| **Ch 1, *The invention of law in the West*, Aldo Schiavone et al.** | | |
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| **Background** | **Argument(s)** | **Conclusion** |
| - Schiavone makes a large claim that Romans invented legal conceptualisation.<br>- **Core argument:** let go of the tradition of studying and re-studying Roman law; shift away from Roman law. | **Views on Roman Law**<br>- The core point of Schiavone's argument is the ***differentness*** of the Romans i.e., the creation of legal thought and the jurist<br>- ***Ius:*** the sense of law, of right and rightness → distinction between these is made in all modern civil law countries.<br>- Parallel with common law: just as common law is "judge made", Roman law is jurist made<br>**Views on non-Roman Law**<br>- The argument would be made that Polynesian laws (and the like) are only laws analogically.<br>***Corpus iuris civilis***<br>- Four distinct units: *Codex, Digesta, Institutiones,* and the *Novellae*<br>**Emperor Justinian**<br>- Codification of laws: a tendency towards this had begun with the Theodosian compilation at the turn of the fifth century<br>- 528 CE: a new collection of constitutions extending from the age of Hadrian intended to replace the three previous collections (*Gregorian Code, Hermogenian Code,* and the *Theodosian Code*).<br>**Legal Policy**<br>- 529-530 CE: Minister Tribonian was commissioned to edit the vast collection of texts (governing laws) and arrange them by subject; the aim was to remodel the ancient thought of masters into a codified body of law; serve as both a code and an anthology<br>- Severan age: threatened to completely erase classical jurists thought.<br>- Legal study: the threshold to study law had dropped dramatically, especially in the Western regions<br>**Historical effect**<br>- The fragments that survived in the *Digesta* were the result of an arbitrary choice, with criteria that differs greatly from modern historical standards of preservation.<br>- Byzantine editors reserved the right to introduce undeclared modifications into the fragments<br>- Salvaged fragments received an imprint of the model of the code (completely alien to them)<br>**The Greeks vs the Romans**<br>- Greeks: Basing the public space upon a constitutional architecture that was an expression of the supremacy of the assembly and the equality of all citizens before the law.<br>- Romans: capturing bare life, the relations between private individuals<br>**Rediscovery**<br>- Late 11th CE: scholars in Bologna began working on a copy of the *Vulgata,* the text that was used derived from an older manuscript, *Littera Florentina*<br>- Since then the *Digesta* have been the focus of uninterrupted attention which has lead to the neo-Roman legal model at the foundations of the modern world.<br>**Influence of the *Corpus Iuris***<br>1. Jurist-theologians: structed canon law, reappropriated the literal significance of the texts. | - The codification, rediscovery and continued interest in Roman law has perhaps held Roman law up to a high standard that was not fitting / blows it out of proportion.<br>- Schiavone suggests that there needs to be a readjustment at the interest in Roman law. |

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| | 2. Spread of the Romanistic paradigm beyond the ambit of private law: the foundation of *ius publicum Europaeum* and the modern doctrine of natural law<br>3. Age of revolutions: bourgeois-Romanist codifications in France, Italy and Germany and the years surrounding WWI.<br>- Supposed infallibility of the methods of "classical" jurisprudence<br>**Twentieth Century**<br>- Advent of totalitarian regimes (post-war period)<br>- Accentuated era of "global law" | |
| **Ch 2, *The invention of law in the West*, Aldo Schiavone et al.** | | |
| **Background** | **Argument** | **Conclusion** |
| | **The *Digesta***<br>- Composed to challenge time<br>- Decontextualization: uprooted Roman legal thought from its original setting<br>**The Romanist tradition**<br>- The gaze of Romanist-jurists moved away from the nascent historiography on classical antiquity after a brief interlude of French and Italian humanism<br>- The new legal science: the separation of philosophy and law, in English and American universities, Roman law is exclusively taught in law schools.<br>- Positive body of law: often reduces Roman legal thought to the sole, misleading dimension of a codified system.<br>- Viewed the *Digesta* as a normative text to be fine-tuned<br>**Relationship between law and history**<br>- Incompatibility of law and history in European tradition<br>- German code of civil law: undercut many of the assumptions at the heart of actualisation<br>- Scholars fundamentally lacked the essential tools of historical research<br>- Justinian's commissioners: would have viewed the history of Roman jurisprudence as a monolithic block<br>**Corruption of the texts**<br>- Historical interpretation: the hunt for interpolations was not the correct route to serious historical understanding, there is a need to be cautious about the real scale of Justinian's interventions, some interpolations seem to be nothing more than personal quirks from original authors.<br>- Certainly, evidence of corruption of the texts before compilation i.e., Severan interference with the texts they had access to. | - There is a schism between law, history and philosophy that has only widened due to the pull of law away from classical studies.<br>- Interference with classical legal texts by jurists has occurred multiple times throughout classical history which has led to the texts being preserved with these corruptions. |
| **"3 Roman Law", P.G. Stein** | | |
| **Background** | **Argument** | **Conclusion** |
| **Passing Roman knowledge down**<br>- Attributed to two main bodies of material: | **Law in the Republic**<br>- Republican law: applied only to Roman citizens (*ius civile*)<br>- Twelve Tables: enacted in 451-0 BCE, a comprehensive set of written laws (*leges*) enacted by the popular assembly | - Roman shifted greatly in some areas, and insignificantly in others, between the period of the |

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| 1. Barbarian codes: collections of materials made by Gothic and Burgundian kings beginning in the 6th C for their Roman subjects.<br>2. *Corpus iuris civile:* Emperor Justinian enacted in the 530s CE.<br>- legal material from the 6th C is partly legislation and partly discussion by legal experts.<br>**Peak of Roman law**<br>- 2nd C CE: classical period | - Legal action: divided into two stages<br>1. Annually elected magistrate (*praetor*) settled what in legal terms the issue between the parties was.<br>2. A private citizen chosen by the parties (*iudex*) heard evidence and decided the issue referred to him by the *praetor*<br>- Expansion of territories: the creation of a *peregrine praetor* to deal with informal claims by non-citizens (*peregrini*)<br>- 2nd C BCE: formulary procedure became available to citizens and non-citizens<br>o Institutions of the *ius gentium* were fused with those of the *ius civile*<br>o Praetor: on taking up office would issue an edict listing the circumstances in which he would grant an action or a defence; had no power to legislate but could control remedies (*ius honorarium*).<br>- Odd feature: *praetor, iudex,* nor even the advocates who represented the parties were lawyers.<br>- 3rd C BCE: jurists provided any advice that was required (replacing pontiffs as guardians of the law); their concern was with particular problems, they helped explain and adapt the law.<br>**Law in the Empire**<br>- *Leges* in the sense of enactments of popular assemblies (i.e., Twelve Tables), stopped.<br>- *Senatusconsulta* acquired the force of *lex* in their place and were a source of law in the first centuries of CE<br>- Codification of the praetorian edict: took place under Hadrian via jurist Julian<br>- Principate: Emperor gradually assumed legislative powers, expressed through imperial constitutions<br>- Jurists: the most prominent were in the Emperor's council<br>o Two schools: Proculians and the Sabinians<br>o Proculians: more positivist, favoured strict interpretation of law, saw the law as a system of logically interrelated rules<br>o Sabinians: more purposive, put more emphasis on justice, relied on practice and authority rather than logic<br>o Papinian (*praetorian* prefect), Paul and Ulpian: each wrote commentaries on praetorian edict and on the civil law<br>- *Constitutio Antoniniana:* 212CE made virtually all the inhabitants of the Roman Empire citizens.<br>- Empire: divided into West and East for administrative purposes; Christianity becoming the official religion of the Empire had little substantial effect on the body of law (some Emperors enforced orthodox beliefs via legislation)<br>- *Cognito* procedure: state-appointed professional judge presided over the whole case, deciding questions of law and fact<br>- Vulgar law: writings of the classical jurists were simplified and edited<br>- *Leges:* continued to be published, more frequently *leges generals* (normative rules of general application)<br>- 426 CE: Law of Citations enacted by Theodosius II identified 5 primary authorities among the jurists (Papinian, Paul, Ulpian, Modestinus and Gaius)<br>- 438 CE: Theodosian Code | Republic and the period of the Empire.<br>- over the course of the Empire, the power vested in Emperors to make legislation increased as they began to see themselves as dispensing with the law.<br>- Jurists remained influential throughout both periods, with their works being anthologised in the *Digesta* and studied in modernity. |

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| | - 5th C imperial authority in the West collapsed; independent kingdoms set up; Germanic laws only applied to their own, continued to apply *vulgar* law to the Romanised subjects.<br>- *Lex Romana Visigothorum* 506 CE: enacted by Alaric II, 7th C CE Visigothic and Romanised populations were merged and the same law was applied to both<br>**Justinian's Codification**<br>- 527 CE: enacted a programme to restore the ancient glory of the Empire<br>- *Digest* (*Pandects*): an anthology of extracts taken from 39 classical jurists (1/3 is Ulpian, 1/6 from Paul)<br>- Instructions to the compilers: attribute every fragment correctly, avoid contradiction/repetition, given powers to make alterations to necessary ends.<br>- *Institutes:* a book based off the manual of Gaius because the *Digest* was too difficult for law students<br>- *Code:* collection of imperial constitutions based on the Theodosian code and two earlier private collections but with much post-Theodosian legislation<br>o Book 1: questions of faith, position of the Church, sources of law and duties of officials<br>o Books 2-8: private law<br>o Book 9: criminal law<br>o Books 10-12 (Middle Ages: *Tres Libri*): Byzantine administrative law<br>- Immediate influence: inaccessible to the Latin-speaking West and unintelligible to the Greek-speaking East<br>- Justinian legislated until his death in 565: *Corpus* looked back, the *Novels* were more Byzantine in character and were written in Greek<br>- *Ius civile:* is the law peculiar to a particular legal system<br>- *Ius gentium:* is the sum of the rules common to all legal systems i.e., under this slavery was recognised to be contrary to the natural law but its validity was unaffected<br>- Greek model: further divided into *ius scriptum* (written law) and *ius non scriptum* (unwritten law).<br>**Emperor's power**<br>- Julian's text: popular sovereignty<br>- Other texts: justify the unlimited power of the Emperor to legislate → this is the result of gradual acceptance. Early emperors = bound by the law. Later emperors = dispensing themselves from laws.<br>- Constitution of Theodosius: states that the Emperor should declare himself bound by the laws, for his authority depends on that of the laws.<br>- Emperor's legislative power was limited: the need to respect the traditional law and to depart from it only in cases of justified necessity and the need for popular approval for change | |

**"2 The sources of Roman law", Paul J. du Plessis and J.A. Borkowski**

| Background | Sources of law in the Republic | Sources of law in the Empire | Post-Classical period | Justinian's Code |
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| **Sources of law in the archaic period**<br>- Custom: *ius non scriptum,* Roman law is almost entirely customary in origin | **Legislation**<br>- Confusion on the extent of the power of the consuls and of the tribune (Plebeian assembly)<br>**Twelve Tables** | **Legislation**<br>- Early years: Republican assemblies and Senate responsible for important law reforms. | **Whither the jurists?**<br>- Absence in this period of outstanding jurists.<br>- Many reasons: Diocletian's bureaucratic | **The *Codex vetus***<br>- First stage: a compilation of all extant imperial legislation.<br>- Imperial decree: organised the commission of collection of all |

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| - Royal decrees: *leges regiae* had a direct binding force as law, doubt exists about the manner and extent, predominantly religious character. | - Commissioners visited Greec to study the laws of the Athenian legislator, Solon.<br>- Resemblance to the legal codes of the Ancient Near East<br>- Our knowledge of the Twelve Tables is based on referenced by later writers<br>- Public law: provisions of a religious or constitutional character i.e., Table X entitled Of Sacred law<br>- Private law: provisions relating to procedure as well as substantive law; amount of procedure was modest compared to other early codes.<br>**The assemblies**<br>- Until the Republic, there were only a handful of statutory changes<br>- *Comitia centuriata:* most important, elected high ranking magistrates.<br>- *Concilium plebis:* plebeian assembly became the dominant assembly long before the end of the Republic, became the usual organ for the passing of laws.<br>- Each assembly was sovereign with own jurisdiction, met only when presiding magistrate.<br>**The senate**<br>- Pre-eminent body in Republican Rome.<br>- No legislative power; purely advisory. | - Imperial decree became the most important<br>**Republican assemblies**<br>- Augustus made considerable use of them; could be a return to the old days of stability and wise govt.<br>- They simply implemented the wishes of the Emperor,<br>**The Senate**<br>- No direct law making powers under the Republic<br>- Regarded as the primary organ of legislation<br>- *Senatus consulta:* regarded as very persuasive; became legally binding in the 1st C CE<br>- Hadrian's reign: *senatus consulta* acquired direct binding force without praetorian edict<br>- Importance waned<br>**The Emperor**<br>- Imperial lawmaking was of overwhelming importance in the later Empire<br>- Main forms of imperial decree:<br>o *Edicta:* could make edicts about an unlimited range of matters; practice to consult their advisers; edicts expired when the Emperor died.<br>o *Decreta:* extensive judicial powers; reported and filed in the imperial archives; came to be regarded as authoritative | reforms required anonymity among draftsmen of his legislation, everything had to emanate from the Emperor.<br>- Literature: anonymous and lacking in originality<br>- Gaius' *Institutes:* became regarded as model exposition of classical law<br>- Law of Citations, 426 CE: Theodosius II enacted, five jurists were singled out as having primary authority (Gaius, Papinian, Paul, Ulpian, and Modestinus).<br>**Post-classical legislation**<br>- Increase of legislation in the East due to problems.<br>- Imperial decrees: became increasingly verbose<br>- Constantine: rescripts contrary to the law were invalid<br>- End of 4th C CE: rescripts were to be regarded as not authoritative except for the case that they were issues; rescripts generally authoritative if they were expressed for general application.<br>- 439 CE: Theodosius enacted that decrees should not be applicable in the territory of another Emperor without their consent. | imperial enactments still in force; updating exercise, a revision of the Theodosian Code and the codes of Diocletian's reign.<br>- Code superseded all previous imperial legislation.<br>**The Fifty Decisions**<br>- Abolished obsolete rules and resolved controversial points of law.<br>**The *Digest (Pandects)***<br>- Legal encyclopaedia: culmination of the rebirth of legal learning<br>- Intended the *Digest* to be a model code for his empire (failed in his aim: too large, too complex and ill arranged).<br>- Compilation: Tribonian was put in charge; mixture of leading academics, practitioners and govt ministers.<br>- Aim was to eliminate repetition and discrepancy (not achieved)<br>- Necessitated the repeal of the Law of Citations<br>- Interpolations: commission was given the power to amend juristic writing for clarity; classical core of most texts remained but interpolation does exist<br>- Speed: completed in three years rather than in the ten years originally planned; no early copies of the digest are known to have survived; Nika riots of 532 CE may have destroyed |

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| | - *Senatus consulta:* advisory, no legal authority unless incorporated into resolution of an assembly or magistrate edict<br>**Edicts of the Magistrates**<br>- *Ius edicendi:* right to issue edicts<br>- *Ius honorarium:* law laid down by magistrates<br>- *Prateor urbanis:* conduct the administration of justice<br>- *Praetor peregrinus:* dealt with the cases with at least one foreigner<br>- Litigation: urban praetor inherited a system enforced by the *legis actiones;* foreigners enjoyed the formulary system while citizens were restricted to *legis actiones.*<br>- Issuing edicts: written on wooden boards (*alba*) displayed in the forum at the beginning of the praetors' tenure of office; stock body of rules carried over; peregrine issued an edict but shorter<br>- *Ius civile and ius honorarium:* praetor would aid the civil law by granting more convenient remedies; correction of the *ius civile* happened less frequently; urban praetor had little room to manoeuvre<br>***Interpretation***<br>- Elucidation of existing rules of law<br>- Interpreter could not create new law | o *Mandata:* instructions from the Emperor to subordinate officials concerning performance of duties.<br>o *Rescripta:* written replied from the Emperor to questions to petitions addressed to him; handled by jurists in the office of letters.<br>**Edicts of the magistrates**<br>- Praetors continued to be elected, issue edicts and control pre-trial stages of litigation.<br>- Came to be seen as reward for loyalty<br>- *Edictum Perpetuum:* came to be regarded as the final version of the praetorian edict.<br>**The classical jurists**<br>- Continuation of the Republican jurists<br>- Glorified civil servants in late Empire<br>- Advising: included drafting imperial decrees, *ius respondendi* conferred on some jurists to give *responsa* sanctioned by the Emperor; issues with the authority arose under Augustus and Hadrian.<br>- Teaching: broadly followed the traditions established by the Republican jurists; loyalty and allegiance led to emergence of differing | **Legal development**<br>- Christianity: had some impact on the content and character of the law, ecclesiastical law attempted to define the relationship between Church and State, civil law created to protect the church and civil law affected by the Church.<br>- Eastern influence: law of persons influenced by Greek practice, custom was upheld as law in Justinian's code<br>- Barbarian codes: *lex Romana Visigothorum* mixed legislation and abridged extracts from classical jurists applied to Romanised citizens in Visigoth; *lex Romana Burgundiorum* intended for Roman citizens in eastern France; *Edictum Theodorici* applied to barbarians as well as Romans, aid the interpretation of existing law.<br>- Vulgarisation: the influence of Christianity, Eastern custom and barbarian codes on Roman law<br>- Law schools: Beirut and Constantinople achieved the greatest eminence. | - Arrangement of material: divides broadly into three masses of work compiled by a subcommittee:<br>o The Sabinian: concerned with commentaries on *ius civile*<br>o The edictal: concerned with works on the *ius honorarium*<br>o The Papinian: concerned with problematic literature<br>**The *Institutes***<br>- Justinian reorganised legal education: instructed Dorotheus and Theophilus to prepare introductory textbooks<br>- *Institutes* Gaius<br>**The New Code and *Novallae***<br>- New Code: 12 books subdivided into titles covering specific topics<br>- Justinian's code: too complex, did more than just codify the law (reformed substantive law and education). |

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| | - Gloss was put on enacted law through implication and extension by analogy<br>- Pontiffs: were the interpreters; connection between religion and law.<br>- *Ius Flavianum:* Appius Claudis *legis actiones* collection → pontiffs not as the only interpreters anymore<br>- Jurists: increasingly specialised in the law on a full-time basis; engaged in cautelary jurisprudence. (Outstanding jurists p. 13) | schools of thought (rivalry between Labeo and Capito).<br>- Sabinians (followers of Capito): purposive approach, pragmatic and turned on individual cases.<br>- Proculians (followers of Labeo): positivist approach, favoured strict adherence to law, favoured rules applicable to all.<br>- Writing: classical age was more varied and voluminous; main categories:<br>o Problematic: focused on the discussion of difficult legal questions, problems and cases.<br>o Commentaries: on *ius civile* and praetorian edicts<br>o Monographs: specialised treatments of statutes and legal topics<br>o Textbooks: emphasis on legal education, production of the *Institutes* of Gaius.<br>o Notes and epitomes: comments on jurists on extracts from published works of other jurists<br>o Practitioner materials: intended primarily for legal practitioners but of use also to students<br>- Outstanding jurists (p. 22-25) | | |
| **"3 Law", Donald R. Kelley** | | | | |
| **Background** | **Argument** | | | **Conclusion** |

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| - The original Roman formula was joined to a deep respect for judicial expertise and the holy office of priests of the law.<br>- European jurists: resumed the strategy of earlier Roman law. | **The old legal heritage**<br>- 12th C: revived civil law, expanded into civil science through academic and practical jurisprudence.<br>- Three different types of law merged into distinctive, localised, national systems:<br>o Civil law from Romano-Byzantine books<br>o Canon law from hierocratic ecclesiological doctrine<br>o Customary law from barbarian, feudal and communal usages<br>- Preservation of the structure and spirit, language and methods of law<br>- The *Institutes* and *Digest* represented a significant part of general 'liberal' as well as specifically legal education in many European universities.<br>- Significance: set down legal tradition for political thought from major rubrics, formulas, concepts and topoi of Roman jurisprudence<br>o Toga and sword: armed with laws as well as glorified with arms, so that there would be good govt in times of war and peace.<br>o Divine origin of law: God as head and author of the whole work, reflects the need to claim perfection or infallibility on transcendent grounds, legal and ideological canon binding legal interpreters.<br>o Reverence for antiquity: celebration of and reliance on antiquity has been characteristic of European jurisprudence.<br>o Absolutism: Justinian insisted that henceforth the only source of law was the imperial will, prince's will as law and prince above the law, later influenced European monarchs and the concept of sovereignty itself.<br>o Popular sovereignty: idea of the prince's will as law was undermined by stating that the prince received his power from the people (*lex regia*) → conflict between the constitutionalist approach and the absolutist<br>o Distinction between pub and private law: deeply embedded in Western thought<br>o Natural law: underlying custom and law of nations came to be identified with reason of Stoic philosophy (distinguished from Greek positive law).<br>o Law of nations: *ius gentium* expanded by medieval and modern lawyers to include non-western cultures, massive expansion in the field of comparative and institutional studies.<br>o Structure of law: formal principle of private law inform western social and political thinking, serving to establish the boundaries of public law.<br>o Status of persons, or condition of man: arising from natural and civil liberty, defined according to various familial, economic, and social qualifications.<br>o Idea of property: represents above all the materials of the natural world, became the basis of possession or property in general, legal, civil sense<br>o Idea of action: introduces more generally fundamental assumptions of legal and political voluntarism<br>o Customary law: unwritten and distinguished from written law, later incorporated into European law | - The writing, rewriting and reinterpretation of Roman law has led to multiple sects of thought emerging throughout the world on the relevance of Roman law and the "correct" interpretation.<br>- Between the medieval period and the enlightenment, Roman law and civil law solidified themselves as integral to European legal systems, regardless of the nation. These nations merged their own customary practices with Roman law. |

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| | o Idea of interpretation: source of many of the conventions, commonplaces, and maxims of legal thought<br>o Criticism of law: ancient distinction between practitioners (*pragmatici*) and philosophical jurists (*jurisconsulti*), lawyers have been regarded with ambivalence<br>**Civil science in the Renaissance**<br>- Classic modern formulation: jurisprudence Italian style, from the 15th C this modernised law was 'received' into the imperial courts of Germany<br>- France, Spain, England: Roman and feudal law did not have specific authority but was taught in universities.<br>- Expansion of jurisprudence in Europe: attributable to the shift from customary law to written law, specifically to Romano-canonical procedure.<br>- 13th C: jurists trained in both kinds of law; same happened in France and Spain<br>- 14th C: *parlement* in France breaks from the royal council, stands at the apex of the French system and legal profession, gaining authority that lasted into the 18th C.<br>- Germany: magistrates and lawyers were trained and licensed by these schools<br>- Italian method: civil, canon and feudal law all tort (earlier named after Bartolus).<br>- Bartolism: distinguished representatives in Germany, France, Spain and England who took the Italiam master as their model.<br>- Civic humanism: subject of much debate in recent years; political posturing has overshadowed the contribution of jurists to political and social thought<br>- Bartolists: favourable attitude toward republican liberty and resistance to tyranny → like humanists they could be easily conscripted into the service of despotism<br>- Significant rivalries: between Italian and northern European humanism; had to do with the authority of Roman law; expressed as an opposition between *Citramontanes* and *Ultramontanes* (Northern)<br>- French, Spanish, and German jurists challenged the formula that the Emperor was literally lord of the world *dominus mundi*<br>- Feudal law: there was disagreement about the authenticity<br>- Canonist tradition: Protestant and Anglican jurists rejected it wholly from the 16th C onward , but Roman law remained effective in legal education and mentality.<br>- True science? Claimed by generations of jurists because of law's universality and rationality<br>- Liberal art? Law had to take into consideration factors of human will and social and cultural circumstances<br>- Seyssel: Civil science exists in action, not in speculation<br>**Humanism and Jurisprudence**<br>- Lorenzo Valla: Italian humanist; Roman law was best understood as a great monument of classical learning mangled by Byzantine editors; banned feudal and canon law the greatest part of which is Gothic and fabricated.<br>- Impact of humanist philosophy: felt in the practice and theory of interpretation. | |

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| | - Debate: between humanists and old glossators who demanded strict construction of legislative will and Bartolists and canonists inclined to extension / the underlying meaning or reason of law.<br>- Valla's polemic: controversy between the French and Italian methods and wider war between scholasticism and humanism.<br>- Legal humanism: elaborated by a long series of manifestos in the 16th C i.e., Gentili: law was a practical science, a systematic discipline to be placed in the service of particular causes, not a form of literature.<br>- 16th C triumvirate of legal scholars: Bude, Ulrich Zasius, and Alciato. All three deplored accursianism and supported the idea that civil law was a part of the humanities, tried to reveal civil law as civil wisdom.<br>  o Political differences: arising from the conflict between Ultramontanes and Citramontanes. Alciato and Zasius supported the imperialist party & Romano-Germanic idea of translation of empire; Bude reached back to Gallican doctrines.<br>**The French School**<br>- No French jurist could agree with the Romanist formulations: Habsburg-Valois conflicts of the 16th C<br>- Bude: appropriate for the Fr ruler political and institutional principles useful for a national monarchy, analogies between *roy* and *princeps* and *imperium, parlement* and senate, chancellor and praetor and other offices, customs and archival records etc.<br>- Emperor had never been lord of the world and that the Fr King was emperor in his kingdom<br>- French royalism: celebrated more insistently by practicing lawyers with official commission i.e., Jean Ferrault and Charles de Grassaille.<br>- Legal history and antiquarianism: accumulated judicial and ideological arsenals for the defence of govt and other institutions<br>- French method: centre was the University of Bourges, emerged in the 1540s as the most distinguished in Europe.<br>- Comparative law and politics: inherent to the civil science; necessity of adapting ancient law to modern condition, reconcile civil and canon law, and acceptance of feudal law into the Roman canon → special urgency in Fr: status of Roman law as common law and political threat of anything deemed 'emperor's law'<br>- Baron: judicial nationalism, went on to glorify the liberal and constitutional traditions of Fr govt and society<br>- Le Caron: opposition to royalists; legal judgement rather than political power represented the cornerstone of magisterial discipline which he called 'la Science politique'.<br>**Rivals to Romanism**<br>- Civil science was a fundamentally comparatist discipline<br>- Feudists: all made Latin commentaries on vernacular texts, customs and statutes<br>- Spanish: national school tried to establish a concordance of Hispanic and Roman law<br>- Germany: assembled a treatise designed to show the difference between civil and Saxon law<br>- England: | |

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| | o William Fulbeke: drew parallel between the civil law, canon law, and common law (England)<br>o John Cowell: compiled an *Institutes of the Lawes of England* to join English with Roman forms<br>o Called civil law the "mother" of common law<br>- France: Etienne Pasquier and Antoine Loisel; commended for rejection of absolutism in public law and rigidity of private law<br>o Loisel's *Institutes coutumiers:* sought the spirit of French law in proverbs and popular lit, provincial customs; did not deny royal authority but stressed its roots and limitations<br>o Reformation of customs: Charles du Moulin: rejected the consensus view of the Roman origins of feudalism (Germanist persuasion)<br>o *Antitribonian,* Hotman (1567, pub 1603): criticised the evils of Romanism; concluded that the laws of the country should be accommodated to the state and not the state to the laws<br>o *Francogallia,* Hotman (1573): emphasised the liberal, consensual and elective character of Celto-Germanic tradition in comparison to the tyranny of Romanism<br>- Martin Luther: set out to evaluate the whole tradition of the church formulated by the canonists; rejected Romaist law entirely; Problems with church and state, human and divine law, and various political doctrines were all discussed in the context of canon law<br>o Protestant ideas of resistance owed much to the secularising of notions of Christian liberty of conscience preached by Luther<br>o Other protestant lawyers, including Hotman and Doneau: took over from arguments by theologians shifting arguments of resistance from biblical to constitutional and political grounds<br>**Custom and the law of nations**<br>- Poles of early modern jurisprudence: written law (Justinian's code) and unwritten custom<br>o Historically linked: recognised in old judicial formula deriving law from fact<br>o Fundamental rivalry<br>o Force of custom was always popular<br>- Custom represented the most basic aspect of positive jurisprudence<br>o Like custom, judicial opinion continued in some ways to be conceptualised according to Roman convention<br>- Pierre Ayrault: impressed and depressed by the variability of custom, his remedy was to develop a more sophisticated and socially useful science of law<br>- Modern civil law: was practiced internationally and produced another intellectual polarity<br>- General framework of interpretation of positive law: from ancient Rome but had expanded since antiquity; *ius gentium* produced military and commercial contacts between barbarians and Rome, consisted of common law to all and a particular law *jus proprium* for each nation<br>- Legal arguments in the Renaissance: not only *ius civile* but also *ius gentium,* not only actions but also people<br>**Rational jurisprudence**<br>- 16th C: interdisciplinary search for proper method of learning, whether pedagogical or scientific | |

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| | o Some inclined toward the old Aristotelian dialectic example: Matteo Gribaldi's treatise of 1541 on method and reason of legal study, utilised Aristotle's transcendentals and predicaments (esp. system of four causes).<br>o Others to the new rhetorical approach associated with Peter Ramus example: Cantiuncula's conception of the perfect jurist was based directly on the bifurcation in the style of Rasmus<br>- Coras: most extensive discussion of legal method; had a vision of the legal system and emphasised the centrality of the notion of causation to the science of law<br>o Aristotelian terms: people itself was the efficient cause, the particular business or social actions were the material cause, the general law relevant to the cause the formal cause and the common good the final cause.<br>o Legal coherence and monarchical authority were two sides of the social coin<br>- Central impulse: search for a general system, which was often a way of subordinating law to politics<br>- Concern: for the law in general, divisions, distinctions, distribution, with concepts of equity, justice, sovereignty, and public utility as well as with the ancient hope of reducing law to an art<br>- Natural law (*ius naturale*): identified with divine law, right reason, the law of nations, even custom (which was at least second nature *altera natura*)<br>**The new legal heritage**<br>- The impact was overwhelming<br>- Private law: much harder to trace and assess as it was conventionally resorted to as a standard of custom or measure of positive law<br>- Law of persons: extended increasingly by notions of citizenship, civil liberty, resistance, commercial forces (individualism)<br>- Law of things: extended through Roman concepts of prescription, definition to vague custom, possession, and property → helped transform feudal lordship into private ownership.<br>- Legal actions: elaborated in connection with commercial law, emphasis on quasi-moral questions of usury to technical questions of economic exchange and interest<br>Themes and transformations between the Renaissance and Enlightenment:<br>o Expansion of legal profession: jurists not only informed national guilds and university but also became an integral part of govt and office-holding nobility; education became important<br>o Debates over method: enquired first into pedagogical organisation of legal study and then into practical application and theoretical formulation of human law<br>o Legal hermeneutics: legal interpretation became a major genre in which questions of sources, authenticity, authorial intention, and rational and contextual meaning were discussed with great sensitivity and ingenuity<br>o Legal antiquities: serious enquiries undertaken in legal and institutional history, medieval as well as ancient<br>o Divergent national traditions: all of the indigenous national traditions drew upon and compared themselves with the Roman model and frequently returned to it | |

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| | ○ Law of nations: expanded Roman law common to the *gentes* and peoples undreamed of by the ancients<br>○ Legal systematics: dialectical method (Bartolists), fully realised in the French system-builders<br>○ Natural law: rationalist offshoot of the legal systematics<br>○ Idea of sovereignty: based on Roman majesty, drew on attributes of empire and acquisition of modern regalian rights, privileges and precedents<br>○ Idea of custom: acquired a social and cultural, and legal, significance suggesting the prehistorical origin and corrective spirit of written law<br>○ Idea of liberty: fundamental human attribute<br>○ Idea of resistance: distinctly modern theory joined religious and constitutional protest and private notions of self-defence<br>○ Idea of private property: extension of personality<br>○ Idea of contract: elaborated from Roman precedents<br>○ Idea of the perfect jurist: convergence of civil science and legal humanism | |
| **"Historical Jurisprudence", Mathias Reimann** | | |
| **Background** | **Argument** | **Conclusion** |
| Defining the terrain:<br>- The movement saw an essentially historical phenomenon which could be properly grasped only in light of its origins and genesis<br>- First arose in German romantic era in the early 19th C, lasting until turn in social legal thought in 1880-1920 | **German historical school**<br>- Friedrich Carl von Savigny (1779-1861): famous anti-codification tract<br>○ Programme of historical legal science, the view of law as custom and the underlying concepts of organicism and evolution<br>○ Objective: not the pursuit of legal research but establishment of a historical legal science<br>○ Law was not a manifestation of abstract reason nor the product of human volition but rather the result of historical development<br>○ Did not see law on a consistently progressive path<br>- German Historical School: lasted as a coherent movement to the middle of the 19th C<br>**Historical jurisprudence in England**<br>- Began half a century later than Germany, heavily influenced by the German model<br>- Henry Summer Maine (1822-88)<br>○ Presented history of various basic legal institutions with an emphasis on their emergence in antiquity (many parallels to Savigny)<br>○ Believed in organic development like Savigny and in the continuity of cultural traditions<br>○ Unlike Savigny, Main proceeded on a higher level of generality with scant references to primary sources<br>○ Unlike Savigny, emphasised progressive evolution from archaic to civilised (collective to individualistic) conceptions of law<br>- James Bryce (1838-1922)<br>○ Provided more direct comparisons between the history and law of Rome and the history and law of England<br>- Frederic William Maitland (1850-1906)<br>○ Turned to English legal history proper<br>○ *The History of English Law Before the Time of Edward I:* became the definitive work on the origins and development of medieval English law<br>- Paul Vinogradoff (1854-1925) | - this reading compares the influence of historical jurisprudence on different Western countries (England, Germany, USA) from the 18th-20th centuries. The lasting effect of historical jurisprudence was cut off around the turn of the 20th C, with the enactment of the *BGB* and the shift in common law countries to forward looking legislation. |

- Focused not only on the history and institutions of the common law but also on the social conditions of medieval England

**USA: Henry Adams and His Disciples**

- American historical jurisprudence was a reaction against an abstract and strictly logical approach; stood in opposition to English analytical jurisprudence
- Triggered and influenced by Maine's *Ancient Law* but drew primarily from German research
- Mainstream: searched primarily for the roots of their own law and focused on the common law of medieval England

**The work of historical jurisprudence: purposed, objects, approaches**

- Purposes:
  - Deep understanding of shared doctrines → to help modern lawyers clarify and define current doctrine
  - Understand the evolution of law more broadly
  - Acquire knowledge for its own sake
- Objects:
  - Germany: reception of Roman law in the late middle ages had rendered it directly applicable by many courts and the bureaucracies of the emerging modern state; first half of the 19th C many jurists worked in the spirit of historical jurisprudence → by the time historical jurisprudence was in in England and America, German jurists had produced a substantial body of scholarship
  - England: Roman law played a limited role, pursued for a number of purposes; English study increasingly liberated itself.; writing of the English legal history was left to the Germans; transnational body of scholarship on early and medieval Germanic and English law
  - American law: Roman law had no direct influence; as American law matured, Roman law had less applicability; English historiography was either superficial or nonexistent
- Method:
  - Savigny successors: became de rigeur to work from the sources themselves
  - USA: took after Germans in the 1870s
  - England: joined shortly after USA

**Political Implications: legal traditions, lawmaking and laissez faire**

- The struggle for the soul of law
  - Worried about the essential character of their respective legal traditions
  - German: issue was not whether Roman law had an influence, it was to what extent and the desirability of that influence
  - Anglo-American: issue was more fundamental as to whether the law was shaped by Roman influence at all, Americans now lead the charge against Romanist view of the common law
- Lawmaking: legislation v legal science
  - Law lay largely beyond the ad hoc will of the legislator → jurists became hostile towards statutory lawmaking
  - Debates on codification: Savigny argued against a German civil code, James Coolidge Carter argued against a New York Civil Code
  - Hostility to piecemeal legislation: opposed mainly to legislation in private law; most rejected statutes as routine lawmaking
  - Roots of anti-legislative lawmaking:
    1. Jurisprudential: view of law as essentially a form of custom naturally emanating from the habits of people (true needs of society), legislative interference would do harm.

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| | 2. Professional: historical jurist's claim to leadership as legal scientists<br>- Conservatism and liberalism: laissez-faire preference<br>○ Hostility fuelled by their dislike of radical change and aversion to state interference in private affairs<br>○ Savigny's school: emphasised continuity with the past, flirted with Romanism and common lawyers' practice of reasoning from past decisions<br>○ Hand-in-glove with classical liberalism: sceptical towards state interference, Savigny reacting to paternalistic tradition of Europe's enlightened monarchies; Anglo-American historical jurists believed that legal systems left alone would develop towards liberalism.<br>○ Laissez-faire attitude: towards attitude and society, German Romanists created the framework for a free market society; Anglo-American common law was good for capitalism<br>○ Germanists: criticised the *BGB* for its excessive individualism and advocated for more social rights and responsibilities.<br>**The instrumentalization of legal history**<br>- By 1920, historical jurisprudence was legal history: fundamentally at odds with the forward looking reform agendas of the 20th C<br>- Rudolf von Jhering: critique against the historical school and pushed towards a sociological approach; 1900 *BGB* cut private law off from the path<br>- England: Maitland's death marked the beginning of decline, his successors did not continue his work<br>- USA: legal thought turned towards pragmatism embracing sociological jurisprudence<br>- Legal historiography had divorced itself from historical jurisprudence<br>- Common law: legal history pursued for its own sake has not eliminated legal history serving current practice, this is not the case in civil law. | |
| **"VI Customary Law and Collectivism", R.P. Boast** | | |
| **Background** | **Argument** | **Conclusion** |
| - study of customary law: emerged in Germany within the context of the conflict between the Romanists and the Germanists as to whether Roman or customary law was the correct law. | - Savigny<br>○ Believed that the German legal tradition was embodied in the tradition of the Roman law<br>○ Logic derived from the constitutionalist traditions of the old Holy Roman Empire<br>○ argued for the jurist's role as the sole interpreter of the Volksgeist (spirit of the people)<br>- Development of the German Civil Code (*BGB*): the debate<br>○ Germanists: interested in legal history of medieval Germany; Brother's Grimm published stories that came from the medieval legal background and an interest in ancient Germanic law from a belief that law, like myth, arose from the spirit of particular people<br>▪ Concocted a system of law by taking aspects from places as diverse as Tacitean Rome and Snorre Sturalasson's Iceland<br>▪ Looked to contemporary Germany too<br>○ Spain and Latin America: liberals were republicans in the French-Jacobin tradition; Germany they were romantic nationalists interested in customary law<br>- Influential Germanist legal historian: Otto von Gierke<br>○ Critic of the *BGB* finding it too Roman and insufficiently German for his liking; most detested the liberal individualism and antipathy towards collectives<br>○ Believed that the development of Roman law had undesirable consequences for the free development of associations in Germany → believed that these were legal bodies that were different from the state on one hand and individualism on the other<br>○ Influence on English-speaking world: Maitland translated his works | - Savigny: Romanist, anti-*BGB,* believed in the role of the jurist and the importance of Roman law.<br>- Germanists: interested in legal history of Germany (customary law), von Gierke found the resultant *BGB* too Roman, too individualistic.<br>- British Industrial revolution: criticised by the Hammonds and their other contributors as being individualistic and profit-seeking, creating a whole new system of capitalism. |

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| | - New tendencies in Br economic and social history associated with John and Barbara Hammond: understood economic rationality as the operation of systematic selfishness; compounded a view as the industrial revolution as a catastrophe for certain classes and establishing a new form of civilisation, driven by narrow and unchecked pursuit of profit (capitalism). | |