THE EXPERIENCE OF ROMAN PRIVATE LAW IN SWITZERLAND

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1. Introduction[1]

A true State since 1848, Switzerland was a political creation of the end of the Middle Ages.[2] Situated at the centre of Europe, the country has benefited from a multitude of cultural influences that have contributed to the evolution of the law. Under the Roman Empire, Helvetica comprised several provinces. At the time of the progressive decline of the occidental Roman Empire, a number of Germanic tribes settled in the territory. Foreshadowing the configuration of the three principal cultural regions of modern Switzerland, the Burgundians settled in the west (present-day French Switzerland), the Alamanni in the north and east (present-day German Switzerland), and the Lombards in the south (present-day Italian Switzerland).[3] The famous *leges barbarorum* therefore influenced both private and public law in Switzerland up until the modern era.[4] The Helvetic territory subsequently became part of the Holy Roman Empire of the German Nation, with different degrees of integration in different regions.[5] From the fifteenth century, Switzerland began to emancipate itself from the Empire.[6] The country acquired official independence in 1648 after the signing of the treaties of Westphalia. The official name, the "Swiss Confederation" was used from 1803. Switzerland became a federal state

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in accordance with the Constitution of 1848. This federal state was later consolidated and given wider competences in the Constitution of 1874.[7]

Swiss law was therefore formed as much on the basis of Germanic as Roman tradition. This modest contribution, written in homage to our eminent colleague Laurens Winkel, attempts to provide a synthesis of the experience of Roman private law in Switzerland. This text will concentrate on four significant aspects: the reception of Roman law (thirteenth – seventeenth centuries); legal science (sixteenth – nineteenth centuries); the cantonal and federal codifications (nineteenth – twentieth centuries) and finally, Roman law today.

The subject matter is vast and complex. The experience of Roman law in Switzerland differed significantly in different places and eras.[8] The panorama that follows will therefore inevitably be schematic.

2.   The reception of Roman law in Switzerland (thirteenth – seventeenth centuries)

During the twelfth century, Switzerland was essentially ruled by Germanic customs, in particular the Burgundian and Alemannic laws. This section will discuss the way in which Roman law was received in Switzerland following the renaissance of Roman law.

The "reception of Roman law" here means the process that began during the twelfth century during which the Roman way of legal thinking, and many of the rules found in the *Corpus iuris civilis*, as elaborated upon by the glossators and the commentators, became an integral part of most European legal systems. Strictly construed, the reception concerns the direct application of the rules of Roman law by civil and laic jurisdictions. This was preceded by the pre-reception, meaning the infiltration of Roman law under the influence of both ecclesiastic jurisdictions and law students educated in prestigious Italian and European universities.

In Switzerland, the process of the reception of Roman law was without doubt slower and less consistent than in other countries. Although the country benefited from an intense pre-reception (section 2.1), there was only a limited reception (section 2.2).[9]

2.1   The pre-reception of Roman law

Switzerland experienced a significant pre-reception of Roman law.[10] Initially this process resulted from knowledge acquired by Swiss jurists who were educated in a number of

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7   Bouquet (n. 2), pp. 79 ff.; Pahud de Mortanges (n. 3), pp. 173 ff.

8   Pio Caroni, Ius romanum in Helvetia: a che punto siamo?, in: *Europa e Italia, studi in onore di Giorgio Chittolini*, Florence 2011, pp. 55-79, 73 f.

9   On the reception of Roman law, see also Theodor Bühler, Die Methoden der Rezeption des römisch-gemeinen Rechts in die Erbrechte der Schweiz, in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Germanistische Abteilung 120 (2003), pp. 1-60 at p. 4.

10   Ferdinand Elsener, Die Einflüsse des römischen und kanonischen Rechts in der Schweiz, in: *Studien zur Rezeption des gelehrten Rechts*, Sigmaringen 1989, pp. 52-65 at pp. 54 ff.; Pahud de Mortanges (n. 3), pp. 134 ff.

European universities. It has, for example, been shown that students from Switzerland often attended the University of Bologna as from the end of the twelfth century. Stelling-Michaud has stated that between 1265 and 1330 there were about 300 Swiss students in Bologna.[11] In the fourteenth and fifteenth centuries, Swiss students attended other universities including Bourges, Montpellier, Orléans and Pavia.[12] In Pavia, some of them had the privilege of attending classes taught by the famous jurist Baldo degli Ubaldi (Baldus).[13] At all the universities, the sources, either the Digest or the Code of Justinian, and the methodology, essentially the casuistic approach, were identical.[14]

Once these students returned to their countries, having obtained a doctorate in law (*doctor legum*, in Roman law) or in the two laws (*in utroque jure*, in Roman and Canon law), these new jurists, in their professional practices, contributed significantly to the spread of Roman legal culture in Switzerland.[15] Many of these former students eventually obtained positions at the highest levels of the Church, the imperial magistracy or within local administrations: bishops, chancellors of the Dukes of Austria, bailiffs, lawyers, prosecutors, judges, lawyers, legal advisors and so on.[16]

The students also evidently brought back to Switzerland the works they had consulted during their studies, such as copies of the Digest or Accursius' Great Gloss. This legal literature was then distributed throughout the Swiss territory. It is therefore possible to find such literature in a number of remarkable private libraries throughout the country.[17] Similarly, many chapters of canons, monasteries and abbeys such as Einsiedeln, St. Gallen, Solothurn and Valère possess fine collections of such works.[18]

A second factor in the pre-reception of Roman law in Switzerland was the ecclesiastic tribunals, notably the bishoprics of Basel, Chur and Lausanne. As from the second half of the thirteenth century, these tribunals used Romano-canonical procedure and sometimes even the foundations of the law of the land (*ius commune*).[19] For example, the rules established by the Bishop of Lausanne in the middle of the fourteenth century show, through the detail of the *litis contestatio*, at which point the Romano-Canonical procedure was introduced into this part of Switzerland.[20]

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11 Sven Stelling-Michaud, La diffusion du droit romain en suisse, in: *Ius romanum medii aevi*, pars V, 12b, Varese 1977, p. 7.

12 Pascal Pichonnaz, Die Schweiz und das Römisches Recht, Ein Bild in groben Zügen, in: *Das Vermächtnis der Römer – Römisches Recht und Europa*, Bern/Stuttgart/Vienna 2012, pp. 21-46 at p. 27; Stelling-Michaud (n. 11), pp. 23 ff.

13 Stelling-Michaud (n. 11), p. 29.

14 Pichonnaz (n. 12), pp. 27 f.

15 Sven Stelling-Michaud, *L'Université de Bologne et la pénétration des droits romain et canonique en Suisse*, Geneva 1955.

16 Stelling-Michaud (n. 11), pp. 7 ff.

17 Stelling-Michaud (n. 11), pp. 20 ff.

18 Stelling-Michaud (n. 11), p. 22.

19 Pahud de Mortanges (n. 3), pp. 110 f.; Stelling-Michaud (n. 11), pp. 9 ff.

20 Stelling-Michaud (n. 11), p. 10.

2.2   The reception of Roman law

Although Switzerland appeared to be on track for a complete reception of Roman law, the process slowed down at the end of the Middle Ages for a number of political and sociological reasons.[21] The first reason was that Switzerland progressively gained greater independence from the Holy Roman Empire of the German Nation. After the Diet that was held at Worms in 1495, it was decided to institute a general tax and to create a supreme Tribunal of the Empire (*Reichskammergericht*). Paragraph 3 of the ordinance on the composition and activity of the Tribunal decreed that applicants would be judged chiefly under the *ius commune*, at least if the parties did not request the application of any specific local rules.[22] The Old Swiss Confederacy, which was omitted from the Diet, did not submit to these decisions.[23] In 1499, the peace treaty of Basel was signed, which brought to an end the Swabian War in which the Confederacy had battled the armies of King Maximilian I as well as the troops of a league of cities in southern Germany.[24] The desire for political independence went hand-in-hand with a desire for an independent legal order, and thus for independence from the *ius commune.* This process was still ongoing nearly a century and a half later when Switzerland obtained an "exemption" from all imperial jurisdiction in the treaties of Westphalia in 1648.[25]

The second reason, linked to the first, came from the desire to give precedence to the local customary sources, which constituted popular and accessible law, as against Roman sources that represented a foreign and scholarly law, which could not be understood or interpreted without the help of legal scholars.[26] There was still insufficient legal education in Switzerland, even though jurists were being educated at Swiss Universities (in Basel as from the fifteenth century) as well as ones abroad (notably Berlin, Heidelberg and Paris).[27] Judges were therefore usually laypersons, often traders or artisans who did not have a legal education.[28] In addition, the republican ideal, which had become entrenched in different Swiss cantons in both urban and rural areas, advocated a direct and democratic control of legal affairs, so that both legal science and jurists were distrusted.[29]

A source is often cited in this context, despite its doubtful authenticity, because it appears to reflect the spirit that was widespread in the Confederacy in the sixteenth and seventeenth centuries.[30] In proceedings heard before a tribunal in Frauenfeld in the sixteenth century, Thurgau, a lawyer from Zurich with a doctorate in law, based his

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21   Pahud de Mortanges (n. 3), pp. 141 ff.

22   Carlo Augusto Cannata, Le droit écrit à Neuchâtel, pays de coutumes, in: *Cahiers de l'Institut de sociologie et de science politique de l'Université de Neuchâtel*, N 9 (Mar 1987), pp. 31-46 at pp. 36 f.

23   Jorio (n. 5).

24   Bouquet (n. 2), pp. 34 f.; Pahud de Mortanges (n. 3), p. 57.

25   Bouquet (n. 2), p. 44; Jorio (n. 5).

26   Clausdieter Schott, Wir Eidgenossen fragen nicht nach Bartele und Baldele … , in: *Gerichtslauben-Vorträge, Freiburger Festkolloquium zum fünfundsiebzigsten Geburtstag von Hans Thieme*, Sigmaringen 1983, pp. 17-45 at pp. 40 ff.

27   Cannata (n. 22), pp. 41 f.

28   Caroni (n. 8), p. 71; Pahud de Mortanges (n. 3), p. 116.

29   Caroni (n. 8), p. 62.

30   Cannata (n. 22), pp. 39 ff.; Schott (n. 26).

pleadings on Roman sources and an assortment of scholarly references, notably from the famous commentators Bartolus and Baldus. The president of the Tribunal sceptically responded, "Listen, Doctor, Bartolus, Baldus and other consulting jurists matter little to us in the Confederacy because we have our own customs and laws".[31]

These diverse factors explain why Switzerland did not experience a true reception of Roman law. The territories making up Switzerland were regulated by a myriad of customs, territorial laws, local statutes and codes, usually in the Germanic tradition.[32] Thus the Alemannic law (*lex Alamannorum*) strongly influenced Swiss law. Some dispositions concerning family and succession law were even reflected in a number of legislative measures up until the seventeenth century.[33] Another example is the Mirror of Swabia (*Schwabenspiegel*), which had an important influence on certain customs (notably those in the regions of Glarus and Davos) and municipal laws (Chur and Lausanne).[34]

Despite this, traces of Roman law remained in certain regions of Switzerland. The terminology of Roman law and certain Roman rules were sometimes reflected in local customs or statutes.[35] The influence of the Roman legal tradition was also demonstrated from the fifteenth century onwards when there was increasing recourse to legal opinions, inspired by the Italian commentators, in proceedings in certain tribunals in large Swiss cities.[36] Citizens and parties to the proceedings thus used formulas and collections of legal models formulated by experienced notaries and jurists.[37] Furthermore, in certain cities such as Geneva or regions such as Grisons, Roman law was sometimes considered a supplementary law.[38] In 1719, the statute of Basel (*Stadtgerichtsordnung)* provided for the *ius commune* to interpret or fill the gaps in the local law.[39]

3.   Legal science (sixteenth – nineteenth centuries)

Despite the attachment to local law and the republican spirit, and the distrust of scholarly law and jurists, academies and universities were founded in Basel (1460), Geneva (1566), Bern (1679), Lausanne (1708), Fribourg (1763), Zurich (1833) and Neuchatel (1840), all of which taught Roman law from their inception.[40] In a remarkable and somewhat

31   Anecdote cited by Schott (n. 26), p. 18.

32   Eugen Huber, *System und Geschichte des Schweizerischen Privatrechts* (four vols.), vol. 4, Basel 1886-1893, pp. 18 ff.; Pahud de Mortanges (n. 3), pp. 91 ff.; Reber (n. 3).

33   Reber (n. 3).

34   Theodor Bühler, Miroir de Souabe, in: *Dictionnaire historique de la Suisse*, *www.hls-dhs-dss.ch* (retrieved: 19 Jan. 2010).

35   Stelling-Michaud (n. 11), pp. 12 f.

36   Stelling-Michaud (n. 11), pp. 29 f.

37   Stelling-Michaud (n. 11), pp. 15 ff.

38   George-Auguste Matile, *De l'autorité du droit romain, de la coutume de Bourgogne et de la Caroline dans la Principauté de Neuchâtel*, Neuchâtel 1838, pp. 27 ff.

39   Pio Caroni, Al di fuori di ogni contrapposizione dialettica: "Vaterländisches Recht" nella Svizzera settecentesca, in: *Il diritto patrio, Tra diritto comune e codificazione (secoli XVI-XIX)*, Rome 2006, pp. 173-197 at pp. 187 ff.

40   Ferdinand Elsener, *Die Schweizer Rechtsschulen vom 16. bis zum 19. Jahrhundert*, Zurich 1975, pp. 34 ff.; Pahud de Mortanges (n. 3), pp. 143 ff.

surprising way, Switzerland participated in the development of European legal science by contributing, in different degrees, to the rise of three large legal schools, the humanist school (section 3.1), the modern school of natural law (section 3.2) and the pandectist school (section 3.3).

3.1   The humanist school

In the sixteenth century, the Universities of Geneva and Basel became important bases of legal humanism.[41] Their publication of sources contributed to the spread of Roman law throughout Europe. These Universities benefited from the skills of a number of legal humanists who had fled religious persecution.

For example, the famous legal humanist Francois Hotman (1524-1590) spent a large part of his career in Switzerland. Having been Calvin's secretary in Geneva (1547), a professor of classical languages at the Academy of Lausanne (1550-1555), and having obtained a doctorate at the University of Basel (1558), he finally left France in 1572 after the Saint Bartholomew's day massacre and established himself in Switzerland, firstly in Geneva and then in Basel. He published there his major works, which had a large influence on European legal thought: Franco-Gallia (1573) and Antri-Tribonian (1603).[42]

As a French refugee in Switzerland, Denis Godefroy (1549-1621) participated in the most significant phase of Genevan legal humanism. It was in Geneva that publication of his most famous work started in 1583: the edition of the Justinian compilation published for the first time under the title *Corpus iuris civilis*.[43] This edition, accompanied by a reproduction of the Great Gloss of Accursius, alongside a commentary and critiques, had immense success amongst jurisconsults, theorists and practitioners alike. It was also thanks to Denis Godefroy that the Twelve Tables was restored to its original text for the first time.[44] His son, Jacques Godefroy (1587-1652), who was born in Geneva and taught at the Academy in the same city, followed in his footsteps. Apart from his numerous studies on various historic phases of Roman law, his editions of juridical works and his critiques on the Twelve Tables, Jacques Godefroy is above all known for his edition of and commentary on the Theodosian Code.[45]

In 1460 Basel, an independent city, became the first in Switzerland to found a University. The first teachers of Roman law at this University were reputable professors from Pavia.[46] Basel became an important centre of legal humanism, led by people such as Bonifacius Amerbach (1495-1562), who studied law in Avignon under André Alciato

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41   On Genevan legal humanism, cf. Vincenzo Piano-Mortari, L'humanisme juridique à Genève des origines jusqu'à Jacques Godefroy, in: *Jacques Godefroy (1587-1652) et l'humanisme juridique à Genève*, Basel/Frankfurt-on-Main 1991, pp. 27-46.

42   Carlos Gilly, Hotman, François, in: *Dictionnaire historique de la Suisse, www.hls-dhs-dss.ch* (retrieved: 21 Nov. 2006).

43   Piano-Mortari (n. 41), p. 40.

44   Piano-Mortari (n. 41), p. 41.

45   Piano-Mortari (n. 41), pp. 44 f.

46   Stelling-Michaud (n. 11), p. 30.

(1492-1550), his son Basile Amerbach (1533-1592), a specialist in Roman epigraphy who studied law in Pavia, Bologna and Bourges, and the famous Desiderius Erasmus (1466-1536).[47]

3.2   The modern school of natural law

In the eighteenth century, French Switzerland played a fundamental role in the spread of the German natural-law doctrine, and so indirectly in the spread of Roman law, in France and in the Anglo-Saxon world.[48] This "Swiss-French school of natural law" comprised a number of scholars who taught mostly in the Academies of Fribourg, Geneva, Lausanne and Neuchatel. Their works included the popular treatises by the Genevan Jean-Jacques Burlamaqui (1694-1748) and Emer de Vattel from Neuchatel (1714-1767), as well as the translations by Jean Barbeyrac (1674-1744) of important works by the eminent natural lawyers Hugo Grotius and Samuel von Pufendorf.[49]

Originally from Languedoc, Jean Barbeyrac (1674-1744), already known for his French translation of *The Law of Nature and People* by Samuel von Pufendorf, which appeared in 1706, was named to the new chair of law and history created at the Academy of Lausanne. After holding the office of Rector of this academy (1714-1717), in 1724 he published a translation of *The Law of War and Peace* by Grotius, which made him famous.[50] Certain works of Barbeyrac were recently re-edited and continue to generate research in both continental Europe and the Anglo-Saxon world.[51]

Emer de Vattel (1714-1767) of Neuchatel had an exceptional destiny. After a diplomatic career which took him to the chancellery in Warsaw and the private council in Dresden, in 1758 he published a work on *The Law of People; Principles of Natural Law Applied to the Conduct of Affairs of Nations and Sovereigns*.[52] This treatise, which Vattel devoted to the founders of public international law, was translated into a number of languages and is still read throughout the world today.[53]

47   Pahud de Mortanges (n. 3), pp. 139 ff.; Bénédict Winiger, Droit romain, in: *Dictionnaire historique de la Suisse*, *www.hls-dhs-dss.ch* (retrieved: 14 Apr. 2011).

48   Alfred Dufour, Droit naturel, in: *Dictionnaire historique de la Suisse*, *www.hls-dhs-dss.ch* (retrieved: 22 Sep. 2011); Pahud de Mortanges (n. 3), pp. 147 ff.

49   Alfred Dufour, *Le mariage dans l'école romande du droit naturel au XVIIIᵉ siècle*, Geneva 1976, pp. 1 ff.

50   Philippe Meylan, *Jean Barbeyrac (1674-1744) et les débuts de l'enseignement du droit dans l'Académie de Lausanne*, Lausanne 1937; Jean-François Poudret, Barbeyrac, Jean, in: *Dictionnaire historique de la Suisse*, *www.hls-dhs-dss.ch* (retrieved: 5 May 2004).

51   Denis Tappy, De Barbeyrac aux premiers Masters en droit de la Faculté de droit et des sciences criminelles de l'Unil: 300 ans d'enseignement du droit à Lausanne, in: *300 ans d'enseignement du droit à Lausanne*, Geneva/Zurich/Basel 2010, pp. 1-45 at p. 3.

52   Peter Haggenmacher, Vattel, Emer de, in: *Dictionnaire historique de la Suisse*, *www.hls-dhs-dss.ch* (retrieved: 13 Mar. 2013).

53   Yves Sandoz (ed), *Réflexions sur l'impact, le rayonnement et l'actualité du "droit des gens" d'Emer de Vattel – A l'occasion du 250ᵉ anniversaire de sa parution*, Brussels 2010.

3.3   The pandectist school (nineteenth century)

There were numerous significant ties between the German pandectist school and Switzerland, which were most noticeable in the domain of university-based research and teaching. Many Swiss professors who had studied or taught in Germany were influenced by the historical school of law founded by Savigny. Furthermore, many German professors taught in Swiss Universities.

We know, for example, that the famous Swiss professors Johann Jakob Bachofen (1815-1887), Johann Caspar Bluntschli (1803-1881) and Friedrich Ludwig Keller (1799-1860), often considered to be the founder of modern legal science in Switzerland,[54] were all students of Savigny. Keller even had the honour of succeeding to the chair of Savigny, who considered him to be the Romanist in Berlin most worthy to do so.[55]

Furthermore, a number of eminent German pandectists, post-savignyians, taught at Swiss-German Universities, for example, Heinrich Dernburg (1829-1907), Theodor Mommsen (1817-1903) and Ferdinand Regelsberger (1831-1911) in Zurich, as well as Rudolf von Jhering (1818-1892), Ernst Rabel (1874-1955) and Bernhard Windscheid (1817-1892) in Basel, and Philipp Lotmar (1850-1922) in Bern.[56] Even though they did not usually stay in Switzerland for more than a few years, the constant presence of German Romanists strongly influenced legal science in Switzerland as well as cantonal and federal codifications.[57]

4.   Cantonal and federal codifications (nineteenth – twentieth centuries)

Codification constituted a crucial moment in the experience of Roman law in Switzerland. Both the cantonal civil codes (section 4.1) and the federal codes (section 4.2) contain a number of institutions and rules derived from Roman law.

4.1   Cantonal codifications

As required by the principal of federalism, codification firstly took place at cantonal level. This is the reason that most Swiss cantons adopted a civil code during the nineteenth century.[58]

It is possible to distinguish three groups of codifications according to the models that inspired them.[59] The first group comprises the codifications that subscribe to the spirit of the French Civil Code. These are the civil codes from French Switzerland

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54   Pio Caroni, Die Schweizer Romanistik im 19 Jahrhundert, in: *Zeitschrift für Neuere Rechtsgeschichte* 16 (1994), pp. 243-271 at p. 246.

55   Caroni (n. 8), p. 76.

56   Caroni (n. 54), p. 251.

57   Pahud de Mortanges (n. 3), pp. 206 f.

58   Huber (n. 32), vol. 4, pp. 185 ff.

59   Pahud de Mortanges (n. 3), pp. 207 ff.; Virgile Rossel and Fritz-Henri Mentha*, Manuel du droit civil suisse*, vol. 1, Lausanne/Geneva 1922, pp. 11 ff.

and the canton of Tessin.[60] The second group comprises the codifications that took the Austrian Civil Code as a model. Examples are the Civil Code from the canton of Berne, drafted by Professor Samuel Ludwig Schnell (1775-1849), as well as codes from the cantons of Aargau, Lucerne and Solothurn. Finally, the third group comprises the later codifications, drawn up in the second half of the nineteenth century under the influence of the German historical school. This group includes not only the Zurich Civil Code, the work of Professors Friedrich Ludwig Keller (1799-1860) and Johann Caspar Bluntschli (1803-1881), professor of German private law in Heidelberg, but also the codes of certain cantons of central Switzerland (Glarus and Zug) and eastern Switzerland (Schaffhausen and Thurgau).

Globally, Roman law, like Germanic law, left profound traces on all these codifications.[61] This is hardly surprising as all the models for the cantonal civil codes, namely the French Civil Code, the Austrian Civil Code and the historic school of law, were themselves rooted in the *ius commune*.[62]

4.2   The federal codifications

In 1874, the federal constitution gave the Swiss Confederation the competence to legislate on all matters relating to commerce. It was only in 1898 that the Confederation permitted itself to legislate on the ensemble of private law.[63] This is why the Federal Code of Obligations, adopted in 1881, preceded the Swiss Civil Code, adopted in 1907. These two codifications bear strong marks of the Roman juridical tradition.[64] It is undoubtedly Roman law that gave the Swiss codes, like other important European codes, the foundational juridical basis that continues to determine these rules, in particular in the areas of property law and the law of obligations.[65] For example, the dispositions on original acquisition of property, easements and the general section of the Code of Obligations have striking similarities to Roman sources.[66]

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60   On the influence of the Napoleonic Code on the civil codes of the French-Swiss cantons, cf. Jean-Philippe Dunand, Le code Napoléon comme modèle des codes civils des cantons suisses romands, in: *A l'Europe du troisième millénaire, Mélanges offerts à Giuseppe Gandolfi*, vol. 4, Milan 2009, pp. 1927-1958.

61   Rossel/Mentha (n. 59), p. 37.

62   Pichonnaz (n. 12), pp. 33 f.

63   Rossel/Mentha (n. 59), pp. 35 ff.

64   Jean-Philippe Dunand and Alexis Keller, L'Europe, la Suisse et l'expérience du droit romain, foreword of Peter Stein's book, *Le droit romain et l'Europe, Essai d'interprétation historique*, Brussels/Paris/Zurich 2004, pp. XVI ff.; Pahud de Mortanges (n. 3), pp. 221 ff.; Hansjörg Peter, La place de l'histoire du droit dans l'enseignement et la formation du comparatiste, in: *Rapports suisses présentés au XVème Congrès international de droit comparé*, Zurich 1998, pp. 337-351 at pp. 341 ff.; Winiger (n. 47).

65   Winiger (n. 47).

66   See the numerous examples cited by Bruno Schmidlin, *Droit privé romain I*, Lausanne 2008 and Jean-Philippe Dunand, Bruno Schmidlin and Bénédict Winiger, *Droit privé romain II*, Geneva 2010. Equally interesting to consult is the collection of Hansjörg Peter, *Textes de droit romain et de droit suisse des obligations*, Zurich 2011, which discusses texts of Roman law alongside the Swiss law of obligations.

A study of the personalities who conceived these two codes shows why they display such a strong Roman influence. Professor Walther Munzinger (1803-1873), compiler of the Code of Obligations, had studied in Berlin under the best pandectists.[67] In his work, Munzinger was inspired by rules applied in the French and German juridical orders as well as those in the Swiss cantons.[68] He considered the modern law of obligations to be based on Roman law and believed that in principle there was no contradiction in this field between Germanic and Roman law.[69]

The history of the Swiss Civil Code is different.[70] Professor Eugen Huber (1849-1923), the driving force behind the Swiss Civil Code,[71] was strongly influenced by the German historical school. Huber, who completed part of his legal studies in Berlin and afterwards taught at the University of Halle, considered that the evolution of law was determined by the needs and convictions of the populations concerned.[72] Insofar as law is a product of history, the Civil Code could not succeed unless it concretised the popular conscience of the Swiss people.[73] He wished to give Switzerland a national civil code independent of all foreign influence, which could reflect "the aspirations of the popular conscience".[74]

Huber was convinced that Swiss private law resulted from various cantonal laws. It must be remembered that at the end of the nineteenth century, despite the adoption of the federal Code of Obligations, Swiss private law did not really exist. It actually comprised a number of local laws, essentially the cantonal civil codes, which as we have seen, were themselves strongly influenced by the Roman tradition. Huber was an expert on cantonal legislation. On a mandate from the Swiss society of jurists he had drafted a vast study comparing the cantonal civil laws and their history,[75] and had notably concluded that Roman, Germanic and French traditions were often present in the majority of Swiss regions.[76]

67   Bénédict Winiger, Le Code suisse dans l'embarras entre BGB et Code civil français, in: *Le Code civil français dans le droit européen*, Brussels 2005, pp. 153-170 at p. 155.

68   Hans Merz, Die Quellen des schweizerischen Obligationenrechts von 1881, Ein Beispiel interner Rechtsvereinheitlichung, in: *Festschrift für Konrad Zweigert zum 70. Geburtstag*, Tübingen 1981, pp. 667-679; Pichonnaz (n. 12), pp. 34 f.

69   Winiger (n. 67), p. 156.

70   On the history of the compilation of the Swiss Civil Code, cf. Jean-Philippe Dunand, Les origines et le rayonnement du Code civil suisse, in: *Le centenaire du Code civil suisse*, Paris 2008, pp. 9-34; Rossel/Mentha (n. 59), pp. 38 ff.

71   Dominique Manaï, *Eugen Huber – Jurisconsulte charismatique*, Basel/Frankfort-on-Main 1990, pp. 64 ff.

72   Winiger (n. 67), p. 156.

73   Dunand (n. 70), p. 20.

74   Eugen Huber, *Exposé des motifs de l'avant-projet du Département Fédéral de Justice et Police*, vol. 1, Berne 1901, p. 2.

75   Huber (n. 32). On the influence of the Swiss society of jurists, see Jean-Philippe Dunand, D'une codification à l'autre: le rôle de la Société suisse des juristes dans l'unification du droit suisse, in: 150 *Jahre Schweizerischer Juristenverein (1861-2011)*, Basel 2011, pp. 213-242, at p. 223 ff.

76   Winiger (n. 67), p. 167.

Finally, as stated above, the Swiss Civil Code adopted a number of rules from the Roman tradition, in particular on the subject of property law. It also contained typically Germanic institutions such as the marriage contract, the inheritance pact and the principle of publicity in property law.[77]

5. Roman law today

As we have seen, the Roman juridical tradition constituted one of the major components of Swiss private law. This tradition has been cultivated in the Universities (section 5.1) and in the jurisprudence of the federal court, the highest judicial body in the country (section 5.2).

5.1 Roman law at university

As indicated above, Roman law was taught at the Swiss Universities and Academies from their inception, a practice that has continued up until today. In French Switzerland, all law students, and thus all future jurists, are initiated into Roman law by obligatory courses given in the first cycle of their studies. More specialist courses often follow this introductory course. The courses set out to examine and explain the institutions and rules of modern and private law in the light of their history, with reference to historic sources. Thus courses in Roman law take into account the evolution of contemporary civil law.[78]

A number of books written by professors teaching at these Universities have become classic works on the study of law. Prime examples are the manuals *Roman Private Law I* (Schmidlin)[79] and *Roman Private Law II* (Schmidlin/Cannata),[80] recently replaced by the new manuals *Roman Private Law I* (Schmidlin)[81] and *Roman Private Law II* (Dunand/Schmidlin/Winiger),[82] the handbook devoted to the *Roman Foundations of Private Law* (Pichonnaz),[83] the *Glossary of Roman Law* (Dunand/Pichonnaz),[84] as well as the *Texts of Roman Law and Swiss Law of Obligations* (Peter).[85]

A number of monographs that have appeared in French Switzerland in the last fifteen years keep the Roman tradition in mind, often through a historic and comparative perspective.[86] The subjects treated include the abuse of law,[87] the recognition of abstract

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77 Reber (n. 3).

78 Pascal Pichonnaz, Droit romain: enseignement, méthode et contribution à la réflexion du juge, in: *Index* 39 (2011), pp. 58-77.

79 Bruno Schmidlin, *Droit privé romain I*, Lausanne 1988.

80 Bruno Schmidlin and Carlo Augusto Cannata, *Droit privé romain II*, Lausanne 1991.

81 Schmidlin (n. 66).

82 Dunand/Schmidlin/Winiger (n. 66).

83 Pascal Pichonnaz, *Les fondements romains du droit privé*, Paris/Geneva/Zurich/Basel 2008.

84 Jean-Philippe Dunand and Pascal Pichonnaz, *Lexique de droit romain*, Brussels/Geneva/Zurich/Basel 2010.

85 Peter (n. 66).

86 Dunand/Keller (n. 64), pp. XXXI f.; Olivier Guillod, Cent ans de sollicitude: un code civil soucieux de la personne humaine, in: *Revue de droit suisse* 126 (2007) II, pp. 51-164, at p. 73.

87 Ursula Elsener, *Les racines romanistes de l'interdiction de l'abus de droit*, Basel 2004.

debt,[88] compensation,[89] pre-contractual responsibility,[90] contractual justice,[91] trust management,[92] donation burdened by a charge,[93] a carrier's responsibility,[94] Aquilian responsibility,[95] civil responsibility for risk,[96] and the sale of property in enforcement proceedings.[97]

5.2   Roman law in jurisprudence

In Helvetic jurisprudence litigation constantly requires the interpretation of rules and institutions with a Roman origin, found in the Civil Code and the Code of Obligations. These rules have been codified in substantive Swiss law, and interpreted with the help of jurisprudence and doctrine on Swiss private law. Sometimes the Federal Court refers directly to historic sources in its judgements.[98] Three significant instances of jurisprudence are cited below.[99]

The first example concerns the mixing of money. The Federal Court considered that, "in conformance with *ius commune*", "the person who, even in bad faith, mixes the money of another with his own, becomes proprietor of all".[100] This solution, confirmed in a number of cases,[101] relies on the specific approach to the mixing of money practised in Roman law.[102]

The second example concerns risks in a contract of sale. The famous rule *periculum est emptoris*, having a Roman origin, was codified in Swiss law in article 185.1 of the Code of Obligations: "The benefit and risk of the object pass to the buyer on conclusion

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88   Eric Muster, *La reconnaissance de dette abstraite (articles 17 CO et 82ss LP) étude historique et de droit actuel*, Basel/Geneva/Zurich 2004.

89   Pascal Pichonnaz, *La compensation, analyse historique et comparative des modes de compenser non conventionnels*, Fribourg 2001.

90   Nicolas Kuonen, *La responsabilité précontractuelle*, Zurich 2007.

91   Laurent Duvanel, *La justice contractuelle dans la philosophie antique et le droit romain*, Basel/Geneva/Zurich 2004.

92   Jean-Philippe Dunand*, Le transfert fiduciaire "donner pour reprendre", Mancipio dare ut remancipetur, Analyse historique et comparative de la fiducie-gestion*, Basel/Geneva/Munich 2000.

93   Davide Cerutti, *Tra gratuità e onerosità studio di diritto romano e di diritto svizzero*, Geneva/Basel/Zurich 2008.

94   Aurélien Stettler, *La responsabilité du transporteur pour perte, avarie et/ou livraison de la marchandise étude de droit suisse avec un aperçu de droit romain*, Geneva/Basel/Zurich 2008.

95   Bénédict Winiger, *La responsabilité aquilienne romaine, damnum iniuria datum*, Basel/Frankfort-on-Main 1997.

96   Guillaume Etier, *Du risque à la faute, évolution de la responsabilité civile pour le risque du droit romain au droit commun*, Brussels/Geneva/Zurich/Basel 2006.

97   Serge Segura, *La cession bonorum étude comparée de droit romain et de droit suisse*, Basel/Geneva/Zurich 2004.

98   Pichonnaz (n. 78), pp. 62 ff.

99   The judgements cited can also be consulted online via the website of the Federal Court (*www.bger.ch*).

100   ATF 47 (1921) II 267, 271.

101   Cf. for example the judgement 6B_994/2010 of 7 Jul. 2011, c. 5.3.3.1.

102   On this question cf. Jean-Philippe Dunand and Davide Cerutti, Le régime juridique du mélange d'argent – Consécration jurisprudentielle d'une règle d'origine romaine, in: *Spuren des römischen Rechts, Festschrift für Bruno Huwiler zum 65. Geburtstag*, Bern 2007, pp. 193-204.

of the contract … ." Yet this does not accord well with the general principles of the Swiss law of obligations, notably with the rule that prescribes that the proprietor is entitled to the benefits and bears the risks of the object (*res perit domino*). In a judgement given in 2002, The Federal Court ruled on the interplay between the rule and the exceptions found in article 185. It was there that the origin of the rule *periculum est emptoris* was recalled and explained. Referring to Zimmermann, *The Law of Obligations*, the meaning of the phrase in the Roman era was expounded.[103]

Finally, the third example concerns the contractual responsibility of the seller. Where a buyer rescinds the contract of sale, article 208.2 of the Code of Obligations provides that the seller is responsible, regardless of fault, for damages resulting directly from delivery and defective merchandise. The meaning of this legal provision was controversial; however, the Federal Court recently had occasion to interpret it historically and systematically. In its analysis of the origin of this legal rule, the Federal Court noted "that the distinction between direct and indirect, or mediate or immediate damage, was already present in the *ius commune*".[104]

6. Conclusion

Pragmatic in nature, respectful of local laws, distrustful of elites, the Confederacy has often privileged the German juridical tradition. In this contribution, however, I have had the opportunity to highlight the importance of the Roman juridical tradition. It is not enough to simply speak of the experience of Roman law; rather, it is necessary to speak of a variety of diverse experiences: of medieval Roman law, humanist Roman law, pandectist Roman law and codified Roman law. The interpretation and the application of law will necessarily differ depending on time, place and socio-political context. Globally, the Roman tradition has had a decisive influence on the development of private law in Switzerland.

Abstract

A true State since 1848, Switzerland was a political creation of the end of the Middle Ages. Situated at the centre of Europe, the country has benefited from a multitude of cultural influences that have contributed to the evolution of the law. This contribution puts forward a synthesis of the experience of Roman private law in Switzerland. The text concentrates on four significant aspects: the reception of Roman law (thirteenth – seventeenth centuries); legal science (sixteenth – nineteenth centuries); the cantonal and federal codifications (nineteenth – twentieth centuries) and finally, Roman law today. The contribution concludes that it is not enough to simply speak of the experience of Roman law; rather it is necessary to speak of a variety of diverse experiences. Whether it be medieval Roman law, humanist Roman law, pandectist Roman law or codified Roman law, it is never the same Roman law.

103   ATF 128 (2002) III 370, 373. On this judgement, see Pichonnaz (n. 78), pp. 62 f.
104   ATF 133 (2007) III 257, 267. On this judgement, see Pichonnaz (n. 78), pp. 65 ff.