V
Infiltration of Legal Ideas

Roman law had the capacity to affect local or other law even in fields where non-Roman law continued to survive or even predominate. The process of the infiltration of Roman law or Roman influenced thinking into these areas can be shown by three books written during the Reception, each of a different nature, each typical in its way, none epoch-making or written by a jurist of the first rank, but all influential. Almost any book, however, that treated of the local law could serve as an example, for once the *Corpus juris civilis* has received any position of authority in a country's law, is taught in universities, and is, if only in part, considered directly relevant in resolving disputes in court, then it will, as a natural consequence, extend its influence through the medium of law books of various types that are not ostensibly directed at the expounding of Roman law or at extolling its glories.

The first and earliest of the three books was published under a variety of titles, such as *Loci argumentorum legales* and *Topicorum seu de locis legalibus liber,* and first appeared at Louvain in 1516. It was the work of Nicolas Everardi (Everts), who was born in Zeeland in 1462 and died in 1532. He studied at Louvain University, graduating as doctor of civil law and canon law in 1493. He became professor of law there and later, in 1504 *rector magnificus.* In 1498 he was appointed "official," or ecclesiastical judge, representing the bishop of Cambrai, at Brussels, and from 1509 to 1527 he was president of the Court of Holland. In the latter year he became president of the Supreme Court of Holland, Zeeland, and Friesland at Mechelen. This type of career, a combination of professor and judge, of public servant and ecclesiastical officer, is not unusual for the period.

The *Loci argumentorum legales* is an innovation in legal literature in that, although interest in legal argument was not new, the author for the first time sets out fully and systematically the various kinds of argument which can be used in legal matters.[1] Of concern here are not the general *loci* (points for discussion) on drawing arguments from etymology, from the genus to the species, and from the whole to the part, but quite a number of *loci,* all based on argument by analogy and all dealing with individual legal subjects, whose arguments are drawn from Roman law to non-Roman law: thus, from slave to monk (*locus* 24); from freedman to vassal (*locus* 25); from "miles armatae militiae (soldier of armed warfare)" to "miles caelestis militiae (soldier of heavenly warfare)" that is, from the rights and duties of a Roman soldier to those of a Christian cleric, priest, or bishop (*locus* 56); from soldier to church or *pia causa* (*locus* 57); from liberty (basically presumption or interpretation in favor of liberty) to *pia causa* (*locus* 58); from fisc to church or *pia causa* (*locus* 61); and from minors to church or *pia causa* (*locus* 74). *Locus* 29, though entitled "from feu to emphyteusis" (Roman long lease of imperial land or of private land for a rent in kind), also deals with arguments from either one to the other.

In all of these the non-Roman element is in effect being delineated in terms of the Roman law. Roman law is regarded as providing a good analogy, and since it is fuller and more developed, gaps or presumed gaps in the other law can be filled. In the process, the non-Roman area of law receives rules of Roman law, and to an extent, the non-Roman element is seen in Roman law terms. More significantly, the system of Roman law is being extended to incorporate the later non-Roman elements. Roman law is being treated as living and developing law. It is appropriate that Everardi continually points out that the analogy is not complete—that, for instance, not on all points is the legal position of a monk identical with that of a slave. Everardi is by no means the initiator of the process, and among the many jurists he cites, the most frequent references are to the *Gloss,* Baldus, and Bartolus.[2] Everardi's main role is that of systematizer.

What is above all striking is the detail of the analogy. For example, the *locus* from slave to monk reports that just as there can be no successor on death to a slave, so there can be none to a monk; a monk can hold property, as if it is his own, with the consent of his superior; there can be

1. See e.g. R. Dekkers, *Het humanisme en de rechtswetenschap in de Nederlanden* (Antwerp, Vlaamsche rechtskundige bibliotheek, 1938), pp. 8ff.

2. See e.g. Dekkers, *Het humanisme,* pp. 14ff.

no valid transaction between monk and superior, though this is slightly qualified; as a slave acquires for his owner, so the monk acquires for the monastery; an action, when a monk has control of something, should be brought not against him but against the abbot or prelate; the monk cannot be a party to an action; monks cannot be witnesses to a will; and the superior must not cruelly punish the monk.

The second book is Johann Joachim Schoepffer's *Synopsis juris privati Romani et forensis,* first published in 1692, which was still being republished as late as 1870. Schoepffer was born in 1661, studied at the universities of Leipzig, Jena, and Frankfurt-am-Oder, at the last of which he became Privatdozent in 1683, professor extraordinarius in 1687, and a doctor of both civil and canon law in 1688. In 1693 he became full professor and assistant consistorial judge (*consistorialassessor*) at Rostock. In 1707 he became a council member and vice-director of the ducal chancery in Rostock, and in 1715 director of the consistory. He became more and more involved in local politics, using his legal talent arbitrarily on the side of ducal despotism. When in 1717 an imperial commission, insofar as it could, took from the duke his powers of governing, Schoeppfer was removed from all his offices. He died in the same year.

As the title signifies, the book sets out in short compass, rather less than nine-hundred smallish pages, both the basics of Roman law and the variations accepted by the jurists and courts of Schoeppfer's time, primarily in Saxony. The primacy of Roman law is shown by the arrangement, which is that of the books and titles of Justinian's *Digest.* Given that normally the arrangement of the *Digest* was properly regarded with a lack of enthusiasm, the fact that both Schoeppfer and others follow it makes sense only on one of two hypotheses, which may be interrelated.[3] Either such a book is to be treated as an auxiliary to lectures on the *Digest,* or the order of the *Digest* is to be regarded as so well-known that the reader's convenience is thought best served if a law book keeps to it. From either hypothesis three consequences ensue. First, the classification of legal elements, and the boundaries of legal concepts, are forced into those of Roman law or remain identical to those of Roman law. Second, local law is seen as a qualification of or even a postscript to Roman law.

3. See e.g. J. Voet, *Commentarius ad pandectas* (1698–1704); P. Busius, *Commentarius in universas pandectas domini Iustiniani* (1656); who expressly spells out in the title page that he will set out the differences of the common customs of Germany, France and Belgium, and of canon law; C. R. ab Oosterga, *Censura belgica in priores 25 libros pandectarum* (1651), follows the *Digest* order, giving modern law, especially of *'Belgium'*; J.-V. Bechmann, *Commentarius pandectarum theoretico-practicus* (1658), gives modern law, for Saxony and the *ius commune.*

Third, the subject matter of every *Digest* title appears to be of continuing importance, and contemporary law which does not fit that mold is omitted, hence downgraded. The result is seen in the discussion of book 9, chapter 2, on the *lex Aquilia,* the Roman statute that deals with damage to property. Although later law did not exhibit the peculiarities of the Roman action, Schoeppfer's discussion, like that of other jurists, proceeds on the Roman basis, even though he points out the differences. To this type of treatment should be attributed much of the detail of the law in Schoeppfer's time, such as the doubling of damages when the defendant denies liability, and the prominence of a rule—fundamental in Roman law, but not so later until the Reception, and now again seriously under challenge—that the availability of a remedy depends upon fault that can be attributed to the injuring party.[4]

The general arrangement with its consequences is of possible benefit to the author, who will seem to be in the international tradition and hence will sell more copies of his book abroad and will even be more likely to be offered chairs abroad. As an indication of this internationalism, my copy of the 1702 edition of Schoepffer was owned by a Scottish advocate, John Rutherford of Edgerston, in the early eighteenth century. The marginal notes are not numerous, and most of them indicate where the text disagrees with the Dutchman Cornelis van Eck, whose book *Principia juris civilis* was used as the basic textbook by the first professor of civil law at the University of Edinburgh, James Craig, who was appointed in 1710.

The third book is Sir Thomas Craig's *Jus feudale* ("Feudal Law"). Craig, the great-great-grandfather of James Craig, was born in Scotland in 1538, was educated in arts at the University of St. Andrews, and studied law in France, probably mainly in Paris, where he remained for seven years from 1555.[5] He became an advocate in 1563 and, partly from lack of ambition, never reached the heights of his profession. He was a strong supporter of the union of the crowns of Scotland and England and was one of the union commissioners. It was this union that induced him to write the *Jus feudale* after 1603. He died in 1608, and although his manuscript circulated among the advocates, the book was not published until 1655.

The book relates to that branch of Western private law which, with the possible exception of matrimonial property regimes, owes least to

4. An early important inroad is found in §829 of the German *BGB.*

5. See D. B. Smith, "Sir Thomas Craig, Feudalist," *Scottish Historical Review* 12 (1915): pp. 272ff.

Roman law. Craig's *Jus feudale* is the first systematic treatise on any branch of Scots law, but its worth has often been suspect, partly because of a political purpose disclosed by a statement in the *epistula nuncupatoria,* or announcement, that the same fundamentals of law can be observed in both Scotland and England, whose laws have very great affinity.[6] But this belief of Craig makes the work the more important, since Roman law was not authoritative in England and thus the work should *a fortiori* display little influence from that system. But this is far from being the case. Craig was a humanist by inclination as well as by training, and the prevailing impression gained from his book is of his historical awareness and his internationality of outlook. The first quality leads him to assert very properly that feudal law is not part of Roman law.[7] The second leads him to make use of international scholarship, whether of canon or civil law or of works specifically on feudal law.[8] Classical allusions are frequent, and he uses Roman law in various ways—to point an analogy, to support an accepted proposition, to indicate that a detail of feudal law rests on a general principle of Roman law, or to suggest a reform in the law of Scotland. This last usage is perhaps the most interesting. He argues, for instance, particularly from Roman but also from general feudal law, that prescription should be more accepted as a mode of constituting a feu in Scotland, and in the course of argument he cites C.7.39.2, 7.39.7.6, D.41.3.9, 48.11.8, and C.7.39.3 and 4.[9]

The influence on Craig of Roman law thinking with its stress on internationality is best seen in his treatment of feudal law as international in character though subject to local variation. It is in no way surprising that the second edition of the *Jus feudale* was published, in 1716, at Leipzig. The internationality of feudal law is to be traced to the *Libri feudorum, the Books of the Feus,* and they could have had little authority outside the empire had they not long been regarded as part of or a continuation of Roman law, habitually published with the other parts of the *Corpus juris.* Many of the most important writers on feudal law, such as Baldus, Bartolus, Duarenus, Hotman, Cujas, Zasius, and Paulus de Castro, are now best remembered for their Roman law studies.

The dominance of Roman law on minds such as Craig's is shown in his general account of English law:

6. See e.g. H. McKechnie, in *Sources and Literature of Scots Law,* by various authors (Edinburgh, Stair Society, 1936), p. 33.

7. 1.5.

8. For the numerous writers on feudal law cited by Craig see Smith, "Craig," p. 294n1. For a modern list of such works see Coing, *Handbuch* 2.1, pp. 395f.

9. T. Craig, *Jus feudale,* 2.1.8–10 in Ruddiman's edition; 2.1.4,5 in Mencken's.

> The Civil Law is but little followed in England; and, although that country abounds with distinguished men in every department of learning, most of them are content with a bowing acquaintance with it. The reason why the Civil Law attracts so few students in England is that the law of that country is so thickly overgrown with native customs and venerable institutions. Hence the saying that the English observe a municipal law of their own while the Scots are under the rule of the Civil Law. But in truth, so little has the Law of England been able to make itself independent of the Civil Law that every part of it is illuminated by principles and precedents derived from that system upon which indeed the solution of its most controversial topics depends. The English are fond of attributing those principles and precedents to the genius of English jurisprudence and are unwilling to admit how much they owe to the jurisconsults of ancient Rome. But how powerfully the Civil Law influences the discussion of legal problems in England is patent to anyone, possessed of a sound knowledge of it, who takes the trouble to examine the more important cases which occupy the attention of the English courts. It will be found that the key to the solution of the difficulties presented in them often lies in the "responsa" of the Roma emperors and jurisconsults which form the sources of the Civil Law. Many instances of this occur in the reports of Plowden and Dyer.[10]

These three books—none devoted exclusively to Roman law, and only one, Schoeppfer's, about Roman law in the main—all reflect and increase the fundamental role of Roman law in their day. Roman law has undoubtedly meant different things at different times, and attitudes to it are part of more general cultural trends. Each book therefore bears considerable traces of its own society and age, and Roman law was seen by each author in a way appropriate to his time and country. Yet when the *Corpus juris* is directly authoritative, there is an inevitable tendency, expressed in law books of various kinds, to increase the sphere of Roman law rules and of modes of thinking influenced by the study of Roman law. Each of the three books, though situated in a particular time and place, nonetheless had a long and international usefulness. Thus, the book of Everardi, first published at Louvain in 1516, was republished in Italy, Switzerland, France, and Germany, and appeared as late as 1648. Craig's work, written in Scotland in the first decade of the seventeenth

10. Craig, *The Jus feudale,* trans. J. A. Clyde (Edinburgh & London, Hodge, 1934), I, 95f; 1.7.22 in Ruddiman's edition; 1.7.11 in Mencken's.

century, was republished in 1716 in Leipzig and again in Edinburgh in 1732. Moreover, these authors are by no means among the most popular.[11] The phenomenon of the continued long use of their books occurred along with the citation in court of very old and foreign authorities. These are complementary aspects of the civil law tradition before codification.

The infiltration of Roman law into local law also occurred through the medium of works specifically on Roman law. That infiltration could in a sense be controlled, since the nature of the books was obvious. Yet one type of book specifically on Roman law is particularly important. The very last title of Justinian's *Digest,* book 50, title 17, is entitled *De diversis regulis juris antiqui,* "On various rules of old law," and 211 texts set out established rules or maxims that still had validity in Justinian's time, such as *h.t.* 3, "Whoever has the power to consent has the power to refuse"; *h.t.* 10, "It is in accordance with nature that the benefits of anything go to that person who receives the disadvantages"; *h.t.* 12, "In wills, the intention of the testator is to be interpreted more fully"; and *h.t.* 56, "In cases of doubt, the more benevolent intention is to be preferred." This title became the object of a very large number of commentaries.

An early but detailed example is the work *In tit. ff De regulis iuris* of Philippus Decius (1454–1535), which was republished more than once with the notes of Molinaeus. Another is the *Commentaria in titulum de verborum significatione et diversis regulis* of Julius van Beyma (circa 1539–1598), who was successively professor at Wittenberg, Leiden, and Franeker. This work is typical in that it also contains a commentary on D. 50.16, "On the Meaning of Words," as does also D. Magirus, *Praelectiones ad postremos duos digestorum titulos* (1628). Again there is the commentary on D. 50.17 of the Livonian jurist, Christophorus Sturcius, written in Rostock in 1590 and dedicated to King Sigismund III of Poland. Another elegant version is that by Everardus Bronchorst, first published in 1607. There was even a "Notes and Strictures" on Bronchorst, A. M. Holtermann's *Notae et stricturae in Bronchorstii commentarium ad tit. pandectarum de regulis iuris antiqui,* published posthumously in 1680. G. Dyemenus (1508–1583), a Dutch judge and practitioner, was the author of another commentary, as was J. Neldelius, a professor in Leipzig, whose work was first published in 1614. The commentary of the Saxon C. Güntzelius went into several editions in the seventeenth cen-

11. For the works of the three Leiden professors—Bronchorst, Vinnius, and J. Voet—published outside the Netherlands see R. Feenstra and C. J. D. Waal, *Seventeenth Century Leyden Law Professors* (Amsterdam, Oxford, North-Holland, 1975), pp. 111ff.

tury. A French example is the work of Petrus Faber (1540 or 1541–1600) of Toulouse.

The very subject matter of the title meant that the use of Roman law for expressing legal maxims gave that system considerable scope for infiltration, but in addition the title played an important role in legal education. Hence a teaching edition of Justinian's *Institutes* would often contain this *Digest* title at the end. A striking example for teaching is the Elzevier edition of the *Institutes*, published for instance in 1654. This prints in red the words, phrases, and sentences of the *Institutes* that are considered particularly valuable for students, and it contains in addition both D. 50.16 and D. 50.17. So popular was the use of *regulae* (rules or maxims) that jurists came to compose books of canon law *regulae*. A curious variation on the theme is appended by Samuel Strykius to his edition of the *Institutes* at the end of the seventeenth century: the *regulae* of both civil and canon law are set out in terms of the first letter of their first word to form the name LEOPOLDUS IGNATIUS, who was then king of Hungary and Bohemia.

The *Libri feudorum* provide a striking illustration of the infiltration of Roman law. The *Libri feudorum* appear to have been composed primarily in Milan in the first half of the twelfth century, and a second version contained the constitutions of 1154 and 1158 of the Emperor Frederick I. A third version was completed by the Bolognese jurist Hugolinus in 1233 and inserted into what is called the *volumen parvum*, which contains the *Institutes* and the *Authenticum* (a version of the *Novels*) of the *Corpus juris*. It was treated as an appendix to the nine *collationes* of the *Authenticum* and hence was even called the tenth, *decem collatio*. The *Libri feudorum*, now part of the medieval *Corpus juris*, though that name comes later, were provided with a gloss which was accepted by Accursius with his additions as the *Glossa ordinaria*. The fortune of the *Libri feudorum* was thus linked to that of the *Corpus juris*, and from an early date the *Libri feudorum* formed part of the ordinary teaching of the Italian universities. They were taught by the same teachers who were responsible for the revival of Roman law.

Just as the teaching of Justinian's codification was to lead to a Roman *ius commune* (common law), so the teaching of the *Libri feudorum* was to lead to a feudal *ius commune*. Just as there was a belief in a body of universal civil law in which the prospective lawyer should be trained, though local law permitted deviations to a greater or lesser extent, so there was a belief in a universal and supranational feudal law from which the feudal laws of particular countries were deviations. To this belief is finally owed the feudal system—a phrase which implies not

only that it is a system but also that only one such system exists. If practical utility had been the sole or even primary consideration, Cujas, for instance, would not have commented on the *Libri feudorum*, because in France the local feudal customs tended to deviate radically from "the common law of feus," especially on such important topics as alienability and inheritance. Cujas commented on the *Libri feudorum* because they were a standard academic text, important in the same way, if not quite to the same extent, as the *Corpus juris*. The *Libri feudorum*, that is, provided a model of the nature of the feudal relationship and might serve as a basis for decision, especially when the local law failed. Likewise it was worth reprinting Craig's *Jus feudale* in Germany, for the basis of common principle was sufficiently extensive for it to be read by a German who had no interest in rules that were specifically Scottish.

VI
The Institutes

Inevitably, sooner or later—and probably sooner rather than later—any society that regards part of the *Corpus juris civilis* as the law of the land or directly of importance in discovering the law gives a place of particular honor to Justinian's *Institutes*. The reason is not that the law in the *Institutes* is more satisfactory for practice or more satisfying to the intellect than that contained in the other parts of the *Corpus juris;* it is purely educational. In territories that adopt the *Corpus juris,* Roman law studies dominate legal education; and in the process, great stress is placed on the *Institutes*. One explanation is that, on the one hand, the *Institutes,* like all of the *Corpus juris,* were issued as statute and, on the other, they were intended as a student's elementary textbook. Moreover, as Justinian well knew, the *Digest* and *Code* make extremely difficult reading for the beginner. It is only to be expected that, with the resurgence of Roman law studies, the *Institutes* take over their old role of the student's first law book.

Numerous introductions to the *Institutes* are known to have been written by the earliest glossators in the twelfth century, and among the vast amount of surviving material there is an introduction that Hermann Kantorowicz plausibly ascribes to Irnerius (1055?–1130?), with whom Roman law teaching at Bologna traditionally begins.[1] The content and structure of these introductions differ greatly from another popular type of work, introductions to the *Code,* because even by this date introduc-

1. *Glossators of the Roman Law* (Cambridge, Cambridge University Press, 1938), p. 64.

tions to the *Institutes* were intended for beginners and served as an introduction to all law books, not just to the *Institutes.*[2] A manuscript survives of lectures on the *Institutes* by Vacarius, who came to England around 1143 and established the civil law tradition there.[3] In many libraries manuscripts exist of the *Institutes* as a separate work, usually glossed; and the first printed edition of the *Institutes* was published in 1468 at Mainz by Peter Schoeffer, earlier than either the *Digest,* the *Code,* or the entire *Corpus juris.* Much later, Justinian's *Institutes* had become the teaching book par excellence to such an extent that "examinations" of the *Institutes* were published, that is, books setting out questions on the *Institutes* that might be put to students at examination time, with the appropriate answers. Two Dutch examples of such books are Johannes Arnaldus Corvinus, *Elementa juris civilis* (1645), and T. Trigland, *Paedia juris* or *Examen institutionum juris* (1671, republished at Oxford in 1710). One by a Spanish Jesuit is Antonio Perez, *Institutiones imperiales erotematibus distinctae,* which appeared in many editions between 1646 and 1719. At least one existing Roman law teaching book, also follows the arrangement of the *Digest,* namely Bernardus Schotanus, *Examen juridicum,* which was popular enough to be republished several times in Holland in the seventeenth century.

In keeping with the book's nature, the *Institutes* are dedicated to "the young desirous of legal knowledge." The prooemium, §4, relates that Justinian gave a special charge to Tribonian, Theophilus, and Dorotheus:

> They were, by our authority and with our encouragement, to compose Institutes so that you might acquire your first rudiments of law not from ancient stories but through the splendour of the Emperor and that both your ears and your minds might receive the truth in these matters without that which is unnecessary or erroneous. And whereas previously at least four years would elapse before you came to read imperial constitutions, begin now at the outset with this work, meriting such honour and rejoicing in the fact that now

2. See Kantorowicz, *Glossators,* p. 56.

3. The manuscript, to be published by P. Stein, was discovered in the British Museum by F. de Zulueta: *British Museum Royal MS. 4 B IV, item* 9. See also P. Stein, "Vacarius and the Civil Law," in *Church and Government in the Middle Ages,* ed. C. N. L. Brooke et al. (Cambridge, Cambridge University Press, 1976), pp. 119ff; R. W. Southern, "Master Vacarius and the Beginning of an English Academic Tradition," in *Medieval Learning and Literature: Essays Presented to R. W. Hunt,* ed. J. J. G. Alexander et al. (Oxford, Clarendon Press, 1976), p. 257ff.

both the commencement and the completion of your legal education proceed from the mouth of the Emperor."[4]

The prooemium also remarks that the *Institutes* were compiled especially on the model of Gaius' *Institutes* and *Res cottidianae*. The reference to Gaius' work as the main source is of particular importance, since that jurist's *Institutes* provided the general layout. Both works not only have the same pattern of treatment, but both are of approximately the same length and are divided into four books. The book length and division are significant for conservatism, because in Gaius' time the length of a book was largely predetermined: a book was set out on a roll and could be only as long as could be conveniently held. This lack of flexibility could entail inelegancies of arrangement. But by the time of Justinian, books (*codices*) had very much their modern form, and the length of a book was by no means so predetermined but depended more on contents.

In the end, the Justinianic division into books was taken over into modern civil codes. But the particular Justinianic division was so far from satisfactory that the attempts to divide the books differently have been numerous. The absence of a satisfactory model in Justinian has led to a diversity of divisions in the codes, which contrasts with the fact that the subjects thought proper to include in a civil code are much the same everywhere.

Book 1 of Gaius' *Institutes* is divided by modern scholars into two-hundred sections. All except the first eight sections concern the law of persons. The first distinguishes between *ius civile* and *ius gentium*, sections two to seven discuss the sources of Roman law, and section eight presents the division of the subject. Quite naturally for the time, these introductory matters do not form a separate book. Justinian unnecessarily follows the same pattern. In his book 1, the first title is "On Natural Law, the Law of Nations, and the Civil Law;" the remaining twenty-four titles are all on the law of persons. And so it continues, the beginning and end of a book of Gaius not necessarily corresponding to the most appropriate places for divisions. Book 2 is things, acquistion of property, and testate succession; book 3 is intestate succession and obligations; book 4 is actions. The pattern is projected into Justinian's *Institutes:* book 2 corresponds to that of Gaius; book 3 is intestate succession, contracts, and quasi-contracts; book 4 is delict, quasi-delict, and actions.

A direct line runs between the acceptance of the *Corpus juris* as authoritative or persuasive, the dominance of Roman law in legal education, the role of Justinian's *Institutes* as the first book of law, and—one of the characteristic products of the civil law systems in the seventeenth and eighteenth centuries—the institutes of national law.[5] These institutes are the direct descendants of Justinian's *Institutes*. The inspiration of Justinian is almost always immediately apparent in their overall form and structure, and in their intention of setting out in a clear, concise, simple, and systematic manner the basic principles of the law. This remains true even though the substance of the law in local institutes may differ greatly from that in Justinian. There are three contrasts, however, between the new and the old institutes. First, frequently it was not the author's intention that his local institutes be used in formal legal education. Rather they were meant to provide material to fill a gap that existed and would continue to exist in legal education.[6] Second, the local institutes were intended to describe the law; they were in no sense authoritative themselves. Any influence they came to possess was due to their own inherent qualities and to the absence of plausible rivals. Third, the local institutes do not form part of a complex whole akin to the *Corpus juris*. Indeed in most cases—the prime exception being France—the institutes are not supported by existing comprehensive treatises from which one can easily learn the details of the local law.

Too sharp a division should not be drawn between these local institutes of the seventeenth century and earlier writings. It would be possible to claim, for instance, that Scotland's *Regiam majestatem* of the fourteenth century is an early example of local institutes and shows typical features, including the influence of Justinian's *Institutes*. But there was a sudden flowering of such works in the early seventeenth century, as in France, where the early local *Institution* of Guy Coquille was published in 1607, even though the extent to which there was not a Reception in northern France is exceptional for Western continental Europe.[7] The main practical impetus there to something akin to an institutional work lay in the multitudinous customs which prevailed each in its own district,

4. *Institutes of Justinian*, trans. J. A. C. Thomas (Cape Town, Juta, 1975), p. 1.

5. See K. Luig, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries," *Juridical Review* 17 (1972): 193ff.

6. Thus Guy Coquille, *Institution au droit françois*, was written before French law was taught in universities; Stair, *Institutions of the Law of Scotland*, and Mackenzie, *Institutions of the Law of Scotland*, were published when no formal legal education existed in Scotland, and Grotius, *Inleidinge tot de Hollandsche rechtsgeleertheyd*, was intended for his sons (see Address to the Reader, by Grotius' brother?).

7. See also Jean Imbert, *Enchiridion iuris scripti Galliae moribus et consuetudine frequentiore usitati* (Lyon, 1556), where the contents are arranged according to the alphabet; thus the first topic is *Abusus*, then *Absens*, *Abbates*, etc.

great or small. By the time of Coquille the work of codifying these local customs was well under way, and he, in fact, published the Custom of Nevers.[8] Charles Dumoulin, or Molinaeus (1500–1566), had already expressed the ideal that Coquille aimed for: "Moreover, nothing is more worthy of praise, nothing more useful or desirable in the whole state than the reduction into a short, very clear and just, harmonious, whole of all the very diffuse and often stupidly varying customs of this Kingdom."[9]

Coquille's *Institution* shows few signs of the direct influence of Justinian's *Institutes*. It is written in French, is not divided into books, contains no treatment of the nature of law at the beginning, and varies considerably from the Roman *Institutes* in its arrangement of topics. Moreover, within the subjects treated, the law set out is not comprehensive but is only that of the customs and royal legislation. The Roman law rules accepted in France are not set out, even when, as with contract, they are dominant. Not that Roman law could be excluded; references to it are frequent, as in the works of Everardi, Schoepffer, and Craig that show infiltration. Roman law is cited in various ways—as a standard of reason, as support for a proposition, as explanation for the development of a customary rule, or even as an aberration—but it is never treated as irrelevant. For example, in discussing family community property, which did not exist in developed Roman law, Coquille observes that in matters of succession the Custom of Nevers—his own special field—differs from all others in that when one parent dies, the male children of fourteen or over and the female of twelve or over acquire shares *per caput* equally with the surviving parent. Coquille prefers the common view of the other customs that, until the children reach eighteen, they should be counted not *per caput* but as a single unit. He explains the exception of Nevers as the result of following the Roman rules on the age of attaining puberty, though in his opinion, it would have been better to take the Roman "full puberty" at eighteen as the test.[10] Thus, in this instance he claims, rightly or wrongly, that Roman law influenced the Custom. He then suggests that the foreign, or Roman, origin may be a reason for rejecting the law in the Custom of Nevers, although he also argues for the adoption of the generally accepted rule of the Customs on the basis that is harmonizes

8. See e.g. J. P. Dawson, "The Codification of the French Customs," *Michigan Law Review* 38 (1940): 765ff.

9. *Oratio de concordia et unione consuetudinum Franciae*, in his *Omnia quae extant opera* (Paris, 1681), II, 690ff. See also Lang, "Institutes," p. 203: "Only the Code Civil was the fulfilment of Dumoulin's desire for the *brevissimus, candidissimus, expeditissimus et absolutissimus libellus* of French law."

10. Coquille, *Oeuvres* (Bordeaux, 1703), II, 58.

with another, rather dubious proposition of Roman law.[11] The tension between customary and Roman law is patent, but so is the importance of Roman law for French legal thinking.

This considerable autonomy of French institutes from Justinian's *Institutes* was not to last. Students introduced to law through Justinian's *Institutes* would find that an approach to local law was much easier if that particular format was used. Again, a particular factor that might be adduced for France is that in the south, in the "pays de droit écrit," Roman law was the custom, and writings on French law written in that area tended to follow Justinian's arrangement.[12] Authors of these institutes might equally be a royal professor of French law appointed under Louis XIV's reform of 1689 or a practicing advocate.

Thus, Jerôme Mercier, an advocate at the Parlement of Paris, published in that city in 1665 his *Remarques nouvelles de droit François sur les institutes de l'empereur Justinien*. Despite the claim in the "Notice to the Reader" that the work "is a faithful translation of Justinian's *Institutes*," it does not contain a translation. Again, despite the "Notice," the work does not contain everything most useful and necessary for an understanding of Roman law. But it is a commentary on the law of France, with citation of customs and decisions, all seen from the angle of Justinian's *Institutes*. The order is entirely that of Justinian, and thus there are titles on "Justice and Law" and on "Natural Law, Law of Nations, and Civil Law" at the beginning of the work. Not every title of Justinian receives its individual treatment, but many particular paragraphs do. This method of proceeding means that parts of French law that had no analogue at Rome, such as marital property regimes, are neglected.

Of more interest are the works that break away from the strict order of Justinian. Pride of place should be given to the two-volume *Institution au droit François* of Gabriel Argou, another advocate before the Parlement of Paris. It was first published in Paris in 1692, and the last edition, the eleventh, appeared two years before the Revolution. The posthumous editions contain in the "Notice" a flattering comparison between this institutes and previous ones, maintaining that those of Coquille and Antoyne Loysel contain only customary law, whereas the present work treats both the customary and the written Roman law.

11. See G. Beyer, *Delineatio iuris Germanici*, (1718) 3.4.15.

12. See e.g. F. de Boutaric, *Les institutes de l'empereur Justinien conférées avec le droit françois*, published posthumously in 1738 at Toulouse, where the author had been professor of French law; and Claude Serres, *Les institutions du droit françois suivant l'ordre de celles de Justinien* (Paris, 1753), whose author had been professor of French law at the University of Montpellier.

The work is divided into four books, with a preliminary title explaining that French law has two parts, public law and the law of individuals, only the second of which shall be covered. The first book is on the civil condition of persons, and full weight is given to topics that had no exact parallel in Roman law. Thus, the first chapter deals with the serfs de main-morte, and the second is "De la noblesse." Book 2 concerns things, hereditary rights, gifts, wills, and intestate succession. Book 3 is obligations; after a first chapter on obligations in general come marriage, the marriage contract, community of property (in several chapters), dowry, the individual contracts, crimes, and penalties. But since this is a work on private law, the chapters on crimes and penalties are concerned with the obligations between individuals, not the public offense: dealt with above all are adultery, fraudulent bankruptcy, and the production of false evidence in a civil suit. Book 4 is accessory obligations and the consequences of obligations. The four books are not of the same size, book 2 being fully four times the length of book 1. And there is no preliminary treatment of justice and law, or of the distinction between natural law, law of nations, and civil law.

The *Institution* of Argou is similar in arrangement to Napoleon's *Code civil*. Scholars frequently claim that the codes of the eighteenth century are a product of the spirit of rationalism influenced by doctrines of natural law. In at least one sense the claim is accurate, but in view of the absence from Napoleon's *Code civil*—and from Argou's *Institution*—of a specific treatment of justice and of natural law, and in view of the similarity between the arrangement of the *Code* and of institutional writings, the onus of proof should be on those who maintain that natural law ideas had a predominant influence. It is not enough to claim that the idea of a short, systematic, authoritative account of the law itself derives from natural law. The impetus for that derives directly from the study of Justinian's *Institutes*.[13]

Outside France, indeed in Holland, one of the earliest such institutes, and one that greatly derives from Justinian, is also the most famous. Grotius' *Inleidinge tot de Hollandsche rechtsgeleerdheid*, though first published in 1631, was written while the author was imprisoned in the castle of Loevestein between 1619 and 1621. The work excludes a specific treatment of procedure, but otherwise the dependence on Justinian is marked. There are differences of arrangement, most of which may count as improvements. There are three books, but book 1 is only about

13. In addition to institutes there were treatises on French law, of which the best remembered are those of Pothier.

one-fourth of the length of the other two. The books are divided into chapters. Book 1 has fifteen chapters, of which the first is "Of Jurisprudence and Justice," the second "Of Different Kinds of Laws and their Working," and the rest deal with the law of persons. Book 2 is real rights: things, acquisition of ownership, testate and intestate succession, and real rights. Book 3 is personal rights: obligations in general, donation, the individual contracts, delicts, the extinction of obligation. By and large, the amount of detail corresponds to that of Justinian's *Institutes*. In distinction to Justinian's *Institutes*, however, the *Inleidinge* contains topics that are conventionally regarded as part of commercial law in civil law countries. Other Dutch works follow the model of Grotius, though the treatment of such topics is briefer than of others.

Grotius' impetus to the work was not quite that which drove Coquille. Although the Netherlands, like France, had different legal systems operating in different places, Grotius is concerned only with the law of the province of Holland with West Friesland. No attempt is made to harmonize or even describe the law of all the provinces, though there are frequent references to natural law, Roman law, and Germanic law.

Subsequent Dutch works of a similar character are Simon van Leeuwen, *Paratitula juris novissimi, dat is, een kort begrip van het Rooms-Hollandts-reght* (1652), and his more important *Het Roomsch Hollandsch recht* (1664); Ulric Huber, *Heedendaegse rechtsgeleertheyt* (1686); and Johannes van der Linden, *Rechtsgeleerd practicaal en koopmans handbook, ten dienste van regters, praktizijns, kooplieden, en allen die een algemeen overzich van rechtskennis verlangen* (1806).

Van Leeuwen, *Het Roomsch Hollandsch recht*, is in five books. Book 1, after introducing material on law in general and on the Reception and the constitution of Holland, deals with persons; book 2 is on property; book 3 on succession, testate, and intestate; book 4 on obligations, including crimes that appear in the position reserved for delict in Justinian, followed by "Obligations from Causes Similar to Crime," and then by a chapter on the extinction of obligations; and book 5 is procedure. The arrangement is thus particularly close to Justinian.

The work of Huber is in six books, of which the first three closely follow Justinian's *Institutes*, apart from actions and crimes. Book 4 is "Of the State and the Officers of Justice," book 5 is on procedure, and book 6 is on crimes. The rational position for the first half of book 4 would be at the beginning of the entire work; its absence from there can be attributed only to the power of the established institutional tradition.

Van der Linden's work is in three books, of which the second, on crime, and the third, on actions, are very short. This treatise is of particu-

lar importance because by the first appendix to the Grondwet, the "Constitution" of September 19, 1859, it was given the status of official law book of the South African Republic. When a matter was not dealt with, or only with insufficient clarity, recourse was to be had to Van Leeuwen, *Het Roomsch Hollandsch recht,* or Grotius, *Inleidinge,* as subsidiary authorities.

The first major, reasonably systematic account of Austrian law is in the series of tractates by Bernhard Walther (1516–1584), which are together known as the *Aurei iuris austriaci tractatus.*[14] These have not the institutional form and do not comprehend the whole of private law but concentrate on those parts that are most based on custom. More to the purpose is Johann Weingärtler, *Con- et discordantia iuris consuetudinarii Austriaci supra Anasum cum iure communi, in quattuor institutionum libris remonstrata,* first published in 1674.[15]

The fashion for institutes of local law spread through Europe, even into countries that even now, cannot boast of a modern codification, such as Scotland and Scandinavia.[16] Thus, the earliest example from Scotland is Lord Stair's *Institutions of the Law of Scotland,* written in the early 1660s and first published, considerably revised, in 1681, and then again with substantial modifications in 1693. The very short *Institutions of the Law of Scotland* of Sir George Mackenzie of 1684, closer in structure to Justinian's *Institutes,* determined the form of the main work of the following century, John Erskine's *Institute of the Law of Scotland,* (1773).

Jurists in the Italian States also produced institutes of local law, but none of outstanding significance or merit. Possibly this is not surprising, since the *Corpus juris* was regarded here more than anywhere else as very much the law of the land. Of such institutes, one example is Josephus Basta, *Institutiones iuris privati Neapolitani,* whose third edition was published in 1803. The work is in four books. Book 1 contains a little on sources of law but mainly concerns the law of persons; book 2 is things or rights *in re* and includes succession; book 3 is rights *in personam* or

14. Although well known to jurists, these tractates were first published in 1716 as an appendix to J. B. Suttinger, *Consuetudines austriacae.* See also *Bernhard Walther: Privatrechtliche Traktate aus dem 16. Jahrhundert,* ed. M. Rintelen (Leipzig, Hirzel, 1937).

15. J. G. Kees, *Commentarius ad Justiniani institutionum imperialium quattuor libros* (1726), is a commentary on Justinian with reference to Austrian practice, but the jurists cited in support are by no means only Austrian; German and Dutch writers are prominent. In much the same vein but proceeding from the Archibishopric of Salzburg is the slightly earlier J. B. Franz, *Jurisprudentia elementaris, seu prima elementa totius legitimae scientiae juxta ordinem institutionum imperialium* (1718).

16. See Luig, "Institutes."

obligations; and book 4 is actions. Although procedure is thus dealt with, criminal law is not. Basta does not restrict his citation of post-Roman jurists to those of Naples or of his own time, as indeed there seems to have been little law that was distinctively Neapolitan, and he ranges widely. Thus, in title 25 of book 3, on wrongful damage, he refers to the Dutchmen Gerhardus Noodt, Arnold Vinnius, Grotius, and Cornelis van Bynkenshoek; to François Hotman, Dionysius Gothofredus, and Jacobus Cuiacius of France; to the German Johann G. Heineccius; as well as to Chilffetius and Iacobus Constantinaeus. Basta is also interested in legal history, as in his discussion of the origins of letters of change in fourteenth century Lombardy, and has a number of references to the Normans in Southern Italy.

To a modern civilian, one of the most striking features of these local institutes is that they appear so thoroughly modern—in structure, in the subjects treated, and in general legal reasoning and argument. This is in sharp contrast to books such as Nicholas Everardi, *Loci argumentorum legales,* to the books of practicks written in Scotland in the days before Stair, and even to works such as Grotius, *De jure belli ac pacis.*

The majority of the local institutes vary among themselves and from Justinian's *Institutes* only slightly both in form and in contents. There are two main differences. First, there was a realization that Justinian's arrangement was not perfect, and many were the attempts at improvement. No one arrangement, however, prevailed, and in virtually all the influence of Justinian is paramount. Second, although Justinian's *Institutes* determined the outer limits of the contents, such as no mercantile law, no guild or similar rules, no administrative law, and no law of evidence, the Roman division of law into private or public was often observed more stringently than by Justinian, and what little of the latter is to be found in the Byzantine *Institutes* often has no counterpart in later local institutes.[17] Thus, public, that is criminal, actions, to which the last title in Justinian was devoted, are frequently omitted: or as in Argou's *Institution au droit françois,* the treatment of crimes is concerned with the obligations between individuals. Likewise, procedure is often left out of the work.

In the case of books so pregnant with consequences as are these local institutes, it is not enough to show that they are the direct descendants of Justinian's *Institutes.* One must also explain why they flourished when and where they did. They have points in common with the natural law movement of the seventeenth and eighteenth centuries. They are, to begin

17. *J.*1.1.4.

with, largely contemporaneous. Second, the same jurists are sometimes leaders both in promoting local law and in developing doctrines of natural law. The great Grotius, for instance, is usually regarded as one of the founders of natural law. One of the most famous of all natural lawyers, Christianus Thomasius (1655–1728), also wrote a short history of Roman and German law which was widely appreciated.[18] Natural law ideas inform much of the arrangement of Stair's *Institutes;* although he seems never to have received formal legal training, he had been a regent in the University of Glasgow, where he taught logic, morals, politics, and mathematics. Third, few local institutes are free from references to natural law, in which they often are doing no more than echoing Justinian's *Institutes.*

Nonetheless, by no means can natural law be regarded as the intellectual spring of works on local law. This is shown most evidently by the difference in structure between books on natural law and local institutes, coupled with the relationship between the latter and Justinian's *Institutes.* More important, the basic notion of seventeenth century natural law is out of harmony with the very emphasis inherent in works of local law. For the natural lawyer, law should derive from reason; the basic rules once thus established should lead to a working out of much of the detail, though it is accepted that at times more than one rule may be equally satisfactory. In contrast, local institutes, however much they declare that justice and the basic principles of law are everywhere the same, nonetheless emphasize the particularity of the rules found within a specific territory, many of them even containing praise for the high quality of the law with which they deal. Thus, in the dedication to the first edition, Stair writes: "And as everywhere the most pregnant and active spirits apply themselves to the study and practice of law, so those that applied themselves to that profession amongst us, have given great evidence of sharp and piercing spirits, with much readiness of conception and dexterity of expression; which are necessary qualifications both of the bench and bar, whereby the law of this kingdom hath attained to so great perfection, that it may, without arrogance, be compared with the laws of any of our neighbouring nations."

Surprisingly perhaps, the immediate intellectual *causa causans* of local institutes is legal humanism. The main aim of legal humanism is fundamentally the same as that of humanism in general: to understand the classical world as well as possible. To this end, satisfactory editions of

18. *Delineatio historiae juris Romani et Germanici,* published at Leipzig in 1704 along with François Hotman's *Antitribonianus.*

the texts had to be prepared, faulty emendations discarded, and subsequent barbarous interpretations recognized and rejected. Naturally in the case of law, attention centered on Rome, not on Greece. The first task, apart from establishing the text, was to free the Roman sources from the interpretation, whether for practice or not, of the glossators and postglossators. Among the humanists, Bartolus and his followers were thus regarded with contempt. In the sixteenth century France became the center of legal humanism, and the *mos gallicus,* the new French approach, is contrasted with the old *mos italicus.* But it was early apparent that it was not enough to discard the accretion of later interpretation. The *Corpus juris* had been put together by the Byzantine Emperor Justinian and his helpers, but what the humanists rather wanted to discover was the Roman law, free from all later accretions, including those of Byzantium.

The most distinguished of the legal humanists was Jacques Cujas (1522–1590), professor first at Cahors but above all at Bourges. Among the earliest of his works are his notes on the *Pauli sententiae,* one of the very few pre-Justinianian Roman law books known at the time. He also edited with a commentary another such work, the *Ulpiani tituli,* likewise the *Consultatio veteris cuiusdam iurisconsulti.* Of much greater importance are his commentaries on the works of the great individual Roman jurists Paul, Neratius, Marcellus, Ulpian (only the *Responsa*), Modestinus, Cervidius Scaevola, Julian, Africanus, and above all, Papinian.

But the one work that best illustrates the connection between legal humanism and local institutes is the short *Antitribonianus* of another French jurist, François Hotman (1524–1590). The book was apparently written in 1567 but was first published in French after his death, in 1603, and the first Latin version appeared in 1647. It was republished many times.

Hotman begins with a declaration of the supreme importance of law and a statement that a part of the French youth are seriously engaged in the study of Justinian's law. "But if I draw a big distinction between the civil law of the Romans and the books of the Emperor Justinian, I do not think I am saying something remote from the truth." Hotman's procedure is, first, to proceed as if that method of legal study was the best regulated in the world and the books of Justinian were made in all perfection, and second, to investigate the quality of these books and their effects. He claims that at all times wise men have accepted that the laws of a country must be fitted to the state and form of the commonwealth, not the commonwealth to the laws. Among his illustrations is Rome, where as soon as kings were destroyed and the republic established, all effort for one hundred and fifty years was on making new laws fit for the democracy.

He then argues that the state of France is so different from Rome that nothing for France can be learned from Roman public law. Moreover, Roman public law of the republic and high empire cannot really be known from the *Corpus juris*.

Chapters 4–9 are devoted to showing how far Roman private law also differed from that of France. Hotman compares Roman and French legal education in chapter 10 but also draws more general conclusions. Thus, "And if one must speak of the civil law of the Romans, I will say further that it was never made or composed to serve as equity or natural reason, suitable to every nation without distinction, but only by a particular prerogative expressly invented to support Roman citizens, and in a higher degree and dignity than the other inhabitants of Italy." Again, "These two points have been sufficiently recognized; first that it is only very mistakenly that one calls the study of the books of Justinian the study of Roman law, since only a twentieth part has remained for us; second, that of the little which has survived to us, not even a tenth part can be used and put into practice in our France."

From chapter 11 onward Hotman deals with his second principal point, namely the quality of the *Corpus juris*. He notes the numerous disputes as to the law among the followers of the two Roman schools, Sabinian and Proculian, and implies that rescripts of notorious emperors such as Helagabalus, Commodus, Caracalla, and Diocletian would not be noteworthy for their equity. He stresses the iniquity of Justinian's chief minister, Tribonian, who according to Suidas despised God and all religions, especially the Christian, was so avaricious that he sold law and justice, and for money changed the tenor of the laws, and who according to Procopius did not let a single day pass without changing the law for the profit of an individual. Justinian, Hotman avers, was regarded as no better. Chapter 12 is devoted to a discussion of some peculiarities in the work of Tribonian. Having completed his work, for example, Tribonian suppressed and abolished all the old laws, the praetorian Edict, and the decrees of the Senate. While vaunting that he had left the expositions of the jurists, Tribonian actually suppressed the works of those great jurists who were truly Roman, such as the Catos and the Mucii, Manilius, Caecilius, and Servius Sulpicius, but retained the works of Greeks, Syrians, and Africans like Africanus, Tryphoninus, Modestinus, Javolenus, and Ulpian. Tribonian's work is composed of broken extracts, useless and out of context, and he has not kept to the original order, not even of statutes. Many contradictions remain, as well as many interpolations of Tribonian himself and many repetitions. Formalities of Roman law that had

been abolished nonetheless appear throughout the work. Thus runs Hotman's criticism of Tribonian. The rest of Hotman's book then concerns the subsequent history of the *Corpus juris*, with chapter 18, the final one, expressing the hope of reform.

Even apart from Hotman's plea for a reformed attitude to law, the message of legal humanism for local law is plain. Roman law was not intended to be eternal or to serve as natural reason but was created for a particular people at a particular time: nor was it ever perfect for its purpose. Moreover, Justinian's law books do not really give Roman law, and they were the work of men famous for their iniquity. Respect for classical antiquity should therefore not lead to admiration of the *Corpus juris*. But if the *Corpus juris* does not give Roman law, if Roman law itself was never perfection and was intended only for a particular people and place and is no longer much in use, and if, as Hotman insists, good law is of great value, it follows that encouragement should be given to the study and improvement of law adapted to local conditions. Thus, legal humanism leads, *inter alia*, to the intellectual respectability of local law and its study. It is perhaps not entirely fortuitous that, on the one hand, France was the main center of legal humanism, followed in the seventeenth century by the Netherlands largely as a result of the flight there of eminent French Huguenot legal scholars, notably Hugo Donellus, and that, on the other hand, both these lands were prominent in the production of local institutes.[19] Institutes of local law are an unexpected by-product of legal humanism. Hence one can account for the time at which they became common.

On the relation between legal humanism and local institutes, Germany presents for the seventeenth century rather an exception, but an illuminating one. The Holy Roman Empire had accepted Justinian's *Corpus juris* as a whole as the law of the land, but as subsidiary law, in what is known as the "theoretical Reception," and had also accepted as primary law various and numerous individual principles and institutions of Roman law as transmitted through Italian scholarship and judicial practice, in what is known as the "practical Reception." The practical Reception was particularly strong in Germany. Side-by-side with this Roman law existed much surviving old German law which, however, lacked scientific treatment. This German law was regarded as "legal usage that had crept in," as divergences from the Roman law, and hence to be inter-

19. See e.g. Wieacker, *Privatrechtsgeschichte*, pp. 168f; R. Feenstra and C. J. D. Waal, *Seventeenth Century Leyden Law Professors* (Amsterdam, Oxford, North-Holland, 1975), p. 16f.

preted narrowly.[20] In this situation it was difficult for legal humanism to have much immediate impact or for institutes of local law to emerge.

Not that there was a shortage of legal humanists. Indeed, Udalricus Zazius (1461–1535), who became a professor in Freiburg-in-Breisgau in 1503, is widely regarded as one of the earliest and greatest of their number. Much more than the Dutch universities, the German Protestant faculties attracted the Huguenots: Franciscus Balduinus to Heidelberg from 1556 to 1561; Hotman to Strassburg from 1556 to 1559 (later to Switzerland); Hugo Donellus to Heidelberg in 1573, and to Altdorf in 1588. But as Franz Wieacker observes, this immigration by and large had no intellectual consequences.[21] Nor is this surprising. The great success of the practical Reception meant that what a German lawyer wanted for practice was a thorough grounding in the legal rules of both the *Corpus juris* and later developments as well as an understanding of the modes of legal argument developed by the glossators and later commentators. There would always be many professors willing to give this training in the *mos italicus* who would be skeptical of the value of a more academic legal training.

Nonetheless, the very calling of the French humanists to the German universities indicates a recognition that not all was well with the teaching of the *mos italicus*. The prolixity of the old method meant that only a few passages of the *Institutes* or *Digest* were commented on in a year, and that after five or six years of study the student had only a fragmentary knowledge. Moreover, the passages selected for study were not necessarily the most useful for practice. Consequently many Germans had already gone to France to study law, and in Germany itself unofficial courses of teaching developed.[22] From the beginning of the seventeenth century there were signs of a new movement toward freeing the universities from the *mos italicus*, but a movement that was essentially practical in its orientation. The aims of this movement were to give a coherent account of individual legal institutions rather than explicating only particular texts, and to concentrate on the *usus modernus pandectarum*, the modern understanding of the Roman law, getting away from the difficult and often outdated apparatus of the *Gloss*. A leader here was the University of Heidelberg, whose reform statute dates from 1604 under the influence of the French jurist Dionysius Gothofredus the Older, who moved there in the

20. Hans Thieme, s.v. Deutsches Privatrecht, in *Handwörterbuch zur deutschen Rechtsgeschichte* ed. A. Etler and E. Kaufmann (Berlin, Schmidt, 1964), I, 702ff.

21. *Privatrechtsgeschichte*, p. 168.

22. See e.g. *General Survey*, pp. 393ff. See also Koschaker, *Europa*, pp. 105ff.

same year.[23] According to the Strasbourg laws of 1634, the first professor of the Pandects should read "the materials which are most useful and in daily service," take account above all of the most recent law, and fit the texts "as much as possible to the use of the present century" so that the hearer learns "what is especially contained in each title and is particularly to be noticed." The lectures on the *Code* are expressly stated to be on the subject of procedure and feudal law. As was the case in other countries, university teaching concentrated on Roman law and, to a lesser extent, on canon law. The first university lectures on German private law were given in 1699 to 1701 by Christian Thomasius in Halle.[24] He was followed in 1707 in Wittenberg by Georg Beyer, one of his pupils.

The position was complicated by the existence inside Germany of a great many states—some large, some merely cities—of various types—princedoms, dukedoms, merchant oligarchies—and of differing religious persuasions—Catholic, Lutheran, Calvinist. Some of the old German private law applied throughout the Empire, some only in particular areas. Legislation might be imperial, or it might be for only one territory or city. Inevitably changes of various kinds would occur at different speeds in the states. For instance, early reform of the law syllabus in universities was particularly noticeable in southwest Germany.

Law books were produced in a bewildering array of types.[25] They ranged from straight commentaries on the *Institutes* or *Digest* to monographs, to commentaries on the law of a particular territory, such as the one for the city of Lübeck by David Mevius or that of Benedict Carpzov for Saxony.[26] Carpzov's work sets out a Saxon constitution with facing translation into Latin, followed by a commentary in the form of the numerous definitions relating to the mixture of Roman and Saxon law in force that can be deduced from the constitution.

To come now to institutes of local law, editions of Justinian's *Institutes* with a commentary concentrating on the *usus modernus* hardly qualify, for they are descendants of the glossed *Institutes*. Nor do com-

23. See e.g. Wieacker, *Privatrechtsgeschichte*, pp. 208ff.

24. See K. Luig, "Die Anfänge der Wissenschaft vom deutschen Privatrecht," *Ius Commune* 1 (1967): 203f.

25. See e.g. A. Söllner, in Coing, *Handbuch* 2.i, pp. 501ff.

26. Mevius, *Commentarius in ius Lubecense* (Leipzig, 1642/43), which contains numerous references to both the *Corpus juris* and later commentators; Carpzov, *Definitiones forenses seu iurisprudentia forensis Romano-Saxonica ad constitutiones Saxonicas* (Frankfurt-am-Oder, 1638; frequently republished until 1721). A very different work for Silesia is *Jus Silesiacum secundum usum modernum illustratum* (1736), which is a collection of dissertations.

mentaries devoted to the *usus modernus* qualify, for they are not designed for a particular locality and pay insufficient attention to German private law. But there were a few real institutes of local law. Sebastian Khraisser, *Institutiones iuris Romano-Bavarici electoralis* (1644), is one, for after a discussion of each title of Justinian's *Institutes* with references to much later jurists it usually includes a very brief treatment of the particular law of Bavaria. Another example is Samuel Stryk, *De iure Lubecensi ad methodum institutionum* (1674), for the city of Lübeck. Nonetheless such local institutes were relatively uncommon.

The most important institute is Georg Adam Struve, *Jurisprudentia Romano-Germanica forensis* (1670). It does not quite live up to its title, since it sets out much of the law in Justinian's *Institutes* that was no longer in use. But Struve does attempt to give German private law as well as the *usus modernus* (contemporary usage), with Germanic institutions such as *unio prolium* (1.11.6) and, above all, procedure. And the scope of the work is not restricted to one or a few German states. The work has the full institutional form, appearing in four books. Book 1 deals with law and justice, then with persons; book 2 is on the law of things, including succession both testate and intestate; book 3 concerns obligations; and book 4 is on procedure. Other such works are J. Philippus, *Usus practicus institutionum Justinianearum* (1665); J. F. Rhetius, *Meditationes academicae ad institutiones juris civilis Justinianeas praxi forensi et usui Imperii Romano-Germanici accommodatae* (1688); and the very different B. C. C. Hofacker, *Principia iuris civilis Romano-Germanici* (1788, volume two published posthumously in 1794).

Though not quite an institute of local law, Johann Schilter, *Institutiones juris ex principiis juris naturae, gentium & civilis, tum Romani, tum Germanici, ad usum fori hodierni accommodatae* (1685), gives the text of Justinian's *Institutes* with a commentary on it, drawn from the contemporary law of nature, international law, and civil law, the last term being used here both of modern Roman law and of German law. The nature of the work as a commentary on the text of Justinian inevitably affects the balance and prevents Schilter from giving a full, systematic picture of the existing law. A surprising amount of German law can be included, such as on hunting, but some topics, such as the various grades of free Germans, are ignored.[27]

But the most striking development for Germany is of institutes of German private law which exclude the treatment of Roman law and its contributions to the *usus modernus*.[28] An essential first step was a work

27. 11 1.16ff.

28. See also Luig, "Anfänge," pp. 195ff.

such as Hermann Conring, *De origine juris Germanici* (1643), which was the first pragmatic history of the Reception and refuted the "Lotharian legend." Wieacker finds its date significant: the collapse in the Thirty Years' War of the idea of a universal empire brought with it the fall of another idea, that of a universal law, to which Roman law had been indebted for its metaphysical legitimation.[29] This is not a full explanation of the emergence of a work such as Conring's since the very concept of German private law itself carries with it the notion that the local laws of the different German states contained principles which were originally German and once at least were valid everywhere in German territories.[30] The idea of a universal Germany is still there, even if in an attenuated form, with the authority of the emperor greatly reduced, and with no belief that the Holy Roman Empire is a continuance of the ancient Roman Empire. Some credit, in fact, must again be given to the humanists for making patent that much of the law in force was not to be found in the *Corpus juris*, that some living law was independent even of subsequent interpretation, and above all that unqualified esteem of the classical world could not be extended to the *Corpus juris* as, in large part, a Byzantine production. In Germany, too, legal humanism cleared the way for the intellectual respectability of local law. Johann Schilter (1632–1705), himself a humanist—as witness his book on the Roman jurist *Herennius Modestinus* (1687) and his *Praxis artis analyticae in jurisprudentiam*, published with *Diatribe logica de syllogismis ex hypothesi, secundum Aristotelem* (1678)—and a writer on Roman, feudal, and German law alike, gave impetus to the study of German private law by his doctrine that Germany possessed two common laws, a German that was native, and a Roman which was foreign.[31]

The earliest institute of German private law seems to be the *Delineatio juris Germanici* of Georg Beyer (1665–1714), which was first published in 1718, four years after his death. This sets out to be a systematic account of general German private law, although local rules of, say, Saxony or Brandenburg are at times noticed. Rules of Roman law as received in Germany are generally omitted. Nor is there much sign of the *Corpus juris* being acceptable as authority. Where a rule is the same in German law as in Roman law, the authorities adduced relate only to the German. At times the work expressly remarks that the *Corpus juris* has *wrongly*

29. *Privatrechtsgeschichte*, p. 206.

30. See e.g. Luig, "Institutes," p. 207.

31. See *Institutiones juris ex principiis juris naturae, gentium et civilis, tum Romani, tum Germanici, ad usum fori hodierni accommodatae* (1685), 1.2.17 (on *J.*1.2.10). The title of the work is itself of prime significance.

been adduced as the source of a rule, or that the rule accepted differs from that of the *Corpus juris*.[32] Nonetheless what is striking is the overall influence of Justinian's *Institutes* once again on the form of the entire work. Book 1 is the law of persons; book 2 is real rights, including succession; and book 3 is obligations.[33] A specific treatment of actions is excluded, as often happens. At least some editions, such as that edited by C. G. Hoffman and published in Leipzig in 1740, also contain introductory material on matters such as the sources and origins of German law and the utility of university lectures on German law. It is not a coincidence that the author of the earliest institutes of German law was almost the first person to lecture on German law. Beyer was also skilled in Roman law. In 1706 he became professor of the *Institutes*, namely of Justinian, at Wittenberg and in 1713 was elected to the third professorship, that is, of the *Digestum vetus*. The fame of the *Delineatio juris Germanici* has obscured his other works, but his *Delineatio juris civilis secundum institutiones et pandectas atque feudalis ad fundamenta sua revocati et ad seculi usum accommodati* (first published in 1704) was very popular. For instance, a fifth edition appeared in 1738. The title is indicative of the scope: "Delineation of the civil law according to the *Institutes* and *Digest* and of feudal law, restored to their basis and adapted to the use of this century." Beyer also produced a *Delineatio* of criminal law, one of feudal law, and one of divine law.

A much larger work is J. G. Heineccius, *Elementa juris Germanici tum veteris tum hodierni* (1735/36). As the title suggests, this is also a historical account. There are references to Tacitus writing on the ancient Germans, and much is made of the laws of the Visigoths and others. The *Elementa* are divided into three books: book 1 deals with persons; book 2, on the law of things, is subdivided into parts, of which the first deals with property, succession (intestate and testate), and contractual obligations, and the second with delicts and crimes; book 3 treats the law of actions. Thus, the arrangement is very much that of Justinian's *Institutes*, but the contents are determinedly Germanic. References to the *Corpus juris* do exist, but they are relatively rare and usually have the purpose of pointing a contrast.[34] A similar work in its emphasis on legal history is the slightly earlier *Systema jurisprudentiae civilis Germanicae antiquae* (1733) of J. F. Polac. This is in four books which betray the influence of Justinian's *Institutes*. Book 1 is persons; book 2 things, including contracts; book 3 delicts; and book 4 procedure. J. S. Pütter, *Elementa juris Germanici privati hodierni* (1748), contains long prolegomena on German law and its history, which are a common feature of such works, then a first part called "Theoretical First Part of German Law", which has two main subdivisions, persons and property, then a second part on procedure. The treatment of procedure is brief, but the division into theoretical law and procedure was to play an important role among the Pandectists, who taught the *Digest* interpreted for nineteenth century needs, and most notably for Karl Salomon Zachariae. J. H. C. von Selchow, *Institutiones jurisprudentiae Germanicae* (1757, then from 1762 republished as *Elementa juris Germanici hodierni*), also deals with procedure, again very briefly, in book 5. The same is true of J. F. Runde, *Grundsätze des allgemeinen deutschen Privatrechts* (1791), though his arrangement is rather different.

32. See e.g. 1.25.8, 2.5.25ff, 2.10.12, 3.1, 3.2.19, 32ff, 3.4.15ff.
33. See Luig, "Institutes," p. 210.
34. See e.g. 2.5.131 and 135.

The question must be put: Why should there appear in Germany institutes of local law which as far as possible exclude treatment of rules deriving from Roman law? What was the practical, educational, or emotional need? There cannot have been a direct practical need, since what was wanted for practice was a work that gave living private law in its entirety, modern Roman law and German rules alike. This need was precisely filled by Struve, *Jurisprudentia Romano-Germanica;* hence its numerous editions until 1771 and its enormous popularity. It was said in the eighteenth century that many a lawyer needed only the "little Struve" for his practice.[35] In 1737, G. Schaumburg published at Jena his notes on Struve: *Annotationes ad. B. Georg Ad. Struvii iurisprudentiam Romano-Germanicam forensem.* This was intended for students for whom Struve was not entirely, in the author's opinion, a complete diet. Yet as he says in the preface: "You love Struve, you choose him as your guide in the study of civil wisdom, you move every stone to turn Struve's *Jurisprudentia* into juice and blood. And not without good reason."

The need, then, for books excluding Roman law was more emotional, rooted in the tradition of the German educational system. Even after the recognition of the existence of indigenous German private law, the universities continued to teach only Roman law, the *usus modernus,* and canon law. Books on living law would reflect the university bias, concentrate on *usus modernus,* and hence play down the role of German law. The natural reaction, indeed the simplest way to emphasize the continuing importance of German law, was the production of systematic treatises of German law, ignoring the contribution of Roman law. That

35. Wieacker, *Privatrechtsgeschichte,* p. 219n19.

such treatises appeared in Germany and not, for example, in France, Holland, or Scotland is to be attributed to the very strength of the Reception in Germany. The authority of Roman law there was so high that a special effort was needed to make heard the voice of indigenous law.

Finally, institutes of local law were produced in lands with a derived civil law system. Insofar as they are true institutes of derived local law, they cite as authority not so much the *Corpus juris* as the sources of the territory from which they derive. Again they may contain discussion on legal topics that appear in Justinian's *Institutes* but had disappeared from western Europe. Slavery is the obvious example.

The most successful was the *Instituciones de derecho real de Castilla y de Indias*, by Jose Maria Alvarez, a native of what became the Central-American Republic. Alvarez's chair at the University of Guatemala was for the "Institutes of Justinian". The book was first published in Guatemala in 1818–1820; a second edition appeared in Mexico in 1826; and there were numerous reprintings, as in New York in 1827, Havana in 1834 and 1841, and Guatemala in 1854. The author died in 1820. With the various editions the notes increased, and the later printings have a considerable citation of authority. The writer states in the prologue that he has followed the order of the Roman *Institutes*, although he could have adopted another better one, and that he has tried to adapt himself to the definitions, principles, and conclusions of the *Recitationes* of Heineccius (1681–1741). In addition to that famous scholar, another expert modern commentator of Justinian's *Institutes* who is frequently cited is the Dutchman Vinnius (1588–1657). A few other jurists are occasionally cited, but by far the greatest number of references are to Spanish laws or legal collections, such as *Las siete partidas*, *Nueva recopilacion de Castilla*, *Novissima recopilacion*, and *Recopilacion de Indias*, as well as subsequent statutes pertaining to Central America. There are also references to canon law, but none to Justinian's *Corpus juris*.