

# REGIONAL PRIVATE LAWS AND CODIFICATION IN EUROPE

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## The civil law in European codes

REINHARD ZIMMERMANN

### The European codes: background and significance

I have been asked to discuss the civil law in European codes. This is not as straightforward a task as it may appear at first glance. We should, at the outset, therefore reflect on the background, scope and significance of the terms used in the title of my chapter. A code, or codification, in the modern technical sense of the word, is a peculiar kind of statute. Like all other statutes, it is enacted by a legislature, and its application is therefore backed by the authority of the state for which that legislature is competent to make laws. Its characteristic features are, firstly, that a codification must aim at being comprehensive. It has to provide a regulation not only for a number of specific issues but has to cover a field of law in its entirety. Secondly, a codification constitutes an attempt to present its subject matter as a logically consistent whole of legal rules and institutions. It provides both the conceptual framework and intellectual fulcrum for any further doctrinal refinement and judicial or legislative development of the law.

Codification, as outlined in these few sentences,<sup>1</sup> is a specific historical phenomenon that originated in late seventeenth- and eighteenth-century

An earlier version of this chapter has appeared in David L. Carey Miller and Reinhard Zimmermann (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Munich and Berlin, 1997), pp. 259 ff.

<sup>1</sup> For a more detailed analysis, see Reinhard Zimmermann, 'Codification: History and Present Significance of an Idea', (1995) 3 *ERPL* 95 ff.; for other assessments, see Pierre Legrand, 'Strange Power of Words: Codification Situated', (1994) 9 *Tulane European and Civil Law Forum* 1 ff.; Pio Caroni, *Lecciones Catalanas sobre la historia de la codificación* (Madrid, 1996); Pio Caroni, *Saggi sulla storia della codificazione* (Milan, 1998); Karel V. Malý and Pio Caroni (eds.), *Kodifikace a Dekodifikace des Privatrechts in der heutigen Rechtsweltentwicklung* (Prague, 1998); Fábio Siebeneichler de Andrade, *Da codificação* (Porto Alegre, 1997).

legal science.<sup>2</sup> It was an enormously influential idea, that managed, within hardly more than 150 years, to recast the entire legal tradition on the European continent. It was much less successful in England.<sup>3</sup> Hence, for the modern legal mind, European private law and codification have become inseparably linked to each other. In reality, however, there is nothing intrinsically self-evident about that connection. Before the age of codification European private law flourished, for many centuries, as a 'common law'.<sup>4</sup> Moreover, it was ultimately based on Roman law, and Roman law itself was never codified. On the contrary, it was characterised by many features which a modern observer would associate with the English common law rather than the (modern) continental private law.<sup>5</sup>

The two oldest codifications still in force today are the French code civil of 1804 and the Austrian General Civil Code of 1811. They were preceded by the Prussian Code of 1794.<sup>6</sup> All three are usually referred to as the 'natural law codes': their purpose was to put the entire law into systematic order in pursuance of a general plan for society.<sup>7</sup> During the nineteenth century, the idea of codification became intimately linked to the emergence of the modern nation-states.<sup>8</sup> This is particularly obvious in

<sup>2</sup> Cf., e.g., J. H. A. Lokin and W. J. Zwolve, *Hoofdstukken uit de Europese Codificatiegeschiedenis* (Deventer, 1990); Helmut Coing, *Europäisches Privatrecht*, vol. I (Munich, 1985), pp. 67 ff.; Helmut Coing, *Europäisches Privatrecht*, vol. II (Munich, 1989), pp. 7 ff.

<sup>3</sup> Cf., e.g., J. H. Baker, *An Introduction to English Legal History*, 3rd edn (London, 1990), pp. 249 ff.

<sup>4</sup> Cf. Coing, *Europäisches Privatrecht*, vol. I, pp. 34 ff., 124 ff.; Manlio Bellomo, *The Common Legal Past of Europe, 1000–1800* (Washington, D.C., 1995); Antonio Padoa-Schioppa, *Il Diritto nella Storia d'Europa*, vol. I (Padua, 1995); Harold J. Berman and Charles Reid, 'Römisches Recht in Europa und das ius commune', (1995) 3 *ZEUP* 3 ff.; Peter Stein, *Roman Law in European History* (Cambridge, 1999), pp. 38 ff.; Reinhard Zimmermann, 'Roman Law and European Legal Unity', in A. S. Hartkamp, M. W. Hesselink et al. (eds.), *Towards a European Civil Code*, 2nd edn (Nijmegen, The Hague and Boston, 1998), pp. 21 ff.; Raoul van Caenegem, 'The Modernity of Medieval Law', (2000) 8 *European LR* 37 ff.

<sup>5</sup> See Peter Stein, 'Roman Law, Common Law, and Civil Law', (1992) 66 *Tulane LR* 1591 ff.

<sup>6</sup> For an important new assessment, see Andreas Schwennicke, *Die Entstehung der Einleitung des Preußischen Allgemeinen Landrechts von 1794* (Frankfurt am Main, 1993). Cf. also the evaluation by Gerhard Dilcher, 'Die janusköpfige Kodifikation – das Preußische Allgemeine Landrecht (1794) und die europäische Rechtsgeschichte', (1994) 2 *ZEUP* 446 ff.

<sup>7</sup> For a detailed discussion, now available in English, see Franz Wieacker, *A History of Private Law in Europe*, trans. Tony Weir (Oxford, 1995), pp. 257 ff.

<sup>8</sup> Cf., e.g., Franz Wieacker, 'Der Kampf des 19. Jahrhunderts um die Nationalgesetzbücher', in Franz Wieacker, *Industriegesellschaft und Privatrechtsordnung* (Frankfurt am Main, 1974), pp. 79 ff.; Reiner Schulze, 'Vom ius commune zum Gemeinschaftsrecht', in Reiner Schulze (ed.), *Europäische Rechts- und Verfassungsgeschichte* (Berlin, 1991), pp. 18 ff.

Germany,<sup>9</sup> where the preparation of a German civil code immediately became a matter of great – practical as well as symbolic – significance in the years after the creation of the German Reich. By the time the German Civil Code (*Bürgerliches Gesetzbuch*) came into effect (1 January 1900), just about all the other states of central, southern and eastern Europe had codified their private law.<sup>10</sup> In most instances, the French code civil provided the main source of inspiration. It continued to apply in Belgium and became the basis of the Dutch *Burgerlijk Wetboek* of 1838. It provided the point of departure for the Italian *codice civile* of 1865 (which could thus be enacted a mere four years after the kingdom of Italy had come into being), for the Portuguese *código civil* of 1867, the Spanish *código civil* of 1888/9 and the Romanian Civil Code of 1865. The Serbian Civil Code of 1844, on the other hand, was influenced mainly by the Austrian codification.

The enactment of the German Civil Code, in turn, stimulated a revision of the Austrian Code (which took effect in three stages during the years of the First World War<sup>11</sup>) and it prompted the Greeks to codify their law; the Greek Civil Code, promulgated in 1940 but effective only from 1946, is generally considered to be part of the German legal family. Another member of that family is Switzerland, although both its Civil Code of 1907 and its revised Code concerning the law of obligations of 1911 are in certain respects highly original and cannot be said to be modelled on the German Code.<sup>12</sup> The Swiss experiences influenced the draftsmen of the new Italian Civil Code of 1942 without, however, inducing them to break radically with the French tradition.<sup>13</sup> A wholesale reception of the Swiss Codes occurred in Turkey.

<sup>9</sup> See Wieacker, *A History of Private Law*, pp. 363 ff.; Michael John, *Politics and Law in Late Nineteenth-Century Germany* (Oxford, 1989); and see the contributions to the special volume of Staudinger's *Kommentar zum Bürgerlichen Gesetzbuch* entitled *100 Jahre BGB: 100 Jahre Staudinger*, ed. Michael Martinek and Patrick L. Sellier (Munich and Berlin, 1999).

<sup>10</sup> For a general overview, see Carlos Bollen and Gerard-René de Groot, 'The Sources and Backgrounds of European Legal Systems', in Hartkamp et al. (eds.), *Towards a European Civil Code*, pp. 97 ff.

<sup>11</sup> Cf. Barbara Dölemeyer, 'Die Teilnovellen zum ABGB', in Herbert Hofmeister (ed.), *Kodifikation als Mittel der Politik* (Vienna, Graz and Cologne, 1986), pp. 49 ff.

<sup>12</sup> Wieacker, *A History of Private Law*, pp. 387 ff. More specifically on the relationship between the Swiss and German codes, see Rudolf Gmür, *Das Schweizerische Zivilgesetzbuch verglichen mit dem Deutschen Bürgerlichen Gesetzbuch* (Berne, 1965). On the influence of pandectist legal learning in nineteenth-century Switzerland, cf. Pio Caroni, 'Die Schweizer Romanistik im 19. Jahrhundert', (1994) 16 ZNR 243 ff.

<sup>13</sup> For a recent evaluation, see Giorgio Cian, 'Fünzig Jahre italienischer codice civile', (1993) 1 ZEUP 120 ff.; cf. also the contributions in *I Cinquant'Anni del Codice Civile*, 2 vols. (Milan, 1993), and, on the more general topic of the relationship between German and Italian legal

Indeed, the idea of codification has shaped the civil law in many countries outside Europe, including regions as diverse as East Asia and Latin America;<sup>14</sup> it managed to gain a foothold even in British India and the United States of America;<sup>15</sup> and it asserted itself under radically different social and political conditions such as those prevailing in the former socialist states.<sup>16</sup>

Even today, and in spite of gloomy visions usually associated with the term *decodificazione*,<sup>17</sup> codification is not a spent force. More than fifty states have codified their private law since 1945.<sup>18</sup> The most recent example in western Europe is the Netherlands. Core parts of the Dutch Civil Code came into force on 1 January 1992; other parts had already been enacted in 1970, 1976 and 1991.<sup>19</sup> Many of the states of eastern Europe have, since the fall of the Iron Curtain, embarked on ambitious recodification schemes.<sup>20</sup> On an international level we have the Convention on Contracts for the International Sale of Goods, concluded in Vienna in 1980, which provides a codification of a particularly important area of international trade law. It has, to date, been adopted by more than fifty states.<sup>21</sup> And as far as the

cultures in the nineteenth century, Aldo Mazzacane and Reiner Schulze (eds.), *Die deutsche und die italienische Rechtskultur im 'Zeitalter der Vergleichung'* (Berlin, 1995). See also, concerning the development of Italian law of breach of contract, Christian Resch, *Das italienische Privatrecht im Spannungsfeld von code civil und BGB am Beispiel der Entwicklung des Leistungsstörungenrechts* (Berlin, 2000).

<sup>14</sup> For Latin America see, e.g., Thilo Scholl, *Die Rezeption kontinental-europäischen Privatrechts in Lateinamerika* (Berlin, 1999).

<sup>15</sup> For British India, see Bijay Kisor Acharyya, *Codification in British India*, Tagore Law Lectures (Calcutta, 1914); for the United States see Shael Herman, 'Schicksal und Zukunft der Kodifikationsidee in Amerika', in Reinhard Zimmermann (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht: Impressionen aus der Neuen Welt* (Tübingen, 1995), pp. 45 ff.

<sup>16</sup> For an overview, see Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, vol. I, 2nd edn (Tübingen, 1984), pp. 355 ff.

<sup>17</sup> Natalino Irti, *L'età della decodificazione*, 3rd edn (Milan, 1989).

<sup>18</sup> Cf. Rodolfo Sacco, 'Codificare: modo superato di legiferare?', (1983) *RDC* 117 ff.; Konrad Zweigert and Hans-Jürgen Puttfarcken, 'Allgemeines und Besonderes zur Kodifikation', in *Festschrift für Imre Zajtay* (Tübingen, 1982), pp. 569 ff.; and see the contributions to the symposium *Codification in the Twenty-First Century*, (1998) 31 *University of California Davis Law Review* 655 ff.

<sup>19</sup> Cf. the contributions in Franz Bydliński, Theo Mayer-Maly and Johannes W. Pichler (eds.), *Renaissance der Idee der Kodifikation* (Vienna, Cologne and Weimar, 1991); A. S. Hartkamp, 'Das neue niederländische bürgerliche Gesetzbuch aus europäischer Sicht', (1993) 57 *RabelsZ* 664 ff.

<sup>20</sup> Cf., e.g., the report by Miroslav Libuda in (1995) 3 *ZEUP* 672 ff. (focusing on Czech law).

<sup>21</sup> See Ulrich Magnus, 'Aktuelle Fragen des UN-Kaufrechts', (1993) 1 *ZEUP* 97 ff.; Ulrich Magnus, 'Stand und Entwicklung des UN-Kaufrechts', (1995) 3 *ZEUP* 202 ff.; Ulrich Magnus, 'Das UN



'approximation' of the laws of the member states of the European Union in terms of the EC Treaty is concerned, the European Parliament has called for the preparation of a code for the entire European private law.<sup>22</sup> Code-like Principles of International Commercial Contracts have been published by the International Institute for the Unification of Private Law in 1994,<sup>23</sup> and in 2000 the first and second parts of the Principles of European Contract Law, prepared by a Commission on European Contract Law, have appeared in print.<sup>24</sup> An express purpose of the latter initiative is to provide a basis for a future European Code of Contracts.

Kaufrecht: Fragen und Probleme seiner praktischen Bewährung', (1997) 5 *ZEUP* 823 ff.; Ulrich Magnus, 'Wesentliche Fragen des UN-Kaufrechts', (1999) 7 *ZEUP* 642 ff.; Michael R. Will, *Twenty Years of International Sales Law under the CISG* (The Hague and Boston, 2000); and see the list of states in Reiner Schulze and Reinhard Zimmermann, *Basistexte zum Europäischen Privatrecht* (Baden-Baden, 2000), II.5.

<sup>22</sup> For a discussion, see Winfried Tilmann, 'Eine Privatrechtskodifikation für die Europäische Gemeinschaft?', in Peter-Christian Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (Baden-Baden, 1993), pp. 485 ff.; Winfried Tilmann, 'Zweiter Kodifikationsbeschluß des Europäischen Parlaments', (1995) 3 *ZEUP* 534 ff.; Winfried Tilmann, 'Artikel 100 a EGV als Grundlage für ein Europäisches Zivilgesetzbuch', in *Festschrift til Ole Lando* (Copenhagen, 1997), pp. 351 ff.; Jürgen Basedow, 'Über Privatrechtsvereinheitlichung und Marktintegration', in *Festschrift für Ernst-Joachim Mestmäker* (Baden-Baden, 1996), pp. 347 ff.; and see the contributions to Dieter Martiny and Normann Witzleb (eds.), *Auf dem Wege zu einem Europäischen Zivilgesetzbuch* (Berlin, Heidelberg and New York, 1999); Pierre Legrand, 'Against a European Civil Code', (1997) 60 *Modern LR* 44 ff. The question was discussed at a symposium in The Hague on 28 February 1997; cf. Winfried Tilmann, 'Towards a European Civil Code', (1997) 5 *ZEUP* 595 ff. and the contributions in (1997) 5 *ERPL* 455 ff. The concept of a 'creeping codification' is propagated by Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (The Hague, London and Boston, 1999).

<sup>23</sup> For a discussion, see Klaus Peter Berger, 'Die UNIDROIT-Prinzipien für Internationale Handelsverträge', (1995) 94 *ZVglRWiss* 217 ff. and the contributions by Michael Joachim Bonell, Alejandro M. Garro, Hernany Veytia, Luiz Olavo Baptista and Franco Ferrari in (1995) 69 *Tulane LR* 1121 ff.; Michael Joachim Bonell, *An International Restatement of Contract Law*, 2nd edn (Irvington-on-Hudson, 1997); Michael Joachim Bonell, 'The Unidroit Principles – A Modern Approach to Contract Law', in Hans-Leo Weyers (ed.), *Europäisches Vertragsrecht* (Baden-Baden, 1997), pp. 9 ff.; Arthur Hartkamp, 'Principles of Contract Law', in Hartkamp et al. (eds.), *Towards a European Civil Code*, pp. 105 ff.

<sup>24</sup> Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law* (The Hague, London and Boston, 2000). For a discussion of the first part, published in 1995, see Reinhard Zimmermann, 'Konturen eines europäischen Vertragsrechts', (1995) *JZ* 477 ff.; Reinhard Zimmermann, 'Die "Principles of European Contract Law", Teil I' (1995) 3 *ZEUP* 731 ff.; Hugh Beale, 'The Principles of European Contract Law and Harmonization of the Law of Contract', in *Festschrift til Ole Lando*, pp. 21 ff.; Ralf Michaels, 'Privatautonomie und Privatkodifikation', (1998) 62 *RabelsZ* 580 ff. Generally cf. also the contributions to Weyers (ed.), *Europäisches Vertragsrecht*. A German translation of the Principles of European Contract Law appeared in (2000) 8 *ZEUP* 675 ff. For an evaluation of both the Principles of International Commercial Contracts and the Principles of European Contract Law, from the point of view of German law, see Berger, *Creeping Codification*, pp. 117 ff. and the contributions to Jürgen Basedow (ed.), *Europäische*

## Civil law and the civilian tradition

### *The meaning of civil law*

Civil law, the other key term in the title of this chapter, is somewhat ambiguous. *The Oxford Companion to Law*, for instance, lists ten different meanings.<sup>25</sup> It may refer to the law applied to Roman citizens (as opposed to the *ius gentium*) or to the traditional core of Roman law, based on the Twelve Tables and on subsequent legislative enactments (as opposed to the *ius honorarium*, i.e. the body of law developed by the praetors). Sometimes it means Roman law at large, but it is also used as a synonym for private law. Civil law (as the entire body of state law) can be opposed to canon law, but it can also (as a common denominator of the Continental European legal systems) be contrasted to the English (or Anglo-American)<sup>26</sup> common law. These are probably the most important variations of the term in legal history, comparative law and modern jurisprudence. In the context of modern comparative jurisprudence we should probably use the last meaning as a point of departure. Civil law and common law are usually taken today to designate the two major legal traditions of the western world.<sup>27</sup> In the civil law, so it is said,<sup>28</sup> large areas of private law are codified. It has already been pointed out that this was not always the case. Codification is merely a specific condition in which the civil law currently presents itself. But there is a second distinctive feature. The civilian legal tradition originated in medieval Bologna with the rediscovery and intellectual penetration of the most important body of Roman legal sources, Justinian's Digest. The English common law, on the other hand, developed more independently from Roman law (though in neither complete nor noble isolation).<sup>29</sup> Here

*Vertragsrechtsvereinheitlichung und deutsches Recht* (Tübingen, 2000); cf. also the contributions by Michael Joachim Bonell and Ole Lando to *Making Commercial Law: Essays in Honour of Roy Goode* (Oxford, 1997), pp. 91 ff., 103 ff.; Roy Goode, 'International Restatements and National Law', in *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (New York, 1999), pp. 45 ff.

<sup>25</sup> David M. Walker, *The Oxford Companion to Law* (Oxford, 1980), p. 222.

<sup>26</sup> On this notion see, critically, Reinhard Zimmermann, '"Common Law" und "Civil Law", Amerika und Europa', in Zimmermann (ed.), *Amerikanische Rechtskultur*, pp. 1 ff.

<sup>27</sup> Cf., e.g., James Gordley, 'Common Law and Civil Law: eine überholte Unterscheidung', (1993) 1 *ZEUP* 498 ff.

<sup>28</sup> Arthur Taylor von Mehren and James Russell Gordley, *The Civil Law System*, 2nd edn (Boston and Toronto, 1977), p. 3.

<sup>29</sup> For details, see Peter Stein, *The Character and Influence of the Roman Civil Law* (London, 1988), pp. 151 ff.; R. H. Helmholz, 'Continental Law and Common Law: Historical Strangers

we have the historical connection between civil law as Roman law and civil law as Continental European private law. This connection is based, historically, on a process usually referred to as 'reception': it was the reception of Roman law that constituted European civil law.<sup>30</sup>

### *Characteristic features of the civil law*

European civil law, in the sense of Continental European private law at large, exhibits a number of attributes distinguishing it from the laws of other cultures.<sup>31</sup> It is, in many complex ways, related to moral norms, religious beliefs and political evaluations. At the same time, however, it is quite distinct from morality, religion and politics. It is administered by a body of professional experts who have received a specialised training that qualifies them for their task. The central institution providing such training is typically a university. As a university subject, law is submitted to methodical reflection and analysis: it is the object of a legal science. European legal science, in turn, attempts to demonstrate how individual rules and the decisions of individual cases can be derived from general propositions, and how they can thus be understood and related to each other. A determined effort is made to rationalise the application of the law. Moreover, European law possesses an inherently dynamic character. It is always developing. But it is developing within an established framework of sources and methods, of concepts, rules and arguments. It constitutes a tradition that is constantly evolving. And in spite of many differences in detail, that tradition is characterised by a fundamental unity. It is based on the same sources, has been moving with the same cultural tides, reflects a common set of values and uses common techniques.<sup>32</sup>

or Companions?'; 1990 *Duke LJ* 1207 ff.; Reinhard Zimmermann, 'Der europäische Charakter des englischen Rechts', (1993) 1 *ZEUP* 4 ff.; Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Clarendon Lectures, Lecture 3 (Oxford, 2000).

<sup>30</sup> The authoritative analysis is still the one provided by Franz Wieacker: see Wieacker, *A History of Private Law*, pp. 71 ff. He emphasises the intellectualisation and rationalisation of law and public affairs in general, and the creation of a European *ius commune*, as the core features of the impact of Roman law on European legal thinking.

<sup>31</sup> For a succinct summary, see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Mind* (Cambridge, Mass., 1983), pp. 7 ff.; Franz Wieacker, 'Foundations of European Legal Culture', (1990) 38 *AJCL* 1 ff.; Peter Häberle, 'Europäische Rechtskultur', in Peter Häberle, *Europäische Rechtskultur* (Baden-Baden, 1994), pp. 9 ff. The following paragraphs are based on my foreword to Wieacker, *History of Private Law*, pp. v ff.

<sup>32</sup> See Reinhard Zimmermann, 'Civil Code and Civil Law', (1994/5) 1 *CJEL* 82 ff.

*Civil law and civil code*

It is important to realise that codification has not brought about an entirely new era within the history of the European civil law. Of course, there have been certain fundamental changes, but they relate to attitude and ideology rather than to substance. The German Civil Code, as has been emphasised already, was drafted in the wake of German national unification and it was taken, at least by some, to be a characteristic expression of the German national spirit. Also, and more importantly, it marked the point where discussion of Roman private law and modern doctrinal scholarship parted company.<sup>33</sup> The codification was attributed sole, supreme and unquestioned authority, and all the energies of those legal academics interested in the application and development of private law were channelled into the task of expounding the code and of discussing the court decisions based on its provisions. As a result, legal scholarship has undergone a process of nationalistic particularisation (which has been denounced, emphatically, as ‘undignified’ and ‘humiliating’).<sup>34</sup>

On the other hand, the codification movement was itself a European phenomenon affecting the private law in Germany or Austria as profoundly, and in essentially a similar manner, as in France or Italy. The Prussian Code apart,<sup>35</sup> all European codifications are characterised by a considerable built-in flexibility which has, by and large, made them stand the test of time.<sup>36</sup> Their draftsmen took to heart Portalis’ famous observation<sup>37</sup> that the task of legislation is to determine, ‘par de grandes vues’, the general maxims of law. It has to establish principles rich in implications rather than descend into the details of every question which might possibly arise. The application

<sup>33</sup> This is elaborated in Zimmermann, *Roman Law, Contemporary Law, European Law* (Clarendon Lectures, Lecture One).

<sup>34</sup> For examples of this kind of ‘national legal science’, see Zimmermann, ‘Civil Code and Civil Law’, 63 ff. (with reference to the sharp criticism of this state of affairs by Rudolf von Jhering).

<sup>35</sup> See Jan Schröder, ‘Das Verhältnis von Rechtsdogmatik und Gesetzgebung in der neuzeitlichen Privatrechtsgeschichte (am Beispiel des Privatrechts)’, in Okko Behrends and Wolfram Henkel (eds.), *Gesetzgebung und Dogmatik, Abhandlungen der Akademie der Wissenschaften in Göttingen, Philologisch-historische Klasse, Dritte Folge* (Göttingen, 1989), pp. 43 ff.

<sup>36</sup> This point is further elaborated, as far as the German Civil Code is concerned, in Zimmermann, ‘Civil Code and Civil Law’, 89 ff.; cf. also Reinhard Zimmermann, ‘An Introduction to German Legal Culture’, in Werner F. Ebke and Matthew W. Finkin (eds.), *Introduction to German Law* (The Hague, London and Boston, 1996), pp. 8 ff.

<sup>37</sup> As cited in Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, trans. Tony Weir, 3rd edn (Oxford, 1998), p. 90. Cf. also the comments by Herman, ‘Schicksal und Zukunft der Kodifikationsidee in Amerika’, p. 52 ff.

of the law belongs to the magistrate and lawyer, 'pénétré de l'esprit général des lois'.

Thus, the scene was set for an alliance, not for confrontation, between legislation and legal science;<sup>38</sup> and, as a result, it appears to be generally recognised today that a code has to be brought to life, and has to be kept in tune with the changing demands of time, by active and imaginative judicial interpretation and doctrinal elaboration.<sup>39</sup> In spite of the code, the civilian tradition is still evolving. And it is indeed, fundamentally, still the civilian tradition that is evolving. For while judicial interpretation and doctrinal elaboration have certainly produced some odd quirks of national jurisprudence, they have proceeded from the provisions of the various codes they were supposed to apply. These codes, however, have grown on the same legal soil. Thus, it is well known that those who drafted the German Civil Code did not, by and large, intend their code to constitute a fresh start, a break with the past. On the contrary: they generally aimed at consolidating the contemporary version of the Roman common law: pandectist legal doctrine. Not inappropriately, therefore, the BGB has been referred to as the 'statute book of the historical school of jurisprudence'.<sup>40</sup>

But even the French code civil, carried by the élan of a revolutionary movement, subscribed to traditional conceptions of private law that were,

<sup>38</sup> Cf. Okko Behrends, 'Das Bündnis zwischen Gesetz und Dogmatik und die Frage der dogmatischen Rangstufen', in Behrends and Henkel (eds.), *Gesetzgebung und Dogmatik*, pp. 9 ff.

<sup>39</sup> This point is also emphasised by Karsten Schmidt, *Die Zukunft der Kodifikationsidee: Rechtsprechung, Wissenschaft und Gesetzgebung vor den Gesetzeswerken des geltenden Rechts* (Heidelberg, 1985), pp. 67 ff. For further elaboration see, as far as German law is concerned, Zimmermann, 'An Introduction to German Legal Culture', pp. 16 ff. As far as the French and Austrian Codes are concerned, see the famous clauses in art. 4 code civil and § 7 ABGB. For details concerning the relationship between the Code and judicial development of the law in France and Austria, see Heinz Hübner, *Kodifikation und Entscheidungsfreiheit des Richters in der Geschichte des Privatrechts* (Königstein, 1980), pp. 33 ff.; Zweigert and Kötz, *Introduction to Comparative Law*, pp. 89 ff., 160 ff. The Swiss Code has, from the beginning, been renowned for its 'deliberate reliance... on judicial amplification' (Zweigert and Kötz, *Introduction to Comparative Law*, p. 175). Its draftsmen have made extensive use of 'general clauses'; cf., e.g., Gmür, *Das Schweizerische Zivilgesetzbuch*, pp. 50 ff. Significantly, the new Dutch Civil Code relies more widely on general provisions than the old one; cf. A. S. Hartkamp, 'Diskussionsbeitrag', in Bydlinski et al. (eds.) *Renaissance der Idee der Kodifikation*, p. 63. Concerning good faith, see M. W. Hesselink, *De Redelijkheid en billijkheid in het Europese Privaatrecht* (Deventer, 1999); Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge, 2000) (with full references).

<sup>40</sup> Paul Koschaker, *Europa und das römische Recht*, 4th edn (Munich, 1966), p. 291. On the reaction of the German courts see the contributions to Ulrich Falk and Heinz Mohnhaupt (eds.), *Das Bürgerliche Gesetzbuch und seine Richter* (Frankfurt am Main, 2000).

as James Gordley<sup>41</sup> puts it very pointedly, almost old-fashioned when the code was enacted. The draftsmen found them in the seventeenth- and eighteenth-century treatise writers, such as Domat and Pothier. The same is true, *mutatis mutandis*, of the other two great 'natural law codes'.<sup>42</sup> For the impact of natural law on the actual content of private law was rather limited.<sup>43</sup> It could be used to make a choice between two or more conflicting solutions, to streamline traditional doctrines or to generalise and round off trends of legal development that had been going on for centuries. But the *ratio naturalis* of natural law did not normally oust the *ratio scripta* of Roman law.<sup>44</sup> Nor, of course, did a code like the Austrian General Civil Code attempt to incorporate the local and regional laws prevailing in the various parts of the monarchy; after all, it was intended to constitute a code that was universally applicable.<sup>45</sup> Predominantly, at least, it is an emanation neither of local custom nor of abstract, universal thought patterns, but of traditional civil law doctrine. The same has remained true of more recent codifications, including the new Dutch Civil Code.<sup>46</sup> They all carry an unmistakably civilian imprint, and the common tradition thus provides the background for an evaluation of their differences and similarities. They all, in a way, used the same legal grammar and, as a result, it is not difficult for those who have learnt that grammar to understand their content. 'Civil law in European codes': this topic, therefore, in essence concerns the fundamental

<sup>41</sup> 'Myths of the French Civil Code', (1994) 42 *AJCL* 459 ff.; cf. also Reiner Schulze, 'Französisches Recht und europäische Rechtsgeschichte im 19. Jahrhundert', in Reiner Schulze (ed.), *Französisches Zivilrecht in Europa während des 19. Jahrhunderts* (Berlin, 1994), pp. 12 ff.

<sup>42</sup> Schwennicke, *Entstehung*, has emphasised the extent to which the draftsmen of the Prussian Code followed (and merely rationalised) traditional patterns of the *ius commune*. As far as the Austrian Code is concerned, see the evaluation by Werner Ogris, 'Zur Geschichte und Bedeutung des österreichischen Allgemeinen bürgerlichen Gesetzbuchs (ABGB)', in *Liber Memorialis François Laurent* (Brussels, 1989), pp. 381 ff.

<sup>43</sup> This has been emphasised, in particular, by Klaus Luig, 'Der Einfluß des Naturrechts auf das positive Privatrecht im 18. Jahrhundert', (1979) 96 *ZSS* (Germanistische Abteilung) 38 ff.

<sup>44</sup> *Ibid.*, p. 54.

<sup>45</sup> Wilhelm Braunerder, 'Vernünftiges Recht als überregionales Recht: Die Rechtsvereinheitlichung der österreichischen Zivilrechtskodifikationen 1786–1797–1811', in Schulze (ed.), *Europäische Rechts- und Verfassungsgeschichte*, pp. 121 ff. The same is true, of course, of the French code civil; cf. Schulze, 'Französisches Recht', pp. 23 ff.

<sup>46</sup> This even contains a whole variety of instances where its draftsmen, consciously or unconsciously, have reverted to principles of Roman law even though the old Code had departed from them: cf. Hans Ankum, 'Römisches Recht im neuen niederländischen Bürgerlichen Gesetzbuch', in Reinhard Zimmermann, Rolf Knütel and Jens Peter Meincke (eds.), *Rechtsgeschichte und Privatrechtsdogmatik* (Heidelberg, 2000), pp. 101 ff.

intellectual unity within a diversity of modern legal systems. We will confine our attention to the law of obligations, the most characteristically ‘European’ of the core areas of private law,<sup>47</sup> although an investigation into property law and testate succession would probably yield similar results. (Family law and intestate succession may not share as much common ground.) And we will take Roman law as our central point of reference. For if it was the ‘reception’ of Roman law that constituted European civil law, it must also have played a pivotal role in rendering the European civil codes civilian.

### Roman roots I: common origins

It is not easy to think of a legal rule expressed in exactly the same way in all European codes. One possible candidate, one would have thought, is the rule that legally or morally offensive contracts must be void. And indeed, the codes invariably tackle this problem by way of general provisions, which (also invariably) use the key concepts of illegality and immorality.<sup>48</sup> All these rules are based on Roman law: the *lex Non dubium* of Emperor Theodosius,<sup>49</sup> which elevated all statutory prohibitions to the status of a *lex perfecta*, and the suppression of transactions ‘contra bones mores’ by the Roman jurists and emperors.<sup>50</sup> But if one looks more closely at the various codes one finds subtle variations. Article 20 I of the Swiss Obligationenrecht (OR) refers to ‘contracts with an illegal content’, § 134 BGB to ‘legal acts violating a statutory prohibition’. The French and Italian codes relate the invalidity of illegal and immoral contracts to their famous doctrines of ‘cause’ or ‘causa’<sup>51</sup> (which in turn derive from medieval jurisprudence but can be traced back ultimately to two fragments in the Digest<sup>52</sup>). The German, Swiss and Austrian Codes contain specific provisions dealing with ‘usurious’ transactions;<sup>53</sup> the Austrian Code also still retains the institution

<sup>47</sup> For an explanation see Reinhard Zimmermann, ‘The Law of Obligations: Character and Influence of the Civilian Tradition’, (1992) 3 *Stellenbosch LR* 5 ff.

<sup>48</sup> For a comparative overview, see Zweigert and Kötz, *Introduction to Comparative Law*, pp. 407 ff. and Hein Kötz, *European Contract Law*, vol. I, trans. Tony Weir (Oxford, 1997), pp. 154 ff.

<sup>49</sup> Nov. Theod. 9.

<sup>50</sup> For all details, see Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (paperback edn; Oxford, 1996), pp. 697 ff., 706 ff.

<sup>51</sup> Cf. art. 1133 code civil; art. 1343 codice civile.

<sup>52</sup> Zimmermann, *Law of Obligations*, pp. 549 ff.

<sup>53</sup> § 138 II BGB (on its historical background, see Zimmermann, *Law of Obligations*, pp. 175 ff., 268 ff.); art. 21 OR; § 879 II n. 4 ABGB.

of *laesio enormis*<sup>54</sup> (derived from C. 4, 44, 2).<sup>55</sup> French law does not deal with 'usury' but has a rather different version of *laesio enormis*.<sup>56</sup> Article 1133 code civil does not refer only to transactions prohibited by law and contrary to the *boni mores* but also mentions those against public policy. The Dutch Civil Code contains a similar provision.<sup>57</sup> As far as legal consequences are concerned, most codes simply declare the contract to be void. German law, however, displays a somewhat greater degree of flexibility concerning illegal contracts. The transaction is void, unless a contrary intention appears from the statute.<sup>58</sup> A similar, though not identical, rule was introduced by the Dutch legislature.<sup>59</sup> This flexible approach, incidentally, is quite in tune with that adopted in classical Roman law before Theodosius enacted the *lex Non dubium*.<sup>60</sup>

## Roman roots II: two sets of rules

### *Duties and liability of a seller*

Not infrequently the Roman sources contain two different sets of rules dealing with the same problem. Both may have found their way into our modern codifications. Under a contract of sale, for instance, the vendor was under no obligation to transfer ownership of the object sold. He merely had to grant the purchaser undisturbed possession and was thus responsible for 'vacuum possessionem tradere' and for sustaining the continued enjoyment of the *res*. Thus, there was an implied warranty of peaceable possession ('habere licere'), for as soon as the true owner, by asserting his title, evicted the purchaser, the latter could hold the vendor responsible.<sup>61</sup> This liability for eviction, as we find it in the law of Justinian, became part and parcel of the *ius commune* and it was also adopted by the code civil.<sup>62</sup> The situation was different as far as *certam rem dare* obligations (for instance, the promise

<sup>54</sup> § 934 ABGB. <sup>55</sup> See Zimmermann, *Law of Obligations*, pp. 259 ff.

<sup>56</sup> Art. 1674 code civil. <sup>57</sup> Art. 3:40 I BW.

<sup>58</sup> § 134 BGB (on which see the discussion by Hans Hermann Seiler, 'Über verbotswidrige Rechtsgeschäfte (§ 134 BGB)', in *Gedächtnisschrift für Wolfgang Martens* (Berlin and New York, 1987), pp. 719 ff.

<sup>59</sup> Art. 3:40 II BW. <sup>60</sup> Zimmermann, *Law of Obligations*, pp. 697 ff.

<sup>61</sup> For the details, see *ibid.*, pp. 293 ff. and, more recently, Wolfgang Ernst, *Rechtsmängelhaftung* (Tübingen, 1995), pp. 7 ff.

<sup>62</sup> Artt. 1626 ff. code civil. Cf. also the comparative remarks by Andreas Wacke, 'Die verschuldete Eviktion', in *Festschrift für Hubert Niederländer* (Heidelberg, 1991), pp. 141 ff.



to deliver a certain slave) were concerned. Here the promisor had to transfer ownership and was liable as soon as he was unable to do so.<sup>63</sup> This is the regime that obtains today in modern German law (§§ 433 ff., 440 BGB). It is as 'civilian' as, but nevertheless quite different from, the liability for eviction, no matter that the draftsmen of the German Code had not in fact taken their inspiration from the *obligationes dandi*, but thought (wrongly) that the new regime had organically evolved from the liability for eviction.<sup>64</sup> This explains why, though requiring the vendor to transfer ownership, they still made his liability to pay damages dependent upon eviction.<sup>65</sup>

### *Breach of contract*

Breach of contract presents another example of a significant discrepancy between French and German law. The BGB distinguishes between different types of breach of contract. Of central significance is a highly artificial concept of (supervening) impossibility devised by Friedrich Mommsen, and inspired largely by the Roman regime applicable to *certam rem dare obligationes*.<sup>66</sup> Although, by the time of Justinian, this concept had lost its function, it still featured in the *Corpus Juris Civilis* and has puzzled subsequent generations of lawyers.<sup>67</sup> On the one hand, Mommsen wanted to be faithful to the sources; on the other hand, he attempted on that basis to devise a neat and logically consistent scheme of liability for breach of contract. It is hardly surprising that under these circumstances 'impossibility' became a very broad conceptual abstraction and, as such, a common systematic denominator for a whole range of situations. What Mommsen could not (given the framework of authoritative sources within which he operated) take into consideration was the fact that the modern general law

<sup>63</sup> For details, see Ernst, *Rechtsmängelhaftung*, pp. 91 ff.

<sup>64</sup> See *ibid.*, pp. 123 ff. <sup>65</sup> § 440 II BGB.

<sup>66</sup> Friedrich Mommsen, *Die Unmöglichkeit der Leistung in ihrem Einfluß auf obligatorische Verhältnisse* (Brunswick, 1853). For a discussion, see Christian Wollschläger, *Die Entstehung der Unmöglichkeitstheorie: Zur Dogmengeschichte des Rechts der Leistungsstörungen* (Cologne and Vienna, 1970), pp. 123 ff.; Susanne Würthwein, *Zur Schadensersatzpflicht wegen Vertragsverletzungen im Gemeinen Recht des 19. Jahrhunderts: Grundsätze des Leistungsstörungenrechts im Gemeinen Recht in ihrer Bedeutung für das BGB* (Berlin, 1990); Zimmermann, *Law of Obligations*, pp. 783 ff., 809 ff. For a meticulous re-evaluation see now Ulrich Huber, *Leistungsstörungen*, vol. I (Tübingen, 1999), pp. 1 ff.

<sup>67</sup> For a modern example of the confusion obtaining in a legal system based directly on the Roman sources, see W. A. Ramsden, *Supervening Impossibility of Performance in the South African Law of Contract* (Cape Town, 1985), pp. 55 ff.

of contract derives from the consensual contracts of Roman law, not from the law of stipulations entailing 'certam rem dare'.<sup>68</sup> With regard to the former, liability had to be assessed according to the standard of good faith ('ex fide bona'), and there was thus no need for a strict categorisation of specific types of breach of contract.<sup>69</sup> More particularly, supervening impossibility did not have to be dealt with separately. Of central importance was the question whether, and under which circumstances, the failure to perform, or to perform properly, was attributable to the debtor, before he could be made liable for *id quod* interest; and this question was indeed the very question that preoccupied the authors of the older *ius commune*. Following this pattern of the *ius commune* is the French code civil.<sup>70</sup> Its art. 1147 refers to 'inexécution', a broad concept which covers all forms of breach of contract (that is, those cases where one of the parties 'ne satisfera point à son engagement'). The debtor is liable wherever such non-performance is not due to *vis maior* or *casus fortuitus*.<sup>71</sup>

### *Initial impossibility of performance*

As far as initial impossibility of performance is concerned, most modern codes appear to be squarely based on the famous principle that has come down to us under the name of Iuventius Celsus: 'Impossibilium nulla obligatio est'.<sup>72</sup> Thus, for instance, § 306 BGB provides that a contract, the performance of which is impossible, is void. Similar provisions can be found in Swiss<sup>73</sup> and Italian law,<sup>74</sup> and, confined to the law of sale, also in the

<sup>68</sup> Cf. Klaus-Peter Nanz, *Die Entstehung des allgemeinen Vertragsbegriffes im 16. Jahrhundert* (Munich, 1985); John Barton (ed.), *Towards a General Law of Contract* (Berlin, 1990); Zimmermann, *Law of Obligations*, pp. 537 ff.; Reinhard Zimmermann, 'Roman-Dutch Jurisprudence and its Contribution to European Private Law', (1992) 66 *Tulane LR* 1689 ff.; Robert Feenstra, 'Die Klagbarkeit der pacta nuda', in Robert Feenstra and Reinhard Zimmermann (eds.), *Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (Berlin, 1992), pp. 123 ff.

<sup>69</sup> Zimmermann, *Law of Obligations*, pp. 788 ff., 807 ff.

<sup>70</sup> Cf., e.g., Zweigert and Kötz, *Introduction to Comparative Law*, pp. 496 ff.

<sup>71</sup> A similarly streamlined set of rules, centred around a uniform concept of breach of contract, has been developed in English law. The Vienna Convention on the International Sale of Goods, the German Commission charged with the reform of the law of obligations, the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law drafted by the Commission on European Contract Law all follow the same approach. Cf. Zimmermann, 'Konturen', pp. 480 ff.

<sup>72</sup> D. 50, 17, 185. <sup>73</sup> Art. 20 OR. <sup>74</sup> Artt. 1346, 1418 II codice civile.

code civil.<sup>75</sup> We appear to be dealing here with a rule, not only of venerable antiquity, but also of obvious and even axiomatic validity. However, 'impossibilium nulla obligatio est' merely encapsulates the obvious idea that nobody can be obliged to perform what he cannot perform. This is not identical with the assertion that a contract, the performance of which is impossible, is void; and in the eyes of the Roman lawyers the one did indeed not necessarily follow from the other.<sup>76</sup> Thus, as far as the contract of sale is concerned, we find some fragments in the *Corpus Juris* where a contractual action for what we would call the positive interest is granted, and where the contract, to that extent, appears to have been regarded as valid. Stipulations concerning an impossible performance, however, were invariably held to be void by the Roman lawyers. This was probably based neither on logic nor on policy; it simply followed from the way in which the applicable formula was phrased: for condemnation presupposed the existence of an object, the value of which could sensibly be estimated.<sup>77</sup>

Thus, the modern codes perpetuate a rule solely applicable to a type of contract which has not been adopted by any of them. The responsibility for this odd anachronism rests in the first place on the natural lawyers.<sup>78</sup> Discarding the 'subtleties' of Roman law, they found an altogether new starting point for determining the effect of initial impossibility on contractual obligations in the idea that their content may be attributed to the promisor only if it is based on the exercise of his free will. The promisor must have chosen to be bound, and as a rational being he can choose only what he is able to carry out. A person can will only what lies within the reach of his volition. The law of contract is based on freedom of will. Ergo: a contract directed at something impossible must be invalid. This reasoning could not fail to commend itself to the Pandectists, and thus we find the (partial) concurrence of views, mentioned above, between the draftsmen of codifications from both the 'Germanic' and 'Romanistic' legal families. More recently, however, the rule embodied in § 306 BGB has been regarded as unsound and unfortunate.<sup>79</sup> Textbooks and commentaries are therefore

<sup>75</sup> Art. 1601 code civil.

<sup>76</sup> For details, see Zimmermann, *Law of Obligations*, pp. 686 ff.; cf. also pp. 241 ff.

<sup>77</sup> See the references in *ibid.*, pp. 689 ff.

<sup>78</sup> For details, see Christian Wollschläger, 'Die willenstheoretische Unmöglichkeitstheorie im aristotelisch-thomistischen Naturrecht', in *Symptotica Franz Wieacker* (Göttingen, 1970), pp. 154 ff.; Zimmermann, *Law of Obligations*, pp. 692 ff.

<sup>79</sup> Cf., e.g., Ernst Rabel, *Unmöglichkeit der Leistung* (1907) and *Über Unmöglichkeit der Leistung und heutige Praxis* (1911), both today in Ernst Rabel, *Gesammelte Aufsätze*, vol. I

full of exhortations to apply it restrictively and to try wherever possible to avoid the harshness inherent in the unequivocal verdict of invalidity. Quite in line with these developments, the new Dutch Civil Code has completely abandoned the rule.<sup>80</sup> One can hardly refuse the label 'civilian' to this solution. For we are dealing here with the return towards a more flexible regime espoused, already, by the Roman lawyers.<sup>81</sup>

### Roman roots III: interpreting the sources

In other cases, considerable variations in the solutions presented by the modern codes are based on the fact that the relevant Roman sources, which have for centuries informed our discussion, are unclear, or even contradictory. This is not at all a rare phenomenon, since the Digest is not a systematically structured piece of legislation but a compilation of fragments from classical Roman legal writings, put together under Justinian in the sixth century AD. It constitutes a gigantic torso of Roman law, which contains case decisions, legal opinions and rules, commentary, disputes, and excerpts from textbooks and monographs. Its overall character is casuistic. Much of it reflects the contemporary position at the various stages of Roman legal history, while other parts were altered to suit the requirements of the sixth century. In addition, we have to take account of the imperial legislation contained in the *Codex Iustiniani* and of the rules contained in an elementary textbook invested with statutory force: Justinian's Institutes.

#### *Vicarious liability*

Digesta 19, 2, 25, 7<sup>82</sup> is one of those ambiguous fragments which have been used as the textual foundation for two contradictory solutions. A contractor has undertaken the transport of a column. He uses some servants to carry

(Tübingen, 1965), pp. 1 ff., 56 ff.; Zweigert and Kötz, *Introduction to Comparative Law*, pp. 488 ff.; Ulrich Huber, 'Leistungsstörungen', in Bundesminister der Justiz (ed.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. I (Cologne, 1981), pp. 813 ff.

<sup>80</sup> Cf. A. S. Hartkamp, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht, Verbintenissenrecht*, Part 1, 11th edn (Deventer, 2000), n. 25.

<sup>81</sup> Cf. also § 878, 1 ABGB ('What is *downright* impossible, cannot be the object of a valid contract') and the interpretation placed on this rule by Ernst Rabel, 'Zur Lehre von der Unmöglichkeit der Leistung nach Österreichischem Recht' (1911), in *Gesammelte Aufsätze*, vol. I, pp. 79 ff.

<sup>82</sup> 'Qui columnam transportandam conduxit, si ea, dum tollitur aut portatur aut reponitur, fracta sit, ita id periculum praestat, si qua ipsius eorumque, quorum opera uteretur, culpa acciderit.'

out that obligation. They drop the column and break it. Is the contractor liable not only for his own fault but also for theirs? Or is his liability dependent upon whether he himself was at fault (for instance, in selecting and supervising his servants)? This depends on the interpretation of the clause ‘si qua ipsius eorumque, quorum opera uteretur, culpa occiderit’; or, more precisely, on whether the particle ‘que’ in ‘eorumque’ has to be understood conjunctively (‘and’) or disjunctively (‘or’). According to the latter interpretation, we would be dealing with an instance of vicarious liability *stricto sensu*, i.e. liability based (merely) on the fault of others. This is indeed how modern Romanists would tend to read the text, for only this interpretation would seem to fit in with the conductor’s *custodia* liability.<sup>83</sup> It is this solution that we find, within a delictual context, in art. 1384 code civil: one is responsible, not only for the injury one causes by one’s own action, but also for that which is caused ‘par le fait des personnes dont on doit répondre’.<sup>84</sup>

Digesta 19, 2, 25, 7 (the ‘que’ interpreted conjunctively), on the other hand, was one of the key sources upon which nineteenth-century German legal writers relied in order to reject the notion that one person could be held strictly responsible for the acts of others.<sup>85</sup> ‘No liability without fault’ was one of the great axioms of pandectist doctrine,<sup>86</sup> and the Roman texts tended to be read in such a way as to conform thereto. By the time the BGB was drafted the idea of vicarious liability had gained ground,<sup>87</sup> but ultimately it managed to establish itself only in the contractual context.<sup>88</sup> But when it came to the law of delict, the forces of tradition – a tradition only supposedly going back to the Roman sources! – largely had their way, strongly supported by lobbyists representing the interests of trade, industry and agriculture. The principle laid down in art. 1384 code civil was curtly

<sup>83</sup> Rolf Knütel, ‘Die Haftung für Hilfspersonen im römischen Recht’, (1983) 100 ZSS (Romanistische Abteilung) 419 ff.; Zimmermann, *Law of Obligations*, pp. 397 ff. Contra: Geoffrey MacCormack, ‘Culpa in eligendo’, (1971) 18 RIDA 541 ff.

<sup>84</sup> On the origin of this provision (Domat and Pothier) cf. Alan Watson, *Failures of the Legal Imagination* (Philadelphia, 1988), pp. 6 ff., 15 ff.; on its application, see Zweigert and Kötz, *Introduction to Comparative Law*, pp. 635 ff.

<sup>85</sup> Cf., for example, Bernhard Windscheid and Theodor Kipp, *Lehrbuch des Pandektenrechts*, 9th edn (Frankfurt am Main, 1906), § 401, n. 5.

<sup>86</sup> Cf., e.g., the analysis by Hans-Peter Benöhr, ‘Die Entscheidung des BGB für das Verschuldensprinzip’, (1978) 46 TR 1 ff.

<sup>87</sup> For details of the development, see Hans Hermann Seiler, ‘Die deliktische Gehilfenhaftung in historischer Sicht’, (1967) JZ 525 ff.

<sup>88</sup> § 278 BGB.

rejected by the second commission drafting the BGB as being entirely alien to traditional 'German' notions of justice and fairness.<sup>89</sup> According to § 831 BGB, therefore, liability for the unlawful acts of employees hinges on *culpa in eligendo vel custodiendo vel inspiciendo*.<sup>90</sup> This rule has turned out to be a major source of embarrassment, and has largely been responsible for the extravagant encroachment of contractual remedies on the law of delict, which is such a characteristic feature of the modern German law of obligations.<sup>91</sup>

We are obviously dealing here with an important difference between French and German law. Yet both solutions will have to be labelled 'civilian', for both of them derive from the same intellectual tradition. That tradition has shaped the parameters within which the legal discourse has taken place: the distinction between contractual and delictual liability; the relevance, in principle, of fault as the basis for liability; the possibility of acting through others and the problem, under these circumstances, of how to attribute fault; and the definition of the range of such other persons for whose fault one may be held responsible. Texts such as D. 19, 2, 25, 7 and others deriving from the same intellectual tradition<sup>92</sup> did not, of course, 'determine' whether a legal system opted for vicarious liability or for a strict implementation of the fault principle, but they provided the framework of concepts and arguments for rationalising that decision.

### *Transfer of ownership and payment of purchase price*

For another example we may turn to Justinian's Institutes. They contain an enigmatic rule relating to the transfer of ownership resulting from a contract of sale.<sup>93</sup> Ownership, according to the first sentence of Inst. II, 1, 41, will pass only once the purchase price has been paid (or security given).

<sup>89</sup> 'Protokolle', in Benno Mugdan, *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol. III (Berlin, 1899), p. 1094.

<sup>90</sup> There is, however, as far as this fault requirement is concerned, a reversal of the onus of proof.

<sup>91</sup> Zweigert and Kötz, *Introduction to Comparative Law*, pp. 630 ff.; B. S. Markesinis, *The German Law of Torts: A Comparative Introduction*, 3rd edn (Oxford, 1994), pp. 676 ff.; Reinhard Zimmermann and Dirk A. Verse, 'Die Reaktion des Reichsgerichts auf die Kodifikation des deutschen Deliktsrechts (1900–1914)', in Falk and Mohnhaupt (eds.), *Das Bürgerliche Gesetzbuch*, pp. 335 ff.

<sup>92</sup> For example, Robert-Joseph Pothier, *Traité des obligations*, nn. 121, 456.

<sup>93</sup> Inst. II, 1, 41: 'Sed si quidem ex causa donationis aut dotis aut qualibet alia ex causa tradantur, sine dubio transferuntur: venditae vero et traditae non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti expromissore aut pignore dato. quod cavetur quidem etiam lege duodecim tabularum: tamen recte dicitur et iure gentium, id

In the very next sentence, however, the rule appears to be rendered more or less nugatory: for here it is said to be sufficient that the vendor ‘puts his trust in the purchaser’. It is likely that we are dealing with an attempt to reconcile generally accepted notions and practices of Justinian’s time with the principles of classical Roman law. Painstaking modern research has revealed the significance and development of both the rule and its fatal qualification within the history of Roman law.<sup>94</sup> The lawyers of the *ius commune*, on the other hand, had to accept the text as they found it. Yet they could never be quite sure how to understand its content.<sup>95</sup> Considerable uncertainty persisted, as is reflected in the fact that all three natural law codes contain a different version of the rule.<sup>96</sup> The draftsmen of the BGB, who at first intended to abandon Inst. II, 1, 41, finally opted for yet another solution (the justification for which is, however, regarded as questionable).<sup>97</sup>

### Roman roots IV: different layers of tradition

If Inst. II, 1, 41 provides an example of a notoriously unclear rule, we have only to look at the question of transfer of ownership in general to find two entirely different regimes, both of which can be traced back to – and have in fact been derived from – a contradictory set of sources from Roman law.

#### *The abstract and the causal system*

In classical Roman law, transfer of ownership<sup>98</sup> was effected by *mancipatio* for *res Mancipi*, by *traditio* for *res nec Mancipi*, alternatively by *in iure cessio*

est iure naturali, id effici. sed si is qui vendidit fidem emptoris secutus fuerit, dicendum est statum rem emptoris fieri.

<sup>94</sup> Cf. Zimmermann, *Law of Obligations*, pp. 272 ff.

<sup>95</sup> For all details, see Robert Feenstra, *Reclame en Revendicatie* (Haarlem, 1949), pp. 98 ff., 255 ff.; Coing, *Europäisches Privatrecht*, pp. 307 ff.; Klaus Luig, ‘Übergabe und Übereignung der verkauften Sache nach römischem und gemeinem Recht’, in *Satura Robert Feenstra oblata* (Fribourg, 1985), pp. 445 ff.; Robert Feenstra, ‘Eigendomsovergang bij koop en terugvorderingsrecht van de onbetalde verkoper: Romeins recht en Middeleeuws handelsrecht’, (1987) 50 *THRHR* 134 ff.

<sup>96</sup> §§ 224 ff. I 11 PrALR; art. 1582 ff. code civil; § 1063 ABGB.

<sup>97</sup> § 454 BGB. For all details, see the historical discussion by Klaus Luig, ‘Das Verhältnis von Kaufpreiszahlung und Eigentumsübergang nach deutschem Recht’, in Letizia Vacca (ed.), *Vendita e trasferimento della proprietà nella prospettiva storico-comparatistica*, vol. I (Milan, 1991), pp. 225 ff.

<sup>98</sup> For a general overview of the historical development, see J. H. Dondorp and E. J. H. Schrage, *Levering krachtens geldige titel* (Amsterdam, 1991) (on which, see (1994) 11 *ZSS* (Romanistische Abteilung) 703 ff.).

for both categories of things. *Mancipatio* and *in iure cessio* were 'abstract', i.e. their validity did not depend on whether they were based on a legal ground motivating and justifying such transfer. *Traditio*, on the other hand, was (probably) causal in that it did require a *iusta causa traditionis* (such as a valid contract of sale).<sup>99</sup> Justinian retained only *traditio*.<sup>100</sup> But he incorporated into the *Corpus Juris Civilis* a text by Julian (D. 41, 1, 36), who appears to have dispensed with this requirement; and in a key text of the Institutes (II, 1, 40) he merely stressed the intention to transfer.

For a long time, the *ius commune* was dominated by the causal system: transfer of ownership was seen to depend on what the jurists of the German *usus modernus* referred to as *titulus* (= *iusta causa traditionis*) and *modus* (= the different forms of *traditio*).<sup>101</sup> This regime was incorporated into the Austrian Civil Code.<sup>102</sup> It was not difficult to trace it back to Roman law. Friedrich Carl von Savigny, on the other hand, took his cue from texts such as Iul. D. 41, 1, 36 and Inst. II, 1, 40, and managed, on the basis of a reinterpretation of the Roman sources, to establish his doctrine of the abstract dispositive legal act:<sup>103</sup> transfer of ownership was based on an agreement between the owner and the acquirer that ownership be transferred. This agreement constituted a legal transaction that was completely separate from, and independent of, the underlying obligatory act, and it replaced the *titulus* of the older doctrine. Eventually, this proposition found its way into the BGB,<sup>104</sup> where it contributes to the famous (or infamous) 'abstract' character of the German Civil Code.<sup>105</sup> The differences between

<sup>99</sup> Max Kaser, *Das Römische Privatrecht*, vol. I, 2nd edn (Munich, 1971), pp. 412 ff.

<sup>100</sup> Max Kaser, *Das Römische Privatrecht*, vol. II, 2nd edn (Munich, 1975), pp. 282 ff.

<sup>101</sup> For all details, see Coing, *Europäisches Privatrecht*, vol. I, pp. 302 ff.; Italo Biocchi, 'Vendita e trasferimento della proprietà nel diritto comune', in Vacca (ed.), *Vendita*, pp. 139 ff.; Dondorp and Schrage, *Levering*, pp. 31 ff.

<sup>102</sup> § 380 ABGB; on which see Theo Mayer-Maly, 'Kauf und Eigentumsübergang im österreichischen Recht', in Vacca (ed.), *Vendita*, pp. 275 ff.

<sup>103</sup> For details, see Wilhelm Felgentraeger, *Friedrich Carl von Savignys Einfluß auf die Übereignungslehre* (Leipzig, 1927); Filippo Ranieri, 'Die Lehre von der abstrakten Übereignung in der deutschen Zivilrechtswissenschaft des 19. Jahrhunderts', in Helmut Coing and Walter Wilhelm (eds.), *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert*, vol. II (Frankfurt am Main, 1977), pp. 90 ff.; Coing, *Europäisches Privatrecht*, vol. II, pp. 393 ff.; Götz Landwehr, 'Abstrakte Rechtsgeschäfte in Wissenschaft und Gesetzgebung des 19. Jahrhunderts', in Karsten Schmidt (ed.), *Rechtsdogmatik und Rechtspolitik* (Berlin, 1990), pp. 173 ff.

<sup>104</sup> Cf. the discussion by Rolf Knütel, 'Vendita e trasferimento della proprietà nel diritto tedesco', in Vacca (ed.), *Vendita*, pp. 287 ff.

<sup>105</sup> Folke Schmidt, 'The German Approach to Law', (1965) 9 *SSL* 133 ff.; Konrad Zweigert and Hartmut Dietrich, 'System and Language of the German Civil Code 1900', in S. J. Stoljar (ed.), *Problems of Codification* (Canberra, 1977), pp. 34 ff.; Zweigert and Kötz, *Introduction to Comparative Law*, pp. 144 ff.



the abstract and the causal systems of transfer of ownership are not inconsiderable; thus, for instance, the *condictio indebiti* acquires much greater practical significance within a system which allows the transferor to lose his title and requires him to argue that this change of title may have been unjustified. Yet, at the same time, both systems are undoubtedly civilian.

### *The consensual system*

The same is true even of a third system that we find in modern Continental codes. It does not require a separate act of conveyance at all, but allows ownership to pass upon conclusion of a sale.<sup>106</sup> The French code civil provides a fine example. Its art. 1583 reads: 'Elle [sc.: the contract of sale] est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée, ni le prix payé.' This doctrine was propagated most forcefully by Hugo Grotius<sup>107</sup> and other natural lawyers of the seventeenth and eighteenth centuries.<sup>108</sup> But it can already be found in Leonardus Lessius,<sup>109</sup> and even at the time of the Commentators it had been foreshadowed by the introduction of a routine clause into notarial sales instruments which stipulated that the vendor would henceforth possess on behalf of the purchaser.<sup>110</sup> This was interpreted as *traditio per constitutum possessorium*. Similar constructions paved the way to the consensual principle in French law.<sup>111</sup> Thus, the new approach was partly the product of notarial practice and possibly also of the French *droit coutumier*. It was also based on biblical authority: because thought is to be equated to deed, a

<sup>106</sup> For comparative evaluations of the different regimes regulating the transfer of property in Europe (abstract, causal and consensual; on the latter cf. the next paragraph in the text), see Franco Ferrari, 'Vom Abstraktionsprinzip und Konsensualprinzip zum Traditionsprinzip', (1993) 1 *ZEUP* 52 ff.; Andreas Roth, 'Abstraktions- und Konsensualprinzip und ihre Auswirkungen auf die Rechtsstellung der Kaufvertragsparteien', (1993) 92 *ZVglRWiss* 371 ff.; Ulrich Drobnig, 'Transfer of Property', in Hartkamp et al. (eds.), *Towards a European Civil Code*, pp. 495 ff.; L. P. W. van Vliet, *Transfer of Movables in German, French, English and Dutch Law* (Nijmegen, 2000); Andreas Wacke, 'Eigentumserwerb des Käufers durch schlichten Konsens oder erst mit Übergabe?', (2000) 8 *ZEUP* 254 ff. Neither the abstract nor the consensual system is carried through in practice without exception. Thus there seems to be a trend among the modern legal systems towards a convergence (once again) on the basis of the causal system.

<sup>107</sup> *De jure belli ac pacis*, lib. II, cap. VI, 1.

<sup>108</sup> Cf., e.g., Samuel Pufendorf, *De jure naturae et gentium*, lib. IV, cap. IX.

<sup>109</sup> William M. Gordon, *Studies in the Transfer of Property by Traditio* (Aberdeen, 1970), pp. 172 ff.

<sup>110</sup> Dondorp and Schrage, *Levering*, pp. 49 ff. <sup>111</sup> *Ibid.*, pp. 83 ff.

promise to transfer ownership must have the same effect as the alienation of property itself.<sup>112</sup> Significantly, however, the consensual theory was couched in terms of traditional civilian learning and thus woven into the fabric of the learned law. Grotius even drew on Roman law in order to provide doctrinal support – both on its *usus modernus* and on the classical law as restored by contemporary legal humanism.<sup>113</sup>

## Roman roots V: more ambiguity

### *Mora creditoris*

There are many more examples of this phenomenon: two distinctly different regimes prevailing in the European codes and both of them tracing their pedigree back to Roman law. *Mora creditoris*, for instance, is unknown in some modern legal systems as a specific legal institution. The creditor is liable, in the same way as the debtor, for breach of contract.<sup>114</sup> This was, *mutatis mutandis*, also the view taken by the authors of the *ius commune*: they saw *mora creditoris* as a counterpart, or twin image, of *mora debitoris*.<sup>115</sup> Both were based on fault, and both required the breach of a duty (to deliver in the one case, to receive performance in the other). The concept of *mora creditoris* underlying the provisions of the BGB is quite a different one.<sup>116</sup> For fault as a requirement for *mora creditoris* had lost its basis when it came to be recognised in the second half of the nineteenth century that the creditor is not obliged to receive performance, but only entitled to do so. The institution of *mora creditoris* is merely designed to relieve in certain respects the position of a debtor who has done whatever he could reasonably be expected to do. This doctrine goes back to Friedrich Mommsen;<sup>117</sup> it was emphatically reasserted by Josef Kohler<sup>118</sup> and it impressed the fathers of the BGB.<sup>119</sup> Of course, both Mommsen and the earlier authors of the *ius*

<sup>112</sup> Ibid., pp. 70 ff.    <sup>113</sup> Gordon, *Studies in the Transfer of Property*, pp. 173 ff.

<sup>114</sup> Cf., as far as French law is concerned, the discussion by Uwe Hüffer, *Leistungsstörungen durch Gläubigerhandeln* (Berlin, 1976), pp. 61 ff., 87 ff.

<sup>115</sup> Cf., e.g., Christian Friedrich Glück, *Ausführliche Erläuterung der Pandekten*, vol. IV (Erlangen, 1796), pp. 401 ff.; Carl Otto von Madai, *Die Lehre von der Mora, Dargestellt nach Grundsätzen des Römischen Rechts* (Halle, 1837), pp. 227 ff.

<sup>116</sup> §§ 293 ff. BGB.

<sup>117</sup> *Die Lehre von der Mora nebst Beiträgen zur Lehre von der culpa* (Brunswick, 1855), pp. 133 ff.

<sup>118</sup> 'Annahme und Annahmeverzug', (1879) 17 *JhJb* 261 ff.

<sup>119</sup> 'Motive', in Mugdan, *Die gesammten Materialien*, vol. II, pp. 37 ff.; cf. also Hüffer, *Leistungsstörungen*, pp. 14 ff.

*commune* claimed that their views were derived from, or at least reconcilable with, the sources of Roman law. Contemporary Romanist doctrine tends to side with Mommsen and to attribute the modern, objective construction of *mora creditoris* to the Roman lawyers.<sup>120</sup> Again, however, not all our sources conform to such a general pattern.<sup>121</sup>

### *Set-off*

Or one may look at set-off as a convenient way of satisfying mutual debts. The *magna quaestio* has always been how set-off becomes effective. Modern legal systems deriving from Roman law generally fall into two groups in this regard; § 388 BGB represents a good example of the one, when it states that 'the set-off is made by declaration to the other party'. This rule is based on a tradition dating back to the Glossator Azo.<sup>122</sup> Both French<sup>123</sup> and Austrian<sup>124</sup> law, on the other hand, do not require any such declaration. As soon (and as far) as two debts capable of being set off confront each other, both of them are extinguished *ipso iure*; no account is taken of the will of the two parties concerned. Again, this conception of a set-off can be traced back to the Glossators.<sup>125</sup> How did this dichotomy arise? Because it was not entirely clear how Justinian's compensation worked. 'Ut actiones ipso iure minuant', say the Institutes,<sup>126</sup> and in the *Codex*, too, it is emphasised that 'compensationes ex omnibus actionibus ipso iure fieri'.<sup>127</sup> That is, however, in strange contrast to the language used in other places ('compensationis obici', 'opponi compensationem')<sup>128</sup> and also to the fact that the *ipso iure* effect of *compensatio* is not stressed more strongly in the Digest. And what

<sup>120</sup> Cf. Kaser, *Römische Privatrecht*, vol. I, pp. 517 ff.; Wolfgang Kunkel and Heinrich Honsell, *Römisches Recht*, 4th edn (Berlin, Heidelberg and New York, 1987), pp. 247 ff.

<sup>121</sup> For a discussion see Zimmermann, *Law of Obligations*, pp. 819 ff.

<sup>122</sup> For details, see Heinrich Dernburg, *Geschichte und Theorie der Kompensation*, 2nd edn (Heidelberg, 1868), pp. 284 ff. On the notion of retroactivity traditionally attributed to the declaration of set-off cf. now the historical analysis by Pascal Pichonnaz, 'The Retroactive Effect of Set-Off', (2000) 48 *TR* 541 ff.

<sup>123</sup> Art. 1290 code civil.

<sup>124</sup> § 1438 ABGB. For a modern comparative discussion see Reinhard Zimmermann, 'Die Aufrechnung: Eine rechtsvergleichende Skizze zum Europäischen Vertragsrecht', in *Festschrift für Dieter Medicus* (Cologne, 1999), pp. 721 ff.

<sup>125</sup> Dernburg, *Geschichte und Theorie*, pp. 283 ff. <sup>126</sup> Inst. IV, 6, 30.

<sup>127</sup> C. 4, 31, 14 (Iust.); cf. also C. 4, 31, 4 (Alex.); Paul. D. 16, 2, 4; Paul. D. 16, 2, 21 (all interpolated).

<sup>128</sup> C. 4, 31, 14, 1. Cf. further Siro Solazzi, *La compensazione nel diritto romano*, 2nd edn (Naples, 1950), pp. 166 ff.

is the reason for this ambiguity in our sources? It lies in the distinctly procedural flavour that was one of the most characteristic features of set-off in classical Roman law. Whether, and if so, in which manner and under which circumstances a set-off could be effected, depended entirely on the nature of the formula applicable in a given situation.<sup>129</sup> Thus, the Roman lawyers never developed a uniform and systematic approach to the problem of set-off, and Justinian was faced with a formidable task when he recognised the need to devise a generalised doctrine, that was no longer dictated by procedural niceties. After all, the formulary procedure had been abandoned. In spite of all his efforts, however, he did not manage to eradicate all traces of the older legal layers.

### The process of generalisation

Generalisation of rules and institutions, concepts and criteria of Roman law is a characteristic feature of the civilian tradition.<sup>130</sup> Often, that process had already been started by the classical Roman lawyers, who built on the foundations of the ancient *ius civile*; it was carried on by Justinian; and it was further advanced by the jurists of the *ius commune*. Sometimes a reaction occurred against these too far-flung generalities. The codifications, of course, reflect the results of these developments. Set-off provides a rather inconspicuous example. The evolution of the law of delict is much more spectacular.

### *The evolution of the law of delict*

The point of departure was a quaintly worded enactment from the third century BC. Even in Roman law this statute had been extended, adapted and modernised in so many ways that a jurist from the time of its enactment would hardly have recognised the late classical (or Justinianic) delict of *damnum culpa datum* as specifically Aquilian; and any legal advice based

<sup>129</sup> For details, see Zimmermann, *Law of Obligations*, pp. 761 ff.

<sup>130</sup> The point is also emphasised by Hartmut Wicke, 'Haftung für Verrichtungsgehilfen in der Europäischen Rechtsgeschichte-Kontinuität durch Generalisierung', in Andreas Thier, Guido Pfeifer and Philipp Grzimek (eds.), *Kontinuitäten und Zäsuren in der Europäischen Rechtsgeschichte* (Frankfurt am Main and Berlin, 1999), pp. 165 ff.; Hartmut Wicke, *Respondeat Superior-Haftung für Verrichtungsgehilfen im römischen, römisch-holländischen, englischen und südafrikanischen Recht* (Berlin, 2000).

merely on the wording of the *lex* would have been hopelessly inadequate. 'Urere frangere rumpere' had been superseded by the all-embracing term 'corrumpere';<sup>131</sup> remedies were granted in cases of indirect causation<sup>132</sup> and even in situations where the substance of the object concerned was not at all affected;<sup>133</sup> fault in the broadest sense of the word became a sufficient basis for liability;<sup>134</sup> the injured party could recover his full 'quod interest';<sup>135</sup> the role of plaintiff was no longer confined to the owner of the object killed or damaged;<sup>136</sup> and the ambit of Aquilian protection had even been extended to damage to freemen.<sup>137</sup>

This process of extension, adaptation and modernisation was carried on by courts and writers of the *ius commune*: almost imperceptibly at first, with small and hesitating steps, but leading, eventually, to the far-ranging, popular and comprehensive remedy described by writers like Samuel Stryk.<sup>138</sup> The famous Enlightenment lawyer Christian Thomasius even set out to pull down 'the Aquilian mask' from the contemporary *actio de damno dato*, which, he said, differed from the Aquilian action as much as a bird from a quadruped.<sup>139</sup> At the same time, however, it was still distinctively civilian. So was the famous general provision of the French<sup>140</sup> and Austrian Codes<sup>141</sup> in which the development culminated. It constituted the statutory version of the 'natural' law of delict as propounded most prominently by Hugo Grotius.<sup>142</sup> 'Ex... culpa obligatio naturaliter oritur, si damnum datum est,

<sup>131</sup> Zimmermann, *Law of Obligations*, pp. 984 ff. For what follows, cf. now also the monographs by Bénédicte Winiger, *La responsabilité aquilienne romaine: Damnum iniuria datum* (Basel and Frankfurt am Main, 1997) and Wolfgang Freiherr Raitz von Frenztz, *Lex Aquilia und Negligence* (Baden-Baden, 2000), pp. 44 ff.

<sup>132</sup> Zimmermann, *Law of Obligations*, pp. 978 ff. <sup>133</sup> Ibid., pp. 986 ff.

<sup>134</sup> Ibid., pp. 1005 ff. <sup>135</sup> Ibid., pp. 969 ff., 973 ff.

<sup>136</sup> Ibid., pp. 994 ff. <sup>137</sup> Ibid., n. 50, pp. 1014 ff.

<sup>138</sup> 'Tituli praesentis usus amplissimus est, cum omnium damnorum reparatio ex hoc petatur, si modo ulla alterius culpa doceri possit': *Usus modernus pandectarum*, lib. IX, tit. II, § 1. For details of the development, see Horst Kaufmann, *Rezeption und usus modernus der actio legis Aquiliae* (Cologne and Graz, 1958); Coing, *Europäisches Privatrecht*, vol. I, pp. 509 ff.; Zimmermann, *Law of Obligations*, pp. 1017 ff.; Jan Schröder, 'Die zivilrechtliche Haftung für schuldhaftes Schadenszufügungen im deutschen usus modernus', in *La responsabilità civile da atto illecito nella prospettiva storico-comparatistica* (Torino, 1995), pp. 142 ff.; Freiherr Raitz von Frenztz, *Lex Aquilia und Negligence*, pp. 71 ff.

<sup>139</sup> *Larva legis Aquiliae detracta actioni de damno dato*, 1703, § 1. For a modern edition, with translation and commentary, of that text see Margaret Hewett and Reinhard Zimmermann, *Larva Legis Aquiliae* (Oxford and Portland, Oreg., 2000).

<sup>140</sup> Art. 1382 code civil. <sup>141</sup> § 1295 ABGB.

<sup>142</sup> On the development from Grotius to the code civil, see Robert Feenstra, *Vergelding en vergoeding*, 2nd edn (Deventer, 1993), pp. 15 ff.; Zimmermann, *Law of Obligations*, pp. 1036, n. 248.

nempe ut id resarciatur', he had postulated,<sup>143</sup> using terms and concepts that were thoroughly familiar to anybody even vaguely acquainted with the tradition of Aquilian liability.

One of the core features of natural law theories concerning delictual liability was, of course, their readiness to provide compensation for purely patrimonial loss. Both § 1295 ABGB and art. 1382 code civil reflect this way of thinking. Even this, however, was not a revolutionary novelty. For a somewhat equivocal phrase in Inst. IV, 3, 16 i.f.<sup>144</sup> could, if taken out of context, be read to imply that according to Roman law any *damnum* was recoverable, irrespective of whether it had flowed from damage to the plaintiff's property or person. This wide interpretation had gained ground in the Middle Ages, and, as a result, Aquilian protection had become available in cases of purely patrimonial loss long before the natural lawyers.<sup>145</sup> The Pandectists of the nineteenth century, on the other hand, predominantly advocated a return to the more limited scope of Aquilian liability in Roman law,<sup>146</sup> and it was this view which found expression in § 823 I BGB: a certain number of specific rights and interests are listed,<sup>147</sup> and it is only by violating one of them that a person may become liable in delict. Neither the German nor the French Codes have conclusively settled the

On the history of the relevant provision in the Italian codice civile (art. 2043) see Guido Alpa, 'Unjust Damage and the Role of Negligence: Historical Profile', (1994) 9 *Tulane European and Civil Law Forum* 147 ff.

<sup>143</sup> *De jure belli ac pacis*, lib. II, cap. XVII, 1. On Grotius' general provision of delictual liability, see Robert Feenstra, 'Das Deliktsrecht bei Grotius, insbesondere der Schadensersatz bei Tötung und Körperverletzung', in Feenstra and Zimmermann (eds.), *Das römisch-holländische Recht*, pp. 429 ff.

<sup>144</sup> 'Sed si non corpore damnum fuerit datum neque corpus laesum fuerit, sed alio modo damnum alicui contigit . . . placuit eum qui obnoxius fuerit in factum actione teneri.'

<sup>145</sup> See Kaufmann, *Rezeption*, pp. 46 ff., 62 ff.; Zimmermann, *Law of Obligations*, pp. 1023 sq.; Schröder, 'Zivilrechtliche Haftung', pp. 147 ff. Cf. also, for instance, Thomas Kiefer, *Die Aquilische Haftung im 'Allgemeinen Landrecht für die Preussischen Staaten' von 1794* (Pfaffenweiler, 1989), who draws attention to the continuity between the doctrines of the *usus modernus* and the generalised form of delictual liability in the Prussian Code.

<sup>146</sup> Cf., for example, Johann Christian Hasse, *Die Culpa des Römischen Rechts*, 2nd edn (Bonn, 1838), pp. 26 ff.; Windscheid and Kipp, *Lehrbuch*, §§ 451, 455; RGZ 9, 158 (163 ff.); Hans Hermann Seiler, 'Römisches deliktisches Schadensersatzrecht in der obergerichtlichen Rechtsprechung des 19. Jahrhunderts', in *Festschrift für Hermann Lange* (Stuttgart, Berlin and Cologne, 1992), pp. 256 ff.; Ruth Bilstein, *Das deliktische Schadensersatzrecht der Lex Aquilia in der Rechtsprechung des Reichsgerichts* (Münster and Hamburg, 1994), pp. 19 ff., 28 ff.

<sup>147</sup> For details, see Hans-Peter Benöhr, 'Die Redaktion der Paragraphen 823 und 826 BGB', in Zimmermann et al. (eds.), *Rechtsgeschichte und Privatrechtsdogmatik*, pp. 499 ff.; Zimmermann and Verse, 'Die Reaktion', pp. 320 ff. The list contained in § 823 I BGB can, incidentally, also be traced back to Grotius: cf. Feenstra, *Vergelding*, p. 17.

thorny issue of liability for pure economic loss. Courts and legal writers in the one country have had to restrict the range of application of an all too liberal provision,<sup>148</sup> while in the other country they are devising strategies of extending the scope of an all too narrowly conceived liability regime.<sup>149</sup> While starting from two opposing principles, the systems in actual practice therefore tend to converge.<sup>150</sup>

### *The evolution of the law of contract*

Since Gaius, contract has been perceived as the other main branch of the law of obligations. Here we find a similar development from unimposing origins towards the modern general law of contract, which constitutes a central feature of all civilian jurisdictions.<sup>151</sup> In this case, not even the Pandectists attempted to reverse the position. The Roman rule was ‘*nuda pactio obligationem non parit*’.<sup>152</sup> But by the time of Justinian, a whole variety of agreements had in one way or another become legally recognised. First, there were the four famous consensual contracts, already well established in classical Roman law. Then there were the contracts *innominati* (‘*innominati*’ even though some of them had actually acquired individual names). Furthermore, consensual agreements were enforceable, if they had been attached to one of the recognised contracts and had been concluded at the same time as the main contract (*pacta in continenti adiecta*). Then, again, there were two groups of agreements, which were not classified as contracts, but which were nevertheless enforceable: the so-called *pacta praetoria* and *pacta legitima*. Other informal arrangements, which did not fall into these categories, could be raised by way of defence; apart from that they could at least be regarded as *obligationes naturales*.

The *Corpus Juris* thus presented a somewhat patchy picture; it was marked by haphazard distinctions and internal inconsistencies. These

<sup>148</sup> Cf., e.g., *Canadian National Railway Co. v. Norsk Pacific Steamship Co. Ltd.* (1992) 91 DLR (4th) 289 (320 ff.) and Peter Gotthardt, ‘Landesbericht Frankreich’, in Christian von Bar (ed.), *Deliktsrecht in Europa* (Cologne and Munich, 1993), p. 16.

<sup>149</sup> Cf., most recently, Karl Larenz and Claus-Wilhelm Canaris, *Lehrbuch des Schuldrechts*, vol. II/2, 13th edn (Munich, 1994), § 75 I 3, 4.

<sup>150</sup> For a similar conclusion, see Helmut Koziol, ‘Generalnorm und Einzeltatbestände als Systeme der Verschuldenshaftung: Unterschiede und Angleichungsmöglichkeiten’, (1995) 3 *ZEUP* 359 ff.; and see now the comprehensive study by Christian von Bar, *Gemeineuropäisches Deliktsrecht*, vol. II (Munich, 1999), nn. 23 ff.

<sup>151</sup> For details of what follows, see the literature quoted above, n. 68.

<sup>152</sup> *Ulp. D.* 2, 14, 7, 4.

inconsistencies, of course, presented an intellectual challenge to Glossators, Commentators and the later generations of learned lawyers and triggered off their efforts to establish a more rational scheme. Canon law, the law merchant, supposedly 'Germanic' notions of good faith, Spanish scholasticism inspiring sixteenth-century courts and treatise writers in the southern Netherlands, natural law theories: many factors contributed to the ultimate recognition of the principle 'ex nudo pacto oritur actio' (or: 'pacta (nuda) sunt servanda'). In a way, one can say that it was a triumph of Roman law in spite of Roman law. That contracts based on nothing more than formless consent are, as a rule, actionable is recognised (though no longer always specifically spelt out<sup>153</sup>) in all modern Continental codes.

### *The evolution of the law of unjustified enrichment*

The move towards a general law of contract was bound to have consequences for the law of unjustified enrichment. The Roman system of *condictiones* tied in with and supplemented the contractual system.<sup>154</sup> Particularly important was the *condictio indebiti*, for it covered the paradigmatic situation of 'indebitum solutum'.<sup>155</sup> Recognition of 'ex nudo pacto oritur actio' was bound to extend its range of application even further. The main function of the *condictio indebiti* is still to supplement the law of contract. It has to be available whenever a transfer fails to achieve what it is supposed to achieve: the discharge of an obligation that the transferor had incurred towards the transferee. Not surprisingly, therefore, in all Continental legal systems we find general rules dealing with the restitution of benefits conferred by transfer.<sup>156</sup> The significance of these rules within a given legal system may vary. But whether they subscribe to a consensual, a causal or

<sup>153</sup> It is usually taken to be implicit in § 305 BGB. But see, as far as France is concerned, art. 1134 code civil.

<sup>154</sup> For details, see Berthold Kupisch, *Ungerechtfertigte Bereicherung: geschichtliche Entwicklungen* (Heidelberg, 1987), pp. 4 ff.; Zimmermann, *Law of Obligations*, pp. 841 ff.; and see the contributions to Eltjo Schrage (ed.), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, 2nd edn (Berlin, 1999).

<sup>155</sup> For details, see Zimmermann, *Law of Obligations*, pp. 834 ff., 848 ff. In both Gaius' and Justinian's Institutes 'indebitum solutum' is the only form of enrichment liability dealt with: Gai. III, 91 (and see Gai. D. 44, 7, 5, 3 read in conjunction with Gai. D. 44, 7, 1 pr.); Inst. III, 27, 6.

<sup>156</sup> For all details, see Reinhard Zimmermann, 'Unjustified Enrichment: The Modern Civilian Approach', (1995) 15 *OJLS* 403 ff.



an abstract system of transfer of ownership, all legal systems provide enrichment remedies, and they all specifically emphasise, and single out, the claim of enrichment by transfer.

Historically, this uniformity of approach is based on the common Roman heritage, for we are dealing here with the modern, extended version of the *condictio indebiti*. Even the new Dutch Civil Code devotes nine sections to ‘onverschuldigde betaling’, before it deals with other cases of unjustified enrichment.<sup>157</sup> Characteristically, the modern version of the *condictio indebiti* has abandoned, step by step, certain idiosyncrasies of its Roman ancestor; characteristically, too, this gradual development is still reflected in the different codes.<sup>158</sup>

Apart from that, however, there have been, over the last 300 years, repeated attempts to formulate a general enrichment action – a magic formula comprising all instances of unjustified retention even apart from *indebitum solutum*. In France and Germany the decisive advances were launched from two completely different points of departure. The French courts<sup>159</sup> recognised a general enrichment action on the basis of the *actio de in rem verso utilis*, a claim based historically on a single passage in Justinian’s *Code*,<sup>160</sup> accepted by the code civil – at best – in a vestigial form, and generalised by a German professor writing a textbook on French private law.<sup>161</sup> Friedrich Carl von Savigny, on the other hand, chose the *condictio sine causa (generalis)* as the most suitable means to overcome the Roman fragmentation.<sup>162</sup> But even before the Court de Cassation and Savigny, Hugo Grotius had drawn

<sup>157</sup> Artt. 203:6 ff. BW. For an analysis of the historical development see Eltjo J. H. Schrage, ‘The Law of Restitution: The History of Dutch Legislation’, in Schrage *Unjust Enrichment*, pp. 323 ff.

<sup>158</sup> See the discussion in Zimmermann, ‘Unjustified Enrichment’, 408 ff.; as far as the law of unjustified enrichment under the *usus modernus pandectarum* is concerned, see Berthold Kupisch, ‘Ungerechtfertigte Bereicherung’, in Schrage (ed.), *Unjust Enrichment*, pp. 237 ff.

<sup>159</sup> Arrêt Boudier, 15.6.1892, Recueil Dalloz 1892 (première partie), p. 596.

<sup>160</sup> C. 4, 26, 7, 3 (Diocl. et Max.).

<sup>161</sup> See Karl Salomo Zachariä von Lingenthal, *Handbuch des Französischen Civilrechts*, vol. II (Heidelberg, 1808), §§ 399 ff. The astonishing career of the *actio de in rem verso* has been described by Berthold Kupisch, *Die Versionsklage* (Heidelberg, 1965). See further John P. Dawson, *Unjust Enrichment* (Boston, 1951), pp. 85 ff.; Robert Feenstra, ‘Die ungerechtfertigte Bereicherung in dogmengeschichtlicher Sicht’, (1972) 29 *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 298 ff.; Coing, *Europäisches Privatrecht*, vol. I, pp. 498 ff.; Zimmermann, *Law of Obligations*, pp. 878 ff.

<sup>162</sup> *System des heutigen römischen Rechts*, vol. V (Berlin, 1841), pp. 503 ff. For an analysis, see Horst Hammen, *Die Bedeutung Friedrich Carl v. Savignys für die allgemeinen dogmatischen Grundlagen des Deutschen Bürgerlichen Gesetzbuches* (Berlin, 1983), pp. 187 ff.

together the different threads spun by his predecessors from the material available within the *Corpus Juris*, and had woven them into a single, crisp and comprehensive formula.<sup>163</sup> Even for this formula the Digest, of course, provided a convenient model; it was the general equitable principle enunciated by Pomponius: ‘...hoc natura aequum est neminem cum alterius detrimento fieri locupletiores.’<sup>164</sup>

### The ambivalence of generalisation

The modern general concept of contract is, ultimately, derived from the consensual contracts of Roman law. On the other hand, one could also describe the modern regime of ‘ex nudo pacto oritur actio’ as a reversal of the Roman rule of ‘nuda pactio obligationem non parit’. This kind of ambivalence is typical of the civilian tradition. One can think of a variety of examples where the second aspect (the gradual erosion of a central principle of Roman contract law by means of Roman learning and, usually, even on the basis of a handful of sources from the *Corpus Juris*) comes out even more strongly.

#### Specific performance

‘Omnis condemnatio pecuniaria’ was one such principle. It had been of fundamental importance in classical Roman law.<sup>165</sup> Closely connected with

<sup>163</sup> *De jure belli ac pacis*, lib. II, cap. X, 2. For details, see Robert Feenstra, ‘De betekenis van De Groot and Huber voor de ontwikkeling van een algemene actie uit ongerechtvaardigde verrijking’, in *Uit het recht, Rechtsgeleerde opstellen aangeboden aan mr. P. J. Verdam* (Deventer, 1971), pp. 137 ff.; Robert Feenstra, ‘L’influence de la scolastique espagnole sur Grotius en droit privé: quelques expériences dans des questions de fond et de forme, concernant notamment les doctrines de l’erreur et de l’enrichissement sans cause’, in Robert Feenstra, *Fata Iuris Romani* (Leiden, 1974), pp. 338 ff.; Zimmermann, *Law of Obligations*, pp. 885 ff.; Daniel Visser, ‘Das Recht der ungerechtfertigten Bereicherung’, in Feenstra and Zimmermann (eds.), *Das römisch-holländische Recht*, pp. 370 ff.; Robert Feenstra, ‘Grotius’ Doctrine of Unjust Enrichment as a Source of Obligation: Its Origin and its Influence in Roman-Dutch Law’, in Schrage (ed.), *Unjust Enrichment*, pp. 197 ff.

<sup>164</sup> Pomp. D. 12, 6, 14; cf. also Pomp. D. 50, 17, 206. On the origin and background of this principle and its reception into the legal system, see Christian Wollschläger, ‘Das stoische Bereicherungsverbot in der römischen Rechtswissenschaft’, in *Römisches Recht in der europäischen Tradition, Symposium für Franz Wieacker* (Ebelsbach, 1985), pp. 41 ff.

<sup>165</sup> For what follows, see Coing, *Europäisches Privatrecht*, vol. I, pp. 432 ff.; Zimmermann, *Law of Obligations*, pp. 770 ff.; Karin Nehlsen-von Stryk, ‘Grenzen des Rechtzwangs: Zur Geschichte der Naturalvollstreckung’, (1993) 193 *AcP* 529 ff.; Wilhelm Rütten, ‘Zur Entstehung des

the formulary procedure, it was largely discarded during the ascendancy of the post-classical *cognitio* procedure, but not completely abandoned by Justinian. The *Corpus Juris*, therefore, leaves considerable doubt as to how much ground the principle of specific performance had actually gained in practice. Glossators and Commentators introduced subtle and elaborate distinctions in order to provide some sort of systematic framework for the confusing casuistry of the sources, and even until the days of the *usus modernus* the question continued to be embroiled in disputes. ‘Nemo potest praecise cogi ad factum’ remained the general maxim applicable for *facere* obligations. Via Pothier<sup>166</sup> it even found its way into the French code civil.<sup>167</sup> In Germany, the last vestiges of *omnis condemnatio pecuniaria* were ultimately overcome in the course of the nineteenth century, and parties to a contract are entitled, as a matter of course, to demand performance of their respective obligations *in specie*. This is implicit in § 241 BGB. By and large, the position in German law is representative of the contemporary civilian approach, for even in France art. 1142 code civil has, for all practical purposes, been rendered nugatory.<sup>168</sup>

### *Contracts in favour of third parties*

‘Alteri stipulari nemo potest’ is another principle of Roman law that took a long time and much intellectual effort to overcome.<sup>169</sup> It was taken to prevent the recognition of a contract in favour of third parties. Justinian’s compilers, however, not only retained – and even emphasised – this principle, but also took over, extended or introduced a number of situations in which it did not apply.<sup>170</sup> Thus they provided convenient levers, which sufficiently imaginative lawyers could use to unhinge the principle altogether.

Erfüllungszwangs im Schuldverhältnis’, in *Festschrift für Joachim Gernhuber* (Tübingen, 1993), pp. 939 ff.; Tilman Reppen, *Vertragstreue und Erfüllungszwang in der mittelalterlichen Rechtswissenschaft* (Paderborn, Munich, Vienna and Zurich, 1994).

<sup>166</sup> *Traité des obligations*, n. 160. <sup>167</sup> Art. 1142 code civil.

<sup>168</sup> For a comparative discussion, see Zweigert and Kötz, *Introduction to Comparative Law*, pp. 475 ff.

<sup>169</sup> For all details of the development, see Zimmermann, *Law of Obligations*, pp. 34 ff.; and see also Hein Kötz, ‘Rights of Third Parties: Third Party Beneficiaries and Assignment’, in *International Encyclopedia of Comparative Law*, vol. VII (Tübingen, 1992), ch. 13, nn. 4 ff.; Kötz, *European Contract Law*, pp. 245 ff.

<sup>170</sup> Cf., for example, C. 8, 54, 3 (Diocl. et Max.); Ulp. D. 13, 7, 13 pr.; C. 3, 42, 8 (Diocl. et Max.). The latter texts are probably interpolated.

In the course of the seventeenth century, and under the combined auspices of *usus modernus* and natural law, the contract in favour of third parties came to be very widely accepted, albeit on the basis that the third party was required to accept the right which was to be conferred on him. This was a consequence of the emphasis that natural lawyers, and most notably Hugo Grotius,<sup>171</sup> placed on will and consensus as the essential elements of contract law. Even before Grotius, incidentally, Antonius Perezius and Covarruvias had drawn attention to the fact that recognition of contracts affecting third parties followed from the endorsement of 'ex nudo pacto oritur actio'.<sup>172</sup>

It was in the garb of this consensual construction that the contract in favour of a third party made its way into the Prussian, Bavarian and Saxonian codifications. The Austrian Code was more conservative in this respect and retained the 'alteri stipulari nemo potest' principle.<sup>173</sup> So did, under the influence of Robert-Joseph Pothier,<sup>174</sup> the French code civil.<sup>175</sup> It made provision for only two narrowly defined exceptions in art. 1121: a 'stipulation au profit d'un tiers' is valid, 'lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre'. It is not difficult to discover the sources from the *Corpus Juris* on which these exceptions were based. French courts have managed to prize open this back door and to introduce into French law – *contra legem*, as it were – the modern contract in favour of third parties.<sup>176</sup> According to the 'théorie de la création directe de l'action' the third party acquires the right directly at the time when promisor and promisee conclude their contract; his own declaration does not have a constitutive effect. This has brought French law into line with modern German law; the 'mature'<sup>177</sup> solutions found in §§ 328 ff. are due to the conceptual clarity achieved by the Pandectists.<sup>178</sup> The Austrian Code, as a result of a revision in 1916, follows a very similar pattern.

<sup>171</sup> *De jure belli ac pacis*, lib. II, cap. XI, 18.

<sup>172</sup> See Coing, *Europäisches Privatrecht*, vol. I, p. 425; and see Antonius Perezius, *Praelectiones in duodecim libros codicis*, lib. VIII, tit. LV, n. 9.

<sup>173</sup> § 881 ABGB. <sup>174</sup> *Traité des obligations*, nn. 57 ff. <sup>175</sup> Art. 1165 code civil.

<sup>176</sup> Cf. Zweigert and Kötz, *Introduction to Comparative Law*, pp. 462 ff.; Kötz, *European Contract Law*, pp. 249 ff.

<sup>177</sup> Zweigert and Kötz, *Introduction to Comparative Law*, p. 468.

<sup>178</sup> Cf. esp. Windscheid and Kipp, *Lehrbuch*, § 316.

## Intellectual unity beyond codification

### *Roman law, natural law and pandectist legal science*

The historical development of the contract in favour of third parties gives rise to two further observations. Firstly, contrary to what is often alleged, the BGB is not necessarily more 'Roman' in its content than the so-called natural law codes. The main thrust of natural law was not directed against the rules and institutions of Roman law as such, but rather against the complexity of sources, the lack of system and transparency, and the great number of intractable doctrinal disputes that had for centuries enveloped its application and bedevilled its comprehensibility. The nineteenth-century Pandectists,<sup>179</sup> on the other hand, who prepared the ground for the BGB were often quite happy to endorse, perpetuate and further refine a development that was clearly moving away from the ancient Roman sources. In essence, they advocated organic development rather than sterile historicism; and while it is easy, today, to criticise their methodology one must not, at the same time, forget that they created a legal framework not only of unequalled sophistication but also suited to the requirements of the first one hundred years of the 'Modern'.<sup>180</sup>

For another illustration of this point we may turn to the problem of the determination of price. Article 1108 code civil requires every contract to have 'un objet certain'. 'Objet' in terms of this rule is also, for instance, the counterperformance to be given for the performance of services, the transfer of an object, etc. As far as a contract of sale is concerned, art. 1591 code civil specifically determines that the price has to be 'déterminé et désigné par les parties'. These rules are based, unmistakably, on Roman law. Article 1591 is the codified version of the 'certum pretium' requirement for the Roman contract of sale.<sup>181</sup> The more general rule of art. 1108, on the other hand, appears to represent an intermediate stage within the

<sup>179</sup> For an overview in English, see Mathias Reimann, 'Nineteenth Century German Legal Science', (1990) 13 *Boston College LR* 837 ff.; Wieacker, *History of Private Law*, pp. 279 ff.; Reinhard Zimmermann, 'Heutiges Recht, Römisches Recht und heutiges Römisches Recht', in Zimmermann et al. (eds.), *Rechtsgeschichte und Privatrechtsdogmatik*, pp. 9 ff. For a vindication of their leading representative, Bernhard Windscheid, see Ulrich Falk, *Ein Gelehrter wie Windscheid* (Frankfurt am Main, 1989).

<sup>180</sup> Cf. Paul Johnson, *The Birth of the Modern-World Society 1815–1830* (New York, 1991).

<sup>181</sup> It is discussed in a number of interesting fragments; see my Zimmermann, *Law of Obligations*, pp. 253 ff.

grand development from the fragmented Roman law of contracts (which focused on individual types of contract, the constituent elements of which, as a matter of course, had to be the object of the agreement of the parties) towards the modern, general concept of contract, which emphasises the freedom of the parties to design their own contract.<sup>182</sup> Thus, according to the modern point of view, it only has to be ascertained whether the parties had intended to be bound.<sup>183</sup> This is, indeed, the approach adopted by the BGB.<sup>184</sup> Thus, in particular, determination of the price may be left to one of the contracting parties, whether he has to decide 'in an equitable manner' or even in his free discretion.<sup>185</sup> This obviously represents a deviation from Roman law. It is based on pandectist doctrine<sup>186</sup> which had managed to venture, in Jhering's famous words, beyond Roman law by means of Roman law. In sharp contradistinction to the strict requirements of artt. 1129, 1591 code civil which have given rise to a complex casuistry,<sup>187</sup> §§ 315 ff. BGB appear to have stood the test of time. It is therefore hardly surprising that these more liberal principles are also gaining ground internationally.<sup>188</sup>

### *Factors counterbalancing nationalistic isolation*

The second point relates to the intellectual unity of the civilian tradition. We have emphasised that it existed until the end of the eighteenth century;

<sup>182</sup> Cf. Barry Nicholas, *The French Law of Contract*, 2nd edn (Oxford, 1992), pp. 115 ff.

<sup>183</sup> Cf. Wolfgang Witz, *Der unbestimmte Kaufpreis* (Neuwied and Frankfurt am Main, 1989), pp. 89 ff., 155 ff. and the comparative discussion by Barry Nicholas, 'Certainty of Price', in *Comparative and Private International Law: Essays in Honour of J. H. Merryman* (Berlin, 1990), pp. 247 ff.; A. T. van Mehren, 'The Formation of Contracts', in *International Encyclopedia of Comparative Law*, vol. VII ch. 9, nn. 50 ff.

<sup>184</sup> §§ 315 ff. BGB. <sup>185</sup> § 315 I BGB.

<sup>186</sup> For details, see Hans-Joachim Winter, 'Die Bestimmung der Leistung durch den Vertragspartner oder Dritte (§§ 315 bis 319 BGB) unter besonderer Berücksichtigung der Rechtsprechung und Lehre des 19. Jahrhunderts' (Dr. iur. thesis, Frankfurt, 1979).

<sup>187</sup> See Witz, *Unbestimmte Kaufpreis*, pp. 21 ff.; Christian Larroumet, *Droit civil*, vol. III, 2nd edn (Paris, 1990), nn. 386 ff.

<sup>188</sup> Cf. Artt. 6:104 ff. of the Principles of European Contract Law (for comment see Zimmermann, 'Konturen', 488 sq.); cf. also art. 5.7 of the Principles of International Commercial Contracts (Unidroit). In the meantime, even the Assemblée plénière of the Court de Cassation has adopted a much more liberal approach to long-term supply agreements and has reversed its previous interpretation of artt. 1129 c.c.: Dalloz 1996, 13; and see the analysis by Claude Witz and Gerhard Wolter, 'Das Ende der Problematik des unbestimmten Preises in Frankreich', (1996) 4 *ZEUP* 648 ff.

and that it has greatly been threatened by the nationalisation of law and legal scholarship resulting from the introduction of codifications within the confines of the modern nation-states. But there have been factors counterbalancing this nationalistic isolation. The most important of them, of course, provides the basis for the present chapter: all these codifications are, and have remained, emanations of one tradition. Characteristically, therefore, neither the French code civil nor the Austrian codifications were intended to be codes of national, specifically French or Austrian, law. They were universalistic in spirit, approach and outlook.<sup>189</sup> The same is true of the German BGB, even if it was caught up in a surge of nationalistic sentiment. For it was only in exceptional instances that this nationalistic attitude, reinforced by a specifically anti-French bias, left its mark on the content of the Code.<sup>190</sup>

The common tradition underlying the modern codifications also contributed to the continued existence of a network of intellectual contacts between them. The code civil, in particular, was able to maintain its dominant position in large parts of Europe even after Napoleon had been defeated.<sup>191</sup> Down to the end of the nineteenth century, for instance, it remained in force in the Prussian Rhine Province and in other German areas on the left bank of the Rhine. The Grand Duchy of Baden adopted the Badisches Landrecht, which was based on a translation of the code civil.<sup>192</sup> One entire division of the Imperial Supreme Court, the second 'senate', dealt with the appeals involving French law. Of course, one did not refer to French but to Rhenish law,<sup>193</sup> and the third senate was therefore dubbed the 'Rhenish' one. Pandectist legal learning, on the other hand, was influential all over

<sup>189</sup> Cf. n. 45 above. Interestingly, Hendrik Kooiker even draws attention to a 'third renaissance' of Roman law (after the introduction of the French and Dutch codifications!): *Lex scripta abrogata* (Nijmegen, 1996); cf. also Zimmermann, 'Heutiges Recht', pp. 2 ff.

<sup>190</sup> Cf. the examples provided in Zimmermann, 'Civil Code and Civil Law', pp. 87 ff.

<sup>191</sup> Cf. Elmar Wadde, 'Französisches Recht und deutsche Gesetzgebung im 19. Jahrhundert', in Schulze (ed.), *Europäische Rechts- und Verfassungsgeschichte*, pp. 201 ff.; Schulze, 'Französisches Recht', pp. 23 ff.; and the other contributions in the same volume.

<sup>192</sup> According to Helmut Coing, 'Einleitung', in Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, vol. I, 12th edn (Berlin, 1980), n. 24, 16.6 per cent of the population of the German Reich (i.e. more than 8 million persons) in 1890 lived according to French law. Cf. also Diethelm Klippel (ed.), *Deutsche Rechts- und Gerichtskarte* (Goldbach, 1996).

<sup>193</sup> Cf. Hans-Jürgen Becker, 'Das Rheinische Recht und seine Bedeutung für die Rechtsentwicklung in Deutschland im 19. Jahrhundert', (1985) *JuS* 338 ff.; Antonio Grilli, 'Das linksrheinische Partikularrecht und das römische Recht in der Rechtsprechung der Cour d'Appel/Cour Impériale de Trèves nach 1804', in Schulze (ed.), *Französisches Recht*, pp. 67 ff.

Europe: from Sweden<sup>194</sup> to the Netherlands<sup>195</sup> and Italy,<sup>196</sup> and not least of all in France.<sup>197</sup> This reception was not confined to methodology and system; we also find impulses penetrating to the level of private law doctrine. Rudolf von Jhering's famous *culpa-in-contrahendo* doctrine, based on the rather shaky foundations of a handful of Roman sources concerning the sale of *res publicae*, *res divini iuris* and *liberi homines*,<sup>198</sup> provides just one example.<sup>199</sup>

In view of the similarity of language, German influence on Austrian legal science and on Austrian law was, of course, particularly strong.<sup>200</sup> Thus, for instance, the general provision of delictual liability in § 1295 BGB was reduced, by way of interpretation, into a kind of condensed version of §§ 823 I, 823 II BGB. In 1916 the legislature even added, totally unnecessarily one would have thought, a second subsection to § 1295 ABGB which corresponds to § 826 BGB.<sup>201</sup>

<sup>194</sup> Jan-Olof Sundell, 'German Influence on Swedish Private Law Doctrine 1870–1914', (1991) *SSL* 237 ff.

<sup>195</sup> Cf. J. H. A. Lokin, 'Het NBW en de pandektistiek', in *Historisch vooruitzicht, Opstellen over rechtsgeschiedenis in burgerlijk recht, BW-krant jaarboek 1994*, pp. 125 ff.

<sup>196</sup> Cf. e.g. Reiner Schulze (ed.), *Deutsche Rechtswissenschaft und Staatslehre im Spiegel der italienischen Rechtskultur während der zweiten Hälfte des 19. Jahrhunderts* (Berlin, 1990).

<sup>197</sup> See the comprehensive study by Alfons Bürge, *Das französische Privatrecht im 19. Jahrhundert: Zwischen Tradition und Pandektenwissenschaft, Liberalismus und Etatismus* (Frankfurt am Main, 1991), pp. 150 ff.; cf. also Alfons Bürge, 'Der Einfluß der Pandektenwissenschaft auf das französische Privatrecht im 19. Jahrhundert: Vom Vermögen zum patrimoine', in Schulze (ed.), *Französisches Zivilrecht*, pp. 221 ff.; Alfons Bürge, 'Ausstrahlungen der historischen Rechtsschule in Frankreich', (1997) 5 *ZEUP* 643 ff.

<sup>198</sup> Cf. Zimmermann, *Law of Obligations*, pp. 241 ff.; Erich Schanze, 'Culpa in contrahendo bei Jhering', (1978) 7 *Ius Commune* 326 ff.; Dieter Medicus, 'Zur Entdeckungsgeschichte der culpa in contrahendo', in *Iuris Professio, Festgabe für Max Kaser* (Vienna, 1986), pp. 169 ff.; Tomasz Giaro, 'Culpa in Contrahendo: eine Geschichte der Wiederentdeckungen', in Falk and Mohnhaupt (eds.), *Bürgerliche Gesetzbuch*, pp. 113 ff.

<sup>199</sup> Stephan Lorenz, 'Die culpa in contrahendo im französischen Recht', (1994) 2 *ZEUP* 218 ff.; Christian von Bar, *Gemeineuropäisches Deliktsrecht*, vol. I (Munich, 1996), nn. 472 ff.

<sup>200</sup> Cf., e.g., Werner Ogris, *Der Entwicklungsgang der österreichischen Privatrechtswissenschaft im 19. Jahrhundert* (Berlin, 1968); Werner Ogris, 'Die Wissenschaft des gemeinen römischen Rechts und das österreichische Allgemeine bürgerliche Gesetzbuch', in Helmut Coing and Walter Wilhelm (eds.), *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert*, vol. I (Frankfurt am Main, 1974), pp. 153 ff.; Wilhelm Brauner, 'Privatrechtsfortbildung durch Juristenrecht in Exegetik und Pandektistik in Österreich', (1983) 5 *ZNR* 22 ff.

<sup>201</sup> For a critical evaluation of the assimilation between the German and Austrian laws of delict, see Rudolf Reischauer, in Peter Rummel (ed.), *Kommentar zum ABGB*, vol. II (Vienna, 1984), § 1294, n. 16; for a different view, see Friedrich Harrer, in Michael Schwimann (ed.), *Praxiskommentar zum ABGB*, vol. V (Vienna, 1987), § 1295, nn. 1 ff. Very much the same development, interestingly, appears to have occurred in Swiss law (with regard to the general provision of



Similarly important was the rise of comparative law as a new and independent branch of legal scholarship in the course of the nineteenth century.<sup>202</sup> Comparative research provided a rich source of inspiration for draftsmen of nineteenth- and twentieth-century legislation.<sup>203</sup>

### New legal rules

We have been referring to instances where the general current of civilian opinion was drifting away from a principle of Roman law. In other cases new legal doctrines were developed and grafted onto the traditional law of obligations. But although they were new, these doctrines were often crafted of Roman substance. Thus, for example, the medieval lawyers could avail themselves of some building blocks hewn from the Digest<sup>204</sup> in order to establish the notion that only those agreements that rest upon a lawful *causa* are actionable. This was a crucial step facilitating the transition from ‘nuda pactio obligationem non parit’ to the counter-rule ‘ex nudo pacto oritur actio’.<sup>205</sup>

‘Fidem frangenti fides frangitur’ was a principle of medieval canon law<sup>206</sup> which was transformed by virtue of a suspensive condition read into the contract: ‘subintelligitur conditio “si fides servetur”’.<sup>207</sup> People usually promise a performance in order to obtain a counterperformance. If the other party fails to perform, they do not, presumably, want to be

art. 41 I OR); cf. Peter Gauch, ‘Deliktshaftung für reinen Vermögensschaden’, in *Festschrift für Max Keller* (Zurich, 1989), p. 136.

<sup>202</sup> Cf. Zweigert and Kötz, *Introduction to Comparative Law*, pp. 51 ff.; Max Rheinstein, *Einführung in die Rechtsvergleichung*, 2nd edn (Munich, 1987), pp. 37 ff.

<sup>203</sup> Cf., in particular, Helmut Coing, ‘Rechtsvergleichung als Grundlage von Gesetzgebung im 19. Jahrhundert’, (1978) 7 *Ius Commune* 168 ff. Cf. also, for instance, the preparatory drafts for the various parts of the BGB: Werner Schubert (ed.), *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches* (Berlin and New York, 1980 ff.).

<sup>204</sup> In particular Aristo/Ulp. D. 2, 14, 7, 2; Ulp. D. 2, 17, 7, 4; Ulp. D. 44, 4, 2, 3; further details in Zimmermann, *Law of Obligations*, pp. 549 ff.

<sup>205</sup> Cf. n. 68 above. And see the contributions to Letizia Vacca (ed.), *Causa e contratto nella prospettiva storico-comparatistica* (Torino, 1997).

<sup>206</sup> Georges Boyer, *Recherches historiques sur la résolution des contrats* (Paris, 1924), pp. 220 ff.; J. A. Ankum, *De voorouders van een boze fee* (Zwolle, 1964), pp. 10 ff.; Friedrich Merzbacher, ‘Die Regel “Fidem frangenti fides frangitur” und ihre Anwendung’, (1982) 99 ZSS (Kanonistische Abteilung) 339 ff.

<sup>207</sup> Cf., e.g., Decretales Gregorii IX, lib. II, tit. XXIV, cap. XXV and Boyer, *Recherches historiques*, pp. 220 ff., 240 ff.

bound either. A general right of rescission in case of breach of contract was never recognised in Roman law.<sup>208</sup> Suspensive conditions and the skilful use of legal fictions, however, were.<sup>209</sup> The natural lawyers took up this line of development,<sup>210</sup> which eventually led to the incorporation of a rule into the code civil according to which ‘la condition résolutoire est toujours sousentendue dans les contrats synallagmatiques, pour le cas où l’une des deux parties ne satisfera point à son engagement’.<sup>211</sup> The draftsmen of the BGB availed themselves of a tacit *lex commissoria* when they granted the creditor a unilateral right of rescission in cases of impossibility of performance and *mora debitoris*.<sup>212</sup>

The device of an implied condition also stood at the cradle of the *clausula rebus sic stantibus*, a proviso according to which a contract is binding only as long and as far as matters remain the same as they were at the time of conclusion of the contract.<sup>213</sup> It became part of the *usus modernus* as well as of the systematic endeavours of the natural lawyers, and it attained great prominence in the field of private law and far beyond. And if, technically, the *clausula* took the form of a *conditio tacita*, even its substance was inspired by the Roman sources, though in this case not the legal ones. Moral philosophers like Seneca<sup>214</sup> and Cicero<sup>215</sup> had been the first to draw attention to the change of circumstances and thus to sow the seed for a legal principle of great importance.

<sup>208</sup> Fritz Schulz very pointedly refers to an ‘iron rule of Roman law which the classical lawyers unflinchingly observed’. But see Zimmermann, *Law of Obligations*, p. 578.

<sup>209</sup> Cf. generally Reinhard Zimmermann, ‘“Heard Melodies are Sweet, but Those Unheard are Sweeter . . .”. Conditio tacita, Implied Conditions und die Fortbildung des europäischen Vertragsrechts’, (1993) 193 *AcP* 121 ff.

<sup>210</sup> For details, see Karl Otto Scherner, *Rücktrittsrecht wegen Nichterfüllung* (Wiesbaden, 1965), pp. 92 ff.; Coing, *Europäisches Privatrecht*, vol. I, p. 444.

<sup>211</sup> Art. 1184 code civil. On this rule, and its history, see Boyer, *Recherches historiques*, pp. 381 ff., 11 ff.; Hans-Georg Landfermann, *Die Auflösung des Vertrages nach richterlichem Ermessen als Rechtsfolge der Nichterfüllung im französischen Recht* (Frankfurt am Main and Berlin, 1968); Scherner, *Rücktrittsrecht*, pp. 135 ff.

<sup>212</sup> For details, see Hans G. Leser, *Der Rücktritt vom Vertrag* (Tübingen, 1975), pp. 16 ff.

<sup>213</sup> For details, see Zimmermann, *Law of Obligations*, pp. 579 ff. and, since then, Ralf Köbler, *Die ‘clausula rebus sic stantibus’ als allgemeiner Rechtsgrundsatz* (Tübingen, 1991); Michael Rummel, *Die ‘clausula rebus sic stantibus’* (Baden-Baden, 1991); Zimmermann, ‘“Heard melodies”’, 134 ff.; Klaus Luig, ‘Dogmengeschichte des Privatrechts als rechtswissenschaftliche Grundlagenforschung’, (1993) 20 *Ius Commune* 193 ff.; Klaus Luig, ‘Die Kontinuität allgemeiner Rechtsgrundsätze: Das Beispiel der clausula rebus sic stantibus’, in Zimmermann et al. (eds.), *Rechtsgeschichte und Privatrechtsdogmatik*, pp. 171 ff.

<sup>214</sup> *De beneficiis*, lib. IV, XXXV, 3. <sup>215</sup> *De officiis*, 3, XXV-95.

## Main features of a European law of obligations

The main theme of what has been said, so far, is that of considerable diversity within a fundamental intellectual unity — a unity created largely by a common tradition. If we finally try to assess the main features of a common European law of obligations, as derived from Roman law and embodied in the modern codes, we may include the following points.<sup>216</sup>

The law of obligations constitutes a body of law that is distinct from property law. The one deals with *iura in personam*, the other with *iura in rem*. Within the law of obligations there is a fundamental distinction between contract and delict. This distinction does not, however, represent an exhaustive basis for the systematic analysis of the law of obligations. In particular, unjustified enrichment and *negotiorum gestio* are recognised as independent sources of obligations. Delictual liability, as a rule, is based on fault. There are, however, also cases of purely risk-based liability. We have a general remedy for the restitution of benefits conferred without obligations, the core features of which are the notions of ‘transfer’ and ‘without legal

<sup>216</sup> There is not, to my knowledge, any comprehensive comparative investigation of this nature. As far as German law is concerned, cf., however, Max Kaser, ‘Der römische Anteil am deutschen bürgerlichen Recht’, (1967) *JuS* 337 ff.; Eduard Picker, ‘Zum Gegenwartswert des Römischen Rechts’, in Hans Bungert (ed.), *Das antike Rom in Europa* (Regensburg, 1985), pp. 289 ff.; Rolf Knütel, ‘Römisches Recht und deutsches Bürgerliches Recht’, in Walter Ludwig (ed.), *Die Antike in der europäischen Gegenwart* (Göttingen, 1993), pp. 43 ff.; for Dutch law, see Robert Feenstra, *Romeinsrechtelijke grondslagen van het Nederlands privaatrecht*, 5th edn (Leiden, 1990); Ankum, ‘Römisches Recht’, pp. 101 ff. Cf. also, under more general aspects, Heinz Hübner, ‘Sinn und Möglichkeiten retrospektiver Rechtsvergleichung’, in *Festschrift für Gerhard Kegel* (Stuttgart, Berlin, Cologne and Mainz, 1987), pp. 235 ff.; Heinrich Honsell, ‘Das rechtshistorische Argument in der modernen Zivilrechtsdogmatik’, in Dieter Simon (ed.), *Akten des 26. Deutschen Rechtshistorikertages* (Frankfurt am Main, 1987), pp. 305 ff.; and, under the auspices of European legal unity, Reiner Schulze, ‘Allgemeine Rechtsgrundsätze und europäisches Privatrecht’, (1993) 1 *ZEUP* 442 ff.; Zimmermann, ‘Roman Law and European Legal Unity’, pp. 21 ff.; Reinhard Zimmermann, ‘Savigny’s Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science’, (1996) 112 *LQR* 576 ff.; Rolf Knütel, ‘Rechtseinheit in Europa und römisches Recht’, (1994) 2 *ZEUP* 244 ff.; Klaus Luig, ‘The History of Roman Private Law and the Unification of European Law’ (1997) 5 *ZEUP* 405 ff.; Eugen Bucher, ‘Gedanken aus Anlaß des Erscheinens zweier Monumentalwerke zum Römischen Recht’, (1997) *Aktuelle Juristische Praxis* 923 ff.; Filippo Ranieri, *Europäisches Obligationenrecht* (Vienna and New York, 1999). More specifically on the question of a common system of European law, see Bruno Schmidlin, ‘Gibt es ein gemeineuropäisches System des Privatrechts?’, in Bruno Schmidlin, *Vers un droit privé européen commun? Skizzen zum gemeineuropäischen Privatrecht* (Basel and Frankfurt am Main, 1994), pp. 33 ff.; Berthold Kupisch, ‘Institutionensystem und Pandektensystem: Zur Geschichte des res-Begriffes’, (1990–2) 25–7 *The Irish Jurist* 293 ff. (published in 1994); Eltjo Schrage, ‘Das System des neuen niederländischen Zivilgesetzbuches’, (1994) *JB1* 501 ff.

ground'. Unjustified enrichment also has to be skimmed off, if it has come about in other ways. Taking care of someone else's affairs may lead to a claim for compensation.

There is a general law of contract, and contracts are based, as a rule, on the informal consent of the parties (established by means of offer and acceptance). Only in exceptional situations, and for specific policy reasons, does the law require the observation of certain formalities. The parties are free to decide whether they want to enter into a contract or not, and it is up to them to determine the content of their transaction. Such content may not, however, be illegal or immoral. Equality in the values exchanged is largely immaterial. A party is not bound by his agreement, if he has given it while labouring under a defect of the will (based on or induced by error, *metus* or *dolus*). The parties to a contract are entitled to demand performance of their respective obligations *in specie*. Apart from that, the general law of contract contains rules concerning legal capacity, the interpretation of contracts, the requirements for breach of contract and the remedies available (damages, the right to withhold performance and termination), agency, contracts in favour of third parties and cession, penalty clauses, time, place and other modalities of performance, termination of contractual obligations by means other than *solutio propria* (most notably set-off), extinctive prescription, plurality of debtors and creditors. Most of these rules constitute 'ius dispositivum', i.e. they are not mandatory.

The legal system also makes available to the parties specific contractual paradigms. They range from sale, exchange, donation, *locatio conductio rei*, *operis* and *operarum*, to suretyship, mandate, deposit and two different types of loan (for use and for consumption). Again, most of the statutory rules concerning these contract types (like the aedilician remedies in sale) are not mandatory. Also, the parties are free to conclude atypical (or, in traditional civilian terminology, 'innominate') contracts.

Even apart from the structural foundations and the main rules and institutions of the law of obligations, most of the key concepts we use in order to express ourselves are Roman in origin and belong to the common civilian heritage: obligation, contract and delict, debtor and creditor, *dolus*, *culpa* and *diligentia quam in suis*, risk and *vis maior*, gratuitous and onerous, bilateral and unilaterally binding transactions. The civilian tradition has also seeped into the interstices of the codes: where they do not deal with a matter at all, where they contain a blanket provision or where the solution to a

specific problem has expressly been left to legal scholarship.<sup>217</sup> ‘Casum sentit dominus’, ‘interpretatio contra eum qui clarius loqui debuisset’, ‘venire contra factum proprium’, ‘dolo agit qui petit quod statim redditurus est’, ‘nemo auditur propriam turpitudinem allegans’: these phrases still belong to the standard repertory of modern private lawyers all over Europe.

And, finally, it has to be remembered that no codification is perfect. Thus, there are bound to be drafting mistakes. In other cases a specific view, espoused by eighteenth- or nineteenth-century legal science, turns out to be, in retrospect, one-sided and unbalanced, somewhat idiosyncratic or too firmly rooted in outdated ideological or doctrinal premises. In many of these cases, courts and legal writers have been able to redress the situation; they have found ways and means to assert more modern views, even in the face of the code. Oddly enough, however, the doctrines thus developed have precursors in the older *ius commune*. Yet this experience is odd only for those who are caught up in the simplistic illusion that a codification can be entirely cut off from the continuity of historical development. For even in a codified legal system the reappearance of ideas is by no means a rare – although it is usually an unacknowledged – phenomenon.<sup>218</sup> In the process, many of the jagged edges and time-bound eccentricities of the codes are worn away. In Germany, for instance,<sup>219</sup> the courts have been prepared to award financial compensation for non-pecuniary harm in all cases where a person’s ‘general personality right’ has been seriously infringed. This is clearly *contra legem*, for the BGB not only does not recognise a ‘general personality right’, it also explicitly confines the aggrieved plaintiff to a claim for the pecuniary loss that he has suffered. It is, however, in conformity with the civilian tradition as established, in this case, on the basis of the Roman *actio iniuriarum*.<sup>220</sup>

Given some insight into historical background and comparative context, it is not at all difficult for a modern private lawyer from one jurisdiction to

<sup>217</sup> For details and examples, see Zimmermann, ‘Civil Code and Civil Law’, 89 ff., 94 ff.

<sup>218</sup> Theo Mayer-Maly, ‘Die Wiederkehr von Rechtsfiguren’, (1971) *JZ* 1 ff.; cf. also Peter Stein, ‘Judge and Jurist in the Civil Law: A Historical Interpretation’, in Peter Stein, *The Character and Influence of the Roman Civil Law* (London and Ronceverte, 1988), pp. 142 ff.; David Johnston, ‘The Renewal of the Old’, (1997) 56 *CLJ* 80 ff.; Zimmermann, *Roman Law, Contemporary Law, European Law* (Clarendon Lectures, Lecture Two).

<sup>219</sup> For more examples concerning German law, see Zimmermann, ‘Civil Code and Civil Law’, pp. 101 ff.

<sup>220</sup> For all details, see Zimmermann, *Law of Obligations*, pp. 1050 ff., 1090 ff.; Helge Walter, *Actio iniuriarum: Der Schutz der Persönlichkeit im südafrikanischen Privatrecht* (Berlin, 1996).

understand the rules contained in other civil codes, to recognise similarities and to evaluate differences, and to identify the common foundations underlying all of them. It should not, in principle, be more difficult to devise a European codification today than it was to draft the French or German Codes – not, at any rate, if one confines one's attention, as was the brief of this chapter, to the European continent. What one may well question, however, is the vocation of our time for this ambitious kind of legislation.<sup>221</sup> The code civil would have been unimaginable without the treatises of Domat and Pothier, the BGB equally inconceivable without the work of Savigny and Windscheid. The lesson is obvious. Once again, the essential prerequisite for a truly European private law would appear to be the emergence of an 'organically progressive' legal science,<sup>222</sup> which would have to transcend the national boundaries and revitalise a common tradition.<sup>223</sup>

<sup>221</sup> For a discussion see, e.g., Ole Lando, 'The Principles of European Contract Law after Year 2000', in Franz Werro (ed.), *New Perspectives on European Private Law* (Fribourg, 1998), pp. 59 ff. He refers to the modern 'Thibauts' and 'Savigniys'.

<sup>222</sup> Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814), in Hans Hattenhauer (ed.), *Thibaut und Savigny: Ihre programmatische Schriften* (Munich, 1973).

<sup>223</sup> For a programmatic statement, see Zimmermann, 'Savigny's Legacy', 576 ff.; for examples of how such a programme may be implemented, see Zimmermann, *Roman Law, Contemporary Law, European Law* (Clarendon Lectures, Lecture Three).