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Roman Law

[DRAFT]

Table of content

I. What is Roman Law?

Ius est ars boni et aequi. "Law is the art of what is good and fair.". The adage of the jurist Celsus (1st-2nd century) illustrates the conception of law in the mind of the Romans in the imperial era. Behind the concise term "Roman law" lies a formidable multitude of legal principles and institutions. In a broad sense, Roman law can be traced back to pre-Republican royal law, the Republican law (509-27 BC), the law of the classical imperial period (from Augustus' assumption of power in 27 BC to the death of Alexander Severus in 235) and the legal experience during the post-classical period up to Justinian law (5th century). Modern scholarship regards classical imperial law as the most sophisticated expression of Roman law and reference is usually made to this period when "Roman law" is mentioned. The influence of Roman law has been major in continental European countries. The modern Swiss[1] legal order is part of this tradition. We shall therefore shortly present the basics of Roman Law (I), then deal with the "reception" of Roman Law in Switzerland (II) and finally assess why Roman law is still important today (III). Contrary to what the purely rhetorical question of the title might suggest, we will not be able to explain here what Roman law consists of. Instead, we propose to the reader an exposition of the main sources of law for the Romans, thus providing the first tools to become familiar with Roman law.

1. The Main Sources of Law

Roman law developed organically over centuries. It consists of a layering of different sources of law, including laws, senatus-consults, edicts, decrees, interpretation of the jurists and imperial constitutions. Roman legal order must be seen as a "*mille-feuille*" of regulations that can be applied in concrete cases. Roman understanding of law thus differs greatly from our modern comprehension of the normativity, validity and application of law. The person applying law does not refer to a code "in force" or a hierarchy of norms; on the contrary, all the sources of law that might guide the legal reflection towards a solution considered to be right.

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 are legislative texts enacted by a vote of the people's assembly (*comitia*). When plebeians gathered (*concilia plebis*) to vote, the legislative text was called a plebiscite. A statute of primary historical importance is undoubtedly the Laws of the Twelve Tables (*lex duodecim tabularum*), drafted in 451/450 BC. Its promulgation was highly political, as it followed plebeian revolts demanding that law be written and public. Until the imperial era, the Twelve Tables truly represent the foundation of civil law and are quoted by Roman jurists. Consisting of terse provisions, the statute dealt (among others) with procedural, family, property, tombs and inheritance law. Various attempts to reconstruct

[1] Switzerland as a modern national entity did not appear until the 19th century. We will erroneously refer to "Switzerland" and the "Swiss people" when referring to the territory occupied by present-day Switzerland and to the inhabitants of these regions. For more details, we refer to the chapter "Swiss legal history".

the original text have been made based to the numerous quotations of the statute, scattered in Roman legal and literary writings. Another fundamental statute is undoubtedly the *lex Aquilia* (early 3rd century BC), passed by the plebs. The statute regulated tort liability in case of damage, notably the death of a slave or cattle (*occidere*) and damage to property (*urere*, to burn; *frangere*, to crush; *rumpere*, to break). The statutes and its commentaries by jurists have had a lasting influence on modern continental law. One cannot ignore the Augustan legislation. The first emperor was distinguished by an intense legislative activity which laid the foundations of a new legal order opening the imperial era, especially in procedural matters (*leges Iuliae iudiciariae*). To stimulate demography and to establish his moral authority, Augustus also promulgated various moral-regulating statutes (*lex Iulia de maritandis, de adulteris, lex Papia and Poppaea*), for example obliging citizens (between 15 and 60 years old for the men; between 12 and 50 years old for the women) to marry and to have children, under penalty of not being susceptible to inherit or to receive bequests.

It is not possible to evoke the hundreds of the known statutes. The seemingly relative importance of statutes in legal texts drove the German scholar Fritz Schulz (1879-1957) to claim that "the law-inspired people was not the statute-inspired people"[2]; this famous point of view is however questioned today. In any case, Roman statutes, at least in the imperial period, do not represent the pre-eminent source of law comparable to modern codifications and should be considered as one legal source among others.

b) Senatus-consults

Senatus-consults (*senatusconsultum* or *SC*) represent the legal prescriptions voted by the Roman Senate (the legal text bearing the name of the senator having proposed the motion). Most of the senatus-consults deal with social and political issues. The activity of the Senate in matters of succession was fundamental for the development of inheritance law in the imperial period. For example, the *SC Iuventianum* deals with the restitution of the estate by the possessor to the rightful owner and was used as a model for the action for restitution of the estate (*hereditatis petitio*); the *SC Tertullianum* created a legal right of succession of the mother to her children; the *SC Orfitianum* enables children to succeed subsidiarily and legally to their mother, favoring succession by natural, "cognatic" filiation (and not by paternal, "agnatic" filiation).

c) Edicts and Decrees of Magistrates or Honorary law

Magistrates had *iurisdictio*, a power that gave them authority to pronounce law in their area of competence, either in the form of edicts (*edicta*) or decrees in particular cases (*decreta*). Some magistrates also had the *imperium*, a power allowing them to order more serious measures, such as the provisional seizure of the debtor's assets as a precautionary measure (*missio in possessionem*). Since the end of the Republic, the law thus created has been called praetorian

[2] Fritz Schulz, Principles of Roman Law, Oxford 1936, 7.

law (*ius praetorium*) or honorary law (*ius honorarium*), often opposed to civil law (*ius civile*, i.e. law of the statutes, senatus-consults, law of the jurists and imperial constitutions).

The most important magistrate in legal matters was the *praetor urbanus*, overseeing the regulation, administration and proper conduct of civil proceedings in Rome since the 2nd century BC. At the time of taking up his annual office, he promulgated an edict announcing the remedies and defenses conceded. This judicial program displayed in the forum was not reinvented each year, but was carried over from year to year with adaptations; this body of rules is known as the tralactice edict (*edictum tralacticium*). Around 130, emperor Hadrian commissioned his closest legal advisor, jurist Salvius Julianus, to draft an edict that would definitively regulate the praetorian judicial program. The new, "canonical" edict is qualified by the Romans as the "perpetual edict" (*edictum perpetuum*), which however did not prevent further reforms. As for the civil judicial procedure established by the Praetorian edict, the plaintiff first had to formally summon his opponent to court (*in ius vocatio*). The parties prepare their requests and defenses according to the actions (*actiones*) and exceptions (*exceptiones*) provided for in the edict. The praetor, depending on the elements presented, either grants the action (*iudicium dare*) or rejects it (*iudicium denegare*). The action being conceded, a formula (*formula, iudicium*) sums up the terms of the dispute, which are "set" in front of witnesses (*litis contestatio*). The praetor refers the case to a judge (*iudex*), a private person chosen by the parties and not a professional magistrate, in charge of condemning (*condemnatio*) or absolving (*absolutio*) the defendant.

As the jurist Papinian (†212) formulates 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*) of Roman law. In order to transfer ownership of important production assets (such as slaves or draught animals) in a sale, the parties must perform the ritual of mancipation (*mancipatio*) in the presence of witnesses; if they refrain from doing so and mere possession of the goods is physically 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 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*) managed the legal relations between Roman citizens and non-Romans (peregrines) since the 2nd century BC. The curule aediles (*aediles curulis*) represent an important magistracy from a modern point of view. They were responsible for controlling public market sales and created regulations on the liability of the seller of slaves and cattle of burden in case of hidden defects (future form of sale warranty).

d) The Interpretation of the Jurists

The authority of jurists became more important as Roman law developed. After the promulgation of the Twelve Tables, the jurisconsults formed a closed religious-like body

(*pontifices*), responsible for granting actions to the parties and giving legal opinions. In the Republican period, this "esoteric" legal knowledge, marked by oral tradition, was progressively communicated publicly in written compilations of judicial actions. This interpretive activity around these sources (*interpretatio*), developing into a legal science, led to the emergence of the profession of jurists. The pre-classical Quintus Mucius Scaevola (†82 BC), author of a treatise on civil law (*libri iuris civilis*), is considered the founder of civil law. Between the 1st century BC and the 3rd century, law became an extremely sophisticated science and various jurists distinguished themselves: for example, in the early classical period, Labeo, Sabinus and Proculus; in the high classical period, Celsus, Julian and Cervidius Scaevola; in the late classical period, Papinian, Ulpian and Paul. It is no exaggeration to say that the social body of jurists represents the fundamental pillar of classical Roman law, allowing for the coordination of various legal sources, legal innovation, the interpretation of the declarations of the parties, the correct application of prescriptions in individual cases and the defence of legal positions with quotation of renowned jurists. This importance was recognised by emperors, who welcomed them into their councils (*consilium principis*); they also granted certain leading jurists the power to write legal opinions "upon the authority of the emperor" (*ex auctoritate principis*), intended for private individuals applying to the imperial chancellery throughout the Empire.

Writings of the jurists represent the kernel of classical legal creation. They mainly consist of concrete cases, fictional or real, which are discussed and solved. Eminently casuistic, they reflect the enormous practical experience required by the profession. Roman jurists were not inclined to formulate abstract theories, although they developed many principles and rules. The substance of the law is much more embodied in the art of legal interpretation of concrete cases and in the legal controversies arising from the difference of opinion between jurists or schools of thought. Jurists' writings form an abundant literary tradition with several genres. The most fundamental treatises are the collections of legal rules (*regulae iuris*) and the institutional treatises (*institutiones*), which offer a higher level of inductive abstraction and were used for teaching purposes. The overwhelming majority of the legal literature that has come down to us consists of commentaries on legal texts belonging to the corpus of civil law (*libri* or *commentari iuris civilis*) and to honorary law (*ad edictum praetoris*, *ad edictum aedilium curulium*), but also on statutes (*ad legem XII tabularum*, *ad legem Iuliam et Papiam Poppeam*), senatus-consults (*ad SC Claudianum*, *ad SC Tertullianum*) or writings of other jurists (*ad Quintum Mucium*, *ad Sabinum*, *ad Plautium*). We also find collections of complex legal questions (*quaestionum libri*), legal advice (*responsorum libri*) and imperial decrees (*libri decretorum*). Finally, many works deal with specific portions of the law (*de interdictis*, *de officio proconsulis*, *de iure fisci et populi*, *de re militari*).

e) Imperial Constitutions

Imperial constitutions represent different types of decisions issued by the imperial chancellery by virtue of the emperor's authority. The emperor can create new law, interpret, or extend civil or honorary law, and even violate them if necessary. The intensification of imperial legislative activity can be explained by the gradual bureaucratisation of the Roman judicial administration

in the imperial period and the increasing importance of a simplified "imperial" civil procedure (*cognitio extra ordinem*). A first category of constitutions is constituted by judgments in concrete cases (*decreta*). A second category of constitutions is represented by the rescripts (*rescripta*). The rescript is an imperial judicial reply to a legal question or a petition and may consist of a simple answer under the request (*subscriptio*) or a stylised letter (*epistula*). Some rescripts grant a privilege, others take a position on a legal question from a party or a magistrate during litigation. The rescript allowed for judicial communication throughout the Empire and gave a possibility to apply directly to the emperor. A third category of imperial constitution is formed by the instructions (*mandata*) addressed to the officials of the Empire. They regulate the modalities of provincial administration, such as the organisation of festivals or the construction of public buildings, but may also concern private law, such as the introduction of the simplified will in favour of soldiers (*testamentum militis*) or the prohibition of marriage between the provincial governor and local residents. A fourth category of imperial constitution consists of the imperial edicts (*edicta*). The *constitutio Antoniniana*, an edict of the emperor Caracalla (188-217) granting Roman citizenship to all residents of the Empire in 212, is a major example.

2. The Justinian "Corpus Iuris Civilis"

While legal instruction was not lost in the postclassical period, the activity of the jurists was no longer as refined and complex as it had previously been. Politically, the western part of the Empire was replaced by Germanic kingdoms from the 5th century onwards, consolidating Constantinople as the new Rome of the eastern, "Byzantine" part of the Empire. The arrival of Justinian (482-565) to power in 527 led to the elaboration of an extraordinary project: to gather the entirety of the classical legal writings, extract the most important passages and compile them into a coherent corpus of texts laying the new foundations of law. The political-legal enterprise was led by an exceptional minister, the jurist Tribonian (†542). This compilation of legal texts produced over eight centuries is known by the anachronistic term "*Corpus Iuris Civilis*".

a) The *Digest*

The compilation of the *Digest* (or *Pandects* in its Greek translation)[3] represents the most impressive work of the Justinian corpus and can be considered a first-rate achievement in human intellectual history. The 15th of December 530, Justinian ordered a thematic compilation of the writings of the classical Roman jurists (*constitutio Deo auctore*). The commission in charge of the work, headed by Tribonian, brought together the greatest professors of law from the law schools of Constantinople (Theophilus and Cratinus) and Beirut (Dorotheus and Anatoleus) as well as lawyers. The compilers are said to have collected 2'000 books (one book represents a papyrus scroll with about 1'500 lines, or 10'000 words) written by the jurists of the classical period. From this mass of texts, the Justinian commissioners selected the most significant passages and classified them in 50 books, under 432 thematic headings following

[3] *Digesta* means "classified"; *pandektes* means "collection of everything".

the material order of the perpetual edict and containing about 9'000 "fragments" of jurisprudence. These extracted and reclassified passages are surmounted by an "inscription", facilitating to trace their origin.

> 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", *De communi dividundo*), law 1, paragraph 5 of the *Digest* is taken from the first book of the commentary to the edict (*libri ad edictum*) of Ulpian; "D. 47.20.1 Pap. 1 resp." means that the fragment placed in the 47th book, title 20 ("On the crime of stellionate", *Stellionatus*) law 1 of the *Digest* is extracted from the first book of the answers (*libri responsorum*) of Papinian.

The titanic work lasted three years and on the 16th of December 533 the *Digest* was promulgated (*constitutio Tanta*). The *Digest* is by far our most complete record of classical Roman jurisprudence, covering the most diverse aspects of Roman law (family law, civil litigation, rights in rem, tort, unjust enrichment, contractual liability, inheritance law, neighbourhood law, enforcement, provisional measures, and criminal law).

b) The *Institutes*, the *Code* and the *Novelles*

During the elaboration of the *Digest*, it became necessary to write an institutional textbook for law students in the schools of Constantinople and Beirut. The professors Theophilus and Dorotheus took on the task. The authors adopted the structure of a successful textbook, the *Institutions* of Gaius (2nd century), which notoriously divided the subject matter into the law of persons (*personae*), things (*res*) and actions (*actiones*). In addition, Justinian commissioned a compilation of the imperial constitutions from Hadrian to Justinian himself as early as 528 (before the *Digest*) in twelve thematically ordered books. For this purpose, post-classical collections of imperial constitutions (the private compilations *Codex Gregorianus* and *Codex Hermogianus*, dating from the end of the 3rd century, and the imposing *Codex Theodosianus* promulgated in 439) were used. The first version of the *Code* was published in 529. A second edition (*Codex repetitae praelectionis*) was promulgated in 534, containing over 4'600 imperial constitutions. Finally, Justinian announced that his new constitutions, after the promulgation of the *Code*, would be the subject of another compilation. The emperor did not keep his promise, but private individuals took it 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 ruling over the western part of the Roman Empire elaborated compilations of constitutions and other 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]. The *lex Romana Curiensis* (or *lex Romana Raetica*), represents an 8th century compilation of Roman law (a literary rather than a legal adaptation of the Visigothic

[4] See Meyer-Marthaler 1975, 9-13, 21-24.

Roman law) was used in eastern Helvetian territory (actual Grisons) and paradoxically strengthened local custom at the expense of Roman law[5].

> A striking example of a Roman revival in the Retic law is the double penalty clause (*poena dupli*) promised by a *stipulatio* (a typically Roman contractual promise) in the event of a breach of a legal act - a modality that spread elsewhere in Switzerland between the 9th and 12th centuries.

In the 10th and 11th centuries, some contracting parties in the Swiss Romandy and some eastern regions still declared their transactions to be made *sub lege romana*. However, the application of Roman law in Switzerland was largely rejected in favour of local laws. This trend was gradually nuanced and finally reversed by what is commonly referred to as the "reception of Roman law".

The process of "reception" is a European phenomenon occurring between the 11th and 19th centuries. It consists of the rediscovery of the sources of Roman law, their study, interpretation, adaptation, and even overcoming with new legal doctrines, and application as common law (*ius commune*) in the continental European legal traditions. The gradual absorption of Roman law into European legal culture has made Roman law one of the most important legacies of Roman civilisation for our time[6]. In Switzerland, we can distinguish three important moments of reception of Roman law: the influence of Roman law between the eleventh and fifteenth centuries because of the legal education of jurists in Italy (1); the activity of Roman law scholars in Switzerland from the Reformation onwards (2); the absorption of the Romanist tradition in the Swiss codifications of the 19th and 20th centuries (3).

1. Swiss Students in Northern Italy

In the 11th century, the process of reception was initiated by the rediscovery of manuscript sources of the Justinian corpus, 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*). Its study initiated the process of reception of Roman law. As the first European universities blossomed in northern Italy, law became an independent subject of teaching. In Bologna, then Pavia, Padua and Perugia, the universities attracted European students who took courses in *Institutions*, *Codex* and *Digest* (*Pandects*), known as "legistics". The provided education was a product of its time. The period from the 11th to the 13th century was that of the *glossators*, i.e. interpreters of the Justinian corpus writing marginal notes to the text seeking to explain it, to compare it with other passages and to harmonise contradictory sources (scholastic method). The activity of the glossators (e.g. Irnerius, Martinus, Bulgarus, Hugo, Jacobus, Placentinus, Azo, Odofred) culminated – only a hundred years after the initiation of an intensive examination of sources! – with the monumental compilation of 96'000

[5] See Meyer-Marthaler 1968; Claudio Soliva, Römisches Recht in Churrätien, in: Jahrbuch der Historisch-antiquarischen Gesellschaft von Graubünden 116 (1986) 189-206.
[6] See Zimmermann 2015, 452-480.

notations in the *Glossa ordinaria* by the Florentine Franciscus Accursius (†1263) in 1250. This last work quickly became the indispensable manual for every jurist and had a profound impact on the history of legal science. From the second half of the 13th century onwards, a new legal school emerged and thrived until the 15th century. The "postglossators" or "commentators", in particular Bartolus de Saxoferrato (1314-1357) and Baldus de Ubaldis (1327-1400), sought to adapt the content of the sources to the conditions of their time in order to offer instruments that could be applied by commercial and judicial practice. This new orientation "in the Italian manner" (*mos italicus*) contributed to the diffusion of Roman law in various parts of Europe in the form of a common law.

Students came from Italy (Citramontanes) or from beyond the Alps (Ultramontanes), especially from Germanic regions. Swiss students at Italian universities, who stayed for about five years (ten years for an *utriusque iuris* education in Roman and canon law), often belonged to wealthy families of the Helvetic bourgeoisie[7] and were mostly of ecclesiastical rank. In Bologna, foreign students belonged to associations (*nationes*) of fellow countrymen who spoke the same language. Because of their proximity to northern Italy, the first Helvetian students came mainly from the Valais and Grisons. The 310 students of Helvetic origin, documented between 1265 and 1330[8], were divided into three "nations": students from the dioceses of Geneva, Lausanne and Sion belonged to the Burgundian nation; students from Swiss-German regions belonged to the Teutonic nation; Italian-speaking Ticino and Grisons students belonged to the Lombard nation. Most of the students originate from the largest Swiss cities: Geneva, Lausanne, Sion, Bern, Basel, Lucerne, Zurich, Schaffhausen, St. Gallen and Chur. Moreover, the bonds of friendship between students come to light in joint debts in various loan contracts: as an early evidence of a linguistic *Röstigraben*, the Romandy, Burgundy and Savoy students presented themselves together and the Germanic students (Basel, Zurich, Lucerne, Schaffhausen, St. Gallen, Constance, Alsace) helped each other.

Back in their homeland, the jurists (*iuris periti*) or "legists" were able to apply Roman law in addition to local law, in response to the needs of the new, booming monetary economy[9]. Most of the Swiss students went on to brilliant careers in the secular world (imperial bailiffs, judges, councilors, burgomasters, professors, notaries, jurists) or in the ecclesiastical world[10], especially in Basel and Geneva. In Geneva, before the Reformation, we find that most lawyers are trained in Roman law and not in canon law. At this time, Roman law influenced many areas of the Swiss legal life, mainly in cities[11]. Various expert opinions (*responsa*, *allegationes iuris*) in favour of parties or courts, notarial formulas, and the activity of *doctores iuris* provide direct evidence of the infiltration of Roman law into Helvetian territory. The notarial activity, taking

[7] The jurist Roffredo of Benevento (†1344) urged candidates to attend university courses only if they had the means to support themselves: "It is necessary for students to have a livelihood for study, so that they are not in need.", quoted by Ettore Coppi, Le università italiane nel medio evo, Florence 1886[2], 281 n. 1.
[8] See Stelling-Michaud 1960.
[9] See Eugen Huber, System und Geschichte des Schweizerischen Privatrechtes, t. IV, Basel 1893, 110.
[10] See Stelling-Michaud 1977, 125-202.
[11] Stelling-Michaud 1955, 203-259; Claudio Soliva, Die Renuntiationen in den Zürcher Urkunden, Zurich 1960; Partsch 1962, 48-58; Meyer-Marthaler 1975; Stelling-Michaud 1977.

over the Italian formulas inspired by Roman law, also had a crucial importance by conveying Roman institutions and principles in Swiss territories.

> For example, we find numerous "waivers" (*renuntiationes*), notably to the exception *doli mali* (exception of fraud in the conclusion of the act) or *non numeratae pecuniae* (exception of non-executed payment) and to the privilege of joint prosecution of several guarantors by the praetor and Hadrian. 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*, codicilary clause) spread swiftly in the French-speaking territories of Switzerland and in Basel.

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

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 welcomed students from Romandy and German-speaking Switzerland. This success was due to a new orientation in the study of texts, breaking with the "Italian" method and developing in the French schools (*mos gallicus*). Jurists henceforth placed their legal study within the humanist trend (we speak of "legal humanism"), seeking to reconstitute the original text (philological method) and to understand the law transmitted in the Justinian corpus in its historical context (historical-exegetical method). Roman law thus became a "law of scholars", spreading more widely in Europe the use of the same Roman sources interpreted with a common method, compensating for the shortcomings of local customs. In these developments, Switzerland experienced a paradoxical evolution: while the application of Roman law decreases, the Swiss territory became the homeland of many Roman law scholars. Various factors contributed to this latter tendency. Reformation and confessional wars created an intellectual elite in the protestant regions and Switzerland offered a haven for persecuted protestants, especially from one of the most advanced nations in the study of Roman law, France. Protestant jurists seeking to flee Bourges and Valence took 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 initially strongly influenced by lawyers educated in Bologna. The establishment of the University of Basel in 1460, which from the outset included teaching in Roman law by six professors, rooted the romanistic tradition in Basel[12]. The city authorities took great care to ensure that the law faculty maintained a high standard of legal education. The training included "imperial law", i.e. the study of the *Institutions*, the *Code* and the Justinian

[12] About the Basel law faculty, see Elsener 1969, 94-133.

Pandects, and provided excellent instruction in Roman law. Basel's legal education peaked with 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, even though until the 18th century, most expert opinions of the Basel faculty were provided abroad, especially Germany. The Roman law teaching of Samuel Grynaeus (1539-1599) and Ludwig Iselin (1559-1612) is notable. The Basel faculty was responsible for the training of generations of lawyers and for the occupation of several chairs of law elsewhere in Switzerland. In addition to its academic activities, the Basel presses also produced several books, which contributed to the development of Roman law in Switzerland by publishing the Justinian corpus, the Accursian gloss and various didactic and scientific publications. In the 17th and 18th centuries, the literary genre of comparing local law and Roman law ("differential literature") developed particularly in Basel[13].

b) Geneva

As a result of the intellectual movements launched by the Reformation, the city of Geneva became a prominent center for legal humanism. Jean Calvin (1509-1564) founded the *Collège de Genève* in 1559. 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 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. His skills in philology enabled the humanist to offer valuable studies in Roman law. However, he relentlessly extolled the superiority of local law and customs ("which is self-generated from the practice of business", *quam ex usu rerum sibi peperint*) and denigrated the value of Roman law as an absolutist instrument of the monarchy and the Church of Rome in polemical publications[14]. The Romanist Ennemond Bonnefoy (Enimundius Bonefidius, 1536-1574), a pupil of the eminent Bourges professor, the humanist Jacques Cujas (1522-1590), taught alongside Hotman before a premature death. Hotman also was 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 increased the reputation of Geneva. He remained until 1589. The scholar, more of a philologist than a jurist, distinguished himself by editing numerous texts on Roman law. He is

[13] 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.
[14] In particular the *Antitribonian* (1567) and the *Franco-Gallia* (1573/1574).

best known for the first modern edition of the Justinian *Corpus Iuris Civilis* (enriched with notations) in 1583, then in 1588. This work became the reference edition until the 19th century. In this respect, Godefroy can be compared to Accurse: while the latter represents the archetype of the Italian glossator with his *Glossa ordinaria*, the former represents the archetype of the humanist jurist.

The Geneva academy was strengthened by the activity of several law professors. The Genevan Jacques Lect (Lectius, 1556-1611), a pupil of Cujas, wrote commentaries and speeches on the writings of the Roman jurists Modestinus, Macer, Papinian and Ulpian. David Colladon (1556-1635), also of Genevan origin, taught *Institutions*, but preferred a political career. In the 17th century, the most important specialist in Roman law was undoubtedly Denys' son, Jacques Godefroy (Jacobus Gothofredus, 1587-1652)[15]. After a solid legal education (Bourges, Paris), he taught at the university of Geneva from 1619. His major work in the legal field consists of 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 raised Geneva to the same level of reputation as the 16th century Bourges, even attracting German-speaking students. This development could not be better expressed than by Hugo Grotius himself, who advised the ambassador Aubéry du Maurier on 6 January 1629 about his sons: "I can think of no better place for studies than Geneva, where Godefroy, the best professor of civil law, is to be found." [16].

Geneva received a new impetus in the 18th century with the influence of the "natural law" school, i.e. the establishment and study of a system of norms applicable to all men, allowing them to live in community, deducible in particular from Roman sources by reason and in conformity with the laws of nature. In these respects, the French Calvinist who took refuge for a time in Geneva, Jean Barbeyrac (1674-1744) and the Genevan Jean-Jacques Burlamaqui (1694-1748) gained international recognition[17]. The teaching of the *Pandects* was not neglected: it was assumed by Jean Cramer (1701-1773). Most of his work, however, consists of monumental commentaries on local Genevan legislation and decisions; he nevertheless recognises the validity of the heritage of Roman law, which is still applicable in the second place, as it "makes up for the defect of our Edicts when they are silent and entirely silent"[18].

We cannot conclude without mentioning Burlamaqui's influence on two renowned Swiss scholars: firstly, Emer de Vattel (1714-1767) from Neuchâtel, whose works with Burlamaqui's contributed to the dissemination of Roman substantive law throughout the Western world; secondly, the Genevan Jean-Jacques Rousseau (1712-1778). In his proposal for a political constitution outlined in his *Du contrat social* (1762), Rousseau takes up Roman republican

[15] See Bruno Schmidlin, L'humaniste Jacques Godefroy à la recherche des sources juridiques, in: Alfred Dufour/Bruno Schmidlin (éd.), Jacques Godefroy (1587-1652) et l'Humanisme juridique à Genève. Actes du Colloque Jacques Godefroy, Basel 1991, 61-79.
[16] Letter of the 6th of January 1629.
[17] See chapter "History of International Law".
[18] Quoted by Partsch, Gottfried, 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) 20.

institutions and magistracies (popular assemblies, tribunate, dictatorship and censorship) – a reminiscence that shall heavily impact the revolutionary anti-monarchical discourse.

c) Other Regions

The Lausanne academy (*Schola lausannensis*) was created by the "Gentlemen of Bern", the authorities of the neighbouring 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, since it was the only French-speaking, protestant academy before the creation of the university of Geneva twenty years later. It welcomed Beza and Hotman. However, law was only sporadically taught until the arrival of Barbeyrac in 1710, who taught Roman law in Latin and local law in French. Unfortunately, students were scarce, as Latin was not mastered by the patricians from Vaud and Geneva absorbed some of the candidates. In Fribourg, the academic teaching of law only appeared after the thrust 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. In Valais, after the emergence of a high notarial legal culture in the 13th and 14th centuries, law schools opened locally. 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 autonomous branch of study until the early 18th century, with the appointment of Niklaus Bernoulli (1695-1726), son of the famous mathematician. The Bernese conservative environment favoured the study of local Swiss law over Roman law. Zurich also had to wait until the 18th century for the appearance of an independent legal education at the *Carolinum*, the theological school of the cathedral. The work *Eidgenössisches Stadt- und Landrecht* (1727, 1728, 1739, 1746) by Hans Jacob Leu (1689-1768) from Zurich is however worth noting; it seeks to analyse the local laws of Switzerland in the light of natural law, Roman law and canon law, Roman law representing a subsidiary law as opposed to a form of Swiss common law. In 1807, the establishment of the *Politisches Institut* allowed the academic teaching of law, the first professor being Ludwig Meyer von Knonau (1769-1841). The new generation of lawyers, also trained in Germany, and the economic success of Zurich made the city an epicentre 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, many German-speaking candidates studied at Germanic universities (Berlin, Heidelberg, Tübingen, Würzburg, Bonn and Vienna). This development tremendously changed in the 19th century, with illustrious professors of Roman law taking up 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 in the time of the Reformation and in the 18th century, Roman law only occasionally infiltrated Swiss law before the 19th century.

a) The Primacy of Local Law and the Occasional Use of Roman Law

Isolated studies as well as the results of the "*Ius romanum in Helvetia*" (or "New Savigny") study committee, chaired by the Vaudois Roman law and legal history scholar Philippe Meylan (1893-1972), demonstrate the infiltration of Roman law in Swiss law since the 12th century and beyond. As previously shown, we find clear evidence of the use of Roman law in civil procedural law, in the contractual and notarial practice, in the testamentary practice and in arbitration (but also in other areas of law) between the 12th and 15th centuries. Because it only "seeped" into customary law, Roman law was therefore less a "subsidiary law" – Roman law is officially never recognised as such in Switzerland – than a practical tool used with utilitarian purposes for better regulation and legal protection, when local law was insufficient. In most of the cases, local law ruled. 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"[19] 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, quoting two well-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!" [20]. This famous burst of anger is not the sole testimony in this respect. Reports about Basel – yet one of the most "romanised" cities! – are particularly striking. Enea Silvio Piccolomini (1405-1464), the future Pope Pius II, says that the people from Basel live "without written law, using customary law more than written law, without a legal expert, without knowledge of the laws of the Romans" [21]. This last statement is confirmed by Amerbach himself, who notes that the appreciation of judges *ex aequo et bono* supplements local law[22]. One of the founders of the university of Basel, the Alsatian Peter von Andlau (1420-1480) wrote: "Our Germany [i.e. German-speaking Switzerland] despises the Roman laws in their folly"[23]. In general terms, the theologian Johannes Simler states in 1577: "[trials] are debated not on the basis of Roman law and the answers of the jurists, but on the basis of what is just and good and the laws and customs of individual peoples"[24]. Almost exactly two

[19] See 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, 64-74.
[20] Johannes Kreydemann, Kurzter Tractatus von des Teutschen Adels sonderlich der Freyen Reichs-Ritterschaft in Schwaben, Tübingen 1646, 160.
[21] Quoted by Paolo Prodi, Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto, Bologna, Bologna 2000, 159.
[22] Quoted by Hans Thieme, Ideengeschichte und Rechtsgeschichte, in: Gesammelte Schriften I, Cologne/Vienna 1986, 429.
[23] Quoted by Schott 1983, 25.
[24] Josias Simler, *De republica Helvetiorum libri duo*, in: *Helvetiorum respublica diversorum autorum*, Leiden 1577, 32.

centuries later, the Vaudois *doctor iuris* Charles d'Apples states: "There is no private law given in Switzerland, which is common to all 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."[25]. Despite the importance of these anecdotes being exaggerated by the 19th century Germanist trend[26] (the rejection of Roman law in Switzerland should have represented the "triumph of the healthy spirit of the Swiss people"[27]), it reflects an obvious reality to be taken into account. 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 the countryside[28]. 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 only used occasionally. This is not only due to the global Swiss attitude towards Roman law, but also has underlying political reasons. The refusal of Roman law represented an act of protest against the hegemonic aims of the Holy Roman Empire, as Roman law was the law applicable to the imperial court of appeal, the *Reichskammergericht*, whose jurisdiction the Helvetians incessantly refused. 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 mostly followed the customary ("*coutumes*") legal tradition (as in northern France) and not Roman written law (as in southern France). This separation did not prevent the application of Roman law in certain regions. The local custom of Geneva (*consuetudo Gebennesii*) originated from Burgundian custom, but as we have seen, Roman tradition substantially influenced Genevan law. 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" [29] (i.e. Roman law). In 1538, the Berrichon Germain Colladon (1510-1594) drew up the "Civil Edict of Geneva", with inspirations from the custom of Berry, Genevan local law, and Roman law. The importance of Roman law was then diminished and lost its influence. The Pays de Vaud particularly resisted the application of Roman law, recalling in several legal documents its attachment to the local rules. The ducal commissioner Barthélémy de Saint-Martin reported in 1470 that the Vaudois did not appreciate jurists who were "more learned than they should be" (*plus sapientes quam oportet*)[30], thus rejecting Roman law. This tendency was accentuated by the conservative influence of the Bernese authority over the canton. In the Town Charter of

[25] Charles Samuel Jean D'Apples, *Observationes miscellaneae ex iure privato Helvetico speciatim Lausoniensi*, Tübingen 1778, 3f.
[26] See Schott 1983, 17-45.
[27] Ulrich Stutz, Die Schweiz in der Deutschen Rechtsgeschichte, in: Sitzungsberichte der Preußischen Akademie der Wissenschaften (1920) 105.
[28] René Pahud de Mortanges, Schweizerische Rechtsgeschichte. Ein Grundriss, Zurich/ St. Gallen 2017², 156.
[29] Quoted by Partsch 1962, 80 n. 577.
[30] 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, 61.

Fribourg of 1600, various provisions were inspired by Roman law, but local custom was undoubtedly preeminent. In Valais, Roman law and local custom coexisted in some villages. Contrary to most other Swiss regions, Ticino has experienced a significant reception of Roman law through various references to common law in statutory laws.

This unfavourable assessment for Roman law 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)[31] and the other by Robert-Joseph Pothier (1699-1772)[32]. 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 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 partially applied the French code throughout the 19th century.

c) The Codes of Bern, Lucerne, Solothurn and Aargau

The Canton of Bern considered the creation of a private law code at a relatively early stage. In 1777, professor Gottlieb Walther (1738-1805) was commissioned by the Bernese authorities to compile private law in a systematic way, but this was not followed up. The father of the Bernese civil code is Samuel Ludwig Schnell (1775-1849), professor of law at the Bernese Academy founded in 1805. In his writings, the jurist commented for the first time on the entire Bernese civil law and contributed to launch a modern legal scholarship in Switzerland. After successfully suggesting the elaboration of a codification, he chaired the commission. The *Bernese Civil Code* has been modelled on the Austrian *Allgemeines bürgerliches Gesetzbuch* (ABGB) of 1812, strongly inspired by Roman law. The cantonal code was promulgated between 1826 and 1831.

In Lucerne, professor Kasimir Pfyffer (1794-1875) was commissioned in 1827 to draft a modern codification. The legislator was inspired by the *Bernese Civil Code* and the ABGB. The *Lucerne Civil Code* came into force in 1832 and 1839. In Solothurn, Johan Baptist Reinert (1790-1853), who studied Roman law with the great Friedrich Carl von Savigny (1779-1861),

[31] Jean Domat, Les loix civiles dans leur ordre naturel, 1689.
[32] Robert-Joseph Pothier, *Pandectæ Justinianae in novum ordinem digestae*, 1748-1752.

was appointed in 1838 to draft a civil code. The *Civil Code of Solothurn* was also inspired by the *Bernese Civil Code*. The Bernese, Lucerne and Solothurn codes belong to the same group, all betraying a significant influence of 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*.

d) The Code of Zurich, Glaris, Grisons and Thurgau

The development of a private law code in Zurich is indebted to two outstanding personalities. Friedrich Ludwig Keller (1799-1860), a pupil of Savigny's in Berlin, was a professor at the *Politisches Institut* of Zurich and early on conceived the idea of 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"[33] and the essential gateway to the then burgeoning German private law. The jurist 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 favour of an objective legal science. Keller's 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, synthesising 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.

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 constitute the bedrock Switzerland's recent romanistic tradition. The drafting of these codes has been granted to two illustrious jurists who were convinced of the desirability of a nationwide unification of law. Walther Munzinger (1830-1873), who studied in Berne 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 prematurely died leaving a draft (1871), mainly inspired by the very romanistic *Dresdner Entwurf* (1866), but also by the *French Civil Code* as well as modern commercial law. This genealogy allowed the

[33] Quoted by Schwarz, Andreas B., Pandektenwissenschaft, in: Rechtsgeschichte und Gegenwart. Gesammelte Schriften zur neueren Privatrechtsgeschichte und Rechtsvergleichung, Karlsruhe 1960, 118s.

manifestation of Roman law in the Swiss law of obligations. 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 of the different norms was fraught with debate: different cantonal legal traditions collided, some influenced by Roman law but interpreted in different ways, others influenced by local law.

> For example, Article 185 CO provides that the risk passes to the buyer with the conclusion of the contract of sale (*periculum est emptoris*). In the German tradition followed by the Swiss-German cantons, the risks pass at the moment of the physical transfer of the thing (*traditio*). According to the *French Civil Code*, which has been adopted by the French-speaking cantons, the risks pass at the moment of transfer of ownership (which is also the moment of conclusion of the contract). While it has been retained in the final text that the conclusion of the contract does not entail the transfer of ownership, it has been accepted as a favour to the French-speaking cantons that the risks pass to the buyer at that moment.

Eugen Huber (1849-1923), educated in the Germanic legal tradition and a proponent of a modern Swiss codification derived from "popular law" ("*Volksrecht*"), was commissioned in 1892 to draft a federal civil code. The *Federal Civil Code* came into force in 1912. From a substantive point of view, Huber made no secret of the fact that he wanted 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 tradition and the Romanist tradition is embodied in the attempts to define possession in the federal code. Huber[34] tried unsuccessfully to define *possessio* as mere control of the thing as in the Germanic tradition ("Gewere") and not as control with the intention to possess (*animus possidendi*), conditions derived from Roman possession.

The *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 law 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" [35]. The quality of the *Swiss Civil Code* has gained unanimous, international recognition. Moreover, the adoption of legislations inspired by Swiss law or the adoption of the Swiss codes (such as Turkey in 1926 during the Kemalist era) contributed to the spread of substantial Roman law throughout the world.

III. Why Roman Law in the Third Millenium?

Roman law is still relevant today. Nevertheless, it is legitimate and necessary to ask why the study of a law created almost two millennia ago can still be of interest. Modern codification has relativised the importance of Roman law as European "common law". In addition, Roman law no longer has the direct professional relevance for lawyers that it had for centuries in different

[34] See Eugen Huber, System und Geschichte des Schweizerischen Privatrechtes, t. IV, Basel 1893, 745s., whose argumentation is repeated in the grounds of the *Federal Civil Code*'s preliminary draft. See Manaï 1990, 69-81.
[35] Franz Wieacker, Privatrechtsgeschichte der Neuzeit, Göttingen 1994, 491.

parts of Europe. For this reason, since the 20th century, the teaching of Roman law has been in a "crisis" [36] because of the new demand for justification of its raison d'être in academic legal education.

1. Education and "Historical Awareness"

Roman law remains a subject taught in most faculties in nations with a continental law tradition. In Switzerland, all law faculties provide for the teaching of Roman law, usually as a propaedeutic course in the first year. In contrast to legal history courses, Roman law is taught in its legal substance for at least two reasons.

The first and – in our view – most important reason is the study of the "dogmatic matrix"[37] common to the multiple legal traditions of continental Europe. The knowledge of the most influential institutions of Roman private law allows to understand the origin and the fundamental elements of modern legal institutions. The acquired skills will therefore not only facilitate the understanding of national laws, but will also enable to comprehend the similarities and differences between different legal systems. Legal thinking is therefore not left to its own devices, but evolves in consciousness of the underlying structure of the law. Assimilating the foundations of Roman law does not only allow us to know a distant ancient law: it gives us the keys to understanding the legal controversies revived and carried out by generations of European jurists from the last few centuries up to today, which called upon Roman sources, even if it was to admit, reject or even sometimes misunderstand their solution. 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. The study of Roman sources allows for the "perfection of legal intelligence"[38]. With the confrontation to a very large repertoire of cases, containing the most varied legal problems, students tackle different aspects of legal thinking: the analysis of the data provided by the case and the identification of important points; the understanding of the interests and stakes involved; the controversy in favour of one or other of the solutions; the presentation of arguments; the choice of a solution. One could argue that such teaching is possible with modern legal problems. This is only true to a certain extent: Roman sources present the interest (in addition to that exposed in the first place) of having a history of several centuries and of having experimented with a multitude of forms of expression, argumentation and methods, leading to the elaboration of a vast corpus ideal for the exercise of the lawyer in training.

[36] The formulation is from Paul Koschaker, Die Krise des römischen Rechts und die romanistische Rechtswissenschaft, Munich 1938.
[37] See Pascal Pichonnaz, Droit romain, enseignement, méthode et contribution, in: Index 39 (2011) 61.
[38] See Girard/Senn, Manuel élémentaire de droit romain, Paris 1929[8], 5.

2. Legislative, Doctrinal and Judicial Debate

One might think that the injunction to participate in the modern legal debate represents a wheezy challenge. It is not. As already mentioned, training in Roman law is necessary to understand the basic elements of national legal orders. A good understanding of modern legal texts, their developments and possible reforms require a historical background, which is best insured with a fundamental education in Roman law. Furthermore, a knowledge of Roman institutions helps to dogmatically situate the various modern institutions in different legal orders. Indeed, when one contemplates these different legal orders, one will notice certain similarities, but often divergences in their content.

> For example: 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)[39].

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 interpretations of the latter. Furthermore, in the era of the internationalisation of law, of comparative law and of questions about the construction of a European private law, Roman law tradition represents an ideal common basis for discussion in the legislative debate. As it was for national codifications, Roman law could represent a "neutral" source of inspiration for the development of transnational or supranational principles. The constitution of supranational rights (e.g. the UNIDROIT principles, the Lando principles or the Draft Common Frame of Reference) is seen as a possible "third birth" of Roman law[40].

Moreover, one can hardly formulate sound critiques and propositions in doctrinal debate without understanding the genealogy of institutions and controversies. A danger to dogmatic clarity is represented by a license to formulate propositions and criticisms without considering the historical significance of the notions and issues conveyed by legal solutions. Studies with a historical perspective make it possible to correct doctrinal developments that are inconsistent or could be improved. Since any expression of law is destined to become immediately historical, it is advisable to arm lawyers with fundamental tools for the historical analysis of law. Training in Roman law therefore increases the quality of legal analysis.

Finally, we must emphasise the importance of Roman law in relation to jurisprudence. Direct recourse to Roman law by Swiss Federal judges is not common[41]. However, there are references

[39] See a critique of the Swiss solutions by Heinrich Honsell, 100 Jahre Schweizerisches Obligationenrecht, in: ZSR 130 II/1 (2011) 56-80.
[40] See Caroni 2011, 74; Pichonnaz 2012, 39-41.
[41] 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*

to doctrinal opinions that have direct recourse to Roman law (e.g. Pothier, but especially 19th century German pandectistics, especially Windscheid, Dernburg and others)[42]. 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 root 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 source of "current" law ("*Heutiges römisches Recht*" in German Pandectistic terminology), but as a source of study in 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 papyrology at the end of the 19th century. This new orientation, which of course pre-existed at least since the time of legal humanism, requires greater specialisation of Roman law scholars and numerous collaborations between Antiquity specialists in the fields of history, philology, papyrology and law. In these respects, we can notice a tremendous dynamism of the branch in the last decades.

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.

[42] On the quotation of Pothier by federal judges in BGE 128/2002 III 370 et BGE 133/2007 III 257, see Pascal Pichonnaz, Droit romain, enseignement, méthode et contribution, in: Index 39 (2011) 62-77.

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