Legal Theory

Vesting

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C.H.BECK

CHAPTER 7
EVOLUTION

A. Legal History

By legal history one understands the description of the change or development of law 274
in the medium of historical time, the 'path of law' from the 'beginnings up to the present'.[1] To be sure, legal-historical literature today no longer presents this path consistently as a linear and continuous upward development, as the path in Western Europe of a (legal) reason coming to itself, as it was largely taken as a given by legal history of the nineteenth century. What has remained, however, is the chronological order of the historical material in accordance with the large epochs of European history: antiquity, the Middle Ages, modernity, sometimes supplemented by early history and contemporary history. The key theme remains the modification of law within a realm of experience of *the* history conceived as 'path' – sometimes also as 'current' or 'river'. This is indeed merely a formula of embarrassment for the ineluctable paradox of historical time, of the identity of continuity (identity) and development (difference).[2] Legal history has attempted, since the late nineteenth century, to unfold this paradox in a concept that places the history of law in Europe as such at the centre of research, while a global-historical perspective that reaches beyond Europe has only gradually become important in legal history.[3]

The modern concept of history could not arise until the world was no longer rooted 275
in an inaccessible (metaphysical-religious) transcendence, and instead became the object of its own development. This required the dissolution of the stationary world picture of old Europe and with it especially a remodelling of the ontological semantics of time. Not until the fleeting time of the present (*tempus*) no longer referred to an eternally lasting past (*aeternitas*), not until time as a *point* in time had initiated a radical temporalisation of the present, was an abstract idea of historical time as a succession of events between the past and the (unknown) future possible. If one follows the historian Reinhard Koselleck, then such a picture of history did not establish itself before the eighteenth century, before the age in which the collective singular 'history' was also invented.[4] Authors like Giambattista Vico and Johann Gottfried Herder developed for the first time in the seventeenth and eighteenth centuries the idea of a secular theory of culture, to which they connected the idea of a specifically historical (not theological) meaning.[5] Thus one can hardly trace the appearance of an intellectual interest in history as history

[1] This is a translation of the succinct formula provided by U. Wesel, *Geschichte des Rechts* (2014) 605.

[2] This follows M. T. Fögen, 'Rechtsgeschichte – Geschichte der Evolution eines sozialen Systems' (2002) 14 et seq, who speaks of the prevailing model in historical research for clarifying change as 'the paradox of identity in simultaneous change'.

[3] Cf. the comprehensive account of literature by T. Duve, 'Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive' (2012) 18 et seq.

[4] Koselleck (*Futures Past*) 202 et seq, 231 et seq. (on the 'temporalization' of time), 21, 93 et seq. (on the concept of history); id., 'Geschichte' (2004) 647 et seq.

[5] Wieacker (*A History of Private Law*) 26, 284; Gadamer (*Truth and Method*) 195, 200 et seq. points out that with Schleiermacher, for instance, the historical meaning still soars above history, in contrast for instance to Ranke, who – following Hegel – arrives at a combination of 'true historical moments' and the 'freedom of the historical context'. On Herder, cf. also Koselleck (*Futures Past*) 215.

to the advanced civilisations of antiquity. To be sure, as a 'culture of memory', as studies or narration (from Greek *historia*, investigation), history was an early phenomenon, attested to, for instance, by the buildings of ancient Egypt, the theology of early Judaism, the genealogies of the nobility of classical Athens, antique historiography in Athens and Rome (for example, Herodotus, Thucydides, Livius etc.) or – outside of Europe – the emergence of critical annals (*Sima Qian*) in the 2nd century BC in China.[6] But the idea that history is concerned with 'history itself' and not a history of something else, as Koselleck points out, is a modern formulation.[7]

276 Not until the idea of a specifically historical meaning had been developed could legal history establish itself as a scientific discipline in the (late) nineteenth century. To be sure, the Historical School of Jurisprudence had already made the historical into a fundamental component of law. For Gustav Hugo, Friedrich Carl v. Savigny and Georg Friedrich Puchta, the historical-genetic interest in Roman law always remained, however, subordinate to constructive-systematic interests; historical understanding was used to support the agenda of a historical legal doctrine, that is, to support the claim to validity of its own legal-positivist systems.[8] If one sets aside for a moment the (legal) historical works of Theodor Mommsen (1817–1903), which enjoy in many respects a special status, then a historical interest in Roman law that is detached from questions of system and validity is visible for the first time in works such as Otto Lenel's *Edictum perpetuum* (1884). The reasons for this may very well, though not exclusively, be political and historical. It was first the large codifications of the Reich at the end of the nineteenth century – Handelsgesetzbuch (German Commercial Code), Bürgerliches Gesetzbuch (German Civil Code) etc. – that led to the declining relevance of Roman sources of law along with the connected legal science, thereby making possible a purely historical interest in Roman law.[9]

277 The fact that in Germany legal history has its origins in the Historical School of Jurisprudence has resulted in a close connection between legal history and Roman civil law. This is evident to this day at German universities in the relatively important role of Romanist legal history and the way legal history is persistently assigned to departments that deal with civil law. By contrast, 'Germanistik', which was first realised by Carl Friedrich von Gerber (1846) in the conception of a (positive) common German private law and which evolved in the mid-nineteenth century as a counter movement, has to this day played only a supporting role. The dominance of Romanist legal history has also had significant consequences for the topic itself: already in the nineteenth century, legal-historical research – oriented to the concept of nation or *Volksgeist* – was being narrowed to Roman law.[10] Other antique legal cultures played almost no role whatsoever. A Greek studies that does research into antique Greek law was not able to establish itself in the German-speaking world until after the Second World War (Otto Pring-

[6] On the 'culture of memory' of the Egyptians and on the beginnings of the writing of history in early Judaism, the 'Deuteronomistic historical work', cf. Assmann (*Cultural Memory and Early Civilization*) 165, 194 et seq, 206; for the geneologies of nobility in Athens, cf. R. Thomas, *Oral Tradition and Written Record in Classical Athens* (1989) 95 et seq; for the antique writing of history, see the references in Koselleck (*Futures Past*) 96 (the Greeks have surgically extracted inherent elapsed times from events without having a concept for history).

[7] Koselleck ('Geschichte') 594.

[8] Wieacker (*A History of Private Law*) 332 ('However, it was impossible to treat Roman law historically while it was still actually in force.'), 336 ('by turning legal doctrine approached historically into a positive science of law.').

[9] This is Wieacker's estimation (*A History of Private law*) 333, and R. Ogorek, 'Rechtsgeschichte in der Bundesrepublik (1945–1990)' (1994) 12 et seq, 17–18.

[10] Cf. Ogorek, 'Rechtsgeschichte', 47 (with a reference to P. Koschaker, *Europa und das römische Recht*).

sheim, Hans-Julius Wolff, Erik Wolf), while Greek studies today is predominantly – apart from a few exceptions (Gerhard Thür) – located in the classical departments of US universities (Michael Gagarin, David Cohen, Kevin Robb). Also the law of advanced civilisations of the Near East is still rarely the object of legal-historical research,[11] but more likely cultivated in Egyptology (Jan Assmann), Assyriology, ancient oriental philology (Hans Neumann) or theology.[12] Only slowly are other currents, for instance, the works by André Magdelain and Yan Thomas or the work by David Daube, which has so far received little attention, beginning to show different effects. For Daube, the history of Roman law is embedded from the outset in an intercultural comparison.[13]

While the Roman legal history of the nineteenth century had at its command a relatively unified research profile, in the twentieth century the discipline has dispersed into diverging currents. On the one hand, efforts have been pursued towards a canonisation of Roman law that is oriented to valid private law (for example, Max Kaser and Rolf Knütel);[14] on the other hand, in the early eighteenth century a legal history had already emerged that renounced all dogmatic claims and was oriented exclusively to historical meaning and historical truth. Franz Wieacker in particular has steered legal history in this direction. The agenda affiliated with his name of a purely historical interpretation of the sources has found expression firstly as a history of ideas in *Privatrechtsgeschichte der Neuzeit* (1953/1967) (translated as *A History of Private Law in Europe*, 1995) and later, with a rather social-historical orientation, in *Römische Rechtsgeschichte* (1988/2006).[15] Moreover, becoming manifest already in Weimar was an interest in the semantics of state and state reasoning in the transition from traditional authority to modern politics. Drawing on historians like Otto Hintze, Otto Brunner and Fritz Hartung, this research operates today under the designation 'Verfassungsgeschichte der Neuzeit' or 'modern constitutional history' (Ernst-Wolfgang Böckenförde, Dieter Grimm, Dietmar Wolloweit). Also Michael Stolleis's historical reconstruction of the theory of state and administrative law may be clearly situated in this context.[16] 278

This rough sketch could easily be expanded to include further considerations, for instance, from legal contemporary history (Joachim Rückert, Diethelm Klippel), recent history of method (Jan Schöder) or the recent research on the emergence of international law from the spirit of positivism (Martti Koskenniemi). We do not intend here, however, to represent, let alone depict comprehensively, the development of legal history as an academic discipline. The above considerations serve merely to lend support to the observation that legal history today has dispersed along diverse research paths and has said farewell to the idea of a unifying inquiry and method. Legal history oscillates today between a somewhat self-sufficient history of the dogmas of Roman civil law (Kaser) and a legal history that is social-historically oriented (Wieacker); moreover, recently legal history has loosened its own classification in the discipline of legal science in favour of a cultural-historical orientation.[17] Yet legal history has thus arguably only agreed to an 279

[11] But see, for example, G. Pfeifer, 'Vom Wissen und Schaffen des Rechts im Alten Orient' (2011) 19, 263 et seq; and id., 'Juristische Domäne oder Hilfswissenschaft?' (2014) 409 et seq.

[12] Cf. the collected volume by U. Manthe (ed.), *Die Rechtskulturen der Antike* (2003). An exception is P. Koschaker who set out in 1900 as a scholar of Near Eastern studies.

[13] Cf. the obituary for Daube by M. T. Fögen, 'David Daube' (1999) 18, 195 et seq.

[14] Based on Kaser (*Das Römische Privatrecht*).

[15] Cf. the self-estimation on the function of the history of law in Wieacker (*A History of Private Law*) 339.

[16] On Michael Stolleis's project of a 'history of science' of public law, cf. Stolleis (*Geschichte des öffentlichen Rechts in Deutschland,* Vol. 1) (1988) 43 et seq; and id., *Öffentliches Recht in Deutschland* (2014).

[17] See Duve ('Von der Europäischen Rechtsgeschichte'); cf also id., 'German Legal Theory: National Tradition and Transnational Perspectives' (2014) 17, 16 et seq, 28 et seq.

'interim concept',[18] which certainly cannot be the final answer to the question concerning the discipline's unity and future. A way out of this situation could consist in making legal history more open to theoretically substantiated questions, which the developmental history of law (Max Weber) and the recent theory of evolution (Niklas Luhmann) have been offering for quite some time. Just as legal theory cannot – contrary, for instance, to Kelsen, Hart and Alexy – be sensibly practised without reflecting on the historical genesis of its categories, which means only in connection with legal history, so could legal history profit from becoming more open towards legal theory,[19] especially if the latter is more strongly oriented to cultural and media theory.

[18] Ogorek ('Rechtsgeschichte') 99, 29.

[19] D. Wyduckel, for example, pleads for this in 'Schnittstellen von Rechtstheorie und Rechtsgeschichte' (2003) 109 et seq; and Ogorek ('Rechtsgeschichte') 31.

B. Developmental History of Law (Weber)

As early as the nineteenth century, attempts were made to connect legal history more closely with theoretically substantiated questions. Already in the Scottish Enlightenment, in the Historical School of Jurisprudence and in legal positivism, one can identify approaches to a developmental history, to an evolutionary theory of law.[20] This type of research did not gain prominence, however, until the twentieth century, and then mainly through Max Weber's 'developmental history' of law.[21] Weber's developmental history inquires into the linking of intra- and extra-juristic conditions that have contributed to the emergence of modern law. Its specific theme is the 'specific and peculiar rationalism of Western culture',[22] the unfolding of the 'the internal and lawful autonomy' of the most diverse orders,[23] which only the Occident, only the West, had brought forth: rational authority, capitalist economy, autonomous (natural) science and even, according to Weber, modern rational law. Weber's developmental history of law is less a sociology of law, suggested by the title Marianne Weber and M. Palyi had applied to it retrospectively, than, as Werner Gephart suggests, a historical-comparative cultural sociology of law from a universal-historical perspective.[24] **280**

In Weber's cultural sociology of law, the universal-historical question led to an outline of a not entirely straightforward typology, concerned essentially with the evolution of *formalism* in law.[25] Weber calls modern (liberal) law 'rational law' and defines it more specifically as law that is determined through its 'formal character'. The first section of the so-called sociology of law – *Fields of Substantive Law* – designates law as formal (and rational), if in its operations, 'in both substantive and procedural matters, only unambiguous general characteristics of the facts of the case are taken into account.'[26] The counter concept is *substantive* rationality. Substantive rationality guides law when concrete evaluations of the single case, 'ethical imperatives, utilitarian and other expediential rules, and political maxims' determine problems of lawmaking and lawfinding.[27] Weber's legal formalism recognises two stages of development. In the first stage, the legally relevant characteristics have a tangible nature – that is, they are perceptible as sense data ('empirical formalism' in what follows). In the second stage, law is disclosed purely rationally, in thought, through 'logical analysis of meaning' **281**

[20] Cf. P. Stein, *Legal Evolution* (1980) 23 et seq. (Scottish Enlightenment); M. Amstutz, *Evolutorisches Wirtschaftsrecht* (2001) 141 et seq.

[21] Weber obviously adopts the concept 'developmental history' (*Entwicklungsgeschichte*) from Heinrich Rickert. Cf. W. Schluchter, *Religion und Lebensführung,* Vol. 2 (1988) 269 fn 16; id., *Individualismus, Verantwortungsethik und Vielfalt* (2000) 169–70.

[22] M. Weber, *The Protestant Ethic and the Spirit of Capitalism* (1930) xxxviii. On this fundamental perspective of Weber's completed work, cf. Schluchter (*Individualismus*) 153 et seq; S. Breuer, *Max Webers tragische Soziologie* (2006) 288–89.

[23] M. Weber, *Essays in Sociology* (1946) 328; S. Breuer, *Bürokratie und Charisma* (1994) 40 (with the remark that 'rationalisation' for Weber must be understood as the differentiation of the the internal and lawful autonomy of orders, that is, as differentiation of autonomous systems of meaning).

[24] Gephart ('Das Collagenwerk') 111, 127; cf. also, B. K. Quensel, 'Logik und Methode in der "Rechtssoziologie" Max Webers (1997) 133, 134.

[25] For an overview of the complete typology, cf. the schematic representations in Quensel, ibid, 133 et seq, 144 et seq, 148; Quensel/Treiber ('Das "Ideal" konstruktiver Jurisprudenz') 91 et seq, 112–13; Gephardt (*Gesellschaftstheorie und Recht*) 497 et seq, 520 et seq.

[26] Weber (*Economy and Society*) 656–57.

[27] Ibid, 657; cf. also 655–56.

('logical formalism' in what follows).[28] Empirical formalism presupposed an analytical 'breaking up of the complex situations of life into specifically determined elements';[29] this means that it at least presupposed approaches to a conceptual analysis through mental abstraction (from what is given). Yet in empirical formalism, the constructive, synthetic moment is only weakly developed, or not at all. Empirical formalism clings to external features and works with certain formulas and rituals, and is predicated on the fact, for example, that 'the utterance of certain words, the execution of a signature, or the performance of a certain symbolic act with a fixed meaning' is carried out.[30] Seen in light of its historical development, empirical formalism had certainly already reached a relatively high level of rationality, but wherever this type remained dominant, the development of law remained stuck in casuistics and precedent case law. It was logical legal formalism that first led to the development, according to Weber, of the characteristically modern, formal-rational law.

282 Empirical formalism formed, according to Weber, the 'strictest kind of legal formalism'.[31] Elements of empirical formalism were known already by the earliest religious rights in a formalism determined by magic;[32] it was first with ancient Roman law, however, that empirical formalism attained 'world-historical' significance.[33] Weber mentions repeatedly the example of the ancient Roman (two-part) *legis actio* procedure and its peculiarly strict verbal formalism. The *legis actio* procedure is based on the employment of standardised formulas (called *legis actio* from Latin *lege agere*, to litigate with formulas). Even the most minor deviation from a formula, the smallest error in speech, could lead to the loss of remedies: 'This contrasts with our principle of fact pleading, under which a presentation of facts will support an action if the facts justify the claim from some legal point of view.'[34] Also the ancient Roman legal transactions, for instance, the *mancipatio*, could be qualified as empirical-formalistic in Weber's sense. With *mancipatio* (from Latin *manus*, hand and *capere*, grasp) the justification of a new property-like authority over a slave, for example, was dependent on a celebratory ritual between an *auctor* (from *augere*, augment, strengthen) and an acquisitor. This ritual entailed, for instance, the acquisitor grasping the slave and speaking a standardised formula (*meum esse aio*) in front of at least five Roman citizens.[35] What Weber wanted to capture by empirical legal formalism can also be demonstrated, however, with the German Civil Code, for example, with the provisions from sections 1310 et seq. These make the validity of the contraction of a marriage dependent on the personal declaration of those simultaneously present who are contracting the marriage in front of the marriage registrar with the optional enlistment of witnesses (for the respective formulas, cf. especially section 1312 German Civil Code). In all of these cases – *legis actio*, *mancipatio* and the contraction of a marriage – we are dealing with 'legal transactions' that are based on performative speech acts (in John Austin's sense).[36] This means that the valid transfer of law, the validity of a legal action, is effected through the speech act, the synaesthetic, visible and audible form of the utterance, that is, through communication and the actions that are themselves part of the communication.

283 Legal formalism qualifies for Weber as developed once 'all the several rules recognized as legally valid' have been 'collected' and 'rationalized' by logical means 'into a

[28] Ibid, 657. Weber also speaks of a 'logical rationality' (657, 844, 882), 'purely logical construction' (855) or 'abstract legal logic' (854).

[29] Ibid, 796.

[30] Ibid, 657.

[31] Ibid.

[32] Ibid, 882.

[33] Ibid, 795; M. Weber, *General Economic History* (2003) 339 et seq.

[34] Weber (*Economy and Society*) 795; id. (*General Economic History*) 290–91 ('strictly formal procedure'). On the legis action procedure, cf. M. Kaser/R. Knütel, *Roman Private Law* (1984) 390 et seq, and the famous example from Gaius, *Institutes*, 4 (confusing the words trees [*arbores*] and vines [*vites*]), for example, in Fögen (*Römische Rechtsgeschichten*) 139.

[35] Gaius, *Institutes*, 1, 119; see, for instance, Kaser/Knütel (*Roman Private Law*) 45–46; Wesel (*Geschichte des Rechts*) 186–87.

[36] In Romance studies one speaks, in connection to the groundbreaking investigations by Jhering (*Geist des römischen Rechts*) on which Weber's concept of intuitive formalism is also based, of 'Spruchformen', 'Realformen' or 'Wirkformen' and recently also of 'Performanz'. Cf. Kaser/Knütel (*Roman Private Law*) 43–44; Wieacker (*Römische Rechtsgeschichte*) 320; cf. A. Magdelain, *De la Royauté et du droit de Romulus à Sabinus* (1995) 17 et seq. (la parole active).

consistent complex of abstract legal propositions'.[37] Weber oriented himself in the conceptual determination of this stage of development entirely to the legal science of his time, the 'legal science of the Pandectists' Civil Law', the drafts of which – paradigmatically in the textbook on the Pandects by Bernhard Windscheid – had reached 'the highest measure of methodological and logical rationality'.[38] Here it is a matter of system rationality, and system rationality did not mean simply 'instrumental rationality' in the sense of the sociological basic concepts, namely, (interest-oriented) consideration of means and ends with a view to alternative means and secondary consequences.[39] Rather, Weber's sense of system rationality linked two components: on the one hand, it was based on juristic constructive work, on the synthesis of legal norms and legal institutions, and on the other hand, on the 'logical new systematisation' of such norms and institutions.[40] Logical rationality means, in other words, constructing abstract rules and institutions and reducing these by means of relations of ranks (hierarchies) to final and most general principles, in order to form law from this highest point into an internally consistent and 'gapless' system. For Weber as for Rousseau, Kant, Savigny, Puchta and Windscheid, the free (general) will, that is, the 'sovereign conviction', forms the primary form or peak of this system.[41] With Franco Moretti one could also say that the bourgeois (or more precisely, the *Bildungsbürger*) along with his integration efforts, are the empirical substrate, the bearer of this Weberian sovereign consciousness.[42] At the same time, Weber emphasises the mechanistic elements of the legal-positivist system, its (dehumanised) manner of operation that is independent of personal (clientelistic) relationships. In other words, Weber's reconstruction of the legal system is closely modelled on the example of mechanics as a fully determined rational system,[43] as a unity from which each legal decision may be grasped as a calculable 'application' of an abstract legal proposition on a concrete fact – beyond the spontaneous character of daily life.[44]

Weber's concept of developmental history may now be further specified. In the foreground stands the reconstruction of the intra- and extra-juristic conditions of the history and evolution of a systemically rationalised law, of a law that may be programmed in a calculable and predictable manner like a trivial machine. Weber drafts a typology of the formal-rational unfolding of law,[45] which, when seen from a world-historical perspective, had developed to its full stage only in continental Europe, only in the West, only in the legal-positivist concept of the system. Then we may ask: which intra-juristic conditions are responsible for this development? 284

[37] Weber (*Economy and Society*) 311.

[38] Ibid, 657, 858 et seq. (on Windscheid). The father of the ideal of logical closure for Weber was certainly Jeremy Bentham.

[39] The precise definition reads as follows: 'Action is instrumentally rational (*zweckrational*) when the end, the means, and the secondary results are all rationally taken into account and weighed. This involves rational consideration of alternative means to the end, of the relations of the end to the secondary consequences, and finally of the relative importance of different possible ends. Determination of action either in affectual or in traditional terms is thus incompatible with this type' (Weber, *Economy and Society*, 26).

[40] Ibid, 656, cf. for example also 885 ('where the facts of life are juridically "construed" in order to make them fit the abstract propositions of *law*') and 858 et seq.

[41] Ibid, 866.

[42] Cf. Moretti (*The Bourgeois*); cf also Ladeur (*Die Textualität des Rechts*) part 4.

[43] Breuer (*Max Webers Herrschaftssoziologie*) 207; cf. also Weber (*General Economic History*) 343 (with the remark that capitalism requires a right that may be calculated similarly to a machine).

[44] Weber (*Economy and Society*) 657 et seq, cf. also 856; Quensel/Treiber ('Das "Ideal" konstruktiver Jurisprudenz') 101, 116 et seq, who point to, among others, Jhering and his 'theory of juristic technique' with its three 'fundamental operations' ('juristic analysis', 'logical construction', 'juristic construction').

[45] Quensel/Treiber ('Das "Ideal" konstruktiver Jurisprudenz') 91.

285 This question is answered by the distinction between legal practice and the administration of law. Weber is interested especially in the 'legal *honoratiores*' as the supporting administrators of law.[46] It was not until a continuous administration of law had been established that a specifically juristic expertise, 'legal thinking', could arise at all, which influenced the dignitary class that was concerned with legal practice. Weber thereby distinguishes three paths of development: legal thinking arises (1) either as 'the empirical training in the law as a craft; the apprentices learn from practitioners more or less in the course of actual legal practice'; or it proceeds (2) from theoretical teaching in special schools of law 'where legal phenomena are given rational and systematic treatment';[47] or (3) the teaching of law takes place in seminaries for the priesthood. This third possibility qualifies as a 'peculiar special type' with a tendency towards material rationalisation and is decisive for instance, according to Weber, in Hindu, Islamic and Jewish legal culture. Representing an ideal type for empirical legal thinking is the English guild-like teaching of law through lawyers. In contrast, the purest type of theoretical-scientific legal thinking is represented by 'modern legal education at the universities',[48] as it first established itself in continental Europe at the law school of Bologna. The training of legal practitioners was carried out in this case at relatively independent institutions, at the universities of free cities. In this way, in comparison especially with English lawyers' law, university law gains much greater distance from the everyday needs of the legally interested parties and the (economic) personal interests of the legal practitioners. It can also unfold more directly in response to the internal needs of legal thought, the internal and lawful autonomy of juristic logic.[49]

286 With the help of these distinctions, a developmental-historical context is brought forth, through which the evolution of the intra-juristic conditions of law of reason may be clarified. Logical formalism is the work of theoretically and historically educated jurists, the work of professors like Windscheid, Goldschmidt and Jhering, and is based on the conceptual and systematic reworking of Justinianic law, especially the digests. This presupposes, in turn, the transmission of this law from the late eleventh century, from that point in time when Roman law, which had been recorded in an old manuscript, was 'rediscovered' in an Italian library. For its reception, the key connecting links are the Italian notaries, the universities and canon law (the legal teaching of the Roman Catholic Church).[50] Thus at the centre of Weber's developmental history is ultimately Roman civil law, and in fact not so much its content, but rather, above all, its 'strictly systematic forms of thought' which were 'so essential to a rational jurisprudence'.[51] Weber points out repeatedly that none of the characteristic institutes of modern (capitalist) economic law, for instance, private property, annuity certificate, bonds, shares, exchange, trading company or a loan with land registry security are of Roman origin.[52] Thus, modern private law, criminal law and public law may be traced to Roman civil law only in terms of its formal side, of strictly formal legal expertise. Only in this regard has Roman civil law been a source of instruction for European legal thought and the basis upon which formal-rational law has developed.

287 The central position of Roman civil law leads Weber, in the next step in his argument, to inquire into the basis of its special status in comparison with other kinds of antique law.

[46] Weber (*Economy and Society*) 784, cf. also 292 (with the suggestion that dignitaries in their primary meaning are such persons that *can* live from their activity without *having* to live from it).

[47] Ibid, 784–85. On Weber's analysis of English law, cf. also Zweigert/Kötz (*Introduction to Comparative Law*) 193–194.

[48] Weber (*Economy and Society*) 789.

[49] Ibid, 856.

[50] Ibid, 828 (on canonical law), 852 (on the reception of Roman law).

[51] Weber (*The Protestant Ethic*) xxix.

[52] Weber (*General Economic History*) 342; on property, see Weber (*Economy and Society*) 801 et seq.