal sources.

The Commentators succeeded both in adapting Roman law to the needs of their own time and in imbuing contemporary law with a scientific basis through the theoretical elaboration of Roman legal concepts and principles.[29] Of particular importance was their contribution to the development of criminal law, commercial law, the rules of legal procedure and the theory of conflict of laws. It was the Commentators who constructed on the basis of the Roman texts on criminal law a legal science and who created a general theory of criminal responsibility. It was they who developed commercial law in such areas as negotiable instruments or partnership; who articulated the concept and principles of international private law; who devised the detailed rules of romano-canonical procedure on the basis of the Roman *cognitio* procedure; who formulated doctrines of legal personality for entities other than human beings; and who gave substance to the notion of the rights of a third party to a transaction and to the law of agency. The work of the Commentators played a major part in the creation of the *ius commune* and enabled the reception of Roman law throughout Western Europe in the fifteenth and sixteenth centuries.[30]

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29 In the words of the German jurist Paul Koschaker, "[the Commentators] drew from the treasures of Roman wisdom and legal technique that could be used at the time and made of it a basic part of the law of their time, thus preparing the unification of Italy in the field of private law; they in addition made of Roman law the substratum of a legal science, which was later to become European legal science." *Europa und das Römische Recht* (Munich and Berlin 1953), 93.

30 On the school of the Commentators see O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London 1994), 59 ff; P. Stein, *Roman*

The Reception of Roman Law

The thousands of students from all over Europe who had studied at Bologna and other Italian universities conveyed to their own countries the new legal learning based on the revived Roman law. Throughout Western Europe (in France, Spain, the Netherlands, Germany and Poland), universities were established where scholars trained in the methods of the Glossators and the Commentators taught the civil law on the basis of Justinian's texts. Their students formed a new class of professional lawyers whose members came to occupy the most important positions in both the administrative and judicial branches of government. Before the twelfth century, justice was administered by untrained jurors and based on local legal sources. In contrast, justice was now administered by professional judges appointed by a sovereign who could apply Roman law if local sources (either customary or statutory) were deficient. Through the activities of university-trained judges and jurists, the Roman law expounded by the Glossators and the Commentators entered the legal life of Continental Europe. It formed the basis of a

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Law in European History (Cambridge 1999), 71-74; D. Tamm, *Roman Law and European Legal History* (Copenhagen 1997), 206-8; F. Wieacker, *A History of Private Law in Europe* (Oxford 1995), 55 ff; W. Kunkel and M. Schermaier, *Römische Rechtsgeschichte* (Cologne 2001), 232 ff; N. Horn, "Die Legistische Literatur der Kommentatoren und der Ausbreitung des gelehrten Rechts" in H. Coing (ed.) *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. I: Mittelalter (1100-1500), Die gelehrten Rechte und die Gesetzgebung* (Munich 1973), 261-364; G. Wesenberg and G. Wesener, *Neuere deutsche Privatrechtsgeschichte* (Vienna and Cologne 1985), 28-39; H. Lange and M. Kriechbaum, *Römisches Recht im Mittelalter. Band II, Die Kommentatoren* (Munich 2007).

common body of law, a common legal language and a common legal science-a development known as the 'Reception' of Roman law.

Like the Latin language and the universal Church, the received Roman law served as an important universalising factor in the West at a time when there were no centralised states and no unified legal systems but a multitude of overlapping and often competing jurisdictions and sources of law (local customs and statutes, feudal, imperial and ecclesiastical law). However, the course of the reception was complex and characterised by a lack of uniformity. This derived from the fact that the way in which Roman law was received in different parts of Europe was affected to a great extent by local conditions, and the actual degree of Roman law infiltration varied from region to region. In areas of Southern Europe that had incorporated Roman law as part of the applicable customary law, the process of the reception may be described as a resurgence, refinement and enlargement of Roman law. This occurred, for example, in Italy where the influence of Roman law had remained strong and in Southern France where the customary law that applied was already heavily Romanised. In Northern Europe, on the other hand, very little of Roman law had survived and the process of the reception was prolonged with a much more sweeping impact in some regions at its closing stages. The common law (*ius commune*) of Europe that gradually emerged towards the close of the Middle Ages was the result of a fusion between the Roman law of Justinian (as elaborated by medieval scholars), the canon law of the Church and Germanic customary law. The dominant element in this mixture was Roman law, although Roman law itself experienced considerable change under the influence of local custom and the statutory and canon law.

The universal *ius commune* was juxtaposed with the *ius proprium*, the

local laws of the diverse medieval city-states and other political communities. Local law sometimes assumed the form of statute or, especially in earlier times, grew out of custom.[31] But the universal and local laws were not necessarily antithetical; they were complementary and each interacted with and influenced the other. Statutory enactments born out of the need to address situations not provided for by the *ius commune* were often formulated and interpreted according to the concepts developed by scholars of the *ius commune*. The scholars, in turn, with their concern for concrete problems of social and commercial life and the need to deal with the law as it actually existed, took the local law into consideration. In their roles as judges, lawyers and officials,

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31 The first compilations of city customary law appeared in the second half of the twelfth century in Venice and Bari. These collections were subsequently superseded by statutory enactments, i.e. legislation issued by a local legislative body. An enactment of this kind (*statutum*) was distinguished from a law of theoretical universal application (*lex*), which could be promulgated only by the emperor. In principle, a *statutum* was subordinate and could only supplement but not alter or derogate from a *lex*. In fact, however, local statutes that were irreconcilable with imperial laws often prevailed in the legal practice of the area or city in which they had been enacted. An important example of legislation issued by a monarch is the *Liber Constitutionum Regni Siciliae*, also known as *Liber Augustalis*, a legal code for the Kingdom of Sicily promulgated by Emperor Frederick II in 1231. This code remained the principal body of law in the Southern Kingdom until the eighteenth century. Royal legislation was also enacted in the County (later Duchy) of Savoy, the provinces of Sardinia, the Patriarchate of Aquileia and many other areas. In the domains of the Church, the most important legislative enactment was the *Constitutiones Sanctae Matris Ecclesiae*, also informally known as *Constitutiones Aegidianae*, issued in 1357 by Cardinal Gil of Albornoz, the legate to the papal state during Pope's residence in Avignon.

jurists trained in Roman law at Bologna and other law schools regarded local law as an exception to the *ius commune*, and therefore as something requiring restrictive interpretation. Furthermore, they tended to interpret local law based on concepts and terminology derived from Roman law, thereby bringing it into line or harmonizing it with the *ius commune*.[32]

The Reception of Roman law in France

In the period between the sixth and the ninth centuries, three bodies of law applied in France: under the system of the personality of the laws, the Germanic sections of the population were governed by their own laws and customs, whilst the Roman inhabitants of the country continued to live according to Roman law; at the same time, everyone in France (irrespective of ethnic origin) was bound by the laws promulgated by the Frankish monarchs. In the course of the ninth century, the

32 Even in parts of Europe where Roman law was not received in a normative sense, the conceptual structure created by the Glossators and the Commentators was sometimes employed to give a Roman form to indigenous customary rules. Thus, although the *ius commune* was not adopted in Norway and Hungary, local legislation exhibited a certain Roman influence. For example, the Norwegian Code of 1274 of King Magnus VI, while intended to be a written statement of ancient Viking custom, reflects an influence of Roman-canonical law in its organization and many of its institutions. Similarly, in Hungary the spirit of Roman law exercised an influence on the structure of Hungarian law and the character and development of legal thought. In areas as far off as the Ukraine and Belarus, where there was no reception, doctrines and practices of Roman law were introduced through the influence of Byzantine law.

personal system of laws began to disintegrate (as the fusion of the different races made its application virtually impossible) and yielded to a territorial system. The shift from the system of personality to that of territoriality coincided in time with the expansion and consolidation of the feudal institutions in France. Whilst the territory of every feudal lord was governed by its own customs, the customary law that applied in an area generally tended to derive from the predominant ethnic group. And since the Roman element was dominant in Southern France and the Germanic element prevailed in the North, the whole country was divided into two broad regions: the country of the written law (*Pays du Droit écrit*) in the South, where Roman law as embodied in various sources, such as the *Lex Romana Visigothorum* and later editions of the *Corpus iuris civilis*, prevailed; and the country of customary law (*Pays des Coutumes, droit coutumier*) in the North that featured the application of a variety of local customs with a Frankish-Germanic character. In both zones, the law in force also included elements derived from royal, feudal, and canonical sources.

In the South of France, the land of written law, the common law of the region was essentially Roman law (notwithstanding local differences). The Roman law of Justinian was rapidly received in Southern France and accepted as the living law of the land. This favourable reception was facilitated by the revival of Roman law in the late eleventh and twelfth centuries, and the spread of its study from Bologna to Montpellier and other parts of France. In the early twelfth century, a summary of Justinian's Code was produced in Southern France with the designation *Lo Codi* and based on the work of the Glossators. The study of Roman law received a fresh impetus with the establishment of new law schools at Toulouse and Orleans in the thirteenth century. In these schools and

the many others that sprang up in the years that followed the civil law was taught on the basis of Justinian's texts.[33]

In the northern regions of France, the country of customary law, a multitude of Germanic customs were in force. Some of these customs applied over a wider area (*coutumes générales*), whilst others were confined to a particular town or locality (*coutumes locales*)-there were sixty general customs and three hundred special or local customs. In this part of France, Roman law was regarded as a supplementary system invoked when the customary law was silent or ambiguous. Moreover, in certain areas of the law (such as the law of contracts and the law of obligations) the Roman system had been adopted and perceived as superior to customary law as well as better suited for tackling many new problems that emerged from the expansion of economic activity.

The administration of justice fell in the province of regional judicial and legislative bodies referred to as Parliaments (*Parlements*). In the country of customary law, the case law of the Parliament in Paris acquired special significance. Advocates attached to this body fostered legal development by means of an intensive literary activity that

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33 The *Ultramontani*, as the jurists at Toulouse, Orleans and Montpellier were referred to, employed essentially the same methods and composed the same types of legal work as their Italian colleagues at Bologna. The first professors of these universities were Frenchmen who had studied at Bologna, but later there were some who had received their training in France (such as Jacques de Revigny and Pierre de Belleperche, both of whom taught at Orleans). These later jurists were more interested in legal theory than the Italian Glossators, and adopted a more historical and more liberal approach to the study of the Roman legal sources. Moreover, they made a significant contribution to non-Roman areas of law, such as penal law and international private law.

pertained, largely, to the study of case law.[34]

From the beginning of the thirteenth century, the customs of many regions of Northern France began to be recorded. Several collections of customary law appeared, written in the vernacular but modelled on Roman law compilations. Some of these works, such as the *Les Livres de Jostice et de Plet* (The Books of Justice and Pleading), composed around 1260, reflect a strong influence of Roman law. In other works, such as the *Coutumes de Beauvaisis* (the customs of the county of Clermont in Beauvaisis) written in the late thirteenth century, the impact of Roman law is much less noticeable. Moreover, some of these compilations were private whilst others were issued under the authority of various feudal lords (*chartes de coutumes*). In general, the purpose of these works was to compile and present in a clear form the rules of customary law that applied in one or more regions so that these rules could more easily be proved in the courts of law.

In order to reduce the confusion caused by the multiplicity of customs, King Charles VII ordered the compilation of the customs of all regions of France in his Ordinance of Montils-les-Tours in 1453. Although the direction proved largely ineffectual, it was repeated by subsequent monarchs and most of the customary law had been committed to writing by the end of the sixteenth century. The consolidation of customary law through its official publication precluded the wholesale reception of Roman law in Northern France, although elements of Roman legal

34 In the course of time, the works of the Parisian advocates formed the basis of an extensive body of jurisprudence that was built upon the comparative study of the diverse local customs-a study that also paid attention to the great tradition of Roman law in France.

doctrine entered the fixed body of customary law by way of interpretation. Moreover, Roman law continued to apply in areas of private law on which customary law was silent. This interaction of Roman and customary sources infused the law that prevailed in Northern France with a distinctive character.

Although the publication of the customs removed much of the confusion caused by local differences, legal unity was certainly not achieved. In addition to the differences between Northern and Southern France, considerable regional diversity persisted even within each of the main territorial divisions. Legal unity was finally established in France with the introduction of the Napoleonic Code in 1804.

In the course of the one hundred and fifty years prior to the enactment of the French Civil Code, the academic study of Roman law reached a climax-a development associated with the writings of jurists such as Jean Domat (1625-1695) and Robert Joseph Pothier (1699-1772).

Domat was born in Clermont-Ferrand, where he served as judge until 1681. His best-known work is his *Les loix civiles dans leur ordre naturel*, published in three volumes between the years 1689 and 1694. After an examination of the entire recorded body of legal material (*droit écrit*) of his region (Auvergne), Domat concluded that it was permeated by an internal logic and rationality that pointed to the existence of certain universal or immutable legal principles (*loix immuables*). He noted that these natural principles are reflected best in the norms of private law; public law, on the other hand, is composed to a much larger extent of statutory laws of a changeable or arbitrary character (*loix arbitraries*). Domat asserted that the general principles of Roman law, as embodied in the codification of Justinian, met the criteria of the *loix immuables* and could be ascribed the status of a system. He argued, further, that

contemporary French language was capable of expressing this system in a clear and precise way.[35]

Pothier was born and studied in Orleans, where he served as judge and, from 1749, as university professor. His first major work, *La coutume d'Orléans avec des observations nouvelles*, published in 1740,[36] was concerned with the customary law of his hometown. His next important work was a comprehensive treatise on Roman private law, titled *Pandectae justineaneae in novum ordinem digestae cum legibus codicis et novellae* (1748-1752). This was followed by a series of works on a diversity of legal institutions.[37] In his writings, Pothier sought to overcome the problems for legal practice caused by the fragmentation of the law in France by means of a systematic restatement of fundamental Roman law concepts and principles.[38] In this way he contributed a great deal to the process of

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35 Domat was the first major academic jurist who challenged the connection between Roman law and its original language, Latin. With respect to the order of the various branches of private law, Domat first treated the general rules of law, then persons, property, obligations and, finally inheritance law. For a closer look at Domat's work see C. Sarzotti, *Jean Domat: Fondamento e metodo della scienza giuridica* (Turin 1995).

36 A revised edition of this work was published in 1760.

37 These included his *Traité des obligations I et II* (1761-1764); *Traité du contrat de vente* (1762); *Traité des retraits* (1762); *Traité du contrat de constitution de rente* (1763); *Traité du contrat de louage*; (1764); *Traité du contrat de société* (1764); *Traité de cheptels* (1765); *Traité du contrat de prêt de consomption* (1766); *Traité du contrat de dépôt et de mandat* (1766); *Traité du contrat de natissement* (1767); *Traité du contrat de mariage I et II* (1766); *Traité du droit de domaine de propriété* (1772); and *Traité de la possession et de la prescription* (1772). Pothier's works were widely used by jurists and lawyers throughout the eighteenth and nineteenth centuries. An important collection of these works in 11 volumes was published by Dupin in 1824/25.

38 For example, in his treatise on the institution of ownership Pothier

unification of private law in France.[39]

The Reception of Roman law in Germany

During the early Middle Ages, the law that applied in Germany was customary law that tended to vary regionally as a result of the shift from the system of personality to that of territoriality of the laws. Some of the customs applied over an entire region, whilst others were confined to a single city, village community or manor. After the establishment of the Holy Roman Empire of the German Nation in the tenth century, imperial law (concerned almost exclusively with constitutional matters) contributed as an additional source of law. Although the German emperors regarded themselves as successors of the Roman emperors and imperial legislation was influenced by the idea of a universal empire, initially there was no attempt to render Roman law applicable to all German regions as a form of common law that could replace local customs. In the twelfth and thirteenth centuries, Germans who had studied at the law schools of Italy and France introduced some knowledge of Roman law into Germany. However, the effect of this

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shows how, in a feudal system that encompassed several forms of property and related entitlements, the fundamental Roman law concept of property could be employed to overcome, in theory at least, many of the discrepancies of the current system.

39 The Code Civil adopted many of the legal solutions proposed by Pothier, especially in the field of the law of obligations. The drafters of the Code also adopted the systematic structure preferred by Pothier, which goes back to the classical Roman jurist Gaius and was followed by Emperor Justinian: persons; things (including obligations and succession); and actions.

activity on the applicable customary laws was limited as Roman law scholars were largely ignorant or contemptuous of the local laws, which they regarded as primitive in both form and substance and as unworthy of the serious attention of the learned.

In the thirteenth and fourteenth centuries, there appeared a number of compilations embodying the customary laws observed in certain regions of Germany. The most important of these works were the *Sachsenspiegel*, or the Mirror of the Saxons, composed around 1225 by Eike von Repgow and containing the territorial customary law observed in parts of Northern Germany;[40] the *Deutschenspiegel*, or Mirror of the Germans, published about 1260 in Southern Germany; and the *Schwabenspiegel*, or Mirror of the Swabians, a collection of the customs of Swabia published in the late thirteenth century.[41] These works aspired to provide a basis for developing a common customary law for Germany, but the centrifugal tendencies that prevailed were too strong to be overcome by these works. The formulation of a native common law for the entire country based upon Germanic sources was impossible. This derived from the weakness of the imperial power that was exacerbated by the political splintering of the empire in the late thirteenth century, and the multitude and diversity of the local customs. A further obstacle to the attainment of legal unity was the fact that there was no organized professional class of lawyers interested in developing a common body of law. The administration of justice was in the hands of lay judges, the *schoffen*, who

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40 The *Sachsenspiegel*, a work of outstanding quality, achieved great prestige and authority throughout Germany. Modern commentators regard it as the beginning of Germanic legal literature.

41 Both the Mirror of the Germans and the Mirror of the Swabians reflect some influence of Roman law.

had the task of declaring the applicable law for a particular issue in court by reference to the customary law that applied in each district. However, the pronouncements of the *schoffen* were only concerned with particular cases and reflected the personal views of laymen who were not necessarily guided by generally established rules or principles-thus, they added to the uncertainty surrounding the application of customary law.

In the fifteenth century, the problems generated by the fragmented nature of the law in Germany became intolerable as commercial transactions proliferated between different territories. Local custom was no longer adequate to meet the needs of a rapidly changing society, and the weakness of the imperial government meant the unification of the customary law by legislative action alone was unthinkable. If a common body of law could not be developed based on Germanic sources, another system offered a readily available alternative, namely Roman law. The acceptance of Roman law in Germany was facilitated by the idea that the Holy Roman Empire of the German Nation was a continuation of the ancient Roman Empire.[42] In this respect, Roman law was viewed not as a foreign system of law but as a system that continued to apply within the empire as its common law. This idea found support in the newly established German universities, where the teaching of law was based exclusively on Roman and canonical sources[43] whilst Germanic customary law was almost completely ignored. Like the jurists of other countries, German jurists regarded Roman law as superior to the native law and

42 The Emperor of the Holy Roman Empire was at the same time king of Germany and of Italy.

43 The methods of study and the legal materials used were substantially the same as those employed in Italian universities.

existing in force both as written law (*ius scriptum*) by virtue of the imperial tradition and as written reason (*ratio scripta*) due to its inherent value.

At a practical level, the reception of Roman law in Germany was facilitated by the establishment in 1495 of the Imperial Chamber Court (*Reichskammergericht*) by a legislative act of Emperor Maximilian I (1493-1519). This act focused on the centralisation of the German system of judicial administration and was part of Maximilian's broader political program designed to restore the power of the monarchy and to secure legal and political unity. The new imperial court, which heard appeals from regional and local courts, was directed to decide cases 'according to the imperial and common law and also according to just, equitable and reasonable ordinances and customs'. Since *doctores iuris* (jurists trained in Roman law) dominated the composition of the court, the term 'common law' was naturally interpreted as meaning Roman law. The significance of the 1495 legislation was that it formally acknowledged Roman law as positive law in Germany. Pursuant to this law, judges were required to apply Roman law only when a relevant custom or statutory provision could not be proved. In practice, the difficulty in proving an overriding German rule meant that Roman law became the basic law throughout Germany. The model of the Imperial Chamber Court was followed by the territorial courts of appeal established by local princes in Austria, Saxony, Bavaria, Brandenburg and other German states. At the same time, the courts where lay judges still presided increasingly relied on the advice of learned jurists (city advocates, state officials and university professors) for information and guidance concerning local as well as Roman law. In the course of time, the role of the lay judges diminished and the administration of justice was dominated by professional lawyers

who had been trained in Roman and canon law at the universities. By the end of the sixteenth century, it had become common practice for judges to seek the advice of university professors on difficult questions of law arising from actual cases. The opinion rendered was regarded as binding on the court that had requested it. This practice (***Aktenversendung***) prevailed until the nineteenth century, entailing the accumulation of an extensive body of legal doctrine that applied throughout Germany.

By the end of the sixteenth century, Roman law had become firmly established as the common law of Germany.[44] Germanic law had largely been rejected in favour of the more advanced Roman system and German jurisprudence had become essentially Roman jurisprudence. The Roman law that was received embodied the Roman law of Justinian as interpreted and modified by the Glossators and the Commentators. This body of law was further modified by German jurists to fit the conditions of the times and thereby a Germanic element was introduced into what remained a basically Roman structure. In some parts of Germany (such as Saxony), Germanic customary law survived and certain institutions of Germanic origin were retained in the legislation of local princes and of cities. Legal practitioners and jurists from the sixteenth to the eighteenth century executed the process of moulding into one system the Roman and Germanic law, which led to the development of a new approach to the analysis and interpretation of the Justinianic Roman law-referred to as *Usus modernus Pandectarum* ('modern application of the Pandects/ Digest').[45] This approach continued to be followed in Germany, subject to

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44 German scholars use the phrase '***Rezeption in complexu***', that is 'full reception', to describe this development.

45 Although this approach externally appears to be a continuation of the

local variations, until the introduction of the German Civil Code in 1900.

Bartolist method, under the influence of Legal Humanism (see relevant discussion below) it gave rise to a different doctrine about the sources of law: whereas Roman law continued to be regarded as an important source of law, local law was no longer viewed as an aberration from Roman law but as a further development of Roman law through custom. Thus, the *Usus modernus Pandectarum* elevated the importance of local law, which now became the subject of systematic scientific study. As far as Roman law is concerned, the term *Usus modernus Pandectarum* implies that the jurists' purpose was to apply the Roman legal texts in contemporary legal practice. The representatives of this approach may to some extent have been influenced by the work of the Humanist jurists, but they tended to use the Roman texts ahistorically, as just another source of legal norms. However, there was no general agreement among jurists as to which texts actually applied. It should be noted that the methods of the *Usus modernus* movement were adopted by many French and Dutch jurists. Leading representatives of this movement include Samuel Stryk (1640-1710), a professor at Frankfurt a.d. Oder, Wittenberg and Halle; Georg Adam Struve (1619-1692); Ulric Huber (1636-1694); Cornelis van Bynkershoek (1673-1743); Arnoldus Vinnius (1588-1657); Gerard Noodt (1647-1725); and Johannes Voet (1647-1713). On the *Usus modernus Pandectarum* see F. Wieacker, *A History of Private Law in Europe* (Oxford 1995), 159 ff; D. Tamm, *Roman Law and European Legal History* (Copenhagen 1997), 225; A. Söllner, "Usus modernus Pandectarum" in H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. II: Neuere Zeit (1500-1800), 1. Teilband, Wissenschaft* (Munich 1977), 501-516; R. Voppel, *Der Einfluß des Naturrechts auf den Usus modernus* (Köln 1996); H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte, Rechtsentwicklungen im europäischen Kontext* (Heidelberg 2005), 76-83.

The ius commune in Italy, the Iberian Peninsula and the Netherlands

By the close of the fifteenth century, the medieval world of the Italian city-states had evolved into the Kingdom of Naples in the south, the Papal States and Tuscany in central Italy, Piedmont, Lombardy under Milan, the Republic of Venice and a number of lesser states.[46] The Kingdom of Naples was a centralized state with a hierarchy of courts, more akin to France or Spain than the rest of Italy. The continued political fragmentation of Italy did not affect the application of civil law and the working of the courts, which maintained the traditional blending of the Roman law of the Glossators and Commentators, canonical procedure and general and particular custom. The great medieval treatises of Bartolus and Baldus, in particular, continued to enjoy high esteem. The legal literature that emerged in university towns, such as Bologna, Padua, Pavia and Naples, although frequently concerned with local needs, became part of the pan-European *ius commune*-a process facilitated by the invention of the printing press in the late fifteenth century.[47] Italian scholars of the late fifteenth and early sixteenth centuries, such as Giasone del Maino (1435-1519) and Filippo Decio (1454-*c.* 1535), sought to combine the tradition of the *ius commune* with the ideals of the new humanist learning. After the integration of Italy into the Napoleonic state, the French Civil Code was introduced in the

46 These included Siena, Ferrara and Mantua.

47 As already noted, the local laws were not necessarily in conflict with the universal ones: many laws born out of the need to address situations not provided for by the *ius commune* were formulated and interpreted in accordance with concepts devised by jurists of *the ius commune*.

country (1806). Even though the *ius commune* continued to exist even after the restoration of the Italian states following the defeat of Napoleon (1815), a growing number of states began to draw up their own law codes (the so-called *codici preunitari*). The earliest among these, the codes of the Kingdom of Naples (1819) and the Duchy of Parma (1820), were modelled closely on the French Civil Code, while the later ones of Piedmont (1837) and Modena (1851) represent a peculiar blend of French style and traditional local elements. In Lombardy and Venice, which had been returned to the rule of the Austrian emperors, the Austrian Civil Code (ABGB) of 1811 was put into force.[48]

Any consideration of the development of law in Spain must take into account the fluid relationships between the different peoples that settled in the Iberian Peninsula and the changing fortunes of the diverse states that evolved in medieval times. As noted earlier, in the second half of the fifth century the Germanic tribe of the Visigoths was successful in establishing a permanent rule on the Peninsula.[49] In the period that followed, Roman personal law, as embodied in the *Lex Romana Visigothorum*, coexisted with the laws of the Visigoths (who never amounted to more that 5% of the total population). In the course of time, as the two ethnic groups merged, a territorial law, permeated in both substance and form by Roman law, prevailed. This law was embodied in the *corpus iuris* promulgated for all citizens by the Visigothic king Recceswinth in *c.* 654. The new law code, referred to as *Liber Iudiciorum* or *Lex Visigothorum*, remained the basis of law in Spain until the fifteenth

48 The ABGB combined natural law ideas, especially in the fields of the law of persons and family law, with Roman law concepts and principles.

49 The capital of the Visigothic kingdom was Toledo.

century, governing the Christian population even during the long Muslim rule (from 711). During the period when Christian forces were pushing back those of Islam, a diversity of states of varying sizes and significance emerged in the territory of present-day Spain: Castile (later reunited with León), including Galicia and the Basque region; Aragon; Catalonia; Navarre; and the Balearic Islands.

The legal development of Castile-León deserves special mention because of the important role this state played in the unification of Spain. In this realm the king exercised supreme jurisdiction as the natural lord of all his subjects. The growing influence of the court of *alcades de corte*, or of the royal household, composed of professional judges, diminished the importance of local customs of a largely Germanic origin, called *fueros* or *usus terrae*. In the course of the thirteenth and fourteenth centuries men trained in Roman law at the universities (*letrados*) became influential and attained high office in the royal service. A large number of students from Spain attended Bologna, and this trend continued even after the first Spanish universities were established (in Palencia, Salamanca, Seville and Lerida) in the thirteenth century.[50] The Spanish jurists spread the knowledge of Roman law and the methods of the Glossators and the Commentators throughout the Iberian Peninsula. The most significant product of this growth of the study of Roman law was the famous *Libro de las leyes*, commonly called the *Las Siete Partidas* (The Seven Parts [of the Law]), compiled by order of King Alfonso X the Learned during the period 1256-1265. This work, drafted largely by jurists of the University

50 So numerous were the students from Spain studying at Bologna that in 1346 a special college was set up for them there by the Spanish Cardinal Gil of Albornoz.

of Salamanca, contains a large number of legal rules on marriage, contracts, inheritance and procedure, derived from a variety of Roman and canonical sources.[51] The enforcement of *Las Siete Partidas* as the common law of Spain was delayed due to the opposition of Spanish traditionalists, who remained loyal to their local customs. Only in 1348 was it promulgated as general law (by the *Ordenamiento de Alcalá*, a compilation of laws enacted by the courts of Alfonso XI in Alcalá de Henares), even though it remained subordinate to local custom. However, as local customs needed to be proved to a court as actually being observed, whilst there was always a presumption in favour of *Las Siete Partidas*, the later work gradually came to prevail as the official law of Spain. The accompanying reception of the learned law of the *ius commune* was so massive that the monarchs decreed that the courts, when faced with gaps in the law, should rely on the authority of the major Glossators and Commentators.[52] Although *Las Siete Partidas* was rearranged at various times as political conditions evolved, it remained the foundation of law in Spain until it was superseded by the *Codigo Civil* of 1889.

In neighbouring Portugal the law that applied was at first derived from the *Liber Iudiciorum* of the Visigoths, as extended in 1054 by King Alfonso V of León, and local customs. But, in the course of time, the *ius*

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51 These sources include the *Corpus Iuris* of Justinian, the *Decretum* of Gratian, the *Decretales* of Gregory IX, and the works of some of the most famous of the Glossators, especially Azo and Accursius on civil law, and Goffredo of Trani and Raymond of Peñafort on canon law.

52 To avoid confusion, in 1427 John II, King of Castile and León, ordained that the courts should not follow, as authorities, the opinions of jurists later that Johannes Andreae (Giovanni d'Andrea) on canon law and Bartolus on Roman law. Later, by a law of 1499, Baldo was also included.

commune was received in this country too, with the principal centres of legal learning being the universities of Coimbra and Lisbon. It is thus unsurprising that the first comprehensive collection of Portuguese laws, the *Ordenações Afonsinas*, enacted by King Alfonse V in 1446, in large part consisted of Roman and canon law. This compilation was followed by the *Ordenações Manuelinas*, promulgated by King Manuel in 1521, and finally in 1603, during the reign of King Philip II, by the *Ordenações Filipilinas*, which remained in force until modern times not only in Portugal, but also in its colonies, such as Brazil. These enactments embodied the principle that Roman law and the works of the Glossators and the Commentators constituted the common law of the realm that was applicable whenever local legislation or customs were silent or ambiguous.

In the Netherlands, as in most areas of Western Europe, the revival in the study and application of Roman law in the High Middle Ages led to a major reception of Roman legal norms, concepts and principles, so that by the end of the sixteenth century Dutch law bore a heavily Romanised look. This development occurred at a time when the material prosperity of Holland had advanced considerably, owing largely to the growth of trade and commerce, and so a more sophisticated legal system was required to meet the new conditions. Instances of Roman legal influence were particularly evident in the fields of the law of property, contract and delict, as these were the areas where Roman law was considered to be far superior to the indigenous Dutch law. However, in spheres such as the law of persons and intestate succession, local customary laws largely resisted the Roman reception. Moreover, even in the areas of property and contract, Dutch jurists were cautious in their selection of Roman rules, and tended to reject archaic and formalistic concepts. The outcome of this process was thus a hybrid legal system, consisting of Roman and

Dutch elements, which came to be known as Roman-Dutch law.[53] The principal centre of Roman legal studies in the Netherlands was the University of Leyden, established in 1575. In the period that followed more universities were founded at Franeker in Friesland (1585), Groningen (1614), Utrecht (1636) and Harderwijk in Gelderland (1648). Legal development in the seventeenth and eighteenth centuries was based largely on the work of the Dutch professors, especially those of Leyden, who, together with the judges of the High Courts of the provinces, created a highly advanced body of law derived from the synthesis of legal science and legal practice.[54] In 1652 Roman-Dutch law was introduced to South Africa, with the result that the Roman and Dutch texts became authoritative sources of South African law.[55]

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53 The term 'Roman-Dutch law' was introduced in the seventeenth century by the jurist Simon van Leeuwen, who used it as a title in his principal work, *Roomsch Hollandsch Recht* (1664).

54 The greatest product of the Leyden law faculty was Hugo Grotius, author of the famous work *De iure belli ac pacis* (1625). Grotius also published a work entitled an Introduction to the Jurisprudence of Holland (*Inleidinge tot de Hollandsche Rechtsgeleerdheid*, 1631), in which he treats the law of Holland as a unique amalgam of Germanic custom and Roman law. Reference should also be made here to Arnold Vinnius (1588-1657), a law professor at Leyden, who established Dutch legal science as a mixture of Roman, customary and natural law elements; Johannes Voet (1647-1714), another Leyden professor, author of the influential *Commentarius ad Pandectas*, published in two volumes in 1698 and 1704; and Ulrich Huber (1636-1694), a professor at the University of Franeker, whose works *De iure civitatis libri tres* (1672) and *Paelectiones iuris civilis* (1678-1690) are built up largely from Roman materials. The widespread influence of the Dutch masters throughout Europe is attested by the large numbers of foreign editions of their principal works in the seventeenth and eighteenth centuries.

55 It should be noted here that unlike the Continental European legal

The Humanists and the School of Natural Law

The school of the Commentators entailed a shift in scholarly attention from the dialectical examination of Justinian's texts to the consideration of the adaptability of Roman law to the needs and conditions of medieval life. But as the Commentators were primarily interested in developing contemporary law, they tended to disregard the historical framework and the primary sources of Roman law. From the fifteenth century the growing interest in the cultural inheritance of classical antiquity, associated with the rise of humanistic scholarship, led to the development of a new approach to the study of Roman law. Scholarly attention now focused on the consideration of Roman law as a historical phenomenon, and special emphasis was placed on the techniques of history and philology for its proper understanding and interpretation. The methods used by the Commentators to study Justinian's texts prompted the formulation of theories, which, from the Humanists' perspective, were utterly unwarranted when the ancient texts were considered in their proper historical context; therefore, such theories were rejected in favour of interpretations based upon the true historical sense of the texts. Thus, the chief aim of the Humanist scholars

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systems, but like the English common law, Roman-Dutch law in South Africa has not been codified. It is thus unsurprising that law courts and commentators have to grapple, even today, with the historical sources of the *ius commune* and its Dutch variant. Special attention is given to seventeenth and eighteenth century Dutch authorities, such as Grotius, Voet and Vinnius, although other works from the entire body of learned literature from Bartolus to the German Pandectists, and even the sources of Roman law itself, are regularly consulted in areas like property, contract and succession.

was the rediscovery of the Roman law existing in Roman times by applying the historical method instead of the scholastic method of the medieval Commentators (referred to as *mos Italicus*). A considerable part of the Humanists' work concerned the detection of the interpolations in the Justinianic codification, which was an important step towards uncovering the true character of classical Roman law.

The new school of thought was initiated in France by the Italian Andreas Alciatus (1492-1550), but its effects resonated all over Europe.[56] The method adopted by the Humanist scholars in France for the study of Roman law became known as *mos gallicus* (in contradistinction with the *mos italicus* of the Bolognese jurists) or *Elegante Jurisprudenz*. In general, however, the Humanist movement appears to have insignificantly influenced the practice of law as the courts in France and elsewhere remained faithful to the Bartolist tradition. This was largely due to the fact that most Humanists were concerned chiefly with the historical analysis of Roman law and paid little attention to problems relating to the practical application of the law or the need to adapt Roman law to contemporary conditions. At the same time, however, the Humanists' approach to Roman law as a historical phenomenon inspired the appreciation of the jurists for the differences between Roman law and the law of their own era. By drawing attention to the historical and

56 The centre of the Humanist School was the University of Bourges in France. Among the most important representatives of this school, which included not only jurists but also historians and philologists, were Jacques Cujas (Cuiacius, 1522-1590), Hugues Doneau (Donellus, 1527-1591), Guillaume Bude (Budaeus, 1467-1540), Ulrich Zasius (1461-1535), Antoine Favre (Faber, 1557-1624), Charles Annibal Fabrot (Fabrotus, 1580-1659) and Jacques Godefroy (Godofredus, 1587-1652).

cultural circumstances in which law develops, the Humanists prepared the ground for the eventual displacement of the *ius commune* and the emergence of national systems of law.[57]

In the seventeenth and eighteenth centuries, European legal thought moved in a new direction under the influence of the School of Natural law. The new school challenged the supreme authority that medieval jurists had accorded to the codification of Justinian. It did so on the grounds that the *Corpus Iuris Civilis* was an expression of a particular legal order whose rules, like those of any other system of positive law, must be assessed in the light of norms of a higher order, eternal and universally valid-the norms of Natural law. Natural law was construed as rational in its content, since its norms could be discovered only by the use of reason, logic and rationality. It was also regarded as common to all humankind of all times and possessing a higher moral authority than any system of positive law. From this point of view, the Natural Law scholars rejected certain 'irrational' features of the Roman legal system illuminated by the Humanists, such as the remnants of the old Roman formalism in the *Corpus Iuris Civilis*, as being specific to the Roman system of social organization and restricted in time. At the same time,

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57 On the influence of the Humanist movement see P. Stein, *Roman Law in European Legal History* (Cambridge 1999), 75ff; D. Maffei, *Gli inizi dell'umanesimo giuridico* (Milan 1956); D. R. Kelley, *Foundations of Modern Historical Scholarship: Language, Law and History in the French Renaissance* (New York 1970); O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London 1994), ch. 10; M. P. Gilmore, *Humanists and Jurists* (Cambridge Mass. 1963); F. Wieacker, *A History of Private Law in Europe* (Oxford 1995), 120 ff; W. Kunkel and M. Schermaier, *Römische Rechtsgeschichte* (Cologne 2001), 237-8; G. Kisch, *Humanismus und Jurisprudenz. Der Kampf zwischen mos italicus und mos gallicus an der Universität Basel* (Basel 1955).

however, they recognized that Roman law contained many rules and principles that reflected or corresponded to the precepts of natural law-rules and principles that they regarded as the product of logical reasoning on the nature of man and society, rather than the expression of the legal development of the Roman state. The Roman doctrine of *ius gentium* and *ius naturale*, in particular, seemed to support their theories. Many legal principles espoused by Roman jurists appeared as suitable materials to use for establishing a rational system of law. Regarding their methodology, the Natural Law scholars, relied on deductive reasoning to extract from a small number of general concepts abstract principles of universal application, which could form the basis for developing an orderly and comprehensive system of law. A leading represenative of the School of Natural Law was the Dutch scholar Hugo Grotius (1583-1645), who laid the foundations for the development of modern international law in his work *De Iure Belli ac Pacis* (Concerning the Law of War and Peace).[58] The Natural Law School, with its system-building approach to law, prompted a renewed interest in codification as a means of integrating the diverse laws and customs of a national territory into a logically consistent and unitary system.[59]

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58 Other important members of the School are Samuel Pufendorf (1632-1694), Christian Thomasius (1655-1728) and Christian Wolf (1679-1754).

59 On the rise and influence of the School of Natural law see A. P. D' Entreves, *Natural Law: An Introduction to Legal Philosophy*, 2nd ed. (London 1970); O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London 1994), ch. 13; F. Wieacker, *A History of Private Law in Europe* (Oxford 1995), ch. 15; P. Stein, *Roman Law in European History* (Cambridge 1999), 107-10; D. Tamm, *Roman Law and European Legal History* (Copenhagen 1997), 231 ff; C. von Kaltenborn, *Die Vorläufer des Hugo Grotius auf dem Gebiete des Ius naturae et gentium, sowie der Politik im Reformationszeitalter* (Leipzig

The codification movement

In the seventeenth and eighteenth centuries, the rise of nationalism and the consolidation of royal power in Europe entailed an increased interest in the development of national law and this, in turn, precipitated the movement towards codification. The demand that law should be reduced to a code arose from two interrelated factors: the necessities to establish legal unity within the boundaries of a nation-state, and develop a rational, systematised and comprehensive legal system adapted to the conditions of the times. The School of Natural Law had a rationalist approach to institutional reform and emphasized comprehensive legal system-building and thus provided the ideological and methodological basis to launch the codification movement. The unification of national law through codification engendered the eventual displacement of the *ius commune* and thus Roman law ceased to exist as a direct source of law. But as the drafters of the codes greatly relied on the *ius commune*, elements of Roman law were incorporated in different ways and to varying degrees into the legal systems of Continental Europe.

The first national codes designed to achieve legal unity within one kingdom were compiled in Denmark (1683) and Sweden (1734). The process of codification continued in the late eighteenth and early nineteenth centuries with the introduction of codes in Bavaria (1756), Prussia (1794) and Austria (1811). The Natural law philosophy exercised a strong influence on both the contents and structure of these codes. But

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1848, reprint Franfurt 1965); H. Thieme, *Das Naturrecht und die europäische Privatrechtsgeschichte*, 2nd ed. (Basel 1954); H. Welzel, *Naturrecht und materiale Gerechtigkeit*, 4th ed. (Göttingen 1962).

the most important codificatory event of this period was Napoleon's enactment in 1804 of the French Civil Code (*Code civil des francais*). The chief aim of Napoleon's Code was to unify the law of France by fusing Roman law, customary law, royal ordinances and some laws of the revolutionary period into one comprehensive system. In this respect it succeeded brilliantly. The importance of the Code is attributed to not only the fact that it fostered legal unity within France, but also the fact that it was adopted, imitated or adapted by many countries throughout the world. This was partly due to its clarity, simplicity and elegance, which made it a convenient article of exportation, and partly due to France's influence in the nineteenth century.[60]

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60 In the course of the Napoleonic conquests and the subsequent political and administrative reshaping of many European countries the French Civil Code was introduced into the western regions of Germany, the low countries, Italy, Spain and other parts of Europe. Then, during the colonial age, France extended her legal influence far beyond Continental Europe to parts of the Middle East, Northern and sub-Saharan Africa, Indochina, Oceania, French Guiana and the French Caribbean islands. But the influence of French law both outlived and went beyond the Napoleonic conquests and French colonialism. To this day, the French Civil Code remains in effect, with revisions, in Belgium and Luxemburg. Moreover, the *Code Civil* had a major influence on the Netherlands Civil Code of 1838 (whose spirit has naturally influenced the new civil code of the Netherlands enacted in 1992); the law codes of the Italian federal states prior to 1860 and the first *Codice Civile* of 1865; the Portuguese Civil Code of 1867 (replaced in 1967); the Spanish Civil Code of 1889; the Romanian Civil Code of 1864; and some of the Swiss cantonal codes. Furthermore, when the Spanish and Portuguese empires in Latin America disintegrated in the nineteenth century, it was mainly to the French Civil Code that the legislatures of the newly independent nations of Central and South America looked for inspiration.

In Germany the French Civil Code attracted a great deal of attention and, as Napoleon extended his rule over Europe, it was adopted in parts of the country. The rise of German nationalism during the wars of independence compelled many scholars to express the need for the introduction of one uniform code for Germany to unite the country under one modern system of law and precipitate the process of its political unification. In 1814, Thibaut, a professor of Roman law at Heidelberg University, declared this view in a pamphlet entitled 'On the Necessity for a General Civil Code for Germany'. Thibaut, a representative of the Natural Law movement, claimed that the existing French, Prussian and Austrian Civil Codes could serve as useful models for the German draftsmen. Thibaut's proposals encountered strong opposition from the members of the Historical School, headed by the influential jurist Friedrich Carl von Savigny (1779-1861).[61] Savigny's thesis, elaborated in a pamphlet entitled 'On the Vocation of our Times for Legislation and Legal Science', asserted that law, like language, ethics and literature, was a product of the history and culture of a people, a manifestation of national consciousness (*Volksgeist*), and could not be derived from abstract principles of natural law by logical means alone. From this point of view, Savigny argued that the introduction of a German Code should be postponed until both the historical circumstances that moulded the law in Germany were fully understood and the needs of the present environment were properly assessed.

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61 The rise of the Historical School was one manifestation of the general reaction to the rationalism of the School of Natural Law and the political philosophy associated with the French Revolution and the regime of Napoleon.

The early proposals for codification were abandoned due to the influence of the Historical School and, perhaps more importantly, the lack of an effective central government. At the same time, scholarly attention shifted from the largely a-historical Natural Law approach to the historical examination of the two main sources of the law that applied in Germany, namely, Roman law and Germanic law, so as to develop a true science of law. A group of scholars focused on the study of Germanic law, whilst others, including Savigny himself, concentrated on the study of Roman law and explored beyond the *ius commune* into the *Corpus Iuris Civilis* and other ancient sources. The latter jurists set themselves the task of studying Roman law to expose its 'latent system', which could be adapted to the needs and conditions of their own society. In carrying out this task these jurists (the Pandectists), elevated the study of the Corpus Iuris and especially the Digest to its highest level. They produced an elaborate and highly systematic body of law (*Pandektenrecht*) for nineteenth century Germany.[62] However, eventually the Pandectists, convinced of the superiority and eternal validity of Roman law, adopted a largely a-historical and primarily doctrinaire approach to law. Their chief objective was to construct a legal system where all particular rules could be derived from and classified under a set of clearly formulated juridical categories and abstract propositions. Although this way of thinking received severe criticism from other scholars, especially those belonging to the Germanist branch of the Historical School, the Pandectists played an important part in the process towards the codification of the civil law

62 Leading representatives of the Pandectists were Georg Puchta, Adolf Friedrich Rudorff, Ernst Immanuel Bekker, Alois Brinz, Heinrich Dernburg, Rudolf von Ihering and Bernhard Windscheid.

in Germany; this began in 1874, three years after the political unification of the country under Bismark. The German Civil Code (***Burgerliches Gesetzbuch*** or BGB) was finally promulgated in 1896 and came into force in 1900. Its chief characteristics are its highly systematic structure and its conceptualism-in both these respects it owes much to the contribution of the Pandectist School. Like the French Code, the German Code has acquired a wide acceptance outside the frontiers of Germany.[63]

The Civil Law Tradition

Legal scholars use the term 'civil law systems' to describe the legal systems of all those nations predominantly within the historical tradition derived from Roman law as transmitted to Continental Europe through the *Corpus Iuris Civilis* of Emperor Justinian.[64] When we refer to the civil

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63 The German Civil Code played a significant part in the codification of civil law in a number of countries, such as Italy, Greece, Portugal and Japan. Either via Japan or directly, the German civil law influence also spread to Korea, Thailand and partly also China. Furthermore, the legal science that preceded and accompanied the German Code has had considerable influence on legal theory and doctrine in several countries in Central and Eastern Europe, particularly in Austria, Hungary, Switzerland, and the former Yugoslavia.

64 The theme of legal tradition focuses attention on the notion that law and the understanding of law involve much more than the description and analysis of statutes and judicial decisions. Law cannot be fully understood unless it is placed in a broad historical, socio-economic, political, psychological and ideological context. As J. H. Merryman explains, a legal tradition is not simply a body of rules governing social life; it embraces "deeply rooted, historically conditioned attitudes about the nature of law,

law systems as belonging to a single legal family, we are calling attention to the fact that, despite the considerable national differences among themselves, they are characterized by a fundamental unity. The most obvious element of unity is naturally provided by the fact that they are all derived from the same sources, and that they have classified their legal institutions in accordance with a commonly accepted scheme that existed prior to their own development and that, at some stage in their evolution, they took over and made their own.

The historical origins and development of a legal system is a factor that sets that system apart as a member of the civil law family. But, upon closer examination, history is also a factor that explains the internal differentiation within the civil law. It is thus unsurprising that contemporary comparative law scholars identify sub-categories of legal systems within the civil law family, with the Romanistic-Latin or French and the Germanic systems forming two secondary groupings or sub-families.[65] The distinctive French and German legal codifications and juristic styles each exerted a far-reaching influence worldwide, and to some extent their influences overlapped. Indeed, one might argue that the 'typical' civil law systems today are not those of France and

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the role of law in society and the polity, the proper organization and operation of a legal system, and about the way law is, or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective". *The Civil Law Tradition: an Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed. (Stanford, Calif. 1985), 2.

65 Consider on this matter R. David and J. Brierley, *Major Legal Systems in the World Today*, 3rd ed. (London 1985), 35; K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd ed. (Oxford 1987), 68-75.

Germany, but rather those systems that have undergone a combined influence of both. Nevertheless, in the post-codification period, French law and German legal science have constituted the two main tributaries to the civil law tradition.

In the foregoing discussion we have traced the long and intricate process that culminated in the codification of the civil law in Europe. The codes constitute a new point of departure in the development of the civil law. In the years following the publication of the codes, the dynamics of legal change have worked primarily through special legislation and judicial interpretation, as well as through code revision, constitutional law and the harmonization of law at a European or regional level. Legislatures in civil law countries responded to changes in society and the economy by excising large areas of the law from the domain of the civil codes. They also created entirely new areas of law that fall outside the scope of the codes, such as employment law, insurance law, competition law, and landlord and tenant law. Furthermore, legislatures endeavoured to update the civil codes by modifying their texts. Both the French and German codes have been amended several times since their introduction. In general, code revision has been more extensive in the area of family law than in any other areas. Many family law reforms were precipitated by constitutional provisions introduced after the Second World War and by international conventions promoting new ideas of equality and liberty that were at variance with the patriarchal family law of the civil codes. In other areas of the law, legislatures have often encountered difficulty in forging the necessary changes within the structure of the civil codes. To deal with this problem, legislatures have resorted to the introduction of special statutes outside the codes-statutes that could more easily be amended as socio-economic conditions change.

While legislatures created and developed bodies of law outside the sphere of the civil codes, the courts have introduced new rules through the interpretation of the code provisions. This judicial adaptation of the codes to new social and economic conditions has produced a new body of law, which is based on the expansion through interpretation of the existing legislative texts. In some civil law countries, such as France, this process has been facilitated by the structural characteristics of the civil code-its gaps, ambiguities and incompleteness. The drafters of the French Civil Code never imagined or anticipated the litigation-producing aspects of modern life such as industrial and traffic accidents, telecommunications, the photographic reproduction of images and mass circulation of publications. Thus, it is no surprise that in essence the modern French law of torts is almost entirely judge-made. Regarding the later codes, such as the German Code, the judicial adaptation of the civil law to changing social and economic conditions was facilitated by the inclusion in the codes of 'general clauses'-provisions that deliberately leave a large measure of discretion to judges. Although traditional civil law theory denies that judges make law or that judicial decisions can be a source of law, contemporary civil law systems are more openly recognizing the unavoidable dependence of legislation on the judges and administrators who interpret and apply it.

Although the oldest legal tradition in the Western world, civil law continues to evolve. In the course of its development it has spawned different sub-traditions and has exported its ideology and legal ideas throughout the world. Furthermore, it has influenced the law of the European Community in structure, style of reasoning and ethos and continues to play an important part in the process of harmonisation of law in Europe. Few would deny that the civil law is gradually converging

with the common law, at least to the extent of its growing reliance on case law. As the exchange of ideas among civil law, common law and other legal systems gains momentum, some of the differences separating these systems tend to wither away. Nevertheless, significant differences remain. At its heart, civil law remains very much a unique tradition in its own right by virtue of, among other things, its predominant forms of legal reasoning and argumentation, ideas concerning the divisions of law and the organization of justice, reliance on elaborations of statutory and codified precepts, and approaches to legal scholarship and education. The changes in the legal universe that have been taking place in the last few decades, associated with the ongoing tendencies of globalization and regional integration, make it difficult for us to predict how the civil law tradition will evolve or how it will be described by future observers. However, we can be reasonably certain that this oldest and most influential of the Western legal traditions has entered a new phase of development and that it will continue to adapt itself to the challenges of an ever-changing world.