

A Short History of Roman Law

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Survival Guide: The Digest

First things first: After a class in Roman law, you should really know what the Digest is!

The Digest is one of our most important sources of Roman Law. It was created 530 – 533 AD at the order of emperor Justinian. His jurists (led by Tribonianus) reviewed and compiled the writings on private law of all prior Roman jurists and Justinian gave the resulting compilation the force of law. The name “Digest” is Latin (from *digesta*) and means “ordered”, referring to the ordering and re-arranging of the earlier sources by Justinian’s jurists. The Digest is also known by its Greek name as the Pandects (*pandektai*), which means “all-containing”, referring to Justinian’s claim to have his compilation contain the gist of all extant Roman law and thus contain everything you need to know regarding its subject matters. The Digest comprises 50 books and mainly deals with private law.

The Digest forms part of a larger compilation, the so-called Corpus Iuris Civilis (lit “Body of Civil Law”). The CIC was not yet called CIC back then, it only came to bear this name after 1583, when the first print edition was published under that title. The CIC consists of four parts, all of which were created on the order of Justinian: the Codex, the Digest, the Institutions and the Novellae. The Codex contains all imperial decrees since emperor Hadrian (2nd century AD). The Institutions are a student textbook that serves as an introduction to Civil law. Those three parts were compiled from 529 – 534 and were supposed to be the only source of law from the time of their compilation for all eternity. But soon, Justinian found himself in need of new laws. The Novellae (“New Laws”) contain all the laws decreed by Justinian in the 30 years after the other three parts were finished. From the Middle Ages onwards, the CIC became the most important source for the reception of Roman Law.

¹ I would like to express my gratitude to Prof. Franz-Stefan Meissel for his encouragement to wrap up 2500 years of legal history in a – hopefully easily readable and enjoyable – literary “nutshell”. For their careful reading and comments, I also warmly thank Caterina Grasl and Verena Halbwachs. Having studied Roman Legal History first with Prof. Philipp Scheibelreiter, my way of thinking about this subject is strongly indebted to his Roman Law lectures.

Citation in and of the Digest:

The Digest being a compilation of the work of earlier Roman jurists which was to be enacted as law, it is sorted by topic (and not by author). Therefore, when the Digest treats e.g. the acquisition and the loss of possession, it quotes various texts from jurists who contributed something to this topic. In modern editions of the Digest² such a quotation looks like this:

D. 41.2.3pr. (Paulus 54 ad ed.)

Possideri autem possunt, quae sunt corporalia.

Those things can be possessed which are corporeal.³

What does “D. 41.2.3pr. (Paulus 54 ad ed.)” stand for?

D. stands for “Digest” (surprise!). 41.2.3pr tells us where we find this passage: Book 41, title 2, fragment 3, *principium*. So what does this mean? The Digest consists of 50 books. Each book is divided into titles, each of which treats one subject matter. Our title 2 in book 41, for example, treats the acquisition and the loss of possession. Each title is again divided into fragments, each of which is a passage stemming from one jurist. Our fragment 3 is from Paulus, its neighbours are fragment 2 (from Ulpianus) and fragment 4 (again from Ulpianus). Finally, each fragment is divided into paragraphs. In our example, however, it says “*principium*”, which means “beginning” in Latin, and refers to the text that is located before paragraph 1. The so-called inscription (*Paulus libro quinquagesimo quarto ad edictum*) is a reference to the original text the passage was taken from. In our case its author is the jurist Paulus and it was contained in the 54th book of his commentary on the edict.

Let’s look at another example:

D. 41.2.18.3 (Celsus 23 Dig.)

Si, dum in alia parte fundi sum, alius quis clam animo possessoris intraverit, non desisse ilico possidere existimandus sum, facile expulsurus finibus, simul sciero.

If, while I am in one part of my estate, someone else enters by stealth, intending to possess the estate, I am not to be held at once to lose possession, since I can easily eject him as soon as I am aware of his presence.

Here we are in book 41, title 2, fragment 18, paragraph 3 and the text originally stems from Celsus, from the 23rd book of his work which was also called “Digest”.

² The original manuscripts contained references to the books and titles and the inscription; the numbering of the fragments and their subsections (paragraphs) is a practice which started only later in the Middle Ages.

³ All translations of the Digest are taken from Watson (1985).

Overview: Roman History and Constitution

According to legend, Rome was founded in 753 BC by the two brothers Romulus and Remus, who were said to have been raised by a she-wolf⁴ (or a prostitute, the Latin word *lupa* means both). Initially, the city was governed by kings. The kings are said to have been expelled in 510 BC, when a republican constitution was instituted.



Be that as it may, Rome was in fact a republic for many centuries until an emperor emerged in 27 BC (see below). During the republican period, Rome first conquered Italy (5th and 4th century BC) and then other vast territories (3rd century BC to 1st century AD), until it basically ruled over all countries adjacent to the Mediterranean.⁵



⁴ See the famous statue with the she-wolf feeding the twins (taken from https://cdn.pixabay.com/photo/2018/05/15/23/14/she-wolf-3404577_960_720.jpg).

⁵ The map shows the largest extension in the history of the empire (117 AD). It is taken from https://commons.wikimedia.org/wiki/File:Roman_Empire-117AD.png.

In the 1st century BC, however, the republic became an empire. Julius Caesar did not yet manage to assume autocracy (he was assassinated in 44 BC), but after bloody civil wars, Augustus became the first emperor in 27 BC. Strictly speaking, he did not abolish the republican constitution, but simply concentrated all powerful offices in his person. In the 1st and 2nd century AD, the succession went (more or less) well and there were peace and stability (also more or less), but in the 3rd century AD, internal power struggles and civil wars took over. Keeping the entire empire together turned out to be impossible, so that in 284 under emperor Diocletian it was split in two parts, which in 395 led to the division into a western empire (capital: Rome) and an eastern empire (capital: Constantinople, today's Istanbul). The western empire was overrun by Germanic tribes in 476, whereas the eastern empire (known as the Byzantine Empire) lasted until 1453, when it was conquered by the Ottomans.

In the Roman Empire, another important change took place: After centuries of more or less intense persecution, Christianity was formally tolerated in 311, then strongly encouraged by emperor Constantine the Great, and even became the official state religion in 380. Despite its momentous consequences for world history, the rise of Christianity did not have a big impact on private law: only legislation running counter to Christian belief was abandoned, but apart from this, the legal tradition went on unhindered.

Many important developments in Roman law took place during the republican period (6th to 1st century BC), which is why we ought to take a brief look at the republican constitution. It provided for the following magistrates (with every office being held by at least two persons at the same time so that they could check and balance their co-magistrate):

- **Consuls**: head of the government, held the supreme command of the army, in charge of foreign affairs, brought legislative proposals
- **Praetors**: in charge of jurisdiction – we will hear more about the praetor later
- **Aediles**: market authority
- **Quaestors**: responsible for the treasury
- **Tribunes of the People**: represent the common people's interests against the nobility
- **Censors**: responsible for the census, i.e. the register of the citizens and their property, on which taxation and admission to the senate depended

However, most of the power lay – not *de iure*, but *de facto* – with the **Senate**, the “council of the old-and-wise” formed by members of the most powerful families as well as former magistrates. After this brief overview, we can now finally get started with legal history!

I. Private Law in the Archaic Period

The origins of Roman private law are obscure. Back in the day, law was oral and customary in nature, but the underlying rules were considered sacred. Thus, in case of a dispute about a customary rule, the correct interpretation was “discovered” by the pontiffs. The pontiffs, however, were all aristocrats, which led to a set of rules that grossly favoured the nobility over the common people. After the two classes within the Roman population, the patricians (=nobility) and the plebeians (=the people) in the 5th century had fallen out over patrician arbitrariness, it was decided to write down a law that applied to all Romans alike. The reasoning was that if the law was fixed as a text, it could be approached by all citizens on equal ground.⁶

Thus, in 451 BC the **Law of the Twelve Tables** was established, which survives only in fragments found in later authors who quoted it. It was not at all systematic and contained provisions mainly for private and criminal law. Its aim was not to cover all fields of the law; it only contained selective rules on issues that could well give rise to particular disputes. For example, there were provisions on what the creditor could do to the debtor after winning in court (12Tab 3, 1-4):

Aeris confessi rebusque iure iudicatis XXX dies iusti sunt. Post deinde manus iniectio esto. In ius ducito. Ni iudicatum facit aut quis endo eo in iure vindicit, secum ducito, vincito aut nervo aut compedibus XV pondo, ne maiore aut si volet minore vincito. Si volet suo vivito, ni suo vivit, qui eum vinctum habebit, libras faris endo dies dato. Si volet, plus dato.

Thirty days shall be allowed by law for payment of confessed debt and for settlement of matters adjudged in court. After this time the creditor shall have the right of laying hand on the debtor. The creditor shall hale the debtor into court. Unless the debtor discharges the debt adjudged or unless someone offers surety for him in court the creditor shall take the debtor with him. He shall bind him either with a thong or with fetters of not more than fifteen pounds in weight, or if he wishes he shall bind him with fetters of less than this weight. If the debtor wishes, he shall live on his own means. If he does not live on his own means, the creditor who holds him in bonds shall give him a pound of grits daily. If he wishes he shall give him more.⁷

The passage continues to describe that the debtor could be kept in fetters for a maximum of 60 days, within which he had to be led to the marketplace three times where the sum he owed

⁶ The same idea can be found for example in George Orwell's *Animal Farm* (1945). After the animals overthrow the humans, they write down their fundamental laws on the side of the barn in order to be constantly reminded of their rights.

⁷ Translation taken and slightly altered from Johnson/Coleman-Norton/Bourne, *Ancient Roman Statutes* (1961).

was declared publicly so as to give his family and friends an opportunity to bail him out. If this failed, he could be sold into slavery. All of this may seem somewhat dull at first glance, but in fact it is quite revealing: If there is need for such a meticulous regulation of what the creditor is allowed to do to the debtor, the conditions prior to the Twelve Tables must have been much worse. In addition to setting a minimum standard for the treatment of debtors in the first place, having it laid down in writing greatly enhanced its effectivity by creating common awareness of the norm's existence and content. This passage also shows that self-help was permitted to a much greater extent than it is today as the state was not yet in a position to rule it out, but it did impose limitations. If nowadays a debtor is condemned in court to pay a certain sum to his creditor and he refuses to do so, the creditor is not allowed to take action himself (which would be unlawful self-help), he rather has to initiate further legal proceedings (foreclosure, compulsory enforcement), in the course of which the state enforces the creditor's claim against the debtor.

The Twelve Tables do not only mark the beginning of extant Roman legal history, they also shaped Roman legal culture for many centuries to come as they were in force formally until the end of the empire and were commented upon by the most eminent Roman jurists. For example, the Twelve Tables declare that in case of a *furtum nec manifestum*,⁸ the thief has to pay the *duplum*, that is, double the stolen item's value (12Tab 8, 16):

Si adorat furto, quod nec manifestum erit ... duplione damnum decidito.

If a person prosecutes for *furtum nec manifestum* ... the thief shall settle the loss by paying double damages.⁹

About 600 years later, in the 2nd century AD, jurists still debate this passage, especially regarding the criteria according to which a *furtum* is considered *manifestum* (Gaius Inst. 3, 184):

Manifestum furtum quidam id esse dixerunt, quod dum fit, deprehenditur. Alii vero ulterius, quod eo loco deprehenditur, ubi fit, [...]. Alii adhuc ulterius eo usque vel manifestum furtum esse dixerunt, donec perferret eo, quo perferre fur destinasset. Alii adhuc ulterius, quando eam rem tenens fur visus fuerit. [...]

Some authorities hold that manifest theft is committed when the culprit is taken in the act; others, however, go further and say that it occurs when he is taken in the place where the theft was perpetrated [...]. Others go still further and hold that manifest theft is committed until the thief has carried the stolen

⁸ On the concept of *furtum* see Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 20ff.

⁹ Translation taken and slightly altered from Johnson/Coleman-Norton/Bourne, Ancient Roman Statutes (1961).

property to the place where he intends to leave it. Others go even further and say that manifest theft was committed as long as the thief holds the property. [...] ¹⁰

At the end of this passage Gaius states that most jurists adopt the second interpretation that a *furtum manifestum* takes place when the thief is caught at the scene of crime. Conversely, a *furtum nec manifestum* occurs when the thief is caught somewhere else.

The pontiffs, however, retained “legislation” in and “jurisdiction” over the areas not specifically addressed by the Twelve Tables as well as the interpretation of the Twelve Tables. The supposedly divine origin of the law was still felt in the extremely strict formalism, i.e. the meticulously correct recital of set formulas required in court (the so-called *legis actiones*, “actions on grounds of the law”). Similar to the Romans believing that the gods would deny a request if they uttered one word wrong in the prayer formula, it was possible to lose a trial in this way (Gaius Inst. 4, 11):

Unde eum, qui de uitibus succisis ita egisset, ut in actione uites nominaret, responsum est rem perdidisse, quia debuisset arbores nominare, eo quod lex XII tabularum, ex qua de uitibus succisis actio conpeteret, generaliter de arboribus succisis loqueretur.

Hence, it was decided that a person who brought an action against another for cutting his vines, and in the pleadings called them "vines," should lose his case, as he ought to have called them "trees," because the Law of the Twelve Tables, under which the action for cutting vines was brought, speaks in general terms of the cutting of trees.

This passage not only showcases the adherence to set formulas but is also interesting for a different reason: It shows the extensive interpretation of the Twelve Tables. An action for cutting vines could be brought under the term “trees”. From this we can see that formally, the Romans strictly adhered to the wording of the Twelve Tables (i.e. you needed to recite it correctly or you lost your case), but materially, they allowed a very extensive interpretation.

In the Twelve Tables we also find legal transactions that would be carried out for many centuries, such as the *mancipatio* ¹¹ (Gaius Inst. 1, 119):

Est autem mancipatio, ut supra quoque diximus, imaginaria quaedam venditio: Quod et ipsum ius proprium civium Romanorum est; eaque res ita agitur: Adhibitis non minus quam quinque testibus civibus Romanis puberibus et praeterea alio eiusdem condicionis, qui libram aeneam teneat, qui appellatur libripens, is, qui mancipio accipit, rem tenens ita dicit: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM

¹⁰ All translations of the *Institutiones* of Gaius are taken (and slightly modified) from Zulueta, *The Institutes of Gaius* (1946).

¹¹ For an overview of *mancipatio* and *in iure cessio* see Benke/Meissel, *Roman Law of Property* (translated by Caterina Grasl) 82ff.

ESSE AIO ISQUE MIHI EMPTUS ESTO HOC AERE AENEAQUE LIBRA; deinde aere percutit libram idque aes dat ei, a quo mancipio accipit, quasi pretii loco.

Mancipatio, as we have mentioned above, is a kind of fictitious sale, and the law governing it is peculiar to Roman citizens. The ceremony is as follows: After not less than five witnesses (who must be Roman citizens above the age of puberty) have been called together, as well as another person of the same condition who holds a brazen balance [= brazen scales] in his hand and is styled the "balance holder", the transferee, holding a piece of bronze in his hands, says: "I declare that this man belongs to me by my right as a Roman citizen, and let him be purchased by me with this piece of bronze, and bronze balance." Then he strikes the scales with the piece of bronze and gives it to the transferor as quasi-purchase money.

Another way how property could be transferred was the *in iure cessio* (Gaius Inst. 2, 24):

In iure cessio autem hoc modo fit: apud magistratum populi Romani velut praetorem urbanum is, cui res in iure ceditur, rem tenens ita dicit: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO; deinde postquam hic vindicaverit, praetor interrogat eum, qui cedit, an contra vindicet; quo negante aut tacente tunc ei, qui vindicaverit, eam rem addicit.

An *in iure cessio* takes place as follows: He to whom the property is to be conveyed appears before a magistrate of the Roman people, for example, the Praetor, and holding the property in his hands, says: "I declare that this slave belongs to me by my right as a Roman citizen." Then, after he makes this claim, the Praetor interrogates the other party to the transfer as to whether he makes a counter-claim, and if he does not do so, or remains silent, he adjudges the property to the party who claimed it.

In case the *mancipatio* and the *in iure cessio* appear a little dry – how about slapping other people in the face? In the Twelve Tables, one provision read: "*Si iniuriam alteri faxit, viginti quinque aeris poenae sunt* – If anyone has inflicted an injury upon another, let him be fined twenty-five asses". The As was a Roman currency unit, but centuries after the Twelve Tables, 25 asses were not a lot of money anymore, so the following happened (Aulus Gellius, *Noctes Atticae* 20, 1, 12f):

L. Veratius fuit egregie homo improbus atque inmani vecordia. Is pro delectamento habebat os hominis liberi manus suae palma verberare. Eum servus sequebatur ferens crumenam plenam assium; ut quemque depalmaverat, numeratae statim secundum duodecim tabulas quinque et viginti asses iubebat. Propterea praetores postea hanc abolescere et relinquere censuerunt iniuriisque aestumandis recuperatores se daturos edixerunt.

One Lucius Veratius was an exceedingly wicked man and of cruel brutality. He used to amuse himself by striking free men in the face with his open hand. A slave followed him with a purse full of asses; as often as he had buffeted anyone, he ordered twenty-five asses to be counted out at once, according to the

provision of the Twelve Tables. Therefore the praetors afterwards decided that this law was obsolete and invalid and declared that they would appoint arbiters to appraise damages.¹²

Takeaway from the Twelve Tables: They were created about 450 BC and were the first written laws in Rome. Back then, everything related to the law was strictly formalized. Unsurprisingly, this turned out to be a problem, especially in the wake of Rome's conquest of today's Italy in the 4th and 3rd century BC, as then the Roman legal system was confronted with many cases in which non-Romans were involved, who obviously were not well-versed in the intricacies of Roman procedural law and the meticulous recital of specific set formulas in court. We will address these issues in the next section (see subsection B), but first we have to briefly look at the Roman sources of law (see subsection A).

¹² Translation taken from Rolfe, *The Attic Nights of Aulus Gellius. With An English Translation* (1927).

II. After the Twelve Tables: Private Law in the Republic

A) Sources of law

Legislation in the Roman republic worked as follows: At the request of a magistrate (mostly a consul or even both of them) the people's assembly adopted a certain law (in Latin: *lex*, plural: *leges*). *Leges* were named after the magistrates who put forward the request, e.g. the important *lex Hortensia* was put forward by a magistrate from the Hortensii family. This *lex Hortensia* stated in 286 BC that the decrees of the plebs (=the non-noble people), the so-called *plebiscita*, were binding for the entire population of Rome, i.e. also for the patricians (=the nobility). In addition to *leges* and *plebiscita*, decrees of the Senate (*senatus consulta*) were another source of law. Together, they made up the *ius civile*, i.e. the law of Roman citizens (in Latin: *cives*).

Leges, *plebiscita* and *senatus consulta* were, however, soon overshadowed as a source of law by the praetor's edict. In 367, the *leges Liciniae Sextiae* (= laws requested jointly by two magistrates, one from the Licinii and one from the Sextii family) introduced the office of the **praetor**. He was responsible for jurisdiction and every year issued the **edictum** (Latin for "public declaration"), in which he declared which *actiones* and *exceptiones* (= legal means of attack and defence) plaintiffs and defendants could use in court. In the beginning, the edict simply provided the procedural means necessary for the enforcement of the *ius civile*, but soon it became an autonomous means of legislation, which proved especially useful due to the immense flexibility it offered: The praetor only had to include a new *actio* in the edict and plaintiffs could then simply sue defendants on grounds of this new *actio*. Soon, every praetor would re-issue the edict of his predecessor and perhaps add new *actiones* or *exceptiones* he wished to grant. The law thus created by the praetor's edict was called the **ius praetorium** (law created by the praetor) or the **ius honorarium** (law created by the office holders) (D 1, 1, 7, 1):

Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam. quod et honorarium dicitur ad honorem praetorum sic nominatum.

Praetorian law (*ius praetorium*) is that which in the public interest the praetors have introduced in aid or supplementation or correction of the *ius civile*. This is also called honorary law (*ius honorarium*), being so named for the high office (*honor*) of the praetors.

The *ius honorarium* was considered as a forceful and flexible corrective of the rigid *ius civile*, which gave rise to the following famous statement (D 1, 1, 8):

Nam et ipsum ius honorarium viva vox est iuris civilis.

For indeed the *ius honorarium* itself is the living voice of the *ius civile*.

One example of the *ius honorarium* supplementing the *ius civile* is **bonitarian ownership**.¹³ According to *ius civile*, ownership in *res Mancipi* could only be transferred by means of *mancipatio* or *in iure cessio*. If a *res Mancipi* was transferred by means of a mere *traditio*, however, the transferee did not acquire civil-law ownership and could thus not bring a *rei vindicatio*. If he were to retain possession of the *res Mancipi* for one year, however, he would become civil-law owner. This status of “civil-law owner to be” was deemed worthy of legal protection by a praetor named Publicius, who thus introduced the **actio Publiciana**.¹⁴ This honorarian action pursued the same aim as the *rei vindicatio*, but unlike for the latter, civil-law ownership was not a prerequisite. This of course constituted a significant development of the law as now many more proprietors were protected, not only civil-law owners by means of the *rei vindicatio*, but also “bonitarian”¹⁵ owners by means of the *actio Publiciana*.

After the introduction of the office of the praetor in 367 BC, the next step was to introduce a second praetor in 262 BC. In the wake of Rome’s expansion, a lot of legal issues occurred between a Roman and a non-Roman or between two non-Romans. Due to this, a second praetorship was created, the so-called **praetor peregrinus** (*peregrinus* means “stranger/alien” in Latin), who was also very active in terms of developing the law. The already existing praetor continued to be responsible for disputes exclusively involving Roman citizens and was called the **praetor urbanus** (which means praetor “of the city”).¹⁶ This led to a tripartition of the law into *ius civile*, *ius honorarium* and **ius gentium** (which literally means “law of peoples”).

The two former ones we already discussed, so let us turn to the latter. The *ius gentium* must not be mistaken as public international law (“Völkerrecht”); it rather refers to norms of Roman law that are valid between human beings in general, be they Roman citizens or not. Hence the name *ius gentium* as “law of peoples” or (in modern terminology) “law of nations”. For example, *mancipatio* and *in iure cessio* were available only to Roman citizens, whereas non-Romans could acquire ownership only by means of *traditio*, which made the institute of

¹³ For an overview of this concept see Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 84ff.

¹⁴ For an overview of the *actio Publiciana* see Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 168ff.

¹⁵ This name stems from Gaius (Inst. 2, 41), who says that a transferee who receives a *res Mancipi* by mere *traditio* has said *res Mancipi* “in his fortune” (*in bonis*).

¹⁶ Random historical fact: Brutus and Cassius, who led the assassination of Julius Caesar in the senate in 44 BC, held the offices of *praetor urbanus* and *praetor peregrinus* at the time.

bonitarian ownership and the *actio Publiciana* very important for them. Another nice example to illustrate the interaction between the *ius civile* and the *ius gentium* are the different Q&As that can be used to enter into a stipulation¹⁷ – most of the different wordings can be used by Romans and non-Romans alike (= *ius gentium*), but one specific expression is (for no apparent reason) peculiar to Roman citizens (= *ius civile*) (Gaius Inst. 3, 92f):

Verbis obligatio fit ex interrogatione et responsione, velut DARI SPONDES? SPONDEO, DABIS? DABO, PROMITTIS? PROMITTO, FIDEPROMITTIS? FIDEPROMITTO, FIDEIUBES? FIDEIUBEO, FACIES? FACIAM. Sed haec quidem verborum obligatio DARI SPONDES? SPONDEO propria civium Romanorum est; ceterae vero iuris gentium sunt, itaque inter omnes homines, siue cives Romanos sive peregrinos, valent.

An obligation is verbally contracted by question and answer, as for instance: "Do you solemnly agree to give it to me?" "I do solemnly agree." "Will you give it?" "I will give it." "Do you promise?" "I do promise." "Do you pledge your faith?" "I do pledge my faith." "Do you guarantee?" "I do guarantee." "Will you do this?" "I will do it." The verbal obligation contracted by the expressions, "Do you solemnly agree to give?" "I do solemnly agree to give," is peculiar to Roman citizens; the others belong to the *ius gentium*, and therefore they are valid among all men, whether they are Roman citizens or aliens.

For legal history, the *praetor peregrinus* turned out to be particularly important, as he was very active in developing the *bonae fidei iudicia*.¹⁸ Roman *ius civile* was found to be lacking as many of its legal institutions were limited to Roman citizens only, which proved difficult when due to the massive expansions, contact with non-Romans increased. Thus, a basis for legal relations between Romans and non-Romans or between non-Romans among themselves was required and was found in the *bona fides* ("good faith"; there is no perfect translation, it means something like correctness and fairness and denotes the way in which honest people act). The more flexible way of handling cases according to *bona fides* soon spilled over to the *ius civile* and new *bonae fidei iudicia* were included in the edict, for example *emptio venditio*, *mandatum*, *locatio conductio* and *societas*. In some cases even already existing contract types were adapted and their *actiones* received a bona-fides-clause, e.g. the *depositum* and the *commodatum* (which had until then been *iudicia stricti iuris*). The praetorial development of the law went on for centuries, until in 130 AD emperor Hadrian had the famous jurist Julian come up with a fixed text for the edict for once and all time (which led to the so-called *edictum perpetuum*; *perpetuum* means eternal). After this, the development of the law entirely lay

¹⁷ For an overview of the *stipulatio* see Benke/Meissel, Roman Law of Obligations (translated by Caterina Grasl) 14ff.

¹⁸ On *bonae fidei iudicia* and their counterparts, the *iudicia stricti iuris*, see Benke/Meissel, Roman Law of Obligations (translated by Caterina Grasl) 17f.

with the emperor and his counselling jurists (by way of imperial enactments, the so called *constitutiones principis*, see below in chapter III on the Imperial Period).

B) Civil Procedure

It is important to note that the changes the edict brought about were not limited to substantive law, but also greatly modernized procedural law. With regard to Roman law, however, these modern terms are not entirely accurate. We tend to think that substantive law vests us with certain rights and procedural law subsequently allows us to enforce them (“X has stolen my book. I am the owner of the book and I have the right to get it back. Therefore, I will bring an action against X”), thus the starting point of our legal analysis is usually the substantive law. The Romans, however, prioritize the procedural aspect, i.e. they do not ask first whether I am the owner of the book but rather whether I can successfully bring a *rei vindicatio* (“X has stolen my book. I can reclaim it with a *rei vindicatio*. I will win because I am the owner”). For me to bring a successful *rei vindicatio* requires, of course, that I prove to be the owner, so in the end, the modern and the Roman vantage point are not that different after all, but the direction in which cases are viewed is.

Now let us have a look at Roman civil procedure. In the 3rd century BC, the cumbersome *legis actiones* were replaced by a more modern form of legal remedies, the so-called *formulae*, after which the new procedure is named **formulary procedure**.¹⁹ Unlike the ancient set formulas of the *legis actiones*, these new *formulae* did not have to be correctly recited in court and were written in the praetor’s edict. If A wanted to sue B, he had to tell B beforehand in order to give B the possibility of averting legal proceedings, for example by simply paying the claim. If A still wanted to go to court, he had to take B to the praetor as every trial began in front of the praetor in the first stage of civil procedure *in iure* (“before the venue of justice”²⁰). A then stated in front of the praetor which *actio* he wanted to bring against B, and B stated which *exceptiones* he wanted to have included. The praetor then either dismissed the action (because he found there were no legal grounds for such a claim; in Latin this is called *actionem denegare*) or he granted an action (*dare actionem*).

¹⁹ For an overview of Roman civil procedure see Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 152ff.

²⁰ Here we can see the very ancient local meaning of *ius* – generally we know it as “law” (as in *ius civile*, “civil law”), but originally it was used to denote the location in which jurisdiction took place.

The praetor's *actio* (or *formula*) sets out the legal questions which the judge (*iudex*) will have to investigate in further proceedings. It takes the form of a hypothetical judgment (e.g. in the case of the *rei vindicatio*²¹: "If it is found that the plaintiff is the civil law owner of the property under dispute and if the defendant does not return the property to the plaintiff, the defendant shall be sentenced to pay the plaintiff the value of the property; if this is not found, he shall be acquitted").

If an action was granted, the praetor also nominated a Roman citizen as *arbiter* or *iudex* who was to conduct the further proceedings based on the action formulated by the praetor. The judge (*iudex*) – unlike the praetor – was a private person, not an official magistrate. This judge then was responsible for establishing the facts of the case and deciding the trial accordingly in the second stage of civil procedure which is usually referred to as procedure "before the judge", i.e. *apud iudicem*.

We mentioned the important moment in which A came to the praetor and asked for an *actio* against B to be granted. If this *actio* was based on the edict, the praetor would obviously grant it. But what if the claim brought forward by A was not based on an *actio* from the edict? There were two possibilities: the praetor could either dismiss the action if he thought the claim lacked any basis whatsoever (*denegare actionem*), or he could grant an analogous action if he thought the claim was not included in the edict but justified in terms of the values embodied by the actions that were included in the edict. In the latter case, the praetor granted an action in analogy to the actions of the edict, specifically created for the case at hand. Such an analogous action was called *actio in factum* ("action for what happened" or "action on the case", i.e. describing how the plaintiff brings facts to the praetor and is granted an action for those facts) or *actio utilis* ("useful action", i.e. describing how a modified version of an existing action can be used to resolve the case at hand). They played a very important role in developing the law as they by definition addressed issues hitherto not covered by the edict. Hence, many *actiones in factum* were subsequently included in the edict and could then be brought "normally" like any other action in the edict.

In addition to granting *actiones*, the praetor could also issue *interdicta*²² (plural of *interdictum*, "prohibited/forbidden"), which contained an ad-hoc order to do or not to do something. Many of the interdicts were designed to prevent interference with peaceful possession, e.g. the

²¹ On the *rei vindicatio* see Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 156ff.

²² For an overview of interdicts and their role in the protection of possession see Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 16ff.

interdictum uti possidetis (prohibits the opponent of the last *iustus possessor*²³ of an immovable object from using force to prevent the exercise of the *iusta possessio*). This idea of having an especially quick procedural remedy for interference with possession can still be found in many modern jurisdictions.²⁴

Having dealt with the praetor's powers, it should also be mentioned that the curule aediles (market authority) could also issue edicts within their remit. Their role was not as significant as that of the praetor, but their edict containing warranty regulations for the sale of slaves and draft or pack animals on the market is important and well-known.²⁵

One important consequence of all the technicalities of *actiones*, *exceptiones*, *interdicta* etc was that professional legal assistance became a need for all participants in the legal system: the *praetor*, the *iudex* and the parties. Thus, a class of legal experts emerged, the jurists. They did not have any formal role in the process of jurisdiction and simply offered legal advice to anyone who asked – at the beginning even for free as the jurists' activities were considered as contribution to the public good. They suggested *actiones* and *exceptiones* to the parties, they advised the *praetor* or the *iudex* on arising legal questions, they drafted contracts and wills and so on. Gradually, the jurists took over the function of being the custodians of the law from the pontiffs.

²³ On the concept of *iusta possessio* see Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 16ff.

²⁴ To just mention one, in the Austrian Procedural Code (ZPO) there is a special section on interference with possession (sec. 454-459).

²⁵ See Benke/Meissel, Roman Law of Obligations (translated by Caterina Grasl) 160ff.

III. The Imperial Period: Introduction

Rome became an empire in 27 BC (the first emperor being Augustus²⁶), and an empire it remained until its fall. Legislation was taken from the hands of the people and taken over by the emperor. For example, after the establishment of the *edictum perpetuum* in 130 AD, the praetors could no longer develop the law, and at around 200 AD, it was no longer the decree of the Senate (*senatus consultum*) that had the force of law, but rather already the emperor's request in front of the Senate (*oratio principis*).



A) Sources of law

Additional sources of law during the imperial period were legal acts issued by the emperor himself (*constitutiones principis*). They included general regulations (*edicta*, i.e. “public declarations”), decisions on particular cases (*decreta*, i.e. “decisions”), answers to questions by private litigants (*rescripta*, which in Latin means “written in reply”, i.e. by the emperor's jurists, who would answer the questions sent to them) and answers to questions by magistrates (*epistulae*, i. e. “letters”). After the establishment of the **edictum perpetuum** in 130 AD (which we already discussed), *rescripta* in particular became the most important means of developing and adapting the law. Of great importance were also the *responsa* (“answers”, i.e. expert opinions) which were given by jurists, particularly by those to whom the emperor had granted the *ius respondendi* (i.e. the right to give expert opinions). If all responding jurists agreed, judges were bound by their opinion.

B) Sabinian and Proculian law schools

Not long after Augustus' rise to power in 27 BC, two rivalling law schools emerged in Rome. They later became known as the *Proculians* and the *Sabinians*. The Sabinians were founded by Capito, who was followed by the eponymous Sabinus; the Proculians are traced back to Labeo, whose successor was the eponymous Proculus. Generally speaking, the Proculians tended to emphasize logic and dogmatic arguments, whereas the Sabinians were oriented

²⁶ On the right we see a famous marble statue of Augustus found in Prima Porta, a district of modern Rome (taken from <http://www.mbradtke.de/augustus.jpg>).

more towards the specific case at hand and more prepared to throw dogmatic considerations overboard in favour of case-by-case justice (*aequitas*). At around 150 BC, the rivalry between the two schools was mostly resolved, as in the most important questions one or the other opinion had prevailed or a *media sententia* had been found.

One example of such a controversy between Proculians and Sabinians is the question whether or not a contract of barter can also be regarded as a contract of sale (D. 18.1.1.1, Paulus 33 ad ed.):²⁷

Sed an sine nummis venditio dici hodieque possit, dubitatur, veluti si ego togam dedi, ut tunicam acciperem. Sabinus et Cassius esse emptionem et venditionem putant: Nerva et Proculus permutationem, non emptionem hoc esse. [...] sed verior est Nervae et Proculi sententia: nam ut aliud est vendere, aliud emere, alius emptor, alius venditor, sic aliud est pretium, aliud merx: quod in permutatione discerni non potest, uter emptor, uter venditor sit.

And today it is a matter for doubt whether one can talk of sale when no money passes, as when I give a *toga* [a Roman garment] to receive a *tunica* [another Roman garment]; Sabinus and Cassius hold such an exchange to be a sale, but Nerva and Proculus maintain that it is a barter, not sale. [...] Still the view of Nerva and Proculus is the sounder one [says Paulus]; for it is one thing to sell, another to buy; one person again is vendor and the other, purchaser; and, in the same way, the price is one thing, the object of sale, another; but, in exchange, one cannot discern which party is vendor and which, purchaser.

In another very famous controversy, the schools disagree on the legal consequences of the transformation of an object (*specificatio*). According to the Sabinians, such a transformation does not affect ownership. According to the Proculians, it depends on whether or not a new object has been created. Later on, a *media sententia* is developed which in some cases applies the Sabinian opinion (if the transformation is reversible) and in other cases applies the Proculian opinion (if the transformation is irreversible).²⁸

C) The “classical” jurists

Usually three time periods are distinguished: the early classic (1st century AD), the high classic (2nd century AD) and the late classic (3rd century AD). Regarding the social environment of the jurists, it is important to note that for a long time, most of them did not exercise a legal profession in a modern sense. Only the late classical jurists held high administrative offices that occupied them (more than) full-time; their predecessors in jurisprudence were mostly

²⁷ See Benke/Meissel, Roman Law of Obligations (translated by Caterina Grasl) 86.

²⁸ See Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 143ff.

wealthy noblemen who were consulted on specific cases due to their expertise or represented clients in court but did not “work” as lawyers in today’s sense, i.e. they were not employed in law firms or anything comparable. They offered their services (at least partly) within the framework of Roman *amicitia* (which literally means “friendship”), a concept which denoted a broad array of connections between members of the upper class. During all centuries, the jurists were the only ones to have a really comprehensive knowledge of the private law – the *praetor* was a politician who held the office for one year only, the *iudex* was not required to have any legal training and was only concerned with the facts of the case at hand, and the “pleaders in court” (*oratores*) valued skill in rhetoric and argumentation higher than expertise in the law. Before introducing some of the most eminent jurists, we will briefly look at the different genres of jurisprudential literature.

1) Literary Genres of classical jurisprudence

First of all, there was elementary literature. Probably the most influential student textbook of all time are the *Institutions of Gaius* (*institutiones* means “principles”). They were created at around 150 AD and contained the tripartition of private law into *personae – res – actiones*. *Personae* was concerned with everything regarding the status of a person (Are they free? Are they a Roman citizen? Are they a *pater familias* or under the power of one? and so on), *res* dealt with the law of property, i.e. everything that had monetary value, which comprehended both corporeal and incorporeal things (by which Gaius also understood claims and obligations), and *actiones* covered the two different types of actions, *actiones in personam* (arising from the law of obligations, can only be brought against a specific person) and *actiones in rem* (arising from property law, can be brought against everyone). The tripartition *personae – res – actiones* was modified over the course of many centuries, but can still be found in the ABGB and the Code Civil (more on that later).

As a teacher, Gaius had a special love for definitions and divisions, e.g. of corporeal and incorporeal things (Inst. 2, 12-14):

Quaedam praeterea res corporales sunt, quaedam incorporales. Corporales hae sunt, quae tangi possunt [...]. Incorporales sunt, quae tangi non possunt [...].

Moreover, some things are corporeal and others are incorporeal. Corporeal things are those that can be touched [...]. Incorporeal things are such as are not tangible [...].

The great achievement of the Institutions lies not so much in their content, which is quite basic (they are a student textbook, after all), but rather in that they offer a remarkable systematization of private law. Due to this virtue, Justinian took them as a model for his own Institutions in 533 (see below), which had a big influence on modern codifications such as the Austrian ABGB and the French Code Civil.²⁹

Apart from elementary literature, the jurists also discussed problems (problem-oriented literature). They issued *responsa* (expert opinions, see above) and also published *quaestiones* (“questions”) and *disputationes* (“discussions”), in which they explained legal problems on the basis of real or hypothetical cases. They also often published “best-ofs” of these discussions, which came to be known as *digesta* (which means “arranged”, “ordered”; Justinian of course also used this as the title of his famous Digest).

Furthermore, the jurists wrote large *commentaries*, most importantly on the praetorian edict (e.g. Paulus and Ulpianus wrote 80 and 83 books on the edict) or on the most famous treatises on the *ius civile* (e.g. from Ulpianus we also have 51 books on the *ius civile* of Sabinus). These commentaries usually briefly reproduce the content of the law or the text (following the original structure) and add useful explanations and further thoughts. There also existed *notae* (“remarks” of jurists on earlier works) and *epitomae* (“excerpts” from older works).

Now let us move on to some chronology. As stated above, we usually distinguish between three time periods: the early classic (1st century AD), the high classic (2nd century AD) and the late classic (3rd century AD).

2) Biographical sketches of classical jurists

A) In the *early classic* period (1st century AD), the most eminent jurists were Labeo, Sabinus and Proculus (in chronological order). They mostly advised parties in lawsuits, courts, and sometimes even the emperor. They also taught students and wrote legal treatises. **Labeo** founded the law school that later came to be known under the name of his successor Proculus (the “Proculians”). He is said to have been a supporter of the republic and thus refused the office of a consul, which was offered to him by Augustus. He used to spend half the year

²⁹ The compilers of these codifications did not have access to the original Institutions of Gaius: The Code Civil entered into force in 1804 and the ABGB in 1812, but it was not until 1816 that a manuscript of the Institutions was rediscovered. Before that it was via the Institutions of Justinian or references to Gaius’ writings in the Digest that his ideas were known and thereby shaped the way European scholarship perceived and systematized private law.

teaching in Rome and the other half in the countryside doing research. **Sabinus**, after whom the Sabinian school is named, received the *ius respondendi* from Augustus and held the office of a consul. His most famous work is his systematic outline of the *ius civile*, which later jurists (e.g. Ulpianus) commented on for centuries. About **Proculus** we do not know much and not much of his literary works is extant, but the Proculian school made his name immortal.

B) In the **high classic** period (2nd century AD), the most prominent jurists were Javolen, Neratius, Celsus, Julian, Gaius and Pomponius (in chronological order). Compared to those of the early classic period, they were more involved in imperial administration as some of them served as members of the emperor's council or as governors of imperial provinces. **Javolen** was head of the Sabinian school, member of the emperor's council and governor of several provinces. His student was Julian, another famous high classicist. **Neratius** was head of the Sabinian school (together with Celsus), member of the emperor's council and served as governor of imperial provinces. **Celsus** was member of the emperor's council and head of the Proculian school (together with Neratius). He is known for his polemic style of writing, as he often introduces other jurists' opinions with openly depreciative formulations such as "ridiculum est" (it is ridiculous). **Julian** was a student of Javolen and made a brilliant career: not only was he member of several emperors' councils, but he also served as governor of imperial provinces. Emperor Hadrian doubled his salary due to his astuteness and in 130 AD tasked him with the edict its final form (the *edictum perpetuum*, as we already know). He is often considered the greatest of all Roman jurists, famed especially for his perspicuity and elegance. In his masterly "reasoning from case to case" he is not afraid to transgress dogmatic borders in order to achieve an equitable outcome for the case at hand. **Gaius** we already know from his Institutions. However, he did not have the *ius respondendi* and his works were mainly educational, thus he was not cited very frequently by his colleagues and successors as he was considered to be "merely" a teacher. Justinian, however, was very fond of him: not only did he base his Institutions on Gaius', he also referred to him quite often as *Gaius noster* ("our Gaius"). **Pomponius** did not have the *ius respondendi* either and is mainly known for his humongous commentaries.

C) In the **late classic** period (3rd century AD), the most prominent jurists were Papinianus, Paulus, and Ulpianus (in chronological order). All of them were extremely powerful as they

held the highest office in the empire's administration, ranking second in hierarchy only to the emperor himself: the praetorian prefecture (the *praefectus praetorio* was the "head of the praetorians", who had originally started out as imperial guards but in the 3rd century AD were one of the most influential forces of the empire). When **Papinianus** was *praefectus praetorio*, Paulus and Ulpianus were his assistants. Papinian was executed in 212, allegedly because he disapproved of the emperor murdering his brother (the emperor's brother, not Papinianus'). He is considered to be one of the greatest Roman jurists of all time, striving for case-to-case justice by combining astute legal argumentation with ethical reasoning. His style is sometimes difficult to understand as he extremely condenses complicated dogmatic problems. **Paulus** started as an assistant to Papinianus and later became *praefectus praetorio* himself. He was extremely productive and of his very numerous works, his monumental commentary on the edict (80 books) stands out in particular. **Ulpian** also started as an assistant to Papinianus and later became *praefectus praetorio* himself, exactly like Paulus. He was killed in 223 during a praetorian upheaval. Of his works, his commentary on the edict (which equals the dimensions of Paulus') and his commentary on Sabinus' *ius civile* are especially important. Ulpian was held in particularly high esteem by Justinian and his jurists, as can be seen from the fact that 40% of the entire Digest's text originate from his writings. Furthermore, he was the first to draw a clear distinction between private and public law, offering some sort of definition. These notions had already been in use prior to Ulpian, but with varying meanings. According to Ulpian, public law was concerned primarily with public affairs, whereas private law was concerned primarily with the interests of private individuals. The last classical jurist of note was **Modestinus**, a pupil of Ulpian.

IV. Between the Classical Period and Justinian (“Epiclasic”)

This timespan is somewhat difficult to grasp due to the great variety of developments over the course of the centuries. First of all, the summit that Roman legal science had reached in the classical period was followed by an inevitable decline. In the wake of the assassination of the emperor in 235 AD, a crisis of the empire ensued that brought the legal literary production to a standstill. Under emperor Diocletian (who ruled 284 – 305 AD) a resurgence of legal writing took place, only to again diminish until the reign of Justinian in the 6th century AD.

Before the compilation of the Digest by Justinian, the most important source of law were the emperors’ decrees. Under the reign of Diocletian (284 – 305), they were for the first time collected in the *Codex Gregorianus*, which a few years later was updated (so as to include Diocletian’s decrees as well) in the *Codex Hermogenianus*. About 150 years later, emperor Theodosius commissioned his jurists to not only collect the existing imperial decrees, but to also compile them. They were sorted by topic and only the relevant passages were taken from the decrees, a method which was also adopted by Justinian’s jurists in compiling the Digest. The resulting ***Codex Theodosianus*** (438 AD) was subsequently made law, again like the Digest a century later.

Apart from the collection or compilation of the imperial decrees, the use of the writings of the jurists as a source of law was regulated, most notably by the ***Law of Citations*** in 426 AD. This law contained rules for citing jurists: Only the works of the five most eminent jurists (Papinianus, Paulus, Gaius, Ulpianus, Modestinus) could be quoted without further preconditions. If a party to a lawsuit wanted to quote other jurists, they were required to produce at least two manuscripts of the work in question. The law also stated that if the five prime jurists expressed conflicting opinions, the opinion of the majority should prevail, and if opinions were split equally, Papinianus’ should prevail. The Law of Citations was included in the *Codex Theodosianus* (438 AD) and also in the *Codex Iustinianus* (529 AD). After that, however, Justinian himself declared the Digest commission free from the constraints of the Law of Citations so that in the Digest we find contributions by many more jurists than just the five endorsed by the Law of Citations.

An important change took place in procedural law: The classical formulary procedure with its typical bipartition of the trial (*in iure/apud iudicem*) was abandoned in favour of the ***cognition procedure***. The *iudex* was now a state-appointed judge, a legal expert who heard the entire case. In addition to that, orality gave way to writing. In formulary procedure, the entire trial

was held orally, whereas in cognition procedure, the plaintiff brought his action in writing, the defendant filed a written defence and only after this exchange of documents did the parties appear in court. Furthermore, it now became possible to regularly appeal against a court ruling as courts of appeal were created.

The most important political development that took place between the classical period and Justinian was the division of the Roman Empire in 395 into a western half (capital: Rome) and an eastern half (capital: Constantinople, which today is Istanbul). In 476, the western empire ceased to exist as it was overrun by Germanic tribes, so that there again was only one Roman emperor, residing in Constantinople. This turbulent political and military situation led to a declining interest in legal questions, and many of the most promising minds no longer chose a legal career (as they might have done in classical times) but rather preferred, for example, to indulge in theological studies, preferring to contemplate the eternal heavens rather than the difficult situation on earth. Therefore, the quality of lawyers declined and many of the important distinctions were blurred, e.g. ownership and possession were mingled so that lost possession could be reclaimed by means of a *rei vindicatio* not only by the owner, but by everyone (e.g. also a lessee, who in classical Roman law could only bring an *interdictum*). There also was no longer a distinction between contract (Verpflichtungsgeschäft) and conveyance (Verfügungsgeschäft) so that property was transferred already upon conclusion of the contract – if you were to write any of this in your Roman law exam, you would have to resit! This development was often named the **vulgarisation** of the law (from Latin *vulgus* meaning “the ordinary people”) by those who appreciated the exactitude of classical law, considering the following digressions as unscientific degenerations. On the other hand, if the practice of the law downscales the theoretical complexity required, this is a sign of legal vitality as the law manages to adapt itself to its societal surroundings. Be that as it may, as a matter of fact the number of capable lawyers declined in post-classical times, to the point that even the emperor of the Western empire lamented in 451 that some regions suffered from a scarcity of advocates and judges.

Another development that took place in post-classical times was the rise of **customary law**, especially in the provinces of the empire. Local customs had always been there, but in the 3rd century, their extent increased quite a lot. In 319, Emperor Constantine the Great finally recognised the validity of customary law as long as it did not override the written law. Already

in the 2nd century AD, the jurist Julian had pondered the relationship between written law and customary law (D 1.3.32):

Inveterata consuetudo pro lege non immerito custoditur, et hoc est ius quod dicitur moribus constitutum. nam cum ipsae leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes: nam quid interest suffragio populus voluntatem suam declarat an rebus ipsis et factis? quare rectissime etiam illud receptum est, ut leges non solum suffragio legis latoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.

Age-encrusted custom is not undeservedly cherished as having almost statutory force, and this is the kind of law which is said to be established by use and wont. For given that statutes themselves are binding upon us for no other reason than that they have been accepted by the judgment of the populace, certainly it is fitting that what the populace has approved without any writing shall be binding upon everyone. What does it matter whether the people declares its will by voting or by the very substance of its actions? Accordingly, it is absolutely right to accept the point that statutes may be repealed not only by vote of the legislature but also by the silent agreement of everyone expressed through desuetude.

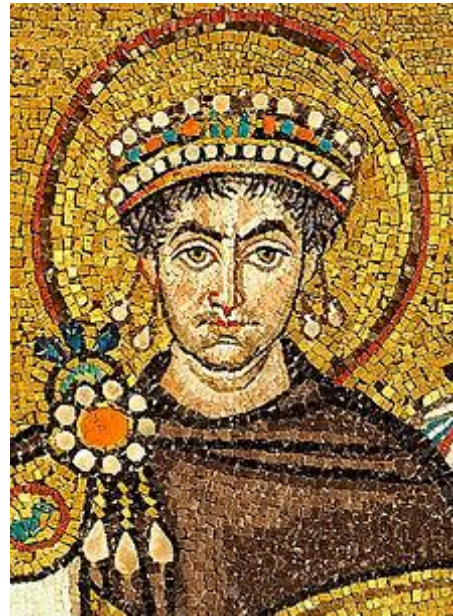
Even to those who still tried to maintain some consistency in the application of Roman law it was difficult to even establish what “Roman law” exactly was. The writings of prior generations were far too extensive to be consulted (e.g. Ulpian’s commentary on the edict had 81 books, way too much for the average 5th century practitioner to read). Therefore, the Institutions of Gaius received much more attention since they were a textbook that contained only the most basic precepts in a systematic way. But even Gaius was too complex for some, so that an *Epitome Gai* (“epitome” is Greek and means short-cut) appeared. For those lawyers who would still use the classical jurists’ works, the Law of Citations regulated their use in 426 (as we already discussed). Most notably, the surge of Gaius’ popularity made him one of the five jurists that could still be cited, alongside the four giants of the late classic Paulus, Papinian, Ulpian and Modestinus.

After the fall of the Western empire to the onslaught of Germanic tribes in 476, several of these Germanic tribes felt the need to write down their tribal laws. Most notably, Latin was their language of choice as after the conquest of Rome, the Germanic peoples recognized the value and the validity of Roman law. The most prominent of these undertakings was the Codex Euricius, which put the law of the Visigoths (= Western Goths) in writing. An important principle at that time, however, was the principle of personal law, i.e. the Germanic people were subject to Germanic law and the conquered Roman people remained subject to Roman

law. Therefore, the new Germanic rulers issued their own collections of Roman law, the most influential of which was the ***Lex Romana Visigothorum*** (“Roman law of the Western Goths”) issued in 506 by Alaric, the king of the Visigoths. It is also known as the “breviary of Alaric” (a breviary is a short version, in this case of the entirety of Roman law). It only applied to Alaric’s Roman subjects; the Visigoth nobility was governed by Visigoth law in the form of the Codex Euriacus. The Lex Romana Visigothorum contained a variety of Roman legal writings ranging from imperial constitutions to the Epitome Gai. It remained in force in Spain well until the middle of the 7th century. It was reinstated by Charlemagne in the 8th century and was very influential in Italy and France in the following centuries, paving the way for the intense reception of Roman law starting from the 11th century (more on that later).

V. Justinian and the Corpus iuris

Emperor Justinian³⁰ ruled from 527 to 565 AD in the eastern part of the Roman empire which by then was known as the Byzantine empire (Byzantium was the name of its capital, formerly known as Constantinople, today's Istanbul). Probably his greatest and most influential accomplishment were the compilatory and legislative projects he initiated.³¹ Shortly after his accession to power, Justinian ordered all the imperial decrees to be compiled. Similar to the Codex Theodosianus, the compilers under the lead of **Tribonianus** were tasked with not only collecting the emperors' decrees but arranging them in a systematic way, sorted by subject matter. Of each imperial decree, the relevant passages were taken out and dragged to the thematically appropriate section; the irrelevant passages were left out. If the provisions of an imperial decree had partly been superseded by other sources of law in the time since the issuance of the decree, the commission altered the text of the decree accordingly. The compilation is known as **Codex Iustinianus** (often merely called the Codex); it was finished in 529 and was given the force of law. Five years later in 534, an updated version was published, also containing the fifty decrees (*quingenta decisiones*) Justinian had issued between 529 and 534 in order to authoritatively resolve a number of legal questions that had been disputed among the classical jurists.



In 530, Justinian appointed a commission led by Tribonianus to collect and compile the writings of all prior Roman jurists in order to create a comprehensive codification, the **Digest**. The commission consisted of 17 members, which were administrative officials, law professors, lawyers, and judges. The commission was freed from the Law of Citations, i.e. no jurist should be favoured on the basis of his name alone; the decision which texts to include and which to leave out was to be based on objective grounds only. As a result, the Digest contains the

³⁰ On the right depicted in a mosaic in Ravenna (taken from https://upload.wikimedia.org/wikipedia/commons/thumb/3/3d/Mosaic_of_Justinianus_I_-_Basilica_San_Vitale_%28Ravenna%29.jpg/220px-Mosaic_of_Justinianus_I_-_Basilica_San_Vitale_%28Ravenna%29.jpg).

³¹ For a more detailed account see Kaiser, Justinian and the corpus iuris civilis, in: Johnston, Roman law (2015) 119-148.

writings of 38 jurists, with Ulpian (his writings make up 40% of the entire Digest) and Paulus (20%) being the most frequently quoted. The Digest is huge, about one and a half times the size of the Bible, but according to Justinian, it contains only one twentieth of the original material (that is, the works of the classical jurists).

The commission scrutinized the writings of the earlier Roman jurists and rearranged them by subject matter. This means that e.g. a passage from Ulpian was placed next to a passage from Paulus, if only they treated the same topic. In addition to that, the commission “updated” the legal content. In classical times, for example, the *mancipatio* was a procedure for the transferral of property in *res mancipi*, but in Justinian’s time, the *mancipatio* had been entirely superseded by the *traditio*. Therefore, every time the classical writings said “*mancipatio*”, the commission replaced this with “*traditio*”.³² Another example is the replacement of “*sponsio*” with “*fideiussio*”.³³

The commission completed the Digest at an amazing pace in only three years, so that in 529 Justinian granted the Digest the force of law, simultaneously forbidding that any of the original jurists be quoted in court. Thus, Justinian achieved his aim of a comprehensive codification to replace the writings of jurists as source of law. Interestingly, though, this epic project received relatively little attention. Being written in Latin, the Digest was of little to no use to the Greek-speaking lawyers of the Byzantine empire, so that Greek versions appeared soon after. The Digest’s Greek restatement from around 900 known as the ***Basilica*** (which means “imperial laws”) became very influential, and the ***Hexabiblos*** (which means “work in six books”), a shortened version of the *Basilica* from 1345, remained the basis of Greek private law until its replacement by the Greek civil code in 1940.

After the completion of the Digest, Justinian adopted a new project: a student textbook for beginners (the so-called ***Institutiones***). Another commission, again led by Tribonianus, compiled the textbooks of earlier jurists, their main source being the *Institutiones* of Gaius (whose tripartite scheme *personae-res-actiones* they kept). Justinian’s *Institutiones* serve as an introduction to the law, often covering the most basic concepts and then referring the readers to the Digest for further information. The *Institutiones* were given the force of law together with the Digest.

³² For an overview of *mancipatio*, *in iure cessio* and *traditio* see Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 82ff.

³³ For an overview of the different types of suretyships (focusing on the *fideiussio*) see Benke/Meissel, Roman Law of Obligations (translated by Caterina Grasl) 273.

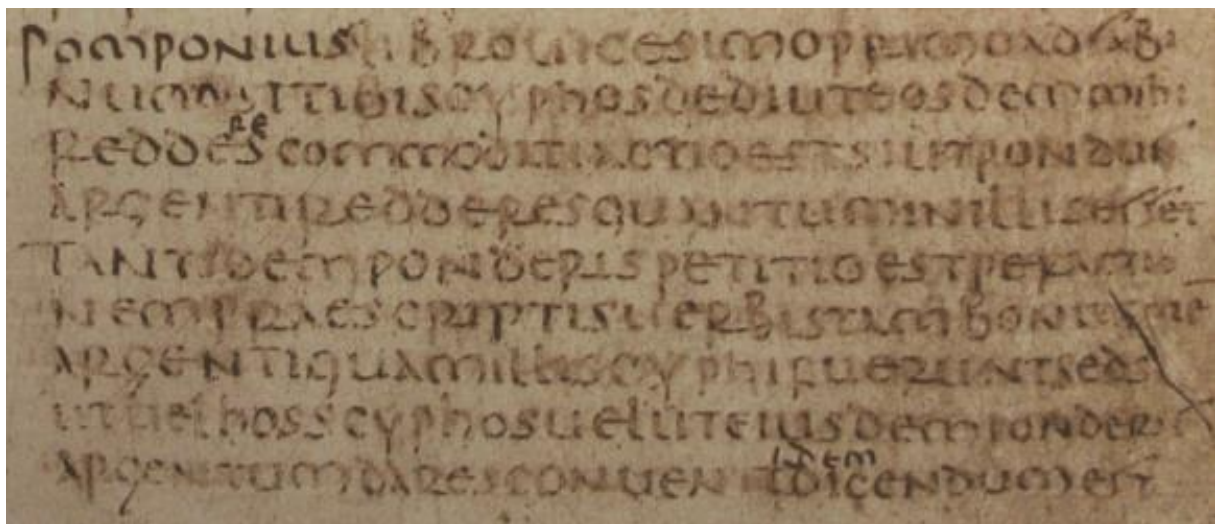
With the completion of the Codex, the Digest, and the Institutions between 529 and 534, Justinian had accomplished a comprehensive judicial reform. However, this did not mark the end of his lawgiving, as he ruled for 31 more years until his death in 565. The laws he issued after 534 were collected and came to be known as the **Novellae** (meaning “new laws”). Taken together, the Codex, the Digest, the Institutions, and the Novellae make up the **Corpus Iuris Civilis (CIC)**. This is a modern name, however, which stems from the first printed edition by Gothofredus (1583) and has been used ever since.³⁴

³⁴ Some modern authors, however, use the term *Corpus Iuris Civilis* solely for the initial Justinianic compilations of the Institutions, the Digest and the Codex.

VI. From Roman Law to the Civilian Tradition

After Justinian's monumental reforms, Roman law was in force both in eastern Rome and in Italy (which Justinian had conquered back from the Germanic tribes). After his death in 565, however, the Lombards reclaimed Italy and Roman law suffered a steep decline in importance due to the rise of customary law. Apart from some remains such as the Lex Romana Visigothorum (which we already discussed), the influence of Roman law dwindled, especially as the text of the most prominent of its works, the Digest, had been lost.

A) Rediscovering Roman Law: Glossators and Commentators



Only in the 11th century, a manuscript of the Digest, the so-called **codex Florentinus** (a small part of which can be seen above; you can read “Pomponius” at the beginning of the first line)³⁵ was rediscovered. This led **Irnerius**, a teacher of grammar and rhetoric, to found his tremendously influential law school in Bologna (which had around 1000 students in 1200, which by medieval standards is a lot), who later came to be known as the **glossators** (11th to 13th century). This name derives from their activity of writing *glossae*, i.e. explanations of the Digest's text written between the lines or in the margin. Their work emphasized the study of the Latin text, which after all was a completely new discovery that needed to be explained. They dove deeply into the text, supplying many explanations to obscure passages and cross-references in order to make the lack of order within the CIC manageable (for example, the

³⁵ Dig 19.5.26; picture taken from https://de.wikipedia.org/wiki/Littera_Florentina#/media/Datei:Florentina-fragment.png

same matters were dealt with in the Institutes, the Digest and the Codex, but without any connections whatsoever). In addition to close scrutiny of the text resulting in *glossae*, the glossators also wrote *summae* (“summaries”), in which they presented the legal principles in a systematic order. The most important glossators were **Azo Portius** and **Franciscus Accursius**. Especially Accursius became very influential via his **Great Gloss** (*glossa ordinaria*, which means “ordinary [in the sense of “in the standard form”] gloss”) from 1230, which summarised all glosses up to his day. Later on, jurists as well as courts would solely rely on the Great Gloss, which in practice made it far more important than the CIC itself and gave rise to the saying *quidquid non agnoscit glossa, non agnoscit curia* (“what is not recognised by the gloss is not recognised by the court”).

In the 14th century, the scholarly work mainly took the form of commentaries rather than glossae. Hence, the successors of the glossators are called the **commentators** (14th to 16th century). The most important commentators were **Bartolus de Sassoferato** and **Baldus de Ubaldis** (both 14th century). Bartolus in particular was extremely famous; in Spain, his opinions were even declared law, and there was the saying *nemo iurista nisi bartolista* (“nobody is a jurist if they do not follow Bartolus”). The commentators not only dealt with Roman law, but also with the statutes of city-states. As the political landscape in Northern Italy was greatly fragmented at that time, so was the law. Every city-state had its own statute, which gave rise to the question which statute to apply in case of a conflict of laws. The commentators developed the idea that the statute with the closest connection to the case at hand should be applied. This later came to be known as “statute theory” and is one of the basic ideas of modern International Private Law.³⁶ The commentators also dealt with canon law (the law of the church, more on that below) and adopted some of its rules such as *mala fides superveniens nocet* (“bad faith which comes later does harm”) regarding usucaption. This contrasts Roman law (*mala fides superveniens non nocet*),³⁷ but is, for example, still valid in Austrian law today.³⁸

³⁶ Cf Sec 1 para 1 of the Austrian Law on International Private Law (IPRG): “In terms of private law, matters involving foreign countries are to be assessed according to the legal system with which there is the strongest relationship.”

³⁷ On the role of *bona fides* in usucaption see Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 104.

³⁸ It does not say so explicitly in the ABGB, but it is universally accepted in doctrine and jurisdiction, see for example the commentary of *Perner* in Kletečka/Schauer, ABGB-ON^{1.03} § 1463 Rz 4.

B) Renaissance and the *Ius Commune*

Starting already in the 14th century, one of the big movements of the European history of ideas took place, starting in Italy: **Renaissance** (which means “rebirth”). The intellectuals, the so-called “humanists”, turned away from contemporary texts to the sources of antiquity, among them the CIC. Legal scholars were appalled by the barbarity of the glossators’ and commentators’ Latin and equally condemned their deformation of the ancient text. Thus, following the motto *ad fontes* (“back to the sources”), humanist scholars despised everything that had been written after Justinian and reverted their attention to the original text of the CIC instead of the commentaries, that had already by far superseded the original text in terms of importance (cf. the saying *quidquid non agnoscit glossa, non agnoscit curia*, “what is not recognised by the gloss is not recognised by the court”). Whereas especially the commentators, following Bartolus, had been aiming at finding solutions for contemporary problems in their studies of Roman law, the humanists wanted to reveal the “original” meaning of Justinian’s text, not only taking into account the dogmatic content (as the commentators did), but also the historical background, the accuracy of the transmission of the text, the different layers of Roman law coalesced in the CIC etc. For example, the legal humanists tried to reconstruct the Law of the Twelve Tables from the Digest, which would not have been of interest to the commentators as this piece of information would not contribute to the solution of any practical problem whatsoever. The new movement soon spread from Italy to France, where it fell on fertile soil and came to be known as the ***mos gallicus*** (“French tradition”), in contrast to the ***mos italicus*** (“Italian tradition”), which followed in the footsteps of Bartolus in that its focus remained on the dogmatic content. The humanists believed that the law should be presented in the same way as other sciences at that time, i.e. proceeding logically from the universal to the particular. Therefore, they devoted a lot of study to the Institutes, which were ordered in a systematic way, a work that had not received much attention by the commentators. The Institutes offered logical distinctions, proceeding from the general to the concrete, e.g. the starting point is obviously the law, which is divided into the three categories *personae/res/actiones*, which then are each subdivided, e.g. *res* into corporeal and incorporeal things and the corporeal things into movable and immovable objects and so on. In the practice of the law, however, the ***mos italicus*** kept its dominance as the humanist studies were considered to be of merely theoretical interest and entirely

irrelevant to court matters. In terms of practical use, the commentaries had triumphed over the text of the CIC.

One very influential humanist of the 16th century was Hugo Doneau, better known under his Latin name **Donellus**. His great innovation was the clear distinction between substantive law and procedural law. He conceived substantive law as a system of subjective rights that laid down what belonged to whom and who had which claim against whom, which was logically prior to procedural law, which he regarded as the mere means of obtaining what the substantive law granted. This constituted a stark contrast to ancient Roman law, in which substantive and procedural law were not really separated. By taking his distinction as a general law of logic, Donellus criticized the Roman view for confusing the logically prior (the subjective right) with the logically posterior (the means of enforcing this subjective right). Nowadays, we tend towards Donellus' view more than the Roman view, acknowledging, however, that matters most often are not that clear-cut.

At the same time as the rise of civil law scholarship, scientific study of the Church's normative order emerged too: **canon law** (derived from the Greek *kanon* meaning "rule"). After many centuries of practical application of some parts of Roman law to clerics all over Europe (hence the saying *ecclesia vivit lege Romana* meaning "the Church lives by Roman law") and a lot of power struggles between the pope and worldly rulers, a bipartition of applicable rules had emerged: canon law for the Church and civil law for earthly matters. The starting point of canon law as a science was the *Decretum Gratiani* in 1140, an authoritative collection of documents (mainly papal decisions, so-called decretals). Dogmatic differences between canon law and Roman law can be found, for example, regarding the matter of the right purchase price. Whereas in classical Roman law only a *pretium verum et certum* was required (i.e. a price that is seriously meant and clearly defined), canon law took up on post-classical ideas that the price had to be just as well and developed the doctrine of the ***pretium iustum***, which demanded for a sales contract to be valid that the price be just – which in oversimplified terms meant: not higher than fair.³⁹ Another example is usucaption, where canon law states *mala fides superveniens nocet* ("bad faith that comes later does harm") contradicting the Roman law *maxim mala fides superveniens non nocet* ("bad faith that comes later does not harm").

³⁹ On the different requirements for *pretium*, see Benke/Meissel, *Roman Law of Obligations* (translated by Caterina Grasl) 86ff.

After the emergence of canon law as a science, canonists jealously looked at the civil lawyers for their CIC, to which nothing in the realm of canon law could be compared. Hence, different compilations of canon law texts came to be known as the **Corpus Iuris Canonici**. In stark contrast to the Corpus Iuris Civilis, it did not come into existence by the decree of one eminent person (Justinian), but rather grew in a more organic way. Being more interested in civil law, we will not deal with the Corpus Iuris Canonici. Some people studied both civil law and canon law, thus coming to be known as erudite in “*utrum ius*”, i.e. both laws. This terminological separation somewhat obfuscated that, in reality, canon law and civil law grew increasingly close, until they were considered as two aspects of one system, which came to be known as the **ius commune** (“common law”, in German “*gemeines Recht*”) of all of Europe. The medieval dichotomy of legal studies (canon law / civil law) is, by the way, the reason why in Germany today the study of law is still called “*Jura*” (which is plural and means “*Rechte*”), whereas in Austria the idea of unity prevailed, hence in Vienna one studies “*Jus*” (which is singular and means “*Recht*”).

Following the model of the tremendously important law school of Bologna, law schools emerged at other universities as well, spreading Roman law from Italy all over Europe, including Britain. In Vienna, Roman law was included as a subject in the curriculum in 1494 (until then only canon law had been taught). Strikingly, it was accepted everywhere that the study of law meant the study of Roman law, and before the 17th century, there was no university that offered classes in local law. Therefore, for centuries every university-trained lawyer was a lawyer trained in Roman law. This had the effect that all over Europe, Roman law was the foundation of a shared legal culture, the *ius commune*.

In addition to legal scholars and practitioners all over Europe sharing a common legal culture based on Roman law, the CIC also became known outside of the legal world. In the 13th century, the extremely influential philosopher and theologian Thomas Aquinas repeatedly drew on material from Roman law sources when he wanted to illustrate human behaviour; he even adapted Ulpian’s famous definition of justice (D. 1.1.10pr. and STh II-II 58.1):

Iustitia est constans et perpetua voluntas ius suum cuique tribuendi.

Justice is a steady and enduring will to render unto everyone his right.

Another example of the wide-spread popularity of Roman law can be found in Dante’s *Divina Commedia* (1320), in which Justinian appears as a sacred figure in the 6th canto of the Paradise,

and in his political works, where the CIC is identified with Reason itself. These instances show that the CIC had become part of general education, also among non-lawyers.

C) The “Reception”

The rediscovery of Roman law not only led to scientific scrutiny, it also had a huge impact on legal practice. The transfer of the results from university to court is called the *reception* of Roman law (which took place in many parts of Europe, but we will focus on Germany and Austria). This process began in the 13th century and gradually, more and more university graduates were employed in the administration and the judiciary. In addition to that, a procedure common to civil law and canon law was developed (“Romano-canonical procedure”), which is very similar to modern civil procedure in that the judge investigates the facts that are not admitted by both sides. The increased technicalities of the procedure required the assistance of trained lawyers to both parties, which in turn increased the demand for university graduates. Also in terms of substantive law, Roman law gained momentum as even local courts would apply Roman law if their local customary law did not provide a solution for the case at hand. This led to a reception mainly of the Roman law of obligations, as the local customary laws offered little in this field. In addition to its subsidiary practical implementation in the courtroom, Roman law gained further momentum due to expert opinions being given by professors to both lawyers and judges, mainly in Germany. The preparation of such opinions became a big part of the activity of German law faculties. Roman law knowledge spread almost at lightning speed in the 16th century and was orientated more towards the practical *mos italicus* than the theoretical and historic *mos gallicus*. One important factor was that the Holy Roman Empire consisted of many disparate territories and the emperor regarded the imperial law of the CIC as a potential unifying factor. Roman law could provide a foundation for a centralistic bureaucratic state, in which power lay with the emperor and the emperor’s law was applied to all subjects alike, which was desired by the rulers, contrasting the status quo of rather independent feudal lords each following their own local customary law. This desire is reflected in the institution of the so-called Reichskammergericht, the supreme court of the Holy Roman Empire. It was established in 1495 and from 1548 onwards, all of its members had to be trained jurists, which meant trained

in Roman law. The court applied the Romano-canonical procedure and in terms of substantive law, it applied the *ius commune*.

Interestingly, the reception was not limited to civil law affairs. **Natural law**, beginning its rise in the 17th century, also heavily drew on the CIC, in spite of asserting that, being derived entirely from reason alone, it was different from civil law. For some natural lawyers, the last title of the Digest (50.17), which contained basic principles of law, provided the starting point for their logical deductions. Digest 50.17 is a collection of legal maxims, which Roman jurists had originally used as part of their reasoning in a specific case at hand, and which had subsequently been removed from their context. Examples include: “no one can transfer to another a better right than he has himself” (the *nemo-plus-iuris*-rule, D. 50.17.55)⁴⁰, “in an equal case, the possessor must be considered the stronger” (the *beatus-possidens*-rule, D. 50.17.128)⁴¹, “a creditor who allows a thing to be sold gives up his pledge” (D. 50.17.158)⁴². Those maxims were taken by some proponents of natural law and presented as commandments of reason from which everything in the legal system was to be deduced. And regardless of the extent the natural law theoreticians considered Roman law to equal reason itself, all of the famous natural lawyers (e.g. Grotius, Leibniz, Pufendorf, Thomasius, Wolff) had to adopt a stance towards the contents of the CIC, which again showcases the great importance Roman law had even for those who sought to overcome positive civil law by natural law, be it based on reason, morals, god, or whatever.

Besides natural law, **public international law** is likewise very much indebted to Roman law. In the 16th century, as the nation-states were on the rise, it became necessary to establish a *ius inter gentes*, i.e. public international law. The Romans, as we recall, did not know a *ius inter gentes* (which means “law between the peoples”), but only a *ius gentium* (“law of the peoples”) referring to norms of Roman law that are valid between human beings in general, be they Roman citizens or not. Theorists of early public international law such as Alberto Gentili and **Hugo Grotius** claimed that the *ius inter gentes* was derived from natural law and therefore worlds apart from civil law. What they did, however, was to take concepts from Roman civil law and slightly adapt them to their newly invented public international law, e.g. did Roman contract law form the basis for the law of international treaties.

⁴⁰ Cfr. Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 77f.

⁴¹ Cfr. Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 13.

⁴² Cfr. Benke/Meissel, Roman Law of Property (translated by Caterina Grasl) 196f.

D) The Codifications

1) The idea of codification

A codification is a collection of laws in a uniform body of law that is intended to conclusively regulate the respective area and that excludes other sources of law. The idea is to comprehensively replace the old laws by new laws. Examples are the French Code Civil from 1804, the Austrian ABGB from 1812, and the German BGB from 1900.

Why have a codification? What are the reasons for introducing a codification and why did they suddenly arise in the 19th century? First of all, in theory there is immense practical value to a codification because it contains all the existing laws on a certain field. This would mean that if you do Austrian civil law, all you need is the ABGB, an idea which is very much concordant with rationalist philosophy (rationalism was popular in the 18th century and held that everything could be deduced from general principles). In practice, however, a plethora of other laws exists and needs to be taken into account. This points to a problem faced by every codification, namely that new problems will arise after the codification and new legal solutions will have to be found. In this situation the legislator can either enact a new law (defying the idea of the codification as containing everything relevant) or include new regulations in the codification. At first sight, the latter sounds like a simple solution, but from the perspective of a lawyer, it is awful. Imagine you have to deal with travel law, would you prefer the most important provisions on travel law (information duties, contract formation, damages etc) to be found in one single law or to be scattered throughout the entire codification at their respective place, i.e. special provisions on contract formation in the section on contract formation and special provisions on damages in the section on damages? As it is obviously preferable to have a single law, the inherent limits of codifications become clear: They just can't comprise everything. Having said that, there is a lot to be said in favour of unity as well. For example, in the ABGB you find the most fundamental rules of Austrian private law that permeate all special fields of private law (such as labour law or mercantile law), which can then limit themselves to expounding their specific deviations from and additions to those general rules.

From a historical perspective, it is not by coincidence that codifications popped up in the 19th century. They were seen as means of unifying different territories and regions within one nation state, thus limiting the independence of regional courts and increasing the influence of the

capital, where the lawmakers would reside. This can be seen, for example, in Austria at the outset of the 19th century. The Habsburg Empire consisted of a lot of disparate territories which more often than not were only united by the common Habsburg rule. In this situation, it obviously makes sense for the emperor to strengthen his position by enacting one uniform body of law (the ABGB) to be valid in all of his territories. The territories, of course, tried to resist the application of the ABGB, so that the (non-)applicability of the ABGB in Hungary was a pretty good benchmark by which one could judge who at the moment had the upper hand, the centralist emperor in Vienna or the Hungarians.

In addition to those power struggles, a uniform body of law benefits commerce by reducing “transaction costs”, meaning that a merchant greatly prefers if there is only one set of laws governing her relationships to all of her business partners rather than having to deal with a plethora of different national laws. By having to deal with one set of laws only, the costs of the merchant’s transactions decrease as she (or the lawyers she has to pay) only has to acquaint herself with one jurisdiction rather than many. And if transaction costs decrease, the merchant will use this to her advantage by offering her product at a lower price than the competitors. And as this logic applies to all merchants, prices will fall, which ultimately benefits the customers. This idea applies not only to 19th century codifications, where the codification supersedes local customary law, but also to legal acts of the EU in relation to the national jurisdictions of the member states.

2) Early Codifications: ALR, Code Civil, ABGB

Having laid out the benefits of a codification, it is not surprising that already before the 19th century, the “century of the codification”, such attempts were made. For example, in 1756 in Bavaria the *Codex Maximilianeus Bavaricus civilis* (CMBC) was issued, which comprised *ius commune* in the familiar tripartite scheme *personae-res-actiones*. Much weaker was the influence of Roman law on the **Prussian ALR** (“Allgemeines Landrecht”, which means General State Law), enacted in 1794. This humongous codification of all legal fields (not only private, but also public, criminal, commercial etc) comprised 19,000 articles and covered many fields in which Roman law never had a big standing, given that the reception took place mainly in civil law. There are some influences, however, especially in areas typically influenced by Roman law such as the law of property.

While in Prussia the ALR was enacted, in France the Revolution from 1789 still raged on. As the revolutionaries wanted to sweep away every last remnant of the *ancien régime*, the abhorred monarchy, they also aimed to overthrow the existing legal system and replace it with a new, short, and simple code, accessible to all citizens and expressing the core values of the revolution: liberté, égalité, fraternité. In 1799, Napoleon assumed power and tasked a commission with creating such a codification, for which it was necessary to strike a balance between customary law and Roman law. The commission heavily drew on the work of Robert-Joseph Pothier, who around 1750 had reorganized the Digest so that it supposedly expressed rules of general validity. Finally, in 1804, the **Code Civil** entered into force. Concordant with the ideas of the French Revolution, it is written in a simple language, in order to be comprehensible to everyone. Due to the heavy reliance on Pothier, the CC is very much indebted to Roman law, especially in the law of obligations. Not only is there a strong link content-wise, but also in terms of structure, as it is closely inspired by the institutional scheme *personae-res-actiones*: the first book deals with the law of persons (“Des personnes”), the second book deals with things, ownership, and limitations to ownership (“Des biens et des différentes modifications de la propriété”), and the third book deals with the different ways of acquiring ownership (“Des différentes manières dont on acquiert la propriété”, e.g. law of obligations and inheritance law). The CC is still in force today, although by now it comprises five books: book 4 (added in 2006) deals with the law of sureties (“Des sûretés”) and book 5 deals with the applicability of the CC in the oversea territory of Mayotte. After the issuance of the CC in 1804, four more codes followed shortly after (civil procedure law, commercial law, criminal law, and criminal procedure law), so that in total five French codes were enacted under Napoleon, the “Cinq Codes”.

In Austria, one general aim of codifications was particularly important, namely the unifying power. Comprising a variety of territories with different languages and culture, creating unity had always been one of the main difficulties faced by the Habsburg Empire. Therefore, empress Maria Theresia (who reigned 1740 – 1780) tasked her jurists in 1753 to draft a code based on *ius commune* (albeit corrected by the natural law of reason). In 1766, the first draft was ready, the so-called **Codex Theresianus**. Content-wise, it was a compromise between the different laws of the empire’s provinces, which in turn were a combination of *ius commune* and local law. The Codex Theresianus comprised over 8,000 articles and never entered into force for being too lengthy, but it served as valuable preparatory work for later codificatory

efforts. In subsequent decades, this draft was shortened and reworked, until finally (after some more adventures) the legislative commission with Franz Zeiller as its main editor was successful and the **Austrian Civil Code (ABGB)** entered into force in 1812. It followed the tripartite scheme *personae-res-actiones*, although with a little twist. The first part (“Von dem Personenrechte”) deals with the law of persons (such as family law), the second part (“Von dem Sachenrechte”) deals with the law of property, inheritance law and the law of obligations. The third part, however, deviates from the Gaian scheme (where the third part deals with actions) and comprises regulations that apply to both *personae* and *res* (“Von den gemeinschaftlichen Bestimmungen der Personen- und Sachenrechte”).

3) The codification debate and the emergence of the Historical School in Germany

After the enactment of the codifications, Roman law seemed pretty much out of fashion again: the prevalent view deemed it outdated and irrelevant, as it had happened so many times before. However, it was in for a revival once more. Let us have a look at Germany, first off at a quote by the famous poet Johann Wolfgang von Goethe, who in 1829 compared Roman law to a duck:

Auch das römische Recht, als ein fortlebendes, das, gleich einer untertauchenden Ente, sich zwar von Zeit zu Zeit verbirgt, aber nie ganz verloren geht, und immer einmal wieder lebendig hervortritt, sehen wir sehr gut behandelt, bei welcher Gelegenheit denn auch unserm trefflichen Savigny volle Anerkennung zuteil wird.⁴³

We also see Roman law treated very well as a living thing, which, like a duck diving amid the depths, hides itself from time to time, but is never completely lost, and always emerges alive again, on which occasion full recognition is also given to our excellent Savigny.⁴⁴

In this quote, Goethe praises one of the most prominent legal scholars of the 19th century: **Friedrich Carl von Savigny**, the founder of the **Historical School**. This movement of thought is closely connected to the resurgence of Roman law, but we need to introduce some context. At the outset of the 19th century, there was no strong German central state but rather a motley crew of small territories, held together (more or less) by the Holy Roman Empire (until 1806), the shared enmity towards Napoleon (who attacked and conquered parts of today’s Germany), or the German Confederation (after 1815). At that time, nationalist movements

⁴³ Goethe, *Sämtliche Werke, Briefe, Tagebücher und Gespräche* (Hg Bims) 1999, 12 (39), 335.

⁴⁴ Translation of the author.

gained traction and the idea of a German nation state based on shared German culture grew stronger and stronger. In this intellectual atmosphere and influenced by the philosophy of Natural Law, Anton Thibaut raised the idea of creating a common German codification and gained a lot of praise for it due to its conformity with the strife for political unity and the protection of civil liberties. However, he was met with fierce opposition by a proponent of a more conservative approach influenced by German Romanticism: Savigny stressed that law originally evolves in the way of customary law as an expression of a people's "Volksgeist". In a professionally specialized society, it is the jurists who as judges and scholars play a particularly important role in the further development of law as a science. According to Savigny, a codification presupposes a thorough scholarly study of the historical sources of law and a state of perfection of legal science which he proposes to pursue with his historical school of law.

In the 1840s, the historical school split into two groups, the Romanists (who dealt with Roman law) and the Germanists (who dealt with Germanic law), united in their fierce disagreement with each other. While the Germanists regarded Roman law as a pollution of the "pure" Germanic law, the Romanists sought to purify what used to be sold as "Roman law". This, they claimed, constituted an abomination of the "pure" Roman law (an idea which we already know from the *mos gallicus*), which therefore needed to be reconstructed in its "true" original state so that the universal principles inherent in the text could then be discovered. Like the Humanists in Renaissance times, the 19th century Romanists aimed more at revealing the theoretical structures of the texts than at practical applicability, but they also discussed contemporary problems such as the position of the peasants, who concordant to the idea of a free German people needed to be freed from the remaining fetters of medieval serfdom. Their solutions, however, did not find great acclaim among legal practitioners.

4) Pandectism and the BGB

Building on Savigny's work, in the second half of the 19th century, German studies in Roman law became known under the name **Pandectism** ("Pandektistik"; Pandect is the Greek name of the Digest). They deviated slightly from Savigny's historical studies and adopted a more practical approach, looking for a Roman law foundation of bourgeois values. They did so with an upcoming codification in mind, which seemed nigh due to the rise of Prussia, which acquired hegemony among the German territories. Indeed, in 1861 an all-German commercial

code (which was hardly influenced by Roman law) was enacted, but the centrepiece of private law was still missing: a civil code. The Romanists now dedicated their work to uncovering general principles of Roman law (purged from the features that were owed only to the ancient society) that could be included in the new code. This led prominent exponents such as **Rudolf von Jhering** to claim that Roman law was not based on morals (as the natural law doctrine sometimes claimed) but rather on economic necessity, which led to self-promotion as the guiding principle. Roman law thus became the prime example of a highly individualist law that protected property and championed freedom of contract, not bothering with the protection of parties with less bargaining power (in contrast to e.g. modern consumer protection law). The most famous of Jhering's contributions to legal science is, however, his invention of *culpa in contrahendo*, a concept that he based on texts from the Digest and that is universally accepted today. Another important proponent of pandectism was **Bernhard Windscheid**, whose widely used textbook was considered to contain the succus of this school of thought. After the creation of the German Empire in 1871 and intense legal debates, in 1900 finally a German codification saw the light of day: the **BGB (Bürgerliches Gesetzbuch)**. In its form it does not follow the tripartite order *personae-res-actiones* of the Institutes (in contrast to the Code Civil and the ABGB), but rather displays the so-called five-part "pandectistic" division of civil law (which has this name because it was championed by pandectism):

- (1) General Part (comprising regulations that are important for the other four parts as well, e.g. legal capacity, representation etc)
- (2) Law of Obligations
- (3) Law of Property
- (4) Family Law
- (5) Inheritance Law

This division of civil law subsequently proved to be the most convenient and is nowadays well-established also in Austrian legal science.

To round up our journey through many centuries of Roman law, one last curious fact: Up to this day, San Marino refuses the idea of a codification and still applies the *ius commune* – there, the duck is still fully afloat.

VII. Final Excursus: Traces of Roman law in the Common Law

The Civilian tradition, i.e. the legal systems which evolved from ancient Roman law, and English Common Law are often seen as strictly separated. Yet, there are a number of crossroads in history in which Roman law was also influential in the development of the Common law.

The spreading of Roman law in medieval times also extended to Britain. From the 12th century onwards, civil law was taught at English universities alongside canon law. Roman law also had a big impact on the written fixation of English common law. When **Henry Bracton** set out to coherently set out the law of the royal courts around 1230, he used the categories of Roman law for his systematization as nothing comparable existed in common law. Many passages of his work echo the Digest, showcasing the impact of Roman law even in a jurisdiction based on local customary law (the common law) rather than the application of the CIC.

In 16th century Scotland, a lack of development of the customary law was heavily felt. In contrast to England with its Royal Court, Scotland did not have a central court of professional judges, which was duly installed. It applied Scots law as far as possible, but if Scots law did not provide an answer, the judges turned to the *ius commune*. The court stressed, however, that a civil law rule was not imported because the authority of civil law had been recognized but rather due to its rational virtue.

In 16th century England, the picture was different. Common law had become a highly specialized discipline that trained its lawyers in the so-called Inns of Court, which were associations of barristers where junior lawyers got their common law training. The common law had, however, become encrusted and cumbersome, fiercely resisting change. One of the problems was that (like Roman law) it only knew monetary damages, which meant that other kinds of remedies (e.g. injunctions to prevent future wrongdoings) had to be found elsewhere. Therefore, the Court of Chancery gained influence with its jurisdiction of **Equity**. Most of the Lord Chancellors were trained in civil law and canon law, drawing freely on them in developing Equity. In addition to this rather free-hand reception of Roman law, there were courts that applied Romano-canonical procedure and *ius commune* (e.g. the Admiralty court for maritime disputes). A special guild of practitioners emerged, as common lawyers were banned from the civil law courts. When Henry VIII broke with Rome in 1530, establishing the Church of England (because he wanted to have his first marriage annulled in order to be able to remarry in terms

of Roman Catholic law, which the pope refused), he banned the teaching of canon law, but fostered the teaching of civil law.

In 18th to 19th century England, Roman law terminology and systematization heavily featured in legal debates, showcased e.g. by Blackstone's famous *Commentaries on the Laws of England* (1770), whose order persons/things/private wrongs/public wrongs was based the Institutional scheme *personae-res-actiones*. The works of Savigny and others were fervently read and some even translated into English. Noteworthy is Henry Maine's *Ancient Law* (1861), which put forth the idea that societal development can best be traced in the law, which is the reason why Roman law with its 2000 years of development serves as the prime example of societal advancement. This idea of gradual development is very much in keeping with contemporary notions of evolution in the natural sciences, which had culminated in Darwin's *On the Origin of Species* two years previously in 1859. Unfortunately, Maine did not make use of Goethe's duck analogy in this context.

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