Medieval Roman Law: A Guide to the Sources and Literature

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In the course of its almost twenty-seven century old history, Roman law has lived two lives. It lived its first life as the legal system of ancient Rome (753 B.C.-A.D. 476). Its second life started with a phoenix-like rebirth at the end of the eleventh century and, after it had influenced to a greater or lesser degree the laws of nearly all mankind, it is still in practical operation in some areas in our own times.

The first life of Roman law has a recorded history of about one thousand years. Serving as markers, there are two compilations of law that signal the start and the close of the first life-cycle of Roman law: The Law of the Twelve Tables in the middle of the fifth century, B.C., and Justinian’s Corpus Juris Civilis in the first half of the sixth century, A.D.

The Law of the Twelve Tables reflects the formalistic, rigid and terse legal concepts of a small city-state in an agricultural society; Justinian’s Corpus Juris Civilis is the embodiment of a mature, highly technical and complex legal system of a wide-spread cosmopolitan empire. The Twelve Tables contained legal rules applicable exclusively to Roman citizens; Corpus Juris Civilis was a depository of legal precepts intended—and for many centuries believed—to govern the universality of mankind.

At the time when Corpus Juris Civilis was promulgated, the Western part of the Empire had already fallen victim to the attacks of Germanic tribes. Justinian was denied the realization of his political dream—the restoration of the unity of the Roman empire—but he succeeded in the other task he set for himself, the compilation and thereby the preservation of the accomplishments of Roman jurisprudence. The fulfillment of this task assured him a distinguished place in the history of mankind; and he genuinely deserved it, for he not only preserved the cream of Roman legal thinking of the past centuries from eventual oblivion, but also by granting to the composite parts of the compilation† the force of imperial

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† Two types of legal rules were promulgated as imperial statutes in three separate works to which a fourth one was added later: the collection of Novels. The Code and the Novels contain the imperial enactments (leges); the first mainly those of Justinian’s predecessors, the second his own. The interpretations of jurists (ius), as expounded in the juristic literature, have been preserved in the Institutes and the Digest. Of the Justinian law books, the Digest is the most
statutes; he lent Roman jurisprudence the imperial prestige which centuries later greatly contributed to the revival and reception of Roman law.

Paradoxically, Justinian’s *Corpus Juris*, the most influential codification of all times, never could find its way to direct practical application. As Koschaker expressed it, *Corpus Juris Civilis*—particularly in its most valuable part, the Digest—is too comprehensive, too complex and on the whole too unsystematic to be routinely consulted. There was always a need for other media that made its rich contents more accessible.\(^2\)

This article is an attempt to offer an informative account in a condensed form of the fate of Roman law sources and their intermediaries, i.e., a literary history of Roman law during the Middle Ages both in the East and the West, as well as a guide to the literature on this subject written in English, French, German and Italian.

I. ROMAN LAW IN THE BYZANTINE EMPIRE

Koschaker’s statement is true even of the period immediately following Justinian’s death in A.D. 565. Justinian’s codification was intended to be not only a complete and enduring statement of the actual laws of the Empire but also a university textbook; it was believed to satisfy completely the needs both of practitioners and law students. Neither group, however, could avail itself of the direct use of *Corpus Juris Civilis*; a series of works was therefore prepared to make it understandable to them.

Apart from the inherent character of Justinian’s work, there was another compelling reason for the preparation of intermediaries. The Byzantine Empire was not a Roman empire any longer. A majority of the population and the dominant language were Greek, and shortly after Justinian, Latin was abolished as the language of the courts. Thus, the almost exclusively Latin *Corpus Juris Civilis* had to be translated into Greek.\(^3\)

In his conviction that conflicting opinions might endanger the desired clarity of his work, Justinian forbade all comments on the Digest, the complexity and depth of which above all called for elucidation. All that he tolerated were translations of the text and preparations of *indices* (brief summaries) and *paratitla* (references to parallel passages). No doubt some of the jurists strictly observed this prohibition; others, however, took advantage of the exceptions and by way of a formal compliance with the imperial ban circumvented its substance.

These factors resulted in the characteristic type of the sixth and early seventh century Byzantine literature: verbatim or paraphrasing translations of Justinian’s law books or certain parts of them and commentaries on the translated texts mostly in the

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\(^3\) Of the composite parts of the Corpus Juris Civilis only the Novels, with the exception of those addressed to the Latin speaking provinces, were originally in Greek.
form of indices. Though the post-Justinian legal literature, inspired by practical aims rather than by speculative considerations, did not contribute to the development of jurisprudence, it is still of importance from another point of view: it is believed to be of great help in modern text critique of Roman law sources. That is, in their commentary expositions of Roman law, the Byzantine jurists of this era relied not only on the texts incorporated in the Corpus Juris Civilis but also on pre-Justinian Greek translations of classical writings which are believed to be free of post-classical text manipulations.

Only one of the literary products of this era has survived completely and independently: the “Paraphrase” of the Institutes by Theophillus, one of the compilers of the Corpus Juris Civilis. Others, like Dorotheus’ and Stephanus’ Indices (summaries) to the Digest, Thalelæus’ and Isidorus’ Indices to the Code, have been preserved in fragments only, mostly in the Basilica and their scholia.

Commencing in the eighth century, the translations and epitomes of legal scholars were replaced by legislative enactments based to varying degrees on Corpus Juris Civilis. The occasio legis was substantially the same in each instance: the need for an updated, brief and easily understandable code in Greek in which the relevant legal precepts scattered throughout the four books of Corpus Juris Civilis were to be brought together in systematic order. As a result, the all too comprehensive, complex and ill-arranged Latin Corpus Juris Civilis was de facto superseded by well-ordered but drastically abridged and simplified Greek versions.¹

The first of the codes was the Ecloga issued in the first half of the eighth century by Leo the Isaurian (also called the Iconoclast) in 18 titles.⁵ This is “a selection of laws arranged in a brief and compendious form . . . from the Institutes, the Digest, the Code and the Novels of the Great Justinian.”⁶ The Ecloga (also known as Enchiridium, i.e., manual) was an attempt to reconcile Roman law with Christian principles. It brought about significant changes particularly in the sphere of marriage law so that it is generally described as a Christian law book.

Ninth century legislation is marked by a Romanizing tendency and in consequence thereof shows a reaction against the Ecloga which is reflected in Basil’s Prochiron (Procheiros Nomos, Manual of Law) promulgated circa 879 in 40 titles. The Roman law of marriage was restored. Soon, Basil issued it anew in revised form under the name of Epanagoge, that is, “introduction” to a projected more comprehensive code.

Basil’s plan was realized by his son, Leo the Philosopher. His Basilica (Imperial laws) dating approximately from 892 contain 60 titles substantially in the order of Justinian’s Code: ecclesiastical law is followed by the

¹ There is no evidence of formal repeal of Justinian’s codification; its disappearance from the practice should be probably attributed to desuetude.—Cf. Wenger, Die Quellen des römischen Rechts. (1955) p. 721.
⁵ There are 432 titles in the Digest alone.
⁶ Freshfield’s translation, see bibliography at the end of this chapter.
sources of law, procedure, private law, administrative law and criminal law. The compilers of the code did not use the original Latin text of Corpus Juris Civilis but its Greek translations made in the sixth century. The Basilica have survived in numerous, though fragmentary manuscripts, many of which contain an extensive apparatus of marginal comments that were added to the text subsequently to the promulgation of the code. These marginal comments, the so-called scholia, were partly taken from the writings of the sixth century authors and were affixed to the Basilica text probably in the tenth century (scholia antiqua, old scholia). The old scholia are presumed to contain—though in Greek translation—classical Roman law text and therefore are thought to be of a great help in identifying intentional post-classical text alterations as well as accidental changes in the original texts caused by careless copying. The other group of scholia (scholia recentiora, new scholia) were taken from writings originated in the eleventh and twelfth centuries and for that reason are of lesser importance.

By the side of the codes private, enlarged compilations came into existence to serve the needs of teaching and practice, such as the Ecloga privata aucta, the Prochiron auctum, and Epanagoge aucta. The Ecloga ad Prochiron mutata was founded on the Ecloga and the Prochiron in the twelfth century for the use of the Greek speaking population in southern Italy which was under Norman rule at that time. The promulgation of the Basilica gave rise to further abridgments. Among others, the Synopsis maior Basilicorum (10th cent.) contains abstracts from the Basilica in alphabetical order; the Synopsis minor (13th cent.) is an alphabetical abridgment of its 10th century predecessor.

Three brief collections are also worthy of note for their specialized subject matter. Though each of them is called nomos (lex, statutory law), they were compiled privately. Based partly on the relevant Corpus Juris text, partly on contemporary customary laws, the Nomos Georgikos (agrarian law) is a collection of rules prescribing retaliations for wrongdoings against agrarian property. The Nomos Nautikos (Rhodian maritime law) is the Greek version of the Lex Rhodia de iactu of Rhodian origin incorporated in the Digest (14. 2. 9.) which provides for distribution of damages in case of jettison. The Tactica Leonis is a collection of military laws.

The trend of abstracting earlier sources continued until it culminated in Harmenopoulos' Hexabiblos in 1345, preceding the fall of the Eastern Roman Empire by one century. This compendium prepared by a judge in six "books" (i.e., parts), though only a rudiment of the great Roman heritage, survived the long centuries of Turkish rule and was clothed with statutory force by the new kingdom of Greece in 1835 and enjoyed validity until the enactment of the new civil code in 1941.

Roman law in its Byzantine version did not influence the development of
Greek law alone. A course of events similar to what took place in the history of Western Europe can also be traced in the East. The new nations founded there could not escape the cultural impact of the Eastern Roman Empire and, together with Byzantine art and religion, Byzantine Roman law left its mark on the cultural development of the peoples of Eastern Europe. The influence which started far back in the ninth century with the translation and adoption of post-Justinian codes lasted until the nineteenth century, and in some cases even to our own day,7 when the Eastern legal traditions were finally superseded by the more advanced Western European jurisprudence.8

SELECTIVE BIBLIOGRAPHY ON BYZANTINE ROMAN LAW

Text Editions

Basilica:


Basilica libri LX, by H. J. Schel-

7 Apart from the Greek example, the eighth-century Ecloga remained in effect until June 1, 1928 in Bessarabia.—Cf. Wenger, op. cit. p. 726, note 545.
8 For a concise account, see Soloviev’s article listed in the bibliography. He, also, indicates that the radiation of the impact caused by the Byzantine Roman law was not confined to Eastern Europe only; it was felt by peoples as far as the Caucasus, Syria and Egypt.

tema. (Groningen and Gra-

venhage, 1953–) This new, revised edition contains fragments not consulted by the Heimbachs. It is published in two series: Series A contains the text; series B the scholia. By 1962 four volumes in series A and five volumes in series B were published. The work will be completed in about 18 volumes.

Hexabiblos:

Constantini Harmenopuli manu-


Prochiron:


Theophilus’ Institutes:

Institutionum graeca paraphrasis


Text collections.


Ius Graeco-Romanum, by C. E. Zachariae von Lingenthal. (7 parts. Leipzig, 1856-1884) Contains among others: Ecloga privata aucta, Ecloga ad Prochi-
ron mutata, Epanagoge aucta, Prochiron auctum, Synopsis Basilicorum.

Ius Graecoromanum, by J. and P. Zepos. (8v. Athens, 1930-31)
The most recent and comprehensive text edition of Byzantine sources.

**English, French and German Translations of Byzantine Sources**


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Sherman, Ch. P. Roman law in the modern world. Vol. 1, p. 151-174. (Boston, 1917)

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Zachariae von Lingenthal, C. E. Geschichte des griechischroemischen Rechts. (Berlin, 1. Aufl. in 3 Hefte 1856-64; 2. Aufl. 1877, 3. Aufl. 1892) The 3d ed. of this standard work on Byzantine law was reprinted with a preface by M. San Marco in 1955. (Aalen, Scientia) ——— Historia iuris Greco-Romanii delineatio. (Heidelberg, 1839)

II. ROMAN LAW IN THE WEST
I. Early Middle Ages

The course Roman law took in the West during the Middle Ages presents a complete contrast to that which it followed during the same period in the East. In the East, Roman law was given a monumental frame by Justinian's codification in the early part of the sixth century and after a steady decline lasting eight centuries, it was finally reduced into "an epitome of epitomes of epitomes" by Harmenopolus in the middle of the fourteenth century. In the West, the pre-Justinian Roman law took the shape of epitomized compilations at the dawn of the sixth century, and eight centuries later the Corpus Juris Civilis was not only rediscovered, but through scientific treatment fully analyzed and adapted to current needs; consequently, it became the basis of almost all of the national legal systems in Western Europe. Whether this development did or did not follow a straight, uninterrupted course is the most controversial problem of modern literature on medieval Roman law.

Since the publication of Savigny's fundamental treatise, Geschichte des roemischen Rechts im Mittelalter (first published in 6 volumes, 1815-1831) there has been no doubt that Roman law survived the fall of the Western Roman Empire in 476. It survived as a diffused body of debased rules.

The young Germanic kingdoms founded on the ruins of the Western Roman Empire were content with holding the political supremacy and occupying territories; they let the Roman population continue to live according to its own laws. The law the Roman population lived by was no longer the classical Roman law, however. The classical Roman law, the creation of Papianus, Ulpianus, Paulus and other great jurists of the first two and a half centuries, started before long to lose its purity. The expansion of Rome's frontiers and the great migrations that caused "the Romanization of the provinces and the barbarization of Rome" made their impact felt also in the domain of law. These factors gave rise to the vulgarization of Roman law. The process went furthest in the provinces. Due to the generally lower cultural standard


of the peripheral regions and particularly the inferior niveau of the inadequately trained provincial practitioners, classical Roman law gradually turned there into a diffused body of degenerated rules.\textsuperscript{11}

The Germanic conquerors continued to live according to their own native customary laws. Thus the two legal systems, the Roman and the Germanic, were applied side by side. Their parallel application must have created difficulties in the administration of justice which were aggravated by the vast amount of inherited Roman juristic writings. The very same reason that finally led to Justinian's \textit{Corpus Juris Civilis} in the East also gave rise to the codifications in the West. The results were different, however. The commissioners entrusted by the Germanic kings with the compilation of the dispersed rules for their Roman subjects were themselves trained in the Roman law of their own time and utilized only those Roman law sources that lay within their comprehension. Lacking the ability and training to understand the great works of the classical jurists, they were content to excerpt in crudely simplified fashion the short maxims of Paulus, the easily understandable textbooks of Gaius (The Institutes) and the third- and fourth-century compilations of imperial enactments, adding to these a single citation from Papinianus. In short, the result reflects the standard of the sixth-century legal culture in the West.

There are known three codes collectively called \textit{Leges Romanae Barbarorum} (barbaric Roman laws) that were compiled almost concurrently and based substantially on the same sources. The \textit{Lex Romana Visigothorum} was issued by the West-Gothic Alaric II (hence also called \textit{Breviarium Alaricianum}) in 506 for the Roman population in present day Spain and southern France. The \textit{Lex Romana Burgundionum} was promulgated by King Gondubad (died in 516) for the Romans in southeastern France. The third one, the \textit{Edictum Theodorici}, which was issued before 508 by Theodoric the Great, the East-Gothic ruler of northern Italy, differed from the other two codes in that it was meant to govern both Romans and Goths in line with Theodoric's policy of maintaining the unity of his realm as the direct successor to the Western Roman Empire.

Of the three, the \textit{Lex Romana Visigothorum}, relatively the most complete statement of Roman law in use during that era, enjoyed the longest life in spite of its formal repeal in Spain by the seventh century West-Gothic code, the \textit{Leges Visigothorum Recessivindiana} (circa 654).\textsuperscript{12} The latter abandoned the personality principle for that of territoriality\textsuperscript{13} and provided a single uniform code for the local population by fusing Roman laws as contrasted with that of the territorially of laws meant that a person's rights and duties were determined according to the laws of the tribe or nation to which he belonged instead of those of the place of his domicile.

\textsuperscript{11} Cf. Levy, E. \textit{West Roman vulgar law; the law of property}. (1951) p. 6-16.

\textsuperscript{12} Also known as \textit{Liber iudiciarum} (Book of judicial actions) and by its Spanish name, \textit{Fuero Jugo} (the law of judges).

\textsuperscript{13} The principle of the personality of laws
law with Germanic elements. The *Lex Romana Visigothorum* remained in use in southern France. From there its influence spread to Italy and the territories north of the Alps and it served as the main source of Roman law until its replacement by the re-discovered *Corpus Juris Civilis* in the twelfth century.

Inevitably, these barbaric Roman law compilations contained Roman principles and precepts intermingled with Germanic notions and thereby contributed considerably to the process of the vulgarization of Roman law. In turn, Roman law exerted varying degrees of influence on the Germanic laws. The impact of Rome's higher culture, though at its nadir by that time, the veneration of Roman law even in its debased form, and the absence of a developed Germanic legal language led the Germanic kings not only to the codification in vulgar Latin of their native laws, but also to inclusion of numerous Roman law passages verbatim or in paraphrased form in their own codes which are collectively called *Leges Barbarorum* (barbaric codes) to distinguish them from the barbaric Roman law compilations (*Leges Romanae Barbarorum*).¹⁴

Apart from the territorially confined Roman population, there was also the steadily expanding Church which likewise lived by Roman law (*Ecclesia vivit lege romana*) and thereby helped to keep Roman legal institutions and concepts alive.

As for Italy proper, the *Corpus Juris Civilis* was introduced in the territories reconquered by Justinian. The exarchate of Ravenna, Southern Italy and Sicily remained under Byzantine rule for a while and here knowledge of the Justinian codification, though dimmed, was never extinguished entirely. After southern Italy and Sicily were lost to the Normans, the Greek population there not only lived by the Byzantine epitomes based on Justinian's law books, but actively furthered Byzantine legal literature by preparing later compilations such as the *Ecloga ad Prochiron mutata*. In the territories occupied by the Lombards, Roman law was applied as the personal law of the Romans.

In summing up, Roman law outlived the fall of the Western Roman Empire. It remained in practical operation as the personal law of the Roman population, not in its pure form, but as a vulgar law. And, in the course of centuries a gradual amalgamation took place: Roman law absorbed Germanic ideas while Germanic laws influenced by Roman law underwent varying degrees of modification.

And now, we have arrived at the controversial issue which was first raised in the nineteenth century and is still lingering: did the science of Roman law, as distinguished from its practical operation, have a continu-

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¹⁴ The earliest Germanic codes compiled from the late fifth to the early seventh century are the *Codex Euricianus* (the first code of the West Goths, around 475 by King Euric), the *Lex Burgundionum*, the *Lex Salica* (Code of the Salic Franks) and the *Lex Ribuaria* (Ripuarian code).---For Roman law influence on the *Codex Euricianus*, see Levy, E. Reflections on the first "reception" of Roman law in Germanic states. Am. Hist. Rev. 48:19ff. (1942)
ous existence in the West from the time of Justinian up to the Glossators' era in the twelfth century? In other words, did Roman law in the West receive a jurisprudential treatment in theory and legal education during the early Middle Ages? Savigny in his *Geschichte des römischen Rechts im Mittelalter* denied any organic link between Justinian and the Glossators. Savigny was joined by Mommsen. In opposition to Savigny, Stintzing and Ficker, German legal historians, expounded the *continuity theory*, holding in favor of the existence of a direct line of scholarship leading from the *Corpus Juris Civilis* to Imerarius, founder of the Bologna School of Glossators. The most reputed proponent of the continuity theory was the German scholar, Fitting (1891-1918) who in his prolific writings argued for the jurisprudential treatment of Roman law at the schools of Rome, Ravenna and Pavia prior to the establishment of the Bolognese school. Fitting has been joined by almost every Italian medievalist. (Chiapelli, Gaudenzi, Solmi, Besta, Calisse, etc.) Among the antagonists of the continuity theory, Conrat gained fame by his profound, though unfinished, treatise, *Geschichte der Quellen und Literatur des römischen Rechts im früheren Mittelalter* (1891) in which he furnished a series of proofs in support of Savigny's view. Conrat has been backed by the Frenchman Flach, the German-English Kantorowicz, the Italian Patetta, the Germans Seckel and Genzmer and other contemporary authorities on medieval legal literature.

The most effective argument against the existence of any scholarly treatment of Roman law in the early Middle Ages is the fact that the Digest, the most valuable part of the *Corpus Juris Civilis*, the depository of the legal heritage of the classical Roman jurists, was almost unknown to the men of that era.\(^\text{16}\) All that they knew of the Justinian work was restricted to fragments of the Institutes, the Code and Novels. As for schools, no direct signs of organized teaching of Roman law can be traced back to the early Middle Ages and no names of outstanding legal scholars have survived either. Monastery and cathedral schools (*scholae artes liberales*) offered some instruction in Roman law in connection with the teaching of rhetoric and dialectics, but there is no convincing proof of the existence of law schools in which students guided by scholars could have acquired a definitive knowledge of Roman law. Due to the ignorance of the Digest and the lack of higher learning legal literature could not rise to higher levels; it served the modest purpose of meeting the needs of practitioners. With such a scope and goal, the literature of this era was confined to abstracts of known sources and marginal notes (*glosses*) attached either to the manuscripts containing the sources or their abstracts to facilitate the grammatical understanding of individual passages often resulting in naive and erroneous philological

\(^{16}\) The Digest was not cited in the period from 608 to 1076. Cf. Kantorowicz, H. *Über die Entstehung der Digesten-Diguitate*, Zeitschrift der Savigny-Stiftung, Rom. Abt. 30: 197-198. (1909)
explanations. Another type of legal literature was represented by form-books (formularium tabellionum) providing scriveners (notaries) with patterns of contract- and will-drafting.

The Turin Gloss of the Institutes and the Lex Romana canonice compita may serve as examples of the first type of the early medieval literature. The former is a marginal apparatus of notes attached to a tenth-century manuscript of Justinian's Institutes which was found in Turin (hence its name). The glosses originated at two different times. The older notes of the sixth century reveal much originality in contrast with the erroneous trivialities of the second group of glosses produced at a later time. The Lex Romana canonice compita is a ninth-century compilation of Roman law for the use of the clergy; it contains excerpts from Justinian's Novels and the Code mainly.

Two other works, having several characteristics in common, should be mentioned here: the Exceptiones Petri or Exceptiones Legum Romanorum (exceptio stands for exceptio, in the parlance of the Middle Ages) is a handbook for practitioners containing excerpts from Justinian's law books. The Brachylogus iuris civilis (generally called Brachylogus: brachy—short, logos—discourse) an anonymous work, is a textbook based on the system of the Institutes. Both works drew not only on the sources repeatedly used in the early Middle Ages, but also on the Digest; both are remarkable for their intelligent application of classical Roman law to contemporary problems and, in conspicuous contrast to the early medieval products, both are systematic in their approach. In short, both bore definite marks of superior scholarship, and so both have become the subject of extreme controversies as to the time and place of their origin. According to the advocates of the continuity theory, the two were written in the pre-Imperial era, i.e., prior to the foundation of the Bologna law school. In their opponent view, both works have been antedated by the continuity theorists and they really belong to the twelfth-century French school of Glossators.17

It is probably fair to conclude that the standard of treatment of Roman law in the literature and schools of the early Middle Ages did not surpass the quality and quantity of Roman legal rules that found their way into practical operation during the same period.

2. The Revival of Roman Jurisprudence: The Glossators

The last years of the eleventh century mark the end of the "dark age of Roman law" which lasted some six hundred years. During this period there functioned a small school at Bologna in Italy, a school of grammar and rhetoric. And it happened some-

17 For a summary account, see Kantorowicz, H. Studies in the Glossators of the Roman law. (1938) p. 112-121. — As for the Exceptiones Petri, it is by now generally conceded that in its final form it was authored by Petrus, a Provencal jurist in the first half of the twelfth century (hence its most commonly used designation), but according to the followers of the continuity theory, it was compiled from Italian manuscripts already in existence prior to the foundation of the Bologna school.
time in the late eleventh century that
the only complete copy of Justinian's
Digest was found in Pavia (the littera
Pisana; later known as littera Floren-
tina for it has been located in Flo-
rence since the early days of the fi-
teenth century). This event, "ein
weltgeschichtlicher Zufall" as E. Se-
kel, the famous Romanist, called it,18
signals not only the rebirth of Roman
law, but the birth of the European
universities and a new era of western
scholarship as well.
Copies19 of the Florentine manu-
script reached the hands of Irnerius
(cca 1055-1125), a professor of gram-
mar in Bologna, and he and his
pupils, children of the early scholastic-
ticism, regarded the copies as a key to
the presumed eternal truth embodied
in Roman legal precepts. Irnerius and
his followers began a profound, pains-
taking and assiduous study of the
Digest and the rest of Justinian's law
books in order to explore and explain
their meaning by means of grammatic-
al and analytical investigation. The
results of their exegetical method found
expression mainly in interlinear and
marginal notes, that is glosses, and the
Bologna scholars and their followers
came to be known as Glossators.20

18 Die Anfänge der europäischen Juris-
prudenz im 11. und 12. Jahrhundert. Zeits-
chrift der Savigny-Stiftung, Rom. Abt. 47:392
(1925).
19 Known as littera bononiensis or littera
vulgata. For details of the origin of the
vulgate (i.e., generally used) text, see Kanto-
rowicz, H. Über die Entstehung der Di-
gestenvulgata, Ergaenzungen zu Mommsen.
(Vienna, 1910, reprinted from Zeitschrift der
Savigny-Stiftung, Rom. Abt. 50:183-271 and
51:14-88).
20 The method of using glosses (equivalent
of the Greek scholia) was common in the
Middle Ages, but the Glossators were the
first who employed it on the text of Roman

In their endeavor to explore and
explain the text, the Glossators
started out by putting a better known,
currently used equivalent word above
a less-known difficult term (glossa in-
terlinearis); if the correct under-
standing of a word or phrase called for
a more elaborate explanation, the
elucidating notes were written on
the margin (glossa marginalis). The
glosses, especially the marginal ones,
contain more than grammatical explo-
lations and explanations of the
text; in the hands of the Glossators,
the text was subjected to rigorous
analytical criticism. Parallel passages
(loci paralleli) were brought together
and the glosses cast light not only
upon the variant readings (variantia)
of different manuscripts, but also
upon the inherent contradictions (an-
tinomia) in the texts.

A series of glosses written by the
same Glossator on the words of a
specific title or the whole of one of
Justinian's law books and arranged in
the order of the text, i.e., a running
commentary, is called apparatus.

The goal of making the text more
understandable was achieved by a
special type of glosses, the casus, that
is, mainly fictitious cases invented to
illustrate the meaning and practical
application of a particularly difficult
passage.

For identification purposes, the
Glossators affixed their initials (sigla)
to each gloss.

Although the main literary form
was the gloss, there is scarcely a type
of modern legal literature the roots
law as preserved in Justinian's Corpus Juris
Civilis.
of which do not go back to the literary activities of the Glossators. The exegetical method led the Glossators to the writing of dogmatic works. Of these, the most important are the summae or summae titulorum (summaries of titles). Each summa consists of summulae, i.e., short systematic treatments of particular titles of one of Justinian’s law books. In preparing the summulae, the Glossators did not confine themselves to the textual order of the titles as in the case of glosses. Rather, in the summulae they laid down the end result of their extensive exegetical investigation in a coherent systematic fashion. By originating the systematic treatment of the unsystematic Justinian compilation, the Glossators provided a cornerstone for the edifice of modern jurisprudence. A series of summulae treating of the titles of one book of the Corpus Juris Civilis in the order of the titles resulted in the summa, e.g., Summa Codices (Summary of Code).

To the category of dogmatic writings belongs the tractatus, a systematic treatise on a particular aspect or institution of the whole legal system. Of the tractati the ordines iudiciorum, i.e., monographs on procedure, excelled by their originality and the great influence they exerted on the practice of the courts. These monographs contain in systematic arrangement the procedural rules that are hidden in substantive rules and scattered throughout Justinian’s law books.

A strict dialectical method was used by the Glossators in preparing the last two types of dogmatic writings to be mentioned here: the distinctiones and the brocarda. The former designate short systematic presentations of legal concepts or legally relevant facts, divided and subdivided into as many different legal or factual ramifications as logically conceivable. The latter name (of spurious origin) was given to subtle dialectical analyses of general principles first juxtaposed to, and then harmonized with, apparent contradictions.

The next type of the work in the Glossators’ library represents a transition from theory to practice: the questiones, collections of decisions on real or fictitious cases disputed in the classes by their students (questiones disputatae). This effective type of university instruction inaugurated by the Glossators is the ancestor of the modern “moot court” practice.

The controversies among the Glossators gave rise to another type of literature, the dissensiones dominorum which contain the dissenting opinions of the Glossators.

Though the Bologna scholars were mainly engaged in the theoretical treatment of the law, many of them

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21 This definition and the following ones of the various types of the Glossators’ literature are based on those given either by Savigny in his Geschichte des roemischen Rechts im Mittelalter or Kantorowicz in his Studies in the Glossators of the Roman law. (1939)

22 Example for a dissection of a legally relevant fact: A creditor is he who loans money. He loans either his own or another’s. If another’s, either in his own name or that other’s. If in that other’s... etc., etc. (Author’s shortened translation of the original Latin example in Kantorowicz’ Studies in the Glossators of the Roman law. (1938) P. 214.

23 According to an explanation (most probably given somewhere by Kantorowicz) “brocarda” is a distorted contraction of “pro” and “contra.”
invited by the courts also acted as legal experts (causidici); their expert opinions were collected in the consilia.

Savigny in his Geschichte gives a detailed account of about eighty Glossators. Despite the scanty information on his life and the controversy about his works, Irnerius is regarded as the founder of the school of Glossators. As regards his literary activities, the controversy around the continuity theory of legal scholarship in the early Middle Ages continued in the “Irnerius question.” There is general agreement that he wrote a great number of the marginal and interlinear glosses to Justinian’s law books. Apart from the glosses, Irnerius was also credited by Fitting and several of his followers with the authorship of ten anonymous writings the most important of which are the Brachylogus,\(^{24}\) the Summa Codicis Trecensis (named for the manuscript at Troyes) and the Questiones de iuris subtilitatis. According to the adversaries of Fitting these writings originated in the post-Irnerian period and the first of the above works—as already mentioned—belongs to the twelfth century French school of Glossators; the second is the first edition of the incomplete work known as the Summa Codicis of Rogerius; and the third was probably authored by Placentinus.\(^{25}\)

Irnerius was followed by the tuor doctores (four doctors, so called because all four served Frederic Barbarossa at the same time as legal advisers): Bulgarus, Martinus Gosia, Jacobus and Hugo. Of the four, Bulgarus excelled as the author of the first apparatus on the last title of the Digest, De regulis iuris, and the first treatise, De iudiciis. One of Bulgarus’ pupils was Placentinus (d. 1192) who has been credited by most of the medievalists with the foundation of the law school at Montpellier in France. Another famous student of Bulgarus was Rogerius who became the teacher of one of the most distinguished of all the Glossators, Azo (d. 1230). Besides glosses, he also wrote distinctiones, brocarda and possibly questiones. By far the most influential of his writings are his two summae: Summa Codicis (on the 1-9 books of Justinian’s Code) and the Summa Institutiones. A profound knowledge of these works was regarded as indispensable for prospective judges.\(^{26}\) The last one of the prominent Glossators was Accursius, a student of Azo (circa 1185-1263). By Accursius’ time, a great multitude of glosses had been accumulated and the needs of students and practitioners called for a comprehensive and orderly collection of all the existing glosses. Accursius offered them such a collection, the Glossa ordinaria, also called the Great Gloss, Accursiana, or simply the Gloss, which gave him an extraordinary reputation that has survived through centuries. The Great Gloss supplanted


\(^{25}\) For details, see Kantorowicz, op. cit. p. 35ff.

\(^{26}\) According to the contemporary Italian slogan: “Chi non ha Azzo, non vad a palazzo.” (Who knows not Azo, goes not to court.)
not only the earlier glosses but even the original sources; it was cited in the courts, studied in the schools, and commented upon by Accursius’ successors. Accursius exerted a tremendous influence by his collection not only on his contemporaries and immediate followers but also on the practice of courts centuries later. It is testified to by the slogan originated in the 17th century: “quidquid non agnoscit glossa, non agnoscit curia,” indicative of the fact that those parts of the Corpus Juris which had not been glossed in the Great Gloss were not allowed to be cited in the courts.

The age of the Glossators embraced the whole of the twelfth and the first half of the thirteenth century. As regards the geographical expansion of the Glossators’ influence, it was not confined to Bologna and northern Italy alone. The reputation of the Bologna school spread widely, so that by the middle of the twelfth century, the number of law students there reached the mark of 10,000. Compared to the approximately 60,000 law students of our own day at more than 130 American law schools, the Bologna figure is astonishing, if not incredible. This relatively huge number of students was recruited not only from Italy but also France, Spain, Germany, and other countries. Bologna was not the only place where Roman law was taught. Following the Bologna model, universities were founded in Western and Southern Europe, in many instances for the principal purpose of teaching Roman law in the fashion of the Bologna school.

England could not escape the influence of the Glossators either. The Italian Vacarius, a fellow of Bologna, came over to England at the invitation of Theobald, Archbishop of Canterbury, and he is said to have founded about 1145 the first law school at Oxford where he taught Roman law employing the exegetic method of his masters.\(^\text{27}\) The law students at Oxford were called pauperistae for they studied Roman law from the Liber pauperum (book of poor students). The Liber pauperum is a selection of extracts from Justinian’s Code and Digest compiled by Vacarius in 1149 to provide law students with a compendious and easily obtainable textbook.\(^\text{28}\)

Although the Glossators achieved tremendous success, one that induced legal historians to speak of the twelfth century as the most legal of all centuries, their success was limited by the actual conditions of their age. The Glossators looked up to the Corpus Juris Civilis as a living law and their main ambition aimed at the acquisition of profound familiarity with the Justinian text and the faithful exposition of its contents. Indeed, by applying the exegetical method to the

27 Pollack and Maitland do not concede the actual foundation of the school by Vacarius.—Cf. History, v. 1, p. 98.
28 A century later, Bracton, the father of the English common law, was exposed to the influence of the Glossators, particularly of Azo. The degree of Azo’s impact on Bracton has been the topic of great controversy for a long time.—For a concise and objective account of Roman law influence upon Bracton, see Holdsworth, W. S. A history of English law. v. 2, 5d ed. (1927) p. 267-285; for a recent bibliography on the subject, see Flicknett, A concise history of the common law. (5th ed. 1956) p. 262.
investigation of the sources, the Glossators mastered Roman law to an extent which perhaps has never been surpassed; they shed light on Roman law as a whole and on its details. In the preceding era, Roman law had been taught as an adjunct subject, subordinate to dialectics and rhetoric, with the modest purpose of providing a tool for practitioners. By freeing Roman law from its early medieval ties and elevating its study to the heights of a science, the Glossators made Roman law the universal law of the universities—but not of the legal practice. Side by side with Roman law, there were the local customary laws of Germanic origin, the Lombard feudal law, the statutory laws of the Italian cities, of the French kings and German emperors. In the meantime, another body of law also claiming universal validity started to gain shape, the Canon law, a Christian-medieval version of the Roman law.29

3. The Commentators and the Reception of Roman Law

The task of developing a new method which helped to elevate Roman law to the rank of a universal law (common law) of practice, was left to another school of law, that of the Post-Glossators or Commentators.30

29 The first part of the later Corpus Juris Canonici, the Decretum Gratiani was compiled by a Bolognese monk, Gratianus, about 1140.
30 The first name, with overtones of epigonism, was chosen by Savigny who did not adequately assess the importance of the school which in modern literature is generally called by the second name.

Originated in France in the thirteenth century, the school rose to its zenith in Italy in the fourteenth century with its principal seats at Perugia, Padua and Pavia. The Commentators were not only university professors but also practitioners involved in everyday problems of law much deeper than their predecessors had been, and, for that matter, more conscious of the necessity of a uniform system of law. Apart from this practical aspect, as contemporaries of Dante, Petrarcha and Boccaccio, the creators of a national Italian literature, the Commentators, inspired by the spirit of their age, addressed themselves to the task of building up a common-law system for Italy. In their endeavor to achieve this goal, they applied the methods of advanced scholasticism to the Roman law sources as these had been explained by the Glossators.

As already indicated, the Glossators also had availed themselves of the less developed methods of early scholasticism to explain the content and scope of Roman legal concepts and precepts and to harmonize the apparent or real contradictions in the texts. Now, the Commentators employed the more advanced and therefore more refined and complicated scholastic dialectic of their own age to harmonize the Corpus Juris Civilis with the prevailing social and economic needs of the fourteenth- and fifteenth-century Italian society.

The Commentators' new method called for a new literary form. Where the Glossators had limited themselves almost exclusively to the text of the Corpus Juris Civilis and wrote mainly
glosses, the Commentators stepped out of the textual confines of Roman law sources and, as their name indicates, wrote mainly commentaries.

The commentaries reflect the laborious, painstakingly accurate and exhaustive use of the fine-spun logic of scholastic dialectic. In form, the commentaries are based on the text of Justinian’s law books. With the help of a complicated analytical mechanism, the Commentators divided and subdivided Roman legal precepts into species and subspecies until they arrived at the abstract, general principles underlying legal rules. From these general principles they drew inferences and tested them in the light of conclusions derived from legal, philosophical and theological writings as well as from a fund of real and fictitious cases presented by contemporary practice and their own imagination. As a result of their analyses and syntheses, the Commentators had at hand a system of abstract, general principles to which they applied—as occasion demanded—a broad or restrictive interpretation so as to meet current needs.

This method led to the writing of multi-volume commentaries in awkward Latin in which the original Roman text lay buried under a mass of dialectic expositions. On the other hand, with the help of this method of analysis and synthesis, systematization and interpretation, the Commentators succeeded in fusing the old Roman law institutions and concepts with the contemporary provisions of Germanic local laws and Canon law principles. Thus, the task of adapting the Corpus Juris Civilis to actual social and economic conditions and the creation of a common law for Italy were accomplished.

Besides the commentaries, the representatives of this school continued to cultivate and further develop some of the literary forms that had been started by the Glossators. They wrote monographs (tractati), prepared legal problems (questiones) for their students, and were active in supplying the courts with expert opinions (consilia).

The most prominent representatives of the school of Commentators were Cinnus, Bartolus and Baldus. Of the three, Bartolus (1314-1357) emerged as the “prince of the Commentators.” His fame gave rise to the well-known maxim: “No one is a jurist who is not a Bartolist” (Nemo jurista nisi Bartolista). His literary activity covers the gamut of the legal literature of his era; apart from consilia and questiones, he wrote commentaries on all parts of the Corpus Juris Civilis and treatises on the entire spectrum of the contemporary legal science: on public, criminal, private and procedural law. His opinions were regarded as law not only in Italy, where in the universities a chair was established to comment on his writings, but also in Spain and Portugal, where his and his student’s (Baldus) commentaries enjoyed statu-

31 For details, see Stintzing, Geschichte der deutschen Rechtswissenschaft. (1880) [v. 1], p. 106-110.

32 For a classified list of Bartolus’ treatises, see Savigny, Geschichte des römischen Rechts im Mittelalter. (1956) v. 6, p. 174-180.
tory authority. In sixteenth-century Germany it was held that Bartolus' and Baldus' opinions "are no less law than the statutes" ( ... non minus ius faciunt quam principum constitutiones).  

The technique of the Commentators, the *mos italicus*, that is, the *Italian method* of deducing abstract conceptions from Roman law precepts replaced the exegetic method of the Glossators not only in Italy, but everywhere that Roman law was taught. In the age of the Commentators—from the second half of the thirteenth century up to the fifteenth century—new universities were founded in Italy, France, Spain, Germany, Belgium, the Netherlands and other European countries; and all of them taught Roman law in the Italian fashion and helped to bring about the reception of Roman law as updated by the Commentators.  

To sum up: the Glossators rediscovered Roman law; the Commentators evolved the method of interpreting it to meet actual needs and conditions; and the universities, turning out lawyers by the thousands, accomplished its reception during the fifteenth- and sixteenth-centuries.  

All that has been written here about the revival and the reception of Roman law is but an outline of the surface events that took place from the time of the discovery of the Digest manuscript to the reception of Roman law at the dawn of the Modern Age. The history of the reception is much more complex, however. There were decisive background forces that by exerting influence on the changing flow of history contributed to a greater or lesser degree to the revival and the reception of Roman law. This article would not be complete without pointing to some of these factors.  

Western Europe in the later Middle Ages lived under the spell of a two-faced universal idea aptly called by Koschaker the "political and cultural idea of Rome."  

From the tenth century onwards, there emerged the political idea of Rome. The German emperors considered themselves genuine successors to the Roman Empire and this idea gained expression not only in their title, but also in their acceptance of the rediscovered *Corpus Juris Civilis* as the living law of the Holy Roman Empire. Like the ancient Imperium Romanum, the medieval Holy Roman Empire claimed universality. Thus, Roman law enjoyed the prestige of universal imperial law. Where the political Rome idea failed to operate, Roman law was buttressed by the cultural idea of Rome most markedly manifested in the universalist Roman Catholic Church. Justinian's *Corpus Juris Civilis* was a part, the most original part, of the cultural heritage of Rome and remaining free from any political implication it had immense appeal merely by having been the legal order of a great empire and a highly civilized society. In the mind of medieval man with inborn respect

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for established authority; Justinian's *Corpus Juris* occupied a place next to the Bible. This high regard for Roman law explains the method by which the Glossators treated the text of the *Corpus Juris Civills*. They did not doubt its authority, they did not care for the intervening centuries. Their main goal, so characteristic of the Middle Ages, was the faithful explanation of the presumed eternal truth of Roman legal precepts by employing the rationalist method of early scholasticism. At the universities, the medieval man met for the first time the most significant product of Roman culture. The cultural aspect of Roman law, not the Holy Roman Emperors' political ideal of a resurrected Rome, attracted, for instance, large numbers of French students to Bologna and inspired the foundation of the university at Montpellier which soon became the French bulwark of Roman law.

A part, a very effective part, of the cultural heritage of Rome was the Latin language itself without which Roman law perhaps never could have conquered the European continent.

All these factors played a decisive role in the revival of Roman law and its dominance at the universities. The reception, aided by these factors, was the result and consequence of those profound changes that took place in contemporary society.

Medieval society was a closed, land- and city-bound conglomeration of people grouped into different classes predestined by the feudal status of their members. They were enclaved not only by the walls of medieval cities and manorial boundaries but by rigid social ties, too. Each group lived its own life governed by its own customs and regulations. The rigid closed structure of the medieval society became subject to profound changes, however. The crusades, the discoveries, the Renaissance, and the Reformation produced a new society with new ideas, new political and religious forces, new opportunities and horizons. The new intellectual, political, religious and commercial currents called for a new legal order which was found in the Roman law of the Glossators and Commentators.

The process of the reception of Roman law varied from region to region both in timing and intensity. In Italy, on the Iberian peninsula and in southern France where the law was basically Roman, the rediscovery of the *Corpus Juris Civills* and its adaptation to current needs meant only the enlargement and elucidation of the body of law the local population already lived by.

In contrast with southern France, customary Germanic law was the basic law in the central and northern parts of France. Under the influence of the Italian schools, French jurists, familiar with Roman law, early started to reshape the amorphous body of customary laws. From the thirteenth-century onwards, there appeared a number of local law compilations revealing Roman law influence to varying degree. Since these compilations and also the later *chartes des coutumes* (official local compilations) left many gaps, Roman law was invoked to fill them. Thus, Roman law
found its direct application as a subsidiary system of law. The influence of Roman law did not stop at this point, however. When the locally developed laws proved entirely inadequate to meet the needs of the expanding trade and commerce, they were supplanted by the Roman law of obligations.

The most comprehensive reception of Roman law took place in Germany. As for the multitude of different local rules, this country showed the most varied picture. Germany, like France, produced compilations of local laws. These compilations, however, were more independent of Roman law influences and therefore they displayed much originality and a great variety of differences as well. When changed conditions called for a uniform system of law, it could be supplied only by the reception of Roman law in complexu, that is, in the form and to the extent that it had been glossed by the Glossators and adapted to current needs by the Commentators. In spite of this large scale reception of Roman law, several important Germanic legal institutions, especially in the sphere of family law and the law of inheritance and succession still survived.

By and large, similar courses were followed in the Low Countries, in Central Europe, and even on the British Isles in Scotland where the reception of Roman law finally resulted in a “mixed system of law.”

Thus, the extent of the reception of Roman legal institutions and precepts varied from country to country, but it was the science of law, the creation of the Glossators and Commentators, which enjoyed a general reception in Europe—with the exception of England and the Scandinavian countries—and furnished the same legal terminology, the same method of legal thinking, and the same technique of developing national legal systems of law by wedding Roman legal principles and concepts to local native laws. This explains why the European national legal systems, despite the essential differences in details, present a striking degree of unity.

In conclusion, Roman law was a private law par excellence; the Digest, the most valuable and influential part of the Corpus Juris Civilis contains the Roman jurists’ expositions on Roman private law institutions, and it was the updated Roman private law which had been received and became the basis of the European private law systems, in other words, the European “Civil law.”

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35 Though Roman law was not received in England, it contributed—in disputed degree—to the development of various common law institutions.
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that some of the Glossators' writings are anonymous; the non-anonymous works are often identified by the initials of the authors only and there might be as many initials for an author as many variances of his name exist, e.g., Irnerius, Irnerius, Hirnerius, Guarnerius, Warnerius.

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