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Comparative Law

Syllabus

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Preface – Caveat

Preface: In this syllabus, you will find an overview of selected legal systems. The first chapters deal with the history of Roman law. This choice presented itself to us insofar as Roman law is to be considered as the parent source of numerous contemporary legal systems. The knowledge of this discipline is therefore a prerequisite to undertake a comparative law study and grasp the differences between the contemporary legal systems to which the subsequent chapters are devoted. Naturally, we had to make a selection as to which contemporary legal systems would be under review. This syllabus is therefore not intended to be comprehensive and must be used as a supplement to the course material that will be given during the oral sessions. Other legal systems and further developments will indeed be included in our lectures. They may also vary from year to year, depending also of eventual visiting professors who would come to speak about their own legal system.

Caveat: This syllabus is in its first version and should only be used for study purposes. If you see any typos, spelling mistakes or other issues in the text, do not hesitate to let us know so that we can improve it in view of its final version (jf.gerkens@uliege.be).

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Chapter 1 - History of Roman Law

1) Introduction

To date, we are still regularly referring to Romans by using Latin expressions for instance. When referring to Romans, people usually raise names such as Julius Caesar, Augustus and Nero, or even mention stories of gladiator fights or horse races. Yet, it is less likely that the they would refer to the science of Roman jurists, even though this is an essential contribution of the Roman civilisation. Indeed, the Romans are considered to be the inventors of the science of law, which is one of their most remarkable inventions. Prior to getting into the heart of this point, one must first focus on the historical context surrounding such a remarkable invention.

Traditionally, the history of Roman law is divided into the following five periods:

- Ancient Law (753-280 BCE);
- Pre-classical Law (280-27 BCE);
- Classical Law (27 BCE-284 AD);
- Post-classical Law (284-527 AD); and
- Justinian Law (527-565 AD).

The first three chapters of this *syllabus* are dedicated to the historical and political description of these five periods, as well as an explanation of the various legal changes known by the Roman people throughout those periods.

2) Ancient Law (753-280 BCE)

2.1) Historical and Political Contexts

The period of Ancient Law is that of the beginnings of Rome. According to the tradition, the city was founded by Romulus in 753 BCE. As per the legend of the twins Romulus and Remus, raised by a wolf, Romulus would have killed his brother and founded Rome on the Palatine Hill thereafter. Yet, authors like Livy (Titus Livius) – thanks to whom this legend passed through generations – lived many centuries later. The very existence of Romulus is therefore far to be certain. On this point, archaeological research shows in fact that the Palatine was already inhabited in the 8th century BCE.

At the outset, Rome was just a small agricultural village. Therefore, numerous rules of law from that period can be explained precisely by this rural character of the first Romans. For instance, being a landowner mainly meant owning fields and animals. It is only later that Romans became merchants and that, by the same token, trade tainted Roman law.

Due to this agricultural and rural character, the legal needs were very limited and so were the legal reasoning in Rome. At that period, the Romans thus did not yet distinguish themselves from the other peoples of Antiquity in terms of law. For instance, to settle neighbourhood disputes or inheritance issues, a single magistrate sufficed: the pontiff, who was in charge of justice, religion and moral.

On the political level, the early Rome was a Monarchy and, according to the tradition, the following seven kings would have ruled the city successively:

1. Romulus (753-716 BCE);
2. Numa Pompilius (715-673 BCE);
3. Tullius Hostilius (671-640 BCE);
4. Ancus Martius (640-616 BCE);

5. Tarquin the Elder (616-578 BCE);
6. Servius Tullius (575-535 BCE); and
7. Tarquin the Proud (534-509 BCE).

However, when those Kings became dictators, the Romans understood that the system had to be changed and Rome stopped being a Monarchy to become a Republic. From then on, the worst political crime was to take oneself for the king of Rome, and many Romans were blamed for tempting to do so. The best-known example is certainly that of Julius Caesar.

To avoid the return of tyranny, the Republic of Rome was ruled by two consuls, who were elected for a term of one year which could not be renewed. Each consul was therefore watched by his colleague and none of them could settle permanently in power.

Whilst Rome managed to avoid the risk of tyranny, this was still not enough to ensure civil peace. At that time, Rome was a class society, with its nobility on the one side (i.e. the Patricians) and the 'ordinary' people on the other side (i.e. the Plebeians). Insofar as the Patricians had all rights, the Plebs revolted often.

2.2) Legal Changes

Among the reasons that triggered Plebeians to revolt, there was a pure legal one: the publicity of the laws. Given that Roman laws were not public, the Plebeians were in fact judged under rules of law which were unknown to them. The Plebeians consequently requested that these rules of law be made public.

In response to this request, Rome commissioned – between 451 and 449 BCE – ten magistrates, who were in charge of drafting the law of Rome. Called *Decemviri*, those ten men enacted a law, which then passed to posterity under the name 'Law of the XII Tables'.

This was a first major step in the evolution of Roman law since, from then on, the law did no longer belong to a limited caste of pontiffs. Instead, the whole people could become aware thereof. This marked the start of the obligation to publish laws.

Still today, such obligation of publicity remains essential for the laws to enter into force. For instance, in Belgium, the publication is done through the Belgian Gazette ('*Moniteur Belge'*; '*Belgisch Staatsblad*') and in France through the '*Journal Officiel*'.

Back to the Ancient Rome, the Law of the XII Tables was published in the form of twelve tables displayed on the Roman forum, which constituted the centre of Roman public life (e.g., the market was held on the forum and justice was served there).

As to the substance of the Law of the XII Tables, it must be stressed that such law marks a significant step in our legal life. Indeed, some legislative choices made by the *Decemvirs* still govern our legal life today. This is, for example, the case regarding the way to evidence ownership. To evidence ownership is a complex question by nature. One could obviously try to prove that he/she has acquired something from someone but this does not prove ownership itself. Indeed, to prove ownership, it is required to evidence that the person from whom ownership was acquired was her/himself the owner already. Two and a half millennia later, the problem remains the same and the solution adopted by our law is still dependent on the choices made by the Decemvirs in this Law of the XII Tables, namely that ownership is proven by possession*.

This perfectly shows why the Romans could be that proud of their Law of the XII Tables, which numerous Romans knew by heart.

Next to the Law of the XII Tables, a second important step was taken in 367 BCE when the urban praetor was created. The urban praetor was the magistrate in charge of addressing disputes between Roman citizens. Consequently, the pontiff was relieved of this category of disputes and could therefore focus exclusively on religious matters. This new distribution of tasks constituted an essential step towards the secularisation of the law as a clear distinction was explicitly made between religious matters on the one side and human and legal rules on the other side.

At the same time, the magistracies of the censor and the curule aediles were probably created. As for the censors, they were in charge of the census as well as of the censorship of behaviours contrary to morality. As for the curule aediles, they held the police power and, thus, intervened in the organization of games and in the regulation of public markets. Some of the rules adopted by these Roman 'policemen' still govern our sales contracts today (e.g., the rules guaranteeing the buyer that what he has purchased is free from hidden effects).

In addition to these two fundamental breakthroughs, a third important step was taken in terms of procedure in ancient Roman Law. This important step related to the way Roman people could assert their rights in court. According to legend, it is Gnaeus Flavius[@] – a scribe of modest origins – who lies behind the publication of the rules of procedure. He achieved this *tour de force* at the end of the 4th century BCE. More concretely, these procedural rules were in the form of formulas, which are stereotyped documents serving both as a starting point and as a guide to the trial. This publication passed to posterity under the name of *ius Flavianum*.

Lastly, ancient Roman law was marked by the adoption of another fundamental law, namely the *Lex Aquilia*. According to the tradition, the adoption of this law dates from 286 BCE but it is now certain that such a date is not exact. Whereas the exact date is still unknown, the form and content of this plebiscite allow us to link this legislation to the Ancient Law.

The name of the law – the *Lex Aquilia* – comes from the magistrate who submitted it to the vote, i.e. the tribune of the plebs *Aquilius*. This piece of law is a masterpiece as it established the principle of tort liability. It was in that frame that, for the first time, Roman jurists associated the three key elements of our law of liability:

- the fault;
- the damage; and
- the causal link between this fault and this damage.

Whilst ancient law is a period during which Roman law evolved slowly, it still distinguished itself very early from the law of other civilizations of Antiquity. This was mainly due to the clear distinction between law and religion, which made Roman law original and innovative. This secularisation of the law was essential. Indeed, if one wants to make a scientific study of it, he/she must be able to criticize the rules, which is hardly thinkable if those rules were attributed to a deity.

3) Pre-classical Law (280-27 BCE)

3.1) Historical and Political Contexts

The period of Pre-Classical Law corresponds to the end of the republican period of Rome. At that time, the Roman farmers became insatiable soldiers, the expansion of Rome continued and went beyond the limits of Italy. This period was essentially marked by the wars between Rome and Carthage over the supremacy of the Mediterranean. These wars against the Carthaginians are called the Punic Wars, in reference to their Phoenician origin.

There were three Punic Wars:

- The first Punic War lasted from 264 to 241 BCE and was maritime.
- The second Punic War lasted from 212 to 202 BCE and left its mark on people's imagination. It is indeed that war that saw Hannibal lead the Carthaginian army on an elephant back: leaving from Spain, the Carthaginians crossed the Alps to attack the Romans from the North and Hannibal sowed trouble and terror throughout Italy. Even though the Carthaginians won numerous battles, it was Rome that ended up winning the war and repelling the Carthaginians to Africa. Yet, this Roman victory did not prevent the occurrence of an additional war.
- The third Punic war lasted from 149 to 146 BCE and ended with the destruction of Carthage by the Roman army led by Scipio the Emilian; this was intended to give it the *coup de grace*.

At the end of the republican period, profound changes were emerging. The two-headed system of the consulate showed its limits. Crassus, Pompey, and especially Julius Caesar aspired to longer reigns. They thus agreed to divide power between themselves. This was the first Triumvirate. Political collaboration between Crassus, Pompey and Julius Caesar was however proving difficult. This period ended in blood. Octavian became the firm Roman Emperor under the name of Augustus. This accession marked a profound change in the political organization of Rome.

The end of the Republic traditionally marks also the end of the pre-classical era of Roman law.

3.2) Legal Changes

At the time of the First Punic War, a new institution besides the urban praetor was created: the peregrine praetor. "Peregrine" means "foreigner living on the Roman soil". Due to the expansion of Rome, the Romans became surrounded by numerous peregrines and commercial contracts between these two were more frequent. Insofar as the law applicable to Romans differed from the one applicable to peregrines, new legal questions arose. A new magistracy, the peregrine praetor, was thus needed.

With respect to the Second Punic War, the Roman victory resulted in important consequences. Whilst such victory brought Spain – which was previously Punic – under Roman domination, it also cost many lives of soldiers which left many orphans. Under the age of fourteen, these orphans were assigned guardians (*tutors*), who were in charge of settling most of the difficulties up to that age. On the other hand, the orphans aged fourteen or more were not given any help and were left to their own devices to manage their assets and their legal life. Such situation entailed risks of abuse. This was the reason why Romans passed the *lex Laetoria*, which was aimed at helping minors under the age of twenty-five who would be victims of abuses from

other unscrupulous Roman citizens. If today the majority has dropped to eighteen, the principles of protection have remained the same as to the ones applicable under the *lex Laetoria*.

In addition, Romans adopted the *lex Aebutia*, which introduced another type of procedure: the formular procedure. More modern, more flexible, such law also gave another role to praetors who were from thereon able to influence the development of law by creating a new body of legal rules called "honorary law" (or *ius honorarium**). Honorary law is opposed to civil law (or *ius civile*), which corresponds to the laws promulgated by the public authority.

During the same period (i.e. around the 2nd century BCE), legal science really took off with the *veteres* – the old men – who are the first real jurists. The first of these *veteres* is Publius Mucius Scaevola@, who is deemed to be one of the founders of civil law. Besides, he exercised political functions as consul, which constituted the highest magistracy of the Roman Republic. His son, Quintus Mucius Scaevola, was also a jurisconsult.

In that respect, it is interesting to note that a jurisconsult was a private individual who studied law for pleasure. This feature was specific to Romans as before them, rules of law were exclusively studied by professionals. These jurisconsults used their experience and knowledge to render important services to their fellow citizens such as gratuitous consultations to help addressing legal problems. Romans were thus a real people of jurists.

In that frame, jurisconsults were also the creators of new legal solutions. For instance, Quintus Mucius Scaevola created the concept of good faith (*bona fides*), which remains an essential legal institution nowadays. Quintus Mucius Scaevola was also the law professor of Cicero@ – who became a universally famous lawyer, and of Aquilius Gallus@ – who became an important jurisconsult.

At the beginning of the 1st century BCE, two important laws were passed: the laws *Iulia* and *Plautia Papiria*, which granted Roman citizenship to the free inhabitants of the Italic peninsula. This was a natural consequence of the geographical expansion of Rome's power.

Moreover, Romans adopted another important law in 67 BCE, namely the *lex Cornelia de iurisdictione*. To understand correctly the content of this law, one must recall the functioning of the formular procedure at that time. Under the formular procedure, formulas were central to the judicial administration. A formula was a text written by the praetor on a wax tablet, whose content depended on the request submitted by the parties to the praetor. Such formula was then given to the judge, who was a mere private individual and not a professional magistrate. The formula had thus to contain an injunction to judge as well as a precise indication of the elements needed to be taken into account to deliver the requested judgment.

Through his edict*, the praetor announced – at the beginning of his office – which formulas he would grant during the year of his office. The novelty brought by the *lex Cornelia de iurisdictione* is that the praetor was bound to comply with the content of his edict. The praetor was therefore required to scrupulously abide by the promises he had made to be elected. Such law brough more stability to the administration of justice in Rome.

One last feature of this period was the drastic increase of jurisconsults. An illustration of this increase is Servius Sulpicius Rufus@. Praetor in 65 and consul in 51 BCE, he was first a pupil

of Aquilius Gallus and then had about ten pupils himself. They were referred as the Servian school. Servius was also prolific in terms of writing, since he is credited with 140 books. In that respect, one must note that what the Romans called *liber* (or book) was in the form of a roll and not a bound book. A bound book was rather called a *codex* (or code), which was much longer than a *liber*.

4) Classical Law (27VCE – 284 AD)

4.1) Historical and Political Contexts

The period of Classical Law starts at the time the Republic became an Empire with the assassination of Julius Caesar and the accession by Augustus to the reign. Yet, this political rupture should not be overestimated as this modern terminology (i.e. Republic and Empire) does not correspond to the one used by the Romans themselves.

Conscious of the critics raised against Julius Caesar as he took himself for the king of Rome, Augustus was cautious and refrained from upsetting the rules of the Roman Republic. Accordingly, he decided to maintain the two consuls, the censors, the praetors, the pontiffs and the Senate. This was however only appearance as, in practice, Augustus had become all-powerful and exercised power alone by centralizing these three magistracies:

- He was consul perpetually re-elected with a well-chosen colleague;
- He was censor and thus controlled the composition of the Senate; and
- He was tribune of the Plebs and thus benefitted from a significant personal immunity.

In addition, on the death of Lepidus, Augustus became Grand Pontiff. Such concentration of powers is of course totalitarian and far removed from our current vision of democracy. Indeed, the Roman Republic was not a democracy.
The dynasty of the *Severi* ended with the assassination of Severus Alexander in 235 AD. This assassination marked the beginning of a long period of anarchy within Rome, which had lasted until Diocletian's accession, fifty years later.

4.2) Legal Changes

In terms of legal science, the teaching of law is of increasing interest to aspiring jurisconsults. The Servian school (i.e. the one of Servius Sulpicius Rufus) was succeeded by two new competing and antagonistic schools of law: the one of the Sabinians and the one of the Proculians.

With respect to the Proculian school, it was founded by Labeo[@]. Whilst his political career was successful as he had managed to climb the ladder of the *cursus honorum* one by one, he then found himself opposed to Augustus. Such position was obviously uncomfortable, and even dangerous. Augustus knew, however, how to recognise the value of his political opponents and went as far as to give consulate to Labeo. The latter decided to reject such honour and to renounce to any political ambition. Alternatively, he decided to devote himself to legal science by spending six months a year teaching and spending the other six months in the countryside to write legal works. During his career, Labeo wrote four hundred books, which earned him the general esteem, including from the Emperor even if he was politically opposed.

With respect to the Sabinian school, it was founded by Capito@. Unlike Labeo, Capito was close to the Emperor and was, in terms of law, more conservative than Labeo. This might explain why he was less famous among future generations.

The next leaders of these two antagonistic legal schools were Proculus@ and Sabinus@, who gave their names to these schools. Despite the undeniable prestige Proculus must have enjoyed, we do not know much about him. This is essentially because he decided to devote himself exclusively to his task of jurist and did not undertake any political career. On the other hand, Masurius Sabinus is better known to us notably due to his masterpiece: the *libri tres iuris civilis*, which are three books dedicated to civil law. This masterpiece will be of such significance that any future jurist wishing to comment on civil law would comment on Sabinus.

At the beginning of the 2nd century AD, the antagonism between these two schools weakened. To name but a few, the great jurists of this time are called Celsus@, Gaius@, Julian@, African@ and Pomponius@.

Among these few names, there is the greatest professor of Roman law in all history: Gaius. We do not know much about him except his first name. This is therefore extraordinary that Gaius managed to cross generations through his sole name, which is even more true as "Gaius" was a frequent name. Indeed, Julius Caesar's full name is Gaius Iulius Caesar and his first name was usually omitted as it was so frequent. Gaius' course is called "Institutes". This course was revolutionary, especially in respect of its three-parts structure which was transplanted in the Napoleon Code seventeen centuries later.

As for the jurist Julian, he was a contemporary of Gaius and assumed several important functions under the Emperors Hadrian, Antonius Pius and Marcus Aurelius. For instance, Hadrian requested from Julian that he codified the praetor's edict. Until then, the content of the praetor's edict depended on the different praetors, who changed the content over the course of their offices. However, insofar as the Emperors sought to control Rome at all levels, it came as no surprise that they also sought to control such praetor's power. Through the codification of the praetor's edict, Julian gave the edict a final form which could only be modified by the Emperor. This edict's final form was called perpetual edict*. In return of this service, Hadrian decided to double Julian's salary. This shows that the jurisconsults' activities changed from gratuitous services (with the *veteres*) to payable activities, making some jurisconsults high-ranking imperial officials.

Among these high-ranking imperial officials, there were three great Roman jurists from the end of the classical period: Papinian@, Ulpian@ and Paul@. In terms of political career, these three jurists all served the Emperor Septimius Severus: Papinian was the prefect of the *praetorium*, which is a position that can be compared with our current minister of justice; Ulpian and Paul were his assessors. These latter served in turn as prefects of the *praetorium* under Severus Alexander. In terms of legal legacy, these three Roman jurists have the greatest number of texts that passed through generations. Insofar as classical Roman law is the most sophisticated law, the texts of these classical jurists were discussed for centuries by generations of jurists involved in studying Roman law.

Next to these important legal legacies, it is worth noting that the *constitutio antoniniana** was adopted in 212 AD under the *Severi*, and more precisely under the reign of Antoninus Caracalla. This imperial constitution (*constitutio principis**) granted citizenship to almost all free inhabitants of the Empire, and thus amounted to a massive naturalization operation. Whilst it

may echo the *Iulia* ad *Plautia Papiria* laws of the pre-classical period, the *constitutio antoniniana* pursued less philanthropic goals. Indeed, Caracalla seemed to have pursued political and tax motives instead. The result was however that as of 212 AD, almost all free inhabitants of the Empire were subject to the same Roman law.

The end of the *Severi* dynasty marked the beginning of a certain decline in terms of legal science. On an anecdotical note, it is worth noting that one of Ulpian's pupils under the reign of Severus Alexander was Modestinus@, which may appear emblematic of such decline. With this decline, the classical era of Roman law ended.

5) Post-classical Law (284 – 527 AD)

It was the Emperor Diocletian who managed to escape Rome from a long period of anarchy. Diocletian coming from Salona in Illyria (not far from the current city of Split in Croatia), his accession marks the beginning of a shift in the centre of gravity of the Roman Empire. Indeed, Illyria was located at the intersection between the Roman and Greek worlds, not only geographically but also culturally and linguistically.

5.1) Historical and Political Contexts

On the political level, Diocletian reorganised the Empire by inventing the Tetrarchy. He also subdivided the Roman territory into four parts so as to improve its protection against enemy invasions. This subdivision corresponded to the linguistic reality of the region: Latin in the West and Greek in the East. As part of such reorganisation, Diocletian joined Maximian as co-Emperor but Diocletian remained an absolute monarch holding economic and religious control. On the economical level, Diocletian – eager to stop the severe economic crisis and the accompanying inflation – adopted an edict called the "Edict of the maximum" in 301 AD. The purpose of this Edict was to set a maximum cap, applicable to the whole Empire, for the price of foodstuffs, objects and services. In the same vein, Diocletian introduced the *laesio enormis*, which allowed to annul the sale (*emptio venditio**) of a house when the price obtained by the seller was less than half of the real value of the building. The economic crisis was such that it had pushed starving owners to sell their houses at a low price to feed themselves, which the Emperor wanted to prevent.

On the legislative level, the reign of Diocletian saw the introduction of a new type of norms: the compilations of imperial constitutions, which were legislative acts emanating from the Emperors. These compilations were called *Codex Gregorianus* and *Codex Hermogenianus**:

- The Codex *Gregorianus* brings together the imperial constitutions from Hadrian to Diocletian; Gregoranius was probably the name of the individual who was in charge of this compilation;
- The Codex *Hermogenianus* takes up Diocletian's constitutions and completes the previous code; Hermogenianus was a jurist and some of his texts are included in the Digest* of Justinian.

From 303 AD, Diocletian persecuted Christians and Manichaean. He was the only Emperor to abdicate, which he did in 305 AD. On an anecdotical note, Diocletian – as his health declined – had a palace built for himself near the places of his childhood. This palace is now the centre of the city of Split in Croatia.

5.2) Legal Changes

At the outset of the Post-Classical Law period, the decline in legal science was notable. There were hardly any jurists worth mentioning anymore and legal changes were the responsibility of the imperial chancelleries.

After Diocletian, the next major Emperor was Constantine, who was also from Illyrian. With Constantine, the Roman Empire switched from a long polytheistic religious tradition to become Christian. Albeit Christians constituted a small minority among the population, Constatine decided to make Christianity the state religion.

To manage to declare Christianity the state religion of the Roman Empire, Constantine first adopted the edict of Milan in 313 AD to proclaim freedom of worship and put an end to the persecutions of Christians. Then, Constatine declared Sunday as a day of legal rest and convened the Council of Nicaea in 325 AD. This Council – aimed at ending the dissensions between Christian sects – constituted an important moment in the foundation of the Christian Church. Among the decisions taken during this Council, there was the calculation of the date of the feast of Easter, independent of the Jewish Passover: since then, this celebration takes place on the first Sunday after the full moon following the spring equinox.

The Christianity of the Roman state was called into question during the reign of the Emperor Julian. In 361 AD, Julian adopted an edict of tolerance to allow Paganism, Judaism and even other Christian sects. Julian's will was to restore the Roman religion in its polytheistic tradition. He was thus called Julian the Apostate as he renounced to the faith in which he was brought up. However, Julien's reign was too short for this attempt to become a success.

At the end of the 4th century AD, the Emperor Theodosius I – also called Theodosius the Great – removed the Roman polytheists and refused the title of *Pontifex Maximus*. In the same vein, he banned the Olympic Games of 393 AD as the Olympic Games were part of the pagan tradition. It is at that time that the Roman Empire was definitely Christian.

After the reign of Theodosius I, the Roman Empire was divided into the Western and the Eastern Empires, with two different Emperors:

- In the East, the Empire evolved slowly with a Hellenizing influence;
- In the West, the decline was obvious as the Barbarian warlords held the *de facto* power; Alaric, the King of the Visigoths, occupied Rome in 410 AD, and Genséric, the King of the Vandals, looted Rome in 455 AD.

In parallel, the mastery of Roman law was in sharp decline. No more interesting jurisconsults existed in the West and the knowledge of the past jurists' texts was lost as their texts became too difficult to understand.

The Western Emperor Valentinian III adopted an imperial constitution in 426 AD which was called "law of citations*". According to this law, only five jurisconsults could still be cited in court: Gaius, Papinian, Ulpian, Paul and Modestinus.

In the East, Theodosius II adopted this law of citations twelve years later but decided to expand the list of jurisconsults that could be cited in court: in addition to the same five jurisconsults than in the West, the jurisconsults that were cited by these latter could also be cited in court. Insofar as the knowledge of Roman law was better mastered in the East, there was no need for simplification.

On the legislative level, the imperial constitutions that were adopted after Diocletian had to be compiled in a codex that would pursue the work done with the Gregorian and Hermogenian Codes. As a consequence, Theodosius II compiled the imperial constitutions adopted since Constantine in a *codex Theodosianus**. This codex came into force in the West through a decision from Valentinian III. Despite the separation of the two Empires, legal ties were maintained at the beginning of the 5th century.

The Western Empire officially fell in 476 AD when Odoacer deposed Romulus Augustulus. Somewhat grotesquely, this teenager who was the last Emperor of the West therefore bore the name of both the first King and the first Emperor of Rome.

In legal terms, the Barbarian domination did not immediately mean that the Romans were subject to the law of the barbarians. Indeed, Alaric II – the King of the Visigoths – promulgated an abridgment of Roman law under the name of *Lex Romana Visigothorum*. The purpose of this collection of Roman law, also called the "Breviary of Alaric", was to allow the ancient Romans to continue to apply their law, even under the Visigoth domination.

In a nutshell, the end of the post-classical period of Roman law ended in the East, with Roman law being increasingly subject to Hellenistic influence, and in the West, with Roman law surviving the fall of the Western Roman Empire.

6) Justinian Law (527– 565 AD)

6.1) Legal Changes

Like Diocletian and Constantine, Justinian – the Emperor of the Eastern Empire – was from Illyria, and more precisely from Tauresium, which is located in present-day North Macedonia. Whilst Greek became the *lingua franca* of the Eastern Roman Empire, Latin was still spoken in Illyria and notably by Justinian even if Latin had become a minority and of peasant origin. It was then hard to imagine that Justinian would later become one of the greatest Roman Emperors and certainly the most important legislator of all eras.

At the outset of his reign, Justinian entrusted his legal work to his main legal advisor, Tribonian@, who was from Side (near present-day Antalya in Turkey) and who was probably trained in law in the famous school of Beirut.

The first task that Justinian entrusted to Tribonian and his commission of jurists was the compilation of a code. Pursuing on the tradition started under Diocletian, this Code of Justinian* compiled a new selection of imperial constitutions since the Emperor Hadrian. The Code came into force in 529 AD.

The second task that Justinian entrusted to Tribonian and his commission of jurists was the compilation of the Digest. This time, Tribonian was the chair of the commission, which worked from 530 to 533 AD to complete the task. Unlike the Law of Citations, the Digest selects fragments from the writings of pre-classical and classical jurists and organized such fragments according to the subject dealt with. The Digest also bears the Greek name of "pandektis" (Πανδέκτης) or Pandects, which means "which contains everything". From thereon, only fragments included in the Digest could be cited in court and could be deemed as the applicable law. The remainder belonged to history and lost all its legal validity.

The Digest of Justinian only includes fragments of pre-classical and classical law, and not fragments from postclassical law which form part of the Code of Justinian. Classical law was the most perfected law as it enclosed discussions pertaining to pre-classical times. Therefore, texts from jurists such as Ulpian or Paul often inform us about the positions of previous jurists as far as the *veteres*. The fragments included in the Digest thus regularly provide a summary of four centuries of legal science.

Justinian was aware of the importance to preserve the classical jurisprudence due to its richness and superiority. Yet, the law of the 6th century AD was very different from that of the classical period. The objective was thus to ensure that the fragments compiled in the Digest complied with the law of the 6th century AD. To that effect, Tribonian's commission selected and adapted the classical texts to ensure compliance with Justinian's law. The consequence was that classical texts suffered multiples changes called "falsifications" or "interpolations". Whilst the existence of such interpolations cannot be called into question, it has been difficult to precisely identify them as they are not qualified as such in the Digest.

Two elements can ease the task of identifying the genuine content of the original classical text:

- The hurry in which the compilers worked; as they completed their work in only three years, inconsistencies were made in the Digest;
- The respect shown by the compilers towards the classical jurists; compilers avoided interpolating fragments even if incoherent; this is notably the case when elements pertaining to the formal procedural can be identified in the Digest, whereas such procedure was abolished at Justinian's times.

In 533 AD, Justinian also issued his Institutes. He instructed Tribonian, Theophile[@] and Dorotheus[@], to write a new handbook of law called to replace the Institutes of Gaius, which became outdated. Yet, Justinian's Institutes are essentially an update of Gaius' handbook since there are many identical points. The peculiarity of Justinian's Institutes is that they were promulgated as a law, which meant that this handbook could be cited in court, unlike Gaius' Institutes.

Due to the changes implied by the promulgation of the Digest and the Institutes, the Code had to be reshuffled to ensure consistence. A new version was therefore promulgated in 534 AD, which is the only version of Justinian's Code that passed through generations.

After 534 AD, Justinian continued to promulgate imperial constitutions, which were not subject to an official and separate collection but rather to private compilations called the Novels of Justinian. These constitutions were written in Greek, the *lingua franca* of the Eastern Empire. Latin became the ancient language of jurists, useful to understand the Code, the Digest and the Institutes but was, for the rest, relegated to the history.

6.2) Historical and Political Contexts

Justinian's army commander was Belisarius. The Emperor not only wanted to restore the legal greatness of Rome but also wanted to reconstitute its territory.
To that end, territories occupied by the Barbarians had to be reconquered. These wars of reconquest notably enabled Justinian to retake Africa from 535 AD and Italy in 553 AD. However, the Lombards managed to take over Italy from 568 AD (i.e. 3 years only after Justinian's death).

Despite a brief Roman presence in Italy, this was sufficient for Justinian to make his law applicable to Italians through the enactment, in 554 AD, of the edict of the Pragmatic Sanction. This allowed the Digest to not to fall into oblivion and, more generally, Roman law to be given a second life. Yet, the work of the Digest's compilers resulted in truncated versions of Roman law. Indeed, the selection made among the classical jurisprudence implied that the texts not selected were subsequently lost. For instance, the works of Ulpian, Proculus and Labeo are no longer known to us except insofar as they were included in the Digest.

On an anecdotical note, it is worth noting that Justinian left an important architectural heritage: the Basilica of Saint Sophia in Constantinople and the Basilica of San Vitale in Ravenna, which provides the most famous portrait of the Emperor.

SUMMARY TABLES

1) Ancient Law

Dates	Political facts	Sources of private law	Science of private law
753	Foundation of Rome: ROYALTY		The pontiffs
510 - 509	REPUBLIC		
451 - 449	The Decemvirs	Law of the XII Tables (*Lex XII Tabularum*)	
367	Creation of the urban praetor, the curule aediles and probably the censors		
Around 300			Cn. Flavius, probable start of the profaned jurisprudence
286?		*Lex Aquilia* (damages)	

2) Pre-Classical Law

Dates	Political facts	Sources of private law	Science of private law
264-241	First Punic War: start of the expansion policy		
Around 242	Creation of the peregrine praetor		
206	Province of Spain		
Around 200		*Lex Laetoria* (minors)	The *veteres* (jurisconsults of IInd and Ist c. BCE)
133			P. Mucius Scaevola, consul
104			Q. Mucius Scaevola, consul

90-89		*Lex Iulia and lex Plautia Papiria* (Roman citizenship to Italians)	
(106-43)			M. Tullius Cicero
67		*Lex Cornelia de iurisdictione* (observance of the edict: *edictum perpetuum*)	C. Aquilius Gallus, praetor
60-56	1st Triumvirate (Caesar, Pompey, Crassus)		Servius Sulpicius Rufus
48-44	Dictatorship of Caesar		C. Trebatius Testa
43-32	2nd Triumvirate (Antoine, Octave, Lepidus)		Aulus Ofilius Alfenus Varus, consul
30	Province of Egypt		Aufidius Namusa Q. Aelius Tubero Fabius Mela

3) Classical Law

Dates	Political facts	Sources of private law	Science of private law	
	PRINCIPAT (High-empire)		Sabinians	Proculians
27-14 AD	Augustus		Capito	Labeo
14-37	Tibère		Massurius Sabinus	M. Cocceius Nerva
37-41	Gaius (Caligula)		Cassius Longinus	Proculus
41-54	Claude			
54-68	Néron		M. Cocceius Nerva (son)	
69-79	Vespasien			
79-81	Titus		Iavolenus Priscus	
81-96	Domitien		Decline of the antagonistic schools of law	
96-98	Nerva			
98-117	Trajan		Urseius Ferox Neratius Priscus Titius Aristo	

117-138	Hadrian	Codification of the *edictum perpetuum*	Iuventius Celsus (Celsus) P. Salvius Iulianus (Julian) Sextus Pedius
138-161	Antoninus Pius		Sextus Caecilius Africanus (African) Sextus Pomponius Gaius
161-169	*Divi fratres* (M. Aurelius + L. Verus)		Ulpius Marcellus Quintus Cervidius Scaevola
169-177	Marcus Aurelius		
177-180	Marcus Aurelius + Commode		
180-192	Commode		
193-198	Septimius Severus		Aemilius Papinianus (Papinian)
198-211	Severus + Caracalla		Iulius Paulus (Paul)
211-217	Antoninus Caracalla		Domitius Ulpianus (Ulpian)
212		*Constitutio Antoniniana* (extension of the citizenship to all ordinary peregrines)	Aelius Marcianus
218-222	Élagabal		
222-235	Severus Alexander		Herrennius Modestinus (Modestin)
235-284	Period of anarchy		

4) Post-Classical Law

Dates	Political facts	Sources of private law	Science of private law
	ABSOLUTE MONARCHY (Law-empire)		
284-305	Diocletian and Maximian	*Codex Gregorianus*	
285-305		*Codex Hermogenianus*	Hermogenian
307-337	Constantine		
379-395	Theodosius I		

395	Division between the Eastern Empire (Arcadius) and the Western Empire (Honorius)		
408-450	Theodosius II (East)		
425-455	Valentinian III (West)	426: Law of citations	
438		*Codex Theodosianus*	
474-491	Zénon (East)		
476	Odoacer: end of the Western Empire		
491-518	Anastase (East)		
493-526	Théodoric le Grand (Ostrogoth) (Italy)		
506		*Lex Romana Wisigothorum*	
518-527	Justin (East)		

5) Justinian Law

Dates	Political facts	Sources of private law	Science of private law
527-565	Justinian (East)	*« Corpus Iuris Civilis »*	Tribonian
533		Digest and Institutes of Justinian	Theophile
534		Codex of Justinian	Dorotheus
535-565		Novels	
535-553	War of Goths: Justinian's army retakes Italy from the Ostrogoths		
554		Justinian's law is introduced in Italy	
(886-911)		The Basilica	

Chapter 2 - The sources of Roman law

1) The Law (lex)

In order to understand Roman law, one must study its sources. When attempting to teach the sources of Roman law to his students, Gaius provided the following structure in his Institutes@: the laws, the plebiscites*, the *senatus-consultum**, the imperial constitutions*, the edicts* of the magistrates and the answers of jurists.

1.1) The law

Similarly to the plebiscites and the *senatus-consultum*, the law emanates from assemblies. Gaius defines the law to be what the people decide and enact (see Gaius, Institutes, 1.3).

For the people to establish and prescribe their laws, the following formalism had to be followed: a magistrate of the Roman people holding the right of auspice (i.e. the right to consult Jupiter by the observation of the sky or the birds before any important civil or military action) brought together the people in *comitia* (i.e. in deliberative popular assemblies) and then submitted his bill (*rogatio*) to the people, who had the choice to accept or reject it, but in no case to amend it.

The oldest assembly is the *Comitia Curiata*. These assemblies brought together all Roman citizens (Plebeians and members of the Patrician aristocracy) and were structured according to the archaic division of the Roman people. There were thus 30 *curiae*, which were subdivisions of the three primitive tribes.

During the Royal era, the *Comitia Curiata* ratified the designation of the king by voting a law of investiture and, under the Republic, they ratified the election of magistrates. Through this *curiate* law of investiture, which is closely linked to the auspices previously taken by the magistrate when taking his office, the *Comitia Curiata* conferred on the elected magistrate additional legitimacy by making him a *magistratus iustus*, irreproachable in the eyes of the gods as well as in the eyes of the men. In case of unfavourable auspices when entering office, the *Comitia Curiata* could exercise their right to retract to comply with Jupiter's sovereign opinion. From an undefined period (possibly the Second Punic War), the thirty *curiae* were represented by thirty apparitors called lictors.

In addition to the *curiate* law of investiture of magistrates, the *curiae* were assigned – both under the Republic and under the Empire – attributions in religious matters, including some public celebrations as well as attributions in family law matters regarding wills and adoptions.

By the end of the Royal era (or at the beginning of the Republic), the centre of gravity in terms of legislative power shifted towards a new assembly, i.e. the *Comitia Centuriata*. Due to the fact that these *Comitia Centuriata* were composed of the people gathered in arms, these assemblies could not meet inside the *pomerium* (the legal-religious limit of Rome) but only outside the city on the *Champ de Mars* (*Campus Martius*) devoted to the God of War.

Since a reform that is traditionally attributed to the King *Servius Tullius* in 578 BCE, but which more probably dates from the 4th century, the *Comitia Centuriata* divided all Roman citizens (i.e. Plebeians and Patricians) into 193 *centuriatae*. These *centuriatae* were hierarchized according to a census logic:

- There were 18 equestrian *centuriatae*, which were composed of the most honourable and rich citizens, as well as of members of the equestrian and senatorial aristocracy;
- There were 5 classes of infantrymen;

- There were *centuriatae* composed of military musicians and engineering craftsmen;
- There were also proletarian *centuriatae*.

Each *centuriata* had one vote and each vote was made according to the hierarchical order of the *centuriatae*. Therefore, the 18 equestrian *centuriatae* voted first, it was then the turn of the 80 *centuriatae* of the first class. Thus, if these *centuriatae* alone voted the same way, the absolute majority of 98 *centuriatae* was reached and the other *centuriatae* were no longer called upon to vote.

From this overview, one can observe that the transition from the *Comitia Curiata* to the *Comitia Centuriata* marked an evolution regarding the criterion allowing Roman citizens to pass their laws. Whilst the *Comitia Curiata* were gathered according to the family origins of the Roman citizens, the *Comitia Centuriata* depended on census criteria, which were regularly assessed by public magistrates, called censors, who focused mainly on the fortune but also on civic and moral virtues.

Far from being a democracy, Rome was an aristocratic *res publica* in which power was held by the richest provided however that they served the city through arms, magistracies or priesthoods. There was thus a somewhat geometric conception of equality where rights were proportionate to duties.

The *Comitia Centuriata* passed laws, elected the superior magistrates of the Roman people (praetors, consuls, censors but not the dictators) and judged capital crimes.

By the end of the 4th century BCE, the *Comitia Tributa* were instituted, which were composed of all Romans citizens (i.e. Plebeians and Patricians) grouped by tribes. From 241 BCE, Rome had 35 territorial tribes, divided into 4 urban tribes – which gathered the poorest citizens – and 31 rustic tribes. Such system seemed again to benefit the great landowners.

The *Comitia Tributa* elected the lower magistrates of the Roman people (the quaestors and the curule aediles) as well as the military tribunes of legions. In addition, 17 of the tribes were chosen by lot to take part in the process of appointing the following priests:

- As of the 3rd century BCE, the *pontifex maximus**; and
- As of 104 or 103 BCE, the pontiffs, the augurs and the *uiri sacris faciundis*.

The *Comitia Tributa* could also pass laws and judge crimes punishable by fines.

The creation of permanent tribunals in 149 BCE – the *quaestiones perpetuae* – gradually diminished the judicial role of the *Comitia Centuriata* and *Tributa*.

Under Tiberius, the *Comitia* lost their electoral powers to the benefit of the Senate, whose freedom of choice was restricted to the sole candidates that had not already been recommended by the Prince.

With respect to the legislative power of the *Comitia*, it remained within their competence but under the close supervision of the imperial power. In particular, the *Comitia* were in charge – at least until Domitian and probably until the 3rd century AD – of ratifying, through one or several laws, all the imperial powers of the new Emperor. In practice, such ratification took place without any debate on the measures previously taken by the army and the Senate, as illustrated by the *lex de imperio* of Emperor Vespasian.

2) The plebiscite

Gaius defines the plebiscite to be what the plebeians decide and enact (see Gaius, Institutes, 1.3). He further specifies that "Plebeians and people differ in that the people is the whole citizen body, including the patricians; but the plebeians are the citizens without the patricians (…)".

The assembly in charge of voting the plebiscites was the *Concilium Plebis*. This assembly was created in 471 BCE in the context of the struggles between the Plebs and the Patricians. The *Concilium Plebis* was composed of the Plebeians by tribe and met upon convocation by a tribune or aedile of the Plebs (i.e. magistrates without auspices).

As of the *Lex Hortensia* of 287 BCE, the plebiscites had the force of law and were applicable on the entire population, including the Patricians who did not take part in their vote.

Like the *Comitia Tributa*, the *Concilium Plebis* could judge crimes punishable by fines.

2.1) The senatus-consultum

Gaius defines the *senatus-consultum* to be what is "decided and enacted by the Senate; it has the status of an act, although the point has been questioned" (see Gaius, Institutes, 1.4). Literally, the *senatus-consultum* means the opinion of the Senate.

Under the Royalty, the Senate – as the King's council – brought together the *pater familias* of the archaic gentile organization. Then, under the Republic and the Empire, the Senate included former magistrates, which were at the beginning Patricians but then (after 367 BCE) also Plebeians. For a long time, the senators – who sat for life – were 300. Later, they were 600 (under Sylla), 900 (under Caesar) and again 600 (under Augustus).

It was under the Republic that the Senate's power increased. Such power covered foreign policy, budgetary policy and the *auctoritas patrum*. The latter's competence was a right of control, and thus of rejection, of the decisions of the *comitia*. Accordingly, the *comitia* could not decide anything without the Senate's agreement. On the contrary, the plebiscites were not subject to this *auctoritas partum*.

Still under the Republic, the *senatus-consultum* was a mere recommendation made by the Senate to a magistrate. Initially, this recommendation was not binding but became gradually followed by the magistrates, including the Tribunes of the Plebs.

Under the Principate, the *senatus-consultum* became mandatory to end up replacing laws and plebiscites as the assemblies were hardly held. The *senatus-consultum* thus amounted to the main source of legislation.

However, from the *Severes*, the Senate's approval was purely formal. The Senate became a mere chamber of ratification, whereas the genuine legislative source was the *oratio principis*, which was a prayer made by the Prince to the Senate, the latter accepting at the Emperor's request. During the late Antiquity, the Senate remained an advisory body but was rarely consulted.

It had thus been a long time since the law no longer really emanated from the people.

3) The Edicts of the Magistrates

Gaius writes that the "the magistrates of the Roman people have the right to issue edicts. The right is found most fully in the edicts of the two Praetors, Urban and Peregrine (whose jurisdiction in the provinces is exercised by provincial governors)" (Gaius, Institutes, 1.6).

Initially, edict (*edictum* in Latin) meant any communication from a magistrate to the public. Etymologically, *edictum* derives from *ex-dicere*, which shows that such communication was at first oral before being made through posters.

With this communicatsion to the public at the beginning of their office, the magistrates announced how they would organize their office. Insofar as such edict remained in force for the entire year of the magistrate's office, it was called a permanent edict (*edictum perpetuum**). Therefore, should the magistrate encounter an unforeseen question during his office, he would address it through an unforeseen edict called *edictum repentinum*.

Even if consuls also made edicts, the most important edict in the field of private law was the praetor's edict, which thus constitutes the focal point of this section.

The law resulting from the magistrates' edicts is called honorary law or *ius honorarium** and the law resulting, more particularly, from the praetors' edicts is called praetorian law or *ius pretorium*.

For the record, the praetor's edict included the list of *formulae* that would be granted to litigants during the praetor's office. To introduce legal actions, claimants were required to obtain from the praetor a *formula*. This was notably the case for legal actions introduced to claim a property of which the claimant had been dispossessed, to request payment of a sum due to the claimant under a contract or to request compensation for a damage suffered. In addition, the edict specified the conditions under which these *formulae* would be granted or rejected.

The praetor's edicts can thus be compared to a code of procedure as well as to a civil code. Unlike our modern view, the Romans approached legal questions from an angle of procedure and *formulae* with a focus on the action rather than the right at stake.

Even though the permanent edict was specific to each praetor during his own office, the praetor's edict could not radically change from one year to the next. Therefore, in practice, the praetor used to rely on the edict of his predecessor and any innovations were actually quite sparse. Yet, the praetor's edict evolved throughout the years and this flexibility was a cornerstone for the evolution of Roman law. It was indeed thanks to praetorian law that Roman could advance and evolve in a crucial manner. More particularly, the edict served to fill the gaps of civil law and to adapt the latter to the practical needs of the people.

According to the above-mentioned excerpt from Gaius, there were urban and peregrine praetors. The urban praetor had jurisdiction to settle disputes between Roman citizens, whereas the peregrine praetor settled disputes between a Roman citizen and a peregrine or between two peregrines living in Rome. On the other hand, if the conflict occurred in the provinces (i.e. outside of Rome), it was the governor who had jurisdiction to rule upon this conflict. Insofar as Roman law applied wherever there were Romans, provincial governors were needed to ensure the exercise of the jurisdictional power outside of Rome. Such governors also adopted edicts including *formulae*.

As mentioned in Chapter 1, the praetor's edict received a definitive form under Hadrian's reign thanks to Julian's work. From thereon, only the Emperors were entitled to amend the content of the perpetual edict.

4) The Imperial Constitutions

Gaius writes that "an imperial enactment is law which the Emperor enacts in a decree, edict* or letter. It has never been doubted it has the status of an act, since it is by means of an act that the Emperor himself assumes his imperial authority" (Gaius, Institutes, 1.5).

According to such definition, the imperial constitution can take the following three different forms.

The first form is the edicts (*edicta* in Latin). This term "edict" has already been encountered when dealing with the edict of the praetor, the edict of Milan, the edict of tolerance, etc. These occurrences always refer to the edictal power of their author. Through such edicts, magistrates were entitled to make decisions of general scope. With respect to the imperial constitutions, the Emperor exercised a similar jurisdiction. Indeed and considering that the Emperor's absolute power derived from the addition of several magistracies, it was as a magistrate that he could deliver edicts with a general scope.

The second form is the decrees (*decreta* in Latin). The decrees were the judgments issued by the Emperor. For the record, judgments issued within the framework of the formular procedure were not issued by professional magistrates but by private persons at the praetor's request. It was therefore next to this formular procedure that the imperial power to deliver decrees developed. More particularly and insofar as Emperors sought to gain absolute power, they started to assume judicial power by providing Roman litigants with the possibility to appeal judgements issued within the formal procedure. It was thus in those circumstances that the institution of appeal was born. Yet, Emperors authorized their subjects to directly address legal recourses to them, without having first addressed such legal recourses to the praetor. In terms of scope of application, one must bear in mind that – unlike edicts – decrees issued by the Emperor (in first instance or on appeal) had in principle an effect limited to the suit at stake. However, such scope of application could be extended if the decree was published. In that event, a general rule could be implied from the decree since the Emperor's decision could serve as a precedent.

The third form is the letter (*epistula* in Latin). With these letters, the Emperor provided legal consultations to answer questions raised by magistrates or private individuals. When the Emperor was asked to merely clarify a point of law for a magistrate, a simple letter would be sufficient. On the other hand, when the legal consultation was provided to a private individual, precautionary measures had to be observed. Indeed, to avoid any risk of fraud, both the question and the answer had to be on the same medium so that they could not be dissociated. The private individual had thus to leave the necessary space on the parchment to allow the Emperor to write his answer. In that case, the *epistula* was called a rescript (*rescriptum* in Latin). Through these rescripts, the Emperor seized the power of the jurisconsults. Initially, the rescript had an individual scope: the Emperor's opinion was intended to apply to the sole case for which he was consulted. Yet, if such opinion was then subject to a wider publicity, it could serve as a precedent and have a general scope.

In addition to these three forms of imperial constitutions cited by Gaius, there is a fourth one: the mandate (*mandatum** in Latin), through which the Emperor addressed an order to an official. The mandate can be compared to our current ministerial circulars. Indeed, the purpose of the mandate was to explain to the official how the law had to be applied. The purpose was not to create law but, depending on the circumstances or the addressees of the mandate, the mandate could still have a general scope. Furthermore, mandates could also receive official publicity from the Emperor. This explains why some mandates can be found in postclassical compilations (i.e. the Gregorian, Hermogenian@ and Theodosian codes).

Insofar as these codes include four types of imperial constitutions, one must acknowledge that Emperors definitely possessed legislative power (*cura legum* in Latin). The question remains however from which legal basis Emperors drew such legislative power.

On this point, Gaius writes that "It has never been doubted it has the status of an act, since it is by means of an act that the Emperor himself assumes his imperial authority". This argument is absurd and it is hardly possible that Gaius himself believed in such argument. Indeed, university professors are appointed by decree, but no one has ever considered that this gives them the power to issue decrees.

Historically, the *cura legum* (i.e. power to make laws) was proposed three times to Augustus, who refused it each time by notably stating the following[1] :

"The dictatorship having been conferred on me in my absence and in my presence by the Senate and the people (…) I did not accept it (…) During my sixth consulship (i.e. in 27 BCE), after having extinguished the civil war by virtue of the absolute powers conferred to me by universal consent, I caused the Republic to pass from my power into that of the Senate and of the Roman people. To honour this meritorious act, by *senatus-consultum*, I was appointed Augustus (…) From then on, I prevailed over all in authority, but I did not have more powers than any of my colleagues in my various magistracies".

In this statement, Augustus took a series of precautions to avoid being blamed for acting as a king. Yet, behind these efforts to show a continuity with the Republic and its magistracies, the reality was that Augustus combined of all these magistracies, which gave him absolute power. Whilst Augustus was still careful to preserve the appearances of continuity, his successors would have fewer scruples in assuming their absolute power.

In practice, the Emperor's legislative power was exercised through an *oratio principis* (i.e. the Prince's prayer) addressed to the Senate. The Senate had then to vote for the reform proposed by the Emperor, with understanding that the Senate could not refuse anything to the Emperor. In other words, the Senate had become a mere ratification chamber of the Emperor's requests. Ultimately, the Senate's vote became unnecessary and the *oratio principis* was immediately adopted as a law.

5) The responsa of the Prudentes

Gaius writes that "juristic answers are the opinions and advice of those entrusted with the task of building up the law. If the opinions of all of them agree on a point, what they thus hold has

[1] The following text is a free English translation of the excerpt *Res gestae*. It comes from an inscription found by Ancyre in which Augustus reminds what he did for the Roman people.

the status of an act; if, however, they disagree, a judge may follow which opinion he wishes. This is made known in a written reply of the Emperor Hadrian" (Gaius, Institutes, 1.7).

The responses of the *prudentes* were opinions provided by ordinary citizens during legal consultations. These citizens were prudent men (i.e. scholars) who were trained in "jurisprudence" and who studied law out of taste without assuming any official role in the administration of justice. This voluntary activity started during the 2nd BCE with the *veteres*, who were the first *prudentes* (i.e. the first real jurisconsults).

With respect to their legal activity, the jurisconsults assumed four types of functions: *agere*, *cauere*, *scribere* and *respondere*.

In the frame of their *agere* function, jurisconsults represented fellow citizens in court as lawyers do today. Quickly, some jurists specialized in this function of representing citizens in court and, by way of consequence, jurisconsults focussed on their other functions, which were more related to legal issues.

In the frame of their *cauere* function (i.e. to be cautious), jurisconsults helped their fellow citizens by advising them on drafting their wills and contracts in order to avoid any future conflicts.

In the frame of their *scribere* function (i.e. to write), which was probably their favourite function, jurisconsults wrote treatises, institutes, digests and commentaries. When commentaries related to civil law, they were called commentaries *ad Sabinum* as Sabinus@ was the author of the standard work on civil law (i.e. *libri tres iuris civilis*). When commentaries related to praetorian law, they were called commentaries *ad edictum** and usually followed the order of the *formulae* of the edict.

In the frame of their *respondere* function, which was the function dealt with by Gaius when discussing the sources of Roman law, the jurisconsults answered questions of law raised by individuals. Usually, the question was raised by a litigant in relation to a legal doubt in a dispute. The jurisconsult then gave an opinion which would be used by the judge to rule upon the dispute at stake. This activity was again a voluntary one. Insofar as such voluntary activity was of high technicality, this again justifies that the Romans be qualified as a people of jurists.

At the time of the *Veteres*, the number of jurisprudents was still relatively small and there was no restriction since this activity was voluntary and exercised by very distinguished citizens. At the time of Augustus, the first restrictions were introduced. In order to limit the possibility to invoke jurisprudents' opinions in court, only the jurisprudents who had been given the *auctoritas* from the Emperor could be cited in court. These restrictions were regularized under the Emperor Tiberius who created the *ius publice respondendi** (i.e. the right to respond officially). According to this new institution, only the opinions given by jurisconsults who had received the *ius publice respondendi* could be invoked in court. This *ius publice respondendi* had a double purpose: on the one side, the objective was to limit the diversity of opinions and avoid contradictions, and, on the other side, it was a means for the Emperor to take control of a power that had been out of his sphere.

Yet, these restrictions had only a limited effect on the unification of the law. Indeed, at the time of Tiberius, the opposition between the Proculians and the Sabinians was in full swing and the

ius publice respondendi was granted to members of both schools. The judge had therefore to choose between two opposing doctrinal positions.

Under the Emperor Hadrian, a rescript was adopted to specify that the judges' freedom of choice was limited to the sole cases in which the positions of jurisprudents differed from each other. Accordingly, in the event that all jurisprudents agreed, the judge had to follow their opinion as such opinion had force of law. Jurisprudents were thus able to create laws and their writings were considered as legal sources.

Later, the Law of Citations* introduced new restrictions. By this law, the Emperor of the West, Valentinian III (426 AD), authorized the use of the writings of five jurisconsults only. Among these five jurisconsults, Gaius was both the oldest (2nd century AD) and the least expected. Indeed, Gaius did not receive the *ius publice respondendi* during his lifetime; the Law of Citations can therefore be regarded as a consecration for Gaius. With respect to the other four lawyers, they were more expected.

Next to the limitation of the jurisconsults whose opinions could be cited in court, the Law of Citations also restricted the judges' freedom of choices between the existing opinions. If the jurisconsults disagreed, the judges had to follow the opinion of the majority. In the case of a tie between the diverging opinions, the judges had to follow Papinian's@ position. It was only if Papinian was mute on the point at stake that the judge could freely decide which opinion to follow.

In 438 AD, the application of the Law of Citations was extended to the Eastern Empire by Theodosius II. Insofar as legal knowledge was better mastered in the East than in the West, the Eastern version of the Law of Citation was less restrictive with regard to the number of jurisconsults that could be cited in court: in addition to the five jurisconsults cited under the Law of Citations of Valentinian III, Theodosius II allowed for the reference to the opinions of the jurists cited by these five jurisconsults. In the East, the Law of Citations was applied until the entry into force of the Digest* of Justinian in 533 BCE.

In the frame of the Digest, the selection of the opinions that could be invoked in court was operated differently: rather than selecting individuals whose opinions could be invoked in court, the compilers led by Tribonian@ selected texts without focusing on the jurisconsult who wrote them. The compilers then tried to remove as many contradictions as possible. Despite such efforts, contradictions nonetheless remained. This was due to three different factors:

- The rush with which compilers worked;
- The respect jurisconsults owed to classical jurisconsults; and
- The difficulty in choosing between two competing and equally honourable opinions.

In light of the above, one can conclude that the influence of the jurisprudents on Roman law – and therefore on our law as well – was considerable. Today, the Digest is still the richest source of Roman law.

6) Comparison between the Institutes of Gaius and the Institutes of Justinian regarding their respective presentation of the sources of law

The Institutes* of Justinian were written by Tribonian@, Theophilus@ and Dorotheus@ about four centuries after Gaius' Institutes. The comparison between these two handbooks shows an evolution in the way of considering the law and its sources.

6.1) The law

Whilst Gaius defines the law as what the people decide and enact, Justinian writes that the law is that which the Roman people commanded on the question being put by a senatorial magistrate, e.g. the consul*.

Both definitions correspond to their own reality. Yet, they show an ideological evolution. The use by Justinian of the past tense underlines the outdated nature of the system. In the meantime, Justinian appears to be drawing a comparison between the past and the present to demonstrate that, in the previous system either, it was not the people who decided on the content of the law.

The preponderance of the magistrates in the voting process of the laws makes it possible for Justinian to avoid legitimising the old system to the detriment of the system in place under him. Therefore, Justinian's definition shows that the content of the laws always depended on the authority's wishes.

6.2) The plebiscite

The main difference between Gaius' definition and Justinian's definition of the plebiscites is that the latter does not refer to the difference between Patricians and Plebeians. Indeed, since the 3rd century AD, such distinction did not play a practical role anymore.

6.3) The senatus-consultum

With respect to the *senatus-consulta*, Gaius merely states that the power of the Senate was subject to debates without any further explanation. As to Justinian, he uses the present tense and explains that the power moved from the people to the Senate because of changes in demographics. Delegation of power became necessary due to an increase in the number of Romans, so that the Roman people had to delegate their power to legislate to the Senate.

Under the Republic, the Senate was composed of former magistrates; it was thus indirectly elected by the people. Under the Principate, one was a senator from father to son and the Emperor could add knights of his choice as well as decide to exclude some senators. Thus, even if the representativeness of the senators was not ideal, Justinian's explanation nevertheless seems to be sufficiently neutral: the size of the Roman people had become such that it required a delegation of power.

Yet, Justinian's explanation is doubtful. Since the *leges Iulia* and *Plautia Papiria* – which date from the beginning of the first century BCE (90-89 BCE) – all citizens of the Italian peninsula had become Roman citizens. At that time thus, the Roman people had already increased. However, the Roman people continued to vote laws at least until the 1st century AD. Accordingly and considering that nearly two centuries separate these two facts, they cannot be considered as the direct consequence of each other. The explanation given in the Institutes of Justinian is therefore totally anti-historical and purely ideological.

6.4) The Imperial Constitutions

To justify the legislative power of the Emperors, Justinian argues that the delegation of power is granted by law. However, the issue is that the law by which the Emperor was vested with his power did not mention any delegation of legislative power. The reasoning is therefore truncated.

The purpose of the explanation given in the Institutes of Justinian was to legitimise the imperial power to make laws. To achieve this goal, all possible arguments were invoked. The justification combines a legal argument (i.e. the delegation of power) with a historical argument (i.e. the legislative process was not more democratic under the Republic) and a factual argument (i.e. in a large society, it is essential to call on a leader).

In addition to being wrong, such arguments contain strange inconsistencies and triggers questions:

- Why does Justinian still justify the Senate's legislative power using the present tense even though it had not taken any more *senatus-consulta* for more than three centuries?
- Why does Justinian still feel the need to justify his legislative power when Emperors have held this power for more than five centuries? This is even more strange that Justinian himself, in the constitution *Deo Auctore* (i.e. the constitution by which he promulgated the Digest), affirms that he received his power from God[2]. This argument of a divine nature was stronger than those included in the Institutes of Justinian as it was widely accepted.

Consequently, it seems that the arguments put forward in the Institutes of Justinian do not date from his time and were written earlier. This is confirmed by a fragment of Ulpian in the Digest, which is similar to the content of the Institutes:

Justinian (I.1.2.6): "But also the will of the Emperor has the force of law since, by the *lex regia* which regulated his imperium, the people conceded to him and conferred upon him all their authority and power. (…)"[3].

Ulpian (D.1.4.1pr.): "A decision given by the Emperor has the force of a statute. This is because the populace commits to him and into him its own entire authority and power, doing this by the *lex regia* which is passed anent his authority"[4].

Assuming that the above excerpt of the Institutes was taken from Ulpian's fragment, everything makes perfectly sense:

- It is normal for plebiscites to be mentioned in the past tense and *senatus-consulta* in the present tense;
- It is normal that the Emperor's legislative power had to be justified since the divine argument could not be invoked at the beginning of the 3rd century when the Roman Empire had not yet become Christian;
- It is understandable that Ulpian tried more seriously to justify the Emperor's power since he was directly in his service, which was not the case of Gaius; Gaius could therefore afford to give a less plausible justification for the legislative power of the Emperor.

In light of the above, one must conclude that any explanation of the sources of law almost always contains a political and ideological message. Considering that the legislative power is exercised by a variety of actors, it is almost impossible for the jurist to avoid showing his position with respect to an attribution of legislative power. For instance, Gaius – not being an imperial official – could take more liberty than Ulpian in trying to legitimise the Emperor's

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2 *Deo auctore nostrum gubernantes imperium, quod nobis a caelesti maiestate traditum est*, which can be freely translated as follows: "*exercising under divine authority Our power, which was given to us by the celestial majesty*".

3 Translated by J A C Thomas, The Institutes of Justinian, 1975.

4 Translated by D.N. MacCormick – Edited by A. Watson, The Digest of Justinian, Vol. I, 1994.

legislative power. Yet, Gaius could not afford criticizing such power overtly. This is why Gaius chose to merely affirm that the Emperor's power to make laws has never been doubted, whilst not attempting to justify it any further.

Chapter 3 - The Second Life of Roman Law

1) The Law applied in the West after the Barbarian Invasions

To talk about the second life of Roman law means that Roman law died at some point. Yet and contrary to what history books usually teach, the Western Roman Empire did not fall brutally, so that Roman Law did not die brutally either. History books usually refer to the date of 476 AD – when Odoacer deposed Romulus Augustulus, the last Western Roman Emperor – to identify the end of the Antiquity and the beginning of the Middle Ages.

From the end of the 4th century AD, the Germanic Kings were already firmly established in the western Roman territory. During the 5th and 6th centuries, and even before the official fall of the Roman Empire, the Germanic peoples established their own kingdoms on the Roman soil. On a technical point of view, Germanic peoples were linked to the Roman State by a treaty which made them allies and respectful of the Roman imperial power. However, this obedience to the Roman imperial power disappeared at the time of the fall of Romulus Augustus.

In terms of law, the Barbarian Kingdoms of the High Middle Ages were ruled as follows.

1.1) Visigoths

The Visigoths were the first of these Germanic peoples to establish – as a people – official and formalized contacts with the Roman Empire by way of a treaty. At the beginning of the 5th century AD, they established their own kingdom on the Roman territory in the South-Eastern Gaul at first and including Spain thereafter. It was around 470 AD that their King Euric – willing to adopt laws that would bind his people following the Roman model – undertook to have the *Edictum Eurici Regis* written. This Code – which was latter called *Codex Euricianum* or Code of Euric – was written in Latin and, even though it adopted the Roman legal technique, its content differed from Roman law.

At the beginning of the 6th century AD, the Visigoth King Alaric II codified the right of "his" Romans, namely the former Roman citizens who became Visigoth subjects. This codification was first called *Lex Romana Wisigothorum* and then Breviary of Alaric (*Breviarium Alaricianum*). The content was based on postclassical Roman law but some provisions were modified or omitted. This was notably the case for the imperial law concerning mixed unions, which prohibited marriage between a Roman woman and a Visigoth. Fundamentally hostile to the Barbarians, one can understand why the latter found it unacceptable and subjected its application to severe penalties.

During the 7th century AD, the Visigoth King decided to definitely prohibit the application of Roman law. All of his subjects were then subject to the *Lex Visigothorum*, the law of the Visigoths.

1.2) The Burgundians

At the beginning of the 6th century AD, a codification of Roman law was made in the Burgundian kingdom. Such codification was made at the initiative of a Roman jurist. The result was a small semi-official book initially called *Lex Romana* and later *Lex Romana Burgundiorum*. The content of this book was based on the same Roman law used by the Visigoths but the texts were often modified or worded differently. This reorganization was made to bring the texts closer to the Burgundian law also included in the *Lex Burgundiorum*. This Burgundian law, which had been written about ten years earlier, actually included the

Burgundian law applicable to the Burgundians themselves. The two sets of rules were therefore more easily comparable and applicable.

1.3) The Franks

In the Frankish Kingdom, the Frankish Kings were not interested in the rights of their Roman subjects. They even tolerated that the Roman subjects be ruled by their own Roman law, provided however that they obeyed to their King and that they paid all taxes previously paid to the Roman Emperor. Insofar as there was no compilation of Roman law made by the Franks, the Romans of the Frankish kingdom applied the Breviary of Alaric.

1.4) The Gauls

Around 787-788 AD, Charlemagne authorised the application of the Breviary of Alaric to the Romans of the Gallic part of his Kingdom. Throughout the reign of Charlemagne, the Breviary of Alaric was reproduced many times and received a very good circulation for that time. This therefore created a paradox: whilst the Breviary of Alaric was used in the Carolingian Empire, it was rejected by the Visigoths who had nevertheless compiled it.

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The Italian peninsula was reconquered by Justinian following the war against the Goths from 535 to 553 AD. Consequently, and by way of the *Pragmatica Sanctio* of 554 AD, Justinian's legislative work was made applicable to all Italians. However, the Emperor already died eleven years later and the Lombards drove out the Byzantines from 568 AD. The fourteen years of application of Justinian's law in Italy did not seem to have been enough for this law to really take root. Indeed, there is no indication to that Justinian's law applied in Italy during the 9th and 10th centuries.

In light of the above, it seems that at the time of the Barbarian Kingdoms of the High Middle Ages, Roman law was in sharp decline. The separation between Romans and Germans faded over time and a differentiated application of Roman law to some and customs of Germanic origin to others was no longer justified. What thus remained of Roman law was far remote from the body of sophisticated rules that had been developed by classical jurisconsults.

2) The rediscovery of the Digest and the Glossators

At the end of the High Middle Ages, the teaching of Roman law was very limited to basic instruments such as the use of the Alaric's Breviary. By contrast, Justinian's massive legislative work was too complex to be understood and to be applied.

Probably during the 11th century, a manuscript of the Digest* of Justinian finally found curious and interested readers; this manuscript was first called the *Littera Pisana* and received, after its move in 1406 to the Laurentiana Library in Florence, the name of *Littera Florentina*, the Florentine.

The first courageous reader whose name came down to us was Pepo, of whom we know little with certainty except that he taught Roman law on the basis of the Digest.

Yet, the real rediscovery of the Digest is often attributed to his pupil, Irnerius, who is more famous than Pepo as he took the care to put his knowledge into writing. Irnerius also played a

key role in founding the first European University, i.e. the University of Bologna. As a consequence, Roman law was one of the first disciplines taught at this University and Irnerius' course was based on the Digest of Justinian.

Furthermore, Irnerius is said to be the founder of the School of the Glossators, which name is directly linked to the technique used by Irnerius and his students: the gloss. The gloss is an explanatory annotation written on the margin or between the line of the Digest's manuscript.

The initial purpose of the Glossators was to merely understand the text of the Digest. Their method was thus called the exegetical method from the Greek "exegesis" (ἐξήγησις), which means "explanation" or "clarification" and which is translated into Latin by *interpretatio*. The exegesis is therefore the philological and doctrinal interpretation of a text by progressing word by word.

The method of the Glossators then gradually evolved towards commentaries. Through these commentaries, the Glossators managed to make links between various fragments of the Digest, to identify analogies and to resolve contradictions stemming from the existence of divergent opinions in the Digest.

At a later stage, the Glossators also created practical examples of the rules contained in the Digest. These practical examples were however not rooted in the ancient Roman society but rather in the Italian reality of the 11th and 12th centuries. In doing so, the Glossators transcended historical study and prepared the ground for a new application of Roman law in Italy. Lastly, the Glossators started to write small summaries of the Digest's fragments and create general principles.

Around 1130-1140 AD, two currents emerged within the School of the Glossators:

- The first current was led by Bulgarus; this school was recognized for its scientific seriousness; it stuck to the text of the Digest and did not take any interpretative liberty;
- The second current was led by Martinus Gosia; this school took more liberties and referred more frequently to equity; Martinus Gosia seemed to be influenced by canon law.

During the 13th century, Accursius – professor at the University of Bologna – wrote the *glossa ordinaria*. This Great Gloss compiles all the previous glosses, which amount to approximately 96,000. Today, this work is still crucial for anyone embarking on a study of Roman law. It is indeed essential to take into account what the Glossators wrote about fragments of the Digest since their degree of knowledge of the Digest has never been overcome.

The success achieved by the Glossators was enormous. This success eventually attracted 10,000 students from all over Europe to Bologna during the 12th century. This was a real intellectual renewal for Europe. Soon after such success, other universities were founded all over Europe and they all adopted the Bolognese model and, thus, the Glossators' way of teaching.

It is undeniable that the success of the Glossators contributed to the birth of a common legal culture in Europe. Indeed, those students who learnt Roman law in Bologna came back to their home countries importing the Roman law they had studied, which was then – at least – applied in a subsidiary way when local law did not provide for any solution to address the issue at stake. Nevertheless, the Glossators' model reached its limit with the Great Accursian Gloss. It was thus supplemented by a new technique: the commentaries. In that frame, professors at the

University of Bologna became more systematic in their teaching of Roman Law. Rather than strictly following the order of the Digest and considering that its content was then well mastered, the objective was to create tools for practice. The jurists that used this new technique were called the Commentators, the post-Glossators or the Bartolists following the name of their main representative (Bartolus de Saxoferrato). The authority of Bartolus was such that the adage "*Nemo iurista, nisi Bartolista!*"[5] prevailed until the 18th century. The genuine contribution of the Bartolists was not so much to have improved our knowledge of ancient Roman law but to have used the Roman heritage to meet the needs of their time.

The success of the Bartolists was more important than the one of the Glossators. The number of universities had increased and the Bartolists' method was widely spread among them. This strengthened the European jurists' community of spirit and technique. In these circumstances, Roman law could reborn and have a second life. It was from thereon called the *ius commune* (i.e. common law).

3) The Humanists and the *mos gallicus*

Thanks to the creation of the University of Bologna, legal and intellectual renewal spread all over Europe: the Italians disseminated the Bartolist method the same way they previously did with the Glossators. It was also in Italy that the Renaissance started from the end of the 14th century. For the record, the Renaissance is the movement operating a return to the culture of antiquity. It started in northern Italy and, from the 15th century, reached other European countries. With the Renaissance, the development of Roman law could be reinforced. Indeed, a better knowledge of antiquity allowed, in turn, a better mastery of philology and history, which made it possible to understand Justinian's work.

One of the key actors of this period was André Alciat (Andrea Alciati (1494-1550)). Coming from a Milanese family, he was a jurist, philologist and historian. These three features allowed him to better master the meaning of legal terms and to deepen their evolution over the Roman eras. In addition and contrary to the Glossators and Commentators, Alciat knew Greek. Considering that Roman jurists regularly quoted Greek authors in their writings, a good command of Greek was therefore essential to fully understand them. Alciat thus published a small work aimed at completing the Digest's fragments that had been omitted by the Glossators and the Bartolists because they were written in Greek (*Opusculum quo graecae dictiones fere ubique in Digestis restituuntur*, 1515).

Due to his background in history, Alciat wanted to study the Roman sources to get their historical truth. He criticized the Bartolists who sought to develop a *communis opinio* (i.e. a common opinion on questions of law) and thus studied Roman sources with the sole intent to apply them for themselves and not for finding the true thinking of the Roman jurists. Alciat's way of approaching Roman sources let to the creation of a new movement: the legal humanism. Insofar as Alciat's work was ignored by Italian jurists, he mainly published his work in France where he got recognized by Guillaumé Budé (1467-1540) who, even before Alciat, already advocated for a philological and historical study of Roman law. At the University of Bourges, Alciat taught his new way of studying Roman law. This is the reason why legal humanism is considered to be a French current of thought called the *mos gallicus*, in opposition to the Italian current of thought called the *mos italicus*, which sticks to the traditional study of Roman law as did the Bartolists.

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5 This adage can be translated as follows: "*No one is a lawyer if he had not studied Bartolus!*"

Other important French jurists of this period were: François Douaren (1509-1559), Jacques Cujas (1522-1590), Hugues Doneau (1527-1591) and Antoine Favre (1557-1624). It was Jacques Cujas who was the greatest representative of the legal humanism movement.

In essence, the Humanists rejected the amalgams between Roman law and modern law as practised by the Bartolists. In the Humanists' view, Roman law had to be studied as a historical discipline. Consequently, one could not seek legal recipes within the Digest, which should instead also be subject to a historical analysis.

Clearly distinguishing between ancient law, pre-classical law, classical law, post-classical law and the law of Justinian, the Humanists acknowledged the superiority of classical Roman law. Classical Roman law was therefore – for the first time – subject to particular attention. Accordingly, Humanists attempted to identify classical sources within Justinian's work, which led them to an additional methodological innovation: the hunt for *interpolations*. For the record, when compiling the Digest, compilers had to adapt – and thus interpolate – classical sources to the requirements of their time. Identifying such interpolations was a difficult task that was notably undertaken by Antoine Favre, who is considered to be the first hunter of interpolations.

Next to France, the legal humanism movement reached other European countries such as Germany with the jurist Ulrich Zasius (1461-1535), who pleaded for a more historical analysis of Justinian's texts, or the Netherlands with the Professor Gabriel Mudée (1500-1560), who taught Roman Law at the University of Louvain. In the Netherlands however, the practice remained profoundly rooted in the Bartolists' tradition.

In Spain, it was Antonio Agustín (1517-1586) – jurist, humanist and man of the Church – who devoted himself to restoring the most authentic version of Justinian's texts following a scrupulous reading of the *Littera pisana* combined with an exceptional knowledge of the Greek and ancient history. Yet, he did not let aside the legal knowledge of the *mos italicus* and managed to apply the Bartolists' tradition as an auditor to the Tribunal of the Roman Rota.

Antonio Agustín's way of combining different approaches to study Roman law was due to his background: during his literature studies at the University of Salamanca, Agustín was sent to Bologna where he was a student of Alciat. At that time, the University of Salamanca was a real pole of attraction for the brightest minds and sent its alumni all over the world to occupy key positions. The University of Salamanca then became a genuine School, called the School of Salamanca, which combined different currents of interpretation of Roman law (both the Bartolist and the Humanist), without neglecting the contribution of moral theology to understand the world.

An illustration of this combined approach is the work done by Antonio Gómez, who held the chair of Roman law at the University of Salamanca and was the author of a treatise comparing Roman law and Spanish law. His work includes passages from Justinian's texts as well as references to Thomas Aquinas (a 13th century theologian), Bartolus, Zasius, Alciat and Domingo de Soto (one of the great theologians of the School of Salamanca).

Particularly strong in Spain, such hybrid legal culture is characteristic of the 16th and 17th centuries when Roman law experienced a flourishing renaissance while opening up to other currents of thought. This contributed both to spreading Roman law but also to making it more vulnerable: with the Humanism movement and the School of Salamanca, the most diverse texts

of Roman law gained interest among an even wider audience while losing the absolute authority they had enjoyed under the Bartolists.

4) Enlightenment, Codifications and Roman law

In the courtrooms, Roman law was subject to competition from customary law. Striking the balance between these two bodies of law differed from one region to another in Europe. This created uncertainties since the applicable law was likely to change from one city to another. The following quote from Voltaire is particularly relevant in that respect: "And isn't it absurd and horrible that what is right in one village happens to be wrong in another? How can it be that compatriots don't live under the same rule of law? (…) In our Kingdom, you change jurisprudence as soon as you change horses".

This became unacceptable with the philosophy of the Enlightenment. Considered as the natural evolution of the Renaissance ideas, the Enlightenment philosophy required the removal of any arbitrariness and obscurantism. The law had thus to be unified and to receive a reasoned organisation.

The main hurdle to such reorganisation and unification was to bring customary law closer to Roman law. To that effect, these two sets of rules had to be made comparable. In France, this task was undertaken by Jean Domat (in "The civil laws in their natural order"[6] – 1689) and François Bourjon (in "The common law of France and the custom of Paris, reduced to principles"[7] – 1747), who respectively presented Roman law and French customary law in a reasoned manner.

Later, it was Robert-Joseph Pothier (1699-1772) who summarized these two bodies of law. He then became the first source of inspiration for the authors of the Napoleon Code of 1804. Among these authors, Jean-Etienne-Marie Portalis (17461807) explicitly describes his work as a transaction between Roman law and customary law with the intent to accommodate the two sets of rules as much as possible. Yet, with respect to contract law, Portalis states that he only referred to Roman law as he considers that "*we will never go beyond the principles which have been transmitted to us by antiquity*".

The Civil Code of the French (or the Napoleonic Code) includes numerous Roman rules. Although such Code is not the only one nor the first civil code of its time (e.g., the Prussian code of 1794, the Austrian civil code of 1812), it is certainly the one that played the most important role in the civil law codification movement. Indeed, many countries followed the French example and drew inspiration from the 1804 Code.

Despite a real craze for the codification movement in many European countries, there was a current in Germany that stood against these codifications. This current was composed of legal historians as well as roman jurists, and is called the German Historical School.

In the 19th century, German science was at the forefront in many fields, including law. Not yet unified at the time of the Napoleonic Code, the codifications existing at that time did not affect all of Germany (e.g., only Prussia or Bavaria were concerned). The German Historical School, dominant in law faculties, refused that German law be codified. This current of legal thought

6 Free translation of "*Les loix civiles dans leur ordre naturel*".

7 Free translation of "*Le droit commun de la France et la coutume de Paris, réduits en principes*".

was first founded by Gustav Hugo (1764-1844) and then led by Friedrich Carl von Savigny (1779-1861). In a controversy that opposed Savigny to his colleague Anton Friedrich Justus Thibaut (1772-1840), the former vividly criticized the codification movement and in particular the French Code.

More particularly, with respect to the study of Roman law in Germany, the "roman jurists" side of the German Historical School sought to extract legal principles from Roman law in order to rationalize them excessively. This "roman jurists" side is called the Pandectist School. This School transformed Roman law from a very casuistical body of law into a dogmatic and logical law.

It was only after having completed this task of rationalization that German law could be codified. This gave rise to the German Code in 1900, which is called *Bürgerliches Gesetzbuch* or BGB. This Code is not qualified as a compromise between Roman law and customary law but rather self-proclaimed as purely Roman.

In light of these developments regarding the codification of the French and German laws, one can observe that Roman law was not killed but rather transformed. Whilst students who have not been trained to recognize the real origins of a provision contained in these conditions may ignore the heritage of ancient Rome, such heritage remains essential to fully grasp the rationality behind our current legal principles.

By placing Roman law in the discipline of history of law, these codifications have fostered research even more, although this freedom was already claimed by legal humanism. There is also an interesting common feature between Antoine Favre and the *iusromanists* of the 20th century: the interpolations. Whilst Antoine Frave was the first to hunt for interpolations in Justinian's texts, this work became an excessive tendency during the first half of the 20th century. Indeed, some authors completely rewrote the Roman sources in a way to make them say what these authors wanted them to say. They even went as far as pretending that Roman jurists were wrong in understanding Roman law. During the second half of the 20th century, the *iusromanists* became a bit humbler and more cautious in their interpolations assumptions.

Today, there seems to be two currents of researching and teaching in Roman law:

- The first current requires that Roman law be studied in full disregard for modern law; Roman law must be free of any modern law influences and must be part of history (and not law), which implies that Roman law be studied in the history department rather than in the law department; this current is of minority;
- The second current requires that connections between Roman law and modern law be made; Roman law is to be considered as a legal discipline and must therefore be studied in the law department.

This second current is more widely spread since the majority considers that teaching and studying Roman law pursues a double objective:

- The first one is explanatory: Roman law explains the basis of our current rules of law and helps us to better understand the genuine rationality behind these rules;
- The second one is propaedeutic: Roman law is ideal to start learning private law; it is stable, it has influenced the private law system of multiple countries around the world and does not depend on the legislators' will; Roman law is therefore an essential asset for an effective legal training, including on an international level.

On a more anecdotical note, it is worth bearing in mind that scientific production in Roman law has increased steadily over the centuries, especially since the 20th century. Not only in volume but also in the diversity of languages and countries in which articles about Roman law are being published. Today, Roman law is in fact studied around many different countries, which justifies that we talk about the third life of Roman law.

5) Conclusion

It results from the foregoing developments that Roman law experienced a second life notably through the codification movement, which attempted to combine modern law with Roman law in a written format.

Whilst this codification movement started among European countries, it eventually reached jurisdictions outside Europe. In that frame and considering the comparative perspective in which the present *syllabus* is embedded, each of the following chapters will be dedicated to the study of a specific jurisdiction whose codification movement is of particular interest.

Chapter 4 - French Law

1) The Revolutionary Period

Following the Revolution of 1789, the Constituent Assembly acknowledged the need for a code that would be common to the French people in its entirety. In 1793, it thus instructed the legislative committee to submit a draft Civil Code within a month. This project was submitted by Cambacérès on 9 August 1793. It was ambitious, it followed the structure of Justinian's Institutes, it included revolutionary laws, and it was largely based on the principle of equality, including between spouses. Yet, it did not succeed because of the following elements:

- The discussions surrounding this Code were interrupted due to the turmoil caused by internal enemies (i.e. the Vendée insurrection) and by external enemies (i.e. the French Revolution worried the leaders of the neighbouring countries);
- The draft as submitted by Cambacérès was deemed too complex, too abstract and too long, even though it only contained 719 articles.

After the fall of Maximilien Robespierre, Cambacérès held a strategic and important position within the Thermidorian convention (i.e. group of people who rebelled against Robespierre and the Terror regime), which allowed him to submit, in 1794, a second draft of the Civil Code. In that frame, Cambacérès took care of reducing the number of articles included therein (only 297 articles). This second draft was however again rejected, notably on the basis that it was too short this time.

From 1795 to 1797 (i.e. under the Directory), Cambacérès was part of the Council of Five Hundred. This Council appointed him as the chairman of the Commission for the Classification of Laws. In that frame, Cambacérès submitted a third draft of the Civil Code, which was longer than the previous one, but which included only limited revolutionary laws. Yet, this draft was a third failure and the Directory ended being overthrown before such draft could be adopted.

It was Napoleon who, having taken power, resumed the ambition to draft a Civil Code on his behalf.

2) The Consulate and the Empire

To complete his ambition of a Civil Code, Napoleon ordered the establishment of a drafting committee of four members only. These members had to be reasoned jurists and not radical revolutionaries. Two of these members were representatives of customary law: François-Denis Tronchet (1726-1806) and Félix-Julien-Jean Bigot de Préameneu (1747-1825), who were former lawyers at the Paris Parliament. The other two members represented the tradition of written law: Jean-Étienne-Marie Portalis (1746-1807) and Jacques de Maleville (1741-1824). This committee managed to submit their first draft after only four months of hard work. The French Civil Code came into force on 31 March 1804.

Napoleon's participation to this codification process was crucial. Whilst he did not take part in any discussion relating to the law of obligations nor in any purely legal discussion, he did influence the form and substance of the French Civil Code. This influence was certainly due to his chairmanship in 57 out of 102 sessions at the Council of State where the text of the Code was debated. It is therefore legitimate to wonder whether the French Civil Code as we know it today would have had the same form and substance without Napoleon's assistance.

With respect to the form, Napoleon insisted on the need to use a clear language. The Code had to be understandable by people who were not lawyers. With respect to the substance, Napoleon was actively involved in discussions relating to divorce and adoption. Indeed, insofar as Napoleon had at that time been elected consul for life, he wished to create a dynasty. Yet, his marriage with Josephine de Beauharnais was meant to remain childless. He thus believed that remarriage and adoption would constitute useful means for him to secure a dynasty.

Napoleon was very proud of the French Civil Code, to which he even gave his name. At the end of his life, during his exile on the island of Saint Helena, he declared that "*[his] true glory is not to have won 40 battles. Waterloo will erase the memory of all these victories. What nothing will erase, what will live forever, is my Civil Code*".

3) The Spirit of the Codifications of the 18th and 19th centuries

Whilst from the end of the 18th century until the beginning of the 19th century, many codifications emerged, the Napoleon Code was certainly the best intellectually and the most fertile in history.

3.1) Characteristics common to the codifications of the 18th and 19th centuries

The Napoleon Code, the Prussian Code of 1794[8] and the Austrian General Civil Code of 1811[9] were all based on the basic principle of the Enlightenment according to which civil law should be subject to a rational and systematic reorganisation.

What however distinguishes these three codifications is the political and historical conditions in which each codification took place, as well as the means employed to that end.

3.2) Differences between the codifications of the 18th and 19th centuries

Despite the French Revolution, the Prussian Code remained dominated by a class structure scheme, which was consistent with the social situation under Frederick II. Indeed, the paternalistic authoritarianism of the despots left little room for originality and progress.

The Austrian Code was more idealistic and rational. It was much shorter and clearer than the Prussian Code. It had also a certain degree of abstraction. In addition, the Austrian Code was ahead of its time since it was dominated by the principles of liberalism and individualism, which clearly contrasted with the political regime (i.e. absolute monarchy) in force in Austria during the 19th century.

The distinctions between these two Codes, on the one side, and the French Civil Code on the other side, arise when the revolutionary character of these codifications is taken into account:

- Both in Prussia and Austria, the codification was decided by an enlightened despot and was based on social conceptions of the Old Regime;
- In France, following the bourgeois revolution, it was considered that the State had to be based on the principle of equality between citizens; this enabled the drafting and adoption of an egalitarian and liberal Code.

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8 Allgemeines Landrecht für die Preußischen Staaten ("ALR").

9 Allgemeines Bürgerliches Gesetzbuch ("ABGB").

Only in France was the Civil Code the genuine result of a revolution and the genuine reflection of the society. Yet, these features should not be overstated as the anchoring of the French Civil in certain pre-revolutionary traditions still remained very important.

4) The Main Characteristics of the French Civil Code

Fundamentally, the French Civil Code was based on the right to property (article 544) as well as on the principle of contractual freedom (article 1134).

In addition, several revolutionary achievements were maintained within the Civil Code. It was notably the case for the abolition of the feudal system, the equality of succession shares, the secularisation of marriage, the prohibition of fideicommissary legacies, etc.

On the other hand, many other provisions that had been submitted during the revolutionary period were tempered or repealed in order to stick with less extreme solutions. It was notably the case for the following rules:

- The transfer of property by reason of death was, at the revolutionary period, prohibited; with the Civil Code, such institution was reintroduced but was limited to the available quantity; such rule thus appears as a compromise between the revolutionary ideas and the tradition;
- The equality between spouses was submitted in the frame of Cambacérès' first draft; with the Civil Code, the principle adopted in that respect was the administration of property by the husband alone; the justification put forward in the preparatory works was based on the "natural order of things" and explained that denying material inequality would only lead to "debates that would destroy the charms of domestic life";
- The divorce was maintained but within strict limits; indeed, the divorce ceased to be regarded as the termination of a contract with successive execution in which the disappearance of consent would result in the disappearance of the marriage; in addition, whilst the husband could request and obtain divorce by showing the adultery of his wife, the latter was able to obtain divorce only provided that she could demonstrate that her husband had a mistress under the marital roof; this contradicts the rule adopted under the Revolutionary period where divorce was free for both the husband and the wife; such difference of treatment between the husband and the wife when it comes to divorce was considered by Portalis as natural since the wife's infidelity could allegedly lead to more dangerous consequences than the husband's infidelity.

5) Compromises between Customary Law and Written Law

About Roman law, Portalis[10] stated in his Preliminary Speech to the Civil Code the following:

"*Most authors who censor Roman law with as much bitterness as lightness, blaspheme what they do not know. We will soon be convinced of this, if, in the collections which have transmitted this law to us, we know how to distinguish the rules which have deserved to be called the written reason, from those which belonged only to particular institutions, foreign to our situation and our uses; if one can still distinguish the senatus-consulta, the plebiscites, the edicts of the good*

10 J. PORTALIS, « Discours préliminaire au Code civil », in P.A. FENET, *Recueil complet des travaux préparatoires du Code Civil.*, t. I, Paris, 1827, pp. 463 à 523.

princes, from the rescripts of the Emperors, a kind of begging legislation, granted from credit or obtrusiveness, and fabricated in the courts of so many monsters who have desolated Rome, and who publicly sold judgments and laws"[11].

About the committee's work, Portalis expressed himself as follows:

"*We made, if it is permissible to express ourselves so, a transaction between written law and customs, every time it has been possible for us to reconcile their provisions, or to modify them by one another, without breaking the unity of the system, and without upsetting the general spirit. It is useful to keep everything that must not be destroyed: the statutes must preserve habits, when these habits are not vices*"[12].

With respect to the content of the French Civil Code, the influences of Roman law and customary law were not felt the same way in all areas of civil law:

- The influences of Roman law were obvious regarding the law of obligations, for which Pothier's work was the main source of inspiration; Roman law also influenced the law of wills and the matrimonial regimes (especially the dowry system);
- The influences of Customary law (i.e. essentially the Paris Coutume) concerned family law, succession law, matrimonial regimes (especially the community-property regime), the rule under article 2279[13] as well as the registration and transcription system for the transfer of real estates.

6) The Judge before the Law

Influenced by natural law, the drafters of the various codifications of the 18th and 19th centuries shared the view of the separation of powers according to which the judge cannot have any power and must only mechanically apply the laws. This principle was included in the Prussian code as well as in the French Civil Code.

6.1) Prussian Code of 1794 (ALR)

The Prussian Code made a thorough application of the separation of powers. Indeed, a decree from Frederick II prohibited judges from departing from the clear and limpid prescription of the law by claiming a philosophical reasoning or an interpretation based on the *ratio legis*.

Accordingly and in order to provide the judge with the necessary tools to assess any question raised before him without proceeding with superfluous interpretation, the Prussian Code included 17,000 articles.

6.2) French Law

Whilst the position in intermediary law in France regarding the separation of powers was similar to the one included in the ALR, the position of the Civil Code's drafters was wiser.

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11 P.A. FENET, *op. cit.*, p. 480.

12 *Ibid.*, p. 481.

13 Substantive rule: it is an original method of acquiring ownership that benefits *bona fides* purchasers of tangible movable property. See J. HANSENNE, *Les Biens — Précis*, Liège, Éditions de la collection scientifique de la Faculté de Droit, 1996, p. 234.

Right after the French Revolution, this principle of separation of powers was still followed literally. For instance, courts had to refer to the Legislative Council any time they were asked to interpret a law or to make a new one, and the Cassation Court could quash a judgment that would breach such requirement.

In contrast, the Civil Code's drafters considered that the legislator's task was only to adopt general rules but not to interfere into the details of a particular case. Accordingly, Article 4 provides that there is a denial of justice when the judge refuses to judge under any pretext whatsoever, even silence, obscurity or insufficiency of law. This provision prevents any risk of excess which may turn to casuistic precision.

In that regard, Portalis stated that "*the office of the law is to fix, by grand views, the general maxims of law; to establish fruitful principles in consequence, not to go down into detail about the questions that may arise on each subject. It is up to the magistrate and the jurisconsult, penetrated by the general spirit of the laws, to direct their application. […] There is a science for legislators, as there is one for magistrates; and one does not look like the other. The science of the legislator consists in finding in each subject the principles most favourable to the common good: the science of the magistrate is to put these principles in action, to ramify them, to extend them, by a wise and reasoned application, to private hypotheses. […] We abandon to jurisprudence the rare and extraordinary cases which can not enter into the plan of a reasonable legislation, the too variable and too contentious details which should not occupy the legislator, and all the objects which we would needlessly endeavour, or that a precipitous foresight could not define without danger. The experience will have to successively fill the voids that we leave. The codes of peoples are made over time, but strictly speaking, they are not made*".

Articles 1382 to 1386 of the French Civil Code constitute the most famous examples of a compressed codification: in only five articles, the Civil Code organizes all civil liability law. On the other hand, the *Allgemeines Bürgerliches Gesetzbuch* (ABGB) provides for forty articles dealing with civil liability law, whilst the *Bürgerliches Gesetzbuch* (BGB) contains thirty-one articles dealing with civil liability law. Whereas Articles 1382 to 1386 did not undergo many amendments since their entry into force, one must note that the case law contribution in their respect is fundamental not only to interpret them correctly but also to understand the very substance of tort liability.

Due to some obscure drafting, the French Civil Code is often open to interpretation. This makes it different from the *Bürgerliches Gesetzbuch* which – as the fruit of the Pandectist School – does not leave room to any terminological inaccuracy. Here are some examples:

- Article 778 of the French Civil Code: "*Pure and simple acceptance (of a succession) may be express or tacit. It is express when the person who is called to the succession takes the title or status of heir, accepting in an authentic act or act under private signature. It is tacit when the person who is called to the succession and has seizin executes an act that necessarily implies his intention to accept and that he would not have the right to except as an accepting heir*"[14]; whereas the word 'act' is used twice in this provision, these two occurrences have different meanings: in the first occurrence,

[14] Translation from D. GRUNING, A. LEVASSEUR, J. RANDY TRAHAN and E. ROY, *Traduction du Code civil français en anglais version* bilingue, 2015, halshs-01385107.

the word 'act' refers to the *instrumentum* and, in the second occurrence, it refers to the *negotium*; in contrast, the BGB does not allow for such polysemic use of the same word.

- Article 1147 of the French Civil Code: "*The debtor shall, where appropriate, be ordered to pay damages, either for non-performance of the obligation or for delay in performance, whenever he does not justify that the non-performance stems from a foreign cause which cannot be attributed to him, although there is no bad faith on his part*"; Article 1148 of the French Civil Code: "*No damages shall be incurred where, as a result of force majeure or fortuitous event, the debtor was prevented from giving or doing what he was obliged to do or did what he was forbidden to do*"; accordingly, on the one side, the foreign cause of discharge allows the debtor to relieve himself from his contractual liability, on the other side, it is both force majeure and unforeseeable circumstances that discharge the debtor in the event of non-performance; however, such provisions do not determine the possible link to be established between these different words, the realities they are meant to cover, or even whether they are indeed different words; it is up to the judges to undertake these tasks.

Such terminological imprecisions clearly distinguish the French Civil Code from the *Bürgerliches Gesetzbuch* or the *Nieuw Nederlands Burgerlijk Wetboek* ("NBW").

Another characteristic of the French Civil Code is its exceptional linguistic elegance, which contrasts with the technical aridity of the BGB. For instance, if one compares Article 2279, §1, of the French Civil Code[15] with Articles 932 and *seq.* of the BGB, one can easily spot the elegant drafting of the French Civil Code whilst observing that the BGB is less fluid and more arduous. Yet, the provisions contained in the BGB easily answer all the questions that could be raised by any reader in its respect, without the latter having to dig into the underlying case law. This is definitely not the case with the French Civil Code, where the provisions remain unclear and where reference to case law remains fundamental.

Lastly, one must note that the French Civil Code includes numerous definitions of various legal terms and concepts. Yet, Cambacérès[16] – as well as other authors from different jurisdictions (e.g., Josef Unger with respect to the ABGB) – were opposed to the introduction of definitions into legislative works such as a civil code. Indeed, they considered that any definition of legal terms and concepts should be the fruit of doctrinal works and should be included into lawbooks rather than into legislative works. Notwithstanding this position, the drafters of the French Civil Code decided to introduce therein numerous definitions of various terms and concepts. This approach appeared to be consistent with their goal to draft and enact a Civil Code that would be readable by the whole people, and not only by legal practitioners.

7) The Structure of the Civil Code

In addition to the preliminary title dealing with the publication, effects and application of laws in general (Articles 1 to 6), the French Civil Code includes three books which follow the structure of Gaius' (or Justinian's) Institutes.

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15 Article 2279 of the French Civil Code: "In the case of movables, possession is equivalent to a title. Nevertheless, he who has lost a thing or from whom it has been stolen, may reclaim it within 3 years, computing from the day of loss or robbery, against the person in whose hands he finds it; saving to the latter the remedy against the person from whom he obtained it".

16 J-F NIORT, *Homo civilis*, Niort, J. 2004, Chapitre III. Les premières interprétations du Code Napoléon, in *Homo Civilis. Tome I et II : Contribution à l'histoire du Code civil français (1804-1965)*, Presses universitaires d'Aix-Marseille, doi :10.4000/books.puam.425.

This threefold structure was first proposed by Cambacérès but some authors were opposed to it. There were thus discussions in that respect to agree on a different structure. It was however eventually decided that these discussions were not of significant importance and that the proposed structure could be maintained.

More particularly, the French Civil Code is divided into the following books:

- The First Book is entitled "Of Persons" and includes Articles 7 to 515;
- The Second Book is entitled "Of Property and the Different modifications of property" and includes Articles 516 to 710;
- The Third Book is entitled "Of the different Modes of Acquiring Property" and includes Articles 711 to 2281.

The First Book provides for rules dealing with civil status, domicile, absence, marriage, divorce, filiation, adoption, paternal power, minority, guardianship, emancipation, majority, etc.

The Second Book provides for rules dealing with movable and immovable property, possession, fruits, usufruct, habitation and easements. This book does not however address the transfer of ownership. Indeed, as per French law, the contract (e.g., sale, gift, exchange, etc.) automatically carries out the transfer of ownership. There is therefore no need for a separate act that would proceed with the transfer of ownership. This feature distinguishes French law from German law, as we shall see later.

The Third Book contains the following provisions:

- Provisions dealing with succession law and donations;
- Provisions dealing with contracts and obligations in general (legal capacity, interpretation of contracts, means of extinguishing obligations, etc.);
- Provisions dealing with matrimonial property regimes;
- Provisions dealing with some special contracts;
- Provisions dealing with security rights;
- Provisions dealing with prescription rules.

Whereas such structure may appear standard for French and Belgian lawyers, lawyers from other jurisdictions such as Germany may be more surprised. For instance, the fact that the provisions dealing with matrimonial property regimes be separated from the provisions dealing with marriage is surprising. The same observation may apply with respect to succession law, which could be expected to be placed close to family law. Lastly, the relevance of linking civil liability actions with the different ways of acquiring property can be called into question.

To answer these criticisms, Planiol does not consider it annoying that the third book be a catch-all book since "the piling up of all these heterogenous materials in a single book makes little sense […]. The scientific order, which is suitable for teaching in the form of a course or a book, is not necessary or even useful in a code. Teaching is an initiation; that is why it needs a particular method. A code is made for people who have finished their studies, for practitioners, who know the law. It is enough that the distribution of the subjects is clear and convenient".

8) The Ideological Context of the Civil Code

Initially, the French Civil Code was an instrument by which the revolutionary ideology could be spread considerably. Today, it is undeniable that the French Revolution was above all a bourgeois revolution. It is therefore not surprising that the French Civil Code essentially defended the bourgeois' interests. Over time however, the amount of interests to be defended increased as lawmakers and judges faced various social developments.

8.1) A Bourgeois Code

Whilst the French Civil Code is considered to be – at least partially – the fruit of the French Revolution, it is also a bourgeois code. Accordingly, when the Code's drafters had to design the ideal man, they contemplated the wealthy citizen/the bourgeois trader but not the craftsman or the peasant. It was thus the interests of the "Third State" that was taken into account by the drafters.

As a consequence, the principles of personal freedom and entrepreneurial freedom were at the core of the French Civil Code since those principles were essential to allow the bourgeoisie to exist and develop. This tendency of the French Civil Code to protect the bourgeoisie's interests also implied that the principle of contractual freedom was given a central place. This principle could indeed only be limited by a strict minimum of mandatory laws and/or by the public order.

The field of family law as provided for by the French Civil Code also reflects the model of the bourgeois family of the early 19th century:

- The husband and the father were the sole masters of the family;
- The husband and the father could prevent the marriage of their son until the age of 25 and of their daughter until the age of 21;
- As per former Article 213 of the Civil Code, the husband had to protect his wife who had to obey her husband;
- It was expected from the married woman that she raised her children and that she took care of the household; perceived as too unstable and not experienced, the married woman was refrained from working in business without having first received the authorization from her husband;
- The interference of the State within the family's issues became unbearable; this is how the Family Council was created.

Furthermore, the bourgeois character of the French Civil Code is also confirmed by the property regime included therein. The property that is dealt with is the land ownership, which is definitely the property *par excellence* of the bourgeois.

8.2) The Evolution of the French Civil Code

In two hundred years, French society has obviously evolved through notably the industrial revolution, the demographic boom of the 20th century, the first and second World Wars, which made it necessary to proceed with several legal changes.

Whilst such changes were made through legislation with respect to family and succession law, case law also played an essential role in adapting the Code to societal developments. This was, for instance, the case in respect of the liability for the actions of things (based on Article 1384, §1, of the Civil Code), the abuse of rights and the action *in rem verso* (Articles 1376 to 1381 of the Civil Code).

Today, it can be considered that a large part of French private law has become a sort of common law, i.e. non-written law/case law. Nevertheless, it is still expressly rejected that case law should be regarded as a source of law. In our view, this position is wrong. If the concept of "source of law" is defined from a functional approach, there is no doubt that case law does indeed constitute a source of French private law.

9) The Reception of Civil Law

9.1) Reasons for the French Civil Code's success outside of France

The tremendous influence that the French Civil Code exerted throughout the 19th and 20th centuries can notably be explained by the circumstances surrounding its entry into force:

- The Code benefitted from the enthusiasm following the French Revolution;
- The Code was directly inspired by the philosophy of the Enlightenment;
- The Code finally scrapped the feudality of the Old Regime and established the principle of equality between citizens; and
- The revolutionary feature of French Civil Code was mitigated due to the political stability under the reign of Napoleon.

Other elements contributed to the wide spreading of the French Civil Code among Latin countries, Central Europe, Eastern Europe and the Middle East:

- The compromise made between written law and customary law;
- The revolutionary inputs;
- The role played by Napoleon as well as his personal charism;
- The style, the logic, the language and the progressive nature of the Code.

The reception of the French Civil Code among these territories was not the result of a qualitative evaluation thereof. On that point, Koschaker[17] stated that the reception of a code is rather a question of power than of quality; the power in question here does not necessarily consist in a military power; it may indeed merely be a cultural or intellectual predominance. Such statement is questionable. Whereas it is true that the French Civil Code was more brilliant linguistically and philosophically than technically, one can observe that Koschaker's statement is made by a German jurist. Yet, French and German jurists would certainly not contemplate the quality of a code according to the same standards: whilst the German jurist would be more likely to focus on the legal rigour, the French jurist will pay more attention to the readability of the Code.

9.2) Some examples of the reception of the French Civil Code in Europe

The end of the 18th century and the beginning of the 19th century were marked by the expansion of the revolutionary ideals throughout Europe. This expansion essentially resulted in military campaigns and conquests launched by Napoleon. Between 1804 and 1812[18], the French Civil Code thus followed the French armies within the conquered territories. Although the defeated countries found their independence back in 1815, the French Civil Code had already completed his work there and the traces it left would soon prove to be indelible.

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17 P. KOSCHAKER, *Europa und das römische Recht*, Berlin, Biederstein, 1947, pp. 137 and *seq*.

18 The Berezina battle (1812) marks the end of the Russian campaign.

Although the French conquests reached Russia, the French civil law truly penetrated the European territories of Benelux, Germany and Switzerland. For instance, the territories located at the West of the Rhin became French territories following the Treaty of Lunéville of 9 February 1801, the French Civil Code therefore came into force there from 1804.

The French Civil Code did not long resit the influences from the Pandectist School (i.e. a legal science that emerged and was developed during the 19th century). From 1808, Zachariä von Lingenthal, professor at Heidelberg, published a manual of French civil law (i.e. the *Handbuch des französischen Civilrechts*), which constituted the first methodical and systematic study of French private law breaking with the unsatisfying structure of the French Civil Code. Such manual marked the beginning of an important chapter regarding the influence of German doctrine upon French law[19]:

- This manual was rapidly translated into French by Aubry and Rau, professors at the University of Strasbourg, and was subject to numerous editions;
- This manual played a key role in breaking with the School of the Exegesis[20]; and
- This manual had a considerable influence on case law[21].

19 See H.J. SONNENBERGER, "Allemagne", in *La circulation du modèle juridique français*, coll. Travaux de l'Association Henri Capitant, n° 44, Paris, Litec, 1994, pp. 340 and *seq*.

20 See R. SACCO, *Introduzione al diritto comparato*, 5th ed., Torino, UTET, 1992, pp. 230 and *seq*.

21 On the influence of German doctrine in France: A.B. SCHWARTZ, "Einflüsse deutscher Zivilistik im Auslande", in *Symbolae friburgensis in honorem Ottonis Lenel*, Leipzig, 1935, p. 425, pp. 435 and *seq*.; A. BÜRGE, *Das Französische Privatrecht im 19. Jahrhundert: zwischen Tradition und Pandektenwissenschaft, Liberalismus und Etatismus*, 2d ed., Frankfurt-am-Main, V. Klostermann, 1995.

Chapter 5 - German Law

1) History of German Law

At the time of the Roman Empire, the current territories of Germany were largely outside the Empire's boundaries, which corresponded to the Rhine and the Danube. Before the Barbaric invasions, the Germans – pushed by the Huns – had already penetrated the Roman Empire's territory. Yet, they continued to apply their own rules, and the fall of the Roman Empire (476 AD) did not change the situation since the principle of personality implied that Roman law only applied to Romanised people. On the other hand, the Germans continued to be the subjects of their own laws.

At the beginning of the 6th century, the Germans' migration increased steadily, which notably provoked the Romanised people' move to the West and the South. This resulted in the Romanised people and Roman law to eventually disappear from the territories close to the Rhine and the Danube.

In this section, we will study the way Roman law reappeared and was received in Germany.

1.1) The German Political Situation during the Middle Ages

In 800, Pope Leo III sacred Charlemagne as the Emperor of the Roman Empire. This caused the disbelief of the citizens of the Eastern Roman Empire as they considered themselves the sole successors of the Empire. From 1157, under Frederick I, named Barbarossa, the German Empire was called "Holy Roman Empire".

The main reasons underlying the important reception of Roman law within Germany derive from the political situation following the fall of the Hohenstaufen. Such fall resulted in a decentralisation of powers as well as in a shift of power towards local despots. In turn, this gave rise to numerous principalities, which were *de facto* independent. Consequently, there was no unified substantive law in Germany nor any judicial system common to the whole territory of Germany.

At the same time, England had royal courts in London as well as a powerful corporation of jurists. In the same vein, France possessed a relatively centralized power as well as many parliaments (e.g., the Paris Parliament played a key role).

In Germany on the other hand, the imperial power was weakened (e.g., the Kaiser had neither a fixed seat nor a centralised administration). A *Reichshofgericht* appears to have existed (i.e. an imperial court, which was aimed to serve as an appellate body of all other courts of the Empire) but its role was insignificant.

Such political situation in Germany facilitated the penetration of Roman law into all Germany's principalities. Indeed, if German law had been subject to collection, had been ordered and rationalised, it would have been able to subsist while adapting to the penetration of Roman law. Instead, the absence of centralized power merely prevented the survival of local laws, which were simply swept away by Roman law.

In addition, there was a "fiction" of continuity within Germany. It was indeed believed that Roman law was the law of the Roman Empire, to which the Holy Empire succeeded, with Kaiser being an heir of the Caesars. Yet, considering the fragmentation of the Holy Empire, Roman law – as the *ius commune* – was only of a subsidiary nature.

1.2) The reception of Roman Law and the *usus modernus pandectarum*

Due to the late appearance of universities within the German territory, the reception of Roman law therein was relatively late. Nevertheless, German lawyers quickly caught up their delay afterwards.

As of the 16th century, universities in Germany started to put Roman law into practice, while still referring to some extent to local law. Such discipline was later called the *usus modernus pandectarum*, which can therefore be defined as a synthesis between Roman law and local laws.

This German discipline was simply a *professorenrecht* with no real connection to the practice. This situation contradicted the aim initially pursued and contrasted with the situation in France and Italy. This may have marked the start of a long tradition of theoretical law developed by intellectuals rather than by practice. The main representatives of this School were:

- In Saxony, Benedict Carpzov (1595-1666);
- In the Baltic region, David von Mevius (1609-1670);
- In Württemberg, Wolfgang Adam Lauterbach (1618-1678).

1.3) The Impact of the Cult of Reason and the First German Codifications

Next to Roman law, German law was also significantly influenced by natural law. A common feature of Roman law and natural law is their aspiration to constitute a law that would be always and everywhere applicable. However, unlike Roman law, natural law was not born out of practice but was rather the result of an abstract reasoning. This feature brought natural law closer to the *usus modernus pandectarum*. Whereas the tension between Roman law and natural law was eventually resolved in favour of the former, natural law still left some traces upon German law.

It was on the basis of natural law that the philosophy of the Enlightenment could – also in Germany – give rise to the idea of a reasoned codification of law. It was indeed considered fair for the subjects of the Empire to know their laws. At that time however, it was still considered impossible to impose a common civil code to the whole territory of the Holy Empire. On the one side, there was a reluctance from Roman law, which did not accept to be erased in favour of the general principles of natural law. On the other side, the Emperor's power was still largely insufficient to carry out such a reform.

In the meantime however, things seemed to have evolved within the doctrine. In Germany, the great *jusnaturalists* were:

- Samuel Pufendorf (1632-1694);
- Christian Thomasius (1655-1728);
- Christian Wolff (1679-1754), which notably imposed on Roman law a logical, almost mathematical, rigour.

Among these jurists, law became a rational and abstract discipline, which led them to lose completely contact with social reality. If such view did not have any impact on the practice of law in Germany at that time, it still found an echo with the various princes.

The first codification of this period was the *Codex Maximilianus Bavarius Civilis* of 1756, which was based on the Bavarian variant of *usus modernus pandectarum*.

In addition and next to the Austrian Code of 1811, the most important Germanic codification of that period was the Prussian Code of 1794, i.e. the *Allgemeines Landrecht der Preußischen Staaten* (ALR), which was in force in Prussia until it was replaced by the BGB. This codification emerged from Frederick II's initiative, who was strongly influenced by French philosophers and jusnaturalists.

The structure of the ALR reflected the conceptual system brought by Samuel Pufendorf, who considered that the human being had a dual nature: as an individual and as an element of a community. Accordingly, the first part of the ALR dealt with individual property and its second part with the legal situation of the individual as part of the various social groups to which he belongs (i.e. the legal situation of an individual in relation to his family, to his extended family, including domestic servants, to associations and corporations, to social classes and to the State). This feature clearly distinguishes the ALR from the egalitarianism French Civil Code.

In terms of content, the ALR's drafters wished to have a complete, readable and popular code, which led them to adopt a discursive and pedagogical style. Yet, the code included 17,000 articles with very detailed rules, which made it impossible for practitioners and academics to master the code. On this code, Kunkel even declared that it was a "monstrously anti-intellectual enterprise"[22].

In addition and as mentioned hereinabove, judges were prevented from interpreting the ALR. Therefore, in case of doubt as to the real meaning of a provision, they were required to address their question to the Chancellery. In that respect, Paragraph 6 of the introduction provided that: "*Auf Meinungen der Rechtslehrer, oder ältere Aussprüche der Richter, soll, bey künftigen Entscheidungen, keine Rücksicht genommen werden*"[23].

Such provision was perfectly in line with Frederick II's views. In his "*Dissertation sur les raisons d'établir ou d'abroger les lois*"[24], the latter claimed that: "*Specific laws do not give rise to chicane, they must be understood literally: when they are vague or obscure, they force to find out the intention of the legislators, and instead of judging the facts, one is busy defining them. Chicane is particularly used in successions and contracts; and for this reason, the rules in these fields must be particularly clear. Judges have two traps to fear, corruption and error: their conscience must preserve them from the first, legislators from the second. Clear laws that*

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22 W. KUNKEL et C.R. F. WIEACKER, "Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der Deutschen Entwicklung", in ZSS, vol. 71, 1954, p. 534: "*In der Beurt eilung des Preußischen ALR schließt sich Wieacker im ganzen der heute durchaus herrschenden Auffassung an, die dem Gesetz einen sehr hohen Rang zuspricht. Immerhin fehlen nicht die Einschränkungen: Hinweise auf den unkritischen Vernunftglauben, auf das Mißtrauen gegen die Wissenschaftliche Jurisprudenz (S. 205f. ; vgl. Auch S.217f.). Vielleicht sollte man die Negativen Akzente noch etwas nachdrücklicher setzen. Bei aller Annerkennung der starken juristischen und sprachlichen Gestaltungskraft, die im einzelnen immer sichtbar wird, muß man das Werk als Ganzes mit seiner Bevormundung des Richters wie der Rechtsuntertanen (‚Rechtsgenossen' wäre fehl am Platze) doch als ein monströses, geistwidriges Unternehmen bezeichnen. Mag der Einfluß der späten Naturrechtstheorie auf den Inhalt des Gesetzes noch so stark sein : vom Pathos der alten Naturrechtsidee ist kaum noch etwas zu spüren ; die eigentlich wirkende Kraft ist der Anspruch einer Omnipotenten Verwaltung, alle Lebensbeziehungen der Untertanen ein für allemal und bis ins letzte nach ihrer erleuchteten Einsicht zu regeln. Daß auf dem Boden dieses Gesetzes keine blühende Wissenschaft entstehen konnte, scheint mir selbstverständlich*".

23 Free translation: "Opinions of scholars or previous judgments should not be considered for future decisions".

24 *Œuvres de Frédéric II, roi de Prusse*, t. I, Berlin, 1791, p. 140. For the record, Frederick II was a French-speaker and wrote in French.

give no way to interpretation are a first remedy, simplicity of the pleadings the second. One can reduce the speeches of the lawyers to a narration of the facts, reinforced by some evidence and concluded by a short epilogue and summary epilogue"[25].

The main consequence of such statement, and more fundamentally of the above-mentioned provision, was that the ALR was not subject to doctrinal works and could, therefore, not serve as the basis for the unification of German private law.

Lastly, one must recall that the Napoleon Code itself was applied in different parts of the Germanic Empire. Indeed, following the Treaty of Lunéville of 9 February 1801, the territories that were located at the West of the Rhine became French. The French Civil Code thus entered into force there as of 1804. Later, and insofar as the Napoleonic armies conquered other territories beyond the Rhine, the Code entered into force in the Kingdom of Westphalia, the Grand Duchy of Baden and Frankfurt, as well as in Danzig (now Gdansk), Hamburg and Bremen.

Whilst the expansion of the French Civil Code ended with the war of liberation, it remained applicable to the territories located at the West of the Rhine as well as to some Prussian provinces. For instance, in the Grand Duchy of Baden, the French Civil Code took the form of a translation – slightly adapted to the Badoise society by Brauer – known as the *Badisches Landrecht*.

For the record and as mentioned under the previous chapter, the presence of French law within some German territories played an important role in the evolution of French law[26].

1.4) Breathlessness of Rationalism and Appearance of Romanticism

With the 19th century, the law of reason – deemed as likely to overcome any obstacle and to unravel universal ethical laws – started to tarnish, especially under the criticism of Immanuel Kant (1724-1804).

Absolute rationalism gave way to new intellectual currents. For instance, Johann Gottfried Herder (1744-1803) showed the people that cultural manifestations such as poetry and language were not the product of pure reason but rather the result of history. The romantic movement exhumes the irrational forces from human beings.

1.5) The German Historical School: Conceptions and Consequences

The German Historical School emerged from those intellectual circumstances.

Its leader was Carl von Savigny (1779-1861). For Savigny, law did not consist in a rational product from lawmakers but rather in a product resulting from the history of a civilisation. Law

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[25] Free translation of: "Des lois précises ne donnent pas lieu à la chicane, elles doivent s'entendre selon le sens de la lettre : lorsqu'elles sont vagues ou obscures, elles obligent de recourir à l'intention du législateur, et au lieu de juger les faits, on s'occupe à les définir. La chicane ne se nourrit pour l'ordinaire que de successions et contrats ; et par cette raison les lois qui roulent sur ces articles, ont besoin de plus grande clarté. Les juges ont deux pièges à craindre, ceux de la corruption et ceux de l'erreur : leur conscience doit les garantir des premiers, et les législateurs des seconds : des lois claires, qui ne donnent pas lieu à des interprétations, y sont un premier remède, et la simplicité des plaidoyers, le second. On peut restreindre les discours des avocats à la narration du fait, fortifiée de quelques preuves, et terminée par un épilogue ou courte récapitulation".

[26] See notably the role played by Zachariäe von Lingenthal.

is deeply rooted in the *Volksgeist* and has been the subject of a long process of maturation. Whereas law is born from the people's conscience, it is clarified by the jurists' work. Thus, the expression of the law is done by jurists, but the people is the real source of it.

This gave rise to a famous controversy known as *Kodifikationstreit*[27] between Savigny and Anton Friedrich Justus Thibaut (1772-1840), professor at Heidelberg:

- Anton Friedrich Justus Thibaut wished to unify German private law through codification; in line with the patriotic sentiment following the liberation war and the end of the Napoleonic domination, Thibaut came with a book entitled "*Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland*", in which he suggested to replace the intolerable diversity of German laws with a unified code; such code would elevate the Germans to the "uniformity of morals and customs" and would serve as a foundation for German political unification; this goal could not however be achieved;
- The German political situation was not mature enough at that time to become unified and Savigny was frontally opposed to such project of codification; such opposition was crystallized in his controversial work entitled "*Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*" (1814); according to Savigny, the French and Austrian codifications were intolerable since they were too egalitarian and since they conveyed an anti-historical rationalism; Savigny considered that having recourse to legislation was not the right way to achieve the unification of German law as this would amount to violence against previous legal traditions; nevertheless, Savigny's main point of opposition was not his critical observations towards the 19th century's codifications but rather his objection to the idea that "the normal source of law is the legislation"[28].

Insofar as Savigny claimed that the law was the fruit of tradition, the study of legal history, and especially Roman law, became essential for the German Historical School. The German Historical School turned exclusively to Roman law. This can surprise, all the more since the Roman law to which it referred is neither the Roman law of the Middle Ages nor the *Usus Modernus Pandectarum*, but the ancient Roman law as it was contained in the *Corpus Iuris Civilis*.

According to Savigny, the apparent antinomy between the popular origin of law and the recourse to ancient Roman law could be explained by the fact that if the origin of law is popular, it is the jurists' work that allows to clarify its content. Insofar as Roman law had to be reconciled with German law, Savigny decided to turn to Roman law exclusively. It appears that the main reason which prompted Savigny to turn to ancient Roman law was his idealisation of the Roman law of antiquity. From the German Historical School's view, ancient Roman law was considered as of exceptional purity and of eternal validity. Furthermore, the members of the German Historical School did not perceive Roman law as an instrument of social justice subject to economic, cultural and social conditions. Instead, the German Historical School viewed the *Corpus Iuris Civilis* as a source of eternal and directly applicable rules.

1.6) The Pandectist School

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27 Such controversy started in 1804. On that subject, see H. HATTENHAUER, *Thibaut und Savigny: Ihre programmatischen Schriften*, München, F. Vahlen, 1973.

28 P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 236.

The German Historical School evolved and its successors – the first of which was Georg Friedrich Puchta[29] – constituted what was later called the Pandectist School.

The Pandectists aimed to study Roman law in a systematic and dogmatic way, which led them to proceed with a legal rationalisation pushed to the extreme. Their method was entirely scientific:

- The application of the rules of logic was sufficient to address any legal problem;
- The legal concepts used were purely abstract, even dogmatic;
- Practice, economics and social considerations are extra-legal considerations and are thus irrelevant for law.

The Pandectist School rejected the popular origin of law and Puchta even declared that Roman law had become the world law, common to all nations[30].

In his *Lehrbuch der Pandekten*, Puchta divides Roman law into two parts[31]:

- A general part: this first part deals with rules of law, legal relations, persons and possession;
- A special part: this second part deals with the law of things, family law and succession law.

This division would later inspire the BGB's drafters as well as the drafters of later codifications.

At that time, German law was still not unified neither on the political level nor on the judicial level. The Pandectists could therefore claim some success in unifying German law only on a theorical level. Indeed, they managed to create a set of clear and distinct legal concepts, which greatly contributed to making the BGB a sophisticated codification in terms of legal technique.

Outside of Germany, the Pandectist School also played a key role due to the fact that it was based on Roman legislation. However and considering that the Pandectist School did not seek to provide an ethical, practical or social justification to its principles, its writing were sometimes unnecessarily complicated. Also, it appeared that the German jurists' dogmatic reflexes were maintained, even in their daily practice when expected to address social issues.

1.7) The drafting of the *Bürgerliches Gesetzbuch* ("BGB")

A. The first steps of the Codification

The first steps towards a unified codification of German private law were taken during the mid-19th century.

A first unification was carried out in respect of commercial law and negotiable instrument law, i.e. respectively with the *Wechselordnung* of 1848 and with the *Allgemeines Deutsches*

29 He was the pupil of Savigny. After being a student at Erlangen (where C.F. Glück taught), he became himself professor at Marburg, Leipzig and Berlin.

30 J. GAUDEMET, *op. cit.*, p. 349.

31 Puchta takes over a division that we could already find in Wolff and Daries. Such distinction was neither entirely foreign to Savigny. See J. GAUDEMET, *op. cit.*, pp. 347 et 349.

Handelsgesetzbuch of 1861. These two codifications entered into force in all states of the German Confederation.

At the same time, the work towards unification of civil law started. Indeed, judges as well as famous Professors drafted a code dealing with obligations: the *Dresdner Entwurf* of 1865. This project – which was written in the Pandectist style – later served as an example for the drafting of the BGB.

B. The Unification of Germany and Otto von Bismarck

In 1871, the German Reich became unified. Otto von Bismarck was the main kingpin of such unification. The first legal fields to have been subject to unification were constitutional law and civil procedure. The Second German Reich had indeed no sufficient power to draft a civil code since its legislative competence was applicable only to the law of obligations.

Following a series of legislative events[32], the German Constitution was eventually amended in 1873, so as to allow the Reich to acquire legislative competence in the field of civil law. The decision to enact a Civil Code was taken at the same time[33].

a) The First Codifying Commission (1874-1887)

As of 1874, a first commission – composed of 11 jurists, 6 judges, 3 ministerial advisors and 2 professors[34] – worked for 13 years behind closed doors, without referring to anyone. It held 873 sessions and filed its first draft in 1887.

This first draft was subject to vehement criticism, especially with respect to its excessively dogmatic form, largely influenced by the Pandectist School. In addition, the language used therein was obscure and incomprehensible to the layman. This was due the commission's desire for precision at the expense of readability and elegance of the text[35]. Lastly, the references included within the text made it particularly difficult to read.

Those critics were notably echoed by Otto von Gierke and Anton Menger:

- Otto von Gierke[36] was outraged at the oblivion into which all German legal traditions, especially social, family and moral traditions, as well as the good faith relations, had fallen; he got irritated to see those traditions replaced by an extremely individualistic attitude; as some authors did write it, "von Gierke denounced the project's doctrinarism, its Romanism, its lack of ideas and the rigidity of its style"[37].

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32 P. ARMINJON, B. NOLDE and M. WOLFF (*op. cit.*, t. II, p. 237) stated that: "Each year the two leaders of the national-liberal party, Miquel and Lakser, presented to the Reichstag proposals aimed at enlarging the competence of the Reich in this field. Each time those proposals were voted, but each time the government refused to ratify them. It was only in December 1873 that, through a law that is generally called lex Lakser, the Constitution was amended […]".

33 P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 237.

34 One can observe that such commission did not include any legal practitioner nor any lawyer. There was no rural owner, merchant, worker or manufacturer.

35 P. ARMINJON, B. NOLDE and M. WOLFF (*op. cit.*, t. II, p. 210) write in that respect that: "aiming at reaching the highest level of precision in the expressions, the commission purposedly renounced to use a language that would have been within everyone's reach. Its language was so technical that solely the jurists could understand it".

36 O. von GIERKE, *Der Entwurf eines Bürgerlichen Gesetzbuchs und das deutsche Recht*, Leipzig, Duncker & Humblot, 1889.

37 P. ARMINJON, B. NOLDE et M. WOLFF, *op. cit.*, t. II, p. 237.

- Anton Menger, in 1891, tackled the draft in a book – that went relatively unnoticed at that time – entitled "*das Bürgerliche Recht und die besitzlosen Volksklassen*"[38], in which he notably shed light on the extent to which contractual freedom was an instrument for enslaving the socially weak individuals by the socially strong individuals, and on the institutions of private property and succession law which protect the interests of the possessing class only, by perpetuating their mastery of the means of production.

b) The Second Codifying Commission (1890-1895)

In practice, those critics did not get their way. In 1890, a second commission – including this time some non-legal members – was appointed. The work of this second commission received greater publicity. Yet, it constrained its work to a limited number of linguistic corrections, i.e. only those which proved absolutely essential were realised and not even all of them. In addition, the commission attempted to mitigate – admittedly in a minimalist way – the individualistic feature of the first draft. On this point, some German authors stated that these modifications were only "a few drops of social in a sea of individualism"[39].

This second draft was filed in 1895; it was subject to some marginal amendments and was voted in 1896. To satisfy the Kaiser's personal whim[40], the *Bürgerliches Gesetzbuch* entered into force on 1st January 1900 so as to coincide with the start of a new century.

2) The *Bürgerliches Gesetzbuch* ("BGB")

Often, civil codifications depend on the historical circumstances in which they were born: in certain situations, such codifications are the result of a revolution, whilst in other situations, they are drafted during a period of relative political stability. In these latter situations, codifications are generally more conservative. This was the case of the BGB. Adopted during a period of political stability, it was endowed with a conservative character[41]:

- Power resided within the great bourgeoisie's hands;
- Economic life was dominated by liberalism according to which the public good ends up being fulfilled by itself provided that the State does not interfere within free trade;
- Whereas some measures of social policy, notably in terms of social security, appeared at that period, they could not reach the realm of civil law;
- The BGB does not reflect a political or social conception of the world; contrary to the modern codifications that preceded (i.e. Napoleon Code, *Allgemeines Bürgerliches Gesetzbuch* and *Allgemeines Landrecht*), the BGB was the result neither of the philosophy of the Enlightenment nor of natural law[42].

The BGB's drafters were not conscious, and thus did not take into account, the depth of the changes that were starting to occur within German society: the industrial economy supplanted

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38 Literally, civil law and the non-possessing classes.

39 K. ZWEIGERT and H. KÖTZ, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3e éd., Tübingen, J.C.B. Mohr Siebeck, 1996, p. 141: "Gleichwohl hat die Zweite Kommission im wesentlichen nur — bitter notwendige, aber immer noch nicht ausreichende — sprachliche Korrekturen vorgenommen und im übrigen dem eisigen Individualismus des Ersten Entwurfs einige wenige ‚Tropfen sozialen Öls' beigemischt".

40 This anecdote is challenged by P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 239.

41 P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 246.

42 A. SCHWARZ, *Das Schweizeirische Zivilgesetzbuch in der ausländischen Rechtsentwicklung*, Zürich, Schulthess & co., 1950, p. 9.

the agrarian economy, the population of the cities grew up rapidly, whilst that of the countryside started to decline, etc. The position of the BGB's drafters also explain why the typical citizen of the BGB was not the worker or the craftsman but rather the rich entrepreneur, the rich farmer or the official, i.e. the citizen that is considered to be able to make good use of contractual freedom and free competition.

2.1) The Impact of the Pandectist School

As far as language, legal technique and concepts are concerned, the BGB is obviously the fruit of the Pandectist School, with all the advantages and disadvantages that this implies (i.e. precision and abstraction). As a consequence, the BGB does not include the reasonable common sense of the *Allgemeines Bürgerliches Gesetzbuch*, neither the clear and popular style of the Swiss Code, nor the egalitarian ideas or the stylistic elegance of the Napoleon Code.

The BGB is not intended for layman but for legal professionals. Therefore, the BGB does not aim at educating the reader or at being readable by the people. All case-based provisions are absent from the BGB, which instead provides for a language exclusively based on abstract concepts[43]. Nevertheless, this language – definitely not understandable by the layman – is also incomprehensible for foreign lawyers.

Yet, this Code is a very valuable asset for German jurists: legal terms are never used in an ambiguous manner; each manifestation of a specific legal term always corresponds to the same meaning and the same content, and any polysemy is discarded. Andreas Schwarz[44] considered that the BGB was the "legal calculator *par excellence*"[45].

The following features show why no one, including German jurists, had a sentimental link to this codification. To the very best, the technical qualities of this codification would be acknowledged remotely, but almost reluctantly.

2.2) The Structure of the Bürgerliches Gesetzbuch and its "General Part'

A. The Structure of the Bürgerliches Gesetzbuch

The BGB includes 2,385 paragraphs and its structure is consistent with the treaties of the Pandects; it is thus divided into the following books:

- Book 1 – General Part (*Allgemeiner Teil*)
- Book 2 – Law of Obligations (*Schuldrecht*)
- Book 3 – Land and Property Law (*Sachenrecht*)
- Book 4 – Family Law (*Familienrecht*)
- Book 5 – Succession Law (*Erbrecht*)

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43 In this sense, see P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 241.

44 A. SCHWARZ, *op. cit.*

45 A. SCHWARZ (op. cit., pp. 7 et s.) expresses himself into the following terms: "Dieser Eindruck beruhte vorwiegend auf der Technik des BGB, auf der niemals zuvor erreichten Präzision seiner Begriffe und Formulierungen, wodurch eine geradezu mathematische Deduktion der Lösung von Rechtsfragen ermöglicht wird. Das Ideal der Rechtssicherheit, das in den Bedürfnissen der Zeit so tief begründet lag, schien hier in weit höherem Ma (verwirklicht, als durch irgend ein anderes Gesetzbuch. In der Tat ist das BGB die juristische Rechenmaschine par excellence".

Family law is separated from succession law and property law is separated from the law of obligations. Such subdivisions are foreign to the Napoleon Code. We will come back to the separation between property law and the law of obligations hereinafter when dealing with the *dingliche Einigung*[46].

B. The "General Part" of the Bürgerliches Gesetzbuch

a) Description of Book 1 – "General Part"

Book 1 entitled *Allgemeiner Teil*[47] was enacted under the influence and legacy of the Pandectists. This General Part does not include general rules or general principles of law. Nor does it provide for principles of interpretation or for considerations regarding customs and practices. It rather includes the basic legal institutions, which are fundamental to the legal practitioner in various branches of law and, therefore, in various parts of the BGB.

The objective of this first part is to avoid as much repetition as possible and to increase the rationality of the BGB. This so-called alphabet of law (i.e. list of the basic legal institutions) is the result of a long process of generalisation and abstraction deriving from the Pandectist doctrine.

b) Content of Book 1 – "General Part"

In substance, Book 1 provides for provisions dealing with (i) "natural persons", i.e. rules on legal capacity, majority, emancipation and domicile, (ii) "legal persons" and (iii) associations and foundations. It then provides for definitions regarding the field of land and property law, and, lastly, provisions on legal transactions and statute of limitations.

c) Observations on Book 1 – "General Part"

With distance, the content of Book 1 appears to be disparate and to constitute a storeroom. It is probably due to an extreme abstraction of the concepts contained in this first part that such concepts were in fact included thereunder. For instance, the rules concerning "natural persons" could have been placed under Book 4 dealing with family law, the definitions regarding property could have been found in Book 3 dealing with property law, and the definitions on legal acts could have been put under Book 2 dealing with the law of obligations.

d) The concept of *Rechtsgeschäft*[48]

- ✓ **The Concept and its Contours**

The term "legal act" is an improper translation of the German term *Rechtsgeschäft*; a better translation thereof would be *negotium*[49]. This concept is the result of an extreme abstraction of the concept of contract, encompassing not only classical contracts such as sale and lease but also *dingliche Einigung*[50], i.e. the specific agreement whose existence is required by German

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46 See below "the concept of Rechtsgeschäft".

47 Literally, "General Part".

48 BGB, §§ 104-185.

49 In Italian law, the translation retained is "Negozio giuridico" (see book from V. SCIALOJA which bears this title). See also the Portuguese and Brazilian Civil Codes which replaced the term "legal act" by "negócio jurídico".

50 Literally, "real agreement" with "real" having exactly the same meaning as in "real rights".

law in order to enforce the transfer of a right *in rem* or the granting of a right *in rem* in the thing of another.
With respect to this concept of *dingliche Einigung*, one can make the following observations:

- It corresponds to the *traditio* of ancient Roman law;

- Under Swiss law – a bilingual law influenced by German law – this concept is translated into French as "real contract"; yet, this translation brings some confusion with what is usually called "real contract/contrat réel"; we therefore suggest to translate the concept of *dingliche Einigung* into "real agreement"; the *dingliche Einigung* is indeed not a contract within the meaning of the law of obligations, but is rather part of property law;

- As to the risk of loss of the thing sold due to unforeseeable circumstances, it is borne by the seller; it is an application of the adage *casum sentit dominus*, which places the risk of loss on the seller as he remains the owner until a *dingliche Einigung* is done;

- German jurists clearly distinguish between property law and the law of obligations; by distinguishing between these two fields of law, German jurists were able to develop the *Abstraktionsprinzip*, or the principle of abstraction; according to such principle, the validity of the transfer of ownership does not depend on the validity of the contract; in practice, this means that should the sale of a movable property that had been subject to an *dingliche Einigung*, be annulled, the transfer of ownership remains valid; the two *negotium* being independent from each other.

Back to the concept of *Rechtsgeschäft*, it also covers some contractual institutions of family law such as adoption or civil marriage, as well as institutions such as will, leave, testament, unilateral termination of contracts or even the decision taken by a general assembly to increase the capital of a joint stock company.

- ✓ **The Scope of the Concept**

Insofar as the concept of *Rechtsgeschäft* covers diverse legal fields, it appears reasonable to place it under the General Part of the BGB.

Nevertheless, placing such concept under the General Part of the BGB also raises difficulties. Indeed, this General Part – which notably provides for rules concerning nullity on account of error, dol or violence, as well as for rules concerning representation, conditions, etc. – claims that these rules are applicable to all *Rechtsgeschäfte*, irrespective of the legal field concerned. Such statement is exaggerated since it was the source of numerous controversies as to the exact scope of the provisions included in the General Part of the BGB.

It seems indeed that the BGB's drafters, when enacting §§116 and *seq.*, only took into account the classical contracts deriving from the law of obligations. In fact, these provisions appear to be perfectly suited for this kind of contracts but not for other legal acts. Consequently, the provisions contained in the General Part of the BGB must be applied to these classical contracts first and to the other legal acts only when possible.

e) Concluding remarks on the General Part of the BGB

From a practical perspective, it does not change the legal solution that the rules applied to address an issue are included in the General Part or in any other part of the BGB. Concerning the conceptual abstraction of the BGB, it essentially raises difficulties to the beginner. Yet, one may still have the impression that the conceptual and systematic accuracy of the solution is far more important to the BGB's drafters than justice and the answer to be given to a concrete problem.

On the other hand, what made the fame and glory of the Pandectist doctrine – and thus of the BGB – was precisely the maturation of its general rules. The influence of the Pandectist School in that respect was significant for the Austrian, Swiss, Italian and Brazilian doctrines. The Pandectist School also left some marks in France thanks to Raymon Saleilles, who – as a true pioneer of modern comparative law – influenced French law through his works on the law of obligations[51] and on the declaration of will[52]. He certainly helped French law to break away from the structure of the Napoleon Code and to be inspired by the Pandectist doctrine.

More fundamentally, it would be impossible to list all the jurisdictions that have been influenced by the Pandectist School. Yet, one can state that very few legal systems have totally escaped such influence and that, when legal systems had already codified their civil law, the influence from the Pandectist School occurred next to these existing codifications.

3) Content and Evolution of the BGB

Given the liberal-bourgeois character of the BGB, Gustav Radbruch claimed that such Code was more a product of the end of the 19th century than a product of the beginning of a new century. Yet, one may wonder how this Code – despite its liberal-bourgeois character – managed to succeed, without fundamental modifications, through the political, economic and social crises of Germany as well as through the Nazi era, which completely perverted legal life.

To answer this question, we will first review the content of the BGB in respect of contract law, tort law and family law. We will then comment on the evolution of the BGB as well as on the German reunification.

3.1) Contract Law

In the frame of the BGB, contract law is essentially governed by the principles of freedom of contract and of equality of the contracting parties. Consequently, employer and employee, consumer and producer, lessor and lessee are being placed on an equal footing.

The BGB does not usually protect the economically weak party, except for the following provisions:

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51 R. SALEILLES, *Essai d'une théorie générale de l'obligation d'après le projet de code civil allemand*, Paris, F. Pichon, 1890 ; id., *Étude sur la théorie générale de l'obligation d'après le premier projet de code civil pour l'empire allemand*, 3e éd., Paris, L.G.D.J., 1914.

52 R. SALEILLES, *De la déclaration de volonté : contribution à l'étude de l'acte juridique dans le Code civil allemand (art. 116 à 144)*, Paris, F. Pichon, 1901.

- §138[53] which provides for the nullity of contracts that are contrary to public policy and of those in which one party took advantage of the state of necessity or the inexperience of the other party;
- §343[54] which allows the Courts to reduce the amount of penalty clauses.

On the other hand, the BGB does not include any protection for the tenant.

Yet, it soon became apparent that these means to mitigate the BGB's liberalism were not sufficient. The evolution of the German society from a bourgeois State model towards a social State model prompted lawmakers and judges to alleviate the BGB's liberal principles which granted some citizens an exorbitant power over other citizens.

From a legislative perspective, this transition towards a social State occurred outside of the BGB, which gave rise to new legal branches. Nevertheless, the BGB still underwent some modifications following the evolution of the State.

This was notably the case of §242[55], which served as the basis to offer a more ethical dimension to the contractual relationship. This provision provides that each party must perform the contract "in good faith"[56], complying with the general practices of trade. During major crises characterized by the resignation of politics and lawmakers[57], such provision allowed German case law to restore a certain degree of justice. Indeed, on the basis of this provision, case law could develop concepts such *clausula rebus sic standibus*, the misuse of right, the *Verwirkung*[58], etc. These concepts mitigated the BGB's individualism. This provision also enabled case law to review the terms and conditions which exclude or limit the liability of one of the contracting parties. When such terms and conditions appear unfair to German judges, they can declare them contrary to the concept of *Treu und Glauben* and disregard them. This is thus an area in which German law becomes casuistic.

3.2) Tort Liability

Under the BGB, civil liability is not as broadly defined as under Article 1382 of the French Civil Code. With respect to the definition of "damage", Article 1382 of the French Civil Code is not defined and is therefore not restricted by lawmakers, whilst §823 of the BGB provides that the damage that can be compensated are those which constitute an attack against life, body, health, liberty, property or against any other rights (*ein sonstiges Recht*).

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53 BGB, §138: "(1) Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig. (2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren läßt, die in einem auffälligen Mißverhältnis zu der Leistung stehen".

54 BGB, §343: "(1) Ist eine verwirkte Strafe unverhältnismäßig hoch, so kann sie auf Antrag des Schuldners durch Urteil auf den angemessenen Betrag herabgesetzt werden. Bei der Beurteilung der Angemessenheit ist jedes berechtigte Interesse des Gläubigers, nicht bloß das Vermögensinteresse, in Betracht zu ziehen. Nach der Entrichtung der Strafe ist die Herabsetzung ausgeschlossen. (2) Das gleiche gilt auch außer den Fällen der §§ 339, 342, wenn jemand eine Strafe für den Fall verspricht, daß er eine Handlung vornimmt oder unterläßt".

55 BGB, §242: "Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern".

56 Literally, *Treu un Glauben* would be translated as follows: fidelity and trust. It finds its origin in the Roman *bona fides*.

57 This covers the periods following directly the two World Wars, and more particularly the circumstances of hyper-inflation which led to the monetary reforms of 1923 and 1948.

58 This is the loss of a right due to non-use. Some authors wished to implement such institutions into Belgian law, under the name "Rechtsverwerking".

Similarly to the Civil Code, civil liability in the BGB is in principle a fault-based liability. However, this principle was mitigated by lawmakers and through case law if the damage occurs following an accident. Accordingly, with respect to accidents at work, railway accidents, road traffic accidents, aircraft accidents, or accidents related to the consumption of gas or electricity, there are specific laws which grant the victim a right to compensation irrespective of any fault being proven or not.
Next to these specific laws, the necessity to protect victims of accidents caused a significant change in the legal principles of civil liability. It was thus accepted – through an extension of the duty of prudence, which technically amounted to a deviation from §831[59] of the BGB – that in case of accident, a *prima facie* proof was sufficient to overthrow the burden of proof. Therefore, with respect to victims of accidents, civil liability became an objective liability (i.e. not based on a fault).

This evolution of the civil liability system was certainly helped by the generalisation of insurance contracts, which implied that the obligation to compensate for damage did no longer have the same ruinous impact on the culprit. These insurance contracts allowed for the distribution and dissemination of the burden to support damages.

Apart from these specific laws and these accidents, the principle of a fault-based civil liability remained unchanged for all other types of damages.

3.3) Family Law

Under the BGB, family law is still symptomatic of the 19th century, especially in respect of its conservative and patriarchal characters. Thus, on the family level, the system of wealth management and paternal power is exclusively based on the husband and father.

With respect to matrimonial property regimes, the first principle is that both spouses bring capital, which is managed by the husband to produce interests. In that sense, the BGB applies the system which is usually applied between (children of) notables.

With respect to divorce and illegitimate children, the BGB is characterized by Christian morality:

- Initially, the BGB allowed divorce only when the defendant spouse had committed a fault or had a mental illness.
- Illegitimate children were purposedly disadvantaged in order to avoid the risk of a generalisation of extramarital sexual intercourses and of a possible promotion of cohabitation (and other immoral situations); there was no legal link between the illegitimate child and his parents; the illegitimate child's status was weak insofar as he had to restrain himself to an alimony which was dependent on the social position held by the mother and such alimony ended when the child turned 16 years old.

[59] BGB, §831: "(1) Wer einen anderen zu einer Verrichtung bestellt, ist zum Ersatz des Schadens verpflichtet, den der andere in Ausführung der Verrichtung einem Dritten widerrechtlich zufügt. Die Ersatzpflicht tritt nicht ein, wenn der Geschäftsherr bei der Auswahl der bestellten Person und, sofern er Vorrichtungen oder Gerätschaften zu beschaffen oder die Ausführung der Verrichtung zu leiten hat, bei der Beschaffung oder der Leitung die im Verkehr erforderliche Sorgfalt beobachtet oder wenn der Schaden auch bei Anwendung dieser Sorgfalt entstanden sein würde. (2) Die gleiche Verantwortlichkeit trifft denjenigen, welcher für den Geschäftsherrn die Besorgung eines der im Absatz 1 Satz 2 bezeichneten Geschäfte durch Vertrag übernimmt".

This being said, family law under the BGB underwent fundamental changes. Numerous of these changes were stimulated by the *Grundgesetz*, which notably provides that men and women must have and enjoy the same rights (Article 3(2)) and that any rules of law which would breach such principle must be abolished as of 31 March 1953. However, lawmakers did let pass this key date without having attempted to comply with such constitutional requirement. This resulted in a number of shortcomings that German case law had to overcome.

Eventually and thanks to the *Grundgesetz*, laws were voted in order to comply with this constitutional requirement. This was notably the case in the following fields of law.

Firstly, a law enshrining this principle of equality of rights between men and women was voted in 1957. Whilst this law naturally implied significant changes in the field of private law, such changes had already been anticipated by case law.

Secondly, in the field of matrimonial property regimes, the default legal regime is that of separate property in which the assets are shared equally between spouses. Yet, the Law of 1957 maintained a certain preponderance in favour of the husband regarding the exercise of parental power, especially when it comes to legal representation. Such deviation from the principle of equality between men and women was declared unconstitutional by the *Bundesverfassungsgericht*[60] as this was in breach of Article 3 of the *Grundgesetz*.

Thirdly, the situation applicable to illegitimate children was definitely addressed in 1970 through a law that was also required by a constitutional provision[61].

Fourthly, in 1976, a law amended the dissolution of marriage regime in order to replace the principle of divorce for fault with the principle of *Zerrüttung* according to which any faults committed by spouses would become irrelevant for the consequences of the divorce.

Lastly, adoption and parental authority were also revised during the second half of the 1970s.

In light of the foregoing, one must observe that German family law – as almost everywhere in Europe – fundamentally evolved during the 20th century to the point that it does not resemble at all to German family law of 1900.

3.4) Observations on the Evolution of the BGB

Despite these major changes in the field of family law and notwithstanding the multiple socio-economic changes of the 20th century, the structure of the BGB did not change much.

A partial explanation to this is that the most versatile legal domains actually developed outside the BGB. The structure of the BGB could also be maintained thanks to the evolutionary interpretation elaborated by case law. In that respect, it was notably stated that "any legislative decision is the result of a choice between two conflicting interests and the judge is bound by the legislative choices. But if the judge finds out that the legislator has not made the choice (hypothesis of a lacuna), it is up to him to do so, as the legislator would have done it"[62].

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60 Judgment of 29 July 1959, BverfG, *NJW*, 1959, 1483 ss.

61 Namely, §5 of Article 6 of the Grundgesetz.

62 Philippe Heck.

Thus, similarly to the French Civil Code, the BGB could no longer be construed without taking into account its jurisprudential interpretation. The main distinction between the "French-based interpretation" and the "German-based interpretation" is that French case law focuses on the vagueness of the wording and on the shortcomings of the texts, whilst German case law focuses on the *Generalklauseln*[63] enclosed within §§138, 157[64], 242 and 826[65] of the BGB.

In the first sense, general clauses are rules of law formulated very broadly, leaving a wide discretion to the judge. These *Generalklauseln* act as "safety valves" which enable the BGB not to yield to the social changes pressure despite its rigidity and technical rigor.

More fundamentally, the Germany peculiarity lies in the fact that the judges have largely interfered in the law of the contracting parties.

A more significant amendment to the BGB was carried out at the occasion of the transposition of Directive 1999/44/EC[66]. Whereas national lawmakers had the choice to opt between different manners to transpose such Directive, German lawmakers decided to follow the maximalist solution, which resulted in a partial amendment of the law of obligations.

3.5) Observations on the Reunification of Germany

Following the fall of the Berlin Wall and the subsequent German's reunification, the two existing German legal systems had to be reconciled. At first, it was believed that such a task would take time. Yet, due to the necessity to facilitate the capital flows from the West ("F.R.A.") to the East ("R.D.A."), many laws had to be passed relatively quickly. This was notably the case of the Western German laws dealing with matters such as money, economy and labour, which entered into force in East Germany under the Treaty of 18 May 1990.

Furthermore, during the summer of 1990, even though political negotiations were still ongoing, the idea of a simple and complete extension of the Western law to East Germany made its way until being accepted. This outcome was initially unthinkable insofar as East Germany had enacted a modern Civil Code in 1976. The only – but essential – difficulty pertaining to East Germany was its inadequacy with the market economy. Germans even thought about maintaining the Eastern legislation on family and succession in the East, but this would have implied the application of conflict-of-law rules within Germany itself. The task to make the Western German laws applicable to the East was achieved on 3 October 1990.

Whereas some people – especially the former Eastern Germans – believed that such a process was quite brutal, it now seems to have constituted the most reasonable solution at that time.

4) Reception of the Pandectist Doctrine and of the BGB

63 For an analysis of *Generalklauseln*, see P. ARMINJON, B. NolDE et M. WOLFF, *op. cit.*, t. II, pp. 249-258.

64 BGB, §157: "Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern".

65 BGB, §826: "Wer in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet".

66 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

During the 19th century, both the German Historical School and the Pandectist School played an important influence outside Germany. They both gave an impetus to the theory of law in many European countries, especially in Italy, France and Austria.

At the time the BGB came into force in 1900, it attracted a keen interest from abroad insofar as it provided a legislative form to the Pandectist concepts and method. This codification attracted a lot of admiration, especially from abroad and even more from abroad than from Germany itself. Nevertheless, this codification exerted its influence only on the theory of law and on the doctrine. On the other hand, there was no genuine reception of the BGB[67].

There are two explanations to this phenomenon:

- The BGB is a complicated tool with an abstract conceptual apparatus; it was thus considered as typically German[68]; this made it difficult to import such codification into a country without the same legal culture as in Germany;
- In 1900, most of the "civilized" nations – except for Common Law countries – had already codified their civil law; there was therefore no need to import the BGB there.

This being said, the BGB – as of its entry into force – definitely played a significant influence upon remote countries, even if the political changes of the early 20th century have reduced or erased such influence.

67 This movement cannot, in any case, be compared with the reception movement of the French Civil Code.

68 In this sense, see what is written by the jurist, historian and philosopher J.J. BACHOFEN (*Selbstbiographie und Anstrittsrede über das Naturrecht*, Halle/Saale, M. Niemeyer, 1927) regarding Swiss law: "*Die Jurisprudenz der Logik und der mathematischen Deduktion auf dem Grunde römisch-rechtlicher Sätze ist unserem Volke fremd und seiner ganzen Geistesanlage zuwider*".

Chapter 6 - Dutch Law

1) The Law of the Netherlands before the Codification

The fame of Dutch law of the 17th century owes much to the person of Huigh de Groot (Hugo Grotius, 1583-1645). The man was precocious since he got enrolled to the University of Leiden at the age of eleven. The University also enjoyed an important reputation at the time. Of the 35,000 students enrolled at the University of Leiden during the 17th century, there were 15,000 foreigners, about half of whom were of German origin[69]. There were also many Scottish students, whose presence in Leiden explained the strong Dutch influence on Scottish legal thinking[70] . Teachers came from all over Europe to teach.

However, there was much more than the lone Grotius and the University of Leiden in the Netherlands of those times. To name a few of the great Dutch jurists of the Romano-Dutch school, there is Gerard Noodt (1647-1725) who studied in Nijmegen, in Utrecht and finally in Leiden, where he became Rector of the University. There is also Johannes Voet (1647-1713), born in Utrecht where he became professor and Rector of the University, before moving to Leiden in 1680, where he also became professor and Rector. Another great jurist of this school is Anton Schulting (1659-1734) who became professor in Franeker and then in Leiden, where he too became Rector. Lastly, there is Cornelius van Bijnkershoek (1673-1743), who can be considered as one of the greatest jurists of his time. He studied at the University of Franeker and then became judge and president of the "*Hoge Raad van Holland, Zeeland en WestFriesland*", often translated into English by "*High Court of Holland and Zeeland*", the Supreme Court of the time.

The law taught, applied and disseminated by the Dutch Universities was the Romano-Dutch law. This concept of "Romano-Dutch" law does not refer to a single law uniformly applied throughout the Netherlands of the Modern Age. It varied from one province to another. In fact, the Romano-Dutch law had its rules adapted locally, creating by the end of the 18th century, a mosaic of local laws, which was made up of a mixture of local regulations and Roman law. The Romano-Dutch law ceased to apply in the Netherlands when the codes came into force, but it is still being applied in South Africa today, as well as in some other former colonies of the Netherlands.

While the Netherlands had gained their independence through the Peace of Münster (1648), the need for codification was not felt until the end of the 18th century. The Dutch Republic, also called the United-Provinces, was lacking a centralised power able to manage a national and general codification[71]. Thus, the unification of the laws of the different provinces did not appear to have been a priority[72].

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69 J.Ph. DE MONTÉ VER LOREN, Hoofdlijnen uit de ontwikkeling der rechterlijke organisatie in de Noordelijke Nederlanden tot de Bataafse ontwenteling, 7th ed. reviewed by par J.E. SPRUIT, Deventer, Kluwer, 2000, p. 288.

70 J.W. CAIRNS, Importing our lawyers from Holland. Netherlands influences on Scots Law and Lawyers in the 18th century, coll. Scotland and the Low Countries 1124-1994, n° 152, East Linton, G.G. Simpson, 1996, pp. 136-154.

71 There were however some local attempts, such as Frederik Adolph van der Marck who advocated in 1762 for a codification limited to the province of Groningen. When he later considered a national codification, he underlined the importance of preserving local disparities.

72 W. WEDEKIND and D. DANKERS-HAGENAARS, "Pays-Bas", *in La circulation du modèle juridique français*, coll. Travaux de l'Association Henri Capitant, n° 44, Paris, Litec, 1994, pp. 420 and subs.

2) From the Reception of French Law to the *Nieuw Burgerlijk Wetboek*

2.1) French Revolution and Napoleon Code

The example of the French Revolution inspired the Dutch people. Six years after this Revolution, the Batavian Revolution (1795) broke out in the Netherlands. The need for unification of the country was then felt. The unification of law was a corollary decided by the Constitution (art. 28). In 1798, a commission composed of twelve members – and chaired by Hendrik Constantijn Cras (1739-1820) – submitted preliminary drafts based on Romano-Dutch law, specifically the works of Grotius, the *Corpus Iuris Civilis* and the Prussian ALR of 1794. However, the Cras project received a negative opinion of the National Court of Justice. The latter criticised its highly theoretical nature and put an end to the project.

Therefore, the legal situation in the Netherlands differed from the one of France. The situation was also different from a geographical point of view: whereas France's revolutionary war against a coalition of European kingdoms raged, the Batavians tried – as far as possible – to maintain their neutrality. This attitude led them to fall under the French domination.

In 1806, the French Emperor Napoleon imposed his younger brother Louis Bonaparte as the King of the Netherlands[73]. For the legislation of his kingdom, the new King wished to adapt the French Civil Code to the circumstances of the Netherlands, rather than simply translating it. It seems that the Dutch people – who called him "Lodewijk" – quite liked their French King, who paid attention to preserve the Dutch particularities.

The codification work was undertaken by lawyer Johannes van der Linden, who prepared in an extremely short time a project in four books. In the meantime however, Napoleon ordered a more direct translation of its Code, letting no choice to Louis Bonaparte. Yet, the newly appointed commission based its works on the ones of van der Linden, and to a lesser extent, on the provisions of the Napoleon Code. Finally, solely the structure of the Code amounted to a direct reproduction of the French Civil Code. Accordingly, this code marginally adapted to the Kingdom of Holland – and known as *Wetboek Napoleon ingerigt voor het Koninkrijk Holland* – was more in line with the traditional Dutch law than what it seemed[74], especially in the field of family law. The Code entered into force on 1 May 1809.

In 1810, Louis Bonaparte abdicated. Napoleon had the territory annexed[75] as a "simple alluvion of the French rivers". Napoleon considered that his brother Lodewijk was too close to the Dutch people. It thus seems that he forced him to abdicate. From that moment on, the Code van der Linden was set aside in favour of the Code Napoleon itself.

On 21 November 1813, the Netherlands were released from the French yoke. To the extent that the Napoleon Code was very poorly accepted, the desire to return to a properly Dutch codification resurfaced. The French Code was declared to remain in force only as long as it was necessary to draft a Dutch Code. A commission, chaired by Joan Melchior Kemper, was responsible for drafting the new Civil Code project.

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73 W. WEDEKIND et D. DANKERS-HAGENAARS, *op. cit.*, p. 421; P.J. DU PLESSIS, *A history of remissio mercedis and related legal institutions*, Rotterdam, Kluwer, 2003, p. 207.

74 F. CERRUTTI, « Het ontwerp van Burgerlijk Wetboek van Joannes van der Linden (1807) », *in Opstellen over recht en geschiedenis. Aangeboden aan prof. Mr. B.H.D. Hermesdorf*, Kluwer, 1965, pp. 39-72.

75 The annexation took place in two stages: 8 November 1810 for the south of the major rivers; 6 January 1811 for the north (W. WEDEKIND and D. DANKERS-HAGENAARS, *op. cit.*, p. 424).

The Kemper project was completed in 1816 but the Battle of Waterloo and the Congress of Vienna (1815) prevented its adoption. Belgium was incorporated into the Netherlands. Kemper obviously worked without the involvement of Belgian lawyers. Consequently, on 16 March 1816, a commission of three Belgian jurists was set up to review the draft[76]. This commission was composed of Clemens Philippus Lammens (1754-1825), Jean Bernard de Guchteneere (1758-1834) and PierreThomas Nicolaï (1763-1836). The Belgians delivered a highly critical report on the draft, to which Kemper responded in a memorandum. The King supported Kemper and the draft was eventually sent to the Council of State. The draft was thus studied within the Council of State and a committee accompanied by Kemper made some adjustments[77]. Finally, the new version of the draft was submitted to the Parliament on 22 November 1820.

The Parliament – half of which was composed of Belgians since the unification of 1815 – rejected the draft. Whilst the fact that half of the Parliament was made up of Belgians did indeed play a role, it is important to note that many Dutch parliamentary deputies, who were largely practitioners, were also opposed to the draft. They deemed the draft to be too theoretical[78].

A new commission – which was, this time, composed of a majority of Belgians – was appointed. The kingpin of the new project was Pierre Thomas Nicolaï. Born in a noble family of the old Duchy of Limburg, he became judge in Liège under the French domination, then member of the Parliament in the Dutch period, before becoming again judge in Liège after the Belgian independence. Given that he was mainly French-speaking and that he probably studied in France, the project itself was written in French.

The Belgian Revolution of 1830 – which led to the independence of the latter – had the effect of putting an end to the joint project. Yet, the Netherlands pursued the codification process, which resulted in the adoption of the *Burgerlijk Wetboek*. The latter was enacted in 1838 and entered into force on 1 October 1838[79].

The Code was largely based on Nicolaï's work. This way, it can be said that the Belgian Code was applied only in the Netherlands and not in Belgium. It had four books: I. Persons; II. Things; III. Obligations; IV. Evidence and prescription. Thus, unlike the French Civil Code, matrimonial regimes (including the marriage contract) fell under the first book, the second book included successions and wills, and the evidence and prescription were the subject of a special book (rather than appearing at the end of the provisions on successions and obligations) The comparatist can therefore conclude that this Code of 1838 is far more logically structured than the Napoleon Code.

The Code of 1838 constitutes a "bizarrerie of history". Although Holland had developed – during the 17th and 18th centuries – a remarkable legal culture independent from the French legal culture, the Dutch drafters did not draw much inspiration from Romano-Dutch law, which consisted of a mixture of old Dutch customs and Roman law. Yet, the Romano-Dutch law had been much more than an anecdote since it continued to be applied in the Dutch colonies, particularly in South Africa. However, it must be conceded that, since that time, South African law has also undergone a strong Anglo-Saxon influence.

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76 J. GILISSEN, "De Belgische commissie van 1816 tot herziening van het ontwerp – Burgerlijk Wetboek voor het koninkrijk der Nederlanden", *in*: *Tijdschrift voor Rechtsgeschiedenis/Revue d'Histoire du droit*, Nijhof, Brill, n°35, 1967, pp. 392-406.

77 F. STEVENS, "Guillaume, codificateur du royaume des Pays-Bas et la "renationalisation" du droit (1815- 1831)", *in Légiférer, gouverner et juger : mélanges d'histoire du droit et institutions offerts à J.-M. Cauchies*, Bruxelles, Presses Université Saint-Louis, 2016, pp. 471-487.

78 A. WIJFFELS, "La conception d'un code civil dans les travaux de codification belgo-néerlandais, 1798-1838", *in Passé et présent du droit. VI. Compilations et codifications juridiques, vol. 3: Les codifications contemporaines*, Editions Le Manuscrit, 2009, pp. 15-62.

79 P. ARMINJON, B. NOLDE and M. WOLFF, *Traité de droit comparé*, t. I, Paris, L.G.D.J., 1950, p. 140.

2.2) Commercial Law

In Johannes van der Linden's project (1807), commercial and civil law were combined into a single code. However, the French Commercial Code entered into force in the Kingdom of the Netherlands as early as 1810, at the same time as the Civil Code.

In 1838, the French Commercial Code was replaced by a Dutch Commercial Code. Although, apparently, the differences between the French Code and the Dutch one were not considerable, there had been some important developments from then on. Accordingly, the commercial courts were abolished (Book IV of the Code disappears) and the Civil Code was declared applicable also to matters governed by the Commercial Code, insofar as the latter did not deviate from the provisions of the Civil Code[80].

Several laws subsequently amended the Commercial Code. For instance, the Law of 30 September 1893 deleted Book III of the Commercial Code dealing with bankruptcy and replaced it with a law on bankruptcy and suspension of payment, applicable to both traders and non-traders[81]. The distinction between traders and non-traders itself was almost abolished – apart from some special laws – in 1934[82] .

2.3) The Common Achievement of Meijers and Snijders

The Dutch did not appreciate the Belgian Code and strongly wished to replace it. Yet, any reform of a Civil Code often requires particularly favourable circumstances and a providential man. In that respect, the Dutch Civil Code of 1992 can be attributed to two providential men: Meijers and Snijders.

Professor E.M. Meijers of the University of Leiden already enjoyed a great scientific reputation in the early 20th century. He received many honorary degrees from other universities (Aberdeen, Brussels, Glasgow, Leuven, Lille and Paris) and was dean of the Law Faculty, then Rector of the University of Leiden respectively in 1926 and 1927. At the 100th anniversary of the 1838 Civil Code, he expressed a strong criticism against the old Belgian Code. Moreover, he stated that Dutch law in general needed some reorganisation.

With the outset of World War II, the situation changed dramatically. The German, Nazi, occupier obliged the Dutch universities to remove all their Jewish professors from duty. The University of Leiden had plenty of professors with Jewish origins, and like in Germany, they had to leave the academic scene. In Leiden, this did not go without resistance. It was another professor of the Law Faculty – Rudolph Cleveringa – who held a remarkable speech at the University on 26 November 1940. As a former PhD student of Meiers, he emphasised the scientific merits of his master, leaving aside any political – let alone racist – argument. Cleveringa was arrested and imprisoned for this act of resistance until the summer 1941. Meiers was deported to the concentration camps, which he survived.

Upon his return, Meijers enjoyed an even greater aura and was officially commissioned to work on the drafting of a new Civil Code in 1947. Meijers worked alone. The first four books of the new Code are mostly from his pen, but he died in 1954. From then on, the works stagnated until

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80 W. WEDEKIND and D. DANKERS-HAGENAARS, *op. cit.*, pp. 426 and subs.

81 P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. I, p. 140.

82 W. WEDEKIND and D. DANKERS-HAGENAARS, *op. cit.*, p. 427.

the arrival of Snijders. It was a commission that succeeded Meijers. The commission continued the work with the help of a full-time team.

The commission's work ended, in 1970, with the entry into force of the first book which deals with personal and family law. The second book, dealing with legal personality – including legal persons – followed shortly afterwards. The eighth book dealing with transport law came into force in 1991. The entry into force of the third, fifth and sixth books – dealing respectively with property law in general, real property law and the law of obligations in general – and a part of the seventh book on special contracts, followed in 1992. The fourth book, dealing with inheritance law, entered into force on 1 January 2003. The *Nieuw Burgerlijk Wetboek* ("NBW"), the remainder of the seventh book, book nine – on artistic property – and book ten – on private international law, are still missing.

3) The *Nieuw Burgerlijk Wetboek* ("NBW")

One of the NBW's peculiarities is the fact that it enshrines the removal of the distinction between civil law and commercial law, like the Swiss and Italian Codes[83]. For instance, the bankruptcy (*faillissement*) regime applies to both traders and non-traders.

The influences to which the *New Burgerlijk Wetboek* was subject are multiple and diverse. This can notably be explained by the fact that, unlike the 1838 Civil Code, not only the French Civil Code existed but also other codifications. Meijers and his successors had indeed the opportunity to make a choice among various options. There are influences from the French, German, Swiss and Italian Codes. In addition, the comparatist will observe some influences from the Common Law system and the Vienna Convention on the International Sale of Goods.

The *Nieuw Burgerlijk Wetboek* also includes 'general clauses', i.e. provisions that soften the rigidity resulting from the details of the law. This is for example the case of Article 6.2 which allows the judge to "set aside the application of the law, where the application of the legal norm would lead to an unfair or unreasonable results"[84]. This way, the NBW points out that the judge's intervention is not neutral. The NWB has thus the enormous advantage to express this judge's prerogative openly. The approach of the Dutch Code is therefore less hypocritical than the approach of the French Civil Code of 1804.

4) Conclusion

With respect to the development of the law in the Netherlands, one must note that, at first, the Low Countries were a patchwork of local mixtures between customs and Roman law. Then, these territories were subject to French Law and, by the same token, the French Codes. After the fall of the French Empire, the Belgian Nicolaï managed to draft a new code under the United Kingdom of the Netherlands. Whilst this Code – essentially based on French law and marginally adapted to the local laws of the Low Countries – entered into force in the Netherlands, Belgium kept the French Civil Code.

With respect to the drafting methods, one must observe, throughout history, that it is generally difficult to write and enact a new codification, except in case of dictatorships (see, for instance,

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83 P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. I, p. 143.

84 Article 6.2 of the Dutch Civil Code: "*Schuldeiser en schuldenaar zijn verplicht zich jegens elkaar te gedragen overeenkomstig de eisen van redelijkheid en billijkheid. **Een tussen hen krachtens wet, gewoonte of rechtshandeling geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn***".

the Napoleon Code) or when the Parliament's role is neglected (see, for instance, *the Prussian Allgemeines Landrecht*). This latter scenario could have occurred with Kemper. Yet, William of Orange complied with the constitutional rules and submitted the draft to the Parliament. Whilst this procedure led to the rejection of the draft, it also shown that a third manner to achieve codification was possible, i.e. a blend of efficiency and democracy by involving the Parliament through the method of *vraagpunten*.

With respect to the codification process, the NWB is a good illustration of the result that can derive from two conflicting visions. On the one side, there was the possibility to enact a learned code, which would provide a written answer to all possible cases. The judge would therefore have no leeway and would merely read the code and apply the provision concerned. Such a code also meant to be understood by everyone. In practice however, the Dutch draft was very complex and hard to be understood. On the other side, it was observed that, albeit practical codes were intellectually less ambitious, they had the advantage of being easy to use. They thus entrusted the judges with the task of filling the gaps, even if this would imply an increase in the judge's powers. Such codes do not claim to teach law (solely universities are doing so). Instead, they aim at allowing practitioners to rely on these codes for their work.

At the end, it is the pragmatical/practical view that won. Practitioners did want a code that would be a practical instrument with simple rules that could be applied and adapted to the cases at stake. Examples of this type of code are the French Civil Code, the *Wetboek Napoleon ingerigt voor het Koningrijk Holland* inspired by the works of van der Linden, and the *Burgerlijk Wetboek van 1838* written by Nicolaï. On the other hand, the Cras and Kemper's projects, which were never legally binding, are not practical instruments.

Chapter 7 - Austrian Law

1) History of the *Allgemeines Bürgerliches Gesetzbuch*

The *Allgemeines Bürgerliches Gesetzbuch* ("ABGB") is the third great codification of the Enlightenment period. In the same way as for the two other codes (i.e. the Prussian Code and the Civil Code of the French), the ABGB was conceived on the idea that a comprehensive, systematic and rational legislation based on state authority should replace traditional, casuistic and empirical law.

Within these three codifications, the ABGB had its own place. The preparatory works for this codification date from the period during which the Emperess Marie-Thérèse began the work of modernising the State and the administration. One of the main issues raised was the diversity of laws that were in force in the different regions of the Empire.

In that respect, it is interesting to underline the instructions that Marie-Thérèse gave to the Commission: "[…] When drafting the Codex, the Commission should limit itself solely to private law, retaining as much as possible the laws already in use, harmonising the various provincial laws insofar as the circumstances allow it, while relying on the common law (i.e. the *ius commune*) and the best interpreters of it, as well as on the laws of other States, and it should always refer to the general law of reason for rectification and supplementation" [85].

The Empress' instructions were clear:

- Solely private law must be codified;
- Any elements that could have a political connotation should be omitted;
- Three sources of law must be relied upon: the various provincial laws, Roman law – in the form of the *usus modernus pandectarum* – and the law of reason, i.e. the School of Natural Law and the philosophy of the Enlightenment.

In 1766, the Commission submitted a draft that would later be called the *Codex Theresianus*. The Austrian Council of State discussed it at length but criticism prevailed. The project was considered too long, too academic and too "Roman". The Empress followed the opinion of the Council of State and set up a new Commission in 1772. She asked the new Commission not to include definitions and to make the project shorter and clearer. The *Codex Theresianus* of 1766 never entered into force[86].

It seems that Frederick II made the same kind of criticisms against the *Allgemeines Landrecht* but these criticisms were less successful than towards the Austrian Commission. Family law was first reduced from one thousand five hundred articles to about three hundred articles. This subject was eventually included in the Code of the Emperor Joseph II, which only dealt with the law of persons. This Code entered into force in 1787.

The other subjects of the *Codex Theresianus* were amended only during the reign of Leopold II. In 1790, he appointed a commission chaired by Karl Anton von Martini, professor of natural law at the University of Vienna. In 1796, von Martini submitted a project of a General Civil

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85 Free translation of: "*... daß die Commission bey Abfassung des Codex sich einzig auf das Privat-recht beschränken, soviel wie möglich das bereits übliche Recht beybehalten, die verschiedenen Provinzial-Rechte, in so fern es die Verhältnisse gestatteten, in Übereinstimmung bringen, dabey das gemeine Recht und die besten Ausleger desselben, so wie auch die Gesetze anderer Staaten benützen, und zur Berichtigung und Ergänzung stets auf das allgemeine Recht der Vernunft zurück sehen soll*".

86 See P. ARMINJON, B. NOLDE and M. WOLFF, *Traité de droit comparé*, t. II, Paris, L.G.D.J., 1950, p. 197.

Code, which was totally independent from the *Codex Theresianus* and Roman law since it primarily relied on the postulates of reason. This Code first became the Code of Western Galicia[87], then the Code of Eastern Galicia before being further amended by Franz von Zeiller, successor of Karl Anton van Martini at the Chair of Natural Law in Vienna. This way, Karl Anton von Martini and Franz von Zeiller can be considered as the two authors of the ABGB.

Yet, Franz von Zeiller was also influenced by Immanuel Kant, in particular by his criticism of pure reason. von Zeiller was able to reconcile pure reason with the contingencies of social reality. To achieve this objective, he removed all purely theoretical and provisions which were far from social reality. The consequence is that the ABGB seems to be – like the Civil Code of the French – a compromise between the zeitgeist (i.e. the philosophy of the Enlightenment) and the historical tradition. This second Commission completed its work in 1808.

2) The Application of the *Allgemeines Bürgerliches Gesetzbuch*

The ABGB was sanctioned in 1811 and entered into force in all states of Austria (but not Hungary) on 1st January 1812[88]. Its equality and freedom are in clear contradiction with the Austrian social reality of the early 18th century. For instance, paragraph 16[89] of the ABGB recognizes legal personality to every individual, whilst serfdom was still in place on the ground. Furthermore, §7[90] of the ABGB allows the judge to fill the gaps of the Code but in reality, the Imperial Court solved, by decree, all events that were not foreseen in the Code, considering that it constituted for judges an obligation similar to the one born by Prussian judges through the ALR or by French judges pertaining to the period immediately following the French Revolution[91].

This being said, a change took place during the Revolutionary year of 1848. From a legal point of view, only the feudal system disappeared. Yet, new ideas such as freedom of the press, freedom of association and citizen participation into politics started to enter different social classes. Despite the fact that the Restoration of the Old Regime occurred later, these ideas remained in motion.

In 1867, there was a constitutional reform. Gradually, the spirit of the ABGB evolved and the latter's correspondence to social reality emerged. At that time, a phenomenon comparable to the one that occurred in France and Prussia occurred in Austria regarding case law and doctrine: whereas case law and doctrine were purely exegetical at first, they then departed from the text of the Code. Again, 1848 was a pivotal year since contacts could be renewed between Austrian and German jurists. These contacts led to a rapprochement with the Historical School first and, later, with the Pandectist School. This German influence marked the end of the exegetic

87 Galicia currently straddles between Poland and Ukraine.

88 P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 198.

89 ABGB, § 16: "*Jeder Mensch hat angeborene, schon durch die Vernunft einleuchtende Rechte, und ist daher als eine Person zu betrachten. Sklaverei oder Leibeigenschaft, und die Ausübung einer darauf sich beziehenden Macht wird in diesen Ländern nicht gestattet*".

90 ABGB, § 7: "*Läßt sich ein Rechtsfall weder aus den Worten, noch aus dem natürlichen Sinne eines Gesetzes entscheiden, so muß auf ähnliche, in den Gesetzen bestimmt entschiedene Fälle, und auf die Gründe anderer damit verwandten Gesetze Rücksicht genommen werden. Bleibt der Rechtsfall noch zweifelhaft; so muß solcher mit Hinsicht auf die sorgfältig gesammelten und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen entschieden warden*".

91 K. ZWEIGERT and H. KÖTZ, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3rd ed., Tübingen, J.C.B. Mohr Siebeck, 1996, p. 159.

interpretation. Josef Unger was the Austrian lawyer who dominated this period as well as the rapprochement with Germany and the non-exegetic systematisation of Austrian law. For Josef Unger, the lawyer who ignores the *Pandectas* is like a navigator without compass[92].

Josef Unger was also opposed to the principles of natural law. Though, this did not prevent that a limited number of provisions of the ABGB refer to such principles. For instance, §7[93] presents natural law as the guiding principle for the judge's interpretation. Yet, Josef Unger considered that this provision was nothing more than "the satisfaction of a purely theoretical need of the legislator". In the same vein, §§16[94] and 17 present humans as individuals with natural rights by the sole reason of their birth. This unique ground thus itself justifies the conferral of legal personality on it. In this regard, Josef Unger states that they are "poor paragraphs, without practical meaning".

In any case, due to Josef Unger's intervention, Austrian doctrine has been strongly influenced by German doctrine. His works[95] had on the ABGB effects similar to those of Zachariäe von Lingenthal's work on French law. For instance, since the contribution of Josef Unger, Austrian jurists have made use of an *Allgemeiner Teil* in the manner of the German Pandectists, notwithstanding the absence of a "general part" in the body of the ABGB itself[96].

3) The Content of the *Allgemeines Bürgerliches Gesetzbuch*

In terms of drafting and legal technicity, the ABGB is a clearer, more modern and accessible codification than the ALR, which was – even for a lawyer – very complex.

With respect to the Napoleon Code, the ABGB shares several similarities. von Zeiller was inspired by such a Code in many respects:

- Both Codes adopted the three-part plan inspired by the Institutes of Gaius[97], even if these plans are not identical;
- Both Codes aim at adopting a simple and easy-to-access language, even for non-lawyers, which was however not achieved;
- Both Codes are the result of a compromise between tradition and new ideas;
- von Zeiller and Portalis shared the same view regarding the role of judges in interpreting and applying the law.

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92 J. UNGER, *System des Österreichischen allgemeinen Privatrechts*, t. I, 4th ed., Leipzig, 1876, p. 641.

93 We find a translation of this principle in P. ARMINJON, B. NOLDE and M. WOLFF (*op. cit.*, t. II, p. 207): if neither the text nor the meaning of the law nor analogy provides for a solution to a case, it must be sought in the natural principles of law after careful consideration of the circumstances of the case.

94 ABGB, § 16: "*Jeder Mensch hat angeborene, schon durch die Vernunft einleuchtende Rechte, und ist daher als eine Person zu betrachten. Sklaverei oder Leibeigenschaft, und die Ausübung einer darauf sich beziehenden Macht wird in diesen Ländern nicht gestattet*". ABGB, § 17: "*Was den angebornen natürlichen Rechten angemessen ist, dieses wird so lange als bestehend angenommen, als die gesetzmäßige Beschränkung dieser Rechte nicht bewiesen wird*".

95 See J. UNGER, *System des österreichischen allgemeinen Privatrechts*, 4th ed., Leipzig, 1876 (5th ed.,1892).

96 See, next to the book of J. UNGER: H. KOZIOL and R. WELSER, *Grundriß des bürgerlichen Rechts*, Band I, *Allgemeiner Teil und Schuldrecht*, 4th ed., Wien, Manz, 1976.

97 The Austrian Code includes a short introduction, followed by three sections dealing respectively with family law, property law and provisions common to family and property law.

A consequence of the simplicity of the language used in the ABGB is that it contains several provisions that are of a pure pedagogical nature, which make them superfluous from a legal perspective.
For instance, §137[98] provides that the birth of a child gives rise to rights and obligations between his/her parents and him/herself. Such provision provides for an obvious fact, which questions its actual relevance. Other provisions of the ABGB provide for mere definitions with no legal content but only with a pedagogical view. For instance, §44[99] on consent to marriages states that, with such a consent, two persons of the opposite sex [express] their consent to live in an unbreakable union, to have children, to raise them and to help each other. Similar "pedagogical" provisions can also be found in the Napoleon Code (e.g., Articles 212-226). In addition to containing superfluous details, the ABGB has another flaw. Its casuistic (e.g., §§487 to 503[100] and 556[101] to 683) does not reach the level of the ALR. Furthermore, the drafting of the ABGB is not as rigorous as the BGB. A comparison between §45[102] of the ABGB – dealing with engagement – and its Pandectist counterpart, i.e. §1297[103] of the BGB, shows that whilst the ABGB mentions an "unfulfilled promise", the BGB refers to "action in court" and "nullity of the penalty clause".

Despite the various similarities between the ABGB and the Napoleon Code, there are also differences. For instance, the marriage under the ABGB is not secularised, which means that a religious marriage has civil effects. In that respect, it is interesting to note that the provisions on the conclusion of marriages and divorces were withdrawn from the ABGB in 1938 just after the *Anschluss*. They were then replaced with the German Law on marriage (§§101-136). Since then, the Austrian marriage has become secular, implying that the religious marriage does not have the same effects as the civil marriage anymore[104].

Moreover, Austrian law – like Roman law and German law – provides that the acquisition of property is not the effect of obligations but supposes an act capable of transferring ownership, which is distinct from the contract. In other terms, a simple title (e.g., sale) does not suffice to provide ownership; a *traditio* and a legitimate possession or registration in the land register are required:

- §1053 of the ABGB: *Durch den Kaufvertrag wird eine Sache um eine bestimmte Summe Geldes einem andern überlassen. Er gehört, wie der Tausch, zu den Titeln, ein Eigentum zu erwerben. Die Erwerbung erfolgt erst durch die Übergabe des Kaufgegenstandes. Bis zur Übergabe behält der Verkäufer das Eigentumsrecht*.
- Free translation: through the sales contract, one thing is handed over to another for a certain sum of money; it belongs to the titles to acquire a property; the transfer of

98 ABGB, § 137: "*Wenn aus einer Ehe Kinder geboren werden, so entsteht ein neues Rechtsverhältnis; es werden dadurch Rechte und Verbindlichkeiten zwischen den Ehelichen Eltern und Kindern gegründet*".

99 ABGB, § 44: "*Die Familienverhältnisse werden durch den Ehevertrag gegründet. In dem Ehevetrage erklären zwei Personen verschiedenen Geschlechtes gesetzmäßig ihren Willen, in unzertrennlicher Gemeinschaft zu leben, Kinder zu zeugen, sie zu erziehen, und sich gegenseitig Beistand zu leisten*".

100 These provisions deal with easements.

101 These provisions deal with inheritance law.

102 ABGB, § 45: "*Ein Eheverlöbnis oder ein vorläufiges Versprechen, sich zu ehelichen, unter was für Umständen oder Bedingungen es gegeben oder erhalt: en worden, zieht keine rechtliche Verbindlichkeit nach sich, weder zur Schließung der Ehe selbst, noch zur Leistung desjenigen, was auf den Fall des Rücktrittes bedungen worden ist*".

103 BGB, § 1297: "*(1) Aus einem Verlöbnis kann nicht auf Eingehung der Ehe geklagt werden. (2) Das Versprechen einer Strafe für den Fall, daß die Eingehung der Ehe unterbleibt, ist nichtig*".

104 J. MICHAEL RAINER, *Europäisches Privatrecht. Die Rechtsvergleichung*, Frankfurt am Main, 2007, p.186.

ownership takes place only through the delivery of the object of the purchase; until the delivery, the seller keeps the right to ownership.

The comparison between the ABGB and the BGB shows an important difference between the two codifications. Whilst the ABGB[105] (§§ 285, 292, 311) regards intangible property to be a thing in the legal sense, the BGB (§90) provides that solely tangible objects can be things. Whereas the ABGB (as well as the Institutes of Gaius and the Napoleon Code) places the Book on obligations after the Book on Family Law, the BGB does the opposite, which makes it a more materialistic Code.

Another difference between the ABGB and the BGB is that the former does not provide for a General Part. There is therefore no *Rechtsgeschäft* under Austrian law. Neither is there a separation between a General Part and Things. As a consequence, Austrian law (§1053) did not adopt the *Abstraktionsprinzip*, i.e. the principle of abstraction between the contract and the transfer of ownership.

In terms of length and form, the ABGB is much shorter than the French Civil Code; it only contains 1502 provisions and it is drafted in a concise and easily understandable way[106]. One of the drafters' objectives was indeed to achieve a certain conciseness. An adverse effect was that Austrian case law encountered many lacunas that caused serious problems. Such lacunas – combined with other shortcomings – led the Austrian Government to accept, in 1904, the idea of Josef Unger that the ABGB be amended[107]. In 1914-1916, the work of a new commission resulted in the adoption – through ordinances – of three *Teilnovellen*[108]. Whereas the first two *Novellen* were quite insignificant[109], the third one significantly altered the original text of the ABGB. Indeed, it rewrites, supplements or deletes one hundred and eighty provisions of the Code. These amendments were drafted in accordance with the provisions of the BGB and affected all fields of the ABGB, but in particular the law of obligations and contracts[110].

From that moment, the German Pandectist School actually settled in Austria. Accordingly, the General Part of the Pandectist is taught and applied in Austrian courts as if it had been included in the ABGB itself. Austrian civil law manuals are structured in the same way as German textbooks, etc. More fundamentally, the theory of *Rechtsgeschäft* is adopted in Austria.

After World War II, Austrian jurists turned to *Interessenjurisprudenz* as did German jurists. Yet, the founder of this theory was Walter Wilburg, whose pupils (Helmut Koziol and The Mayer-Maly) deepened and developed such a theory.

4) Reception of the *Allgemeines Bürgerliches Gesetzbuch* outside Austria

105 ABGB, §285: "*Alles, was von der Person unterschieden ist, und zum Gebrauche der Menschen dient, wird im rechtlichen Sinne eine Sache genannt*"; §292: "*Körperliche Sachen sind diejenigen, welche in die Sinne fallen; sonst heißen sie unkörperliche; z. B. das Recht zu jagen, zu fischen und alle andere Rechte*"; §311: "*Alle körperliche und unkörperliche Sachen, welche ein Gegenstand des rechtlichen Verkehres sind, können in Besitz genommen warden*".

106 P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 198.

107 *Ibid.*, p. 209.

108 P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 209.

109 "The first novelle of 12 October 1914 amended the Code on a number of detailed points relating to the law of persons, the family and succession *ab intestat*" (P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 209). "The second novelle of 22 July 1915 concerned the demarcation and rectification of land boundaries: this second reform had become essential, especially in Galicia and Bucovina, where the boundaries of many plots of land were no longer recognizable" (*ibid.*, p. 210).

110 See P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 210.

The reception of the ABGB cannot be compared to the one of the Napoleon Code. The reason for this is not to be found in the lack of Austrian possessions after 1811 but rather in the conservative nature of this codification. It constituted indeed a Code belonging to a restorative Monarchy of the Ancient Regime. This was further supported by the fact that Austria did not appear as a strong and united nation.

Though, these elements did not prevent the ABGB to have some influence during the 19th century on the non-German speaking regions of the Austro-Hungarian Empire. Whilst the ABGB was in force in Hungary for a very limited number of years, it was received in Croatia, Slavonia and Bosnia-Herzegovina; a slightly abbreviated form was adopted in Serbia and Montenegro. The ABGB was also in force in Lombardy and Veneto until the Risorgimento movement. Even after the implosion of the Austro-Hungarian Empire (1918), the Austrian General Code remained in force in the former Austrian Polish, Yugoslav and Czechoslovak territories. It was only after World War II that the ABGB was replaced in these territories by socialist codifications. Lastly, the Liechtenstein – which is independent from Austria since 1719 – received and applied very widely Austrian law, including the ABGB but, after World War I (the Great War), the Liechtenstein turned away from any Austrian influence and relied on the Swiss Confederation. Therefore, since the 20th century, the Liechtenstein has followed the Swiss Law and the Swiss Civil Code. The sole sections of the ABGB that are still in force in the Liechtenstein are the primary parts concerning marriages, inheritance, and children's rights.

Chapter 8 - Swiss Law

1) Background

The Helvetic Confederation has linguistic peculiarities insofar as it as four official languages:

- German, which is the main language of 62% of the inhabitants;
- French, which is the main language of 23% of the inhabitants;
- Italian, which is the main language of 8% of the inhabitants; and
- Romansh, which is the main language of 0,5% of the inhabitants.

Regarding the German-speaking Swiss, it is important to note that – even if they are German-speaking –, they do not wish to be confused with the German-Germans in terms of language. They insist on the use of their own language, i.e. *Schwitzerdütsh* as opposed to *Hochdeutsch*, the standard German.

The Helvetic Confederation consists of 26 cantons:

- German is the official language of 17 cantons:
- 3 cantons are bilingual French-German (Berne, Fribourg and Valais);
- 1 canton is trilingual German-Italian-Romansch (Grisons or Graubünden);
- French is the official language of 4 cantons (Geneva, Vaud, Neuchâtel, the Jura);
- Italian is the official language of 2 cantons (Ticino and in southern Graubünden);
- Romansch is the official language of 1 canton (Grisons).

1.1) Reception and place of Roman Law

Some have said that contrary to the Holy Roman Empire of the German Nation, the Swiss territories would not have been subject to the reception of Roman law[111]. Otto von Gierke even considered that the real "*German Volksgeist*" had to be sought within the Swiss Alps, which would be the only place where pure German Law remained untouched by Roman Law. Yet, recent studies tend to contradict such a statement. Indeed, the territories that currently make up Switzerland were totally Romanised during the Roman Antiquity and medieval archives show that Roman law was applied there in the same way as it was applied in the neighbouring areas.

Just as in France and in many German states, Roman Law was the *ratio scripta* in Switzerland.

1.2) French Revolution and premises of a codification

After the French Revolution, the philosophy of the Enlightenment penetrated Switzerland due to the occupation of French troops onto the territory of the Swiss Confederation in 1798. The French established a unitary Swiss State. At the same time, the unification of law was decided. However, Switzerland became again a Confederation after the defeat (or victory, depending on the side one stands) of Waterloo: the Swiss territory increased and acquired additional cantons (Geneva, Neuchâtel, Valais). Despite such failure of a political unification, the idea of a codification of private law persisted. Yet, this codification only took place at the cantons' level and not at the country's level.

111 P. ARMINJON, B. NOLDE and M. WOLFF, *Traité de droit comparé*, t. II, Paris, L.G.D.J., 1950, p. 396.

Insofar as the cantons from the West to the South of the Confederation (Geneva, Vaud, Fribourg, Valais and Ticino) were close to the French legal tradition, these cantons enacted codifications close to the Napoleon Code[112]. This was the first wave of codification.

Bern was the first German-speaking canton to codify its civil law. It occurred from 1826 to 1831. Its Code was essentially based on the old Bernese law, but it based its structure (as well as some other elements) on the ABGB's model. The latter's philosophy – which was more conservative than the one of the French Civil Code – seemed probably more acceptable for Bern. Then, the cantons of Lucerne, Solothurn and Aargau followed the example of Bern[113]. This was the second wave of codification.

A third wave of codification was initiated by the canton of Zurich in 1853-1855. The Zurich Code – written in a clear, precise and simple way by Johan Caspar Bluntschli (1808-1881) – was the first codification to take into account the influences of German Schools (i.e. Historical and Pandectist). This Code was also based on former Zurich law. The Zurich Code was the codification that influenced the most[114] the drafting of the future Swiss Civil Code, which entered into force in 1912[115]. Furthermore, its clear and popular writing style served as a model for many other cantons.

1.3) Unification of the Helvetic Law

During the second half of the 19th century, the need to unify Swiss civil law became more compelling. This was notably due to the fact that trade relations were increasingly crossing the cantonal borders, and that the population gradually began to migrate within Switzerland.

Yet, the unification of law raised some issues in terms of confederal legislative competence. The Constitution[116] was thus amended in 1874 to allow the federal legislator[117] to draft federal statutes in certain areas of private law, i.e. mainly with respect to the law of obligations and commercial law. As a consequence, a Unified Code of Law of Obligations could be adopted in 1881. The German Commercial Code of 1861 and the *Dresdner Entwurf* of 1865 were the main sources of inspiration. This explains why Swiss law does not currently have a separate Commercial Code; the Swiss Commercial Law is integrated into the Code of Obligations.

The Swiss Code of Obligations was based on a five-parts plan and was thus inspired by the Pandectist School:

- General provisions: similarly to the future BGB, the first part of the Swiss Code of Obligations was a general part, including general provisions;
- Types of contractual relationship;
- Commercial and cooperative companies;
- Commercial register, business names and commercial accounting;

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112 K. ZWEIGERT and H. KÖTZ, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3d ed., Tübingen, J.C.B. Mohr Siebeck, 1996, p. 166 ; see also P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 198.

113 K. ZWEIGERT and H. KÖTZ, *op. cit.*, p. 167; in the same sense, see P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 396.

114 In this sense, F. WIEACKER, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, Göttingen, Vandenhoeck und Ruprecht, 1996, p. 490.

115 The Swiss Civil Code was adopted on 10 December 1907 but entered into force on 1st January 1912.

116 Article 64 of the Federal Constitution of 29 May 1874 (today repealed): "The Confederation is responsible for law on civil capacity, on all legal matters relating to trade and securities transactions (law of obligations including commercial law and the law of exchange), on literary and artistic property, on the protection of inventions applicable to industry, including designs and models, on debt collection and bankruptcy. The Confederation shall also have the right to enact on other matters of civil law. The organization, procedure and administration of justice shall remain with the cantons to the same extent as in the past".

117 In this sense, see F. WIEACKER, *op. cit.*, p. 490.

- Negotiable securities.

The "General provisions" include important rules on the creation, effects and extinction of obligations:

- Creation of obligations;
- Effects of obligations;
- Extinction of obligations;
- Special relationships relating to obligations;
- Assignments of claims and assumption of debts.

In 1884, the association of Swiss jurists decided to go further than a minimalist unification of Swiss private law. In order to pave the way for a legislative unification, they decided to proceed with a complete and comparative overview of the cantonal private laws. It was Eugen Huber (1849-1922) – a journalist, lawyer and professor at the University of Basel, in Berne – who was in charge of such a work. He was then responsible for drafting a project of a Swiss Civil Code, which was meant to be clear and understandable by the common citizen[118].

Eugen Huber's writing style[119] can be described as follows:

- Each provision shall contain a maximum of 3 paragraphs;
- Each paragraph shall contain no more than 3 sentences;
- The use of popular sayings is frequent[120];
- The language is smooth[121];
- The Code is incomplete[122].

Whilst Eugen Huber's project was already done, a second amendment to the Constitution[123] was necessary to extend the federal legislator's competences to other areas of private law[124].

The Swiss Civil Code was eventually adopted in 1907 and entered into force on 1st January 1912. In the meantime, the Code of Obligations was amended to align with the new Civil Code[125]. Later, the Code of Obligations was integrated into the Civil Code; it became its fifth book, whereas the first four books deal with the law of persons, family law, inheritance law and property law[126]. In addition, the Swiss Civil Code includes a preliminary title, which sets out some generalities within 10 articles[127].

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118 In this respect, P. ARMINJON, B. NOLDE and M. WOLFF (*op. cit.*, t. II, p. 399) state that "the drafter of the Swiss Codes has endeavoured to use a simple style, to avoid excessively long sentences and to make use of everyday expressions. In this way, he has succeeded in making the text of the law easily understandable to any reader, even those without a legal education".

119 Unfortunately, the amendments made to the Swiss Civil Code have not been able to preserve it.

120 For example, *Heirat macht mündig*, which can be translated into "the marriage emancipates". In this sense, F. WIEACKER, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, *op. cit.*, p. 492.

121 In this sense, A. SCHWARZ, *Schweizerisches Zivilgesetzbuch in der ausländischen Rechtsentwicklung*, Zürich, Schulthess & co., 1950, p. 9.

122 *Ibid*.

123 This second constitutional amendment occurred in 1898. See notably F. WIEACKER, *op. cit.*, p. 490.

124 Article 122 of the Federal Constitution of 18 April 1999 (RS 101): "The Confederation is competent for civil law legislation. Judicial organization, procedure and the administration of justice in civil law matters belong to the cantons. Res judicata civil judgments are enforceable throughout Switzerland".

125 See in this sense, P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 397.

126 See notably in this sense, F. WIEACKER, *op. cit.*, p. 491.

127 In this sense, P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 399.

2) Characteristics of the Swiss Civil Code

The Swiss Civil Code was much admired abroad, especially in Germany where some even considered that the BGB should be removed to be replaced by the Swiss Civil Code[128] since the latter has proved able to avoid the pitfalls of an overly complex structure and an exaggerated dogmatism. Moreover, the language of the 1912 Swiss Civil Code was far more accessible to non-jurists[129].

Whereas the five-parts structure of the Swiss Civil Code reflects the Pandectist influence, it does not include a general part similar to the one of the Pandectist Codes. This comes from the fact that, initially, only the law of obligations was codified and that, in 1881, the introduction of a general part into the Civil Code would have been illogical since it only concerned the law of obligations. In addition, inserting a general part into the Swiss Civil Code afterwards would have implied major amendments to the Code of Obligations although this latter proved satisfactory until then. Lastly, the Swiss were conscious that a possible *Allgemeiner Teil* would have almost exclusively concerned the law of obligations. Such general clause was thus not necessary. However, it must be observed that the preliminary title of the Swiss Civil Code includes, *inter alia*, a provision that – by itself – replaces most of the provisions included in the general part of the BGB. It is Article 7, which provides that "the general provision of the law of obligations relating to the conclusion, effects and termination of contracts shall also apply to other matters of civil law"[130]. Through such provision, the general part included within the Code of Obligations became the general part of the whole civil law.

Furthermore, despite the absence of a general part within the Swiss Civil Code, the latter makes an extensive use of general clauses or *Generalklauseln*. It even refers – in its Article 2 – to the concept of *Treu und Glauben*, which was already encountered when studying German civil law and which is translated by the principle of "good faith".

Art. 2	***Art. 2***
B. Inhalt der Rechtsverhältnisse	*B. Scope of civil rights*
I. Handeln nach Treu und Glauben	*I. General obligations*
*1 Jedermann hat in der Ausübung seiner Rechte und in der Erfüllung seiner Pflichten nach **Treu und Glauben** zu handeln.*	*1 Everyone is required to exert their rights and perform their obligations according to the rules of good faith.*
2 Der offenbare Missbrauch eines Rechtes findet keinen Rechtsschutz.	*2 The manifest abuse of a right is not protected by law.*

Another important feature of the Swiss Civil Code is its deliberate incomplete nature. The aim is to give judges the opportunity to intervene in order to supplement the law. Eugen Huber's view was thus far removed from the postulate of the fulness of the law as it prevailed during the Enlightenment period. On this point again, Huber was lucid. Experience has indeed shown that trying to prevent judges from adapting, or even creating, law is vain.

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128 In this sense, P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 417.

129 P. ARMINJON, B. NOLDE and M. WOLFF (*op. cit.*, t. II, p. 401) criticize this version: in some of its provisions, the Code gives a glimpse of Eugen Huber as a theorist and professor.

130 K. ZWEIGERT and H. KÖTZ, *op. cit.*, p. 170.

The position of the drafters of the Swiss Civil Code regarding its incompleteness also derives from the peculiarity of the legal situation in Switzerland. Practicing law has never been the exclusive preserve of specialists. On the contrary, practicing law was close to the "popular" population. Swiss judges were not always individuals chosen by the public authorities because of their legal knowledge or education; they were sometimes mere citizens elected by their fellow citizens because of their human qualities. Such selection method is still used in some lower cantonal courts[131]. In these cases, lay judges are assisted – to draft their judgments – by clerks, *Gerichtsschreiber* (*greffiers*), which explains the use of relatively open provisions as well as the use of a language that is not only understandable by legal specialists but also by non-jurists. Accordingly, codifying civil law in the Pandectist way was inconceivable in Switzerland[132].

Moreover, it must be recalled that the cantons had adopted their own codification before the adoption of a unified codification. Therefore, their loss of autonomy had to be compensated by a certain degree of autonomy left within or beyond the Civil Code. Such degree of autonomy was implemented through two areas of private law: on the one side, issues relating to local aspects such as neighborhood disturbances and on the other side, areas which are close to cantonal authorities such as matter of guardianship of minors.

Article 1 of the Swiss Civil Code is also noteworthy. It reads as follows:
"A. Application of the law
1. The law applies according to its wording or interpretation to all legal questions for which it contains a provision.
2. In the absence of a provision, the court shall decide in accordance with customary law, and in the absence of customary law, in accordance with the rule that it would make as a legislator.
3. In doing so, the court shall follow established doctrine and case law".

In substance, such provision does not state anything revolutionary. Indeed, no codification can never be complete, and the intervention of the judge will always occur. Yet, the most remarkable point with this provision is its place and how the judge's power is confirmed. It is impossible to miss it. As François Gény[133] wrote it down, it appears that "For the first time, perhaps, we see a modern legislator officially recognizing, and in a general formula, as his indispensable auxiliary, the judge, charged with telling the law to individuals whose interests are threatened, and confer on him, by a sort of general delegation, the powers necessary to specify and complete his own action".

Some blamed Eugen Huber for the too great power left to the Swiss judge. Huber answered these criticisms by stating that judges are – in this way – freer than if they were limited to a mere exercise of deduction from the text of the law; the action of judges is better if they are allowed to first find a gap in the law and then issue a decision as fair and legitimate as if the legislator had legislated himself. This implied that judges would not act in contradiction with existing laws. It is thus easier for them to decide since they are not expected to proceed with complex reasoning in the context of their interpretation of the law.

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131 With respect to the division of competences in the judicial field, it appears that, except for the Federal Court, procedural rules and judicial organization are determined by the Swiss cantons. In this sense, P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, pp. 394 et s.

132 In this sense, K. ZWEIGERT and H. KÖTZ, *op. cit.*, p. 173.

133 Free translation of F. GÉNY, *Méthode d'interprétation et sources en droit privé positif*, 2nd ed., t. II, Paris, 1919, p. 328: « Pour la première fois, peut-être, on voit un législateur moderne reconnaître officiellement, et en une formule générale, comme son auxiliaire indispensable, le juge, chargé de dire le droit aux particuliers menacés dans leurs intérêts, et lui conférer, par une sorte de délégation générale, les pouvoirs nécessaires pour préciser et compléter son action propre ».

Like its German and Austrian counterparts, Swiss law requires that parties to a contract of sale transfer ownership of the thing sold through a separate deed. Unlike these German and Austrian counterparts however, the risk of accidental loss is borne by the buyer under Swiss law. On this point, the Swiss Civil Code applies the same solution as the Roman jurists or the Napoleon Code, i.e. "*periculum is emptoris*"/"the risk is borne by the buyer".

3) The Evolution of Swiss Law

Switzerland exports a large amount of its industrial production to the European Union, especially to the Federal Republic of Germany. There is however a risk that the Swiss production be treated with a disadvantage by the Member States. To avoid such a risk, Switzerland has accepted to be influenced by European law even though it does not intervene in the discussions or in the adoption of such a law.

Two phenomena show the influence of European law on contractual matters in Switzerland:

- There is a phenomenon of autonomous transposition of European law in Switzerland: particularly in 1993[134], Switzerland adopted a law on liability for defective products as well as a law on consumer credit.
- There is a phenomenon of interpretation that is consistent with European law: for instance, Article 33 of the Code of Obligations was interpreted by the Swiss Federal Court in accordance with European Community Law[135].

4) Reception of the Swiss Civil Code

The Swiss Civil Code has been greatly admired and has given a lesson of objectivity to many legislators. It is still frequently used today in international contracts and arbitrations.

More concretely, it influenced the drafters of the Italian Codes of 1942 and the Greek Codes of 1946. It was also received *in toto* in Turkey. After Mustapha Kemal Atatürk founded the Turkish Republic in 1922, the Swiss Civil Code – including the Code of Obligations – entered into force, almost word for word[136], as the new Turkish Civil Code in 1926. This occurred because there was a wish to modernize and secularize Türkiye[137]. What is striking in the reception of the Swiss Civil Code in Türkiye is that – unlike what usually happens – it focused on family law and inheritance law. This caused many problems. For instance, whilst the validity of a marriage previously depended on the realization of a contractual declaration made by the spouses or their parents before witnesses, the Swiss Civil Code recognizes civil marriages only. Yet, outside large cities, ancient traditions continued to apply. A similar issue arose with respect to repudiation, which is a practice that is ignored by the Swiss Civil Code. The consequence of the survival of old practices is that children may be seen as illegitimate under the law but as

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134 In fact, at that time, Switzerland was considering joining the European Economic Area. With this in mind, the Swiss legislator prepared a series of laws adapting Swiss law to European law (*Euro-lex*). However, in a referendum held on 6 December 1992, the Swiss people rejected membership of the EEA. In order to ensure a degree of consistence between Swiss law and European law, some of these laws were nevertheless adopted under the name *Swiss-Lex*.

135 Cass. civ., 27 August 2001, *G.*, *RJN*, 2001, pp. 100-113, obs. Th. Probst.

136 "Articles 1 to 551 of the Swiss Code of Obligations have been translated literally, with minor amendments. In reproducing the Swiss Civil Code, the Turkish legislator has removed quite a number of provisions, while others underwent significant changes. Most of the removals are justified by the fact that Turkey is not a confederation and that the reservations in favour of cantonal laws and cantonal authorities and the references to domicile of origin were inconceivable" (P. ARMINJON, B. NOLDE and M. WOLFF, *op. cit.*, t. II, p. 418).

137 In this respect, P. ARMINJON, B. NOLDE et M. WOLFF (*op. cit.*, t. II, pp. 417 et s.) state that "By the laws of 17 February and 22 April 1926, the Turkish Grand National Assembly adopted the Swiss Civil Code and the Code of Obligations. Islamic law, which had governed Turkey for centuries, was thus abrogated and replaced by codes considered to be the best and most modern expression of Western law. Islamic law was part of the old regime hated by the national revolution, and its demise was explained by a deep-seated feeling of resentment towards the Osmanli dynasty and the clerical hierarchy of the Doctors of the Law".

legitimate by the people. Special laws were thus adopted to allow the regularization of all filiations that are compliant with old customs.

In addition to the reception of the Swiss Civil Code, Türkiye followed legislative changes that were subsequently made by the Swiss legislator to the work of Eugen Huber. Türkiye inserted such changes into the Civil Code of 1926. On the other hand, recent changes seem now to be more autonomous.

Chapter 9 - English Law

1) Introduction

To the continental lawyer (i.e. the lawyer from the EU continent), English law appears as a strange and different legal system. English public institutions and legal traditions are indeed different from the ones the continental lawyer is accustomed to. Moreover, the continental lawyer will not find within English law elements such as a civil code, a code of civil procedure, a commercial code nor will he find well-established legal concepts or principles. Instead, the continental lawyer will find legal techniques that rely on a case-by-case/concrete analysis, and not on legislative texts that provide for abstract and general rules and their interpretation, nor will these legal techniques rely on a systematic factual and legal analysis.

To understand the current state of the Common law system, one must first study its historical evolution to then understand why and how it has developed into a legal system that is *prima facie* so different from the continental/"Civil law" systems. One must also take into account the fact that England is an island separated from the rest of Europe, meaning that it has been more hermetic to foreign influences than the rest of the continent. A consequence is that England was not influenced by Roman law, Natural Law or the ideas of the Enlightenment period in the same way as the continent was. More concretely, this meant that England was not prompted to proceed with a codification of the law and was not influenced by the imperatives of a systematisation/rationalisation.

Furthermore, England was preserved from the political tensions and upheavals the rest of Europe experienced such as the French Revolution of 1789. As a reminder, the French Revolution wiped the slate clean by throwing out the institutions and legal traditions from the *Ancien Régime* and by creating new ones, although the latter were actually largely based on some well-established legal traditions.

Before studying English law, it is necessary to go back in time to focus on the main tendencies and the unbroken evolution of the Common law system.

2) Romanisation of England

Although the Romans occupied England and not Scotland, Scottish law was – unlike English law – influenced by Roman Law to a great extent. The consequence is that today the UK is composed of different legal orders. For instance, whilst English law is a pure product of the Common law system, Scottish law is a mix of both Civil and Common legal traditions. In the frame of this class, we will only focus on English law (and not UK law).

During the Roman occupation, Roman law naturally applied to all Romans. The extent to which Roman Law impacted British customs is uncertain.

At the beginning of the 5th century AD, the Romans left England. This is surprising since, at that time, the Barbarians had already invaded the Roman Empire after having been confined to those regions by the Hun invaders coming from Asia. In Rome, the Barbarians had *de facto* already the power.

In England, the Angles and the Saxes started to invade and occupy the eastern parts of the island. The Celts, who lived there before, were confined to the western parts, i.e. Wales, Cornwall and Argyll (the south-east of the Romanised Scotland). The legendary King Arthur attempted to defend the Celts and to slow down the Teutonic invasion but in vain. The Angles

and the Saxes were very different from the Celts: they did not speak the same language, they did not have the same religion, tradition and physical appearances. The Romans had already noticed that their legal customs were different from those of the British and the Gauls. These latter's customs are the only customs that passed on to us insofar as the Angles and the Saxes left written traces of them. On the other hand, the Celts' customs passed from one generation to the other through oral tradition.

Christianity became the driver of British unification after the arrival of Saint-Augustin of Canterbury's mission in 597. Members of the clergy had the required skills (i.e. they could read and write) to help govern the land through writing. It seems that, at that time, the Anglo-Saxon legislation was drafted in accordance with the Roman example, even if such statement remains controversial.

At the same time in Wales, the old traditions survived the course of time due to the absence of Angles and Saxes on this part of the territory. However, they were more inspired by British customs than by Roman law. Christianity remained there, such as in Ireland and Argyll.

England was later invaded by the Danes. It started with a raid against the Monastery of Lindisfarne in 793, who occupied and governed the country for two centuries. It appears that the word "law" was brought by the Danes at that time. Durin this period, and despite a quite important legislative activity, England remained governed by various unwritten customs and not by written and unified law. This might be explained by the absence of a unified body of law and the absence of a national judicial order that would have been able to implement such a law.

3) The Battle of Hastings (1066)

The Danish domination ended after the Battle of Hastings in 1066 and the Normans' arrival in England led by William the Conqueror. Many consider that this event constituted the main turning point in the history of English law. Yet, the changes in the law subsequent to this event were neither immediate nor the result of a deliberate choice of the government in place.

William the Conqueror contended to be the rightful heir to the English throne. After having accessed the throne, he promised the English people that they would be allowed to keep their former laws. The Normans were an uneducated people, who had not brought with them a set of sophisticated legislation that would have been able to impose itself in England due to its quality. The laws of England were not more developed than the Normans' ones. They thus agreed on leaving the situation as it was when they arrived. All changes in law that happened at that time were controversial and divided the people. This is the reason why it is hard to believe that the Normans brought about the existence of a unified law, the Common law.

Among the changes in law that eventually occurred, one can mention examples such as discriminations between the French people and the English people, the abolishment of slavery, which was however subsequently replaced by a general serfdom system, or the substitution of capital punishment for body mutilations.

Yet, the most important change remains the adoption of a feudal system that replaced the Anglo-Saxon system that was then in force. This meant that the whole territory of England became the property of the King. The territory was then divided into so-called "Knight's fees" (i.e. *fiefs des chevaliers*), it being understood that the term "fee" derives from the word "*feodum*/*feudum*" and

refers to the link between the King and his subjects, who notably owed him military services. This whole pyramidal system increased the centralisation of power into the sole Kings' hands.

Common law emerged during the 12th century due to the prompt and efficient development of institutions that existed in their embryonic form before 1066. The first institution was the existence of a government that was centralised through "sheriffs" who were responsible before the King. This did not exist in Normandy. The second institution was a primary form of bureaucratic administration based on written acts on which the royal seal had to be affixed.

To these two institutions, the Normans – and their successors, the Angevins – added their taste for a form of autocratic government as well as their administrative efficiency. This is why, already at the time of William the Conqueror (William I), changes in the tax system could occur. Accordingly, on the King's initiative, a "Domesday Book" was drafted from 1086 onwards. This Book was a record of all feudal relations within England, which allowed the *Curia Regis* (i.e. a sort of State Council composed of the King and his advisers) to verify that all vassals in the land duly paid their taxes. This system became an actual tax administration system under King Henry I (i.e. the youngest son of William), which was known as the "Exchequer". The Exchequer was not only a control body as it progressively developed into an actual court charged of solving small claims related to tax matters.

In addition, the central administration of the *Curia Regis* took more and more part in the administration of justice, especially with respect to civil and criminal matters. This was primarily due to tax purposes. Indeed, the most important taxpayers in England were the big landowners. This explains why the *Curia Regis* had such a great interest in all private issues that would arise among these owners, particularly when these issues concerned real properties detained by "Tenants in Chief", i.e. vassals whose property rights had been conferred to them directly by the King. The King was also interested in delivering criminal justice. Whilst collecting taxes was easier and more profitable in times of peace, inflicting fines and confiscations could also be very lucrative.

It follows from the foregoing that the *Curia Regis*' jurisdiction expanded significantly during the 12th and 13th centuries (i.e. tax, civil and criminal matters). Subsequently, the *Curia Regis* was divided into three permanent courts, which were staffed by professional judges. These three courts were based in Westminster and were allowed to adopt rulings even in the absence of the King. The division of competences between these three courts was decided around 1300 and remained unchanged until the 17th century. Next to the Court of Exchequer, the Court of Common Pleas had jurisdiction on common pleas (i.e. small and ordinary disputes between individuals), whilst the Court of King's Bench dealt with all cases of political importance.

Beside these Westminster Courts, the King resorted to "travelling justices" from the 12th century onwards. Travelling justices were judges who moved from one province to another to replace sheriffs at the local courts and deliver justice in the King's name. This practice can be compared to that of provincial governors during the Roman era, who fulfilled the *praetor*'s mission in the Roman territories located outside of Rome. Today, these travelling justices still exist. They go from on province to another to settle local disputes.

This was the starting point of a long process of centralisation of English justice, which then led to the progressive unification of English law. Local courts were gradually marginalised. This was not only due to the royal authority attached to the decisions issued by the Westminster Courts and the traveling justices, but also to the fact that the King's justice quickly proved to

be faster, more modern and more efficient in terms of both procedure and administration. Following this movement, local customs were also left aside in favour of the unified law of England, now referred to as Common law.

In light of the above developments, one can conclude that English Common law is actually older than French or German common laws (for the record, German common law emerged from the Pandectists' works in the 19th century). This ancient character of English Common law explains why, contrary to France or Germany, the country never really felt the need to codify the existing law. The law was already unified.

4) The writs

Medieval procedure in England was entirely based on writs (i.e. in French, "*bref*" which comes from the Latin word "*breve*"). Under its usual meaning, the term "writ" refers to a piece of writing emanating from a temporal or spiritual lord and containing a certain message for the attention of certain addressees. Under its legal meaning, a "writ" is an order from the King addressed to the relevant official – a judge or another magistrate – containing an indication as to the matter at stake and instructing the official to call the defendant to appear before him and to settle the dispute in the presence of all parties.

Insofar as similar cases regularly arose, which led to similar decisions, the practice started to develop standardised texts in which solely the name and the address of the parties had to be filled in. Towards the end of 12th century, the Chancery had drafted about 75 writs. During the 13th and 14th centuries, this number increased significantly. All writs were gathered in semi-official records (i.e. "Registers of Writs") which circulated among practitioners.

It was important for the plaintiff to pick up the right writ when deciding to initiate judicial proceedings. If the plaintiff chose writs that would not match the facts of the case, the application had to be dismissed. The problem was that the number of writs available increased constantly and that the differences between all the writs became more subtle. This made it difficult for the plaintiff to choose the writ that would correspond to the case at stake. In addition, each writ corresponded to a specific procedure. This system was flexible, which allowed the Chancellor and the judges to introduce new and more modern types of evidence, and which made justice more appealing to the public. In particular, royal justice officials started to remove old-fashioned types of evidence that needed to be set aside. This was notably the case for ordeals in the form of trials by combat and other "oaths of purification" (e.g., "*serment de purification*", "*Reinigunseid*"), which were replaced with methods of rational verification of the facts by a jury composed of 12 jurors.

There are many similarities between English law in force during the Middle Age and Roman Law. Indeed, writs can be compared to the Roman formulary procedure, and the Register of Writs is similar to the *Edictum perpetuum*. The practice kept on drafting new writs in the same way as the *praetor* adapted his Edict by granting new formulas. Accordingly, both the Roman and the English people based their legal reasoning on procedure rather than on abstract legal concepts. The former reasoned in terms of procedure and types of lawsuits, and not in terms of subjective rights. One can thus observe that, whereas Glossators in continental Europe consciously chose to base their whole legal thinking and reasoning on Roman law to improve their owns laws, the English people – although unconsciously – reproduced the Roman way of thinking and reasoning. Yet, whilst German Pandectists affirmed to base their work exclusively on Roman Law, English jurists have always rejected all forms of association with Roman law.

In practice however, English law is very close to that of the Romans: both work on a case-by-case basis, thereby avoiding – at all costs – the creation of abstract and general rules applicable to similar cases. The most important factor is to develop proper legal rules that would work and allow avoiding further issues. This was actually the antithesis of the Pandectists' work, who avoided any case-by-case analysis to focus on general rules based on logical principles that derive from one another.

Towards the end of the 14th century, the writ system showed its real flaws. Some writs could indeed be diverted and mischievously misused. Also, political interferences could sometimes influence the outcomes of trials. It eventually appeared that Common law could lead to immoral and unfair results. In these instances, the injured party tended to address a request to the King to complain about the injustice suffered. The King then forwarded these complaints to the Chancellor, i.e. the highest official in the hierarchy, who had to decide to accept or not the complaints. His decisions were – from 15th century onwards – gathered and recorded in the form of a new body of laws, called "Equity". This is also a feature that is similar to Roman law. As per Roman law, the *praetor* was expected to amend civil law when its application would lead to unfair results. Furthermore, the Romans resorted to the Emperor's justice – under the form of an appeal – during the postclassical period. Lastly, the Emperor often settled disputes on the basis of equity in the form of *rescripts*.

5) Equity

The procedure before the Chancellor was different from the one applicable before the Royal Courts. If the Chancellor did not find the request submitted to him immediately inappropriate, he summoned the defendant and suggested a mediation between both parties. This mediation occurred before the Chancellor, and not before the Royal Courts. This call to appear before the Chancellor took the form of a "writ of sub *poena*", which meant that those who received the writ but did not attend the mediation session risked a severe penalty, i.e. a *poena* in the form of a fine.

Insofar as the objective of the Chancellor's justice was to question the regularity and morality of the previous procedure, all evidence established during this previous procedure that might have been manipulated, had to be set aside. The defendant had to answer under oath all Chancellor's questions. The latter decided alone, without the assistance of any jury, on both the factual and legal matters of the case. His final decision was supported by heavy sanctions.

During the 15th century, the Chancellor based his reasoning and decision on his sole appreciation. This meant that his decisions depended on the personal scale of values of the Chancellor in place. However, the appointment of Thomas More – the first layman Chancellor – as Chancellor changed this situation. The practice of Equity started to align on Common law. From this moment, Equity rested on principles and rules that the Chancellor had to apply in every similar case. From the 16th century, the Chancellor's decisions were published. The Chancellor thus felt compelled to abide by his own precedents, in the same way as ordinary courts. Accordingly, the Chancellor created a Court of Chancery within his administration. He was first the sole member of this Chancery. Later, in 1730, the Chancellor's closest collaborator – i.e. the Master of Rolls – became the second judge of the Chancery. By the 18th century, it was clear that the rules on which the Court of Chancery based its decision – which corresponded to a body of laws referred to as Equity – were rules that evolved throughout time and that were strengthened on a case-by-case basis. This way of doing was exactly the same as the Common law system.

The concept of "Common law" has multiple meanings:

- It often refers to the law applied in Anglo-Saxon countries, as opposed to the "Civil law" systems which derive from Roman law;
- It can also refer to the law created in England by the Royal Courts, as opposed to Equity (i.e. the law created by the Court of Chancery) and Statute law (i.e. the law crated by the Parliament).

The set of rules emerging from Equity that had the most practical significance was the one concerning the "uses", which were then called "trust". During the 12th and 13th centuries, vassals tried to avoid property taxes resulting from feudal links. In particular, they tried to avoid a tax that was owed by the heir when the latter took possession of the fief. This led landowners to transfer fiefs to "trustees", i.e. people they trusted for the administration of the estate (in French, the word "trustee" can be translated into "*fidéicommissaire*"). Whereas the third parties considered the owner of the fief as the trustee, the situation was different for the concerning parties, i.e. the trustee and the fiduciary creditor (which is translated into *créancier fiduciaire* in French): the trustee agreed to let the creditor use and possess the estate during his lifetime and to transfer the estate to his heir at the creditor's death; the heir was called "cestui qui trust" or the "beneficiary" since he benefitted from the trust (the tax was indeed avoided).

A similar mechanism was used during the crusades: the knight who left entrusted his estate to a bishop who administered it while he was away and gave it back upon his return or, if he had died along the way, he transmitted the estate to the knight's heir.

Insofar as the whole system relied on trust, it could happen that the trustee did not abide by his commitment. In that circumstance, the problem was that the Royal Courts did not provide for any judicial procedure that could urge the trustee to comply with his obligations. There was indeed no writ for such claims. As a consequence, the Chancellor had to step in to provide a solution to the fiduciary creditor or to the other trust beneficiaries. The solution provided by the Chancellor was based on good faith and good conscience: when the trustee did not comply with his obligations deriving from the trust, the Chancellor decided that he was behaving contrary to the good faith and that he breached the principle of good conscience. He thus concluded that, whilst such a behaviour was "at law" (i.e. in compliance with Common law), it breached Equity which expects from the trustee that he behaves in compliance with his commitments. In the long run, such a reasoning proved fruitful and was consolidated to such a great extent that – even after the disappearance of the feudal system – it remained in force as it became an important part of various legal fields. Today, the mechanism of trust is still the most typical legal institution in all Common law systems.

Next to the mechanism of trust, Equity developed other legal means that supplemented the lacunas of Common law. For instance, early Common law did not provide for any preventive means against one's offences. One had thus to wait for the damage to occur to be allowed to file a claim. The Chancellor therefore granted preventive injunctions in case someone – by behaving negligently – could cause a damage to someone else. This system recalls the *praetor*'s *interdicta*. The conditions to be fulfilled to allow the granting of such injunctions depended on the case at stake. Again, the evolution took place on a case-by-case basis. There was no general rule.

Given the fact that Common law and Equity were the realm of different courts, the Chancellor did not hesitate to request the prohibition of the introduction of proceedings before the Royal

Courts and of the enforcement of the Royal Court's decisions. There was no such competition in Roman law, since both civil and praetorian laws were administered by the same persons.

Equity also developed the request for "specific performance". In fact, Common law did not provide for many rules regarding contracts. In case of non-performance, the plaintiff could only ask for an equivalent enforcement and not for the performance in kind of the contract. On the other hand, the Chancellor agreed to allow performances in kind whenever he thought Equity required to do so.

In light of this last example, one can observe that the rules of Equity and those of Common law were not in obvious contradiction. Rules of Equity rather amounted to glosses that rectified Common law when the latter resulted in unfair outcomes. This reflects the situation under Roman law where praetorian law adapted civil law whenever the latter led to unsatisfying solutions.

6) Inns of Court

English jurists quickly organised themselves to form a social class that would become very powerful and influential on the political scene.

Already during the early Middle Age, the main legal institutions (e.g., the Royal Courts, the Royal administrations, and other nascent courts) had their seats in London. There were thus an important number of jurists in that city. At first, most of them were clerical but, gradually, legal knowledge spread outside clergy so that all jurists were actually laymen.

At the beginning of the 14th century, legal practitioners organised themselves in the form of guilds, called Inns of Court. Today, four of them still exist (Lincoln's Inn, Gray's Inn, Inner Temple, Middle Temple). They were headed by benchers, i.e. a team composed of the most renowned and experiences lawyers. These benchers had to ensure that everybody abode by the Etiquette. They also had to ensure loyal competition. In addition, they detained important disciplinary powers. Until the 19th century, Inns of Court had a monopoly on the education of young lawyers. Thus, unlike the rest of Europe – where legal education took place at university –, young lawyers in England learnt their profession in the Inns of Court where they received a practical education. They indeed had to attend judicial debates, follow classes given by passionate practitioners, etc. They were also in permanent contact with older and more experienced lawyers, with whom they could discuss practical legal issues.

Inns of Court did also contribute to forging a form of solidarity among lawyers since professionals and apprentices lived together as a community within these Inns. They ate together, went to mass together and to the same library (there was one library per Inn), they played music together, organised parties and theatre plays, etc.

Under King Henry III (1216-1272), one started appointing judges to the Royal Courts from the class of lawyers. This became an established rule from the 14th century until today, even if it was never formally written anywhere. This explains why judges and lawyers have always maintained close ties and good relationships.

During the 16th century, a clear distinction between two types of lawyers – i.e. the barristers, who went to court and pleaded, and the sollicitors, who did not – appeared. Before this distinction, both types of lawyers lived together in the Inns. From thereon, the barristers claimed

that they would no longer take part in trials as representatives of one of the parties but would rather offer their support to the noble office of an impartial justice. Therefore, they stopped taking care of any aspects relating to their client (e.g., they refused to perform any technical acts relating to the administration of justice, they refused to meet clients if it was not necessary, etc.). These tasks were thus left to the solicitors. Lastly, they found it inappropriate to act in court to claim the payment of their fees from their client. By the end of the 16th century, all solicitors were evicted from the Inns, despite their crucial role (e.g., it was them who had direct contacts with the clients, who prepared the trials, who established the facts of the case, etc.).

Inasmuch as English law was developed outside universities, English practitioners never tried to develop a rationalised legal system organised in a logical way. They have always tried to find practical solutions to the legal issues of their time, by reasoning on a case-by-case basis, without ever drafting general and abstract rules that could be deducted from one another and applied to all similar cases. This peculiar development of English law also explains why there was no massive reception of Roman law in England.

7) Civil Law

Despite the fact that English law has not been subject to a massive reception of Roman law, Common law was very early in contact with what English lawyers called "Civil law", i.e. Roman law from the Middle Age.

Firstly, Roman law was already taught at Oxford University and at Canterbury Abbey in the middle of the 12th century by Vacarius, an expert from Bologna. At that time, Roman law had not reached Germany yet. Ecclesiastical courts – that had already extended their competences to marriage and movable inheritance – applied Romano-canonical law (*ius commune*).

Secondly, an important English jurist of that time was Bracton. As a clerk, he perfectly knew Roman law. However, when writing about English law, he used – to a limited extent – his knowledge of the Roman legal concepts and mechanisms.

Thirdly, Roman law made an intrusion into the practice of Equity. Until the 16th century, the Chancellor was a clerk (for the record, Thomas More was the first lay Chancellor). The Chancellor thus knew all about Roman law and the inquisitorial procedure established by him was inspired by canonical procedure.

Fourthly, the influences that Roman law had on the fields of commercial law and maritime law were strong. During the Middle Age, commercial law was essentially international as it regulated relations between traders coming from different countries. Therefore, and considering that Roman law prevailed in most of the European countries, the law that was applied by the Courts of commercial cities and fairs was strongly influenced by Roman law. This law was referred to as the *Lex Mercatoria*. The consequence was that commercial courts in England applied the same rules and procedures as in the rest of the European continent, and not Common law.

With respect to maritime law, specialised courts in port cities were created. Later, the King even established several Courts of Admiralty, which mostly applied "Civil law". Until the 19th century, there were conflicts of jurisdiction between these Courts and the Courts of Common law. The latter prevailed, which implied that both commercial and maritime law were eventually

diluted into Common law. Despite such evolution, these two sets of law remain influenced by Roman law.

In the English history, there was only one time when Roman Law did really threaten Common law, i.e. during the 16th and 17th centuries under the Tudor and Stuart regimes. At that time, there was a strong conflict between the Crown – which sought absolute power – and the Parliament – which stood against such absolute power. The King was fond of Roman law since he considered it could help him achieve his autocratic dreams. He thus established new courts and, consequently, Common law slightly stepped back. More particularly, he created the "Star Chamber", which acted as a high court having jurisdiction on important political crimes. The Chamber applied Romano-canonical procedure and was staffed by jurists educated within universities, and thus influenced by Roman law. Such a situation can be compared with the one of the Courts of Admiralty. These jurists had organised themselves as a professional group and founded, in 1511, the Doctor's Commons. In this frame, Roman law could have imposed itself and evicted Common law. This is all the more true as English intellectuals – inspired by the schools of thought of the Renaissance and by the Humanist movement – had also expressed growing criticism against Common law, which appeared less appropriate on many levels than Civil law.

This being said, the English Bar organisation – which stood with the Parliament in its battle against the King – was able to put an end to the intrusion of Civil law. Therefore, the victory of the Parliament against the Crown also meant that Common law won its fight against Civil law. In addition, the English people saw Common law as a guarantor of their freedom and a safeguard against the arbitrary power, thus serving the same role as the Constitutions in the rest of Europe.

8) Age of Settlement

After the Parliament's victory against the Crown (i.e. during the 17th century, under the Stuart regime), Common law was declared the Supreme Law of the Land. This marked the start of a pacification period known as the Age of Settlement.

Common law and Equity evolved in accordance with the needs of the practice and of the economy, which was no longer agrarian. In that respect, Lord Mansfield played a peculiar role since – as the Chief Justice of the Court of King's Bench – he had a good knowledge of Civil law and could establish the bases of English commercial law.

Whereas almost all famous English jurists were either practitioners or senior judges, this feature changed during the 18th century with William Blackstone. The latter was an Oxford Professor, who became the most famous jurist of his time. Blackstone (1723-1780) gained renown thanks to his 4-volumes book called "Commentaries on the Laws of England". This book was essentially conceived as a handbook whose aim was to provide students with a systematic description of the law covering all legal branches (i.e. private law, civil procedure, constitutional law, criminal law). This book was a huge success. This was notably due to its clarity, precision and ability to focus on the most important aspects of the subject. It was reedited multiple times. If one could observe that this book was not as good as similar books in the rest of Europe, the reason is that, in those countries, centuries of academic work were necessary to achieve such results. Blackstone was actually the first to put Common law in order and to present it in a way that both jurists and non-jurists could understand.

9) Age of Reform

After Napoleon's defeat and exile, the English supremacy was absolute. Yet, internally speaking, the 19th century was a period of repeated political and social crises for the country. Whilst the economy increasingly relied on trade and industries and people became employees, the two chambers of the Parliament were still full of conservative aristocrats, bishops and rich landowners. For the English industrials, the rest of Europe – destroyed by the Napoleonic wars – was not a sufficiently rich market anymore, the poverty as well as the unemployment rate were on the rise, and famines and strikes occurred regularly. A reform was thus indispensable to avoid a revolution.

Therefore and despite a strong resistance from the upper chamber of the Parliament, the electoral system was amended in 1831-1832. This amendment allowed the bourgeoisie to take part – for the first time – in the exercise of power. This paved the way for further reforms such as changes in the legislation concerning the poor, limits to children's work, trade liberalisation and modernisation of the law through legislative interventions.

Thus, after the Age of Settlement, came the Age of Reform. The most important figure of that period was Jeremy Bentham (1748-1832), the leader of the utilitarian movement. According to this movement, all existing institutions had to be subjected to a critical review to make sure they were useful and that they could reach "the greatest good for the greatest number".

Bentham considered that most of Common law rules were created because of an historical conjuncture and not because they were actually useful. In his view, these rules prevented the social reforms he advocated for from occurring. He stood against practitioners' traditionalism and against Blackstone, whose ideas were seen as too conservative compared to the law applicable at that time. Bentham eventually called for a deep reform of English law and for its codification. This last aspect was obviously rejected by the associations of professional jurists.

Nevertheless, Bentham managed to have a strong influence on the practitioners' work. Indeed, some of his proposals became the subject of many statutes adopted by the English Parliament during the second half of the 19th century. This was particularly true with respect to judicial organisation and civil procedure. Such a reform was needed since the division of competences between the existing courts was odd. For instance, a party that would request both the cessation and damages in the frame of a single claim had to launch proceedings before two distinct courts. If the Parliament attempted to solve this kind of issues progressively through the adoption of specific laws, it eventually adopted the Judicature Act in 1873, which entered into force in 1875.

This Act aimed at reforming the whole judicial system. The underlying principles of this Act still apply today in England.

9.1) The Judicature Act (1873)

C. Judicial reorganisation

The Act gathered all Courts of England into one single Supreme Court of Judicature, which consisted of a High Court of Justice and of a Court of Appeal.

Within the High Court of Justice, there were several departments which were specialised in a field that was previously under the jurisdiction of one or more courts. As a result, whenever a

case would be introduced before the wrong department, the latter could redirect the case to the right department. Prior to the Act, such a situation was solved by the Court seized, which would simply decline its jurisdiction. Initially, solely three departments were created: the Queen's Bench division, the Exchequer division, and the Common Pleas division.

As of 1881, these three departments were grouped under the Queen's Bench division. Besides, the Chancery division dealt with all matters over which the Court of Chancery had jurisdiction. The Probate, Divorce and Admiralty division had jurisdiction over inheritance issues, marital disputes and all disputes relating to navigation. Prior to the Act, all of these matters were assessed by different courts. The reason why these matters were brought together under the same High Court is to be found in the links these matters have with Romano-canonical law.

There was, above the High Court, the Court of Appeal which was actually composed of different courts of appeal.

Furthermore, a law of 1876 established a third court outside the Court of Judicature, which emanated from the House of Lords (i.e. the upper chamber of the English Parliament). This Court was composed of the Lord Chancellor as well as other judges who had been ennobled for this special occasion (e.g., Alan Rodger who was an expert of Roman law).

D. Merger of the rules of Common Law and Equity

On the basis of the Judicature Act, all rules of Common law and of Equity were merged together. Concretely, this implied that all departments of the High Court and the Court of Appeal were expected to know and apply both sets of rules. In case of conflict between these two sets of rules, Equity was to prevail.

E. End of the writs system

The Judicature Act put an end to the writs system which had been in force for centuries. At Blackstone's time, the plaintiff had still to state – prior to the start of the proceedings – on which of the seventy or eighty existing "forms of actions" (i.e. writs) the claim was based. This choice was irrevocable and had important consequences on the subsequent procedure (e.g., it determined the types of procedure that could be used during the proceedings, the category of precedents the judge had to rely on, the rules that would be applied for the enforcement of the judgment, etc.). Thus, the plaintiff who would opt for the wrong writ, would lose the trial because of mere technical reasons.

The Judicature Act replaced the writs system by a single Writ of Summons, whereby the plaintiff could detail the claim without technical terms.

F. Standardised procedural rules

The Judicature Act standardised the procedural rules that were applicable before the various courts. This standardisation implied that procedures were subject to mere minimal variations between the different types of disputes. This does not mean however that English practitioners stopped reasoning in terms of procedure. On the contrary, even if the writs did not play the same role regarding the launching of proceedings than before, the categorisation of material rules was still based on this writs system. This situation reflects the one of post-classical Roman

law period, where – although the formulary procedure had been replaced by the *cognitio extraordinem* –, Roman jurists continued to reason in terms of legal actions, and thus procedure.

10) English legislation

Substantive legislation experienced a certain evolution during the 19th century thanks to an important legislative activity. Whilst England has always had laws dedicated to private law, these laws never covered the concerned matters extensively and globally; they were only circumstantial and very occasional.

At the end of the 19th century, a series of important laws were adopted in the commercial field. These laws followed the principles established by Bentham:

- Bills of Exchange Act (1882);
- Partnership Act (1890);
- Sales of Good Act (1897);
- Marine Insurance Act (1906).

These laws were not substantially innovative. They rather corresponded to a limited form of codification of existing rules. As for the laws unrelated to commercial law, they were adopted in the course of the 20th century.

Today, England still does not have any piece of legislation that would cover family law, inheritance law, contract law or tort low, in their entirety. The English legislator is still keen to adopt specific laws that would solve occasional legal issues (e.g., matrimonial regimes, inheritance *ab intestat*, adoption, the regime of illegitimate children, etc.), it being understood however that these specific laws are still based on legal categories and concepts that were previously established by case law. For instance, the Law of Property Act of 1925 – which deals with real estate in England – is so strongly based on ancient Common law that any foreign lawyer, who would ignore English history, could simply not understand its content. The Common law concepts to which such Act refers would indeed not be understood.

11) Conclusion

In light of the foregoing developments, it seems that English law is no longer a jurisprudential law as it used to be before. It cannot therefore be firmly opposed to the Civil law systems. Today, the Parliament and the legislators take care of more matters, and the judge's power is reduced.

On the other hand, the tendency in the rest of Europe is an increased influence of the courts' decisions. Today, it is indeed difficult to grasp the correct meaning of a law without knowing and taking into account the decisions that were taken by other courts on a certain point of law.

Common law and Civil law systems are thus no longer as different from each other as they used to be.

Chapter 10 - Italian Law

1) History

1.1) From Roman law back to Roman law

At the fall of the Western Roman Empire in 476 AD (i.e. when Romulus Augustulus had been deposed by Odoacer), Roman citizens officially became citizens of Odoacer's Barbarian Kingdom. They were nevertheless still allowed to use their Roman law.

After completion by Justinian of his legal opus – including the Codex (534), the Digest (533) and the Institutes (533) –, he sent his armies to the West to reconquer the lost territories: Flavius Belisarius led them to conquer the Vandal Kingdom (in North Africa) and, then during the Gothic War, much of Italy. Such a War lasted for almost twenty years (535-554).

In 554 AD, Justinian enacted the Pragmatic Sanction, which was an imperial edict through which Justinian cancelled the administrative and patrimonial system of the Ostrogothic domination over Italy and extended the imperial legislation to the whole peninsula. However, this reconquest did not last long as the Lombards invaded the peninsula in 568 AD (i.e. only 14 years after the Pragmatic Sanction).

This being said, this short episode had long-lasting consequences as it later brought the *Corpus Iuris Civilis* on the Italian soil. This was essential for Pepo and Irnerius[138]. They indeed found a copy thereof during the 11th century and started studying it. Both were then involved in the creation of the School of the Glossators and the University of Bologna.

By creating the School of the Glossators, Pepo and Irnerius gave a new impetus to the study of Roman law. The need for a good legal system was such that even though the last Roman Emperor to have ruled over Italy had died five centuries earlier, Justinian's compilation was seen as the best option. Even if such compilation was a refined and complicated set of legal rules, it was considered as the only fruitful option.

Roman law was not the only legal field that was worth being studied at the time. It indeed served as an example for Canon law, which also experienced a boom around 1150 thanks to Gratian. Whilst Roman law had its *Corpus Iuris Civilis*, Canon law had its *Corpus Iuris Canonici*.

As to the University of Bologna, it enjoyed an incredible success. Students flocked in from all over Europe. They wished to be educated in the field of Roman law and Canonical law. This marked the start of the *ius commune*, when legal science had a universal character.

As mentioned in the chapter on French law, the Glossators were followed by the Commentators, with Bartolus de Saxoferrato and Baldus de Ubaldis. As for Alciat, he attempted to provide a new approach to the sources of law, but this approach was not well received in Italy. He thus migrated to France where his approach was better received. This led to the division between two Schools of Law in Europe: the *mos italicus* in Italy (the Commentators' School) and the *mos gallicus* in France (the Humanist School).

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[138] Irnerius is more famous than Pepo, who seems to have been his master. See J. GAUDEMET, *Les naissances des droits*, Paris 1997, p. 294.

1.2) The early codifications[139]

After some centuries of application of the *ius commune*, Italy experienced changes with the armies of Napoleon who annexed the peninsula at the end of the 18th century, except for Sicily and Sardinia which were not annexed by France thanks to the British marine. The French reorganised the institutional structures and imposed the Napoleon Code in the various Italian territories[140].

With the fall of Napoleon and the enthusiasm of the liberation, the French codification was quickly abrogated throughout Italy. In the meantime, it also appeared that the *ius commune* was not meeting the expectations of the 19th century[141]. The various regions of Italy thus enacted new codifications, which were very much inspired by the French codes.

This is how the Kingdom of the Two Sicilies replaced, in 1819, the French codes by a new Code divided into five books (civil law, criminal law, civil procedure, criminal procedure and commercial law), which was still very similar to the French model[142].

In the Duchy of Parma, Duchess Marie-Louise – who was Napoleon's second wife (1810-1814) and was from the Habsburg family – enacted a new Civil Code for her Duchy in 1820, namely the *Codice Civile per Gli Stati Parmensi*. This Civil Code followed the same plan as the French Civil Code, and thus Gaius' Institutes (1. *Delle persone*; 2. *Dei beni, e del domino*; 3. *De modi di acquistare il dominio e delle obbligazioni*), but with many peculiarities.

The style was globally similar to the one of the French Civil Code, except that the former was obviously written in Italian. The first book (on persons) was adapted to the local habits, while the second book (on ownership) included a chapter dealing with the emphyteusis – which was lacking in the French Civil Code – and had its own specificities. Some provisions were a mere translation of the French ones (e.g., Article 1134 of the Napoleon Code corresponded to Article 1107 of the *Codice Civile per Gli Stati Parmensi*[143]; Article 1382 of the Napoleon Code corresponded to Article 2085 of the *Codice Civile per Gli Stati Parmensi*[144]).

The transfer of ownership also aligned with the French system. Article 561 stated that ownership was transferred by contract ("*Il dominio si acquista (...) per l'effetto de' contratti*"). Basically, the law of obligations and contracts was similar to the French Civil Code. This was probably due to the fact that the latter was close to Roman law. The *Codice Civile per Gli Stati Parmensi* nevertheless kept some peculiarities: its third book included parts that were absent from the French Civil Code (e.g., bill of exchange in articles 1523-1603 (*lettera di cambia*; *lettre de change*); insurance contract in articles 1854-1866). Therefore, albeit an important French influence, there were also some originalities in this Code of 2,376 articles.

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139 See R. SACCO, *Introduzione al diritto comparato*, Torino 1992, p. 256 and subs.

140 Dates are the following: Piedmont 1804, Genoa, Lombardy, Parma, Piacenza and Guastalla 1805, Modena, Venice, Lucca 1806, Tuscany, Naples and the Papal States 1809.

141 Unsuccessful attempts were made to turn back the clock, particularly in the territories subject to the House of Savoy and in the Duchy of Modena. See A.GAMBARO/A.GUARNERI, *Italie*, in Travaux de l'Association Henri Capitant (La circulation du modèle juridique français), 44 (1993), p.79.

142 See A.GAMBARO/A.GUARNERI, *op.cit.*, p.79.

143 Le convenzioni legalmente formate hanno forza di legge per coloro che le hanno fatte. Non possono essere rivocate che o per mutuo loro consenso, o per cause approvate dalla legge. Esse devono essere eseguite di buona fede.

144 Ogni fatto dell'uomo cha arreca danno ad altri, obbliga quello, per colpa del quale è avvenuto, a risarcirlo.

With respect to the Kingdom of Sardinia[145], King Charles Albert[146] enacted a code in 1837[147]. This *Codice Albertino* was relatively similar to the French Civil Code[148]. It included 2,415 articles and was enacted in both Italian and French. Just like the Napoleon Code, it was divided into three books (1. *Persone*; 2. *Diritti reali*; 3. *Successioni e contratti*).

As for the Duchy of Modena, it had to wait until 1851 for its own civil code. There, the Civil Code was also inspired by the French Code[149]. Even if it was divided into four books, this did not make it an original piece of legislation. The fourth book was indeed a commercial code (1. *Delle persone*; 2. *Dei beni e delle diversi modificazioni della proprietà*; 3. *Dei modi di acquistare la proprietà*; 4. *Disposizioni sul commercio*). This Code may have been closer to the French model than the *Codice Civile per Gli Stati Parmensi*.

In the Lombard-Venetian Kingdom, it was an Italian translation of the Austrian ABGB that was in force[150]. This was notably due to the fact that this region lived under the rule of the Austrian Empire from 1815 to 1866.

In the Grand Duchy of Tuscany and in the Papal States, no codification was undertaken. These States did not replace the French codes but went back to the *ius commune*. This was also true for the Republic of San Marino. The main difference between these three States is that San Marino[151] never entered the Italian Republic. It therefore still relies on the *ius commune*.

In light of the foregoing, it can be asserted that – in the middle of the 19th century – Italy was far from being unified, or to use Metternich's words, it was nothing more than a geographical concept[152].

2) The Unification of Italy

2.1) The Political Unification

In 1848, there were revolutionary movements in Italy. This marked the first chapter of the *Risorgimento* (i.e. unification movement). Milanese and Venetians revolted against Austria, and were helped by Charles Albert, the King of Sardinia and Piedmont. They were initially also supported by the Papal States and the Kingdom of the Two Sicilies. They later withdrew their support. The military commander of Charles Albert was Giuseppe Garibaldi (1807-1882). They were eventually defeated by the Austrians in 1849 (i.e. during the First Italian War of Independence). This defeat meant for Charles Albert that he had to abdicate in favour of his son, Victor Emmanuel. For Garibaldi, this was not a goodbye but a mere farewell.

The second and decisive chapter of the *Risorgimento* started in the years 1859-1860 with an alliance with France led by Napoleon III. In exchange of this support, France was granted Nice and Savoy even if Nice was Garibaldi's native town. Next to Garibaldi, Camillo Cavour (1810-

145 The "Sardinian States" cover a much wider area than just one Mediterranean island, since they also include Piedmont and Savoy.

146 King Charles Albert was the father of Victor-Emmanuel II.

147 See R.SACCO, *Introduzione al diritto comparato*, Torino 1992, p.257.

148 See R.SACCO, *op.cit.*, p.225.

149 See A.GAMBARO/A.GUARNERI, *op.cit.*, p.79.

150 See A.GAMBARO/A.GUARNERI, *Ibidem*.

151 San Marino has only 32,000 citizens.

152 See letter from K. von Metternich of 2 August 1847, available on the following link: https://archive.org/details/ausmetternichsna07mettuoft/page/388/mode/2up

1861) was the other important figure of the Second Italian War of Independence. Cavour was the Prime Minister of Victor Emmanuel and the man behind the alliance with Napoleon III.

Austria was defeated and Sardinia annexed Lombardy from Austria (but not Venetia). Central and South Italy were still resisting but the Kingdom of the Two Sicilies was experiencing some insurrections in 1860. This is when Garibaldi was sent to Sicily with 1,000 volunteers. This operation was later called *La spedizione dei Mille* (The Expedition of the Thousand). Sicilian rebels soon joined the operation, which increased to 4,000 men. They won battle after battle in Sicily and pursued their operation to the mainland, crossing the Strait of Messina. Soon, Calabria, Basilicata and Apulia surrendered. People in Naples literally welcomed Garibaldi in September 1860. With the Sardinian army coming from the North, the whole peninsula could have soon been annexed but the Catholics resisted. Napoleon III did not allow the invasion of Saint Peters' patrimony. This ended the provisional unification process of Italy, without the (reduced) Papal States and Venetia. Garibaldi – sill angry about the loss of Nice to France – retired on the island of Caprera, off the shores of Sardinia, and Cavour died unexpectedly in 1861.

In 1865, Florence became the new capital city of Italy, replacing Turin (which was the capital city of the Kingdom of Sardinia). Technically, the unification of Italy occurred through the annexation by the Kingdom of Sardinia. The tensions between Piedmont and the newly annexed regions were thus numerous.

It was the Third Italian War of Independence that allowed to complete the unification process. The Kingdom of Italy – with Garibaldi again – fought against Austria in 1866, gaining Venetia. Italy had to wait until 1870 to include Rome in its new Kingdom. This was due to the Franco-Prussian War of the same year: Napoleon III needed his armies to fight against the Germans; he thus could not provide protection to the Papal States anymore. Thus, when the French eventually lost against Prussia in Sedan, nothing was standing in the way. In 1871, the capital moved from Florence to Rome. For the eternal city, this meant a new demographic expansion after the fall of the Western Roman Empire[153].

2.2) The Legal Unification

When the new Kingdom[154] decided to unify its civil law, it opted for the French model. This decision was grounded on the fact that Sardinia had already similar codes and that the sole available alternatives were the Prussian and the Austrian Codes, which were not acceptable. The ALR was too detailed and too conservative, and the ABGB was the Code of the enemy. Italy considered that France was their ally and that it had the most brilliant Code to offer. The first Civil Code of the Kingdom of Italy was enacted in 1865 (without Venetia and the Papal States). The negative image of the annexation of Italy by Napoleon I was forgiven by the hand of Napoleon III[155].

In substance, the *Codice Civile* of 1865 is very similar to the Napoleon Code. Yet, it was innovative in being the first code to integrate international private law provisions into its

153 Around 150 AD, Rome had ca. 1,500,000 inhabitants. In the 6th century, it fell to 40,000 inhabitants and around the year 1000, even to 30,000. Only around 1951, Rome exceeded the numbers of the Antiquity. Apparently, the first modern city to have surpassed the antique Rome was London, in 1831, with 1,655,000 inhabitants.

154 The Kingdom of Italy was proclaimed on 17 March 1861.

155 See A.GAMBARO/A.GUARNERI, *op.cit.*, p.80.

preliminary provisions. This feature was proposed by Pasquale Stanislao Mancini[156]. For the rest and insofar as the French influences were significant, Italian jurists of the end of the 19th century were directed towards the French doctrine[157]. This notably meant that books from French jurists were translated into Italian[158], including the writings of Aubry and Rau as well as the ones of François Laurent[159].

Contrary to the French doctrine, French case law did not have a direct influence on Italian case law, except if it had been integrated and accepted by the French doctrine. Insofar as Italian judges never referred to French case law, the style of their decisions varied from the French one. Italian decisions were indeed much longer and much more motivated than the French ones[160]. Italian decisions also varied from the French ones due to the differences between their respective judicial systems. Whilst the French *Cour de cassation* was at the top of the French system (with a lot of power and weight), the unification of Italy's judicial system had not been completed at the time of the enactment of the *Codice Civile*. There were indeed four different *Corte di cassazione* (Turin, Florence, Naples and Palermo[161]), none of which was in a position to act as an arbiter in the interpretation of the law. Case law was thus of a less importance for Italian jurists[162].

This being said, there was another source of inspiration, namely Roman law. Unlike in France, the most prestigious chair of Italian Law Faculties was the Roman law Chair (and not the Civil law Chair). Therefore, whereas French interpreters were keen to opt for rational solutions, Italian jurists rather opted for Roman law to supplement their law. This choice is particularly telling when focusing on the elaboration process of general principles of law: whilst the Frenchs based it on the law of reason, the Italians stuck with Roman law[163].

Therefore and considering that the Pandectists were seen as the best jurists of that time, the end of the 19th century in Italy was marked by a willingness from the Italian specialists of Roman law to be in contact with German Romanists[164]. From then on, the Italians turned away from the French influence to focus on the teachings of the German Historical School[165], and the German law books – rather than the French ones – were translated into Italian.

The German influence on Italian law also affected private and public law. Italian authors found inspiration in the German dogmatic. The German influence was overwhelming[166]: for instance, Italians started to use the expression "*negozio giuridico*[167]", which is a translation of the German "*Rechtsgeschäft*". Adopting German legal concepts implied the creation of new Italian legal concepts such as "*il soggetto*, *le vicende*, *la fattispecie*[168], etc.".

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156 Brilliant jurist and minister, he stood at the side of Garibaldi during the wars of independence; he was also strongly opposed to the death penalty.

157 See R.SACCO, *op.cit*., p.258.

158 On the translation tradition of the French exegetes which ended with Baudry-Lacantinerie, see A.GAMBARO/A.GUARNERI, *op.cit.*, p.81 and subs.

159 SACCO (*Ibidem*) observes the existence of an "uniform juridical air" covering France, Italy and Belgium.

160 A.GAMBARO/A.GUARNERI, *op.cit.*, p. 82 and subs.

161 Rome was added in 1870, during the integration of the Papal States into the Kingdom of Italy.

162 See R.SACCO, *op.cit*., p.258 and subs.

163 See R.SACCO, *op.cit*., p.259.

164 See R.SACCO, *op.cit*., p.259 and subs.

165 This turnaround seems to have resulted from a choice of method. Even when the French doctrine and the Pandectist doctrine reached the same result, the reasoning of the Germans seemed cleared and less arbitrary than the Exegeses. See for instance the illustration drawn from the preface of Giovanni Pacchioni's book and proposed by A.GAMBARO et A.GUARNERI (*op.cit.*, p.86 and subs.).

166 See R.SACCO, *op.cit*., p.260 and subs. A similar influence also existed in France (with the works of Lambert and Saleilles) but it did not have the same general effect.

167 See for instance V.SCIALOJA, *Negozi giuridici,* 1893.

168 See R.SACCO, *op.cit*., p. 260.

The reception in Italy of the Pandectist doctrine eventually discredited the French model of interpretation of the law. Yet, it also raised the question whether a Code inspired by French law could be interpreted with German tools. This is exactly what the Italians did by using the Pandectist system whenever it was compatible – or at least non-contradictory – with the Civil Code. They refrained from doing so in the sole event where the contradiction between German law and the Italian Civil Code was flagrant. This was notably the case with the transfer of ownership. The Italian Civil Code relied on the French system of automatic transfer of ownership through the sales contract. Italian jurists could thus not refer to the "*dingliche Einigung*" without amending the Code.

In a nutshell, the Italian trend was to reject the French solutions whenever it was possible. Thus, whereas the French jurists would have recourse to traditional solutions outside of the Code, Italian jurists would rely on the letter of the law to reject the French solutions. A good example of this practice is the field of donations: the French Civil Code provides that donations must be done in the presence of a notary; in practice, however, it is accepted that donations be made without further modalities; the Italian jurists, on the other hand, rejected the French solution to stick with the law.

3) The Elaboration of a New Civil Code for Italy

3.1) The First World War

The First World War put an end to the Italian admiration towards German law. Although Italy was part of the Triple Alliance since 1882 (with the German and Austro-Hungarian Empires), it declared itself neutral at the beginning of the War. Later, it offered its help to Austria and Germany in order to receive some territories in exchange. Italy sought to have the Trentino and Croatian islands, but the Austro-Hungarian Empire refused the deal. In 1915, Italy entered the War on the sides of the Allies, thereby rejecting the Triple Alliance.

Professor Vittorio Scialoja was an important figure of this period. Whilst the latter was a driving power underlying the rapprochement with the Pandectist School, he then changed his mind. In 1916, he wrote an article entitled "*Per un'alleanza legislativa fra gli Stati dell'Intesa*[169]", which was well received by the dean of the Faculty of Law in Paris, Ferdinand Larnaude. In 1917, the latter invited Scialoja to give a conference in Paris. In the frame of such conference – entitled "*L'entente juridique entre la France et l'Italie*[170]" –, Scialoja clearly called for a collaboration between jurists of the two countries. To support this call, Scialoja insisted on the German aggression and on the fact that French and Italian armies were fighting side by side. Sialoja also stated that, in the free world both nations were defending, the common intellectual and spiritual heritage had to be preserved. This common intellectual and spiritual heritage was the Roman heritage, a period he called the happiest in the world, a time of peace and unity of money, of weights and measures, of road networks and of law. He then alleged that modern codifications destroyed this unity of law but still observed that most of these codifications relied very much on Roman law, notably with respect to their law of obligations. He thus suggested that Italy and

169 V. SCIALOJA, "Per un'alleanza legislativa fra gli Stati dell'Intesa", *Nuova Antologia*, 1916, p. 450. This title can be translated as follows: "For a legislative alliance with the allied States".

170 V. SCIALOJA, "L'entente juridique entre la France et l'Italie", *Revue internationale de l'enseignement*, 72 (1918), pp. 171-184. This title can be translated as follows: "The juridical agreement between France and Italy".

France be working together to develop a new legal community that would serve the world in a near future.

Towards this goal, Italy created a "*Comitato Italiano per un'alleanza legislative fra nazioni amiche*[171]" in 1916, which was chaired by Scialoja. Right after, France created a similar committee, called "*Comité français pour l'union legislative entre les nations alliées et amies*[172]" and which was chaired by Larnaude. These committees were initially private initiatives. They soon started to collaborate spontaneously. Later, the Italian Committee became official through a decision of the Italian government. The Committee was renamed "*Commissione Reale per la riforma dei codici*[173]". In parallel, the French Committee was also officially recognized under the name of "*Commission d'études du ministère de la Justice*[174]". Both Committees pursued their work under the name of "Mixed Commission[175]".

In that respect, Scialoja wrote that other countries than Italy and France wished to join the club of countries with a new Code of obligations[176]. He mentioned Belgium, Romania, Greece and Canada.

In 1927, the Mixed Commission issued a draft for a common code of obligations and contacts[177]. Following such issuance, the political situation changed and both countries were not as close as they used to be. This was notably because of Mussolini, who became the *de facto* dictator of Italy in 1925. Nevertheless, the Mixed Commission met again in 1935 in Paris and in 1936 in Rome[178]. The purpose of these meetings was to extend the existing draft to commercial contracts. Yet, no official text had ever been made public afterwards. Finally, the French government decided to set aside the project of a new code of obligations mainly because it became politically unacceptable to work with Mussolini anymore.

3.2) A New Civil Code for Italy (*Codice Civile* of 1942)

Unlike the French, the Italians were not that radical about the Civil Code project of the Mixed Commission. Yet, they considered that the project was a mere update of the Napoleon Code. They thus wished to get closer to the German scholars[179].

The dominant position of the Italian doctrine was fading away. It was considered too scattered[180] and the doctrinal controversies appeared too frequent to help the practice. In addition, the judiciary system managed to be unified with solely one Cassation Court, i.e. the one of Rome. The best conditions were in place to allow case law to take over the power and play in Italy the same role as it played in France.

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171 This can be translated as follows: "Italian Committee for a legislative alliance between friendly nations".

172 This can be translated as follows: "French Committee for the legislative union between allied and friendly nations".

173 This can be translated as follows: "Royal commission for the reform of the Codes".

174 This can be translated as follows: "Study Commission of the Ministry of Justice".

175 COMMISSIONE REALE PER LA RIFORMA DEI CODICI & COMMISSION FRANÇAISE D'ÉTUDES DE L'UNION LÉGISLATIVE ENTRE LES NATIONS ALLIÉES ET AMIES, *Projet de Code des obligations et des contrats*, Rome 1928, XXXV: « *Les deux Commissions officielles, française et italienne, ont donc pris la suite des travaux de leurs devanciers et (...) leur collaboration, sans changer ni de caractère, ni de méthode, est devenue plus intime* ».

176 V. SCIALOJA, in: *Studi e proposte della prima sottocommissione presieduta dal Sen. Vittorio Scialoja*, Roma 1920, p. 357.

177 COMMISSIONE REALE PER LA RIFORMA DEI CODICI & COMMISSION FRANÇAISE D'ÉTUDES DE L'UNION LÉGISLATIVE ENTRE LES NATIONS ALLIÉES ET AMIES, *Projet de Code des obligations et des contrats*, Rome 1928.

178 M. ROTONDI, "The Proposed Franco-Italian Code of Obligations", in *American Journal of Comparative Law*, Summer, 1954, vol. 3, pp. 345-359, p. 345-356.

179 A.GAMBARO/A.GUARNERI, *op.cit.*, p.80.

180 See R.SACCO, *op.cit*., p.264.

From 1930 until 1936, the Italian Commission pursued its work towards a reformed Civil Code; it drafted four books. The first three books of this project dealt with persons, family law and things, whilst the fourth book concerned the law of obligations and contracts. This last book included the text of the project of the Mixed Italo-French Commission.

At the end of 1939, it was decided to extend the draft Civil Code to all personal and professional relations of citizens. This meant that commercial law and labour law were integrated into the project. With respect to the fourth book, it was withdrawn to be replaced with a new draft, which would include – next to the traditional contracts of sale, lease and enterprise – modern contracts such as insurance, transport, agency, bank credit, etc. A fifth book, called *del lavoro*, was added. It dealt with any economic activity, going from individual relations (including liberal professions) and collective labour relations to competition law, monopoly law, patent law, partnership and capital company law. A sixth book dealing with protection of rights, ended the Civil Code. This last book included provisions on rules of transcription, evidence, securities (*sûretés*), usucapion, limitation period and enforcement of judgments.

3.3) The Fascist Content of the *Codice Civile* of 1942

In March 1942, Italy enacted a decree in virtue of which the six books of the draft Civil Code – completed with an Act on the Legal Value of the *Carta del lavoro* (i.e. Chart of Labour), the text of the Chart and the provisions on the laws in general – would form the *Codice Civile*. This Code included 2,969 articles and came into force on 21 April 1942. The Labour Chart and the Act on Legal Value remained outside of the Civil Code. They amounted to an affirmation of the fascist ideology of Italy but had no real impact on the private law provisions provided for in the Code[181].

After World War II, it was decided that the *Codice Civile* as such was not a fascist code and that the abrogation of the *Carta del lavoro*[182] as well as of other fascist laws did not harm the whole Code, which was acceptable in light of the principles of democracy[183].

3.4) The Plan of the *Codice Civile* and the General Provisions

The plan of the Civil Code is divided into six books and sticks with some sequences of the 1865 Code (e.g., persons – things – obligations). There is no German influence to be identified in that respect. The same could be said regarding the absence of a general part. However, the Italian jurisprudence integrated the alphabet of the law included in the General Part of the BGB. In addition, the rules that German case law developed on the basis of the general clauses were directly integrated into the *Codice Civile*.

Article 1 of the *Codice Civile* provides for a list of the sources of law, which includes customary law but none of the corporative rules of fascist origin. Article 8 states that customary law may be implemented only when the law says so.

With respect to the interpretation of the law, Article 12 of the *Codice Civile* innovates since it acknowledges the use of the interpretation by analogy and the use of general principles. On the other hand, the important innovation of the 1865 Civil Code – namely, the rules on private international law – was withdrawn from the *Codice Civile* of 1942 through a law of 1995.

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181 P.ARMINJON/B.NOLDE/M.WOLFF, *Traité de droit comparé*, Paris 1950, p.143.

182 *Carta del lavore*,

183 See R.SACCO, *op.cit.*, p.265 and subs.

3.5) French Remains in the *Codice Civile*

Whereas the French tradition can be found in various articles and fundamental decisions[184], we will only focus on two important features, i.e. the transfer of ownership and the extracontractual liability.

As for the transfer of ownership, it sticks with the French model. Article 1376 provides that the ownership is transferred by agreement. This choice was already made at the time of the previous Civil Code and the Italians wished to keep it.

As for the extracontractual liability, the system is also very similar to the French example. Article 2043 reads as follows: "*Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno*"[185]. If the wording is very similar to the French Article 1382, it is more precise as it refers to "*fatto doloso o colposo*" instead of merely "*fait*".

With respect to tort law, there are other differences between the Italian and French models. For instance, Article 2044 of the *Codice Civile* excludes any liability when the person has acted in a situation of self-defence; Article 2045 of the *Codice Civile* provides for the same solution in case of necessity, provided that the author of the damage has not purposedly caused the necessity at stake and that the damage was not otherwise avoidable; Article 2047 deals with the liability of an incapable person by allowing for the compensation of the victim, which must be paid by either the incapable's supervisor or the supervisor itself depending on their respective economic situation.

Lastly, one must observe that the concept of moral damage was influenced by Roman law tradition. Indeed, Article 2059 of the *Codice Civile* states that "non-economic damage must be compensated only in cases determined by law". Such a solution is different from French law, which does not limit the right to have a compensation for moral damage. In the draft Code of obligations, the Franco-Italian Commission chose to follow the French example and to admit any moral damage. Yet, this rule was later deleted from Italian law.

3.6) Influences of German case law on the *Codice Civile*

German jurisprudence also strongly influenced the 1942 *Codice Civile* in terms of contract law.

Article 1341 of the *Codice Civile* provides that when one of the parties imposes general terms to the other, these general terms do not apply unless they were expressly agreed to in writing. Article 1342 continues by stating that when the contract was signed on a pre-printed form, the clauses added later that contradict the pre-printed ones take precedence over these latter.

In case of disproportion between the mutual performances of the parties to a bilateral contract and if this disproportion derives from the fact that one party took advantage of the weakness of the other party, the rescission of the contract can be claimed (Article 1448 of the *Codice Civile*). As a landmark, the disproportion (*lesione*) must be at least of one half of the value of the performance promised.

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184 See enumeration done by R. SACCO (*op. cit.*, p. 266).

185 This can be translated as follows: "Any intentional or culpable act, which causes unfair damage to others, obliges the person who committed the act to pay compensation for the damage".

Article 1454 of the *Codice Civile* introduces a procedure called "*diffida ad adempiere*", i.e. a warning to comply or to fulfil. This procedure applies when one party to a bilateral contract does not fulfil its obligations. With this warning to fulfil, it is possible to terminate the contract without having to go to court. The party that does not fulfil its obligations is given a certain period of time to fulfil its obligations and if it does not do so within that period of time, the contract will be automatically terminated.

Article 1467 of the *Codice Civile* provides for the *clausula rebus sic stantibus*. According to such institution, if the performance of one of the parties to a periodic contract becomes excessively expensive due to an extraordinary and unpredictable event, this party may claim the termination of the contract.

Article 2041 of the *Codice Civile* sets forth another Pandectist invention, namely the action for unjust enrichment. Roman law already provided for a series of actions to deal with unjust enrichment, but these actions were rather casuistic. German jurists of the 19th century relied on such actions to create a general principle. This general principle was then integrated into the *Codice Civile*.

3.7) Relations between the Catholic Church and the *Codice Civile*

After the French Revolution of 1789, a clear distinction between the Church and the State was established. This affected Italy too. Yet, the Lateran Agreements of 11 February 1929 brought again the Italian State closer to the Vatican. Article 1 of these Agreements states that the catholic religion is the religion of the State. There are therefore several fields of Italian law where the catholic religion occupies a special place.

A first example is marriage law. Although Article 1865 of the *Codice Civile* qualifies marriages as secular, Article 34 of the said Agreements provides that the Italian State gives to the sacrament of marriages the effects of civil marriages but that marriages remain canon law contracts ruled by canon law and ecclesiastical courts. Accordingly, divorce remained prohibited in the *Codice Civile* until 1970, when it became lawful after long and difficult debates at the Parliament.

A second example is criminal law. Article 402 of the *Codice Penale* condemns public offences against the catholic religion[186]. As the mentalities evolved and the Italian State changed, such article was challenged before the Constitutional Court of Italy. The plaintiffs claimed that this provision was incompatible with the principle of secularity of the Italian State. In 1988, the Constitutional Court rejected the claim. The Court contended that, insofar as most Italians were Catholics, offences to such religion would cause more trouble than if these offences were directed towards another religion. The discrimination was thus justified for the Court. Anyway, in 2000, the Court eventually declared Article 402 of the *Codice Penale* unconstitutional.

4) Short Conclusion on Italian Law

The 1942 *Codice Civile* is the result of a blend of French and German influences. Yet, modern Italian jurists consider that it is mainly a set of French rules with a German terminology and interpretation. However, one can observe that, whilst the first *Codice Civile* followed the French

[186] Strictly speaking, Article 402 mentions the "religion of the State" but refers to the Albertine Statute, which is repeated in Article 1 of the Lateran Agreements.

example, the second *Codice Civile* was modelled on the German example, this without ever breaking with all their traditions.

The French influence can be explained by political reasons. At the time of the first *Codice Civile*, France was supporting the unification of Italy. At the time of the second *Codice Civile*, German law became unacceptable due to World War II.

Chapter 11 - Greek Law

1) Introduction

Whereas the Romans were brilliant builders, organisers and jurists (e.g., their networks of roads, aqueducts and legal interventions are unmatched), the Greeks were certainly greater philosophers and scientists (e.g., Aristotle's intelligence and knowledge (384-322 B.C.); it was probably him who first demonstrated that the Earth is round and not flat by showing that the shadow of the Earth during Moon's eclipses is round; he was also interested in political sciences).

With respect to ancient Greek Law, Cicero expressed himself as follows:

Marcus Tullius Cicero, *De Oratore*, I, 197 : *Percipietis etiam illam ex cognitione iuris laetitiam et voluptatem, quod, quantum praestiterint nostri maiores prudentia ceteris gentibus, tum facillime intellegetis, si cum illorum Lycurgo et Dracone et Solone nostras leges conferre volueritis; incredibile est enim, quam sit omne ius civile praeter hoc nostrum inconditum ac paene ridiculum; de quo multa soleo in sermonibus cotidianis dicere, cum hominum nostrorum prudentiam ceteris omnibus et maxime Graecis antepono. His ego de causis dixeram, Scaevola, eis, qui perfecti oratores esse vellent, iuris civilis esse cognitionem necessariam*[187].

Free translation: In studying this science (of law), you will still have the noble pleasure, the just pride of recognizing the superiority of our ancestors over all other peoples, by comparing our laws with those of their Lycurgus, their Dracon, their Solon. Indeed, it is hard to imagine the incredible and ridiculous disorder that reigns in all other legislations; and this is what I keep repeating every day in our talks, when I want to prove that other nations, and especially the Greeks, never came close to the wisdom of the Romans. These are the reasons that led me to say, Scaevola, that a knowledge of civil law was necessary for anyone who wanted to become a perfect orator.

If credits can be given to such statement[188], it should not be taken too literally. The Romans compared themselves with the Greeks and recognized the latter's great qualities in many fields such as the arts and philosophy. The way Cicero alleges the superiority of his own people over the Greeks in the field of law seems to result, at least in part, from this competitive relationship between two great civilisations of Antiquity.

2) Antiquity

Traditionally, Greek Antiquity is divided into three eras: the Archaic Era (2nd millennium-7th century BC); the Classical Era (7th century BC-4th century BC); the Hellenistic Era (4th century-1st century BC).

2.1) The Archaic Era

187 Traduction française : « Vous aurez encore, dans l'étude de cette science (du droit), le noble plaisir, le juste orgueil de reconnaître la supériorité de nos ancêtres sur tous les autres peuples, en comparant nos lois avec celles de leur Lycurgue, de leur Dracon, de leur Solon. En effet, on a de la peine à se faire une idée de l'incroyable et ridicule désordre qui règne dans toutes les autres législations ; et c'est ce que je ne cesse de répéter tous les jours dans nos entretiens, lorsque je veux prouver que les autres nations, et surtout les Grecs, n'approchèrent jamais de la sagesse des Romains. Voilà les raisons qui m'ont fait dire, Scaevola, que la connaissance du droit civil était nécessaire à celui qui voulait devenir un parfait orateur ».

188 J. GAUDEMENT (*Les institutions de l'Antiquité*, 5ème édition, Montchrestien, Paris 1998, p.12) affirms, for example, the originality and undeniable superiority of Roman law over other ancient laws. Similarly, he writes (p.30): "This absence of any systematisation, common to the laws of the East and Greece, sets them in fundamental opposition to Roman law. It was through the development of a genuine science of law that Rome prevailed over all other ancient peoples".

The Archaic Era started with the Era of the Minoan Civilisation[189], also called the civilisation of Palaces. It was a Bronze Age civilisation that flourished mainly on the island of Crete. The name of this civilisation comes from the name of the mythical King Minos of Knossos. Insofar as their language is still undecrypted, their kind of government is still unknown. Yet, the predominance of female figures in authoritative roles seems to indicate that the Minoan society was matriarchal. The end of the Minoan civilisation might have been partly caused by one of the largest volcanic explosions in history. This eruption was followed by a massive tsunami. It took place on the island of Thera, which is now called Santorini.

The Mycenaean civilisation[190] is the first distinctively Greek civilisation in mainland Greece. It perished with the collapse of the Bronze Age culture. It was followed by the so-called Greek Dark Ages or the Homeric society[191].

If these civilisations are obviously very significant for the history of mankind, their influences on legal history were less significant. At least, their legal knowledge is too little known.

2.2) The Classical Era

The Classical Era is one of the *poleis*. The pølis is a new form of political government with an important impact on the law. This Era is a time of great legislators, especially Lycurgus, Dracon, and Solon. We do not know a lot about Lycurgus of Sparta but the legend transmitted by Plutarch[192] states that he would have written Sparta's law. Dracon and Solon were Athenian legislators[193].

With respect to Dracon, he lived during the 7th century and reformed the Athenian law in 621 BC. If his name is still linked to the severity of the criminal sanctions he inflicted, he also mitigated the arbitrariness of the judges by setting equal and fixed sanctions to all citizens. In addition, he was the first one to distinguish between murder and homicide, which constituted an important innovation for criminal law.

With respect to Solon, he lived during the 7th and 6th centuries BC. He was a poet, a traveller and a rich salesman. He reformed politics, law and trade. In terms of politics, he reduced the privileges of the aristocracy in favour of a plutocracy. In terms of law, he allowed appeals against decisions issued by judges, and helped farmers by prohibiting lenders from taking the borrower's person as a pledge[194]. In terms of trade, Solon reformed weights and measures, and created a currency that would guarantee Athens' independence.

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189 It is also known as the "palace civilisation". Writing was unknown there at first, but from the end of the third millennium, signs were inscribed on vases to identify their contents. These signs indicated the nature and quantity of the food contained in the vases (GAUDEMET, *op. cit.*, p. 54). The Cretans then switched to hieroglyphic writing, followed by Linear A. This latter script has yet to be decoded, but we know that it was a language of the local population predating the Greek population (GAUDEMET, *op. cit.*, p. 55). They then moved on to Linear B. Linear B tablets have been discovered at Knossos, as well as in the Peloponnese. This script transcribes a Greek language. Linear B is also the script of the Achaeans of the Mycenaean civilisation (GAUDEMET, *op. cit.*, p. 55). The Minoan civilisation disappeared in a cataclysm (earthquake, eruption and tidal wave) around 1450.

190 The Mycenaean civilisation was the one that took root in Mycenae and other cities on the Greek peninsula. The Mycenaeans also used Linear B and writings found in the Peloponnese attest to significant bureaucratic activity (GAUDEMET, *op. cit.*, pp. 57-58). Archaeological excavations have shown that they traded with many regions of the Mediterranean.

191 Homeric society is the one depicted in the Homeric poems: the Iliad and the Odyssey. The historical value of these poems is obviously questionable. The fact remains that, in the absence of other more reliable sources, they provide important evidence of the "Greek society" at the end of the Archaic period.

192 Plutarch devotes one of his Parallel Lives to Lycurgus and the Roman King Numa Pompilius. From the outset, Plutarch notes that nothing is known with certainty about the Spartan legislator, but he places his existence in the 9th or early 8th century BC.

193 See for instance GAUDEMET, *op.cit.*, p.72.

194 ARISTOTE, *Constitution d'Athènes*, chapitre VI. (French translation reproduced in: GAUDEMET, *op.cit.*, p.93 and subs.).

The next period is often called the Golden Century for the Athenian democracy (5th century BC). This period also corresponds to Pericles, who ruled over Athens from 443 to 429 BC. One of the latter's important achievements was to have involved the poor classes into public affairs. In terms of democracy, the popular assembly (called *ecclesia*) exercised direct government, and was composed of all men over 18 years old. Discussions were free and votes were done with hands. Such assembly intervened in the political decisions of the city (e.g., war and peace, control of finances, public constructions, etc.) and was competent for crimes against the city as well as in matters of banishment (i.e. exile through ostracism[195]).

Ostracism was not a punishment, but a preventive measure that reflected the city's distrust of a man who was too powerful and could become a tyrant. Ostracism did not affect the family or property. It was simply a matter of removing a dangerous person. The decision was taken without any trial. There was no accusation or defence, and ostracism did not have to be justified. In this way, the city asserted its omnipotence. However, ostracism was subject to a procedure designed to avoid hasty decisions. Every year, between January and March, the prytanis asked the people whether it would be appropriate to convene an assembly to vote on the ostracism of a citizen. If so, a period of one or two months was allowed for reflection before the assembly was held. The assembly, presided over by the nine archons and meeting in the agora, decided on the ostracism. The name of the banished person was announced by the herald. That person was given ten days to leave the country. In principle, the period of exile was ten years, but some texts refer to a shorter period.

Apart from this quasi-judicial role played by the popular assembly, judicial power was exercised by the Areopagus, the Heliaia Court and the magistrates. The Areopagus – after losing its political functions – kept a judicial power on the worst crimes (e.g., murders, premeditated injuries, poisoning, arson (fire), false testimony). The Heliaia Court – created by Solon – played an important role as the appeal court of the decisions issued by the magistrates. This popular Court was composed of 6,000 citizens over 30 years old selected by lot on an annual basis. Due to a growing number of trials, the Court was divided into 10 courts (*dikasteria*) of 501 members[196] each, where the remaining 1,000 members were substitutes (i.e. *suppléants*). Given that such a Court represented the people, there was no appeal possible. Due to the lack of public prosecutors, prosecutions were launched by individuals who thus risked heavy penalties if he failed to convince the *dikasterion*. The investigation was undertaken by a magistrate, who also chaired the Court afterwards. When the debates were closed, there was no deliberation. The judgement was delivered immediately through a vote among the members of the *dikasterion*.

The Classical Era ended at the end of the 4th century BC. As the regime in force started to decline, the power eventually ended into the hands of the Macedonians. Philipp of Macedonia, and his son Alexander, founded an empire whose dimensions are still unknown.

2.3) The Hellenistic Era

195 GAUDEMET, *op.cit.*, p.81: "Il ne s'agit pas d'une peine, mais d'une mesure préventive qui traduit la méfiance de la cité à l'égard d'un homme trop puissant qui pourrait devenir un tyran. L'ostracisme ne frappe pas la famille et n'atteint pas les biens. Il s'agit simplement d'éloigner un personnage dangereux. La décision est acquise sans procès. Il n'y a ni accusation, ni défense et l'ostracisme n'a pas à être motivé. Ainsi s'affirme la toute-puissance de la cité. Cependant l'ostracisme est soumis à une procédure qui doit éviter les décisions hâtives. Chaque année, entre janvier et mars, les prytanes interrogent le peuple sur l'opportunité de convoquer une assemblée pour se prononcer sur l'ostracisme d'un citoyen. Dans l'affirmative, un délai d'un ou deux mois de réflexion est laissé avant la tenue de l'assemblée. Celle-ci, présidée par les neuf archontes et réunie à l'agora, se prononce sur l'ostracisme. Le nom du banni est proclamé par le héraut. Dix jours lui sont donnés pour quitter le pays. L'exil est en principe de dix ans, mais certains textes font état d'une durée moindre".

196 The number could vary according to the importance of the case. For private cases, the number of jurors could be reduced to 201. It was essentially for political cases that *dikasteria* of 501 jurors were used, or even of 1501 jurors when the case was particularly serious.

The Macedonian domination over Greece led it to the Hellenistic Era, which lasted until the Roman conquest. During this period, there was not much legislative innovation. Alexander the Great's Empire grew too quickly to allow a real administrative and judicial reorganisation.

Then, the Greek territories passed progressively under the Roman domination. It is not clear when Roman law supplanted Greek law. Initially, due to the principle of the personality of law, the Greeks remained subject to Greek law. It was at that period that Cicero compared Roman law to Greek law, considering Greek law almost ridiculous (see above).

This being said, it is stated that – during the years 454-449 BC – the *Decemviri* (i.e. ten men in charge of Rome) took inspiration from the Laws of Solon[197] to draft the Law of the Twelve Tables. It is difficult to determine to which extent Roman law was influenced by Greek law[198]. Yet, one must recall that Cicero himself asserted that a rule taken from the Law of the Twelve Tables was a mere translation of Solon's Law[199]. In saying so however, Cicero wished to show his erudition rather than asserting a historical certainty[200].

During the first centuries of the Principate, the Greeks progressively became Roman citizens. Roman Law was thus applicable to them. From that moment, both Roman law and Greek law were on the same path. During the postclassical Era of Roman law, the Roman Empire was divided into different "zones"[201] to enhance the administration and, especially the defence against foreign attackers. During the 4th century AD, the Emperor Constantine settled in Byzantium, and changed the latter's name into Constantinople. The latter may be considered as the new Rome. At the end of the 4th century, the Empire was divided into a Western Roman Empire and an Eastern Roman Empire. From the Greek's standpoint, this division transformed the Eastern Roman Empire into a quasi-Greek Empire: the common language was Greek and not Latin anymore. From then on, the Empire also became Christian.

3) The Byzantine Era

3.1) Justinian Law

The advent of Justinian can be seen in two ways. On the one side, the traditional – Western – point view considers Justinian's legislative opus as the pinpoint of Roman law, which allowed an important turn back towards classical Roman law. On the other side, the Greek point of view considers Justinian's law as the beginning of Byzantine law. Actually, Justinian is in between these two points of view: his Digest, Institutes and Code are Roman legislations, written in Latin and essentially containing previous rules of Roman law; his Novels contain new rules, meet new needs and are written in Greek.

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197 Livy writes that an ambassy was sent to Athens to study Solon's laws. He also writes that three decemvirs, the authors of the Law of the XII Tables, took part in this expedition to Athens: [*Ab Urbe condita,* 3.31 : "(…) *Cum de legibus conueniret, de latore tantum discreparet, missi legati Athenas Sp. Postumius Albus A. Manlius P. Sulpicius Camerinus, iussique inclitas leges Solonis describere et aliarum Graeciae ciuitatium instituta mores iuraque noscere.* » ; 3.33 : « (…) *His proximi habiti legati tres qui Athenas ierant, simul ut pro legatione tam longinqua praemio esset honos, simul peritos legum peregrinarum ad condenda noua iura usui fore credebant*. (…)"].

198 This question occupied many authors. Among them, we can notably cite: Michèle DUCOS, *L'influence grecque sur la loi des douze tables (Préface d'André Magdelain)*, Presses Universitaires de France, Paris 1978; and Michel HUMBERT, *La codificazione décemvirale: Tentativo d'interpretazione*, *in* M. HUMBERT (cur.), *Le Dodici Tavole*, IUSS Press, Pavia 2005, pp.5-19.

199 M.T. CICERO, *De Legibus*, II, 23, 59: "(…) *Iam cetera in XII minuendi sumptus [sunt] lamentationisque funeris, translata sunt de Solonis fere legibus. 'Hoc plus', inquit, 'ne facito'. 'Rogum ascea ne polito'. Nostis quae sequuntur. Discebamus enim pueri XII ut carmen necessarium, quas iam nemo discit.* (…)".

200 See in this respect: : M. DUCOS, *L'influence grecque sur la loi des douze tables*, Presses Universitaires de France, Paris 1978, pp.37-41.

201 Diocletian established the Tetrarchy, a sort of four-man government (on this subject, see for example: William SESTON, *Dioclétien et la Tétrachie*, Paris 1946), but this system did not survive him.

The Byzantine period lasted until the Fall of Constantinople, which ended into the hands of the Ottoman Empire in 1453.

3.2) The *Ecloga* and the *Basilica*

If Justinian's reign has proven to be very fruitful in terms of law, the same cannot be said about his successors. There was a qualitative decline in the law over the centuries that followed.

The most important legislative innovation during this period occurred in the field of criminal law, with the *Ecloga* (from the ancient Greek ἐκλογή, meaning "choice, selection"). The *Ecloga* was a code enacted during the 8th century by Leo III and his son Constantine V, which compiled rules selected from Justinian's Code. The purpose of this code was to humanise criminal law and reduce the number of crimes that could lead to death penalty. The *Ecloga* was written in Greek and was influenced by Christian ethics. It was applied until the advent of the Macedonian dynasty and Basil I, who rejected the code.

Under the Macedonians, there was a new period of blossoming in terms of law. In the 9th century, Basil I undertook to recodify Roman law. Most of the work was done under the reign of Leo the Wise. Yet, the main inconvenient of Roman law, and in particular of Justinian's Digest, was that it was written in Latin, a language that was no longer widely spoken by the people. Thus, around 900, a Greek version of Justinian's Digest was enacted under the name *Basilica*. This version is precious as it provides interesting interpretations of Justinian's Digest after some years of implementation.

3.3) The *Hexabiblos*

Following the hijacking of the 4th Crusade, Constantinople fell into the hands of the Crusaders in 1204. The city was looted and its resources were plundered. This had a negative impact on the relations between Catholics and Orthodox and this caused the Empire to be fragmented. The Crusaders established a Latin Empire of Constantinople and shared the Greek territories with each other.

The Greeks – driven out of Constantinople – considered to be exiled and kept the desire to reconquer their capital. They grouped into three independent states (i.e. the Empire of Nicaea, the Despotat of Epirus and the Empire of Trebizond), which considered themselves to be the heirs of the Byzantine Empire. In 1261, Michel Palaiologos, the co-emperor of Nicaea, re-established the Byzantine Empire and the Palaiologan dynasty ruled over Byzantium until its definitive fall (i.e. when it fell into the hands of the Ottomans, who took Constantinople in 1453).

In terms of law, this period corresponds to the *Hexabiblos* of Constantine Harmenopoulos. Enacted in 1345, the *Hexabiblos* was composed of 6 books, in which civil and criminal law were systematically classified. It was in this form that Byzantine law was applied by the various Balkan peoples during the four centuries of the Ottoman domination.

4) Modern Greece

4.1) Independence War

From the 18th century onwards, the Ottoman Empire started to weaken. This also corresponded to the period when the Philosophy of the Enlightenment and the French Revolution started to inspire the Greek diaspora.

The war of independence started in 1821 in the Peloponnese. The National Assembly of Epidaurus declared the independence of Greece in 1822. However, the Ottomans were far from giving up on Greece: numerous Greeks were massacred by the Ottoman army in different parts of Greece, and particularly on the Island of Chios (out of the 100,000 to 120,000 inhabitants of Chios in 1822, about 25,000 were killed and 45,000 enslaved). This terrible episode caused a wave of sympathy in favour of the Greek independence movement throughout Europe[202].

The liberation from the Ottoman yoke did not yet bring peace: from 1823 to 1825, Greece was indeed plunged into civil wars. The country suffered a lot, and many cities were in ruins (e.g., Athens had only 300 houses standing in 1830 when von Maurer arrived with the Regency Council[203]).

4.2) The Greek Law of the National Assemblies

In the field of law, the independence implied that a Greek Civil Code was soon to be written in accordance with the French example. The reasons behind this choice were not only to have a systematic and modern codification, which was necessary for a country wishing to belong to the Western Europe, but also political[204].

However, the political situation of that time was so tense that the plan to write a Civil Code for Greece could not be completed immediately. Therefore, the unanimous decision of the National Assemblies of Epidaurus (1822), Astros (1825) and Troezen (1827) was to choose – in the meantime – the application of the "Laws of our Memorable Emperors" as the Law of the State. Concretely, this meant to go back to the Basilica of the Byzantine Emperors[205]. This was not an easy choice since solely two copies of the Basilica of Leo IV the Wise were still available on the Greek ground at that time. Thus, to facilitate the administration of justice, the Governor Ioannis Kapodistrias – the first Head of the State of independent Greece – decided that by the Law of the Byzantine Emperors, one should understand the Laws of Harmenopoulos[206]. Accordingly, it was the *Hexabiblos* that had to be applied by the Greek courts. For commercial matters, it was the Greek translation of the French Commercial Code translated that applied.

4.3) The Greek Kingdom

In 1830 (i.e. some time before the assassination of Ioannis Kapodistrias), the three National Assemblies offered the throne of Greece to Leopold of Saxe Coburg Gotha[207]. The latter refused it because of the tensions that persisted in Greece and because the changes to the Constitution he requested were never granted. After some other refusals due to the same motives as the ones

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202 See G.L VON MAURER, *Das griechische Volk in öffentlicher, kirchlicher und privatrechtlicher Beziehung vor und nach dem Freiheitskampfe bis zum 31. Juli 1834*, Heidelberg 1835, p. 1.

203 G.L. VON MAURER, *op. cit.*, p. 21-22.

204 See French summary of Chariklia Dimakopoulou on the introduction of the Greek Civil Code (Δημακοπούλου Χ., Η πορεία προς σύνταξιν ελληνικού Αστικού Κώδικος. Η περίοδος των αναζητήσεων: 1822- 1891. Συμβολή εις την ιστορίαν του νεοελληνικού δικαίου, Athènes 2008, p. 572).

205 Stavros KITSAKIS, "Pavlos Kalligas (1814-1896). Historische Rechtsschule und Pandektenrecht in der ersten Stunde der neugriechischen Rechtswissenschaft", in Savigny *Global 1814-2014. Vom Beruf unserer Zeit zum transnationalen Recht des 21. Jahrhunderts, St. Meder/C.-E. Mecke (Hg.)*, Göttingen 2016, p.395-417, 396.

206 See also G.L. VON MAURER, *op. cit.*, p. 331; Athina DIMOPOULOU-PILIOUNI, "Il diritto privato romano nella giurisprudenza dei tribunali ellenici", in Fernando Reinoso BARBERO (ed.), *Principios Generales del Derecho. Antecedentes Historicos y Horizonte Actual*, Thomson Reuters Aranzadi, Madrid, 2014, p.1.

207 G.L. VON MAURER, *op. cit*., p.4.

put forward by Leopold of Saxe Coburg Gotha, the National Assemblies finally turned to the young Otto of Wittelsbach, which was 17 years old at the time. He accepted the throne of Greece[208]. As the second son of Ludwig I, King of Bavaria, he became King of Greece in 1832. Due to his young age, a Regency Council was established for the beginning of his reign.

4.4) The Regency Council

The Regency Council's first concerns were money and troops[209]. Law was not their priority.

Of the three members of the Regency Council, it was the jurist Georg-Ludwig von Maurer – a distinguished member of the German Historical School – who was in charge of the administration of justice[210]. He made sure that four new codes be enacted[211]: a Criminal Code, a Code of Civil Procedure, a Code of Criminal Procedure and a Code organising tribunals and public notaries. Besides, he wished to improve the Greek translation of the French Commercial Code[212]. His personal involvement into this work was essential. The various Codes were first written in German and then translated into modern Greek[213]. von Maurer also undertook to study Greek customary law in order to find the Volksgeist, which was crucial to the Historical School[214].

From 1832 to 1835, it was decided to draft a Civil Code. A commission was established. Its mission was to adapt the French Civil Code to the Greeks' needs[215]. According to von Maurer, such a choice was not his but resulted from a decision made before his arrival in Greece. He had thus no choice but to comply with it[216]. He even confessed that he would have preferred to lean towards ancient Greek law, which was similar to the ancient German law. He thus tried to mix these three legal systems (French, Ancient Greek and ancient German)[217].

Whilst waiting for the Greek Civil Code to be enacted, it was decided to apply – as a transitory provision – the decree of the Regency of 1835, which provided that the civil laws of the Byzantine Emperors as found in the *Hexabiblos* had to remain in force during the drafting process and until the enactment of the new Civil Code[218]. At the same time however, such a decree allowed judges to use customary law as well as Byzantine Law and Justinian's legislation[219].

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208 G.L. VON MAURER, *op. cit*., p.5; it seems that he was confident about the fact that once he would be *de facto* King, the Greeks would forget their "ideas about the constitution" (VON MAURER, p. 74-75).

209 G.L. VON MAURER, *op. cit*., p.68.

210 The Regency Council was composed of three men: Joseph Ludwig von Armansperg, Georg Ludwig von Maurer and Carl Wilhelm von Heideck. Carl von Armansperg was chairing the Council, but the relationships between these men did not seem to be good. G.L. von Maurer (*op.cit.*, p. 93-97) writes how ridicule and pathetic he thinks von Armansperg has been during the time he spent in Greece, as member of the Regency Council (1832-1834).

211 Michail SOTIROPOULOS, European jurisprudence and the intellectual origins of the Greek state: the Greek jurists and liberal reforms (ca 1830-1880), p. 34 (PhD: consulted last on 26.11.2020: https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/9111/Sotiropoulos_Michail_PhD_270215.pdf?sequence=1&isAllowed=y).

212 The Greeks already used a Greek translation of the French *Code de commerce*. G.L. VON MAURER (*op.cit.*, p.335) writes that the first Greek translation was poor and had to be rewritten. It was enacted in 1834.

213 G.L. VON MAURER, *op. cit*., pp.342-344.

214 DIMAKOPOULOU, *op. cit*. p. 573; VON MAURER (*op.cit.*, p. 331-333) writes that he wanted to protect Greek customary law against a prevailing unfavourable mood.

215 Stavros KITSAKIS, *op. cit*., p. 396.

216 G.L. VON MAURER, *op. cit*., p. 346.

217 G.L. VON MAURER, *op. cit*., p. 347.

218 Athina DIMOPOULOU-PILIOUNI, *op.cit.*, p.1.

219 Stavros KITSAKIS, *op. cit*., p. 396.

4.5) ***Hexabiblos* vs *Pandectas***

This possibility to rely on two distinct sets of rules caused some turmoil among Greek jurists. Many of them resolutely turned to the Roman law of the *Corpus Iuris Civilis* and the Pandectist law, which had been brought in by Otto's advisers from Bavaria. Two camps were thus emerging with respect to the law to be applied in Greece. Indeed, the *Hexabiblos* had still its own supporters[220].

A Greek translation of the French Civil Code was completed under the direction of Konstantino Schinas, the first rector of Athens' University founded in 1837. It was already Schinas who translated the codes prepared by von Maurer[221]. Although he was not a jurist, he was Savigny's son-in-law and had a very good knowledge of the law[222]. Together with three other persons, he completed the translation of the French Civil Code in 1838[223].

The Pandectist professors did their best to show the shortcomings of the laws of Harmenopoulos[224] and to demonstrate how much the Pandectist law was necessary for Greece. German law eventually prevailed.

The Greek Pandectist School was represented by two distinguished professors of civil law at the University of Athens: Pavlos Kalligas and Petros Paparrigopoulos, who both studied law in Germany. Kalligas, who studied with Savigny, did not want Greece to be using a foreign code since it would have implied a renunciation of Greek sovereignty. Greek law had to rely on the Greek Volksgeist[225]. However and similarly to Savigny, his focus was mainly on the Roman law that was prior to both the Hexabiblos and the Basilica, namely the Roman law of the Classical Period[226].

In that respect, it is important to note that the national historian Paparrigopoulos managed to impose the idea of a Greek history divided into three phases: Ancient Greece, Byzantium and the New Greek State. The latter had to define its identity similarly to other new European States at the same period. The continuity thesis prevailed.

Yet, Kalligas' preference for Classical Roman law created a break in this continuity thesis, at least with respect to the continuity of Greek law. As a consequence, he had to admit that Classical Roman law was a foreign law, even if his wish was to draft a Greek Code. The main difference between Kalligas and Savigny is that the former was not opposed to the codification of law. Instead, he was reluctant about a hasty reception of the French Civil Code[227].

Whereas the main defenders of the Basilica (i.e. Konstantin Ractiva and Basil Oikonomides) did not give up the fight, the Pandectists had the great advantage of being able to rely on a rich scientific production, which was lacking on the opposite camp. In addition, the most important

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220 Even in recent years, the *Hexabiblos* kept its supporters, amongst whom it is impossible not to mention our dear friend and colleague Konstantinos PITSAKIS. See also Stavros KITSAKIS, *op. cit.*, p. 396.

221 G.L. VON MAURER, *op. cit.*, p. 343.

222 Stavros KITSAKIS, *op. cit.*, p. 399-400.

223 Stavros KITSAKIS, *op. cit.*, p. 400.

224 Stavros KITSAKIS, *op. cit.*, p. 412.

225 Stavros KITSAKIS, *op. cit.*, p. 402.

226 Stavros KITSAKIS, *op. cit.*, p. 408.

227 Stavros KITSAKIS, *op. cit.*, p. 411.

Pandectist works had also been translated into Greek[228]. The influence of these works was such that courts referred to them in their decisions as if they constituted legal codes, instead of referring to legislation. In the same vein, Kalligas wrote a five-books opus on the system of Roman civil law as though it was applied in Greece[229].

On the other hand, the Byzantine law was losing its influence and was considered as being less appropriate for the needs of a modern State. Greek law was thus modernised by new pieces of legislation, which would later on be included in the Greek Civil Code.

Besides, it must be noted that the Greek territory continued to change after the first years of its independence. It included new territories (Crete, Samos, Ionian Islands[230], etc.), which had their own Civil Code. The need to enact a common Civil Code was thus urgent. However and even if such a Code was already announced by the said decree of the Regency Council, Greece had to wait for another century before having its own common Civil Code.

4.6) Commissions for the Drafting of a Hellenic Civil Code in the 19th century

From 1835 to 1866, there were three different commissions that worked on the text of the new Civil Code: Commission Christodule Clonarès, Commission Constantine Proveleghios and Commission Georges A. Rallis. Their work was slowed down due to the coups of 3 September 1843 and of 1862. The latter also brought a change of dynasty by expelling King Otto[231].

In 1847, the Greeks considered calling von Maurer back to draft the Civil Code. The latter's conditions were however not accepted by the Greek government. Therefore, the Bavarian jurist did not come back.

After the change of Dynasty, the commission Georges A. Ralis was reorganised. It completed the Greek Civil Code's project in 1870. This project was based on the French Civil Code as well as on the Code of the Kingdom of the Two Sicilies, the Code of the Netherlands and Roman-Byzantine Law. Besides, the members of the Commission introduced innovations[232].

This project was however never transmitted to the Parliament. The Minister of Justice, Alexandros Al. Contostlavos, considered that the Greek juridical world was not ready to elaborate a new Civil Code that would be able to replace the Roman-Byzantine law. In reality, the Minister of Justice was delaying the enactment of the new Civil Code in order to keep the legal unity of Greece, and thus hoped to include the Greek provinces that were still living under the Ottoman yoke.

In 1873 and 1874, the project was reviewed by two successive commissions. The last commission, which was composed of most of the members of the previous commissions, submitted a revised version of the project. This revised version included 2025 articles and was transmitted to the Parliament. The project was not voted by the Parliament due to the latter's dissolution in April 1875. The project was never submitted to the new Parliament due to the same reasons as in 1870 but also because Germany had started to draft its own Civil Code. It

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228 See for example: F. MACKELDEY, *Lehrbuch des heutigen Römischen Rechts* (translated by Rallis and Renieris); B. WINDSCHEID, *Lehrbuch der Pandekten* (translated by Diovouniotis); H. DERNBURG, *System des Römischen Rechts* (translated by Diovouniotis).

229 Pavlos KALLIGAS, *Σύστημα Ρωμαϊκού Δικαίου καθ' ά εν Ελλάδι πολιτεύεται* (5 τόμοι, 1848-1855).

230 The Ionian Islands were attached to Greece in 1864.

231 DIMAKOPOULOU, *op. cit.* p. 575.

232 DIMAKOPOULOU, *op. cit.* p. 575.

was considered crucial to wait for such codification. The Greeks were, at that period, convinced that German law was closed to Roman-Byzantine Law, and thus more suited to Greece.

4.7) The Beginning of the 20th century in Greece

At the outset of the first World War, Greece took a neutral position. Yet, it could not stick to such a position. The French indeed pushed Greece to pick up a side. Whilst the Greek King, Constantine I, was Germanophile, the Prime Minister, Eleftherios Venizelos, was in favour of the Allies. They eventually declared war to Germany and Bulgaria. This led to the overthrowing of the King, in favour of his second son Alexander I.

After the War, the Greeks hoped again to increase their territories by taking advantage of Turkey' weaknesses. Yet, this led to the war with Turkey (1919-1922), which resulted in severe losses against the army of Mustapha Kemal Atatürk and in the conclusion of the Treaty of Lausanne in 1923. This Treaty defines the borders between Turkey and Greece and provides for the Greek-Turkish population exchange. More concretely, the Turks that lived in Greece had to go to Turkey, while the Greeks living in Turkey had to go to Greece. The bases of such exchange were not ethnicity or language but religious identity. This means that the Turkish-speaking Orthodox citizens had to leave Turkey for Greece, while the Greek-speaking Muslim citizens had to leave Greece for Turkey.

4.8) A New Start for the Drafting of the Greek Civil Code

In 1930, the Eleftherios Venizelos Government established a new commission of five members to draft a new Greek Civil Code that would not be a mere translation of a foreign code. These members were professors K. Demertzis (chair), K. Triantafyllopoulos, G. Ballis, G. Maridakis and the lawyer P. Thivaios. This commission strived for drafting a new code that would codify the law in force while trying to adapt it to the needs of the Greek society.

The work of the commission resulted in a project of 5 books, each member having written one book. The dictatorial Metaxas government[233] then asked Professor G. Ballis to harmonise the 5 books and to give them a final touch. It took him one year to complete this final task. The Civil Code was due to come into force on 1 July 1941. Yet, the dictatorship came to an end and Greece was occupied by Mussolini's Italy during the Second World War. The enactment of the Civil Code was thus suspended again.

After the liberation, the P. Voulgaris Government established a new commission that would include all surviving members of the previous one (i.e. Ballis, Triantafyllopoulos and Maridakis) as well as J. Sakketas. They finalised the project and handed it to the Government in 1945. On 23 February 1946, at the occasion of the anniversary of the Decree of the Regency, the new Greek Civil Code came into force.

Whereas such codification may appear to have constituted a turning point for Greek law – relegating Roman law to the historic books –, there was no real discontinuity before and after the new Civil Code[234]. Indeed, Greek Courts continued to invoke Roman law directly in their judgments[235].

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233 The government of Ioannis Metaxas (1936-1941) was a dictatorial government.

234 Athina DIMOPOULOU-PILIOUNI, *op.cit.*, p.2.

235 Athina DIMOPOULOU-PILIOUNI, *op.cit.*, pp.2-7.

4.9) The Greek Civil Code of 1946

The Greek Civil Code is divided into five books:

- General Principles
- Law of Obligations
- Property Law
- Family Law
- Law of Successions

It has 2035 articles, as well as 21 articles in the Introductory Law.

The structure of the Code and the presence of a general part show an obvious Pandectist influence. It also includes German case law after the entry into force of the BGB. Nevertheless, the Greek Civil Code cannot be seen as a simple copy of the BGB or of any other code. Byzantine tradition was also one of the inspiration sources.

With respect to the style of the Code, the Greeks wished an easy-to-read Code, like the Swiss ones. Yet and insofar as the Greeks did not have to deal with cantons, the Greek Civil Code is more complete than the Swiss Codes.

Article 1 of the Greek Civil Code provides that the sources of law are the statutes and the customs. A third source is then added by the Greek Constitution in 1975, with Article 28, §1 stating that the rules of international law immediately applicable in Greece must also be considered as a source of law.

4.10) Some Rules of the Greek Civil Code

The Greek Civil Code provides for a list of the sources of obligations: it is either a contract or the law. The extra-contractual liability does not therefore appear amongst the sources of obligations. It is in the law that negligence, unjust enrichment and *negotium gestum* are to be found.

The Greek Civil Code includes several general clauses such as the general clause of good faith (Article 288), which is inspired by the German "Treu und Glauben" (Article 242 of the BGB), the prohibition of the abuse of rights (Article 281) or the power of the judge to annul or adapt a contract in the event of an unexpected change in circumstances (Article 388). Through these general clauses, judges are being given an important power of interpretation.

The transfer of ownership is similar to the Roman and German laws: an agreement distinct from the sales contract is required to transfer the property (Article 1033). Both contracts are "Rechtsgeschäfte" (σύμβαση) and subject to the general rules of validity. The consent must be devoid of defects and the transfer of ownership implies that the seller was the owner of the alienated thing. The Greek equivalent to the Roman *traditio* and the German *dingliche Einigung* is called εμπράγματη σύμβαση. In principle, these two distinct agreements are in causal connection, meaning that if the sales contract is declared invalid, the ownership will not be transferred either. Yet, such principle is only applicable if it has not given rise to rights *in rem* for the benefit of third parties (Article 184). Accordingly, the agreement on the transfer of ownership recorded in the land register, will remain valid despite the invalidity of the sales contract, provided however that the agreement on the transfer of ownership has not been declared invalid by a judicial decision which has become *res judiciata* and which has also been

recorded in the register. On that point, the Greek Civil Code follows the German principle of abstraction (Abstraktionsprinzip).

The transfer of risks also follows the German example. Risk is indeed transferred together with the ownership when the ownership is specifically transferred.

The extra-contractual liability (Article 914) followed the pattern of the French general clause inspired by Grotius. Yet, a second general clause (article 919) follows the German pattern in giving a list of unlawful acts that give rise to a claim for damage, when accomplished intentionally and in contradiction with good morals.

After the entry into force of the Greek Civil Code, amendments were made: civil marriage was introduced in 1982, gender equality was recognised by the Greek Constitution in 1975. Similarly to Germany, it was the Greek Constitution that stimulated the evolution of the Civil Code towards gender equality.

The Greek Civil Code was mainly influenced by the German BGB but other Codes did exert a certain influence on it too (e.g., Swiss Codes (Code of Obligations and Civil Code), the French Code and case law, the Roman-Byzantine law).