The Historical and Institutional Context of Roman Law

George Mousourakis

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Preface

The law of ancient Rome, as transmitted through the sixth century codification of Emperor Justinian, has been one of the strongest formative forces in the development of what we now think of as the Western legal tradition. It furnished the basis of the Civil law family of legal systems – one of the major groups of legal systems in the world today – and supplied an almost inexhaustible reservoir of legal concepts, doctrines and principles the influence of which can be traced in any body of law, both national and international, and in any system of courts and procedures. The history of ancient Roman law spans a period of more than twelve centuries. Initially the law of a small rural community, then that of a powerful city-state, Roman law became in the course of time the law of a supranational empire which embraced a large part of the civilised world of its time. During its long history Roman law went through a remarkable process of evolution. It passed through different stages of development and underwent important transformations, both in substance and in scope, keeping up with changes in society, especially with those changes brought about by Rome's expansion in the ancient world. During this long process the interaction between custom, enacted law and case law led to the formation of a highly sophisticated system, gradually built up from layers of different elements. But the great bulk of Roman law, especially Roman private law, was not a result of legislation but of jurisprudence. This unenacted law was not a confused mass of shifting customs, but a steady tradition developed and handed down by specialists, at first members of the Roman priestly class and later by the jurists. In the closing stages of this process, as law-making became more and more centralised, this law, together with statutory law, was compiled and then 'codified'. The codification of the law both completed the development of Roman law and became the means by which Roman law was subsequently transmitted to the modern world.

The aim of this book is to show how Roman law emerged, how it became a universal system and how it was transmitted to the modern world. The book traces the evolution of Roman law from the primitive law of a small rustic community in Italy into a highly refined system continuously adapting itself to the needs of a commercial society extending over a vast empire and embracing many different races. It examines the development of the various sources of Roman law in their social and political setting and attempts to explain how in practice a source was made

effective. And since so much of Roman law hinged upon forms of legal process, the book also discusses the evolution of Roman legal procedure and outlines the mechanisms by which legal judgements were put into effect. Although the growth of Roman criminal law is also considered, the emphasis is upon the development of Roman private law. This is largely because private law was the chief interest of the most creative makers of law, the Roman jurists, but partly too because the later influence of Roman law has been predominantly in this field. In this survey I have tried to encompass the history of Roman law as a whole and to convey it in such a way as to avoid the fragmentation which has become usual in the subject. While principally concerned with the historical development of Roman law, I have made a sincere effort to combine the perspectives of social, political and economic history with those of legal history. In the foreground are those historical events which had the strongest impact on Roman law. Special emphasis is placed on the development of the Roman political institutions and the historical evolution of the Roman state. In the final chapter of the book attention is paid to the factors which, in later times, warranted the preservation and continuing influence of the Roman legal inheritance in continental Europe.

This introductory book on the history of Roman law has been written primarily for law students whose course of studies includes Roman law, legal history and comparative law. It is also designed to meet the needs of the general reader of history who would like to know about the main features of Roman law and the social, political and cultural processes that contributed to its development. However, the details of the development of particular legal doctrines or branches of law are not within the scope of this book. There is abundant material available in English and other languages to enable the student to examine selected topics in depth. But any detailed study in Roman law should be carried out only when some understanding of the system as a whole has been attained. It is hoped that this book will provide an accessible historical introduction to the development of Roman law and will encourage students of all kinds to carry out further work in this area of study.

I am grateful to a number of people who have helped me in the preparation of this book. First I should like to thank my colleagues and students at the University of Auckland for their encouragement and constructive criticism. I also wish to thank Professor Alberto Burdese of the University of Padova, Professor Pietro Costa of the University of Florence, Professor Vito Mangini of the University of Bologna, Professor Alfons Bürge of the University of Munich and Professor Nikolaus Benke of the University of Vienna, who enabled me to spend several months in Italy, Germany and Austria as a Research Scholar and to make use of the

libraries and facilities of their Institutions. Mr Ian McIntosh, with his eye for detail and acute insight, has been a superb editor and has made a number of helpful suggestions for improvement. Finally, I wish to thank Chapman Tripp law partnership for one year's financial grant towards the research for this book and my publishers for their courteous assistance.

Abbreviations

Bas	*Basilica*
Bruns, *Fontes*	*Fontes iuris romani antiqui*, ed. C. G. Bruns, Tubingen 1909, repr. Aalen1969
C	*Codex* of Justinian
C Th	*Codex Theodosianus*
D	*Digest* of Justinian
FIRA	*Fontes Iuris Romani Anteiustiniani*, I-III, ed. S. Riccobono, J. Baviera and V. Arangio-Ruiz, Florence 1940-1943, 2nd edn, 1968
G	*Institutes* of Gaius
Girard, *Textes*	*Textes de droit romain*, ed. P. F. Girard and F. Senn, 7th edn, Paris 1967
Inst	*Institutes* of Justinian
MGH	*Monumenta Germaniae Historica*
Nov	*Novels* of Justinian
SZ	*Zeitschrift der Savigny Stiftung für Rechtsgeschichte*
P.Oxy.	*The Oxyrhynchus Papyri*, ed. B. P. Grenflell, A. S. Hunt, et al., London 1898
PS	*Pauli Sententiae*
UE	*Tituli ex corpore Ulpiani* in FIRA II, 261-301
XII T	*Twelve Tables*

Contents

1 Introduction

Divisions of Roman Legal and Constitutional History

The history of Roman law may be divided into periods in different ways, depending on the nature of the developments taken to provide the requisite historical landmarks. Although these divisions have facilitated the study of Roman law, one must bear in mind that Roman law evolved gradually and therefore no clear-cut lines separate the different stages of its development. The sources of Roman law were, in varying degrees of strength from period to period, all present and in force at one and the same time, and in various ways qualified the influence of each other.

In general, Roman history falls into three major periods that correspond to Rome's three successive systems of political organisation:

(i) The Monarchy – from the founding of Rome in the eighth century BC to the end of the sixth century BC.

(ii) The Republic – from the end of the sixth century BC to the battle of Actium in 31 BC, or the transformation of the Roman constitution under Augustus in 27 BC. The republican era is subdivided into two phases: the early Republic (509 BC to 367 BC), and the later Republic (from 367 BC to 31 or 27 BC).

(iii) The Empire – this period begins in 31 or 27 BC and ends, for the western Roman empire in 476 AD with the overthrow of the last emperor of the West, and for the eastern Roman empire in 565 AD with the death of Emperor Justinian. The imperial era is subdivided into two parts: the Principate (from 31 or 27 BC to 284 AD), and the Dominate (from 284 AD to 476 AD for the western empire and to 565 AD for the eastern empire).

According to one approach, Roman legal history follows these divisions as the various legal institutions adapted themselves to the type of government in power.

Roman legal history may also be divided into periods by reference to the modes of law-making and the character of the legal institutions that came to prevail in different epochs. In this respect, the history of Roman law may be divided, roughly, into four phases:

(i) The archaic period – from the eighth century BC to the third century BC. This period includes the Monarchy and the earlier part of the Republic.
(ii) The pre-classical period – from the third century BC to the beginning of the Principate in the first century AD. This phase covers the later Republic and the early years of the Principate.
(iii) The classical period – from the first century AD to the middle of the third century AD.
(iv) The post-classical period – from the middle of the third century AD to the middle of the sixth century AD. This period covers the later part of the Principate and the Dominate.

The above divisions will provide a suitable framework for the discussion of Roman legal history as presented in this book. Before we proceed to examine the development of Roman society and its law in some detail, an outline of the general features of each historical period will be offered in the following paragraphs.

The archaic period

The earliest Rome was an agricultural community which differed little in its social and political organisation from its neighbours in central Italy. The mass of the population was composed of small freeholders and economic life was based largely on cattle-raising and the cultivation of the land. Political power was in the hands of a landowning aristocracy, the patricians, which dominated the most important political body, the senate, out of which the highest magistrates of the state were chosen. Social life revolved around the family (*familia*), the basic social unit, whose head (*pater familias*) had absolute authority over all persons and all property in his family group. A turning-point in the history of this period was the overthrow of the Monarchy, Rome's earliest system of government, at the close of the sixth century BC and the establishment of an aristocratic Republic. During the period from the sixth to the mid-third centuries BC Rome's social and political organisation underwent a series of important changes – a process marked by the 'struggle of the orders', the internal political strife between the old aristocracy, the patricians, and the lower classes, the plebeians. By the middle of the third century BC a precarious equilibrium between the classes had been established and the Roman state came to be dominated by a new nobility composed of both patrician and wealthy plebeian families.

During the earlier phase of the archaic period Roman society was governed by a body of customary norms of a largely religious nature. There

appear to have been no written laws, although the jurist Pomponius, who lived in the second century AD, does allude to certain *leges regiae* (laws of the kings) in his description of the state of the law during this period. In the archaic era the formulation and articulation of the law was in the hands of the priestly class, the *pontifices*. In their capacity as custodians of religious law (*ius divinum*) the pontiffs were concerned with, among other things, the punishment of violations of religious norms and the regulation of the calendar; at the same time they supervised the application of private law (*ius civile*). They alone were acquainted with the technical forms employed in the making of the typical transactions of private law, and they alone were entitled to give official advice and authoritative opinions on questions of law. Like the law of other primitive societies, the Roman law of the archaic period was characterised by its extremely formalistic nature. A legal transaction or procedure could not produce the desired results unless it was performed in accordance with strictly prescribed rituals. And once the prescribed ritual had been observed, the transaction was regarded as binding irrespective of the parties' real intentions. A momentous event that marks the development of Roman law during this period was the codification of the customary norms that governed the life of the Roman citizens by the Law of the Twelve Tables, enacted around 450 BC. With the introduction of this law, the first binding written record of the rules and procedures by which justice might be done, a new source of law came into existence, in addition to the unwritten customary law. In the years that followed the promulgation of the Law of the Twelve Tables legal development was based largely on the interpretation of its text, a task carried out by the pontiffs and, in later ages, by the jurisconsults. Moreover, in this period the office of praetor was introduced (367 BC), a new magistracy entrusted with the administration of the private law. In the course of time the praetor's edict became one of the strongest formative forces in the development of Roman civil law and provided the basis for a distinct source of law known as *ius praetorium* or *ius honorarium*.

The pre-classical period

This period witnessed Rome's ascendancy as the dominant power in the ancient world. By the middle of the third century BC Rome had conquered most of the Italian peninsula and, by the end of the first century BC, she held sway over the entire Mediterranean basin. It was during this period that the Romans came into direct contact with the Greek world and were fully exposed to the influence of the Greek and Hellenistic culture. But Rome's rapid growth in territory, wealth and political influence had far-reaching consequences for the social and economic life of the later

Republic. The new conditions brought about by Rome's expansion generated a social and political crisis which was accompanied by an increasingly violent internal strife, both between rival factions and individuals within the ruling classes and between the aristocracy and various disadvantaged groups. This state of affairs degenerated into an almost permanent state of civil war which led to the erosion and final collapse of the republican system of government.

The legal history of this period is marked by the emergence of the first jurisconsults (*iurisconsulti* or *iurisprudentes*), a group of jurists who, without being members of the pontifical college, acted as interpreters of the law. Like the pontiffs, these secular jurists were members of the Roman aristocracy. They were men actively engaged in public life and many of them were elected to the highest offices of the state. The main focus of their activities was the giving of legal advice on difficult points of law to judicial magistrates, judges and parties at law. They were also engaged in drafting legal documents, such as contracts and wills, and in advising state organs on legal matters. At the closing stages of this period there appeared the first systematic treatises on civil law – a development associated with the influence of Greek philosophy and rhetoric or Roman legal thought. The legal history of the pre-classical period is marked also by the development of the *ius honorarium* or magisterial law as a distinct source of law. As was mentioned before, early Roman law was rigid, narrow in scope and resistant to change. As a result of the changes brought about by Rome's expansion, the Romans were faced with the problem of how to adjust their law so that it might meet the challenges imposed upon it by new social and economic conditions. In response to this problem the law-dispensing magistrates, and particularly the praetors, were given the power to mould the law in its application. A new flexible system of legal procedure was developed, known as the *per formulam* procedure, under which the magistrates were given much more discretion in deciding whether to grant or to refuse a legal action. Although the magistrates had no legislative authority, by making an extensive use of their right to regulate legal process they did in fact create a new body of law which was progressive and free and subject to continual change and development.

The classical period

The classical period of Roman law largely coincides with the first part of the imperial era, referred to as the Principate. With the establishment of a new form of government under Augustus in the late first century BC the political and social upheaval that marked the closing years of the Republic came to an end. During the first two centuries of the Empire Rome

consolidated its position as the dominant power in the Mediterranean world and, under the conditions of peace and security that prevailed within the boundaries of the empire, trade and industry flourished and Roman culture reached its highest level of achievement. However, the first symptoms of a new crisis began to appear in the second century AD and became more apparent in the closing years of that century: a weakening of Rome's political system and the rise of the army as the decisive power factor, lack of economic equilibrium and economic stagnation, social unrest, and the emergence of new enemies on the empire's frontiers. All these and other factors interacted to intensify and spread the crisis during the third century. In the closing years of that century, under a line of strong emperors, the crisis was finally checked and a temporary revival materialised, but only at the cost of establishing a despotic government and a rigidly regulated society.

Roman law reached its full maturity in the classical period and this was largely due to the creative work of the jurists and their influence on the formulation and application of the law. From the early years of the Principate it became customary for the emperors to grant to the most influential jurists the right to give opinions on questions of law (*ius respondendi*) and to deliver them by the emperor's authority. In the later half of the second century the opinions of the jurists who had been granted this right, when in agreement with each other, came to be regarded as authoritative sources of law and as legally binding. Besides dealing with questions pertaining to the practical application of the law, the jurists were also engaged in the teaching of law and the writing of legal treatises. Most of the fabric of Roman law, as it is known to us today, was built upon the writings of the leading jurists of this period. During the same period the resolutions of the senate and the decrees of the emperors came to be regarded as authoritative sources of law. On the other hand, the influence of the magisterial law (*ius honorarium*) on the development of Roman law gradually weakened as praetorian initiatives became increasingly rare. The final codification of the praetorian edict in 130 AD put an end to the *ius honorarium* as a distinct source of law.

The post-classical period

The unity of the Roman state, badly shaken by the crisis of the third century, was gradually restored in the later half of that century by a line of capable emperors elevated to the throne through the support of the army. The work of these emperors was completed by Diocletian (284-305 AD), whose rise to power is traditionally taken to mark the beginning of a new phase in Roman history known as the Dominate. Under Diocletian and his

successors the imperial government was transformed into an absolute monarchy of an Oriental-Hellenistic type. The administration was reorganised and measures were introduced aimed at the stabilisation of the economy and the strengthening of the empire's defences. But most of these measures proved short-lived and, as the empire's problems escalated, the forces of dissolution gathered momentum. In the later part of this period civil wars, invasions and economic decay plagued the empire, which was finally divided into an eastern and a western part in 395 AD. Within less than a century the western Roman empire finally succumbed to the invading Germanic tribes (476 AD). The eastern empire was transformed into the medieval Byzantine empire and, with Constantinople as its capital, survived for another 1100 years as an essentially Greek state.

The legal history of this period is marked by the general decline of jurisprudence. The interpretations of the jurists ceased to be a living source of law and earlier juristic works came to be regarded as a body of finally settled doctrine. The only effective source of law was imperial legislation, largely concerned with matters of public law and economic policy. At the same time custom began again to play a part as a secondary source of law – a development which, in the western provinces in particular, led to what is referred to as the 'vulgarisation' of Roman law. As the body of imperial legislation continued to grow, there emerged the need for the codification of the law. In addition to that, direction needed to be given concerning the use of the classical literature – a vast body of legal materials stretching back over hundreds of years of legal development. The process of codification began with the publication of two private collections of imperial law which appeared at the end of the third century AD: the *Codex Gregorianus* (291 AD) and the *Codex Hermogenianus* (295 AD). These were followed by the *Codex Theodosianus*, an official codification of imperial statutes published in 438 AD. The process of codification came to an end in the middle of the sixth century AD with the great codification of the Roman law – both of juristic law and imperial enactments – under Emperor Justinian.

Sources of Roman Legal History

Our knowledge of the history of Roman law is derived from a number of different sources. Depending upon the nature of the relevant historical material a distinction is drawn between literary sources, epigraphic evidence and the unwritten archaeological record. Of particular importance for our reconstruction of Roman legal history are documents of a specifically legal nature, such as various legislative texts, the surviving

body of juristic literature, records of legal transactions and statutes inscribed on tablets of bronze, stone or copper.

Juridical literature

Of the literary sources of particular importance are the surviving works of the Roman jurists of the pre-classical and classical periods. Most of these works have come down to us in a fragmentary form and only indirectly through the codification of Justinian and other post-classical compilations of law. But questions arise as to whether many of the surviving fragments accurately reflect the original sources from which they were derived, as they may have been simplified and in various ways adapted to the needs and purposes of the post-classical compilers. The only juristic work from the classical period that has survived in its entirety is the Institutes of Gaius, a textbook dating from the middle of the second century AD. Although the manuscript containing this work dates from the fifth or early sixth century AD – more than three centuries after Gaius's time – it is believed that it is a faithful reproduction of the original text. This was confirmed after the discovery in 1933 in Egypt of fragments of another manuscript of Gaius's Institutes, probably of the late fourth century, matching the text of the first manuscript. About a tenth of the manuscript's content is lost or totally illegible, but some of the missing parts have been reconstructed from extracts included in later compilations.

Another important source of juristic literature is the so-called Vatican Fragments (*Fragmenta Vaticana*), a general collection of juristic opinions and imperial legislation discovered in the Vatican library in 1821.[1] A further collection, known as the *Collatio legum Mosaicarum et Romanarum* (A Comparison of Mosaic and Roman Law), dates from the late fourth or early fifth century AD and was first published in Paris in 1573.[2] This collection has been particularly helpful in reconstructing the *Pauli Sententiae*, an important work based on the writings of the classical jurist Paul. Extracts from the latter work, which was produced by an unknown author in about 300 AD, have been included in a number of post-classical compilations besides the *Collatio*, as well as in the Digest of Justinian. In this connection the *Ulpiani Epitome* may be mentioned as well. This was probably an abridgment of the *liber singularis regularum*, a

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1 This collection was published in Rome in 1823. See chapter 10 below.

2 The original title of this manuscript is *Lex dei quam praecipit dominus ad Moysen* (The divine law which the Lord gave to Moses). It appears that in this work the author wanted to demonstrate that Roman law agreed with or possibly even was based on Mosaic law. See chapter 10 below.