

# A Brief Introduction to Roman Law

By

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## Introduction

Roman law was the law of the city of Rome and subsequently of the whole Roman Empire. The development of Roman law comprises more than a thousand years of jurisprudence which developed in different phases. A high-watermark in Roman jurisprudence was the *Corpus Juris Civilis* (AD 529-34) prepared under the direct guidance of Emperor Justinian 1. The *Corpus Juris Civilis* is a remarkable legacy from a remarkable era in legal history.

Five and a half centuries after Justinian, the 'jurisprudence' of Rome was studied in the universities of Northern Italy. Nicholas, in his book, *An Introduction to Roman Law*, noted that this phase of Roman law

'gave to almost the whole of Europe a common stock of legal ideas, a common grammar of legal thought and, to a varying but considerable extent, a common mass of legal rules.'<sup>1</sup>

Nicholas observed that England stood out against the 'reception' of Roman law and retained its own Common law – but that the Common law too has been, in part, influenced by Roman law.

Today, there are two great legal systems of European origin – the Common law of England (influenced to a small extent only by Roman law) and the Civil law

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<sup>1</sup> Barry Nicholas, *An Introduction to Roman Law*, Oxford, 1961, p..2

shaped largely by the revived Roman law. The Common law is the basis of the legal systems of most English-speaking nations. The Civil law is the basis of the legal systems of countries of the continent of Europe and countries in South America and elsewhere. The other great non-European legal systems, the Hindu and the Mohammedan, are largely religious based but have 'imported' aspects of the Common law and Civil law into commercial transactions.

Students of law will be familiar with the concepts of, and distinctions between, public law and private law. Public law relates to the regulation of the state; constitutional law is described as a branch of public law. Private law regulates legal relationships among individuals and the greatest influence of Roman law has been in the sphere of private law and this paper is confined to this aspect of law.

### Phases of Roman History

A significant phase of Roman history ended in 510 BC with the expulsion of King Tarquinius Superbus. From then the Roman Republic developed as a small city-state. By 272 BC, following a period of territorial expansion, Rome's control over Italy was almost complete. In two wars 264-241 BC, 218-201 BC Carthage, a rival for the Central Western Mediterranean, was eventually defeated. Subsequently Rome was at war with the East. Territorial expansion in the second century BC changed the face of Italy from small farming holdings to large estates with slave labour. Over a period, a professional army became mobilised. This enhanced the power of ambitious generals setting a pattern.

After much strife, a period of peace and stability commenced in 27 BC and Octavian, known as Augustus, restored constitutional government and the Empire took shape. The history of the Empire is often divided into two periods, the Principate (27 BC –AD 284) and that of the Dominate or absolute monarchy which followed.

## Sources and Forms of Roman Law

In terms of sources of written law, the Twelve Tables (c. 451 BC ) were both a 'statute' (*lex*) and a code. The pronouncements of the Emperor had the force of law (*lex*). 'Magisterial' law developed from the edicts of the magistrates and above all from the Urban Praetor. The day-to-day functions of the Praetor were to grant remedies in individual cases.

Today, in the common law world, the interpretation of the law in a binding form in disputes is within the jurisdiction of the courts with professional judges. Nicholas wrote that in Rome in the formative period of the law there were no professional judges and no regular courts; the interpretation of the law was discharged by the priestly 'college of *pontifices*' and subsequently by lay jurists.<sup>2</sup> When the period of the Dominate emerged, the sole source of law became the Emperor.

Justin, an elderly soldier, born of a peasant family in what became Yugoslavia, came to the throne in 518 AD. His nephew and adopted son was Justinian who received the best education available in Constantinople. Justinian acceded to the throne in 527 AD. He ordered his chief jurists to extract the best and most reliable sections of the earlier Roman texts for inclusion under appropriate headings in a *Digest*. All prior texts were to be destroyed throughout the Empire with the purpose of eliminating error. The *Digest* was ready by 533 AD.

Justinian also directed his jurists to prepare a textbook for law students called *Justinian's Institutes* which was completed by 533 AD. The following year Justinian's jurists completed a final version of all the Imperial statutes known as the *Codex*. The texts known as the *Digest*, the *Institutes* and the *Codex* became generally known as the *Corpus Juris Civilis*, the 'body of law'.<sup>3</sup> Subsequently the law of Justinian became the bedrock of the law of the continent of Europe.

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<sup>2</sup> Above pp. 14-59.

<sup>3</sup> See generally Daniel R. Coquillette, Chapter 1, 'The Glory that was Rome' in *The Anglo-American Legal Heritage: Introductory Materials*, 2<sup>nd</sup> ed. North Carolina, 2004, pp. 1-35 and J.M.Kelly, *A Short History of Western Legal Theory*, Oxford, 1992,, chapter 2, 'The Romans' pp. 39-78.

Roman law enjoyed a renewal during the renaissance of learning at the end of the eleventh century. The great teacher Irnerius (c.1055-c. 1130) who taught at Bologna expounded the *Corpus Juris Civilis* text by text. Irnerius and his successors became known as the 'Glossators'. Roman law became a popular subject of study at the universities of Italy.

The *Institutes* became one of the most read law books of all time and was significantly influential. Law students in many countries are required to read the *Institutes* to the present day.

I set down here an extract from the *Institutes* translated by Thomas Collett Sandars<sup>4</sup> which demonstrates a remarkable elegance of expression and nobility of thought:

*'Liber Primus: Tit.1. De Justitia et Jure*

Justice is the constant and perpetual wish to render everyone his due.

1. Jurisprudence is the knowledge of things divine and human: the science of the just and the unjust.
2. Having explained these general terms, we think we shall commence our exposition of the law of the Roman people most advantageously, if our explanation is at first plain and easy, and is then carried on into details with the utmost care and exactness. For, if at the outset we overload the mind of the student, while yet new to the subject and unable to bear much, with a multitude and variety of topics, one of two things will happen – we shall either cause him wholly to abandon his studies, or, after great toil, and often after great distrust of himself (the most frequent stumbling block in the way of youth), we shall at least conduct him to the point, to which, if he had been led by a smoother road, he might, without great labour, and without any distrust of his own powers, have been sooner conducted.

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<sup>4</sup> T.C. Sandars, *The Institutes of Justinian*, 7<sup>th</sup> ed., 1883, quoted in part by Daniel R Coquillette, note 3 above.

3. The maxims of the laws are these: to live honestly, to hurt no one, to give everyone his due....'

Leaving aside the noble ideas expressed in the *Institutes* the paternal care of the Emperor for law students is so very 'modern'.

In Roman jurisprudence, there were three different kinds of *ius*. *Ius naturale* was the law of nature. It included everything beyond the power of human law-making. The idea of 'natural law' developed from the *ius naturale* and included the concept of fundamental human rights inherent in man which cannot be taken away by human law. The writings of Cicero (106-43 BC), (court advocate and politician before the Christian era) influenced the development of the *ius naturale* which in turn have influenced the natural-law doctrines of the medieval Roman Catholic Church and what have been described as 'secularised' natural-law theories. In his *De Legibus*, Cicero wrote:

'True law is right reason in agreement with nature, diffused among all men; constant and unchanging, it should call men to their duties by its precepts, and deter them from wrongdoing by its prohibitions.... To curtail this law is unholy, to amend it illicit, to repeal it impossible; nor can we be dispensed from it by the order either of the senate or of popular assembly; nor need we look for anyone to clarify or interpret it; nor will it be one law at Rome and a different law at Athens, nor otherwise tomorrow than it is today; but one and the same law, eternal and unchangeable, will bind all peoples and all ages; and God its designer, expounder and enacter, will be as it were the sole and universal ruler and governor of all things;....'

Another *ius* was the *ius civile*, the body of laws that applied originally to Roman citizens and the *Praetores Urbani* – those who had jurisdiction over cases involving citizens. The term 'civil law' in the sense of Roman-based legal doctrine comes from *ius civile*. This is what we would designate as 'positive law' today. In the *Institutes*, it is written: 'Every community governed by laws and customs uses partly its own law, (the civil law – the law of the particular

state) and partly laws common to all mankind'.<sup>5</sup> There were further distinctions between 'written' laws referred to as *leges* or *lex* and the Roman concept of *equitas* from where the term 'equity' is derived – the doing of justice in a given factual circumstance ameliorating perhaps the harsh effect of a written law.

*Ius gentium* referred to the law of nations. These were human-made laws but 'common to all mankind'. Today we would designate *ius gentium* as 'international law'. Rules of diplomacy and state relations were governed by the *ius gentium*. Laws relating to commercial trade and commercial practices were also comprised in the *ius gentium* – what we call 'private international law' today. Modern international law including admiralty law has been significantly influenced by this aspect of Roman law.

The Roman law of 'things' (*res*) - economic assets - was divided into the law of property ('things' in a restricted sense), the law of succession and the law of obligations. Today this division of the law is a cardinal feature of the modern Civil law.

The law of sale is set out in *Justinian's Institutes (Tit. XX11 De Consensu Obligatione)*. The Romans were great merchants – men of business - and built a business empire which required law to regulate their transactions. This extract below refers to the law of obligations:

'Obligations are formed by the mere consent of the parties in the contracts for sale, of letting to hire, of partnership, and of mandate. An obligation is, in these cases, said to be made by the mere consent of the parties; because there is no necessity for any writing, nor even for the presence of the parties; nor is it requisite that anything should be given to make the contract binding, but the mere consent of those between who the transaction is carried on suffices.'

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<sup>5</sup> *Liber 1. Tit 11, De Jure Naturali, Gentium et Civili.*

## Legacies of Roman Law

Roman law has left many legacies. The Emperor Justinian, building on earlier jurists, codified in a structured written form a sophisticated system of law by means of the *Digest*, *Codex* and the *Institutes*. This codified system of law has influenced much of the Civil law world. The concepts inherent in the legal order comprised in the *ius naturale* and *ius gentium*, intended to extend beyond national border, are today the cornerstones of human rights law and international law throughout the world. With the Romans, law developed into a science and we write today of the science of the law.

*End.*

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