

Christian Church and roman legal culture*

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Християнська Церква а римська правова культура

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I. Christian Churches: *Ut unum sint*

1. Impressions

It is a great honour for me, and an equally great pleasure, to have been named the recipient of the degree of *doctor honoris causa* of the Catholic University of Lublin, and that pleasure is increased by the fact that your University is named after Pope John Paul II. I am not myself a Catholic; the tradition in which I have grown up is the distinctly Protestant immediacy of every human being vis-à-vis God.¹ And yet, the Polish Pope was one of the most admirable and charismatic persons whom I have happened to see in my life: the first time about a year after his election in the Basilica of St. Peter in Rome from a very close distance while he was proceeding with the College of Cardinals through the central aisle towards the altar; and the second time about a year before his death when I was part of a crowd of hundreds of people gathered in St. Peter's Square on a Sunday at noon to receive the blessing from a faraway window of the Apostolic Palace. The first time, he was a vigorous man in his late fifties, vibrant with energy; the second time, he was stricken with Parkinson's disease: no more than the white spot of his *pileolus*, or *zucchetto*, was visible, and the words of the blessing were hardly audible: human suffering perso-

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¹ The formulation alludes to T. Mann, *Gesammelte Werke*, vol. 11, Frankfurt am Main 1990, p. 409: "Ich bin kein Katholik, meine Herrn und Damen, meine Überlieferung ist [...] die protestantische Gottesunmittelbarkeit."

nified. Unlike his predecessor, John Paul II did not come from a mountain village,² but he was born close to a mountain range, the Beskids.³ He thus came to love outdoor activities, particularly in the mountains.⁴ That struck a chord in me, for I am a very keen hillwalker myself and have always been attracted by Psalm 121: “I will lift up mine eyes to the hills, from whence comes my help”.

There was even a time in my life when I envied my Catholic friends and would almost have wished to be one of them. That was during the last years of Apartheid in South Africa when I occasionally took part in regional conferences of the South African Council of Churches and services of the Catholic student community of my university, the University of Cape Town. I then realized that the Catholic Church adopted a more courageous and critical stance, guided by the compass of universal human rights, than many of the protestant Churches. I was surprised at first but then started to see this as a consequence of a global perspective. The Catholic Church appeared like a supertanker not easily deflected from its course, while the protestant Churches resembled small barges tossed about when the sea gets rough. The claim to be all-embracing (and that, after all, is the meaning of Catholic), based on a tradition reaching back 2 000 years, imbues the Catholic Church with relatively strong immunity against particular currents and any local political subversion. This, at any rate, was my impression of it in the South Africa of the 1980s. It must be added that many more black South Africans used to belong (and still belong) to the Catholic denomination than to the Lutheran or Calvinist Churches. If, nonetheless, I have remained a protestant Christian of the Lutheran persuasion, this is due to the fact that Martin Luther, in some respects an irritating and also somewhat scary patron, attempted to re-spiritualize the Christian religion and bring it back to its original core: a core which I believe to be common to all Christian denominations.

2. The Core

Sola scriptura. We are supposed to take seriously the good news revealed to us in the Bible. Again and again, we have to grapple with, and reflect upon, the messages

² Albino Luciani was born in Canale d'Agordo, close to Belluno, in the Dolomites. He became Pope on 26 August 1978 and took the name John Paul I. His pontificate lasted only 33 days; he is remembered as *il papa di sorriso*, the smiling Pope.

³ Karol Wojtyła was born on 18 May 1920 in Wadowice.

⁴ One of Pope John Paul II's predecessors, Achille Ratti (subsequently Pope Pius XI), was a well-known mountaineer; he was part of the first Italian rope team climbing the Eastern Face of the Monte Rosa.

contained in it, particularly the steep and radical ones. What does ‘imitation of Christ’ mean? In what sense can we be said to be God’s heirs and co-heirs of Christ? Why will the last be first and the first be last? Why is the servant, who buried (and thus preserved) his master’s money in the ground, scolded as lazy and wicked? How should we understand the statement that whoever wants to preserve his life shall lose it? These and many others are questions of direct relevance for every Christian.

Sola fide. It was “through the righteousness of faith” that Abraham received the promise to be the heir of the world,⁵ and Noah, too, “became heir of the righteousness [...] by faith.”⁶ The main thrust of these statements is that “the inheritance” (i.e. the land of Canaan) is not acquired “through the law.” God does not want us to follow a specific set of rules; he does not want the observation of rituals nor the offering of gifts; he only wants our faith. We can thus interpret every rule teleologically if the light in which the rule receives its meaning is faith. Thus, for example, the third commandment does not prevent us from plucking the ears of corn and from eating them, or from caring for the sick.⁷ *Sola fide* also means that we are justified before God by faith and not as a result of what we have done.⁸

Sola gratia. God has turned towards us. He has adopted us as children with the result that we have become co-heirs of the kingdom together with his only begotten son.⁹ God has even become man in order to atone for our sins and thus to do what only he can do but does not need; and what man needs but is utterly unable to do.¹⁰ “By the grace of God, I am what I am”, as St. Paul puts it in the first letter to the Corinthians,¹¹ and Martin Luther has reminded us that we can live in the confident belief to have a merciful God.

Sola scriptura, sola fide, sola gratia. From what I know of the Polish Pope’s theology, he would have subscribed to the truth of these assertions and would not have regarded Martin Luther’s emphasis on them as an obstacle to ecumenism; his

⁵ *Romans* 4, 13.

⁶ *Hebrews* 11, 7.

⁷ *Mark* 2, 23–28.

⁸ See the joint declaration of the Lutheran World Federation and the Catholic Church, signed during the pontificate of John Paul II in 1999.

⁹ See R. Zimmermann, *Sind wir aber Kinder, so sind wir auch Erben, nämlich Gottes Erben und Miterben Christi: Zur Bedeutung der Rede von Erbe und Erbschaft in der Bibel*, in: *Zivilrecht und Steuerrecht, Erwerb von Todes wegen und Schenkung, Festschrift für Jens Peter Meincke*, München 2015, pp. 435–450.

¹⁰ Saint Anselm of Canterbury, *Cur Deus Homo?* (end of 11th century; Latin and German 1956; English edition 2005); on which see also e.g., H.J. Berman, *Law and Revolution: The Formation of the Western Legal tradition*, Cambridge–Massachusetts 1983, pp. 174–181.

¹¹ *1 Corinthians* 15, 10.

encyclical ‘*Ut unum sint*’, after all, constitutes a commitment to proceed on the irreversible path of the ecumenical venture.¹²

3. ...*ut unum fuerunt*

Ut unum sint is an exhortation; it constitutes a task to be achieved in the future. It is a call for unity. Such unity existed, at least in the Latin Church of the West, before the Reformation. *Ut unum sint* can thus be supplemented by a statement of fact: *ut unum fuerunt*. One of the greatest legal scholars of the 19th century, Rudolf von Jhering, once wrote, “Three times Rome [...] united the peoples of the earth: the first time, when the Roman people still stood in the fullness of their power, it has brought about the unity of *statehood*, the second time, when the Roman Empire had perished, the unity of the *Church*; the third time, as a result of the reception of Roman law, during the Middle Ages the unity of the *law*; the first time through the force of arms and compulsion, the other two times through the force of the mind.”¹³ My lecture today will be devoted to the latter two ingredients of European culture or, more precisely, to the impact of the Roman Church, as it existed in the Middle Ages, on the development of the secular private law, as it has come down to us from Rome. This constitutes an important aspect of the cultural-historical mission of the Church – not either the Catholic or the Protestant, but the united Christian Church.¹⁴

¹² “Per Concilium Oecumenicum Vaticanum II Ecclesia catholica modo irreversibili se tradidit itineri inquisitionis oecumenicae conficiendo [...]”, *Encyclica Ut unum sint*, sub 3. And the Pope affirms that “credentes in Christum [...] divisos manere non posse” (sub 1).

¹³ R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Part 1, 6th ed., Leipzig 1907, p. 1: “Dreimal hat Rom [...] die Völker zur Einheit verbunden, das erstemal, als das römische Volk noch in der Fülle seiner Kraft stand, zur Einheit des Staats, das zweitemal, nachdem dasselbe bereits untergegangen, zur Einheit der Kirche, das drittemal infolge der Rezeption des römischen Rechts im Mittelalter; das erstemal mit äußerem Zwange durch die Macht der Waffen, die beiden andern Male durch die Macht des Geistes.”

¹⁴ For an earlier German version of what follows, see: R. Zimmermann, *Recht und Religion in der europäischen Rechtstradition II: Römisches Recht und Römische Kirche: Ein rechtshistorischer Streifzug*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung (ZRG (KA)) 2019, vol. 105, no. 1, 159–179.

II. Roman Empire and Roman Church

The reception of Roman law in Central and Western Europe that started with the glossators in late eleventh-century Bologna has indelibly shaped the tradition of European private law.¹⁵ Roman law, being the Imperial law, had a claim to universalism, corresponding to the claim of the medieval ‘Emperor’ who saw himself as the successor of the Roman Emperors of antiquity; the doctrine of *translatio imperii* served to substantiate that claim. But it could clash with a similar claim of the Church that also conceived of itself as universal; and that universalism not only manifested itself in the desire to impart to the world the belief in Christ, the Lord, and to urge that the commandments of the Holy Scripture had to be kept. The Church also established its own jurisdiction and its own body of rules. That body of rules was strongly shaped by Roman law (*Ecclesia vivit lege Romana*)¹⁶ but also, in turn, had a considerable impact on the latter; the canonical prohibition on taking interest (based on *Luke* 6, 35: “mutuum date nihil inde sperantes”) is perhaps the most telling example.¹⁷ Since, however, it was overcome in the wake of the Reformation, when writers such as Johannes Calvin, Carolus Molinaeus and Claudius Salmasius successfully attacked both its theological justification and its legal and economic foundation, we will concentrate on doctrines with a more lasting impact.

¹⁵ P. Koschaker, *Europa und das römische Recht*, 4th ed., München 1966; F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd ed., Göttingen 1967, two works which have the status of classics. Wieacker’s historiography has become a subject of dispute; see V. Winkler, *Der Kampf gegen die Rechtswissenschaft*, Hamburg 2014 and V. Erkkilä, *The Conceptual Change of Conscience: Franz Wieacker and German Legal Historiography 1933–1968*, Tübingen 2019; see, however, the reviews: R. Zimmermann, *Winkler, Viktor: Der Kampf gegen die Rechtswissenschaft. Franz Wieackers »Privatrechtsgeschichte der Neuzeit« und die deutsche Rechtswissenschaft des 20. Jahrhunderts.* (Zugl.: Frankfurt a. M., Univ., Diss., 2012/13.) Hamburg: Kovač 2014, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (RabelsZ) 2015, vol. 79, pp. 686–694 (on Winkler) and R. Zimmermann, *The Conceptual Change of Conscience: Franz Wieacker and German Legal Historiography 1933–1968* (= *Beiträge zur Rechtsgeschichte des 20. Jahrhunderts* 106), *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* (ZRG (RA)) 2020, vol. 137, no. 1, pp. 543–548 (on Erkkilä). I have attempted, following Koschaker, to provide examples of the imprint of Roman law on modern private law: R. Zimmermann, *Europa und das römische Recht*, *Archiv für die civilistische Praxis* (AcP) 2002, vol. 202, no. 2, pp. 243–316.

¹⁶ A. Thier, *Ecclesia vivit lege Romana*, in: *Handwörterbuch zur deutschen Rechtsgeschichte*, eds. A. Cordes et al., vol. 1, 2nd ed., Berlin 2008, cols. 1176 f.

¹⁷ For an overview, see R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford 1996, pp. 170–175; H.-J. Becker, *Das Zinsverbot im lateinischen Mittelalter*, in: *Vom Wucher übrigbleibt. Zinsverbote im historischen und interkulturellen Vergleich*, eds. M. Casper, N. Oberauer, F. Wittreck, Tübingen 2014, pp. 15–45; most recently, see W. Druwé, *Loans and Credit in Consilia and Decisiones in the Low Countries (c. 1500–1680)*, Leiden 2020, pp. 212–301.

III. Contract Law

1. *Pacta sunt servanda*

If a modern lawyer knows one Latin legal maxim, it is *pacta sunt servanda*: agreements are binding even if they do not comply with a specific form. This adage is Roman and non-Roman at the same time. The underlying idea can indeed be traced back to Roman law. That an agreement is binding without any magical ritual, invocation of God, placing oneself under a curse, or any other formality being required is an enormously far-reaching idea: a kind of cultural quantum leap in law. The Roman jurists took this leap, though only with regard to specific types of transactions.¹⁸ It was medieval Canon law that generalized the idea. It happened via an interesting detour. In the Middle Ages, it had become common to confirm transactions by way of oath. That was a tradition originating in the pagan world of the Germanic tribes, subsequently transferred, under the auspices of Christianity, into the religious sphere.¹⁹ The breach of a promise made under oath thus necessarily constituted the sin of perjury, which allowed the Church to assert its jurisdiction over disputes arising in these matters. However, there is no difference between a simple lie and perjury before God. Christ had even gone one step further by stating, according to *Matthew* 5, 34 and 37, “Swear not at all [...] But let your communication be, Yea; yea; Nay; nay: for whatsoever is more than these cometh of evil”. The medieval jurists thus insisted that informal promises had to be kept like an oath. Eventually, the Decretals of Pope Gregory IX sanctioned the enforceability of formless consensual agreements in general terms: “*pacta quantumcumque nuda servanda sunt*.”²⁰ Use of the term *pacta nuda* (contracts which are ‘naked’, i.e. not clothed with, or based upon, any formality) pointedly refers to the Roman legal tradition.²¹ The canonical principle is the root of the adage cited above and was to

¹⁸ For the development, see R. Zimmermann, *Law of Obligations...*, pp. 508–538; E. Hosemann, *Art. 2:101 (2)*, in: *Commentaries on European Contract Laws*, eds. N. Jansen, R. Zimmermann, Oxford 2018, [7]–[8].

¹⁹ G. Dilcher, *Eid*, 3. *Versprechenseide*, in: *Handwörterbuch...*, vol. 1, Berlin 1971, cols. 866–870; H. Coing, *Europäisches Privatrecht*, vol. 1. *Älteres Gemeines Recht (1500 bis 1800)*, München 1985, p. 405.

²⁰ See the *rubrum* of X 1, 35, 1, where canon 12 of a Carthaginian Council of 345/348 is passed down; see *Corpus Iuris Canonici*, ed. E. Friedberg, vol. 2, Leipzig 1879 (repr. Graz 1959), cols. 203 f.; see P. Landau, *Pacta sunt servanda: Zu den kanonistischen Grundlagen der Privatautonomie*, in: *Ins Wasser geworfen und Ozeane durchquert. Festschrift für Knut Wolfgang Nörr*, eds. M. Ascheri et al., Köln 2003, pp. 457–474; idem, *Pacta sunt servanda*, in: *Handwörterbuch...*, vol. 4, 2nd ed., Berlin 2017, cols. 302–304; A. Thier, § 311 I, in: *Historisch-kritischer Kommentar zum BGB*, eds. M. Schmöckel, J. Rückert, R. Zimmermann, vol. 2/2, Tübingen 2007, no. 11–16.

²¹ R. Zimmermann, *Law of Obligations...*, pp. 538–540.

constitute, from the 17th century onwards, a foundation of modern secular contract doctrine.²²

2. *Fidem frangenti fides frangitur*

Pacta sunt servanda is a manifestation of the idea of *fides*, or (good) faith, and already for Cicero, *fides*, was the basis of justice.²³ Bonds of loyalty dominated the life of medieval man – feudalism provides perhaps the most telling illustration. Even God had concluded a Covenant with humankind and had thus pledged his faith towards them. If faith was the cardinal point of any contractual bond, the question was bound to arise about how breach of faith was to be dealt with.²⁴ Confronted with this question, the Canon lawyers developed the idea that no faith is owed towards someone who has himself been in breach of faith. It can be found in a Decretal of Pope Innocent III and was also adopted into the *Regulae iuris* of Boniface VIII.²⁵ Remarkably concise is the elegantly alliterating formulation *fidem frangenti fides frangitur*. Essentially, this entailed a general right of termination in cases of breach of contract that managed to establish itself in the realm of secular law only surprisingly late and led to the adoption of rules such as Article 1184 *Code civil* (1804) and § 323 BGB.²⁶ Such a general right to terminate a contract had been alien to Roman law. Still, however, the Roman sources contained a number of individual instances in which a party was allowed to get away from a contract that had been concluded, which lent themselves to generalization;²⁷ and they contained points of

²² See *ibidem*, pp. 544 f., 576 f.; E. Hosemann, *Art. 2:101*, in: *Commentaries...*, [9] f.

²³ Cicero, *De officiis* I, 23: *Fundamentum autem est iustitiae fides*.

²⁴ For an authoritative discussion, see F. Merzbacher, *Die Regel "Fidem frangenti fides frangitur" und ihre Anwendung*, ZRG (KA) 1982, vol. 68, no. 1, pp. 339–362; more recently, see A. Thier, *Von der gehaltenen und gebrochenen fides: Zur fides in den Vertragsrechtskonzeptionen der klassischen Kanonistik seit dem 12. Jahrhundert*, *Das Mittelalter. Perspektiven mediävistischer Forschung* 2015, vol. 20, no. 2, pp. 337–342.

²⁵ See VI. 5, 12, 75: "Frustra sibi fidem quis postulatab eo servari, cui fidem a se praestitam servare recusat," *Corpus Iuris Canonici*, col. 1124.

²⁶ See Article 1184 *Code civil* (1804): "La condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfera point à son engagement"; on the development, see R. Zimmermann, *Law of Obligations...*, pp. 800–806; J. Kleinschmidt, *Introduction before Art. 9:301*, in: *Commentaries...*, [5]. For German law, see R. Zimmermann, *The New German Law of Obligation. Historical and Comparative Perspectives*, Oxford 2005, pp. 66–74.

²⁷ See R. Zimmermann, *Law of Obligations...*, pp. 578 f.

departure for the general principle that one party may withhold its performance in cases of non-performance on the part of the other party.²⁸

3. Change of Circumstances

a) The deposited sword

Fidem frangenti fides frangitur can be understood as a specific application of the general idea that a person ceases to be bound by his contractual promise if the circumstances prevailing at the time of conclusion of the contract have changed in a significant way. That general idea, a modern manifestation of which is § 313 BGB (on *Störung der Geschäftsgrundlage* = disruption of the basis of the transaction), also has a Roman-Canon history. It leads back not to Roman law but Roman moral philosophy. In his treatise *De officiis*, Cicero deals with a case, previously discussed by Plato, where someone deposits his sword with a friend. When he comes back in order to reclaim the sword, it turns out that he has become mentally deranged. Will the friend, nonetheless, have to comply with the request?²⁹ In terms of the contract of deposit concluded between the two, the answer would generally be affirmative. In view of the change of circumstances, however, according to Cicero, the depositor is not only entitled not to return the sword; he is duty-bound not to do so. It is a moral obligation (*officium*) to keep the sword away from a madman.

In the fifth century AD, the Church Father, St. Augustine, took up this case scenario in his interpretation of the psalms (*Enarrationes in Psalmos*).³⁰ For Augustine, the solution advocated by Plato and Cicero is obvious (*manifestum*): The madman has to be prevented from killing either himself or others. This reception of Roman moral philosophy was integrated into a discourse on *mendacium*, i.e. the sin of telling a lie, breaking a promise or deceiving another. That is the case only when the promisor has a *duplex cor*, i.e. a 'twofold' (or false) heart – when he is guilty

²⁸ W. Ernst, *Die Einrede des nichterfüllten Vertrages*, München 2000; K. Boosfeld, *Art. 9:201*, in: *Commentaries...*, [2 f.].

²⁹ Cicero, *De officiis* III, 95: "Si gladium quis apud te sana mente deposuerit, repetat insaniens, reddere peccatum sit, officium non reddere." Previously, see Plato, *Politeia* [33 C]. Along the same lines but with different examples Seneca, *De beneficiis* IV, 35.

³⁰ Augustinus, *Enarrationes in Psalmos* V, 7: "Illud vero, quod non habet duplex cor, nec mendacium quidem dicendum est, verbi gratia, tamquam, si cui gladius commendetur, et promittat se redditurum, cum ille, qui commendavit, poposcerit; si forte gladium suum repetat furens, manifestum est, non esse reddendum, ne vel se occidat, vel alios, donec ei sanitas restituatur. Hic ideo non habet duplex cor, quia ille, cui commendatus est gladius, cum promittebat, se redditurum poscenti, non cogitabat furem posse repetere."

of ‘duplicity’. However, the friend, when he received the sword as a deposit, could not be accused of duplicity in view of the fact that it did not occur to him that the *depositor* might become mad.

b) *Clausula rebus sic stantibus*

Augustine’s text became part of the first great compilation of the laws of the Roman Church, the *Decretum Gratiani*, which dated from the 12th century and was to become the first part of the *Corpus Juris Canonici*.³¹ The *Decretum Gratiani*, in turn, was commented upon by scholars trained in Roman and Canon law. The most influential commentary was by Johannes Teutonicus, a Bolognese professor who hailed from a German-speaking place, possibly Halberstadt. À propos the word ‘] *furens* (insane), he noted that contractual promises always have to be understood to be made under the condition that matters remain as they are (*conditio, si res in eodem statu manserit* – a phrase clearly inspired by a text from the body of the Roman sources, Africanus D. 46, 3, 38: “[...] si in eodem statu maneat.”)³² Johannes Teutonicus’ comment became the point of departure for the *clausula rebus sic stantibus*: a doctrine also confirmed by St. Thomas Aquinas (a breach of a promise is no sin if the circumstances have changed)³³ that could also be applied to other cases mentioned in the *Corpus Juris Canonici* (as in a letter by Pope Innocent III addressed to the Archbishop of Genua, contained in the Decretals of Pope Gregory IX, dealing with a promise to marry),³⁴ and it also became part of the secular law where it experienced a heyday in the course of the turbulent 17th century.

³¹ C. 22, q. 2, c. 14 § 2. For the development of the *clausula* doctrine, see R. Zimmermann, *Law of Obligations...*, pp. 579–582; A. Thier, *Legal History*, in: *Unexpected Circumstances in European Contract Law*, eds. E. Hondius, H.Ch. Grigoleit, Cambridge 2011, pp. 15–32; T. Repgen, *Ein Schwert in Verwahrung*, in: *Rechtsgeschichte heute*, eds. N. Jansen, P. Oestmann, Tübingen 2014, pp. 95–118; T. Rüfner, *Art. 6:111*, in: *Commentaries...*, [3]–[10].

³² Johannes Teutonicus († 1245), *Glossa Ordinaria on the Decretum Gratiani*, gl. *Furens* ad C. 22, q. 2, c. 14: “[...] semper subintellegitur haec conditio, si res in eodem statu manserit,” cited here according to the edition Venetiis 1525, col. 394.

³³ Thomas Aquinas, *Summa Theologiae, Secunda Secundae*, qu. 110, art. 3, 5: “[...] si sint mutatae conditions personarum et negotiorum.”

³⁴ X 2, 24, 25: “Quemadmodum, si vir mulieri iurasset, quando contraxit cum illa, quod eam semper pro legitima uxore teneret, pro fornicatione, quam mulier antea commisisset, non posset eam dimittere, sed pro fornicatione, quam postea perpetraret eam dimittere posset non obstante huiusmodi iuramento, quoniam in eo talis erat subintelligenda conditio, si videlicet in legem coniugii illa non peccaret,” *Corpus Iuris Canonici*, cols. 368 f.

c) Modern developments

The *clausula* became part and parcel of customary public international law; a codified version can be found today in the *Vienna Convention on the Law of Treaties*, i.e. the ‘treaty on treaties.’³⁵ In the second half of the 19th century, Bernhard Windscheid attempted to integrate the *clausula*-doctrine – which had been alien to ancient Roman law – into the system of contemporary Roman law by developing the doctrine of ‘presupposition’ (*Voraussetzung*), which he took to constitute a “restriction of the contracting parties’ will” (*Willensbeschränkung*): the effect intended in principle is to be taken to depend on a certain state of the prevailing circumstances.³⁶ However, the *clausula*-doctrine was adopted into the German Civil Code neither in its original form nor its will-theoretical cloak tailored by Windscheid. That did not turn out to be a wise decision. Soon after the enactment of the code, the German Imperial Court started to create doctrinal by-paths to carve out exceptional situations in which a change of circumstances could be taken into account.³⁷ The transition from an ever-increasing number of exceptions to a new (or rather: to a reassertion of the old) principle occurred in 1920 when, in view of the previously unimaginable revolution of all economic affairs resulting from the Great War, the *clausula*-doctrine ‘openly manifested itself’ in that it was seen to justify judicial interference with a steam-supply agreement.³⁸ A little later, the Imperial Court

³⁵ Article 62 (1) *Vienna Convention on the Law of Treaties*: “A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty”; for comment, see C. Rabl Blaser, *Die clausula rebus sic stantibus im Völkerrecht*, Zürich 2012.

³⁶ B. Windscheid, T. Kipp, *Lehrbuch des Pandektenrechts*, 9th ed., Frankfurt am Main 1906, § 97: “Die Voraussetzung ist eine unentwickelte Bedingung (eine Willensbeschränkung, die nicht zur Bedingung entwickelt ist). Wer einen Willen unter einer Voraussetzung erklärt, will ebenfalls, wie derjenige, welcher eine bedingte Willenserklärung abgibt, dass die gewollte rechtliche Wirkung nur bei einem gewissen Zustand der Verhältnisse bestehen solle. [...] [D]eswegen ist das Bestehen der rechtlichen Wirkung, obgleich formell gerechtfertigt, doch materiell ohne rechtfertigenden Grund. Infolge davon kann der durch die Willenserklärung Beeinträchtigte sich sowohl durch Einrede gegen die aus derselben hergeleiteten Ansprüche schützen, als auch seinerseits einen Anspruch auf Wiederaufhebung der rechtlichen Wirkung gegen denjenigen, zugunsten dessen sie eingetreten ist, erheben”; for comment, see U. Falk, *Ein Gelehrter wie Windscheid*, Frankfurt am Main 1989, pp. 193–214.

³⁷ See R. Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today*, Oxford 2001, pp. 80–83.

³⁸ *Reichsgericht* (Imperial Court), Judgment of 21 September 1920, RGZ 100, p. 129 (131): “Dagegen hat das Reichsgericht in den letzten Jahren in einer Reihe von Entscheidungen [...] dem durch den ungeahnten Verlauf und Ausgang des Krieges herbeigeführten Umsturz und Umschwung aller wirtschaftlichen Verhältnisse ausnahmsweise eine derartige Einwirkung auf bestehende Verträge

blended the *clausula* with Paul Oertmann's notion of *Geschäftsgrundlage* ('foundation of the transaction'),³⁹ and that amalgamation established itself as a widely accepted piece of judge-made law; doctrinally, it came to be anchored, hardly very plausibly, in the general good-faith clause of § 242 BGB. In 2002, the German legislature put its stamp of approval on that development by adopting the rule of § 313 BGB. Other European legal systems have similar provisions: the Italian *Codice civile* in Article 1467 ("avvenimenti straordinari e imprevedibili"), the Netherlands in Article 6:258 BW ("onvoorziene omstandigheden") and, since 2016, France in Article 1195 *Code civil* ("changement de circonstances imprévisibles.")⁴⁰ The modern model rules, or restatements, of European contract law also contain comparable rules, usually under the heading "change of circumstances."⁴¹

IV. Deceased's Estates

1. Commonalities and Differences

Germany, Italy, the Netherlands and France today all have their own private law systems. The same applies to the other national states within Europe and sometimes even to individual regions within these national states (Scotland, Catalonia).⁴² All these private law systems we face today display countless differences from each other. At the same time, however, there are fundamental commonalities. Private

eingerräumt, dass es das Begehren einer Vertragspartei auf Lösung des Vertragsverhältnisses dann als berechtigt erachtet hat, wenn ihr das Aushalten des Vertrags unter den neuen, völlig veränderten Zuständen wirtschaftlich nicht mehr zugemutet werden konnte. Die Anknüpfung an das positive Gesetzesrecht boten und bieten die §§ 242 (157) und 325 BGB. [...] [D]amit [tritt] im Gesetz die *clausula rebus sic stantibus* [...] unverhüllt zutage"; see K. Luig, *Die Kontinuität allgemeiner Rechtsgrundsätze: Das Beispiel der clausula rebus sic stantibus*, in: *Rechtsgeschichte und Privatrechtsdogmatik*, eds. R. Zimmermann, R. Knütel, J.P. Meincke, Heidelberg 1999, pp. 171–186.

³⁹ RGZ 103, 328 (331–334); on which decision see B. Rüthers, *Die unbegrenzte Auslegung*, 5th ed., Tübingen 2012, pp. 36–63; for the background see also J. Thiessen, *German Hyperinflation of the 1920s*, in: *Money in the Western Legal Tradition. Middle Ages to Bretton Woods*, eds. D. Fox, W. Ernst, Oxford 2016, pp. 735–769.

⁴⁰ T. Rüfner, *Art. 6:111*, in: *Commentaries...*, [12]–[16]. For the development of French law, see W. Doralt, *Der Wegfall der Geschäftsgrundlage. Altes und Neues zur théorie de l'imprévisation in Frankreich*, *RabelsZ* 2012, vol. 76, no. 4, pp. 761–784.

⁴¹ T. Rüfner, *Art. 6:111*, in: *Commentaries...*, [17].

⁴² R. Zimmermann, J. McLeod, *Scottish Private Law*, in: *The Max Planck Encyclopedia of European Private Law*, eds. J. Basedow, K.J. Hopt, R. Zimmermann, A. Stier, Frankfurt am Main 2012, pp. 1532–1536; and see the contributions to *Regional Private Laws and Codification in Europe*, eds. H.L. MacQueen, A. Vaquer Aloy, S. Espiau Espiau, Cambridge 2003.

law in Europe thus reflects a historical development shaped by Roman law, Canon law, indigenous law and, later, also other impulses such as the rules recognized in international trade and natural law theory – a stream that branched out from the 18th century onwards into increasingly separate, isolated rivulets. This can be seen not only in the law of contract but also in other core areas of private law. The law of succession provides an example. During the days of the *ius commune*, the law of succession was of central importance,⁴³ while with the enactment of the modern codifications, it sunk into the slumber of a sleeping beauty. The comparative discourse is still in its initial stages.⁴⁴

Everywhere in Europe (and in the legal systems influenced by European law), there are two modes of succession upon death: the succession may be determined by a disposition on the part of the deceased (typically his will), or it may occur *ab intestato*. Intestate (or ‘statutory’) succession is of a subsidiary character: it requires the deceased not to have disposed of his estate by will. The term ‘intestate’ succession still reflects the high esteem in which the Romans held the determination of the fate of his estate by the deceased himself: a person who died intestate had failed to do what a *bonus pater familias* was supposed to have done.⁴⁵ The rules of intestate succession are based, universally, on the idea of family succession; also, it is generally recognized that the estate has to go, in the first place, to the deceased’s descendants.⁴⁶ That corresponds to the regulation set out in Justinian’s novels 115 and 127, 1,⁴⁷ and it is also consistent with the early medieval idea of ‘concatenation’ (*Verkettung*) of estate and blood. Also, in this context, already *Accursius’ Glossa Ordinaria* invoked Paul the Apostle’s letter to the Galatians (4, 7): “Wherefore thou art no more a servant, but a son; and if a son, then an heir of God through Christ.”⁴⁸

If there are no descendants, the legal systems in Europe differ as to who is to receive the estate. Some of them subscribe to the tree-line system, others follow the Justinianic system as further developed in France, and again others have adopted

⁴³ D. Heirbaut, *A History of the Law of Succession, in Particular in the Southern Netherlands/Belgium*, in: *Imperative Inheritance Law in a Late-modern Society Imperative. Five Perspectives*, eds. C. Castelein et al., Antwerpen 2009, pp. 65–84.

⁴⁴ See M.J. de Waal, *Comparative Succession Law*, in: *The Oxford Handbook of Comparative Law*, eds. M. Reimann, R. Zimmermann, 2nd ed., Oxford 2019, pp. 1058–1087.

⁴⁵ See, e.g., F. Schulz, *Classical Roman Law*, Oxford 1951 (repr. 1992), p. 205. A different view was taken by D. Daube, *The Preponderance of Intestacy at Rome*, *Tulane Law Review* 1965, vol. 39, pp. 253–262.

⁴⁶ See R. Zimmermann, *Das Verwandtenerbrecht in historisch-vergleichender Perspektive*, *RabelsZ* 2015, vol. 79, no. 4, pp. 768–821 (787 f.).

⁴⁷ See T. Rübner, *Intestate Succession in Roman Law*, in: *Comparative Succession Law*, vol. 2. *Intestate Succession*, eds. K. Reid, M.J. de Waal, R. Zimmermann, Oxford 2015, pp. 1–32 (26–29).

⁴⁸ For discussion, see R. Zimmermann, *Sind wir aber Kinder...*, pp. 435–450.

the so-called parentelic system.⁴⁹ Of course, there are many variations in detail. The parentelic system can be considered a remarkably consistent implementation of the ideas underlying the Justinianic law in a reconceptualization inspired by natural law. Particularly significant, as a point of orientation, was the deceased's presumed intention. The parentelic system was adopted in the Austrian General Civil Code in the first place, from where it was taken over into the BGB.⁵⁰

2. Wills and Dispositions *ad pias causas*

Recognition of the last will and, connected with it, the idea of testamentary freedom was one of the great achievements of Roman law. The Germanic tribes did not recognize testamentary succession, as was already recognized by Publius Cornelius Tacitus.⁵¹ Among the Franconians and Lombards, a person who had no descendants was allowed to adopt a successor into the family (*Affatomie/Gairethinx*).⁵² This was a first step away from the natural order of succession. A true inroad into the notion that a person's property was tied with his family, i.e. that it was taken to belong to the family rather than to an individual, occurred when the possibility of leaving part of the property for pious purposes came to be recognized. Such gifts could be made by way of *donatio post obitum* or *donatio reservato usufructu*, i.e. transactions *inter vivos* motivated by an early form of estate planning.⁵³ They were eagerly promoted and protected by the Church: on the one hand, the Church benefited from them while, on the other hand, they served the salvation of the donor's soul. Even more suitable for these purposes was the last will, which indeed owes its revival in the High Middle Ages to the Church. With time, it managed to oust the Germanic gifts. It was turned into an essentially spiritual instrument by means of which the testator could, as recommended by St. Matthew, lay up a treasure in heaven for himself in order to save his soul

⁴⁹ R. Zimmermann, *Winkler, Viktor: Der Kampf gegen die Rechtswissenschaft...*, pp. 784–787.

⁵⁰ R. Zimmermann, *Intestate Succession in Germany*, in: *Comparative Succession Law*, vol. 2, pp. 181–223 (184–191).

⁵¹ Tacitus, *Germania*, XX: “Heredes tamen successoresque sui cuique liberi, et nullum testamentum”; see H.-R. Hagemann, *Erbrecht*, in: *Handwörterbuch...*, vol. 1, 2nd ed., Berlin 2008, cols. 1370–1383 (1376).

⁵² See the references in R. Zimmermann, *Heres Fiduciarius?: Rise and Fall of the Testamentary Executor*, in: *Itinera Fiduciae: Trust and Treuhand in Historical Perspective*, eds. R. Helmholz, R. Zimmermann, Berlin 1998, pp. 267–304 (277 f.).

⁵³ See W. Ogris, *Testament*, in: *Handwörterbuch...*, vol. 5, 2nd ed., Berlin 1998, cols. 151–165 (154 f.); H.-R. Hagemann, *Erbrecht*, in: *Handwörterbuch...*, vol. 1, 2nd ed., Berlin 2008, cols. 1376 f.; H. Coing, *Europäisches Privatrecht*, vol. 1, pp. 564 f.

from damnation.⁵⁴ This was also why the Roman law relating to wills was not simply copied as handed down in the *Corpus Juris Civilis*. Thus, for example, the form requirements were relaxed. No longer was it necessary for seven witnesses to be present;⁵⁵ a will was also valid if it had been made in front of the parish priest and two witnesses.⁵⁶ That was based on *Matthew* 18, 16.⁵⁷ “Caput et fundamentum testamenti”⁵⁸ was no longer, as it had been in Roman law, the institution of an heir but the disposition *pro animae remedio* to further pious purposes, i.e. *ad pias causas*.⁵⁹ That disposition had to be saved – in the interest of the deceased! (as well as of the Church) – at just about all costs from invalidity. Thus, it was even considered sufficient if only two witnesses confirmed the testator’s will.⁶⁰ No longer was the institution of an heir required for the validity of the will. Also, for example, the Roman rule according to which no one could dispose of only part of his estate (“*nemo pro parte testatus pro parte intestatus decedere potest*”) was not received.⁶¹

An essential characteristic of the disposition *ad pias causas* is that it was made voluntarily. This was a consideration that Justinian, inspired by Paul the Apostle,⁶² had turned into the focal point for the law of donations.⁶³ In Justinian’s view, also,

⁵⁴ *Matthew* 6, 19–20: “Lay not up for yourselves treasures upon earth, where moth and rust doth corrupt, and where thieves break through and steal: But lay up for yourselves treasures in heaven, where neither moth nor rust doth corrupt, and where thieves do not break through nor steal.”

⁵⁵ On the post-classical Roman will requiring seven witnesses (*testamentum tripertitum*: Inst. II, 10, 3) that became part of the *ius commune*, see R. Zimmermann, *Testamentary Formalities in Germany*, in: *Comparative Succession Law*, vol. 1. *Testamentary Formalities*, eds. K. Reid, M.J. de Waal, R. Zimmermann, Oxford 2011, pp. 175–220 (179); for the development in Roman law, see T. Rüfner, *Testamentary Formalities in Roman Law*, in: *Comparative Succession Law*, vol. 1, pp. 1–26.

⁵⁶ See the *rubrum* of X 3, 26, 10 (*Corpus Iuris Canonici*, col. 541): “*Valet testamentum, quod parochianus facit coram presbytero parochiali et duobus testibus, nec valet contraria consuetudo.*” Generally on the relaxation of the form requirements in the law of the early modern period N. Jansen, *Testamentary Formalities in Early Modern Europe*, in: *Comparative Succession Law*, vol. 1, pp. 27–50 (35–42).

⁵⁷ “But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established.”

⁵⁸ Gai. II, 229.

⁵⁹ See, e.g., P. Ariès, *Geschichte des Todes*, München 1980, pp. 233–235, 242–248; E.F. Bruck, *Kirchenväter und soziales Erbrecht*, Berlin–Göttingen–Heidelberg 1956, pp. 257–261.

⁶⁰ See the *rubrum* to X 3, 26, 11: “*Valet ultima voluntas ad pias causas coram duobus testibus, et est casus singularis.*”

⁶¹ H. Coing, *Europäisches Privatrecht*, pp. 571–573, 593–597.

⁶² Paul, 2 *Corinthians* 8, 7: “[...] for God loveth a cheerful giver.” For discussion, see E.F. Bruck, *Über römisches Recht im Rahmen der Kulturgeschichte*, Berlin–Göttingen–Heidelberg 1954, pp. 101–121.

⁶³ See Iulianus D. 39, 5, 1 pr. (probably interpolated from *et propter until exerceat*): “*Dat aliquis ea mente, ut statim velit accipientis fieri nec ullo casu ad se reverti, et propter nullam aliam causam facit, quam ut liberalitatem et munificentiam exerceat: haec proprie donation appellatur*”; see E.F. Bruck, *Über römisches Recht...*, pp. 126–130; R. Zimmermann, *Law of Obligations...*, pp. 496 f.

immeasurability was the best measure for donations to the Church.⁶⁴ He, therefore, did not lay down a fixed quota. Bishop Bernward of Hildesheim, for example, is indeed said to have instituted Christ as his sole heir.⁶⁵ On the other hand, the Latin Church Fathers, by way of compromise between the ideal of absolute impecuniosity and the reality of a somewhat less ideal worldly life cushioned by the possession of property, recommended leaving a son's share to Christ. That recommendation could be found, for example, in one of St. Augustine's sermons, a text which found its way into the *Decretum Gratiani*.⁶⁶ Gratian took this to constitute a prohibition against exceeding a son's part to the detriment of the testator's family. It, in turn, sparked off a controversy among the subsequent canonists, which led Johannes Teutonicus in his *Glossa Ordinaria* to fall back upon a criterion inspired by Roman law: the testator may leave his entire property to the Church as long as he does not thereby impinge upon the *portio legitima*, i.e. the compulsory share due to the closest members of his family.⁶⁷

3. Executors

Since a medieval will no longer necessarily required the institution of an heir, the question was bound to arise who was to be responsible for the winding-up of the estate and, particularly, the implementation of the dispositions *ad pias causas*.

⁶⁴ *Novel 7*, cap. II: “[...] et maxime in sanctissimis ecclesiis, in quibus optima mensura est donatarum eorum immensitas”; for the practice in Justinian's time, see C. 1, 2, 25.

⁶⁵ *Vita Bernwardi*, chapter 46 (*Monumenta Germaniae Historica, Scriptores 4*, ed. G.H. Pertz, München 1841, p. 778): “Interea venerabilis praesul Bernwardus, ampliari studens divinae servitutis obsequium in parrochia sui praesulatus, ob reparationem futuram Christum haeredem elegit, et quod praecipuum habuit, se ipsum cum omnibus acquisitis seu acquirendis rebus patri omnipotenti, sicut iam dudum in secreto mentis statuerat, in sacrificium obtulit.”

⁶⁶ Augustinus, *Sermones duo de moribus et vita clericorum*, Sermo 355, c. 4, as contained in the *Decretum Gratiani* C. 12, q. 2, c. 8 (*Corpus Iuris Canonici*, col. 723): “Pro numero filiorum pars hereditatis Deo offeratur. [...] Unum filium habet, putet Christum alterum; duos habet: putet Christum tertium; decem habet: faciat Christum undecimum.” See O. Condorelli, *The Ius Decretalium and the Development of the Law of Succession in Medieval Europe. Some Examples from Denmark and Sweden (XII–XIII c.)*, in: *Succession Law, Practice and Society in Europe across the Centuries*, ed. M.G. di Renzo Villata, Berlin–Heidelberg 2018, pp. 105–147 (120–122). For the Greek Church Fathers, also advocating a compromise between asceticism and property, see E.F. Bruck, *Kirchenväter...*, pp. 1–29, 41–69.

⁶⁷ Johannes Teutonicus, in: *Glossa Ordinaria*, gl. Prohibetur ad C. 13, q. 2, c. 8: “Falsum dicit [Gratianus]: quo etiam totum dare potest ecclesiae [...] dum tamen legitimam relinquit filiis”; generally on what has been stated in the paragraph J. Hallebeek, *Dispositions ad pias causas in Gratian's Decretum: Should the Portio Christi be Restricted to a Child's Share?*, in: *Der Einfluss religiöser Vorstellungen auf die Entwicklung des Erbrechts*, ed. R. Zimmermann, Tübingen 2012, pp. 280–286.

It thus became a widely accepted practice for testators to appoint an *executor ultimae voluntatis* in their will. The institution of the executor was another creation of medieval Canon law based upon elements of the Roman tradition and Germanic legal notions.⁶⁸ Classical Roman law had not known the concept, or office, of an executor, but traces of it can be found in the Justinianic law.⁶⁹ Justinian was concerned that dispositions *pro animae remedio* favouring the Church, the poor, or Christ were to be duly carried out; and who would have been better suited for this purpose than the Church? Justinian, therefore, in one of his novels, determined that the local bishops had to see to it that the estate was wound up in line with the wishes of the deceased.⁷⁰ This source, as well as others, could be tied up with the notion, widely recognized among the Germanic peoples, of a *salmann*, or fiduciary,⁷¹ in order to establish an institution which can be found today, in one form or another, in all European legal systems. That the executor appears in so many different shapes in, for example, Austrian, French, German and English⁷² law is due to the fact that medieval and early modern authors struggled to conceptualize an institution created at the intersection of Roman, Germanic and Canon law and coordinate it with the position of the heir which, under the influence of Roman law, had regained considerable significance. In England, the executor reached the apex of his career by essentially becoming *heres fiduciarius*, i.e. a sort of fiduciary heir.⁷³

4. Cy-près

From the 16th century onwards, the concept of *pia causa* was not only used to describe the purpose of a disposition but also, more narrowly, the institution to be benefited or established by the disposition.⁷⁴ Such institutions already existed in late antiquity: hostels for foreigners or pilgrims (*xenodochia*), for the poor (*ptochotrophia*), hospitals (*nosotrophia*), orphanages (*orphanotrophia*), and homes for

⁶⁸ H. Coing, *Europäisches Privatrecht*, vol. 1, pp. 597–601; R. Zimmermann, *Heres Fiduciarius?...*, pp. 280–286.

⁶⁹ R. Zimmermann, *Heres Fiduciarius?...*, pp. 268–273.

⁷⁰ *Novel* 131, cap. XI, 2: “In omnibus enim talibus piis voluntatibus sanctissimos locorum episcopos volumus providere, ut secundum defuncti voluntatem universa procedant.”

⁷¹ W. Ogris, *Testament*, cols. 163 f.; R. Zimmermann, *Heres Fiduciarius?...*, pp. 275–277.

⁷² For details, see R. Zimmermann, *Heres Fiduciarius?...*, pp. 286–304.

⁷³ *Ibidem*, pp. 301–304.

⁷⁴ For the development, see R. Zimmermann, *Cy-près*, in: *Iuris professio: Festgabe für Max Kaser zum 80. Geburtstag*, eds. H.-P. Benöhr, K. Hackl, R. Knütel, Wien 1986, pp. 395–414 (402–408); see also H.-P. Coing, *Europäisches Privatrecht*, vol. 1, pp. 593–597.

the aged (*gerontocomia*).⁷⁵ Dispositions in their favour were, like dispositions for charitable purposes generally, privileged in many respects. Andreas Tiraquellus, in his much-cited and centrally important *Tractatus de Privilegiis piaae causae* (1561), pedantically listed no fewer than 167 such privileges.⁷⁶ Also, it was generally recognized that when a testator's disposition turned out to be impracticable, impossible or unachievable, it had to be upheld to benefit a related cause (*alius usus piaae analogicus*)⁷⁷. This was justified in view of the fact that ultimately the disposition was a means to save the testator's soul, and its central purpose was jeopardized if the property designated for the *pia causa* would, instead, have gone to the heirs. One was, therefore, acting quite in line with what the testator had ultimately intended. That basic principle, namely that respect for the testator's intention was of key significance, could be gathered from the Roman legal sources. These sources, moreover, also contained a very specific pointer allowing the use of the property for similar purposes than initially envisaged. That was the fragment D. 33, 2, 16.⁷⁸ A legacy had been left to a town so that from the revenues, a play could be performed each year in that town to keep alive the memory of the deceased. Such performance was not, however, permitted in that town. The question thus arose whether the heirs were to benefit from the possible invalidity of the legacy in that, what was intended for the play, was now to fall to them. According to Modestinus, however, the disposition was to be transformed so that the testator's memory would be celebrated in some other, lawful way. Modestinus, therefore, appears to have been guided by what the testator ultimately intended. The power recognized in the Roman-Canon *ius commune* to uphold dispositions *ad piaae causas* which have failed in favour of a similar purpose was to become the basis of the *cy-près*-doctrine in the English law relating

⁷⁵ R. Zimmermann, *Cy-près*, p. 403. These institutions, in the words of Eberhard Friedrich Bruck, were imbued "with the fragrance of chianti and salami", i.e. they were creations of the so-called 'Vulgar law' – E.F. Bruck, *Über römisches Recht...*, p. 72.

⁷⁶ See R. Zimmermann, *Cy-près*, p. 404; H. Coing, *Europäisches Privatrecht*, vol. 1, pp. 595 f.

⁷⁷ See, e.g., *Utrechtsche Consultatien*, Part II (1695), I, 12 and 14: "[...] dat volgens alle so Goddelijcke als Wereltlijke rechten buyten alle contriversie is dat legata, donationes, foundationes ad pios usus, vel piam causam, cessante vel abrogate illa causa, neutiquam revocentur, [...] sed converti debeant ad pios usus pariles et analogicos"; R. Zimmermann, *Cy-près*, pp. 408 f.

⁷⁸ "Legatum civitati relictum est, ut ex redditibus quotannis in ea civitate memoriae conservandae defuncti gratia spectaculum celebretur, quod illic celebrari non licet: quaero, quid de legato existimes. Respondit, cum testator spectaculum edi voluerit in civitate, sed tale, quod ibi celebrari non licet, iniquum esse hanc quantitatem, quam in spectaculum defunctus destinaverit, lucro heredum cedere: igitur adhibitibus heredibus et primoribus civitatis dispiciendum est, in quam rem converti debeat fideicommissum, ut memoria testatoris alio et licito genere celebretur"; on this fragment, see R. Zimmermann, *Cy-près*, pp. 305–398.

to charitable trusts (*cy-près* being Law French and meaning as much as ‘aussi près que possible.’)⁷⁹ It has also left its traces on the German law relating to foundations.⁸⁰

V. Adoption and Integration

Roman law and Canon law are constitutive elements of European legal culture. Both were very closely connected; in the Middle Ages, it was said that “*ius canonicum et civile sunt adeo connexa, ut unum sine altero non intellegi potest.*”⁸¹ We thus refer to the Roman-Canon *ius commune*.⁸² This intellectual connection between the Latin Church and the ancient Greek, as much as the Roman world, was characteristic of European culture generally, not just for its legal culture. Origen and St. Augustine are but two, albeit particularly influential, theologians seeking, as Adolf von Harnack has put it, “the momentous alliance between the Christian Church and Greek philosophy”;⁸³ their work is testimony to a process of productive integration. “The scene was thus set for the creative interaction of Christian theology, liturgy, and spirituality with the cultural tradition of the ancient world – unquestionably one of the most interesting examples of cultural cross-fertilization in

⁷⁹ *Attorney-General v. Lady Downing*, 1 Wilmot 1 (pp. 32 f.) (1767) = *English Reports* 97, 1: “The donation was considered as proceeding from a general principle of piety in the testator. Charity was an expiation of sin, and to be rewarded in another state; and therefore, if political reasons negated the particular charity given, this Court thought the merits of the charity ought not to be lost to the testator, nor to the public, and that they were carrying on his general pious intention; and they proceeded upon a presumption that the principle which produced one charity, would have been equally active in producing another in case the testator had been told the particular charity he meditated could not take place. The Court thought that one kind of charity would embalm his memory as well as another, and, being equally meritorious, would entitle him to the same reward.” Subsequently, *Modestinus* D. 33, 2, 16 is cited; see R. Zimmermann, *Cy-près*, pp. 409–412.

⁸⁰ § 87 (1) BGB; on which see R. Zimmermann, *Cy-près*, pp. 412–415.

⁸¹ F. Wieacker, *Privatrechtsgeschichte...*, p. 79. According to Pollock and Maitland, “[t]he imperial mother and her papal daughter were fairly good friends. It was hand in hand that they entered England”; F. Pollock, F.W.Maitland, *The History of English Law before the Time of Edward I*, vol. 1, 2nd ed., Cambridge 1898 (reissue by S.F.C. Milsom, Cambridge 1968), p. 116.

⁸² See, e.g., R. Zimmermann, *Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit*, *Juristen Zeitung* 1992, vol. 47, no. 1, pp. 8–20.

⁸³ A. von Harnack, *Lehrbuch der Dogmengeschichte*, vol. 1, 4th ed., Tübingen 1909 (repr. Tübingen 1990), p. 498: “weltgeschichtlicher Bund zwischen kirchlichem Christentum und griechischer Philosophie”; on Origen (c. 185 – c. 254) who contributed most to winning over the ancient world to the Church (“am meisten dazu beigetragen hat, die alte Welt für die Kirche zu gewinnen”), see the same work, pp. 650–697.

human intellectual history.”⁸⁴ The artists, too, adopted the pagan philosophers into the Church. This is conspicuous in the iconographical programme underlying the Stanza della Segnatura in the Vatican, the private library of Pope Julius II, as devised by Raphael (who died 500 years ago, on 6 April 1520). On the two long sides of the room, facing each other, we find two of the masterworks of the Italian Renaissance: the *School of Athens* and *La Disputa*.⁸⁵ The philosophers shown in the *School of Athens* appear, from the deeper part of the room, to proceed forwards, with Plato pointing upwards towards higher wisdom that still remains invisible. It only becomes visible on the opposite wall (*La Disputa*), facing the pagan philosophers and towards which they are thus shown to progress. The vaulted room, in which they are depicted together with the altar in the centre of *La Disputa*, is situated in a semi-circular room, separated by two bars and creates in the observer (who has entered the room as if he were part of the School of Athens) the impression of being in a Church.⁸⁶ The Church thus appears to provide the framework for the progress of intellectual and cultural history, and within that intellectual and cultural progression, the ancient philosophers have their legitimate place.⁸⁷ In their love of wisdom and their striving for the truth, they are, as it is put in *Ephesians* 1, 9 and 10, part of God’s hidden plan, “[t]hat in the dispensation of the fullness of times he might gather together in one all things in Christ, both which are in heaven, and which are on earth.” This is a truly Catholic programme that can be accepted as authoritative also by Protestant Christians.

⁸⁴ A.E. McGrath, *Christian Theology*, 3rd ed., New York 2001, p. 19. Cf. also e.g., H.D. Betz, *Antike und Christentum*, in: *Religion in Geschichte und Gegenwart*, eds. H.D. Betz, D.S. Browning, B. Janowski, E. Jüngel, vol. 1, 4th edn., Tübingen 1998, cols. 542–546 (542), stating that this was not just ‘Auseinandersetzung’ but ‘ineinandersetzung’.

⁸⁵ For what follows, see T. Verdon, *Pagans in the Church: The School of Athens in Religious Context*, in: *Raphael’s School of Athens*, ed. M.B. Hall, Cambridge 1997, pp. 114–130.

⁸⁶ T. Verdon, *Pagans in the Church...*, pp. 121 f.

⁸⁷ Cf. also e.g., J. Pelikan, *The Christian Tradition*, vol. 1. *The Emergence of the Catholic Tradition (100–600)*, Chicago 1971, p. 31, who quotes the Church Father Justin († 165) with the words that, to some extent, Christ was even known to Socrates; cf. also pp. 62 f.: “Whatever things were rightly said among men”, wrote Justin, “are the property of us Christians,” “Christianity laid claim to all that was good and noble in classical thought, for this had been inspired by the seminal Logos, who became flesh in Jesus Christ. This meant that not only Moses but Socrates had been both fulfilled and superseded by the coming of Christ”; A. von Harnack, *Lehrbuch der Dogmengeschichte*, p. 503: “Diese Umsetzung der Religion in Philosophie wäre nicht möglich gewesen, wenn die griechische Philosophie sich nicht selbst in der Entwicklung zu einer Religion befunden hätte.”



Raphael, *The School of Athens*, Stanza della Segnatura, Vatican Museums, Public domain, via Wikimedia Commons [access: 20.03.2022]



Raphael, *La Disputa*, Stanza della Segnatura, Vatican Museums, Public domain, via Wikimedia Commons [access: 20.03.2022]

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