Roman Law

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I. What is Roman Law?

Ius est ars boni et aequi. "Law is the art of what is good and fair." This adage by the Roman jurist Celsus (1st-2nd century) encapsulates the Roman conception of law during the imperial era. Behind the succinct term "Roman law" lies a complex web of legal principles and institutions that spans several distinct periods: pre-Republican royal law, Republican law (509–27 BC), classical imperial law (from Augustus' rise to power in 27 BC to the death of Alexander Severus in 235), and the legal developments of the post-classical period leading up to Justinian's codification in the 5th century as well as further developments in Byzantine law. Modern scholars typically regard classical imperial law as the most refined expression of Roman law, and it is this period to which references to "Roman law" most often pertain. The influence of Roman law is profound, particularly in the legal systems of continental Europe and those influenced by them. In this context, we will first introduce some foundational concepts of Roman law (I), then explore its so-called "reception" in Switzerland[1] (II), and finally discuss its continued relevance today (III). Contrary to the rhetorical implication of the first title, we will not attempt a comprehensive definition of Roman law. Instead, we will focus on its primary sources, offering a framework to help readers begin to engage with Roman legal thought.

1. The Main Sources of Law

Roman law developed organically over centuries, resulting in a complex system where different legal sources interact. These include statutes, senatus-consults, edicts, decrees, interpretation of the jurists and imperial constitutions. The Roman legal order can be likened to a "*mille-feuille*" of regulations, with different layers of complementary or exclusive legal principles that could be applied to specific cases. This understanding of law diverges significantly from our modern conception of legal norms, validity, and application. In the Roman system, the person applying the law did not rely on a single "code", specific statutes or a hierarchy of norms. On the contrary, the judge relies on a series of legal sources to guide his or her reasoning and arrive at a solution deemed fair.

a) Statutes and Plebiscites

Statutes (*leges*) and plebiscites (*plebiscita*) represent the essence of written law from the early Republic to the first century of the Empire. Statutes were laws enacted by a vote of the people's assembly (*comitia*), while plebiscites were legislative texts passed by the plebeian assembly (*concilia plebis*). It is impossible to list all the hundreds of statutes passed over time. The relatively secondary role of statutes in Roman legal history led the German scholar Fritz Schulz (1879–1957) to claim that "the law-inspired people was not the statute-inspired people"[2]; this famous viewpoint is however nuanced in scholarship. In any case, Roman statutes, especially

[1] Switzerland, as a modern national entity, did not appear until the 19th century. We will erroneously use the terms "Switzerland" and "Swiss" to refer to the territory occupied by present-day Switzerland and the inhabitants of these regions. For further details, please refer to the "Swiss legal history" chapter.
[2] FRITZ SCHULZ, Principles of Roman Law, Oxford 1936, p. 7.

in the imperial period, do not represent the primary source of law comparable to modern codifications. They should instead be considered one of several important legal sources.

One of the most historically significant statutes is undoubtedly the Laws of the Twelve Tables (*lex duodecim tabularum*), drafted in 451/450 BC. Its promulgation was a major political act, following plebeian revolts that demanded laws be written and made public. Until the imperial era, the Twelve Tables served as the foundation of civil law and were frequently cited by Roman jurists. Comprising brief and often terse provisions, it addressed various aspects of law, including procedure, family, property, tombs, and inheritance law. Many attempts have been made to reconstruct the original text of the Twelve Tables, based on numerous quotations scattered throughout Roman legal and literary writings. Another key statute is undoubtedly the *lex Aquilia* (early 3rd century BC), passed by the plebeian assembly. The statute regulated tort liability in case of damage to property, notably the death of a slave or livestock (*occidere*) and other kind of damages (*urere*, to burn; *frangere*, to crush; *rumpere*, to break). The statute and its commentaries by jurists have had a lasting influence on modern continental tort law. Furthermore, the importance of Augustan legislation cannot be overlooked. Emperor Augustus distinguished himself with a flurry of legislative activity that laid the foundations of a new legal order marking the transition into the imperial era, particularly in procedural matters (e.g., the *leges Iuliae iudiciariae*). To promote population growth and establish his moral authority, Augustus also enacted various moral-regulating statutes (e.g. *lex Iulia de maritandis*, *lex Iulia de adulteris*, *lex Papia et Poppaea*), which, among other things, required citizens between 15 and 60 years old (for men) and 12 and 50 years old (for women) to marry and have children, under penalty of losing inheritance rights or the ability to receive bequests.

b) Senatus-consults

Senatus-consults (*senatusconsultum* or *SC*) represent legal prescriptions issued by the Roman Senate, often named after the senator who proposed the motion. While most senatus-consults dealt with political and social issues, their impact extended into the imperial era. Thus, the Senate played a crucial role in shaping the law of succession in the 2nd century. For instance, the *SC Iuventianum* dealt with the restitution of an estate, requiring the possessor to return it to the rightful owner. This decree became a model for the legal action for the recovery of an inheritance known, a claim known as "petition of inheritance" (*hereditatis petitio*). Similarly, the *SC Tertullianum* established a legal right of succession for a mother to inherit from her children. The *SC Orfitianum* further expanded the scope of inheritance by allowing children to inherit from their mother, promoting a new system of a blood-lined, maternal "cognatic" rather than the traditional civil law-oriented, paternal "agnatic" succession.

c) Law of the Magistrates

Magistrates in ancient Rome held *iurisdictio*, an unlimited legal authority that enabled them to pronounce law within their specific areas of competence, either through edicts (*edicta*) as general regulations or decrees (*decreta*) as decisions in individual cases. Some magistrates also possessed the supreme *imperium*, a broader civil and military power that allowed them to take

more forceful actions in civil proceedings, such as the provisional seizure of a debtor's assets as a precautionary measure (*missio in possessionem*), injunctions or prohibitions (*interdicta*) or the restoration to original condition (*restitutio in integrum*). From the end of the Republic onward, the body of law created by magistrates was referred to as praetorian law (*ius praetorium*) or honorary law (*ius honorarium*), which was contrasted with civil law (*ius civile*) – the law derived from statutes, senatus-consults, interpretation of the jurists, and imperial constitutions.

The most significant magistrate in legal matters was the *praetor urbanus*, responsible for overseeing the regulation, administration, and proper conduct of civil proceedings in Rome since the 2nd century BC. Upon assuming his annual office, the praetor would promulgate an edict outlining the remedies and defenses available for the year. This judicial program, displayed publicly in the forum, was not entirely rewritten each year but carried over from previous years with adaptations; the body of rules taken over from previous magistracies came to be known as the "transmitted edict" (*edictum tralaticium*). Around 130 AD, Emperor Hadrian tasked his closest legal advisor, the highly renowned jurist Salvius Julianus, with drafting an edict that would provide a definitive framework for the praetorian judicial program. Thise new, "canonical" edict was qualified by the Romans as the "perpetual edict" (*edictum perpetuum*).

Civil judicial procedure according to the edict (so-called "formulary proceedings") began with the plaintiff formally summoning the defendant to court (*in ius vocatio*). The parties would then prepare their claims and defenses according to the actions (*actiones*) and exceptions (*exceptiones*) outlined in the praetor's edict. Based on the evidence presented, the praetor would either grant the action (*iudicium dare*) or deny it (*iudicium denegare*). If the action was granted, the praetor issued the central instrument of the trial, the formula (*formula, iudicium*), summarizing the terms of the dispute and setting the extent of the matter before witnesses (*litis contestatio*). The magistrate would then assign the case to a judge (*iudex*) chosen by the parties, a private layperson entrusted with delivering a verdict – either condemning (*condemnatio*) or absolving (*absolutio*) the defendant.

As the jurist Papinian (†212) put it, praetorian law can be considered as an "adjuvant, a complement or a corrector of civil law" (*adiuvandi vel supplendi vel corrigendi iuris civilis*). Civil law and praetorian law have a complementary relationship, the latter being the "living voice of civil law" (*viva vox iuris civilis*), as the jurist Marcian (3rd century) states.

> One of the most striking example of this complementarity is probably the "dual ownership" (*dominium duplex*). In order to transfer ownership of important production assets (such as slaves or draught animals), the parties must perform the ritual of mancipation (*mancipatio*) in the presence of witnesses; if they refrain from doing so and mere possession is given to the buyer against payment of the price, the latter does not become the owner according to civil law until one-year acquisitive prescription elapsed. The praetor remediates this overly formal civil regulation by legally protecting the buyer by giving him the status of "bonitary" (*in bonis habere*) or "praetorian" owner during the "gap year".

The peregrine praetor (*praetor peregrinus*) was responsible for overseeing legal relations between Roman citizens and non-Romans (peregrines) from 2nd century BC onward. The curule

aediles (*aediles curulis*) were tasked with overseeing the public markets and regulating the sale of goods. They established rules concerning the liability of sellers of slaves and draught animals for hidden defects that laid the groundwork for what would later become the modern concept of warranty in sales, protecting buyers from undisclosed flaws in purchased goods.

d) The Interpretation of the Jurists

The authority of jurists (or jurisconsults) grew significantly as Roman law evolved. Following the promulgation of the Law of the Twelve Tables (449 BCE), the jurisconsults formed an exclusive, almost priestly body (*pontifices*), responsible for granting actions to the parties and offering legal opinions. During the Republican period, this "esoteric" legal knowledge in the hands of the patricians and rooted in oral tradition, was gradually made more accessible through written compilations of judicial actions. The interpretive activity (*interpretatio*), which developed into a formal legal science, led to the emergence of the profession of jurists. The pre-classical Quintus Mucius Scaevola (†82 BCE), author of a treatise on civil law (*libri iuris civilis*), is regarded as the founder of Roman civil law. Between the 1st century BCE and the 3rd century CE, Roman law became increasingly sophisticated, with several jurists standing out for their contributions. Notable figures include Labeo, Sabinus, and Proculus in the early classical period, Celsus, Julian, and Cervidius Scaevola in the high classical period, and Papinian, Ulpian, and Paul in the late classical period.

It is not an exaggeration to say that the body of Roman jurists was the cornerstone of classical Roman law, facilitating the coordination of various legal sources, legal innovation, interpretation of the parties' declarations, proper application of prescriptions in individual cases, and the defense of legal positions through legal advice and quotation of renowned jurists. The importance of jurists was acknowledged by the emperors, who incorporated them into their advisory councils (*consilium principis*). They also granted leading jurists the authority to issue legal opinions "on the authority of the emperor" (*ex auctoritate principis*), which were used by private individuals seeking legal guidance through the imperial chancellery across the Empire.

The writings of the jurists form the core of classical legal thought. These writings primarily consist of discussions and resolutions of concrete legal cases, whether fictional or real. The approach was inherently casuistic, reflecting the immense practical experience required by the profession. Roman jurists were generally not inclined to develop abstract legal theories, though they did establish many principles and rules. The essence of the law was embodied in the art of interpreting concrete cases and in resolving legal controversies arising from differing opinions between jurists or schools of thought. Jurists' writings constitute a rich literary tradition, encompassing various genres. The most fundamental works include collections of legal rules (*regulae iuris*) and institutional treatises (*institutiones*), which offered higher-level abstractions and were used for educational purposes. The vast majority of surviving legal literature consists of commentaries on legal texts that belong to the body of civil law (*libri iuris civilis*) or honorary law (*ad edictum praetoris, ad edictum aedilium curulium*), as well as commentaries on statutes (*ad legem XII tabularum, ad legem Iuliam et Papiam Poppeam*), senatus-consults (*ad SC Claudianum, ad SC Tertullianum*), and writings of other jurists (*ad Quintum Mucium, ad*

Sabinum, *ad Plautium*). Other works include collections of complex legal questions (*quaestionum libri*), legal advice (*responsorum libri*), and imperial decrees (*libri decretorum*). Additionally, many texts addressed specific areas of law, such as interdicts (*de interdictis*), the duties of proconsuls (*de officio proconsulis*), tax law (*de iure fisci et populi*), and military law (*de re militari*).

e) Imperial Constitutions

Imperial constitutions refer to various types of decisions issued by the imperial chancellery under the authority of the emperor. Through these constitutions, the emperor could create new regulations, interpret or extend existing civil and honorary law, and even override these laws if deemed necessary. The growing intensity of imperial legislative activity can be attributed to the increasing bureaucratization of the Roman judicial administration during the imperial period, as well as the rising significance of a streamlined "imperial" civil procedure (*cognitio extra ordinem*), which allowed for more direct and efficient judicial processes. One category of imperial constitutions consists of judgments in concrete cases (*decreta*), where the emperor or his officials issued rulings in individual legal disputes. A second category of imperial constitutions consists of rescripts (*rescripta*). A rescript is an imperial judicial response to a legal question or petition, which can take the form of a simple answer under the request (*subscriptio*) or a more formal letter (*epistula*). Some rescripts grant privileges, while others address legal issues raised by parties or magistrates during litigation. Rescripts played a key role in judicial communication across the Empire, providing a means for individuals and officials to directly seek the emperor's decision on legal matters. A third category is formed by mandates (*mandata*), which were instructions issued by the emperor to the officials of the Empire. These directives regulated various aspects of provincial administration, such as the organization of festivals or the construction of public buildings. They could also address matters of private law, including the introduction of the simplified will for soldiers (*testamentum militis*) or the prohibition of marriage between provincial governors and local residents. The fourth category of imperial constitutions consists of imperial edicts (*edicta*). One of the most notable examples is the *Constitutio Antoniniana*, issued by Emperor Caracalla (188-217), which granted Roman citizenship to all free inhabitants of the Empire in 212 CE.

2. The Justinian « Corpus Iuris Civilis »

Although legal scholarship was not lost during the postclassical period, the level of refinement and complexity seen in earlier times among Roman jurists diminished. Politically, the Western part of the Roman Empire fell to Germanic kingdoms from the 5th century onward, while Constantinople emerged as the new capital of the Eastern, or Byzantine, Empire. The ascent of Justinian (482–565) to the throne in 527 marked the beginning of an extraordinary legal project: to collect all classical legal writings, extract their most significant passages, and compile them into a coherent body of texts that would lay the foundation for a new system of law. The political-legal enterprise was overseen by an exceptional minister, the jurist Tribonian (†542).

This compilation of these legal texts produced over eight centuries is known by the anachronistic term "*Corpus Iuris Civilis*".

The compilation of the *Digest* (or *Pandects*, in its Greek translation)[3] represents the most significant achievement of the Justinian corpus and stands as a monumental accomplishment in the history of human intellectual endeavor. On the 15th of December 530, Justinian ordered a thematic compilation of the writings of the classical Roman jurists (*constitutio Deo auctore*). The minister Tribonian assembled the most distinguished legal scholars from the law schools of Constantinople (Theophilus and Cratinus) and Beirut (Dorotheus and Anatoleus), alongside expert lawyers. The compilers are said to have gathered approximately 2'000 books – each book being a papyrus scroll containing around 1'500 lines or 10'000 words – written by the jurists of the classical period. From this vast collection, the commission selected the most important passages, organizing them into 50 books under 432 thematic headings, following the material structure of the abovementioned perpetual edict. The result was a compilation of around 9'000 "fragments" of classical jurisprudence. These selected passages were carefully reclassified and accompanied by "inscriptions**"** identifying their original sources, making it easier to trace their origins.

> For example: "D. 10.3.4.1 Ulp. 19 ad ed." means that the fragment placed in the 10th book, title 3 ("On the action for property partition"), law 1, paragraph 5 of the *Digest* is taken from Ulpian's first book of the commentary to the edict (*libri ad edictum*).

The titanic task took three years to complete and on the 16th of December 533 the *Digest* was promulgated (*constitutio Tanta*). The *Digest* remains by far the most comprehensive surviving record of classical Roman jurisprudence, covering a wide array of legal fields, including family law, civil litigation, rights *in rem*, torts, unjust enrichment, contractual liability, inheritance law, neighborhood law, enforcement procedures, provisional measures, and criminal law.

During the elaboration of the *Digest*, it became necessary to create a textbook for law students at the law schools of Constantinople and Beirut. Professors Theophilus and Dorotheus were entrusted with this task. They adopted the structure of a well-known earlier textbook, the *Institutions* of Gaius (2nd century), which famously divided the subject matter into the law of persons (*personae*), things (*res*) and actions (*actiones*). In addition, Justinian commissioned a compilation of imperial constitutions spanning from Hadrian to Justinian himself as early as 528 (before the *Digest* was completed). To aid in this project, the existing post-classical collections of imperial constitutions – namely the private *Codex Gregorianus* and *Codex Hermogenianus* (both from the late 3rd century), as well as the comprehensive *Codex Theodosianus* (promulgated in 439) – were used. The first version of the Code (*Codex Justinianus*) was published in 529. A second edition, the *Codex repetitae praelectionis*, was issued in 534, incorporating over 4'600 imperial constitutions into twelve books. Finally, Justinian announced that his constitutions after completion of the *Code* would be the subject of another compilation. The emperor did not fulfill his promise, but private individuals took it

[3] The word *digest* means "put in order" and *pandects* means "collection of all".

upon themselves to collect the *Novellae* in abridged form (*Epitome Juliani*, *Authenticum corpus Novellarum*).

II. The Reception of Roman Law and Switzerland

In the High Middle Ages, the Germanic kingdoms that ruled over the Western part of the Roman Empire compiled Roman legal texts for their Roman subjects (edict of Theodoric in the 5th century, the *lex Romana Burgundionum* around 501/502, the *lex Romana Visigothorum* or "Breviary of Alaric" in 506), which were applied in parts of Helvetian territories[4]. Among these, the *Lex Romana Curiensis* (also known as the *Lex Romana Raetica*), an 8th century compilation of Roman law, stands out. While it was primarily a literary adaptation of Visigothic Roman law rather than a strict legal codification, it was used in Eastern Helvetia (modern-day Grisons) and paradoxically reinforced local customs at the expense of Roman legal principles [5].

> A striking example of the revival of a typical Roman legal construction in the Retic law is the double penalty clause (*poena dupli*) promised by a stipulation (*stipulatio*, a Roman verbal promise) in the event of a breach of a legal act – a mechanism that spread elsewhere in Switzerland between the 9th and 12th centuries.

By the 10th and 11th centuries, some contracting parties in Romandy and the Eastern regions still declared their transactions to be governed *sub lege romana*[6]. However, Roman law was increasingly rejected in favor of local legal traditions. This trend was gradually tempered and ultimately reversed by what is now known as the "reception" of Roman law.

The process of "reception" refers to a European phenomenon occurring between the 11th and 19th centuries. It involves the rediscovery of sources of Roman law, followed by their study, interpretation, and adaptation, often associated with the creation of new legal doctrines. Over time, these Roman principles were incorporated into *ius commune*, a common law applied to a different extent all over continental Europe. This gradual integration of Roman law into European legal culture has made it one of the most enduring legacies of Roman civilization[7]. In Switzerland, we can identify three key phases in the reception of Roman law: the influence of Roman law between the 11th and 15th centuries, driven by the legal education of jurists in Italy (1); the work of Roman law scholars in Switzerland following the Reformation (2); the incorporation of the Romanist tradition into the Swiss codifications of the 19th and 20th centuries (3).

[4] See MEYER-MARTHALER 1975, 9-13, pp. 21-24.
[5] See MEYER-MARTHALER 1968; CLAUDIO SOLIVA, Römisches Recht in Churrätien, in: Jahrbuch der Historisch-antiquarischen Gesellschaft von Graubünden 116 (1986) pp. 189-206.
[6] BERNARD DE VEVEY, Droit romain et droit barbare dans le canton de Fribourg, in : Mém. Soc. Hist. du droit bourg., franc comtois et romand 5 (1938) 161s.; Stelling-Michaud 1955, p. 232.
[7] See ZIMMERMANN 2015, pp. 452-480.

1. Swiss Students in Northern Italy

In the 11th century, the process of reception of Roman law was initiated by the rediscovery of the Justinian corpus in manuscript form, including the famous *littera Florentina* (preserved in the Laurentian Library in Florence since 1406), a parchment containing the *Digest* and dating from the time of its creation. A first edition of the *Digest*, the Vulgate (or *littera Bononiensis*, the "Bolognese reading"), was drawn up using the available manuscripts (now all lost, except for the *littera Florentina*). The study of this edition marked the beginning of the reception of Roman law. As the first European universities began to flourish in Northern Italy, law emerged as an independent subject of study. Universities in Bologna, Pavia, Padua, and Perugia attracted students from across Europe, who enrolled in courses on the *Institutions*, *Codex*, and *Digest* (*Pandects*), a field of study known as "legistics". The educational framework of this time was shaped by the methods of the era. From the 11th to the 13th centuries, the period of the glossators saw jurists write marginal notes to the Justinian texts, interpreting and explaining the law, comparing passages, and reconciling contradictions. This was part of the scholastic method, which aimed to harmonize different legal sources. The glossators – such as Irnerius, Martinus, Bulgarus, Hugo, Jacobus, Placentinus, Azo, and Odofred – were instrumental in laying the groundwork for later development of legal science. Their work culminated in 1250, when the Florentine jurist Franciscus Accursius (†1263) produced the monumental *Glossa ordinaria*, a compilation of 96'000 annotations to the Justinian texts. This comprehensive work became the essential manual for every jurist. From the second half of the 13th century to the 15th century, a new legal school emerged. The postglossators or commentators, including figures like Bartolus de Saxoferrato (1314-1357) and Baldus de Ubaldis (1327-1400), sought to adapt the principles of Roman law to contemporary societal needs. Their goal was to create legal tools that could be applied to practical issues in commercial and judicial practice. This approach, known as the *mos italicus* ("Italian manner"), greatly contributed to the spread of Roman law across Europe, eventually shaping a common law tradition.

Students at the medieval Italian universities came from both Italy (the Citramontanes) and beyond the Alps, particularly from the Germanic regions (the Ultramontanes). Swiss students at Italian universities, who stayed for about five years (ten years for an *utriusque iuris* degree in Roman and canon law), often belonged to wealthy families of the Helvetic bourgeoisie, and many were of ecclesiastical rank. In Bologna, Swiss students, like other foreign students, belonged to *nationes*, associations based on shared language and regional origin. Due to their geographical proximity to Northern Italy, the first Swiss students primarily came from the Valais and Grisons regions. Between 1265 and 1330, a total of 310 Swiss students are documented[8], divided into three nations: those from the dioceses of Geneva, Lausanne, and Sion belonged to the Burgundian nation; students from the Swiss-German regions were part of the Teutonic nation; and those from Italian-speaking Ticino and Grisons joined the Lombard nation. The majority of students came from Switzerland's largest cities: Geneva, Lausanne, Sion, Bern, Basel, Lucerne, Zurich, Schaffhausen, St. Gallen, and Chur., We find signs of

[8] See STELLING-MICHAUD 1960.

solidarity among Swiss students, reflected in shared debts in loan contracts: as an early evidence of a linguistic *Röstigraben*, the Romandy, Burgundy and Savoy students take on debts together and the Germanic students (Basel, Zurich, Lucerne, Schaffhausen, St. Gallen, Constance, Alsace) helped each other. Back in their homeland, the "experts of law" (*iuris periti*) or "legists" applied Roman law alongside local laws to address the growing needs of the monetary economy. Most of the Swiss students went on to successful careers in the secular world (imperial bailiffs, judges, councilors, burgomasters, professors, notaries, jurists) or in the ecclesiastical world, especially in Basel and Geneva. In Geneva, especially, we find that most lawyers are trained in Roman law and not in canon law before the Reformation.

During this period, Roman law influenced Swiss legal life, particularly in cities. Various expert opinions (*responsa*, *allegationes iuris*) in favour of parties or courts, notarial formulas, and works of legal experts provide direct evidence of the Roman law's dissemination into Helvetian territory[9]. The adoption of Italian notarial formulas based on Roman law also played a crucial role in conveying Roman legal institutions and principles across Swiss territories.

> For example, we find numerous "waivers" (*renuntiationes*), notably to the exception of fraud in the conclusion of the act (*doli mali*), to the exception of non-executed payment (*non numeratae pecuniae*) or to the privilege of joint prosecution of several guarantors by the praetor and Hadrian[10]. Furthermore, from the 13th century onwards, a new form of testamentary will, known as roman-canonical will, with strong Roman characteristics (institution of an heir, bequest, *nuncupatio*, codicillary clause) spread swiftly in the French-speaking territories of Switzerland and Basel[11].

Commercial practice was also stimulated by the widespread introduction of the Roman arbitration (*compromissum*) in Switzerland, although the arbitrators usually did not apply Roman law[12]. Roman law also pervaded Switzerland through ecclesiastical courts; the new roman-canonical procedure in written form, gaining resonance throughout Switzerland, is rapidly encountering resistance due to costs, legal subtleties and Latin language, in contrast to the customary oral procedure in local language[13].

2. Roman Law Scholars in Switzerland

In the 15th century, the gravity center of legal education gradually shifted from Northern Italy to France. The schools of Bourges, Orléans, Avignon, Montpellier, Paris and Angers attracted students from Romandy and German-speaking Switzerland. This success was fueled by a new French method (*mos gallicus*) in the study of texts, moving away from the "Italian manner". Jurists henceforth placed their legal study within the humanist trend ("legal humanism"),

[9] See MEYER-MARTHALER 1975, pp. 14-18; STELLING-MICHAUD 1977, pp. 11-20.
[10] See STELLING-MICHAUD 1955, 235-238; CLAUDIO SOLIVA, Die Renuntiationen in den Zürcher Urkunden, Zurich 1960; GOTTFRIED PARTSCH, Bericht an das Schweizerische Komitee des neuen Savigny über den Einfluss des römischen Rechtes auf das Genfer Recht vom 13. bis zum ausgehenden 15. Jahrhundert, Tranchepied 1962, pp. 48-58.
[11] See STELLING-MICHAUD 1955, pp. 238-246.
[12] See STELLING-MICHAUD 1955, pp. 246-259.
[13] See STELLING-MICHAUD 1955, pp. 203-230; Elsener 1969, pp. 21s.; OTTO P. CLAVADETSCHER, Die geistlichen Richter des Bistums Chur. Zugleich ein Beitrag zur Geschichte des römischen Rechts im Mittelater, Basel/Stuttgart 1969, pp. 69-120.

seeking to philologically reconstitute the original text and to understand the law transmitted in the Justinian corpus in its historical context. Roman law thus became a "law of scholars", spreading more widely throughout Europe and compensating for the inadequacies of local customs.

In these developments, Switzerland experienced a paradoxical evolution: while the application of Roman law decreases in Helvetic territories, the Swiss territory became the homeland of many Roman law scholars. Several factors contributed to this trend. During the Reformation and the confessional wars, Switzerland offered a haven for the persecuted protestants intellectual elite, especially from one of the most advanced nations in the study of Roman law, France. Protestant jurists fleeing from Bourges and Valence found refuge in Basel and Geneva (the protestants' *Eleutheropolis* or "City of freedom"), contributing to the growth of their law faculties.

a) Basel

The city of Basel was deeply influenced by the Bologna-trained lawyers who shaped its early legal tradition. With the establishment of the University of Basel in 1460, which included the study of Roman law from the outset – taught by no less than six professors – the Romanistic tradition became firmly rooted in the city[14]. The city authorities took great care to ensure that the law faculty maintained a high standard of legal education. The training encompassed "imperial law", i.e. the study of the *Institutions*, the *Code* and the Justinian *Digest*, and provided excellent instruction in Roman law. Basel's legal education flourished under the influence of legal humanism introduced by Claude Chansonette (Claudius Cantiuncula, 1400-1549) and Bonifacius Amerbach (1495-1562). Their judicial advice activity demonstrates the punctual introduction of Roman law into cantonal jurisprudence[15], even though until the 18th century, most expert opinions of the Basel faculty were provided abroad, especially Germany[16]. The teaching of Roman law by Samuel Grynaeus (1539-1599) and Ludwig Iselin (1559-1612) is notable. The university not only trained generations of Swiss lawyers but also played a significant role in filling legal chairs in other parts of Switzerland. Beyond its academic contributions, Basel's presses were instrumental in disseminating Roman law throughout Switzerland, publishing works such as the Justinian corpus, the Accursian gloss, and various didactic and scientific treatises. In the 17th and 18th centuries, Basel became a center for the genre of differential literature, which compared local laws with Roman law, further solidifying the city's role in the evolution of legal scholarship in Switzerland [17].

[14] About the Basel law faculty, see ELSENER 1969, pp. 94-133.
[15] See HANS-RUDOLF HAGEMANN, Einfluss des römischen Rechtes auf das Basler Stadtrecht vom 13. bis zum Anfang des 16. Jahrhunderts, n/a.
[16] See ELSENER 1969, p. 112.
[17] See for example JOHANN WETTSTEIN, *Iuris Romani ac Basiliensis collatio*, Basel 1765; CHRISTOPH BURCKHARDT, *Dissertatio inauguralis iuridica collationem iuris Romani et Basileensis curca successionem ab intestato continens*, Basel 1717.

b) Geneva

As a result of the intellectual currents sparked by the Reformation, Geneva became a prominent center for legal humanism. In 1559, Jean Calvin (1509-1564) founded Geneva's university, the *Collège de Genève*. Fleeing Lausanne after the Bernese invasion of 1536, the theologian Theodore Beza (1519-1605), trained in jurisprudence, became rector and in 1565 successfully proposed the creation of a law professorship. The young Geneva university benefited a great deal from the French Protestant emigration ("*Huguenots*"). Despite a short stay in Geneva in 1572 after the Bartholomew's Night, the renowned romanist Hugues Doneau (Hugo Donellus, 1527-1591) left for Heidelberg. Geneva was however able to retain the famous François Hotman (Franciscus Hotomanus, 1524-1590). After an education in philology and classical literature in Geneva, he met Amerbach in Basel, from whom he obtained the title of *doctor iuris* in 1558. After a stay in France, the Bartholomew's Night prompted him to return to Switzerland, to teach law in Geneva and Basel, where he died. Hotman's philological training enabled him to produce valuable studies in Roman law, but he also took a controversial stance, advocating for the superiority of local laws and customs ("self-generated from the practice of business"[18]) and denigrated the value of Roman law as an absolutist instrument of the monarchy and the Church of Rome in polemical publications[19]. The Romanist Ennemond Bonnefoy (Enimundius Bonefidius, 1536-1574), a pupil of the perhaps the best-known exponent of legal humanism, the Bourges professor Jacques Cujas (1522-1590), taught alongside Hotman before a premature death. Hotman was also the teacher of Jules Pacius de Beriga (1550-1635), a professor of *Institutions* in Geneva who achieved international fame.

The arrival of Denys Godefroy (Dionysius Gothofredus, known as the "Elder", 1549-1622) in 1579 further enhanced the city's reputation. Godefroy remained until 1589, and though he was more a philologist than a jurist, he distinguished himself through his extensive work on Roman law texts. He is best known for the pioneering modern edition of the Justinian *Corpus Iuris Civilis* in 1583, then in 1588. This edition, enriched with annotations, became the authoritative reference for Roman law until the 19th century.

The Geneva academy was further strengthened by the activity of several law professors. One of the most notable was the Genevan Jacques Lect (Lectius, 1556-1611), a pupil of Cujas, who wrote extensive commentaries and speeches on the works of Roman jurists such as Modestinus, Macer, Papinian and Ulpian. Another influential figure was David Colladon (1556-1635), also from Geneva, who taught *Institutions*, but eventually shifted to a political career[20]. In the 17th century, the most important figure in Roman law was undoubtedly Denys' son, Jacques Godefroy (Jacobus Gothofredus, 1587-1652)[21]. After a solid legal education (Bourges, Paris), he taught at the university of Geneva from 1619 onward. His most significant legal contribution

[18] See the *Antitribonian*.
[19] In particular the *Antitribonian* (1567) and the *Franco-Gallia* (1573/1574).
[20] See ELSENER 1969, pp. 171-174.
[21] See BRUNO SCHMIDLIN, L'humaniste Jacques Godefroy à la recherche des sources juridiques, in: ALFRED DUFOUR/BRUNO SCHMIDLIN (eds.), Jacques Godefroy (1587-1652) et l'Humanisme juridique à Genève. Actes du Colloque Jacques Godefroy, Basel 1991, pp. 61-79.

was the edition of the *Theodosian Code* in 1663, a compilation of imperial constitutions since the reign of Constantine (†337) by Emperor Theodosius II (401-450). Godefroy the Younger elevated Geneva to the same level of reputation that Bourges had enjoyed in the previous century, attracting even German-speaking students. This development could not be better expressed than by Hugo Grotius himself, who, in a letter from January 1629 to the French ambassador Aubéry du Maurier, advised that there could be no better place for his sons' studies than Geneva, where Godefroy was recognized as the finest professor of civil law[22].

Geneva experienced a new intellectual impetus in the 18th century with the rise of the "natural law" school, which sought to establish a system of universal and fundamental norms that could govern all people, enabling them to live in community, deductible by reason from Roman law sources and in conformity with the laws of nature[23]. Key figures in this movement included the French Calvinist and temporary Geneva resident Jean Barbeyrac (1674-1744) and the Genevan Jean-Jacques Burlamaqui (1694-1748), both of whom gained international recognition[24]. The teaching of the *Pandects* was assumed by Jean Cramer (1701-1773). Most of his work consists of monumental commentaries on local Genevan legislation and decisions; he nevertheless argued that Roman law, though secondary, played a crucial role in supplementing local law, as it "makes up for the defect of our Edicts when they are silent and entirely silent"[25].

We must also acknowledge Burlamaqui's significant influence on two renowned Swiss intellectuals. The first is Emer de Vattel (1714–1767), a native of Neuchâtel, whose works played a key role in spreading Roman substantive law throughout the Western world[26]. The second is the Genevan Jean-Jacques Rousseau (1712–1778), who, in his seminal work *Du contrat social* (1762), drew heavily on Roman Republican institutions and magistracies – such as popular assemblies, the tribunate, dictatorship, and censorship – to outline his political constitution. This influence would have a profound effect on the anti-monarchical discourse leading to the French Revolution.

c) Other Regions

The Lausanne academy (*Schola lausannensis*) was created by the "Gentlemen of Bern", the authorities of the neighboring canton having occupied the Pays de Vaud in 1536 – a tutelage that lasted until the Napoleonic invasion. The foundation of the university of Lausanne was of major importance, as it was the only French-speaking Protestant academy until the creation of the university of Geneva two decades later[27]. The university welcomed prominent figures such as Beza and Hotman, although law was taught only intermittently until the arrival of Jean Barbeyrac in 1710, who offered instruction in Roman law in Latin and local law in French.

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[22] "*Non video quae sit regio ad studia opportunior Geneva, ubi Gothofredus, iuris civilis optimus monstrator*" (letter of 6 january 1629).
[23] See ELSENER 1969, pp. 183-202.
[24] See chapter "History of International Law".
[25] See GOTTFRIED PARTSCH, Jean Cramer et son précis de l'histoire du droit genevois (1761), in: Bulletin de la Société d'histoire et d'archéologie de Genève 13 (1964) p. 20.
[26] See chapter "History of International Law".
[27] See ELSENER 1969, pp. 209-233.

Unfortunately, enrollment was low, as Latin was not widely mastered by the local elite in Vaud, and many candidates sought education in Geneva instead. In Fribourg, academic legal teaching began with the efforts of Jean Nicolas André Castella (1739-1807); in 1763, the municipal council authorised the teaching of the *Institutions* and the *Digest*, the Town Charter and criminal law[28]. In Valais, after the emergence of a high notarial legal culture in the 13th and 14th centuries, law schools opened locally[29]. From 1766, Roman law was taught at the Abbey of Saint-Maurice. In 1808, a chair of civil law was opened in Sion and entrusted to Emanuel von Kalbermatten (1756-1830).

The city of Bern did not prioritise law as an independent field of study until the early 18th century, with the appointment of Niklaus Bernoulli (1695-1726), son of the famous mathematician[30]. The conservative environment in Bern favored the study of Swiss local law over Roman law. Similarly, Zurich did not develop an independent legal education system until the 18th century, with the establishment of the *Carolinum*, the theological school of the cathedral. An important work from this period is the *Eidgenössisches Stadt- und Landrecht* (1727, 1728, 1739, 1746) by Hans Jacob Leu (1689-1768) from Zurich; it seeks to analyze the local laws of Switzerland in the light of natural law, Roman law and canon law, positioning Roman law as a subsidiary to Swiss common law[31]. In 1807, the creation of the *Politisches Institut* allowed for formal academic legal education; Ludwig Meyer von Knonau (1769-1841) was its first professor. The growing economic success of Zurich and its strong ties to legal scholarship in Germany made the city a major center in the field of law in the 19th century. Apart from Basel, there was no major institution for legal education in the German-speaking part of Switzerland until the 19th century. After the 16th century, German-speaking Swiss students often pursued their legal education at universities in Germany or Austria (Berlin, Heidelberg, Tübingen, Würzburg, Bonn and Vienna). However, in the 19th century, the landscape of legal education in the German-speaking part of Switzerland changed dramatically, illustrious professors of Roman law taking positions in Swiss-German universities: Theodor Mommsen (1817-1903), Heinrich Dernburg (1829-1907) and Ferdinand Regelsberger (1831-1911) in Zurich; Julius Baron (1834-1898) and Philipp Lothmar (1850-1922) in Bern; Rudolf von Jhering (1818-1892) and Bernhard Windscheid (1817-1892) in Basel.

3. Local Law, Roman Law and Cantonal Legislations

Despite intense academic activity during the Reformation and in the 18th century, Roman law only sporadically influenced Swiss law before the 19th century.

[28] See ELSENER 1969, pp. 136-142.
[29] See ELSENER 1969, pp. 156s.
[30] See ELSENER 1969, pp. 49-58.
[31] See ELSENER 1969, pp. 80-93.

a) The Primacy of Local Law

Isolated studies[32] as well as the findings of the "*Ius romanum in Helvetia*" (or "New Savigny") study committee, chaired by the Vaudois Roman law and legal historian Philippe Meylan (1893-1972), reveal the infiltration of Roman law in Swiss legal practice since the 12th century onward. As previously demonstrated, Roman law had a noticeable impact on civil procedural law, contract and notarial practices, testamentary procedures, and arbitration, among other legal areas, between the 12th and 15th centuries. However, this influence was not uniform or officially recognized; rather, Roman law "seeped" into customary law, often functioning as a practical tool to address gaps in local legal systems and enhance legal protection, especially when local law proved insufficient. In most cases, local law remained indisputably dominant. It is also difficult to deny that between the 15th and 19th centuries, the use of Roman law was rather isolated phenomena in Switzerland and the notion of "Germanic continuity"[33] cannot be dismissed.

The modest reception of Roman law in Switzerland before the 19th century is often illustrated by an anecdote, reported in 1646. A judge in Frauenfeld (canton of Thurgau) is said to have reprimanded and expelled an advocate, who quoted the two best-known Italian commentators: "We Confederates ask nothing of Bartolus and Baldus and the other doctors; we have our own customs and rights. Out, Doctor, out!" [34]. This outburst encapsulates a broader attitude toward Roman law during the period. In Basel (yet one of the most "romanised" cities!), Enea Silvio Piccolomini (1405-1464), the future Pope Pius II, says that the people live "without written law, using customary law more than written law, without a legal expert, without knowledge of the laws of the Romans" [35]. This last statement is confirmed by Amerbach himself, who noted that local law is supplemented by the appreciation of judges *ex aequo et bono*, and not by Roman law[36]. One of the founders of the university of Basel, the Alsatian Peter von Andlau (1420-1480) melodramatically remarked: "Our Germany [i.e. German-speaking Switzerland] despises the Roman laws in their folly"[37]. In more general terms, the Vaudois *doctor iuris* Charles d'Apples stated in 1778: "There is no private law given in Switzerland, which is common to all

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[32] See for instance THEODOR BÜHLER, Die Methoden der Rezeption des römisch-gemeinen Rechts in die Erbrechte der Schweiz, in: ZRG rom. Abt. 120 (2003) pp. 1-60.

[33] See EUGEN HUBER, System und Geschichte des Schweizerischen Privatrechtes, t. IV, Basel 1893, pp. 117s.; ELSENER 1969, pp. 237-260; URS REBER, Germanisches Recht, in: Historisches Lexikon der Schweiz (HLS), 2006 (https://hls-dhs-dss.ch/de/articles/008932/2006-12-05/), accessed 04.11.2022; CARONI 2011, pp. 64-74.

[34] "Hört ihr Doctor, wir Aydgenossen fragen nicht nach dem Barthele oder Baldele und andern Doctorn; wir haben sonderbare Landbrüch und Recht. Naus mit euch Doctor, naus mit euch!" (JOHANNES KREYDEMANN, Kurzter Tractatus von des Teutschen Adels sonderlich der Freyen Reichs-Ritterschaft in Schwaben, Tübingen 1646, p. 160).

[35] "*Vivunt sine certa lege, consuetudine magis quam scripto iure utentes, sine iuris perito, sine notitia Romanorum legum*", quoted by PAOLO PRODI, Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto, Bologna, Bologna 2000, p. 159.

[36] "*De testamentis, tutelis, successionibus perpaucas apud nos leges scriptas esse. Consuetudine vero et more recepto plura regi, reliquia, quae legibus moreve definita non sunt, ab arbitrio iudicum, ex aequo, ut aiunt, et bono pronuntiantium, magna pro parte dependere*.", quoted by HANS THIEME, Ideengeschichte und Rechtsgeschichte, in: Gesammelte Schriften I, Cologne/Vienna 1986, p. 429.

[37] "*Leges Romanas nostra Alemannia despicit in sua insipientia*." (PETER VON ANDLAU, *Libellus de Caesarea Monarchia*, 1460, quoted by Schott 1983, p. 25).

villages, but each village is governed by its written or unwritten laws, and the Roman and canonical law in Switzerland is not either that subsidiary authority which they enjoy in Germany, but if the written laws and morals fail, the judges judge according to what is just and good"[38]. While the significance of these anecdotes was likely exaggerated by the 19th century Germanist trend[39] (who saw the rejection of Roman law in Switzerland as "the triumph of the healthy spirit of the Swiss people"[40]), they reflect an undeniable reality. In a broader sense, it can be said that the reception of Roman law was greater in French-speaking than in German-speaking Switzerland and more pronounced in the cities than in rural areas[41]. Nevertheless, a good comprehension of the extent of the reception of Roman law in Switzerland lacks further specific studies.

In the German-speaking part of Switzerland, Roman law is used only occasionally[42]. This is not only due to the global Swiss attitude towards Roman law, but also has underlying political factors. The refusal of Roman law represented a political statement against the hegemonic ambitions of the Holy Roman Empire, as Roman law was the law applicable to the imperial court of appeal, the *Reichskammergericht*, whose jurisdiction the Helvetians consistently resisted. In the 18th century, Roman law was sometimes used in several German-speaking cantons as a useful legal instrument in the watered-down form of the *usus modernus pandectarum*, a 17th and 18th century interpretation of Roman law for modern commercial practice.

French-speaking regions of Switzerland mostly followed the customary ("*coutumes*") legal tradition (as in Northern France) rather than Roman written law (as in Southern France). Yet, Roman law still found its way into certain Swiss regions.

In Geneva, for example, while the local custom (*consuetudo Gebennesii*) was rooted in Burgundian custom, Roman law exerted a notable influence on Genevan legal practices. The Genevan jurist Glaudio Grossi was able to argue in a court in 1493 that Geneva was governed partly by customary law, "partly by common law"[43] (i.e. Roman law). Later, in 1538, the Berrichon jurist Germain Colladon (1510-1594) drew up the "Civil Edict of Geneva", which incorporated elements of the custom of Berry, Genevan local law, and Roman law, although

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[38] CHARLES SAMUEL JEAN D'APPLES, *Observationes miscellaneae ex iure privato Helvetico speciatim Lausoniensi*, Tübingen 1778, 3s.: "*Non datur in Helvetia jus quoddam privatum, quod omnibus ejus pagis commune est, sed suis quisque pagus legibus, scriptis vel non scriptis regitur, nec juris romani et canonici ea est in Helvetia auctoritas, qua in Germania gaudent, sed si leges scriptae et mores deficiunt, iudicant iudices ex aequo et bono.*" A similar statement had already been made by Josias Simler (1530-1576): "*ex aequo et bono et legibus atque consuetudinibus singulorum populorum*" (JOSIAS SIMLER, *De republica Helvetiorum libri duo*, in: *Helvetiorum respublica diversorum autorum*, Leiden 1577, p. 329)

[39] See SCHOTT 1983, pp. 17-45.

[40] ULRICH STUTZ, Die Schweiz in der Deutschen Rechtsgeschichte, in: Sitzungsberichte der Preußischen Akademie der Wissenschaften (1920) p. 105.

[41] RENÉ PAHUD DE MORTANGES, Schweizerische Rechtsgeschichte. Ein Grundriss, Zurich/ St. Gallen 2017², p. 156.

[42] See for instance PETER WALLISER, Römischrechtliche Einflüsse im Gebiet des heutigen Kantons Solothurn vor 1500, Basel/Stuttgart 1965, 67-226; HANS REINHARD, Schlussbericht über die Quellenforschung zur Erfassung römischrechtlicher Einflüsse im Gebiete Luzerns bis Ende des 15. Jh, n/a.

[43] See PARTSCH, *op. cit.* (n. 12), p. 80 n. 577.

Roman law's influence began to wane in subsequent years. In contrast, the Pays de Vaud, like many other parts of the Swiss Confederation, showed a marked resistance to Roman law. For example, in 1470, Barthélémy de Saint-Martin, a ducal commissioner from Savoy, reported that the Vaudois people did not appreciate lawyers who were "more learned than they should be"[44], reflecting a clear rejection of Roman law. This resistance was further reinforced by the conservative influence of Bernese authority. In Fribourg, while Roman law provided inspiration for certain legal provisions in the Town Charter of 1600, the dominant local custom remained vastly prominent[45]. In contrast, the canton of Valais saw a coexistence of Roman law and local custom in some villages, reflecting a more mixed approach. The most notable exception to this general trend of resistance was Ticino, the Italian-speaking region of Switzerland. Under the influence of Lombardy, Roman legal principles were directly referenced and incorporated into the region's statutory laws, making it one of the few areas in Switzerland where Roman law had a relatively pronounced influence.

This unfavorable assessment of the role of Roman law in Switzerland changed after the Congress of Vienna (1815) with the emergence of cantonal codes following the 18th century codifications. Before the promulgation of federal codifications, various cantons adopted cantonal legislations which inaugurated the resurgence of the Roman law tradition in Switzerland.

b) The Influence of the *French Civil Code* on Latin Cantonal Codes

The *French Civil Code* (Napoleonic Code) had a major influence in Switzerland and ensured the material application of Roman law in Swiss territories. Its elaboration is based on the study of the sources of Roman law and follows temporally two thematic "rearrangements" of the Justinian sources: one by Jean Domat (1625-1696)[46] and the other by Robert-Joseph Pothier (1699-1772)[47]. After the failure of the drafting of a Swiss civil code based on the French model under Napoleon, the cantons were given a free hand. The French and Italian-speaking cantons established codifications using the *French Civil Code* as a model. The first Swiss cantonal code was promulgated in the canton of Vaud in 1817. It was followed by a code in Geneva (1819), Fribourg (1834), Neuchâtel (1854/1855) and Valais (1855), all following the French legal tradition. The *Codice civile Ticinese* of 1837 was inspired by the civil code of Parma (1820), itself based on the Napoleonic Code. Finally, the canton of Jura applied the French code throughout the 19th century.

c) Civil Codes in German-speaking Cantons

The Canton of Bern considered creating a private law code relatively early. In 1777, Professor Gottlieb Walther (1738–1805) was tasked by Bernese authorities with systematically compiling

[44] "*plus sapientes quam oportet*", quoted by JEAN-FRANÇOIS POUDRET, Enquêtes sur la coutume du pays de Vaud et coutumiers vaudois à la fin du Moyen Âge. Contribution à l'étude des rapports entre coutume et droit écrit, Basel/Stuttgart 1967, p. 61.
[45] See VEVEY, *op. cit.* (n. 6), p. 159-164.
[46] JEAN DOMAT, *Les loix civiles dans leur ordre naturel*, 1689.
[47] ROBERT-JOSEPH POTHIER, *Pandectæ Justinianae in novum ordinem digestae*, 1748-1752.

private law, though the effort was ultimately discontinued. Samuel Ludwig Schnell (1775–1849), a professor of law at the Bernese Academy (founded in 1805), is considered the father of the *Bernese Civil Code*. In his writings, he was the first jurist to comprehensively comment on Bernese civil law[48], helping to establish modern legal scholarship in Switzerland. After successfully advocating for codification, he chaired the commission responsible for drafting the code. The *Bernese Civil Code*, promulgated between 1826 and 1831, was modeled on the Austrian *Allgemeines bürgerliches Gesetzbuch* (ABGB) of 1812, which was heavily inspired by Roman law[49]. In Lucerne, Professor Kasimir Pfyffer (1794–1875) was commissioned in 1827 to draft a modern civil code. Drawing inspiration from both the *Bernese Civil Code* and the ABGB, the *Lucerne Civil Code* was enacted in 1832 and 1839. Meanwhile, in Solothurn, Johann Baptist Reinert (1790–1853), who had studied Roman law under the illustrious Friedrich Carl von Savigny (1779–1861), was appointed in 1838 to draft a civil code. The civil codes of Bern, Lucerne, and Solothurn all belong to the same group, sharing a strong influence from the ABGB. In Aargau, after commissioning Schnell to draft legislation, the project was carried out by several jurists, including Rudolf Feer (1788-1840), drawing on the ABGB and the *Vaudois Civil Code*.

The development of a private law code in Zurich is largely attributed to two remarkable figures. Friedrich Ludwig Keller (1799-1860)[50], a pupil of Savigny in Berlin, was a professor at the *Politisches Institut* of Zurich. Early on, he envisioned drafting a "Zurich private law system". The author considered the teaching of Roman law to be fundamental, as it represented both "the eternal model of scientific training"[51] and the essential gateway to the then burgeoning German private law. Keller was the leader of a renovation of the Zurich judicial system (*Junge Juristen*), seeking to get rid of the old patrician jurisdiction considered arbitrary and advocating in favor of an objective legal science. His academic activity, which sought to link Zurich's local law to the Roman law doctrine (as in the German *Historiche Rechtschule*), founded modern civil legal science in Switzerland. The jurist was commissioned to write a code of private law, but the project never came to fruition. Johann Caspar Bluntschli (1808-1881), a pupil of Keller and Savigny, developed an interest in Roman law and later in Zurich local law. His first-class academic career led him in the 1840s to receive the mandate once granted to Keller. His *Privatgesetzbuch für den Kanton Zürich* (PGB) came into force between 1853 and 1856. The work, internationally acclaimed, is a product of the historical legal school, synthesizing Zurich local law, Roman law and modern commercial law. The influence of Roman law is, however, deliberately restrained to preserve the "popular legal tradition" in accordance with the author's Germanist ideal.

[48] SAMUEL LUDWIG SCHNELL, Bemerkungen über den Ursprung und die Ausbildung des bernischen Civil-Rechts; Abhandlungen über verschiedene Teile des bernischen Civil-Rechts, 1809; Handbuch des Civil-Processes, 1810; Handbuch des Civil-Rechts, 1811.
[49] See ELSENER 1969, pp. 290-300.
[50] See WOLFGANG ERNST, Friedrich Ludwig Keller als Gegenstand der rechtshistorischen Forschung, in: ZRG rom. Abt. 125 (2008) pp. 688-674.
[51] Quoted by ANDREAS B. SCHWARZ, Pandektenwissenschaft, in: Rechtsgeschichte und Gegenwart. Gesammelte Schriften zur neueren Privatrechtsgeschichte und Rechtsvergleichung, Karlsruhe 1960, 118s.

In the canton of Glarus, Johann Jakob Blumer (1819-1875) and in the canton of Grisons, Peter Conradin von Planta (1815-1902), drafted cantonal codifications, also focusing on special cantonal rights. The same applies to the Basel draft private code, which was written in the 1860s mainly by the Germanist Andreas Heusler (1834-1921).

4. Roman Law and Federal Codifications

The federal codifications form the bedrock Switzerland's recent romanistic tradition. The task of drafting these codes was entrusted to two distinguished jurists who strongly advocated for nationwide legal unification. Walther Munzinger (1830-1873)[52], who studied in Bern and Paris, doctor of Roman law and professor of private law, was commissioned to draft a commercial code and later a national code of obligations. The jurist passed away prematurely, leaving behind a draft (1871), mainly inspired by the very romanistic *Dresdner Entwurf* (1866), but also by Bluntschli's PGB, the *French Civil Code* as well as modern commercial law. This blend of influences enabled the principles of Roman law to permeate the Swiss law of obligations to a large extent. After several other drafts (1875, 1877, 1881), the *Federal Code of Obligations* came into force in 1883 (some twenty years before the German *Bürgerliches Gesetzbuch*) and was reformed in 1911. The parliamentary drafting process was marked by intense debate as diverse cantonal legal traditions clashed: some were shaped by differing interpretations of Roman law, while others were rooted in local legal customs.

> For instance, Article 185 of the *Swiss Code of Obligations* (CO) specifies that risk transfers to the buyer upon conclusion of the contract of sale (*periculum est emptoris*). In the German legal tradition, followed by the Swiss-German cantons, risk typically transfers at the moment of physical delivery (*traditio*). Under the rule of the *French Civil Code*, adopted by the French-speaking cantons, risk passes at the point of ownership transfer, which coincides with the contract's conclusion. While the final text of Article 185 CO does not link contract conclusion with ownership transfer, it accommodates the French-speaking cantons by stipulating that risk shifts to the buyer at the moment of contract conclusion[53].

Eugen Huber (1849-1923), educated in the Germanic legal tradition and a proponent of a modern Swiss codification rooted in "popular law" ("*Volksrecht*")[54], was commissioned in 1892 to draft a federal civil code. The *Swiss Civil Code* came into effect in 1912. From a substantive point of view, Huber was transparent about his aim to integrate Swiss customs as much as possible at the expense of Roman law. An opposition between supporters of Swiss customary law and Romanists arose; the final product is a daring mixture of principles derived from both legal traditions.

> A famous example illustrating the opposition of the local and Romanist traditions is embodied in the attempts to define possession in the federal code. Huber[55] tried unsuccessfully to define *possessio* as mere

[52] See URS FASEL, Bahnbrecher Munzinger. Gesetzgeber und Führer der katholischen Reformbewegung (1830-1873), Bern/Stuttgart 2003.
[53] See EUGEN BUCHER, Notizen zu Art. 185 OR (Gefahrtragung durch den Käufer), in: ZSR 89 I (1970) pp. 281-294.
[54] On the celebration of a "legal patriotism" hostile to the "law of the jurists", see SCHOTT 1983, 20-22; MANAÏ 1990, pp. 69-81.
[55] See HUBER, *op. cit*. (n. 32), pp. 745s., whose argumentation is repeated in the explanatory notice to the *Swiss Civil Code*'s preliminary draft.

control of the thing, in line with Germanic tradition of possession ("*Gewere*"), and rather than as factual control coupled with the intention to possess (*animus possidendi*), which reflects the Roman understanding of possession.

The *Swiss Civil Code* follows the pandectistic systematic order, i.e. the law of persons, of the family, of inheritance and of property, the "fifth book" being the *Swiss Code of Obligations*. Franz Wieacker (1908-1994) considers that the code created by Huber represents a typical "Pandectist code" in "its system, its semantics and its logical ideal" [56]. The quality of the *Swiss Civil Code* has earned unanimous, international recognition. Furthermore, the adoption of legislation inspired by Swiss civil law, or the direct adoption of the Swiss codes (as seen in Turkey in 1926 during the Kemalist era), played a significant role in the global spread of substantial Roman law.

III. Why Roman Law in the Third Millenium?

Roman law remains relevant today. However, it is both legitimate and necessary to question why the study of a legal system developed almost two millennia ago continues to be of interest. Modern codification deeply relativized the importance of Roman law as European "common law". Moreover, Roman law no longer holds the same professional significance for lawyers that it once did across various parts of Europe. As a result, since the 20th century, the teaching of Roman law has been in a state of "crisis"[57], driven by the growing demand for a justification of its continued relevance in academic legal education.

1. Legal Education

Roman law continues to be taught in most law faculties in countries with a continental legal tradition. In Switzerland, most law faculties include Roman law in their curriculum, typically as a foundational course in the first year. Unlike legal history courses, Roman law is taught in terms of its legal substance for at least two key reasons.

The first and – in our view – most important reason is the study of the "dogmatic matrix"[58] common to the various legal traditions of continental Europe. Understanding the most influential institutions of Roman private law enables one to trace the origins and fundamental elements of modern legal institutions. The skills acquired through this study not only facilitate comprehension of national laws but also help to understand the similarities and differences between different legal systems. Legal thinking, therefore, evolves not in isolation but with an awareness of the underlying structure of the law. Assimilating the foundations of Roman law does not merely allow us to understand an ancient legal system; it provides the keys to interpreting the legal debates revived and pursued by generations of European jurists, from the past centuries to the present, who have drawn upon Roman sources – whether to adopt, reject,

[56] FRANZ WIEACKER, Privatrechtsgeschichte der Neuzeit, Göttingen 1994, p. 491.
[57] The *terminus technicus* is from PAUL KOSCHAKER, Die Krise des römischen Rechts und die romanistische Rechtswissenschaft, Munich 1938.
[58] See PASCAL PICHONNAZ, Droit romain, enseignement, méthode et contribution, in: Index 39 (2011) p. 61.

or sometimes even misinterpret their solutions. The requirement of "historical awareness" in the instruction of jurists sharpens their knowledge, gives diachronic coherence to the concepts and institutions used in legal language, and provides a valid critical tool in national and international law.

The second reason is more didactic in nature. The study of Roman sources contributes to the "perfection of legal intelligence"[59]. By engaging with a vast repertoire of cases, each presenting diverse legal challenges, students are exposed to various facets of legal reasoning: analyzing the facts of a case, identifying key issues, understanding the interests and stakes at play, debating competing solutions, presenting arguments, and selecting an appropriate resolution. One might argue that such teaching could be applied to modern legal problems as well. While this is true to some extent, Roman sources offer the additional advantage of a centuries-long history, having tested a wide range of forms of expression, argumentation, and methods. This rich history has resulted in a vast corpus that is ideal for the training of future lawyers.

2. Legislative, Doctrinal and Judicial Debate

To a certain extent, legal historians should participate to modern legal debates. A solid grasp of modern legal texts requires a historical foundation, which is best provided by a comprehensive education in Roman law. This knowledge will help scholarship, legislators and judges to interpret modern legal institutions, to understand their evolution throughout time, and improve possible reforms. Furthermore, knowledge of Roman institutions helps to dogmatically situate modern legal concepts within various legal orders. Indeed, when comparing these different legal systems, one will observe certain similarities, but often also significant divergences in their substance. Thus, to deal with the content of national regulations and their divergence from foreign norms of Roman tradition, a fundamental knowledge of Roman law is necessary, since the solutions chosen by the various countries are often based on Roman sources or on different interpretations of the latter.

> For instance, Switzerland knows the "causal" transfer of ownership, Germany the "abstraction" principle (§ 929 BGB) and France the "consensual" principle (Art. 1583 CC); Switzerland (Art. 404 para. 1 CO) knows the possibility of terminating a lesionary contract at any time, in contrast to Germany (§ 675 BGB); in Switzerland (Art. 207 CO), the buyer is liable for the accidental loss of the defective thing, in contrast to France (Art. 1647 CC), Spain (Art. 1488 CC) and Italy (Art. 1492 CC); in Switzerland (Art. 185 Para. 1 CO), the benefits and risks pass to the buyer at the time of the conclusion of the contract and not at the time of transfer of possession, in contrast to Austria (§ 1064 BGB) and Germany (§ 446 BGB)[60].

Moreover, in the era of legal internationalization, comparative law, and discussions about the construction of European private law, the Roman law tradition offers an ideal common foundation for legislative debate. Just as it served as a source of inspiration for national codifications, Roman law can act as a "neutral" reference for the development of transnational or supranational principles. The constitution of a present or future supranational law (such as

[59] See PAUL-FRÉDÉRIC GIRARD/FÉLIX SENN, Manuel élémentaire de droit romain, Paris 1929[8], p. 5.
[60] See a critical review of the Swiss solutions by HEINRICH HONSELL, 100 Jahre Schweizerisches Obligationenrecht, in: ZSR 130 II/1 (2011) pp. 56-80.

the UNIDROIT-principles, the Lando-principles or the Draft Common Frame of Reference) could be seen as a possible "third birth" of Roman law[61].

Moreover, it is difficult to offer sound critiques and proposals in doctrinal debates without understanding the genealogy of institutions and controversies. A threat to doctrinal clarity arises when propositions and criticisms are made without considering the historical significance of the concepts and issues underlying legal solutions. Historical studies enable the correction of doctrinal developments that are inconsistent or could be improved. Since every legal expression eventually becomes part of history, it is advisable to equip lawyers with the essential tools for the historical analysis of law. Consequently, training in Roman law enhances the quality of legal analysis.

Finally, it is important to highlight the role of Roman law in relation to jurisprudence. While direct recourse to Roman law by Swiss Federal judges is uncommon[62], there are instances where doctrinal opinions, which draw directly from Roman law, are referenced (e.g. Pothier, but especially 19th century German pandectistics, especially Windscheid, Dernburg and others)[63]. The numerous quotations from the German BGB (and to a lesser extent from the *French Civil Code*) as well as from doctrinal opinions and interpretation of institutions influenced by Roman law, makes the knowledge of the common Roman foundation as a useful tool for the analysis of judicial decision.

3. Research in Legal History

The success of modern codification made it possible to understand Roman law no longer as a mere source of "current" law ("*Heutiges römisches Recht*" in German Pandectistic terminology), but as a subject of study within its historical context. In addition to its practical utility, the study of Roman law acquired a purely historical interest, stimulated by the extremely dynamic emergence of legal papyrology at the end of the 19th century. This new orientation, which of course pre-existed at least since the time of legal humanism, necessitates greater specialization among Roman law scholars and extensive collaboration with experts in related fields, such as ancient history, philology, papyrology or epigraphy. In this regard, the field has experienced remarkable dynamism in recent decades.

[61] See CARONI 2011, 74; PICHONNAZ 2012, pp. 39-41.

[62] See recently BGE 145/2019 III 255, 5.1 explaining the Roman tradition of fixing the judicial forum at the residence of the citizen by recalling the Justinian Code 3.19.3: *Actor rei forum, sive in rem sive in personam sit actio, sequitur* ("The plaintiff follows the domicile of the defendant, whether the action is real or personal") or the emphasis on the Roman roots of the solidarity regime in BGE 148/2022 III 115, 6.3.

[63] On the quotation of Pothier by federal judges in BGE 128/2002 III 370 et BGE 133/2007 III 257, see PICHONNAZ, *op. cit.* (n. 57), pp. 62-77.

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