Peter STEIN, ***Roman Law in European History*****, Cambridge, 1999**

CHAPTER 1 Introduction

When we think of the legacy of classical antiquity, we think first of Greek art, Greek drama and Greek philosophy; when we turn to what we owe to Rome, what come to mind are probably Roman roads and Roman law. The Greeks speculated a great deal about the nature of law and about its place in society but the actual laws of the various Greek states were not highly developed in the sense that there was little science of law. The Romans, on the other hand, did not give much attention to the theory of law; their philosophy of law was largely borrowed from the Greeks. What interested them were the rules governing an individual's property and what he could make another person do for him by legal proceedings. Indeed the detailed rules of Roman law were developed by professional jurists and became highly sophisticated. The very technical superiority of its reasoning, which has made it so attractive to professional lawyers through the ages, has meant that Roman law is not readily accessible to the layman. Inevitably its merits have a less obvious appeal than art or roads. Yet over the centuries it has played an important role in the creation of the idea of a common European culture. Most of what we know about ancient Roman law derives from a compilation of legal materials made in the sixth century AD on the orders of the Byzantine Emperor Justinian. The texts that he included in this collection were the product of a thousand years of unbroken legal development, during which the first from a monarchy to a republic and then, not long before the beginning of the Christian era, to an empire. At the same time its law was adapted to cope with the changing social situation, but all the time the idea was maintained that it was in essentials the same law which had been part of the early Roman way of life. Justinian's texts have been viewed from different perspectives by different peoples at different periods in European history. The revival of Roman law started in Italy, which remained the focus of its study and development through the later middle ages. In the sixteenth century, with the advent of humanism, France took over the leading role. In the seventeenth century, it was the turn of the Netherlands to give a new vision to the discipline and in the nineteenth century German scholarship

transformed the subject yet again. In each period different aspects were emphasised. Roman law has had passionate adherents and fierce opponents. As H. F. Jolowicz pointed out in 1947, the latter based their opposition on three main grounds. First, it has been seen as a foreign system, the product of an ancient slave-holding society and alien to later social ideas. Secondly, it has been portrayed as favouring absolutist rulers and as hostile to free political institutions. Thirdly, it has been regarded as the bulwark of individualist capitalism, favouring selfishness against the public good ('Political Implications of Roman Law', Tulane Law Review , 22 (1947), 62). Sometimes these notions have been combined. The original programme of the Nazi party in Germany demanded that 'Roman law, which serves the materialist world order, should be replaced by a German common law.' That attitude provoked the great German legal historian Paul Koschaker to warn of the crisis of Roman law and to write Europa und das römische Recht , eventually published in 1947. Fifty years later a certain crisis still affects specialist Romanists but the contribution of Roman law to European culture can be reviewed more calmly. This book does not purport to rival that of Koschaker. It attempts to give an idea of the character of ancient Roman law and to trace the way its texts have constituted a kind of legal supermarket, in which lawyers of different periods have found what they needed at the time. It has indelibly impressed its character on European legal and political thought. How that happened is our theme.

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3 THE PRAETOR AND THE CONTROL OF REMEDIES

For most of the duration of the republic the law was developed less through legislation and its interpretation than through the control of legal remedies. Originally the first stage of a legal action was formal and technical; there was a limited number of forms of action, which were begun by the oral declaration of set words in the presence of the magistrate and the defendant. A plaintiff who did not follow the precise wording might lose his action. Such legis actiones could only be brought on set days. Once again only the pontiffs were familiar with the exact details until the forms and the calendar were published, traditionally around 300 BC , when the pontificate was opened to the plebeians. The magistrates, originally the two consuls, elected annually, who replaced the king as the head of the state, were responsible for all governmental activities. The administration of justice was only a minor

part of their duties and the procedure allowed them little scope for innovation. As Rome expanded, a special magistrate, called the praetor, also elected annually, was established in 367 BC , to deal exclusively with the administration of justice. He had no special training but he was expected to supervise the formal stage of every legal action. The praetor retained the two-stage character of the legal action, the first concerned with the categorisation of the issue in legal terms and the second with the actual trial of that issue. The second stage had always been, and essential, but it was the second stage which was by far the more time-consuming. The Romans realised that in many situations quarrels arise not from disagreement about the law, which is clear enough, but from dispute about the facts and that an ordinary citizen, even without experience of the workings of the law, was quite capable of deciding what had happened. In the second half of the republic an important change in legal proedure was introduced. When the parties appeared before him, the praetor allowed them, instead of adhering to set forms, to express their claims and defences in their own words. Then, having discovered what the issue was, he set it out in hypothetical terms in a written document, known as a formula . This instructed the iudex to condemn the defendant, if he found certain allegations proved, and to absolve him, if he did not. The formula, once it was settled by the praetor and the parties, was sealed, so that the iudex who opened it could be sure that it had not been tampered with. The iudex derived all his authority from the formula and had to act within its terms. So long as he did so, he was allowed great freedom in his conduct of the trial and often took the advice of a consilium of friends to help him reach a decision. In the early republic the parties had represented themselves but later they tended to hire professional orators, trained in rhetoric, to present their case to the iudex . The praetor could grant a formula whenever he felt that legal policy justified it, in the sense that he considered that a plaintiff, who could prove his case, ought to have a remedy. The function of the praetors was to declare the law (ius dicere) and to give effect to it by their grant of appropriate remedies. Most remedies were concerned with recognised claims, such as that the defendant was detaining the plaintiff's property against his will or that the defendant owed the plaintiff money. The praetor could, however, grant a formula in a situation in which there was no precedent. Officially in such a case he was not making new law; that would have been beyond his powers. In effect he was
saying that the claim justified a remedy and so the law must provide it. Although he spoke as if he were just implementing existing law, he was in fact making new law. Since the new remedies were presented as an expression

of the old law, the innovation was disguised. For example, the praetor could not treat as owner of property someone who was not the owner under the civil law, which he was bound to uphold, and so he could not grant such a person the owner's action to recover what was his. He could, however, give a non-owner an alternative action to enable him to obtain physical control of the property, and protect him in that control until he became owner by law through lapse of time. Similarly, he could grant the heir's action to recover the deceased's property only to one who was heir according to the civil law. But he could give a non-heir an alternative remedy to get and keep possession of the property. Such a person enjoyed the property as a possessor rather than as owner. Doubtless for many Romans this was purely a semantic distinction, but for those with an appreciation of the law it was significant. It enabled the praetor to grant a deserving party a remedy, when he felt that the popular sense of justice required it, while at the same time maintaining the formal integrity of the civil law. At the beginning of his year of office the praetor published an edict, in which he set out the various circumstances in which he would grant a formula, and eventually appended the appropriate formulae. Prospective litigants would consult the edict and could obtain on demand any formula promised in it. A defendant who disputed the plaintiff's allegations would not be prejudiced by the grant of a formula, as he would be confident that his opponent could not persuade the iudex that his allegations were well founded. The formula was a flexible instrument and could be modified to take account of particular defences put forward by the defendant. For example, where the civil law prescribed a particular form for a legal transaction, it was originally concerned only with whether or not the form had been complied with. It did been carried out, the fact that the promisor might have been induced to make his promise by the fraud or threats of the other party was irrelevant. In the later republic, however, the praetor allowed both fraud and duress to be pleaded in the formula by way of a defence to the plaintiff's claim, and if the promisor could prove his assertions, he would be absolved. Such a defence, or exceptio , was required where the defendant admitted the truth of the plaintiff's allegation (e.g. 'I did make the formal promise') but asserted further facts (e.g., 'but that promise was obtained from me by fraud') which nullified the plaintiff's claim. By allowing the defences, the praetor gave legal recognition to the principle that transactions tainted by fraud or duress were unenforceable. In certain formulae, the iudex was told to condemn the defendant only to pay whatever sum he ought to pay 'according to good faith (ex fide bona)', and in such cases a specific exceptio was not needed. The only award which the iudex

could make at the conclusion of a legal action was money damages. Once he had given his judgment in favour of one of the parties, his task was over and he ceased to exist as a iudex . He could not, therefore, order a party to do something or not to do something, since, when the time came to decide whether or not the order had been obeyed, he would no longer be a iudex . A decision that a defendant should pay a particular sum is an appropriate conclusion of many types of dispute but it is not suitable in all cases. In the later republic, when remedies other than the grant of regular legal actions were required,

4 THE IUS GENTIUM AND THE ADVENT OF JURISTS

Where one or both of the parties was not a citizen, it was inappropriate to apply the traditional civil law to their disputes. At first, when non-citizens were relatively rare, the Romans resorted to the fiction that the foreigner was a citizen in order to bring a case within the scope of the civil law. After the Roman victory over the Carthaginians in the Punic Wars of the third century, Roman rule extended over the whole of the western Mediterranean and the number of non-citizens, or peregrines, in daily contact with Romans increased to such an extent that they had to be brought expressly within the ambit of the law. In 242 BC a second praetor was introduced specially to deal with cases in which one or both parties was a peregrine and the two praetors were henceforth distinguished as urban and peregrine. The civil law was the proud possession of Roman citizens and could not be extended indiscriminately to peregrines. In the third century BC citizenship was a privilege that marked off Romans from other peoples and Romans were expected to observe higher standards of conduct than others. Livy (34.1) records that an Oppian law of 215 BC required Roman matrons to wear simple dress without ornament, while peregrine women walked the streets of Rome in purple and gold. Disputes involving peregrines had, however, to be settled by recognised rules.

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however, to be settled by recognised rules. The Romans solved the problem in a typically pragmatic way by the recognition that Roman law consisted of two kinds of institutions. There were first those legal institutions, such as traditional ceremonies for the transfer of property from one person to another, which were peculiarly Roman and therefore must be reserved for citizens. There were also other institutions of Roman law, such as many of those derived from praetorian remedies, which were considered to be found in the laws of all civilised people. They collectively formed what the Romans called the ius gentium , or law of nations, in contrast with the traditional civil law. The ius gentium was available to citizens and non-citizens alike. The notion enabled the Romans to deal with the practical problem posed by peregrines living under Roman government. Later, when they speculated about why such rules were universally recognised, they suggested that the reason must be that they were based not on traditional practice but on the common sense, or 'natural reason', which all men shared as part of their human nature. Thus the 'law of nations' was sometimes characterised as natural law (ius naturale). It came to be accepted that the law of nations and natural law were similar, except for the institution of slavery. This was an institution which was recognised in all ancient societies, and was therefore clearly part of the law of nations, but it was equally clearly not something dictated by common sense and so could not be part of natural law. In the later republic the formulary system and the supplementary remedies available to litigants became increasingly technical and there was a need for specialist experts to give advice where it was needed. Neither the praetor nor the iudex , nor the advocates who represented the parties before them, were trained in the law and all of them needed expert help from time to time. From the second half of the third century we hear of a class of legal experts, jurists, who had no formal role to play in the administration of justice but who of being custodians of the law from the pontiffs but, unlike the pontiffs, they acted openly and in public. The work of the Roman jurists was from the beginning concerned with cases which had given rise to legal problems. Their function was to suggest formulae or defences, appropriate for a particular fact-situation, and to draft documents, such as wills or contracts, which would achieve the effect that the parties desired and have no other, undesired, effect. The opinions of these late-republican jurists depended entirely on their personal reputation and those of the more authoritative jurists were collected together in Digests, for reference in similar cases that might arise in the future. The jurists were largely concerned with private law and did not normally deal with public or criminal or religious matters. The

law relating to these topics was, as it were, 'factored out' of the civil law, which became synonymous with private law.

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12 JUSTINIAN AND THE CORPUS IURIS

The collapse of the western empire had left the eastern empire relatively unscathed and indeed the second half of the fifth century saw a revival of legal learning in the law schools of Constantinople and Beirut. The texts were, of course, all in Latin but they were expounded in Greek. In 527 there ascended the imperial throne a man whose name is for ever associated with Roman law. Justinian was born near Naissus (Niš in modern Serbia), also the birthplace of Constantine. He was a native Latin-speaker (the last eastern emperor to be such) but enjoyed a Greek education at Constantinople, which now reverted to its old name of Byzantium. His legal work was part of an ambitious programme to renew the ancient glory of the Roman empire in all its aspects. A man of great nervous energy and command of detail, like Napoleon he required little sleep. He was much influenced by his wife Theodora, a former actress, and after her death in 448, he was less active as a ruler. Through the efforts of his generals, Narses and Belisarius, he recovered North Africa from the Vandals and re-established imperial authority over the Ostrogothic kingdom in Italy. He resisted the claims of the Pope to equal authority with the emperor and regarded himself as holding supreme religious as well as supreme temporal power. The symbol of his religious authority was the great church of Hagia Sophia in Byzantium, in the building of which he claimed to have surpassed Solomon. never have admitted it. Whereas Alaric's aim was to give his Roman subjects a law suitable for sixth-century Gaul, Justinian consciously looked back to the golden age of Roman law and aimed to restore it to the peak it had reached three centuries before. Rather inconsistently he also wanted a law that could be applied in the Byzantine empire of his own time. One part of his project was modest enough: to bring the Theodosian Code up to date. The main agency of legal development had been imperial constitutions and there had been many 'Novels' in the previous century. Justinian's Code arranges the constitutions in chronological order in titles and covers twelve books. In the course of the general overhaul of the law, many controversies, unresolved since the time of the classical jurists, came to light and were settled by his own constitutions. The most important part of Justinian's compilation was quite unprecedented. This is the Digest

(Latin Digesta ; Greek Pandectae), an anthology of extracts from the writings of the great jurists. The five jurists of the Law of Citations are given pride of place, over one-third of the Digest being taken from Ulpian and a sixth from Paul, but there are extracts from earlier jurists of repute, even the jurists of the late republic. The whole forms an immense legal mosaic, about one and a half times the size of the Bible, but it represents, Justinian says, only a twentieth of the material with which its compilers began. The extracts are arranged in titles, each title being devoted to a particular topic and the titles arranged in fifty books. Where a subject could not easily be divided up, such as legacies, a single title might extend over three books. Normally, however, division was preferred, as with the contract of sale which is covered in eight titles: a general title and special titles dealing with particular aspects of sale. The order of the titles is the traditional order of the praetorian edict, but the fragments within each title seem to be arranged quite haphazardly. The compilers were instructed to attribute each fragment to its source by an appropriate inscription. In the nineteenth century, the German scholar Bluhme showed, from a study of these inscriptions, that extracts from particular works appear in three groups and that within each group the extracts normally appear in the same order, although the groups themselves were not arranged in the same order in every title. He therefore concluded that the compilers, under pressure from the emperor to speed up the work, must have divided themselves into three committees, each of which took a bundle of works to extract. They then brought chains of fragments to a plenary session, at which the order of the respective chains was agreed for each title and a few specially significant fragments moved out of order into a more prominent position. Recent research, based on computerised study of the text, has further refined Bluhme's conclusions. The Digest was produced in three years and the compilers must have had their work cut out just abbreviating the material at their disposal and making the resulting extracts as coherent as possible. Although they gave the source of each extract, we cannot assume that what they attributed to the jurist is what he actually wrote. This is partly because the original discussion has been cut down, but also because the compilers were expressly instructed to eliminate all contradictions and to avoid repetitions. Much evidence of disagreement among the classical jurists was therefore excised. The compilers were also authorised to make whatever substantive changes were necessary to ensure that the final work expressed the law of sixth-century Byzantium. It is the extent of such alterations which has been a main concern of Digest study in the twentieth century. The changes in the texts have been known since the

sixteenth century as emblemata Triboniani and more recently as interpolations, whether they subtract from, add to, or just alter the original text. The Code and the Digest are the main parts of Justinian's compilation, but of their studies, and Justinian ordered that they be supplemented by a new Institutes, based on Gaius's Institutes of nearly four centuries earlier. Although an elementary text-book, it was given equal status with the Digest and Code. The Digest and Institutes became law on 31 December 533 and a revised edition of the Code a year later.

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13 THE REDISCOVERY OF THE DIGEST

In the later eleventh century the level of legal culture began to rise and there is evidence of a new interest in Justinian's law; notaries in their documents and advocates in their pleadings now refer accurately to technical Roman legal institutions. Five hundred years after its compilation, Justinian's Digest came to be used in Western Europe as a source of rules and arguments. No doubt there had been manuscripts lurking in Italian libraries but their bulk and the All surviving manuscripts of the Digest today derive ultimately from a sixth-century codex in Pisa, which was seized as war booty by the victorious Florentines in 1406 and is now in the Laurentian library in Florence. The relationship is not direct but through a lost, amended, copy made in the eleventh century and known as Codex secundus . This version was the source of the vulgata or litera bononiensis , that came to be studied in the twelfth-century schools. The recovery of the entire Corpus iuris civilis was a slow process, extending over much of the twelfth century. The Digest became available in three parts, known as Vetus, Infortiatum and Novum . The division bears little relation to the original structure, Vetus being Books 1 to 24.2, Infortiatum Books 24.3 to 38 and Novum Books 39 to 50. The origin of the division, and in particular the designation Infortiatum for the middle section, is unknown and was a mystery to the twelfth-century doctors themselves. It probably reflects the order in which the parts of the Digest became generally available. Eventually the complete Digest could be added to the Institutes and to the first nine books of the Code. Later the Tres libri (the last three books of Justinian's Code) were discovered but were kept separate rather than integrated into the rest of the Code; and a better version of the Novels than the Epitome Juliani , known as the Authenticum , became available. The latter was grouped into nine Collationes in imitation of the

Code. The Institutes, Tres libri , and Authenticum were placed in a fifth volume, after the three volumes of the Digest and the (nine books of the) Code.

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14 THE ATTRACTION OF THE BOLOGNA STUDIUM

By the end of the twelfth century the position of Bologna as the legal centre (or 'mother of laws') of Europe was unchallenged and the studium had thousands of law students from all over Europe. They were grouped in 'nations' according to their country of origin. For the first time since the fall of Rome, law in the West was an autonomous discipline, whose special techniques had to be learned over several years of rigorous study, at the conclusion of which a professional qualification was received. The law students not only attended lectures. They cut their teeth as lawyers by participating in disputations on set topics, in which each side presented an argument with supporting texts, after which the master presiding gave his solution to the problem. They were expected to equip themselves with a personal set of the more important texts. Authorised booksellers, known as stationarii exempla tenentes , held certified copies of the texts, which they hired out to students so that they could make their own copies. When their period of study was over, they would have the basic material to take with them. In this way former students were able to disseminate a knowledge of what they had learned in their own countries. Although the emphasis of the Bologna law school was academic rather than sheer force, as had been the case in earlier centuries. There was a yearning for power to be legitimated, but standard collections of laws, whether of Roman or Germanic origin, offered little guidance on fundamental questions of jurisdiction and the like. Bishops and secular princes alike looked for men who could deploy arguments, based on principles which were objective and rational and had a universal authority. Only the Roman texts could provide such principles. The new legal learning provided its students with qualifications which won them positions of responsibility both in episcopal and princely establishments. Enlightened bishops sent their promising young chaplains to Bologna to acquire at least some knowledge of the new learning, while princes and nobles seeking to legitimate their power sought to ensure that its results were also available to them. The University of Bologna was not founded by a deliberate act. It emerged out of the need, felt by the students of law, to

organise themselves for the purpose of ensuring that they received the most effective teaching and obtained a recognised qualification. In contrast with the other twelfth-century universities of Paris and Oxford, established and governed by masters, Bologna became the model of a university governed by students, who employed the professors to teach them. Although other higher subjects, such as theology and medicine, were also taught there, law, both civil and canon, remained dominant. Both the imperial and the papal authorities endeavoured to find favour with the Bolognese studium , by supporting it in its dealings with the municipal authorities of the city. The influx of students had created serious problems for the citizens but they did not want to lose the economic advantages that the students' presence brought them. The young Emperor Frederick Barbarossa, on his way to Rome for his coronation in 1155, stopped at Bologna to meet the leading doctors of law and to seek their support, in justifying certain laws that he wished to enact. Having obtained their assistance, he promulgated the Constitutio habita , in which he conferred privileges on law students coming to Bologna, whom he described as 'pilgrims for the sake of study'. In particular Frederick recognised corporations of students, who were to be allowed to govern themselves in the manner of craft guilds. This concession enabled the students to negotiate with the professors but it also gave the studium as a whole a certain independence from the commune of Bologna. By the beginning of the thirteenth century, the students were sufficiently strong that they could often get their way by threatening to secede from the town. The commune reacted by trying to keep them and it was now the turn of the papal authorities to intervene on the students' behalf. In 1217 Pope Honorius III pointed out that, instead of trying to compel the students to stay, it would be better for the commune to adopt measures that would encourage them to remain there of their own free will. Two years later, the Pope granted the archdeacon of Bologna the power to confer on successful students the right of teaching everywhere, thus indirectly subordinating the university to the Church. The success of Bologna ensured its imitation through the foundation of law schools in other parts of Italy. There was a law school at Modena in 1175. The studium at Padua was begun in 1222, and the example was followed by other Italian centres, such as Pavia, where the old school of Lombard law developed into a school of civil and canon law. In 1224 the Emperor Frederick II founded the university of Naples, largely for the study of Roman civil law, and sought to ensure its success by commanding his subjects to study there rather than in Bologna. At first the order applied only to those in the kingdom of Sicily, but, in the course of his

dispute with the Lombard League, to which Bologna adhered, he extended the ban on studying at Bologna to his subjects in his Lombard dominions and to those in Germany and Burgundy.

15 CIVIL LAW (IUS COMMUNE) AND LOCAL LAWS (IURA SINGULARIA) IN THE THIRTEENTH CENTURY

From the thirteenth century Europe saw attempts in several European countries to set down the local law in writing and in every case those responsible turned to the civil law to provide organising categories and organising principles. The English common law was set out in the Latin treatise on the laws and customs of England, known as Bracton. Its core was written in the 1230s and it was later revised. Although based on the records of the royal court, it used, and sometimes adapted, the categories of Roman civil law, derived from Azo's Summa Codicis . The author of Bracton understood that if the laws of the king's court were to be set out in a manner approaching coherence, he would need a structure of general notions, which were articulated only in Roman law. Many passages echo the language of Digest and Code, not by formal citation but by the use of phrases from the Roman texts, which the author has woven into his exposition. They show that he had made Roman law part of his way of thinking as a lawyer. His treatise equipped the nascent common law with the minimum theoretical structure that it needed to grow in a coherent way. When kings wanted to legislate, they turned to civil lawyers for help. Edward I, king of England from 1272 to 1307 (and lord of substantial parts of France), was very interested in problems of government and law and was responsible for several pieces of legislation that earned him the (exaggerated) title of 'the English Justinian'. For this work he specially recruited Francis Accursius, son of the great glossator, and a well-known civil lawyer in his own right, into his service. At the same time as Bracton was compiling his collection of English law, the Emperor Frederick II in 1231 promulgated a collection of laws for his Sicilian were used to justify the law-making power of the emperor and the procedure to be adopted in the royal courts. Again the underlying assumption seems to have been that, without a clothing of Roman law, the laws of the kingdom, even when promulgated by the emperor, would not appear to be fully authentic. Gradually the Roman civil law was permeating all legal culture; it provided the categories, the methods of legal reasoning and the forms of argumentation, which were essential for anyone who wished to be considered a jurist. The Constitutio puritatem laid down the duties of

Frederick's judges in the face of a multiplicity of overlapping laws. In the first place they must apply royal legislation. If there is no relevant rule to be found there, local customs may be applied, so long as they are good customs; in the absence of a rule in legislation or approved customary law, the judges should turn to the ius commune , which is explained as Lombard law and Roman law. Lombard law was the only Germanic law to have been the subject of scholarly interpretation (at Pavia). Henceforth, however, no law was taught in law schools but civil and canon law. Even Frederick's royal constitutions had no place in the curriculum of the law school at Naples, which he founded. In Spain the legal situation was much affected by the Moorish domination. The Liber iudiciorum , a seventh-century collection, based on earlier collections of Visigothic and Roman laws, which had originally been applied to the Visigothic and subject populations but had become territorial, provided some basis for the regional customs. The Moorish occupation, beginning early in the eighth century, covered the whole peninsula, except for the far north and Catalonia, until the end of the tenth century. The Reconquista proceeded during the eleventh and twelfth centuries and by 1200 the northern two-thirds of the country had been freed from Moorish domination. It was, however, not united, since, as different parts were freed, they became independent kingdoms, each with its own set of customs, set out in a multitude of written 'fueros'. The leading kingdom was Castile and Leon. The earliest Spanish university was established in the first decade of the thirteenth century at Palencia and moved in 1239 to Salamanca, which became a centre for civil and canon law. In the middle of the thirteenth century, two remarkable kings, Ferdinand III and Alfonso X, were able to exploit the new learning in order to counter the diversity of laws in their dominions. In the style of Frederick II in Sicily, they sought to introduce a modern system that would act as a unifying force and bring Castile into the mainstream of European legal thought. Ferdinand initiated an ambitious set of law books, culminating in the Siete partidas , published by Alfonso, known as 'the wise'. The division into seven parts glowed with religious significance and may have been modelled on the sevenfold division which Justinian imposed on the Digest for educational purposes (Constitutio Tanta , 1–8). Alfonso had been persuaded of the virtues of Roman law by his tutor, who had studied at Bologna, and personally led the team of compilers. The work they produced was a mixture of traditional customs of Castile and Leon, of civil and canon law and of rules derived from the Old and New Testaments and from patristic writers. Although by inclination favouring Roman law, Alfonso had to make it acceptable to his subjects. The Siete partidas were written in the

vernacular rather than in Latin, and were comprehensive in scope, covering general notions of law and custom, procedure, property, marriage and marital property, contracts, succession on death and criminal law. Roman and canon law influences are noticeable in all parts. Alfonso was not strong enough to impose this legislation throughout his kingdoms. The nobility, whose privileges he had attempted to curtail, and the municipalities initially found it too foreign. Gradually, however, its merits were recognised and the more professionally trained the judges became, the more they turned to the Siete partidas .

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16 THE RECEPTION OF ROMAN LAW

As the national states in continental Europe gloried in their new found 'sovereignty', and set up professional courts to take over important business from local courts, they uniformly adopted a variant of the Romano-canonical procedure. They adopted the substantive civil law, however, only to the extent that the existing customary law was inadequate for their needs or was difficult of access, since it had not been cast in written form. Thus in France, where the customary laws had generally been codified, the reception of Roman law into court practice proceeded as a gradual trickle, whereas in Germany, as we shall see, it was a dramatic flood. Sometimes royal legislation furthered the movement. In Spain the Siete partidas acted increasingly as a counterweight to provincial particularism. In 1567 they were supplemented by a collection of new laws, known as the Nueva Recopilación , arranged in nine books in imitation of Justinian's Code. Everywhere there was a need for the more comprehensive and technically superior law that was offered in Justinian's texts, but the extent of its adoption depended on the local circumstances.