Trends in the Development of Private Law in Europe

The Role of the Civilian Tradition in the Shaping of Modern Systems of Private Law

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PREFACE

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

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

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

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

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

EFFORTS TO CODIFY CIVIL (PRIVATE) LAW IN EUROPEAN UNION COUNTRIES REGARDING LEGAL UNIFICATION

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

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

2. In 1980, almost ten years prior to the adoption of the 1989 Resolution, a working group led by Professor Ole Lando of the Business School in Copenhagen, called the Commission on European Contract Law, was formed and sponsored by the European Communities. It has undertaken the task of developing the principles of European contract law.[6]

Of the various private efforts at harmonising private law in Europe, Ole Lando's Commission on European Contract Law is undoubtedly one of the best known. The Commission started its work in the 1980s. It resulted in the publication of the first part of its Principles of European Contract Law, consisting of General Provisions, Terms and Performance of the Contract, Non-Performance and Remedies in General, and Particular Remedies for non-Performance.[7] In

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

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

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

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

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

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

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

2000, Part II followed, which was integrated with Part I.[8] Meanwhile, in 2001, a third part was completed. Part III consists of chapters on assignment, assumption of debt, compound interest, conditional obligations, illegality, joint liability, prescription and set off. This part, which will once again be integrated with Parts I and II, was published in 2003.

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

3. An international academy (*Accademia dei Giusprivatisti Europei*) sitting in Pavia and consisting of mostly Roman law experts (including professors Peter Stein of Cambridge, who is the Vice President of the Academy, Theo Mayer-Maly of Salzburg, Fritz Sturm of Lausanne, Dieter Medicus of Munich, and Roger Vigneron of Liège), held its first session in October 1990. The Academy, which formally became the Académie des Privatistes Européens in November 1992, comprising European civilists and Roman law scholars, enjoying a great international reputation and working on the creation of a common European legal system, gives home to the Groupe d'étude pour le droit européen commun (GEDEC), which is currently drafting the Code of European Contracts Law (Code Européen des Contrats).[10] The proposed Code is modelled after the Fourth Book (regulating obligations and contracts) of the 1942 Italian Codice civile (which incorporates many aspects of the traditions of the 1804 French *Code civil* and the 1900 German *Bürgerliches Gesetzbuch*) and the Contract Code[11] drafted in the 1960s and 1970s by Harvey McGregor of Oxford for the English Law Commission.[12] Professor Giuseppe Gandolfi of Pavia, whose achievements in the field of Roman law research are also significant, has played a major role in establishing the Academy.[13] Meanwhile, civil law specialists of Central European countries like Hungary, which joined the European Union on May 1 2004, also participated in the preparation of the above-mentioned Draft Code. The Italian Civil Code of 1942, rather than the more modern Dutch Civil Code, was taken as a model because the Dutch Code had not yet generated case law. In 2002, the Academy published its Draft Code (*Avant-projet*).[14] The subject matter is close to what the Lando Principles deal with. In one respect, the Gandolfi Draft Code is similar to the Lando Principles in that both drafts are the result of a collaborative effort.

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

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

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

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

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

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

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

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

In Rome, the Institute for the Unification of Law (UNIDROIT) started a very similar project, which in 1994 resulted in the publication of Principles for International Commercial Contracts.[17] There has always been some competition between the two projects. However, the most striking conclusion from a comparison of the two is their obvious similarity. Not only are the adopted solutions often the same or similar, but the choice of the subjects addressed, the drafting style and the order of the chapters are all remarkably alike. This in itself is not so strange, if only because of the personal connections (at least five members served on both Commissions). Two formal aspects on which the two sets of Principles differ pertain to their scope of application. The UNIDROIT Principles only deal with commercial contracts, whereas the PECL are applicable to all contracts, including consumer transactions and private contracts. An obvious difference is that the Lando Principles only cover (Western) Europe, while UNIDROIT has a global scope of application. This geographical feature perhaps explains why the PECL's highly acclaimed system of national Notes could not work in the case of UNIDROIT.

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

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

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

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

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

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

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

of young researchers in Germany and the Netherlands.[20]

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

A disadvantage of teamwork, such as that in the Trento project, is that it may take a long time to finish. This is apparent from the fact that the national reports in the Zimmermann/Whittaker volume were concluded in 1997. Fortunately, the general report does reflect later developments. The disadvantage is also discernible in the second volume, which was published on *Enforceability of Promises.*[23] The Editor of this volume is the American comparatist and legal historian James Gordley. The volume investigates the question of to what extent promises are binding. In modern continental law, this question is usually answered in the affirmative, as opposed to Roman law and the *common law* with its *consideration* requirement. The book comprises fifteen cases dealt with from the point of view of twelve European jurisdictions (Denmark, Finland, Luxembourg and Sweden are missing, but Scotland once again receives special attention). The differences are greater than anticipated by the Editor. An example is the gift. In most European jurisdictions, its validity is still dependent upon the fulfilment of a form requirement. Usually, the form required is a notarial deed, but an ordinary deed is sufficient in Portugal, Scotland and Spain. In England and Wales, the promisor should make a "deed under seal" – it is sufficient (but not in Ireland) that he declares the deed to have the object of being such a deed, or he must establish a trust. Gordley did find *something* in common.

7. One of the more active private groups that are engaged in the development of "Principles" of European Private Law is the Helmut Koziol (Vienna) – Jaap Spier (Tilburg/Maastricht) group.[24] Before publishing a set of Principles, the group sets out to discover any common ground between the various jurisdictions. The questionnaire method used is very much akin to that of the Trento Common Core project. It is highly commendable that the group does not keep the results of the questionnaire approach to itself but is willing to share the findings with others through publication. By 2002, another four had been published. No. 4 deals with

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

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

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

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

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

causation.[25] It contains ten national reports and a comparative analysis. The national reports deal with the same 24 cases each. The ten jurisdictions covered are Austria (Koziol), Belgium (Cousy, Vanderspikken), England and Wales (Rogers), France (Galand-Carval), Germany (Magnus), Greece (Kerameus), Italy (Busnelli, Comandei), South Africa (Neethling), Switzerland (Widmer) and the United States (Schwartz). The comparative analysis demonstrates how much the jurisdictions have in common but also how much they differ on other points.

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

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

And, even though it is undoubtedly, undecided whether Europe, at the present moment, needs any sort of a unified legal system at all, it is obvious that harmonisation in the field of civil (private) legislation (even if not in the same extent in every aspect of private law) is unavoidable. However, the way of realisation of law harmonisation is uncertain. It could take the form in particular of (Council) regulation, directive, etc., and could also be realised via coordinated national legislation.[29] The failure of England and Scotland in 1970 to adopt the unified Law of Contracts that would have been binding in both countries does not contradict the tendency of efforts of European law harmonisation.[30] Roman law, which constitutes the historical foundation of the unity of European law, might have a crucial role in this undeniably long-term process, possibly requiring decades of hard work.[31] A circumstance that ensures the prevalence of Roman law is the application of the legal principles of private autonomy and freedom of contract, among other things, in European relations.[32] There is no doubt, however, that these legal principles, stemming from Roman law, could become relatively important and relativised in certain areas. This is the situation, for example, in the field of consumer

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

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

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

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

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

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

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

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

protection. The more emphasised and better-founded legal protection of the consumer, who is the more disadvantaged participant in commercial relations, doubtlessly relativises private autonomy and the legal principle of freedom of contract within a given private law system. That is, the laws of the EU, without doubt, indicate certain tendencies that seem to jeopardise the freedom of contract.

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

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

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

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

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

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

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

12. The expression "reception", as it relates to Roman law, the meaning of which, if interpreted correctly, is not some sort of "cultural occupation," but, at least in Germany, more like a notion that is equivalent to a type of "scientification" (*Verwissenschaftlichung*) of law. Reception cannot be connected to either the *Reichskammergerichtsordnung*, adopted in 1495, or the mythical decree of the emperor of the Holy Roman Empire, Lothar III, fading in the dimness of legends. The reception of Roman law means an intellectual tradition built on Roman legal foundations that only to a small extent relates to a well-defined positive legal system*, ius positivum*. Reception, defined in this manner, could be traced back centuries, with the conveyance of German lawyers (from Germany) who studied at the universities (stu*dia generalia*) of Northern Italy.

The signs of reception, i.e., the subsidiary prevalence of Roman law, associated with positive law, began to appear quite early on, in the 11th century. Later, in the 13th century, elements of Roman law can be found especially in the practice of ecclesiastical courts that often-litigated disputes having the nature of private law. According to our view, the influence of the Commentators appears in the latter area. At the same time, Roman law, defined as "legal literature," had already been accepted in Germany with the conveyance of the Glossators. Naturally, the division of the influence of Roman law into these two categories does not mean the denial of the importance of the Commentators' work, that is, the acceptance of Savigny's concept of viewing them merely as post-Glossators. Reception, however, was not limited to

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

Roman law material but also extended to the acceptance of canon law and feudal law of the Longobards as well. That is how the *ius commune = gemeines Recht* evolved as a body of law pertaining to both common law and private law, but divergent from, and competing with, the *Landesrecht*. The harmonisation of the hybrid law-like *ius commune* and local legal systems, or, in other words, the task of adaptation of *ius commune* to local conditions, was resolved by the so-called Practicals (*Rechtspraktiker*).

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

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

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

14. The fundamental conflict between *Usus modernus pandectarum* and natural law could have been only dissolved by the *Pandektistik*, developed in the work of the followers of the school of historical jurisprudence (*Historische Rechtsschule*). The characteristics of

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

Pandektistik, the intention of which was the creation of "the philosophy of positive law" (*Wieacker*), include the historical point of view, building on the original, Justinian's' sources, the desire for systemisation, the development of legal theories, and, finally – as a hoped-for result of all the aforementioned – the partition from particularism. In the light of the previously mentioned, the law of Pandects (*Pandektenrecht*) of the 19th century, *heutiges römisches Recht*, ("contemporary Roman law") should be sharply separated from *Usus modernus pandectarum*, which was dominated by the elements of particularism.

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

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

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

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

It is a fact that similarities may be found among numerous institutions and constructions of Roman law and English law. It is without doubt, at the same time, that there are essential differences appearing between the views of Roman law and English law, which was formed as the result of unique historical conditions. One kind of attribute of Roman law is that it is jurisprudential law, so-called "*diritto giurisprudenziale*"[37] that generally is not associated with the binding authority of preceding juridical decisions. The interpretation of jurisprudential law, however, could differ depending on what scientific discipline the interpreting scholar follows. According to Friedrich Carl von Savigny, the unique notion of *Juristenrecht* is systematisation, or more precisely, a tendency-like aspiration for systemisation. This view is especially clearly expressed in his work titled Sy*stem des heutigen römischen Rechts*. Rudolf von Jhering, a declared opponent of legal positivism, examines this problem from a different angle. At Jhering – primarily in his book titled *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* – Roman law, viewed as jurisprudential law, maintains its relevance in terms of both methodology and ideology.

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

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

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

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

An important difference between Roman law and English law is the Roman legal scholars' so-called *ars distinguendi*, expressed in some *responsa* ("legal opinions") of legal scholars (*iurisperiti* i.e. *iurisconsulti*), the "art" that is capable of distinguishing between the relevant, the legally relevant, and the irrelevant. As a result of this *ars distinguendi*, the high-level abstraction capability of Roman *iurisperiti* (*iurisconsulti*), which was always denied from Roman law by the *communis opinio*, is clearly demonstrable. Here, we wish to refer to the fact that, oddly enough, even Fritz Schulz writes about the Romans' aversion to abstraction.

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

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

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

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

precedents. Namely, in the case of *ius singulare* – for example, in relation to a privilege – in *aliis similibus* can be interpreted cautiously, obviously, in light of previous cases.

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

17. Although the first International Congress of Comparative Law did not occur until l900, there were numerous historical precursors to recognising comparative law as a separate legal discipline[40]. Indeed, the value of the comparative method in matters involving the law was recognised even in ancient times. Plato's three protagonists in *The Laws – an Athenian, a Cretan, and a Spartan* – discuss the form, meaning, and purpose of the law. During their conversation, it is suggested that a city's guardians should send out observers to survey “the life lived by foreigners”. After having been abroad for no more than ten years, each emissary should return to their home city and “present themselves before the council which muses on legislation”. There he should make his report concerning what he has learned from those in foreign lands who were able “to give him some information about any problems of legislation”. The council, in turn, should be attentive to any information provided by the observer that “throw(s) light on legislative problems that would otherwise remain difficult and obscure”[41].

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

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

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

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

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

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

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

It is sufficient here to suggest three main headings under which the uses of comparative law may be organised and evaluated[46]. Firstly, comparative law as a means for developing legal history and formulating general legal theory; secondly, comparative law as a means for understanding and improving the laws of one's own nation; and thirdly, comparative law as a means to promote understanding between nations and to develop a framework for international cooperation.

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

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

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

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

Yet, the comparative method is not without its challenges. Differences in language and terminology and dissimilarities in legal structures and procedures can make it difficult to compare legal systems. The resolution of this problem is to use a “functional” approach[49].

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

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

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

[49] Konrad Zweigert and Hein Kötz, *lntroduction to Comparative Law,* 3d. ed. (Tony Weir, trans.) (Oxford: Clarendon Press, 1998), p. 34 f. See Basil S. Markesinis, *Foreign Law and Comparative MethodoLogy: a Subject and a Thesis* {Hart Publishing, Oxford, 1997), pp. 196 f. See also, *Justice across the Atlantic ll: The Criminal Process in Portugal and the United States: Two Lega! Systems in Pursuit of Justice, supra,* Foreword by Rui Chancerelle de Machete, p. II (“This is how one of

Viewed by some as "a basic methodological principle of all comparative law"[50], functionality presumes that "the legal system of every society essentially faces the same problems, and solves these problems by quite different means though very often with similar results."[51]

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

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

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

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

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the primary objectives of the comparative scholars is achieved, the goal of functional equivalence allowing us to see our own institutions in another light, not only from a dogmatic but also from a sociological point of view").

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

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

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

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

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

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

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

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

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

The private law (*ius privatum*) of European countries is undoubtedly connected to Roman law, albeit to varying extents and building on different historical traditions. This is increasingly obvious in the decrease or even disappearance of differences, often motivated by political interests, between certain "legal fields" and "legal families." Not even differing traditions of culture and civilisation constitute obstacles (as this will become especially evident in the chapter of this book examining the influence of Roman law traditions in states outside

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

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

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

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

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

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

Europe), to a various extent – to the reception of Roman law. It follows from the foregoing that considering the significant role of Roman law in the comprehensive, comparative analysis of the evolution of European private law is justified.

PART I
THE ORIGINS OF EUROPEAN PRIVATE LAW

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

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

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

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

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

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

After the Frankish occupation of Burgundy in 534, the *Lex Romana Visigothorum* gradually

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

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

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

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

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

2. Justinian's Compilation (Codification)

a) The Aim of Justinian Regarding the Codification

Emperor Justinian I (527–565) was born around 482 in Tauresium, Moesia, of a Thracian-Illyrian peasant family under the name Petrus Sabbatius.[63] Once his uncle and adoptive father, Justinus, became emperor in 518, Justinian quickly rose through the ranks as a soldier and civil servant (serving as *comes*, *magister militum*, and *consul* 520). As the co-emperor and successor of Justinus, his primary political aim was to restore the unity of the empire (*Imperium Romanum*). This is why he launched successful campaigns to recover Italy, North Africa, southern Hispania and other important regions of the Mediterranean. For the same reason, he wished to unite the whole material of Roman law into a vast, comprehensive work of compilation, i.e., codification.[64] He intended it to be valid throughout the empire. The old glory of the Roman Empire seemed to return during his lifetime.

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

[63] Formerly, Justinian was thought to have been of Slavic origin but recent research seems to prove his Thracian-Illyrian ancestry. What is really important is that his birthplace belonged to one of the Latin-speaking territories of the eastern part of the empire (speaking mostly Greek). This explains why the emperor insisted on codifying Roman law in Latin, even though most of his jurists would have preferred Greek. Posterity must be very grateful for his decision, for only a few in medieval Europe knew Greek, which would have sealed the later fate of Roman law.

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

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

b) The Course of the Codification

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

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

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

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

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

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

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

It is a mystery how the compilers managed to create the largest code of all time in such a short period out of the huge body of legal literature that they had to master. F. Bluhme (1820) believes that they arranged the excerpts taken from the works of the jurists into four groups ('masses') (*Sabinus*-, *Papinian*-, *edicta*- and *appendices*- 'masses') and the relevant subcommittees worked on them separately (*Massentheorie*). Others (such as F. Hofmann, H. Peters, and V. Arangio-Ruiz) presume that there must have been a *praedigesta* that was merely rewritten by the compilers. Gy. Diósdi and A. Honoré maintain that, however difficult the task was, it was not a "mission impossible". The compilers must have had some collections made for educational purposes that contained allusions to the other sources of the period. Their use must have made the work of the compilers of the Digesta significantly easier.[67]

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

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

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

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

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

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

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

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

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

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

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

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

Justinian's aim with the compilation was to forestall the revival of the disputes of earlier years. As he was convinced that he could settle all debated questions by the compilation serving legal (and political) unity within the empire, he forbade commenting on the Digest and referencing works by jurists not included in it. He allowed only translations, references to parallel passages, and indexing. In the *constitutio Cordi nobis* he reserved, however, the right to issue new decrees to amend prevailing law.

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

Justinian's *Novellae* are not to be mistaken for the Novels added to the Codex Theodosianus that survive in fragments. The items belonging to the so-called *Novellae posttheodosianae* are numbered according to the emperors issuing them, so the name of the emperor has to be

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

indicated after the abbreviation "Nov." as follows: *Nov. Val.* (or *Nval*) = Novellae Valentiniani III.

c) Classical Jurisprudence and Justinian's Codification

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

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

It is still debated whether Justinian's compilation can be viewed as a codification at all or whether it is simply an unsystematic compilation, as, for instance, Gottfried Wilhelm Leibniz (1646-1716) maintained.[71] Measured by the standards of modern codes (codifications)[72], with their strict demands for logic and structure and with their level of abstraction, Justinian's work can hardly be qualified as codification. However, according to the standards of its own time, it was of outstanding importance and an unprecedented step forward.

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

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

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

The impact of Justinian's compilation on legal life was considerable. The material contained in this work of compilation did not become generally and exclusively applied law at all courts of the Byzantine (Eastern Roman) empire due to the following three circumstances: a) Justinian's codes regulated highly developed economic conditions, while in most parts of the empire outside the cities, economic life was largely backward; b) the codes were written in

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

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

Latin, while the language used in most parts of the empire was Greek; c) the local rules of the law of persons, family law, and the law of succession continued to be used by local courts of lower instance even after the *constitutio Antoniniana*, or the *Edictum* Caracallae (212 A.D.).

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

e) Corpus Iuris Civilis

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

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

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

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

The most outstanding of the learned editors of the source publications accepted today is Theodor Mommsen, who is responsible, among others, for the best critical editions of the *Digesta* and the *Codex Theodosianus*. Mommsen's achievement in Roman law, Roman history, and classical ancient studies in general (and even in certain fields of medieval studies) is fundamental and lasting. He even received a Nobel Prize for literature in 1902 for his literary achievement. W. Kunkel, one of the greatest Romanists of the 20th century,

[73] As to the significance of Roman law in the Middle Ages and in modern times see G. Hamza, *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn* (Budapest, 2002) and idem, *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján* [Trends in the Development of Private Law in Europe. The Role of the Civilian Tradition in the Shaping of Modern Systems of Private Law] (Budapest, 2002).

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

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

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

PART II
THE DEVELOPMENT OF EUROPEAN (PRIVATE) LAW IN THE MIDDLE AGES

1. Introduction

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

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

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

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

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

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

Contrary to the development of law on the European continent, the Anglo-Saxon world

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

2. The European *Ius Commune*

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

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

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

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

dell'ordinamento giuridico dello Stato, which also meant Roman law (as national tradition).[77]

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

3. Canon Law

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

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

In the Roman Catholic and Orthodox Churches, several private collections were issued, incorporating in chronological order the sources of law (*fontes cognescendi iuris canonici*), the provisions of the ecumenical and local councils, the *decretales* and canons attributed to the apostles. The first *decretalis* was sent in 395 to the bishop Himerius of Tarragona by the successor of Pope Damasus, Pope Siricius (384–399).

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

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

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

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

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

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

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

As they were included in five collections in the early 13th century (accepted as a material to be taught at the Bologna school of law (*Quinque compilationes antiquae*)), in 1234, Pope Gregory IX issued a universal and exclusive version to be implemented with the beginning of *Rex pacificus,* prepared by St. Raimundus de Pennaforte (about 1175–1275) and titled *Liber extra* (*abbr. X*), later complemented by the *Liber Sextus* of Pope Bonifatius VIII (*abbr. VI*). The Decretalists wrote notes and explanations to the decretals and their collections. Both the *Liber extra* and the *Liber Sextus* were complemented by a *glossa ordinaria*. We must also

mention the English scholar Alanus, who is typically regarded as the author of the Apparatus *ius naturale*. The *Liber Sextus,* compiled between 1296 and 1298, was the first collection to have not only one but several authors. Pope Bonifatius VIII ordered that the decretals issued after the pontificate of Pope Gregory IX and not previously incorporated into the *Liber Sextus* be all repealed. The *Liber Sextus* had an exceptionally high reputation. Notably, the appendix of the *Liber Sextus* contained 88 *regulae iuris*. It was probably the civilist Dino da Mugello who composed these *regulae*. The elements of Roman law had a particularly substantial influence on the *Appendix*. The Appendix can be viewed as a document of the close relationship between Roman law and ecclesiastical law. Decretalists wrote commentaries and notes to the decretes and later to their collections (*Liber Extra, Liber Sextus* and *Glossa Ordinaria*). The *Liber Sextus* was commented on by renowned jurists, such as the canonist Johannes Andreae (Giovanni d'Andrea) and the civilist Alberico da Rosata. The *Summa aurea*, the work of Henricus de Segusio, was an outstanding achievement of the contemporary school of Decretalists.

Further collections of decretals were also prepared in the late Middle Ages. In 1317, Pope John XXII issued one under the title *Clementinae* (abbreviated as *Clem.*) encompassing the *decretales* of Clement V, while the decretales issued later (*decretales posteriores*), such as the *Extravagantes Iohannis XXII* (1325–1500) and the *Extravagantes communes* (1500 and 1503) containing the decretals of the pontificate of Urban IV (1221–1264) and Sixtus IV (1471–1484) were only private collections (abbreviated as *Extravag. Iohann XXII* and *Extravag. comm.*) This is how a synopsis of canon law developed from six autonomous works into a single unit by the end of the Middle Ages and was called *Corpus iuris canonici,* modelled after the notion *Corpus iuris civilis*. This codification work included the *Decterum Gratiani*, the *Liber extra*, the *Liber sextus*, the *Clementinae*, and the two *Extravagantes*. Its authentic text was promulgated by Pope Gregory XIII in 1582.

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

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

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

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

In world history, the Hellenistic period begins with the death of Alexander the Great in 323 BC and the founding of the Hellenistic monarchies by his Macedonian successors and ends with the absorption of these monarchies into the Roman Empire. The year 30 BC is generally considered to mark the end of the period when Egypt came under Roman rule. In terms of legal history, however, the landmarks differ.

In Greece, Greek law continued to exist and apply to the relations of the Indigenous populations at 1east until the year 146 BC, when Corinth, the last remaining free city, was destroyed by the Romans, and possibly until the year 212 AD when Roman law was made applicable to the relations of most inhabitants of the Roman Empire. In the Hellenistic monarchies, a body of *Hellenistic law* was applicable to the Greek and Hellenised inhabitants of Egypt, Palestine, Syria, Asia Minor, and other countries of the ancient Near East. This law was essentially of Greek origin and a part of the Greek civilisation that the Macedonians disseminated. It was a "common law" of all the Greek-speaking people, the very people who spoke and developed the "common" (*κοινή*) language from a variety of ethnic dialects. Private Hellenistic law appears to be universal, despite certain influences from local sources; however, it was otherwise in the fields of public law where local influences were much more pronounced. Knowledge of Hellenistic law is derived from legal as well as extra-legal sources. *Papyri*, parchments, and inscriptions on which contracts, petitions, and records of lawsuits are reported abound and continue to be the object of intense study.

For centuries, Roman, Greek, and Hellenistic law lived and grew side by side. The principle of "personality" of the law was a fundamental precept of most ancient systems of law, including Greek law, Roman law and Hellenistic law. Consequently, Greek law governed the relationships among the subject Greek populations in Greece, whereas Roman law pertained to the legal relations of Roman citizens in Greece. In the Hellenistic monarchies, however, the principle of personality was gradually displaced by a freedom of choice: everybody was allowed to choose the system of law they wished to be governed by. Quite routinely, the language used by the parties in a legal document determined the applicable law. These conditions prevailed well into the 2nd century AD. In the year 212, however, the celebrated *Constitutio Antoniniana* of Emperor Caracalla granted Roman citizenship to practically all inhabitants of the vast empire, and thus, theoretically, Roman law became applicable to the relations of all citizens, regardless of ethnicity.

The following centuries witnessed a struggle between native laws and imperial Roman law, and Roman law finally prevailed and was able to displace Greek law and Hellenistic law in the official administration of justice. The victory was not achieved without compromise. The strict and inflexible Roman law had by that time been deeply influenced by Greek philosophical and legal thought and had become a Roman-Greek law, or *Ius Greco-Romanum*. The Justinian legislation of the 6th century that concluded this development was

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

predominantly the product of the Hellenic eastern provinces of the empire and largely reflected the work of the law schools of Constantinople and Beirut.

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

The same trend of returning to Greek sources is apparent in the legislative efforts of the Macedonian dynasty (9th and 10th centuries). The Procheiros Nomos and the Epanagoge of Basill, while designed to substitute for the repealed Isaurian legislation, in effect, preserved its very substance. The Basilica of Leo the Wise represents a crucial recodification of Justinian's legislation in the Byzantine Empire. Alongside the Eparchikon Biblion, which addresses guilds and associations, and several *Novellae* issued by Justinian and his successors, these works contributed to a comprehensive harmonisation of the law.

The foundation of the new law school of Constantinople by Constantine IX in 1045 gave new impetus to legal studies. In the following centuries, several collections of considerable legal significance appeared, such as the Epitome Legum, Ecloga Privata, Synopsis Basilicorun, Peira (a collection of judicial precedents) and several Canones, Nomocanones and Syntagmata, dealing with the canon law of the Greek Orthodox Church. The *Hexabiblos* of Harmenopoulos, compiled by a local judge in Thessaloniki in 1345, was one of the last Byzantine collections. Byzantine law, representing a fusion of Roman tradition, Christian ethics and Greek legal thought, exercised a deep influence on the legal systems of most Eastern European and Balkan countries.

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

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

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

The whole work was completed during the reign of Leo VI the Wise (886–911). The emperor wished to replace Justinian's codification by publishing "a total work of codification consisting of sixty books". This huge compilation called Basilica ("imperial laws" or *Res regiae/imperatoriae*) contained the text of the *Digesta*, the *Codex*, the *Institutiones*, and the

Novellae on the basis of their Greek versions, as well as extracts and explanations in a revised and partly altered form. Besides the *Basilica*, a new revised version of the *Procheiron* was also prepared at that time titled *Epanagógé tuo nomuo scholia* ("guide to the law book"). Byzantine jurists later added scholia or explanatory notes to the text of the Basilica.

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

Due to the difficulties of the practical application of the Basilica, mostly extracts and tables of content were used, such as the *Synopsis tón Basilikón* (the Synopsis of the Basilica) and the (from the phrase *ti pu keitai*, meaning "where to find what"). The last of these was a work by Harmenopulos, judge of Salonica, consisting of six books. It was issued in 1345 under the title *Hexabiblos* (Six Book-Work) and was in many respects a forerunner of the Pandectists. It also greatly impacted the development of law in Greece, the Balkans and Russia.

Over the centuries, the jurisdiction of local authorities and that of the Orthodox Church, initially a form of arbitration, has evolved into a clearly defined judicial system and was extended from the fields of family law and succession to those of obligations and criminal law. It was in this way that an incipient system of courts emerged, with the local authoríties at the lower level, bishop's courts in the *metropoleis*, functioning as courts of appeal, and the patriarch Synod in Constantinople, acting as the court of last resort.

Local authorities and ecclesiastical courts applied Byzantine law as it had been epitomised in several synoptic collections, such as the *Hexabiblos* of Harmenopoulos, which was most frequently used. At the same time, various local customs emerged, gaining legal force through the courts, and in some cases, such as in the Aegean Sea islands, were codified. By local custom and through scientific elaboration, new institutions emerged that brought Byzantine law in line with Western European developments. Thus, direct agency became possible and contractual transactions were freed of most formal requirements; the law of partnership and other associations and the law of banking and exchange were modernised.

In Byzantine law, attention was focused on equity, not as a distinct set of rules separate from those of a strict law but as a built-in humanisation of the whole legal system. In this spirit, old modes of procedure were simplified and freed of the excessive formalism that characterised the Roman actions, and substantive rules of law were altered in line with the teachings of Greek philosophy and Christian ethics. The new spirit affected all branches of private law. In the law of persons, a new measure of protection was accorded to minors and other incompetents. In the law of family, the institution of marriage acquired a prominent position and the previously unlimited authority of the husband over his wife and children was curbed. In the law of property, protection was accorded to the small agricultural owner, and the idea of family ownership of property found fertile ground for development. In the field of succession law, the governance of intestacy was streamlined, and the concept of a forced share emerged. Finally, in the field of the law of obligations, the subjective element of liability – namely, fault – was emphasised, and debtors were accorded relief against unscrupulous or greedy creditors.

5. Italian Territories (Italy)

After the fall of the Eastern Gothic Kingdom in 553, Justinian extended the implementation of his codification to Italy. The application of the codification of Justinian was strongly related to and rested on the Byzantine conquest, so once the Byzantines were forced to withdraw,

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

The starting point of the scientific cultivation was the foundation of the University (*studium generale*) of Bologna[80], also called the cradle of *legalis scientia* or *lucerna iuris*, where Irnerius (d. around 1140) explained during his courses Justinian's codification as early as the 1080s. The knowledge of Roman law gradually spread through university education at first in Italy and later also in Southern France. Irnerius did not write works (books). He added glosses[81] to certain passages of Roman *leges found* in the *Codex Iustinianus,* and to the *responsa* of Roman jurisconsults, included in the *Digesta*. This method gave rise to the Bologna School of Glossators. The Glossators later also added summaries *(summae)* and conceptual definitions *(distinctiones)* to the various parts of the codification of Justinian. Moreover, they compiled collections of case law *(casus)* and various other monographs. The Glossators also collected contradictory passages from the sources and the writings of outstanding jurists *(dissensiones dominorum).* Lacking a sense of historical perspective, The Glossators treated the *Corpus iuris civilis* as if it had been authored in a single period. The apparent inconsistencies of the *Corpus iuris civilis*, resulting from the fact that the passages originated from different periods of time, were, according to them, to be eliminated.

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

The most outstanding representatives of the School of Glossators, disciples that later became successors of Irnerius, were the *quattuor doctors,* or "four doctors": Bulgarus (d. around 1166), Martinus Gosia (d. 1158 or 1166), Iacobus (d. 1178), who authored between 1130 and

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

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

1140 the first work of criminal law in the Middle Ages titled the *Tractatus criminum*, and Hugo de Porta Ravennate (d. 1168). Bulgarus was the author of the earliest work on the law of “civil” procedure. He used a special mosaic-like method of collecting and connecting words from various passages (texts). He also introduced several new genres of dealing with legal texts. He and his successors interpreted the texts literally, while Martinus was the forerunner of attributing importance to the application of equity (*aequitas*). Bulgarus's approach prevailed later in Bologna, while Martinus's gained ground mostly in France.

According to Hostiensis (Henricus de Segusia [Susa] d. 1271), a teacher of canon law at the University of Paris who studied both in Italy (Bologna) and England, Martinus Gosia, could be viewed as a kind of *homo spiritualis.* Martinus Gosia was more devoted to divine law (*ius divinum*) than to the strict interpretation of civil law (*divinae legi adhaerebat contra rigorem iuris civilis*). At the Imperial Diet of Roncaglia in 1158, the "Four Doctors" established, at the request of Emperor Frederick I, the list of imperial prerogatives (*iura regalia*). This list was an important step forward for the development of constitutional law. Therefore, the work of glossators cannot be viewed as being limited to the field of private law (*ius privatum*).

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

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

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

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

Its paramount authority is well reflected in the maxim “Whatever is not accepted by the Glossa will not be accepted by the court, either” *(Quidquid no agnoscit Glossa, non agnoscit curia).*

The activity of Accursius was by no means limited to compiling the glosses. He is also the

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

author of the *Summa authenticarum,* which was published together with the *Summa* of Azo, and of the *Summa feodorum,* which used to be attributed to Hugolinus, and which presented the novels of Justinian and the feudal law (*ius feudale*). In these works, he emphasised both practical application and legal science.

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

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

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

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

The author of the most outstanding work on the law of procedure in medieval legal science was Wilhelmus Durantis (1235–1296) of Southern France, bishop of Mende, who paved the way for the work of the Commentators. He is the author of the most prestigious work on procedural law of the Middle Ages, the *Speculum Iudiciale, also* called *Speculum Iuris*. The first version of this work came about between 1271 and 1276, while the second one was between 1287 and 1291. By means of the *Speculum Iudiciale,* Roman law-based doctrines and principles became known in Europe, along with those territories, for instance, in Northern

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

Europe, where there had been no reception of Roman law. The founder of the school of Commentators, Cinus (Cino da Pistoia) (1270–1336), a professor in Perugia, sharply attacked the Gloss for its possible false conclusions and distorting simplifications. His pupil, Bartolus de Saxoferrato (1313–1357), also called the *lumina et lucerna iuris* by his contemporaries, was the most brilliant Commentator and can be seen as the founder of both private international and commercial law. However, Bartolus returned to the Gloss, the authority of which was superseded by his own. His works were seen as having binding legal force, and his name became so closely tied to legal science that "only those who follow Bartolus are considered good lawyers.", went the maxim *(Nemo (bonus) iurista, nisi Bartolista).* His commentaries on Roman law were reflected primarily in the needs of citizens.

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

The stagnation and decline of Roman law studies coincided with the flourishing of Humanism, i.e., Humanist studies. It was particularly the philosophy that had a predominant position in the Platonic academies. The relationship between jurists and Humanists was eventually overshadowed by a number of disputes. While jurists often based their research on confronting *thesis* and *antithesis,* in compliance with the method of late scholastic representatives, the Humanists favoured the implementation of the platonic dialectics while trying to find a synthetical analysis. The Humanists rejected the teaching method of jurists, which focused solely on the interpretation of certain texts, i.e., sources, instead of embracing the entirety of the law. In the view of the Humanists, this method led to considerable cultural insufficiency, evoking the danger of a trend of simplification. Humanists also ridiculed the simplified and often distorted Latin used by jurists. Petrarca and Lorenza Valla called themselves “Antibartolists” and viewed jurists as *homines illiterati.* They appear to haveforgotten the fact that medieval Latin underwent a continuous development and became the spoken language used in every praxis. The individualistic approach of Humanists, which focused solely on individuals, led to a disdain for jurists working within corporations. (*ordines iurisperitorum*). They viewed the *ordo iurisperitorum* not as a form of expressing autonomy but as an institutional adherence to outdated traditions.

6. France[84]

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

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

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

The students of the Glossators brought from Italy respect for Justinian's law, which influenced both written and customary law. The universities of Montpellier, Toulouse and Orléans played an outstanding role in teaching Roman law. Certain French jurists of the second half of the 13th century can be considered forerunners of the Italian School of Commentators. Two of their outstanding representatives were the *doctores ultramontani Iacobus de Ravanis* (Jacques de Révigny, c. 1210-15–1296) and Petrus de Bellapertica (Pierre de Belleperche, c. 1250–1308), whose lectures at the Law Faculty in Orléans (École d'Orléans) were said to have also been audited by Cinus. Important works of Petrus de Bellapertica were the commentaries written to the *Digesta vetus* and the *Digesta novum*. He gave up teaching in 1296 and continued his activity as the *clericus regis* in the court of Philippe IV (1285-1314).

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

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

question.

Petrus de Bellapertica (Pierre de Belleperche) continued his studies in Orléans; his master was Raoul d'Harcourt, the pupil of Jacobus de Ravanis. Petrus de Bellapertica (1247–1308) was a professor at the University of Orléans, where, according to traditions, Cinus attended his courses. After offering his services to King Philippe IV in 1296, he first became a member of the Parliament of Paris before being ordained as the bishop of Auxerre in 1306. At the end of his career, he became chancellor of France. Among his works, the most important one is the *Commentaria,* containing his lectures dealing with the titles (*tituli*) of the Digest. He also wrote *repetitiones* to some of the *tituli* of the Digest and to the *Codex Iustinianus*. His lectures on the *Institutiones* of Justinian, dedicated in particular to their procedural part *(De actionibus),* are also considered very significant.

7. The Iberian Peninsula[85]

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

7.1 Spain

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

The collections of Latin-language *customs* of several towns in Catalonia (e.g. Barcelona, Gerona, and Tortosa) were fundamentally based on Roman law. At the very beginning of the 15th century, the official compilation commissioned by the Parliament (*Generalitat*) of Catalonia of the law (*dret general)* was also based on Roman law traditions. This compilation, carried out at the proposal of the *Generalitat*, also aimed at the unification of law. The redactors of this compilation, which embraced the customs of Barcelona (*Usatges de Barcelona*), Catalonian laws and the decisions (sentences) of the Supreme Court in Barcelona, took the system of the *Codex Iustinianus* into consideration while also having in mind the chronological order of the different Catalan legal sources. The laws of King James I of

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

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

Aragon (1213–1276) mandated ”the use of natural reason” in place of appropriate custom (*usatges*), implementing Roman law even before its formal reception in 1409. In Castile and León, the law book of King Alfonso X (the Wise), known as the “Spanish Justinian” (1252–1284), consists of seven books and is entitled *Siete Partidas*, which serves as a significant document illustrating the extensive use of Roman law. The *Ordenamiento de Alcalá* (1348) directly ordered the application of Roman law as subsidiary law. The collections of customs titled *Fuero General* in Navarra and *Furs de Valencia* in Valencia are clear evidence of a thorough knowledge of Roman law.

7.2 Portugal

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

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

8. The Holy Roman Empire[87]

8.1 Introduction

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

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

8.2 a) The German Territories

At first, Justinian law penetrated medieval Germany gradually. Then, in the 15th century, it gained general reception through an act of legislation. The concepts of Roman law can already be found in German legal sources in the 12th and 13th centuries. The increased influence of the *Breviarium Alaricianum* can be attributed to two main factors. First, it was taught in German monasteries, which helped spread its principles. Second, during the legal conflicts between the emperors and the papacy, Roman public law was frequently cited, contributing to its acceptance and integration into legal practices. At the same time, there arose a trend in German intellectual life that manifested itself in legal life in the application of Justinian "scholarly/learned law", introduced by the pupils of the Glossators. From the 13th century onward, Roman law began to influence the activities of ecclesiastical courts. However, it was only in the latter half of the 15th century that provinces started adopting it as a supplementary legal system alongside their municipal and provincial laws.[88]

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

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

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

b) Austrian Hereditary Provinces

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

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

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

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

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

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

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

Due to the presence of elements of Roman law in the most important sources of old Austrian provincial laws (both in collections of formulae (*libri formularum*), legal opinions, law books and acts), the unification of the particular laws of the provinces became possible in the late Middle Ages. Emperor Frederick III (1440/42-1493) made the first attempts to unify the legal order of all Austrian territories. For instance, in compliance with the autonomous status of the Austrian provinces, from 1460 onward, no differences were permitted in Styria, Carynthia, Krain and Austria regarding the legal regulation of marital property law for nobles.

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

A Chair of Roman law was established at the University of Vienna (*Universität Wien*), founded in 1494, which was founded in 1365. The first head of the Roman law department was the famous jurist and humanist Hieronymus Balbus (Girolamo or Geronimo Balbi,

around 1460-1535). He was born in Venise and presumably learned law in Padova, eventually leaving Vienna in 1499. His successor was Johannes Sylvius Siculus in 1497, who also pursued his studies in Padova. The new head of the department was Johannus Stephanus Reuss from Constance in 1499. A year later, Wolfgang Pachaimer from Gründen became his successor. These scholars were outstanding representatives of humanism and showed predilection towards Roman poetry rather than Roman law. The introduction of Roman law in the University of Vienna took place thanks to the devotion towards humanism of the emperor Maximilian I (1493-1519).

8.3 c) The Low Countries

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

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

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

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

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

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

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

8 .4 Switzerland

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

In French-speaking cantons like Geneva, Vaud, Valais, Neuchâtel and Fribourg, Roman law traditions survived. In the episcopate of Geneva – where Protestantism was accepted in 1536 – the General Council (*Conseil general*) of the citizens adopted a private law collection under the title of *Edits civils* in 1568. Legist Germanus Colladon, who emigrated from France, contributed greatly to the edition of this collection, primarily to family law.

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

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

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

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

Legal humanism also experienced significant development in Switzerland. Claudius Cantiuncula (Claude Chansonette, around 1490-1549), a professor in Basel, was a prominent figure of this movement. In this regard, professors Bonifacius Amerbach (1495–1562) and his son Basilius Amerbach (1533–1591) were especially important. Their expert opinions were

highly respected nationwide. All the two jurist consults belonged to the humanist school of thought. They were both engaged in the *gelehrtes Recht*, which contained Roman law and canon law.

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

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

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

8.5 Bohemia and Moravia

In Bohemia and Moravia, the monarchs of the Pzremyśl dynasty urged the application of certain Roman legal institutions. It was during the reign of King Wenceslas II (1278–1305) that the code of mining law (*Ius regale montanorum*, or *Constitutiones iuris metallici*) containing elements of Roman law was issued. During the same period, an Italian author published a private collection of laws under the title *Constitutiones iuris metalli*, which was the first in Europe to summarise procedural law based on Roman and canon law.

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

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

At the first University in Central Europe (1348), Roman law was taught from the beginning.

This played a decisive role in the spread and reception of Roman law.

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

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

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

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

9. Poland and Lithuania[89]

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

Polish students studying at Italian universities introduced Roman law in Poland as early as the 12th century. The statutes of King Casimir III the Great (1333–1370) already reflect the impact of Roman law besides feudal customs, the former later penetrating the law of marriage and the law of succession. In the towns flourishing from the second half of the 15th century, the courts tended to refer to the law of the Glossators that was almost entirely absent from the practice of feudal noble courts applying native customs (*ius terrestre*). This is because the Polish estates considered Roman law the imperial law of the Holy Roman Empire (*ius Caesareum*) and believed that its reception would promote their kingdom becoming a German vassal. Roman law spread in Poland, therefore, only by means of a slow infiltration, just like in Hungary.

A personal union first united Lithuania and Poland in 1386 and by a Realunion (Union of Lublin) in 1569. The structure and, to a smaller extent, the subject matter of the Lithuanian statutes issued in the 16th century show the influence of Roman law. The most important of

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

them was the Third Lithuanian statute of 1588 that provided that Roman law should gain acceptance as a subsidiary "Christian law" (*ius Christianum*) and which can be regarded as the formal reception of Roman law in the Grand Dutchy of Lithuania, similar to Germany.

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

1. Hungary

(i) Roman Law and Medieval Hungarian Customary Law[90]

Although Hungary maintained connections with the Byzantine Empire, the fact that King Stephen I [St. Stephen] (1000-1038) and his country adopted Western (Latin) Christianity, making the penetration of Byzantine law into Hungary impossible. It was only Justinian's codification, especially the *Codex* and some novels that made its impact felt in the laws of St. Stephen, even if indirectly.[91]

The Transdanubian part of Hungary was under Roman control for almost four centuries. The provinces of *Pannonia prima* and *secunda, Savia* and *Valeria* belonged to the western part of the Roman Empire. Romanisation also included the sphere of law, as testified by several inscriptions.[92]

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

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

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

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

Other Hungarian students learned canon law in Paris and became acquainted with Roman law. A small number of Hungarians attended the faculty of law at the universities of Padova, Oxford, and Cambridge, among others. Hungarian students continued to go to universities abroad under the Angevin kings. The first Hungarian university operated in Pécs from 1367, where Roman law was probably taught as well.[93]

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

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

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

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

(ii) István Werbőczy and the *Tripartitum*The law book of Chief Justice István Werbőczy (c. 1450–1541) systematising feudal customs in the native language of learning, i.e., in Latin (*lingua patria*), was titled *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae.* - Demonstrating the impact of Roman law in many respects, this general and comprehensive *decretum* was the first to codify native custom. It was accepted by the Diet of 1514 and sanctioned by the king. However, it was never promulgated and thus never formally became a source of law, with the sole exception made in the case of Transylvania, where the

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

Tripartitum gained the force of law on the 4th December 1691 by means of the third article of the *Diploma Leopoldinum*. However, Werbőczy's *Tripartitum* achieved authority despite its failure to be enacted.

A law book nonetheless, Werbőczy's work contained contemporary feudal customary law and the royal decrees using the terminology of Roman law. However, the passages taken from Justinian's codification were probably included only to increase the prestige of the *Tripartitum*. The links between the *Tripartitum* and Roman law are conspicuous in the following aspects[94]:

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

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

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

Where Werbőczy studied Roman law and from where he took the texts of Roman law included in the *Tripartitum* is still a subject of debate. His source must have been the textbook of Roman and canon law written by Master Raymundus[95] at Naples in the 13th century that must have been taken to Hungary and Poland in the course of King Louis I the Great's campaign to Naples. In Poland, it even became a national statute. The so-called *Summa legum Raymundi* contained the customary law of the South Italian towns and the penal laws of the Angevin kings and became part of the law books of several royal free cities in Upper Hungary (such as Bártfa and Eperjes). Manuscript versions of it were also at Cracow and Wiener Neustadt. Recent research maintains that Werbőczy's source must have been the one from Cracow, concluding that he must have studied there.

The matter of the *Tripartitum* became partly completed and partly revised in 1553 by the *Quadripartitum*. This new collection of customary law testifies to the presence of Roman law in its regulations about procedural law, contrary to Werbőczy's claim that these were borrowed from French sources (*Tripartitum*, II. pars 6. tit. 12.§). 1. England and Scotland[96]

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

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

[96] For England, see T.E. Scrutton, *The Influence of the Roman Law on the Law of England* (Cambridge, 1885); P. Vinogradoff, *The Roman elements in Bracton's treatise*, *Yale Law Journal* 32 (1923); H. Peter, *"Actio" und "writ"*

a) *England*

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

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

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

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

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

Henricus de Bracton (1200–1268) applied developed concepts of Roman law to systematise

(Tübingen, 1957), idem. *Römisches Recht und englisches Recht* (Wiesbaden, 1969); J. L. Barton, *Roman Law in England*, *IRMAE* V 13 a (1971); P. Stein, *Roman Law, Common Law, Civil Law TLR* 66 (1992), idem. *The Vacarian School*, *JLH* 13 (1992); F. Winkler, *Roman Law in Anglo-Saxon England*, *JK* 48 (1993); Tóth, Á., *Vacarius, az angliai glosszátor* [Vacarius the English Glossator], *JK* 48 (1993); R. Zimmermann, *Der europäische Charakter des englischen Rechts*, *ZEuP* 1 (1993); P. Stein, *The Future of Roman Law in a Britain that is Part of Europe*, *RIDA* 41 suppl. (1994). For Scotland see P. Stein, *Roman Law in Scotland*, *IRMAE* V 13 b (1968).

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

the evolving English law in his book *De legibus et consuetudinibus Angliae* written around 1250, the introduction of which shows the influence of the Glossators. Glanvill and Bracton's authoritative texts introduced knowledge of Roman law in England.

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

b) Wales

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

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

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

c) Scotland

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

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

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

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

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

11. Northern Europe[100]

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

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

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

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

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

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

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

a. *Introduction*

The Balkan states and the Danubian Principalities (Wallachia and Moldavia) received Roman law through the mediation of the Byzantine Empire and its legal system. In present-day Bulgaria, Serbia, and Romania, the *Eklogé tón nomón* and the *Nomos geórgikos* exercised great influence on the development of law, and from the 14th century onward, a similar role was played by the *Hexabiblos* and the so-called *nomocanon* (compilation of both secular and ecclesiastical law) of a Greek friar called Matthaios Blastarés, as well as by the *Syntagma kata stoicheion* (alphabetical collection of legal texts), compiled in 1335 and containing the most important laws of the *Procheiron* and the *Basilica* in alphabetical order.

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

b. *Bulgaria*

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

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

c. *Serbia*

Serbia gained independence in around 1180 and applied Byzantine law to a great extent.

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

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

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

d. Wallachia and Moldavia

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

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

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

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

13. The Russian Principalities (Russia)[102]

It was partly due to the Roman law's commercial relations with Byzantium that reached Russia. The other factor was the activity of the Orthodox Church. In the Grand Dutchy of Kyiv, elements of Byzantine Roman law became known primarily through the Zakon sudni

[102] A. Rozhdesvenski, *Razhzushdenie o vlianii greko-rimskogo prava na rossiyskie zakoni* (Moscow, 1843); D. Oblonesky, *Russia's Byzantine Heritage* (Oxford Slavonic Studies 1, 1950); A. V. Solovyev, *L'influence du droit byzantin dans les pays orthodoxes*, *Atti del Congresso internazionale di scienze storiche*, vol. 6 (Florence, 1956); D. P. Hammer, *Russia and the Roman Law*, *American Slavonic and Eastern European Review* 16 (1957); J. N. Shchapov, *Vizantiyskoye i yuzhnoslavanskoye pravovoye naslediye na Rus XI-XIII vv.* (Moscow, 1978); D. H. Kaiser, *The Growth of the Law in Medieval Russia* (Princeton, 1980); J. Quigley, *The Romanist Character of Soviet Law, The Emancipation of Soviet Law* (Dordrecht, 1992); V. A. Dozortsev, *The Trends in the Development of Russian Civil Legislation during the Transition to a Market Economy*, *Review of Central and Eastern European Law* 19 (1993). For the idea of the "Third Rome", see I. D. Strémooukhoff, *Moscow the Third Rome. Sources of the Doctrine*, *Speculum* 28 (1953); N. M. Zernow, *Moscow, the Third Rome* (London, 1937); H. Schaeder, *Moskau, das dritte Rom* (1957^2) W. Goez, *Translatio imperii* (Tübingen, 1958); W. Lettenbauer: *Moskau, das dritte Rom* (1961).

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

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

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

The title of the Tsar of Russia was first used in international relations by Ivan III (1462–1505) in 1473 after he married Sophia Palaiologa, niece of Constantine XI, the last Byzantine emperor in 1472. The man who outlined the idea of Moscow being the successor of Byzantium was a monk called Philotheos (Filofej) of Pskov in the early 16th century. Based on Justinian's Novel, he worked out the principle of caesaropapism, the unity (*symphónia* or *sviashchennaya sugubitsa*) of ecclesiastical (*sacerdotium* or *hierosyné*) and political power (*imperium* or *basileia*), which entitled the subordination of the Church to the monarch. The title of the tsar was already recognised by Holy Roman Emperor Maximilian I during the reign of Vasily III (1505–1533), but the patriarch of Byzantium made the Byzantine-style coronation of Ivan IV, the Terrible (1533–1584), a precondition for his approval. This took place in 1547.[103] In 1589, the patriarch of Moscow was established, which was the birth of the *autocephale* Russian Orthodox Church. The first *metropolite* of Moscow was elected in 1448. The Constitutional Charta *(Gramota Ulozennaja)*, adopted in a synod by the participation of Russian and Greek prelates, was equally signed by the patriarch of Constantinople.

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

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

and *Eklogé*) can be felt only in criminal law and even there it is mostly vague.

PART III
THE DEVELOPMENT AND THE CODIFICATION OF EUROPEAN PRIVATE LAW IN MODERN TIMES

1. The Development of European Jurisprudence at the Beginning of the Modern Era

In the 16th century, Humanism and the Renaissance gave rise to a scholarly approach to Justinian's law, known as 'Elegant Jurisprudence'. Although Justinian's law had already been studied scholarly by the Glossators, their approach was more practical than theoretical when compared to the level of jurisprudence at the time of its compilation. In contrast, the Humanists had both legal, thorough historical and linguistic training and dealt with the sources accordingly, including the Greek texts that were ignored both by the Glossators and the Commentators (see the *Novellae*).

They were the first to establish that Justinian's work was not a single achievement of codification but a compilation of provisions issued at different times. Their method was also characterised by rational reasoning and the neglect of authority. They, therefore, did not deal with the glosses at all but analysed the original texts of Justinian from a historical and a grammatical point of view. At the same time, they did not discard the different methods of the glossators and commentators for analysing legal texts. Roman law was revived through the initiative of the humanists, who were representatives of the Humanist School.

The jurisprudence of the scholastics came under the criticism of Petrarca, Coluccio Salutati and Lorenzo Bruni in Italy. Jurisconsults studied the Florentine manuscript of the *Digesta*. Lorenzo Valla was the first to turn his attention to the sources written before Justinian's era.

2. Germany

In Germany, the so-called *gemeines Recht*, i.e., Roman law received in 1495, remained valid until the publication of modern law books such as a) the *Codex Maximilianeus Bavaricus civilis* in Bavaria (1756), b) the *Allgemeines Landrecht für die Preussischen Staaten* in Prussia (1794), c) the *Bürgerliches Gesetzbuch für das Königreich Sachsen*, the civil code for Saxony (1863), and d) the *Bürgerliches Gesetzbuch* [BGB], the imperial civil code for the whole German empire (January 1, 1900). Modern German jurisprudence played an important role in the creation of these law books and was also recognised internationally. As such, it deserves to be dealt with in detail.

The reception of Roman law as a legal source was not delayed in Bavaria either. This subsidiary reception of the entire body of law was accomplished through the adoption of the *Bayerisches Landrecht* in 1616.

The *Codex Maximilianeus Bavaricus civilis*, also known as *Chur-Bayerisches Landrecht* (1756), constituted part of the *Codex Maximilianeus* alongside the *Codex juris Bavarici criminalis* (1751) and the *Codex iuris Bavarici judiciarii* (1753). This *Codex Maximilianeus* became valid under the reign of Joseph Maximilian III (1745-1777) and was codified in one as part of the entire legal system of Bavaria. Through several revisions, this Bavarian code remained valid on the territories of Bavaria, on the right bank of the river Rhine, until the adoption of the BGB on 1 January, 1900.

The *Codex Maximilianeus Bavaricus civilis* was single-handedly codified by Wiguläus

Xaverius Aloysius von Kreittmayr (1705-1790). Kreittmayr respected Roman law traditions through certain institutions and achievements, such as the structure of the code, which resembles much of the institutional system of Gaius. Therefore, private law was articulated in the following four books: personal law, real rights, succession law and law of obligations.

The German-language version of the *Codex Maximilianeus Bavaricus civilis* had great importance in the unification of law in Bavaria. It bears the marks of the local and customary laws as well. As an autonomous source of law, Canon law was repealed, but this did not mean its disappearance at the same time. Its institutions were incorporated into the new code, primarily through the regulation of marriage.

This code was also important in the subsequent pursuits of unification of European private law. However, this code was applied only subsidiarily, as statutory law continued to operate alongside the adoption of the private law code. This code replaced the *ius commune universale* (Roman law), but Kreittmayr accentuated in his commentary that Roman law could and still had to be applied as *imperio rationis* for the interpretation of legal institutions.

As an interpretation of the *Codex Maximilianeus Bavaricus civilis,* Kreittmayr first wrote anonymously a commentary on five books under the title *Anmerkungen über den Codicem Maximulianeum Bavaricum Civilem*. This work was respected as a legal source and was used as a coursebook in the education system. This work was published from time to time until 1821. This *Anmerkungen* influenced legal practice beyond the territory of Bavaria as well.

Kreittmayr, who was an expert of Roman law and of the Bavarian *Landrecht*, published his coursebook entitled *Grundriß der gemeinen und baierischen Privatrechtsgelehrsamkeit*. This work was first published in German in 1768 and Latin in 1776.

The *Allgemeines Landrecht für die Preußischen Staaten,* consisting of 19,187 paragraphs, exceeded the limits of a simple codification of civil law. It was the product of natural law since its authors, namely Johann Heinrich Casimir von Carmer (1721-1801) and Carl Gottlieb Svarez (1746-1798), were all devoted to the school of natural law. Another jurist of natural law, Joachim Georg Darjes (1714-1791), also took part in the preparation of these works. This code of natural law, which encompasses all jurisdictions, lacks elements of Roman law.

The Saxon Civil Code, adopted in 1863 and promulgated in 1865, also called "the little Savigny", is the first among the codes to follow the pandectistic structure. Its 2,620 paragraphs are organised in the following order: General Part *(Allgemeine Bestimmungen)*, real rights *(Das Sachenrecht)*, law of obligations *(Das Recht der Forderungen)*, family law and guardianship *(Das Familien- und Vormundschaftrecht)* and succession law *(Das Erbschaftsrecht)*. This structure was an inspiring example for the editors of the BGB. This Saxon code can finally be taken as the paragraph incarnation of the German pandect law *(pandektistisches Juristenrecht)*.

Simultaneously with the preparation of the Saxon Civil Code, demands arose within the member states of the German Federation (*Deutscher Bund)* that, at the very least, the substance of the Law of Obligation be controlled at the all-German level. The preparation of this plan began in 1859. This initiation came from the ten member states of the German Federation. The Federal Assembly *(Bundesversammlung)*i.e., the legislative power of the Federation – after a very long negotiation in 1862 – ruled that the Law of Obligation had to be regulated in a unified law book. Since inIn 1861, they passed the bill of the German Trade Law (*Allgemeines Deutsches Handelsgesetzbuch,* ADHGB), the pursuit of attainment of the trade unity of the German Federation – including Austria and Prussia – by the means of unified regulation of the relation of Law and Obligations gained additional support.

Family Law and the Law of Succession needed to be regulated in a genuine way. Considering various Customary Laws – especially the Right of Property of Marriages – this idea had to be scrapped.

In the same year, a committee was set up in Dresden, the capital of the Kingdom of Saxony, to work out the form of statutes. Austria, Bavaria, Württemberg, Hannover, Hessen-Darmstadt and Frankfurt participated in the work of the Committee of the representatives of Saxony. In the Committee, the influence of Austrian lawyers was outstanding. The Dresden Committee put forward their proposition in 1866, the so-called *Dresdener Entwurf (Entwurf eines allgemeinen deutschen Gesetzes über Schuldwerhältnisse)*. In the Federal Convention, the proposed modifications concerning the Dresdner Entwurf were rejected due to the opposition from Prussia, whose representative did not participate in the work of the Committee. Prussia, in particular, did not want the Federal Convention – of which jurisdiction wanted to be reduced – to adopt this motion. In addition, the same year, a war broke out between Austria and Prussia. As a consequence of this war, the German Federation dissolved.

The *Dresdener Entwurf* contains both the General and Special Parts of the Law of Obligation. The General Part bears evidence of the Pandect's effects. It contains, for example, the doctrine of the Act of Will and the institution of representation, which is regulated separately from the mandates *(mandatum)*. All this largely resulted in the General Part of the *Dresdener Entwurf* being influential to the BGB. Moreover, the *Dresdener Entwurf* also influenced the 1881 Swiss Law of Obligations (OR), the preparation of which was initiated by Walther Murzinger in 1870.

The Humanist School in Germany was represented by Udalricus (Ulrich) Zasius (U. Zäsy 1461-1535), who, as an acting lawyer, professor of the law and legislative person, all in one. Zasius, who completed his studies under the spirit of *mos (iura docendi) Italicus,* in his *Lectura ordinaria legum* follows new trends criticising the writings of glossators and commentators. His ambition was to separate Roman law from its settled *controversia* and reveal the original meaning of sources in such a way that they could be used in practice. He positioned himself in opposition to the *mos (iura docendi) Italicus* trend. However, but did not align with the *mos (iura docendi) Gallicus* trend either, thus forming a sort of transition between the two.

The municipal law of Freiburg, which reflected the strong influence of Roman law, was reformed in 1520 and linked to the name of Zasius. In view of Zasius' own scholarly work, he did not belong to the Humanist School. Nevertheless, he maintained a very close relationship with the European representatives of the Humanist School, especially with Alciatus lecturing in Bourges at this time. He deserves credit for the introduction of the overflow of Roman Canon Law from Italy to Germany, adapting it to the local needs and the conditions of Germany.

The Humanist school was represented in Germany by Udalricus Zasius (Ulrich Zäsy, 1461–1535), who was an active lawyer, legal historian, and legislator all at the same time.[104] His contemporary, Gregorius Haloander (G. Meltzer, 1501–1531), was the first to publish the *Digesta* based on the Florentine manuscript (*Codex Florentinus*) in the Nuremberg publication of the *Corpus iuris civilis* in 1529–1531.[105]

[104] See S. Rowan, *Ulrich Zasius. A Jurist in the German Renaissance, 1461-1535*. (*Ius Commune Sonderhefte* 31, Frankfurt am Main, 1987)

[105] See K.-H. Burmeister, *Das Studium der Rechte im Zeitalter des Humanismus im deutschen Rechtsbereich* (Wiesbaden, 1974)

Private law developed in modern Germany under the joint impact of humanist scholarship and the valid *ius commune*, and gradually became decisive in all other countries of the European continent. This organic development, lasting for centuries, occurred in two phases, with the participation of several trends of jurisprudence. In the following passages, the representatives of the so-called *usus modernus Pandectarum*, the school of Natural Law, and the school of Pandectist law, developing from the former, will be discussed in detail.

2.1 Representatives of the So-called Usus Modernus Pandectarum

There was a trend in the practice of law courts in the Holy Roman Empire from the 16th century onward that made the Roman law of the Commentators available for practitioners. It was called Pandect law after the *Digesta* or the *Pandectae*. This was called "the modern practice of the Pandectae" (*usus modernus Pandectarum*), the name which was made widely known by Samuel Stryk's (1640–1710) *Specimen usus moderni Pandectarum,* published between 1690 and 1712. Böhmer's work was continued in 1733 by Justus Henning Böhmer's (1674–1749) *Usus modernus Strykianus*. His book titled *Introductio ad ius Digestorum*, regarded as the best textbook of the *usus modernus Pandectarum* was published fourteen times before 1791. This *Usus modernus Pandectarum* was the basis for the Prussian *Projekt des Corporis iuris Fridericiani,* elaborated by Samuel von Cocceji (1679-1755), regulating the law of persons and the real rights (containing the law of succession as well) and came into effect between 1749 and 1751 in certain territories. Johann Gottlieb Heineccius (1681-1741) attended courses at the University of Halle and belonged to the Elegant School of Law. What contributed to his international (Italian, Spanish, Austrian, French and Hungarian) reputation was that the course book on Roman law dogmatics exerted only a small effect on German legal practice.

Although the trend of German practitioners was less scientific, its representatives undoubtedly laid the foundations of *Pandektistik*. Its most outstanding followers were M. Wesenbeck (1531–1586), J. Mynsinger (d. 1588), J. Harpprecht (1560–1639), Benedikt Carpzow (1595–1666), Johannes Brunnemann (1608–1672), David Mevius (1609–1670), Adam Georg Struve (1619–1692), Johannes Schilter (1632–1705), a pupil of Stryk and his successor in his professorship at Halle, followed by Johann Gottlieb Heineke (Heineccius, 1681–1741), Augustin Leyser (1683–1752), Esaias Freiherr von Pufendorf (1707–1785), L. Böhmer (1715–1797), J.A. Hellfeldt (1717–1782), L. Höpfner (1743–1796), C. Ch. Hofacker (1749–1793), Ph. Weiss (1766–1808), Savigny's teacher at Marburg, and Ch. Glück (1755–1831).

2.2 Representatives of the School of Natural Law

The most prominent representative of the School of Natural Law was Christian Thomasius (1655-1728), a professor at the University of Halle, who effectuated the harmonisation between the institutions of Roman and Natural laws. In his work titled *Notae ad singulos Institutionum et Pandectarum titulus,* published in 1713 in Magdeburg, he examined the correspondence and the possibilities of usage between the *Corpus Iuris Civilis* and the practices of German courts.

Another important representative of Natural law was Christian Wolff (1679–1754). Under his influence, Roman law was taught at most German universities in the 18th century as Natural Law. Christian Wolff's most prominent student was Daniel Nettelbladt (1719-1791), who paved the way towards creating the General Part (*Allgemeiner Teil*) of the civil codes in Germany during the 19th century. The chief architects (drafters) of the Prussian General Land Code (*Allgemeines Landrecht für die Preussischen Staaten*), namely, von Kramer, Svarez and

Klein, were all students of Nettelbladt.

2.3 Representatives of the School of Pandectist Law

In nineteenth-century Germany, classical studies, including the research of the history of Roman law, as well as legal science – particularly the still-valid "today's Roman law" (*heutiges römisches Recht)* – reached unprecedented heights. The work of Theodor Mommsen (1817–1903) constituted the pinnacle of these scientific activities. He is mostly seen as the greatest historian of ancient Rome and an expert on Roman law. Legal science was very much influenced by the *usus modernus Pandectarum* of German legal practitioners, which, in the first half of the century, became the foundation for a quickly evolving and highly significant trend called *Pandektistik*.

The pandectist system is the culmination of a centuries-long process of development that began in the area of the glossators and lasted till the 19th century.

The scientific system of the glossators and commentators was characterised by the institutional system of Gaius and Justinian, treating the regulations of persons *(personae)*, real rights *(res)* and actions *(actiones)*. By the time of Bartolus and Baldus, this system was not recognised as clearly as it was in more ancient times. According to the last two commentators, the union of the part of real rights should be divided into two: on the one hand, the *iura in re* and on the other hand, the *iura ad rem*. *Iura in re* consists of *dominium* and *quasi dominium,* while *iura ad rem* is a collection of obligations. There are two categories mentioned that were used by Johann Apel (1486-1536) for a new categorisation. The terms and the concepts of "real rights" and "obligation" date back to scientific activities. The two parts of the law of goods began to be elaborated in the 18th century, during the early period of pandectistics. Heinrich Hann (1605-1668) also focused on the categorisation in his work *Dissertatio de iure rerum et iuris in re speciebus*, published in 1639 in Helmstedt. He describes private law as encompassing both *ius reale* (*ius in re* and *ius ad rem*) and *ius personale*. *Ius in re* refers to property, hypothecs, easements, possession and the law of succession, while *ius ad rem* is associated with the law of obligations. The basis of his distinction lies in the fact that real rights are absolute, whereas obligations are relative rights.

The *Pandektistik*, along with the historical school of law, began with the scientific work of Friedrich Carl von Savigny (1779-1861) and Georg Friedrich Puchta, which issued the concept of the so-called General Part *(Allgemeiner Teil)*. The roots of the General Part and the family law take us back to the scientific system of the famous jurist of natural law, Samuel Pufendorf (1632-1694). In his work, Pufendorf begins with a philosophical thesis through which he divides law into two main branches: the law of individuals and the law of communities, notably laws working between families, in the country, between countries, or, in other terms, the international law *(Völkerrecht)* of that time. The instability of the General and Special Parts presented in the whole system derives from the structure *(pars generalis et specialis, iurisprudentia naturalis, generalis et specialis),* developed by Christian Wolff (1679-1754) and his students Joachim Georg Darjes (1714-1791) and Daniel Nettelblandt (1719-1791), who studied first in Rostock and continued his professional work in Halle, and translated the work of Heineccius into German language.

We can also mention the work of Christoph Christian Dabelow (1768-1830), titled *System der gesamten heutigen Civilrechtsgelehrtheit ,* in which he expresses his respect for the Pandektist system by structuring his work through a similar way. His work starts with the General Part. Its first edition was published in 1794. His aforementioned work, namely, the *System der gesamten heutigen Civilrechtsgelehrtheit*, which had its second edition published in 1796, can

be regarded as the study for his three-volume work, the *Handbuch des Pandecten-Rechts in einer kritischen Revision seiner Hauptlehren* (Halle, 1816-1818). In his work, Dabelow attempted to unify the entire body of law. In this book, both private and feudal law, as well as procedural and canonic laws are addressed. In this regard, he can be regarded as one of the collaborators of the General Part, naturally alongside Nettelbladt.

It was Gustav Hugo who first represented the law in the *Pandektistik* system (1764-1844). Regarding this, Hugo differs from this system in the following publications; it was Georg Arnold Heise (1778-1851) who testified to it in his first *Grundriß eines gemeinen Civilrechts zum Behufe von Pandecten-Vorlesungen* (1807).

As for the General Part and its content in relation to the pandectistic system, it is, in a way, a singular issue of the *Pandektistik*. The law of persons and the actions at law have Roman law origins *(personae et actiones),* while the part treating subjective law and legal transactions (negotiations) *(Rechtsgeschäftslehre)* dates back to the Natural law.

Following these prior steps, it was Puchta and Savigny who worked on the final version and details of the pandectistic system. In 1838, Puchta represented in his pandectistic work the system in the following order: First comes the General Part with its four parts, next comes the real rights, then the law of obligations, family law and finally, the law of succession. The General Part contains general rules, or in other words, the lore of the legal norm *(Die Lehre der Rechtsnormen)*, then the legal relations *(Rechtsverhältnisse)*, the application of legal norms and finally, the law of persons *(Die Rechte an der eigenen Person).*

Two years after the publication of Puchta's book, Savigny commenced work on his eight-volume *System des heutigen römischen Rechts* (Berlin, 1840–1849), which has fundamental importance and remains valid even today. It contains the final corp of the Pancectistic system: a) General Part, b) real rights, c) law of obligations, d) family law and e) law of succession. The law of actions is separate from all these, in accordance withthe pandectistic science.

The *Pandektistik* (or, in other words, the Pandect law) departs from the Historical School of Law *(Historische Rechtschule)* of the later decades of the 18th century, associated with W. von Humboldt and L. von Ranke. This was one of the most characteristic currents of the historism of the 19th century. Its founder was Gustav Hugo (1764–1844), a university professor at Göttingen, who first published his pioneering textbook on legal history titled *Lehrbuch der Geschichte des römischen Rechts bis auf Justinian* in 1790. The other was Karl Christoph Hofacker, a student of Pütter. He worked on the representation of Roman law from a historical aspect. The pandectists, who studied Roman law, gained a leading role in the Historical School of Law, in contrast to the Germanists, such as J. Grimm (focusing on German national law).

Georg Arnold Heise (1778–1851), a professor at the University of Heidelberg, belonged to the first generation of Pandectists. He was the first to develop the modern system of Pandects in his epoch-making work *(Grundriss eines Systems des gemeinen Civilrechts zum Behuf)*. He was also the first to distinguish the two types of juridical persons (*Pandekten-Vorlesungen,* 1807). Gustav Hugo, in his *Institutionen des hautigen römischen Rechts,* published first in 1789, private law was structured in the same way as the pandectistic system (e.g., family law was represented as separate). In the following edition, he broke from this structure.

Regarding legislation, family law is shown separately in the *Allgemeines Landrecht für die preussischen Staaten.* Other elements of the law of persons are in the General Part. The pandectistic system's roots date back to the logic of natural law.

The Historical School of Law acquired great prestige through the activities of Friedrich Carl von Savigny (1779–1861), a minister in the Prussian government and university professor

first at Marburg Landshut and later at Berlin. He returned to the sources of Roman law and dealt with both its outer history and the inner development of its institutions. His work represented an unprecedented level of scholarship. He gained his authority very early, in 1803, thanks to his first work, which broke with the lores of the *Usus modernus pandectarum* by redefining the institution of possession. He wrote, among others, a seven-volume work on the history and subsequent fate of Roman law in the Middle Ages *(Geschichte des römischen Rechts im Mittelalter),* which is unpaired even today. His eight-volume *System des heutigen römischen Rechts* (Berlin, 1840–1849) is of fundamental importance and valid even today. It laid the foundations, among other things, for the theory of legal relationships and modern private international law. In this work, he represents each institution by the logic of the pandectistic system. According to pandectistic theory, procedural law should be treated separately, making a pretension of trial exempt from material law. We should also mention his unfinished, two-volume work, the *Obligationrecht als Teil des heutigen römischen Rechts* (Berlin, 1851-1853).

The Historical School of Law and the *Pandektistik* did not come down only to the Romanists. A Germanist trend of the Historical School of Law, working on German customary law, was inspired by Karl Friedrich Eichhorn (1781-1854). He finished his studies at the University of Göttingen, where he continued his scientific work by staying there as a teacher. Apart from Göttingen, he also taught at the University of Frankfurt an der Oder, and Berlin. In 1815, together with Savigny, he founded the *Zeitschrift für geschichtliche Rechtswissenschaft*. Additional notable representatives of the Historical School of Law are: Jacob Grimm (1785-1863), who frequented the lessons of Savigny, Georg Beseler (1809-1888), Otto von Gierke (1841-1921), Wilhelm Eduard Albrecht (d. 1867) and Christian Gottlieb Haubold (d. 1824). They all used the terminology, concepts and structure of the pandectistic system for representing German private law.

Anton Friedrich Justus Thibaut (1774–1840), professor of law at Heidelberg, is also often mentioned along with the Pandectists, but his approach and method greatly differs from that of the main trend of the Pandectistic, as determined by Savigny.[106] He first published his work titled *System des Pandectenrechts* in 1803. In its 8th edition of 1834, he follows the pandectistic system of Heise. August Moritz von Benthmann Hollweg (1795-1877), who effectuated his habilitation in 1819 under the control of Savigny and then continued his career by teaching as a professor at the University of Bonn between 1829 and 1842, thought over the civil process of the *gemeines Recht* in line with the methods of the Historical School of Law. He took part in the foundation of the *Mittwoch Gesellschaft* of Berlin.

Eduard Gans (1797–1839), a university professor in Berlin, and a great opponent of Savigny, did not belong to the Historical School of Law and, as a follower of Hegel, he even opposed it sharply. His outstanding achievements are notably in the fields of the theory of possession and the law of inheritance. His most important, four-volume work was published in Berlin in 1825, titled *Erbrecht in weltgeschichtlicher Entwicklung.*

Georg Friedrich Puchta (1798–1846), a professor of Roman law at the Leipzig University in

[106] The famous controversy of Savigny and Thibaut must be mentioned here. In his book (or rather a pamphlet) titled *Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland,* which was a reply to the article, published in 1813 *Über den Code Napoleon und dessen Einführung in Deutschland* of A. W. Rehberg (1757-1836), published in 1814, Thibaut advocated for codification. Savigny's famous reply (*Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*), published in the same year, definitively dismissed the idea of codification as he believed it hindered the organic development of law. See Peschka, V., *Thibaut és Savigny vitája* The Polemic of Thibaut and Savigny], *ÁJ* 17 (1974); Hamza, G. and Sajó, A., *Savigny a jogtudomány fejlődésének keresztútján* [Savigny at the Crossroad of the Development of Legal Science], *ÁJ* 23 (1980).

Leipzig (and later in Berlin), as successor of Savigny, is an early representative of the Historical School of Law. His works were characterised both by a historical and a dogmatic approach. Puchta significantly contributed to laying the foundations for the development of so-called conceptual jurisprudence (*Begriffsjurisprudenz*). He worked out the method of the *Begriffspyramide* ("pyramid of concepts"), the strictly logical system of legal concepts.

In the works of Savigny's followers, active in later decades, the historical and the dogmatic approaches were finally separated from one another. The a) trend of legal history was represented by A. F. Rudolff (1803–1873), Eduard Huschke (1801–1886), and Karl Georg Bruns (1816–1880), professor in Berlin from 1861, while b) conceptual jurisprudence (*Begriffsjurisprudenz* or *Konstruktionsjurisprudenz*) evolved through the activities of Alois von Brinz (1820–1887), Heinrich Dernburg (1829–1907), and Bernhard Windscheid (1817–1892). They were the ones to work out the current dogmatics of modern private law. Windscheid, whose monumental pandectist textbook is considered the basis of private law even today, played a great part in the preparation of the First Draft of the German BGB published in 1887.

The impact of the *Begriffsjurisprudenz* can also be observed in the field of commercial law research. The eminent representative of commercial law jurists belonging to this trend was Heinrich Thöl (1807-1884), who was a student at Leipzig and Heidelberg, then a professor at the Universities of Rostock, and later at Göttingen. In his case, his conceptual jurisprudence is close to the legal practice; it responds to the needs and pretensions of the actual application of the law. He was a private law professor and author at the same time; one of his famous, tree-volume works was *Das Handelsrecht als gemeines in Deutschland geltendes Privatrecht mit Berücksichtigung des außerdeutschen Handelsrecht.* Concerning dogmatics, he was greatly influenced by Savigny and Puchta while he turned away from the historical pretensions of the Historical School of Law. He strictly objected to structuring commercial law according to the Romanistic system of concepts. He was – with the words of Windscheid – the *Mann mit dem eisernen Gedankenschritt*. He had an important effect on the unification of German commercial law.

The unification of German commercial law inspired jurisprudence through legislation and practice. The name of Levin Goldschmidt (1829-1887) must be mentioned in this context. He started his legal studies in Berlin in 1848, continuing in Bonn, Heidelberg and finally in Berlin again. He obtained his doctorate at Halle, in 1851. In Heidelberg, he completed his habilitation in 1851 with a lecture on the *fenus nauticum* of Callimachus (D. 45, 1, 122,1.). In Heidelberg, he was appointed as an extraordinary (1860) professor and later became a full professor (1866). After refusing an invitation to Vienna, he became part of the *Bundes-Oberhandelsgericht* from 1870 till 1875. In the same year, he was the most eminent professor of commercial law. Although he sought the universal presentation of his subjects, works such as *Handbuch des Handelrechts* and *Universalgeschicte des Handelrechts* remained unfinished. The *Universalgeschicte des Handelrechts* is exemplary in its methodology. The author presents commercial law in its constant development by creating a bridge between past and present. He effectively utilises historical information in the context of valid law.

The dominant method is the genetic method of Heinrich Thöl, which underplays the static method. He uses the inductive method versus logical deduction. He pays attention to German law and commercial bases in line with Roman law. The presentation of Italian, German and Dutch commercial law concepts highlights the fact that commercial law regulations necessarily evolve over time and in response to sociological developments. The works of Goldschmidt create a synthesis between the history of law and dogmatics, which led to the autonomy of commercial law as a distinct field of study within thirty years.

The *Allgemeines Deutsches Handelsgesetzbuch* was adopted in 1861 and went into effect gradually. Apart from the territories where the Prussian *Allgemeines Landrecht für die Preußischen Staaten*, the law was in effect and commercial law was regulated based on the example of the French *Code de commerce*. This last version was typical for the German states on the left bank of the Rein.

The most eminent representatives of the Germanistic trend of the Historical School of Law were Karl Friedrich Eichhorn (1781-1854), a colleague of Savigny in Berlin, Jacob Grimm (1785–1863), a disciple of Savigny and Georg Beseler (1809-1888).[107]

Rudolf von Jhering (1818–1892), professor at Gießen, Vienna, and Göttingen, represented a new trend in Pandectistic. His starting point was the Historical School of Law, but he soon opposed its one-sided historical approach and started to analyse the inner relationship of legal institutions, interests protected by law, and the aim of legal regulations, thus giving an unprecedented insight into the original concept of Roman law in several fields, namely, the law of possession.

Judged by the textbooks they wrote, the following German Pandectists were pre-eminent: G. Hufeland (1760–1817), J. F. L. Göschen (1778–1837), E. Schrader (1779–1860), A. Schweppe (1783–1829), F. Mackeldey (1784–1834), Ch. F. Mühlenbruch (1785–1843), J. N. von Wening-Ingenheim (1790–1860), K. E. F. Rosshirt (1793–1873), J.A. von Seuffert (1794–1857), C. J. G. S. von Wächter (1797–1880), F. L. Keller (1799–1860), Eduard Böcking (1802–70), Karl Ludwig von Arndts (1803–1878), K.F. F. Sintenis (1804–68), J. F. Kierulff (1806–94), K.A. von Vangerow (1808-70), Emmanuel I. Bekker (1827–1915), F. Regelsberger (1831–1911), and Julius Baron (1834–98).

The development of Pandectistic was halted by the promulgation of the German imperial *Bürgerliches Gesetzbuch* (BGB) on January 1, 1900, as a consequence of which, Pandect law ceased to be a living, valid law in Germany. The code based on the system of Pandect law was a record achievement of German jurisprudence that had a direct and – through the BGB – also an indirect impact on the development of law in continental Europe as well as overseas. The activities of scholars dealing with civil law in the second half of the Modern Age were, to varying degrees, but nonetheless decisively influenced by German legal science.

Even at the time of its promulgation, many authors "downgraded" it to the status of a restatement[108], and recent research concurs with this assessment. In fact, German studies rather unanimously state that there was no break with the past[109]. Yet, this is not completely true, at least as far as the sources of law are concerned. References to the great handbooks of the *Pandektenwisschenschaft* have been replaced by references to the civil code. Even if one believes the exaggerated claim that the German Civil Code is only the handbook of the great pandect, Windscheid, under another guise, the undeniable fact is that the form – though not the contents – of German private law changed in 1900 because of the new civil code and that great authors of nineteenth-century German private law were very soon forgotten[110].

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[107] See O. von Gierke, *Die historische Rechtsschule und die Germanisten* (Berlin, 1903; reprint: Aalen, 1975)

[108] R. Zimmermann, *Roman law, contemporary law, European law. The Civilian Tradition Today,* Oxford, University Press, 2001, p. 55.

[109] See, for instance, the articles in U. Falk and H. Mohnhaupt, *Das Bürgeliche Gesetzbuch und seine Richter. Zur Reaktion der Rechtsprechung auf die Kodifikation des deutschen Privatrechts (1896-1914),* Frankfurt, Klostermann, 2000.

[110] Cf. R. Zimmermann, *Das Bürgerliche Gesetzbuch und die Entwicklung des Bürgerlichen Rechts*, in M. Schmoeckel, J. Rückert and R. Zimmermann, *Historisch-kritischer Kommentar zum BGB,* Siebeck, Mohr, 2003, p. 11.

Although the German BGB's one characteristic is the relatively large number of general clauses (*Generalklauseln*), this fact, however, cannot be overemphasised. For instance, the changed circumstance clause (*clausula rebus sic stantibus*) is not even mentioned, albeit not forbidden in the BGB. A general historical analysis of this clause regarding this particularity of the code is useful.

The changed circumstance clause (*clausula rebus sic stantibus*) has its historical roots in Roman law[111] and was not unknown to medieval scholars, among them Thomas Aquinas. In the 19th century, the clause passed through a period of remarkable influence, culminating in the Italian and German interpretations of the doctrine. These countries took advantage of the tempting possibilities of a less scrupulous application of the clause on their path to national unity, thereby allowing themselves to justify acts that would otherwise have been questionable. However, the doctrine suffered a serious setback with the rise of the positivist school of law.

Grotius is sometimes regarded as the first to take a stand against the theory, which is said to be inherent in all treaties that an agreement would come to an end if the accompanying circumstances change. Although one passage in his famous treaties, *De iure belli ac pacis*, suggests such an interpretation[112], other passages stress the need for an equitable treaty construction[113]. Grotius thought that no one should be obligated to carry out an obligation if, in good faith, performance would be onerous and burdensome. While it had to be regarded as a breach of the treaty if a promise was not fulfilled and the conditions which existed at the making of the treaty still prevailed, a change in circumstances gave the right to reconsider the extent of the obligation.

This idea came to a clear expression in some of the most important codifications of civil law during the Age of Enlightenment. The Bavarian Landrecht of 1756 presupposed that all agreements tacitly contained the clause *rebus sic stantibus*[114]. The Prussian *Allgemeines Landrecht* of 1793 referred to an unforeseen change as a ground for withdrawal from any treaty not yet executed if the realisation of its object and purpose had become impossible[115]. The Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1811 made the clause a fundamental principle of law[116].

With the decline of the natural law school in the 19th century, the supporters of the clause were increasingly put in a defensive position.

Among the first to lead an attack against the principle was the famous jurist Thibaut, who rejected the clause on politico-legal grounds. He argued that *rebus sic stantibus* had often

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[111] *See* Pfaff, *Die Clausel: Rebus sic stantibus in der Doctrin und der Oesterreichischen Gesetzgebung, Festschrift zum Sebzragsten Geburtstag von Josheph Unger*, 226 et *seq*. (1899).

[112] „Grotius, De Iure Belli Ac Pacis, Book II, chap. l6, § 25, no. 2: "The question also is commonly raised, whether promises contain in themselves the tacit condition if matters remain in their present state. A negative answer must be given to this question unless it is perfectly clear that the present state of affairs was included in that sole reason we mentioned."

[113] *Id*. at § 27, nos. 1-3.

[114] Bavarian Landrecht, IV, Chapter l5, § 12 (1756).

[115] Allgemeines Landrecht, I, Chapter 5, § 378 (1793).

[116] Allgemeines Buergerliches Gesetzuch § 901-976 (l811) (Austria).

been "wrongly construed and applied"[117]. Others followed suit, and because of this doctrinal development, the Saxonian Civil Code of 1865 expressly rejected the principle of "changed circumstances". Further, the German *Bürgerliches Gesetzbuck* of 1900 does not speak of the clause as a general principle of law[118].

If this was true for municipal law at the height of passivism, international legal doctrine never went along with it. Codifications are sometimes seen as typically national texts. Such was the case in Germany in 1900 when the new civil code was hailed as an example of German genius[119]. This nationalistic view of codifications agrees for the most part with theories stating that law is the product of a *Volksgeist* (C.F. von Savigny) or the "identity postulate of a people" (*Chiba Masaji*)[120]. However, many codifications are foreign transplants, sometimes even in their own country of origin, if they are meant to unify a country's laws as part of a process of "internal colonisation" in which a centre imposes its ideas about law on the periphery. Thus, the advent of the *Code civil* in Southern France has been labelled a "legal colonisation"[121]

3. German Democratic Republic

On 1 January 1976, the German Democratic Republic replaced the 2,385 paragraphs of the BGB with 480 paragraphs of its own *Zivilgesetzbuch*. The new Code's language was simple, spurning both abstraction and elegance: for instance, its basic principle – from each according to their abilities, to each according to their work – is enacted in §3 under the ugly *rubric Gewahrleistung des Leistungsprinzips*. The Code's brevity befits its scope, reflecting as it does *ein eingeschrankter Zivilrechtsbegriff*.[122] It now covers only relations between citizens and between them and state enterprises entered into to satisfy their material and cultural needs (§1(2)). In other words, the human being is recognised by civil law only as a customer, client or consumer. For instance, while, as we have seen, Soviet law – at least in theory – lays down no numerus clausus of permitted contracts, the ZGB provides that "Citizens are entitled, within the limits of this statute, to conclude all kinds of contracts designed to satisfy their

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[117] A. Thibaut System Des Pandektenrechtes § 201 (l814).

[118] This was the case for legal doctrine rather than the law itself. The old codes, which were not revised under the influence of positivism, still served as the basis for the court's decisions. Thus, an unbroken line of precedents was preserved, distorted very little by the academic struggles of the various schools of legal thought. It should be further observed that positivism had only of transitory effect on German private law thinking, where it had been most deeply rooted. After the end of World War II, the "Changed circumstances" clause experienced a revival due to the "breakdown of legal positivism". See generally Wieacker, *History of Privat eLaw in Modern Times* 16 (1952).

[119] R. Zimmermann, *Roman law (supra,* n. 6), p. 53.

[120] For the similarities between these two scholars, see D. Heirbaut. *Europe and the people without legal history: on the need for a general history of non-European law*, *Tijdschrift voor rechtsgeschiedenis,* 2000, pp. 271-272.

[121] L. Assier-Andrieu, *op. cit.,* p. 505.

[122] *Zivilgesetzbuch und Zivilprozessordnung der DDR mit Nebengesetzen,* (Herwig Roggeman,

ed.), Berlin 1976, 18.

material and cultural needs”.[123]

Juridical persons are understood solely from the citizen's perspective rather than through the pedantic term: the Code refers to them as *Betriebe* (which could be translated as “shops”), and These entities are responsible for tasks such as "creating a cultured sales atmosphere"[124] and keeping customers' suggestion books in a convenient location.[125]

The article dealing with the effect of the contract of sale sets out provisions of strikingly different juridical nature: the shop must transfer ownership, and if it is a self-service store, it must make wrapping paper available.[126]

Thus, the newly fashioned Code is quite deliberately, even endearingly, something which Brunner describes as “a welfare law for the little man”.[127] This aim was thought desirable by the regime, and indeed there is certain appropriateness, if not inevitability, in such a development of civil law under socialism. In attaining this stage, however, the code has forsaken three things: the Roman assumption that people come before the law (“It is pointless to know the law if one knows nothing about the persons for whose sake it exists” (J 1.2.12)); the generalising features and the structural strength of the BGB; and the widespread function of the civil law elsewhere, even in the Soviet Union: that of forming a residual *ius commune* for the whole legal system.

4. The Austrian Hereditary Provinces (Austria)

Both the books of formulas and the legal textbooks of the Austrian hereditary provinces contain elements of Roman law, which played a subsidiary role in everyday practice. Municipal courts (e.g., in Vienna), either directly or indirectly, referred to Justinian's Roman law in cases of inheritance and marital property law through the works of the Commentators.

From the second half of the 16th century, authors analysing questions of private law from practical aspects (such as Bernhard Walther) blended the local customs of the Austrian provinces with Roman law. Local customary laws could thus be brought closer to one another by means of their mutual relationship to Roman law. Besides Natural Law, Roman law became, therefore, the basis of the codification of private law, serving the unification of law in Austria at the turn of the 18th and 19th centuries. The Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch* [ABGB]) of 1811, the most outstanding compilers of which were Karl Anton von Martini (1726–1800) and Franz von Zeiller (1751–1828), was formally based on the system of the institutes of Justinian and also a significant part of its content went back to Roman law. From the second half of the 19th century and on the impact of German Pandect law, the ABGB became a code reflecting the impact of Roman law to an

[123] *Zivilgesetzbuch* (hereafter cited as *ZGB)* §7(2). Emphasis added. The phrase is „im Rahmen dieses Gesetzes“.

[124] *ZGB* §134(3) „die Verkaufskultur heben“.

[125] *ZGB* §136.

[126] *ZGB* §139.

[127] *Zivilrecht der Deutschen Demokratischen Republik,* (Georg Brunner, ed.), Munich 1977, 18: „das Versorgungsrecht des kleinen Mannes“.

ever greater extent.

The major representatives of Pandectistic in Austria were Joseph Unger (1828–1913) and Viktor Hasenöhrl (1834–1903). It was primarily due to Unger's efforts that Austrian private law, once again through the mediation of Pandectistic, became based on Roman law and was renewed through this late reception. At the same time, the spread of Pandectistic was hindered by the fact that the ABGB, which has been in force since 1812 and remains largely valid even today, was not yet based on the system of Pandect law.

5. Switzerland

The codification of civil law took place in most cantons in the early 19th century. While a) in the group of cantons led by Geneva (such as Geneva, Vaud, Neuchâtel, Ticino, Valais/Wallis, and Fribourg), the model of codification was the French *Code civil*, b) the group led by Bern (i.e, Bern, Luzern, Solothurn, and Aargau), followed the example of the Austrian ABGB, and c) the ones led by Zurich (i.e., Zurich, Schaffhausen, Thurgau, Nidwalden, Zug, Glarus, Graubünden) had civil codes reflecting an increased influence of Roman law through the German Historical School of Law. The law of obligations valid in all cantons of the Swiss Confederation (*Schweizerisches Obligationenrecht* [OR], 1881) contains elements of Roman law through the mediation partly of the French *Code civil*, partly of Pandectistic. It also includes commercial law. Later, German jurisprudence and the practice of the courts played a significant role in the interpretation of the OR. The Swiss Civil Code (*Schweizerisches Zivilgesetzbuch* [ZGB], 1907) is characterised by a reasonable harmonisation of various traditions of civil law, such as the French *Code civil*, the Austrian ABGB, and the German BGB.

The greatest *Pandektist* of Switzerland was J. C. Bluntschli (1808–1881), an expert on Roman and constitutional law and legal history. He compiled the civil code of the canton of Zurich in 1853–55, influenced by his teacher, F. L. Keller (1799–1860), the most outstanding representative of the Swiss Historical Law School, and directly by Savigny. The spirit of Pandectistic can also be felt in his work titled *Deutsches Privatrecht* (1853–54). J. J. Bachofen (1815–1887), a professor in Basel, belonged to the historical trend in the study of Roman law. Additionally, the code of obligations of 1881 (OR), elaborated by W. Munzinger (1830–73), is based on the traditions of Roman law. Its overall revision occurred after Eugen Huber's creation of the ZGB (1849–1923), first in 1911, then in 1936. The German BGB and its interpretation, having deep roots in Pandectist tradition, greatly impacted the development of civil law in Switzerland. Philipp Lotmar (1850–1922), professor of Roman law in Bern, completed Brinz's textbook on Pandect law. His very impressive writing on labour contracts made him one of the fathers of the modern law of labour. Andreas von Tuhr (1864–1925), a professor of Roman law in Zurich, is the author of the last powerful textbook on Pandect law dealing with the law of obligations. He also wrote a book on the general part of the BGB, often referred to even today.

6. Belgium

In what is today Belgium, the *mos* [*iura docendi*] Gallicus was represented by Gabriel van der Muyden (Mudaeus) and Curtius Brugensis (Jacques de Corte), teachers at the University of Leuven in the 16th century. The latter edited a Latin translation of Theophilus's *Paraphrasis Institutionum*. The most eminent pupil of Mudaeus was H. Giphanius (van Giffen, 1534–1609). In the 17th century, the most distinguished scholars dealing with Roman law were Goudelin, Zoes, and D. Tulden. In the Belgian provinces, Dutch "Elegant Jurisprudence"

dominated the scene from the middle of the 17th century.

The scholarly achievement of Franciscus Zypaeus (1580–1650) was also significant in canon law, both in theory and in practice. In 1635, he edited his Notitia juris Belgici in Antwerp, modelled after Grotius's *Inleidinge tot de Hollandse rechtsgeleerdheid* (published in 1631) and following the structure of the *Codex Iustinianus*. In it, he discussed valid Belgian law in a systematised form, highlighting Roman law's great theoretical and practical significance. Zypaeus considered it his task to systematise the legal practices valid in the southern regions of the Netherlands (*ius Belgicum)* with regard to canon law and private law.

The codification of civil law started relatively early in the provinces of Belgium due to strong French influence. In present-day Belgium, the Belgian Civil Code, a version of the French *Code civil*, was issued in 1804 and is still valid after several amendments.

Research by Belgian historians has shown that during the French occupation, the Belgian population resisted the new civil code and the new legislation imposed by their French overlords. Local lawyers who were willing to serve as judges under French authority collaborated with their fellow countrymen. Despite all that, French law was very successful in Belgium[128]. A good explanation for this paradox has hitherto not been given, but if one follows R. Beauthier, resistance by local judges had a "perverse" effect: it helped to ease the problems of transition and thus ensured the success of French law.

7. The Netherlands

The School of Humanists evolved in Holland during the 17th and 18th centuries, experiencing a second golden age. The representatives of "Elegant Jurisprudence" were Arnoldus Vinnius (Vinnen, 1588–1657), Anton Schulting (1659–1734), Paulus Voëtus (Voet, 1619–1667), his son, Iohannes Voëtus (1647–1713), Cornelis van Bynkershoek (1673–1743), Gerhard Noodt (1647–1725), called "the Dutch Cuiacius", and Ulrich Huber (1636–1694). Another noteworthy figure of the era was Hugo Grotius (1583–1645), one of the founders of modern international law. One of his works, titled *Inleidinge tot de Hollandse rechtsgeleerdheid* and published in 1631, fundamental from the point of view of the development of Dutch law, drew massively upon Justinian's Institutiones. Dutch jurists exercised a significant influence on the development of law in the Netherlands and also on legal science all over Europe, as their greatest achievement was the application of Roman law to modern conditions (see Roman-Dutch Pandect legal science).

In 1838, the *Code civil* was replaced in Holland by a national civil code *Burgerlijk Wetboek*. It basically followed the French model with the exception that it discussed property law in two books. In 1947, E. M. Meijers (1880–1954), a professor of Roman law in Leiden, was entrusted with revising the civil code. He managed to publish the draft of four volumes out of the planned total of nine before his death. The new code, which also includes commercial law, reflects the impact of Pandect law both in its structure and in several of its legal institutions (e.g., regarding legal transactions). Unlike the BGB, it does not contain a general part, but the common regulations of property law and the law of obligations are dealt with in separate volumes. The new Dutch civil code, which came into force gradually, has taken several of its legal principles and statutes from Roman law, thus coming closer to it than its predecessor

[128] H. Van Goethem, *La Belgique sous l'annexion á la France, 1975-1813: l'acceptation des nouvelles institutions judiciaires et du droit français*, in S. Dauchy, J. Monballyu und A. Wijffels (ed.), *Auctoritates. Xenia R.C. van Caenegem oblata,* Brussels, Koninklijke Academie voor wetenschappen, letteren en schone kunsten van België, 1997, pp. 289-301.

inspired by the French *Code civil*.

The first code of a part of private law, i.e., civil law, the *Wetboek Napoleon ingerigt voor het Koningrijk Holland* came into being for the Kingdom of Holland, in 1809 by order of King Louis Napoléon, brother of Napoléon. It was partly based on the French *Code civil*, partly on the old private law of the province of Holland, from which the general community of property as the legal system of matrimonial property and the requirement of delivery for the transfer of ownership had been taken. From 1811 until the end of 1813, the Netherlands were part of the French Empire. In 1811, the five French codes entered into force. Two of them are relevant for us here: the French *Code civil* of 1804 in its version of 1807, called '"*code Napoléon"'* and the French *Code de Commerce* of 1807. Four of these live codes, among them the two last mentioned, remained in force until1838; the *Code pénal* was not replaced by a Dutch penal code until 1886; the latter is still in force, though many provisions have been modified.

Work on the new codification had already commenced in The Netherlands in 1814, before its unification with Belgium. A first draft was not satisfactory because it was not "national" enough, but by 1816, Joan Melchior Kemper wrote, with the blessing of the king, a new text. However, the Belgians did not like his draft, and during parliamentary discussions in the 1820s, a new text, written by a commission of which the leading member was the Belgian Pierre Thomas Nicolaï, replaced it. The new code should have come into force in 1831, but the Belgian Revolution prevented it. Yet, after a few minor modifications, it finally became the law of The Netherlands in 1838. Its strange origins made a Dutch professor say that "Belgium has a French and The Netherlands a Belgian code"[129]. Many Dutch lawyers, heirs to the great legal tradition of Grotius, Voet and others, were critical of it. They saw it as the result of a derby between Belgians and Dutchmen, or even a duel between Nicolaï and Kemper, in which the beaten man had lost[130]

In 1838, the Dutch Civil Code (*Burgerlijk Wetboek*) came into force together with the Dutch Commercial Code (*Wetboek van Koophandel*). Parts of the Civil Code, i.e., the regulation of the law of successions and the main part of the law concerning special contracts, are still applied today. When it came into force, the i of 1838 was, roughly estimated, for 70% a translation and an adaptation of the French Civil Code. Important differences came from Roman-Dutch law, for example, the general community of property between spouses and the rule that ownership was transferred not by contract but by an act of delivery. From the beginning of the 20th century, the Civil Code became less and less apt to deal with the changed and changing social and economic circumstances. It was no longer in accordance with social and political opinions. Many partial changes to the contents of the code took place. A few notable mentions are: the introduction of parental rather than paternal authority in 1905, the introduction of an extended, fundamentally different regulation of the labour contract, with numerous rules of *jus cogens* to protect the socially weak labourers, in 1909, the creation of a much better position of the surviving spouse in the law of intestate succession in 1923, the introduction of a regulation of the hire purchase contract (with rules tending to the protection of the hire purchaser) in 1936 and the abolishment of the incapacity of married women and the introduction of adoption both in 1956. All these partial

[129] J. Lokin, *Tekst en uitleg. Opstellen over codificatie en interpretatie naar aanleiding van de invoering van het nieuwe Burgerlijk Wetboek*, Groningen, Chimaira, 1994, p. 119.

[130] See about all this Wijffels's article in his book, and T. Veen, *En voor berisping is hier ruime stof.* Over *codificatie van het burgerlijk recht, legistische rechtsbeschouwing en herziening van het Nederlandse privaatrecht*, Amsterdam, Cabeljauwpers, 2001.

modifications of the Civil Code harmed its consistency.

At the end of the 19th century, an important phenomenon emerged, particularly in intellectual and industrial property fields, where many statutes were introduced independently of the Civil Code. Often these statutes contained rules of private law, of procedure of penal law and of administrative law. An example of these types of statutes is the Act concerning the lease of land for agricultural purposes of 1937. Because of these, numerous statutory rules of private law on many legal institutions cannot be found in the Civil Code.

Another, even more important reason why the Civil Code became less and less the source of the main principles and rules of civil law was the huge growth of the number of new rules of law created by decisions of the Supreme Court. The important part of this judge-made civil law had but a small, if any, point of contact with the code. Whole branches of civil law were almost totally created and developed by the Supreme Court. We give as examples the law concerning unlawful acts (tort), ownership of movables, fiduciary security of movables and natural obligations. Constitutionally, this creation of new law by the Supreme Court, especially in cases of political interest, was not without its problems: the judges of the Supreme Court, though not responsible to Parliament, assumed the role of the legislator. There were also practical problems: many questions for which the Civil Code did not give a satisfactory solution were not even brought before the Supreme Court.

Finally, there were numerous titles and articles in the Civil Code that were defective. As early as 1928, in a famous paper, prof. E.M. Meijers (1880-1954), professor of civil law at Leyden University from 1910 to 1950, published a list of one hundred points on which the Code was, by general consent, erroneous.

It was Meijers himself that maintained, before and after the Second World War, that, for all the reasons mentioned above, a recodification of private law war was necessary. The Commercial Code of 1838 too – although parts of it (e.g., the title on insurance law) are still in force – had begun to be antiquated by the end of the last century. In 1896, the law of bankruptcy was removed from the Commercial Code and incorporated into a special statute, namely the Bankruptcy Act, which was applicable to merchants and non-merchants alike. Important parts of the Commercial Code were modernised in the 21st century. Some of these are: the law of transport by sea (1924), the law concerning limited liability companies (1929) and the law concerning bills of exchange and cheques (1932 and 1933).

In 1934, the existing special rules for acts of commerce and for merchants were abolished, and in the opinion of most lawyers, there was no longer any reason to have a special Commercial Code. This unity of private law is in accordance with the 17th and 18th century Dutch law, which did not know a separate commercial law. The distinction between civil and commercial law was introduced in the Netherlands in 1809 under the influence of French law. Napoleon also imposed his Code civil on The Netherlands in 1810-1811. However, a new Dutch Civil Code came into force in 1838. Almost all of it had been written in the period of the United Kingdom of The Netherlands (1815-1830), which incorporated the territory of today's Belgium and The Netherlands.

In 1883, Prof. Willem Molengraaff (1858-1931) at the University of Utrecht highlighted the need for a new code that combined civil and commercial law.

After the Second World War, prof. Meijers gained support for his idea that a new Civil Code should be made. By Royal Decree of 1947, Meijers was entrusted with the mandate to make a draft for a new Civil Code divided into 9 books. Since it had to be a *code unique* as it existed in Switzerland and Italy, the rules of commercial law had to be incorporated into the new Code. Meijers worked seven years on his draft for the new Civil Code. In 1951, Books 1-4

with Explanatory Commentary were published. Then, Meijers died unexpectedly in June 1954. His work was continued by others. We only mention here the names of four eminent jurists who drafted parts of the new Code and defended them in Parliament as governmental commissioners: Prof. J. Drion, Meijers' successor as professor of civil law at Leyden University, Dr. C.E. Langemcijer, *Procureur-generaal* at the Supreme Court, Mr. W. Snijders, a judge in the Supreme Court (all three for the books 3, 5 and 6) and professor H. Schadee (for book 8). An important part of the work of recodification has also been done by Dr. A.S. Hartkamp, who was a member of the Civil Code Revision Office of the Ministry of Justice for many years (he became *Advocaat Ceneraal* at the Supreme Court and professor of private law at the University of Utrecht). The basis was always a draft made by an individual lawyer or a group of lawyers. Based thereon, bills were presented in Parliament, containing books or parts of books.

According to Meijers, the new Civil Code had to consist of 9 Books: 1. Law of Persons and Family Law (including the law of matrimonial property), 2. Law of Legal Persons, 3. Patrimonial Law in general, 4. Law of Succession, 5. Real Rights, 6. General Part of the Law of Obligations, 7. Special Contracts, 8. Law of Transport, 9. Law of Products of the Mind (Intellectual and Industrial Property).

Books 1, 6 and parts of Books 7 and 8 have been enacted. Book 1 came into force in 1970, Book 2 in 1976; the main part of Book 8 (containing more than 1,830 articles) in 1991 and 1993. Books 3, 5 and 6 and four titles of Book 7 were implemented in January 1992. Three other titles of this Book followed suit on December 31, 1992, and September 1, 1993, respectively. No work was done concerning Book 9 until the autumn of 1993; recently, professor J.J. Brinkhof was appointed as a governmental commissioner for this Book, and it is possible that some general rules on patrimonial aspects of the institutions of industrial and intellectual property will be drafted. Finally, the possibility of drafting Book 10, containing a codification of rules of private international law, is discussed. Though excellent specialists in this field of law were not in favour of such a codification, a draft was eventually made.

8. France

The French Guilhelmus Budaeus (G. Budé, 1467–1540) was a precursor of the Humanist School, and Andreas Alciatus (A. Alciato, 1492–1550), one of the founders of the university at Bourges, is generally seen as its initiator.

The three most outstanding representatives of the French Humanist school of law (*mos* [*iura docendi*] *Gallicus*) were Franciscus Duarenus (1509–1559), a pupil of Alciatus, and two professors at Bourges, namely Iacobus Cuiacius (J. Cujas, 1522–1590) and Hugo Donellus (H. Doneau, 1527–1591). The latter was a student of Duarenus and taught first at Bourges, then at Heidelberg, Leiden, and Altdorf. Cuiacius's nine-volume *Opera omnia* (Paris, 1658) is famous for its interpretation and analysis of the sources, while Donellus won a high reputation with his commentaries (*Commentarii iuris civilis*, vols. 1-5, Frankfurt, 1595–1597). The study of interpolation began with Antonius Faber (A. Favre, 1557–1624), a Savoyard Humanist whose work *Rationalia ad Pandectas* was not properly appreciated until the 19th century. Further eminent representatives of this trend were Dionysius Gothofredus (D. Godefroy, 1549–1622) and his son, Iacobus Gothofredus (J. Godefroy, 1587–1652). The former edited the *Corpus iuris civilis* and the *Hexabiblos*, while the latter the *Codex Theodosianus*.

Had the French school proceeded in the wake of Cuiacius's theoretical work alone, it would have never played a role in spreading Justinian's law in the country. Donellus, having originally been a Bartolist and a practising lawyer, was much more able to diminish the great

division between the *droit coutumier* and the *droit écrit*, i.e., Roman law. Donellus's writings were a valuable source for Savigny when writing his fundamental work *System des heutigen Römischen Rechts* (1840-1849). In his commentaries, written on the *Coutume de Paris* of 1510 (*In consuetudines Parisienses commentarii*, 1539), Carolus Molinaeus (Ch. Dumoulin, 1500–1566) considered Roman law the *ius commune* to be used by all courts despite France not belonging to the Holy Roman Empire. However, in the second edition of this work, published in 1554, the author considered the application of Roman law compulsory as a ratio scripta[131] only in cases when there was no neighbouring customary law or a generally valid *consuetudo* that could replace an inadequate or vague local custom. Jean Domat (1625–1696), the author of *Les lois civiles dans leur ordre naturel,* published in 1694, also attributed normative force (*vigor legis*) to Roman law and, for the same reason, opposed the royal efforts to centralise the French legal system on a basis other than Roman law. Domat was the first to separate property law from the law of inheritance, viewed formerly only as a title of acquisition (*titulus adquirendi*). Therefore, we can consider him a forerunner of the modern system of the Institutes and the Pandects.

The French *ius commune* (*droit commun*), first considered to be a mere subsidiary law, gradually evolved from Justinian's law with the help of royal efforts, the practice of the judges, and jurisprudence.

Robert-Joseph Pothier (1699–1772) was the highly reputed author of an important commentary on the Pandects. Judge and professor of French law at Orléans, Pothier published between 1748 and 1752 a work titled *Pandectae Iustinianeae in novum ordinem redactae* before publishing his monograph *Traité des obligations* (Paris, 1761), which greatly contributed to the preparations of the *Code civil*. In his *Pandectae,* he described Roman law as a rational legal system of Natural Law. Pothier aimed to harmonise Roman law with the local customs that were valid in his time. In his book, commenting on the local law of his birthplace, Orléans, was also heavily used by the editors of the *Code civil*, and there are traces of this effort. Furthermore, he placed the often-confused local laws into a dogmatically well-founded, clear-cut system. Pothier's work was much quoted at courts abroad as well, for example, in Britain, for a long time to come.

The French civil code, the *Code civil des Français* (1804), was the epitome of the subsequent development of law based on the common law of France and Roman law. Two of its four authors, Jean-Etienne-Marie de Portalis (1745–1807) and Jacques de Maleville (1741–1824) were experts of Roman law, and the other two, Félix-Julien-Jean Bigot de Préameneu (1747–1825) and François-Denis Tronchet (1726–1806), were specialists of the *droit coutumier*.

The structure of the French Civil Code is based on the system of the Institutes. The introductory part (*Titre préliminaire*) consists of six articles and contains general rules on the promulgation, effectiveness and implementation of the acts (*lois*). Article 3 still constitutes the basis of private international law in France. The first book of the code (Article 7-515) contains the law of persons (*Des personnes*). This book does not include regulations relating to legal persons (*personnes morales*). The second book (Article 516-710) regulates things,

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[131] The view that Roman law should be considered *ratio scripta*, i.e., internationally valid law, was first set forth by the Commentators (Butrigarius [1274–1348] and Baldus) in a commentary on a passage of the *Codex* (7, 45) (*ratio naturalis non circumscribitur loco, quum ipsa cum humano genere nata est* [sic!] *a principio*). This means that Roman law as the "common reason" of humankind should be applied in a jurisdiction even where it is politically undesirable as a positive law. On the other hand, Jean Bodin (1530–1596), in his principal work of 1576 titled *Les six livres de la république,* considered Roman law both in France and in the neighbouring territories (such as Savoy, Italy, and Spain) not as positive law but merely as *ratio scripta* (*raison écrite*), as he maintained that positive law was exclusively the one sanctioned by the monarch.

property and other real rights (*Des biens et des différentes modifications de la propriété*). The third book (Article. 711-2,281) of the code contains regulations regarding the different ways of acquisition of property (*Des différentes manières dont on acquiert la propriété*). This last book of the *Code civil* comprises both the law of succession and the law of obligations. Inheritance is regarded as a title (in Latin titulus) of acquisition of property.

If one wants to study whether the 1804 *Civil Code* was really an end and a new beginning, one should first wonder whether the act of codification necessarily entails a break with the past. Friedrich Carl von Savigny once considered any code to be, by definition, hostile to tradition[132]. However, there are two types of codification, some aspiring to be nothing more than restatements, only reformulating existing law in a new order, others being more ambitious as to change society with new laws[133]. The German Civil Code, for instance, clearly falls into the first category.

Unlike the German BGB, the French Code civil is seen as not only changing the framework, but also the contents of private law. At first sight, this seems highly unlikely, the authors of the code all being rather conservative, working for an emperor who wanted to bring stability to a country which, after ten years of civil war and other upheavals, was sorely in need of it. Consequently, the family law of the *Code civil* was anything but progressive, the central idea being that each French patriarch would have his own "empire", his own household where he would have over the other members of his family a power which mirrored the power, Napoleon, the father of the nation, had over all Frenchmen. In family law, the only radical innovations were civil marriage and divorce. In other fields of law, there seems to be more of a break with the past, for instance, in inheritance law privileges, such as the preferential treatment of the eldest son in feudal law, were abolished, the heirs henceforward all being equal. Most of all, property and contract were reorganised so that they gave freedom to the individual to do with his property as he pleased or to conclude any contract he wanted[134].

Yet, none of these "new" principles were the product of the *Code civil* itself, and in some cases, their innovative character itself is in doubt. For instance, the civil marriage amounted to nothing more than the old marriage of canon law in a new setting, with the town hall replacing the church and the mayor replacing the priest, while the legal rules themselves largely remained the same[135]. Inheritance law was also less radical than is sometimes thought. True, privileges were abolished, and the unequal treatment of heirs ended, but before the revolution in many parts of Northern France, the equal treatment of heirs was the rule, and privileges were exceptional. As there were many exceptions, historians tend to overlook the fact that they were indeed exceptional. After all, it takes only a few lines in a handbook to

[132] C.F. Von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft,*

Heidelberg, Mohr und Zimmer, 1814 (consulted in the following edition: H. AKAMATSU and

J. Rückert (ed.), *Friedrich Carl von Savigny, Politik und neuere Legislationen* : *Materialien zum*

Geist der Gesetzgebung, Frankfurt, Klostermann, 2000, pp. 227, 238-241).

[133] C.F. R. Beauthier, I. Rerive, "Le paradis perdu de la codification… un Eden á reconquérir? "*Revue de la Faculté de droit de l'ULB,* 2003/2, pp. 22.

[134] J.L. Halpérin, *L'impossible Code civil,* Paris, PUF, 1992.

[135] J. Gaudemet, *Le mariage en Occident,* Paris, Cerf, 1987, pp. 398-401.

state that in general, all heirs were equal, but there are many pages to list and study all the privileges that got in the way of that principle. Thus, the revolution (by permitting no exceptions to the equality of heirs) can be regarded as having been more faithful to the spirit of the old Northern French law than the abolished customs. Moreover, the *Code civil* sometimes tempered the radicalism of the revolution, for example, by allowing more testamentary freedom[136]. Even more tellingly, divorce law was very lenient during the revolution, but it became much stricter in the Code civil, making divorce more theoretical than practical.[137] This was recognised in 1816 when divorce was abolished in France[138], but even in Belgium, where divorce remained possible, it was a rare event[139].

It is also hard to see their innovative character in property and contract law. A revolutionary freedom of property or freedoms of contract are not to be found in the *Code civil*. They were not revolutionary in the sense that they were not new at all but based on general principles which had been around for centuries[140]. They were even less revolutionary because, if anything, they did not express new principles of individualism. These only appeared later in the 19th century and were then read into the Code by later authors[141]. It is amazing that later historians would think that the *Code civil* enshrines the freedom of the individual, as the text itself is quite clear about the power of the legislator to limit that freedom. The famous definition of property in Article 544 leaves no doubt about this: “La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu’ on n’en fasse pas un usage prohibé par les lois ou par les regléments”. Napoleon was not shy in using the power Article 544 gave him to curb the property rights of his subjects[142], which was, in fact, to be expected of a general. As a champion of freedom, Napoleon, the military dictator, would have been a surprise[143].

There is a contradiction between the preparation of a codification and its aftermath. The drafters of the new text are very much inspired by legal history and comparative law, whereas these are discarded after the promulgation of the new code, or rather after the publication of the preparatory documents of the codification[144]. Together with the code they contain

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[136] D. Heirbaut, *Europese juristen en oud recht,* Ghent, Academia press, 2001, pp. 170-173, 186.189.

[137] Cf. N. Arnaud-Duc, *L'esprit d'un code et ses variations apparentes: la législation sur le divorce en France au XIXe siécle*, *Mémoires de la société pour l'histoire du droit et des institutions des anciens pays bourguignons, comtois et romands,* 1989, pp. 220-225.

[138] X. Martin is quito right in stating that: “la suppression du divorce en 1816 nous semble moins une atteinte au principes juridiques du Code Napoléon que Ie parachévement de sos fondements politiques” (X. MARTIN, “Fondements politiques du Code Napoléon”, *Revue trimestrielle de droit civil,* 2003, p. 261).

[139] C. Meulders en K. Matthijs, “On ne se jouera pas du divorce! Echtscheiding in de negentiende eeuw in het licht van de echtscheidingspraktijk te Brugge, 1865-1914”, *Revue belge d'histvire contemporaine,* 1996, pp. 65-103.

[140] J. Gordley, “Myths of the French Civil Code”, *American journal of comparative law,* 1994, pp. 459-505.

[141] A. Bürge, *Le code civil et son évolution vers un droit impregné d'individualisme Liberal*, *Revue trimestrielle de droit civil,* 2000, pp. 1-24.

[142] A survey of his measures in that regard was already made in the 1950's by R. Derinie, *Le droit de propriété en France et en Belgique au XIXe siécle : droit absolu et quasi illimité?,* Léopoldville, Editions de l'université, 1959, pp. 41-49.

[143] See more about the authoritarian character of the *Code civil:* X. Martin, *Mythologie du Code Napoléon. Aux soubassements de la France moderne,* Bouere, Dominique Martin Morin, 2003.

[144] R. Zimmermann, „Das Bürgerliche Gesetzbuch“ *(supra,* n. 8), pp. 11-12.

everything one needs to understand it. Thus, the publication of Locré's and Fenet's works gave rise to the exegetical school in France, for which there was no private law outside the *Code civil*, and therefore no need to go looking in the past or in other countries. This should not be exaggerated, as Pothier, sometimes even Domat, and Roman law were still extensively used in the 19th century and occasionally even later[145]. In Germany, after 1900, the break with the past and the idea that the code forms its own world, sufficient unto itself, was even stronger. Even Windscheid, whose handbook was to the German Civil Code what Pothier's works were to the French one, was quickly forgotten[146].

Yet, the foreign origin of a codification is not necessarily a bar to its success. There is no better example of this than Belgium's adherence to the French *Civil code*. In fact, Belgium is even more faithful to Napoleon than France. In 1816, after the restoration of the monarchy, France amended its civil code so that in its text, "*Empereur*" and "Empire" were replaced by "*Roi*" and "*Royaume*"[147]. The 1831 Belgian constitution ordered new national codifications to be written, but this article was eventually abrogated in 1970.[148]

In the 19th century, it was Charles Marie Toullier (1752–1835), professor at Rennes, who wrote an important commentary on the *Code civil (Le droit civil français, suivant d'ordre du Code I–XI*, Paris, 1819–1823). Duranton was the author of the first complete commentary of the *Code civil*, which was published between 1825 and 1837 in 22 volumes.

The strong impact of the French Civil Code could be seen in several civil codes in Europe (the Italian codes of 1865 and 1942, the Belgian Code and the Dutch Code of 1838, and the Romanian Code of 1864) and overseas (mostly in Central and South America).

9. Italy

Italian jurisprudence had no great impact on the development of legal science in Europe in the Modern Age. During the 19th century, private law was finally codified in Italy founded on Roman law traditions. In most parts of the Italian territories, the *Code civil* was introduced after 1804 *ratione imperii*, i.e., due to the conquest. Although it was repealed in several states later on, it served as a model for the civil codes of Parma (1820), Piemont (the so-called *Codice Albertino* of 1837) and Modena (1852), *imperio rationis*, i.e., by virtue of the legal principles it contained. The civil code of unified Italy (*Codice civile*) of 1865 was based on the system of the Institutes and was decisively influenced by the French *Code civil*.

The outstanding Romanists advocating Pandect law in Italy were Filippo Serafini (1831–1897), Vittorio Scialoja (1856–1933), Carlo Fadda (1853–1931), and Paolo Emilio Bensa (1858–1928). Serafini translated Arndts's textbook on the pandects, Scialoja translated Savigny's *System des heutigen römischen Rechts*. The latter two scholars translated and complemented Windscheid's textbook on pandects. Among the rest of the Romanists, G.

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[145] See for examples D. Heirbaut, "De immissio-leer" *(supra,* n. 23).

[146] R. Zimmermann, *Das Bürgerlicbe Gesetzbuch (supra,* n. 8), p. 11.

[147] Ordonnance du roi du 17 juillet 1816, ordonnance du roi du 30 août 1816.

[148] About the history of the *Code civil* in Belgium, see D. Heirbaut, *Het civielrechtelijk beleid*

van de Belgische ministers van justitie (forthcoming).

Segrè (1864–1942), an expert in private law, can be counted among the followers of the Pandectist School. However, other eminent Romanists in modern Italy did not belong to the Pandectist School.

The *Codice civile* of 1942 opened a new era in the history of civil codes. It broke with the system of the earlier French model and included commercial law. Although the new Italian civil code does not contain a General Part, it is accepted that the German model largely influenced Italian civil law.

10. Spain

In the 16th and 17th centuries, public law, rooted in Roman law, was the primary focus of legal scholarship in Spain. The University of Salamanca served as the central hub for scholars in this field." The writings of Francisco de Vitoria (c. 1483–1546), for example, which laid the foundations of modern international law, also contain categories of Roman law. The influence of Humanists working in neighbouring France had reached Spain by that time. Outstanding Spanish Humanists were Diego Covarruvias y Leyva (1512–1577), Bishop of Segovia and the "Bartolus of Spain", and Antonius Augustinus (A. Augustín, 1516–1586), Archbishop of Tarragona and a pupil of Alciatus.

The official bodies of law were compiled with the aim of consolidating valid law in the Kingdom of Spain (the *Nueva Recopilación* of 1567 and the *Novísima Recopilación* of 1805) and also contained elements of Roman law. In the early 19th century, several statutes were passed to put an end to particularism in Spanish private law. A draft civil code was worked out in 1851 by Florencio Garcia Goyena (1783–1855), who relied on the French *Code civil*, the Prussian *Allgemeines Landrecht*, and the Austrian ABGB.

The partly still valid Spanish Civil Code, the *Código civil* of 1888/1889, is based on the system of the *Institutes* and reflects the impact of the *Code civil*. Its compilation was primarily the work of M. Alonso Martínez (1827–1891). The *Código civil* is, however, still not the primary source of law for the whole country, as it is applied in certain regions (such as Catalonia, Galicia, the Baleares, Aragon, Navarra, and the Basque Provinces) only as subsidiary law, mainly regarding marriage, inheritance, and property law. Local (private) law (*derecho foral*) is directly based on Roman law. Its compilation into official bodies of law has been occurring with a particular intensity since the introduction of regional autonomy.

11. Portugal

The *Lei da Boa Razão* of 1769 considered Roman law subsidiary law insofar as its principles did not contradict the *boa razão* as Natural Law. Some representatives of the codification movement, gaining momentum in the early 19th century, called for the elimination of earlier legal traditions. António Luís Visconde de Seabra (1798–1895), a follower of the Natural Law School, published the draft of the Portuguese Civil Code in 1858. (He had been entrusted with the work in 1850, and the code was promulgated in 1868 after several modifications.) Although a liberal himself, Visconde de Seabra took the Prussian Allgemeines Landrecht, the French *Code civil* and the Austrian ABGB as his models. Paragraph 16 of his Code considers Natural Law as a subsidiary source of law, which is identical with Roman law as a *boa razão*. The five-volume commentary of J. Dias Ferreira (1837–1909) interpreted the Portuguese Civil Code based on Roman law. The author was an eminent judge and interpreted the *Código civil* from a practitioner's point of view.

The new Portuguese Civil Code was promulgated in 1966. It came into force on June 1, 1967, after three decades of preparation and shows the strong impact of German legal science and

the BGB (e.g., regarding regulation of legal transactions dating back to Pandectistic).

11. Greece

The Civil Code in force in Greece since 1946 has its own "history", which, in this particular case, dates back many, many centuries and derives from sources which belong historically to the remote Byzantine era of the history of law. However, as is the case with other Codes, the Greek Civil Code is closely related to the prevailing contemporary international conditions. It reflects the common continental European spirit, diffused throughout and encountered in every contemporary legislation in the European peoples. Additionally, like other Codes of continental Europe, the Greek Civil Code combines several historical elements. It also contains a number of elements taken from other European civil codes, including drafts. To be more specific, the Greek Civil Code of 1946 is composed of Greek-Roman and German elements, as these are offered either in the historical review or in the "empiric" observation of the contemporary comparative law systems.

When early in the past century, after many years of revolution against the Ottoman Empire, Hellenism was once again free and independent to form the Greek State, the men responsible for the organisation of this State immediately encountered the question of its legislation. Specifically, regarding the Civil Law to be applied in the future, the question of orientation was sharp and urgent, in view of the glorious historical past of Greece and the splendour of the then-recent and much-discussed European codifications, namely, the French Civil Code of 1804 and the General Austrian Civil Code of 1811.

During the long years of the Greek Revolution against the Ottomans, although fully absorbed in their fighting, the leaders of the Revolution managed to find the time to also think of the legislative organisation of their nation, whose freedom was won and was founded with their own blood and sweat. Thus, the Greek leaders maintained close ties with the Philhellenes outside Greece, who, on their part, assisted the nation not only with supplies and funds but also with ideas for its future legislation. From this point of view, the British Colonel, Leicester Stanhope's correspondence with Jeremy Bentham (1748 – 1842), the British philosopher of law, is most characteristic and somehow original. Colonel Stanhope lived in Greece during its struggle for freedom, and kept a correspondence with Bentham, whose utilitarian ideas were greatly appreciated in Greece, even if, as Stanhope himself writes, the Greek Code was about to be constituted according to the "Benthamian models" and up the principle "for the greatest good of the greatest number," should in fact have been made according to the theory of the Byzantine law "in order to make it palatable to the people."

It is understood that Bentham's influence was a mere episode, characteristic of the Greek leaders' anxiety over their orientation in drafting their legislation. We must surely accept the fact that this anxiety of the men leading the Greek Revolution was most acute and intensive at that period, in view of the necessity of taking account of the historical weight of the Byzantine-Roman tradition and the prestige of the latest European codifications of Civil Law.

The importance of the historical inheritance of the Byzantine Roman tradition was extremely heavy at that particular juncture of history. The Greek struggle for independence was a struggle for the liberation of the country from the conqueror, who had taken possession of Constantinople on the unlucky day of May 29, 1453, and who had thus put an end to the Christian Byzantine Empire, an Empire over a thousand years old.

The law of this Empire, namely the Byzantine law, had remained in effect in Greece even after the fall of the Byzantine Empire, as the law which, at the conqueror's tolerance, regulated the relations among Greeks, and among Christians, in general. The *Hexabiblos* by

Harmenopoulos of the year 1345 had thus, for centuries, constituted the concise Byzantine collection, which regulated the relations among Greeks throughout the whole period of Turkish rule. In addition to this *Hexabiblos*, there were several other subsequent collections of Byzantine law, which were in use during the years of subjugation, which confirmed the opinion that the Byzantine law had never ceased to be valid in Greece, throughout the Balkans and in Asia Minor – in other words, in every place inhabited by Christians, Greeks and others.

Nevertheless, the Greek lawmakers were also influenced by the great codifications of their era, namely the French Civil Code of 1804 and the Austrian Civil Code of 1811. It is a fact that the Austrian Civil Code had some attraction and was used as a principal model for the "Political Code" of Scarlatos Kallimachis, drawn up in the Greek language at Jassy of Moldavia in 1817. However, it was principally the French Civil Code which was of special influence to the Greeks early in the past century, not only because of its generally recognised advantages we all know but also because of certain special reasons for the Greeks of that era, inasmuch as the Greeks had a great affinity for it. It should, in fact, be mentioned here that the Greeks were already accustomed to the French juridical thought through the application of the French Commercial Code of 1807 to their commercial and maritime relations even before the Greek Revolution of 1821. This was at a period when some Greek translations of the French commercial code were already circulating in Greece. The French Commercial Code was actually recognised as a Greek Code by all the National Assemblies of the revolutionary period as well as by the President of the newly established Greek nation, Ioannis Kapodistrias. Thus, in practice, the Greeks were well-acquainted with the French legal mentality even before their Revolution. However, it was not only in this way, as we may recall, that several Greek men of law of the revolutionary period and even after the Revolution, were educated in French universities.

Thus, when the Greek Revolution ended, the Greeks were under the spell of the historical inheritance of the Byzantine law, which had been applied for many centuries. Yet at the same time, they also had a complete and clear realisation of the significance of the French Civil Code. Confronted with this dilemma by means of a series of proclamations made during the revolutionary period as well as after it, the Greek framers of law chose the law of their "ever-memorable Christian Emperors," namely the Byzantine law. However, their clinging to their historical past did not hinder a parallel use of contemporary foreign legislations, particularly the French, as is evident from certain special enactments of that early period and the first books on the legal theory of that period. This fact justifies the remark that, right after the end of the Revolution, and early in the post-revolution years, it was generally accepted that the law of the new Greek State should be based *historically* on the Byzantine law, and *comparatively* on the model of the French Law. This tendency towards broadening the boundaries of the field of comparative research was basically maintained in Greece throughout the entire past century and until 1946, when, after so many years, the drafting and enforcement of the Greek Civil Code was finally accomplished.

The struggle for the liberation of Greece – which had started in 1821 – ended in 1830 with the recognition of the new, independent Greek State. A year later, in 1831, the first Greek President, Ioannis Kapodistrias, was assassinated, and after two years of anarchy, young King Othon arrived in Greece in 1833. This marked the beginning of a new period, the period of the Bavarian Regency, which was of great consequence in the general evolution of Greek legislation, particularly in civil law.

Although the Bavarian Regency was soon disfavoured in Greece; however, it continued with the systematic organisation of the new state through a series of enactments that, as expected, bore the hallmark of the German legal systems. In this way, German legal thinking was introduced into Greece for the first time, on top of the already existing influence of the French

legislation. Thus, the comparative field of foreign legislation, which could ultimately serve as model for Greek legislation, was greatly enlarged.

G. L. von Maurer, a member of the Bavarian Regency, is largely credited with establishing Greece's complete legislative organisation. It is to Maurer that we owe the drafting of the legislation on the Organization of Courts, of the Penal Code, and of Civil and Penal Criminal Procedures. In his book *Das Griechische Volk*, published in Heidelberg in 1835, Maurer himself pointed out that in the drawing up of these four codes, he tried to combine French simplicity with German accuracy. True indeed, Maurer was a German; however, he was fully permeated by the French liberal ideals, with which he had become acquainted during his legal studies in Paris. The result of this Franco-German education of Maurer was that his codes necessarily bore the mark of the comparative method.

Von Maurer wished to expand his legislative activity to commercial law and, later, to civil law. Regarding civil law, he had certain doubts, dictated by his personal theoretical beliefs. Von Maurer was a follower of the Historical School of F. K. von Savigny and, therefore, he considered that the law, as a product of *Volksgeist*, was mainly expressed in the people's customs. There were several "customs" connected with civil law. For this reason, von Maurer prepared a collection of these customs, with the view to their further codification. This, however, he did not manage to do because he was recalled to Bavaria and had to leave Greece in July 1834, as a result of intrigues among the members of the Regency.

After von Maurer's departure from Greece in 1835, a translation of the French *Code de Commerce* was published as a Greek Commercial Code. Regarding the Civil Code, the Royal Decree of February 23, 1835, repeated that "the civil laws of the Byzantine Emperors, included in the *Hexabiblos* of Harmenopoulos, would be applied until the publication of the Civil Code, which was about to be drawn up; however, the customs established by long years of uninterrupted usages or the decisions of Courts would be valid wherever they prevailed." Thus, a new era opened in the history of civil law and in the drawing up of the Civil Code in Greece, by means of the Royal Decree and Maurer's previous activity.

The result was that, in the 19th century, Byzantine law remained essentially Greek civil law; however, its study was undertaken in the German method, following the model of German Pandectism. Its modernisation in special subjects, for example, in the law of persons, of real security, etc., was legislatively established based on French models. Thus, we had in Greece a complete combination of the historical and comparative methods, both in theory and in practice – a combination which is also evident in the history of the efforts which, after long and numerous adventures, led to the drafting of the Greek Civil Code, which came into force in 1946.

Following closely upon the publication of the Royal Decree of 1835, a commission was set up to draw up the Civil Code. This committee worked for many years and drew up various enactments on special subjects, yet, it did not manage to accomplish its prime mission to endow the nation with a single and complete Civil Code. A Greek translation of the French Civil Code originally appeared in 1836. Certain enactments (legislative decrees) were drafted after the French model (for instance, the ones on persons, on pledging, mortgage, guardianship and curatorship). They were put into force by the cancellation of corresponding Byzantine provisions. However, a draft of a complete Civil Code appeared only in 1874. This draft Code underlined further the comparative factor in that, although it was drawn up principally based on the French Civil Code, one can trace some influence from the Italian and Saxon Codes.

Later, a new committee set up in 1911 drafted several sections of a Civil Code, primarily based on the German Civil Code, but also influenced by the French, Italian and Swiss Codes,

as well as the Second Draft of the Hungarian Civil Code (1913). However, this committee was also dissolved in 1920 without fulfilling its mission.

To judge from the results, the next committee, set up in 1930, was more fortunate, since the Civil Code presently in force in Greece is the result of the work of this committee. This committee of 1930 was more fortunate, not only because the public opinion was by then entirely "mature" and ready to accept the introduction of the new Code, but also because the members of said committee carried out their work of drawing up the Civil Code according to the best possible method: that is, they did not simply and fully accept any one of the foreign models, but their work was done by combining the historical prerequisites, which dictated the maintenance of the Byzantine law, with the demands of the modern legislation, as these were deduced from a review of all the applicable continental European codes.

The Committee of 1930 based its work on both historical and comparative data. Such data was supplied largely by the 'Greek reality itself, because in 1930, Greece had essentially more than one law, namely,

a) Byzantine-Roman law, as it was definitively fixed in the Royal Decree of 1835.

b) Several special enactments, some of which were drawn up on the basis of French law (for example, the law on persons, the law on guardianship, curatorship, pledging, mortgages, etc.), and others, on the basis of the German law, as for example the law on divorces, succession by will or “ab intestate,” etc., and finally others, based on the Swiss law, as for example the law on the protection of illegitimate children.

c) Finally, we must not forget that the creation of local codes remained in Greece, for example:

aa) In the State of Eptanisos, the Ionian Civil Code of l841 was drawn up based on the French Civil Code, the Code of the Kingdom of the two Sicilies and the *Statuta Veneta*.

bb) In the island of Samos, the Samian Civil Code of l899 was drawn up based on the French, the Italian, and the Saxon Civil Codes.

cc) In the island of Crete, the Civil Code of 1903, which contained only provisions on the General Principles, the Law on Contracts and Torts, and the Law on Things, and which was drawn up largely based on the German Civil Code of 1900.

There can be no doubt that for a small country the size of Greece, all these laws were excessive. However, this multitude of laws undoubtedly had a positive effect, namely because the Greek framers of law and, generally, the Greek people, were already acquainted with the historical and comparative foundations of their law. This familiarisation of the people with their law was perhaps a factor of special importance in the successful drawing up of the Civil Code, which the Committee of l930 had attempted to complete by l940.

The Greek Revolution of 1821 marks the beginning of a new era in the history of Greek law. The first revolutionary assembly was adopted in Epidaurus (January 1, 1822), a liberal and democratic constitution modelled on the French Declaration of the Rights of Man. A second constitution (Astros, 1823) established a powerful parliament and a third constitution (Troizena, 1827), while still in principle liberal and democratic, and vested all executive functions in a single man, the Governor, Ioannis Capodistrias. Capodistrias, a native of the Ionian Islands and a former cabinet minister of the Russian Tsar dissolved the parliament and governed Greece with the assistance of an appointed consultative senate until his assassination in 831. His death threw Greece into anarchy and chaos, and order was re-established only with the arrival of young King Otho (1833). Greece was governed for a while

by a regency council, and then, after Otho's majority, by the king himself as an absolute monarch.

A successful revolution in 1844 compelled the king to grant a constitution along the lines of the French Charter of 1830, which made Greece a constitutional monarchy. Another revolution in 1862 overthrew Otho, and two years later, a new democratic constitution was proclaimed by King George I. This constitution recognised the sovereignty of the people and vested all legislative authority in the parliament and the king. For the first time, universal male suffrage by secret ballot was guaranteed.

As a result of a bloodless and peaceful revolution, the 1864 constitution was revised in 1911. During and following World War I, the revised constitution was suspended several times and was finally replaced in 1927 by a constitution which abolished kingship. The monarchy, however, was restored in 1935, and the 1911 constitution was reintroduced, only to be quickly rendered inoperative during the Metaxas dictatorship (1936-1941).

Following World War II, a new constitutional revision was undertaken. It resulted in the adoption of the 1952 constitution, which was another version of the 1911 constitution.

Recognising an uninterrupted legal tradition, the first two revolutionary constitutions designated the law of the ever-memorable Byzantine Emperors as the main source of Greek civil law. In the 1827 constitution, however, a wish was expressed that all future codes should be based on French models. The influence of French doctrine and legislation in Greece may actuallybe traced to the years preceding the revolution, at a time when parts of the French commercial code of 1804 had been translated into Greek and were in use among Greek merchants, and to a Greek criminal code of 1823 based on that of France. Despite the constitutional wish, the adoption of French models was confined to these two codes, and the *Code Napoléon*, though seriously confined, did not become a Greek civil code. Governor Capodistrias, clearly disregarding the constitutional directive, designated the Byzantine laws as the source of Greek civil law and, in 1830, announced his plan for collecting and classifying them in an orderly fashion. This work was never accomplished.

During King Otto’s reign, four major codes were drafted by the Bavarian lawyer G. L.von Maurer, a member of the regency council, based on French and Bavarian models. Of these, the one dealing with civil procedure, as amended by subsequent acts, remained in force until l968, when it was replaced by a new Code of Civil Procedure; the second code on the organisation of justice is still partly in force. The other two, the *paella code* and the code of criminal procedure, had already been replaced by modern codes in 1951. Maurer did not draft a civil code. An adherent of the historical school of jurisprudence, he believed that native institutions and ideas of law should prevail – at least with regard to civil law – and accordingly began collecting local customs and current interpretations of Byzantine laws that were regarded as manifesting the spirit of the people. This project was interrupted by his dismissal from the regency council in 1835. In Greece, liberated from Ottoman rule in 1822, a decree of 1835 provided that as long as a civil code did not exist, private law-related relations should be governed by customary law and the laws of the Byzantine emperors in the form they had been included in Harmenopulos's *Hexabiblos.*

The law books that represented the first steps of codification (the code of the Ionian Isles of 1841, that of Samos of 1899, and that of Crete of 1904) took the French *Code civil* as their model and were valid only regionally. The draft civil code of 1874 reflects the influence of the *Code civil*, the Italian *Codice civile*, and the Saxon Civil Code of 1863.

Subsequently, a royal decree of 1835 declared that ”the civil laws of the Byzantine emperors contained in the *Hexabiblos* of Harmenopoulos shall remain in force until the promulgation of

the civil code whose drafting we have already ordered' and that “customs, sanctioned by long and uninterrupted use or by judicial decisions, shall have the force of law wherever they prevail.” This decree became the cornerstone in the edifice of civil law in Greece and profoundly influenced the path of the law during the next hundred years. Perhaps because of inadequacies in Harmenopoulos' compilation, the scarcity of copies of the *Hexabiblos*, and the increasing elaboration of Roman law by the Pandects in Germany, the Greek courts adopted a broad interpretation of the decree. Thus, the entire body of Byzantine legislation from Justinian's time up to the dissolution of the empire contained not only in the *Hexabiblos* but also in collections, was reintroduced in modern Greece.

For this purpose, the work of the German Pandects was not only useful but almost necessary. Greek legal thought, which had been oriented almost exclusively toward France, became increasingly oriented toward Germany. Indeed, by the end of the century, the redaction of the German civil code seemed to set a pattern for future codification. Nevertheless, at the same time, Greek jurists developed a more critical attitude and proceeded to new legislative efforts by evaluating achievements in western-continental countries.

In accordance with the decree of 1835, a committee was appointed to draft a new civil code. Although the ultimate objective of the committee was not realised, its preparatory work resulted in important legislation in the field of civil law, including a comprehensive statute titled *Civil Law* in 1856. This contained various provisions, including rules on conflict of laws, rules pertaining to the validity and no retroactivity of the law, and regulations involving registration of births, marriages and deaths. A draft civil code of 1874, based on French, Italian and Saxon models, was not adopted, partly because of constitutional difficulties.

Meanwhile, Greek legislation was introduced in 1866 into the Ionian Islands; later, in 1882, into the newly liberated provinces of Thessaly and Epirus; and, in 1914, into the islands of the Aegean, Crete and Macedonia. However, a special provision was made regarding the Ionian Civil Code (1841), the Civil Code of Samos (1899), the Civil Code of Crete (1904) and the Code of Civil Procedure of Crete (1880), which was allowed to remain in force. This situation gave rise to a conflict of local laws and heightened the demand for a new civil code that would apply across the state.

After another failed attempt at codification in 1922, a new, five-member committee was appointed to the task in 1930. This committee published a series of drafts up to 1937, and in the following year, Professor G. Balis of Athens University was appointed to co-ordinate these. His project was successful and resulted in the passage of the Civil Code of 1940. The backbone of this code was Byzantine law, the national Greek tradition dressed in modern clothes. Far from being a revolutionary codification, it largely reproduced a law that was already in force, developed by judicial decisions and scholarly elaboration. The comparative method was also widely used, and an attempt was made to modernise and systematise the law by employing legislative techniques tested in other modern continental codes. Besides these law books, Byzantine law remained valid until 1946, when a unified Greek Civil Code was introduced, the chief editor of which was G. Balis, professor of law in Athens. The still valid code shows the massive influence of the German BGB both in its structure and most recognised legal institutions. Further influences came from the French *Code civil*, the Swiss OR and ZGB, the French-Italian Draft of the law of obligations of 1927, and the draft civil codes of Hungary of 1914 and 1928.

The outstanding Greek Romanists of the 20th century and, at the same time, renowned experts of modern private law were C. Triantaphyllopoulos (1881–1966), G. Maridakis (1890–1979), and Pan. J. Zepos (1908–1985). All of them were followers of the German Pandectist School

and were deeply involved in the creation of the Greek Civil Code and in its subsequent interpretation.

The 1940 Code was scheduled to become effective July 1, 1941. At that time, however, Greece had been overrun by the Axis forces. After the liberation of the country, a new committee was appointed to make a final revision of the code, and a revised version was put into effect in 1945. Subsequently, this revision was repealed, and the original 1940 Code was given the force of law retroactively from February 23, 1946. All pre-existing local codes and customs were abrogated by the introductory law of the code. The Civil Code and other legislation were introduced in the Dodecanese Islands after their liberation in 1948.

With respect to the "technique" of the Civil Code of Greece, we note the following:

The Greek Civil Code was drawn up during the years 1930-1940, at a period when out of the three major continental European Codes, the French Civil Code maintained its splendour, the Swiss Civil Code and the Code of Obligations were greatly valued for their charm and simplicity, while at the same time, there were many followers and supporters of the accurate, casuistic formulation of the German Civil Code. The Greek framers of the Civil Code had at their disposal all the available "models" for the preparation of their own codifications, yet this very wealth of models confronted them with the dilemma of which one they should choose, i.e., conciseness or completeness, flexibility or security, charm or depth? They finally chose something in between. Probably under the influence of Aristotle's idea of "moderation," Greek legislators preferred not to omit any necessary provisions, yet they refused to enter into tiresome unjustified details; they preferred not to overload their text with dogmatism, yet made sure at the same time that their text was not deprived of the necessary technical terminology; they preferred not to draw up a code that would be comprehensible only to the men specialised in law, yet refused to sacrifice legal accuracy to the naive demand of the laymen that all provisions be drafted in such a way as to be easily understood by all at first sight.

Thus, as far as its technique is concerned, the Greek Civil Code lies between the casuistry of French and German Civil Codes, and the flexibility of the Swiss Civil Code and the Swiss Code of Obligations. The result of this has been that the area left un-influenced and open to the free legal judgment is not as broad as in the Swiss texts nor as narrow as in the German. This may help explain, though it does not justify, why the final revision of the Greek Civil Code did not include a provision equivalent to Article 1 of the Swiss Civil Code. This omission is notable despite repeated proposals for its inclusion by the legislator who introduced the General Part of the Civil Code.

It should also be noted that as concerns the technique of the Civil Code, at least in principle and in general terms, the legislators avoided making references from one article to another. Lastly, it is worth noting that the 2,035 articles of the Civil Code are divided into five parts, namely, the General Part, the Law on Contracts and Torts, the Law of Things, Family Law and the Law of Inheritance. This division into five parts is obviously due to the influence of the Pandectist views, which prevailed in Greece up to the introduction of the Civil Code of 1946, and which were also clearly formulated in the German Civil Code – one more proof of the combination of the historic and comparative elements encountered generally in the Greek Civil Code of 1946.

Moreover, when one examines the *essence* of the provisions of the Greek Civil Code as opposed to its technique, it should be clear that one is obliged to admit also that this code is the product of the combination of the historical and comparative elements. This is clearly shown from a review of the settlement in the Code of those laws which are considered in any law to be the fundamental institutions in the drawing up of any Civil Code.

The first book of the Greek Civil Code, namely its General Part, regulates the sources of the law in general; the so-called Private International Law; the legal position of the physical and legal entities; the interpretation and function of the acts-in-the-law; the exercise of rights; and several highly important provisions that sometimes reflect the clear influence of historical, and sometimes comparative models. Thus, the sanctioning of customs as a source of legislation, existing parallel to the law (Article 1, with the modifications of Article 2, item 2, of Legislative Decree 7/10 May 1946) as well as the general clause stipulating that the implementation of the public order regulations (Article 3) cannot be excluded by private intention, constitute provisions heavily influenced by the historical tradition, as founded in the Roman law and developed in the general theory of law through to our times. The game-heavy historical tradition is also encountered in many other provisions, amongst which one might note particularly, at this point, the provisions concerning the recognition of the doctrine of intention, as is shown in the Code's regulation of "error" in the act-in-the-law. However, regarding this final subject, we must emphasise that the Greek Civil Code permits significant concessions in favour of the doctrine of declared intention, as exemplified in Article 144, where it stipulated that acts-in-the-law are not cancelled because of an "error," firstly, if the other party accepts the declaration of intention as it is interpreted by the party in error and, secondly, when the cancellation is contrary to *bona fides*. This last provision actually repeats and supplements the provision of the Swiss Code of Obligations and is one of the many provisions which are under the influence of either the historical or the purely comparative models.

True enough, the comparative foundation is also evident in several other provisions of the General Part of the Greek Civil Code, amongst which one should underline the provisions of the articles which concern the protection of the rights of persons (Article 57 *et seq.)* as well as the prohibition of the abuse of rights (Article 281). Thus, the protection of the rights of the persons (i57 *et seq.)* is generally regulated according to the model of other foreign codes, in particular, the model of the Swiss Civil Code and the Swiss Code of Obligations. The influence of the Swiss Civil Code is also evident in the formulation of the prohibition of the abuse of rights in Article 281 of the Greek Civil Code, which orders, to a somewhat broader extent, that "the exercise of the right is prohibited if such obviously surpasses the margins dictated by good faith, *boni mores*, or by the social or financial aim of the right." The prevalence of the foreign legislative models is evident in these provisions, just as in many other provisions. However, outside these, there are several other provisions of the General Part, which indicate the comparative influence, for instance, the provisions concerning the Private International Law (Articles 4-33). On the other hand, certain provisions bear the evident mark not only of foreign legislative models but also of the theory taught elsewhere. For example, in the case of the regulation of the responsibility arising from negotiations in drafting an agreement, the Civil Code, under the dominating influence of the advanced Pandectist theory, stipulates that (Article 197) "at the negotiations for the conclusion of an agreement, the contracting parties are mutually obliged to conduct themselves according to the dictations of good faith, and usages in transactions," and, in Article 198, that “the party that, in the negotiations for the conclusion of an agreement, has by fault caused damage to the other party, is obliged to restore game even if the agreement was not concluded."

The Second book of the Civil Code, which includes the Law on Contracts and Torts, is permeated by the theory of Pandectism, as it has taken final form in the German Code. With the combination of the Roman tradition and the use mainly of the German but also of other models, such as the French or the Swiss ones, it is also apparent in this book that the Greek legislators achieved their aim by combining the historical and comparative elements.

It is worth noting that the Greek Civil Code's Law on Contracts and Torts is based on the principle of freedom of agreement, the maintenance of good faith and *boni mores*, and the principle of favouring the debtor. Of these, we must note that the principle of freedom of agreement is subject to several restrictions, commonly found in all contemporary codes, and also to the general restriction of Article 388 of the Greek Civil Code, which ordered, under the influence of the French *theorie de l'impévision* and the German theory of *Geschäftsgrundlage*, that in the case of unforeseen change of the circumstances under which a reciprocal agreement was concluded (because of which agreement, the debtor's obligation became onerous), the Court may either adjust the agreement or decide on its dissolution. This provision is important in principle and has been applied repeatedly by the Greek Jurisprudence, and in this way has been adjusted to the teachings of the contemporary theory on revising the agreement, as such is found in almost all contemporary laws. On the other hand, in many provisions of the Civil Code, we encounter the principle of good faith and the principle of favouring the debtor, deriving from the ancient Greek, Roman and Teutonic beliefs, which were further developed under the humanistic influence.

All of these basic principles have resulted in a broadening of the meaning and essence of obligation in contemporary Greek law, in which an obligation is, in fact, something more than the simple Roman *vinculum iuris*, and consists of a true "organism" in the sense that this concept is taught at present in the general theory of obligations.

For the rest, regarding the Law of Contracts and Torts, it should be noted that the Greek Civil Code insisted on the recognition of the so-called subjective responsibility (in other words, the Civil Code insisted on the principle of responsibility based on the fault), with a parallel recognition of many cases of "objective" responsibility, without fault. The responsibility of restoring even the moral damage is likewise recognised, at least in unlawful acts, and in many cases, the Code sanctions the recognition of the obligation to pay a "reasonable" indemnity, in the opinion of the judge, and sometimes, the payment of indemnity proportional to the degree of the offence. Needless to say, all these provisions were the result of the comparative review of the contemporary civil codes.

Additionally, one should mention the regulation of two more subjects which, under all laws, are considered fundamental in the theory of the law of Contracts and Torts, namely the question of the non-performance of an obligation and the responsibility arising from unlawful acts.

More specifically, the question of the non-performance of an obligation constitutes, as commonly known, a truly "crucial" problem in the search for a better legislative arrangement. Thus, the solutions given to this subject by Roman Law are rather vague, while, on the other hand, the French theory of the non-performance of an obligation, of the so-called *inexecution du contrat*, and the German *Nichterfullung*, as well as the Anglo-Saxon "breach of contract," present both advantages and disadvantages. In view of this doubtful and "hybrid" material, the Greek Civil Code was based on the correct general principle, namely that any culpable breach of contract leads to the responsibility of the debtor.

Nevertheless, the Greek Civil Code has broken this general principle into several provisions which fall under the two basic categories of "non-performance" of an obligation, namely a) the impossibility and b) the delay in performance, generally applied to any obligation, and particularly to the reciprocal agreement. In this point, as in several others, we find the combination of the French and Anglo-Saxon simplicity, mixed with the accuracy and casuistry of the German Civil Code. This was, in fact, a somewhat important argument in favour of maintaining the division between the two categories, a division which should have

perhaps been abandoned (Greek Civil Code, Articles 335 *et seq.,* 362 *et seq.,* 380 *et seq.,* 383 *et seq.).*

In appraising the articles on the responsibility arising from unlawful acts, one can easily discern the influence of Pandectism as well as that of the French and the German Civil Codes. In fact, in accordance with the developed teaching of the theory of Pandectism, which, in the implementation of the rules of the Roman Lex Aquilia, had approached, in essence, the famous provision of Article 1,382 of the French Code Civil, the Greek Civil Code included in article 914 the general provision that "the person who caused damage to another person illegally and owing to his own fault, is obliged to indemnify the person who sustained the damage."

However, in addition to this general provision, following the theory of the German Civil Code, the Greek Civil Code included certain provisions on the responsibility for special kinds of unlawful acts (for example, libel, rumours, insult to a woman's honour, etc.) as well as the provision of the offence *contra honor mores*, this latter corresponding to the provision of the German Civil Code par. 826. The Greek Civil Code also included provisions addressing the responsibility for unlawful acts committed by others, the responsibility of the owner of an animal, and the responsibility for the collapse of a building or other structure, in which it established either objective or subjective responsibility, following the model of the German Civil Code. The Greek Civil Code thus addressed the issue of responsibility arising from unlawful acts with historic Pandectist and comparative data. This was in line with the spirit of the legislators mentioned earlier, according to which, in drafting the Civil Code, one should, in essence, take into consideration the Byzantine law that was applied earlier, but it should be modified and supplemented with the abundant teachings derived from the contemporary comparative review of modern European codifications.

This spirit is further encountered in the entire Law on Contracts and Torts, both in its General Part as well as in its Special Part, which regulates the concrete contracts and other special obligatory relations, such as "unjust enrichment, torts", among others. The contribution of the historical factor in the Law of Contracts and Torts is made in the form of the developed teaching of Pandectism and, as such, constituted the law valid in Greece before the introduction of the Civil Code of 1946.

Even apart from that, however, the formulation of the German Civil Code and other codes, such as the French, the Swiss and others, were very often considered. The desired combination of historical and comparative data gives a special characteristic to the Greek Civil Code, among the other contemporary European codifications.

Whatever was said above with regard to the General Principles and the Law on Contracts and Torts, may also be repeated for the Law of Things, where we also encounter the combination of the historic and comparative elements.

According to the Byzantine-Roman model, the Greek Civil Code thus regulates the possession and ownership as well as the servitudes. There are, however, several modifications and completions here, which were based on the model of the contemporary foreign legislators, as, for example, the recognition of the ownership by floor (Civil Codes 1002 and 1117, under the French model), the acquisition on of ownership of movable assets *bona fide* (Civil Code 1036, which follows the German model), etc. However, the provisions of transcription on real estate (Civil Code 1192 *et seq.),* on pleading (Civil Code 1209 *et seq.)* and on mortgages (Article 1257 *et seq.)* were formulated on the French model, and special laws were drafted on these subjects early in the past century that formed part of the law valid in Greece until the year 1946, when the present Code was introduced.

Family Law naturally concerns a traditional law in Greece, as it had been historically established for centuries under the influence of Byzantine law and the concepts of the Eastern Orthodox Church. This applies particularly to marriage, which must necessarily be religious, i.e., officiated by an orthodox priest to be valid. The religious marriage was thus imposed also in the Greek Civil Code, not in a theocratic spirit but in the spirit of historical respect, recognising that from the the 8th century onward, the religious marriage was uninterruptedly applied in Byzante. Certain other provisions are also of historical origin, for example, those concerning the *impedimenta* of marriage, the regulation of property relations between husband and wife, the system of property independence (separate property), etc.

These provisions have naturally undergone special modifications and additions; however, Byzantine law prevails in them fundamentally. In contrast, other areas of Family law had been formulated, even before the Civil Code, by special laws, based on fairly modern legislative models, such as the laws on divorce, which mainly follow the German model; the provisions on the recognition of illegitimate children, which follow the Swiss model; the articles on the curatorship and guardianship, which follow the French model.

Finally, the Law of Inheritance, which also on several subjects had been formulated prior to the introduction of the Civil Code, through modern special laws, and which also presents the characteristic that it reflects basically the Byzantine law but with essential modifications and supplementations according to the model of new foreign legislations, particularly of the German Civil Code. Thus, in the provisions regarding succession by Will and intestate succession, the institution of the certificate of inheritance and certain others have followed the German model in their formulation. For the rest, however, Byzantine law continues to dominate also over this sector of the Civil Code, which includes the Law on Inheritance.

The Greek Code of 1946 is the product of this comparative research by Greek lawyers. This Code is not a revolutionary codification but rather a crystallised formulation of current legal thought and Greek law already in force. Here perhaps, lies a possible weakness since Codes and codifications have as a mission, wherever possible, to provide for the requirements of legal life at present and for the future. This Code, however, reflects the current state of Greek legal thought. Yet, I would assert that this legal thought has achieved a level of development and maturity that permits such a codification.

The Code does not contain such a provision as the famous Article 1 of the Swiss Code or Article 210 of the Louisiana Civil Code. After discussion, the framers of the Code preferred to leave the entire issue of filling the so-called gaps in the law to legal scholars and the courts. If, however, the Code does not follow the modern ten tendencies in this respect, it may be said that the adoption of general clauses, shown in such phrases as "*boni mores*," "justice and equity," "public order," "abuse of rights," "good faith," and "usage in transactions", is an achievement that remains fully in accordance with the claims of modern legal theory and practice on the Continent. These principles presuppose a generous and wise activity on the side of the Courts.

Greece, until 1946, was the only continental European country, whose civil law was traditionally governed by the Roman-Byzantine legal system. In 1946, however, after many years of effort, a civil code was enacted. The text of this code was prepared as early as 1940, but circumstances created by the Second World War prevented its coming into force until 23 February 1946. Since that time, the civil law in Greece has been governed by this clear, unified and extensive text, which, although modelled on the most recent European codes,

adapted to the needs of contemporary life, also reflects the law which was previously in force in Greece, namely, the Roman-Byzantine law.[149]

As far as the fundaments al question of civil responsibility is concerned, the Greek Civil Code of 1946 holds a special interest for legal scholars of comparative law because this Code has been able to reconcile two contending principles of civil responsibility; the principle of so-called "subjective" responsibility (responsibility based on fault) and the principle of "objective" responsibility, sometimes referred to as "responsibility without fault" or "absolute liability."[150]

The Greek Civil Code establishes as a general rule the concept of "subjective" responsibility, i.e., responsibility founded on "*culpa*" or "fault." Thus, as far as contractual relations are concerned, Article 330 provides that the debtor, unless otherwise stipulated, is responsible for any non-performance of his obligation used by "*dolus*" or "negligence", either on his part or on the part of his legal representatives. On the other hand, with regard to extra-contractual relations and, more especially, unlawful acts, Article 914 stipulates that those who cause damage to another unlawfully and culpably are bound to make reparation.

It is, however, important to note that such a recognition of the "fault" as the basis for civil responsibility does not mean that it is the exclusive basis, but rather that this basis predominates in Greek civil law. As a matter of fact, the Greek Civil Code recognises more than one instance of "objective" responsibility, and more particularly cases of "pure objective" responsibility (where fault is not considered at all) and cases of "non-pure objective" responsibility (where fault is present, but the author of the damage, not the victim. bears the burden of proving their lack of fault in order to be freed from any civil responsibility). It is also worth mentioning that the Greek Civil Code recognises several cases of the so-called "equitable responsibility", i.e., responsibility dependent upon the estimation and discretion of the judge, which later presents a series of new cracks in and exceptions to the principle of "subjective" responsibility.

It is not our aim here to enumerate the provisions of the Greek Civil Code that contain these exceptional cases of "objective" responsibility but rather to point out that, in the author's opinion, the thesis which has been adopted by the drafting committee of the Code with regard to civil responsibility and, in particular with regard to "objective" and "subjective" responsibility, is a most satisfactory one.

Contemporary law undoubtedly accepts the principle of "objective" responsibility in multiple instances. Legal research in every country frequently points out the need to abandon the concept of "subjective" responsibility and to adopt instead the idea of responsibility without fault. Certain more recent theories advocate for the recognition of a general concept of "insurance responsibility," sometimes even going further and suggesting the abandonment of all notions of "responsibility" in favour of the more modern concept of "loss insurance."

[149] See Zepos, The New Greek Civil Code of 1946, 28 J. Comp. Leg. & Int'l L. 56, reprinted in Zepos, Greek Law 76 (1949).

[150] See Zepos, *Les solutions du Code Civil Hellenique en matiere de responsabilite civile,* 2 Revue international de droit compare 297 (1950).

These latter theories appear in the writings of certain American, Scandinavian and German legal scholars.[151]

However, neither the great number of instances or cases in which the notion of "objective" responsibility has been adopted nor the arguments put forward in favour of this kind of responsibility (even less where the concepts of "insurance responsibility" or of "loss insurance" are involved) are, in the author's opinion, able to minimise the moral importance, which the principle of "subjective" responsibility represents in all legal systems.

It is indeed true that the theory of "objective" responsibility has greatly contributed to the clearing up and elucidation of many complicated legal problems and to the improvement of the legal status of the victims of damage. This "objective" responsibility has likewise facilitated the rapid development of the very useful idea of insurance, which has been of great help in meeting and solving some of the complicated problems of civil responsibility.

However, any generalisation of the principle of "objective" responsibility presupposes the exclusion of any concept of "fault" and thus leads to some solutions which are unacceptable from a moral point of view and teleological standpoint. The application of the principle of "objective" responsibility as a general rule, if accepted, would lead directly to the disappearance of any scruple on the part of the author of the damage and, in the end, the civil law would become simply the automatic regulator of the relationship between damage and reparation. It would have no other mission. Especially, it would lack the mission that previously prevailed in all legal systems, of not simply providing a sanction but also preventing the unlawful act itself.[152]

Up to this point, the book has focused on presenting the general aspects of Greek civil law concerning the issue of civil responsibility. This position can be summarised as follows: the predominance of the concept of responsibility based on fault, alongside the acceptance of many exceptions that favour the principle of responsibility without fault: a system that allows for desirable flexibility.

However, among the many provisions related to this system, there are certain ones that hold a special interest and are characteristic of the liberal and radical conceptions that inspired the men who drafted this Code – conceptions independent of the problem of subjective or objective responsibility that we have just discussed.

Among these provisions, analysed below, are the following, which have appeared most interesting.

These relate:

a) to the responsibility arising from the negotiations preceding a contract (arts. 197, 198);

b) to the right of the co-author of damage who has already valid the total amount of the reparation, to sue the other authors of the damage for contribution (Articles. 926, 927);

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[151] On the problems of "insurance responsibility" and "loss insurance" Bee Ehrenzweig, *A Psychoanalysis of Negligence,* 47 Nw. U.L. Rev. 855 (1953); Sieg, in 113 Zeitschrift für das gesamte Handelsrecht 95 (1949); Ussing, *The Scandinavian Law of Torts,* 1 Am. J. Camp. L. 359 (1952).

[152] See, e.g., Bienenfeld, Die Haftungen ohne Vershulden 93 (1933); Holmes, The Common Law 1, 34 (1945); Josserand, Évolutions et actualités 29 (1936); Pound, An Introduction to the Philosophy of Law 144 (1945); the works of Ripert, *La regle morale dans les obligation civiles* No. 112 (3rd ed. 1935); *Le régime démocratique et le droit civil moderne* No. 168 (1938); *Aspects juridiques du capitalisme moderne* (1946); and others.

c) to the reparation of damage based on the "equitable" or "reasonable" estimation or discretion of the judge (Articles 225, 286, 331, 387, 574, 675, 918 etc.);

d) to the provisions relating to the so-called "frustration of contract" (Article 388);

e) and lastly, to the reparation of the damage which results from the abusive exercise of a right (Article 281).

Article 197 reads as follows: "During the negotiations for the conclusion of a contract, the parties must mutually conduct themselves according to the principles of good faith and of usage in transactions." Article 198 provides: "one who, by his fault, has caused damage to the other party during the negotiations for the conclusion of a contract is obliged to make reparation even if the contract has not been concluded. The provision that relates to the prescription of claims arising out of unlawful acts is to be applied by analogy to claims under this article."

By means of these two articles, the Greek Civil Code framers attempted to directly and effectively and efficaciously solve the problem of civil responsibility arising from the negotiations for a contract. It must be noted that these provisions cover not only the case in which the negotiations have resulted in a valid contract but also the cases where such negotiations have failed or have resulted in the conclusion of a contract void in itself for any reason whatsoever.

As is well known, it was Rudolf von Jhering who first raised and discussed the problem of the responsibility arising from such negotiations through his theory of *culpa de contrahendo* and of *Negatives Interesse* in the case of a void contract.[153] This famous theory was taught under the Roman legal system, which was then in force in Germany. However, the problem of responsibility arising from the negotiations preceding a contract is one which has troubled and concerned the doctrine of civil law in almost all countries. Contemporary civil law doctrine does indeed consider that the behaviour of the parties during the negotiations for the conclusion of a contract must be submitted to some restrictions, lest the parties be led by their unrestrained desire to obtain the greatest possible gain from the contract at the expense of the other party.[154]

The problem has been discussed in Germany from the perspective of indemnity owed in case of the conclusion of a null and void contract. The French Civil Code does not contain any provision relating to this specific problem since the French Code was drafted long before von Jhering raised his now-famous question. On the other hand, the German Civil Code and the Swiss Code of Obligations both contain provisions relating to special cases but do not attempt the formulation of a general rule. Since the Soviet Civil Code and the Hungarian Draft of a Civil Code of 1928 are incomplete or silent on this matter, the result is that the first attempt to address this problem directly through a general provision is found in Articles 197 and 198 of the Greek Civil Code.

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[153] von Jhering, *Culpa in cantrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen, 4 Jhering's Jahrbücher für die Dogmatik* § 1 (1861).

[154] See generally K. Bünger v. Schadensersatz, in 6 *Rechtsvergleichendes Handwörterbuch* § 122 (1938); III L. Enneccerus-H. Lehmann, *Recht der Schuldverhaltnisse* § 43 (13th ed. 1950) (with further special literature). See also A. Kampitisis, On the Responsibility Arising from the Negotiations Preceding a Contract (Greek ed. 1960).

In any case, although contemporary codifications do not contain provisions similar to those found in the Greek Civil Code, the problem has by no means been ignored in the legal theory or doctrine. For instance, after the enactment of the German and the Swiss Codes, legal theorists tried to analyse the problem more profoundly to establish a "scientific" foundation for it and expand the concept of civil responsibility resulting from such negotiations.

The result of this effort is the establishment of three categories of theories, namely (a) the theory of unlawful act, (b) the so-called theory of obligation, and (c) the theory of responsibility imposed directly by law.

The theory of unlawful act, accepted today principally in France, Italy and Belgium, is based on the idea that inasmuch as the law does not contain any special provision relating to responsibility arising from the negotiations and inasmuch as no other obligation could serve as a foundation for this responsibility, it follows that the only possible juridical foundation would be that of responsibility based on the existence of an unlawful act. Interestingly, this theory prevails in these countries, where civil responsibility arising from unlawful acts has been widely conceived.[155]

Turning to the second theory – namely, that of obligation, or more precisely, that based on different variations of this theory – responsibility is considered to be founded either upon the contract resulting from the negotiations[156] or upon some "tacit" contract, independent of the principal contract, which covers only the stage of the negotiations.[157] The disadvantage of each of these positions is that they are notable in covering the case where the contract concluded is void or the case where no contract is concluded due to the failure of the negotiations. Moreover, the concept of a "tacit" contract, which these theories usually imply, is a fictitious and, therefore, undesirable juridical concept.

The third theory, which bases responsibility directly on the law itself, seeks to address the problem by bridging or filling the legislative gap either through interpretation by analogy[158] or by recognising a general principle where the mere act of entering into negotiations creates a special juridical relationship between the parties concerned.[159] This special juridical relation is sometimes called a "frame relation."[160] by scholars. According to these theories, this relationship gives birth to an obligation that prevents each negotiating party from harming the interest of the other. Some variations of these theories, on the other hand, base the responsibility arising from negotiations on some juridical rapport existing *de facto (faktisches*

[155] See H. et L. Mazeaud-A. Tunc, 1 *Traité theorique et pratique de la responsabilité civile delictuelle et contractuelle*, No. 116, 120 (5th ed. 1957) (with further references to literature and court-practice).

[156] F. Leonhard, *Verschulden beim Vertragsschluss* (1910) and also F. Leonhard, *Allgemeines Schuldrecht des BGB* 544 (1929).

[157] In this sense, however with variations, H. Siber in *II Planck's Kommentar zum BGB* (4th ed. 1914), and in his *Schuldrecht* § 27, at 102 (1931); Stoll, *Haftung für das Verhalten wiihrend der Vertragsverhandlungen,* Leipziger Zeitschrift für Deutsches Recht 532 (1923).

[158] See Kuhlenbeck, *Deutsche Juristen Zeitung* 1142 (1905).

[159] A. von Tuhr, *Der Allgemeine Teil des Deutschen Bürgerlichen Rechts*, II 1 (1914) § 62 VI, p. 486.

[160] F. Herholz, *Das Schuldverhiiltnis als konstante Rahmenbeziehung,* 130 Archiv für die civilistische Praxis 257; J. Esser, 157 *Archiv für die civilistische Praxis* 89. On the concept of the obligation as "frame-relation" *(Rahmenbeziehung)* or "organism" (so H. Siber) or *Gefüge* (so K. Larenz) or *Gestalt* (so P. Zepos) See my contribution *Zu einer "gestalttheoretischen" Auffassung des Schuldverhältnisses,* 155 *Archiv für die civilistische Praxis* 486 (1956).

Vertragsverhältnis) or on some "quasi-contractual rapport of confidence" *(vertragsähnliches Vertrauensverhältnis)* according to the continued practice of the German *Bundesgericht.*[161] Thus, all the variants of this third theory generally subsume each specific case under the provisions governing contractual responsibility. In the author's opinion, this is the principal disadvantage of all the theories in discussion: the responsibility which arises from the negotiations preceding the formation of a contract is simply not contractual responsibility: they are rather a special kind of responsibility requiring special and independent regulation.

There is much more to be said on this matter, but this must suffice to indicate the nature of the problem and the reasons why it is my opinion that the drafters of the Greek Civil Code have been wise in formulating clearly and concisely general rules governing the matter, as indicated in Articles 197 and 198. As a matter of fact, Article 197 determines the measure of good faith and honesty in conducting negotiations that the parties must observe, and it does this quite independently of the question of whether a contract has resulted from the negotiations or of the question of whether or not the resulting contract is null and void.

Consistent therewith, Article 198 provides that if good faith and honesty are not preserved so that damage is caused by the fault of one party to the other during the negotiations, the author of the damage is bound to repair it. Finally, it is to be noted that both Articles 197 and 198 have been formulated in such general terms that they cover all the possible cases of responsibility that may arise during negotiations. This solution may be considered unique in the Greek legal system in that the responsibility arising from negotiations is founded directly upon specific legislative provisions or texts, quite independent of any contractual or extra-contractual notions of responsibility.

The next question addressed is the right of a co-author who has fully paid for damages to sue the other responsible co-authors and recover their share of the compensation. This issue is regulated by Articles 926 and 927 of the Greek Civil Code, which appropriately adhere to the principle that the responsibility be determined according to the degree of the fault of each co-author. More specifically, Article 926 provides that "in cases of damage caused by the common act of more than one person or where more than one person is jointly liable for the sale damage, all such persons are bound for the full extent of the damage. The sale result applies when more than one person has acted simultaneously or successively, and it is impossible to determine who caused the damage through their own act." Article 927 then provides that "the one who (in accordance with Article 926) has paid the total amount of the reparation due has a right of recourse against the others. The court fixes the measure of their reciprocal responsibility according to the degree of fault of each of them. In case of impossibility in verifying this degree, the duty to indemnify is divided equally among all of them."

It is Article 927 that, in the author's opinion, holds particular interest because it consecrates the principle of fixing responsibility according to the degree of the fault of each coauthor. This principle is certainly not new. It has already been stipulated in the French Civil Code (Article 1150), the Austrian General Civil Code (Articles 1234, 1323, 1332), the Civil Code of Poland of 1934 (Article 160), and many other contemporary codifications. As a more general rule, the Swiss Code of Obligations stipulates in Article 43 that the nature and the

[161] On the *de facto* juridical rapports, see *Haupt, über faktische Vertragsverhältnisse* (1943); Sp. Simitis, *Die faktischen Vertragsverhältnisse* (1957). On the "quasi-contractual rapport of confidence" according to the court practice of the German *Bundesgericht,* see K. Ballerstedt, in 151 *Archiv für die civilistische Praxis* 5Ü1, 595. See J. Esser, Schuldrecht § 88 (1949).

extent of the reparation due must be fixed by the judge, who must also assess and take into consideration the circumstances and the degree of fault.

However, especially insofar as the right of recourse of the coauthor, who has paid the total amount of reparation is concerned, the Greek Code may be said to follow the formulation contained in Article 84 of the Franco-Italian Draft of a Code of Contracts and Obligations of 1927.[162] Thus, it may be said that the Greek Code is, to a certain degree, original in this connection: the principle which has been discussed above was a novelty in relation to the Roman-Byzantine legal system in force in Greece until 1946 since that legal system did not know such a principle; and, with the exception of von Jhering, the Romanists and pandects taught that the reparation due for damages, whether caused by "*dolus*" or by "negligence," must be the same, i.e., no distinction was to be made between these two categories of "fault."[163]

It is true that the Greek law abandoned this teaching in certain instances where the matter was regulated by more recent statutes, e.g., in the event of a collision of ships (present Article 236 of the Private Maritime Code of 1958), or of automobile accidents (Article 9 of a law of 1911) etc. Apart from these statutory cases, however, the acceptance of the principle of the fixation of the indemnity according to the degree of the "fault" involved in the body of the Civil Code itself (Articles 926, 927, and 652, paragraph 2), was a solution that expressed the radical spirit that inspired the framers of the Greek Code on this important question.

It is neither the place nor the time to repeat the argument in favour of accepting the principle of fixing the indemnity according to the degree of the fault. I prefer to limit myself to remark that such acceptance is almost satisfactory from the point of view of common sense in that the law does not indeed tolerate an equation of "*dolus*" and "negligence". Moreover, the acceptance of this principle releases the judge from the dilemma they must often face in cases involving contribution, where one of the co-authors is charged with very slight negligence. Lastly, this principle is a flexible one and, consequently, it is very successful in the regulation of juridical relations, i.e., relations whose nature shows a great variety in everyday life.[164]

At this point, something which may be interesting has to be noted, especially to lawyers who are interested in the history of law in general, namely, that the principle of fixing the reparation due according to the degree of the fault of the author of the damage, evidently a creation of the subtlety of contemporary theory on civil responsibility, has, however, its roots in the philosophy of ancient Greece.[165]

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[162] Article 84 of the Franco-Italian Draft of a Code of Contracts and Obligations of 1927 runs as follows: « *Lorsque plusieurs personnes sont responsables du meme fait dommageable, elles sont obligées solidairement il la réparation du dommage. Celui qui a payé la totalite du dommage a un recours contre chacun des autres pour une part qui sera fixee par de juge d' apres la gravité de la faute commise par chacun. S'il est impossible d' établir le dégré de responsabilite chacun des auteurs, la repartition se fera par parte viriles.* »

[163] 2 H. Dernburg & P. Sokolowski, *System des Römischen Rechts* § 301 (8th ed. 1912); R. von Jhering, *Das Schuldmoment im römischen Privatrecht* 215 (1867); 2 B. Windscheid & Th. Kipp, *Pandektenrecht* § 258 (9th ed. 1906).

[164] Fr. Baur, *Entwicklung und Reform des Schadenseratzrechts* § 5, at 43 (1935); 1 Hedemann, *Die Fortschritte des Zivilirechts in XIX Jahrhundert* § 7, at 100 (1910); G. Ripert, *Le régime démocratique et le droit civil moderne*, No. 185 (1936).

[165] See for the following Zepos, *Der Gedanke der Abstufung des Schadens nach dem Verschulden im altgriechischen Recht,* 70 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)* 372 (1953).

Indeed, Aristotle exposes in his *Politics* (II.V.1267) various theories of Hippodamos, the son of Euryphon from Militos, a famous architect of the time of Pericles (Hippodamos was the architect of the plan of the city of Piraeus). These theories were related to the problems of the organisation of the city and of the exercise of justice in general, and, according to Aristotle, Hippodamos thought that judicial decisions should not be taken by simply a majority vote but that each judge must pronounce his views and his vote separately by writing his opinion on a tablet. In case one favoured the pure and simple condemnation of the accused, they were required to write this on the tablet; in case they favoured acquittal, they were required to hand over the tablet without writing anything on it; however, in the event that they were doubtful about condemnation or acquittal, they were required to write their own opinion on the tablet! And this triple solution was the most equitable in the opinion of Hippodamos. It is well known that during this period (5th century BC), the ancient Greek law of responsibility was already governed by the principle of fault. Consequently, the theory of Hippodamos had as a basis the distinguishing of the degree of responsibility according to the degree of the fault both in private and in penal law.

This theory of Hippodamos plays an important role in the development of the principle in discussion. It is probable that Hippodamos was influenced by the Pythagorean concepts of "measure" and "harmony", which in ancient Greece and juridical matters found their expression in applying the principle of Equity. Lastly, one can ask themselves why Aristotle, who among all Greek philosophers had especially studied and analysed the concept and importance of Equity in law, tried in his work *Politics* to refute this equitable theory of Hippodamos!

The case of Article 927 of the Greek Civil Code, as analysed above, leads us now to another important question of civil responsibility, namely, the acceptance by the Greek Code of the principle of the so-called "reasonable" or "equitable" indemnity, i.e., the indemnity fixed by the free estimation (discretion) of the judge.[166]

Regarding the general notion of "equitable" indemnity, the Greek Civil Code contains other provisions, for example, those which declare that under certain circumstances, the debtor is bound to pay an indemnity that is not "total" but "reasonable." This principle applies to cases of contractual and extra-contractual responsibility. For example, in contractual relations, we find the mention of "reasonable" indemnity provided in Article 225 (in cases of representation and agency); Articles 331 and 918 (responsibility of a person who has no knowledge of his acts); Article 387 (responsibility in case of avoidance or annulment of a contract); Article 674, 675 (notice of termination in the contract of labour); etc. On the other hand, in extra-contractual relations, we may note Article 286 (case of necessity); Article 918 (responsibility of a person who has no knowledge of his unlawful act); etc.

The concept of "reasonable" reparation leads directly to the acceptance of the principle of "equitable" responsibility. This responsibility, which may be subjective or objective, addresses the problems raised by individual cases flexibly, resolving them according to common sense in the law. It works very well, especially in cases where the abstract logical interpretations would not permit the payment of an indemnity or would result in a total indemnification, however exaggerated and unjust such a result might be.

The measure and extent of reasonable reparation are determined according to the circumstances in each particular and concrete case. On the other hand, it is self-evident that,

[166] On this subject, see Zepos, *Der Schadenersatz nach Ermessen des Richters im Griechischen Zivilgesetzbuch, Festschrift für Martin Wolff* 167 (1952).

in cases of subjective (culpable) responsibility, the judge may take into account not only the degree of the fault of the debtor but also the ultimate fault of the creditor; that the judge may take into account the economic and social situation of both parties concerned (for example, the poverty of the creditor and the wealth of the debtor); and the judge may consider all the possibilities of any other means of reparation (e.g., by insurance); etc.

It is true that the principle of reasonable reparation has the disadvantage of uncertainty as far as the extent of the reparation to be determined by the judge is concerned. On the other hand, however, this principle has a great advantage in the possibility given to the judge to decide rather objectively each particular case according to the usages in transactions and the common sense in the law. The principle of reasonable reparation complements the concept of equity, which must govern each problem of civil responsibility. Lastly, we should add that this game principle gives expression to the ancient Greek idea of "moderation" and "symmetry", which we all encounter in the Roman legal system.

As far as the problem of the so-called frustration of contract is concerned, the Greek Code contains a special provision in Article 388: "In case of subsequent change in the circumstances on which the contracting parties, under consideration of the principles of good faith and of fairness in transactions, have mainly founded a reciprocal contract, the change being due to extraordinary and unforeseen events, and where, because of such a change the obligation of the promisor – in comparison with the obligation of the promisee – has become excessively onerous to him, the court may, at the request of the promisor, reduce his obligation to the proper extent, or decree the discharge of the contract as a whole or to the extent of the non-performed part. In the case in which the discharge of the contract has been decreed, all the obligations arising from it cease to exist, and the parties are mutually obliged to return all they have received in accordance with the provisions relating to unjustified enrichment."[167]

This provision is generally formulated on the model of the French *théorie de l'imprevisíon* and of the German theory of *Geschäftsgrundlage* (basis of the act-in-the-law), albeit with some variations and limitations.[168] Indeed, Article 388 of the Greek Code provides only for "reciprocal" contracts and applies only in cases of subsequent change in the circumstances on which the parties have founded their contract – subsequent change due to extraordinary and unforeseen events. Consequently, the prerequisites required for the application of Article 388 are limited; on the other hand, however, the consequences of these prerequisites may even entail the discharge of the contract at the judge's discretion.

The gist of the rule contained in Article 388 is that in cases of a supervening change in the circumstances under which a contract was made, where these circumstances constitute the basis and foundation of this contract, the court may decree the entire or partial discharge of the contract if, in its opinion, the performance of the contract should not be claimed. It is thus decisive for the application of Article 388 (a) that the circumstances under which the contract was made have changed, owing to the fault of neither party and (b) that the equilibrium of the

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[167] See for the following Zepos, Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946 (Art. 388), 11 Modern L. Rev. 36 (1948). See alg. *La théorie de l'imprévision dang les contrats et de la "frustration of contracts" in 3 Revue Hellénique de droit international* 27 (1950).

[168] For a brief comparative survey, see 6 A. Blomeyer, *Rechtsvergleichendes Handwörterbuch* 317 (-938); Gutteridge, Comparative Law 66 (1946); 6 Planiol, Ripert & Esmein, Tra*ité pratique de droit civil fran ais*, No. 391; 1 Rabel, *Das Recht des Warenkaufs* 353 (1936). See also the contributions published in the 1946 Journal of Comparative Legislation (parts III, IV).

two obligations arising from a reciprocal contract has been disturbed to such an extent that the promisor's obligation has become excessively onerous to him.

Article 388 contains a provision in which the principles of justice and equity find their most characteristic formulation. Being itself a limit on the application of the principle of *pacta sunt servanda,* it contains a provision which bears the seal and imprint of the other two fundamental principles that dominate any law of contracts, i.e., the principle of good faith and the principle of favour to the promisor.

The limitation of the principle *pacta sunt servanda,* introduced by Article 388 of the new Code into the Greek legal system, is implemented through the court. At the request of the interested parties, the court operates as the "reasonable third party" and decides on the contract's fate. In fact, the judge is not supposed to be merely an automaton in the application of a concrete legal system; they also collaborate with the legislator and contribute to the legislator's task. The judge is a real interpreter of the system of law, who has not only to fill the "gaps" in a given legal system but is also able to make alterations and even a total change in the conditions under which the obligations arising from a contract are to be carried out.

The results of this activity on the part of the court are, according to Article 388, either an entire or partial discharge of the contract or a reduction of the promisor's obligation to a "proper" extent. In the case of discharge of the contract as a whole, the frustration "kills the contract itself and discharges both parties automatically."[169] Where the court decides in favour of a partial discharge of the contract, that contract is partially void to the extent of its discharged part. Lastly, where the court decides for the reduction of the promisor's obligation to the "proper extent," this reduction means an alteration of the contents and of the function of the contract, an alteration imposed by the court at its free discretion, in accordance with the principles of good faith, justice and equity.

In the case of discharge of the contract, the obligations arising from it cease to exist and, according to Article 388, the parties are reciprocally obliged to return all they have received, with this return governed by the detailed provisions of the Code relating to unjustified enrichment (Greek Civil Code, Articles 904-13).

Thus, the general frustration clause contained in Article 388 gives a solution to all the problems arising from the frustration of a contract that has been the subject of analysis and criticism in international theory and court practice. The solution of Article 388 is a remarkable advancement in addressing problems of civil responsibility in cases of frustration. This is also the reason why Article 388 has been deemed a model in the resolutions of the Third Congress of the International Academy of Comparative Law in London in 1950.[170]

The provisions of the Greek Civil Code analysed above appear to emphasise the flexibility that characterises the Greek law of civil responsibility. This flexibility is the result of the conciliation reached between "objective" and "subjective" responsibility, of the recognition of a responsibility existing at the stage of the negotiations for the conclusion of a contract, the acceptance of the principle of fixation of the indemnity due according to the degree of the fault of the author of the damage and also according to "reasonable" and "equitable" considerations, and lastly, the solutions adopted on the issue of frustration of contract. Since,

[169] These are the words of Viscount Simon, L.C., in the Joseph Constantine Case (1942) A.C. 154, 163; cf. McNair, Legal Effects of War 157 (2d ed.1944).

[170] See the "Resolution, sect. II A.5" published in 3 Revue Hellénique de droit international 284 (1950).

on the other hand, the Greek Civil Code contains in Article 281 a provision which *expressis verbis* prohibits the abusive exercise of a right and declares that the surpassing of the limits of good faith, or *boni mores,* and the economic and social purpose of the right creates an obligation to make reparation for damage caused, it would appear that we have before us a system of civil responsibility, which is inspired by liberal and radical ideas in general, thoroughly in line with contemporary needs, inherently flexible and equitable and capable of covering any claim for reparation of damages which may arise. It might not be an overstatement to suggest that this system is a success.

However, The following section is a concise overview of several issues that the infamous Article 281 concerning the abuse of rights must address. Truly, the provision contained in this Article is one of the most important innovations of the Greek Civil Code; it has been amply elaborated in theory and practice in Greece; and now it is of some special interest in our discussion in this essay because this provision touches the whole problem of civil responsibility.

According to Article 281: "The exercise of a right is prohibited if it manifestly surpasses the limits imposed by good faith or by *boni mores* or by the social or economic aim of this right."[171]

Thus, in the last analysis, these criteria are juridical in nature. One is free to exercise their right and its prerogatives, but at the same time, they are bound by the restrictions imposed by the contemporary social concept of the right in general. Hence, in a manner contrary to the teachings of the Roman-Byzantine legal system, the Greek Code tries to restrain the unbridled individualism in exercising a right, through the aid of concepts, such as good faith, *boni mores*, or social and economic aim of the right. As is well known, Roman law did not prohibit the abuse of rights, except in cases of simple malevolence (Dig. 6.1.38: *malitiis non est indulgendum).* In contrast, the Greek Civil Code establishes certain objective criteria, which, independently of any estimation of the conduct of the beneficiary, are linked to the general concept applicable to transactions.

Thus, in the last analysis, these criteria are juridical criteria submitted to the control of the Supreme Court *(Cour de cassation)* in Greece. This Court will finally fix the nature and the extent of these criteria, in order that a uniform way of exercising rights may proceed and transactions may be facilitated.

The formulation of the provision contained in Article 281 is very wide. Although the leading theory admits that the principle formulated in this article cannot be subject to restraint, Greek jurisprudence has attempted to establish some limitations to prevent an overly extensive application of this provision.

Thus, according to the opinion prevailing in jurisprudence, Article 281 may be applied only in cases involving the exercise of rights by a positive act and not in cases of omission. On the other hand, again, according to the opinion of the decided cases, Article 281 applies only in cases involving the exercise of a certain and concrete private right and not in cases improving the so-called "general" prerogatives, which result from the personality of the human being (the *libertatis naturales facultates,* Dig. 1.5.4. pr., Just. 1.3.1), i.e., the prerogatives resulting

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[171]See Fragistas, *Der Rechtsmissbrauch nach dem griechischen Zivilgesetzbuch* Festschrift für Martin Wolff 49 (1952).

from the juridical capacity of every person as far as their professional and economic activity is concerned.[172]

Some of these limitations imposed by the Greek jurisprudence are incompatible with the broad formulation of Article 281. Nevertheless, I do not propose to discuss this problem here. Instead, at this time, I would like to emphasise the relationship between the provisions of Article 281 and the overall system of civil responsibility adopted in the Greek Civil Code.

As it has already been noted, Article 281 establishes the concept of good faith, *boni mores,* and the social or economic aim of the right as limits upon the exercise of the right. Consequently, surpassing these limits establishes the right of a third person damaged (1) to claim the interdiction of the abusive exercise of the right for the future and (2) to claim indemnity for the damage suffered thereby. Hence, the question arises as to whether this responsibility for the abuse of the right presupposes a fault on the abuser's part or whether simply the fact of surpassing the limits set by Artic1e 281 leads to his responsibility without examination of the question of fault on his part. This problem has not yet been resolved.

According to most of the authors who have discussed the problem thus far, the obligation to make reparation is based on the provisions relating to "unlawful acts" (Articles 914, 919), which presuppose a fault on the part of the author. Consequently, according to this opinion, only a culpable surpassing of the limits of Artic1e 281 may lead to an obligation for reparation. In the absence of any fault of the actor charged with abuse of right, the person damaged cannot claim reparation except based on the provisions relating to unjust enrichment (Artic1es 904 *et seq*.).[173]

On the contrary, according to another opinion, the fact of surpassing the limits imposed by Article 281 is, in any case, an unlawful act since the formulation of this article contains an "interdiction" in itself. The presence of "faults" is not necessary for the acceptance of this interdiction of the abusive exercise of a right, according to Artic1e 281. Hence, surpassing the limits of Article 281 is an unlawful act without fault – one of the rare cases where an unlawful act, independent of any idea of fault, creates an obligation for reparation.

This latter opinion is more in line with the social spirit which prevails in Article 281 and with the formulation of this article itself. It should be kept in mind that Article 281, in prohibiting the abusive exercise of a right, is essentially a part of the whole system of civil responsibility, which is characterised so strongly by its flexibility in satisfying contemporary needs.

12. Poland

Codification in Poland began in 1768, part of which was former chancellor A. Zamoyski's (1716–1792) draft code of 1778. The draft showed the influence of Roman law both in its structure and several of its legal institutions. It was, however, rejected by the Polish Diet, the *Seym,* in 1780. Nor was the order for the codification of private law in the Constitution of

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[172] For instance, it is not an abuse of right if *A* prefers to have *B* as their servant instead of C, who (the latter) is an equally good servant, but also a very poor man. Or, if *A* buys their provisions from grocer *B* instead of C, who (the latter) is their neighbour, has a large family and is poor. In both cases, there is no abuse of right. *Cf.* Balis, General Principles of Civil Law § 166, at 430 (in Greek, 7th ed. 1955).

[173] See Fragistas, *supra* Note 23, at 66.

1791 realised. In 1808, the Dutchy of Warsaw introduced the French *Code civil* with some modifications. The French doctrine of private law influenced Polish civilists, mainly in territories under Russian rule. The prevailing law in the southern part of the country was the ABGB.

Notable Polish Romanists who also focused on private law include F. Zoll, senior (1834–1917), a professor at Cracow University, and his successor. S. Wróblewski (1868–1938), called the "Polish Papinian". An eminent Polish representative of Austrian private jurisprudence showing the influence of the German Pandectist School of Law was E. Till (1846–1926), a teacher of Austrian private law at Lemberg. Additionally, the works of F. Zoll, Jr. (1865–1948), a professor of private law at Cracow and a former student of Regelsberger and Jhering, reflect a strong influence of German *Pandektistik*, particularly in his draft for the codification of property law.

The Polish law of obligations of 1933 primarily reflects the influence of the Swiss OR and the Franco-Italian draft law of obligations of 1927. The Polish Civil Code of 1964 was influenced by the German Pandectist School of Law, French civil jurisprudence, and Swiss private law.

13. Characteristic Features of Legal Development in England

In the 16th century, the spirit of Humanism emerged in English jurisprudence due to the teaching of law at universities. One of its outstanding representatives was Arthur Duck (1580–1649), whose famous posthumously published work titled *De usu et authoritate iuris civilis Romanorum in dominiis principum Christianorum libri II* (Leyden, 1654) is essentially the first comprehensive history of the *ius commune* in Europe. The writings of Cowell must also be acknowledged. In his book *Institutiones iuris Anglicani ad methodum et seriem Institutionum imperialium compositae et digestae,* Cowell integrated English law into Justinian's Institutiones system, aiming to reconcile civil law with common law. The first great expert of common law in the Modern Age, Sir Matthew Hale (1609–1676), also thought Roman law was useful in systematising native English law. His book titled *An Analysis of the Laws* – published only posthumously in 1705 – followed the system of the Institutes to a certain extent and served as a basis for the scholarly activities of the first university professor of English law, Sir William Blackstone (1723–1780), whose *An Analysis of the Laws in England* (1756) and *Commentaries on the Laws of England* (1765–1769) contain several categories created on the basis of Roman law. The revised version of Blackstone's principal work was edited in 1841 under the title *New Commentaries on the Laws of England.* Its last edition came out in 1938, discussing English law in the framework of the system of the Institutes as late as the first half of the 20th century.

The first professorship of historical and comparative jurisprudence was set up in Oxford in the 19th century. Its first professor was Sir Henry Sumner Maine (1822–1888), *regius professor* of Roman law in Cambridge. Maine was the author of the famous *Ancient Law, its connection with the Early History of Society and its Relation to Modern Ideas* (1861). He considered the institutions of Roman law fundamental in the comparative analysis of English law. As a representative of historical jurisprudence, his main achievement was to provide a historical foundation for conceptual jurisprudence (*Begriffsjurisprudenz*).[174]

[174] Maine's work had a great impact on British and continental legal thinking (see G. Hamza, *Maine és a XIX. század európai jogtudománya* [Maine and the Legal Science of Europe in the Nineteenth Century], *Jogtörténeti előadások*, vol. 2 (Budapest, 1990)). At the same time, it has to be mentioned that in the last two centuries, British courts have tended to refer to arguments of Roman law that cannot be considered even as a subsidiary source of law. For example, the House of Lords decided in 1923

There is no need to linger on the ongoing debate concerning whether comparative law forms a separate body of knowledge about the law or primarily a method of study. Esteemed names have aligned themselves on both sides of this significant question.[175] Sir Frederick Pollock, addressing the International Congress of Comparative Law, spoke for those who see comparative law as merely an analytical tool, a methodology for looking at legal problems. He said: "Le droit comparé n'est pas une science propre, mais qu'il n'est que l'introduction de la méthode comparée dans le droit"[176]. On the other hand, Professor Watson put it this way: Comparative law is "an academic discipline in its own right, a study of the relationship, above all, the historical relationship, between legal systems or between rules of more than one system"[177].

Comparative law can be a valuable tool in the evaluation and improvement of the law[178]. Even Maine, whose *Ancient Law* was the foremost contribution to the field of legal history and general legal theory of its time, asserted that "the chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of the law". Following him, Pollock similarly asserted that comparative law is primarily a "handmaid to the theory of legislation"[179]

Accordingly, it is hardly surprising that the first formal initiatives in the domain of comparative jurisprudence dealt with comparative legislation (*législation comparée*). These initiatives reflected the extension to which the comparative approach could serve to improve national legislation. By consulting the experience of other legal systems, the legislator is exposed to new perspectives and models for consideration in the development of legislation in their own country. Enriched by the experiences and ideas of other nations, the legislator is better prepared to consider the form that the law should take in their society. The comparative approach thus permits one to think outside the limits of one's national boundaries and to seek out the best practices and most advanced thinking on any particular issue.[180]

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on the basis of *condictio causa data causa non secuta* in the case of Cantiere San Rocco v. Clyde Ship Building and Engineering Co. [1924] A. C. 226.

[175] See, for instance, Peter de Cruz, *supra,* pp. 3.7, for a discussion of the differences among comparatists on this point. See also Jerome Hall, *Comparative Law and Social Theory* (Louisiana State University Press, 1963), pp. 7-15.

[176] Quoted in Jerome Hall, *supra,* p. 7. Similarly, see H. C. Gutteridge, *Comparative Law,* 2nd ed. (Cambridge, 1949), p. l ("'Comparative Law" denotes a method of study and research and not a distinct branch or department of study"). See also Peter de Cruz, *supra,* p. 5 ("Comparative law is, therefore, primarily a method of study rather than a legal body of rules").

[177] Alan Watson, *Legal Transplants: An Approach to Comparative Law,* 2nd ed. (Athens, Georgia: University of Georgia Press, 1993), p. 9. Corporatists of this school of thought see comparative law "as a social science so that the data obtained should be seen not just as a part of its method, but as forming part of a separate body of knowledge". Peter de Cruz, p. 5. See also Jerome Hall, *supra,* p. 22 ("That the so-called "result" of the comparative method, applied to law, is a kind of knowledge, indeed, a social discipline, is the position of those who hold that comparative law is a synonym of legal sociology and legal science".

[178] Here, of course, we deal with law as *législation* as distinct from *droit*.

[179] Pollock, *supra,* p. 2.

[180] To the extent that the "law" is found not just in legislation but in custom, decisional law, legal treatises, regulatory provisions, and administrative law, all those involved in the law-making process, not just the legislator, benefit from the comparative approach. Thus, judges, attorneys, academics, and legal commentators all stand to benefit from exposure to the experiences of those operating within different legal systems or traditions. See *infra,* n. 64.

Thus, for Sir William Blackstone (1723-1780) "the study of comparative law was not merely the study of comparisons". According to Blackstone, a general principle of law existed somewhere out there, which was the perfect form of any rule. This perfect form was merely exemplified and imperfectly reflected in any particular system"[181]. The comparative approach thus found support in the view that, to extract the essence of any particular rule, it was necessary to survey the points of commonality among the various systems of law. The perfect rule was likely to be reflected in that zone of common principles[182].

Any search for the common elements of the law inevitably involves not only the question of what the law is but an inquiry into how the law and different legal traditions came to be. As described by Professor Wigmore, the questions thus put are, "What factors give rise to a legal system? What controls its destiny"[183]? In this respect, comparative law was first recognised as a subject for study in the 19th century. In his landmark work, *Ancient Law,* Maine used the tools of historical and social comparison to trace the development of law. Similarly, Oliver Wendell Holmes, in *The Common Law,* described the progress of the common law from its distant roots. Together they stand as formidable examples of the view that "the prime virtue of comparative law is the understanding it can give of the nature of the law and especially of legal development"[184]

Sir Frederick Pollock (1845-1937), the sole representative of the English legal tradition at the first International Congress of Comparative Law[185], later stated that the recognition of comparative law as a "new branch of legal science" could be dated from 1869. Explaining his assertion, he cited not only the founding the year of the Society of Comparative Legislation in Paris but also the appointment of Sir Henry Maine (1822-1888) as the first professor of Historical and Comparative Jurisprudence at Oxford[186] A chair in comparative legislation was founded at the College de France in 1831. Similarly, in 1869, the Society of Comparative Legislation (*Société de Législation Comparée*) was founded in Paris. In 1895, a Society of Comparative Legislation was established in England.

In nineteenth-century England, Maine dominated the field of comparative law. His best-known work, *Ancient Law,* studies the historical and social evolution of the law and is strongly reliant on the comparative method[187]. Although Maine's work is informed by the

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[181] Deniel J. Boorstin, *The Mysterious Science of the Law* (Boston: Beacon Press, l958) pp. 40-42.

[182] In more modern times, this same approach can be discerned in the determination of public international law. One of the sources of such law, as indicated in the statute of the Permanent Court of International Justice, is to be found in the "general principles of law recognised by civilised nations". Article 38:3. Clearly, identifying such "general principles of law" requires a comparative assessment of the prevailing legal systems of the world.

[183] John Henry Wigmore, *A Panorama of the World's Legal Systems* (St. Paul: West Publishing Company, 1928), Vol. III, p. 1119.

[184] Watson, *supra,* p. 16.

[185] David and Brierly, *supra,* p. 3, n. 4

[186] Pollock, *supra* at p. 25. Pollock notes the earlier establishment of a chair of comparative law at the College de France as early as 1831, as well as a second, limited to criminal law, at the Sorbonne. Finding no reference to comparative law *(droit comparé)* a generation later in Littré's definitive dictionary of the French language, he clearly implies that the earlier ventures did not have the impact of later efforts.

[187] First published in 1881, *The Common Law* by Oliver Wendell Holmes similarly surveys the historical context of the common law, the cornerstone of American and British jurisprudence. See Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown and Company, 1963).

belief that the progress of mankind follows the evolution of its legal institutions, he also saw the more immediate and practical side of comparative law. Ten years after the publication of *Ancient Law,* he asserted that it was “universally admitted by competent jurists, that ... the chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of the law”[188].

Less than a decade after Maine's death, Pollock attended the International Congress in Paris. Shortly after the event, he wrote to his friend, United States Supreme Court Justice Oliver Wendell Holmes, and informed him, “I am writing a farewell lecture for Oxford on the history of comparative jurisprudence, not with much pleasure, as ... I really have little to put into it that is either new or important”[189]. In his lecture, delivered one week later, Pollock continued in the same vein: “The work of the present generation in the field of comparative jurisprudence is mostly work of detail. Our great predecessors have annexed realms which it is for us to settle and administer”[190]. Perhaps Pollock believed that Maine's work in comparative law was so definitive that there was little room for innovation or original contribution by his successors. Pollock appeared to suggest that what was left to those who followed was to tinker about in the margins of settled principles announced by the great thinkers of an earlier generation.

Pollock's hesitation has not been borne out over time. The International Congress of Comparative Law was not so much a finale as an opening act for the study of comparative law. It became a clear point of reference for the international emergence of comparative studies as a recognised legal discipline. Moreover, coming as it did at the threshold of the 20th century – a period of intense legislative growth – Congress confirmed the value of the comparative approach in drafting legislation. By its pioneering example, Congress also took the comparative method beyond the confines of 1900 and projected it into our own age of globalisation, in which legal thinking has increasingly developed an international orientation. It is for us to determine what scope we shall give to the comparative approach in the development of the law in the 21st century.

14. Scotland[191]

Modern Scottish law was greatly influenced by the book of Senior Judge Lord Stair titled *Institutions of the Law of Scotland* (1681), an important source of which was Roman law. (One can use it as a fundamental source even today, referring to the works of the institutional

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188 Pollock, *supra,* p. 3.

189 Letter of Pollock to Holmes dated January 17, 1903 in Mark De Wolfe Howe, ed., *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock* 1874-1932 (Cambridge: Harvard University Press, 1946), Vol. r, pp. 111-112.

190 Pollock, *supra,* p. 29.

191 T.B. Smith, *British Justice: The Scottish Contribution* (London, 1961); Cooper, *The Scottish Legal Tradition,* ed: S.C. Styles (Edinburgh, 1991); Evans-R. Jones (ed.), *The Civil Law Tradition in Scotland* (Edinburgh, 1995); D.M Walker, *The Scottish Legal System,* (Edinburgh, 1997[7]); D.L.C. Miller-R. Zimmermann (eds), *The Civilian Tradition and Scots Law,* (Berlin, 1997); E. Reid, *Scotland (Report 1)* in: Mixed Jurisdictions Worldwide. The Third Legal Family, ed: V.V. Palmer (Cambridge, 2001), R. Leslie, *Scotland (Report 2),* in: Mixed Jurisdictions Worldwide. The Third Legal Family, ed: V.V. Palmer (Cambridge, 2001)

writers.) Roman law was no longer used exclusively from the late 18th century. However, the influence of common law began to be felt earlier, starting with the union with England in 1707.

Scots law is basically a civilian system in that, in essence, its terminology and concepts are derived from Roman law. Roman debt or inheritance is particularly clear in the areas of property (notably moveable property) and possession. Examples abound, such as the distinction between natural and civil possession, the rules on acquisition and loss of possession and modes of acquisition of ownership, such as *specificatio* and *accessio*. Pursuing these positive contributions to the Scottish legal system is interesting, and pursuit reveals that Roman rules have not necessarily been followed exactly, even where a Roman derivation is apparent. That there was such deviation is easily explained, as Roman law was selectively adopted and not imposed. This holds true for *specification,* where the texts themselves show that there was scope for argument regarding the appropriate rule.

There are, however, also divergences which raise questions about the operation of certain rules or institutions in Roman law itself. Scots law has not adopted *usucapio*, and it is not clear that there is a positive prescription in Scots law setting up the title of movable property. The rule, which Scots law shares with other systems, i.e., ownership is presumed from possession, means that it is seldom necessary to appeal to positive prescription. In practice, *usucapio* was important in Roman law, except to cure a formal defect in the mode of acquisition, such as delivering a *res mancipi.* In Scots law, i.e., Scots' legal doctrine, there has been very little discussion of the nature of the *iusta causa* in *traditio*, although it was accepted that a *iusta causa* is needed.

The impact of common law increased during the 19th century due to the activities among others of the House of Lords, which still acts as a court of appeal for the Supreme Court of Scotland (Court of Session). The fact that the United Kingdom joined the European Communities in 1973 only increased the importance of autonomous Scottish law. It can also promote a better understanding of Anglo-Saxon common law and the continental traditions of civil law.

15. Ireland[192]

The model of putting Irish customary law (brehon law) of Celtic origin in writing was the first "official" codification of Roman law, i.e., the *Codex Theodosianus* of the 5th century AD, as some scholars, for instance, W. N. Hancock maintain. This code presumably became known throughout the Irish island through the mediation of the Christian Church. According to sources of law, brehon law and common law interacted after the settlement of the Anglo-Norman tribes in Ireland in the late 12th century. The so-called second reception of common law took place in the late 16th and early 17th centuries. The significance of Roman law is indicated by the establishment of a regius professorship of Roman law (civil law) at the Trinity College of Dublin in 1668.

Thanks to the British conquest, common law prevailed even prior to the union with England in 1800 (Act of Union). The role of the House of Lords as a supreme court was enforced also

[192] For the survival of Roman law in Ireland in general, see W. N. Osborough, *Roman Law in Ireland*, Parts I–III, *The Irish Jurist* 25 (1990)–27 (1992). For the Irish legal system, see W. N. Hancock, ed., *Ancient Laws and Institutes of Ireland* (Dublin, 1965) and F. Kelly, *A Guide to Early Irish Law* (Dublin, 1988). Cf. also R. Byrne, I. Paul McCutcheon, *The Irish Legal System* (London, 1989).

by statute law. Since Ireland regained independence in 1922, it has gradually moved away from British law. The High Court of the Free State, established after the foundation of the Irish Free State, relies on Roman law, especially in cases of inheritance.

16. Science of Private Law in Northern Europe during the 19th and 20th Centuries

German jurisprudence also had its impact felt in Northern Europe. Danish, and in many respects, Norwegian legal science, were under the influence of the Historical School of Law. It was provided a new basis by A. S. Ørsted (1778–1860) – a contemporary of Savigny –who sought to complement defective native law with foreign, i.e., Pandect law (*Pandektenrecht*). Ørsted intensively examined the new European codes, particularly the Prussian Allgemeines Landrecht, the French Code Civil and the Austrian ABGB. Since he proposed many suggestions to promote the modification of many regulations of the *Danske lov,* which had already become impracticable, he also sought to conserve the main institutions of Danish law. His work on Danish private legislation and jurisprudence, published in six volumes, is titled *Haandbog over den danske og norske Lovkyndighed*. In the works of F. C. Bornemann and A. W. Scheel, who introduced the system of Pandects in Denmark, Savigny's impact can be recognised. The brightest works of J. E. Larsen and F. T. J. Gram were also written under the influence of the German pandects.

Hägerström, the professor of practical philosophy at the Swedish University of Uppsala criticised the prevailing positive concept of law by contrasting it with the eternal values of Roman law. Alfred Vilhelm Lundstedt (1882–1955), a professor of private and Roman law at the same university, mediated between the work of Hägerström and two other professors, Olivecrona and Ross, by developing the unexpounded ideas of Hägerström. He took Roman law as a model for his two works *Superstition or Rationality in Action for Peace?* and the other one, *Legal Thinking Revised*.

From the end of the 19th century, the representatives of Swedish, Danish and Norwegian jurisprudence show the influence primarily of Jhering and Windscheid, though mixed with that of other trends.

Ivar Afzelius (1848–1921), a student of Windscheid in Leipzig and of Jhering in Göttingen, attempted to incorporate the German dogmatics of private law in the traditions of Swedish law. The introduction of the dogmatical method in Sweden is, without a doubt, his achievement. As chairman of the permanent codification committee, he pressed for the unification of law in the northern states. Afzelius, who was also the president of the Svea Hofgericht between 1910 and 1918, translated Jhering's *Kampf und Recht* into Swedish. Swedish legal science is also characterised by the impact of Jhering's ideas in relation to *Zweckjurisprudenz.*

In Finland, the impact of Pandectist law can be felt from the very beginning, and the conceptual jurisprudence of the Historical School of Law is still apparent today. The penetration of Roman law, Pandectist law and the Roman-Dutch school of Pandectist law into the Danish–Norwegian and Swedish-Finnish jurisdictions makes the centuries-old efforts of unifying private law (commercial law) in Northern Europe significantly easier.[193]

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[193] J. Lessing (1847–1923) was the first in 1899 to express the need for a unified code of private law valid in all countries of Northern Europe. Under the terms of the Helsinki Convention of 1962, the legislations of Denmark, Iceland, Norway, Sweden, and Finland cooperate in creating the greatest possible harmony in the sphere of private law.

In 1899, J. Lessing (1847–1923) claimed the adoption of a unified code of private law in the states of Northern Europe. According to the Convention of Helsinki of 1962, the legislations of the Northern European states cooperate in harmonising the private law-related legislation (codification).

17. Denmark

King Christian V (1670–1699) of Denmark issued a remarkable code in 1683 (*Danske lov,* consisting of six books), promulgated on 15 April and enforced on 23 June by a royal decree. The Code was drafted by Rasmus (Erasmus) Vinding Poulsen (1615–1684) and was put into force in Norway four years later as well (*Norske lov*). Despite being a brilliant mind of his age as a historian, linguist and a man of letters and serving in the Supreme Court, Rasmus had no deep theoretical knowledge of the law. For these reasons, the major part of the compilation of *Danske lov* was the work of Peder Lassen (Lasson) (1606–1681), a highly respected jurist of the time. Lassen studied in Rostock, Orléans and Padova and obtained his *licenciatus* in Basel in 1636 with his work titled *De jurisdictione et imperio*. The first drafting committee was set up in 1661, although the final version of *Danske lov* was the work of the second committee, formed in 1667. The codification was supported by a Danish statesman, Peder Schumacher Griffenfeld (1635–1599). Some of its provisions are still in force in both countries. The structure of the code follows Justinian's system of the Institutes, but regarding its content, it reflects the impact of Roman law only with respect to certain legal institutions.

The trend of natural law played a very important role in the interpretation of the codified Danish law in the 18th century. Among the leading personalities of this trend, we can mention Dons, who published his work on the Danish and Norwegian codes *Forelaesninger over den danske og norske lov* (1780-1781), Brorson, who wrote a six-volume work about the interpretation of the Danish code *Forsog til den danske lovs fortolkning* (1791-1801) and Nørregaard, author of a voluminous work of Danish and Norwegian private laws *Forelaesninger over den danske og norske lovs private ret* (1784-1799). At the very beginning of the 19th century, in 1819, Hurtigkarl published a work about the historical basis of Danish and Norwegian laws titled *Den danske og norske rets forste grunde*.

This work of codification still cannot be considered modern code. The law of contracts, accepted in Denmark in 1917, is simultaneously different from Roman and common law. It greatly influenced legislation in that particular field across all other Scandinavian countries.

Greenland became part of Denmark in 1721, but just about two centuries later, in 1917, Denmark extended its authority on the entire island. Greenland was formally declared an external part of the Danish Kingdom by means of the Constitution of 1953. It has had significant internal autonomy since 1979 and has a one-chamber system composed of thirty-one members (*Landstig*) and its own government with the prime minister heading it. The island is represented in the parliament of Copenhagen by two deputies.

Greenland became part of the European Communities at the same time as Denmark but resigned from its membership as a result of a referendum, held on 23 February 1982. The relationship between Greenland and the European Communities, i.e., the European Union is regulated by an agreement signed on 12 March 1984.

In general, Danish private law is in force on the island and the ancient Greenlandic (*inuit* in Eskimo language) customary law is implemented by the courts in relation to a limited number of legal institutions. It can be considered a characteristic feature of the jurisdiction that non-professional judges resolve legal disputes. These judges rely on the opinions of professional

judges who received legal education in Denmark. Most legal disputes are decided by mutual consent of the parties by way of mediation.

The Faerøer Islands, while maintaining their autonomy, were part of the Norwegian territory from 1035 to 1380. Since 1380, the Islands have been governed by Denmark as a vassal state. In 1816, Denmark abolished the self-government of the Faerøer Islands. The self-government of the Islands was not reinstated until 1948. However, Denmark still maintains its authority over foreign policy, national defence and the jurisdiction of the Islands. The Faerøer Islands have had a one-chamber parliament (*Logting*) since 1948. According to the Danish constitution of 1953, the islands constitute part of Denmark. Just like Greenland, they are also represented by two deputies in the Danish parliament, which elects the prime minister, as well as two other members of the government of the Islands. This fact can be viewed as a testimony of the movements for national sovereignty on the Islands.

Contrary to Greenland, the ancient customary law has entirely vanished from practice since the Islands are governed by Danish private law. The explanation of this effect is that the customs of the native population of the Islands – Irish people and Norwegians – in the 8th and 9th centuries had been nearly identical to those of the Danes, compiled in the *Danske lov* in 1683. The Faerøer Islands, contrary to Greenland, are now a member of the European Union.

18. Norway

The *Danske lov,* promulgated in 1683, came into effect in Norway under the name *Norske lov* in 1687. This was because Norway was part of Denmark until 1814. Norway, after having been independent for a short period of time, became part of Sweden. Norway gained its independence from Sweden in 1905. Several of the provisions of the *Norske lov* are still in effect. Regarding the system of the *Norske lov*, it was compiled mainly following the scheme of the *Institutes* of Justinian, although it conserved only a few legal institutions rooted in Roman law. This legislative work cannot yet be considered as a code in the modern sense of the term.

It is important to note that this code, while not reflecting the modern concept of the term, somewhat anticipates the principle of abstraction (*Abstraktionsprinzip*) in the regulation of the transfer of ownership of movable property, as outlined in the German BGB.

19. Iceland

The law of the state of Iceland, founded in 930 AD, is based on the consolidated customary law. The *Althing*, having the capacity of both a legislative organ and a court of appeal, played an important role in the formation of law. In the second half of the 13th century, it was promulgated in 1273 under the Norwegian rule a new “code” according to Norwegian law, which became effective both in Iceland and Norway.

A law from 1281 transfers the legislative power completely to Norway, while the *Althing* becomes purely a judicial court. In 1380, following the establishment of the Union of Norway with Denmark (Danish–Norwegian Federation), Iceland fell under Danish rule. In 1660, Iceland became the province of Denmark. After that, Icelanders pleaded allegiance to the founder of Danish absolutism, Frederic III (1648–1670). The *Althing* was dissolved in 1800 and was restored only in 1843 as a consulting assembly.

In 1874, Iceland was granted special status, and the *Althing* became an institution with two chambers, authorised to exercise legislative functions in matters concerning the island. The Treaty of Alliance of 1918 with Denmark created the new Icelandic kingdom while still maintaining the personal union with Denmark. However, the residence of the Supreme Court stayed in Copenhagen. By virtue of the Icelandic Constitution of 1920, *Althing* maintained legislative power. In 1940, after the occupation of Denmark by Germany, Iceland declared the Danish-Icelandic Treaty of 1918 non effective. The *Althing* transferred executive power to the government, which declared the union with Denmark void. This decision was confirmed by a referendum.

In 1941, the government of Iceland promulgated the independence of Iceland, which was also confirmed by the *Althing*. Nevertheless, the formal invalidation of the law of alliance of 1918 and the acceptance of the constitution of the republic was postponed until the end of the war. The proclamation of the republic and the adoption of a constitution in 1944 severed the public law-related ties with Denmark. Notably, the 1944 Constitution was based on the Constitution of the United States.

The substantial characteristics of Danish private law were borne by Icelandic private law, which remained formally independent from Danish private law, even after the dissolution of the personal union that previously existed between the two sovereign countries.

It is important to note that in the realm of the law of obligations, the Act on contracts and matrimonial rights, enacted in 1936, is of utmost significance.

19. Sweden

In Sweden, the foundation of an ecclesiastical school in 1477 and that of two universities, one in Uppsala and the other one in Lund (where Samuel Pufendorf taught natural law) throughout the 17th century, played a significant role in spreading knowledge of Roman law. The University of Uppsala was the first in Europe where, as early as 1620, a chair to teach national law (*ius patrium*) was set up. In addition, in Uppsala, the teaching of Roman law was provided under the name "Encyclopaedia of law" in the last decade of the 19th century. The German pandects also found their adherents in two noted professors of private law: V. Nordling, a professor at the University of Uppsala and Ö. Undén and a highly reputed private law scholar.

After nearly half a century of preparation – and a committee for the preparation (*Lagkommissionen*) established in 1686 – the General (State) Code of Sweden (*Sveriges Rikes Lag*) was adopted in 1734 by the states, having representation in the *Rigsdag*. The *Sveriges Rikes Lag* was promulgated two years later, on January 23 1736, by the king and became effective as of 1 September in the same year.

The Swedish General (State) Code is called *Sverikes Riges Lag* or *Svea Riges Lag* in Swedish. The *Sverikes Riges Lag* is composed of nine separate parts called "codices" or, in other words, books (the Swedish word *balk* as a legal term means "code" or "book" although the original meaning of the word balk is simply balk. As to the present-day structure of *Sverikes Riges Lag*, the Code consists of ten *balks*. Apart from private and commercial laws, this Code also contains criminal, procedural and executive laws. The Code, which underwent a number of modifications later on, is still in force.

Chapter V, which deals with commercial law, is based on the concepts elaborated by the representatives of the line of thought of the German *Usus modernus pandectarum*. The impact of Roman law is, however, insignificant in the private law sections. The part dedicated to

commercial law of the *Sveriges Rikes Lag* (*Handelsbalken*) includes regulation of the law of contracts. Originally, it constituted the fifth "book" of the *Sveriges Rikes Lag*, but in the present version of the Code, it is the sixth. The *Handelsbalken* was substantially modified on the one hand by the Act on the Law of sale, adopted in 1905, and on the other hand, by the Act on the Law of contracts, promulgated in 1915. An act, adopted in 1972, provided for the re-regulation of contractual and delictual liability. In the present version of the sixth part of the *Sveriges Rikes Lag*, the influence of the German School of Pandects is evident. This influence can be attributed to its modifications.

Comparing the *Sveriges Rikes Lag* with *Danske lov* from 1683, the *Sveriges Rikes Lag* has a more advanced structure. One of its characteristic features is that its compilers took natural law into serious consideration. By contrast, the influence of Roman law in its parts related to private law is more limited. It must be emphasised that Swedish law was dominated throughout its entire history by written law (*ius scriptum*). Despite this fact, the codification in Sweden took place in a different way from Germany or France. This is because during the codification, the compilers adopted the language of sources of medieval Swedish law. Furthermore, the compilers drew upon the non-scientific systematisation of medieval Swedish law without following either the system of the Pandects or the scheme of the institutes of Justinian.

In essence, the *Sveriges Rikes Lag* still constitutes the law in force in Sweden. It is completed and published in a semi-official version every year, incorporating the latest legal, judicial practices and principles established in the courts' most significant rulings. These sentences precede the proper text of the Code. The roots of this scheme date back centuries. In this context, it must be noted that around the middle of the 16th century, Olavus Petri (1493–1552) reformulated forty-three judicial maxims reflecting the influence of the *regulae* of Roman law.

Although *Sveriges rikes Lag* is still the main law in force, certain legal institutions are regulated separately, i.e., in separate legislative acts. This is true, for instance, for extracontractual liability, which has, since 1972, been regulated in a separate law on civil law liability (*Skadeståndslag*).

While no formal reception of Roman law took place in Sweden, the records of disputes arising primarily from finance-related matters (*codices rationum*) at the Swedish royal council (*Svea Hofrätt*) reveal that the judges of this council (founded in 1614), functioning as a supreme court, predominantly applied Roman law rather than traditional municipal and rural acts (promulgated in 1350 and 1357), which, over time (*tractu temporis*), had become antiquated. Their decisions were influenced by the Roman-Dutch Pandectist legal science.

20. Finland

Finland was part of Sweden until 1809, during which the Swedish General Code (*Sveriges Rikes Lag*) was in effect. This Code remains in effect today, albeit in a rather formal manner. The official Finnish version of the Code has been published since 1950 in every odd year, and it includes private law in the first part. (*Suomen Laki I*). In the first part of the Code, the principles based on the most important judicial sentences precede, similarly to the *Sveriges Rikes Lag*, the proper text of the Code. This method follows the Swedish way of regulation of law. The above principles often evoke the *regulae* of Roman law.

The introduction of Roman law in Finland, where the Swedish General Code (*Sveriges Rikes Lag*) was also in effect, was primarily attributed to the academy of Turku, founded in 1640, and to the academic subject called "comparative Roman law", taught there. M. Wexonius

(Gyldenstolpe), a professor at the academy, advocated for the reception of Roman law as early as the late 17th century.

The thinking of Professor M. Calonius (1738–1817)[194] was heavily influenced by the Pandectist legal thought (*Pandektenrecht, Pandektenwissenschaft*) that prevailed in Turku during his tenure. Calonius also translated the *Sveriges Rikes Lag* into Finish. The Finnish translation was published in 1808.

In Finland, while having maintained its autonomy also in the field of law from Russia during the Russian reign from 1809 until 1917, the Grand Duchy of Finland was bound to the Russian Empire by a personal union –the Swedish General Code remained in effect, although in the practice of courts, the non-codified, consolidated Russian law based on the *Svod Zakonov* and the *Polnoje Sobranije Zakonov Rossijskoj Imperii* played some role.

The first textbook of Roman law, based on the system of the institutes of Justinian and intended for Finnish law students, was written by K. E. Ekelund (1791-1843), a professor of Roman and Russian law at the University of Helsinki from 1829. Ekelund was also commissioned to align the law of Finland, which was based on Swedish law, with the consolidated Russian law as set forth in the *Svod Zakonov Rossijskoj Imperii.* The highly renowned legal scholar drew heavily upon Roman law during this systematisation work. Additionally, the scholarly activity of J. Ph. Palmén (1811–1896), a professor of Roman law in Helsinki, is also noteworthy.

The outstanding work of R. A. von Wrede (1851-1938), who taught Roman law, private law and private procedural law at the University of Helsinki, is also remarkable. Moreover, he also played an important role in political life. His works on private law and procedural law demonstrate the influence of German legal doctrine.

S. Zitting, an educator of private law at the University of Helsinki until 1978, was an excellent representative of the Finnish analytical school. In his foundational work, *Omistajavaihdoksesta*, published in 1951, he analyses various aspects of property transfer, utilizing principles from Roman law and the German pandectist legal doctrine concerning real rights.

21. Attempts to Unify Private Law in Northern Europe

The attempts made at unifying private law were largely facilitated by the fact that the legal systems (orders) of Denmark, Norway and Iceland were also based largely on the same foundations in the field of legislation. The same also applies to Sweden and Finland.

From 1870 onward, the leading jurists of the Scandinavian countries attempted to unify private law across all Scandinavian countries. These efforts were crowned with success, so that between 1905 and 1907, the Sale of Goods Act was generally accepted, except for Finland (which did not have sovereignty at that time). The Act on the law of contracts was adopted during World War I. The Act on contracts and other patrimonial transactions was promulgated in Sweden in 1915, Denmark in 1917, and Norway in 1918. The same act was adopted in Finland after it became an independent country in 1926, and in Iceland in 1936. This act was first revised in 1929 and later in 1936. The final objective of this act was to pave the way for the creation of a unified Scandinavian civil (private) code. This effort was

[194] See R. A. Wrede, *Matthias Calonius* (Helsingfors, 1917)

rendered viable because, in the Northern countries, German private law-related doctrine had a predominant role in legal education and legal practice.

In 1962, a committee was established, entrusted with the preparation of the text of a new act regulating the law of sale in the countries in Northern Europe. During the preparatory work, the codifiers considered the 1980 Vienna Convention on the International Sale of Goods (CISG), which was still being prepared at that time. The Nordic Sales Act was promulgated with the same text in Norway, Finland and Sweden. However, it has still not been adopted in Denmark.

At the same time, the Northern European countries signed the Vienna Convention of International Sale of Goods, adopted on April 11, 1980. These countries made reservations in relation to the second part of the CISG regulating the creation of contracts. This Convention is not applied in the internal commerce of these countries, pursuant to Article 92 of the Convention. Having promulgated the Convention as part of its legal system, Norway followed a different path than other Northern European countries.

21. Bulgaria

For nearly four centuries of Ottoman occupation, the Orthodox Church enjoyed large-scale independence and used the *Hexabiblos* and the *Syntagma.* In 1867, a code titled *Medzellé* was introduced in the territory of present-day Bulgaria, with the intention of harmonising Islamic law with European law, especially with the French *Code civil*, without relying directly on Roman law. After Bulgaria gained its independence, a code of the law of obligations was issued in 1892, followed by another one pertaining to the law of things in 1904. They were primarily modelled after the 1865 Italian *Codice civile* and, to a lesser degree, also the Spanish *Código civil*. The traditions of Roman law they relied on are still present in the more recent similar codes of 1950 and 1951.

The influence of the German Pandectist School can also be seen in the jurisprudence of the Balkan states, as indicated by Bulgarian legal scholars (e.g., P. Danchov, J. Fadenhecht, and S. Angelov) studying Roman law and civil law at German universities.

22. Serbia

G. Zachariades was entrusted with the codification of Serbian private law as early as 1829, but his draft was never promulgated. It was eventually in 1844 that a Serbian civil code was created primarily by J. Hadžic (1799–1869) and V. Lazarević, who followed the system of the Institutes and modelled it after the ABGB. The revision of this code led to the draft code of 1914 that reflected the view of the Pandectist School and the impact of the BGB and the ZGB regarding its section on property law. The “Fundamentals” of the Yugoslav civil code, issued in 1935 and meant to be valid for the whole South Slav kingdom as well as the law of obligations, issued in 1978 for the Yugoslav federation, basically follow the traditions of codification in Western Europe rooted in Roman law.

23. Albania

V. Bogisić: Pravni obicaji u Crnoj Gori, Hercegovini i Albaniji (*Rechtsgewohnheiten* in Montenegro, Herzegowina und Albanien). Forschung durchgeführt in 1873. (Hrsg. und Kommentar von T. Nikčević) Titograd, 1984; L. Thallóczy: *Österreich-Ungam und die Balkanländer.* Wien, 1901; Dr. Freiherr von Dungen: *Die Entstehung des Staates Albanien.*

In: Jahrbuch des Völkerrechts Bd. II. München -Leipzig, 1914. S. 291ff; L. Thallóczy: *Illyrisch-albanische Forschungen I-II* München-Leipzig, 1916.; M Hasluck *The Unwritten Law in Albania.* Cambridge, 1954; Logoreci: *The Albanians*. London, 1977.; Castellan: *L' Albanie.* Paris, 1980.; P. Biscaretti di Ruffia: *Repubblica Popolare d'Albania* In: *L'Amministrazione locale in Europa V.*, Milano, 1985.; GF. Ajani: *Codification of Civil Law in Albania*. In: *The Revival of Private Law in Central Eastern Europe. Essays in Honor of FJM.* Feldbrugge. The Hague - Boston, 1996. S. 513-527.; J. Voka: *Das Bodenrecht in Albanien. OsteuropaR* 49 (2003) S. 274-280.; J. Voka: *Die GmbH im albanischen Recht*. WIRO 12 (2003) S. 109-115.

The sovereignty of Albania was recognised by major powers after it declared independence from the Ottoman Empire in 1912, during a conference held in London in July 1913. Following the First World War, political and economic connections between Albania and Italy became tighter. In April 1939, after the military annexation it suffered, Albania formed a personal union with Italy.

In the territory of today's Albania, laws in application were Canon law (which largely reflected the influence of Romano-Byzantine law) and Islamic law (modernised in the second part of the 19th century). Islamic law (*Sharija*) was applied primarily in the field of the law of contracts and obligations.

The drafters of the first Albanian civil code (Kodi Civil, promulgated in 1928) took the French *Code civil* and Italian *Codice civile* of 1865 as its models. In the area of the law of obligations, the drafters of the code also paid attention to the French-Italian Draft of obligations and contracts (*Projet Franco-Italien des Obligations et des Contrats - Projet Larnaude-Scialoja*) of 1927.

Following the Second World War, due to political changes, this code was repealed gradually. New acts governing various branches of law were promulgated. Family law became regulated by an act as early as 1948. The Act on the law of succession, which was accepted in 1954 and promulgated in 1955, also deserves mention here. This act addressed the General Part of civil law. It is important to note that the provisions regulating prescription (*praescriptio*) were published a year prior to the acceptance of the Act on property in 1955, as well as the Act on contracts and contractual relationships in 1956. This last act primarily regulated the relations between socialist economic organisations. The new Act on family law was passed in 1966, although a new family code replaced it in 1982.

The Albanian civil code of socialist type was passed in 1981. This civil code, which consists of only 354 paragraphs, contains the General Part (Allgemeiner Teil) as well – probably reflecting the influence of Soviet civil codes. Additionally, it is worth mentioning that the Civil Code knows the institution of legal transactions (*veprim juridik*, in German: *Rechtsgeschäft*). This General Part mirrors the influence of the German legal doctrine, i.e., the influence of pandectist legal science (*Pandektistik*).

During the recodification of civil law, a synthesis of German pandectist legal science (*Pandektistik*) and Italian civil law (and doctrine) was taken into consideration. The new civil code comprising 1,168 paragraphs was promulgated in 1994. In terms of structure, the new Albanian civil code consists of five books and includes a detailed General Part.

The first commercial code of Albania, promulgated in 1932, was largely the work of the distinguished Italian commercial lawyer Cesare Vivante (1855-1944). Cesare Vivante, as the head of the committee preparing the reform of the Italian commercial code of 1882, had previously elaborated the preliminary draft for revising the Italian Act of commercial law (*Progetto preliminare per la riforma del codice di commercio*). The Albanian commercial

code of 1932, repealed after the Second World War, gained exceptional recognition at the international level as well, as it influenced the Fourth book (*Libro Quattro*) –

24. Montenegro

In the General Code of the Law of Property (*Opšti imovinski zakonik za Knjaževinu Crnu Goru*) in Montenegro (1888), which codifies mostly archaic Slavic customary law (for instance, on collective property, called *zadruga*), there are several articles that date back to Roman law. Most of the maxims (*regulae iuris*) in the final part of the Code (called Explanations, Definitions, and Supplementary Provisions) are of Roman origin as well. In 1898, the Code underwent general revision. The author of this Code was Valtazar Bogišić (1834–1908), professor of Slavic legal history at the University of Odessa in Russia. Upon his return to Montenegro, he became minister of justice (1893–1899) in the Principality of Montenegro.

25. The Danubian Principalities (Romania)

The first part of the Criminal Code of Vasil Lupu, Prince of Moldavia in the 17th century, titled *Carte românescă de învăţatură dela pravilele împărăteşti* (1646), contains the *Syntagma* and the *Nomos geórgikos*. Similarly, the nomocanon of Matej Bazarab, Voivode of Wallachia (*Indreptarea legei*, 1652), reflects the influence of Byzantine Roman law. Besides penal regulations, it contains agrarian law and civil law as well. The comprehensive draft code of the 18th century (*Nomikon procheiron*) relies on the *Basilica*, the *Hexabiblos*, the *Syntagma*, and directly on Justinian's *Institutiones* and the *Codex Iustinianus.* Its compiler, M. Photeinopulos, 'the Wallachian Bartolus', did not take the development of Western European jurisprudence into consideration. The Civil Code of Moldavian Prince Kallimach of 1817, titled *Kódix politikos,* already shows the impact of both the *Basilica* and the Austrian General Civil Code (ABGB). At the same time, the code of the Wallachian Caragea, issued in 1818 under the title *Nomothesia* or *Cod Caragea,* is nothing more than the shortened version of the *Basilica* following the system of the *Hexabiblos.*

The code of Romanian private law of 1864 was influenced by the French *Code civil*, Pisanelli's draft of the 1865 Italian *Codice civile*, and the Belgian law on security and mortgage of 1851. It also relies on the *Cod Caragea* and, in the case of several of its legal institutions, directly on Roman law. The 1940 Draft of the new Romanian Civil Code reflects the impact of the German Pandectist School of Law and the BGB.

In Bessarabia, the territory which largely coincides with the territory of the Republic of Moldova, which came under Russian rule in 1812, the *Hexabiblos* remained valid law, meaning that Byzantine law continued to be applicable until the introduction of the Romanian Civil Code of 1865 in 1928.

26. Russia

In the late 18th century, several scholars (such as G.A. von Rosenkampff [1764–1832], M.M. Speranski [1772–1839], and Mihály Balugyánszky (Michael Balugianski) [1769–1847], professor at the Nagyvárad (now Oradea, Romania) Academy of Law) were entrusted with the consolidation, i.e., summarisation, of Russian law. However, their drafts did not satisfy the tsar. Nonetheless, not to remain without any results, the issue of all these preparations was the adaptation of the previous decrees in the new *Compilation of the Russian Empire* in 15

volumes (*Svod Zakonov Rossiiskoj Imperii*) in 1832. In its tenth part of the private law, it followed the French *Code Civil* and the doctrines of Pothier to regulate several legal institutions and as far as the real rights were summarised according to the ABGB and the German jurisprudence. Nevertheless, the impact of Byzantine law is limited to marital and family law. The effect of the French *Code Civil* can be clearly demonstrated in the 10th book of *Svod Zakonov*, more precisely in Article 1,5399 article of the interpretation of contracts, which is the summary of the articles of the *Code Civil* defining contracts. Some private law regulations can also be found in other parts of the *Svod Zakonov,* such as the dispositions about the legal capacity in the ninth volume, of the marriage between non-Orthodox Slavs in the eleventh, and a few restrictions of land ownership in the twelfth.

By 1832, a systematised revision of the previous law was prepared and issued in fifteen volumes under the title *Svod Zakonov* (Collection of Laws). Several legal institutions of its private law section (vol. 10) were based on the French *Code civil* and Pothier's ideas. Regarding the law of things, the influence of German jurisprudence could be felt. Byzantine law survived only in marital and family law.

The new publications of the revised and, in some parts, augmented *Svod Zakonov* – subsuming Russian law – were republished in 16 volumes in 1842 and again in 1857. Apart from the *Svod Zakonov*, another compilation comprising most of the laws (*ukazu*) of the Russian Empire in chronological order was edited too, titled *Polnoje Sobranije Zakonov Rosijskoy Imperii.* The first edition was published in 1830 – two years before the first edition of *Svod Zakonov* – the second in 1884, and the third in 1913, just before the breakout of World War I.

The Pandectist School made its impact felt in Russia from the 1820s when Russian law students began to study at German universities by Thibaut, Savigny, and Puchta. There was a Russian Seminar of Roman Law for a decade from 1887 at the Faculty of Law at the University of Berlin, led by H. Dernburg. Some of its students, such as D.D. Grimm and I.A. Pokrovski became professors of Roman law, while L. Petrazhitski became a professor of legal philosophy, and W. von Seeler taught private law in Russia. Some of them translated the German textbooks on Pandect law into Russian. The Russian representatives of *Pandectistic* considered Roman law as an introduction to private law. P. Sokolovski emphasised the importance of the modernisation of Russian law. The contribution of Russian Romanists to the literature on the subject is noteworthy. Let us briefly discuss Pokrovski's *History of Roman Law* (1913) and V. Hvostov's *Roman Private Law* (1906). Both followed the traditions of German jurisprudence. Jehring's trend of Jurisprudence of interests (*Interessenjurisprudenz*) was developed further by S. A. Muromtsev (1850–1910), the founder of Russian legal sociology.

In 1882, Tsar Alexander III (1881–1894) established a committee of codification that published drafts of the Russian Civil Code in 1899 and 1903 (*Grazhdanskoe Ulozhenie*). In most parts, these codes reflected the impact of the German BGB. The structure of the draft code (its general part and its parts referring to family law, the law of obligations, succession, and the law of things) is based on Pandect law. Its part dealing with obligations also contained much of the commercial law, similar to the Swiss code of obligations. Due to the political situation in the country, the unified code was not accepted. Only partial codification could be considered. The draft for the law of obligations of 1913 relied on both the BGB and the Swiss code of obligations. It also addressed legal concepts that date back to Roman law, such as unjust enrichment and management, which had not been previously recognised in Russia.

Commercial laws were included in the second part of the Volume 11. A casuistical nature characterises its 2,598 articles named *Uslav Torgovuj,* meaning commercial procedure.

Dispositions in that procedure were later subject to a separate legal regulation concerning commercial procedures and the law of exchange. Arising from this, the aforementioned procedure contained only 819 articles. The sources of the commercial part of the *Svod Zakonov* were, on the one hand, archaic Russian law and, on the other hand, the *code de commerce*. Nevertheless, the *Ustav Torgovüj* was already outdated and defected at the time of its codification, requiring the Senate of the Russian Empire to supplement this imperfect system through its judicial practice. This procedure, in its first article, grants judges the authority to apply customary law *ex officio* whenever it is deemed necessary.

27. The Soviet Union

The Soviet-Russian Civil Code (*Grasdansky Kodeks*), adopted, then later compiled by a committee under the direction of Grigiryevits Gojbarg (1883-1962) in 1922, is a significantly dense version, consisting of 435 paragraphs, of the bill *Grensdanskoye Ulosegniye* and reflects certain pandectistic influences. It was the inauguration of the NEP (*Novaya Ekonomitcheskaya Politika*), which replaced military communism and respected the requirements of a market economy, that necessitated a new codification. The compilers had to work within an extremely short period of time – only a few weeks – to draft the bill.

In accordance with the Socialist concept of law, family, land, and labour laws were all proclaimed as separate branches of law and were regulated accordingly. In November 1918, labour law was systemised in a separate code. On October 30, 1922, new labour and land laws were adopted, followed by the readaptation of marital, family, and guardianship laws from 1918 into a unified code in 1926. The impact of the German Pandectist School is evidenced by the legal acts of civil law, particularly in the General Part of the Civil Code. Apart from the Civil Code itself, additional civil law codifications reflect the conceptual system of German Pandectist science. After the NEP era, the publication of a unified system of all laws adopted in Soviet Russia and the Soviet Union was proposed as a project. Historically, this project, planned for realisation between 1927 and 1930, bore some resemblance to the ideal of the *Svod Zakonov* compiled by Speransky and Baludjansky. Notably, this compilation was given the same name *Svod Zakonov.*

Russian codes were adopted at a federal level in December 1961 and were compiled according to the Principles of Civil Legislation, much like the Civil Code of 1922. These are all shorter than the ones in the West. The Soviet-Russian Civil Code, adopted in 1964, is based on the pandectistic system, evident not only in its structure but also in many of its institutions and legal theses. Regarding these pandectistic features, it suffices to mention the fourteenth paragraph of the Principles of Civil Legislation concerning legal acts. An entire chapter (41-61 §§ of the Civil Code of 1964 is dedicated to legal acts.

The Civil Code of 1922, which appears to have traits of Swiss influence, does not follow the traditional system in the case of the transmission of property. In contrast, the Principles of Civil Legislation return to the Roman law traditions by requiring the transmission of property, in addition to the mere contract, as a precondition for the acquisition of property.

The Civil Code of the Union of Soviet Socialist Republics, adopted in 1964 with 569 articles, follows the Roman concept of Ulpian in regulating property. This approach, in line with the new trends of codification, takes inspiration from the Article 544 of the French *Code Civil*. Regarding the transmission of property by contract, it disregards the abstraction concept (*Abstraktionsprinzip*) of the German BGB. This code, while differing in some aspects from the German BGB, does not contain detailed regulations on a wide range of institutions, such as hypothecary law, which is summarised in only 11 paragraphs (192-202 §§), in contrast to

the much more detailed provisions of the German BGB. Inheritance law similarly reflects this simplifying trend. This is further reinforced by the complete absence of regulations on *collatio*, and the *substitutio fideicommissaria* is entirely unknown to the code.

The Civil Code of 1964 contains 8 parts in the following order: the General Part, property law (as well as the real rights, i.e, *iura in re aliena*), the law of obligations, and a general part of obligations and specific contracts, obligations, copyright, patents, the law of inheritance, private international law, and the law of conflicts.

In certain republics of the Soviet Union, marital and family laws were promulgated in accordance with the Principles of Marital and Family Legislation, which was federally adopted in 1968. The Union of Soviet Socialist Republics adopted marital and family laws based on these principles. In 1968, the Principles (Fundamentals) of Land Law Legislation were accepted, leading to the codification of land law in most of the Soviet republics in the following years. The Principles of Labour Law Legislation were adopted in December 1970. The codification of labour law occurred in the Russian Federation a year later. The structure, institutions and conceptual system of the German pandectistic sciences influenced not only the Principles but also many of the codes of the Soviet Republics.

The publication of the *Svod Zakonov* had already included the Principles of various branches of law. Consequently, all codes and laws were adopted in the Soviet Republics. This centrally organised codification aimed primarily at the consolidation of the law.

Soviet law does not recognise a separate commercial law. In line with the concept of the *dvhuhsektonoye pravo*, legal relations between socialist economic organisations are regulated not only by the Civil Code but also by several separate legal rules. It was only in 1922 that a separate code was adopted specifically for sea commerce.

Russia after 1991

On 31 May 1991, the Supreme Soviet of the Russian Federation adopted a new *Principles of Civil Legislation* comprising 170 paragraphs, replacing the previous version, which had come into effect thirty years earlier in 1961. The new Principles were to come into effect in 1992, but this was prevented by the dissolution of the USSR in 1991.

Nevertheless, the Highest Russian Councilor (the Federal legislation) ordered the application of the Principles within the Russian Federation. Like the 1961 predecessor, the Principles are normative regulations with immediate effect. These Principles invalidated the regulations of the Civil Code concerning the market economy, which relates to the *razgosudarsvtleniye*.

Preparation of the Civil Code for the Russian Federation began in November 1991. The ones in charge of the bills were the research centre for private law in Moscow, the director of the committee for preparation and his collaborators.

The new Russian Civil Code, gradually enforced just like the process of the civil codification in Holland, bears marks of the German BGB as well as the new Dutch Civil Code. Due to German influence, the Russian Civil Code came with a General Part.

During the codification process, the compilers adhered to the European contractual principles developed by the Lando Committee as they pertained to commercial contracts, which UNIDROIT subsequently adopted. Furthermore, the compilers considered and respected both the Vienna Convention on the International Sale of Goods and the Model Civil Code – the

UCC, adopted by the inter-parliamentary session of the CIS (Commonwealth of Independent States).

In 1994, the inter-parliamentary session of the CIS initiated the preparation of a Model Civil Code applicable to all CIS member states. The Private Law Research Center of Moscow assumed responsibility for coordinating these efforts throughout the codification process. The first part of this model code (*Gragsdansky kodeks. Tchasty pervaya. Model recomendatelgny zakonodatelgny akt Sodrugestva Gnezavisimy Gosudarstv*) was adopted by the inter-parliamentary session of the CIS on October 29, 1994. The remaining sections were adopted incrementally throughout 1994 and 1995. While this Model Civil Code cannot be considered a direct translation of its Russian counterpart, it incorporated many of its fundamental principles. Legal experts from various CIS member states participated equally in the codification work.

The compilers drew significantly from the *Louisiana Civil Code*, particularly regarding property law regulations. Subsequently, they incorporated the *Louisiana Civil Law Trust* into the forms of property. Unlike its common law counterpart, this trust variant does not distinguish between *legal* and *equitable title*. This specialised form of property, rooted in the Roman tradition of fiduciary acts, is termed *doverintelnaya sobsvenosty*. The technical term *doveriye* corresponds to the Latin *fiducia*. Ultimately, this property form was not incorporated into the Russian Civil Code and is exclusively applied in banking transactions.

Following its adoption by the State Duma (*Gosudarstvennaja Duma*) in 1994, the first part of the Russian Civil Code (§§ 1-453) came into force on January 1, 1995. Notably, Chapter 4 of the first part, concerning juridical persons, had already taken effect before the general enforcement. The second part was adopted in January 1996 and implemented on May 1 of that year. The third part, addressing inheritance and private international law, was not enforced until 2002, five years after the second part. This adoption effectively invalidated both the Civil Code of the Russian Federation of 1996 and the Principles of Soviet Union Civil Legislation from 1991. Significantly, the will of the testator now receives full recognition and protection under the law.

The first part comprises 29 chapters: the General Part (§§ 1-208) based on the BGB, property law (§§ 209-306), general provisions of obligations (§§ 307-419), and general regulations concerning contracts (§§ 420-453).

The second and third parts encompass specific contract types, inheritance law, and provisions regarding the application of foreign law, including conflict of laws principles.

The Russian Civil Code establishes distinct regulations regarding forms of property. The *iura in re aliena* – comprising usufruct, easements, and copyhold – are recognised as property types alongside traditional private property concepts.

Chapter 17 (§§ 260-287) of the first part, containing fundamental regulations on land ownership, was promulgated in April 2001. Political considerations delayed its promulgation, specifically two pieces of legislation: the Land Reform Bill of 1990 and the Land Law of 1991, which substantially restricted private property rights. Article 36 of the 1993 Constitution permitted private land ownership for all citizens and their associations. However, without implementing legislation, this constitutional provision lacked practical effect. The

2001 Land Law of the Russian Federation, harmonising with Chapter 17 of the Civil Code, provides detailed regulations concerning land ownership.

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The Russian Civil Code, partially following the monist concept (*concept moniste*) – in contrast to the new Dutch *Burgerlijk Wetboek* – does not comprehensively regulate corporate law. Although Russia has not adopted a separate commercial code, regulated by specific legislationspecific legislation that regulates business entities.

The first adoption of legislation regulating business entities in accordance with market economy principles and *razgosudarvstleniye* occurred on December 25, 1990. This legislation has undergone multiple amendments. Notably, the Civil Code of the Russian Federation, like the Dutch Civil Code, regulates commercial contracts alongside general obligations in its first part. The Russian federal law on joint-stock companies was adopted in 1995, while legislation governing limited liability companies was not adopted until 1998.

28. Ukraine

In Ukraine and Belarus – both achieving independence in 1991 following the Soviet Union's dissolution – law derived from various sources, including the Third Lithuanian Statute of 1588, the Magdeburg municipal law (*Magdeburger Stadtrecht*), and the Agrarian Law Statute of 1577. These laws, promulgated during Sigismund August's reign, remained in force until 1840. That year, the Russian *Svod Zakonov* was promulgated throughout most of Ukraine and Belarus. In these territories, unlike the first (1529) and second (1566) Lithuanian Statutes, the Third Lithuanian Statute – rooted in Roman law – was available in Polish translation when promulgated in 1614. A Latin edition was published in 1632. The Magdeburg municipal law, functioning as a foundational law (*Mutterrecht*) for Central and Eastern European municipal law, influenced numerous Ukrainian and Belarusian municipal codes, facilitating the spread of German law throughout Eastern Europe. Despite containing limited Roman law elements due to its feudal nature, the Agrarian Law Statute of Sigismund August contributed to legal unification in Ukraine and Belarus.

Following the uprising led by Hetman Bogdan Khmelnitsky between 1648 and 1654, a significant portion of Ukraine gained independence from Poland. In 1667, pursuant to the armistice following the Polish-Russian war, Ukraine ceded its territories east of the Dnieper, including Kyiv, to Russia. Ukrainian territories incorporated into Russia received substantial autonomy under the Articles of March, proposed by Khmelnytskyi in 1654 and accepted by the Russian tsar as a grant on March 27 of that year.

Preparatory work to systematise legal sources for the Ukrainian territories commenced during the autonomy period in 1720. Under Hetman Skoropatsky's direction, Ukrainian translation began in May 1721 of the Third Lithuanian Statute, the Saxon Mirror (*Speculum Saxonum*, *Sachsenspiegel*), and the works of prominent Kraków jurist Bartolomeus Groitsky, closely

associated with the concept of *ius municipale Polonicum*. Four appointed translators began the work, though its completion remains uncertain. The underlying objective was to consolidate these sources into a unified code within seven years.

The legal compilation efforts concerning Ukrainian territories were advanced by a *ukase* of Peter the Great, who specifically identified systemic weaknesses in legal implementation, particularly the lack of harmony among enforced laws. To address this untenable situation, the tsar deemed it necessary to unify various sources into a single code for adoption by the Russian Empire's Senate. Codification work commenced that same year under a committee headed by Chief Justice Ivan Borosna. By 1734, the twelve-member committee included five Orthodox Church representatives and a deputy from the Kyiv municipal council.

The committee established in 1738 continued the significant preparatory work of its 1734 predecessor. In 1743, the committees completed their work, which the Governor of Ukraine submitted to the Senate on June 27, 1744, titled "Rights According to Which Jurisdiction Is Practiced in Ukraine." The Senate was tasked with submitting the proposed code, which contained private law, criminal law, and procedural law regulations, for imperial approval in 531 paragraphs across 30 chapters. The Senate inexplicably delayed submission for twelve years, possibly viewing the proposal as a political autonomy movement incompatible with contemporary circumstances.

By Senate decree adopted on May 20, 1756, the proposal was returned to the committee through Hetman Rozumovsky for revision and updating. Interpreting the Senate's prolonged silence, the Cossack chancellery and Supreme Court prepared an alternative proposal, i.e., "Collection of Ukrainian Rights “, which demonstrated greater alignment with Russian legislation.

Nevertheless, neither the 1743 proposal nor its alternative was adopted, as both conflicted with Russian absolutism. The death of Elizabeth I in 1761 marked the end of both Ukrainian autonomy and separate Ukrainian codification efforts.

Following Ukraine's independence in 1991, private law reforms commenced. The following year, the Ukrainian Parliament commissioned the Kyiv Legislative Research Centre to prepare proposals for comprehensive legal system reform.

Although several discrete statutes governing important private law institutions have been enforced, no comprehensive private law code has been adopted.

In civil law legislation, the collapse of the Soviet Union preserved the application of the "Principles of Civil Legislation," adopted in Moscow in May 1991, which currently operates alongside the Ukrainian Civil Code formally enforced in 1963. Property law, a fundamental private law institution, is governed by a 1991 statute. Land ownership was also regulated by a code from 1991, which underwent multiple amendments throughout the following year. Pledge regulations are consolidated in a statute adopted in 1992.

Notable among private law statutes are the 1992 legislation concerning monopolies and unfair competition, bankruptcy law, and a comprehensive 1996 statute addressing unfair competition.

Structurally, the Ukrainian Civil Code proposals reflect pandectist influences. Three proposals are well-documented: the first published in 1993, the second in 1995, and the third in 1996. The second proposal incorporates various influences, including the CIS Model Civil Code, and the Russian Federation Civil Code (both adopted and pending sections), while the third proposal shows particular influence in its treatment of juridical persons, especially partnerships.

Pandectist traditions are evident in the proposals' inclusion of a General Part. Roman law influences are numerous throughout the Special Part of the third proposal, notably in its treatment of pledge law, which employs the concepts of *hypotheca* and *pignus*. The 1996 private law proposal addresses family law in its sixth book and encompasses inheritance and private international law.

The third Ukrainian Private Code proposal, adopted in May 1996, contains eight parts: General Part, natural persons (excluding possession rights), copyright law, law of obligations, family law, succession rights, and private international law. Despite addressing common subjects, the Ukrainian proposal and the Russian Civil Code reveal numerous structural differences. For instance, the Ukrainian proposal addresses real rights in a separate book, clearly distinguishing among property, possession, and other real rights, while addressing pledge law in a separate subchapter of the preceding book.

Ukraine's first land law was adopted in 1991. The new law, adopted in 2001 and effective January 1, 2002, maintains land as national property subject to special state protection while permitting Ukrainian citizens to hold private land ownership.

The new family law, adopted on January 10, 2002, supersedes its 1969 predecessor and took effect on January 1, 2003.

The first law governing business entities aligned with market economy principles was adopted shortly after independence in September 1991. This legislation underwent multiple amendments, including after the Constitution's adoption, which established the new economic system. Although a separate team of experts developed proposals for new commercial law, these proposals, like the Civil Code proposal, were never enacted. The reason is that, as in other countries, the raison d'être of a separate commercial law legislation is not evident.

29. MOLDAVIA (BESSARABIA)

From 1367, Bessarabia – the territory between the Dniester and Prut Rivers – belonged to Moldavia. Under the Treaty of Constantinople, Bessarabia first became part of Russia and was subsequently annexed to the Ottoman Empire through the Peace Treaty of Kutschuk-Kainarge.

Between 1806 and 1812, the Russian Empire annexed Bessarabia. Under Russian authority, this territory retained its autonomy with respect to private law, as confirmed by the Treaty of Bucharest in 1812. Since the *Svod Zakonov* was not enforced in this area, the *Hexabiblos* remained in effect.

In the region of Bessarabia – which became part of Romania after World War I – Byzantine-Roman law remained influential until 1928. This was the year when the Romanian Civil Code was fully implemented, as in 1918, the Romanian Civil Code had been enforced only partially. Following the change in sovereignty, the Romanian Commercial Code of 1887 was extended to encompass the entire territory of Bessarabia.

In addition to the *Hexabiblos*, the *Sobornicescul Hrisov* of 1785, a decree issued by mutual agreement between the Phanariote Prince Alexandru Mavrokordat and the regal council, was also in force. In judicial practice, the works of Andronache Donici were also considered authoritative. The private law provisions of the *Svod Zakonov* were applied only within narrow parameters, specifically when the two previously mentioned sources either did not adequately regulate or failed to address the cases at hand. Consequently, rules widely applied throughout the Russian Empire functioned only as supplementary law in Bessarabian regions.

It is noteworthy that P. Manega, who earned his doctoral degree at the University of Paris, developed a Civil Code proposal for Bessarabia in 1825 (*Projet de Code civil pour la Bessarabie*). This code, based on the French *Code Civil*, was never enacted. In their introductory study to the code proposal, P. Manega and Baron Brunov emphasised the significance of Roman law in the development of Bessarabian private law.

In June 1940, following the Soviet annexation of Bessarabia, the legal system of the Ukrainian Soviet Socialist Republic was introduced in the Moldavian Soviet Socialist Republic, including family law in December. This Soviet-type Ukrainian structured system was repealed in the summer of 1941 after Moldavia was annexed to Romania.

After 1945, when Moldavia was annexed to the Soviet Union, a Soviet-style legal system was established. The drafters of the Moldavian Civil Code followed the 1961 Principles of Civil Legislation in their 1963 codification.

In the Republic of Moldova – which regained independence in 1991 – a comprehensive civil law codification aligned with market economy principles began. These preparations resulted in, among other legislation, a separate law on pledges in 1996. This law, supplemented by legislation adopted in July 2001, regulates the institution of pledges according to pandectistic traditions.

The new Civil Code, comprising 1,624 articles, was promulgated in Moldova on June 6, 2002. This five-part Moldavian Civil Code follows in many aspects the Model Civil Code created within the Commonwealth of Independent States (CIS) between 1994 and 1995. The structure of the Moldavian Civil Code is as follows: General Provisions (§§1-283), Real Rights (§§284-511), Obligations (§§512-1431), Inheritance Law (§§1432-1575), and Private International Law (§§1576-1624).

Following the monist concept, the General Provisions contain the basic provisions for companies and cooperative societies. The regulation of legal acts (§§191-241) is particularly detailed. In the Real Rights section, which also regulates pledges, the pandectistic influence is evident. In the inheritance section, the notion of *bona vacantia* (unclaimed goods), directly derived from Roman law (*Succesiunea vacantă*, Article 1515), is noteworthy.

Family law was adopted in a separate code on April 19, 2001.

Regarding commercial law, legislation from 1997 governing incorporated companies was revised and supplemented in June 2001.

It is worth noting that the Ukrainian and Russian-speaking territories on both banks of the Dniester River proclaimed the Moldavian Republic of the Dniester region. Despite lacking international recognition, this entity considers itself independent, a concept supported by its practice of concluding international treaties, such as with the South-Ossetian Republic. However, in that territory – considered autonomous by Chișinău – laws of the Republic of Moldova are not in force.

In August 1995, the Supreme Soviet of Tiraspol adopted legislation regarding incorporated companies. In the same year, a law addressing foreign investments was adopted, followed by arbitration legislation in 1997. Traditional aspects of civil law continue to be regulated by laws promulgated before 1991.

30. Belarus

Belarus's present territory, or most of it, belonged to the Polish-Lithuanian State until 1795. Consequently, the Lithuanian Statutes were in force in these territories. The Third Lithuanian Statute (1588) – containing numerous Roman law elements – remained in effect until the enforcement of the *Svod Zakonov* in 1835.

The Civil Code of the Belarusian Soviet Socialist Republic was adopted on June 11, 1964, concurrent with the Civil Code of the Russian Soviet Socialist Republic. The first law revising the Civil Code was adopted on March 3, 1994, followed by further revisions the subsequent year.

The initial version of the Civil Code proposal was adopted by the Belarusian legislature in March 1993.

In Belarus, the new Civil Code, replacing the previous one adopted in 1964 and revised in 1994, was adopted on December 7, 1998, and entered into force on July 1, 1999. In its structure, the new Civil Code follows the pandectistic tradition by incorporating a General Part. The Belarusian Civil Code comprises eight parts: General Part, Real Rights, General Part of Obligations, Special Part of Obligations, Copyrights, Inheritance Law, International Private Law, and Final Clauses. Regarding its structure, similarities with the 1964 Belarusian Civil Code are numerous. Despite having different structures, the Belarusian legislators consistently follow the concept of the Russian Civil Code. Differences are significant concerning foreign investments. It is also important to note that while the Russian Civil Code was implemented incrementally, the Belarusian Code was enacted in its entirety upon promulgation.

Western European scholars, primarily German, Dutch, and Italian, played a prominent role in developing the new Civil Code. The drafters also considered the Model Civil Code of the Baltic States, adopted between 1994 and 1995.

The new Principles of Civil Legislation adopted in Moscow serve as guiding principles for institutions not regulated in the Belarusian Civil Code. Moreover, it is important to note that

private law reform commenced prior to the declaration of independence. Examples include a 1990 law concerning the property and another regarding the real estate of private persons. In addition to land ownership, the Belarusian Constitution of November 1996 declares state ownership of agricultural lands. Family and marital laws have continued to be regulated by legislation since 1996.

Departing from the monist concept, Belarusian commercial law has separate regulations. Commercial law legislation began adapting to market economy demands in the early 1990s. This is evidenced by the 1991 law on insolvency, subsequent legislation on bankruptcy proceedings, and 1992 laws addressing monopolies, unfair competition, incorporated companies, and limited and unlimited liability companies.

31. The Baltic States until 1918

In 1710, Livonia and Estonia submitted themselves by capitulation to the Russian Empire. The Treaty of Nystad in 1721, which ended the Northern War, confirmed the capitulation of municipalities and orders. Similarly, the Russian annexation of Courland occurred in 1795.

In Baltic territories – belonging to the Russian Empire in the 19th century and regaining independence after World War I – the German-language Private Law of Livonia, Estonia, and Courland (*Liv-, Est- und Curländisches Privatrecht*), which was also officially published in Russian, remained in force, despite numerous modifications, in Latvia until January 1, 1938, and in Estonia until 1945. These codes underwent several revisions before World War I, first in 1890, again in 1912, and the following two years.

Certain regions of the Russian Empire remained exempt from the force of the *Svod Zakonov*, namely Poland, Finland, Bessarabia, and the Baltic States. This voluminous code of 4,636 articles, modified several times under Russian rule, was published in 1864 as the third volume of the *Provinzialrecht der Ostseegouvernements*.

In 1857, Friedrich Georg von Bunge, a pandectist and professor at the University of Dorpat between 1831 and 1842, was charged with preparing the new code. This code contains family law, real rights, inheritance law, and obligations in separate parts, although it differs from the pandectistic structure in lacking a General Part. Real rights reflect feudal traditions, as evidenced by its recognition of divided landed property even after land reform.

This code is somewhat more current than the tenth volume of the *Svod Zakonov* regulating private law relations, which remained in force in Latvian territories. The work of legal history by Bunge, "*Einleitung in die liv-, esth- and curländische Rechtsgeschichte und Geschichte der Rechtsquellen*" (Reval, 1849), can be considered preparation for that code.

The continental reception of Roman law was effectuated in Latvia and Estonia through the mediation of primarily Saxon settlers using German municipal laws. The four-volume work of Karl Endmann (professor at the University of Dorpat and immediate predecessor of Rummel), *System des Privatrechts der Ostseeprovinzen Liv-, Est- und Kurland*, exerted considerable

influence on practising jurists. It is worth noting that Endmann's work was the only scholarly treatment of the *Liv-, Est- und Curländisches Privatrecht*.

A. Estonia

Estonia gained independence from Russia in 1918. During the interwar period, the *Liv-, Est- und Curländisches Privatrecht* remained in force. Despite the publication of a proposal for an Estonian Civil Code with significant pandectistic influences (1936), codification work did not commence. Shortly after declaring independence in 1923, the Ministry of Justice initiated the formation of a committee for preparatory work on a private code, presided over by Jüri Uluots, professor of private law at the University of Tartu, and Jüri Jaakson, lawyer and politician. The following sources were considered: the Code of Bunge, the Russian Civil Code proposal, the German Civil Code (BGB), the Swiss Civil Code (ZGB) and Code of Obligations (OR), the French Civil Code, the Hungarian Civil Code proposal from the early 19th century, the 1928 Draft Civil Code, and finally the Polish Proposals. The first proposals appeared in 1935 and 1936. The Government presented the Draft Civil Code to Parliament in 1939. The Estonian Parliament established a committee to review the proposal, which – comprising 2,135 articles – was confirmed in 1940. Despite these preparations, the code was not enacted due to Estonia's annexation by the Soviet Union.

Until June 16, 1940, the *Liv-, Est- und Curländisches Privatrecht* – prepared by Bunge under the order of Tsar Alexander II – remained in force in the independent Estonian State. Following annexation, pursuant to an ordinance of the Supreme Soviet of the Soviet Union, the Soviet-Russian Civil Code was implemented along with other codes, including family law.

Although the *Liv-, Est- und Curländisches Privatrecht* was not reinstated after Estonia regained sovereignty in 1991, it remains an important source – in the absence of a new Civil Code – particularly in the reprivatisation of property.

After regaining independence, Estonian private law codification work began. The possibility of adopting the 1940 proposal – as occurred in Latvia – was considered. The Ministry of Justice supported the adoption of a revised version of the original proposal. Moreover, a committee established by the Ministry completed the necessary revision work. However, despite the revision concept, the committee ultimately changed the original plans by adopting the idea of new codification.

In accordance with the provisions of the 1992 Constitution, civil law codification began through partial codification. The General Part – based on pandectistic traditions – was adopted in 1994. The General Part, dealing extensively with representation, was revised regarding artificial persons in 1995.

The law concerning real rights – comprising 365 paragraphs – was enacted a year earlier, in 1993. Family law was promulgated in 1994, while inheritance law was adopted in 1996. Certain aspects of the general provisions of obligations are addressed in the General Part. In November 1998, the Government discussed the proposal for obligations consisting of 1,200 articles, which contains both the General Part of obligations and specific contracts. This law was adopted in 1999 and entered into force on January 1, 2000.

Civil law codification continued after the adoption of the obligations part. The sixth part of the Estonian Civil Code, regulating international private law, remains under preparation. Until the enactment of the aforementioned law, international private law is regulated by the fifth part of a law concerning the General Part of the Civil Code in 180 articles, promulgated in 1994.

It should be noted that the Soviet Principles of Civil Law Legislation (from 1991) are no longer in force in Estonia.

During the codification work through the adoption of partial proposals, the German Civil Code, the Swiss Civil Code and code of obligations, the new Dutch Civil Code, the new Civil Code of Quebec, and the French and Danish civil law legislation were all considered. Additionally, the committee for private law codification drew from the Louisiana Civil Code and its modifications.

The Commercial Code (*Äriseadustik*), which entered into force on September 1, 1995, contains 541 articles. This code addresses general regulations alongside respective commercial societies. Both the Civil Code and the Commercial Code comply with European Community legislation. The monist concept was not adopted in Estonia. The most recent modification of the Estonian Civil Code occurred in May and June 2000.

The Labor Code was adopted in 1992.

The University of Dorpat, founded in 1632 by Swedish authorities, remained an important centre of jurisprudence by European standards even after the Russian conquest. German was the language of instruction from the resumption of teaching in 1802 until the end of the 19th century. However, the Russian language was gradually introduced into the higher education system. In 1889, the University of Dorpat – renamed Jurjev in 1893 – lost its independence like other Russian universities.

Ernst Ein (1898-1976), a professor at the University of Dorpat and a student of Pietro Bonfante, a Roman law professor at the University of Rome, was an excellent Romanist. Ein was the first professor to teach Roman law after World War I at the University of Tartu (Dorpat) in the Estonian language. He also served briefly as minister of justice in 1933. His main work, published in Italian, is *Le azioni dei condomini*.

Between the World Wars, Elmar Ilust (1898-1981), a professor at the University of Tartu, was an important civilian jurist. He authored the first civil law manual in the Estonian language, published in Tartu in 1939. This manual was the last to follow the *Liv-, Est- und Curländisches Privatrecht* in discussing private law.

B. Latvia

Between the two World Wars, the Latvian Civil Code was promulgated in 1937 under the government of Kārlis Ulmanis and came into force on January 10, 1938. With its 2,400 paragraphs in four books, this code lacks a General Part. Its structure is as follows: introductory provisions (§§ 1-25), family law (§§ 26-381), inheritance law (§§ 382-840), real rights (§§ 841-1400), and obligations (§§ 1401-2400). The pandectistic sciences narrowly influenced this code, affecting just a few institutions. This can be explained by the fact that the codifiers regulated relations according to Latvia's social and economic conditions at that

time. The divided property—representing the survival of feudal traditions—was abolished after the Civil Code came into force by a law of 1938.

In 1940, following the annexation by the Soviet Union, the Russian Civil Code was enforced, accompanied by other laws, such as the family law code – pursuant to the decree of the Presidium of the Supreme Soviet of the Soviet Union.

The Principles of Civil Legislation (Osnovy Grazhdanskogo Zakonodatelstva) of 1961 were also implemented in Latvia. Considering these sources, the Latvian Civil Code was enacted in 1964. Certain legal institutions, such as *negotiorum gestio* (agency of necessity) – unknown to other Soviet states – were regulated according to the Roman law model. This code was reinstated when Latvia regained independence in 1991.

The renowned Latvian professor of Roman law was Vasily Sinaisky (1876-1949), who served as a professor at the University of Riga between 1918 and 1944. Sinaisky's works – teaching in Dorpat before 1918 and in Kyiv afterward – primarily addressed Rome's origins, Roman historiography, and the Law of the Twelve Tables.

During the interwar period, no comprehensive commercial code was adopted. However, the law regarding incorporated companies was significant in the commercial field, which was adopted in December 1937 and entered into force with the new Civil Code. This law superseded the first part of the tenth book of the Svod Zakonov and the provisions of Russian law that had been in force since 1836.

Commercial law remains uncodified in Latvia. Incorporated companies are regulated by separate legislation.

C. Lithuania

In Lithuania, which after the first (1772) and second (1793) partitions of the Polish-Lithuanian state became part of Russia, private relations were governed by the *Svod Zakonov*, implemented in 1835. While Estonia and Latvia maintained their autonomy against the Russian legal system, Lithuania yielded to its influences. Between the World Wars, the law in force was one that had been implemented before World War I.

In 1940, following annexation to the Soviet Union, the Russian Civil Code was implemented, along with other laws such as the family law code, pursuant to a decree of the Presidium of the Supreme Soviet of the Soviet Union.

The Principles of Civil Legislation (*Osnovy Grazhdanskogo Zakonodatelstva*) of 1961 were also implemented in Lithuania. Taking these sources into account, the Lithuanian Civil Code was enacted in 1964. This code underwent comprehensive revision to address market economy demands after independence was established in 1991. Certain institutions had their own codes, such as mortgages, regulated by 1992 legislation. Although this law regulated only immovable property, it also referenced chattels under mortgage. Mortgages on chattels are regulated by separate legislation from 1997. This latter mortgage represents a return – at least formally – to Roman law principles.

After establishing independence, preparation began for a new Civil Code harmonising with market economy demands. The first draft of the new Civil Code was prepared in 1994. Its revised version was published two years later, in 1996.

On July 18, 2000, the Lithuanian parliament adopted the final text of the Civil Code, to which preparation Professor V. Mikelenas of the University of Vilnius significantly contributed. This Civil Code entered into force the following year, on July 1, 2001.

This code bears the imprint of Roman law in numerous institutions, including property, possession, usufruct, sale, loan, and the aforementioned *hypotheca*. The code, developed under the monist concept, draws upon the Italian Civil Code (1942), the new Civil Code of Quebec, the new Dutch Civil Code, as well as the French *Code Civil* and German BGB.

Roman law influences in the codification can be explained by historical factors, particularly the Third Lithuanian Statute (1588) – which remained in force for an extended period until the implementation of the Private Law of Livonia, Estonia, and Courland (*Liv-, Est- und Curländisches Privatrecht*).

The 1969 marriage and family law were superseded by new legislation in 1993. Upon implementation of the Civil Code, all these laws were repealed, and marriage and family law are currently regulated in the third book of the Civil Code.

Roman law education holds a distinguished position at the University of Kaunas. For several years, Roman law was taught in conjunction with comparative law by Elemér Balogh. The Historical School of Law occupied a significant place in the curriculum. In this context, A. Tamosaitis's 1929 work provided a detailed explanation of the Historical School of Law's contributions.

Commercial law is regulated by 1995 legislation. Additional legislation regarding incorporated companies was adopted the previous year, in 1994.

33. Georgia

A compilation in Georgian language, also considered a code, containing Georgian laws and customary law is attributed to the Georgian ruler, Vakhtang VI (1707-1737). This code incorporated the Syrian-Roman code translated into Georgian from Armenian. This six-part code demonstrates the profound influence of Byzantine Roman law.

The *Syntagma* of Matthaeus Blastares and the *Hexabiblos* of Konstantinos Harmenopoulos served as foundations for both the compilation's structure and many of its institutions. This compilation incorporates the laws of two Byzantine emperors, Leo VI (the Wise) and Constantine. Furthermore, it contains the laws of George V (d. 1346) – a Georgian ruler – which summarised the customary law of Georgian highlanders. This compilation includes criminal law regulations from the 14th and15^{th} centuries and provisions regarding the Georgian autocephalous church. The 267 articles of Vakhtang VI's laws are predominantly criminal in nature. This compilation, intended for comprehensive legal system reform, remained in force until 1870, when it was superseded by the *Svod Zakonov*.

The end of Georgian statehood was marked by the 1783 convention between Erekle II, ruler of Eastern Georgia, and Catherine II, whereby Eastern Georgia was placed under Russian Empire protection. Russia's annexation of Eastern territories occurred during the final period of Tsar Paul I's reign in the early 19th century (1800-1801). On September 12, 1801, Tsar Alexander I (1801-1825) declared in his manifesto that Russia "assumes the administration of the Georgian tsardom" and extended its imperium over Eastern Georgia. The territories remaining under Ottoman rule were gradually brought under Russian protection between 1803 and 1811. However, this protectorate did not preclude substantial autonomy for these regions for decades. International recognition of Russian authority over the Western regions resulted from the treaty signed in Bucharest on May 16 (28), 1812.

Independent in 1918, Georgia was reannexed to the Soviet Union in 1922. It regained autonomy in 1991. After the restoration of independence, preparation began for the Georgian Civil Code. The draft, adopted by parliament in June 1997, was implemented in November of the same year.

This code consists of six books. The first addresses the General Part (§§1-146), the second pertains to property (§§147-315), the third focuses on obligations (§§316-1016), the fourth encompasses intellectual property (§§1017-1105), the fifth addresses family law (§§1106-1305), and the sixth pertains to inheritance law (§§1306-1503). The code concludes with transitional provisions (§§1504-1520).

The first book was strongly influenced by the German BGB. This influence is particularly evident in obligations; however, the codifiers borrowed many provisions from the French Civil Code and the Swiss Code of Obligations in regulating the invalidity of legal acts.

Like the first, the second book is based on German Civil Code regulations. In this book, Roman law influences are evident in the regulation of possession (§158, first lines). Roman law traditions are also apparent in usucaption. The regulation of neighbouring rights reflects both Georgian traditions and Roman law influences. Agricultural land ownership is regulated by separate 1996 legislation.

The most extensive part, the third book addressing obligations, draws from Georgian, German, and French traditions and the modern civil codes of Italy (1942) and the Netherlands. As in the German Civil Code, creditor default is addressed in the defective performance section, while debtor default appears in the breach of contract section.

Provisions regarding specific contracts in the Special Part reflect the intention to create a code incorporating modern Western European private law trends. The Special Part regulates insurance contracts, including third-party liability – previously unknown to the Georgian legal system. The code includes provisions concerning financial services following the Anglo-American system. This Anglo-American influence is most evident in the institution of *trust*, which was incorporated into the Georgian Civil Code as a special synthesis of commission and use (*usus*). This construction has its roots in Roman law fiduciary acts.

The fourth book was influenced by numerous foreign legal systems and primarily addresses copyrights.

Family law, regulated in the fifth book, remained least affected by foreign influences. Family law institutions are primarily based on secularised law principles. Following Georgian traditions, the institution of marriage contracts represents an entirely new element in Georgian civil legislation. In this area, the legislators drew upon Byzantine Roman law.

The sixth book, unlike the Socialist-style Civil Code, which covered inheritance law in just forty chapters, addresses this jurisdiction in a comprehensive manner. Notable is the prominence of testamentary succession, which was minimised under the previous regime for political reasons.

The 1997 Georgian Civil Code, while incorporating numerous European codification techniques and reforms, stands as an original and distinctive legislative accomplishment, merging Georgian traditions with Roman law institutions. Unlike Armenia, international private law is addressed in separate legislation adopted in 1998.

Private law legislation does not follow the monist concept. Georgia has not yet adopted a unified commercial code. Commercial law is regulated by separate laws, notably those governing commercial leases (ground lease is regulated by 1996 legislation), pledges (1994), and legal relations between entrepreneurs and merchant banks (1996).

Roman law education has been continuous since 1920, and its role has intensified since independence. This fact has contributed to the presence of numerous Roman law institutions in the new Georgian Civil Code.

34. Armenia

Following the first partition of Armenia in 387 AD, one-quarter of the country belonged to the Roman Empire and three-quarters to Persia. Roman authority over these territories persisted despite the Roman Empire's division and subsisted afterwards. Initially, Roman law influences were minimal. In the 6th century, Armenian territories under Roman (Byzantine) jurisdiction were rejoined with regions previously under Persian control, which had enjoyed substantial autonomy and limited statehood (thus retaining their legal systems). These reunifications resulted from Justinian's wars against the Persian Empire. By a Justinian decree of 536, Armenia was divided into four parts. Several decrees (*novellae*) addressed the introduction of Roman law institutions into the Armenian legal system, though their integration was often formal or limited.

The annexation to the Roman (Byzantine) Empire facilitated the penetration of Byzantine Roman law elements into Armenia. The reception of Roman law was also influenced by canonical law. Although Emperor Heraclius subjected "Greater Armenia" to Armenian *katholikos*, this did not significantly affect Roman law reception. The spread of Byzantine Roman law elements was facilitated by translating the Syrian-Roman compilation into Armenian. While Byzantine law sources are known in Armenia, their influence was limited. After the Russian conquest, Roman law spread primarily through Russian mediation. In the 19th century, Armenian lawyers and jurists gained opportunities to attend German universities, significantly contributing to the recognition of pandectistic sciences.

After regaining independence, the Armenian Civil Code was adopted in May 1998 and implemented on January 1, 1999. The Civil Code is divided into twelve parts: general provisions, personal law, objects of civil legal relations, property and other real rights, legal acts, general part of obligations, contractual obligations, unilateral obligations, tort liability, unjust enrichment, copyrights, inheritance law, and international private law.

The new Armenian Civil Code has a unique structure, following neither the institutional system nor the pandectistic tradition. Nevertheless, many of its institutions and terminology derive from pandectistic and Roman law traditions, particularly in property, real rights, and obligations – especially in general provisions. During codification, the editors considered – alongside Armenian and Byzantine Roman law traditions – the French Civil Code, German Civil Code, Swiss Civil Code and code of obligations, and the new Dutch Civil Code. Armenian legislators noted reforms of "classical" European civil codes. Unlike Georgia, the codifiers considered the Model Civil Code developed by the CIS Inter-Parliamentary Assembly between 1994 and 1996.

Notably, testamentary succession plays a more significant role in the new private code than in the previous Soviet-type code, where intestate succession predominated. Byzantine-mediated Roman law influence is evident in the inheritance section.

Roman law (with strong pandectistic elements) was introduced primarily through Russian mediation during codification. Roman law was a legitimising instrument for returning to European legal traditions during codification.

Before implementing the new Armenian Civil Code, several laws were adopted: in 1990 – before independence but after legal reforms began – laws regarding property and state property were adopted, both subsequently modified several times.

In Armenia, commercial law is not regulated according to the monist system. Without a separate commercial code, commercial institutions are regulated by individual laws. Notable among these are the 1997 law regarding company names, trademark legislation (revised in 2000), and patent law.

35. Azerbaijan

Roman law influences have been present in present-day Azerbaijan since the 1st century BC. Christianity spread through Armenian mediation in the 5th century. After the Persian period, Azerbaijan fell under Arabian dynastic rule. With the advent of Seljuk hegemony, Turkish influences became dominant. Persian rule also contributed to the spread of Islam.

In 1723, under Peter I (the Great), Russia conquered Baku. This Russian conquest was temporary, as Azerbaijan returned to Persian authority between 1735 and 1747. The division into khanates significantly facilitated Russian penetration. In 1806, Baku became permanently part of Russia. Under the Treaty of Gulistan (1813), Persia ceded Azerbaijani territories north of the Aras River to Russia; however, Persian acquiescence took longer, and Russian control over these territories was not recognised until the Treaty of Turkmenchay, which ended the Russo-Persian War of 1825-1828.

From 1828, Azerbaijan was under Russian administration, similar to Georgia and Armenia. Under Russian rule – Russia being tolerant in this respect – Muslim legal traditions persisted.

In 1920, the second republic (Azerbaijan Soviet Socialist Republic) was established in Azerbaijan. After the formation of the Soviet Union, efforts to codify new Soviet private law began. The Azerbaijani Civil Code (1965), like the Civil Codes of other republics, reflects pandectistic influences in its structure and terminology.

Following the proclamation of the Third Republic, the legal system was revised to meet the requirements of a market economy. Azerbaijan – a CIS member – adopted legislation in 1992 protecting foreign investment. This law – consistent with CIS legislation on legal guarantees for foreign investment – recognises and protects private property. Article 15 of the 1995 constitution provides constitutional guarantees for market economy requirements.

The new Civil Code (promulgated in December 1999 and implemented June 1, 2000) draws from the German BGB, the Swiss ZGB and OR and the new Dutch Civil Code. Additionally, the CIS Model Civil Code of 1994-1995 was considered.

The new Azerbaijani Civil Code, comprising 1,325 articles (with the Russian version being authoritative), includes a General Part following pandectistic traditions. The particularly extensive General Part of 566 paragraphs begins with general provisions, followed by sections on persons, rights with *in rem* protection (*veshchnye prava*), legal acts, regulation of default and prescription of legal actions, and general obligations.

The General Part, which includes real rights, is followed by the special part of obligations law. This part has three divisions: the first addresses contractual obligations, the second covers legal obligations (namely *negotiorum gestio* and *unjust enrichment*), and the third discusses obligations arising from private law violations (*delikty*). The final, tenth part regulates inheritance law.

Private law constructions and terminology frequently derive directly from Roman law. This applies, for example, to property, other real rights (such as easements), contract regulation, and various inheritance law institutions. Pandectistic influences are evident in the doctrine of legal acts.

Similar to the Russian Civil Code, general provisions regarding business entities appear in the General Part under legal persons, adopting the monist concept. Detailed regulation of business entities appears in other legislation.

The Codification of Canon Law in the 20th Century

The official codification of canon law in the 20th century, following modern principles, was initiated by Pope Pius X in 1904 after numerous scholarly attempts and at the urging of many bishops. The codification, which notably adopted the institutional system in its structure, was directed by Cardinal Under-Secretary Pietro Gasparri (1852-1934). Jusztinián Serédi (1884-1945), a distinguished Hungarian canonist, Benedictine monk, and future Cardinal Prince-Primate, made significant contributions to both the codification process and the publication of sources. The Code of Canon Law (*Codex Iuris Canonici*) was promulgated by Benedict XV in 1917. This first ("old") *Codex Iuris Canonici* took effect in 1918. Canon 20 of the five-part code, comprising 2,414 canons, did not include Roman law among its sources, indicating that Roman law could not formally serve as supplementary law (*ius subsidiarium*) to canon law.

Pope John XXIII first proposed the modernisation and comprehensive revision of the Code of Canon Law, which commenced after the Second Vatican Council in 1965. The new *Codex Iuris Canonici*, containing 1,752 canons and departing from the institutional system with its seven-part structure, was promulgated and implemented by Pope John Paul II in 1983.

Orthodox Christians in communion with Rome received their unified code from John Paul II on October 18, 1990, through his apostolic constitution *Sacri Canones*. This code was titled *Codex Canonum Ecclesiarum Orientalium*. The codification of Eastern Catholic law began in 1929 when Pope Pius XI established the *Commissio Cardinalitia pro Studiis Preparatoriis Codificationis Orientalis*, under Cardinal Under-Secretary Pietro Gasparri's leadership. Following Gasparri's death in 1934, Pope Pius XI formed a new committee, the *Pontificia Commissio ad Redigendum Codicem Iuris Canonici Orientalis*. This committee produced a provisional version in 1943 during Pope Pius XII's pontificate. After further consultations, a revised draft of the *Codex Iuris Canonici Orientalis* was published in 1945. In 1972, Pope Paul VI established another committee that, building upon the work of previous committees, completed the final text of the code in 1990.

The relationship between canon law and Roman law persisted throughout the 20th century. Canonists continued to reference Roman law after codification, particularly citing passages from the *Digesta*. Contemporary scholarship, including analyses of the origins of the 1983 *Codex Iuris Canonici*, continues to examine the relationship between canon and Roman law, generating numerous scholarly studies.

Russia

The day a true legal system for Russia was established came fifty years later. The fourth period of Russian legal history began under the wise and dedicated Emperor Nicholas I, who was inspired by his chancellor, Michael Speransky. Speransky initially started as a professor of mathematics but ultimately became one of the greatest legislative minds of his time. His ambition was to create a comprehensive legal system for Russia. Despite facing long delays and even experiencing exile, he ultimately succeeded.

In 1826, the new Emperor Nicholas authorised Speransky to assemble a commission of legal experts. They spent four years collecting and organising all legal materials since Alexis' Code of 1649 in chronological order, resulting in forty-seven volumes containing a total of thirty-one thousand laws.

Under Duke Vladimir, around 1000 AD, the Russians accepted Christianity through Greek missionaries from Constantinople. The Greek alphabet was adapted by missionaries for the Slavic language, which lacked books and an alphabet of its own, relying instead on a few crude runes or word symbols. As a result, Greco-Roman religion, morals and law began to dominate Russian life.

The first traditional lawgiver was Yaroslav the Just, son of Vladimir; he lived in about. 1015-50 AD; but the oldest extant text of his code actually dates from his successors, about legal 1200. This Code of Yaroslav was called "Russian Truth" (*Pravda Russkaya*); and it was primarily drafted or inspired by Greek ecclesiastics to inform church courts. It represents a mixture of Germanic, Slavic, and Roman-Greek elements. It was modelled after the Roman-Greek law books of Constantinople, and the Greek church had already for three centuries been modifying native Slav customs in family and property relations.

The peasant reform of 1861, enacted during the reign of Tsar Alexander II (1855-1881), was of significant importance from the perspective of civil (private) law. This reform abolished serfdom, effectively freeing peasants from their landlords and altering the status and functions of the Russian land community. Prior to this reform, Russian peasants in the first half of the 19th century were considered tied to the land they occupied. However, post-reform, they were recognised as personally *free* citizens, leading to a substantial change in their legal status. Peasants emerged as a new, distinct fourth estate in society, establishing their own corporative organisations and implementing systems of self-government. The lawmakers in 1861 based their reforms on the self-governing structures of state peasants (*sel'skoye obshchestvo and volost'*), which had already been successfully tested and refined under Minister Kiselev's earlier reforms.

Interestingly, jurists who analyse the development of the socialist legal system often do so from an external perspective. They have taken it upon themselves to examine the topic through somewhat of a summary. In this regard, we can reference the work of René David, which was published a few years ago in Hungarian.[195] To the majority of bourgeois comparative legal, socialist law is merely *one* of the legal fields in the world. In the second edition of the handbook, written by Konrad Zweigert and Hein Kötz,[196] the socialist legal field (Rechtskreis) is discussed in only about 61 pages. However, this brevity does not imply a lack of independent studies or monographs on socialist law within bourgeois literature. Notable works by authors such as Berman, Böckeförde, David-Hazard, Dekkers, Schlesinger,

[195] David, R., *The Great Legal Systems of the Present Comparative Law*. Bp. 1977.

[196] Zweigert, K. - Kötz, H., *Einführung in die Rechtsvergleichung auf dem Gebiete des Privat rechts. 1-11*. Bd. 2. neubearb. Aufl. Tübingen, 1984.

and Westen exist. Nonetheless, none of these works address the establishment and development of socialist law as comprehensively as Pál Horváth does in his book. Methodological objections may also be raised against the type of representation which discusses this topic dissected from its historical context. Furthermore, a false image is presented to the leader if the author of a monograph or study examines the various legal branches independently of each other. A typical example of this method of representation is the work of Zweigert and Kötz mentioned above, which – though this follows from the subject of the book, too, as the authors wish to introduce their readers to the realm of private law – presents a survey of the main characteristics of the civil law of the socialist, *Rechstkreis* without offering any passing view of the political structure.[197]

Pál Horváth departs from this "tradition." In the first chapter of his work, he explores the prehistory of socialist law – not just the "legal field" – from the Paris Commune up to the Great October Socialist Revolution. In this section of his book, he points out that the socialist type of law represents something new qualitatively as compared to the earlier legal systems. This novelty lies in the comparison with Anglo-Saxon law, just as with the bourgeois legal systems created in the wake of the French Revolution – the legal system here means the positive law of a given state. Naturally, the author does not wish to deny that there are significant differences between the system of Common Law and the legal systems based on Roman law. It is sufficient to point out in this connection that while in the case of Common law, the judge-made law is prevalent, in the field of the *origo* – Roman law **-** the leading role is played by the jurists ruling *Juristenrecht,* to use the German term.[198]

Casuistry or, in other words, the also significant difference in the casuistic method may be traced back to this highly important difference. The problem of precedent appears in a completely different way in Roman law and in Anglo-Saxon law, which has been pointed to so well by Bucklalnd, McNair, Schiller, Stein, Dawson and Peter.

Specific legal features are characteristic of the eastern part of Europe. The law and legal system of this region still display several signs of belated social development.[199] It is in Central and Eastern Europe regions that this bourgeois element of legal groups possesses specific features, a part or, more precisely, a sub-type of which is the otherwise heterogeneous law pertaining to the Russian empire. To map the law of the Russian empire is of special significance for Hungarian researchers since the law of the Austro-Hungarian Monarchy is heterogeneous as a consequence of different legal systems – reference could also be made to the Prussian-German legal territories to display parallel features to the law in tsarist Russia in several respects. In this region, the institutions of feudal law are very closely intertwined with the elements of modern bourgeois law.

A specific way of codifying law is characteristic of Russia's legal system in the last century. The Collection of Laws of Speransky (Polnoie Sobranie Zakonov Russiiskoy Imperii) was published during the reign of Nicolas I. This collection, containing approximately 35,000 laws (regulations), comprises the legal regulations from 1649 (the year the *Sobornoie Ulozienie*

[197] See Zeigert-Kötz, op. cit. I. Bd. p. 332 and ff.

[198] See a summary of recent literature in Vacca, *Contributo illo studo del metodo caistico del diritto romano*. Milano, 1982. passim.

[199] See Horváth P., *The mMain Trends of the Legal Development of East and Central-European Peoples (with Special Regard to the Legal Development of the Neighbouring Peoples).* Budapest, 1968. pp. 353-374 and 395-426. Also, Horváth: *An Introduction to the Basics of Comparative Legal History*. Bp. 1979. pp. 301-315.

came into effect) up to the accession of Nicolas I in 1825, in no fewer than 45 volumes. The essence of "codification" remained largely unchanged even after Speransky's work in 1835. He organised the legal regulations into a systematic framework, although some viewpoints were not entirely accurate. In this process, he omitted outdated regulations and published the valid codification known as the *Svod Zakonov Rossiiskoi Imperii* (Collection of Laws of the Russian Empire). This collection, which consists of 15 volumes, contains approximately 40,000 articles and encompasses almost all branches of law. It includes common law, administrative law, private law, procedural law, and criminal law. However, it excludes military law (*ius militare*) and ecclesiastical law (*ius ecclesiasticum*).

In the area of private law, there was a clear intention to change and modify regulations over time. This was facilitated by remarks (*primetsania*) issued by competent judicial forums, which held the force of law (*vigor legis*). This mode of law-making bears a strong resemblance to the novel. mechanisms of legal development seen during the principate and the age of absolute imperial power in Roman history. During those periods, the decisions of rulers and "theoretical directives" inspired by administrative offices also became integral to the sources of law.[200]

The continuously updated *Svod Zakonov* remained formally valid up until the victory of the October Revolution, serving as the foundation of Russian law.

In relation to the *Svod Zakonov* – without indulging in a detailed analysis of this collection - the question of analogy with the law of the modern age (the capitalist period) may also be raised. An answer is not difficult to give: the closest “intellectual relative” of this collection is the *Preussisches Allgemeines Landrecht* of 1794, also characterised by an irrationally exaggerated casuistic approach.[201] This parallel is obviously no accident. The soil is identical in the case of both “legal works”; they are codices created in the same region. This example might almost be a paradigm of why it is correct to think in terms of the category of the Central and East European region proposed by the author; signs of acceptance of this concept, by the way, are to be encountered in the works of other researchers too (e.g., Geilke), albeit not in such an explicit form. In the last third of the past century, there were further factors exerting an influence on Russian law, referred to as the “weakest link in the chain” of the bourgeois type of law, and its uncertainty (determined by the specific forms of codification). In the author's view, they were influenced in a decisive manner by the appearance of monopolies.

The growing strength of Russian and international monopolies exerted a significant influence even on countries with legal systems otherwise relying more or less on a constitutional structure. That effect was even stronger in the Central and East European regions where unequivocally negative tendencies were concealed. Therefore, it was not by accident that this process adversely affected the progressive trend of feudal-capitalist law.

Pál Horváth makes convincing references to the manifold economic and social changes going hand in hand with this process of monopolisation. He also points out that this process was an effective instrument for solving concrete political tasks. The restructuring of conditions in Europe, which became favourable to Russia in the last third of the last century, led to the

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[200] See *Vacca:* op. cit. p. 37 and ff.

[201] For a summary of the *Preussisches Allgemeines Landrecht,* see *Wieacker. F.. Privatrenchtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung.* 2. neubearb. Aufl. 331. seq.

tsarist system increasingly relying on foreign capital, primarily from France, in its efforts to break out of economic isolation. However, the loans from foreign lenders often came with harsh conditions. Naturally, that phenomenon had the appropriate diplomatic consequences. Cancelling the article containing adverse conditions in the Paris Peace Conference that concluded the Crimean War constituted an undoubtedly very significant impulse for Russia's economic development. Economic infiltration was dependent upon orientation in foreign politics. In relation to legal development, however, there was no special sign of a concrete economic orientation playing a role beyond certain general symptoms. For example, the invasion of the French capital did not lead to the takeover of French legal institutions, even in commercial law, which is closely tied to the economic sphere. Consequently, the Code de Commerce was not adopted in Russia, despite the Russian state's closest relations with France.

After the October Revolution, a significant change occurred in how most people viewed the law. It is a specific feature of Russian history that the *jus scriptum* was familiar to the agricultural population in very exceptional cases only. A significant issue was that most of society held a negative view of the law from the beginning. In the works of several prominent figures in Russian literature, particularly Tolstoy, it is explicitly stated that the law serves as a tool for identifying and addressing wrongdoing. Thus, following the victory of the October Revolution, lawmakers had a dual task to contend with: on the one hand, they had to create a new law, not merely to reform a few legal institutions; They had to fundamentally transform society's approach to law. Therefore, following the revolution's victory, they needed to create new elements qualitatively in two key areas.

This process related to the revolution is inseparably linked with the changes that occurred in the structure of the state. In the second part of his book dealing with the establishment of the Soviet law and constitution, Pál Horváth presents the main features of this highly complex process. He lays great emphasis, for example, on the significance of the 5th Pan-Russian Soviet Congress, which created the first Soviet constitution. In addition, he discusses in detail the formation of the state mechanism of a federal character.

In the section focusing on the opportunities for the system of people's councils and socialist law to gain traction, the author pays special attention to specific political events. He also examines trends in international politics. For example, he discusses the economic significance of the Geneva Conference of 1922. Additionally, the author provides insights into the political preparations for the Soviet Constitution of 1924.

Following this, he analyses in detail the developments in Soviet civil law during this period. He identifies 1922 as the point when concerted efforts to establish legal order truly began, leading to the creation of an increasing number of legal codices. Notably, the Civil Code of the Russian Republic was enacted during this time; it came into effect on January 1, 1923, although its development was obstructed by the transition to the New Economic Policy.

When examining the characteristic features of the codified Soviet Civil Law, it must be emphasised that the Civil Code did not completely break with the system of civil (private law) codes that, in a sense, served as a model. This is well documented by the fact that the Soviet-Russian Civil Code also contains a general part which contains regulations concerning legal subjects, legal objects and legal affairs, essentially in harmony with the tradition of the pandects. The part on substantive law contains significant new features, as it regulates the new property categories per the socialist social-economic transformation. The part on the law of obligations also contains the articles pertaining to commercial companies. The part of the Civil Code on inheritance law is of a much lesser scope, creating order in a system of institutions of inheritance law different from the traditional ones, in harmony with the reforms

of the October Revolution concerning inheritance law. Finally, the significant role played by the general clauses must be emphasised in this review; they represent a new phenomenon and have gained increased importance because they settle the practice of rights in accordance with their nature, mostly on a political basis (e. g. Civil Code Par. 1 and Par. 30.). In accordance with this intention, the Soviet-Russian Civil Code breaks in a spectacular manner with the Kantian a priori formalism, which analyses the incorporation of general clauses in works of law by essentially allowing absolute significance to legal formalism. In connection with this, reference should be made to several bourgeois jurists who diverge from a principle primarily associated with the name of Kant (e.g., Savigny).[202] Consequently, the BGB is also familiar with the concept of general clauses (e.g., Par. 242.). All this, naturally, does not negate the fact that it is specifically in Soviet civil law legislation that the general clauses assume a qualitatively new role.

In further parts of his work ("The Soviet State and Law in the Period of Laying down Social-Economic Bases of Socialism", "The Soviet State and Law in the Period of the Second World War, Restoration and the Completion of Building Socialism", and finally, "The constitutional and legal order of developed socialism"), the author follows the game method as in the chapters discussed relatively fully in this review. Thus, a survey of the historical events is followed by the analysis of the main features of the structure of the state and only afterwards are we presented with the main features of the individual legal branches. In surveying the field of civil law, outstanding importance is attached to the principles of civil legislation coming into force in the period of developed socialism (1961). These principles aim to revitalise the recodification of civil law in the individual Soviet Republics, emphasising the significance of the Civil Code of the RSFSR from 1964. Naturally, the question of internal legal unification is raised in the Soviet Union, the most important undoubtedly civil law. When compared with the legal development of the United States, also based on a federal system, different features are displayed by Soviet law since the republics of the Soviet Union preserve their national characteristic features within the legal sphere too. Thus, the form of legal sources similar in character to the "Principles" serving the purpose of legal unification cannot be compared to the construction of "uniform laws" known in the United States. It is remarked only in passing that legal unification of that type fails to reach its goal, demonstrated by the fact that even the Uniform Commercial Code (UCC), otherwise of very great economic significance, is not applied in all the states. Furthermore, Soviet legal unification followed a route different from that of France, the Bourgeois Revolution or that of Germany after 1871 where the elimination of legal disunity was carried out by creating large legal in the field of private law as well. Thus, the promotion of legal unification, taking into account national characteristics, is undoubtedly the result of the establishment of a new type of (socialist) state.

A review is limited in scope and is thus unable to provide even a sketchy survey of all the state and legal constructions included in Pál Horváth's monography (which may indeed be regarded as a handbook): As a result, it was unable to provide a comprehensive overview. However, it may be concluded even from this that we have been presented with a monograph which is equally new to both the Hungarian and foreign literature and which really deserves

[202] For Kant and Savigny on the general clauses, see in recent literature Behrends, O., *Geschichte, Politik und Jurisprudenz in F. C. v. Savignys System des heutigen römischen Rechts*. In: *Römisches Recht in der europäischen Tradition.* Ebelsbach, 1985. p. 198 ff.

the attention of the reader. The impact of the Pandectist School could also be felt in A.G. Gojkbarg's (1883–1962) civil code for Soviet Russia of 1922. It was in essence, a shortened version of the draft of 1905. The same is true of The Fundamentals of Civil Jurisdiction, issued in 1961 and accepted as valid for the whole Soviet Union, which served as a basis for the codes of the Union republics. Thus, the Soviet-Russian civil code of 1964 relied on the Pandectist system not only in its structure but also in most of its institutions and legal principles. The New Fundamentals of Civil Jurisdiction issued in the Russian Federation in 1991 invalidated previous regulations contrary to a market economy's principles. The new Russian civil code came into force gradually and impacted not only of the German BGB but also of the new Dutch civil code. Soviet civil law is very significant, and it is beneficial to find two recent systematic studies on the subject published in English. One is by Olimpiad S. Ioffe, author of a magisterial three-volume treatise and many other studies published in the Soviet Union, and now a Professor at the University of Connecticut Law School[203]. The other, by several authors under the editorship of O.N. Sadikov, is a translation of a standard Soviet textbook which appeared in Russian in 1983.[204]

There are many reasons why attention should be paid to this topic. The *first* is ancient and concerns the importance traditionally assigned to civil law as the major category of a legal system. Throughout the entire history of law, no text has been so widely read or so influential as Justinian's *Institutes*[205]. Its aim was "to serve as the first elements of the *whole* of legal learning" *(Proemium* §4). To attain this aim, the book's compilation (with amendments) of the older jurists begins with a few general observations on law and justice. It clears the ground for its main function by telling us (J 1.104): "The study of law is divided into two aspects: public and private". However, it then goes on to announce that "here we shall deal with the latter" and, indeed, virtually the whole work is devoted to private law. The structure of its treatment (repeating Gaius's great scheme at G 1.8) is announced by the statement that *"All* the law we use concerns either persons or things or actions" (J 1.2.12). Thus, for 1,400 odd years, the student who complies with the Imperial injunction *(Proemium* §7) to "take the book eagerly and study it diligently" is likely to develop, almost unconsciously, the idea that private law, if not perhaps the whole system, is quite the most important, probably the best, and somehow the most natural of its categories. One might assume that the RSFSR Civil Code (CC) should adhere to the fundamental structure established by Roman law. In the first paragraph of Justinian's work, it is stated that "the imperial majesty should be not only adorned with arms but also armed with laws, so that the state may be well governed.", it will come as no surprise to find the RSFSR Code's preamble explaining that "Soviet civil legislation provides an important means for the further strengthening of legality it is called upon to play an active part in the fulfilment of the task of establishing Communism". Equally familiar is the glimpse, under the pandects' corpus, of the skeleton of the *Institutes:* some initial observations followed by the familiar triad of Persons, Property, and Obligations.[206]

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[203] *Soviet Civil Law*. By Olimpiad S. Ioffe. No.36 Law in Eastern Europe, (F.J.M. Feldbrugge ed.), Dordrecht / Boston / Lancaster: Martinus Nijhoff Publishers, 1988. ix and 382pp. inc. index. Dfl.205.00/$112.00. ISBN 90-247-3676-5.

[204] *Soviet Civil* Law. Edited by O.N. Sadikov. Armonk, New York / London: M.E.Sharpe, Inc., 1988. xv + 542pp. inc. Table of Citations, Glossaries, Index. $75.00. ISBN 0-87332-429-3. The text is a hard-cover edition of the translation, which appeared in the quarterly Soviet Statutes and Decisions, Vol. XXI, Nos.l, 2, 3, 4 and Vol. XXIII, No.2.

[205] The point is well made in Alan Watson, *The Making of the Civil Law,* Cambridge, Mass. 1981, esp. chapter VI.

[206] Indeed, today's civil law of the People's Republic of China seems to follow the same general pattern. See William C. Jones, "Translation of the Fourth draft Civil Code (June 1982) of the PRC", 10 *Rev.Soc.Law* 1984 No.3, 193-257; Thiagarajan Manoharan, "The 1981 Economic Contract Law and the 1986 General Principles of Civil Law of the PRC - A

The *second* reason for civil law's importance stems again from that powerful Roman text. The difference between public and private law is, we are told, that "public law deals with the state organisation… private law with the wellbeing of individuals"[207]. Later ages found read into this apposition the notion that there was much of human life which was properly the subject matter of law but not of public law; that is, not the state's business. From this, it is a small step to seeing civil law as defining and protecting our human personality in its widest sense: as constituting that zone where we are safe from the state. Eörsi points out that bourgeois law is organised around a few crucial pivots.[208] They are of constitutional import, yet they are laid down in the civil law. Private property is protected by the French Civil Code in Article 545: "No one can be constrained to cede his property save by reason of public utility and with just compensation determined in advance". This recalls both the "due process" phrase and the last clause of the 5th Amendment to the US Constitution: "... not shall private property be taken for public use without just compensation". In France, the sanctity of contracts is enshrined in the Civil Code: In the United States, we find a (fading) echo in the Constitution: "No State shall ... pass any... law impairing the obligation of contracts" (Article I, 10). Even the French code's general rule on liability for carelessly causing damage (Article 1382) has recently been held to possess "constitutional value" strong enough to prevent French legislators from abrogating it in relation to Trade Unions.[209]

When such fundamental values are enshrined in the civil law, not the constitution; when that law is laid out in coherent form expressing and correlating the system's basic principles, then its existence conditions a society's perception of the whole of law. At the student level, it is in the first chapters of the standard French works on *Droit civil* (and nowhere else) that one finds an elementary exposition of the general theory of law. One begins to understand how, since their Revolution, the French might need fifteen Constitutions, but only one Civil Code. One also understands how the French can say - with every appearance of sincerity - that they live in a codified system. Ask them where their code of public law is, and the answer is likely to be a shrug.

The *third* reason for the importance of Soviet civil law takes us beyond the *Institutes.* Its form is essentially a distillation of the nineteenth-century development of the *usus modernus pandectarum.* The great German scholars of that school gained great popularity among Russian jurists (the translation of Dernburg, for instance, was published in three editions[210]); they influence the form and content of the 1905 draft code, and, with the *BGB,* determined the framework of Goikhbarg's 1922 Civil Code, whose present-day direct descendants are *Osnovy* and Codes. The Soviet model utilises a conceptual framework that has been familiar to other

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Supplementary Note", 13 *Rev.Soc.Law* 1987 No.3, 285. The Romanist appearance of socialist law has often been noted: for a recent treatment, see Rodolfo Sacco, "The Romanist Substratum in the Civil Law of the Socialist Countries", 14 *Rev.Soc.Law* 1988 No.l, 65-86. That the borrowings descend to detail is shown in the interesting article by Herbert Hausmaninger *"Diligentia quam in suis:* a standard of contractual liability from ancient Roman to modern Soviet law", 18 *Cornell International Law Journal* 1985, 179-202.

[207] Translation is difficult. The text reads *"Publicum jus est, quod at statum rei Romanae spectat;*

privatum, quod ad singulorum utilitatem" (J 1.1.4).

[208] Gyula Eörsi, *Comparative Civil (Private) Law,* Budapest 1979, 64-71.

[209] Conseil Constitutionnel du 22 Octobre 1982 *(Labbé et autres)* DS 1983 J., 189.

[210] G. Dernburg, in *Obiazatelstvennoe pravo.* Ce, Sokolovski, ed.), 3rd ed., Moscow 1911.

countries within the socialist bloc for a long time. Additionally, as Ioffe brilliantly demonstrates, this model can be analysed and evaluated through the logic of that same framework.

The fourth reason concerns the civil codes function within the Soviet legal system. In three ways, it is that system's *ius commune. Firstly,* the fifteen Republican codes differ only in trifle *Secondly,* it is in the civil code that one fundamental legal concept: legal personality, the juridical act, ownership, obligation, and the great nominate contracts lay a dual role, serving both the ordinary human being and the whole apparatus of state production, distribution and exchange. *Perestroika* makes great use of them, and parts of the new legislation simply repeat *mutatis mutandis,* provisions of the code.[211] *Thirdly,* the civil code has an important residual function: it provides a safety net to catch the cases which fall through other structures. Article 4 (at least in theory) indicates that there is no *numerus clausus* of legal relationships, juridical acts, rights and obligations, and it incorporates the notion of general principles of law to be used in difficult cases.[212] Similarly, as Ioffe points out (p.7), the other codes, such as that on Land or on the Family, do not concern themselves with basic principles such as the computation of time or the application of limitation and prescription periods. To apply these, resort must be had to the general part of the civil code.

The fourth reason for the importance of this branch of Soviet law is its effect on other countries. Along with much else, it was implanted into the basically Islamic local laws of the central Asian republics. Somewhat later we find it installed in the Baltic States, which had had a tradition of Romano-Germanic civil law. Finally, the other Warsaw Pact countries – many of whom had a long, confused, but highly sophisticated system of their own – received inspiration from the Soviet model.[213] For instance, the Hungarian Minister of Justice, in introducing the 1959 Civil Code, explained that there was “no question of trying to preserve the decrepit legal relations of a moribund society; on the contrary, the task consisted in an Endeavour to regulate the entirely novel legal relations of a new society”. The drafters, he said, had studied the Soviet civil code then in force and had produced a text that was neither demotic not pedantic. With its enactment “the law-making activity of the courts, unfavourable for the cause of legality in the consolidated people's democracy, will cease completely and definitely”.[214]

The volume edited by Sadikov gives the Western reader a taste of how civil law is presented to Soviet students. The presentation is clear and practical, lacking any deep analysis and making very few references to case law. Overall, it is similar to many ordinary and

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[211] Compare RSFSR CC Article 93(l) on operative management with Article 5 of the joint venture decree of 13 Jan. 1987 *(SP SSSR* 1987 No.9 item 40) and note the latter's omission of the Plan. The same Decree's c1ause 16 adapts RSFSR CC Article120 on the assignment of an undivided share, according to its right of pre-emption to the Soviet participant. This last prerogative seems to have been removed by the Decree of 2 Dec. 1988: *SP SSSR* 1989 No.2 item 7, clause 33.

[212] RSFSR cc Article4: “Civil-law rights and obligations arise on the grounds provided for by legislation ... and also from actions of citizens and organisations which, though not covered by statute, yet give rise to them under the general principles and sense of civil-law legislation. (They) arise from juridical acts ... which, though not provided for by statute, yet do not contradict it.”

[213] See Kalman Kulcsár, “Forced Adaptation and Law-making”, in *Law in East and West,* Institute of Comparative Law, Tokyo 1988, 257-259.

[214] *Civil Code of the Hungarian People's Republic,* Budapest 1960, 172, 181.

unpretentious course books on private law available in various countries, offering useful insights without being overly complex. In an approach which recalls (though does not mention) the Roman jurists and their intellectual heirs, the law is presented as self-contained and a-historical. There is, naturally perhaps, no discussion of the pre-revolutionary period; but there is also little on any developments since. The first chapters focus on dogmatics, outlining established doctrine regarding the concept, functions, scope, and methods of civil law – this last meaning the presumed juridical equality of its subjects and the facultative nature of many of its norms. Civil law is then distinguished from contiguous areas (such as family and labour law); and the book emphasises the source of all wisdom, stating that the making and development "of civil law in all basic, principal questions is carried out under the direct and unmediated guidance of the Communist Party" (p.l1).

There then follows (pp.11-14) a useful and interesting summary of those "general principles" which, even if not enacted, inform the entire system: socialist ownership, plan, the prohibition against exercising civil-law rights in a way contrary to the state interest, the protection of the individual's property rights and the duty of collaboration with one's legal partners. The introductory chapters close with a standard account of the relationship between the General Part to the Special Parts of the Code. No hint is given that any other country's lawyers might have thought of this first or that any other way of organising civil law is conceivable. On the contrary, the account begins by stating. "The system of civil law exists objectively as it reflects the actual social relationships which constitute the subject of that branch" (p.14).

This lucid but unquestioning approach persists in subsequent chapters. First comes the *General Part,* with explanations of the legal norm, legal relationship, juridical events and actions, an account of legal and disparities capacity, a descriptive list of juridical persons (pp.65- 78), and an explanation of transactions, representation and prescription. Then comes ownership, to which (although "the most important principle of Soviet civil law" (p.12)) only 50 pages are devoted. By contrast, there are 227 pages on obligations. Most of this section is devoted to the contracts, big and small: sale, of course, comes first; incidentally, it is still called *kuplia-prodazha, making* the heritage of *emptio-venditio* semantic as well as substantive. In contrast, *locatio-conductio* has always been too broad a category, although its boundaries can be seen in the chapters concerning leases, labour contracts, and transport. The topics which do not fit the Roman structure – intellectual and industrial property – are, as in the Union *Osnovy* and the RSFSR Code, sandwiched between obligations and inheritance. Sadikov's book ends with a separate treatment of Family law.

Initially, Ioffe's work may appear similar. He focuses solely on civil law and not family law; aside from that, his framework is nearly identical. In both books, of course, this feature is explicable and rational as being more or less mandated by the structure of the Code itself. On a closer reading, however, Ioffe's work is infinitely richer and more profound. Although he frequently cites case law and practical examples, his work is clearly not restricted to simply illustrating the conflicts between Soviet law and Soviet life. It is the work of not a politician or sociologist but a jurist. Every page testifies to the results of decades of reflection on the law in general and on the civilian tradition in particular. His approach is that of the pandects at his best.

This means several things. Firstly, it is an intellectual structure which has attained self-consciousness. It is aware of its own history: for instance, the pages on the civil law relationship, with its subject, object *andjuristische Tatsachen* are written in explicit recognition of nineteenth-century German tradition. Equally, it is aware of its own conceptual and logical structure. A good deal of law consists of distinguishing relations, classifying them and of compiling lists, an activity in which the Sadikov volume demonstrates complete competence. Nevertheless, Ioffe also responds to a need to articulate the inner structure of this

process: what are the relations between the various components of the system? Are the alternatives offered in any area mutually exclusive? Are they exhaustive? Does any given list (of legal persons, real rights, contract types and the like) represent a *numerus clausus?* If so, why? The result is a treatment of Soviet civil law which is by no means unreflectively hostile. Quite the contrary. If considered pure norms, many features are perfectly sensible, workmanlike or even elegant: the straightforward rules on the formation of a contract, for instance, or the two fundamentals of tort law (fault liability for ordinary and strict liability for dangerous activities). The result is that the criticisms that Ioffe levels against Soviet civil law are serious because they stem *from* the very method – the pandects – on which the system itself is built.

Examples abound. His treatment of the legal capacity *(pravosposobnost', Rechtsjiihigkeit)* of human beings (pp.30-31) begins by quoting in full article 10 of the Code.[215] His analysis then shows the relations with (and tensions between) this libertarian definition and the provisions of labour law, administrative law and the (Internal) Passport Act of 1974 (pp.30-31). Similarly, he lists the three ways in which a juridical person may be created, ranging *from* its conferral as an automatic result of certain private arrangements, through that in which official permission must be sought to that where the legal person's birth is commanded; he then shows that in practice, only the last method is permitted (p.35). The Code's unremarkable provision that an obligation is terminated by the impossibility of performance caused by a circumstance for which the debtor need not answer (Article 235) is shown to apply even to generic obligations (save for money and for the care cases where a citizen is debtor). This would astonish the Western civilian *(*BGB 279)[216], but Ioffe demonstrates that the Plan may cause a genus to become extinct for all practical purposes. Furthermore, even where the planner's permission is not required to enable the debtor to make a covering transaction and obtain supplies elsewhere, such an act – which would involve the acquisition of the object needed to fulfil the obligation – may fall outside the legal capacity of a state organ created only to make and dispose of things (pp. 48, 206). The time limits within which actions must be brought are *ius cogens* and must be applied by court or arbitration *ex officio.* For similar reasons of strengthening discipline, acknowledgement of a debt owed by one organisation to another does not stop time running. And performance after the expiry of the period may be reclaimed. However, if one party is a state organisation and the time has run out, the creditor will lose but the debtor must transfer the windfall to the state budget (pp.86-89).

Pandectist analysis of the various special contracts is also revealing. Ioffe's technique is to discuss the basic figure rather briefly, assuming sensibly enough that a reference to a standard type – gratuitous use of a thing or the loan of generic goods – will at once call to the Western reader's mind the basic features of, in these examples, *commodatum* and *mutuum.* He then focuses on particularly Soviet sub-variants of this general figure. Loan, for instance, in its simplest basic form as defined in the Code (Articles Articles 269-271) occurs only, if at all, between Soviet citizens. Ioffe explains why "savings banks bear even less resemblance to the model of loans" (pp.283-284) and touches on the dispute as to whether dealings with them are

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[215] The article is titled "Content of Citizen's Legal Capacity". It begins: "Citizens may, in accordance with statute, have property in personal ownership, have the right to the use of living accommodation and other property, inherit and bequeath property, choose their occupation and place of residence ... ".

[216] *Bürgerliches Gesetzbuch* §279: "If the object owed is described only by class, and as long as performance from this class is possible, the debtor must answer for his inability to perform, even though no fault may be imputed to him".

correctly classified as deposits or loans. He concludes that they are a specific kind of loan and says “the legislator has not directly expressed his point of view” (p.284). However, on one reading of the code, he has. Where pawnshops make advances to citizens, the legislator speaks of loans *(study,* Article 273), but in relation to savings, using the language of ordinary people, the code says that citizens may *keep (khranit')* their money in the savings bank (Article 395). Of course, this cannot be taken literally. However, it would seem that the statute conceives of the transaction as some sort of *depositum irregulare.* Sadikov contains no hint of this discussion, but merely paraphrases the code, adding the details provided by the relevant Decree of the Council of Ministers (pp. 350-351).

Another fascinating example of the utility of rigorous pandects analysis to reveal the deeper features of Soviet civil law is Ioffe's frequent demonstration of the use of confiscation to protect the civil law legal order. This may occur within the *General Part* of civil law (RSFSR CC Articles 49, 58) as an addition to the normal declaration of invalidity of transactions concluded under some defect of consent (through fraud, mistake or duress), or aimed at some illegal end, or set up as sham arrangements cloaking some other, less desirable deal. It may strike at one or both of the parties; and it may be invoked by a victim or by state, cooperative and public organisations. A similar technique is found in the law of property, where it covers both forbidden objects (a second house or apartment, or one built without permission: CC Articles 107, 109) or lawfully owned dwellings used to extract unearned income (CC Article 111), or deliberately neglected housing or cultural treasures (CC Articles 141, 142). It is also found in that part of the law of obligations which even Gaius found difficult to classify: unjustified enrichment.[217] The Code provides in Article 473 par. 4 that "property obtained at the expense of another person, not under any transaction but as a result of other acts consciously opposed to the interests of the socialist state, if not subject to confiscation (as would apply to crimes), is forfeit to the state". Ioffe's account of confiscation in civil law evokes the period in England when items that resulted in death were deemed deodand and forfeited to the Crown.

Looking at the two volumes, not in terms of their praise or blame of the system described, but simply as accounts of civil law, there is no doubt whatsoever that (even, one would think, for the devout Soviet law student) Ioffe's is much the better textbook.[218] It is, for instance, particularly interesting to compare the two treatments of liability for breach of obligations. The Sadikov volume's per suit of the entirely commendable aim of lucidity results at times in a treatment so simple as to confuse. It describes (pp. 203ff.) the basic form of liability as being compensation for losses caused and says this “must always be used when an action provided in an obligation is not performed at all or when it is performed improperly”. It then goes on to define the conditions required for civil liability for breach of obligations as: loss by the creditor, unlawfulness by the debtor, a causal link, and fault of the debtor. At once, the reader is bewildered. Soviet law defines an obligation in the normal Roman / pandects way, but then goes on to give examples. First comes *dare* – “to transfer property”, *then facers* – “to carry out work”. However, then – and this is both novel and interesting – comes the obligation “to pay money”.[219] Thus, unlike most countries' civil codes, that of the Soviet lawmaker

[217] D 44.7.1: Obligations arise from contract or from wrongdoing or by some special right from various types of causes.

[218] It is not be hoped that any future edition will include (as Sadikov usefully does) a table of citations of the various articles of the codes.

[219] D 44.7.3 pr. *Bürgerliches Gesetzbuch* §241. *Osnovy Grazhdanskogo Zakonodatel'stva Article*33; RSFSR CC Article158.

wisely singles out to mention what is surely the most widespread, abstract, and rigorous of all obligations. In the Soviet Union, as in other places, the majority of civil claims are likely to be straightforward actions taken by suppliers of goods and services or lenders seeking payment for their products or repayment of loans.[220] When we examine Sadikov's account of liability in this context, it makes little sense. A seller who sues for the price of goods sold and delivered does not need to demonstrate a loss; it is not a valid defence for the buyer to argue that they would have discarded the goods otherwise. Therefore, the issue of causality does not come into play. The buyer's failure to pay can only be considered unlawful in the sense that it constitutes a breach of the obligation to pay for what they received; however, this adds no substantive value to the argument.

Finally, the buyer's lack of fault (subjective or objective) or even the occurrence of some *force majeure* is no answer to the seller's claim. Ioffe's treatment of liability offers a significant contrast. His account resembles Sadikov's in its insistence on the conditions of loss, causation and fault (pp. 1 *79ff; ef.* RSFSR cc Article 219). Nevertheless, before this passage, he has scrupulously distinguished those measures which make the debtor's position worse from those which do not. He puts it neatly (p.175): "If one does not perform an obligation, performance may be enforced; if non-performance causes losses, damages shall be recovered. It is obvious, however, that these consequences of a violation are essentially different. Under enforced performance, the debtor fulfils only that which they were required to fulfil on the basis of the original obligation. This measure need not result in any negative effect upon the offender and, therefore, while being a sanction because of its coerciveness, it does not embody legal liability." With this explanation, one can understand why enforcement of a primary monetary obligation, not being "liability" in the Soviet civility's sense, does not require the conditions described above.

A similar difference in approach of the two works, in terms of their pure usefulness to the law-student, is strikingly and simply demonstrated by their treatment of gift. The Code's provision (Article 256) reads: "By the contract of gift, one party gratuitously transfers property into the ownership of another. [It] is deemed concluded at the moment of transfer". However, the next article requires that "a contract of gift in a sum exceeding 500 rubles ... be notarially authenticated". If this is not done, the transaction is void, so apparently, the gift must be returned (RSFSR CC Articles 47, 48). The Soviet law student reading this may well be baffled. He or she will learn that a gift is a contract, although it seems to create no obligations for anyone; and will surely wonder why both delivery and notarisation should be necessary. Indeed, the better student may suspect that the Soviet legislator has not grasped the difference between making a present and promising to make a present. None of these doubts is addressed by the Sadikov account (p.223), but what the student will learn (p.29) is that socialist organisations cannot make presents to each other. This conclusion is achieved "by means of logical and systematic interpretation". By contrast, Ioffe faces up to the difficulties of the provisions on gifts, observing (without anchor) that "despite (the) somewhat clumsy construction, the desired goal as not been achieved" (p.248).

Likewise, the student may be puzzled – in terms of pure law – by this kind of statement drawn from the Sadikov volume's description of credit sale p.228): "The sale of goods on credit is not possible for all citizens but only for workers and employees who are steadily employed in a town where a store is located; for sergeants who have re-enlisted and officers; and for

[220] Yet Sadikov's book tails us that "the most universal method of defending civil rights is the claiming of damages" (p.42).

graduate students studying in that town and pensioners with permanent passports". And in relation to hire, the leader has to guess at the situation behind statements such as "A citizen may lease out an article for domestic use to another citizen if this is not of the nature of the prohibited handicraft and artisan business" (Sadikov, p.260).

Perhaps something may be learned about Soviet civil law from noting the topics which are not dealt with in detail by either Ioffe or Sadikov. For instance, the RSFSR CC Articles 211-214 lay down sensible and familiar, basic rules on the assignment of claims. This could have led to a consideration of vast areas of activity such as financing against receivables, commodity futures, and, indeed, the whole treatment of incorporeal things in which Gaius included obligations (G. 2.14). The fact that neither book attempts this is understandable given the absence in the Soviet Union of such structures for commercial enterprise. It also, perhaps, reveals the way in which Soviet law has only partially profited from the Roman insights. Ioffe devotes over five pages to a very acute discussion of "things" (pp.48-53) but confines his analysis to tangible objects.

Similarly, both books do certainly describe the *General Part* of the civil law, the redhibitory actions available to a purchaser of defective goods, and the law of tort. Neither ventures into the interrelationship between common mistakes on the one hand and, on the other, the action for latent defects; nor – where the defects cause injury – into the relationship between the contract action against the seller and the tort action against the manufacturer. One would have liked to learn Ioffe's view of the case law, which denies the buyer an action against the manufacturer until the expiry of the guarantee period for his claim against the seller.[221]

The problem finally provoked by both texts is this: Is one to marvel at the flexibility of the Roman creation, to weep for the sterility of succeeding generations of lawyers, or to admire their ability to make the old ideas work to this day? Roman private law was elaborated by jurists under a public "law" wielded by such tyrants as Caracalla (who had Papinian killed). Yet, after the French Revolution, the Civil Code formed the citizen's fortress with its canonisation of private property (CC Articles 544-545) and its elevation of a contract to the status of statute (CC Article 1134).[222] In the Soviet Code, this fortress lies in ruins, with State and Plan prowling the remnants. Yet, they build their thrones from the fallen masonry. Even in narrow legal terms, the state is the only *dominus.* Its creatures – enterprises, organisations and the like – enjoy over their property a *jus disponendi,* circumscribed by their charter, while the *jus acquirendi* of human beings is limited to the things they need. The Civil Code can be made to work for this system, but only by forcing its concepts to play a double code: a modest, if fairly traditional one for humans, while for juridical persons, their function is constantly distorted to become yet one more means of state discipline. Sadikov quotes Lenin's statement that "we do not acknowledge anything private in the economic sphere" (p.10). Perhaps the logical step is taken in the Eastern part of the pandects' homeland.

Trust (Trust Ownership) in the Federal Republic of Russia

[221] *HVSRSFSR* 1982 No.3, *9-1O (P. v. Rubinand Univermag).* See also *Postanovlenie No.l Plenuma Verkhovnogo Suda SSSR, HVS SSSR* 1985 No.3, 13 clause 19.

[222] See G. Eörsi, *Comparative Civil (Private) Law,* Budapest 1979 No.68, 153-155.

I. Trust Ownership (in Russian: doverit'elnaja sobstvennost) in Russia

A. The Law on Banks and Banking Activities in the RSFSR (Russian Socialist Federal Soviet Republic) was adopted on December 2, 1990, i.e., prior to the demise (dissolution) of the Soviet Union, which took place on December 30, 1991.

Article 5. Banking Operations and Transactions:

*"*Banks may perform the following banking operations and transactions*"*

Subarticle (k) of Article 5 states: „attract and place assets and manage securities on behalf of clients" (trust operations)."

*"*Trust*"* - has been, for decades, a species (pool) of industrial economic organisation in State ownership (*gosudarstvennoje sobstvennost*) in the former Soviet Union as well as in most "socialist" States both in Central and Eastern Europe and outside Europe.

The first act on trust in the Soviet Union was promulgated on June 29, 1927. This act constituted the legal basis of the activity of State-run industrial trust for decades.

B. During the privatisation process, however, the turn was interpreted differently.

On July 1, 1992, President Boris Yeltsin issued his Edict (Decree) on Organizational Measures regarding the Transformation of State Enterprises and Voluntary Associations of State Enterprises into Joint Stock Companies. This Presidential Edict (Decree) stated in Point 6 that the Property Funds of the subjects of the Russian Federation must transfer the blocks of stock in their possession on a contractual basis, specifically on trust.

Administration of State Property

Russian Federal Property Fund

*„*contract of trust*"* - what does this term mean exactly?

In his article "Trends in the Development of Russian Civil Legislation during the Transition to a Market Economy," published in the Review of Central and Eastern European Law (1993), Dozortsev expressed strong criticisms regarding these developments. Research Center of Private Law in Moscow also heavily opposed the adoption of the trust as one form of ownership (*sobstvennost*) in Russia. This Center issued a contrary opinion regarding the viability of adopting trust ownership in December 1992. The above opinion played a substantial role in that, finally the drafters of the new Russian Civil Code rejected the insertion of trust ownership into the text of the Civil Code.

C. On Trust Ownership (Trust) - Presidential Edict (Decree) Consisting of 24 Article

Edict of President Boris Yeltsin – issued on December 24, 1993 – based on the Presidential Edict (Decree) *"*On Legal Regulation in the Period of Constitutional Reforms by Stages in the Russian Federation*"*

Authorisation

Article 1: To introduce the institution of trust ownership into the civil legislation of the Russian Federation.

Article 5: "Any natural or juridical person … and also a foreign natural or juridical person, stateless person, or international organisation, may act as the founder of a trust unless otherwise established by the legislation of the Russian Federation."

D. The concept of trust ownership, known as *doverit'elnaja sobstvennost*, was widely debated but ultimately not adopted as an independent form of ownership in the new Russian Civil Code. This code consists of four parts and was implemented between 1995 and 2007. In Article 209 (Subsection 4) of Book One (Part One) – General Part – of the Russian Civil Code (*Grasdanskoe Ulozhenije*), we find only the Russian term *doverit'elnoje upravlenije* which entitles the partner of the owner (in Russian: *sobstvenn'ik*) to the administration ("operational' management") of the assets he is entitled to administer, i.e., to manage (*upravljatj*).

There is no transfer of ownership (like *traditio* as a derivative method of acquisition of ownership (*proprietas* or *dominium*) in Roman law). The trustee must manage the assets in the interest of the owner or of third person/s/. This construction partially resembles the *fiducia cum creditore* from ancient Roman law.

E. Some Historical Antecedents (Overview)

The idea of establishing Equity courts in Russia was inspired to a considerable extent by the Russian translation of the four-volume work *"*Commentaries on the Laws of England*"* (1765-1769) of Sir William Blackstone (1723–1780).

It should be mentioned that this fundamental work, viewed as a *"*Book of Authority*"* of William Blackstone, was translated into Russian by Semon Efimovich Desnitskii ("Father" or "founder" or "creator" of Russian jurisprudence), who studied law in Scotland, at the University of Glasgow between 1761 and 1767- and published at the end of the 18th century in Russia (Saint Petersburg). Desnitskii (b. ca. 1740, d. ca. 1789) started to teach law at the University of Moscow. He and Tret'iakov (1735 – 1776) were the first professors of law to lecture in Russian. (See: A.H. Brown: The Father of Russian Jurisprudence: The Legal Thought of S. E. Desnitskii. In: Russian Law: Historical and Political Perspectives. (Ed. by W.E. Butler) Leyden, 1974. 117-141.)

The empress (*tsarina*) Catherine the Great (1772-1796), during her reign in the 1770s and 1780s, intended to establish in the Russian Empire equity courts (in Russian: *sovestnij sud*). "Sovest" means in Russian "conscience".

Although Russian law has – historically seen – from time to time "flirted" with the concept of equity (*aequitas*) as known in the English common law, it was and still is wholly absent in both modern Soviet and Russian legislation. The same holds true for the Russian legal doctrine (jurisprudence). Notably, the English equivalent of the Roman concept of *aequitas* (*ius aequum*) is the term "natural justice".

The Russian legal scholars essentially adopted the Louisiana civil law trust (*fiducie*), which is similar to the Roman law concept of *fiducia cum creditore*. The most important characteristic of the Louisiana civil law trust is that it does not distinguish between legal title and equitable title. Legal ownership of the trustee does not differ clearly, i.e., strictly from the equitable ownership of the beneficiary. So far, it is quite different from the common law trust as known in the English common law.

26. Baltic Territories (Baltic States)

In the Baltic territories, which were part of the Russian Empire in the 19th century, the influence of the German Pandectist School is evident in the *Liv-, Est- und Curländisches Privatrecht*, composed in German. It remained valid in Lithuania, Latvia, and Estonia for some time, even after the First World War. (The *Svod Zakonov* was not valid in certain parts of the Russian Empire, e.g., in Poland, Finland, Bessarabia, and the Baltic territories.) This bulky code, comprising 4,600 articles, was compiled by the Pandectist Friedrich Georg von

Bunge (1802–1897) and was revised several times during Russian rule. It contains family law, the law of things, succession and obligations. It does not follow the system of Pandects in that it contains no general part. The reception of Roman law regarding its content took place in present-day Latvia and Estonia through the mediation of mostly Saxon settlers applying German municipal law.

In the interwar period, the Pandectist School significantly influenced the development of the Latvian Civil Code of 1937. Subsequently, when Latvia regained its independence in 1991, the legislature reinstated this Civil Code with minor amendments.

27. The Codification of Canon Law in the 20th Century

Urged by his bishops, and after several scholarly attempts in the field, Pope St. Pius X ordered in 1904 the codification of canon law in 1904. This initiative aimed to create a comprehensive synthesis of canon law, understood around the turn of the century, based on modern official principles. The work of codification primarily followed the system of the *Institutes* and was led by Pietro Gasparri (who later became Cardinal Secretary of State). The Benedictine friar Jusztinián Serédi, the excellent Hungarian canonist, later cardinal and prince-primate, was of great help in editing the sources. The *Codex iuris canonici* was promulgated by Pope Benedict XV in 1917.

The modernisation of canon law and the comprehensive revision of the code was first drafted by Pope John XXIII. After the Second Vatican Council in 1965, actual work began. The new *Codex iuris canonici,* breaking with the system of institutions with its seven-book structure, came into force in 1983[223] by Pope John Paul II. The Eastern Christian Church, united with Rome, was given a unified code by Pope John Paul II in 1990 under the title *Codex canonum ecclesiarum orientalium.*[224]

Concluding Remarks on Codification in Europe

It is worth contemplating why codification takes place. The historical impetus for it can be attributed to two primary factors. Firstly, it is clear that the law requires clarification. It has become too convoluted and difficult to understand. There are significant benefits in organising it. However, this reason has rarely stood alone. Usually, codification has followed the unification of a courier hitherto disunited, or it has been felt necessary to unify the law in a country which, although politically united, has been governed by – a separate legal system, each of which has extended over only a part of the country. – Germany, the latter by France, exemplifies the former case. Both are only varieties of the same general situation, namely, the desire to consolidate disparate legal frameworks into a unified system. We need not labour the point that the United States is in a position not very unlike that of France before the Revolution of 1789. There is significant variation in the laws across different states, which can create practical difficulties, particularly in areas such as commercial law and marriage and divorce laws. It is not up to us to determine whether the laws of the United States should be more unified than they currently are. All that can be added is that others have felt the need for

[223] See O. Bucci, *Il Codice di diritto canonico orientale nella storia della Chiesa*. Apollinaris 55 (1982) 370-448

[224] See C. Salinas Araneda, *El derecho romano en el Código de derecho canónico de 1983*, Revista Chilena de Historia del derecho 17 (1992-1993) 157-163

unification and that that desire lies at the back of the movement to unify commercial law in the Uniform Commercial Code.

No person considering the possibility of codification needs to feel that they are committed to any particular method or type. Some countries, such as Switzerland, have delegated the task of codifying to a single person, thereby achieving consistency in style. However, they have insisted on committees or parliament revision in the final stages. Others, for instance France, have preferred to delegate the task to a committee. Any combination of the two methods is, of course, possible. The types of codes are also various. The German code, perhaps the most carefully made of all codes, is a collection of concepts, principles and rules of the most coherent kind. An attempt was made to achieve such completeness of organisation that for every legal question, some solution could be found in the code. Accordingly, the code resembles the formulation of a philosophical system.

The drafters appeared to operate on the principle that addressing enough fundamental legal questions would provide adequate guidance for resolving subsequent issues. The result is that there are many gaps in the code, which have been filled in later by the commentators and the courts. On the whole, the French code has worked very well in practice. It has given enough guidelines to the courts without binding them unduly to its language. On the other hand, it has proved rather stiff and, in some ways, awkward to work efficiently. The French Civil Code, on the other hand, may be described as episodic in the sense that it provides solutions for all the more important questions that occurred to the compilers and were thought by them to merit solution, such as following old methods of thought in new circumstances. A third and very celebrated code, namely, the Swiss Civil Code, is characterised by extremely simple language – intelligible, for the most part, to the ordinary layman. It has also proved extremely successful and had great influence outside Switzerland. The drafters had no option regarding style, for they had to provide a code that could be used to affect both by the highly sophisticated lawyers of a city like Zurich and the lay judges of the old Forest Cantons, for the most part, peasants. Accordingly, a modifier has a choice not only of method but also of style.

They also have a choice in the matter of completeness, though if they aim at including every bit of detail which is contained in the existing law, they will, in fact, achieve a restatement rather than a code. Hitherto, all codes have aimed at some measure of abridgement, that is to say, the laying down of principles and rules of some breadth, and have omitted as far as possible the application of those rules or principles, leaving it to the interpretation of the commentators or the courts. They have, at the same time, tried to state the role or principle in such form that there should be little doubt of their interpretation. While acknowledging the absence of attempts at completeness, it should be noted that the measure of completeness may vary considerably among different codes. In other words, some are more complete than others. In particular, three points must be made. (a) Not all laws of a country requires codification. In France, for example, the general part of administrative law is not codified at all but exists in a form comparable to that of common law or equity. (b) Even inside a civil code, certain topics need not be dealt with. For instance, if the general law of contracts is adequately dealt with, there is no need to provide rules for all the particular (specific) contracts. In France, indeed, insurance was first summed up in statute as late as 1930. (c) The amount of detail may be very small indeed. Thus, in the French Civil Code, the law of torts is regulated in as few as five articles, whereas in German law, there are over twenty articles, and the draft code of torts, which Sir Frederick Pollock drafted for India, ran into some hundreds of sections. Hence, a would-be codifier has ample choice in the matter of completeness.

Closely related to completeness is the size of codes. Most codes are quite short. The normal scale seems to have been set by the French Civil Code of 1804. It has 2,281 articles. The German Civil Code, which came into force in 1900, comprises 2,385 paragraphs, making it

considerably longer than the French articles. The Swiss Civil Code and code of obligations comprise a total of 2,159 paragraphs, which are essentially of the same length as the French articles. The Austrian Civil Code of 1811 is decidedly shorter, having only 1,502 articles. We have not undertaken to count the number of sections in the Restatement, and indeed, it would be difficult to compare it with the number of articles in the various codes. Nevertheless, it is instructive to note that the Restatement of Contracts contains 609 sections, compared to 269 articles in the French Civil Code, 270 in the German Civil Code, 156 in the Swiss Civil Code, and 79 in the Austrian Civil Code. Evidently, the American scale is considerably larger than that of the various codes. In fact, it is probably much greater than the figures suggest. This is partly because the sections are generally much longer and also because additional material may be included in other restatements. We have chosen contract law because, on the whole, this area of law does not differ greatly in the different systems of law. There is no compelling reason why an American code should not adopt the scale of the Restatement rather than that of the European codes; and indeed, the Argentine Civil Code is about twice as long as the German. However, it would be misguided to consider vast compilations such as Corpus Juris of American Jurisprudence as a code. Comparable compilations exist in civil law countries in the form of commentaries or comprehensive scholarly works.

It is indeed rather obvious that no continental European lawyer works merely with their code. Ultimately, their task is to interpret the code while making use of several very important aids to interpretation, which in practice, enjoy almost as much authority as the code itself. The oldest of such aids are the great commentaries and other works written by professors. However, it is quite a mistake to think that they alone enjoy authority. No court decision is binding on any other court; indeed, it is even possible for an inferior lower court to overrule a higher court decision. However, as the reporting of decisions has become more efficient, they have acquired substantial persuasive authority. The decisions of the *Cour de Cassation* have, in practice, become almost as binding as those of any court in a common-law country. Thus, to differentiate between code countries and case law countries is, in practice, quite false. All countries with advanced codes have a great deal of case law and attach much authority to it, whereas most common law countries have practical codes, such as the Uniform Sales Act. Thus, in a country such as France, it is always necessary to examine the ways in which the codes have been interpreted by the courts. The exact status of what the French call *doctrine,* namely, non-judicial writings, is very uncertain at present, but it is undoubtedly quite great – probably greater than the authority of a book like *Williston on Contracts* or *Scott on Trusts.* Thus, if an American jurisdiction were to adopt a civil code, there would probably be little to no change in the use of decisions or textbooks.

It is a general understanding in common law countries that adopting a code makes the law less flexible, and indeed, sometimes it is even thought that a code is unchangeable, just like the "laws of the Medes and Persians." In fact, flexibility does not seem to depend on the presence or absence of a code. Codes can be interpreted in such a way as to be inflexible. On the other hand, they can be the basis of a very flexible legal system. Even the German Code, which was in general intended to provide a very firm basis for future interpretation, contains what has been called "supereminent principles", such as the famous paragraph that provides that obligations must be performed in accordance with good faith and commercial use. Under the guise of this paragraph, many modifications have been made to the law of contract. The French Code, which was deliberately drafted with flexibility, has permitted far more extensive changes. For instance, it is evident that the compilers thought that a third-party beneficiary should not, in principle, be allowed to sue on a contract, even though they allowed an exception. In fact, this exception has effectively superseded the rule. Today, the governing principle is that a third-party beneficiary can sue. This stands in contrast to the remarkable

resistance with which English professional orthodoxy has borne the beneficiary's action. In this instance, at least, the case law system has proven much less flexible than the code system. It should not be concluded that case law is invariably inflexible.American case law is generally flexible and English case law is not as inflexible as our previous example might suggest. Nevertheless, the code systems have one great advantage: their judges can always go back to the code's text for an authentic statement of fundamental principles, whereas a common law judge must often feel adrift if not anchored to prevailing case law. Conversely, while it may be more difficult to modify first principles under a code than under a common law system. On the whole, however, this has not generally proved to be the case in practice.

In any case, there is no basis whatsoever for the notion that a code is immutable. While a civil code does provide something akin to a constitution for private law, and one does not include in a civil code provision expected to have to change over the next few years. Indeed, it has been said that the Civil Code is the only permanent constitution that France has known since 1804. Nevertheless, the Code has undergone modifications. By 1930, over 700 of its 2,281 articles had been amended, particularly in family law, including matrimonial property law. Similar substantial alterations have occurred in the German Civil Code. In particular, the old law on married women's property, which gave a very marked predominance to the husband, could not be reconciled with the provision of the German Basic Law (*Grundgesetz*) mandating gender equality; and many alterations have been made in the code to align it with that constitution. If a code is less likely to be altered than an ordinary statute, this likely stems from its deliberate construction to contain only those rules and principles expected to remain stable. However, the code is only a statute like any other statute and can be altered just as easily. There is no doubt whatsoever that French and German laws are much easier to use than they were before the adoption of the French and German civil codes, quite apart from the territorial unification of law the codes brought about. Nevertheless, a code is not a panacea. One must not expect too much of it. Furthermore, if the law on a topic rresists expression as a series of general principles, there is no t much point in trying to codify it. In some instances, concerns arise that codification may be premature and even dangerous, though we have seen that in a case law system doctrine may suffer from premature doctrinal rigidity. When a code becomes old, like the French Civil Code, even if it is amended from time to time, it may ultimately generate a type of law not very different from a common law system.

Part IV

The Influence of European Civilian Tradition on Countries Outside Europe

(A) North America

1. The United States of America

a) The Influence of European Private Law on Legal Development in the USA

It is a lesser-known fact that the development of law in the United States has been influenced not only by English common law but also by European private law founded on Roman principles. Let us examine the impact of English, Spanish, and French law on legal

development in America and the relationship between American jurisprudence and European law and jurisprudence.

The legal system and judicature of the American colonies of the British crown were originally based on the English common law, which, in turn, borrowed several elements of Roman law, especially regarding the practice of the ecclesiastical courts concerning matrimony, divorce, testaments and the law merchant.[225]

(i) The Role of European Private Law in the Legal Development in Louisiana[226]

The state of Louisiana was ruled by the Spanish and French until its transfer to the United States in 1803. The state promulgated its first Civil Code in 1808. The code was written in French and was translated into English later. Most of its passages and structure were based on the draft (1800) and final version (1804) of the French *Code civil.* Its editors, one of whom was Edward Livingston, an outstanding figure, also took notice of Spanish law to a lesser extent. The second code, put into force in 1825 (written in French and English), also relied on the works of Domat, Pothier, and Toullier, as well as directly on the Digest.

Despite revisions beginning in 1979, the third civil code (the one of 1870 titled Louisiana [Revised] Civil Code) continues to be based on Roman traditions mediated by the French *Code civil*. However, the impact of common law is already stronger in the case of certain legal institutions such as representation (contractual agency).

The Reform of Louisiana's Civil Code

1. The private law system of Louisiana is based on the Civil Code of 1808, which has been modified several times by the state's legislature. Governor William Claiborne's intention to subordinate the law of Louisiana – the state that joined the United States of America in the December of 1803 – to common law was not successful. Despite Claiborne possessing – by the edict of President Thomas Jefferson - all rights previously held by the Spanish Governor

[225] M.H. Hoeflich, *Roman Law in American Legal Culture,* TLR (1992)

[226] J. H: Tucker Jr., *source books of Louisiana Law,* TLR (1932-33); H.F. Jolowicz, *The Civil Law in Louisiana,* TLR (1955); A. Tate Jr., *Civilian methodology in Louisiana,* TLR (1970); R. Batiza, *The Louisiana Civil Code of 1808. Its Actual Sources and Present Relevance,* TLR (1971/1972); Idem, *Sources of the Civil Code of 1808. Facts and Speculation,* TLR (1971/1972); A. Tate Jr., *The Role of the Judge in Mixed Jurisdiction: The Louisiana Experience,* in: the Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions, ed.: Joseph Dainow, (Baton Rouge 1974); A.N. Yiannopoulos, *Louisiana Civil Law System,* (Baton Rouge, 1977); Idem, *Louisiana Civil Law: A Lost Cause?,* TLR (1980); R.H. Kilbourne, Jr, *A History of the Louisiana Civil Code. The Formative Years, 1803-1839,* (Baton Rouge, 1987); V.V. Palmer, *The Death of a Code – The Birth of a Digest,* TLR (1988); S. Symeonides, *An Introduction to the Louisiana Civil Law System,* Baton Rouge, 1988); Sh. Herman, *The Influence of Roman Law upon the Jurisprudence of Antebellum Louisiana,* (Stellenbosch Law Review 3, 1992);A.N. Yiannopoulos, *Two Critical years in the Life of the louisiana Civil Code: 1870 and 1913,* LaLR (1992); Sh. Herman, *The Louisiana Civil Code. An European Legacy for the United States,* (New Orleans, 1993); K. Vetter, *Louisiana: the United States' Unique Connection to Roman Law,* (LLR, 1993); J. Zekoll, *Zwischen den Welten – Das Privatrecht von Louisiana als europäisch-amerikanische Mischrechtsordnung. (*ZfvgIRW, 1994); Sh. Herman, *The Louisiana Civil Code: A European Legacy for the United States,* in: European Legal Traditions and Israel. Essays on Legal History, Civil Law and Codification, European Law, Israeli Law, ed: A.M. Rabello, Jerusalem (1994); Idem, *Der Einfluß des römischen Rechts auf die Rechtswissenschaft Louisianas vor dem amerikanischen Bürgekrieg,* ZSS (Rom. Abt.) 1996; A.A. Levasseur, *The Major Periods of Louisiana Legal History,* (LLR, 1996); V.V. Palmer, *Two Worlds in One: The Genesis of Louisiana's Mixed Legal System,* (in: Louisiana: Microcosm of a Mixed Jurisdiction, ed: V.V. Palmer, New Orleans, 1999);A.N. Yiannopoulos, *Civil Law system: louisiana and Comparative Law,* (Claitor's, 1999); V.V. Palmer, *Louisiana*, (in: Mixed Jurisdictions Worldwide. The Third Legal Family, Cambridge, 2001); John A. Lovett, *Another Great Debate?: The Ambiguous Relationship Between the revised Civil Code and Prerevision Jurisprudence as Seen through the Prytania Park Controversy,* LLR (2002)

and the Intendant of the territory, they could not ignore the majority population's wish that *common law* [227] should not replace civil law. Despite the antipathy regarding common law – although indeed a century and a half later - the legislature of Louisiana state accepted the *Uniform Commercial Code (UCC),* which regulates the unified, "harmonized" commercial laws of the USA as conceived by the *American Law Institute* (ALI), established in 1923, and the *National Conference of Commissioners on Uniform State Laws* („NCCUSL"), originated decades earlier, in 1892. LouisianaLouisiana's legislature did not adopt the provision concerning trading.

In its content, structure and form, the Louisiana Civil Code reaches back to the traditions of Roman law and builds a bridge between the United States of America and the countries with civil law traditions[228] In this context, it is important to point out that codification is not unfamiliar in countries with *common law* traditions [229] However, codification differs between countries with common law tradition and countries built on civil law tradition – notably, in the casuistic nature (*case law*). Regarding the United States of America, it is remarkable that a private law code, the Civil Code, almost succeeded in being adopted in the State of New York during the second half of the last century. In some states, like California (in 1872), South Dakota, North Dakota, Idaho and Montana, the legislature managed to codify private law. However, these codes only superficially resemble their European counterparts.[230]

2. The Civil Code of Louisiana is undoubtedly the most significant symbol of the European continent's legal traditions.[231] The peaceful coexistence of Romanistic Roman, Spanish and French – and common law traditions is characteristic of the state. Thus, the legal system of Louisiana – similar to Quebec, Scotland, South Africa and Israel – is a mixed jurisdiction as it features two different legal traditions. The „Digest of Civil Law Now in Force in the Territory of Orleans", adopted in 1808 by the state's legislature, is divided into three parts, just like the French Code Civil, promulgated in 1804.

In the first part - "About ersons" –the Louisiana lawmaker regulates legal entities, marriage, divorce, adoption, paternal authority, guardianship, etc. In the second passage, „About Things and the Various Changes of Property," the property of movables and immovables, personal and redial servitudes, neighbouring rights, and the restrictions of constructions are codified. In the third and most extensive part, "Different methods of acquiring possession of the things", the legislator regulates methods of the origins and cessation of the property of the citizens, inheritance, legitimate inheritance and inheritance relying on final arrangements, donations, delicts, properties of special nature, and contracts. The technical terms of the code are based

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[227] Eisenberg gives a nice summary of the nature of the common law – more precisely, the legal systems built on common law. See M. A. Eisenberg, *The Nature of the Common Law*. Cambridge, Mass. passim.

[228] Regarding the difference between legal system and legal tradition, see J. H. Merryman , *Civil Law Tradition*. Stanford, 1969. p. 1.

[229] See J. H. Tucker, jr., *The Code and the Common Law in Louisiana*. In: The Code Napoléon and the Common Law World. New York, 1956. p. 17.

[230] See L. Friedman, *A History of American Law*. 2nd ed. 1985. p. 405. Also see: M. Reimann, *The Historical School Against Codification. Savigny, Carter and the Defeat of the New York Civil Code*. The American Journal of Comparative Law 37/1987/ 95. o. and A. Földi – G. Hamza, *History and institutions of Roman law*. 5th edition. Budapest, 2000. p. 126.

[231] The following works are fine, as well as the overall reviews of the *Louisiana Civil Code*: S. Herman – D. Combe – T. Carbonneau, *The Louisiana Civil Code: A Humanistic Appraisal*. New Orleans, 1981. and S. Herman: *The Louisiana Civil Code: A European Legacy for the United States.* Louisiana Bar Foundation, New Orleans, 1993.

on Spanish and French terminology, which rest on Roman law traditions.[232] The influence of the works of Jean Domat (1625-1696) and Robert-Joseph Pothier (1699-1772) Civil Code of Louisiana is particularly evident. Instead of *life estate* (which is well known in common law), the private law of LouisianaLouisiana uses *ususfructus*, and *nu-propriété* instead of *remainder* – using French terminus technicus. *The Louisiana Civil Code* regulates the inheritance in cases of common death (*commorientes*) – similar to the French *Code Civil* /art. 720-722/ - recipiating the difficult and fairly unrealistic regulation based on age and sex (*praesumption of survivorship*).[233]

The creators of the Louisiania *Civil Code* consider the code to be the „solemn (?) manifestation of the legislative will", in harmony with the French doctrine of the time. In this respect, the influence of the French *Projet du gouvernement* from 1800 is evident. The *Louisiana Civil Code*, which is far more extensive than the French *Code Civil* (containing more than 3,500 articles compared to the French Code's 2,281 articles), is modern in terms of its abstract article formulation and is thus – using the expression of the Romanist Jean-Étienne-Marie de Portalis (1746-1807) – *féconds en conséquences*. This peculiarity arises from the fact that most of its articles remain unchanged despite numerous revisions. French legal traditions were not limited to the *Code Napoleon*. The famous work of Jean Domat, *Traité des lois. Loix civiles dans leur ordre naturel*, remained a subject of the Louisiana Bar examination in the early twentieth century, as did the Institutions of Justinian.[234]

3. Louisiana's traditions date back to 1712, when Antoine Crozat received monopoly trading rights (in business), in the territory. The charter from the French King ordered the *Coutume de Paris* (dating to the 17th century) to be considered in force in Louisiana. The withdrawal of the monopoly charter in 1717 does not change the fact that the French law remains in force in the state.

Of course, the *Coutume de Paris* is the expression of society's division by orders. However, many of its legal institutions were adopted by the French *Code Civil* and the Louisiana Civil Code. Notably, the state's company law incorporated the *sociéte en commandite* , recognised by the French *ordonnance* of 1673.

The year 1769 marked a break in the continuous survivorship of French legal traditions. In this year, Don Alejandro O'Reilly introduced the institutions of Spanish law in Louisiana. In this respect, Louisiana shares the same position in legal terms as the other Spanish colonies. The norms and provisions of the *Recopilación de las Indias*, the Castilian *Nueva Recopilación,* and the *Siete Partidas* (dating back to the 13th century) came into force. The *Curia Filipica* –considered the commentary of the Spanish acts – is gaining importance alongside these juridical sources. O'Reilly's code – more accurately a consolidation than codification — systematised the previous legal sources.

In October 1800, Spain ceded Louisiana to France through the Peace Treaty of San Ildefonso. The actual transfer occurred three years later. Consequently, there was only little time (20 days) to introduce French law under French sovereignty – according to the convention signed

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232 The monography of Vetter serves as a summary of the connection between the Roman law and the *Louisiana Civil Code.* See B. K. Vetter: *Louisiana: The United States' Unique Connection to Roman Law*. Louisiana Law Review 39 (1993)

233 See K. Venturatos Lorio – F. W. Swaim, Jr: *Louisiana Successions and Donations. Materials and Cases.* Second Ed. Clearwater, Florida 1992. p.s 103-131

234 See *Rules for admission to the Bar*. West Publishing Co., St. Paul, 1913. p. 62

April 30 1804 regarding Louisiana's transfer to the USA, as France handed it over that December. Scholars debate the extent to which the French Colonial Prefect, Laussat, could adjust Louisiana's law to French law. To this day, there is still no consensus on whether the articles of the Louisiana Civil Code are rooted in French or Spanish law.

The resolution approved by the *Territory of Orleans'* legislature is particularly important, as it maintained that in Louisiana – at this time, the *District of Louisiana* was not under the previous territory's jurisdiction – the Spanish and Roman acts in effect at the time of the *Louisiana Purchase* (1803) would remain in force. The manifest signed by Sauvé, president of the legislature's council, and twelve legislators, published in the newspaper *Le Telegraphe*, is a compelling document demonstrating unconditional adherence to Roman, Spanish, and French traditions.

4. In recent decades, intense debate has emerged regarding the sources of the Louisiana Civil Code. The professional debate between Professors Batizal and Pascal is well-known. Analysis of this controversy leads to the conclusion that the *Louisiana Digest*—approved by the legislature in 1808 – is not merely a copy of the French *Code Civil*. The *Louisiana Digest* represents the first attempt to consolidate the legal system, with the *Louisiana Civil Code* of 1825 being an improvement upon the Digest. The *Louisiana Civil Code* is more extensive than the Louisiana Digest (containing more than 3,522 articles compared to the Digest's 2,160) and regulates conditions that were not part of the Digest's scope.

It is remarkable that the effectiveness of the legal sources originating from the time before the *Louisiana Civil Code* (Spanish, French and Roman legal collections and rules, maxims and regulations) remained open for a while.

The Reynolds v. Swain case from 1839 is notable, wherein the Louisiana Supreme Court ruled that the laws of Rome (sic! H.G.), Spain, and France lost their effect, provided that the legal principles expressed in them were not confirmed by judicial decisions.

In 1870, state legislature thoroughly revised the *Civil Code*. Analysis of individual legal institutions (property, contracts, etc.) demonstrates significant similarities – and sometimes complete parity – with similar common law institutions, owing to shared historical origins. In recent decades, common law's influence has become increasingly apparent during Civil Code revisions, showing a growing tendency in legal practice as well.

In 1870, the Civil Code was generally revised by the state legislature. During the analysis of the single legal institutions (property, contracts, etc), the significant resemblance is demonstrable in many respects with the similar institutions of common law. The resemblance – sometimes full parity – originates from common historical events. In the last decades, the *common law* gaining ground during the Civil Code's revision is noticeable. This advancement of the *common law* shows a growing tendency in legal practice as well.

The Louisiana Law Institute, founded in 1948, currently functioning in Baton Rouge (capital of the state) – which built a fruitful cooperation with the School of Law functioning within the Louisiana State University – plays a prominent role in the operations of revising the Civil Code. As a result of the code's revision the Louisiana Civil Code was supplemented with a fourth book consisting of the law of conflicts. Trading was also the focus of a thorough

revision. The work on reforming the law of succession and the law of leasing or renting is still ongoing progress.[235]

(ii) European Private Law and Legal Development in the Other States of the USA

The presence of Roman law in America can be exceptionally well documented in the case of Virginia, the most outstanding of the colonies. Thomas Jefferson, the author of the Declaration of Independence (1776) and a later president, had a profound understanding of Roman law and frequently referred to it throughout his career as a lawyer. George Wythe (1726–1806)[236], the first professor of law in Virginia and Edmund Pendleton, a renowned judge of his age, considered Roman law the basis of teaching law at the universities and often referred to it during their everyday practice as judges. In a statute regulating lawful succession, accepted in Virginia in 1785 (*Virginia Succession Act*), drafted by Jefferson, the impact of Justinian's Novel 118 can be directly felt.[237] Reference to Roman law also played a role in the American efforts to achieve independence from the United Kingdom and these efforts manifested themselves in the sphere of law as well. The decisions of the federal Supreme Court often rested upon Roman law and the legal practice of Judge Joseph Story and his colleagues in the first decades of the 19th century.

In the southern and western states (such as Texas, New Mexico, Arizona, California, Utah, Nevada, and certain southern regions of Colorado), Roman law remained valid almost until the middle of the 19th century as a result of the Spanish influence. Common law was officially introduced in Texas in 1840, but the Spanish and Mexican water and mining laws resting on Roman law continued to be prevailing law until 1866. Common law was introduced in California in 1849 and in New Mexico in 1876.

The Role of European Jurisprudence and Codification

In the beginning, English legal writings and the German Pandectist School mediated Roman law to American jurisprudence. Three phases of the history of American jurisprudence have to be dealt with here in detail, namely, a) the period of the Commentators, b) codification and c) consolidation. Many in the 19th century urged the codification of private law on the basis of Roman legal traditions.

a) Jeremy Bentham (1748–1832) took the lead in the British movement for codification. The missing codes were replaced in the United States both on federal and state levels by synthesizing commentaries nicknamed “mini-codifications”, a model of which was Blackstone's *Commentaries on the Laws of England.* It has to be noted that Blackstone’s *Commentaries* became the basis of lectures, particularly at the College of William and Mary in Virginia. A new edition of the *Commentaries* was published in 1803 by Professor St.

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[235] See R. Knütel, *Einflüsse des Louisiana Civil Code in Lateinamerika*. Index. Quaderni camerti di studi romanistici 25 (1997) p.s 117-143

[236] Wythe also taught Roman law to his students, such as Thomas Jefferson and James Monroe. Roman law meant for him the rational basis of law, and he considered Justinian's codification a model for systematising case law in the United States.

[237] It cannot be excluded that Jefferson took into consideration by drafting the *Virginia Succession Act* the Danish Code (*Danske Lov*) of 1683. See D. Tamm: *The Danish Code of 1683*. An Early European Code in an International Context. Scandinavian Studies in Law 28 (1984) 172.

George Tucker (1752–1827). Tucker annotated Blackstone's *Commentaries* with reference to the American authorities.

Joseph Story (1779–1854), the father of "American equity", wrote outstanding commentaries on various legal institutions in the wake of Blackstone.[238] Story always paid attention to the institutions of Roman (civil) law and relied on its rationality. In his commentaries that introduce the individual legal institutions in a systematising manner in the nature of textbooks, Story often refers to the *Corpus iuris civilis* and the outstanding Romanists of the European continent. Story envisaged codification with reservations and advocated for a moderate form of codification akin to consolidation in the Justinian sense.

James Kent's (1763–1847) remarkable commentaries on American law ("Commentaries on American Law I-IV", 1826–1830) held the authority almost of a code. Kent's *Commentaries* became a classic and were periodically re-edited until 1899. It should be emphasised that the most famous twelfth edition, published in 1873, was prepared by O. W. Holmes Jr. They often referred to Roman law and were intended by their author to become a "national Blackstone". The codification trend strengthened in the United States during the 1820s, with William Sampson (1764-1836) as a prominent advocate. American legal reformers sharply criticised the precedent system (*stare decisis* doctrine) and viewed the *Code civil* as an ideal codification model. Hugh Swinton Legaré argued that Roman law's synthesising capacity made it suitable for codification, contrasting with "incoherent" common law. David Hoffman, the University of Maryland's first law professor, shared this view.

David Dudley Field (1805-1894), the codification movement's most renowned representative, called Justinian's codification ”a great achievement of human genius". At New York State's 1846 constitutional assembly, Field proposed enacting a general civil code, arguing its purpose would match Justinian's era: systematising prevailing law while eliminating deficiencies. His common-law codification draft comprised four books, following Gaius's institutions' structure and showing influence from both the *Code civil* and Louisiana Civil Code. The Digest directly influenced several passages and thirty-four regulations. Though New York State[239] rejected Field's code, it significantly influenced other jurisdictions, with its contract regulations implemented in California, Georgia, Montana, South Dakota, North Dakota, and Idaho.

Individual state private law codes (California 1872; Georgia 1860; Idaho 1887; Montana and the Dakotas 1865) reflected Roman law's impact in structure and terminology. California's legislature adopted a Civil Code in 1872, primarily based on Field's draft, which remains valid after several revisions. The California Law Revision Commission, established in 1953, coordinates revision work. The code's four-part structure (persons, property, obligations, and general regulations) reflects Roman law's influence, particularly in Part Four's legal maxims.

Oliver Wendell Holmes Jr. (1841-1935), a Roman law expert and Harvard professor, advocated for law compilation. Influenced by K.A. von Vangerow and Sir H. S. Maine,

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[238] Story was the author of the *Commentaries on the Law of Bailments* (1832), the *Commentaries on the Law of Agency* (1839), and the *Commentaries on the Law of Partnership* (1841). His most famous work dealt with private international law under the title *Commentaries on the Conflict of Laws* (1834), in which he often referred to works by old European legal scientists (humanists and followers of Natural Law).

[239] The opponents of the code (especially James Carter) criticized it primarily because they did not hold it suitable for systematizing law. The polemics reminds one of that between Savigny and Thibaut.

Holmes avoided antiquity imitation and positivist conceptual jurisprudence pitfalls. His influential book *Common Law* (1881) remains a legal history landmark.

Friedrich Kessler, a German *Pandectistic* expert, introduced Jhering's Roman law-based *culpa in contrahendo* theory into the *Restatement of Contracts*.

bc) Inconsistent case law necessitated standardisation or consolidation undertaken by the Law Reform Movement. The 1952 Uniform Commercial Code (UCC) represents the most significant consolidation achievement, unifying federation-wide commercial law. The UCC, dubbed “Llewellyn's code”, advanced beyond case law restatements. Chief Reporter Karl N. Llewellyn (1893-1962), an American Realist Movement leader and German law expert, incorporated Windscheid's conditions theory (*Voraussetzungslehre*) and Jhering's influence while applying European codification methods.[240]

2. Canada[241]

Quebec, ceded to France by Great Britain in 1763, retained its previous law. The 1866 *Code civil de la province de Québec* (originally Civil Code of Low Canada) followed the French *Code civil* model in its first three books. Its fourth book innovatively unified civil and commercial law. While incorporating common law influences, the code's editors relied more on the valid *Coûtume de Paris* and Pothier's works than Code civil compilers.

The new 1994 *Code civil du Québec* took four decades to create. Its ten books follow Roman law-based European traditions. The fifth book on obligations unifies civil and commercial contract law under the *code unique* concept.

A) Central America and South America[242]

a) Introduction

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[240] As to the future of codification in the United States see: Sh. Herman, *Minor Risks and Major Rewards: Civilian Codification in North America on the Eve of the Twenty-First Century,* TECLF (1993); Idem, *The Fate and the Future of Codification in America,* in: Essays on European Law and Israel, ed: A.M. Rabello, Jerusalem, 1996

[241] J.-G. Castel, *Civil Law System of Province of Quebec* (Toronto, 1962); L. Baudouin, *Les Aspects Généraux du Droit Privé dans la Province de Québec, (*Paris, 1967); J.E.C. Brierly, *Quebec's Civil Law Codification*, McGill Law Journal 14 (1968); P.A. Crépeau, *La Réforme de Code civil de Québec,* RIDC 31 (1979).

[242] H. Valladăo, *Der Einfluss des deutschen Rechts auf das brasilianische Zivilgesetzbuch (1857–1922)* (Rio de Janeiro, 1973); P. Catalano, *A mai is élő római jog: a világ nagy jogrendszerei és a latin-amerikai jog* [Roman Law Which is Still Alive. The Great Legal Systems of the World and Latin American Law], Tanulmányok a római jog és továbbélése köréből, vol. 1 [Studies on Roman Law and Its Survival] (Budapest, 1987) G. Hamza, *A magánjog kodifikálása Brazíliában* [Codification of Private Law in Brasil], AUB 29 (1987); S. Meira, *Direito romano e direito novo do Brasil. Existe un direito civil brasilerio?*, Estudios A. d'Ors, vol. 2 (Pamplona, 1987); G. Hamza, *Törekvések a magánjog újrakodifikálására Brazíliában* [Attempts to Recodify Private Law in Brasil], MJ 44 (1997); M. C. Mirow, *Latin American Law. A History of Private Law and Institutions in Spanish America* (Austin, 2004).

A) Most countries in Central and South America, former colonies of Spain, Portugal, France, the United Kingdom, and the Netherlands, have preserved Roman law traditions to the present day. Roman law served as the foundation for legal theory and education at universities. Roman law traditions prevailed even in some British colonies, particularly British Guiana. Regarding civil law codification, several sources played important roles alongside the French *Code civil*: Spanish colonial legislation (especially the *Recopilación de las Leyes de las Indias*), Spanish legal compilations serving as consolidation (the *Nueva Recopilación* and the *Novísima Recopilación*), the Spanish *Código civil*, the Austrian General Civil Code (ABGB), the Dutch *Burgerlijk Wetboek* (1838), the Portuguese Civil Code (1867), the German BGB, and the Swiss Law of Obligations (OR) and Civil Code (ZGB). The Italian *Codice Civile* of 1942 exercised considerable influence on civil and commercial codes and drafts during the second half of the 20th century.
B) Among the civil code models in these countries, the 1851 draft by Florencio García Goyena deserves particular attention, as it formed the basis of the 1889 Spanish Civil Code. Beyond the civil law traditions of the former colonial powers, the German Historical School of Law (the pandectist science) has played a substantial role in legal doctrine.
C) The draft civil code by renowned Panamanian Romanist Justo Arosemena (1817-1896) was based on Justinian's codification in its terminology. Although this draft never came into effect in either Panama (which belonged to Colombia until 1903) or Colombia, it influenced many Central and South American states during their private law codification. Arosemena, an outstanding constitutional law specialist, was among the first to engage in Latin America's private law integration process. In these efforts, he utilised legal doctrine and compilation experience based on Roman law traditions.
D) Under French influence, Central and South American countries adopted autonomous commercial codes (*código de comercio, code de commerce*) in the 19th century. One consequence of French influence is the persistence of the dualist concept, which resulted in commercial code autonomy.
E) We can also note the lesser-known fact that *ius Romanum* remains in force in a considerable part of Antarctica, to which two South American states – Argentina and Chile – claim rights, although these claims are not recognised by international law.

a) Central American and Caribbean States

Haiti

The Civil Code of Haiti (a former Spanish and, subsequently, French colony) came into effect in 1826. This code was also implemented in the Dominican Republic, encompassing the entire territory of the island of Hispaniola. The Haitian Civil Code was essentially identical to the French *Code civil* in both content and terminology. The codifiers incorporated certain legal institutions rooted in Haitian customary law and several local institutions concerning family law and the law of inheritance.

Notable among Haiti's legal framework is the Code rural governing land ownership, which was adopted in 1961 in accordance with local traditions. In Haiti, where the French *Code de commerce* was initially implemented, a new commercial code was promulgated in 1949. During its development, the codifiers drew upon the latest developments in commercial law codification both within and outside Europe.

Dominican Republic

The Dominican Republic, initially a Spanish and later a French colony, adopted the complete text of the French *Code civil* in French in 1845. Subsequently, in 1884, its Spanish translation replaced the French version. The commercial code was adopted that same year and has since undergone substantial amendments.

Mexico

Under Mexico's first federal constitution of 1824, the Federal Congress had limited jurisdiction, primarily in bankruptcy law. This framework meant that the adoption of private law codes fell within the competence of individual states and territories.

The first Civil Code of Mexico was established in the Free State of Oaxaca between 1827 and 1829, following the structure and content of the French *Code civil*. Subsequent Mexican civil codes (1871, 1884, and 1928) – though formally applicable only in certain territories due to the federal structure – served as models throughout the country. These codes do not directly reflect Roman law influences. The 1870 code, based on Justo Sierra's bill, was enforced only in the federal capital districts and Lower California (*Territorio de Baja California*). Its structure incorporated Roman law principles, Spanish colonial legislation, elements of the French *Code civil*, the Austrian Civil Code, the Civil Code of Piedmont, the Dutch Civil Code of 1838, and the Spanish Draft Civil Code of Florencio García Goyena (1851). The 1884 code, enforced in the same territories, represented more of a reform than a new codification.

Mexico's current federal structure, established by the 1917 constitution, remains in force. Consequently, each of Mexico's 29 states, two districts, and the federal capital district (Dis*trito Federal de Mexico*) maintains its own Civil Code. However, these 32 codes share substantial structural and content similarities.

The similarity among these codes largely stems from the influential role of the Federal District's Civil Code, which served as a model for other states and territories. This code, adopted on August 30, 1928, and implemented on October 1, 1932, underwent significant modifications in 1965 and 1977. Its development was informed by the German BGB, the Swiss Civil Code (ZGB), and the French-Italian draft laws on contracts and obligations from 1927.

Civil codes in force across Mexican territories can be categorised into four groups: a.) states where the legislation adopted the whole text of the code from 1928 – they are the majority; b.) states where the same code was adopted as well but with minor modifications; c.) states where the Civil Codes borrow a lot from the above-mentioned two laws; d.) states where the private law code is based on the version from 1884. The 1928 *Código civil* is structured as follows: introductory provisions (Articles 1-21), personal rights (Articles 22-476), property rights (Articles 477-1181), inheritance law (Articles 1182-1791), and the law of obligations (Articles 1792-3074). This code maintains Roman law traditions in its treatment of obligations, drawing most significantly from the French *Code civil* among modern codifications.

A new civil law codification was implemented in the Federal District (*Distrito Federal de Mexico*) in May 2000.

Mexico's 1857 constitution initially granted the Federal Congress authority only over commercial law codification principles. A unified federal commercial law framework required constitutional revisions in 1883 and 1884. Commercial law is now governed by the Commercial Code of 1889 (*Código de comercio*), which applies throughout the federation and has undergone multiple revisions. Business organisations are regulated by a 1934 statute, which was subsequently modified in 1980 and 1982.

Costa Rica

Costa Rica adopted a General Code (*Código general*) encompassing private and criminal law and their respective procedural provisions. This code's private law section, unique in its comprehensive nature, shows influences from the Bolivian *Código civil* (1830).

The first dedicated civil code, adopted in 1886 and implemented in 1888, contains traditional private law regulations based on European legal traditions. This code remains in force, though family law provisions (formerly part of the *Código civil*) have been regulated separately since 1934.

Commercial matters are governed by the 1964 *Código de comercio*, which has undergone several recent modifications. Only the maritime commerce provisions from the previous commercial code (1853) remain in effect.

Salvador

Salvador's Civil Code, implemented in 1860, reflects both French *Code civil* influences and Spanish colonial law traditions. Significant revisions occurred in 1928, 1937, 1955, and 1958, incorporating elements from the German BGB, Swiss Civil Code (ZGB), and Italian Civil Code (1942).

The current Commercial Code of Salvador was adopted in 1970 and implemented in 1971.

Honduras

Honduras adopted its Civil Code in 1906, following the French *Code civil*'s structure, which has remained largely intact through subsequent revisions. The current Commercial Code was implemented in 1950 and has been updated, particularly regarding business organisation regulations.

Nicaragua

Nicaragua's current Civil Code, adopted in 1904, underwent comprehensive revision in 1929 and continues to be updated in accordance with developments in European private law codification. The 1916 Commercial Code (*Código de comercio*) was substantially modified in 1949, with only minor amendments since then.

Panama

Panama, formerly part of Colombia, adopted its first Civil Code in 1916, which remains in force. The 1855 Chilean Civil Code significantly influenced its development. The Commercial Code was also implemented in 1916, with business organisation regulations added through laws enacted in 1927 and 1946. The commercial code has not been updated ever since that time.Guatemala

Guatemala's Civil Code, promulgated in 1936 and implemented in 1964, drew upon both the French *Code civil* and other significant European private law codes. A new Commercial Code was promulgated in 1970 and implemented in 1971.

Cuba

Cuba, a Spanish colony until 1898, implemented the *Código civil* simultaneously with Spain in 1889. This code remained in force during the subsequent U.S. administration, with the country's changing political orientation initially having minimal impact on private law.

Despite the 1959 political and economic transformation, the Civil Code formally remained in effect, though major revisions occurred in family and labour law. Socialist family law was adopted in 1975, and the Labor Code was implemented in 1985 following its 1984 adoption). Property rights and contractual freedom became significantly restricted.

A new socialist-oriented Civil Code was implemented in 1988, resembling other European socialist countries' civil codes in its selective coverage of classical private law areas. The 547-article *Código civil* comprises four sections. While lacking a traditional General Part, it includes 21 introductory articles under *Relación Juridica* serving a similar function. Cuba's Civil Code codifiers carefully preserved Roman law doctrinal traditions despite political changes.

The Spanish Commercial Code (*Código de comercio*) of 1885, initially applicable in Cuba, was repealed in the early 1960s following political and economic reforms.

b) South American States

Bolivia

The Bolivian Civil Code of 1830 was the first civil code enacted on the South American continent. While primarily based on the French *Code civil*, it also incorporated elements of colonial Spanish law, particularly regarding succession law, which derives from Roman law. The French *Code civil*'s prominence was due to the absence of a Spanish model civil code at the time of codification.

The Bolivian code subsequently influenced the development of the Peruvian Civil Code of 1851 and the Costa Rican Civil Code of 1841. The Bolivian Civil Code of 1845 was likewise a Spanish adaptation of the French *Code civil*. Later, the Italian *Codice Civile* (1942) served as the primary foundation for Bolivia's new Civil Code, which was promulgated in 1975 and implemented the following year.

In recent years, Bolivia has drafted a new *Código civil*. During its preparation, the drafters considered not only the civil codes of Central and South American states but also non-European Roman-Germanic laws. Bolivia also participated in the conference regarding the acceptance of the *Acta de Arequipa* (Arequipa Document), which established principles of private legislation. This conference was held in Arequipa, Peru, from August 4-7, 1999, with representatives from Argentina, Peru, and Puerto Rico in attendance.

Bolivia's first Commercial Code was promulgated in 1934. The current Commercial Code, enacted in 1972, took effect in 1977.

Chile

The Chilean Civil Code, promulgated in 1855 and implemented two years later, remains largely in force today despite various modifications. While its content shows significant influence from the French *Code civil*, its structure differs from the French model, notably in its lack of a General Part. One of its primary drafters, Andrés Bello (1781-1865), an expert in Roman law, incorporated Spanish legal doctrines based on Roman law traditions and German pandectistic jurisprudence, particularly Savigny's concepts. The code drew from multiple sources, including the French *Code civil*, the Austrian ABGB, the Louisiana Civil Code, the Prussian *Landrecht*, and the *Burgerlijk Wetboek* (1838).

The code's structure consists of a *Titulo preliminar* containing general provisions, followed by sections on personal law, real rights, inheritance law (including *inter vivos* dispositions), and contractual obligations. Bello's work is particularly noteworthy for its continued practical applicability despite significant changes in social relations.

This code served as a model for civil law codification throughout Central and South America, including Ecuador (1860), Venezuela (1871), Colombia (1887), and several Central American states including Nicaragua, Guatemala, Honduras, El Salvador, and Panama.

Chile's Commercial Code was promulgated in 1865 and implemented in 1867. This pioneering commercial code significantly influenced the commercial laws of Panama (1869), Guatemala (1877), Ecuador (1882), Colombia (1887), Honduras (1888), and El Salvador (1904). The *Código de Comercio* underwent comprehensive revision in 1983. Notably, business organisations are governed by separate legislation enacted in 1981.

Argentina

The Argentine Constitution of 1853 granted the federal government authority to legislate civil and commercial law at the federal level. This constitutional framework led to adopting the Argentine Civil Code in 1869 and its implementation in 1871, structured primarily on the French *Code civil* model. The code's author, Dalmacio Vélez Sársfield (1800-1875), a civil and Roman law expert, drew inspiration from multiple sources, including Pothier's work, Spanish legal doctrine, and the Chilean Civil Code. The code's text originated from Sársfield's draft developed between 1864 and 1869, incorporating principles from Augusto Teixera de Freitas's work on the Brazilian Civil Code (Es*boço de Código civil*). Additionally, Sársfield extensively studied the Prussian code, the *Allgemeines Landrecht für die preußischen Staat*en. The Argentine Civil Code is organised into sections addressing personal and family law, obligations, real rights, and inheritance law.

The code's flexibility in accommodating evolving jurisprudential interpretation initially precluded the need for comprehensive revision. However, reform efforts began following World War I. In 1926, Professor Juan Antonio Biblioni published a draft civil code that later informed the 1936 draft of the Argentine *Código civil*, though the latter was never adopted.

In 1954, Minister of Justice Jorge J. Lambiast was commissioned to develop a new civil code, but political circumstances prevented this reform. The Argentine Civil Code underwent revision in 1968 to implement planned reforms. Reform efforts resumed in 1987, with consideration given to adopting a monist concept. A 1993 draft was published in 1994, but the project (*Proyecto*) was not presented to the Senate. In 1995, a new committee was established to prepare further reforms. In December 1998, a new draft emerged incorporating the monist concept, and in July 1999, this draft, encompassing both civil and commercial laws (excluding maritime law), was submitted to Congress.

The Congressional legislation committee proposed additional modifications, but the draft remained unadopted. In April 2001, nine of thirteen committee members resigned, further delaying the adoption process.

Paraguay adopted the Argentine Civil Code in 1876. The code also influenced Uruguay's civil code and served as a reference for Spanish *Código civil* drafters. Its influence extended throughout Central and South America.

Argentina's first Commercial Code was adopted in 1862, with Dalmacio Vélez Sársfield and Eduardo Acevedo playing instrumental roles in its development. The Código Comercio of 1889 replaced this initial code. Subsequent modifications included significant changes to business organisation regulations through legislation enacted in 1972.

Colombia

Colombia's first civil code, known as the *Código civil* de Santander (named after the province), was promulgated in 1858 and implemented in 1860. The subsequent Civil Code, adopted in 1873 and promulgated in 1887, reflected significant Chilean Civil Code influence,

as did its predecessor. The current Colombian Civil Code, adopted in 1933, has undergone various modifications, including the repeal of civil law society provisions in 1995.

The Commercial Code of 1971, implemented the following year, has experienced several amendments to its business organisation provisions since implementation.

Ecuador

Ecuador adopted its Civil Code in 1861, drawing primarily from the Chilean *Código civil*. Later revisions incorporated elements from both the Italian *Codice Civile* of 1942 and the Swiss Civil Code and law of obligations. Despite these influences, Ecuador did not adopt the monist concept.

The Commercial Code (*Código de Comercio*), implemented in 1906, has undergone multiple revisions.

Uruguay

The Civil Code of Uruguay (*Código civil de la República Oriental del Uruguay*), promulgated in 1868 and implemented in 1869, has undergone numerous revisions. The code's editor, renowned jurist Tristán Narvaja (1819-1877), drew inspiration from Eduardo Acevedo's draft (1847-1849, published 1852) and Andrés Bello's Chilean Civil Code.

The Commercial Law of 1865 remains in effect, though its business organisation provisions have been modified.

Paraguay

Paraguay adopted the Argentine Civil Code of 1869 in 1877. This was replaced by a new code adopted in 1985 and implemented in 1987, which reflects pandectistic traditions. The current Civil Code is unique among Central and South American codes in partially following a unified model regulating both civil and commercial law, including business organisations and banking transactions.

The Commercial Code of 1889, which replaced the 1846 *Código de Comercio* and was implemented in 1891, continues to govern unregulated matters. This code, modelled on the Argentine Commercial Code, addresses commercial law matters tangentially.

Peru

Peru's first Civil Code, published in 1851 and implemented in 1852, clearly shows the influence of Bolivia's 1830 *Código civil*. The 1936 Civil Code incorporated elements from Argentine and Brazilian codifications, as well as the German BGB and Swiss ZGB.

The current Peruvian Civil Code (1984), implemented in 1985, represents one of Latin America's most modern civil law codifications. Although heavily influenced by the Italian *Codice Civile* (1942), Peru maintained its independent Commercial Code. Recent developments indicate a trend toward the civil code's primacy as *lex generalis* in commercial law regulation, suggesting a movement toward the monist concept.

The Commercial Code of 1902, which succeeded the 1853 *Código de Comercio*, remains in force, with significant modifications to business organization regulations made in 1966.

Venezuela

Venezuela's legal development includes seven civil codes. Julián Viso's 1854 draft civil code was rejected by the legislature. The first adopted code, promulgated in 1862 and implemented in 1863, showed Chilean *Código civil* influence along with elements from Viso's draft and the 1851 Spanish Civil Code draft. This code, temporarily implemented under José A. Páez, lasted only four years before being replaced in 1867 by a new civil code reflecting the French *Code civil* influence.

Subsequent (i.e., the third) civil codes were enacted in 1873, 1880 (under G. Blanco's liberal government), and 1896 (under President M. Bustillos), with the latter incorporating Italian legal doctrine and more sophisticated terminology. The seventh civil code, adopted under President J. Vicente Gómez, remained in force until 1942.

The current Venezuelan Civil Code, adopted in 1942, primarily draws from the French *Code civil* while incorporating provisions from the Swiss (1907), Mexican (1928), and Italian (1942) civil codes. This code introduced concepts of unjust enrichment and moral damages while refining regulations regarding abuse of rights and objective responsibility. The *Ley de Reforma Parcial del Código civil* of 1982 substantially modified this code.

Venezuela's Commercial Code, adopted in 1919 and modified in 1955, has since undergone revisions only to its business organisation provisions.

Brazil

Roman law significantly influenced Brazilian civil law development, with initiatives for private law codification dating to the imperial period before the 1889 Declaration of Independence. Some scholars refer to Emperor Pedro I as the "Brazilian Justinian" due to his efforts toward private law codification.

Following independence in 1822, a law adopted in 1823 maintained the effect of Portuguese statutes promulgated before April 25, 1821, including the *Ordenações Filipinas* of 1603,

which regulated private law. The first Brazilian Constitution (1824), in its Article 179, mandated the creation of private and criminal laws based on principles of "justice and equity."

Augusto Teixeira de Freitas (1816-1883), commissioned by the Brazilian Government in 1857, authored the first organised compilation of private law (*Consolidação das Leis Civis*) of independent Brazil. This work drew from the Ordenações Filipinas, which remained in practical application until the Brazilian Civil Code took effect. The *Ordenações* included a General Part but did not specifically address legal acts.

After sixty years of preparation, the Brazilian Civil Code, implemented in 1917 following its 1916 promulgation, remains in force despite numerous reform attempts. The code follows the German BGB in structure and content, comprising two sections: the General Part (Articles 1-179) and the Special Part (covering family law, real rights, law of obligations, and inheritance law). Like the German BGB, it includes an *Einführungsgesetz* containing principles of international public law. The code exhibits an eclectic nature, following the French *Code civil* in content while adopting the German BGB's structure. The Brazilian code consists of two parts: the General Part (1-179 paragraphs) and the Special Part (family law, real rights, law of obligations, inheritance law). This code, just like the German BGB, has an *Einführungsgesetz* that even contains some principles of international public law. The Brazilian civil code exhibits an eclectic nature, drawing content from the French *Code Civil* and structure from the German BGB.

The code draws substantially from Augusto Teixeira de Freitas's work (1860-1864) on Brazilian civil law principles (*Esboço de Código civil*). Teixeira de Freitas, known as the "American Savigny," achieved a synthesis of modern European private law doctrines, codification traditions, and Roman law principles. His work significantly influenced Uruguay's *Código civil*, edited by Tristán Narvaja, and the Argentine Civil Code by Dalmacio Vélez Sársfield, which directly incorporated approximately one thousand articles from the *Esboço*.

The unfinished *Esboço de Código civil*, comprising 4,908 articles and translated into multiple languages, including Spanish, proposed a two-part structure with General and Special Parts. The Special Part addressed personal law and real rights, and notably, Teixeira de Freitas advocated for the monist concept.

Clóvis Beviláqua (1859-1944), a distinguished private and comparative law scholar, also influenced Brazilian codification. Commissioned in 1899 to prepare a civil code draft, his "*Projeto de Código civil*" incorporated major elements from Teixeira de Freitas's *Esboço* and the German BGB's preparatory works. Beviláqua's six-volume commentary (1916-1924), "*Código civil dos Estados Unidos do Brasil Commentado*," frequently references Roman law and German pandectistic sources and remains fundamental to Brazilian jurisprudence.

The Roman law influence is evident in the work of renowned romanist and civilist Francisco C. Pontes de Miranda (1893-1979). His six-volume *Tratado de direito privado* (1954-1969), published multiple times in Rio de Janeiro, provides a comprehensive analysis of Brazilian private law from a Roman law perspective.

The Brazilian Government established a committee of three distinguished jurists (Orosimbo Nonato, Philadelfo Azevedo, and Hahnemann Guimarães) to revise the private law code, aiming to eliminate dualism between private and commercial law principles.

Under the Minister of Justice's direction, codification work resumed with the completion of a new civil code project (*Anteprojeto de Código civil*) in 1963. This draft, prepared by a committee under Professor Orlando Gomes, contained 964 articles divided into four parts. A subsequent committee reduced it to 870 articles in 1964, though this revised Preliminary Project faced significant criticism.

In 1965, the revised version of the Preliminary Project of the Law of Obligations was published. It comprised three parts: general provisions on legal acts, obligations, and contracts; regulation of commercial societies and acts (following the monist concept); and securities law. The proposal to regulate obligations in a separate code met opposition.

President H. Castello Branco presented both the civil code and obligations law projects to Congress on October 12, 1965. However, due to criticism, particularly regarding family law provisions, the Federal Government withdrew these projects in 1966. A new committee, directed by Professor Miguel Reale, with Sylvio Marcondes handling society law, prepared a revised Preliminary Project. This was presented to the Federal Congress in 1975 as Project Number 634 (*Projeto de Lei 634:* Project) and was adopted by the Chamber of Deputies nine years later with 1,063 modifications.

Key characteristics of the Project include the unification of private and commercial laws (code unique), following Teixeira de Freitas's approach, its division into General and Special Parts; and the Special Part encompassing obligations, real rights, family law, and inheritance law.

The General Part maintains the distinction between absolute and relative legal capacities, with representation regulated under general provisions for legal acts rather than mandate provisions.

In the first part of the Special Section of the Project, an institution similar to (*laesio enormis* is addressed through obligations. The justification for incorporating this rule, which takes into account the disproportion between service and compensation leading to invalidation, dates back to the era of Emperor Diocletian. It is rooted in Roman law traditions, as indicated by the principle of *reverentia iuris Romani*.

The third part of the Project focuses on real rights. The regulations regarding environmental protection are very detailed, imposing limits on the use of property rights. This project proposes the elimination of perpetual leases, which have lost their economic and social significance both in Europe and beyond in recent decades.

The fourth part deals with family law regulations. A specific provision regarding illegitimacy deserves attention. The process for legitimizing illegitimate children is much simpler compared to that of legitimising children born from adultery.

The fifth and final part of the project addresses inheritance law. These regulations reflect strong influences from Roman law traditions. Certain institutions, such as the codicil (*codicillus*) and specific privileged forms of the testament, are regulated in the same manner as in Roman law.

In conclusion, the Project's adoption was supported by its continuity with Brazilian private law traditions, preserving institutional concepts from Teixeira de Freitas's work not codified in the 1916 code.

Regarding commercial law, Silva Lisboa's "*Principios de Direito Mercantil e Leis de Marinha*" (1798-1804) influenced commercial law application in both Brazil and Portugal until the 1833 Portuguese Commercial Code.

The Brazilian Commercial Code, adopted in 1850, remains in effect with numerous revisions. This pioneering legislation influenced the joint work of Argentine Dalmacio Vélez Sársfield and Uruguayan Eduardo Acevedo, leading to its adoption in Buenos Aires territory in 1875 and subsequently influencing the commercial codes of Argentina (1862) and Uruguay (1865).

Suriname

In Suriname, formerly a Dutch colony, the old Dutch law (*oud-Hollandsche regt*) and supplementary Roman law (*Romeinsche Recht*) were replaced by the Dutch Civil Code, adopted in 1838 and implemented in 1869. This code remained in force after independence in 1975, maintaining Surinamese civil law's independence from subsequent Dutch civil legislation (*Burgerlijk Wetboek*).

Commercial law is governed by the Dutch Commercial Code (*Wetboek van Koophandel*) of 1838. The 1934 commercial code reform reinforced the monist concept rather than suppressing it.

Guyana

Guyana, which gained independence in 1966, transitioned from Dutch to British control in 1803. In 1831, three former Dutch colonies (Essequebo, Demerara, Berbice) united as British Guiana. The Supreme Court established that year, initiated the transition from Roman-Dutch Law to English law.

The decline of Dutch language usage, particularly in Berbice (which maintained Dutch culture longest), led to decreased reliance on Dutch legal works. English law was imposed through ordinances governing inheritance and prescription.

Despite British dominance, British Guiana officially maintained Roman-Dutch Law until January 1, 1917, pursuant to the capitulation agreement with the Batavian Republic. Subsequently, English common law gradually displaced the original legal system, though some Roman law institutions persisted, particularly regarding immovable property, due to restrictions on applying English Real Property Law.

Private Law Unification Efforts in Central and South America

Pan-American conferences in Montevideo (1913, 1933) passed resolutions promoting unification of Central and South American private law. The draft new Brazilian Civil Code was proposed as a model for a unified American Civil Code (*Código civil* Americano único).

The 1938 Pan-American conference in Lima established a permanent jurist committee for civil and commercial law unification. Subsequent conferences in Havana (1941), Rio de Janeiro (1943), and Detroit (1950) (*Conferencia Interamericana de Abogados*) advanced these efforts.

Two main approaches emerged, namely, the creation of separate unified civil and commercial codes and the development of a single unified code incorporating both civil and commercial law (*code unique*).

Prominent nineteenth-century supporters of the monist concept included Augusto Teixeira de Freitas and Alfredo Valladão. The unified codification drew from the Quebec Civil Code, Swiss Law of Obligations (OR), and 1942 Italian Civil Code, aiming to incorporate commercial law within obligations law.

The *Acta de Arequipa*, adopted at the 4 to 7 August 1999 Arequipa conference with participation from Argentina, Bolivia, Peru, and Puerto Rico, established principles for private law codification and international cooperation. Article 4 emphasised harmonising Latin American private law institutions based on their Roman-Germanic foundations.

The influence of various legal traditions is evident throughout South American civil law development. The Chilean Civil Code of 1857, while following the French *Code civil*, incorporated Roman law expertise through its editor, Andrés Bello, who considered both Spanish legal doctrine and German Pandectist School teachings. This code, lacking a general part, was subsequently adopted by Ecuador (1860), Venezuela (1871), Colombia (1887), and several Central American nations such as Nicaragua.

The Argentine Civil Code of 1871, prepared by Romanist Dalmacio Vélez Sársfield, combined the French *Code civil* influence with Pothier's works and Spanish legal doctrine. Paraguay adopted this code in 1877 before replacing it with a Pandectist-influenced code in 1985.

Modern South American civil codes have drawn from multiple sources, including the Portuguese Civil Code of 1867, the Spanish Civil Code of 1889, and the German BGB of 1900. The Brazilian Civil Code of 1917 exemplifies Roman law influence through its BGB-inspired system and incorporation of German Pandectist traditions via Teixeira de Freitas (*Esboço, 1860–1865*) and Clóvis Beviláqua. The 1984 Peruvian Civil Code followed the 1942 Italian *Codice Civile* model.

C) South Africa[243]

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[243] J.W. Wessels, *History of the Roman-Dutch Law* (Grahamstone, 1908); M. Kaser, *Das römische Recht in Südafrika*, ZSS RA 81 (1964); H.R. Hahlo-E. Kahn, *The South African Legal system and its Background* (Cape Town, 1968); P. van Warmelo, *Le droit romain en Afrique du Sud*, Index 3 (1972); A. Földi, *A római jog Dél-Afrikában* [Roman Law in South Africa], Jogtörténeti Szemle 3 (1990); R. Zimmermann, *Das römisch-holländische Recht in Südafrika* (Darmstadt, 1983). For the Roman-Dutch law in general see Das römisch-holländische Recht. Fortschritte des Zivilrechts in 17. und 18. Jahrhundert (Berlin, 1992); R. Zimmermann-D. Visser, *Southern Cross: Civil law and Common Law in South Africa* (Cape Town-Oxford, 1996); Hamza, G., *A dél-afrikai magánjog fejlődésének újabb tendenciái* [Recent Tendencies in the Development of Private Law in South Africa], MJ 45 (1998); P. Farlam-R. Zimmermann, *The Republic of South Africa (Report 1)* in: Mixed Jurisdictions Worldwide. The Third Legal Family, ed: V.V. Palmer (Cambridge, 2001); C.G. van der Merwe, J.E. du Plessis,

The concept of South Africa, officially the Republic of South Africa, encompasses more than just the South African Union that was part of the British Commonwealth between 1910 and 1961. The term also refers to states where Roman-Dutch law remains in effect and which have since gained independence.

The reception of Roman-Dutch law in South Africa dates to 1652 when the Dutch established Cape Colony. The Court of Justice (*Raad van Justitie*), operating in Cape Town since 1656, based its proceedings on the colonists' Roman-Dutch law (*Romeins-Hollandse reg in Afrikaans*)[244] and gradually developed independently from the colonists' native law beginning in the late eighteenth century. The British conquest further contributed to this evolution, as common law was introduced primarily in public law from 1795 and 1806, respectively. Contemporary South African private law is characterised by the symbiosis of these two legal systems, both of which have resisted codification efforts, except for statutory regulation of specific legal institutions. Roman-Dutch law, however, maintains the dominant role. Modern Roman-Dutch law operates in the Republic of South Africa, Namibia, Zimbabwe, Swaziland, Botswana, and Lesotho.

Namibia, known as German Southwest Africa until 1919, became a mandate under the independent Republic of South Africa (1910) according to the mandate convention of December 1920. Through South Africa's influence, Roman-Dutch law was adopted and continued to operate even after the territory's independence. Southwest Africa's status was unique in that it remained a B-type mandate without becoming a trusteeship territory, even after the formation of the League of Nations and, subsequently, the United Nations. Consequently, oversight of this territory was exercised not by the Trusteeship Council but by a specially established United Nations commission. This distinctive arrangement reinforced the influence of South African legal systems in Namibia, both under the Union of South Africa and, after 1961, the Republic of South Africa.

Roman-Dutch law persisted after independence in Swaziland, which was jointly governed with the Boer Transvaal state from 1903.

Lesotho, initially becoming a British protectorate as Basutoland in 1868 and subsequently a Cape Colony possession in 1871, was administered from 1884 by a South African high commissioner based in Cape Town. Although Basutoland never fell under Boer state control, Roman-Dutch law remained effective after its independence in 1966.

Botswana, which became a British protectorate as Bechuanaland in 1885, implemented Roman-Dutch law through Boer coloniser influence. This legal system continues as a source of law in the independent state of Botswana after 1966. Notably, Bechuanaland became a British protectorate shortly after its southern territory was annexed to Cape Colony in 1895, which later became part of the independent South African Union after 1910.

M.J. de Waal, *The Republic of South Africa (Report 2),* in: Mixed Jurisdictions Worldwide. The Third Legal Family, ed: V.V. Palmer (Cambridge, 2001)

[244] The term comes from Simon van Leeuwen, who used it first in Latin in the sub-title of his *Partitla iuris novissimi* in 1652 and in Dutch in his famous *Het Roomsch Hollandsch recht* published in Leiden in 1664. The term Roman-Dutch law means today Roman law as it was used and studied in Holland in the seventeenth and eighteenth centuries.

In Zimbabwe, formerly Southern Rhodesia, Roman-Dutch law played a significant role in legislation, primarily because most white colonisers were Boers.

Regarding the Netherlands, Friesland demonstrated the most comprehensive reception of Roman law. In South Africa, Hugo Grotius's seminal work *Inleidinge tot de Hollandsche Rechts-geleerdheid*, published in English by C. Herbert in 1845, was particularly influential.

Roman-Dutch law comprises: a) Roman law, b) Dutch and Germanic customs and the customary law of other Low Countries regions, c) statutes of Holland and other Low Countries regions (especially Zeeland), d) canon law, e) prior court decisions, and f) works by prominent jurists including Grotius, van Leeuwen, Huber, J. Voet, Bynkershoek, and others.

Johannes Christiaan de Wet (1912-1990) deserves particular attention as the most influential South African jurist of the 20th century. Continental jurisprudence influenced his work primarily through Savigny and Windscheid's writings, explaining his departure from English legal thinking.

Roman-Dutch legal institutions are most evident in real rights. The perpetual quitrent, established by the Cradock Proclamation (1813), is distinctive and structurally similar to Roman *emphyteusis*. Under perpetual quitrent, the state grants definitive parcels to private persons for annual payment while retaining certain rights, such as mining rights. The relationship between this *ius in re aliena* and common law remains debated in legal literature.

Act No. 54 of 1934 abolished the payment obligation, significantly altering this institution. The state no longer retained ownership of these parcels. Under the new framework, the leaseholder becomes the proprietor of the parcel, though the state maintains certain rights. South African law rejects the common law distinction between the *dominium directum* of the proprietor and the *dominium utile* of the leaseholder. This absence of distinction creates mixed terminology that consistently treats the leaseholder as proprietor, and legislation sometimes declares the leasehold as property, as exemplified in the Sectional Titles Act of 1986.

In the law of obligations, Roman law's influence is evident in sales contracts, where the transfer of chattels alone is insufficient for ownership; payment is also required. The practice of cession (*cessio*) similarly follows Roman law regulations. Notably, a judicial practice directly references German Civil Code (BGB) regulations in cession cases, and the Roman law distinction between *actio utilis* and actio directa persists.

Among delicts, the *actio iniuriarum* warrants special attention as the basis for non-pecuniary damage claims. Since the early 1960s, emphasis on *animus iniuriandi* has increased, while the *amende honorable* has notably disappeared. The *actio iniuriarum*'s comprehensive nature enables it to address various bodily harm cases.

The reception of trust law might suggest common law's advancement. This conception partly stems from the treatment of charitable trusts (*Treuhand ad pias causas*) as civil law institutions in South African law. While this might initially suggest diminishing Roman law application, considering that English trust law (*Treuhand*) and fiduciary transactions originate in Roman law, charitable trusts actually align with Roman law principles.

South African private law exemplifies mixed jurisdiction systems, historically maintaining elements of both Roman-Dutch law and common law.

D) Asia[245]

At the beginning of the Modern Age, the legal systems of several countries in Asia lagged behind compared to the European ones, but European law was gradually making its way in. Others were under Dutch, British, or French rule, and both the laws of the colonists and the local customs were valid. The countries mentioned below are those where the impact of Roman law could be felt.

1. Ceylon (Sri Lanka)

The island of Ceylon, present-day Sri Lanka, first a Portuguese (1505) and then a Dutch colony (between 1658 and 1796), initially used Roman-Dutch law under Dutch colonial rule, which remained in force after 1796 during British rule. However, the significance of English case law became considerable on the island after the establishment of the Supreme Court. The development of the judiciary system based on the Courts Ordinance of 1889 resulted in the growing importance of English law. This development could not be counterbalanced even by verdict references to works – primarily from J. Voet – on which South African Roman-Dutch Law is based. In recent decades, as most jurists in Sri Lanka no longer attend English universities, non-codified Roman-Dutch Law has gained prominence. The Roman-Dutch Law, as the "Common law" of Sri Lanka, is applied in cases of private law, such as family law, real rights, and law of obligations, while English law is effective through commercial and civil codes.

The reception of the institution of trust also reflects the influence of Common law.

The legal system of Ceylon, similar to Scotland, South Africa, and Louisiana, is a mixed jurisdiction. In recent decades, following independence, the jurists of Ceylon have come to call the legal system of Sri Lanka Indigenous Common law.

In recent decades, the influence of Roman-Dutch law has grown partly because most active lawyers in Sri Lanka have studied at universities outside Great Britain. The Roman-Dutch law, as the common law of Sri Lanka, is most conspicuous today in the law of things, and British law is used as a source of law only exceptionally, mainly in commercial law.

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[245] For Ceylon, i.e., Sri Lanka, see M. H.-J. van den Horst, *The Roman-Dutch Law in Sri Lanka* (Amsterdam, 1985). For Indonesia, see J. Ball, *Indonesian Legal History 1602–1848* (Sydney, 1982); S. Gautama, *Essays in Indonesian Law* (Bandung, 1993[2]. For Japan, see M. Arai, *A Japán Polgári Törvénykönyv létrejöttének története* [The History of the Japanese Civil Code], JK 34 (1979); N. Hayashi, *Derecho Romano en el Japón*, Iura 34 (1983); N. Kamiya, *Aspetti e problemi della storia giuridica in Giappone: la recezione de diritto cinese e del sistema romanista*, Index 20 (1992). For China, see Mi Jian, *Diritto cinese e diritto romano*, Index 19 (1971); U. Manthe, *Bürgerliches Recht und Bürgerliches Gesetzbuch in der Volksrepublik China*, Jahrbuch für Ostrecht 28 (1987). For Korea, see Hyeong-Kyu Lee, *Die Rezeption des europäischen Zivilrechts in Ostasien*, ZfVglRWiss 86 (1987); Cho Kyu-Chang, *Koreanisches Zivilrecht und deutsches bürgerliches Recht. Zur Rezeption des deutschen Rechts in Korea* (Baden-Baden, 1992). For the Philippines, see M. J. Gamboa, *An Introduction to Philippine Law* (New York, 1969[7]).

2. Siam (Thailand)

In 1939, Siam first took the name "Thailand," which was changed back to Siam on January 1, 1946. Three years later, it adopted the name Thailand, which has remained the official name of the state ever since.

The Civil Code of Siam of 1925, which comprised commercial law as well, reflected the strong influence of the German BGB. Still, its editors also relied on the French *Code civil* and the French *Code de commerce*, the Japanese Civil Code of 1899 and the Japanese Commercial Code of 1899, the Swiss OR, and the Swiss ZGB. The Swiss codes influenced the structure of the Siamese Civil Code, particularly regarding its concept. The Civil Code of Siam exerted a decisive influence on the Chinese Civil Code and commercial laws. The drafters of the current, only partly revised Civil Code of Siam followed the *concept moniste*. The Civil Code of Siam is the first *code unique* (i.e., the code combining a traditional civil code with the commercial code) in Asia.

3. Indonesia

Indonesia, i.e., the former Dutch East Indies, also applied Roman-Dutch law through its civil and commercial code issued in 1847, which was essentially the local version of the Dutch Civil and Commercial Code of 1838. The Indonesian Civil Code was initially applied only to Europeans in Indonesia. This code remains largely in effect, although the non-European population could voluntarily be subjected to the Civil Code through the Constitution of 1854 of the Dutch East India, modified in 1919.

After Indonesia gained independence in 1948, the Civil Code became applicable to the entire population, though its field of application was restricted to real rights and obligations. This limited field of application resulted from the growing influence of Islam, which led to the reintroduction of the traditional *Adat* law. This local customary law, closely related to religion, primarily affected the law of persons, family law, and the law of succession.

In East Timor (which regained its independence in 2002), which was occupied and annexed by Indonesia in 1975, the Portuguese Civil Code had been in effect before the annexation. Under Indonesian rule, the *Código civil* adopted in 1966 was repealed, and Indonesian private law came into force. After East Timor became independent, Portuguese private law (both civil and commercial law) was reinstated.

4. Japan

Following the Restoration of the Meiji dynasty in 1868, Japan's legal system underwent reform. French Professor Gustave Emile Boissonade de Fontarabie (1825--1910) taught law in Japan after 1873 and presented Roman law as the basis of the French *Code civil*. His lectures on the history of comparative law also rested on Roman law. From 1870, various agencies worked on drafts of a civil code. Boissonade was put in charge in 1880 and

completed most of a five-book code patterned after the French Civil Code by 1886. The remaining sections, dealing with inheritance and family law, were drafted in 1887 by two French-trained Japanese lawyers, Shirō Isobe (1851--1923) and Toshizō Kumano (1854--1899). In 1888, the Ministry of Justice revised the *Isobe-Kumano Draft* to support the *samurai* family tradition of authoritarian headship and primogeniture.

The draft of the Japanese Civil Code (*Projet de code civil pour l'Empire du Japon, accompagné d'un commentaire*) prepared mainly by Boissonade was promulgated in 1890 and was to be enacted three years later, in 1893. Boissonade's draft faced heavy criticism from Japanese legal experts who were adherents of the English legal system and those who wanted to maintain substantial parts of traditional Japanese law in the Japanese Civil Code. This dispute was reminiscent of the *Kodifikationsstreit* (dispute regarding codification) that took place in Germany at the beginning of the 19th century between Thibaut and Savigny. A new draft committee consisting of Nobushige Hozumi (1855-1926), an adherent of the German Historical School of Law, Masaakira Tomii (1858-1935), who was also a scholar of Roman law, and Kenjiro Ume (1860--1910), was commissioned to compile the civil code. The committee drew upon the first draft of the BGB of 1887 prepared primarily by Windscheid. This explains why the second Japanese civil code is characterised by pandectist legal thinking in both structure and terminology.

The structure of the Code essentially follows the Pandectist system. As a result, it has a General Part (*Allgemeiner Teil*). Differences from Roman law are numerous, mainly in family law – more precisely in the part concerning "relatives" – and in succession law, where numerous institutions reflect the influence of Japanese legal traditions. After World War II, family law and succession law underwent substantial changes under modifications due to the new Constitution of 1946. Approximately three hundred articles of the Civil Code were modified as of January 1, 1948.

The influence of the United States is particularly evident in commercial law-related institutions. The concept of trust was adopted into commercial regulations in 1922, between the two World Wars. The project of Hermann Roesler (1834-1894), a professor in Rostock who served as a consultant to the Japanese Government between 1878 and 1893, was strongly considered. It is worth noting that Roesler played an important role in elaborating the Japanese Constitution in 1889. The pandectist concept of the Japanese commercial code was implemented by Jogi Matsumoto (1877-1954). A dispute arose among legal experts from 1889 to 1892 regarding the nation's first modern code of private law. Promulgated in 1890, the "Old Civil Code" (*Kyū Mimpō*) was never implemented due to intense criticism from several legal experts. In 1898, it was replaced by the "New Civil Code" (*Shin Mimpō*). The controversy primarily revolved around the French style and inspiration of the code; critics mainly were trained in English law, while supporters were predominantly from a French law background. With the Penal Code in force since 1882 being closely patterned after French law, enforcing the Civil Code would have given those trained in French law a significant advantage in bar and civil service examinations.

Meanwhile, the German legal advisor K. F. Hermann Roesler drafted the Commercial Code. Despite public controversy, both the Civil and Commercial Codes were promulgated in 1890. When the first Diet (national assembly) convened, the Commercial Code was passed by large majorities in both houses after a two-year postponement. Encouraged by this action, Yatsuka Hozumi, a member of the "postponement faction" (*enkiha*), published an article titled *Mimpō idete chūkō horobu* (If the Civil Code Comes In, Loyalty and Filial Piety Will Go) in the journal of Tōkyō Hōgakuin, a law school (now Chūō University) that taught only English law.

This article grossly misrepresented the sections of the code dealing with family and inheritance after revision. Conversely, the rival private law school Meiji Hōritsu Gakkō (now Meiji University), which taught French law, was the stronghold of the "quick enforcement faction" (*dankōha*).

In 1892, the Diet passed a law postponing the implementation of the Civil Code (and a significant part of the Commercial Code) until the end of 1896. The government, albeit reluctantly, appointed a Codes Revision Committee (Hōten Chōsakai), where the influence of the postponers among its members grew. Consequently, a large-scale revision of the Civil Code became inevitable. The "New Civil Code," completed in 1898 after a second postponement, was more aligned with German law than French law, both in structure and content.

The Japanese Civil Code of 1898 and the Japanese Commercial Code of 1899, known as the Code Boissonade, were primarily based on the French *Code civil*, except for the laws of persons regulated in the General Part, Family Law, and the Law of Successions. Three years later, a new commission was established to elaborate a new code emphasising Japanese legal traditions. This commission mainly relied on Windscheid's first draft of the BGB from 1887, so the Japanese Civil Code, in effect from 1898, followed the system of Pandects based on Roman law. The institutions covered in the General Part, Law of Obligations, and Law of Things are fundamentally based on Roman law and the German Pandectist School. At the same time, Family Law and the Law of Successions differ to a certain extent from Roman law.

Among the five books composing the Civil Code, the first three were promulgated in 1896 and consist of General Provisions (General Part), followed by the Law of Things—covering property—and the Law of Obligations. The books on Family Law and Law of Successions were promulgated in 1898.

As a product of modern liberalism, the code is founded on the principles of freedom and equality and acknowledges absolute private property rights and freedom of contract. However, as Japanese capitalism developed, new issues arose that the code could not address, leading to increasing inequalities. After World War I, problems emerged in areas such as housing and the growing size of enterprises, rendering the provisions of the code concerning rental relations and labour-management relations inadequate. Consequently, legislation such as the Leased Land Law, the Leased House Law, and the Labor Standards Law was enacted. Similarly, regarding mortgages, the code proved insufficient, prompting the enactment of the Law for the Hypothecisation of Factory Property (1905), the Trust Law (1922), and the Enterprise Security Law (1958).

Family law was structured around the household system of premodern times. However, Japan's post-World War II Constitution, promulgated in 1947, established respect for the individual and fundamental equality of the sexes as primary tenets, necessitating major amendments to the inheritance and domestic relations chapters. The old household system was abolished. Two new influential provisions established that private rights defer to the public good and recognised the equality of men and women. During the 1970s, the Ministry of Justice conducted a re-examination of the property system for married couples and the inheritance law system. The inheritance system was amended effective January 1981.

5. China (The People's Republic of China and Taiwan)

The Chinese civil code was promulgated after decades of preparation. The earliest project dates to 1911. The final version of the Civil Code of China, consisting of five books (General Part, law of obligations including commercial contracts, property and real rights, family law, and law of succession), was enacted gradually between 1929 and 1931. The Civil Code, as a *code unique* based on the *concept moniste*, includes commercial law similar to the Swiss Civil Code. The German BGB, the Swiss Code of Obligations (*OR*), and the Swiss Civil Code (*ZGB*) played decisive roles in the preparatory work of the Chinese Civil Code. The Civil Code of Siam of 1925 also influenced the Chinese Civil Code. This code remains in effect in the Republic of China (Taiwan), where everyday practice and jurisprudence have relied heavily on the German Pandectist School based on Roman law. In mainland China, this was true only prior to the proclamation of the People's Republic of China in 1949.

The reception of common law in China was indirectly prevented by Roscoe Pound, a professor at Harvard University, who emphasised the importance of adhering to Roman legal tradition. Pound served as chief counsellor in the Ministry of Justice for two years from 1947 in Nanking. Before 1949, Roman law (*luoma fa* in Chinese) played an important role in Chinese private law. Since 1976, there has been renewed interest in Roman law, both in university education and as a subject of research.

In the General Principles of Civil Law of the People's Republic of China, promulgated in 1986 and enacted in 1987, there is a marked tendency to return to Roman law traditions. The General Part comprises 156 articles divided into nine chapters. The courts implemented the General Principles of Civil Law as if they were a civil code proper, as the principles had a direct effect. The General Principles were superseded by special acts on the law of obligations and, in 2005, by an Act on Property and Real Rights. There is no plan to adopt a comprehensive civil code; civil law matters will be regulated through piecemeal legislation. The Act on Business Organisations was adopted in 2007.

In the Republic of China (Taiwan), since the island (Formosa) was under Japanese occupation from 1895 until 1945, the Civil Code enacted between 1929 and 1931 could only take effect from 1945. This code, though modified, remains in force. The influence of U.S. law has become considerable over the last three decades, particularly in the regulation of movable property.

6. South Korea

The political relationship between Japan and Korea played an important role in the development and current trends of Korean private law. Korea and Japan signed a convention in 1885 in Tianjin to curb Japanese influence, agreeing to respect Korea's independence mutually. China's breach of the convention led to war between Japan and China in 1894. That war ended in April of the following year with China's recognition of Korean independence. Korea's status was also the decisive reason for the Russo-Japanese War in 1904.

According to the Treaty of Portsmouth (USA) between Japan and Russia, Korea fell under Japanese protectorate. This arrangement contradicted the Anglo-Japanese Treaty of 1902, which guaranteed the independence of Korea and China. Japanese political, military, and

economic control gradually penetrated Korea. A treaty concluded between the two countries in 1907 provided for the introduction of the Japanese legal system, marking a significant point in the extension of Japanese rule over Korea.

The Korean Civil (Private) Code, published on February 22, 1958, and enacted on January 1, 1960, adopted the pandectist structure, following the model of the Saxon Civil Code of 1863, promulgated two years later.

The system of this Civil Code corresponds to the structure of the Japanese Civil Code of 1898. In its 1,118 paragraphs, divided into five books, it addresses the following jurisdictions in order: General Part (§§1-184), real rights (§§185-372), law of obligations (§§371-766), family law (§§767-979), and inheritance law (§§980-1118). Its introduction law (*Einführungsgesetz*) consists of 28 paragraphs.

The historical fact that Korea fell under Japanese colonial rule after the dethronement of the last king of the Choson dynasty (1392-1910) significantly influenced the reception of the Japanese Civil Code. The Korean Republic was proclaimed after World War II on August 15, 1948. During Korea's colonial period (1910-1945), both the official language and the language of jurisdiction were Japanese. Japanese influence in politics and economics dates to the late 19th century. Notably, an ordinance from 1912 (the Introductory Ordinance on Civil Cases) enforced the Japanese Civil Code until the promulgation of the Korean private code. A significant figure among Japanese civil law scholars was Kenjiro Ume (1860-1910), who served as legal counsellor to leading politician Hirobumi Ito in Korea from 1906 until his death. He substantially contributed to the "downward" reception of the Japanese Civil Code (with German pandectist roots) through the modernisation of the protectorate country's legal system.

The codifiers of the Korean Civil Code (whose work began shortly after World War II) adhered to the German BGB by eliminating paragraphs that differed from it. They considered it important to detail the regulatory institutions of the German BGB that had been omitted from the Japanese Civil Code and to bypass certain institutions of the French *Code civil*.

Consequently, the Korean Civil Code became closer to the German BGB than the Japanese Civil Code. For example, the regulation of *culpa in contrahendo* (§535) in the Korean Civil Code completely aligns with the provisions of the German BGB (§307).

However, the Korean Code's codification did not adopt all institutions of the German BGB. Therefore, like the Japanese Civil Code, not all institutions of the Korean Code correspond to those of the German BGB. Examples include the provisions regarding default (§§387-390), specific regulations on indemnification (§§393-399), and provisions concerning withdrawal (§§544-553).

In 1960, Korea experienced significant economic development, necessitating sociological examinations of private law jurisprudence development. From 1960 onward, Roman law influences appeared in jurisprudence alongside German influences.

The Civil Code of the Republic of Korea (South Korea) was enacted in 1960. Its structure follows the Pandects system, similar to the Japanese Civil Code that was valid in Korea before 1912 when the first Korean Civil Code was adopted. The German Pandectist School also strongly influenced the development of Korean private law prior to 1960.

7. The Philippines

Following the Spanish conquest of 1521, the Philippine Islands operated under various Roman law-based compilations (including the *Breviarium Alaricianum*, the *Siete Partidas*, and the *Ordenamiento de Alcalá*). The comprehensive codification of Spanish law, the *Nueva Recopilación*, was also applicable, along with the *Recopilación de las Leyes de las Indias* (promulgated in 1680 for Spanish colonies) and the *Novísima Recopilación* of 1805, which was later superseded by the *Código Civil* of 1889. The *Ordenanzas Filipinas* (1603) directly regulated the Philippines' colonial legal system. The *Recopilación de las Leyes de las Indias* of 1680 and the *Novísima Recopilación* promulgated by Charles V in 1805 were both enforced in the Philippines. This compilation was ultimately replaced by the Spanish *Código Civil*, implemented in December 1889. The Spanish Civil Code was adopted almost in its entirety, with exceptions for marriage law (paragraphs 4-10 of Title 4), civil registration regulations (paragraphs 325-332 of Title 12), and family council provisions (paragraphs 293-313 of Title 10). The Spanish Commercial Law of 1885 was also implemented in the Philippines in 1886.

The 1898 Treaty of Paris between Spain and the United States established the Philippines as a "Dependency" under U.S. military and subsequent legal authority. Under the "Union Law," adopted by the gradually established Philippine legislature (including the Senate in 1916), the Philippines gained formal independence as the Commonwealth of the Philippines on May 1, 1934, though under continued American hegemony. Through the Constitution of 1935, the Philippines became a commonwealth with municipalities under United States jurisdiction.

American Common law significantly influenced the legal system of the independent Philippines (July 4, 1946).

In March 1947, by the presidential ordinance of Manuel Roxas, a committee comprising exclusively private law professors was established to prepare the civil code draft. The Civil Code adopted in 1949 incorporated certain legal institutions from English and American law while maintaining its foundation in the Spanish Civil Code. Several other Roman law-based civil codes influenced its development, including the Louisiana Civil Code, California Civil Code, French *Code civil*, Argentine Civil Code (1871), Mexican Civil Code (1928), Swiss Civil Code (1911), Italian Civil Code (1942), and the German BGB.

In its report to the president (January 26, 1948), the drafting committee emphasized the significance of Roman law traditions in the Philippines' private law system as the primary indirect source of the new Civil Code (1950). Book Four, addressing obligations and contracts, clearly demonstrates the influence of the Roman *fideicommissum* on the trust institution.

Part V

Hungary

(i) Roman Law and Medieval Hungarian Customary Law[246]

Although Hungary was in connection with the Byzantine Empire, the fact that King Stephen I [St. Stephen] (1000-1038) and his country assumed Western (Latin) Christianity, made the penetration of Byzantine law into Hungary impossible. Only Justinian's codification, especially the Codex and some novels, made its impact felt in the laws of St. Stephen, even if indirectly.[247]

The Transdanubian part of Hungary was under Roman control for almost four centuries. The provinces of *Pannonia prima* and *secunda, Savia* and *Valeria,* belonged to the western part of the Roman empire. Romanization also included the sphere of law, as testified by several inscriptions.[248]

a) The direct influence of Roman law appeared in Hungary only in the age of the Glossators. Hungarian students attended the University of Bologna by the 13th century. There was even a separate 'Hungarian nation' (*natio Hungarica*) within which about eighty Hungarian students attended the lectures of the Glossators before 1301.

Other Hungarian students learned canon law in Paris and became acquainted with Roman law. A small number of Hungarians attended the faculty of law at the universities of Padova, Oxford, and Cambridge, among others. Hungarian students continued to go to universities abroad under the Angevin kings. The first Hungarian university was established in Pécs in 1367, where Roman law was probably taught as well.[249]

As a consequence of all this, the books of *formulae* by János Uzsai, rector of the Bologna University around 1340, and Bertalan Tapolczai reflected the influence of Roman law to a certain extent. The terminology of the diplomas issued at that time also showed the influence of Roman law, as well as the chronicles written during the Árpád and Angevin dynasties, especially the *Gesta Hungarorum* of Kézai Simon at the end of the 13th century. The impact

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

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

[248] See K. Visky, *A római magánjog nyomai a magyar földön talált római kori feliratos emlékeken* [Traces of Roman private law on Roman inscriptions found on Hungarian soil] , JT 5 (1983).

[249] For the Hungarian *peregrinatio academica* directed at the faculties of law at European universities see B. Szabó, *Előtanulmány a magyarországi joghallgatók külföldi egyetemeken a XVI–XVII. században készített disputatióinak (dissertatióinak) elemzéséhez* [Preliminary study to the analysis of dissertations prepared by Hungarian students of law studying abroad in the sixteenth and seventeenth centuries], *PUM* VIII 5 (Miskolc, 1993). For the beginnings of Hungarian higher education see A. Csizmadia, *A pécsi egyetem a középkorban* [The University of Pécs in the Middle Ages] (Budapest, 1965).

of Roman law was much less marked in the *ius scriptum*, i.e., the royal statutes and decrees. At the same time, certain principles of Roman public law can be observed, for example, in references to the *plenitudo potestatis* serving as a justification for the preponderance of royal power at the time of the Anjous and later in the days of King Sigismund (1387.-1437) or King Matthias (1458-1490).

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

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

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

(ii) István Werbőczy and the *Tripartitum*

The law book of Chief Justice István Werbőczy (c. 1450–1541) systematising feudal customs in the native language of learning, i.e., in Latin (*lingua patria*), was titled *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae.* Showing the impact of Roman law in many respects, this general and comprehensive *decretum* was the first to put native custom into writing. It was accepted by the Diet of 1514 and sanctioned by the king but was never promulgated, so it never formally became a source of law. However, Werbőczy's *Tripartitum* achieved authority despite its failure to be enacted.

A law book anyway, Werbőczy's work contained contemporary feudal customary law and the royal decrees using the terminology of Roman law. However, the passages taken from Justinian's codification were probably included only to increase the prestige of the *Tripartitum*. The links between the *Tripartitum* and Roman law are conspicuous in the following aspects[250]:

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

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

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

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

Where Werbőczy studied Roman law and from where he took the texts of Roman law included in the *Tripartitum* is still a subject of debate. His source must have been the textbook of Roman and canon law written by Master Raymundus[251] at Naples in the 13th century, which must have been taken to Hungary and Poland during King Louis I the Great's campaign in Naples. In Poland, it even became a national statute. The so-called *Summa legum Raymundi* contained the customary law of the South Italian towns and the penal laws of the Angevin kings and became part of the law books of several royal free cities in Upper Hungary (such as Bártfa and Eperjes). Manuscript versions of it were also at Cracow and Wiener Neustadt. Recent research maintains that Werbőczy's source must have been the one from Cracow, which suggests that Werbőczy must have studied there.

(iii) Hungarian Private Law from 1514 to the 19th Century[252]

At the time when the *Tripartitum* was written, the economic development of Hungary was restricted mostly to towns, but production for the market was already increasing on the estates of the nobility. These changes must have contributed to the compilation of the *Formularium Posoniense* by Prebend Imre Pápóczi in the 1530s. This collection of laws was intended to be a textbook and to regulate the ever-livelier economic conditions of the day by its formulas of contracts resembling the ones of Roman law and its endless commentaries. The impact of Roman law can be felt also in the laws passed in the first half of the century.[253]

Werbőczy's *Tripartitum* containing feudal private law, applying Roman law mostly only formally and not so much in merits, became "the Bible of the nobility" for the following three centuries, paralysing both the development of law and legal science. Although in the 16th

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

[252]A. Degré, *Elemente des römischen Rechts im Vermögensrecht der ungarischen Leibeigenen,* Einzelne Probleme der Rechtsgeschichte und des römischen Rechts (Szeged, 1970); K.K. Klein, *Der Humanist und Reformator Johannes Honter* (Sibiu, 1936).

[253] Act XLIII of 1542 about affiliation shows, for example, the direct impact of the *SC Plancianum* of Emperor Vespasian, see T. Vécsey, *Századok* 42 (1909).

century, the Hungarian humanists made an attempt at least at a partial reception of the *Corpus iuris civilis*, they failed to break the power of custom.

Iohannes Honterus (1498–1549) published his didactic *Sententiae ex libris Pandectarum iuris civilis* in Brassó (now Braşov in Roumania, Kronstadt in German) in 1539, aiming to acquaint the public with Roman law. In its preface, he emphasised the advantages of Roman law in contrast with the often-uncertain municipal custom. Honterus's work based on Roman law and entitled *Compendium iuris civilis in usum civitatum ac sedium Saxonicarum collectum in Transsilvania* (1544) later served as a basis for the municipal statutes of the Saxon towns of Transylvania. These statutes remained valid on the Királyföld (King's Land, *Königsboden* in German, *Fundus Regius* in Latin) for three centuries after 1583. Iohannes Sambucus (János Zsámboki, 1531–1584) was responsible for the first edition of the *Corpus iuris Hungarici* in 1581. Zsámboki included in this edition (as an appendix to the *Tripartitum*) the legal principles to be found in the last title of the *Digesta* (50, 17) under the subtitle *Regulae iuris antiqui*, which indicated their formal reception in the Hungarian legal system. The work of Iohannes Decius Barovius (János Baranyai Decsi, c. 1560–1601) entitled *Syntagma institutionum iuris imperialis sive Iustiniani et Hungarici* (1593) introduces the institutions of the *ius patrium* in the framework of Justinian's *Institutiones.*

In the seventeenth and eighteenth centuries, Roman law was primarily a subject to be taught at the universities, mainly at Nagyszombat (today Trnava in Slovakia). The impact of Roman law could also be felt also in works dealing comprehensively with Hungarian law.

The work of János Szegedy (1699–1760) entitled *Tripartitum iuris Hungarici tyrocinium* (1734) compared the institutions of Hungarian and Roman law. Also, Imre Kelemen (1744–1819), an outstanding civilist, referred to Roman law, especially in his *Institutiones iuris Hungarici privati* (1814).

(iv) The Science of Roman Law and Private Law in the 19th Century[254]

The first significant change in Hungarian legal life was brought about by the influence of Savigny's branch of *Pandectistic.* It could be felt first in the works of Ignác Frank (1788–1850), the first great civilist of the nineteenth century, who can be considered — in László Szalay's words — 'the pioneer of a new era' despite his protest against codification. In his *Specimen elaborandarum insitutionum iuris civilis Hungarici* of 1823, which still reflects the influence of Natural Law, especially Christian Wolff, Frank used the terminology of Roman law to describe relations of land ownership. Roman legal terms can be found in several of his other works, as well as in the phenomena in Hungarian law. Frank's pupil, Gusztáv Wenzel (1818–91), was a dedicated follower of the Historical School of Law and often referred to Roman law in his writings.

From the second half of the 19th century, the Pandectist School, especially Jhering's trend, made its impact felt to an ever-greater extent through the works of Gusztáv Szászy-Schwarz (1858–1920), a civilist of universal scope, on Hungarian jurisprudence and the practice of the courts. Since almost all Hungarian Romanists and civilists had been pupils of German

[254] E. Pólay, *A pandektisztika és hatása a magyar magánjogtudományra* [The Pandectist School and its Impact on Hungarian Civil Law Jurisprudence], AUSz 23, 6 (1976); J. Zlinszky, *Wissenschaft und Gerichtsbarkeit. Quellen und Literatur der Privatrechtsgeschichte Ungarns im 19. Jahrhundert* (Frankfurt a. M., 1997). For Ignác Frank, see L. Villányi Fürst, *Jogi professzorok emlékezete* [In Memoriam of Some Professors of Law] (Budapest, 1935); For Gusztáv Wenzel, see T. Balázs, AnnUB 31 (1990); For Gusztáv Szászy-Schwarz, see K. Szladits, *Magyar jogászegyleti értekezések* [Studies Prepared for the Hungarian Association of Lawyers] (Kecskemét, 1934); For Elemér Balogh, see G. Hamza, JK 35 (1980).

Pandectists (Szászy-Schwarz and Mihály Biermann [1848–1889], a professor of law at Győr and Nagyszeben (now Sibiu in Romania, Hermannstadt in German), attended the lectures of Jhering, and Elemér Balogh [1887–1953], an outstanding expert of comparative law, was a disciple of Dernburg), they contributed to the spread of several elements of German Pandect law in the legal practice.

(v) The Role of Roman Law in the Codification of Hungarian Private Law[255]

Act XVIII of 1791 was the first step towards codifying the Hungarian ius privatum by charging a legal committee to prepare a draft civil code (*Proiectum nonnullarum utilium civilium legum*). The draft was ready in two years but was put in print only in 1826. Neither its structure nor content reflected Roman law's impact, and it could not be called a draft code anyway. The reception of the *Code civil* in Hungary could naturally not take place, though László Szalay thought it to be an ideal model for Hungarian codification. The developments in political life made even the second attempt at codification ordained by Act XV of 1848 impossible.

The ABGB was put into force in Hungary and Transylvania in 1853, so a work of codification was out of the question until the Austro-Hungarian Compromise (*Ausgleich*) of 1867. The general part of the General Code of Private Law (1871) was prepared by the Romanist Pál Hoffmann on the model of the Saxon Civil Code of 1863, reflecting the influence primarily of Puchta. This code was practically the codification of all Pandectist writings. The draft of the law of succession by István Teleszky (1836–1899) of 1882 is based on the Saxon Civil Code both in its structure and its theoretical basis, which, in turn, relied on the particular Saxon law of succession in its institutions. István Apáthy's (1829-1889) draft law of obligations of 1882, influenced by the Draft of the Law of the Obligations for the German States (*Dresdner Entwurf*) of 1866, preparing the way to the future BGB, followed Savigny's theory of will concerning legal transactions, similar to Hoffmann's suggestion. The same applies to the draft of the general part by Elek Győry (1841–1902), prepared in 1880. The impact of the Pandectist School is not so marked in the partial draft of the law of things by Endre Halmossy (1882) and in the draft concerning matrimonial law, the law of persons, and property law by Benő Zsögöd (*alias* Béni Grosschmid, 1852–1938).

The idea of a comprehensive civil code became prevalent in 1895. One of its most consistent representatives was Gusztáv Szászy-Schwarz, who wished to realise codification in Hungary on the basis of Roman law. The draft of 1900, the structure and institutions of which resemble those of the German BGB, broke with the idea of partial codification. It consisted of four parts (the law of persons and family law, the law of obligations, the law of things, and the law of succession) but had no general part, replacing it with the first few titles of the law of obligations. As regards legal transactions, it followed the theory of declaration (*Erklärungstheorie*). The impact of the BGB was more manifest in the case of the following

[255] R. Dell'Adami, *A nemzeti eredet problémája* [The Problem of our Nation's Origin], *Az anyagi magánjog codificatiója* [The Codification of the Material Private Law of] , vol. 1 (Budapest, 1877) and idem, *Magánjogi codificatiónk és régi jogunk,* vol. 1 [The Codification of our Private Law and our Ancient Law] (Budapest, 1885); A. Meszlény, *Magánjogpolitikai tanulmányok különös tekintettel a magyar általános polgári törvénykönyv tervezetére* [Studies on the Policy Concerning Private Law with Special Regard to the Draft of the General Hungarian Civil Code] (Budapest, 1901); G. Szászy-Schwarz, *A magánjogi törvénykönyvről. Tanulmányok és bírálatok* [On the Civil Code. Analysis and Criticism] (Budapest, 1909); F. Mádl, *Kodifikation des ungarischen Privat- und Handelsrecht im Zeitalter des Dualismus*, Die Entwicklung des Zivilrechts in Europa (Budapest, 1970); A. Csizmadia, *Ungarische zivilrechtliche Kodifikationsbestrebungen im Reformzeitalter*, Rechtsgeschichtliche Abhandlungen, vol. VI (Budapest, 1974).

draft of the private law of 1913, which was shorter and had no general part, similar to the former one. The draft civil code of 1928, considered by the courts as a *ratio scripta* (Mtj.), and in the drafting of which Béla Szászy (1865–1931) played an outstanding part, reflected the strong impact of the Swiss ZGB and OR.[256]

(vi) Eminent Roman Law Specialists in Hungary in the 19th and 20th Centuries[257]

Roman law has been taught at Hungarian universities ever since the establishment of the faculty of law at the University of Nagyszombat in 1667. The university's first professor of Roman law was Ádám Takács (Textor). The earliest surviving scholarly writings on this subject were authored by Ernő Frigyes Something during his professorship from 1691 to 1695, which marked the first open disputations on Roman law. Between 1733 and 1749, important contributions were written by János József Rendek, the author of the oldest textbook of Roman law in Hungary, published in 1734. For a long time, education was based at Nagyszombat (after 1777 in Buda and finally in Pest) on commentaries on the *Institutiones* and the *Digesta* by foreign authors. Mihály Szibenliszt, a professor in Pest, published a high-level textbook in 1829 (*Institutiones iuris privati Romani*) comparable to ones written in other parts of Europe. The first textbook on Roman law was written in Hungarian by János Henfner of the University of Pest under the title *Római magánjog* [Roman private law] and was published in 1855–1856.

The first professor teaching Roman law on the Western European level was Pál Hoffmann (1830–1907), a follower of Savigny. He called it a "school of legal thinking". In the second half of the 19th century, the education of Roman law consisted of two parts: an institutions course containing the history and a short summary of Roman law and a pandects course, in the beginning, containing German *Pandectistic*.

The textbook of Alajos Bozóky (1842–1919), professor at the Academy of Law at Nagyvárad (now Oradea in Romania), followed the system of teaching Roman law in the 19th century and dealt with institutions and pandects separately. Some Romanists such as Pál Hoffmann from Budapest and Lajos Farkas (1841–1921) from Kolozsvár (now Cluj-Napoca in Romania), both of whom were Savigny's followers — emphasised the importance of legal history, while others — like Gusztáv Szászy-Schwarz from Budapest and Mór Kiss (1857– 1945) from Kolozsvár, the followers of Jhering — introduced Roman law based on the modern theory of the pandects as distinct from the German Pandectist School, thus bringing by this Justinian's work of codification nearer to everyday practice. Tamás Vécsey (1839–1912), a professor at the University of Budapest, stood between these two trends. The unfortunately unfinished

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[256] It is quite edifying to survey the influence of the Pandectist School concerning objective (strict) responsibility. While based on the BGB rather than its literal translation, the draft Hungarian Civil Code of 1900 established that responsibility was grounded in guilt (*culpa*). Para. 1486 of the draft of 1913 (based on the first draft of the BGB of 1887) spoke of damages objectively. The famous § 1737 of the Draft Civil Code (*Magánjogi Törvényjavaslat*, abbreviated *Mtj*.). of 1928 regulating responsibility based on equity followed the second draft of the BGB, however indirectly, making the responsibility for damages on an objective basis possible as a subsidiary regulation.

[257] M. Móra, *Über den Unterricht des römischen Rechts in Ungarn in den letzten hundert Jahren*, RIDA 11 (1964); E. Pólay, *A római jog oktatása a két világháború között Magyarországon (1920–44)* [Teaching of Roman law in Hungary between the Two World Wars, 1920–44] (Szeged, 1972); G. Hamza, *A római jog oktatásának és művelésének történetéhez egyetemünkön* [To the History of the Teaching of Roman Law at Our University], AUB 26 (1984).

book by Károly Helle (1870–1920) helped students get acquainted with the sources of Roman law.[258]

After World War I, the dual teaching system of the institutions and the pandects ceased to exist, and only the former were taught. The same happened in relevant jurisprudence. Géza Marton (1880–1957), an expert of responsibility in private law well known all over Europe, taught the dogmatics of Roman law with a historical approach. His textbook served as a basis for teaching Roman law at almost all Hungarian universities and academies of law for almost four decades. Kálmán Személyi (1884–1946), the master of the critic of interpolations, was a professor at Szeged and at Kolozsvár. In the years before World War II, other professors of Roman law were the following: Albert Kiss (1873–1937), Nándor Óriás (1886–1992), Zoltán Pázmány (1869–1948), Márton Szentmiklósi (Kajuch) (1862–1932), and Zoltán Sztehlo (1889–1975). Pázmány and Sztehlo also dealt with juristic papyrology, similar to Géza Kiss (1882 – 1970), who was a professor of Roman law at Nagyvárad in the years prior to World War I and later at Debrecen, and András Bertalan Schwarz (1886–1953), professor in Zurich, Freiburg, and Istanbul.[259]

Outstanding scholars dealing with Roman law after World War II were Károly Visky (1908–1984), Róbert Brósz (1915–1994), Elemér Pólay (1915–1988), and György Diósdi (1934–1973).[260]

(vii) Characteristic Features of the Development of Private Law in Hungary

With the foundation of the Hungarian State, as early as the reign of King Stephen I, some rules of written law (*ius scriptum*) also appeared, i.e., the statutes (*decreta*) of King Stephen, a code of laws comparable, like all primitive codes, to the Salic law (*lex Salica*) or the *Russkaya Pravda*. Its main aim was to stop the blood feud as then practised by the award of monetary compensation by the courts since the free exercise of the blood feud was inconsistent with the existence of an orderly State, but it also contained other dispositions by which it hoped to modify the prevailing customs.

Thus, the written law enacted exceptions to the customary law, abolished some customs but left customary law to regulate all aspects of life. Customary law also remained of such basic importance that in following centuries, even reforms were proclaimed to be restorations of the good old customs. For example, the Golden Bull (*Bulla Aurea*) of 1222 merely conferred more privileges to royal servants (*servientes regis*) and, in part, to the members of the aristocracy. The introduction of the Golden Bull presents it as restoring the freedom granted by King Stephen I, who later became canonised at the end of the 11th century.

The first conscious effort to make the compilation of law in existence was the *Decretum Magnum* of King Matthias, promulgated in 1486. It is characteristic and unfortunate that this statute was repealed six years later.

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[258] For Pál Hoffamnn and Tamás Vécsey, see G. Hamza, JK 35 (1980) and 40 (1985).

[259] For Géza Marton, see G. Hamza, ed., *Tanítványok Marton Gézáról* [Students Remember Géza Marton] (Budapest, 1981); for Nándor Óriás, see Gy. Gátos, JK 47 (1992); for András Bertalan Schwarz, see G. Hamza, JK 34 (1979).

[260] For Károly Visky, see G. Hamza, JK 39 (1984); for Róbert Brósz, see A. Földi, ed., *Flosculi professori R. Brósz oblati* (Budapest, 1990) and G. Hamza, JK 49 (1994); for Elemér Pólay and György Diósdi, see idem, AnnUB 32 (1991) and JK 39 (1984).

In the last centuries of the Middle Ages, customary law retained its importance, and we may see that within the hierarchy of sources of law, it actually took dominance over legislation. This is seen from the series *Corpus Juris Hungaric,* in which one volume, admittedly of 853 pages, covers the period from the year 1000 (the foundation of the Kingdom) to the Mohacs Disaster in 1526, i.e., practically the whole mediaeval period, while in the succeeding centuries, though for a time still cautiously, the volumes containing the legislation keep growing (first covering 100 and then 50 years at a time). From this, it appears that even in the more modern age, right up to the 1848 bourgeois rebellion, the flow of legislation remained small. The legislative activity of Hungarian capitalism, starting from the Austro-Hungarian Compromise (*Ausgleich* in German, *Kiegyezés* in Hungarian) of 1867, presents a very different picture when the volumes of the *Corpus Juris Hungarici* appear every two or three years and, later, from the beginning of the 20th century, every year.

It was not always easy to ascertain the rules of customary law; no doubt local customs also existed. In principle, customary law lived on in the "convictions of honest men". It mainly served the object of having the numerous assessors serving with the judge inform the judge what the customary law prescribed in the question before the court.

It is evident that the more highly developed social and economic relations became, the greater the complications in customary rules. Hence, it became necessary to reduce them to writing. About two centuries after the production of the famous German collection of customary law, the *Sachsenspiegel,* István Werbőczy, a master of the supreme court, after several unsuccessful attempts, put down the customary law in force in Hungary in a royal document. The compilation of Werbőczy's work, the *Tripartitum (Hármaskönyv),* was the result of a sincere attempt to summarise the customary law still in force. However, at times, he diverged from that aim to subordinate it to the cause of advancing certain political principles (the development of the lesser nobility into a decisive power factor).

On the other hand, he wrote in the introductory section of his book a general legal theory influenced by books on Roman law. He, therefore, measured the force of customary law as against statute, explaining that customary law had three roles to play, i.e., to explain, supplement and impair statute law. This third effect was restricted to cases where the statute was older and conflicting customs grew later. Here he regards statute law as the main rule and the force of customary law as related to it.

Mediaeval Hungarian legal theory always treated customary laws as, by nature, unwritten law, which was in no way altered by the fact that it had been reduced to writing. But they regarded customary law as a law defined by its uniform operation, a law possessing public authority to enact legislation. According to this theory, every nation can create its own customary law. However, for a custom to be effective, certain requirements had to be satisfied. The *Tripartitum* refers to three of these. The first is that customary law should be reasonable. It was treated as reasonable if it was directed towards and strove for the realisation of the aims of law. They held that if a custom was directed to spiritual happiness, it followed that it was reasonable by canon and divine law, but it would be unreasonable if it were inconsistent with the eternal destiny of Man. According to Civil Law, a custom is reasonable if aimed at the public good. Generally, all customs were deemed reasonable if not contrary to Natural Law, the Law of Nations or positive law (*ius positivum*). The second requirement was that the custom be prescriptive, namely, have lasted a sufficient time and been in force for the period required for prescription. But this was only required by Canon Law and only when it conflicted with established law. According to Civil Law, ten years sufficed to establish a custom, i.e., after the lapse of ten years, even if it conflicted with Civil Law. If the custom conflicted with ecclesiastical law, a period of forty years must have expired. If the custom arose outside the field of legislation, then, according to the ecclesiastical law, ten years

appears to have been sufficient. This ten-year period began to run from the first moment when people observed the custom. In civil law, the ten-year period did not apply to matters reserved for the prince. In such cases, customs were only effective if their origins were immemorial.

The third requirement was the regularity of the act creative of the custom. Frequent acts were not by themselves required for the introduction of a custom since approval by the people appears from practice and cannot be deduced from a single act. The frequency of acts is a cause, and custom is an effect. Evidently, the action required is such that the custom appears to have been accepted into popular legal consciousness. Hence, it is not the act itself but the implicit approval of the people that establishes the custom. Since this implicit approval may be deduced from circumstances, it is unnecessary for acts to be frequent or numerous. One act may be sufficient to create a custom if its uninterrupted effect and consequences last for the whole period of the evolution of the custom. If, for instance, someone builds a bridge and collects tolls on it, the building of the bridge is a single act. However, its continuous effect clearly appears throughout the long collection period of tolls.

As to the possible reception of Roman law in Hungary, the researcher of mediaeval Hungarian law who concentrates on this issue comes to the conclusion that a *receptio in complexu* or a *receptio in globo* of Roman law was totally absent in Hungary, even in the taking over of general principles. Canon Law was in force throughout the feudal period in Hungary in its own field, primarily the ecclesiastical jurisdiction. Civil (Roman) Law enjoyed great respect as a kind of Law of Nature but was not regarded as a binding system. This does not exclude a manifold effect that manifested in Hungarian society's evolution.

Werbőczy included Roman law rules among the binding legal rules, for instance, regarding the legal consequences of a river changing its bed and guardianship law. However, in practice, these were not accepted. We may add that the greatest effect was in the law of the cities. Here, the major influence was exercised by German law, which had itself received Roman law rules, especially in the law of obligations.

Never again was a Hungarian diplomat to be raced by such rich Roman legal terminology as then. The civilising influence of Roman law scarcely failed to affect every part of the customary law, and its terms of art became typical for it. However, with the passing of a learned generation in the last decades of the Arpad dynasty, this temporary Romanisation suddenly ended. At the same time, Canon Law was the system in force in the well-organised vicarial courts and therefore maintained a firm hold in the ecclesiastical court system.

It is notable that the decline in Roman law influence coincides with the regime of the House of Naples-Anjou. Though Charles Robert (1308-1342) and his son Louis I (1342-1382) also used the Roman law doctrine of *plenitudo potestatis,* the basis of customary law was untouched. The well-known Hungarian legal historian, György Bónis (1914-1985), considered that the reason for this peculiar phenomenon was the development and strengthening of the Hungarian legal intelligentsia. At that time, the jurists, the administration of justice, and the public administration figured largely in the royal courts and chanceries. When a fresh wave of Roman law influence arrived in the second half of the 15th century, it collided with a defensive wall of national law. Nevertheless, some stones in that very wall were of ancient Roman masonry. The influence of the second wave of Roman law took the form of early humanism, but its progress was combined with a simultaneous contraction of the sphere of Canon Law. King Matthias wished to reduce the extensive powers of church courts and sacred instances, in previously secular questions, by legislative action (1462, art. 3). At the very beginning of his reign, he began to limit, by statute, the cases that could be tried by church courts. These cases included wrongs against divine reverence and sacraments, matters related to religious faith and heresy, wills and testaments, matrimonial cases and

associated dowry issues, betrothal gifts, the daughter's portion (excluding land inheritance), real and personal tithes, usury, claims made by widows (as long as the case did not involve land acquisition), and breaches of oaths. In summary, he restricted church court jurisdiction to cases that fell under the sanction of excommunication.

King Matthias made a notable comparison in the famous Decretum Maius of 1486, which he asserted to be eternal alongside Roman Law. He referenced the introduction to the Institutes of Emperor Justinian (527-568), stating in Article 1 that it is appropriate for Kings and Princes – who are divinely appointed as exemplars of supreme dignity – to be honoured through laws and military might. Apart from this antiquated sentiment, national law was raised in the reign of Matthias to a scientific level in State life in the field of criminal law and procedural law, whereas Civil (Roman) Law remained silent as a subsidiary source – it was only after the Mohács Disaster in 1526 that it gained some application in the town laws already mentioned.

Until our time, István Werbőczy's *Tripartitum* was the recognised source for Hungarian customary law and was used as a "Bible" by the nobility. In 1514, he drafted the *Tripartitum* under royal instruction and presented it to the national diet. Although it was accepted, it never became law due to the absence of certain constitutional requirements. Specifically, the royal seal was not affixed to the decree and was not distributed to the counties for promulgation. The higher nobility at the royal court likely prevented the sealing. After the diet session concluded, the King left the country and soon died, resulting in the missing requirements never being fulfilled. The higher nobility apparently disliked the proclamation of "one single liberty", with which Werbőczy, as leader of one of the parties of the lesser nobility, wished to reinforce the privileges of these. Though the higher nobility succeeded in sabotaging the promulgation, Werbőczy had the *Tripartitum,* printed in Vienna in 1517 and himself sent it to the county towns. Since the county town tribunals *(sedes judiciariae)* were generally in the hands of the lesser nobility, within a few decades, especially when it was translated into Hungarian, the *Tripartitum* became widely used in court practice and became part of the customary law. In Transylvania, the "second Hungary", which had since 1541 been an independent principality under a Hungarian prince for 150 years after the feudal period, ruled by the Szapolyai, of whom Werbőczy was a leading partisan, the *Tripartitum* went into immediate operation. Indeed, after the dissolution of the independent Hungarian principality, King Leopold I (1657-1705) acquired the princedom. The constitutional charter, known as the *Diploma Leopoldinum,* of 1691 lists the *Tripartitum* among the sources of Transylvanian law. The leading circles in Transylvania consisted, especially in the 16th century, exclusively of the "new men"; progressives were teaching law at the University of Padua, and the humanistic act of state government, so this became adapted for the further development of the existing national customary law (*ius patrium*).

Judicial practice in Hungary also necessitated the inclusion of the *Tripartitum* specifically among the legal sources of the country, and this happened in such a way that the publishers of the legal compilation of Hungarian law, the *Corpus Juris Hungarici,* in its 1628 edition, and thence-forward, constantly drew on it.

In the following centuries, Roman law exploited further opportunities, though, as seen before, it never received into general Hungarian law. Its principles and terminology came primarily to be incorporated in Hungarian decisions through the works of the *Quadripartitum,* which were to succeed the *Tripartitum.*

The Diet of l790-1791 set up a legal committee (*deputatio juridica*) to prepare the necessary reforms, among which there was a criminal code (*codex de delictis eorumque poenis*) and a draft civil code (*projectum legum civilium*) for debate in the following Diet.

The author of the book on private law, Imre Kelemen (1744-1819), followed new paths. In the first volume of a four-volume work, he deals with the history of private law according to the Kings and diets; in the second volume, he follows Werbőczy's order and in the same place, his Roman law (*De personis* - Persons, *De rebus* - Things and *De actionibus* - Actions). He defends the independence of Hungarian law against Roman law. Hungarian law had been nourished by decisions enjoying legal effect, was harmonious in its parts and contained far fewer contradictions than Roman and other laws. In his view, however, there were general sources of Hungarian law common to other legal systems: the law of nature, the positive divine law, i.e., law resting on Holy Scripture and statutes revealing it. Special sources were statutes, customs, privileges, decisions and particular legal rules. This comprehensive work also discusses the influence of Roman law, particularly in the chapter on paternal authority, while noting that betrothal and marriage were governed purely by canon law. Kelemen translated his book from Latin into Hungarian, and a subsequent translation into German was prepared by Jung.

The most notable scholar of Hungarian private law, and hence of an important part of the national law in the feudal period, was Ignác Frank (1781-1850), a professor at the University of Pest, who, after a short work, *Specimen elaborandarum institutionum iuris civilis Hungarici,* which was published in Kassa (Cassovia in Latin) in 1823, expounded his principles in a major work in two volumes which appeared in Pest in 1829, the *Principia Iuris Civilis Hungarici.* In Frank's works, having examined the origins of Hungarian law, he considered that it had been affected by Roman and Canon law as well as by French and German law. The Germans had been able to transmit their civilisation and institutions to the country. He cites as examples of this the holding of a National Assembly, legislative procedure, the principle of national defence, the privileges of the nobles, the status of the serfs (*servientes*), the institutions of feudal fiefs and grants, the mortgaging of lands, the rights of dowry, the use of the blood-price, and the various types of court procedure. Building on Werbőczy, he considers that the reign of Charles Robert (1308-1342) brought the system of civil procedure to Hungary from his French territories.

Ignác Frank elevated the study of Hungarian private law during the feudal period to its pinnacle. The *Principia iuris* was the most thorough and lucid of all works on private law up to that time, so that, as the highly reputed Hungarian legal historian Ferenc Eckhart (1885-1956) properly pointed out, it may be considered the classic work of the old private law literature, one that, if we wish to understand that law, renders it superfluous, so to speak, to consult any work written before it. Frank further developed the statements in the *Principia Iuris Civilis Hungarici,* in a work published in Buda in 1846 in Hungarian, which was by no means a mere translation of the original Latin text but supplemented it with new legislation and made use of historical documents published in the meantime. With their assistance, he attempted to outline the evolution of certain rules of customary law. (*ius consuetudinarium*), sometimes criticising the surviving rules of that law, explaining that they originated under quite different circumstances and with other objectives.

The work of the universities was deeply affected by the teaching reform of Empress Maria Theresa, the *Ratio Educationis* (1777), which aimed to include legal history, private law, criminal law and procedural laws in the teaching of Hungarian law (*ius patrium*), while now elevating public law to an independent subject. The first treatise on the national law for universities was also produced in 1751 by the pen of István Huszty, a professor at the Law Academy in Eger. This work did not further develop basic customary law, though it was used for half a century as a university textbook. The second *Ratio Educationis* published by the Emperor and King of Hungary Francis I (1792-1835) in 1806 did advance the teaching of

Hungarian law (*ius patrium*) at university by separating the teaching of criminal law (*ius criminale*) from that of private law (*ius privatum*).

Treatises by Kelemen and Mátyás Vuchetich (1767-1824) – Vuchetich as a follower of the ideas of Martini and Zeiller was the author of the books *De origine civitatis* (1806) and *Elementa juris feudalis* (1824) of major significance – on private and criminal law were also written. The evolution of the customary law, exploiting the judicial practice of the Supreme Court (*Curia*), continued. Hungarian private law writing peaked in the works of Ignác Frank, a professor at the University of Pest, which must be regarded as a classic scholarly work of the feudal private law (*ius privatum feudale*).

(viii) Recodification of the Hungarian Civil Law

1. Act IV of 1959 is the first Civil Code enacted in Hungary. Previously, drafts were made during the 19th century: first, partial drafts were framed to regulate specific areas of civil law,[261] then proposals were submitted on the comprehensive codification of civil law.[262] The most significant of these was submitted as the Bill of 1928 on Civil Law, which Parliament did not pass as an act, has been applied in judicial practice.

After World War II, Parliament adopted Act IV of 1959 concerning the Civil Code (Ptk)[263], followed by a comprehensive amendment in 1977.[264]

Since the political transformation in 1989-1990, more than 50 amendments to the Civil Code have been passed. Significant changes occurred in economic and social relations, also affecting civil relations. In 1998, the Hungarian government announced the initiation of a comprehensive modernisation of civil law, specifically focusing on the Civil Code. The goal was to create a modern civil code that would serve as an economic constitution, acting as the fundamental law governing civil life.[265]

Pursuant to the Hungarian government's decision, the Conception draft was completed, adopted as a moot point and submitted for extensive professional and social debate by the government.[266] The Editorial Committee and the Chief Codification Committee deliberated the motions concerning the Conception. The Chief Codification Committee divided the draft into two parts, i.e., the Conception that sets forth the cardinal principles of the new Civil Code and the Programme as the basis of the elaboration of the norm text. The main tendencies of the necessary amendments of the new Civil Code were comprehensively summarised in the

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[261] Partial drafts were made during the second half of the 19th century to regulate specific areas of civil law, for instance, the draft by Pál Hoffmann concerning a general part of civil law completed in 1871 and the draft by Istvan Teleszky concerning law of succession completed in 1887.

[262] Draft of the First Hungarian General Civil Code of 1900, Committee text of 1913 (second draft), the so-called Parliament Text of 1914 (third draft), and finally, the so-called Committee Text of 1915 (fourth draft).

[263] Law Decree XI of 1960 was enacted to regulate the effectiveness and implementation of Act IV of 1959.

[264] Act IV of 1977 was implemented pursuant to Law Decree II of 1978.

[265] Government Decree no. 1050 of 1998 (IV. 24.) on the Codification of Civil Law as amended by Government Decree no. 1061 of 1999 (V. 28.)

[266] Government Decree no. 1009 of 2002 (1. 31.)

Conception,[267] while the Programmed rendered a more meticulous elaboration of conceptual problems. In 2003, the government adopted the Conception[268] and published it in the Hungarian Official Gazette in line with the Programme. Any diversion from the Conception will require authorisation from the government, whereas departure from the Programme is subject to the decision of the Chief Codification Committee.

2. The Conception takes a stand on general substantial issues with respect to drafting the new Civil Code.[269] These are as follows:

No foreign *models* were adopted for framing the new Civil Code, although instances of foreign codification, such as the Civil Code of Holland and various international achievements of legislation were taken into consideration, such as the Vienna Convention on International Sale of Goods, UNIDROIT Principles of International Commercial Contracts (1994) and Principles of European Contract Law (Volumes I-II: 1999 and Volume III: 2002). Besides relevant directives of the European Community (considering the requirements of Harmonisation as pursuant to the European Agreement), rules of civil law currently framed under separate provisions of Hungarian law and significant principles of law established by judicial practice are also designated to be integrated into the new Civil Code.

The new Civil Code is designated to codify civil law at the national level and enact legislative accomplishments within a unified framework.

The Code adopts a monist principle, encompassing both civil relations of professional entities in the business world and financial transactions and civil relations of private entities. This approach is justified by several factors, including that in relevant foreign codification examples, separate codification of commercial transaction rules is no longer considered modern, as general contract law has evolved to incorporate commercial law principles. The monist principle helps avoid parallel regulation and eliminates current denotation problems.

Scopes of Content of the Future Civil Code

The scope of the future Civil Code will be defined as follows:

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[267] The following authors compiled specific parts of the Conception: András Kisfaludy:

General Rules of Liabilities On Securities, Tamás Lábady Liability for Extra-Contractual Damages and Insurance Contracts, Ferenc Petrik, *Volume One on Persons*, András Kőrös, *Volume Two on Family Law*, Tamás Sárközy, *Volume Three on Law of Things*, Lajos Vékás, *Introduction, and, Volume Four on Law of Obligations* (with the exception of Rules Pertaining to Insurance Contracts, Delictual Liability for Damages and Liabilities Pertaining to Securities), and, Emília Weiss, Volume Five on Law of Succession.

[268] Government Decree no. 1003 of 2003 (1. 25.)

[269] The document on “The Conception of the New Civil Code” is accessible on the homep. of the Ministry of Justice of the Republic of Hungary: http://www.im.hu/mainp.

Family Law will be integrated into the new Civil Code. The elaboration of the new Civil Code is designed to align with the comprehensive reform of the Labour Code. Consequently, norms of particular labour agreements as a separate type of agreement may be integrated into the Volume on Contract Law of the new Civil Code. Hence, special norms of labour agreements will be substantiated by the general rules on contracts pursuant to the new Civil Code.

According to the monist conception, rules of Company Law formulated under separate law would be integrated into the scope of special norms on particular legal entities under the new Civil Code. An advantage of this regulation would be that the scope of legal entities could be regulated under the new Civil Code in full breadth, the scope of general rules on legal entities could be extended, the repetition of particular rules could be avoided, and the character of the norms of the new Civil Code as secondary law would become manifest. (This corresponds to foreign patterns as well.)

The Conception enumerates several counter-arguments *vis-à-vis* the monist standpoint: pursuant to such regulation, norms of civil law and public law would mingle, the unity of the Act on Business Associations (which would be repealed in case of the purported regulation under the new Civil Code) would cease, and the cogent character of company law would also encumber its incorporation into the new Civil Code. The viability of the monist conception is debated in special literature and professional circles. The Chief Codification Committee, following deliberation on the draft of the Conception, formed the opinion that the relationship between company law and the new Civil Code will be defined following the supplementary review of the Act on Business Associations. Since the viability of the monist solution is under dispute, with all probability, the dualistic approach vis-à-vis the Conception would be adopted pursuant to the Amendment Act on Business Associations.[270]

The volume of rules on Industrial Property Rights and Copyright Law is not integral to the effective Civil Code, which should be maintained on the following grounds: in reseparate provisions under this branch of law set forth complex norms, they should not be extricated; furthermore, some powers are conferred pursuant to administrative acts. Finally, the effective settlement is customary and internationally recognised.

The Conception does not include a proposal for the re-codification of International Private Law and its manner, merely referring to scopes of content. Considering volume and content, the new Civil Code would be extended by a further structural unit, i.e., the "Volume." Therefore, the new Civil Code would consist of Volumes, Sections, Titles, and Chapters. (The numbering of articles would be continuous, whereas the numbering of Sections within the Volumes, of Titles within the Sections, and of Chapters within the Titles would recurrently start from the beginning.)

As pursuant to the Conception, the Civil Code will simultaneously be adopted by Parliament and take effect.

Concerning the inner structure of the new Civil Code, the following proposal has been made:

[270] The deadline for drafting the norm text of the new Civil Code is December, 2005.

The objectives of the new Civil Code will be formulated concisely in a Preamble, which will precede both the "Volumes" and the "Introductory Provisions." The fundamental principles of the new Civil Code will be summarised under the "Introductory Provisions." The new Civil Code, in accordance with the current Civil Code and the Bill on Civil Law of 1928, will not contain a General Section. According to the preamble to the Conception, a General Part would a) unnecessarily complicate the structure of the law,b) excessively increase the significance of rules of legal transactions, and c) encumber the application of the law.

The new Civil Code is going to contain the following books: book One on Introductory Provisions, Book Two on Persons, Book Three on Family Law, Book Four on Property Law, Book Five on the Law of Obligations, Book Six on the Law of Succession and Book Seven on Final Provisions.

The importance of the new Civil Code would be ensured by including a clause stipulating that only a separate act designed explicitly for that purpose could amend it. This contrasts with the current practice, where unrelated legislation often modifies the Civil Code.

3. In the following, we will outline major proposals for amendment concerning the Programme:

Book One on Introductory Provisions

Section One: The Purpose of the Act

Section Two: Principles of Interpretation

Section Three: Principle of Good Faith and Fair Dealing

Section Four: Principle of Expectable Conduct

Section Five: Imputable Conduct

Section Six: Prohibition of the Abuse of Right

Section Seven: Enforcement of Rights by Court

Preamble: The act's objective is not normatively based; therefore, it will be formulated under a Preamble, separately from the normative text. Besides emphasising that the Code regulates pecuniary circumstances concerning the integration of family law, it will highlight that civil relations of entities are also regulated under the new Civil Code.

Introductory Provisions: Fundamental principles that pertain to the whole body of the new Civil Code will be formulated under the Introductory Provisions; however, separate fundamental principles may be laid down within the Volumes, if necessary. According to the Conception, overlaps of effective fundamental principles will be eliminated, and the regulation will be more focused.

The following fundamental principles will be upheld under the new Civil Code:

The principles of *bona fides (*good faith) and honesty will be upheld as requirements concerning the exercise of civil rights and fulfilment of duties,

The principle of *nemo suam turpitudinem allegans auditur* will be upheld since a mainly correct relevant judicial practice has been established in broad scope.

The new Civil Code will also set forth the principle of the prohibition of the abuse of the law; however, it shall not render a definition of the content of this prohibition but transfer this power to judicial practice,

Substitution of legally required statements by judicial decisions will qualify as a significant intervention in the private autonomy of the parties concerned; therefore, this, as opposed to former practice, would only exceptionally be admissible,

The new Civil Code will also set forth the currently effective fundamental principle that the protection of rights guaranteed by law shall primarily pertain to the powers of courts.[271]

Book Two on Persons

Section One: Man as Subject of Law (with two titles)

Section Two: General Rules on Legal Persons (with seven titles)

Section Three: Inherent Rights (with three titles)

Section Four: Association (6 titles)

Section Five: Foundation (8 titles)

Section Six: Business Associations (6 titles)

Section Seven: Copyright and Protection of Industrial Property Rights

This Volume will specify rules concerning natural persons and legal entities. According to the Conception, substantial amendments to the regulation concerning natural persons will not be made under this Volume.

Provisions, primarily general provisions concerning legal entities and rules concerning the foundation and cessation of legal entities will require significant amendments.

The preamble of the Programme highlights that the Hungarian legal system currently lacks fundamental directive principles for legal entities. Therefore, the new Civil Code will reasonably establish both general rules for legal entities and a comprehensive set of regulations on their various types. Defining general criteria is essential because, according to the new Civil Code, any law outside its scope can only create a legal entity if it complies with the general criteria outlined in the Civil Code. In specific cases, an organisational unit of the legal entity may qualify as a legal entity solely based on its adherence to these general criteria. Furthermore, under the new Civil Code, a legal entity recognised by law must possess a minimum volume of property (primary capital) and ensure that a trustee manages its administration and representation. The new Civil Code will introduce a significant overhaul of the rules governing the establishment, modification, and dissolution of legal entities. Legal

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[271] The prescription of requirements of *generally expectable behaviour* and *proper exercise of powers* as fundamental, formally recognised principles is not deemed necessary, since their content corresponds to that of the requirements of *bona fides* and *honesty.*

The principle of *the obligation to cooperate* formerly prescribed as a fundamental principle shall not be a general requirement; therefore, it shall not be set forth under the Introductory Provisions, but under the law of obligations.

The principles of *the protection of the fundamental right of the person to property* and of *the right of the person to protection of the law* set forth under the effective Civil Code as fundamental principles do not need to be framed under the new Civil Code since the protection of these rights is laid down under the Constitution. Their formulation under the new Civil Code would be a mere repetition.

entities will acquire legal capacity not at the point of establishment but through an act of constitutive force and registration. All changes will only take effect upon the registration of this constitutive act, while the dissolution of a legal entity will occur upon its removal from the registry. The responsibilities related to maintaining these registers will be handled by an office organised under judicial supervision by a court.

According to the Conception, a so-called preliminary legal entity will operate like a preliminary association during the period between registration and establishment.

Regarding the general rules for establishing and dissolving legal entities, the new Civil Code specifies that a legal entity may be established via an agreement, a deed of foundation, or a charter (hereinafter referred to as the charter) when the Civil Code or other laws define the type of legal entity. Unless stated otherwise, the charter must mandatorily include the following information: The identity of the founder, name and registered office of the legal entity, purpose of establishing the legal entity, volume of assets allocated to the legal entity, area of economic activity of the entity, main decision-making and managing body of the legal entity, legal representative of the entity and the manner and extent of liability acceptance for the duties of the legal entity.

In alignment with Directive No. 1 of the European Community on Company Law, the definition of the area of economic activity (purpose) within the charter will not affect the legal capacity of the legal entity.

The general rules for the dissolution of a legal entity will be standardised, contrasting with the current Civil Code. Accordingly, a legal entity will cease to exist in the following circumstances: *a)* expiration of a specified period or supervening of a specified condition, *b)* dissolution, *c)* fusion or merging, *d)* de-merger or withdrawal, *e)* transformation into another type of legal entity, *f)* liquidation, *g)* declaration of cessation by court. Additional elements, such as the manner of legal succession, the obligations of the legal successor, and related matters, will also be addressed in the new Civil Code.

Business associations that currently do not qualify as legal entities (general and limited partnerships) *will be defined as legal entities* under the new Civil Code. According to the preamble, in their legal substance, these organisations currently function as legal entities, and their legal capacity corresponds to other forms of associations. If an organisation that does not qualify as a legal entity is conferred legal capacity by law, such law will specify the representative and managing body of the organisation as a lawful minimum and determine conditions for the assumption of financial obligations by the organisation.

In the scope of protection of civil rights of entities, the most significant proposal for amendment concerns the introduction of remuneration for injury of the entity. The effective objective legal consequences of privacy violations would be upheld; however, the legal institution of remuneration for injury of the entity would replace non-financial restitution. This would imply, on one hand, indirect compensation for privacy violations and, on the other, a civil penalty, which would incur indemnification. Remuneration for injury of the entity could also be adjudged in cases where the privacy violation did not incur losses for the aggrieved party; however, considering all circumstances, indemnification for the aggrieved party would be reasonably due. Based on the extent of loss, the seriousness of the breach of law, and improbability, the adjudication of remuneration for injury of the entity and determination of its extent would be subject to court discretion. Irrespective of or besides the

adjudication of remuneration for injury of the entity, the court could adjudge compensation for pecuniary losses pursuant to the rules of liability for damages.

Book Three on Family Law

Section One: Principles
Section Two: Marriage (6 titles)
Section Three: Unmarried Partnership (5 titles)
Section Four: Consanguinity (5 titles)
Section Five: Guardianship (3 titles)

According to the Conception, family law will be integrated into the new Civil Code to address peculiarities of relations under family law. *In the* area of family law, the legislator will not primarily conform to effective norms of the EU but to specific provisions of the European Convention on Human Rights on family law and to adjudication by the Strasbourg Court of Human Rights on family law, and, in the scope of international treaties, primarily to the Convention on the Rights of the Child of 1989.

The Volume on Family Law would be introduced by special fundamental principles peculiar to rules of family relations or depart from rules of civil relations.

The following principles regulated under the effective Act on Family Law will be reasonably upheld in the new Civil Code: the principle of protection of marriage and family, the principle of guaranteeing equal rights for the spouses and in the child-parent relationship, and the principles of protection of the child and of the primacy of their interests.

The requirement for harmony between the interests of the family and the individual, instead of the currently effective requirement for harmony between the interests of society and the individual, would be stipulated as a new principle. Some principles and provisions of family law framed under the Convention on The Rights of the Child will be incorporated into the new Civil Code; for instance, a child should ideally be raised within their own family, or, if that is not possible, in an alternative family environment.

The structure of the Volume on Family Law would conform to the effective framework that consists of the following five main sections:

1. Principles
2. Marriage
3. Unmarried Partnership
4. Consanguinity
5. Guardianship

In the scope of regulations concerning marriages, the rules of *matrimonial property law* will be fundamentally transformed. This can be justified by several factors; one of the most important is that these rules have been adjusted to transform social-economic conditions only marginally. Therefore, in this scope, content-based amendments and more detailed regulation will be required with special regard to the interest of family protection. These will be harmonised with the broader recognition of the autonomous financial decisions of the spouse engaged in economic activity, with the requirement of transaction security, particularly with protecting creditors' interests.

Book Four on Property Law

Section One: Possession (two titles)
Section Two: Ownership (four titles)
Section Three: Limited Proprietary Rights (3 titles)
Section Four: Land Register (4 titles)

(Book Three on Law of Things)

Instead of the Right of Ownership, this Volume will be titled Law of Things, and therein, the following maxims will be proclaimed as fundamental principles:

- Rules of Law of Things may be exclusively formulated under the Civil Code (by reason of the constraint of standard form)
- Rules of Law of Things may not be disregarded despite the common wish of the parties concerned
- Peremptory prohibition of nationalisation by law that overreaches the scope of appropriation will be formulated as a fundamental principle
- Appropriation under terms regulated by law will exclusively be admissible by reason of exceptional and cogent public interest and will be attached to guaranteeing full, immediate, and unconditional compensation
- Restriction of proprietary rights by reason of public interest may be affected exclusively on legal grounds and will be attached to guaranteeing full indemnification if legal conditions are obtained.

The Volume on Law of Things will specify rules on *res* and rights *in rem.*

Accordingly, the Volume will specify rules on blocks of freehold flats, basic rules of land law, and substantive rules of civil law on the registration of estates. According to the Chief Codification Committee, problems related to the registration of estates could be solved if the effective system were replaced by a system of administration implemented by an organisation under direct court supervision. This would adequately guarantee publicity and public authenticity.

The Programme does not propose a further specification of the scope of the *notion of res* under the Volume on Law of Things but recommends further regulation under the rules on sales agreements.

State property: As pursuant to the civil law of market economies, the property of all subjects of law is construed as private property, which also pertains to state property: under civil law, state property shall qualify as private property. As a main rule, state property is administered by publicly financed institutions that qualify as autonomous legal entities pursuant to the rules of budget economy set forth under the Budget Act. If the administration of government property does not pertain to the authority of any publicly financed institution, such property is administered by the Treasury as a legal representative of the state exercising the powers of the minister responsible for government property. If state property does not qualify as government property but is constituted as venture capital, the state will be liable to utilise it in business associations or non-profit organisations. The scope of state venture capital will be circumscribed under separate law; however, within venture capital, it is deemed necessary to

circumscribe both the scope of property to be maintained as long-term state property and the property designated to be privatised and realised, i.e., transferred to private ownership.

Exclusive and non-negotiable objects of state and local authority property will be defined, whereas the scope of negotiability will be reduced pursuant to the new Civil Code. Activities pertaining to state monopoly, which the state may benefit from pursuant to concession agreements, may exclusively be prescribed by law.

Besides framing, the rules of civil law pertaining to the right of ownership, the new Civil Code will set forth norms of restricted rights pertaining to another res. In this scope, rights of use and rights of assets will be regulated under separate chapters: personal and predial servitude shall qualify as rights of use, whereas lien shall qualify as rights of assets. Under that proposal, hypothecary law would be reintegrated into substantive law, or at least, pertinent rules under the Volume on Substantive Law and Contract Law would be divided.

Book Five on Law of Obligations

Structure: This Volume will consist of six Sections:

Section One: Common Rules of Obligations
Section Two: General Rules of Contracts
Section Three: Specific Contracts
Section Four: General Rules of Securities
Section Five: Tort Liability
Section Six: Unjust Enrichment, Benevolent Intervention in Another's Affairs, Implicit Conduct

Structure: This Volume will consist of six Sections:

Section One: It outlines general rules regarding liabilities.
Section Two: Will outline general rules regarding contracts.
Section Three: Will outline rules concerning specific types of contracts.
Section Four: Will outline general rules of liabilities related to securities.
Section Five: Will outline rules regarding extra-contractual liability for damages.
Section Six: Will outline rules relating to various case facts that establish liabilities, including unjust enrichment administration without a mandate, promises of reward, other itemised unilateral legal transactions, and implied behaviour.

1. *General rules of liabilities* will encompass regulations regarding the limitation and calculation of deadlines, rules of representation in transactions, guidelines related to guidelines related to interest and compensation, norms for the order of liquidation of debts of the obligor, provisions for multi-civic liabilities and principles governing unilateral legal transactions.[272]

[272] Unilateral legal transactions could include itemised unilateral legal transactions affecting liabilities, such as norms governing promises of reward and assumption of duties for public interest purposes.

2. Section Two will set forth *general rules pertaining to contracts.* To begin, the Conception outlines general principles that will guide the regulation of contract law.

Pursuant to the new Civil Code, the effective system of regulations will be replaced by a *uniform regulation* pertaining to contractual relations in commercial transactions and between private entities. It may be regarded as a substantive change that the legislator, for the purpose of framing contract law, construes contracts concluded in commercial (business) transactions as a *model* to be followed instead of traditional contractual relations between private entities.

According to the assumption of the Conception, parties engaged in financial transactions can enforce and protect their interests; therefore, civil law should interfere with contractual relations to the least possible degree. This entails both *recognition of private autonomy in a broad scope* and limiting legal possibilities of judicial intervention by the state. (This would be admissible exclusively *in exceptional cases and in the interest* of the so-called "weaker party," and its possible instances will be expressly defined. Such instances typically obtain in consumer legal relations, relations under labour law, and transactions realised pursuant to the application of general conditions of contract conclusion.) As a traditional means of protection, nullifying prohibited, immoral, and usury transactions may be resorted to as a sanction.

Pursuant to the above, the principle of *disposability* shall be applied in the scope of rules pertaining to contracts. Cogent rules in a broader scope shall be formulated for the purposes of consumer contract regulation.

According to the Conception, the effective framework of contract law would be upheld with respect to the *inner structure* of *contract law* rules.

Special rules pertaining to *consumer contracts* will be specified under the new Civil Code, which mainly implies the adoption of Community Law. Certain norms of consumer contracts will be stipulated under general rules governing contract law, whereas other norms will be stipulated under the respective type of contract. This would suggest a need for further clarification regarding the effective regulation of consumers and consumer contracts concepts.[273]

A *fundamental principle* of contract law will be stipulated as the freedom of the parties to determine the *content of the contract*. Furthermore, the principle of the parties' freedom to decide on the *conclusion of the contract* will be laid down. The parties may be required to conclude a contract exclusively under a separate law, which may outline such obligations in exceptional circumstances.

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[273] The concept of the consumer shall be construed as a natural entity concluding a contract beyond its scope of self-employment or business activity. Consumer contract shall be construed as a contract, which has been concluded between the consumer and the entity (“trader”) that concludes such contract within its scope of self-employment or business activity as pursuant to Para. d) of Article 685 of the effective Civil Code.

The *obligation* of the parties to *cooperate* will be set forth as a specific fundamental principle of contract law, which, as a general fundamental principle, will not pertain to the whole body of the new Civil Code.

In the scope of general rules of contract law, the Conception proposes the introduction of *amendments of substance* pertaining to: I. invalidity of contracts, and II. indemnification.

I. Rules pertaining to *invalidity* shall be based upon new principles since the Conception introduces amendments with respect to three elements: *a)* causes of invalidity, *b)* nullity, and *c)* the legal consequences of invalidity.

a) According to the Conception, *causes of invalidity* shall be formulated in a *unified system*, whereas, so far as possible, the legal consequences of the conclusion of invalid contracts shall be attached to causes of invalidity.

In the scope of causes of invalidity, the invalidity of *illegal contracts that violate the law* has posed a difficulty of construction in judicial practice for a long time. Consequently, the subsequent textual amendment will be regarded as reasonable: irrespective of other legal consequences, any contract that violates a rule of law shall be null and void provided that it is either specified under the respective rule of law, or the objective of such rule of law expressly prohibits the provision of the service defined by the parties to the contract or prohibits other content of the contract.

According to the Conception, the interest in eliminating unnecessary legal impediments in business transactions requires adopting the principle prevailing in judicial practice that *in re invalid contracts by reason of defect of form*, unless an exception is allowed by law, the defect of form of the legal statement shall be remedied by completion.

To ensure doctrinal completeness, *coercion* will be introduced as a further cause of invalidity.

The element of "conspicuously considerable difference in value" that is obtained between *service and valuable consideration* at the moment of contract conclusion would be upheld as a further cause of invalidity. Pursuant to the new Civil Code, the inclusion of certain elements in specific types of contracts, such as the element of chance, shall constitute an incontestability clause on grounds of invalidity, or, with the exception of consumer contracts, the parties upon contract conclusion could waive their right to impugn on the grounds of invalidity.

b) In pais, reference to the invalidity of null and void contracts will be maintained as admissible. Furthermore, the rule according to which the court deciding the case shall not take the nullity of contracts into consideration *ex officio* without the according request of the parties concerned will also be maintained. For further specification of these maxims, the legal principle prevailing in judicial practice, according to which exclusively a legally concerned entity with contentious legal capacity may institute action (objection) to establish invalidity by the court, will be formulated under the new Civil Code. The general fundamental principle of *nemo turpitudinem suam allegans auditur* will be specified not only under the Introductory Provisions but also *in re* invalidity, stipulating that the entity incurring the cause of nullity in an imputable manner may not refer to the contract's invalidity.

The distinction between null and void contracts and voidable contracts will be upheld. The relative ineffectiveness of contracts that violate the right of first refusal will be addressed as a new instance of ineffectiveness.

c) Regarding the *legal consequences of invalidity*, the principle stating that completion cannot be demanded due to an invalid contract should be clearly stated.

Provided *that* partial completions have been affected pursuant to invalid contracts, the Conception introduces solutions based on new principles that depart from effective rules: the restitution of the *status quo ante* is admissible provided that the conditions preceding the conclusion of the contract *may be restituted in kind*. In reversible real value services, this option applies based on a claim of ownership. However, due to its nature, a claim of ownership cannot be made for matching payment as a valuable consideration. A court may order a refund of payment based on the rules relating to the prevention of unjust enrichment.

Financial discrepancies (arising from costs, profits, damages, etc.) not settled by the restitution of the *status quo ante* shall be adjudicated based on rules pertaining to possession without legal grounds. Additionally, rules pertaining to the unjust enrichment of wealth shall be applied as supplementary guidelines.

In each case, conditions preceding the conclusion of the contract *may not be restituted* in kind either by reason of the character of the service, which substantiates genuine irreversibility, or by reason of annihilation, consumption, utilisation, processing, or alienation of the service, etc., which substantiates subsequent irreversibility. In such cases, for the settlement of the relations of the contracting parties, the Conception stipulates the application of rules pertaining to accession of unjust enrichment. However, in favour of the party that acceded to unjust enrichment, preferential rules of loss of enrichment shall not be applied by reason of the consideration of bearing responsibility and risk.

The option that, on condition, the cause of invalidity of the contract may be terminated, *the contract may be pronounced valid by the court* will be upheld.

The *legal consequences* of invalid contracts *shall be adjudicated by courts*. As opposed to effective regulations, the Conception proposes that even *in re* nullity of contracts, courts do not make decisions *ex officio* but exclusively at the request of the parties concerned.

Under the new Civil Code, the sanction of *condemnation in favour of the state* shall be null and void as a legal consequence of invalid contracts and the acquisition of wealth without legal grounds since their primary cases have been removed from adjudication.

II. The Conception states that, on the one hand, the rules regarding exemptions from liability for damages for a party that violates a contract will become more stringent*(A)*. On the other hand, the scope of indemnification will be defined in a way that contradicts the current Civil Code *(B)*.

a) Exemption of the Party Breaching the Contract from Liability for Damages: Under the new Civil Code, *a more stringent principle of exemption* will be introduced in international trade by separating the sanction of indemnification for breach of contract from the culpability of the breaching party. According to the Programme, in contracts concluded in commercial transactions, the allocation of consequential damages pursuant to a breach of contract

primarily implies the distribution of losses rather than the repression of individual fault. Therefore, the breaching party shall not be exempted by merely demonstrating compliance with generally expected behaviour in the given situation. The exemption would be substantiated exclusively if the breaching party can prove that the damage was incurred by an unavoidable obstacle that was not predictable at the time of contract conclusion. This principle of exemption shall also apply to the obligee's contributor.

b) Scope of indemnification: As a starting point, it needs to be established that damages deriving from breach of contract shall be fully indemnified.

In conformity with recognised norms under international commercial law, the standard of rational predictability *as a basis for limitation of the extent of unrealised profits and consequential damages* will be introduced. This implies that the extent of indemnification shall not exceed the extent of losses that the party infringing the contract could or had to foresee at the moment of contract infringement based on facts and circumstances they could be or had to be aware of as potential consequences of the contract upon concluding it. The aggrieved party shall be liable to furnish evidence concerning the extent of damages foreseeable for the party infringing the contract.

Under the new Civil Code, the regulation of contractual liability for damages deriving from breach of contract would be separated from extra-contractual (delictual) liability for damages *with respect to different conditions of exemption*. In contrast, under the effective Civil Code, the general rule (on the grounds of imputability) pertaining to *delictual and contractual liability for damages* is formulated manner principally uniformly and their partial elements are regulated accordingly. In the framework of the new Civil Code, the condition of liability with respect to exemption will be separated. The regulation of the manner and extent of indemnification would be upheld as uniform. The norms of the manner and extent of indemnification would be set forth within the scope of rules pertaining to delictual liability; however, including a mere reference to these shall suffice within the rules pertaining to contractual liability.

Given the demands posed by market competition, *restriction and exclusion of liability for breach of contracts* would be admissible, except consumer contracts.

3. Subsequently to formulating general rules pertaining to contracts, the new Civil Code would not set forth norms of delictual liability but rules of specific types of contracts and liabilities pertaining to securities. It would subsequently stipulate terms of extra-contractual damages and, finally, other elements that establish *liabilities*.

Rules formulated under particular parts of most types of contracts call for modernisation primarily by reason of the requirements of commercial transactions, and accordingly, rules pertaining to certain types of contracts under the Civil Code do not respond to the requirements of the business world. Therefore, they require modernisation, as well. Various commercial contracts are not integral to the effective Civil Code. Therefore, these contracts need to be integrated into the new Civil Code. The sequence of types of agreements will be determined on their financial import; however, the dare, *facere, praestare* character of services shall also be considered.

4. General substantive rules pertaining to securities will be summarised under the new Civil Code, which will define securities in a normative manner and circumscribe their

content-based criteria. Furthermore, it will set forth procedural rules of legitimation, rules of the transfer of securities, the restriction of raising objections, and substantive rules of the rescission of securities. These elements will also be regulated concerning dematerialised securities.
5. According to the Conception, rules pertaining to liability for extra-contractual damages will be divided into two parts: the general and the special part.

The general part would establish the universally recognised framework of delictual liability, rules of law of liability with peremptory effect, and pertinent sanctions (provisions concerning the manner and extent of indemnification). Increasing the rigour of the general rule pertaining to liability for extra-contractual damages is not deemed necessary.

According to the Conception, *the particular part* would establish the framework of special liability and indemnification and specify the respective particular rules.

By reason of the inconsistencies prevailing in judicial practice, the rule that incurring damages is prohibited by law will be formulated under *the general part* of the new Civil Code. Accordingly, all forms of incurring damages shall be illegal unless the rule of law provides otherwise. By reason of *the stipulation of* a *general prohibition of incurring damages*, the instances of the admissibility of incurring damages and the causes that exclude unlawfulness should be expressly specified. In the scope of *specifying causes that exclude unlawfulness*, the rule according to which indemnification shall be due in instances of incurring damages permitted by law will be formulated with peremptory effect. The exemption is admissible exceptionally and *in favour* of public interest exclusively pursuant to a provision of law.

The manner and extent of indemnification: Pursuant to Paragraph 4 of Article 355 of the effective Civil Code, four types of damages are distinguished: depreciation, unrealised profits, non-pecuniary damages, and expenses required for the elimination or reduction of financial losses.

a) According to annotations and judicial practice, the concept of *depreciation* of the property of the aggrieved party is defined as loss pursuant to changes incurred in *res*. This interpretation should be extended to *non-in-rem* pecuniary damages (e.g., losses proceeding from loss of rights or claims).

b) The category of *unrealised profits* contains several elements of uncertainty; therefore, its scope should be circumscribed within limitations of predictability, as manifest in standard judicial practice. According to the proposal, under the new Civil Code, the party incurring damages shall be exclusively accountable for unrealised profits that could be reasonably foreseen as a consequence of a given activity under normal circumstances. As a *condition sine qua non* of the establishment of liability for damages, the aggrieved party would be liable to prove the probability of real risk obtained.

c) Regulation of *non-pecuniary damages* is not deemed necessary under the new Civil Code, because the proposal to introduce compensation for privacy violations is on the agenda, which would be classified as a form of non-pecuniary damages.

d) The category of *expenses required to eliminate or reduce financial losses* affecting the aggrieved party should be supplemented by a limitation of content developed in judicial

practice. This means that only reasonable and appropriate expenditures and costs could be claimed as damages.

Besides upholding the principle of full indemnification, the new Civil Code should primarily provide for *pecuniary indemnification*. The options of restitution *in integrum* and indemnity in kind would be admissible as marginal manners of compensation, which the court may order at the express request of the aggrieved party and if the conditions set forth by effective provisions are obtained.

The particular part, within the scope of special instances, will specify rules pertaining to civil liability currently set forth under separate provisions. Among these, the following clauses are deemed to be most important:

- *Problems of liability for damages under labour law:* In case particular labour agreements are regulated in the framework of the new Civil Code, then liability for damages by the employee and the employer will also be regulated therein, either within the scope of rules of particular labour agreements or under rules pertaining to delictual liability.
- *Liability of public officials:* Under the new Civil Code, the specification of special rules pertaining to the liability of (head) officials of *business* associations, cooperatives, and various partnerships that are obtained for the association (cooperative, partnership) will be subject to the legislator's discretion.
- Act X of 1993 on *Product Liability* will be re-enacted under the part of the new Civil Code regulating delictual liability.
- *Absolute liability:* Subsequent to the harmonisation of different rules, rules pertaining to liability for damages incurred by the application of nuclear energy and the provisions on amends for damages pursuant to Act CXVI of 1996 on Nuclear Energy will be incorporated into the new Civil Code. If the clause on absolute liability is integrated into the new Civil Code, these provisions will introduce the part on delictual liability.
- As a fact of the case of *autonomous liability*, causal liability for damages will be established in case of *endangering, polluting, or otherwise harming* the *environment* or *nature*. Thereby, rules of liability currently set forth under separate law would be unified under the new Civil Code with the application of the European Community doctrine pertaining to causality and allocation of damages. The admissibility of action institution by the public prosecutor in favour of public interest and condemnation in favour of the Fund for Protection of the Environment could be prescribed separately.
- *Liability for hazardous activities:* The effective rule would be upheld with the adoption of the amendment elaborated in judicial practice that in case the instrumentality of the aggrieved party can be established, upon determining the extent of instrumentality, the degree of risk of the operation should be evaluated.
- *Damage done by game or incurred in the course of hunting, damages caused to game:* Provisions on damage done by game or incurred in the course of hunting and on damage caused by killing game currently regulated under separate provisions will be integrated into the new Civil Code. Under the new Civil Code, as a replacement for the liability clause for hazardous operation, the regulation of acceptance of responsibility for damage done by the game would reasonably prescribe stricter liability of the party with a hunting license. The party with a hunting license would exclusively be exempted from liability on the condition that the damage was incurred by the imputable fault of the aggrieved party.
- *Damages incurred by the employee and the substitute:* Under the new Civil Code, the effect of operative provisions that establish the liability of the employer (and cooperative) for damages will be extended to all legal entities in cases when the (head) official or member (in

the context of their position) incurs damages to a third party. It needs to be stipulated that if an employee, substitute, or member incurs damages by deliberate criminal act or misdemeanour, they will (potentially jointly with the employer or the legal entity) be directly liable to the aggrieved party.

- *State Liability for damages:* Effective rules pertaining to damages incurred in the scope of the exercise of administrative power will be amended according to maxims established by judicial practice. Therefore, *liability for damages incurred by the state, local government, or their institutions* shall exist exclusively if damages are incurred in the scope of the exercise of public authority, i.e., of the activity or negligence of the public authority. Rules pertaining to liability for *damages incurred in the scope of exercise of judicial power* will be formulated under a separate scope of actual circumstances concerning EU regulations. Under a relevant clause, the new Civil Code should stipulate, pursuant to the effective Act on the Rules of Procedure, that the state, irrespective of imputability, will be liable for grievances incurred by the violation of the right to due process of law and to its conclusion within a reasonable period. The regulation of claims for damages by reason of unlawful arrest or detention will be reasonably provided for under this clause. In the scope of judicial liability regulation, the stipulation that wrong decisions in their content made in particular cases shall not substantiate liability for damages by the state will be introduced as a peremptory non-liability clause. Liability for damages incurred by the state via legislation could be established with the limitation that the state shall be liable exclusively for damages incurred by particular acts substantiated by statutes pronounced *ex post facto* unconstitutional.

6. Section Six will set forth rules pertaining to various facts of cases that establish liabilities, such as the accession acquisition of wealth without legal grounds, administration of affairs without order, promises of reward, other itemised unilateral legal transactions, and implied behaviour.

Book Six on the Law of Succession (with five titles)

The Programme emphasises that commitments to tradition and conventions hold greater importance in the law of succession than other civil law areas. According to the Conception, "the objective of drafting a new Civil Code may not be construed as the replacement of rules responding to contemporary socio-economic relations by necessarily new regulations." As a result, the Conception suggests only minor amendments, rather than significant changes, in succession law. This means that lineal inheritance, a specific institution in Hungary, and the legal entitlement to inheritance will be preserved.

The community of Hungarian Lawyers is particularly interested in both the Conception and the Programme. They analyse the underlying principles and debate various assumptions

related to these proposals.[274] The development of the new Civil Code text has begun as a result of the government's decision..[275]

Book Seven on Final Provisions

Section One: Definitions
Section Two: Plural influence
Section Three: Computation of time
Section Four: Conformity with the laws of the European Union
Section Five: Entry into force

[274] This was demonstrated as a moment in the course of professional debates by the Conference on Codification of Civil Law held at the Eötvös Loránd University of Sciences in November, 2003, which dealt with significant institutions of civil law in the context of the Conception and the Programmed of the Civil Code. Reputed invited lecturers explicated their views on the following subjects: Pál Solt and János Zlinszky delivered lectures on strict liability, András Kisfaludy and Tamás Sárközy held forth on general rules pertaining to legal entities and on the powers of business associations. György Boytha lectured on non-financial indemnification and remuneration for the injury of the entity, and finally, Attila Harmathy and Lajos Vékás expounded the legal consequences of invalid contracts.

[275] Governmental Decree no. 1003 of 2003 (1. 25).

I. List of Abbreviations

Reviews

AcP	Archiv für die civilistische Praxis, Heidelberg, 1820sqq, New series Heidelberg, 1868sqq, Tübingen and Leipzig, 1878sqq, Tübingen, 1923sqq
AHDE	Anuario de Historia del Derecho Español, Madrid, 1924sqq
AJ	Acta Juridica, Cape Town, 1985sqq
ÁJ	Állam- és Jogtudomány, Budapest, 1985sqq
AJCL	The American Journal of Comparative Law, Ann Arbor, 1952sqq
AnnUB (AUB)	Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae, Budapest, 1959sqq
AUSz	Acta Universitatis Szegediensis de Attila József nominatae. Acta Iuridica et Politica, Szeged, 1955 sqq.
BIDR	Bullettino dell'Istituto di Diritto Romano <<Vittorio Scialoja>> (1st series: Roma, 1888-1933, 3rd series:) Milano, 1959sqq.
BMCL	Bulletin of medieval canon law, 1971sqq.
DROITS	Revue Française de Théorie de Philosophe et de Culture Juridique, Paris, 1985 sqq.
Glossae	Glossae. Revista de Historia de Derecho Europeo, Murcia, 1988sqq.
IJ	The Irish Jurist, Dublin, 1935sqq
Index	Index. Quaderni camerti di studi romanistici─International Survey of Roman Law, Camerino, 1970sqq
IRMAE	Ius Romanum Medii Aevi, Milano (Mediolani), 1961sqq
Iura	Iura. Revista internazionale di diritto romano e antico, Catania, 1950sqq
JC	Ius Canonicum, Pamplona 1961sqq
JJP	Journal of Juristic Papirology, Warszawa, 1946sqq
JK	Jogtudományi Közlöny (Bulletin of Legal Science), Budapest, (1866skk, new series:) 1946sqq
JLH	Jorurnal of Legal History, London, 1980sqq
JZ	Juristenzeitung, Tübingen, 1945sqq
Labeo	Labeo. Rassegna di diritto romano, Napoli, 1955sqq
LHR	Law and History Review, Ithaca, 1983sqq
LLR	Loyola Law Review, New Orleans, 1920sqq
LaLR	Louisiana Law Review, Baton Rouge, 1910sqq

MIÖG	Mitteilungen des Instituts für österreichische Rechtsgeschichte, Innsbruck, 1888-1944, Wien-Köln-Graz, 1948sqq
MJ	Magyar Jog (Hungarian Law), Budapest, 1954sqq
PUM	Publicationes Universitatis Miskolciensis. Series Iuridica et Politica, Miskolc, 1985sqq
QF	Quaderni Fiorentini per la storia del pensiero giuridico moderno, Milano, 1972sqq
RDFDSJ	Revue d' Histoire des Facultés de Droit et de la Science Juridique, Paris, 1987sqq
Rechtsgeschichte	Rechtsgeschichte, Frankfurt am Main, 2002sqq
RHD	Revue historique de droit français et étranger, Paris, (1st series: 1855-1877, 4th series:) 1922sqq
RIDA	Revue internationale des droits de l'antiqité, Bruxelles, (1st series: 1948sqq, 3rd series:) 1954sqq
RIDC	Revue internationale de droit comparé, Paris, 1949sqq
RISG	Rivista italiana per le scienze giuridiche, Roma, (1st series: 1886sqq, 3rd series:) 1946sqq
RIW	Recht der Internationalen Wirtschaft
RJ	Rechtshistorisches Journal, Frankfurt am Main 1982-2001
ROW	Recht in Ost und West
RSDI	Rivista di storia del diritto italiano, Roma 1928sqq
SDHI	Studia et Documenta Historiae et Iuris, Roma, 1935sqq
SG	Studia Gratiana, Roma, 1953sqq
SJH	Scandinavian Journal of History 21 (1966), Stockholm, 1975sqq
SSL	Scandinavian Studies in Law, Stockholm, 1957sqq
TECLF	Tulane European & Civil Law Forum, New Orleans, 1986sqq
TLR	Tulane Law Review, New Orleans, 1926sqq
TR	Tijdschrift voor Rechtsgeschiedenis, (Revue d'Histoire du Droit; The Legal History Review) Haarlem, 1918sqq
WiRO	Wirtschaft und Recht in Osteuropa,
ZEuP	Zeitschrift für Europäisches Privatrecht, München, 1993sqq
ZR	Zeitschrift für Rechtsgesichte, Frankfurt am Main, 2000sqq
ZSS RA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung, Weimar, 1880sqq
ZSS GA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung, Weimar, 1880sqq
ZSS KA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung, Weimar, 1911sqq
ZfNR	Zeitschrift für Neuere Rechtsgeschichte, Wien, 1979sqq

ZfRV	Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht, Wien, 1990sqq (Zeitschrift für Rechtsvergleichung 1960-1989)
ZfVglRW	Zeitschrift für vergleichende Rechtswissenschaft, Stuttgart, 1878-1942; 1953-sqq

II. EDITIONS OF SOURCES AND SERIALS

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

III. OTHER ABBREVIATIONS

ABGB	Österreichisches Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code, promulgated in 1811; put into force in 1812)
BGB	Bürgerliches Gesetzbuch (German Civil Code, promulgated in 1896; put into force in 1900)
Csjt.	A házasságról, családról és gyámságról szóló 1952: IV. tv. (Act nr. IV on Family, Marriage and Tutelage (considerably modified in 1974, 1986, 1990, 1995, 1997 and 2002)
Mtj.	Magyarország Magánjogi törvénykönyvének javaslata (1928) (Draft on the Hungarian Civil Code)
OR	Schweizerisches Obligationenrecht (Swiss Law on Obligations, promulgated in 1881; put into force in 1883; revised in 1911; the revised version went into force in 1912)
Ptk.	A Magyar Köztársaság Polgári Törvénykönyvéről szóló 1959: IV. tv. (Hungarian Civil Code; Act nr. IV promulgated in 1959 (substantially revised in 1977, 1991 and 1993)
UCC	Uniform Commercial Code promulgated in 1952)
ZGB	Schweizerisches Zivilgesetzbuch (Swiss Civil Code, promulgated in 1907; put into force in 1912)

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