

A Critical Review of Reinhard Zimmerman's *Roman Law, Contemporary Law, European Law*

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*Roman Law, Contemporary Law, European Law*¹ is the offspring of the Clarendon lectures that Reinhard Zimmerman was invited to deliver in October 1999 at the University of Oxford. The close of the second millennium and the imminent commencement of the third, combined with the centennial anniversary of the German Civil Code (BGB), provided Zimmerman with the opportunity to advance both a retrospective and prospective argument: That contemporary, codified European laws were derived from, and fundamentally shaped by, Roman law as channeled through the *ius commune*, and that the process of European integration is fostering the emergence of a new common European private law that should, even as it moves into unchartered territory, be cognizant of the common legal tradition that unites all European jurisdictions. “A European private law scholarship is gradually emerging,” Zimmerman writes, and “[it] is not too difficult to predict that it will dominate private law in the twenty-first century [...] we stand at an important juncture. It may, therefore, be appropriate to try to take stock. I have [...] argued for the reconstitution of Savigny’s Historical School of Law on a European level. Essentially, in these lectures, I would like to ask why this is necessary and suggest what may be done to implement such a programme” (Zimmerman 2001: xix). This critical review outlines how Zimmerman proceeds to make this argument, and concludes with a critical appraisal of his efforts.

I. Codification and the Historicization of Savigny’s Historical School

In his first lecture, Zimmerman substantively seeks to chart how the scholars involved in the fragmentation of the *ius commune* via their support of nationalist codification movements lost sight of the unifying function fulfilled by Roman law and their intellectual indebtedness to its constitutive principles: “With the enactment of the codifications there was a change. The awareness of a fundamental intellectual unity was gradually lost, and thus the national isolation

¹ Zimmerman, Reinhard. 2001. *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*. New York, NY: Oxford University Press.

of legal practice, legal training, and legal scholarship gained ground” (ibid: 2). The preconditions for the codification movements lay in the emergence of scholars who sought to integrate indigenous customary law with Roman law, a development which by the 18th century had made the presence of a Roman-Dutch, Roman-Hispanic, and Roman-Saxon law readily identifiable (ibid: 1). What followed was the promulgation of a series of civil codes whose authority was territorially circumscribed to the jurisdictional boundaries of the state, enforced via its coercive capacity, and legitimated by the secular natural law that emerged following the Enlightenment’s rationalist proclivities. The Prussians enacted their civil code in 1794; the French promulgated Napoleon’s *code civil* in 1804; the Austrians established their civil code in 1811; and in 1900 the BGB came into effect in Germany (ibid: 3-6). All remain the effective civil codes of their respective countries.

To chart the scholarly impact of the codification movements, Zimmerman focuses on the evolution of 19th century German legal thought. German unification under Bismarck and the drive to construct a civil code for the German people pushed German law schools to turn away from the study of Roman law and focus instead on the ahistorical development and interpretation of contemporary law. “Academic legal writers,” Zimmerman argues, “confined their attention, and their intellectual horizon, to the BGB and led German private law scholarship into a national isolation [...] Scholarship in Roman law, in turn, freed from its obligation to serve the needs of modern private law, was in the process thoroughly to historicize its subject” (ibid: 9-10). This, Zimmerman posits, is where the codification movement went astray, and where it abandoned the tenets of what he deems to be most valuable strand of German legal theory: Savigny’s Historical School.

For most of the 19th century “German legal scholarship was dominated by the Historical School” (ibid: 11). While it is certainly true that Savigny was “also interested in legal history as such,” he did not believe (and this is a point that for Zimmerman is absolutely essential) that the buck stops with historical narrative; it was essential to derive from said narrative progressive prescriptions for the development of contemporary law (ibid: 12). Hence Savigny’s Historical School was primarily focused on producing “legal scholarship rather than legal history,” even as said scholarship “was to be an ‘organically progressive’ legal scholarship, aware always of the ‘vital connection’ between present and past [...] Since there is no ‘completely separate and independent human existence...every age creates its own legal world, not for itself and

arbitrarily, but in indissoluble community with the entire past” (ibid: 12). Zimmerman’s ringing endorsement of this applied legal history approach is captured when he baptizes it a “fascinating vision” (ibid: 12). Yet as efforts to construct the BGB began to monopolize the energies of legal academics,² Savigny’s Historical School “transformed into a Pandectist School” whose practitioners were “much more interested in the ‘certainty with which we think and adjudicate in law’ [...] than in legal history” (ibid: 18). As an ahistorical presentism began to predominate, the Historical School was marginalized and cast off as antiquarian, engendering an illusory sense of liberation for the few who mistakenly saw themselves as continuing Savigny’s work: “Savigny’s programme had [...] been subtly changed: a *Journal of Historical Legal Science* had been turned into a *Journal of Legal History*. The destination of a historical legal science, so it appeared to many, had been achieved [...] and having] arrived at its ultimate destination, scholars were now free to turn their attention to [...] legal history as such, not one controlled by contemporary needs” (ibid: 22). This move, whereby legal history and the development of contemporary law are approached as mutually exclusive phenomena, was an approach Savigny opposed then, and which Zimmerman opposes today. Yet for the draftsmen of the BGB, “[t]he Code was widely regarded as *the* turning point in German legal history, a boundary between the new law and the old law. Few academics, and even fewer practitioners, continued to be aware of the ‘vital connection which ties the past to the present’” (ibid: 42). The faulty foundations of this belief are evident if one considers the degree to which the BGB failed to alter the trajectory of the development of German private law – the topic to which Zimmerman devotes his second lecture.

II. The BGB as a False Critical Juncture: 20th Century Continuity in Legal Development

The entry into force of the BGB on January 1st, 1900 was widely believed to signal a critical juncture in German legal and political development. As the headline of the German Lawyer’s Journal enthusiastically proclaimed: “One People. One Empire. One Law” (ibid: 53). Historical

² Zimmerman qualifies the exclusive focus on the impact of the BGB towards the conclusion of his first lecture: “Where do we have to seek the reasons for the study of Roman law acquiring an exclusively historical character and superseding pandectist scholarship so radically and conclusively? Not, at any rate, in the fact of codification as such, for the change of perspective started before the BGB came into effect [...] An number of factors coincided [...] Thus there was the ‘immeasurable’ wealth of sources [...] discovered, deciphered, and published in the course of the nineteenth and early twentieth centuries [...] The evaluation of these new sources was bound to be a fascinating task for legal historians: it offered the promise to break new ground. It had thus become possible to advance far beyond the standard canon of legal sources dominated by the texts of the *Corpus Iuris*” (ibid: 46-47).

argument was to be cast off as an “exploration of the preparatory ‘paper trash’”, and the 19th century “scholarly positivism was turned into a statutory positivism” that “identifies the law with the entire body of statutory provisions, as long as they have been properly enacted” (ibid: 51). There was even a fear that the exhaustive provisions of the BGB would so dominate the attention of jurists and legal academics that the code would become a “prison cell” for legal scholarship, replacing the grand, creative, abstract theorizing that had so distinguished 19th century German legal science with a narrow, mechanistic, and technical alternative (ibid: 55). The philosophers would be fired, only to be replaced by plumbers. The purpose of Zimmerman’s second lecture is to demonstrate how misplaced these beliefs turned out to be, for the BGB did not fundamentally alter the developmental trajectory of German private law. In so doing, Zimmerman concludes that an understanding of 20th century civil law must necessarily inquire into its pre-1900 legal foundations.

Much of Zimmerman’s focus in the second lecture is on the jurisprudence of the German courts, and particularly the Imperial Court, over the course of the first two decades of the BGB’s tenure. During this time period, Germany witnessed “a ‘case-law revolution’. A whole range of legal rules and institutions is recognized today of which there is no trace in the provisions of the Code” (ibid: 55). But the courts did not develop said rules *in vacuo* – rather, they turned to the *ius commune*, and in particular to Roman law, for inspiration. Hence the Imperial Court extended the scope of protection provided by Section 823 of the BGB concerning the rights of individuals leading to delictual³ liability by narrowly interpreting Section 823 and plugging the residual legal space with a “robust expansion of contractual liability” (ibid: 59-60). The principle of *Verkehrssicherungspflicht*, or that one has the duty to ensure the safety of one’s neighbor, was a judicial creation by the Imperial Court whose foundations lay in the *ius commune* (ibid: 72). From Roman Law the Imperial Court revived the principle of *clausule rebus sic stantibus* – the notion that a contract is binding only so long as matters remain roughly equivalent to when the contract was signed (ibid: 80). The Imperial Court, and the Federal Constitutional Court after it, also introduced the notion of “positive malperformance” to cover cases of deficient performance on the part of the debtor under his contractual obligations – a “fundamentally important – though uncodified – part of German contract law” built upon “Roman rules applicable to obligations

³ Note that the “delict” is the civil law equivalent of the common law “tort,” and thereby constitutes a civil wrong consisting of negligent or intentional breach of duty of care that inflicts loss or harm and which triggers legal liability for the wrongdoer.

certam rem dare” (ibid: 92-93). “All in all,” Zimmerman concludes, “we get an overwhelming sense of continuity of development. The BGB itself was based on the results of a nineteenth-century scholarship that had been inspired by Savigny’s Historical School [...] It left considerable room for further development by courts and legal writers. If, then, the BGB may indeed be regarded, largely, as a restatement of contemporary legal doctrine, it was both right and natural for the Imperial Court to pick up the thread of its pre-1900 precedents” (ibid: 98-99). Of course, the courts were often ambiguous with respect to the sources of the principles they leveraged to creatively interpret and extend the BGB, relying frequently on notions of reason contained within secular natural law. But secular natural law was ultimately a code-word for the Roman elements of the *ius commune*, and it became clear that although the codification movement had attempted to kick Roman law out the front door, the latter had successfully re-entered under the guise of a breeze of natural law wafting its way through an open window.

III. The Revival of the Historical School and the Emergence of a New *Ius Commune*

If even under the gleaming light of the BGB’s triumph the shadow of the *ius commune* managed to maintain its identifiable form, then the emerging European private law spurred by the process of European integration similarly cannot escape its community with the past. “We are living in an age of post-positivism,” Zimmerman proclaims, and thus the “narrowness, but also the security, of a national codification [...] is increasingly left behind and we are moving towards a new *ius commune* [...] But since, in the words of Savigny, there is no autonomous human existence entirely isolated from the past, we cannot freely fashion our existence, including our laws” (ibid: 109). Hence the construction of a European private law requires a comparative and historical scholarly frame (ibid). It requires, in other words, a revival of the perspective championed by the adherents to Savigny’s Historical School.

To demonstrate a practical application of such an applied legal history, Zimmerman devotes much of his third lecture to breaking down what he perceives to be an exaggerated emphasis on the distinctions between continental civil law and English common law. He rejects the notion of a chasm, or *summa differentia*, between the civil and common law traditions by emphasizing three points (ibid: 111). First, “[t]here are a great number of lawyers who have in fact managed not only to understand both legal worlds but also to be at home in them,” allowing their “training in the one tradition” to sharpen “their faculty of perception [...] into the

characteristics of the other tradition” (ibid). Second, a *summa differentia* perspective “greatly exaggerates the insularity, or isolation, of the common law and its development. Roman law, Canon law, indigenous customary law, feudal law, the Law Merchant, Natural law theory: these were the most important ingredients in the development of continental law. All of them in various ways, also shaped the English common law,” from the Magna Carta onwards (ibid: 112). In particular, Zimmerman highlights that that perhaps the most distinct element of the common law – the Anglo-American trust – “depended to some extent on Roman law. Roman law itself had not developed the trust as an abstract fiduciary concept, but it had known a fiduciary institution (the *fideicommissum*) and a fiduciary office (the *tutor*)” (ibid: 165). Further, a whole host of legal maxims leveraged by the common law courts from the Middle Ages into the beginning of the 19th century – *cessante ratione legis cessat lex ipsa; odiosa sunt restringenda; optimus legum interpret consuetundo; expressio unius est exclusion alterius; statute sunt stricte interpretanda* – “were taken from the civilian literature” (ibid: 183). Third, and finally, “[a]ny attempt to describe and analyse the Western legal world in terms of a civil law/common law dichotomy is in great danger of considerably underrating the diversity existing within the civil law systems” by homogenizing the common and civil law traditions in a misplaced effort to construct a series of grand divergences that separate the two (ibid: 112-113).

To demonstrate the compatibility of the common law with the civil law, Zimmerman notes that several “mixed” legal systems have successfully incorporated both English common law elements and Roman civil law principles (ibid: 127). In South Africa, for example, the law of evidence, civil procedure, and commercial law are drawn from English common law, whereas the law of property and succession is predominantly Roman-Dutch (ibid: 128). Similarly in Scotland, the law of obligations is strongly inspired by continental civil law, whereas the law of contract is primarily derived from English common law (ibid: 154). Additionally, both the South African and Scottish legal systems followed the civil law tradition by not instituting the common law separation between law and equity while simultaneously embracing a “vigorous law of trusts” modeled on English common law (ibid: 168).

To bolster the foregoing argument, Zimmerman highlights that a legal pluralism has always characterized the civil law tradition, beginning in the “third century AD [when it] became ‘vulgarized’, which means that it absorbed elements of Greek law (in the East) and Germanic customary law (in the West)” (ibid: 159). In the contemporary era, the construction of a

common, supranational European law and its coexistence with domestic law renders it evident that “all our national private laws in Europe today can be described as mixed legal systems” (ibid). Indeed, Zimmerman highlights a comparative study of 14 Western European jurisdictions which analyzed thirty typical sets of facts according to how they would be treated by their national legal systems. The study found that “[of] the thirty cases, eleven led to the same results in all jurisdictions covered; nine led to the same result in all the legal systems but one or two [...] and ten led to a significant disharmony of result” that largely “cut across the civil law/common law divide” (ibid: 171).

Finally, even in areas where a civil vs. common law distinction does exist, Zimmerman perceives a trend towards convergence. He highlights the example of the law of contracts: “English law, like all other legal systems included in our study, has moved away and is continuing to move away from a paradigm of contract law which focuses almost exclusively on party autonomy. Instead, we find increasing emphasis being placed on party loyalty, the protection of reliance, cooperation, consideration also of the other party’s interests, and substantive fairness [...] this process of ‘materialization’ can be seen as a revival of the ethical foundations of contract doctrine prevailing in the era before the ‘rise of freedom of contract’” which aligns British contract law more closely with its continental counterparts (ibid: 174). Similarly, the distinction between precedent-based legal development in the common law and codification-based legal development in the civil law has broken down over the course of the 20th century, as “[e]ven in countries with a civil code, precedents are of very considerable importance today. In Germany, they constitute an independent source of law, albeit one of only ‘outweighable force’” (ibid: 178). Zimmerman concludes that a rediscovery of a shared European legal heritage is “essential [...] in order to re-establish a European legal world marked as much by an interesting diversity as by a fundamental intellectual unity” (ibid: 188).

IV. A Critical Appraisal

Zimmerman’s effort to trace the common European foundations of 19th and 20th century legal development is laudable, as it addresses a blind spot within some of the most prominent works on European legal history available today. In particular, Peter Stein’s *Roman Law in European History*⁴ breezily devotes just three pages to 20th century developments, and correlatively John

⁴ Stein, Peter. 1999. *Roman Law in European History*. New York, NY: Cambridge University Press.

Henry Merryman and Rogelio Perez-Perdomo's *The Civil Law Tradition*⁵ neglects the topic of the contemporary convergence between the civil and the common law altogether and only briefly highlights that European integration is engendering a fundamental transformation of European civil law systems. Nevertheless, Zimmerman's efforts open themselves up to at least three critiques: First, that his advocacy for a European-wide private law may skew his historical inquiry; second, that his focus on the benefits of legal pluralism and reliance on the principles of the *ius commune* may understate the negative externalities involved; third, that he does little to show how the construction of a new *ius commune* will or should unfold.

The first point is one which Zimmerman himself brings up when discussing Savigny's approach: "He [...] thus assessed Roman law from the point of view of modern doctrine. There was the danger of a skewed perception of the past: a perception affected by 'considerations of how Roman law might still be applied' [...] For if the ultimate challenge is the transformation of Roman law into a contemporary Roman law, a certain temptation always exists to read contemporary law into Roman law" (ibid: 14). Interestingly, Zimmerman's tendency is to do the exact opposite, namely to always read Roman law into contemporary law, and particularly to exaggerate the civilian influences on the development of the contemporary British common law. This, however, does not rid him of the presentist bias that he identifies within the Historical School's approach, and unless legal history is to be hijacked by the vicissitudes of contemporary legal needs, Zimmerman must address how the critique leveraged against the Historical School should be addressed in its contemporary reformulation.

Relatedly, the second point is that Zimmerman's analysis casts the resilience of Roman law, and the contemporary re-emergence of a European legal pluralism, as fundamentally beneficial. We see this in his analysis of the German Imperial Court's use of 19th century legal principles ground in the *ius commune* to address shortcomings and *lacunae* in the BGB; we see this in the praise he bestows upon the mixed South African and Scottish legal systems; we see this in his eager anticipation of a European civil code. Yet legal pluralism, reliance on historical legal principles, and legal Europeanization can also spark negative externalities. These may emerge via legal uncertainty stemming from contradictions amongst different bodies of law, as well as by introducing a conservative bias by maintaining legal rules that may no longer accord

⁵ Merryman, John Henry, and Rogelio Perez-Perdomo. 2007. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed. Stanford, CA: Stanford University Press.

with contemporary social realities. In the examples Zimmerman offers, past rules are generally appropriate, if not more appropriate, than contemporary rules, and hence it seems only natural and beneficial to look to the past for solutions to contemporary problems. But this is surely a two-sided coin, one that may well be tilted in Zimmerman's favor but nonetheless merits contemplation and contestation.

The final point relates to a promise that Zimmerman fails to keep. In his introduction, Zimmerman proclaims that his third lecture is devoted to explicating how the revival of Savigny's approach may be put to use towards constructing a contemporary European private law – perhaps even a European civil code to replace existing national codes (ibid: xix-xx). Yet Zimmerman's third lecture is mostly devoted to deconstructing and undermining the distinctions between the common and the civil law traditions via select historical case studies. There is nothing particularly forward-looking in this endeavor, and we may well conclude that the most difficult problem – how to craft a single European law that identifies and codifies commonalities while accommodating prevailing heterogeneity (even if it is not necessarily one that maps onto a civil vs. common law distinction) – remains on the table. Zimmerman's own comparative study of 14 European jurisdictions finds that at least a third of 30 common private legal problems generate substantial heterogeneity in treatment across jurisdictions – how, exactly, are these differences to be resolved? We may add that this is not a purely legal question – one concerned with the difficulties of forging statutory unity out of legal disunity – but a political question. Where, exactly, is the political momentum for such harmonization going to come from? Scholars of European integration have long highlighted how European political development is absent of the mass support that characterized 18th and 19th century nationalism and its constitutive codification movements. Without such a drive towards harmonization, it is difficult to see how a European civil code is going to be crafted in the foreseeable future. What is more likely is that a contemporary analogue of the *lex mercatoria* is organically developing – one that incorporates the pragmatic incrementalism of the common law's evolution with the *lex mercatoria*'s substantive components. Absent of a centralized state authority furthering a unified vision for legal development that is legitimated by a prevailing nationalist ideology, the new *ius commune* seems destined to evade the path of codification in favor of a more organic, incremental, and customary evolutionary trajectory.