THE CAMBRIDGE COMPANION TO

ROMAN LAW

This book reflects the wide range of current scholarship on Roman law. The essays, newly commissioned for this volume, cover the sources of evidence for classical Roman law; the elements of private law, as well as criminal and public law; and the second life of Roman law in Byzantium, in civil and canon law, and in political discourse from AD 1100 to the present. Roman law nowadays is studied in many different ways, which are reflected in the diversity of approaches in the essays. Some focus on how the law evolved in ancient Rome, others on its place in the daily life of the Roman citizen, still others on how Roman legal concepts and doctrines have been deployed through the ages. All of them are responses to one and the same thing: the sheer intellectual vitality of Roman law, which has secured its place as a central element in the intellectual tradition and history of the West.

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Abbreviations

1. General

AARC	Atti dell'Accademia Romanistica Costantiniana
AE	*L'Année Épigraphique*
AJP	*American Journal of Philology*
ANRW	*Aufstieg und Niedergang der römischen Welt*, edited by H. Temporini (Berlin, 1972–)
BIDR	*Bulletino dell'Istituto di Diritto Romano*
c.	caput (i.e., chapter)
C.	Code of Justinian (*Corpus iuris civilis* vol. 2, edited by P. Krueger)
C. 1 q. 1 c. 1	*Decretum Gratiani*, Causa 1, quaestio 1, canon 1
CAH	*Cambridge Ancient History*, 2nd edn. (Cambridge, 1970–2005)
CCG	Cahiers du Centre Glotz
CGL	*Corpus Glossariorum Latinorum*, edited by G. Goetz, 7 vols. (Leipzig, 1893–1901)
CIL	*Corpus Inscriptionum Latinarum* (Berlin)
Collatio	*Mosaicarum et Romanarum Legum Collatio* (in *FIRA* vol. 2, 541–89)
CPL	*Corpus Papyrorum Latinarum*, edited by R. Cavenaile (Wiesbaden, 1958)
CQ	*Classical Quarterly*
C.Th.	Theodosian Code
D.	Digest (*Corpus iuris civilis* vol. 1, edited by T. Mommsen and P. Krueger)
DD	*Doctores* (authoritative jurists on the *ius commune*)
Dist. 1 c. 1	*Decretum Gratiani*, Distinctio 1, canon 1
D. p.	Dictum post (in the *Decretum Gratiani*)
Ed. Just.	Edict of Justinian

FIR	*Fontes Iuris Romani*, edited by C. G. Bruns, 7th edn. by O. Gradenwitz (Tübingen, 1909)
FIRA	*Fontes Iuris Romani Anteiustiniani*, edited by S. Riccobono, J. Baviera, C. Ferrini, J. Furlani, and V. Arangio-Ruiz, 3 vols., 2nd edn. (Florence, 1968)
fo.	folio
FV	*Fragmenta Vaticana* (in *FIRA* vol. 2, 463–540)
Gaius	*Institutes* of Gaius
gl.	gloss
gl. ord.	*glossa ordinaria*
ILS	Inscriptiones Latinae Selectae
Inst.	*Institutes* of Justinian (*Corpus iuris civilis* vol. 1, edited by P. Krueger)
JJP	*Journal of Juristic Papyrology*
JRS	*Journal of Roman Studies*
lex Irn.	*lex Irnitana*
lib.	liber (i.e., book)
ms	manuscript
Nov.	Novels (*Corpus iuris civilis* vol. 3, edited by R Schoell and G. Kroll)
PS	*Pauli sententiae* (in *FIRA* vol. 2, 317–417)
PSI	Pubblicazioni della Società italiana per la ricerca dei papyri greci e latini in Egitto
RAAN	Rendiconti dell'Accademia di Archeologia Lettere e Belle Arti di Napoli
RAC	Reallexikon für Antike und Christentum (Stuttgart, 1950–2012)
RE	*Paulys Realencyclopädie der classichen Altertumswissenschaft*, edited by G. Wissowa et al. (Stuttgart, 1894–1978)
RHDFE	*Revue Historique de Droit Français et Étranger*
RIDA	*Revue Internationale des Droits de l'Antiquité*
Roman Statutes	Roman Statutes, edited by M. H. Crawford, 2 vols. (London, 1996)
SB	Sammelbuch Griechischer Urkunden aus Ägypten
SDHI	*Studia et Documenta Historiae et Iuris*
SEG	Supplementum Epigraphicum Graecum
Sext 1.1.1	*Liber Sextus*, Lib. 1, tit. 1, cap. 1
TH	Herculaneum tablet

TP	Pompeian tablet
TPN	New Pompeian tablet (in edition by Wolf, 2010)
TPSulp	New Pompeian Tablet (in edition by Camodeca, 1999)
TR	*Tijdschrift voor Rechtsgeschiedenis*
TUI	Tractatus universi iuris (Rome, 1584–86)
UE	*Ulpiani Epitome* (in *FIRA* vol. 2, 259–301)
X 1.1.1	*Decretales Gregorii IX*, Lib. 1, tit. 1, cap. 1
ZSS	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (unless otherwise stated, all references are to the Romanistische Abteilung)

2. Classical Authors

App. *Iber.*	Appian, *Iberica*
Apul.*Apol.*	Apuleius, *Apologia*
Ar. *Pol.*	Aristotle, *Politica*
Asc. *Corn.*	Asconius, *in Cornelianam*
Mil.	*in Milonianam*
Scaur.	*in Scaurianam*
Aug. *Ep.*	Augustine, *Epistulae*
Caes. *Gall.*	Caesar, *De bello Gallico*
Call.	Callistratus
Cels.	Celsus
Cic. *Att.*	Cicero, *Epistulae ad Atticum*
ad Brut.	*Epistulae ad Brutum*
Brut.	*Brutus*
Caec.	*pro Caecina*
Cat.	*in Catilinam*
Clu.	*pro Cluentio*
Deiot.	*pro rege Deiotaro*
Dom.	*de Domo sua*
Fam.	*Epistulae ad familiares*
Flacc.	*pro Flacco*
Inv.	*de Inventione*
Leg.	*De Legibus*
Mur.	*pro Murena*
Off.	*de officiis*

de Orat.	*de Oratore*
Part.	*Partitiones Oratoriae*
Phil.	*Philippicae*
Q. Rosc.	*pro Q. Roscio comoedo*
Quinct.	*pro Quinctio*
Quint. frat.	*Epistulae ad Quintum fratrem*
Rab. perd.	*pro Rabirio perduellionis reo*
Rosc. Am.	*pro Roscio Amerino*
Sest.	*pro Sestio*
Sull.	*pro Sulla*
Top.	*Topica*
1 Verr. /2 Verr.	*in Verrem (actio prima/secunda)*
Dio	Cassius Dio, *Historia romana*
Diod.	Diodorus Siculus, *Bibliotheke*
Dion. *Ant.*	Dionysius Hallicarnassensis, *Antiquitates Romanae*
Eutropius	Eutropius, *Breviarium Historiae Romanae*
Front. *de aq.*	Frontinus, *de aquis urbis Romae*
Gai.	Gaius
Gell. *NA.*	Aulus Gellius, *Noctes Atticae*
Isid. *Etym.*	Isidore, *Etymologiae*
Jul.	Julian
Lact. *Mort.*	Lactantius, *De mortibus persecutorum*
Livy	Livy, *ab Urbe Condita*
Marcel.	Marcellus
Marci.	Marcian
Mod.	Modestinus
Ov. *Trist.*	Ovid, *Tristia*
Pap.	Papinian
Paul	Paul
Petr. *Sat.*	Petronius, *Satyrica*
Plin. *Ep.*	Pliny (Caecilius Secundus), *Epistulae*
Plin. *NH.*	Pliny (Secundus), *Naturalis Historia*
Plin. *Pan.*	Pliny (Caecilius Secundus), *Panegyricus*
Plut. *Cato*	Plutarch, *Cato maior*
Cic.	*Cicero*
Pomp.	*Pompey*

Quaest. rom.	*Quaestiones romanae*
Sull.	*Sulla*
Polyb.	Polybius, *Histories*
Pomp.	Pomponius
Quint. *Inst.*	Quintilian, *Institutio Oratoria*
Sall. *Cat.*	Sallust, *Catilina*
Hist.	*Historiae*
Jug.	*Jugurtha*
Scaev.	Q.Cervidius Scaevola
Sen. *Apoc.*	Seneca, *Apocolocyntosis*
Ira.	*de Ira*
SHA	Scriptores Historiae Augustae
Stat. *Silv.*	Statius, *Silvae*
Strabo	Strabo, *Geographia*
Suet. *Aug.*	Suetonius, *Augustus*
Calig.	*Caligula*
Claud.	*Claudius*
Galb.	*Galba*
Jul.	*Julius*
Ner.	*Nero*
Tib.	*Tiberius*
Tac. *Ann.*	Tacitus, *Annales*
Dial.	*Dialogus*
Hist.	*Historiae*
Ulp.	Ulpian
Val. Max.	Valerius Maximus, *Facta et Dicta Memorabilia*
Varr. LL.	Varro, *de Lingua Latina*
Vitr.	Vitruvius, *de Architectura*

21 Roman Law in the Modern World

Reinhard Zimmermann

1. Roman Law in Legal Practice*

> Three times the laws of the world were dictated by Rome, three times it bound the nations together in unity: first when the Roman people still stood in the fullness of their power, the unity of the *State*; secondly after the fall of that state, the unity of the *Church*; thirdly as a result of the reception of Roman law in the Middle Ages, the unity of the Law. The first was achieved by force of arms and compulsion, the latter two by the force of mind and reason.

These are the opening words of Rudolf von Jhering's *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (1852–1865). And, indeed, Roman law was one of the elements of the culture of antiquity that left an enduring mark on contemporary Europe and beyond.

Of course, this is particularly conspicuous where the continuity of the development has not been disrupted or obscured by the intervention of the legislature. South Africa probably provides the best example in the modern world. Here Roman-Dutch law as imported by the settlers of the Dutch East India Company in the middle of the seventeenth century – that is, the early modern *ius commune* in its specifically Dutch variant – still applies today.[1] The courts in Cape Town, Blomfontein, and Pretoria therefore still occasionally rely on authors such as Voet and Vinnius, Van Bynkershoek, Grotius, and Ulrich Huber or even venture back directly to the Roman sources.[2] Within Europe, Roman law is still referred to, every now and again, in the Scottish courts. In spite of the Union of Crowns and Parliaments, Scotland retains an independent legal system which owes its civilian flavour mainly to the institutional writers of the seventeenth and eighteenth centuries.[3] As a result of having come under the influence of English law too, Scots law today presents the picture of a mixed jurisdiction;[4] together with South African law, it is

the main modern exponent of this phenomenon that has remained uncodified.[5] In San Marino the *ius commune* still applies in its pure form, unaffected by a reception of English legal rules and doctrines. Professors from Italian faculties of law, appointed as judges of appeal, still today base their decisions ultimately on the *Corpus iuris civilis*.[6] By far the majority of the other civilian legal systems have codified their private law. Here the immediate practical relevance of Roman law is confined to the very rare occasions on which pre-unitarian law is still applicable, as in a decision of the German Federal Supreme Court of 1984 involving alluvions to an island situated in the river Mosel.[7]

But much more important, if less obvious, is the imprint that Roman law has left on modern codifications. For on a doctrinal level their draftsmen did not usually intend them to constitute a radical turning point. They aimed largely at setting out, incorporating, and consolidating 'the legal achievements of centuries',[8] as they had been processed and refined by generations of scholars. The codifications bore certain characteristics of a restatement and so they were immediately taken to provide a framework for the kind of scholarship of which they were themselves the product.[9]

2. Roman Law in the Modern Civil Codes

When we refer today in modern German law to claims for recovery of property, we distinguish between a claim based on ownership (*rei vindicatio*, *Vindikation*) and one based on unjustified enrichment (*condictio*, *Kondiktion*).[10] Where a possessor makes improvements to an object that does not belong to him and which he is not entitled to keep but has to return under a *rei vindicatio*, he may claim compensation from the owner. The relevant rules are laid down in §§ 994ff. of the German Civil Code (BGB); they are inspired by the Roman rules on the restitution of expenditure (*impensae*).[11] The most important unjustified enrichment claim, which is laid down in § 812 I 1, 1st alternative BGB, is often referred to as *condictio indebiti* (from *indebitum solutum* – that is, a payment that was not owed). § 812 I 2 BGB contains the *condictiones ob causam finitam* (the enrichment claim arising from the fact that the legal ground for a transfer has subsequently fallen away), and *causa data causa non secuta* (the enrichment claim for a cause that has failed to materialize).[12] In § 817,1 BGB we encounter the *condictio ob turpem vel iniustam causam* (the enrichment claim based on the recipient having acted illegally or immorally in receiving the transfer), which, however, can be excluded according to the

maxim *in pari turpitudine melior est causa possidentis* (where both parties have acted illegally or immorally, the possessor is in a comparatively better position and therefore does not have to render restitution): § 817,2 BGB.[13] Here even the terminology still in use points to the Roman origins of modern private law.[14] The link is not always so obvious. The term 'delict' (*Delikt*) is derived from the Roman *delictum*; but the German word for contract (*Vertrag*, based on *sich vertragen*, meaning to make up, to be reconciled) was also formed on the model of the Latin term *pactum* (based on *pacisci*, to make peace),[15] as we find it in the edict of the Roman praetor (*pacta conventa . . . servabo*).[16] The famous provision on good faith in contract law (§ 242 BGB), as interpreted by the German courts from very soon after the BGB had entered into force, originates in the *exceptio doli*, as well as in the *bona fides* that governed the Roman consensual contracts.[17] A person is barred from exercising a contractual right if, by doing so, he contradicts his own previous behaviour (*venire contra factum proprium*), if he himself has not acted in accordance with contract (*tu quoque*), or if he claims something that he will subsequently have to return to the other party (*dolo agit qui petit, quod statim redditurus est*). We read these Roman legal maxims into § 242 BGB.[18] Sometimes the draftsmen of the BGB even received such maxims into the text of the BGB, although not in Latin. § 117 BGB on simulation (*plus valere quod agitur, quam quod simulate concipitur*) and § 305c II BGB (*interpretatio contra eum qui clarius loqui debuisset*, or *contra proferentem* rule)[19] provide examples. Systematic distinctions such as the one between contract and delict, between absolute and relative rights, and between the law of obligations and property law are inspired by Roman law. So are standard types of contract such as sale, exchange and donation, mandate, deposit and suretyship, and the distinction between loans for use (*Leihe*) and loans for consumption (*Darlehen*); general standards of liability such as the various forms of fault (*culpa, dolus, diligentia quam in suis*),[20] as well as specific instances of no-fault liability, such as the ones in § 536a BGB (liability of the lessor for defects in the object leased)[21] and §§ 701ff. BGB (innkeepers' liability);[22] as well as innumerable concepts, legal institutions, and individual rules: the invalidity of immoral contracts (*contra bonos mores*),[23] the special rules on delay on the part of the debtor (*mora debitoris*) and the creditor (*mora creditoris*),[24] the rights of termination and price reduction on account of delivery of a defective object (*actiones redhibitoria* and *quanti minoris*),[25] management of someone else's affairs without authority (*negotiorum gestio*),[26] and liability for damage done by animals.[27] These are just a few random examples that cannot do more than provide a cursory impression of the BGB's Roman impregnation and that have, moreover, been taken from only one specific

area of private law: the law of obligations. Similar lists can be compiled for other areas, particularly property law and the law of succession.[28] The same can be said about the other continental codifications in Europe.[29] The French *Code civil* is in a number of respects even more Roman than the BGB:[30] in its rejection, in principle, of contracts in favour of third parties (art. 1121 *Code civil*, perpetuating the rule of *alteri stipulari nemo potest*);[31] in its insistence on certainty of price as a requirement for the validity of contracts of sale (art. 1591 *Code civil*, the modern version of the requirement of *pretium certum*);[32] in its rule that set-off operates 'de plein droit par la seule force de la loi, même à l'insu des débiteurs' (art. 1290 *Code civil*, which is supposed to be based on set-off *ipso iure* in Roman law);[33] and in its perpetuation of the systematic categories of contract, quasi-contract, delict, and quasi-delict.[34]

3. How Roman is the Roman Law in the Modern Civil Codes?

Misunderstandings, Different Layers of Tradition, Ambiguities

In all of these and in many other cases, our modern law and legal thinking have been moulded by Roman law. Yet hardly ever are the modern rules identical to Roman law (or with one another!).[35] Occasionally, the Roman model has even been turned on its head. Quasi-delict, as we see it today, was a systematic niche for a number of instances of extracontractual no-fault liability; these were kept apart from delictual liability, which depended upon fault.[36] For a long time, however, lawyers proceeded on the assumption that delictual liability was tantamount to intentional damage done to another, while quasi-delictual liability covered cases of negligence.[37] That misconception, which was caused by Justinian's attempt to reconceptualize the sources of classical law from the point of view of a generalized requirement of *culpa*, was shared by the draftsmen of the *Code civil*. But since liability for damage done negligently and damage done intentionally were placed on the same footing, the distinction between delictual and quasi-delictual liability had lost its significance. In addition, an appropriate place to accommodate the phenomenon of no-fault liability within the system of private law was now lacking.[38] Interpretation of the phrase 'ipso iure' in the sense of 'sine facto hominis' (that is, occurring automatically) was also based on a misunderstanding of the Roman sources. Originally, it had been intended to signify that set-off was not to be effected by the judge but that the plaintiff was forced 'by the law itself' to subtract the amount of the counterclaim from his own

claim.[39] Moreover, the relevant sources merely concerned one specific type of set-off: the *agere cum compensatione* of the banker. Unlike modern law, Roman law did not recognize a uniform legal institution of set-off with standardized requirements: reflecting the 'actional' character of Roman law, four different types of set-off were distinguished.[40] With regard to *bonae fidei iudicia*, for example, set-off had to be pleaded. Justinian, too, in one of his constitutions stated that set-off must be declared;[41] and that statement was destined ultimately to shape the model of set-off that we find today in German law.[42]

Thus we are faced with a situation in which two completely different solutions to one and the same problem both find their origin in Roman law. It is not the only one. *Mora creditoris* (delay in accepting performance) provides another example, for both the concept that has found its way into the BGB (the creditor does not infringe a duty vis-à-vis his debtor and is not liable for damages but merely jeopardizes his own legal position in a number of respects) and the idea of *mora creditoris* constituting the mirror image of *mora debitoris* (and thus focusing on duty, fault, and damages) derive from Roman law.[43] Transfer of ownership as an 'abstract' legal act or as being based on a just cause (*iusta causa traditionis*) may also be mentioned.[44] It has even happened that two different solutions are based on one and the same fragment in the *Digest*. Gaius D. 19.2.25.7 is a case in point. Here someone who had contracted to transport columns was held to be responsible for damage done to the columns 'if they are damaged due to his own fault and/or the fault of those whom he used for the transport' (*si qua ipsius eorumque, quorum opera uteretur, culpa acciderit*). If *que* in *eorumque* is interpreted disjunctively,[45] the text provides a basis for a strict type of liability to be imposed on an entrepreneur for damage negligently caused by his employees. We find that solution today, so far as delictual liability is concerned, in art. 1384 *Code civil*.[46] Nineteenth-century German pandectists, on the other hand, understood the text to impose liability on the entrepreneur if he himself and those who had been employed by him had been at fault.[47] On that interpretation the text fitted in neatly with a precept very widely taken as axiomatic in contemporary scholarship, namely that extracontractual liability must be based on fault;[48] and it could be adduced in favour of the fault-based liability for the acts of others that we still find today in § 831 BGB.[49]

. . . *magis differat, quam avis a quadrupede*

Contracts can be formed *nudo consensu*, by mere informal agreement. This basic principle goes back to Roman law. And yet in Roman law it was

valid only in certain situations; the general rule was that an informal agreement does not give rise to an action (*nuda pactio obligationem non parit*).[50] Agreements are to be observed (*pacta sunt servanda*) was a sentence that was formulated for the first time in the *Corpus iuris canonici*, the medieval collection of Canon law.[51] The development of contracts in favour of a third party, the law of agency, and the assignment of claims were for a long time impeded by the Roman idea of an obligation as a strictly personal legal bond between those who had concluded the contract.[52] At the same time, however, the *Corpus iuris civilis* contained a number of crucial points of departure for the eventual abandonment of this restrictive view.[53] One single, apparently innocuous text contained in the *Codex Iustiniani*[54] was to become the catalyst for the general *actio de in rem verso* (action for whatever has been used to enrich another person's property) of French law,[55] which, as such, is undoubtedly un-Roman. The *condictio indebiti* of modern German law, on the other hand, does have a model in Roman law, although one from which it differs considerably. Thus, for example, the Roman *condictio indebiti* lay for enrichment received rather than enrichment surviving;[56] also, it required a *mistaken* payment of something that was not owed. Two conflicting sources contained in the *Corpus iuris civilis* – one by Papinian,[57] the other attributed to the Emperors Diocletian and Maximian[58] – provided the main arguments in a centuries-old debate about the relevance, in this context, of an error of law.[59] In view of the recognition of *pacta sunt servanda*, the *condictio causa data causa non secuta* has largely lost its function; the *condictio ob turpem vel iniustam causam* has lost its completely.[60] As a result, the application of the *in pari turpitudine* rule has also become problematical.[61] Since the Roman *condictiones* in a way supplemented the fragmented Roman contract law,[62] recognition of the general concept of contract in the early modern period also paved the way towards a general enrichment action. This was pursued above all by Hugo Grotius,[63] the French *Cour de cassation*,[64] and Friedrich Carl von Savigny.[65] Each used different points of departure. Generalization of the liability for unjustified enrichment was in turn bound to affect the significance of the Roman rules on compensation for expenditure: if a person who had made improvements on an object belonging to someone else could avail himself of an enrichment claim, he no longer had to be protected by a special set of rules. The draftsmen of the BGB nonetheless decided to retain these special rules (§§ 994ff. BGB); but, by doing so, they had to turn their *ratio* on its head.[66] The decision to preserve the Roman rules under different auspices and within a changed doctrinal environment turned out to be distinctly unfortunate.[67] Delictual liability, too, was

both modernized and generalized in medieval and early modern jurisprudence.[68] Again, it was possible to latch on to the successful attempts of Roman jurisprudence to convert a narrowly confined and strangely formulated enactment from the third century BC, the *lex Aquilia*, into a central pillar of the Roman law of delict.[69] Medieval and early modern lawyers continued to refer to 'Aquilian' liability, even though it had come to differ from its Roman origin 'more than a bird from a quadruped'.[70] That prompted Christian Thomasius in the early eighteenth century to 'tear off the Aquilian mask' from the action for damage done.[71] And yet modern delict is still based on concepts (particularly unlawfulness and fault) that originate in Roman law but cause considerable difficulties in view of the fact that the function of the modern law of delict differs from its Roman forebear.[72] The Roman law of sale was tailored exclusively for the sale of specific objects; the extension of its rules to the sale of objects described as being of a particular kind, or belonging to a particular class (unascertained goods), is due to one of many 'productive misunderstandings'[73] of the Roman sources by medieval jurisprudence.[74] That extension was a very progressive step, for the sale of unascertained goods was to become practically much more significant than the sale of individual objects. Yet at the same time a number of the rules of Roman sales law were hardly suitable for that type of transaction, above all the old rule that with the conclusion of the contract of sale, the risk passes to the buyer (*emptione perfecta periculum est emptoris*),[75] and the aedilician liability for latent defects.[76] The first of these problems was eventually resolved by the draftsmen of the BGB, who established a risk rule differing from Roman law (§ 446 BGB),[77] while the other, in spite of the compromise laid down in § 480 BGB (old version), essentially remained unsettled.[78]

4. Characteristics of Roman Law in Antiquity Essential for its Survival

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

(i) It constituted a highly developed jurisprudence, a specific branch of knowledge developed and sustained by lawyers. That was unique in the world of classical antiquity.
(ii) Closely related with it was what Fritz Schulz referred to as the isolation[79] of law vis-à-vis religion, morality, politics, and economics: the separation of law from non-law.

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

(iv) Roman private law was very largely 'lawyers' law' or 'Juristenrecht': it was not laid down in a systematic and comprehensive enactment, but was instead applied and developed by lawyers with great practical experience.[80]

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

(vi) These controversies were an expression and a sign of the inherent dynamic of Roman law. It was constantly developing. Between Publius Mucius Scaevola (who was described as one of those who founded the civil law[81] and was consul in 133 BC) and Aemilius Papinianus (prefect of the praetorian guards from AD 205–212 and the most eminent lawyer of the late classical era), there was a period of more than 300 years in the course of which state and society, Roman legal culture, and Roman law were subject to fundamental change.

(vii) Reference just to 'Roman law' is therefore imprecise. Even the Roman law of classical antiquity constituted a tradition and was based on a discussion of legal problems spanning many generations of jurists. Here is a typical example:[82] In D. 24.3.66 pr. Justinian preserved a text by Javolenus[83] written at the turn from the early to the high classical period. It is taken from a work that constitutes a revision of the posthumous works of Marcus Antistius Labeo (a contemporary of Emperor Augustus)[84] and contains a rule according to which a husband is responsible for fault (*dolus* and *culpa*) with regard to property that he has received as a dowry. In support of that rule reference is made to the most prominent jurist of the preclassical period, Servius Sulpicius Rufus.[85] Servius, in turn, had taken up the decision of a specific legal dispute by Publius Mucius Scaevola.[86] That dispute concerned the dowry of Licinnia, wife of Gaius Sempronius Gracchus, who had perished in the turmoils unleashed by the agrarian reforms masterminded by Gracchus.

(viii) Roman law, therefore, was extraordinarily complex. It was largely casuistic in nature. It was developed over many centuries and thus constituted a tradition. It was recorded in an abundant literature.[87] And it rested on two conceptually and historically separate foundations: the *ius civile* – that is, the traditional core of legal rules applying to a Roman citizen; and a *ius honorarium* – one might call it Equity – that had been introduced by the praetors in the public interest in order to assist, supplement, and correct the traditional civil law.[88]

(ix) Nonetheless, Roman law was not an impenetrable jungle of detail. The Roman jurists developed a large number of legal concepts, rules, and institutions, which they constantly attempted to coordinate, and intellectually to relate, to one other. They thus created a kind of 'open' system that combined consistency with a considerable degree of flexibility.[89] In the process, the Roman jurists were guided by a number of fundamental values, or principles, such as liberty, *bona fides*, *humanitas*, and the protection of acquired rights, particularly the right of ownership.[90]

(x) Another characteristic of Roman jurisprudence that contributed to making it such a fertile object of legal analysis was the fact that reasons for the decisions arrived at were either not given at all, or only hinted at.[91]

Roman case law is therefore particularly rich in tacit assumptions and presuppositions that can be, and have to be, unravelled by a process of interpretation. Again, an example may illustrate the point. In Marcianus D. 18.1.44 we find the following brief text: *Si duos quis servos emerit pariter uno pretio, quorum alter ante venditionem mortuus est, neque in vivo constat emptio*. Two slaves have been sold for one price. It subsequently turned out that, at the time when the contract was concluded, one of the slaves had already died. Its delivery could thus no longer be demanded, and the contract, as it stood, was invalid. The authors of the *ius commune* based that on the rule *impossibilium nulla obligatio* (there is no obligation concerning the impossible).[92] But can the purchaser request delivery of the second slave? Here we are faced with the problem of partial invalidity of legal transactions. From the time of the Glossators, the general rule was taken to be *utile per inutile non vitiatur*:[93] the 'useful' part of the transaction is not affected by the invalidity of part of it: it remains in force. That rule was taken from a fragment by Ulpian[94] who, however, had not intended to provide a general rule but had merely solved an individual case.

Marcianus' decision in D. 18.1.44 demonstrates that *utile per inutile non vitiatur* cannot have been recognized in Roman law as a general rule, for the contract is held to be invalid with regard to the second slave too. That may be related to the fact that the price for just one of the slaves was neither determined nor determinable with any degree of certainty. One of the requirements for the validity of a Roman contract of sale (*pretium certum*) was thus lacking.[95]

5. Roman Jurisprudence and Its Transmission

The emergence of a jurisprudence with these characteristics would hardly have been possible without the reception of Greek philosophy in republican Rome.[96] Of decisive importance, however, was the role of the legal expert in the application and development of law. In Greece itself that had been absent. Ancient Greek law had been, to put it very pointedly, a law without lawyers: legal disputes were decided by a number of laymen, appointed by drawing lots, who had to take their decision on the basis of oral proceedings, in the course of which parties were allocated a set time in which to argue their case, and the decision had to be given without any discussion or the possibility of asking questions, by secret ballot on the basis of a simple majority.[97] These were not fertile conditions for the establishment of a science of law or the flourishing of legal experts.

Decisive for the European significance of Roman law, moreover, was something that had been completely alien to classical Roman law: a comprehensive act of legislation by the Emperor Justinian. He ordered an enormous compilation of excerpts from the writings of the classical period to be produced (the *Digest*) which he then promulgated as law, together with a collection of previous imperial legislation and an introductory textbook. As is apparent from its Greek name (*pandectae*; hence pandectist legal science), the *Digest* was supposed to be comprehensive, which was also a rather un-Roman idea. 'May no lawyer dare to add commentaries to our work and spoil its brevity through his verbosity', Justinian decreed.[98] But that remained a naive and pious hope. Justinian could not prevent scholars from making a work of scholarship itself the object of scholarship. That was necessary, *inter alia*, because he had introduced an additional level of complexity into the body of legal sources: the texts to be compiled in the *Digest* were more than 300 years old, and Justinian had therefore ordered their revision and adaptation to contemporary conditions (this was the origin of the so-called interpolations); he had placed next to one another and invested with equal validity texts from completely different periods of

Roman legal development, and he had adopted into his compilation a variety of texts that reflected controversies among the Roman lawyers and that therefore hardly constituted the kind of material suitable for an act of legislation.

6. Changes in the Perception of Roman Law

The university is regarded as 'the European institution par excellence'.[99] It does not date back to classical antiquity but originated as a manifestation of the great occidental educational revolution towards the end of the twelfth century, first in Bologna, then in Paris, Oxford, and in an ever-increasing number of places in western, central, and southern Europe.[100] Law in Rome can be described as a jurisprudence without, however, having been an academic discipline taught at the university. But when in the high middle ages law was caught up in the educational revolution just mentioned, it was Roman law that lent itself like none of the other contemporary laws (with one exception closely linked to Roman law, namely Canon law) to scholastic analysis and hence to the type of scholarship appropriate to a university.[101] Roman legal texts therefore immediately occupied the central position in the study of the secular law. That applied to all universities founded on the model of Bologna throughout Europe, and it remained the case down to the era of codification – that is, in Germany until the end of the nineteenth century. Yet the approach towards the Roman texts was subject to considerable change.[102] Medieval jurisprudence predominantly regarded these texts as a logically consistent whole, and attempted to demonstrate how apparent divergences could be overcome. That way of proceeding provoked a reaction in the form of the legal humanism of the Renaissance period. The humanist lawyers were concerned, in the first place, to establish what the texts had originally been intended to mean by their ancient authors. That, essentially, marked the beginning of the history of legal history. But since the humanist lawyers took the Roman texts to embody not only a model of justice and fairness for classical antiquity, but also for contemporary society, they were confronted once again with the problem that some sources contradicted others, that there were questions to which they clearly did not provide an answer, and that some of the answers provided were obviously based on outdated ideas. These problems were tackled by the representatives of a school known programmatically as *usus modernus pandectarum* (modern usage of the *Digest*). Since they had gone through the humanist enlightenment, unlike the medieval lawyers they no longer regarded the texts of

the *Corpus iuris civilis* as absolutely binding authority: one could generalize and further develop the ideas contained in them, critically examine them, or even declare them abrogated by disuse.[103]

At about the same time, another school of thought gained influence which also acknowledged that Roman law had many shortcomings and often merely hinted in the direction of what was just and fair: this school therefore endeavoured to bring out the fundamental truths hidden in the Roman texts by philosophical analysis: the late scholastic, and subsequently secular, Natural law. In the nineteenth century, legal scholarship in Germany was dominated by Savigny's Historical School, which, however, also had considerable appeal and influence in other European countries.[104] With the Historical School, an approach gained ascendancy that tended to look at Roman law from the point of view of contemporary law and so in a way made the analysis of historical texts once again serve present needs. The interpretation of the texts was largely inspired by the consideration of how they could be applied in modern practice. It was only the advent of the BGB that ultimately freed the 'Romanists' (that is, scholars dealing with the sources of Roman law) from the overwhelming weight of that concern and, in the process, converted them from legal doctrinalists into pure legal historians, studying Roman law as a manifestation of classical antiquity.[105]

7. Roman Law and *Ius Commune*

In the broadest outline, this is the history of what is often called the second life of Roman law: its effect on European legal scholarship from the days of the 'reception'. Roman law became the foundation of the *ius commune*. That *ius commune* was a learned law, sustained by academic scholarship and study; it found its manifestation in a very large and essentially uniform body of literature across Europe; and it was based on a uniform university training in law.[106] But it was never on its own. The dualism of Empire and Church, and of Emperor and Pope, was reflected in the dualism of Roman law (that is, civil law) and Canon law, of secular and ecclesiastical courts, and of scholars studying Roman law (the legists) and Canon law (the canonists). At times, the jurisdiction of the ecclesiastical courts extended far into the core areas of private law.[107] There were jurisdictional shifts and conflicts that reflected the power politics between spiritual and secular rulers. But there were also far-reaching intellectual connections. Canon law was the law of the Roman Church, and it was largely based on Roman law; in turn, it exercised a considerable influence

on the secular law.[108] The principle of *pacta sunt servanda* derives from Canon law,[109] as does the principle of restitution in kind.[110]

Apart from Roman law and Canon law, there was also feudal law which had, however, been incorporated through the *Libri feudorum* into the body of Roman law.[111] There were the systematic designs and the doctrines of the late scholastics in Spain[112] and, later, of the adherents of a rationalistic Natural law that were moulded by Roman law and, in turn, influenced the *ius commune*. There were customs (*consuetudines*), confined in their application to specific places and territories, which were recognized within the framework of the *ius commune* and subjected to scholarly analysis. There were the rules and customary laws – predominantly unwritten, but also sometimes laid down in writing – that had emerged, from about the twelfth century onwards, in fairs and trading centres across Europe, as well as in the harbour towns on the shores of the Mediterranean, the Atlantic Ocean, and the Baltic Sea.[113] Here, too, there was mutual influence with regard to Roman law and the Roman-Canon *ius commune*.

Above all, however, there was an enormous variety of territorial and local legal sources that, in theory, always enjoyed precedence before the courts. The *ius commune* was applicable only as a subsidiary source of law, yet practically it often gained the upper hand. According to early modern legal literature, there was even an established presumption (*fundata intentio*)[114] in favour of the application of the *ius commune*. But that presumption does not express the whole truth; for what actually happened in courtrooms across Europe was subject to considerable variation, and it could vary from place to place and from subject area to subject area. Even legal practice in the Holy Roman Empire of the German Nation, the heartland of the reception, can be said by way of summary to have been characterized by 'a legal pluralism hardly imaginable' today.[115] But it was a diversity within an overarching intellectual unity, and that intellectual unity was established by a legal training focusing everywhere in Europe on the body of the Roman legal sources. The unifying effect of the legal training was to become particularly evident, once again, in nineteenth-century Germany. Only in parts of Germany was the *ius commune* directly applicable. The remainder was subject to a range of special legal regimes, among them the Prussian code of 1794, the General Civil Code of Austria, the *Code civil*, the *Landrecht* of Baden (which, essentially, constituted a translation of the *Code civil*), and later also the Saxon Code of Private Law.[116] Nonetheless, it was the *ius commune* that provided the basis for interpreting and truly understanding these legal regimes,[117] and thus it claimed – and was, as a matter of course, granted – centre stage in the curricula of all German faculties of law.[118] The

pandectist branch of the Historical School thus managed to create (or rather preserve) a distinctive cultural unity on the level of legal scholarship, enabling professors and students to move freely from Königsberg to Strasbourg, from Giessen to Vienna, or from Heidelberg to Leipzig.[119]

8. Roman Law and European Legal Tradition

The tension between unity and diversity is characteristic of European culture in general.[120] As will have become apparent by now, it is of central significance also for the European legal tradition.[121] That tradition was shaped by the *ius commune*, which in turn was largely based on Roman law. If one attempts to specify further features characterizing the European legal tradition in comparison with others in the world (that is, the chthonic, Talmudic, Islamic, Hindu, and East Asian),[122] the influence of Roman law can be shown in every instance. There is the element of writing.[123] One of the reasons why Roman law was so influential in medieval Europe is that it was a law that had been laid down in writing. It was *ratio scripta*. This is not only demonstrated by the process of reception itself, but also by the many endeavours to provide written documentation of customary laws prevailing in Europe from the end of the twelfth century (Glanvill and Bracton in England, the *coutumes* in France, the *fueros* in Spain, *Sachsenspiegel* and *Schwabenspiegel* in Germany). This remarkable development was inspired by the learned laws.[124]

Apart from that, Roman law was also for centuries regarded as *ratio scripta*: it was the model of a law that was reasonable – that is, in conformity with human reason. Roman law, therefore, was an expression of, and stimulated the quest for, a law that was rational and scholarly, intellectually coherent, and systematic.[125] At the same time, the specific nature of the Roman sources prevented that system from becoming inflexible and static. For European law has always been characterized by an inherent ability to develop. Or, in the words of Harold J. Berman: 'The concept of a . . . system of law depended for its vitality on the belief in the ongoing character of law, its capacity for growth over generations and centuries – a belief which is uniquely Western. The body of law only survives because it contains a built-in mechanism for organic change.'[126] European law is subject to constant adaptation; it is able to react to changed circumstances and new situations, and it has always displayed an extraordinary capacity for integration. Medieval Roman law was no longer the Roman law of classical antiquity, the *usus modernus pandectarum* no longer corresponded to the *usus medii aevi*, and pandectist legal doctrine was a far cry from the

usus modernus. The development moved, to use a famous phrase coined by Rudolf von Jhering,[127] beyond Roman law by means of Roman law. In the days of the Roman republic and imperial Rome, legal experts had fashioned a Roman 'legal science'.[128] The medieval lawyers turned it into an academic discipline, a learned law that had to be studied at a university.

That is yet another characteristic of European law and also one that originates in Roman law. Law is a learned profession, and the application and development of the law is the task of learned jurists.[129] Closely related is the fact that law is an autonomous discipline and that as a result it is conceived as a system of rules that is separate, in principle, from other normative systems seeking to guide human conduct and to regulate society, such as religion.[130]

9. How European is the 'European' Legal Tradition?

Modern European law still presents the image of an intriguing mixture of diversity and unity. Thus, the continental legal systems are usually subdivided into the Germanic and Romanistic legal families.[131] Moreover, a number of systems have to be located somewhere between these two legal families, particularly the Dutch and Italian ones. But even the systems belonging to the Germanic legal family display significant differences in style and substance. The Austrian and the German Civil Codes date from different periods of European legal development and are marked by different intellectual currents. Of the Swiss Civil Code it has been said that it received its characteristic mark 'largely from the special conditions of Switzerland and the traditions of that country's legal life'.[132] Nonetheless, it can hardly be disputed that all legal systems belonging to the Romanistic and Germanic legal families are sufficiently similar to describe them as different manifestations of one legal tradition.[133] The English term chosen for that tradition is 'civil law' (or 'civilian tradition'), which refers, historically, to Roman law.[134] But are we really entitled to speak of a European tradition? As far as the states of central and eastern Europe are concerned, the question probably has to be answered in the affirmative.[135] Up to the period of the World Wars of the twentieth century, they belonged to the cultural sphere of the *ius commune*. In some of them (most notably Hungary and Poland), the continued teaching of Roman law during the days of the rule of socialism maintained a connection with the west.[136] And since then we can see a process of re-integration 'by way of a renovation of private law guided by

comparative scholarship'.[137] Lawyers in nineteenth-century Tsarist Russia had also availed themselves of the doctrines and methods of Roman law in order to cope with the social and legal challenges that traditional Russian law was unable adequately to deal with. Like lawyers in many other countries, they were particularly inspired by the legal development in Germany that was shaped by Savigny and the Historical School.[138] Turkey in 1926 took over Swiss private law and thus 'conclusively left the Islamic legal family'.[139] The Nordic legal systems are also predominantly regarded as part of the civilian tradition, in spite of having developed their own style in a number of respects.[140]

The central argument often advanced against the recognition of a genuinely European legal tradition is the existence of the English common law which, so it is said, has developed in noble isolation from Europe[141] and is therefore fundamentally different.[142] But the idea of the common law as an entirely autochthonous achievement of the English genius is a myth. In reality England was never completely cut off from continental legal culture; there was a constant intellectual contact that has left its imprint on English law.[143] Even in its origin it was an Anglo-Norman feudal law of a pattern typical of medieval Europe.[144] For many centuries, Latin and French remained the languages of English law. The Catholic Church brought its Canon law,[145] and international trade brought the *lex mercatoria*. In Oxford and Cambridge, two of the oldest European universities, Roman law was taught and studied on the model established in Bologna. From Scotland too Roman legal ideas filtered into English law; Scotland in the early modern period had become a far-flung province of the *ius commune* with particularly close relations to French and Dutch universities.[146] Modern English contract law has been decisively shaped by massive borrowings from authors such as Pothier, Domat, Grotius, Pufendorf, Burlamaqui, and Thibaut.[147] Of course, in many cases the inspiration provided by Roman law has led to entirely un-Roman results. But that was true also of the continental legal systems. Thus, in the best known of the cases concerning King Edward VII's coronation procession – which had to be postponed because the King had contracted peritonitis – we read: 'The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions.'[148] The principle referred to is that of *debitor speciei liberatur casuali interitu rei* (the debtor is released from his obligation to perform when such performance becomes impossible and the impossibility is not attributable to his fault).[149] From about the middle of the nineteenth century onwards, the English courts had started to read that rule into the contractual agreement of the

parties.[150] In the process they used a device also originating in Roman law: the implication of a tacit (resolutive) condition.[151] The foundations were thus laid for the doctrine of frustration of contract. Functionally, this corresponds to the continental doctrine of *clausula rebus sic stantibus*, which was also assembled with elements taken from Roman law, although as such it was unknown to Roman law.[152] But this is merely an example. Wherever one looks, one will find 'legal institutions, procedures, values, concepts and rules that English law shares with other Western legal systems'.[153] Hardly anything is sacred. Even the Magna Carta, 'the most basic statement of English customary law and constitutional principle', was partly shaped by influences coming from the *ius commune*.[154]

A person who does not merely confine his attention to the specific solutions to be found in the sources of Roman law, but also takes account of the flexibility of the civilian tradition and of its capacity for growth and productive assimilation, will be able to acknowledge that it has also shaped the English common law.[155] Of course, it is also marked (as are the continental systems) by countless peculiarities and idiosyncrasies. But it is clear today that these idiosyncrasies are increasingly being worn away, on both sides of the Channel. Basil Markesinis refers to a gradual convergence,[156] James Gordley to an outdated distinction between civil law and common law.[157] That applies on the level of substantive law as much as with regard to basic issues such as legal methodology.[158]

In addition, it must be kept in mind that many other parts of the world have been affected in one way or another by the European legal tradition. The United States inherited English common law,[159] as have most of the other territories once belonging to the British Empire. The Latin American countries received French, Spanish, Italian, and German law.[160] Japanese and (South) Korean law have been significantly shaped by German law;[161] Québec has to a large degree retained its French heritage;[162] Roman-Dutch law prevails in South Africa;[163] and so forth. If all this is taken into account, one may still say today, as Rudolf von Jhering did some 150 years ago:

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

law has thus become, just as Christianity, a constituent cultural feature of the modern world.[164]

10. Teaching and Research in Roman Law

The codifications of continental Europe very largely brought to an end the 'second life' of Roman law, the story of its reception and transformation into a *ius commune*. In nineteenth-century Germany that *ius commune* experienced a last and dazzling flowering. German pandectist scholarship, as it had emerged in the wake of the Historical School, was influential throughout Europe and was accorded pride of place in the world of legal learning.[165] It was also in Germany that codification had particularly dramatic consequences for the scholarship of Roman law radiating, once again, across Europe,[166] for it could now devote its whole attention to antiquity itself and begin to understand the sources of Roman law in their historical context.[167] Otto Lenel reconstructed the praetorian edict on the basis of the fragments from the works of classical jurists contained in the *Digest* (*Das Edictum Perpetuum*, 1893). Lenel's other great work, the *Palingenesia Iuris Civilis* (1889), was a sustained attempt to recreate the classical law library as far as that was possible on the basis of the fragments that have come down to us. Ludwig Mitteis demonstrated the extent to which indigenous 'vulgar' legal conceptions, particularly of Hellenistic origin, remained alive in the eastern part of the Empire and he thus shattered the traditional understanding of a uniform – and uniformly Roman – legal order in imperial Rome (*Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*, 1891).[168] Otto Gradenwitz and Fridolin Eisele were pioneers in the systematic search for interpolations. Fritz Schulz and Franz Wieacker set out to detect pre-Justinianic alterations of the classical texts. With West-Roman vulgar law, Ernst Levy unlocked the interface between ancient Roman law and medieval 'Germanic law'. Alongside private law and civil procedure, the history of criminal and constitutional law attracted increasing attention (Wolfgang Kunkel). Legal practice in the Roman provinces, as documented in a vast quantity of papyri, began to be scrutinized (Ludwig Mitteis, Ernst Rabel) and the horizon was broadened to include other ancient legal cultures (Josef Partsch, Fritz Pringsheim, Paul Koschaker).[169]

This very pronounced historicization of Roman law, with all its brilliant discoveries, and the simultaneous process of an 'emancipation . . . by thinking apart Roman and modern law',[170] also had a downside: legal scholarship was turned into a largely unhistorical intellectual enterprise; it

lost its character as a 'historical science' (Savigny). The BGB was taken to constitute a comprehensive and closed system of legal rules. It constituted an autonomous interpretational space that was to be attributed sole, supreme, and unquestioned authority. All the energies of legal academics in the field of private law were channelled into the task of expounding the code and discussing court decisions based on its provisions. That in turn was to have dramatic consequences for the teaching of law. For it was the BGB that immediately acquired the central position in the law faculties' curricula throughout Germany.[171] Knowledge of Roman law was no longer of practical utility and thus its position within the law faculties was gradually weakened. Hardly any Romanist in Germany continued to teach Roman law in the pandectist tradition. Instead, the pronounced historicization of Roman law was also bound to shape its teaching, further contributing to the alienation between Roman law and modern law.[172] Sooner or later, the establishment of chairs for Roman law in law faculties was bound to be questioned. Roman law had, essentially, become a branch of the study of classical antiquity, employing methods of research entirely different from those of doctrinal scholarship in law. Similar developments and methodological debates have taken place in other countries in Europe. In only a few (Italy, Spain, partly also Austria) does Roman law remain reasonably well entrenched in the law curricula and the law faculties. In Germany and in the Netherlands the story is one of gradual decline, and the experience one of a deep-rooted sense of crisis.[173]

These developments, of course, are particularly paradoxical at a time which aspires to recreate a European private law or, at least, a European scholarship of private law.[174] We will have to overcome the nationalistic isolation of legal scholarship that is a consequence of tailoring law curricula around national codifications. Students will have to be made to see the fundamental connections and the European character of our legal culture. What could be better suited for this purpose – and for shaping the intellectual horizon of lawyers in Europe as European lawyers – than the study of the Roman foundations of the civilian tradition?

Notes

* Parts of this essay are based on my New Zealand Legal Research Foundation Lecture, published in *New Zealand LR* 2007: 341 and my entry 'Roman Law' in *Max Planck Encyclopedia of European Private Law*, ed. J. Basedow, K. J. Hopt, and R. Zimmermann (Oxford, 2012), 1487. This version dates from 2009.

1. R. Zimmermann, *Das römisch-holländische Recht in Südafrika* (Darmstadt, 1983). On 'classical' Roman-Dutch law, see R. Feenstra and R. Zimmermann, eds., *Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (Berlin, 1992). On

the initial disintegration of the *ius commune* into Roman-Dutch, Roman-Scots, Roman-Hispanic law, etc., at the time of the *usus modernus*, see K. Luig, 'The Institutes of National Law in the Seventeenth and Eighteenth Centuries', *Juridical Review* 1972: 193.

2. R. Zimmermann, 'Roman Law in a Mixed Legal System: The South African Experience', in *The Civil Law Tradition in Scotland*, ed. R. Evans-Jones (Edinburgh, 1995), 41. Owing to English influence during the nineteenth century, South African law became a mixed system: R. Zimmermann and D. Visser, eds., *Southern Cross: Civil Law and Common Law in South Africa* (Oxford, 1996); R. Zimmermann, 'Gemeines Recht heute: Das Kreuz des Südens', in *Der praktische Nutzen der Rechtsgeschichte: Festschrift für Hans Hattenhauer*, ed. J. Eckert (Heidelberg, 2003), 601.
3. On the reception of Roman Law in Scotland, see P. Stein, 'The Influence of Roman Law on the Law of Scotland', *Juridical Review* 1963: 205 as well as the essays in Evans-Jones (n. 2), and D. Carey Miller and R. Zimmermann, eds., *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Berlin, 1997).
4. The historical development is traced in the essays in K. Reid and R. Zimmermann, eds., *A History of Private Law in Scotland*, 2 vols. (Oxford, 2000).
5. R. Zimmermann, D. Visser, and K. Reid, eds., *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford, 2004); J. du Plessis, 'Comparative Law and the Study of Mixed Legal Systems', in *The Oxford Handbook of Comparative Law*, ed. M. Reimann and R. Zimmermann (Oxford, 2008), 477.
6. M. Reinkenhof, *Die Anwendung des ius commune in San Marino* (Berlin, 1997).
7. BGHZ 92: 326; cf. B. Kupisch, 'Eine Moselinsel, Kaiser Napoleon und das römische Recht', *Juristenzeitung* 1987: 1017. Cf. BGHZ 110: 148 (on riparian ownership).
8. B. Windscheid, 'Die geschichtliche Schule in der Rechtswissenschaft', in Windscheid, *Gesammelte Reden und Abhandlungen*, ed. P. Oertmann (Leipzig, 1904), 75.
9. See for Germany, H. H. Jakobs, *Wissenschaft und Gesetzgebung im bürgerlichen Recht nach der Rechtsquellenlehre des 19. Jahrhunderts* (Paderborn, 1983); U. Falk and H. Mohnhaupt, eds., *Das Bürgerliche Gesetzbuch und seine Richter* (Frankfurt, 2000). Cf. also Windscheid (n. 8), 75.
10. These terms are found even in short commentaries on the BGB such as by C. Berger in *Bürgerliches Gesetzbuch*, 14th edn. by O. Jauernig (Munich, 2011), § 985, n. 1; and *Vor* §§ 987–993, n. 3.
11. Following the model of Roman law, a distinction is drawn today between necessary, useful, and luxurious improvements (*impensae necessariae*, *utiles*, and *voluptuariae*); see, e.g., C. Berger (n. 10), *Vor* §§ 994–1003, n. 8 (the German Civil Code itself contains only provisions for the first two types of improvements).
12. Here also the Latin terms are to be found even in brief commentaries such as A. Stadler, in Jauernig (n. 10), § 812, nn. 13 and 14.
13. For a brief discussion in English of the German unjustified enrichment claims just mentioned, see R. Zimmermann, 'Unjustified Enrichment: The Modern Civilian Approach', *Oxford Journal of Legal Studies* 15 (1995): 403ff.
14. For the historical background, see R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, 1996), 857.
15. C. Wolff, *Grundsätze des Natur- und Völckerrechts* (Halle, 1754), § 438. For comment, see K.-P. Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (Munich, 1985), 164.

16. Ulp. D. 2.14.7.7; see Zimmermann (n. 14), 508.
17. *Bona fides* was one of the driving forces for the development of Roman contract law: see S. Whittaker and R. Zimmermann, 'Good faith in European contract law: surveying the legal landscape', in R. Zimmermann and S. Whittaker, eds., *Good Faith in European Contract Law* (Cambridge, 2000), 16; M. Schermaier, 'Bona fides in Roman contract law', in Zimmermann and Whittaker, 63; R. Zimmermann, *Roman Law, Contemporary Law, European Law* (Oxford, 2001), 83. The most influential attempt to systematize the case law on § 242 BGB – F. Wieacker, *Zur rechtstheoretischen Präzisierung des § 242 BGB* (Tübingen, 1956) – was clearly inspired by Roman law.
18. Cf. H. P. Mansel, in Jauernig (n. 10), § 242, nn. 39, 47, and 48. For a brief discussion in English, see Zimmermann and Whittaker (n. 17), 22.
19. See Zimmermann (n. 14), 639; S. Vogenauer in *Historisch-kritischer Kommentar zum BGB*, ed. M. Schmoeckel, J. Rückert, and R. Zimmermann (Tübingen, 2007), vol. 2, §§ 305–310 (III), nn. 13ff.
20. See §§ 276f BGB; and M. Schermaier, in Schmoeckel et al. (n. 19), §§ 276–278.
21. See K. Luig, 'Zur Vorgeschichte der verschuldensunabhängigen Haftung des Vermieters für anfängliche Mängel nach § 538 BGB', in *Festschrift für Heinz Hübner*, ed. G. Baumgärtel et al. (Berlin – New York, 1984), 121; Zimmermann (n. 14), 367.
22. See R. Zimmermann, 'Die Geschichte der Gastwirtshaftung in Deutschland', in *Usus modernus pandectarum: Römisches Recht, Deutsches Recht und Naturrecht in der frühen Neuzeit: Festschrift für Klaus Luig*, ed. H.-P. Haferkamp and T. Repgen (Cologne – Weimar – Vienna, 2007), 271.
23. § 138 I BGB; see Zimmermann (n. 14), 713.
24. §§ 286ff. and 293ff. BGB; see Zimmermann (n. 14), 790, 817.
25. §§ 459ff. BGB of 1900; see Zimmermann (n. 14), 305. The rules were reformed in 2002: see R. Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (Oxford, 2005), 79.
26. §§ 677ff. BGB; see Zimmermann (n. 14), 433.
27. § 833 BGB; see Zimmermann (n. 14), 1116.
28. On Roman law and the BGB, see M. Kaser, 'Der römische Anteil am deutschen bürgerlichen Recht', *Juristische Schulung* 1967: 337; R. Knütel, 'Römisches Recht und deutsches Bürgerliches Recht', in *Die Antike in der europäischen Gegenwart*, ed. W. Ludwig (Göttingen, 1993), 43; E. Picker, 'Zum Gegenwartswert des römischen Rechts', in *Das antike Rom in Europa*, ed. H. Bungert (Regensburg, 1985), 289. See also the table of Roman legal sources cited in the *travaux préparatoires* of the BGB, compiled by R. Knütel and M. Goetzmann in *Rechtsgeschichte und Privatrechtsdogmatik*, ed. R. Zimmermann, R. Knütel, and J. P. Meincke (Heidelberg, 1999), 679.
29. Up to and including the new Dutch Civil Code: H. Ankum, 'Römisches Recht im neuen niederländischen Bürgerlichen Gesetzbuch', in Zimmermann et al. (n. 28), 101. Generally, see A. Beck, 'Römisches Recht in unserer Rechtsordnung', in *Horizonte der Humanitas: Freundesgabe Walter Wili*, ed. G. Luck (Bern – Stuttgart, 1960), 120; R. Zimmermann, 'The Civil Law in European Codes', in Carey Miller and Zimmermann (n. 3), 259; A. Bürge, 'Das römische Recht als Grundlage für das Zivilrecht im künftigen Europa', in *Die Europäisierung der Rechtswissenschaft*, ed. F. Ranieri (Baden-Baden, 2002), 19.
30. See also J. Gordley, 'Myths of the French Civil Code', *American Journal of Comparative Law* 42 (1992): 459.

31. Zimmermann (n. 14), 45.
32. Zimmermann (n. 14), 253.
33. See text to n. 39, this chapter.
34. See book III title IV, chs. I and II of the *Code civil*. On the corresponding fourfold division of obligations in Justinian Inst. 3.13.2, see Zimmermann (n. 14), 14.
35. On illegality and unconscionability, see R. Zimmermann, 'The Civil Law in European Codes', in Carey Miller and Zimmermann (n. 3), 267.
36. See Zimmermann (n. 14), 16.
37. See, e.g., R. J. Pothier, *Traité des obligations*, in Pothier, *Traités de droit civil* (Paris, 1781), vol. 1, § 116.
38. See Zimmermann (n. 14), 1126.
39. P. Pichonnaz, *La compensation: Analyse historique et comparative des modes de compenser non conventionels* (Fribourg, 2001), 127; R. Zimmermann, in Schmoeckel et al. (n. 19), §§ 387–396, n. 6.
40. For details, see Pichonnaz (n. 39), 9; for an overview, M. Kaser, *Das römische Privatrecht*, 2nd edn. (Munich, 1971), vol. 1, 644; Zimmermann (n. 19), §§ 387–396, nn. 5ff.
41. C. 4.31.14.
42. For details, see Zimmermann (n. 19), §§ 387–396, nn. 11ff.
43. See Zimmermann (n. 14), 817.
44. See F. Ranieri, *Europäisches Obligationenrecht*, 3rd edn. (Vienna, 2009), 1045.
45. The majority view among modern Romanists: R. Knütel, 'Die Haftung für Hilfspersonen im römischen Recht', *ZSS* 100 (1983): 419ff.; Zimmermann (n. 14), 397; H. Wicke, *Respondeat Superior* (Berlin, 2000), 69.
46. See A. Watson, *Failures of the Legal Imagination* (Pennsylvania, 1988), 6, 15; K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung*, 3rd edn. (Tübingen, 1996), 639.
47. See, e.g., B. Windscheid and T. Kipp, *Lehrbuch des Pandektenrechts*, 9th edn. (Frankfurt, 1906), § 401, 5.
48. See, e.g., H.-P. Benöhr, 'Die Entscheidung des BGB für das Verschuldensprinzip', *TR* 46 (1978): 1.
49. For the historical development, see H. H. Seiler, 'Die deliktische Gehilfenhaftung in historischer Sicht', *Juristenzeitung* 1967: 525; Zimmermann (n. 14), 1124.
50. Ulp. D. 2.14.7.4; Zimmermann (n. 14), 508.
51. More precisely, *pacta quantumcunque nuda servanda sunt*. For details, see Zimmermann (n. 14), 542; P. Landau, 'Pacta sunt servanda: Zu den kanonistischen Grundlagen der Privatautonomie', in *'Ins Wasser geworfen und Ozeane durchquert': Festschrift für Knut Wolfgang Nörr*, ed. M. Ascheri et al. (Cologne – Weimar – Vienna, 2003), 457.
52. Inst. 3.13 pr: *obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura.*
53. For the historical development, see Zimmermann (n. 14), 34, 45, and 58.
54. C. 4.26.7.3.
55. B. Kupisch, *Die Versionsklage* (Heidelberg, 1965); Zimmermann (n. 14), 878.
56. Unlike §§ 812ff. BGB, the Roman *condictio* did not focus on the entire patrimony of the enrichment debtor. The recipient was obliged to return the object received, and the content and fate of that obligation were governed by the general rules. On this and the further development, see W. Ernst, 'Werner Flumes Lehre von der ungerechtfertigten Bereicherung', in W. Flume, *Studien zur Lehre von der ungerechtfertigten Bereicherung* (Tübingen, 2003), 2.

57. Pap. D. 22.6.7.
58. C. 1.18.10.
59. Zimmermann (n. 14), 868.
60. For details, see Zimmermann (n. 14), 857.
61. Zimmermann (n. 14), 863.
62. B. Kupisch, *Ungerechtfertigte Bereicherung: geschichtliche Entwicklungen* (Heidelberg, 1987), 4; Zimmermann (n. 14), 841.
63. See R. Feenstra, 'Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: Its Origin and Its Influence in Roman-Dutch Law', in *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, ed. E. J. H. Schrage, 2nd edn. (Berlin, 1999), 197; D. Visser, 'Das Recht der ungerechtfertigten Bereicherung', in Feenstra and Zimmermann (n. 1), 369.
64. See A. Bürge, 'Der Arrêt Boudier von 1892 vor dem Hintergrund der Entwicklung des französischen Bereicherungsrechts im 19. Jahrhundert', in *Festschrift für Hans Jürgen Sonnenberger*, ed. M. Coester, D. Martiny, and K. A. Prinz von Sachsen-Gessaphe (Munich, 2004), 3.
65. See N. Jansen, 'Die Korrektur grundloser Vermögensverschiebungen als Restitution? Zur Lehre von der ungerechtfertigten Bereicherung bei Savigny', *ZSS* 120 (2003): 106.
66. For details, see D. A. Verse, *Verwendungen im Eigentümer-Besitzer-Verhältnis: Eine kritische Betrachtung aus historisch-vergleichender Sicht* (Tübingen, 1999). Cf. Zimmermann (n. 17), 45.
67. The problems are analysed by Verse (n. 66), 1.
68. H. Kaufmann, *Rezeption und usus modernus der actio legis Aquiliae* (Cologne – Graz, 1958); H. Coing, *Europäisches Privatrecht* (Munich, 1985), vol. 1, 509; Zimmermann (n. 14), 1017; J. Schröder, 'Die zivilrechtliche Haftung für schuldhafte Schadenszufügungen im deutschen usus modernus', in *La responsabilità civile da atto illecito nella prospettiva storico-comparatistica*, ed. L. Vacca (Turin, 1995), 144.
69. For details, see Zimmermann (n. 14), 953.
70. *[A]ctio nostra, qua utimur, ab actione legis Aquiliae magis differat, quam avis a quadrupede*: C. Thomasius, *Larva Legis Aquiliae*, ed. and trans. M. Hewett (Oxford, 2000), § 1.
71. Thomasius (n. 70).
72. See N. Jansen, *Die Struktur des Haftungsrechts: Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadensersatz* (Tübingen, 2003).
73. This term was coined, at least for legal history, by H. R. Hoetink (who in turn took it from theological literature); see his 'Over het verstaan van vreemd recht' and 'Historische rechtsbeschouwing', in H. R. Hoetink, *Rechtsgeleerde opstellen* (Alphen, 1982), 34, 266.
74. M. Bauer, *Periculum Emptoris: Eine dogmengeschichtliche Untersuchung zur Gefahrtragung beim Kauf* (Berlin, 1998), 98; W. Ernst, 'Kurze Rechtsgeschichte des Gattungskaufs', *Zeitschrift für europäisches Privatrecht* 7 (1999): 612; Zimmermann (n. 25), 84.
75. Zimmermann (n. 14), 281.
76. Zimmermann (n. 14), 305.
77. Zimmermann (n. 14), 291.
78. Zimmermann (n. 25), 87.
79. F. Schulz, *Principles of Roman Law* (Oxford, 1936), 20.
80. See, e.g., the discussion by Bürge (n. 29), 21; A. Bürge, *Römisches Privatrecht* (Darmstadt, 1999), 17.

81. Pomp. D. 1.2.2.39.
82. Inspired by J. P. Meincke, *Juristenzeitung* 2006: 299.
83. On whom see W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen*, 2nd edn. (Graz – Vienna – Cologne, 1967), 138.
84. W. Waldstein and J. M. Rainer, *Römische Rechtsgeschichte*, 10th edn. (Munich, 2005), 201; Kunkel (n. 83), 32.
85. On whom see Waldstein and Rainer (n. 84), 135; Kunkel (n. 83), 25.
86. On Publius Mucius Scaevola, see Waldstein and Rainer (n. 84), 133; Kunkel (n. 83), 12.
87. Justinian's compilers, in the sixth century, could still draw on 2,000 books (C. 1.17.2.1); the classical literature must have consisted of that number many times over: Waldstein and Rainer (n. 84), 199.
88. Pap. D. 1.1.7.1. See, generally, M. Kaser and R. Knütel, *Römisches Privatrecht*, 18th edn. (Munich, 2005), 19, 22.
89. Cf. also Waldstein and Rainer (n. 84), 196, and Kaser and Knütel (n. 88), 27 summarizing the prevailing view.
90. See, in particular, Schulz (n. 79), 140 (liberty), 189 (humanity), 223 (fidelity), and 239 (security in the sense of stability of acquired rights). On equity in Roman law, see P. Stein, 'Equitable Principles in Roman Law', in P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays* (London, 1988), 19.
91. Essential for the legitimacy of the jurists was their *auctoritas*, based on the knowledge acquired through their practical experience. On authority as a formative feature of Roman law, see Schulz (n. 79), 164 and, on the jurists, 183.
92. It is based on Cels. D. 50.17.185 but tended to be misunderstood, including by the draftsmen of the BGB: see § 306 BGB (old version). For details, see Zimmermann (n. 14), 686.
93. See Zimmermann (n. 14), 75.
94. Ulp. D. 45.1.1.5 *in fine*: . . . *neque vitiatur utilis per hanc inutilem*.
95. H. H. Seiler, 'Utile per inutile non vitiatur: Zur Teilunwirksamkeit von Rechtsgeschäften im römischen Recht', in *Festschrift für Max Kaser*, ed. D. Medicus and H. H. Seiler (Munich, 1976), 130. On the requirement of a *pretium certum*, see Zimmermann (n. 14), 253.
96. For an overview, see Waldstein and Rainer (n. 84), 134. For further detail, F. Schulz, *History of Roman Legal Science* (Oxford, 1946), 38; F. Wieacker, *Römische Rechtsgeschichte* (Munich, 1988), vol. 1, 351, 618; M. Schermaier, *Materia* (Vienna – Cologne – Weimar, 1992), 35.
97. See, e.g., G. Thür, 'Recht im antiken Griechenland', in *Die Rechtskulturen der Antike*, ed. U. Manthe (Munich, 2003), 211.
98. C. 1.17.1.12; cf. C. 1.17.2.21.
99. W. Rüegg, 'Vorwort', in *Geschichte der Universität in Europa*, ed. W. Rüegg (Munich, 1993), vol. 1, 13.
100. See, e.g., M. Borgolte, *Europa entdeckt seine Vielfalt 1050–1250* (Stuttgart, 2002), 296; and the index and instructive maps in J. Verger, 'Grundlagen', in Rüegg (n. 99), vol. 1, 70.
101. The same was true already for the private law schools in Bologna in the second half of the eleventh and in the twelfth centuries, in particular for the school of Irnerius. On the significance of Irnerius, see F. Dorn in *Deutsche und Europäische Juristen aus neun Jahrhunderten*, ed. G. Kleinheyer and J. Schröder, 5th edn. (Heidelberg, 2008), 220.

102. For the detail, F. Wieacker, *A History of Private Law in Europe*, trans. T. Weir (Oxford, 1995); P. Koschaker, *Europa und das römische Recht*, 4th edn. (Munich – Berlin, 1966), 55ff.; P. Stein, *Roman Law in European History* (Cambridge, 1999); J. Gordley, 'Comparative Law and Legal History', in Reimann and Zimmermann (n. 5), 753ff.
103. Hence such books as Philibert Bugnyon, *Tractatus legum abrogatarum et inusitatarum in omnibus curiis, terris, jurisdictionibus, et dominiis regni Franciae* (1563) and Simon van Groenewegen van der Made, *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* (1649).
104. On the influence of the Historical School, see, e.g., J.-O. Sundell, 'German Influence on Swedish Private Law Doctrine 1870–1914', *Scandinavian Studies in Law* (1991): 237; J. H. A. Lokin, 'Het NBW en de pandektistiek', in *Historisch vooruitzicht. Opstellen over rechtsgeschiedenis en burgerlijk recht*, ed. M. E. Franke et al. (Arnhem, 1994), 125; R. Schulze, ed., *Deutsche Rechtswissenschaft und Staatslehre im Spiegel der italienischen Rechtskultur während der zweiten Hälfte des 19. Jahrhunderts* (Berlin, 1990); A. Bürge, *Das französische Privatrecht im 19. Jahrhundert: Zwischen Tradition und Pandektenwissenschaft, Liberalismus und Etatismus*, 2nd edn. (Frankfurt, 1995); A. Bürge, 'Ausstrahlungen der historischen Rechtsschule in Frankreich', *Zeitschrift für europäisches Privatrecht* 5 (1997): 643; W. Ogris, *Der Entwicklungsgang der österreichischen Privatrechtswissenschaft im 19. Jahrhundert* (Berlin, 1968); P. Caroni, 'Die Schweizer Romanistik im 19. Jahrhundert', *Zeitschrift für neuere Rechtsgeschichte* 16 (1994): 243; P. Stein, 'Legal Theory and the Reform of Legal Education in Mid-Nineteenth Century England', in Stein (n. 90), 238; A. Rodger, 'Scottish Advocates in the Nineteenth Century: The German Connection', *Law Quarterly Review* 110 (1994): 563ff.; J. Cairns, 'The Influence of the German Historical School in Early Nineteenth Century Edinburgh', *Syracuse Journal of International Law and Commerce* 20 (1994): 191.
105. See Section 10, this chapter.
106. See Coing (n. 68), 7; R. C. van Caenegem, *European Law in the Past and the Future* (Cambridge, 2002), 22 and 73.
107. In particular, matrimonial causes, probate, and promises affirmed by oath. For an overview, see W. Trusen, 'Die gelehrte Gerichtsbarkeit der Kirche', in *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, ed. H. Coing vol. 1 (Munich, 1973), 483. For England, see R. Zimmermann, 'Der europäische Charakter des englischen Rechts: Historische Verbindungen zwischen civil law und common law', *Zeitschrift für europäisches Privatrecht* 1 (1993): 21.
108. Generally, on the influence of Canon law, see P. Landau, 'Der Einfluss des kanonischen Rechts auf die europäische Rechtskultur', in *Europäische Rechts- und Verfassungsgeschichte: Ergebnisse und Perspektiven der Forschung*, ed. R. Schulze (Berlin, 1991), 39; H. Scholler, ed., *Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien* (Baden-Baden, 1996); H.-J. Becker, 'Spuren des kanonischen Rechts im Bürgerlichen Gesetzbuch', in Zimmermann et al. (n. 28), 159ff.
109. See text accompanying note 51, this chapter.
110. See U. Wolter, *Das Prinzip der Naturalrestitution nach § 249 BGB* (Berlin, 1985); N. Jansen, in Schmoeckel et al. (n. 19), §§ 249–253, 255, nn. 17ff.
111. See Coing (n. 68), 27, 352; cf. M. Mitterauer, *Warum Europa? Mittelalterliche Grundlagen eines Sonderwegs* (Munich, 2003), 109.
112. See, esp., J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991); J. Gordley, *Foundations of Private Law* (Oxford, 2006).

113. On the so-called *lex mercatoria* (law merchant), see Coing (n. 68), 519; H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass., 1983), 348; A. Cordes, 'Auf der Suche nach der Rechtswirklichkeit der mittelalterlichen Lex mercatoria', *ZSS (Germanistische Abteilung)* 118 (2001): 168; K. O. Scherner, 'Lex mercatoria – Realität, Geschichtsbild oder Vision?', *ZSS (Germanistische Abteilung)* 118 (2001): 148; K. O. Scherner, 'Goldschmidts Universum', in *'Ins Wasser geworfen und Ozeane durchquert': Festschrift für Knut Wolfgang Nörr*, ed. M. Ascheri et al. (Cologne – Weimar – Vienna, 2003), 859; and essays in V. Piergiovanni, ed., *From Lex Mercatoria to Commercial Law* (Berlin, 2005). Cf. for England, Zimmermann (n. 107), 29.
114. W. Wiegand, 'Zur Herkunft und Ausbreitung der Formel "habere fundatam intentionem" ', in *Festschrift für Hermann Krause*, ed. S. Gagnér, H. Schlosser, and W. Wiegand (Cologne – Vienna, 1975), 126; Coing (n. 68), 132; K. Luig, 'Usus modernus', in *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin, 1998), vol. 5, cols. 628ff. Apart from that, sources of law that deviated from the *ius commune* had to be narrowly interpreted. See W. Trusen, 'Römisches und partikuläres Recht in der Rezeptionszeit', in *Festschrift für Heinrich Lange*, ed. K. Kuchinke (Munich, 1970), 108; H. Lange, 'Ius Commune und Statutarrecht in Christoph Besolds Consilia Tubigensia' in *Festschrift für Max Kaser*, ed. D. Medicus and H. H. Seiler (Munich, 1976), 646; R. Zimmermann, 'Statuta sunt stricte interpretanda, Statutes and the Common Law: A Continental Perspective', *Cambridge Law Journal* 56 (1997): 315.
115. The conclusion of P. Oestmann, *Rechtsvielfalt vor Gericht: Rechtsanwendung und Partikularrecht im Alten Reich* (Frankfurt, 2002), 681.
116. See, e.g., 'Anlage zur Denkschrift zum BGB', in B. Mugdan, ed., *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich* (Berlin, 1899), vol. 1, 844; and *Deutsche Rechts- und Gerichtskarte* (Kassel, 1896; new edn. by D. Klippel, 1996).
117. Thus, apart from still being directly applicable in parts of Germany, it also provided the underlying theory of private law wherever a codification had been enacted: see Koschaker (n. 102), 292.
118. For further references, see Zimmermann (n. 17), 2.
119. E. Friedberg, *Die künftige Gestaltung des deutschen Rechtsstudiums nach den Beschlüssen der Eisenacher Konferenz* (Leipzig, 1896), 7.
120. See, e.g., Borgolte (n. 100), 242ff.
121. See also, e.g., Berman (n. 113), 10.
122. See the division by P. Glenn, *Legal Traditions of the World*, 4th edn. (Oxford, 2010).
123. In contrast, the chthonic tradition is marked by its orality: see Glenn (n. 122), 64.
124. S. Gagnér, *Studien zur Ideengeschichte der Gesetzgebung* (Stockholm, 1960), 288.
125. H. Coing, 'Das Recht als Element der europäischen Kultur', *Historische Zeitschrift* 238 (1984): 7; F. Wieacker, 'Foundations of European Legal Culture', *American Journal of Comparative Law* 38 (1990): 25; P. Häberle, *Europäische Rechtskultur* (Frankfurt, 1997), 22.
126. Berman (n. 113), 9; Glenn (n. 122), 155.
127. R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, 6th edn. (Leipzig, 1907), 14.
128. See Schulz (n. 96).
129. See Koschaker (n. 102), 164. For the Islamic tradition, see Glenn (n. 122), 187.
130. Coing (n. 125), 6; Wieacker (n. 125), 23.

131. Zweigert and Kötz (n. 46), 62.
132. Zweigert and Kötz (n. 46), 174. On the phenomenon of legal reception in Switzerland, see M. Immenhauser, 'Zur Rezeption der deutschen Schuldrechtsreform in der Schweiz', *recht* (2006): 1.
133. Glenn (n. 122), 133.
134. For the different meanings of the term 'civil law', see R. Zimmermann, in Carey Miller and Zimmermann (n. 3), 262.
135. For an overview, see Zweigert and Kötz (n. 46), 154; Z. Kühn, 'Comparative Law in Central and Eastern Europe', in Reimann and Zimmermann (n. 5), 215.
136. See, e.g., F. Mádl (then President of the Republic of Hungary), in *Aufbruch nach Europa*, ed. J. Basedow et al. (Tübingen, 2001), vii.
137. L. Vékás, 'Integration des östlichen Mitteleuropa im Wege rechtsvergleichender Zivilrechtserneuerung', *Zeitschrift für europäisches Privatrecht* 12 (2004): 454.
138. See, esp., M. Avenarius, *Rezeption des römischen Rechts in Rußland – Dmitrij Mejer, Nikolaj Djuvernua und Iosif Pokrovskij* (Göttingen, 2004); M. Avenarius 'Das russische Seminar für römisches Recht in Berlin (1887–1896)', *Zeitschrift für europäisches Privatrecht* 6 (1998): 893; M. Avenarius, 'Das pandektistische Rechtsstudium in St. Petersburg in den letzten Jahrzehnten der Zarenherrschaft', in *Deutsches Sachenrecht in polnischer Gerichtspraxis*, ed. W. Dajczak and H.-G. Knothe (Berlin, 2005), 51.
139. H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte*, 10th edn. (Heidelberg, 2005), 214, who points out that this reception was neither extraordinary nor completely surprising. But cf. Zweigert and Kötz (n. 46), 175.
140. Zweigert and Kötz (n. 46), 271.
141. J. H. Baker, *An Introduction to English Legal History*, 3rd edn. (London, 1990), 35; in the 4th edn. (2002), the word 'noble' has been deleted.
142. See, e.g., K. Schurig, 'Europäisches Zivilrecht: Vielfalt oder Einerlei?', in *Festschrift für Bernhard Großfeld*, ed. U. Hüber und W. F. Ebke (Heidelberg, 1999), 1102; E. Bucher, 'Rechtsüberlieferung und heutiges Recht', *Zeitschrift für europäisches Privatrecht* 8 (2000): 409. Particularly pointedly, see P. Legrand, 'Legal Traditions in Western Europe: The Limits of Commonality', in *Transfrontier Mobility of Law*, ed. R. Jagtenberg, E. Örücü, and A. de Roo (The Hague, 1995), 63; P. Legrand, 'European Legal Systems are Not Converging', *International and Comparative Law Quarterly* 45 (1996): 52. Legrand refers to an unbridgeable epistemological chasm.
143. For what follows, see the essays in Stein (n. 90), 151, and Zimmermann (n. 107), 4. Also of interest in this context is the 'inner relationship' of (classical) Roman and English law: see F. Pringsheim, 'The Inner Relationship between English and Roman Law', *Cambridge Law Journal* 5 (1935): 347; P. Stein, 'Roman Law, Common Law, and Civil Law', *Tulane Law Review* 66 (1992): 1591; P. Stein, 'Logic and Experience in Roman and Common Law', in Stein (n. 90), 37.
144. R. C. van Caenegem, *The Birth of the English Common Law*, 2nd edn. (Cambridge, 1988).
145. R. H. Helmholz, *Canon Law and the Law of England* (London, 1987); R. H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge, 1990); J. Martinez-Torrón, *Anglo-American Law and Canon Law: Canonical Roots of the Common Law Tradition* (Berlin, 1998).
146. On the civilian tradition in Scotland, see the references in nn. 3 and 4 above.
147. See, in particular, A. W. B. Simpson, 'Innovation in Nineteenth Century Contract Law', *Law Quarterly Review* 91 (1975): 247; Gordley (n. 112), 134; cf. D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999).

148. *Krell v Henry* [1903] 2 KB 740, 747 (CA).
149. See H. Dilcher, *Die Theorie der Leistungsstörungen bei Glossatoren, Kommentatoren und Kanonisten* (Frankfurt, 1960), 185.
150. *Taylor v Caldwell* (1863) 3 B & S 826; see, e.g., M. Rheinstein, *Die Struktur des vertraglichen Schuldverhältnisses im anglo-amerikanischen Recht* (Berlin – Leipzig, 1932), 173; G. H. Treitel, *Unmöglichkeit, 'Impracticability' and 'Frustration' im anglo-amerikanischen Recht* (Baden-Baden, 1991); M. Schmidt-Kessel, *Standards vertraglicher Haftung nach englischem Recht: Limits of Frustration* (Baden-Baden, 2003), 45.
151. See R. Zimmermann, '"Heard melodies are sweet, but those unheard are sweeter … ": Conditio tacita, implied condition und die Fortbildung des europäischen Vertragsrechts', *Archiv für die civilistische Praxis* 193 (1993): 121. On implied terms in modern English contract law, see M. Schmidt-Kessel, 'Implied Term – auf der Suche nach dem Funktionsäquivalent', *Zeitschrift für vergleichende Rechtswissenschaft* 96 (1997): 101; W. Grobecker, *Implied Terms und Treu und Glauben: Vertragsergänzung im englischen Recht in rechtsvergleichender Perspektive* (Berlin, 1999).
152. See Zimmermann (n. 151), 134.
153. Berman (n. 113), 18.
154. R. H. Helmholz, 'Magna Carta and the *ius commune*', *University of Chicago Law Review* 66 (1999): 297, 371.
155. See, in particular, Berman (n. 113); Glenn (n. 122), 176. See also the studies by R. H. Helmholz, *The ius commune in England: Four Studies* (Oxford, 2001).
156. B. S. Markesinis, ed., *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century* (Oxford, 1994). Cf. R. C. van Caenegem, 'The Unification of European Law: a pipedream?' *European Review* 14 (2006): 33.
157. J. Gordley, 'Common law und civil law: eine überholte Unterscheidung', *Zeitschrift für europäisches Privatrecht* 1 (1993): 498.
158. S. Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*, 2 vols. (Tübingen, 2001) concludes that historically English law can be described as a province of the *ius commune* so far as statutory interpretation is concerned. A fundamental uniformity of approach in statutory interpretation can still be observed today: see Vogenauer, 1293; and S. Vogenauer, 'Zur Geschichte des Präjudizienrechts in England', *Zeitschrift für neuere Rechtsgeschichte* 28 (2006): 48. On the role of legal doctrine, see R. Goff, 'The Search for Principle', repr. in *The Search for Principle: Essays in Honour of Lord Goff of Chieveley*, ed. W. Swadling and G. Jones (New York, 1999), 313.
159. There was also some direct influence from civilian legal sources: P. Stein, 'The Attraction of the Civil Law in Post-Revolutionary America', in Stein (n. 90), 411; M. Reimann, *Historische Schule und Common Law* (Berlin, 1993); R. H. Helmholz, 'Use of the Civil Law in Post-Revolutionary American Jurisprudence', *Tulane Law Review* 66 (1992): 1649; M. H. Hoeflich, *Roman and Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century* (Athens, Georgia, 1997); M. H. Hoeflich, 'Translation and the Reception of Foreign Law in the Antebellum United States', *American Journal of Comparative Law* 50 (2002): 753.
160. E. Bucher, 'Zu Europa gehört auch Lateinamerika!' *Zeitschrift für europäisches Privatrecht* 12 (2004): 515; J. Kleinheisterkamp, 'Development of Comparative Law in Latin America', in Reimann and Zimmermann (n. 5), 261; J. Schmidt, *Zivilrechtskodifikation in Brasilien* (Tübingen, 2009), esp. chs. 1 and 7.
161. Z. Kitagawa, *Rezeption und Fortbildung des europäischen Zivilrechts in Japan* (Frankfurt – Berlin, 1970); Z. Kitagawa, 'Development of Comparative Law in East Asia', in

Reimann and Zimmermann (n. 5), 237; M. Rehbinder, Ju-Chan Sonn, eds., *Zur Rezeption des deutschen Rechts in Korea* (Baden-Baden, 1990).

162. M. McAuley, 'Québec', in *Mixed Jurisdictions Worldwide*, ed. V. V. Palmer, 2nd edn. (Cambridge, 2012), 329.
163. This chapter, n. 1.
164. Jhering (n. 127), 2.
165. This chapter, n. 104.
166. Partly, at least, as a result of the emigration of German Romanists during the Nazi regime: see P. Birks, 'Roman Law in Twentieth-Century Britain', and R. Zimmermann, 'Was Heimat hieß, nun heißt es Hölle', in *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain*, ed. J. Beatson and R. Zimmermann (Oxford, 2004), 249 and 46 respectively.
167. For what follows, see Zimmermann (n. 17), 22; M. Rainer, 'Dieter Nörr e la romanistica tedesca', in *Dieter Nörr e la romanistica europea tra xx e xxi secolo*, ed. E. Stolfi (Turin, 2006), 7ff.
168. On Mitteis and the Mitteis school, see R. Zimmermann, ' "In der Schule von Ludwig Mitteis": Ernst Rabels rechtshistorische Ursprünge', *Rabels Zeitschrift* 65 (2001): 1.
169. On the challenges for Roman law scholarship today, see L. Capogrossi Colognesi and R. Knütel in Stolfi (n. 167), 77, 133.
170. E. I. Bekker, *Die Aktionen des römischen Privatrechts*, vol. 1 (Berlin, 1871), 2.
171. Zimmermann (n. 25), 14.
172. See also, for England, Birks (n. 166), 249, 260; for the Netherlands, see W. Zwalve, 'Teaching Roman Law in the Netherlands', *Zeitschrift für europäisches Privatrecht* 5 (1997): 393.
173. Zimmermann (n. 17), 44; Zwalve (n. 172).
174. R. Zimmermann, 'Comparative Law and the Europeanization of Private Law', in Reimann and Zimmermann (n. 5), 539; R. Zimmermann, 'Ius Commune and the Principles of European Contract Law: Contemporary Renewal of an Old Idea', in *European Contract Law*, ed. H. L. MacQueen and R. Zimmermann (Edinburgh, 2006), 1; R. Zimmermann, 'The Present State of European Private Law', *American Journal of Comparative Law* 57 (2009): 479.