Roman Law Always Dies with a Codification

Tomasz Giaro
Roman Law and European Legal Culture

Cooperation of Universities supporting the development of the Lublin and Lviv regions
Roman Law and European Legal Culture

Edited by:
Antoni Dębiński, Maciej Jońca

Lublin 2008
Roman law always dies with a codification

1. The ancient law. In the cultural formation of Europe, the significance of Roman law has always been recognized as parallel to that of the Christian religion and of Greek philosophy. But the idea of a unitary “Roman law tradition”, inaugurated by two waves of a “Reception”, occurring in the 13th and the 16th century, cannot seriously be maintained, since this presupposes the identity of Roman law throughout the ages. We must rather ask the question whether it is still the same ancient Roman law which we are referring to in the third millennium. Emphasizing the difference between the ancient and the reborn Roman law recalls the expression “second life of Roman law”, made popular by Paul Vinogradoff in respect of the reception in medieval Europe. However, Alan Watson is doubtless correct in questioning its capacity to embrace all reappearances of Roman law in a great variety of times and places. It is already the fourth incarnation of Roman law that is currently haunting Europe.

Before addressing at greater length the fourth life of Roman law, it is necessary to say something of the first, second and third lives. The first was confined to the legal world of ancient Mediterranean culture. And yet, when studied by contemporary jurists who define themselves as legal historians, Roman law is usually treated as valid law, albeit valid law set in the past. According to this ‘juristic conception’ of legal history, the discipline constitutes the description of a past valid law, just as modern legal dogmatics analyses the valid law of the present. Considering that it is mainly the law in force which is taught at Western European law faculties today, such an approach, which treats Roman law as wholly parallel to contemporary private law, is advanced as the best remedy for the current crisis within the discipline.

Consequently, the condition of Roman law in any given age is presented as if the writer’s aim was to bestow some practical legal advice on the reader, for example how to perform a legal transaction according to Roman law: to hire something, to compile

---

*Tomasz Giaro*

---

* Warsaw University.
a will or even to get engaged „according to the Roman law”\(^1\). But because in reality this law is no longer valid, such a manner of studying it can lay claim to neither intellectual interest nor utility. From the practical point of view, the detailed knowledge of how to litigate under the *legis actiones* or how to become a lawful slave-holder, is of no service whatsoever. There is an internal and an external point of view on legal problems. To be capable of surviving in a society of cannibals, and to make them an object of study, are at least partially different abilities. Just like the comparative lawyer, so too the legal historian envisages not a particular rule or set of rules, but rather the whole of a legal culture in the course of its development.

Despite all structural differences between historical and dogmatic knowledge, the legal historian, in particular if he is a member of a law faculty, is often expected to contribute directly to the study of contemporary law. This being so, his job is conceived as that of making an ancient legal rule applicable once more, or at the very least of inspiring future legislators. For this reason the applicative, as contrasted with the contemplative conception of legal history, concentrates exclusively on those aspects of Roman law which influenced contemporary legal systems\(^2\). Interest in such influence is, as a rule, unduly confined to private law to the exclusion of public law. It is indeed true that the latter always changed faster than the former, and that its impact on modern constitutions has been smaller. Moreover, in contrast to the so-called classical private law, no Roman paradigm of legal perfection in the field of public law has been ever acknowledged\(^3\). Ancient Rome was never a democracy comparable to the Athenian one\(^4\), so the sources of European constitutionalism are hardly Roman.

Nonetheless private and public law are inseparable from each other for the simple reason that the system of legal sources, and particularly the problem of law-making competence, is a constitutional issue. The internationalization of the first life of Roman private law during the late Republic, and particularly the rise of the *ius gentium*, is strictly connected with Roman expansion after the second Punic war (218–201 BC) and with the parallel transformation of the city-state into the territorial and then the imperial one. Significantly, the term *ius gentium* was used by the Romans to designate public international law as well as those elements of Roman private law which were shared with other nations in a sense at least partially covering the range of natural law (*ius naturale*)\(^5\).

The first life of Roman law was dominated by the juristic opinions as the main legal source during the Principate. Their paramount role gave birth to the so called jurists’ law\(^1\), a kind of abstract case law, in a certain sense intermediate between statute law and judge-made law\(^2\). But already during the reign of Diocletian (284-305 AD) the statute law in the form of imperial rescripts, preferred as early as the time of Hadrian (117-138 AD), took over definitively as the almost exclusive source. The first life of Roman law ended famously with its codification, even if only of the ancient compilation-type, carried out by the Byzantine Emperor Justinian (528-534 AD). His work, composed of extracts of the casuistic legal literature of the Principate, was made possible by the abstraction of the original Roman casuistry.

Already the final stage of the first life of Roman law indicates that it is adaptation to new circumstances which conditions the survival of legal phenomena. Justinian’s compilation reduced the historical whole of the ancient law, as Friedrich Carl von Savigny pertinently observed, to a single statute\(^3\). Even if Watson postulates “an earlier reception”, inaugurated with the founding of Constantinople in 324 AD\(^4\), it was the compilation, well prepared by the Eastern law schools, which was to be the “first transplant” of Western Roman law to the East. This transplant failed because of the ignorance of Latin in Byzantium as well as the low level of legal scholarship of the time. Equally ineffective was the “first reception” of Roman law in the East, consisting of a Greek translation of the whole compilation, known as the Basilika, which was published in Byzantium at the end of the 9\(^{th}\) century\(^5\).

As a classicizing collection of case solutions going back to the age of the Principate, the Justinianic compilation was decidedly backward-looking, in stark contrast to the typical modern code, which is always forward-looking. Moreover, in conformity with the absolutist doctrine of the later Roman Empire, laid down already by Constantine the Great (306-337 AD), Justinian forbade any interpretation of his compilation, thus sentencing the law of the Roman jurists to death. A temporary death, however; the revival of Roman law in northern Italy during the 12\(^{th}\) century was due precisely to the phenomenon which Justinian intended to ban: its interpretive study. The second life of Roman law, which took place in medieval Europe, is known as the Reception.

2. THE OLD IUS COMMUNE. According to the traditional view, the reception took place only in the continental area of Western Europe: in Germany in its full dimension and elsewhere only partially. Equally diffused until recently was the opinion that the reception consisted of a transfer of Roman private law, taken over from Justinian's compilation as a body of norms, more or less in the same way as the French Code civil was transplanted to several countries during the 19th century. But it is clear that neither in Germany nor elsewhere in medieval Europe did a mechanical transfer of an ancient body of legal rules take place; the reception of Roman law consisted rather in an intellectualization of legal knowledge in particular European countries, during which the law, first the Roman, then also the local, was made an object of university study1.

Already the medieval ius commune, a phenomenon more doctrinal than strictly normative, was by no means a uniform legal system applied in courts throughout Europe2. Further, with respect to the early modern period, 'influence' is the best word to designate a stronger or weaker presence of Roman law on the continent. In spite of the asserted disparity between Germany and the rest of Europe, the Justinianic Corpus Iuris constituted for European jurists during the age of the Reception only a persuasive authority, quite different to the binding force of modern codes. The common law of pre-codification continental Europe was certainly not a judge-made law and not exactly a statute law, even if the compilation of Justinian was nominally treated as such. It was rather a learned interpretation of the Corpus Iuris, hence a bookish law3, which can be considered as the forerunner of the Pandectist professors' law.

During the pre-codification age three zones of influence of Roman law in Europe can roughly be individualized: (1) the western part of the continent, where either the reception (Germany) or at least a strong influence of Roman law (France) took place, and two further regions, where only weak infiltrations of this law occurred, namely (2) England and (3) Eastern Europe. The continental West is generally considered the home area of the old ius commune, but apart from some reflection, conducted occasionally at the Max-Planck-Institute for European Legal History in Frankfurt am Main, no serious research has been undertaken in order to establish just how common this supposed ius commune was, or to what extent it was an effective normative system transcending the limits of a loose doctrinal tradition4.

---

3 R. C. van Caenegem, European Law, p. 39, 54, 56.
A distinguished American scholar has even posited several distinct incarnations of the old *ius commune*: first the canon law of the Roman Church, then the Roman law of the *mos italicus* and finally the learned law of the Reformation, represented during the 16th century by Protestant jurists such as Johann Apel, Konrad Lagus, Nicolas Vigelius and Johann Oldendorp. These three embodiments of the common law of Europe have been designated the first, second and third *ius commune*¹, a nomenclature which is perhaps little more than an unnecessary multiplication of entities. Strong arguments favour, in fact, the assumption that after the disintegration of the medieval legal world, its unity, founded upon the universal powers of the Empire and the Papacy, has never been regained. On the contrary, the long period between the rise of the nation state in the 16th century and the codifications of the 19th century, was characterized by a permanent crisis of the *ius commune*².

In Germany, the stronghold of the reception, the indigenous *usus modernus Pandectarum* displayed different facets in diverse territories during the 17th-18th century: the writings of Samuel Stryk were influenced by Saxon law, those of David Mevius by the law of Lübeck, and so on. Only the Pandect-science of the 19th century bestowed on Germany the same legal unity which in France and Austria was conferred by their civil codes. Returning to the aforementioned tripartition of Europe, it is noteworthy that from the 16th century onwards a standard literary genre has been constituted by lists of those parts of the *Corpus Iuris* which did not apply in contemporary practice. These were first published in France, questioning the validity of Roman law, and subsequently also in Holland, Germany and Austria where, by contrast, its validity was generally presumed³. Neither in England nor in Eastern Europe would such a list make sense, since these regions knew only the exceptional infiltration of Roman law.

The outstanding role played by Roman law in Europe during its second life was limited to the continental West for the simple reason that only there did Roman influence assume the form of continuous university study. In South-eastern Europe, where until the 19th century universities were completely lacking, the medieval reception of Roman-Byzantine law, itself very simplified and restricted mainly to the Orthodox canon law, was followed by its mummification during the 500 years of the Ottoman rule, to which also the folk laws of the Balkan Peninsula were subjected⁴.

---

In the meantime East Central Europe underwent an indirect Roman influence, exercised through the canon law of the Roman Church and through the German town law of the Magdeburg type.

The Romanist influence embraced also the constitutional thinking of Europe which owes to the ancient models, apart from the very idea of public law, such central concepts as imperium or iurisdiction. It is by no means clear, however, whether this influence was a blessing. From the time of the Bolognese glossators onwards the Roman maxims princeps legibus solutus and quod principi placuit, legis habet vigorem were invoked in order to strengthen royal or imperial power rather than to promote democracy. Also in recent times, as a common-law-writer has pertinently observed, the "remarkable success" of the Anglo-American legal system in producing stable democratic societies all over the globe contrasts with the parallel "catastrophic failure" of the civilian system of continental Europe. Hitler and Stalin are, in fact, personalities which hardly fit the world of the common law.

The second life of Roman law ended as the Corpus Iuris, unsuitable for a modern nation state, was obliterated by the natural law codes. For that reason the 19th century has been blamed in Western historiography for the disintegration of the ius commune or at least of the homogeneous Romanist legal culture. The truth, however, is that the supposed unity of the ius commune in reality never existed. On the eve of the Revolution France alone had about 60 customary laws of regional significance and about 300 local coutumes, whereas European legal scholarship (communis opinio doctorum), not to mention judicial practice, which always retained its national character, proved unable to assure legal uniformity and certainty. Only the codes, or more precisely the two successful models, the French Code civil and, to a lesser extent, the Austrian ABGB, overcame this particularism in favour of a relative unification at the state level.

3. The Pandectist Legal Science. During the Napoleonic wars French conceptions of constitutionalism, as well as the French administrative and judicial system, were carried to every corner of Europe up to the Balkans and Russia. Hence the conclusion must be drawn that the 19th century signified not a disintegration, but on the contrary a consolidation of Romanist legal tradition on a territorial basis enlarged to the East of the continent. In that sense the introduction of the Code civil in central Poland has rightly been defined as a sort of reception of Roman law, even if partial,

---

2 D. Osler, Fantasy Men, p. 169.
indirect and belated\textsuperscript{1}. From a Western point of view, however, the French and Austrian civil codes reduced Roman law, once seen as the exclusive source of legal wisdom, to the status of a secondary subject in the curriculum of legal education, a fact noted by Savigny, terrified by the advance of the \textit{Code civil} in Germany\textsuperscript{2}.

Paradoxically, however, these codes can be seen as instigating a resurrection of Roman law to its third life, equivalent to its second reception, attributable to the German Historical School. The significance of this process for the survival of Roman law at the turn to the 19\textsuperscript{th} century can hardly be overestimated. Indeed, the “Roman law code” could be defined at that time by Johann Georg Schlosser (1739-1799), German jurist and brother-in-law of Johann Wolfgang Goethe, as “practically forgotten”\textsuperscript{3}. After the first wave of civil codifications, which crowned the Age of Reason, Roman law seemed to have been forced to leave the stage as a purely antiquarian subject. When Savigny re-launched it as a tool for constructing a new civil law for Germany, he saved Roman law from the fatal blow, which his opponent in the 1814 codification debate, Anton Friedrich Justus Thibaut, was about to deliver it.

Whereas the second life of Roman law, synonymous with its first reception, made European law a science, the second reception, inversely, made a science out of Roman law. In order to put its chaotic casuistry on the same level with the French and Austrian codes as valid civil law of Germany, Roman law received a scientific treatment based on the truly un-Roman instrument that was the all-embracing Pandectist system\textsuperscript{4}. Rudolf von Jhering was proud of his capacity to produce with its help an unlimited amount of “absolutely new material” and extolled the system as an inexhaustible source of “new legal truths”\textsuperscript{5}. To realize the creative role of modern legal doctrine the Pandectists had to abandon the medieval idea of ancient Roman law as the \textit{ratio scripta} of Western Christendom. A new paradigm, invented by Gustav Ritter von Hugo and taken over by Savigny, saved Roman law in its traditional function as a synonym for juristic perfection: the classical law\textsuperscript{6}.

As a worthy product of the Historical School, the concept of the classical Roman law is a differentiating tool, because only a part of Roman legal history can be considered classical. Both pre-classical and post-classical law thus remain useless as

\begin{itemize}
  \item \textsuperscript{1} J. Kodr\'ebski, \textit{Le droit romain et le Code Napoléon en Pologne du XIXe siècle}, Index 16 (1988), p. 200.
  \item \textsuperscript{2} F.C. von Savigny, \textit{Vom Beruf unserer Zeit zur Gesetzgebung und Rechtswissenschaft}, Heidelberg 1814, p. 124.
  \item \textsuperscript{5} R. von Jhering, \textit{Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung}, vol. I, Leipzig 1852, p. 31; \textit{ibidem}, vol. II.2, Leipzig 1883, p. 386 nt. 528a.
\end{itemize}
models to be followed. Even today the classical law is considered by Romanists as “the outstanding representative of true Roman private law” and “one of those vantage points on which the true historian loves to take his stand”\(^1\). But paradoxically it was the post-classical law which influenced the later development, at any rate in such fields as legal proceedings, legal education and legal profession, as well as the law of family and succession, written legal transactions etc\(^2\). In practical terms, the concept of the classical law, opposed to the old *ratio scripta*, does not imply unconditional adoration, but only selective utility.

Despite their distinction between the Roman law of antiquity and “of today”, the Pandectists were bound to justify their modern constructions through the text of the *Corpus Iuris*. However, in several cases a too strict adherence to the letter of Roman law proved unfortunate. Thus the Pandectists, attached to the traditional conception of ownership as a subjective right to material things only, impeded the development of intellectual property. In the same way, in the name of programmatic fidelity to the ancient sources (*Quellenmäßigkeit*)\(^3\), they cancelled the progress already achieved by the Law of Reason in the fields of equality in exchange and the *clausula rebus sic stantibus*, as well as the assignment of obligations and *culpa in contrabendo*\(^4\). Just like its first and second lives, so too the third life of Roman law ended with a codification: the German BGB of 1896.

But the third incarnation of Roman law, still living on its formal validity, was the last which could take the identity of ancient and modern problems and solutions for granted. This applicative approach transmitted to contemporary applicative legal history the deep conviction that its mission consisted in selecting from the past something which was still useful for the present, in waiting for a return of some “juristic concept” (*Rechtsfigur*), in going “back to the roots” or in carrying out an organic “renewal of the old”\(^5\). The contemplative method stressed, on the other hand, the contrast between past and present, just as comparative lawyers stressed the contrast between civil and common law. The more a legal system differed from that presently in force, the more it appeared ‘historical’\(^6\). Today, after the failure of both progress-oriented philosophies, the positivistic and the Marxist, which divided human history into distinct compartments, both the contrast and the continuity approach seem equally exaggerated.

---


The third life of Roman law, which lasted until the beginning of the 20th century, entailed not only the deepening of the knowledge of ancient law, but also an enlargement of the whole Romanist or civilian system to the East of the continent. South-eastern as well as East Central Europe joined its kernel only during the 19th century, the age of codification and constitutional change in the West. Many eastern countries of Latin Europe, such as Poland, Bohemia, Croatia and also to some extent Hungary, participated in that movement *natio imperii*, by way of imposition by the imperial powers, but hereafter they remained irrevocably a province of the civilian system. This holds true also for the Orthodox Europe of Russians, Serbs, Bulgarians, Rumanians and Greeks who, by contrast, received the Romanist system *imperio rationis*. Universities were founded in South-eastern and restored in East Central Europe1.

In the late autumn of the third life of Roman law, there emerged for the first time in a juristic debate the anti-Romanist argument, attacking the old age of Roman law, which in the past had always been regarded as a virtue. After some less important precedents, the great Germanist Otto Gierke excoriated Roman law in the year 1895 for its “fossilized techniques”, and dismissed it as the law of a “senile culture”, which had already reached its deserved end a thousand years before its reception in Germany, and which was now “forever dead”2. This censure was, however, misplaced insofar as Pandectist legal science radically purified the *Corpus Iuris* of all historical contingency, producing a sort of timeless ideal seemingly fitting both ancient and modern needs or, as the outstanding Pandectist Bernhard Windscheid claimed, the needs of every society in which civilized men live together3.

4. THE NEW IUS COMMUNE. After the codification of civil law in Germany, the university course on Pandectist legal science was abolished. The fresh code, which promised a completely new beginning, was expected to supersede all prior legal knowledge. Consequently, Roman law became a purely historical discipline and, despite great scholarly achievements, a stranger in the law faculties. But in recent decades the so-called decodification of national legal orders and their Europeanization has seemed to demand a new common law of Europe. As a result, legal historians are trying to regain the attention of the juristic community, appealing – even if not always with sufficient clarity – to the old *ius commune*. Three directions in this appeal can be individualized: (1) once there was a law common to all Europe, and this can serve as general encour-

---


agement, as it were, to the builder of a new ius commune; (2) some specific content of the old ius commune may still be inspirational today; (3) some content of this legal tradition must be positively imitated.

However, more attention should be directed not to the content-related but rather to the structural-methodical aspects of the ancient jurists' law. Until recently these were regarded in the modern legal world of systems and codifications as a closed chapter of history. Nonetheless, the aforementioned phenomena of decodification and Europeanization have rehabilitated the extra-governmental mechanisms of law making, which appear very similar to the methods of Roman jurisprudence. Its autonomous law production, taking place outside the realm of statute law, consisted mainly in juristic reinterpretations of previous interpretations. Such an interpretive method of law making, adopted at the European level, is perhaps what we might consider the fourth life of Roman law. And yet, no resurrection is able to revive the dead completely.

It may seem a paradox that Justinian's Digest, which is effectively a collection of case solutions, a huge case-book similar to the American ones, could become the foundation of modern codified systems. But the paradox disappears on a closer examination. The link between pre- and post-codification jurisprudence was the central role of a text, first of the Corpus Iuris Civilis and then of the modern code, as a unique legal source, as well as the hermeneutic method of its treatment. Moreover, the paragraphs of Justinian's Digest as citations of old Roman jurisprudence retained their original quality as pieces of both legal literature and juristic ius controversum. Only in the modern era were they transformed into rules of Roman law, which became building elements of private law codifications.

But as far as private law is concerned, the present legal order of the European Union closely resembles the ancient Roman law of the Principate which was poor in rules or, more precisely, poor in rules declared in writing. Besides the sparse and heterogeneous directives, there are only individual decisions of the European Court of Justice, i.e. judge-made law, on the one hand and broad legal principles, shared by all member-states of the European Union, on the other. Consequently, the judicature of the EU-Courts never resorts to Roman rules, but rather only to general maxims.

---


2 The comparison is borrowed from E.F. Bruck, Römisches Recht und Rechtsprobleme der Gegenwart: Richterpersönlichkeit und lebendiges Recht, Tübingen 1930, p. 27.


themselves largely of post-Roman origin, such as *singulatria non sunt extendenda*, *nemo auditur suam turpitudinem allegans*, *ventire contra factum proprium nemini licet*, and the like\(^1\).

Whether under these conditions any hypothetical European civil code could be Romanist in character seems questionable. But most of all it is open to doubt whether such a codification is necessary, let alone possible\(^2\). According to the fashionable medieval-like interpretation of the European Union as Holy Roman Empire\(^3\), the Union needs no written constitution. And without it Europe can maintain its previous codes as well. The supporters of direct learning from the past, who insist that "medieval and early modern history managed without national legal systems"\(^4\), forget that above all this period of history managed without nations. It also remains extremely doubtful whether there are enough rules common to the United Kingdom and the continent, whereas it is striking that the main civilian distinctions, such as those between public and private law, or between property and obligations, are unknown to the Common Law\(^5\).

The Romanist influence on the private law of individual European countries is not limited to the cases in which civilian superstructures were built on a Roman foundation. Quite often Roman law blocked the development of European legal systems which could only make progress by confronting the Romanist tradition, even if this continued to constitute the principal frame of reference for the continental jurist of the West. Freedom of contract was unknown to the ancient Romans, and the enforceability of informal agreements (*pacta*) is due not to the Romanists but to the medieval canon lawyers. Again, as regards private penalties, the modern evolution separated indemnity functions from penal ones and eliminated completely the ancient remnants of the so-called private criminal law\(^6\).

The European legal history which is seen through Romanist spectacles scarcely exhausts the whole of the discipline, yet we can hardly deny our shared professional distortion. The answer to the fashionable question of counterfactual history ‘What would Europe be without Roman law?’ is very simple: England\(^7\). Europe would probably have retained its feudal, procedure-oriented law, based on experience rather than logic, which survived only on the British Isles. But the opposite problem is seldom

---

1 Luig K.: *The History*, p. 413 f.
posed, namely what would Roman law be without Europe. And here the answer is that probably it would be something like the historic South-African legal order, with its system of lawful slavery, later substituted by a racial discrimination. So we can be thankful for Europe, and indeed in the course of time for the several Europes, with the civilizing effect of their constitutions and codifications.

The four lives of Roman law identified above are not to be understood as the constant return of one and the same duck which, according to the oft-quoted but unhappy metaphor of the great German poet Goethe, is periodically diving and re-emerging in one and the same pool. The Roman law has always been adapted to the changing face of Europe. The Roman law of Byzantium, of the German Emperors, and of the enlightened codifiers has ceded its place to the Roman law of the European consumer, interested above all in better protection against unfair commercial practices. The fourth life of Roman law is likely to end, as usual, with a codification which, national or European, has always been deadly for Roman law.
