ALAN WATSON

THE STATE, LAW AND RELIGION: PAGAN ROME

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PAGAN ROME

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Preface

It is a curious fact that no one has written a comprehensive account of the interaction of law and religion in ancient Rome.[1] Law and religion are among the most powerful organized forces in society; hence a knowledge of how they interact, or fail to interact, is vital for understanding a people's moral, political, and social attitudes. This is especially true when the religion is a state or official religion, and it should be particularly the case for ancient Rome. Roman law, after all, was the most innovative legal system in the Western world, and it has been the most influential. In the later republic, at least until the latter part of the second century B.C., the Romans regarded themselves, and were regarded by others, as the most religious people in the world.[2] The empire saw the legalized persecution of the Christians. The eventual adoption of Christianity as the state religion shaped much of later history.

My present subject is the interaction of law and religion during the republic and empire until Christianity was legally recognized and encouraged by Constantine and subsequently adopted as the state religion. Among the questions one might ask are, How does state organized religion affect the general development of law? What is the impact of religious doctrines on the substance of law? What use is made of religion to support law? What legal protection is given to religion? What are the legal forms used for the persecution of dangerous religions?

For me, the most important and interesting issue has turned out to be the impact of the state religion on legal development, and the implications of this for the nature of Roman law. This impact was not always direct, but the growth of the law cannot rightly be understood without an awareness of the nature of Roman state religion. Legal scholars—and Roman political historians, too—should not relegate knowledge of religion to a footnote in the mind.[3] Indeed, at the heart of this book is an apparent paradox. Roman private law received its distinctive characteristics during the republic and that law is remarkably secular. Yet the Romans of the day were renowned for their attachment to reli-

gion, and the development of the law itself was largely under the control of the priests, the pontifices, or pontiffs. How could that be? In this book I strive to provide the answer.

I have not directly addressed the very controverted issue of the accuracy of the sources, such as Livy, for very early Rome. I am well aware of the danger of attributing credibility to them, but the fact is, as I have argued in the past, Livy, who clearly does not have a deep understanding of law, almost always presents a plausible account of archaic institutions.[4] I hope the coherence of this volume will strengthen the feeling of plausibility.

It is my hope that this study will be followed by a volume that concerns the period from Constantine onward. By the time Constantine made Christianity an official Roman religion, the system of Roman private law was fully developed and firmly in place. Yet the Christian Fathers had their own views on what the law should be. In the next volume I will examine Christian doctrines and elucidate their impact on pagan Roman law.

Acknowledgments

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My biggest debt is to my teacher, David Daube, who was constantly in my thoughts while I was working. His influence on me is pervasive. The studies of ancient law and religion, by no means restricted to Rome, are peculiarly his own, and without the training I received from him I could not have embarked on this book. May the results not disappoint him.

Abbreviations

Bruns, *Fontes*	C.G. Bruns, *Fontes Iuris Romani*, 7th ed., O. Gradenwitz (Tübingen, 1909).
C.A.H. 7.2	*The Cambridge Ancient History*, vol. 7, book 2, *The Rise of Rome to 200 B.C.*, 2d ed., F. W. Walbank, A. E. Astin, M. W. Frederiksen, and R. M. Ogilvie (Cambridge, 1989).
C.I.L.	*Corpus Inscriptionum Latinarum* (Berlin, 1863–).
D.	The *Digest* of Justinian.
Der Kleine Pauly 1–5	*Der Kleine Pauly: Lexikon der Antike*, vols. 1–5, ed. K. Ziegler and W. Southeimer (Munich, 1975).
Dumézil, *Religion* 1, 2	G. Dumézil, *Archaic Roman Religion*, vols. 1 and 2 (Chicago, 1970).
FIRA 1	*Fontes Iuris Romani Antejustiniani*, vol. 1, 2d ed., ed. S. Riccobono (Florence, 1941).
G.	The *Institutes* of Gaius.
J.	The *Institutes* of Justinian.
Jolowicz and Nicholas, *Introduction*	H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3d ed. (Cambridge, 1972).
Kaser, *Privatrecht* 1	M. Kaser, *Das römische Privatrecht*, vol. 1, 2d ed. (Munich, 1971).
Kaser, *Zivilprozessrecht*	M. Kaser, *Das römische Zivilprozessrecht* (Munich, 1966).
Kunkel, *Herkunft*	W. Kunkel, *Herkunft and soziale Stellung der römischen Juristen*, 2d ed. (Graz, 1967).

Latte, *Religionsgeschichte*	K. Latte, *Römische Religionsgeschichte*, 2d ed. (Munich, 1967).
Lenel, *Edictum*	Otto Lenel, *Das Edictum perpetuum*, 3d ed. (Leipzig, 1927).
Liebeschuetz, *Continuity*	J. H. W. G. Liebeschuetz, *Continuity and Change in Roman Religion* (Oxford, 1979).
LQR	*Law Quarterly Review*.
Michels, *Calendar*	A. K. Michels, *The Calendar of the Roman Republic* (Princeton, 1967).
Mitchell, *Patricians and Plebians*	R. E. Mitchell, *Patricians and Plebians: The Origins of the Roman State* (Ithaca, 1990).
Mommsen, *Staatsrecht*, 1, 2, 3	T. Mommsen, *Römisches Staatsrecht*, vols. 1 and 2, 3rd ed. (Leipzig, 1887); vol. 3, 1st ed. (Leipzig, 1888).
Nicolet, *World of the Citizen*	C. Nicolet, *The World of the Citizen in Republican Rome* (Berkeley, 1980).
RIDA	*Revue Internationale des Droits de l'Antiquité*.
Rotondi, *Leges publicae*	G. Rotondi, *Leges publicae populi romani* (Milan, 1912).
Schulz, *Legal Science*	F. Schulz, *History of Roman Legal Science* (Oxford, 1946).
Talamanca, *Lineamenti*	M. Talamanca, et al., *Lineamenti di storia del diritto romano*, 2d ed. (Milan, 1989).
Thomas, *Textbook*	J. A. C. Thomas, *Textbook of Roman Law* (Amsterdam, 1976).
T.v.R.	*Tijdschrift voor Rechtsgeschiedenis*.
Wardman, *Religion*	A. Wardman, *Religion and Statecraft among the Romans* (Baltimore, 1982).
Watson, *Evolution of Law*	Alan Watson, *The Evolution of Law* (Baltimore, 1985).
Watson, *Law Making*	Alan Watson, *Law Making in the Later Roman Republic* (Oxford, 1974).

Watson, *XII Tables*	Alan Watson, *Rome of the XII Tables* (Princeton, 1975).
Wieacker, *Rechtsgeschichte*	F. Wieacker, *Römische Rechtsgeschichte*, vol. 1 (Munich, 1988).
Wissowa, *Religion und Kultus*	G. Wissowa, *Religion und Kultus der Römer*, 2d ed. (Leipzig, 1912).
ZSS	*Zeitschrift der Savigny-Stiftung (romanistische Abteilung).*

Contents

Preface *ix*

Acknowledgments *xi*

List of Abbreviations *xiii*

Introduction *1*

1 Prolegomena on Roman Religion *4*

2 The Twelve Tables: Contents *14*

3 The Twelve Tables:
The Public/Private Law Distinction *21*

4 Formalism in Religion and Law *30*

5 *Votum* and *Stipulatio* *39*

6 The Oath in Private Law *44*

7 The Pontiffs and the Family *51*

8 Religion and Property *55*

9 State Religion and Alien Religion *58*

10 The Pontiffs and Legal Development *63*

11 The Paradox Resolved *73*

12 The *Leges Regiae* *87*

Appendix *91*

Notes *95*

Index of Texts *131*

Introduction

The development of Roman private law as it appears in this book is so different from standard accounts that it is appropriate at the beginning to set out the main theses about law in a simplified form, quite independently of the course of argument in the main body of the book.

The most prominent—but not necessarily the most important—issue is why Roman law is so remarkably secular, especially since the Romans were the most religious people of the time, and the interpretation of civil law was long the preserve of the College of Pontiffs. The explanation lies above all in the history of the Twelve Tables, the codification of the mid-fifth century B.C.

Not long after the explusion of the last Roman king in 509 B.C., trouble broke out between the patricians, the aristocratic top rank of society, and the great bulk of Roman citizenry, the plebeians. According to the ancient sources, the plebeians' main demands were for laws establishing equality among the citizens, and laws delineating and limiting the powers of the top officials of the state. After considerable struggle, the senate decreed that ten men, all of whom had to be patricians, were to prepare a body of law. The result was the Twelve Tables.

The patrician lawmakers did produce a body of law that was extremely egalitarian, with no differences in law between one man and another on account of wealth or social standing. This has to be seen as intentional. But in spite of appearances, the Twelve Tables were a defeat for the plebeians, with lasting consequences. The Twelve Tables dealt only with those matters with regard to which the patrician legislators were willing to grant equality between patrician and plebeian, and which, moreover, they regarded as appropriate for the attention of plebeians. Thus, public law was entirely omitted, and the plebeians did not achieve their demand of having the powers of the consuls delimited. In public law gross inequalities continued between one class of citizens and another, and in the assemblies of the people wealth dominated voting rights—and it was an assembly that elected the leading state officials. Again, astonish-

ingly perhaps, until the late second century B.C. only senators could be judges even in civil cases, and thereafter only members of the equestrian order could be appointed as such. Roman public law was never to be the object of comprehensive legislation and did not develop by interpretation to the extent that private law did. Sacred law was omitted from the Twelve Tables as being not the business of plebeians, since only patricians could be priests of the state religion. The argument here is not that religious elements were cut out of the provisions on private law, but the rules that predominantly concerned religious law were not set out in the code.

Thus came about, as the result of particular circumstances, the famous division between public and private law that is with us today.

The job of interpreting the Twelve Tables was given to one of the main colleges of priests, the College of Pontiffs. This was an astute move on the part of the patricians, since the pontiffs (who were part-time priests) not only had to be patricians themselves but were men of distinguished public service with an established, known, record.[1] Moreover, they already had the responsibility of interpreting sacred law. The College of Pontiffs appointed one pontifex, or pontiff, per year to interpret the Twelve Tables.

In keeping with the Roman view that the business of the state religion was to maintain the right relations between the gods and humans (especially public officials and the state), the pontiffs did not carry the characteristics of Roman religion over to private law, which concerned relations between private individuals. But, probably unconsciously, they used for interpreting private law the same approaches that they used for sacred law. Hence, a decision could not be reached on the basis that it was economically efficient or benevolent or useful but primarily on internal, legal, grounds. The resulting enclosed, legalistic form of reasoning toward a decision is not obviously the most appropriate for private law. Decisions are not, in appearance at least, result oriented, and law was on its way to becoming autonomous from the interests of society.

The state monopoly of interpreting civil law, now in the hands of one individual pontiff, meant that interpretation of the law was a worthy task for a gentleman. That view continued even after the College of Pontiffs both ceased to be the preserve of patricians and also lost its monopoly of interpretation. The high social prestige of the jurists, and the prediliction of the Roman upper class for giving legal opinions, resulted from this early situation. So also did the state's willingness to allow private individuals to develop the law by interpretation. It is this that largely explains the high level of development of Roman private law, despite the state's failure to produce much legislation.

But a further consequence of this early pontifical monopoly of interpretation was that it closed the door to development by custom and even by judicial decision. This increased the extent of law's autonomy from society.

The main characteristics of developed Roman law thus resulted in large measure from a particular political conflict in the mid-fifth century B.C. Though we need not here take the argument further, without these characteristics there could not have occurred the all-important Reception of Roman law.

1 Prolegomena on Roman Religion

Scholars are generally agreed on the broad outline of law in the Roman republic. There is less agreement, however, on the nature of Roman religion.[1] The aim, therefore, in this first chapter is to present a sketch of the state religion that is plausible, self-consistent, and true to the sources. No claim is made that other outlines may not also be plausible. But subsequent chapters will reveal facets of the interaction of law and religion which, I believe, will make convincing the sketch given here.

When the book was begun, it seemed proper to start with the better known and proceed to the less well known; hence in this case, from law to religion. And in what follows, significant and surprising features in the law will help to explain Roman religion.[2] The book has turned out to be primarily, however, an account of the development of Roman private law which is radically different from that usually presented. Accordingly, a preliminary account of Roman religion is needed to provide a framework.[3]

Like the Latin language, Roman state religion was of Indo-European origin.[4] Just as Latin shares morphology and linguistic roots with Sanskrit, Greek, Celtic, and other Indo-European languages, so Roman state religion shares elements such as the archaic triad of deities—in Rome, Jupiter, Mars, and Quirinus—with other peoples of Indo-European origin. But the fate of Indo-European religion, like language, differed from place to place. As rich in myths as Indo-European religion was,[5] this richness was much enhanced in Greece. In Vedic India, religion was to reach new heights of mysticism. But among the Roman people official religion lost its mythology. The major deities had no histories and no adventures. The gods became depersonalized. The bareness in the religion as it appears in historical times is not primitive or original but acquired.[6] The intervention of the gods in human affairs was essentially discontinuous.[7] At least in appearance, Roman state religion lost its vitality.[8]

Not only that, but Roman state religion was not concerned with the question of how its devotees should lead the moral life. Hostile witness as he is, Augus-

tine poses the relevant question why it is that the Roman gods did not lay down laws to aid their worshippers to lead the good life. "It would certainly appear proper that the care shown by the worshippers for the gods' rites be matched by the gods' concern for their behavior."[9]

But it remained the official religion. There is nothing surprising in this. Tradition dies very hard, and there is nothing so traditional as religion.[10] This is not to suggest that changes in official religion did not occur—many did, even such important renewals as the introduction of the Capitoline triad, Jupiter, Juno, and Minerva, in Etruscan times.[11] Again, the deities, Ceres, Liber, and Libera were introduced from Magna Graecia in 493 B.C., with a temple at the end of the Campus Martius near the Aventine.[12] Nor should we see in the perseverance of this seemingly sterile state religion a cynicism, an absence of belief in the existence of the gods.

Rather, state religion became restricted to a particular context.[13] It became a matter of keeping man—especially man in his public function—in proper contact with the gods. The functions of the priests were to ensure that ceremonies were correctly and formalistically carried out in every detail. They had to ensure, for example, that meetings of the senate or comitia were opened with prayers said according to the fixed and rigid formulas. They had to see to it that the days on which such assemblies met or on which the praetor made pronouncements were auspicious. They were, in this way, responsible for the calendar. They also had to make sure that each sacrifice was carried out precisely in the way acceptable to the gods. They dictated to state officials what was religiously proper in the conduct of business, including the business of war. State religion was very important, but it became confined to its context. The main functions of the priests became, from a modern perspective, legal.[14]

Beneath the highest deities—not in the hierarchical sense, but in terms of importance—were many others, and they, above all, reveal the fundamentally peasant nature of Roman religion. One should not, however, draw a sharp distinction between the "official religion" and the "folk religion"—as distinct from unauthorized "foreign cults"—since both had state recognition, but the main concern here is with the leading gods and goddesses.[15] The divine, however, was to be found everywhere.[16]

There were many classes of priests, but for convenience we may very largely restrict our consideration to the most important of the four great colleges of priests, the College of Pontiffs.[17] This body contained the pontiffs (including the *pontifex maximus*), the *rex sacrorum*, and the flamines (three *maiores* and twelve *minores*); closely associated with it were the vestal virgins (of whom

there were six). Of these, the pontiffs in the narrow sense were during the regal period the advisors (*consilium*) of the king for matters relating to the gods.[18] Thereafter the College of Pontiffs performed that function for the senate, which itself developed from what had also been the king's advisory body.[19] Since the *regia,* "royal palace," was the center of religious activities during the republic and it was here that the pontiffs held their deliberations, it would appear that after the fall of the monarchy the pontiffs were considered to replace the king to some extent in religious matters.[20] The *rex sacrorum* performed the religious functions for which the king had been responsible in his own person.[21] There is no indication that the *rex sacrorum* was regarded as having magical powers and he was not surrounded by taboos as the flamines were.[22] The flamines, in contrast to the pontiffs in the narrow sense, were the priests for a particular deity, the three *flamines maiores* being in order, respectively, Dialis, Martialis, Quirinalis.[23]

The pontiffs had various functions which can be distinguished. First, they gave instructions, above all to officials, for the proper performance of sacral acts such as the dedication of a temple, and they preserved the appropriate oral formulas. They oversaw activities in the assembly known as the *comitia calata*. They kept the calendar which set out the days on which the courts could sit, votes could be taken, sacrifices could be made, and on which the senate could issue valid *decreta*.[24] They had also been the guardians of the general pronouncements of the kings, whether on sacral or on other matters. The *pontifex maximus* had disciplinary jurisdiction over the vestal virgins.[25] These matters—apart from the last—will appear in later chapters. Here we need deal only with their remaining function, their giving of *responsa*.[26] They might deliver their opinion on the religious "legality" of a course of action upon request by the senate or by a magistrate. The opinion might relate to a past event, in which case the *responsum* might be termed a judicial pronouncement.[27] It is in this sense that Festus claims: "He is called the *pontifex maximus* because he is the chief [*maximus*] judge of matters that appertain to religion and the sacred, and is the avenger of stubbornness of private individuals and of magistrates."[28] The *pontifex maximus* was the spokesman for the College of Pontiffs.[29] But the text of Festus must not mislead: no action was taken by the pontiffs on their *responsum*. It was declaratory only, to set out the proper conduct of men to gods, and it was not followed by execution of judgment. Nor could it be. It was not normally part of the College of Pontiffs' functions to examine the facts.[30] They responded only to the terms of the facts proposed to them. Thus, a standard decree might contain words such as: *si ea ita sunt que libelo contenentur,* "If the

facts are those that are contained in the petition."[31] The decree of the pontiffs on the issue whether Cicero's house had been properly consecrated as a temple—by an enemy, in order to deprive him of it—ran (as reported by him): "Si neque populi iussu neque plebis scitu is, qui se dedicasse diceret, nominatim ei rei praefectus esset neque populi iussu aut plebis scitu id facere iussus esset, videri posse sine religione eam partem arcae mihi restitui" (If the person claiming to have dedicated had not been appointed by name either by order of the people or by a decree of the plebs, and if he had not been commanded to do so by an order of the people or decree of the plebs, then it appeared that that part of the site might be restored to me without sacrilege.)[32] In this instance we have the speech delivered by Cicero before the pontiffs.[33] The pontiffs heard the alleged facts, but they used their information only to set the appropriate legal parameters. They made no finding of fact. The decree just quoted leaves unresolved the issue of fact. Cicero, indeed, reports that he was immediately congratulated when the decree was issued, but then someone got up and claimed that the decree was actually against Cicero, who was trying to seize the temple of Liberty by force.[34]

Again, the pontiffs might issue a *responsum* when asked whether a contemplated sacred act was permitted. This may be regarded as an instance of cautelary jurisprudence.[35] Two episodes reported by Livy are instructive. In 203 B.C. one of the consuls set out to the army in Lucania. The other consul, Marcellus, was delayed:

> Religious scruples, one after the other, as they were impressed upon his mind, detained Marcellus. One of them was that, although he had vowed a temple to Honor and Valor at Clastidium in the Gallic war, its dedication was hindered by the pontiffs, [8.] because they denied that one chapel could be properly dedicated to more than one god because, if it should be struck by lightning or some portent should occur in it, expiation would be difficult [9.] because it would be impossible to know to which god sacrifice should be made: for, except to certain deities, one sacrifice could not be offered to two.[36]

In Livy, the arguments for the pontiffs' stance are given in indirect speech: that is, Livy is (ostensibly) not providing his own explanation but giving the reasoning expressed by the priests. Thus, the pontiffs are giving not only the decision but the reasons for it. Of course, Livy may well not be historically accurate but that is a matter of little significance. It is enough that for Livy it was plausible that the pontiffs might give reasons of this kind for their decision.

The other episode is from 200 B.C.: