THE ROMAN LAW TRADITION

EDITED BY

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 2RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521441995

First published 1994
This digitally printed first paperback version 2006

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
The Roman law tradition / edited by A. D. E. Lewis and D. J. Ibbetson.
p. cm.
ISBN 0 521 44199 4 (hardback)
1. Roman law. I. Lewis, A. D. E. II. Ibbetson, D. J. (David J.)
KJA147.R66 1994
340.5'4 – dc20 93–24746 CIP

ISBN-13 978-0-521-44199-5 hardback
ISBN-10 0-521-44199-4 hardback

ISBN-13 978-0-521-03346-6 paperback
ISBN-10 0-521-03346-2 paperback

In *The Roman Law Tradition* an international team of distinguished legal scholars explore the various ways in which Roman law has affected and continues to affect patterns of legal decision-making throughout the world. Roman law began as the local law of a small Italian city. It grew to dominate the legal relationships of the Mediterranean basin for the first five hundred years of our era. The revival of its study in the mediaeval universities led to its influencing the subsequent development of the legal system of western Europe and thereafter those parts of the rest of the world colonised from Europe. Roman legal ideas penetrated procedure as well as the substance of law and assisted the process of harmonisation and codification of local customary laws. Techniques of legal reasoning which first emerge in Rome continue in daily use. Roman law was also of immense significance in the emergence of modern political thought.

Few scholars have written as widely and influentially on the Roman legal tradition as Peter Stein, former Regius Professor of Civil Law in the University of Cambridge. As a tribute to and continuation of his work, the present volume brings together twelve studies, ranging in time from republican Rome to the European Court of Human Rights, which together provide an emphatic endorsement of the continued importance and vitality of that tradition.

The Roman Law Tradition

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Foreword: Peter Stein, Regius Professor of Civil Law in the University of Cambridge, 1968–1993

> Bracton got his Roman law from the Glossators, Hale from the Humanists and Austin from the Pandectists. In each case the English writer was affected by the form and tendency of his source. Bracton found a legal grammar with which he was able to build up a picture of English law in substantive rather than procedural terms. Hale found an account of the parallel development of law and society from a primitive to a sophisticated system. Austin found the categories and tools of analysis with which to test the scientific quality of the law against an external standard.

This passage from his inaugural lecture as Regius Professor of Civil Law in Cambridge, *Roman Law and English Jurisprudence Yesterday and Today* (Cambridge, 1969), witnesses to the depth and range of Peter Stein's scholarship. He has made major contributions to jurisprudence and its history, and he is a master of the western European legal tradition and its Roman foundation.

His writings have ranged across the whole field of the Roman legal tradition: the substantive Roman law and its reflection in modern legal systems, both Common law and civilian, from Scotland to San Marino; the resurgence of Roman law in the twelfth and thirteenth centuries, and legal humanism in the sixteenth; the basic forms of legal reasoning and modes of legal analysis; Roman legal ideas and their pervasive influence on political philosophy.

Few scholars command more affection and admiration, and few have done more to illuminate not only Roman law as it was in its first life but also the huge contribution of the Roman law library to both the principal legal families in modern Europe. His long and immensely fruitful tenure of the Cambridge chair has also brought many to depend on his permanent availability as a leader and defender of a particular view of the law and legal education, as requiring, indispensably, an historical foundation.

PETER BIRKS

Regius Professor of Civil Law,
University of Oxford

Abbreviations

A.C.	Law Reports, Appeal Cases
All E.R.	All England Law Reports
B. & Ald.	Barnewall and Alderson's Reports
B. &. C.	Barnewall and Cresswell's Reports
B.G.B.	Bürgerliches Gesetzbuch (German Civil Code)
B.I.D.R.	Bulletino dell'Instituto di Diritto Romano
B. & S.	Best and Smith's Reports
Bing.	Bingham's Reports
Bulstr.	Bulstrode's Reports
Burr.	Burrow's Reports
C.	Codex Justinianus
C.B.	Common Bench Reports
C.L.J.	Cambridge Law Journal
C.L.P.	Current Legal Problems
Cmnd.	Command Paper
Co.Rep.	Coke's Reports
Coll.	Collatio Legum Mosaicarum et Romanarum
Const.	Constitutio(n)
Cr.App.Rep.	Criminal Appeal Reports
Crim.L.R.	Criminal Law Review
Cro.Eliz.	Croke's Reports of the time of Elizabeth I
D.	Digesta or Dunlop's Court of Session Cases
F.	Faculty Decisions, Court of Session
FIRA	Fontes Iuris Romani Antejustiniani (ed. S. Riccobono *et alii*, 2nd edn (Florence, 1968))
G. or Gaius	The Institutes of Gaius
Gl.	Gloss(a)
H.t.	Hoc titulo
J.Inst.	Justinian's Institutes
Kel.	Sir John Kelyng's Reports
L.Q.R.	Law Quarterly Review
Lib.Ass.	Liber Assisarum

Lord Raym.	Lord Raymond's Reports
M.	Morison's Dictionary of Decisions
M. & W.	Meeson and Welsby's Reports
Mod.	Modern Reports
O.J.L.S.	Oxford Journal of Legal Studies
P.R.O.	Public Record Office
P.S.	Pauli Sententiae
Q.B.	Law Reports, Queen's Bench Division
R.	Rettie, Crawford and Melville, Court of Session Cases
R. &. R.	Russell and Ryan's Crown Cases Reserved
S.	Shaw's Session Cases, first series
S.C.	Session Cases
S.D.H.I.	Studia et Documenta Historiae et Iuris
S.L.T.	Scots Law Times Reports
Salk.	Salkeld's Reports
Stra.	Strange's Reports
T.R.	Term Reports
T.v.R.	Tijdschrift voor Rechtsgeschiednis
Tab.	Twelve Tables
W.Bl.	William Blackstone's Reports
W.L.R.	Weekly Law Reports
Wils.	Wilson's King's Bench Reports
Y.B.	Year Book
Z.S.S.	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: römanistische Abteilung

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1 The Roman law tradition

David Ibbetson and Andrew Lewis

Roman law was first the local law of a small central Italian city-state.[1] As the political boundaries of that state expanded, so did its law, until by the early centuries of our era its influence was widespread over and beyond the Mediterranean basin. Important evidence revealing the application of Roman law at local level has recently been dug up in southern Spain; the Roman lawyer and administrator Papinian is said to have been at the northern British capital York assisting the Emperor in dispensing justice in AD 208; and papyri from Egypt and the Arabian desert indicate the extent of penetration of Roman legal notions even in areas of strong local traditions. Conveyances written on wood in Transylvania testify to a near-obsessive desire to comply with metropolitan standards.

The Roman legal tradition was characterised not so much by its substantive rules as by its intellectual methodology. Between about 100 BC and AD 250 the Roman jurists developed techniques of analogical and deductive reasoning which produced a jurisprudence of enormous refinement and sophistication.[2] When the Emperor Justinian caused the substantial extracts from the writings of these classical jurists to be collected together in the early sixth century AD, he ensured the survival of their thought into subsequent ages. His Digest remains the finest monument of any legal culture.

[1] Studies of the history of Roman law are legion. The most recent comprehensive survey is F. Wieacker, *Römische Rechtsgeschichte*, vol. I (Berlin, 1988, continuing). A useful survey in English is the edition of H. F. Jolowicz's *Historical Introduction to the Study of Roman Law* by B. Nicholas (Cambridge, 1972), which was originally written to complement W. W. Buckland's *Textbook of Roman Law from Augustus to Justinian*, now in its third edition, by Peter Stein (Cambridge, 1963). There are numerous studies of the mediaeval development of Roman law in the collection *Ius Romanum Medii Aevi* (Milan, 1961–), which have full bibliographical references, and the ways in which Roman law came to influence western philosophy are well charted by J. M. Kelly, *A Short History of Western Legal Theory* (Oxford, 1992). Peter Stein's own contributions have spanned the whole field. Many of his essays are collected together in *The Character and Influence of the Roman Civil Law* (London, 1988); see too his *Regulae Iuris* (Edinburgh, 1966) and *The Teaching of Roman Law in England Around 1200* (London, 1990).

[2] For discussion of the jurists' techniques of interpretation, see Alan Rodger, 'Labeo and the Fraudulent Slave', below, pp. 15–31.

As the political fortunes of the Roman state waned, so did its direct legal influences. Nevertheless, albeit in Greek dress, it continued to apply within the limits of the Eastern Empire until the fall of Constantinople in 1453. During this long period it succeeded in directly influencing the legal traditions of neighbouring states. For example, its penetration into Slavic territories is well recognised, while significant parts of the Islamic law which developed after 661 have recently been traced to Roman roots.

The western successor states of the fifth and sixth centuries continued an administrative pattern modelled on that of the previous local Roman government, and this involved a commitment to Roman law, applied side-by-side with Germanic custom. Unsurprisingly, the law codes of these Germanic states reveal some infiltration of Roman legal ideas, though these survivals became progressively more corrupt. Still, the Christian Church continued to keep alive Roman ideas and solutions, even in such unpromising territory as Anglo-Saxon England, and the most fundamental ideas of Roman law were sustained in scholarly environments familiar with such works as Isidore of Seville's *Etymologia*.

The revival of the Roman law tradition stemmed from the concurrence of two conditions. First was the intellectual renaissance of the eleventh and twelfth centuries. While there may have been a continuous, if sparse, acquaintance with the Institutes, Code and Novels of Justinian from the time of their promulgation in the sixth century, there is no trace of the most important of the Justinianic tetralogy, the Digest, until the eleventh century, when two copies come to light. One, now known as the *Littera Pisana* or *Fiorentina* from the two Italian cities which successively preserved it, was a copy made within a generation of the original production. The other, known since Mommsen as the *Codex Secundus*, disappeared in the mediaeval period, though its contents were preserved in very many copies. All mediaeval scholarship was based on this text; the Florentine, treated almost as a sacred relic, was little studied before the Renaissance. The pattern of appearance of the *Codex Secundus* strongly suggests that it emerged into a strongly Lombardic legal world, perhaps into the well-known Lombard law school at Padua, though our earliest reliable evidence of its study fixes it in Bologna. Here there developed in the early twelfth century a strong scholarly tradition around Irnerius, and his pupils, the so-called Four Doctors: Hugo, Martinus, Bulgarus and Jacobus.

This intellectual resurgence provided no more than the launching-pad for the revival of Roman law. Setting it off were the political circumstances of the dispute between Pope and Emperor known as the Investiture Crisis, the question by whom and at what moment bishops and lesser clergy were to be invested with the symbols of their sacred and secular

functions. The heat of this dispute lasted between 1075 and 1122, and for a long period both the imperial and papal powers encouraged their supporters to seek for any and every argument to support their cause. Amongst the sources culled for this purpose were the written remains of Roman law preserved in the Digest, Code and Institutes of Justinian. Foremost amongst the scholars who applied this learning to the new political uses was the imperial apologist Peter Crassus. Significantly, Crassus was a citizen of Ravenna, the Byzantine capital of reconquered Italy; here the Roman traditions were most obviously retained, and it may be surmised that it was here that Justinian's texts had been preserved.

The first century of scholarly work on the Roman texts was largely devoted to teasing out the meanings of the very heterogeneous opinions and materials contained in Justinian's Corpus Iuris Civilis. Four generations of students link Irnerius, through the Four Doctors, their students Rogerius, Placentinus, Pillius and the student of these in turn, Johannes Bassianus, with Azo and Accursius in the early thirteenth century.[3] Whilst these teachers produced a great variety of literature in their exploration of the understanding of their texts, they are chiefly remembered (and were in due course execrated) for their glosses to the text. Accursius found fame and notoriety as the compiler of the fullest and most widely diffused gloss, known as the Great Gloss or *glossa ordinaria*, which eventually found its way into the standard manuscript tradition and ultimately into the printed editions of the Corpus Iuris.

Later generations criticised the glossators for their narrow-minded literalness and absence of a wider cultural context, but the very narrowness imposed upon them by their task gave them an unrivalled knowledge of the Roman law texts on which their successors could build. Moreover, it is as well to remember that the Bolognese school did not come into being as a research institute, but as a teaching institution for immediate practical need: it needs to be constantly re-emphasised that Roman law at this time was not a dry university subject, but a matter of everyday utility throughout Europe. The law school at Bologna became the centre for the scholarly study of the Roman law texts, and all who wished to advance themselves in literate employment outside the church obtained their training there. The link between law and public administration which remains strong in the continental European tradition began here.

This first wave of reception of Roman law into the European legal tradition had many, intertwined, aspects. Three principal lines stand out. Most obvious is the infiltration of Roman law into written texts; behind this lies a widespread acceptance of Roman law as a subsidiary source of

[3] See further William M. Gordon, 'Going to the Fair – Jacques de Révigny on Possession', below, pp. 73–97.

law, filling in the gaps left by customary law; and finally there is the general adoption of the refined Roman techniques of legal reasoning.

As the general rate of literacy increased, there was a consequent rise in the respect accorded to written text and a tendency to reduce law into writing. Roman law provided both a technical vocabulary and a conceptual structure with which local customary law could be explicated. By so affecting the way in which law was conceived and expressed, Roman ideas profoundly influenced – one might say determined – the course of European legal history. This is most visible in the writings of legal commentators; in England, for example, the debt of Glanvill in the twelfth century and that of Bracton in the thirteenth to Roman law are strikingly obvious: whole sections from the latter are copied directly from Justinian's Institutes or the commentaries of Azo, and even those sections apparently most English can be shown to have close connexion with the classical Roman texts. Less obviously, but no less significantly, as local customary law came to be committed to writing there was an infiltration of Roman ideas. Sometimes this might have been conscious and deliberate, as in those Italian city-states whose pro-imperial ideology had caused them to treat Roman law as properly a part of their own customary law. Sometimes, however, it was less conscious, the product of relying on university-trained lawyers to prepare the written text: hence – to select only a sample of geographically distinct examples – there are Roman characteristics in the earliest written Norwegian code, the *Gulathingslov*, in a substantial number of English and Irish borough custumals, and in the majority of the French *Coutumes* of the thirteenth century. Even more, there was huge Roman influence on legislation, both national (the Spanish *Siete Partidas* and the French *Etablissements* of Louis IX, for example) and local. Urban codes were particularly influential in bringing about a diffusion of Roman ideas: the German laws of Lübeck and Magdeburg were widely adopted throughout central and eastern Europe, and the Spanish *Fuero Real* through much of Spain.

The use which had been made of the Roman legal texts in the Investiture controversy gave Roman law a status as essentially a supranational body of legal principles. In the hands of the Spanish scholastics of the sixteenth century and Grotius and his followers in the seventeenth and eighteenth, they were to form the base of an elaborate system of Natural law, an idealised system to which national laws might aspire. While the glossators and commentators similarly treated them as an ideal, they saw them as having a more practical revelance, supplementing the patchwork of local and national laws when these did not give any definitive answer to questions. There developed a widespread practice of academic lawyers giving *consilia* – opinions – to courts on disputed points of law. In some

places university-trained lawyers had more direct input into legal practice; in the multi-member parlements of France, for example, they ensured a place for Roman law solutions despite both local and regal opposition to it. Judges operating outside their own immediate region, such as the *podestà* imported into Italian city-states, inclined towards judgments which could be supported by appeal to the written texts of Roman law when local custom was lacking or uncertain, if only to minimise the risk that they might themselves fall foul of the rule which provided that they should be personally liable for a litigant's loss if they gave a wrong judgment. All of these had the effect of providing a common substructure to the laws of continental Europe, wherever the influence of the professors had been pronounced, underpinning the common heritage of the written texts.

Just as importantly, the activities of the mediaeval Roman lawyers had ensured the survival of the rigorous analytical method of the classical jurists. Treating the Corpus Iuris as an authoritative text, they attempted to harmonise the arguments found there; while this essentially quixotic task ultimately led to much criticism, it did require the development of increasingly refined techniques of analysis. Moreover, because of the work of the academic lawyers called on to apply Roman law in the courts, these techniques which had been developed within the universities became a ubiquitous feature of European legal practice.

This general infiltration of Roman legal ideas and practices in the thirteenth and fourteenth centuries can be regarded as the first wave of the reception of Roman law. It marked, most crucially, the absorption of the methodological aspects of the Roman tradition into mediaeval Europe, and thence into the modern world.

The second wave of the reception of Roman legal ideas occurred in the sixteenth century. At an academic level, this was a product of the humanist scholars' perception of antiquity, an important dimension of which was provided by Roman legal sources. Exploration of the juristic texts transmitted from the Middle Ages, alongside recently recovered inscriptional evidence, led Antonio Agustín, Alciatus and their contemporaries to the earliest understandings of the historical dimension of Roman law.[4] It was on the basis of these explanations that later generations of Roman law scholars like Cujas (1522–90) and Donellus (d. 1591), working in northern Europe, were able to establish more critical and reliable editions of the basic texts.

As well as this academic aspect there was, most notably in Germany, a practical side to the second wave of reception. At the beginning of the

[4] See Michael H. Crawford, 'Bembo giureconsulto?', below, pp. 98–103.

sixteenth century there was a large range of local customary jurisdictions, reflecting Germany's notorious political fragmentation. In 1495 the remodelled imperial Supreme Court, the Reichskammergericht, adopted a written procedure. This written procedure was modelled on that found in the ecclesiastical courts, akin to that of the late Roman legal sources (as the common term 'Romano-canonical' implies). Moreover, just as the ecclesiastical practitioners had naturally looked to Roman law for solutions to substantive legal problems, so too the Reichskammergericht applied the 'common law of the Empire', i.e. the Roman Empire, which naturally meant Roman law. While the ground had been prepared to some extent by the Roman ideas present in the urban codes of the thirteenth century, it was only in the sixteenth that there was any wholesale or conscious Romanisation of German law. The direct importance of this was at first limited as large portions of the Empire were in practice privileged from its jurisdiction, but under its influence the independent princes began in the course of the century to remodel their own high courts along the same lines. It was not, however, until it became general practice to give reasons for decisions and to report these that Roman law scholarship and the practice of the courts came together.

Elsewhere in Europe, too, this second wave of the reception of the Roman legal tradition was significant. The humanist scholars of the fifteenth and sixteenth centuries had introduced a more historical criticism of the Roman texts, associated with a weakening of the belief in the Roman texts as revealing a near-authoritative supranational law. There was, in consequence, a greater influence on the harmonisation of Roman law with national and local laws. Paramount in this regard was Hugo Grotius' *Introduction to the Jurisprudence of Holland* (*Inleidinge tot de Hollandsche Rechtsgeleertheyd*), published in 1631. Writing in the vernacular rather than in Latin, he laid down the foundations of Roman-Dutch law which could be built on by his successors Vinnius, van Leeuwen, Voet and Noodt. A similar harmonisation was brought about in France by the works of Coquille and Dumoulin, for example, and in parts of Germany by Ulrich Zasius. But even where there was a move away from the traditional reverence for the Roman text, there was no such departure from the ideals of the Roman legal method: the practical dominance of reasoning by deduction and analogy was so deeply embedded that it was easily detachable from its roots in the writings of the Roman jurists.

This harmonisation of Roman law and customary laws reached its peak with the codification movement in continental Europe, beginning with the Prussian Code of 1794. Most important of these codes by far was the French *Code civil*, dating back to 1804, in part at least because it was