Roman Law and European Culture

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The European legal tradition was characteristically shaped by the ius commune which, in turn, was largely based on Roman law. This paper attempts to specify these intellectual connections. In addition, it examines the essential features of Roman law in classical antiquity, analyzes changes in the perception of Roman law, and explores the questions: How Roman is "contemporary" Roman law? How European is the "European" legal tradition?

European Culture

This paper addresses the subject of Roman law and European culture. All of the terms used in, and assumptions made by, that title are disputed or problematical. "Culture" is a notoriously multi-faceted and shifting concept, known especially in anthropological and sociological writing, that is supposed to capture the specificity of a particular society. It serves to define that society, to describe its identity, and to distinguish it from others. "Culture", therefore, often has a slightly confrontational connotation. That was obvious, for example, when in the late eighteenth and nineteenth centuries the call was made to preserve German culture against the universalist ideals emanating from the yonder side of the river Rhine. Any attempt to specify the concept of "culture" appears to be doomed to failure. No fewer than 150 different definitions have been proposed in the 30-year period from 1920 to 1950. None of them has gained acceptance.

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2 See Kuper, Culture: The Anthropologists' Account (1999) 56 f (referring to Kroeber &
“Europe” cannot be defined with any precision either, particularly if the term is used, in the tradition of the Greek historian Herodotus, in a political or cultural, rather than geographical, sense. The borderline to the East, in particular, has always been so uncertain, and has been subject to so many transformations, that it has been compared to a coastline that is constantly affected by the change of tides (“tidal Europe”). Today, the term is usually associated with the European Union and the states belonging to that Union. But Switzerland and Norway also, undoubtedly, belong to Europe, though not to the European Union. Many English still identify Europe with continental Europe. And yet, the United Kingdom is part of the European Union (even if it has not joined the monetary union). For more than 500 years there has been a debate as to whether Russia is a European state. Also, a lively dispute today surrounds the question of whether Turkey belongs to Europe. Both the Russian Federation and Turkey are members of the Council of Europe, Turkey since 1949. Other states belonging to that Council include Georgia and Azerbaijan.

Obviously, then, the composite term “European culture” can hardly be easier to define than its individual components. Very widely, its Christian imprint is regarded as a specific feature of European culture. That is why, for a long time, one has referred to the Christian occident (Abendland), or the res publica Christiana, rather than Europe. And yet, the European Christians constantly experienced a tension between the ideal of unity and the reality of conflict and separation. They were confronted with Jews and Muslims, and thus developed a sense of difference and diversity. Among the Christians themselves there were also just about always rifts and disputes: the controversies surrounding arianism, pelagianism, and monophysitism, the parting of the ways of the Latin-Roman and the Greek Orthodox churches in the great schism of 1054, and the other split resulting from the Lutheran

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Kluckhohn, Culture: A Critical Review of Concepts and Definitions (1952)). Recently, for example, see di Fabio, Die Kultur der Freiheit (2005) 1 ff and 18 ff.

3 “The Persians claim Asia for their own, and the foreign nations that dwell in it; Europe and the Greek race they hold to be separate from them”: Herodotus, History (Godley transl, 1966), bk 1, 4 in fine.


5 On what this might mean today, see Weiler, Ein christliches Europa: Erkundungsgänge (2004).

6 See Borgolte, Europa entdeckt seine Vielfalt 1050–1250 (2002) 242 ff; idem, “Wie Europa seine Vielfalt fand”, in Joas & Wiegandt (eds), Die kulturellen Werte Europas (2005) 144 ff. This is, in fact, also the theme of Muschg, above note 4 at 37 ff.
Reformation, to mention just a number of prominent examples. Another characteristic of European culture often referred to is its rationality. That rationality is a legacy of classical, Greek and Roman, antiquity. Thus, there also was a constant tension between ratio and fides. They were not regarded, at least not in the Middle Ages, as opposites. The Bible itself, with its distinction between Old and New Testament, and with its juxtaposition of the four Gospels, provides ample scope for historical criticism, and for the establishment of an academic theology. Also, apart from its eschatological dimension, the Christian faith entails a marked concern for the existing world. The claim for recognition of the Pope as universal ruler (which, in turn, collided with the equally universal claim of the Emperor) was based on it, as was the constant attempt to understand and intellectually to penetrate the world. The leitmotiv of medieval European philosophy was "intellege ut credas, crede ut intellegas" (understand in order to believe, believe in order to understand). It opened up the opportunity to acknowledge, and productively to assimilate, the intellectual and cultural achievements of classical antiquity: a first, and essential, process of reception that was to be followed by many more. In their quest for what is true and what is good, the Greek and Roman philosophers could be taken to have been inspired by the divine logos; they were, so to speak, Christians avant la lettre. In Christ, God had conclusively revealed what those heathen philosophers had unconsciously been groping for; history had, in a way, reached its destination. At the root of European culture, therefore, was the fruitful coexistence, confrontation, and reconciliation of diverging perceptions, powers, and perspectives:

7 See Schluchter, "Rationalität — das Spezifikum Europas?", in Joas & Wiegandt, ibid at 237 ff.
8 See Meier, "Die griechisch-römische Tradition", in Joas & Wiegandt, ibid at 93 ff.
9 From today's point of view, see the encyclical Fides et Ratio by Pope John Paul II of 14 September 1998, beginning with the words “Faith and reason … are like two wings on which the human spirit rises to the contemplation of truth”; see also Josef Cardinal Ratzinger, “Der angezweifelte Wahrheitsanspruch — Die Krise des Christentums am Beginn des dritten Jahrtausends”, in Ratzinger & d'Arcais, Gibt es Gott? (2006) 7 ff (originally in the Frankfurter Allgemeine Zeitung of 8 January 2000).
10 On the topic of Antiquity and Christianity, on which an enormous amount of literature has been published since Franz Josef Dölger (1879–1940) coined the phrase, see, by way of summary, Betz, “Antiquity and Christianity” (1998) 117 Journal of Biblical Literature 3 ff. For the reception of classical antiquity in Europe generally, see, eg, Ludwig (ed), Die Antike in der europäischen Gegenwart (1993), and, comprehensively, Landfester, Cancik & Schneider (eds), Der Neue Pauly, Enzyklopädie der Antike (1999–2003) vols 13–15.
11 That becomes particularly clear in the iconographic programme of the Stanza della Segnatura, the private library of Pope Julius II in the Vatican, painted by Raphael; see Hall (ed), Raphael's School of Athens (1997).
fides and ratio, Pope and Emperor, Empire and the individual territories constituting the Empire, Rome and Byzantium, classical antiquity in their Greek and Roman varieties, Judaeo-Christian tradition, the repeated assaults by Muslim armies facilitating the emergence of a sense of European identity, the role of revolutions in the re-shaping, but also preservation, of that identity, the sense of being free and yet being bound, the ideals of vita activa and vita contemplativa, the one God as a Trinitarian God, Christ as being true man and true God, the Christian who renounces the world and yet, at the same time, embraces it: who, because he recognizes something that is more important than this world, loves even this world better than those who know nothing beyond it. Historically, Europe and European culture are intellectual constructs, constituted by the fertile tension of diverse elements. It is the opposition between unity and diversity that explains the characteristic dynamic and ability for growth and development of European culture.

Law and Culture

Back to the title of this paper: Roman law and European culture. It will soon become apparent that "Roman law" is also a term in need of explanation and interpretation, even if only for the reason that there was no such thing as "a" Roman law. And, finally, even the word "and" gives rise to doubts and questions. It is intended, probably, to convey the idea of the contribution of Roman law to European culture. But that presupposes that law can be regarded as a cultural phenomenon in the sense of being either a constitutive element or a manifestation of a specific culture. This may be questioned.

14 This is the great theme of Eugen Rosenstock-Huessy (Die europäischen Revolutionen (1931)); idem, Out of Revolution: The Autobiography of Western Man (1938), and, taking up the same theme, Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983); idem, Law and Revolution II (2003). See also Moore, The First European Revolution, c 970–1215 (2000).
15 See, with regard to Luke 10: 38–42 (the story of the sisters Martha and Maria), Flasch, "Wert der Innerlichkeit", in Joas & Wiegandt, above note 6 at 219 ff.
16 That is a kind of cantus firmus of the modern literature on Europe; see, eg, Davies, above note 4 at 16; Borgolte, above note 6 at 356 ff; Joas, "Die kulturellen Werte Europas: Eine Einleitung", in Joas & Wiegandt (eds), Die kulturellen Werte Europas (2005) 11 ff; Le Goff, Das alte Europa und die Welt der Moderne (1996) 53; Häberle, above note 4 at 26 ff; Beck & Grande, above note 4 at 29; and, very pointedly, also Schieffer, "Einheit in Vielfalt", Frankfurter Allgemeine Zeitung of 6 December 2005, 7.
17 In a similar sense, Muschg, above note 4 at 56 f: European history was "a history of critical partitions, and in each of them there was an integrative element leading to a unity at a higher level".
18 See already Kohler, Das Recht als Kulturerscheinung: Einleitung in die vergleichende...
by someone who, as a comparative lawyer, subscribes to an extremely functionalist approach. For whoever proceeds from the assumption that every society confronts its legal system with the same problems, and that lawyers therefore merely have to work out what is functionally the best solution to these problems, will — so it is sometimes alleged — fail to notice the culturally conditioned alterity of the law; at any rate, he will have to marginalize it. But also those who see in the development of the law very largely a sequence of receptions, and who argue that such development follows an autonomous intellectual dynamic, may be seen to question, apart from its economic foundation, the rootedness of law in culture. But hardly any proponent of these two views would appear to engage in such implausible radicalism. Even adherents of a strictly functional approach recognize, as a matter of course, that though the outcomes may be similar, or even identical, the paths toward reaching them will often differ; and they recognize that these differences may be based on differences in legal culture. The observation of processes of intercultural legal transfers (such as the reception of German law in Japan, or Swiss law in Turkey) does not lead to a different result either: for the legal culture of the receiving country is, at least to some degree, changed as a result of the reception, while the law that has been received does not remain unchanged either. Thus, it is at least plausible that law and culture affect and influence each other. Such influence,


19 See, eg, Zweigert & Kötz, Einführung in die Rechtsvergleichung (3rd ed, 1996) 33.
however, is not always easy to establish; the step from law to general culture appears to be relatively wide. At the same time, the point of reference for a culturalist position is unclear: Does it lie in a European culture, or in the many national cultures in Europe? Oddly, proponents of a decidedly culturalist approach toward comparative law sometimes exclusively emphasize the modern nation state and its specific culture that is to be preserved against the perceived threat of Europeanization.24

My own point of reference, on the other hand, is European. But I would like slightly to vary the perspective by focusing on the Roman impregnation of a tradition, the characteristics of which are specifically European and which can therefore be taken to be both an expression and a component of European culture. Thus, I propose to use the concept of “legal tradition” as a bridge connecting law and culture. Others would probably, instead, have availed themselves of the term “legal culture” that has gained currency in comparative discourse in order to emphasize that the study of comparative law does not consist merely in the comparison of legal rules.25 That point is brought out equally well by the term “legal tradition”. Apart from that, however, it points to the character of law and legal culture as something that has a history and that is inevitably moulded by that history.26 Also, it avoids the confrontational connotation of the concept of culture.27

generally, see Graziadei, “Comparative Law as the Study of Transplants and Receptions”, in Reimann & Zimmermann, above note 22 at 441 ff.


26 See also Koschaker, above note 18 at 4; Häberle, above note 4 at 21 ff; Mohnhaupt, above note 25 at 657 ff; Alföldy, Das Imperium Romanum — ein Vorbild für das vereinte Europa? (1999) 7; Wagner, “Hat Europa eine kulturelle Identität?”, in Joas & Wiegandt, above note 6 at 498 f.

Roman Law in the Modern Codifications

When we refer today in modern German law to claims for the recovery of property, we distinguish between a claim based on ownership (rei vindicatio, Vindikation) and another one based on unjustified enrichment (condictio, Kondiktion). Where a possessor makes improvements on an object that does not belong to him and that he is not entitled to keep (ie, that he has to return the object under a rei vindicatio), he may ask for compensation from the owner. The relevant rules are laid down in §§ 994 ff BGB; they are inspired by the Roman rules on the restitution of impensae. The most important unjustified enrichment claim, laid down in § 812 I 1, 1st alternative BGB, is often referred to as condictio indebiti (from indebitum solutum, that is, a payment that was not owed). Section 812 I 2 BGB contains the condictiones ob causam finitam (the enrichment claim arising from the fact that the legal ground for a transfer has subsequently fallen away), and causa data causa non secuta (the enrichment claim for a cause that has failed to materialize). In § 817, 1 BGB we encounter the condictio ob turpem vel iniustam causam (the enrichment claim based on the recipient having acted illegally or immorally in receiving the transfer), which, however, can be excluded according to the maxim "in pari turpitudine melior est causa possidentis" (where both parties have acted illegally or immorally, the possessor is in a comparatively better position and, therefore, does not have to render restitution): § 817, 2 BGB. Here even the terminology still used today points to the Roman origins of modern private law. Not always is that link as obvious as that. The term "delict" (= Delikt) is derived from the Roman delictum; but also the German word for contract (Vertrag, based on sich vertragen = to make it up, to be reconciled with one another) has been

28 These terms are to be found even in short commentaries to the BGB such as Jauernig (ed), Bürgerliches Gesetzbuch (11th ed, 2004) (see § 985, n 1, where the Latin term "rei vindicatio" is used; Vor §§ 987-993, n 3: "Vindikationslage"; § 812, I “Voraussetzungen der Leistungskondiktion”, II “Kondiktion wegen Bereicherung in sonstiger Weise”).

29 Thus, following the model of the Roman law, a distinction is drawn today between necessary, useful, and luxurious improvements (impensae necessariae, utiles, and voluptuariae); see, eg, Jauernig, in Jauernig, ibid at Vor §§ 994-1003, n 8 (although the German Civil Code itself contains only provisions for the first two types of improvements).

30 Here also the Latin terms are to be found even in brief commentaries such as Stadler, in Jauernig, above note 28 at § 812, nn 13 and 14.

31 Stadler, ibid at § 817, n 1, mentions only the first phrase, not the latter maxim. For a brief discussion in English of the German unjustified enrichment claims just mentioned, see Zimmermann, "Unjustified Enrichment: The Modern Civilian Approach" (1995) 15 OJLS 403 ff. For the historical background, see Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition (paperback ed, 1996) 857 ff.
formed on the model of the Latin term pactum (based on pacisci = to make peace), as we find it in the edict of the Roman praetor ("pacta conventa ... servabo"). The famous provision on good faith in contract law (§ 242 BGB), as interpreted by the German courts from very soon after the BGB had entered into force, originates in the exceptio doli, as well as in the bona fides governing the Roman consensual contracts. A person is barred from exercising a contractual right if, by doing so, he contradicts his own previous behaviour (venire contra factum proprium), if he himself has not acted in accordance with the contract (tu quoque), or if he claims something that he will subsequently have to return to the other party (dolo agit, qui petit, quod statim redditurus est). We read these Roman legal maxims into § 242 BGB. Sometimes, the draftsmen of the BGB have even adopted such maxims into the text of the BGB, though not in Latin. Section 117 BGB on simulation (plus valere quod agitur, quam quod simulate concipitur) and § 305 c II BGB (interpretatio contra eum qui clarius loqui debuisset, or the contra proferentem rule) provide examples. Systematic distinctions such as the one between contract and delict, or between absolute and relative rights, and, tying in with it, between the law of obligations and property law, are inspired by Roman law. So are standard types of contract such as sale, exchange and donation, mandate, deposit and suretyship, and the distinction between loans for use (Leihe) and loans for consumption (Darlehen); general standards of liability such as the various forms of fault (culpa, dolus, diligentia quam in suis), as well as specific instances of no-fault liability, such as the ones

33 Ulp D 2, 14, 7, 7; see Law of Obligations, above note 31 at 508 ff.
34 Bona fides was one of the driving forces for the development of Roman contract law; see Whittaker & Zimmermann, "Good faith in European contract law: surveying the legal landscape", in Zimmermann & Whittaker (eds), Good Faith in European Contract Law (2000) 16 ff; Schermaier, "Bona fides in Roman contract law", in Zimmermann & Whittaker, ibid at 63 ff; Zimmermann, Roman Law, Contemporary Law, European Law (2001) 83 ff. Thus, the most influential attempt to systematize the case law concerning § 242 — Wieacker, Zur rechtstheoretischen Präzisierung des § 242 BGB (1956) — has clearly been inspired by Roman law.
35 They are mentioned by Mansel, in Jauernig, above note 28 at § 242, nn 39, 47, and 48; see also ibid at nn 37 and 44, distinguishing between exceptio doli praesentis and exceptio doli praeteriti. For a brief discussion in English, see Zimmermann & Whittaker, ibid at 22 ff.
37 See §§ 276 ff BGB; and see Schermaier, in Zimmermann, Rückert & Schmoeckel, ibid at vol 2, §§ 276–278 BGB (Verantwortlichkeit des Schuldners, passim).
in § 536 a BGB (liability of the lessor for defects in the object leased)\(^{38}\) and §§ 701 ff BGB (innkeepers’ liability);\(^{39}\) and an innumerable amount of concepts, legal institutions, and individual rules: the invalidity of immoral contracts (contra bonos mores),\(^{40}\) the special rules on delay on the part of the debtor (mora debitoris) and of the creditor (mora creditoris),\(^{41}\) the rights of termination and price reduction on account of the delivery of a defective object (actiones redhibitoria and quanti minoris),\(^{42}\) management of someone else’s affairs without authority (negotiorum gestio),\(^{43}\) and liability for damage done by animals.\(^{44}\) These are just a few random examples that cannot do more than provide a cursory impression of the BGB’s Roman impregnation and that have, moreover, been taken from only one specific area of private law, namely, the law of obligations. Similar lists can be compiled for other areas, particularly property law and the law of succession.\(^{45}\) The same can be said about the other continental codifications in Europe.\(^{46}\)


\(^{40}\) § 138 1 BGB; see Law of Obligations, above note 31 at 713 ff.

\(^{41}\) §§ 286 ff and 293 ff BGB; see Law of Obligations, above note 31 at 790 ff and 817 ff.

\(^{42}\) §§ 459 ff BGB of 1900; see Law of Obligations, above note 31 at 305 ff. The rules have been reformed in 2002; see Zimmermann, The New German Law of Obligations: Historical and Comparative Perspectives (2005) 79 ff.

\(^{43}\) §§ 677 ff BGB; see Law of Obligations, above note 31 at 433 ff.

\(^{44}\) § 833 BGB; see Law of Obligations, above note 31 at 1116 ff.


civil, in a number of respects, is even more Roman than the BGB: in its rejection, in principle, of contracts in favour of third parties (art 1121 Code civil, perpetuating the rule of alteri stipulari nemo potest); in its insistence on certainty of price as a requirement for the validity of contracts of sale (art 1591 Code civil, that is, the modern French version of the requirement of pretium certum); in its rule that set-off operates “de plein droit par la seule force de la loi, meme à l’insu des debiteurs” (art 1290 Code civil, which is supposed to be based on set-off ipso iure in Roman law); and in its perpetuation of the systematic categories of contract, quasi-contract, delict, and quasi-delict.

How Roman is Contemporary Roman Law?

A Misunderstandings, different layers of tradition, ambiguities

In all these and many other cases, our modern law and legal thinking have been moulded by Roman law. Yet, hardly ever are the modern rules identical with Roman law (or with each other!). Occasionally, the Roman model has even been turned on its head. Quasi-delict was, as we see it today, a systematic niche for a number of instances of extracontractual no-fault liability; these were thus kept apart from delictual liability, which depended upon fault. For a long time, however, lawyers proceeded from the assumption that delictual liability is tantamount to intentional damage done to another, while quasi-delictual liability covers cases of negligence. That misconception, which was caused by Justinian’s attempt to reconceptualize the sources of classical law from the point of view of a generalized culpa requirement, was shared by the draftsmen of the Code civil. But in view of the fact that liability for damage done to another negligently and intentionally is placed on the same footing, the distinction between delictual and quasi-delictual liability had lost its significance. In addition, an appropriate place was now

48 Law of Obligations, above note 31 at 45 ff.
49 Law of Obligations, above note 31 at 253 ff.
50 See text below at p 351.
52 Concerning the example of illegality and unconscionability, see Zimmermann, “The Civil Law in European Codes”, above note 46 at 267 f.
54 See, eg, Pothier, “Traité des obligations”, in Pothier, Traité de droit civil (1781) vol 1, n 116.
lacking for accommodating the phenomenon of no-fault liability within the system of private law. Interpretation of the phrase "ipso iure" in the sense of "sine facto hominis" (that is, occurring automatically) is also based on a misunderstanding of the Roman sources. Originally, it had been intended to signify that set-off was not to be effected by the judge, but rather that the plaintiff was forced "by the law itself" to subtract the amount of the counterclaim from his own claim. Moreover, the relevant sources merely concerned one specific type of set-off: the agere cum compensatione of the banker. For contrary to modern law, Roman law did not recognize a uniform legal institution of set-off with standardized requirements; reflecting the "actional" character of Roman law, four different types of set-off had to be distinguished. With regard to bonae fidei iudicia, for example, set-off had to be pleaded. Justinian, too, in one of his contributions stated that set-off must be declared; and that statement was destined, ultimately, to shape the model of set-off that we find today in German law.

Thus, we are faced with a situation that two completely different solutions to one and the same problem both find their origin in Roman law. It is not the only such situation. Mora creditoris (delay in accepting a performance) provides another example, for both the concept that has found its way into the BGB (the creditor does not infringe a duty vis-à-vis his debtor, and is not liable for damages but merely jeopardizes his own legal position in a number of respects) and the idea of mora creditoris constituting the mirror image of mora debitoris (and thus focusing on duty, fault, and damages) derive from Roman law. Transfer of ownership as an "abstract" legal act or as being based on a iusta causa traditionis can also be mentioned in this context. It has even happened that two different solutions have been based on one and the same fragment in the Digest. Gaius D 19, 2, 25, 7 is a case in point. Here someone who had contracted to transport columns was held to be responsible for damage done to the columns "si qua ipsius eorumque, quorum opera uteretur, culpa acciderit" (if they are damaged due to his own fault and/or the fault of those whom he used for the transport). If "que" in

55 See Law of Obligations, above note 31 at 1126 ff.
57 For details, see Pichonnaz, above note 56 at 9 ff. For an overview, see Kaser, Das römische Privatrecht (2nd ed, 1971) vol 1, 644 ff; Zimmermann, in Zimmermann, Rückert & Schmoeckel, ibid at vol 2, §§ 387–396, nn 5 ff.
58 C 4, 31, 14.
59 For details, see Zimmermann, in Zimmermann, Rückert & Schmoeckel, above note 36 at vol 2, §§ 387–396, nn 11 ff.
60 See Law of Obligations, above note 31 at 817 ff.
“eorumque” is interpreted disjunctively, the text provides a basis for a strict type of liability to be imposed on an entrepreneur for damage negligently caused by his employees. We find that solution today, as far as delictual liability is concerned, in art 1384 Code civil. Nineteenth-century German pandectists, on the other hand, understood the text to impose liability on the entrepreneur if he himself, and those who had been employed by him, had been at fault. In that interpretation the text fitted in neatly with one of the precepts, very widely taken as axiomatic in contemporary scholarship, that extracontractual liability must be based on fault; and it could be adduced in favour of the fault-based liability for the acts of others that we still find today in § 831 BGB.

B “… magis differat, quam avis a quadrupede”

Contracts can be formed “nudo consensu”, by mere informal agreement. This basic principle goes back to Roman law. And yet, in Roman law it was valid only in certain situations; the general rule was “nuda pactio obligationem non parit” (an informal agreement does not give rise to an action). Pacta sunt servanda (or, more precisely, pacta quantumcumque nuda servanda sunt) was a sentence that was formulated for the first time in the Corpus Juris Canonici, the Medieval collection of Canon law. The development of contracts in favour of a third party, the law of agency, and the assignment of claims was impeded, for a long time, by the Roman idea of an obligation as a strictly personal legal bond between those who had concluded the contract. At the same time, however, the Corpus Juris Civilis contained

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64 See, eg, Windscheid & Kipp, Lehrbuch des Pandektenrechts (9th ed, 1906) § 401, 5.

65 See, eg, Benöhr, “Die Entscheidung des BGB für das Verschuldensprinzip” (1978) 46 Tijdschrift voor rechtsgeschiedenis 1 ff.


67 Ulp D 2, 14, 7, 4; Law of Obligations, above note 31 at 508 ff.


69 Inst III, 13 pr: “[O]bligatio es iuris vinculum, quo necessitate adstringimur alicuius solvenae rei secundum nostrae civitatis iura.”
a number of crucial points of departure for the eventual abandonment of this restrictive view.70 One single, innocuously looking text contained in the Codex Justiniani71 was to become the catalyst for the general actio de in rem verso (action for whatever has been used to enrich another person's property) of French law,72 which, as such, is undoubtedly un-Roman. The condictio indebiti of modern German law, on the other hand, does have a model in Roman law, though one from which it differs considerably. Thus, for example, the Roman condictio indebiti lay for enrichment received rather than enrichment surviving;73 also, it required a mistaken payment of something that was not owed. Two conflicting sources contained in the Corpus Juris, the one by Papinian,74 the other attributed to the Emperors Diocletian and Maximian,75 provided the main arguments in a centuries-old debate about the relevance, in this context, of an error of law.76 In view of the recognition of pacta sunt servanda, the condictio causa data causa non secuta has largely lost its function; the condictio ob turpem vel iniustam causam has lost it completely.77 As a result, the application of the "in pari turpitudine" rule has also become problematical.78 Since the Roman condictiones, in a way, supplemented the fragmented Roman contract law,79 recognition of the general concept of contract in the early modern period also paved the way toward a general enrichment action. It was pursued, above all, by Hugo

70 For the historical development, see Law of Obligations, above note 31 at 34 ff, 45 ff, and 58 ff.
71 C 4, 26, 7, 3: "Alioquin si cum libero rem agente eius, cuius precibus meministi, contractum habuisti et eius personam elegisti, pervides contra dominum nullam te habuisse actionem, nisi vel in rem eius pecunia processit vel hunc contractum ratum habuit."
72 Kupisch, Die Versionsklage (1965); Law of Obligations, above note 31 at 878 ff.
73 Contrary to §§ 812 ff BGB, the Roman condictio did not focus on the entire patrimony of the enrichment debtor. For the recipient was obliged to return the object received, and the content and fate of that obligation were governed by the general rules. On this and on the further development, see Ernst, "Werner Flumes Lehre von der ungerechtfertigten Bereicherung", in Werner Flume, Studien zur Lehre von der ungerechtfertigten Bereicherung (2003) 2 ff.
74 Pap D 22, 6, 7: "Iuris ignorantia non prodest adquirere voluntibus, suum vero potentibus non nocet."
75 C 1, 18, 10: "Cum quis ius ignorans indebitam pecuniam persolverit, cessat repetitio."
77 For details, see Law of Obligations, above note 31 at 857 ff.
78 Law of Obligations, above note 31 at 863 ff.
Grotius,\textsuperscript{80} the French Cour de cassation,\textsuperscript{81} and Friedrich Carl von Savigny,\textsuperscript{82} and each of them used different points of departure. Generalization of the liability for unjustified enrichment, in turn, was bound to affect the significance of the Roman rules on compensation for impensae: for if a person who had made improvements on an object belonging to someone else could avail himself of an enrichment claim, he no longer had to be protected by a special set of rules. The draftsmen of the BGB, nonetheless, decided to retain these special rules (§§ 994 ff BGB); but, by doing so, they had to turn their ratio on its head.\textsuperscript{83} That decision, to preserve the Roman rules under different auspices and within a changed doctrinal environment, turned out to be distinctly unfortunate.\textsuperscript{84} Delictual liability, too, was both modernized and generalized in medieval and early modern jurisprudence.\textsuperscript{85} Again, it was possible to latch on to the successful attempts of Roman jurisprudence to convert a narrowly confined and strangely formulated enactment from the third century BC, the lex Aquilia, into a central pillar of the Roman law of delict.\textsuperscript{86} Medieval and early modern lawyers continued to refer to the “Aquilian” liability, even though it had come to differ from its Roman origin “more than a bird from a quadruped”.\textsuperscript{87} That prompted Christian Thomasius in the early eighteenth century to “tear off the Aquilian mask” from the


\textsuperscript{83} For details, see Verse, Verwendungen im Eigentümer-Besitzer-Verhältnis: Eine kritische Betrachtung aus historisch-vergleichender Sicht (1999). For a brief account, see also Zimmermann, Roman Law, above note 34 at 45 ff.

\textsuperscript{84} The problems are analyzed by Verse, above note 83 at 1 ff.


\textsuperscript{86} For details, see Law of Obligations, above note 31 at 953 ff.

\textsuperscript{87} “[A]ctio nostra, qua utimur, ab actione legis Aquiliae magis differat, quam avis a quadrupede”: Thomasius, Larva Legis Aquiliae (Hewett ed and transl, 2000), § 1.
action for damage done. And yet, modern delict doctrine is still based on concepts (particularly unlawfulness and fault) that originate in Roman law but cause considerable difficulties in view of the fact that the function of the modern law of delict differs from its Roman forebear. The Roman law of sale was tailored exclusively for the sale of specific objects; the extension of its rules to the sale of objects described as being of a particular kind, or belonging to a particular class (unascertained goods), is due to one of many "productive misunderstandings" of the Roman sources by medieval jurisprudence. That extension was a very progressive step, for the sale of unascertained goods was to become practically much more significant than the sale of individual objects. Yet, at the same time, a number of the rules of Roman sales law were hardly suitable for that type of transaction, above all the old risk rule of emptione perfecta periculum est emptoris (with the conclusion of the contract of sale, the risk passes to the buyer), and the aedilician liability regime for latent defects. The first of these problems was eventually resolved by the draftsmen of the BGB, who established a risk rule differing from Roman law (§ 446 BGB), while the other, in spite of the compromise laid down in § 480 BGB (old version), essentially remained unsettled.

Essential Characteristics of Roman Law in Antiquity

Even these few examples, I think, illustrate a number of characteristics of Roman law that were to be essential for the development of the law in Europe:

88 Thomasius, Larva Legis Aquiliae (Hewett ed and transl, 2000).
89 This is shown by Jansen, Die Struktur des Haftungsrechts: Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadensersatz (2003).
90 This term was coined, at least for legal history, by H R Hoetink (who in turn took it from the theological literature); see Hoetink, "Over het verstaan van vreemd recht", in Hoetink, Rechtsgeleerde opstellen (1982) 34 f; idem, "Historische rechtsbeschouwing", in Hoetink, Rechtsgeleerde opstellen (1982) 266 f.
92 Law of Obligations, above note 31 at 281 ff.
93 Law of Obligations, above note 31 at 305 ff.
94 Law of Obligations, above note 31 at 291 f.
95 Zimmermann, New German Law of Obligations, above note 42 at 87 ff.
(i) We are dealing here with a highly developed jurisprudence, that is, a specific branch of knowledge developed and sustained by lawyers. That was unique in the world of classical antiquity.

(ii) Closely related with it was what Fritz Schulz has referred to as the isolation\(^{96}\) of law vis-à-vis religion, morality, politics, and economics: the separation of the law from non-law.

(iii) That, in turn, entailed a strong emphasis on private law (and civil procedure); criminal law and the administration of the state, on the other hand, appear to have been regarded by the Roman lawyers as something not subject to specifically legal criteria.

(iv) Roman private law was very largely "Juristenrecht": it was not laid down in a systematic and comprehensive enactment, but rather was applied and developed by lawyers with great practical experience.\(^{97}\)

(v) That explains, on the one hand, the great realism of Roman law and its focus on practical problems rather than abstract theory. On the other hand, it also explains the many controversies that tended to envelop the resolution of legal problems.

(vi) These controversies were an expression and a sign of the inherent dynamic of Roman law. It was constantly developing. Between Publius Mucius Scaevola, who was described as one of those "qui fundaverunt ius civile" (who have founded the civil law;\(^{98}\) he had been consul in 133 BC) and Aemilius Papinianus (prefect of the praetorian guards from 205–212 AD and the most eminent lawyer of the late classical era), there was a period of more than 300 years, in the course of which state and society, Roman legal culture, and Roman law were subject to fundamental change.

(vii) Reference just to "Roman law", therefore, is imprecise. Even the Roman law of classical antiquity constituted a tradition and was based on a discussion of legal problems spanning many generations of jurists. Here is a typical example.\(^{99}\) In D 24, 3, 66 pr Justinian preserved a text by Iavolenus\(^{100}\) written at the turn from the early to the high classical period. It is taken from a work that constitutes a revision of the posthumous works of Marcus Antistius Labeo (a contemporary of Emperor Augustus)\(^{101}\) and contains a

\(^{96}\) Schulz, *Prinzipien des Römischen Rechts* (1934) 13 ff.

\(^{97}\) See, eg, the discussion by Bürge, above note 46 at 21 ff; idem, *Römisches Privatrecht* (1999) 17 ff.

\(^{98}\) Pomp D 1, 2, 2, 39.

\(^{99}\) It has been inspired by Meincke [2006] Juristenzeitung 299.


\(^{101}\) Waldstein & Rainer, *Römische Rechtsgeschichte* (10th ed, 2005) 201; Kunkel, ibid at 32 ff.
rule according to which a husband is responsible for fault (dolus and culpa) with regard to property that he has received as a dowry. In support of that rule the most prominent jurist of the pre-classical period, Servius Sulpicius Rufus, is referred to. Servius, in turn, had taken up the decision of a specific legal dispute by Publius Mucius Scaevola. That dispute had concerned the dowry of Licinia, wife of Gaius Sempronius Gracchus, which had perished in the turmoils unleashed by the agrarian reforms masterminded by Gracchus.

(viii) Roman law, therefore, was extraordinarily complex. It was largely casuistic in nature. It was developed over many centuries and thus constituted a tradition. It was recorded in an abundant literature. And it rested on two conceptually and historically separate foundations: the ius civile, that is, the traditional core of legal rules applying to a Roman citizen; and a ius honorarium — one might call it Equity — that had been introduced by the praetors in the public interest “adiuvandi vel supplendi vel corrigendi iuris civilis gratia” (in order to assist, supplement, and correct the traditional civil law).

(ix) Nonetheless, Roman law was not an impenetrable jungle of detail. The Roman jurists developed a large number of legal concepts, rules, and institutions, which they constantly attempted to coordinate, and intellectually to relate, to each other. They thus created a kind of “open” system that combined consistency with a considerable degree of flexibility. In the process, the Roman jurists were guided by a number of fundamental values, or principles, such as liberty, bona fides, humanitas, and the protection of rights that have been acquired, particularly the right of ownership.

(x) Another characteristic of Roman jurisprudence that contributed to
making it such a fertile object of legal analysis was the fact that reasons for the decisions arrived at were either not given at all, or only hinted at. The Roman case law, therefore, is particularly rich in tacit assumptions and presuppositions that can be, and have to be, unravelled by a process of interpretation. Again, an example may illustrate the point. In Marcianus D 18, 1, 44 we find the following brief text: "Si duos quis servos emerit pariter uno pretio, quorum alter ante venditionem mortuus est, neque in vivo constat emptio.” Two slaves have been sold for one price. It consequently turned out that, at the time when the contract was concluded, one of the slaves had already died. Its delivery could thus no longer be demanded, and the contract, insofar, was invalid. That was based, by the authors of the ius commune, on the rule “impossibilium nulla obligatio” (there is no obligation concerning the impossible). But can the purchaser request delivery of the second slave? Here we are faced with the problem of partial invalidity of legal transactions. From the time of the Glossators, the general rule was taken to be “utile per inutile non vitiatur:" the “useful” part of the transaction is not affected by the invalidity of part of it, that is, it remains in force. That rule was taken from a fragment by Ulpian who, however, had not intended to provide a general rule but had merely solved an individual case. Marcianus’ decision in D 18, 1, 44 demonstrates that utile per inutile non vitiatur cannot have been recognized in Roman law as a general rule, for the contract is held to be invalid also with regard to the second slave. That may be related to the fact that the price for merely one of the slaves was neither determined nor determinable with any degree of certainty. One of the requirements for the validity of a Roman contract of sale (pretium certum) was thus lacking.

108 Essential for the legitimacy of the jurists was their auctoritas, based on the knowledge acquired through their practical experience. On the issue of authority as a formative feature of Roman law, see Schulz, Prinzipien, above note 96 at 112 ff (on the jurists, see ibid at 125 ff).

109 It is based on D 50, 17, 185 (Celsus), but tended to be misunderstood, also by the draftsmen of the BGB; see § 306 BGB (old version). For details, see Law of Obligations, above note 31 at 686 ff.

110 See Law of Obligations, above note 31 at 75 ff.

111 Ulp D 45, 1, 1, 5 in fine: “... neque vititatur utilis per hanc inutilem”.

Roman Jurisprudence and Its Transmission

The emergence of a jurisprudence with these characteristics would hardly have been possible without the reception of Greek philosophy, and quest for truth, in Republican Rome. Of decisive importance, however, was the role of the legal expert in the application and development of law. In Greece itself, for example, it had been absent. Ancient Greek law had been, to put it very pointedly, a law without lawyers; for legal disputes were decided by a number of laymen, appointed by drawing lots, who had to take their decision on the basis of an oral proceeding, in the course of which both parties were allocated a specific period of time in order to argue their case, and they had to give it without any discussion or the possibility of asking questions, by secret ballot on the basis of a simple majority. It is not difficult to see that these were not fertile conditions for the establishment of a science of law and for the flourishing of legal experts.

Decisive for the European significance of Roman law, moreover, was something that had been completely alien to classical Roman law: a comprehensive act of legislation by the Emperor Justinian. He ordered an enormous compilation of excerpts from the writings of the classical period to be produced (the Digest) which he then promulgated as law, together with a collection of previous Imperial legislation and an introductory textbook. As is apparent from its Greek name (pandectae; hence pandectist legal science), the Digest was supposed to be comprehensive, which was also a rather un-Roman idea. "May no lawyer dare to add commentaries to our work and spoil its brevity through his verbosity", Justinian decreed. But that remained a naive and pious hope. Justinian could not prevent scholars from making a work of scholarship itself the object of scholarship. That was necessary, inter alia, because he had introduced an additional level of complexity into the body of legal sources: the texts to be compiled in the Digest were

113 For an overview, see Waldstein & Rainer, above note 101 at 134 f. For more detailed accounts, see Schulz, History of Roman Legal Science (1946) 38 ff; Wieacker, Römische Rechtsgeschichte (1988) vol 1, passim, eg 351 f (with further cross-references) and 618 ff; Schermaier, Materia (1992) 35 ff.
115 C 1, 17, 1, 12; cf also C 1, 17, 2, 21. This was commonly understood as a general prohibition of commentaries; see Becker, “Kommentier- und Auslegungsverbot”, in Handwörterbuch zur deutschen Rechtsgeschichte (1978) vol 2, cols 963 ff. But this has recently been disputed: the prohibition may only have been referring to commentaries written into the Justinianic law books themselves; see Waldstein & Rainer, above note 101 at 252.
more than 300 years old, and Justinian had therefore ordered their revision and adaptation to contemporary conditions (that was the origin of the so-called interpolations); he had placed next to each other, and invested with equal validity, texts from completely different periods of the Roman legal development; and he had adopted into his compilation a variety of texts that reflected controversies among the Roman lawyers and that therefore hardly constituted the kind of material suitable for an act of legislation.

Changes in the Perception of Roman Law

The university is regarded as “the European institution par excellence”.\(^{116}\) It does not date back to classical antiquity but rather originated, as a manifestation of the great occidental educational revolution, toward the end of the twelfth century, first in Bologna, then in Paris, Oxford, and in an ever-growing number of places in Western, Central, and Southern Europe.\(^{117}\) Law in Rome can be described as a jurisprudence without, however, having been an academic discipline taught at the university. But when, in the high Middle Ages, law was caught up in the educational revolution just mentioned, it was Roman law that lent itself like none of the other contemporary laws (with one exception closely linked to Roman law, namely, Canon law) to scholastic analysis and hence to the type of scholarship appropriate to a university.\(^{118}\) The Roman legal texts therefore immediately occupied the central position in the study of the secular law. That applied to all universities to be founded on the model of Bologna throughout Europe, and it remained the case down to the era of codification, that is, in Germany until the end of the nineteenth century. Yet, the approach toward the Roman texts was subject to considerable change.\(^{119}\) Medieval jurisprudence predominantly regarded these texts as a logically consistent whole, and attempted to demonstrate how apparent


\(^{117}\) See, eg, Borgolte, above note 6 at 296 ff (with the chapter heading “The Occidental Educational Revolution”); and see the index and the instructive maps in Verger, “Grundlagen”, in Rüegg, ibid at vol 1, 70 ff.

\(^{118}\) The same was true already for the private law schools in Bologna in the second half of the eleventh century and then in the twelfth century, in particular for the school of “the first luminary of science”, Irnerius. On the significance of Irnerius, see Dorn, in Kleinheyer & Schröder (eds), Deutsche und Europäische Juristen aus neun Jahrhunderten (4th ed, 1996) 211 ff.

\(^{119}\) For a detailed discussion, see Wieacker, A History of Private Law in Europe (Weir transl, 1995); Koschaker, above note 18 at 55 ff; Stein, Roman Law in European History (1999). For a particularly concise and recent summary, see Gوردley, “Comparative Law and Legal History”, in Reimann & Zimmermann, above note 22 at 753 ff.
divergences could be overcome. That way of proceeding provoked a reaction in the form of the legal humanism of the Renaissance period. The humanist lawyers were concerned, in the first place, to establish what the texts had been intended to mean originally, by the ancient authors who had written them. That, essentially, marked the beginning of the history of legal history. But since the humanist lawyers took the Roman texts to embody not only a model of justice and fairness for classical antiquity, but also for contemporary society, they were confronted, once again, with the problem that some sources contradicted others, that there were questions, to which they clearly did not provide an answer, and that some of the answers provided by them were obviously based on outdated ideas. These problems were tackled by the representatives of a school known programmatically as usus modernus pandectarum (modern usage of the Digest). Since they had gone through the humanist enlightenment, they no longer, unlike the Medieval lawyers, regarded the texts of the Corpus Juris as absolutely binding authority: one could generalize and further develop the ideas contained in them, critically examine them, or even declare them abrogated by disuse. At about the same time, another school of thought gained influence that also acknowledged that Roman law had many shortcomings, and often merely hinted in the direction of what was just and fair, and that therefore endeavoured to bring out the fundamental truths hidden in the Roman texts by their philosophical analysis: the late scholastic, and subsequently secular, Natural law. In the nineteenth century, legal scholarship in Germany was dominated by Savigny’s Historical School, which, however, also had considerable appeal and influence in other European countries. With the Historical School,

10 Thus, books such as Bugnyon, Tractatus legum abrogatarum et inusitatarum in omnibus curiis, terris, jurisdictionibus, et dominiis regni Franciae (1563) and van Groenewegen van der Made, Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus (1649) were written.

an approach gained ascendancy that tended to look at Roman law from the point of view of contemporary law and that, therefore, in a way made the analysis of historical texts, once again, serve present needs. The interpretation of the texts was largely inspired by the consideration of how they could be applied in modern practice. It was only the BGB that ultimately freed the “Romanists” (that is, scholars dealing with the sources of Roman law) from the overwhelming weight of that concern and, in the process, converted them from legal doctrinalists into pure legal historians. That change of scholarly agenda led to a tremendous increase in our knowledge of Roman law in the context of other ancient legal systems. But it also entailed that legal scholarship had not only ceased to be a historical scholarship, but was also to become a largely unhistorical intellectual enterprise.\(^\text{122}\)

**Roman Law and Ius Commune**

This, in the broadest outlines, is the history of what is often called the second life of Roman law: its effect on European legal scholarship from the days of the “reception”. Roman law became the foundation of the ius commune. That ius commune was a learned law, sustained by academic scholarship and study; it found its manifestation in a very large, and essentially uniform, body of literature across Europe; and it was based on a uniform university training in law.\(^\text{123}\) But it was never on its own. The dualism of Empire and Church, and of Emperor and Pope, was reflected in the dualism of Roman law (that is, civil law) and Canon law, of secular and ecclesiastical courts, and of scholars studying Roman law (the legists) and Canon law (the canonists). At times, the jurisdiction of the ecclesiastical courts extended far into the core areas of private law.\(^\text{124}\) There were jurisdictional shifts and conflicts that reflected the power politics between spiritual and secular rulers. But there were also far-reaching intellectual connections. Canon law was the law of the

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\(^{122}\) For a detailed account, see Zimmermann, “Heutiges Recht, Römisches Recht und heutiges Römisches Recht: Die Geschichte einer Emanzipation durch ‘Auseinanderdenken’”, in Zimmermann, Knütel & Meincke, above note 45 at 1 ff; cf also Zimmermann, Roman Law, above note 34 at 6 ff and 40 ff.

\(^{123}\) See Coing, above note 85 at 7 ff; van Caenegem, European Law in the Past and the Future (2002) 22 ff and 73 ff.

\(^{124}\) In particular, matrimonial causes, probate, and promises affirmed by oath. For an overview, see Trusen, “Die gelehrte Gerichtsbarkeit der Kirche”, in Coing (ed), Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte (1973) vol 1, 483 ff. For England, see the overview in (1993) 1 Zeitschrift für Europäisches Privatrecht 21 ff.
Roman Church, and it was largely based on Roman law; in turn, it exercised a considerable influence on the secular law. The principle of pacta sunt servanda derives from Canon law, as does the principle of restitution in kind. Apart from Roman law and Canon law, there was the feudal law that had, however, been incorporated through the Libri feudorum into the body of Roman law. There were the systematic designs and the doctrines of the late scholastics in Spain and, later, of the adherents of a rationalistic Natural law that were moulded by Roman law and, in turn, influenced the ius commune. There were consuetudines (customs), confined in their application to specific places and territories, which were recognized within the framework of the ius commune and subjected to scholarly analysis. There were the rules and customary laws — predominantly unwritten but also sometimes laid down in writing — that had emerged, from about the twelfth century onwards, in the fairs and trading centres across Europe, as well as in the harbour towns on the shores of the Mediterranean, the Atlantic Ocean, and the Baltic Sea. Here, too, there was mutual influence with Roman law and the Roman-Canon ius commune.

Above all, however, there was an enormous variety of territorial and local legal sources that, in theory, always enjoyed precedence before the courts. For the ius commune was applicable only in subsidio, that is, as a subsidiary
source of law. Yet, practically, it often gained the upper hand. According to early modern legal literature, there was even an established presumption (fundata intentio)\textsuperscript{131} in favour of the application of the ius commune. But that presumption also does not capture the entire truth; for what actually happened in the courtrooms across Europe was subject to considerable change, and it could vary from place to place and from subject area to subject area. Even for the legal practice in the Holy Roman Empire of the German Nation, the heartland of the reception, it can only be said, by way of summary, is characterized by "a legal pluralism hardly imaginable" today.\textsuperscript{132} But it was a diversity within an overarching intellectual unity, and that intellectual unity was established by a legal training focusing, everywhere in Europe, on the body of the Roman legal sources. The unifying effect of the legal training was to become particularly evident, once again, in nineteenth-century Germany. For it was only in parts of it that the ius commune was directly applicable. The remainder was subject to a range of special legal regimes, among them the Prussian code of 1794, the General Civil Code of Austria, the Code civil, the Landrecht of Baden (which, essentially, constituted a translation of the Code civil), and later also the Saxonian Code of Private Law.\textsuperscript{133} Nonetheless, it was the ius commune that provided the basis for interpreting and truly understanding these legal regimes,\textsuperscript{134} and thus it claimed and was granted, as a matter of course, centre stage in the curricula of all German faculties of law.\textsuperscript{135} The pandectist branch of the Historical School thus managed to create (or rather preserve) a distinctive cultural unity on the level of legal


\textsuperscript{132} This is the conclusion of Oestmann, Rechtsvielfalt vor Gericht: Rechtsanwendung und Partikularrecht im Alten Reich (2002) 681.

\textsuperscript{133} See, eg, "Anlage zur Denkschrift zum BGB", in Mugdan (ed), Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich (1899) vol 1, 844 ff, and also the Allgemeine Deutsche Rechts- und Gerichtskarte (1896, new edition 1996 by Klippel).

\textsuperscript{134} Thus, apart from still being directly applicable in parts of Germany, it also provided the underlying theory of private law wherever a codification had been enacted; see Koschaker, above note 18 at 292.

\textsuperscript{135} For further references, see Zimmermann, Roman Law, above note 34 at 2 ff.
scholarship enabling professors as well as students freely to move from Königsberg to Strasbourg, from Giessen to Vienna, or from Heidelberg to Leipzig.\(^{136}\)

**Roman Law and European Legal Tradition**

The tension between unity and diversity is, as we have seen,\(^{137}\) characteristic for European culture. As will have become apparent by now, it is of central significance also for the European legal tradition.\(^{138}\) That tradition was shaped by the ius commune, which, in turn, was largely based on Roman law. If one attempts to specify further features characterizing the European legal tradition in comparison with others in the world (that is, the chthonic, Talmudic, Islamic, Hindu, and East Asian),\(^{139}\) the influence of Roman law can be shown in every instance. Thus, there is the element of writing.\(^{140}\) One of the reasons why Roman law was so influential in medieval Europe is that it was a law that had been laid down in writing. It was "ratio scripta". This is not only demonstrated by the process of reception itself but also by the many endeavours to provide a written documentation of the customary laws prevailing in Europe from the end of the twelfth century onwards (Glanvill and Bracton in England, the coutumes in France, the fueros in Spain, Sachsenspiegel and Schwabenspiegel in Germany). That was a remarkable development that was inspired by the learned laws.\(^{141}\)

Apart from that, of course, Roman law was also for centuries regarded as "ratio scripta": it was the model of a law that was reasonable, that is, in conformity with human reason. Roman law, therefore, was an expression of, and stimulated the quest for, a law that was rational and scholarly, intellectually coherent, and systematic.\(^{142}\) At the same time, the specific nature of the Roman sources prevented that system from becoming inflexible.

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137 See text above at pp 341–344.
138 See also, eg, Berman, *Law and Revolution I*, above note 14 at 10; Mohnhaupt, above note 25 at 657 ff.
139 See the division by Glenn, *Legal Traditions of the World* (2nd ed, 2004). None of the following features can only be found in the European legal tradition; but only therein are all of them to be found.
140 In contrast, the chthonic tradition is marked by its orality; see Glenn, above note 1 at 61 ff.
142 Glenn, above note 1 at 143 ff; Coing, above note 18 at 7 f; Wieacker, "Foundations of European Legal Culture" (1990) 38 Am J Comp L 1 at 25 ff; Häberle, above note 4 at 22 ff. Chthonic law, in contrast, is unstructured; see Glenn, ibid at 78 ff. The rationality
and static. For European law has always been characterized by an inherent ability to develop. Or, in the words of Harold J Berman:143

The concept of a … system of law depended for its vitality on the belief in the ongoing character of law, its capacity for growth over generations and centuries — a belief which is uniquely Western. The body of law only survives because it contains a built-in mechanism for organic change.

European law is subject to constant adaptation; it is able to react to changed circumstances and new situations, and it has always displayed an extraordinary capacity for integration. Medieval Roman law was no longer the Roman law of classical antiquity, the usus modernus pandectarum no longer corresponded to the usus medii aevi, and pandectist legal doctrine was a far cry from the usus modernus. The development moved, to use a famous phrase coined by Rudolf von Jhering,144 beyond Roman law by means of Roman law. In the days of the Roman Republic and Imperial Rome, legal experts had fashioned a Roman “legal science”.145 The medieval lawyers turned it into an academic discipline, a learned law that had to be studied at a university.

That is yet another characteristic of European law, and also one that originates in Roman law. Law is a learned profession, and the application and development of the law is the task of learned jurists.146 Closely related is the fact that law is an autonomous discipline and that, as a result, it is conceived as a system of rules that is separate, in principle, from other normative systems seeking to guide human conduct and to regulate society, such as religion.147 That corresponds to the Roman isolation of law from

of the Talmudic tradition is not of a systematic nature; see Glenn, ibid at 106 ff. It is similar for the Islamic law; see Glenn, ibid at 190 ff.

143 Berman, Law and Revolution I, above note 14 at 9; Glenn, ibid at 146 ff; Muschg, above note 4 at 37 (“time arrow”). This is different, particularly, in the chthonic and (East-) Asian traditions, which have no linear concept of history and thus do not share the European idea of progress and development; see Glenn, ibid at 74 ff and 322 ff. For the the Talmudic, Islamic, and Hindu traditions (also differing from the European in that respect), see Glenn, ibid at 110 ff, 193 ff, and 287 ff.

144 von Jhering, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung (6th ed, 1907) 14.


146 See Koschaker, above note 18 at 164 ff. For the Islamic tradition, see, in that respect, Glenn, above note 1 at 176 ff.

147 Coing, above note 18 at 6 f; Wieacker, above note 142 at 23 ff. This is different in the chthonic (“Chthonic law is … inextricably interwoven with all the beliefs of chthonic people and is inevitably, and profoundly, infused with all those other beliefs”), Talmudic (“The jewish tradition is a normative or legal tradition in much the same measure as it is a religious tradition. The two have become fused in the idea that the divine will express
non-law. A Roman legacy is also the predominance of private law within the tradition of the ius commune, with an emphasis on a finely differentiated law of contract. Moreover, law in Europe is based on certain values that ultimately reflect the centrality of the person as the subject and intellectual reference point of the law. That was to be expressed particularly clearly in the idea of a specific dignity attributed to Man as having been created in the image of God, but it was inherent already in the principle of liberty of Roman law. Also in this respect, the Christian revelation may, therefore, be seen to have taken the intellectual achievements of antiquity to their true destination. In a very similar way, aequitas canonica and Roman fides corresponded to each other.

How European Is the “European” Legal Tradition?

Modern European law still presents the image of an intriguing mixture of diversity and unity. Thus, the continental legal systems are usually subdivided into the Germanic and Romanistic legal families. Moreover, there are a

itselt best in legal norms, which have sanctions, leaving relatively little outside the reach of the law, or halakah", Islamic ("[Islamic law] has been described as a 'composite science of law and morality', and this must be understood not as a joint administration of the two separate concepts but as a fusion, or composition, of (almost all of) both"), and Hindu traditions ("You may wish to talk about law and morals, but the reason it is law is because of the (religious) morals, which infuse all types of obligation"). See Glenn, above note 1 at 69, 102 f and 186, 282. Generally, on (Comparative) Law and Religion, see, most recently, Berman, “Comparative Law and Religion”, in Reimann & Zimmermann, above note 22 at 739 ff.

See text above at note 96.

Coing, above note 18 at 8 ff; Mohnhaupt, above note 25 at 662. Coing himself, in this context, stresses the difference from other legal cultures.

Wieacker, above note 142 at 20 ff; see also Borgolte, above note 6 at 346 f. For Glenn, this appears to be a central characteristic of the Continental European legal tradition. The title of the respective chapter is, therefore, “A Civil Law Tradition: The Centrality of the Person”. For the chthonic, Islamic, and (East-) Asian traditions, where this is different, see Glenn, above note 1 at 70 ff, 192 f, and 319 ff. Related to the centrality of the person is the idea of subjective rights, which is not at all self-evident; see Coing, “Zur Geschichte des Begriffs 'subjektives Recht'”, in Coing, Gesammelte Aufsätze zu Rechtsgeschichte, Rechtsphilosophie und Zivilrecht (1982) vol 1, 241 ff; idem (1984) 238 Historische Zeitschrift 8 ff; idem, above note 85 at 172 ff. See also Glenn, ibid at 140 ff, in contrast to 86 ff (chthonic traditions), 108 f, 119 ff (Talmudic tradition), 192 f, 209 ff (Islamic tradition), 286 f (Hindu tradition), and 320 f, 336 f (Asian tradition).

See, generally, Acts 17: 23 and Romans 1: 19; also text accompanying note 11 above.

Gordley, “Good faith in contract law in the medieval ius commune”, in Zimmermann & Whittaker, above note 34 at 93 ff.

Zweigert & Kötz, above note 19 at 62 ff.
number of systems that have to be located somewhere between these two legal families, particularly the Dutch and Italian ones. But even the systems belonging to the Germanic legal family display significant differences in style and substance. The Austrian and the German Civil Codes date from different periods of the European legal development and are marked by different intellectual currents. Of the Swiss Civil Code it has been said that it has received its characteristic mark "largely from the special conditions of Switzerland and the traditions of that country's legal life". Nonetheless, it can hardly be disputed that all legal systems belonging to the Romanistic and Germanic legal families are sufficiently similar to describe them as different manifestations of one legal tradition. The English term chosen for that tradition is "civil law" (or "civilian tradition"), which refers, historically, to Roman law. But are we really entitled to speak of a European tradition? As far as the states of Central and Eastern Europe are concerned, the question probably has to be answered in the affirmative. Up to the period of the World Wars of the twentieth century, they belonged to the cultural sphere of the ius commune. In some of them (most notably Hungary and Poland), the continued teaching of Roman law has, during the days of the rule of socialism, maintained a connection with the West. And since the end of that rule we see a process of reintegration "by way of a renovation of private law guided by comparative scholarship". Lawyers in nineteenth-century Tsarist Russia had also availed themselves of the doctrines and methods of Roman law in order to cope with the social and legal challenges that the traditional Russian law was unable adequately to deal with. As with the lawyers in many other countries, they were particularly inspired by the legal development in Germany that was shaped by Savigny and the Historical School.

155 Glenn, above note 1 at 125 ff.
156 For the different meanings of the term "civil law", see Zimmermann, in Carey Miller & Zimmermann, above note 46 at 262 f. The connection between civil law and Roman law becomes apparent in the naming of the chairs for Roman law in Oxford and Cambridge as Regius Chairs in Civil Law.
157 For an overview, see Zweigert & Kötz, above note 19 at 154; Kühn, "Comparative Law in Central and Eastern Europe", in Reimann & Zimmermann, above note 22 at 215 ff.
158 See, eg, the very personal words by Mádl (then President of the Republic of Hungary), in Basedow & Drobnig et al (eds), Aufbruch nach Europa (2001) vii.
160 See, in particular, the works by Avenarius, Rezeption des römischen Rechts in Rußland — Dmitrij Mejer, Nikolaj Djuverman and Iosif Pokrovskij (2004); idem, "Das russische Seminar für römisches Recht in Berlin (1887–1896)" (1998) 6 Zeitschrift für Europäisches Privatrecht 893 ff; idem, "Savigny und seine russischen Schüler:
in 1926 took over Swiss private law and thus "conclusively left the Islamic legal family."\textsuperscript{161} Also, the Nordic legal systems are predominantly regarded as part of the civilian tradition, in spite of having developed their own style in a number of respects.\textsuperscript{162}

The central argument often advanced against the recognition of a genuinely European legal tradition is the existence of the English common law that, so it is said, has developed a noble isolation from Europe\textsuperscript{163} and is therefore fundamentally different.\textsuperscript{164} But the idea of the common law as an autochthonous achievement of the English genius is a myth. In reality England was never completely cut off from continental legal culture; there was a constant intellectual contact that has left its imprint on English law.\textsuperscript{165} Even in its origin it was an Anglo-Norman feudal law of a pattern typical of medieval Europe.\textsuperscript{166} For many centuries, Latin and French remained the languages of English law. The Catholic Church brought its Canon law,\textsuperscript{167} and

\begin{itemize}
  \item Schlosser, \textit{Grundzüge der Neuen Privatrechtsgeschichte} (10th ed, 2005) 214, who points out that this reception was neither extraordinary nor completely surprising. But see also Zweigert & Kötz, above note 19 at 175 f.
  \item Zweigert & Kötz, ibid at 271.
  \item Baker, \textit{An Introduction to English Legal History} (3rd ed, 1990) 35; in the fourth edition (2002), the word "noble" has been deleted.
  \item For what follows, see the contributions by Peter Stein, above note 121 at 151 ff; Zimmermann, "Der europäische Charakter des englischen Rechts: Historische Verbindungen zwischen civil law und common law" (1993) 1 Zeitschrift für Europäisches Privatrecht 4 ff. Also of interest, in this context, is the question of the "inner relationship" of (classical) Roman and English law; see Pringsheim, "The Inner Relationship between English and Roman Law" (1935) 5 CLJ 347 ff; Stein, "Roman Law, Common Law, and Civil Law" (1992) 66 Tulane L Rev 1591 ff; idem, "Logic and Experience in Roman and Common Law", in Stein, above note 121 at 37 ff.
  \item van Caenegem, \textit{The Birth of the English Common Law} (2nd ed, 1988).
\end{itemize}
the international trade, the lex mercatoria. In Oxford and Cambridge, two of the oldest European universities, Roman law was taught and studied on the model established in Bologna. From Scotland, too, Roman legal ideas filtered into English law; Scotland, after all, in the early modern period had become a far-flung province of the ius commune with particularly close relations to French and Dutch universities.168 The English common law was supplemented by another layer of law, referred to as Equity: a ius honorarium inspired by considerations of fairness and justice (aequitas) that were shared throughout Europe. The medieval English customary law was recorded in writing in England as much as in Scotland or on the European continent. Another type of legal literature that we find in England in the same way, and at the same time, as elsewhere were the Institutes of national law. Key figures within this process of reception and adaptation were authors from Bracton via Blackstone to Birks and eminent judges such as Sir Matthew Hale, Sir John Holt, Lord Mansfield, and Mr Justice Blackburn. Modern English contract law has been decisively shaped by massive borrowings from authors such as Pothier, Domat, Grotius, Pufendorf, Burlamaqui, and Thibaut.169 Of course, in many cases the inspiration provided by Roman law has led to entirely un-Roman results. But that was true also of the continental legal systems. Thus, in the best known of the cases concerning King Edward VII's coronation procession — which had to be postponed because the King had contracted peritonitis — we read: “The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions.”170 The principle referred to is that of “debitor speciei liberatur casuali interitu rei”: the debtor is released from his obligation to perform when such performance becomes impossible and the impossibility is not attributable to his fault.171 From about the middle of the nineteenth century onwards, the English courts had started to read that rule into the contractual agreement of the parties.172


169 See, in particular, Simpson, “Innovation in Nineteenth Century Contract Law” (1975) 91 LQR 247 ff; Gordley, Philosophical Origins, above note 129 at 134 ff; see, generally, also Ibbetson, A Historical Introduction to the Law of Obligations (1999), who begins his work with the sentence: “The common law of obligations grew out of the intermingling of native ideas and sophisticated Roman learning.”

170 Krell v Henry [1903] 2 KB 740 (CA) 747 f.


172 Taylor v Caldwell (1863) 3 B & S 826; see, eg, Rheinstein, Die Struktur des vertraglichen Schuldverhältnisses im anglo-amerikanischen Recht (1932) 173 ff;
In the process they used a device also originating from Roman law: the implication of a tacit (resolutive) condition. The foundations were thus laid for the doctrine of frustration of contract. Functionally, it corresponds to the continental doctrine of clausula rebus sic stantibus, which has also been assembled by elements taken from Roman law, even though as such it was unknown to Roman law. But that is merely an example. Wherever one looks, one will find “legal institutions, procedures, values, concepts and rules that English law shares with other Western legal systems”. Hardly anything is sacred. Even Magna Carta, “the most basic statement of English customary law and constitutional principle”, was at best partly shaped by influences coming from the ius commune.

Whoever does not merely confine his attention to specific solutions to be found in the sources of Roman law, but also takes account of the flexibility of the tradition based on Roman law and of its capacity for growth and productive assimilation, will be able to acknowledge that the English common law can also be regarded as a manifestation of the European legal tradition. Of course, it has developed, over the centuries, a considerable number of peculiarities and idiosyncrasies. But it is clear today that these idiosyncrasies are increasingly getting worn away, on both sides of the Channel. Basil Markesinis refers to a gradual convergence, James Gordley...
to an outdated distinction (between civil law and common law).\textsuperscript{179} That applies on the level of substantive law as much as with regard to basic issues such as legal methodology.\textsuperscript{180} If account is also taken of the influence that Roman law has had worldwide,\textsuperscript{181} one may still say today, as Rudolf von Jhering did some 150 years ago:\textsuperscript{182}

The historical significance and mission of Rome, in a nutshell, is to overcome the limitations of the principle of nationality through the idea of universality … The special significance of Roman law for the modern world does not consist in the fact that, for some time, it was applied in practice as a source of law … but that it has brought about an intellectual revolution which has decisively shaped our entire legal thinking. Roman law has thus become, just as Christianity, a constituent cultural feature of the modern world.

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\item \textsuperscript{179} Gordley, “Common law und civil law: eine überholte Unterscheidung” (1993) 1 Zeitschrift für Europäisches Privatrecht 498 ff.
\item \textsuperscript{182} von Jhering, above note 144 at 1, 2 f.
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