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Robert L. Bloom
Gettysburg College

Basil L. Crapster
Gettysburg College

Harold A. Dunkelberger
Gettysburg College

See next page for additional authors

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4. Rome: Roman Law

Abstract

A persistent problem wherever men live together is the settlement of disputes. Primitive men often regard quarrels as personal matters, to be settled by those immediately involved. This may result in violence, possibly encompassing whole families in a blood feud; or compensation may take a milder form. Sooner or later the community begins to take a hand, to serve its own best interests. Perhaps its elders listen to the arguments and render a decision, based on custom once it is established. When the community takes one more step and begins to enforce its decisions in a positive way, a state comes into existence and, with it, a law. The provisions of the law contain a heavy deposit from the past. [*excerpt*]

Keywords

Contemporary Civilization, Rome, Greece, Golden Age, Law, Government

Disciplines

Ancient History, Greek and Roman through Late Antiquity | Classics | Cultural History | History | Political History | Political Theory

Comments

This is a part of [Section I: Athens, Rome, and Jerusalem: Background of Western Civilization](#). The [Contemporary Civilization](#) page lists all additional sections of *Ideas and Institutions of Western Man*, as well as the [Table of Contents](#) for both volumes.

More About Contemporary Civilization:

From 1947 through 1969, all first-year Gettysburg College students took a two-semester course called Contemporary Civilization. The course was developed at President Henry W.A. Hanson's request with the goal of "introducing the student to the backgrounds of contemporary social problems through the major concepts, ideals, hopes and motivations of western culture since the Middle Ages."

Gettysburg College professors from the history, philosophy, and religion departments developed a textbook for the course. The first edition, published in 1955, was called *An Introduction to Contemporary Civilization and Its Problems*. A second edition, retitled *Ideas and Institutions of Western Man*, was published in 1958 and 1960. It is this second edition that we include here. The copy we digitized is from the Gary T. Hawbaker '66 Collection and the marginalia are his.

Authors

Robert L. Bloom, Basil L. Crapster, Harold A. Dunkelberger, Charles H. Glatfelter, Richard T. Mara, Norman E. Richardson, and W. Richard Schubart

4. Roman Law

A persistent problem wherever men live together is the settlement of disputes. Primitive men often regard quarrels as personal matters, to be settled by those immediately involved. This may result in violence, possibly encompassing whole families in a blood feud; or compensation may take a milder form. Sooner or later the community begins to take a hand, to serve its own best interests. Perhaps its elders listen to the arguments and render a decision, based on custom once it is established. When the community takes one more step and begins to enforce its decisions in a positive way, a state comes into existence and, with it, a law. The provisions of the law contain a heavy deposit from the past.

Roman law began as customs and traditions transmitted orally from generation to generation in patrician families. One of the concessions to the plebeians, others of which have already been mentioned, was the granting of a written code, the Twelve Tables, about 450 B. C. The Twelve Tables represent a concession because now part of the law was in written form, carved on stone tablets, and displayed publicly in the market place for all to see. We do not know whether the specific provisions of this code were regarded as the most important of the laws or whether they were the ones which were in most frequent dispute at the time.

There are several ways in which we can divide the whole body of law. One is to distinguish between public law, which deals with the powers of government, and private law, which deals with the relations between individuals. Another way is to distinguish between criminal law, dealing with offenses the state has defined as crimes and which it will punish, and civil law, dealing with offenses as a result of which wronged individuals may seek compensation through the courts. Actually, it is next to impossible to make distinctions between types of law which do not involve some overlapping. There are offenses which are, in law, both criminal and civil.

The Roman law in which we are interested at the moment was the private civil law (ius civile), which dealt with disputes involving such everyday matters as property, contracts, family

* Acts 22:25-29. Revised Standard Version of the Holy Bible. This and subsequent quotations from the same version are used with permission of the National Council of the Churches of Christ in the U.S.A.

relationships, and estates of deceased persons. It was administered at first by the consuls and after 367 B. C. by an annually elected praetor, who heard complaints and then decided what principles of law, if any, were at issue; and by one or more judges, who then decided the facts in the case. The actual trial occurred before the judge. It will be seen that the praetor corresponds roughly to the modern American judge and the Roman judge to the modern American jury.]

One of the most important characteristics of this system was the ease with which it met changing times and circumstances. There were three noteworthy ways in which Roman civil law grew during the republican period. The first and least important was by legislation on the part of an assembly. This was the usual method by which public and criminal law developed. A second way was by the praetor's edict. At the beginning of his term of office, the praetor published a list of the types of cases which he proposed to hear (some of which might not have been granted a hearing before) and the rules of procedure which he intended to follow. Most of one praetor's edict would be incorporated into that of his successor and gain the force of law. It is for this reason that one Roman called the praetor's edict the "living voice of the civil law." A third way in which development took place was through the activities of a very small and unofficial group of men called the iuris prudentes, or jurists. These men were lawyers or public officials who were often consulted by both praetors and judges, neither of whom were themselves necessarily experts in law. In replying, the jurists would recall past decisions and attempt to apply them to the case at hand. If no such decision seemed applicable, they would recommend what was, according to their own best judgment, equitable. If their advice was accepted, the body of law would grow, for here was a precedent being set. As was the case with the praetor's edict, this represented growth by interpretation rather than by legislation. The jurists were not paid for their services, performing them because of the high repute in which a knowledge of the law was held in Rome and because of the value of such knowledge in their conduct of public affairs.]

Roman civil law was only for citizens. In time, cases arose involving foreigners in Rome who were dealing with each other or with citizens. As early as 242 B. C. a special praetor was chosen who was free to begin building a body of law the principles of which were drawn from the entire Mediterranean area and which seemed fair and just in these cases. This body of law came to be called the ius gentium, or law of peoples. It was not an international law, since it did not seek to order relations between Rome and neighboring states. The same procedure was followed as in the civil law, with praetor, edict, judge, and jurist. Later, except where they permitted the retention of native legal systems, the Romans extended ius gentium to the provinces.

Both ius civile and ius gentium were well-advanced long before Augustus transformed the republic into the empire. Now further legal development came to be identified closely with the imperial office. The emperors began issuing proclamations and orders which were in fact legislation and which covered both civil and criminal law. Also, the Senate enacted laws at their behest. After careful study, the emperor Hadrian about the year 130 issued a permanent edict which subsequent praetors were required to follow. Gradually, the jurists were drawn into the imperial bureaucracy where, as we shall see, they actually expanded their importance. In the sixth century the emperor Justinian, who ruled in Constantinople from 527 to 565, appointed a commission to codify the accumulated mass of Roman law. The results of its work, which appeared between the years 529 and 546, were -- most important of all -- a collection of carefully selected opinions of the jurists (called the Digest); a textbook of law (the Institutes); a code of all edicts in force (the New Code); and edicts issued after the code (the Novels). Together this collection is referred to as the Corpus Iuris Civilis, the body of civil law. It stands as one of the greatest -- perhaps the greatest -- monuments of Roman Civilization.

Traces of Roman law survived after the fall of the empire among some of the western barbarians and also in the Christian Church. The Justinian Code was forgotten in the West until its discovery in the eleventh century, after which it was studied carefully in the center from which the University of Bologna grew. This revival provided the inspiration for a codification of canon law and for the legal systems of several rising states. Roman law remains at the base of the legal systems of most nations touched by Western Civilization, excepting those using English law. Even English law in its formative stages was influenced by Roman and still shows traces of that influence. Many specific provisions, and in instances the spirit, of Roman law have long been outdated, but the pioneering effort had been made once and for all.

Jurisprudence is the name given to the systematic study of law. It seeks to answer such questions as: What is law? What is its purpose? What is justice? What is the nature of rights? Obviously Plato, Aristotle, and other Greeks were absorbed with these questions and the science of jurisprudence can be said to have begun with them.

Roman law, as we have seen, developed on the very practical level of experience. Given the Roman temperament, it is not surprising that neither praetors nor judges showed much interest in relating their everyday practices to the principles which lay behind them. The men who were in the logical position to attempt this were the jurists, who were the founders of Roman jurisprudence. They dealt with cases arising under ius civile and ius gentium. Not only did they have to know the rules of both, but, since ius gentium was a Roman innovation and still growing, they also had to be ready to fashion new rules.

Inevitably, when the jurists took to making comparisons between the two systems, in the hope of finding something in one which could be adapted usefully into the other, they found that the ius gentium had more to offer than the ius civile. It had fewer technicalities, none of the religious ceremonialism of earlier times which the civil law had not entirely shed, and in general its provisions seemed to be more equitable. Therefore, it was the civil law which was the more modified as the jurists advised the praetors and judges and as the praetors incorporated these suggestions into their edicts. Nowhere did the distinctions between the two systems disappear more rapidly than in the field of commercial relations, the existence of which had provided the necessity for the ius gentium in the first place. The granting of Roman citizenship to all freemen in the year 212 meant that whatever distinctions still remained would soon be rendered meaningless. Civis Romanus would now be entitled to the processes of a law -- civil law, to which only citizens were allowed access -- devised for a small city-state, but one which, thanks to good sense and patience, now approached universality.

With many early jurists this mutual borrowing between the two systems of law was undoubtedly a rather unconscious process which could not be separated from the urgency of their everyday legal tasks. But before the end of the republic there were a few who began to generalize on their experience giving oral advice and who committed their conclusions to writing. Especially in the second century and the early part of the third, other jurists produced commentaries on the law which sought to expound, systematize, and describe basic principles. Their efforts provided the basis necessary for the success of Justinian's codification three centuries later.

It is frequently difficult to determine with any degree of assurance what ideas actually influenced the men who have fashioned human institutions. Very often these men are primarily doers rather than thinkers and doers; they are singularly uncommunicative. Those who seek to establish a connection between the institutions they raise and the ideas which precede, accompany, and follow what they do often must arrive at tentative conclusions. This is the case when we go behind the Roman legal system -- an institution -- to seek for the ideas which may have guided its development toward universality.

As we have seen, shortly before 100 B. C. Stoicism was introduced into Italy. Several of the Roman jurists were among the first to embrace this philosophy. Up to that time, both the ius civile and ius gentium had grown with little influence from outside ideas. One of the Stoic emphases that appealed to the jurists was the idea of natural law (ius naturale). No clearer formulation of this idea, nor any more frequently quoted, is possible than the one made by the Roman lawyer and public figure, Cicero (106-43 B. C.):

... True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment. J. . . *

Every man will know it

It is probable that some of the Roman jurists took the idea of natural law to be a model or a standard of justice by which men rationally must measure the worth of the practices in the ius civile and the ius gentium. They may have used it as a tool in criticizing and restating these practices. It is clear that Cicero, who was not himself a jurist, was convinced that the idea of natural law gave an understanding of what human laws and human relationships should be. There is little real evidence that the jurists of the republic thought in these terms, although they may well have. In the imperial period, when the commentators ventured to define natural law, they were not in agreement as to exactly what it meant. But it is clear that for most of them it was, as we have defined it, a model or a standard (the Latin ius, from whence comes the word "justice," conveys the idea) by which all human laws (in the sense conveyed by the Latin word lex) were to be judged and in the light of which they were to be changed. Slavery, for example, while recognized by Roman law, was regarded by the legal commentators as wrong, because natural law decreed that all men are equal. Natural law, then, pointed in the direction of individual rights based on a conviction of human equality. This, too, represented an accommodation of the large and impersonal state to the minute individual, one not to be judged in terms of twentieth century political democracy but in terms of the problem which the day of Mediterranean-world empires had created.

* Cicero, De re publica, De legibus, trans. Clinton Walker Keyes (London: William Heinemann, 1928), p. 211. Reprinted by permission of the publishers and the Loeb Classical Library.

The idea of natural law was not Roman; it was Greek. But the formulation given to it by the Romans was distinctive and this was the one which was bequeathed, largely through Cicero, to Western Civilization. It constitutes a cultural contribution in the realm of thought comparable to Roman law in the realm of human institutions. From the very beginning, there have been those who have insisted that natural law is the creature of fancy, that there is no evidence whatsoever that all men are endowed with reason and with the innate sense of right and wrong. But this caveat has not prevented the concept of natural law from recurring many times in the history of Western Civilization. It found its way easily into the thought of the Christian Church. It was an important source for the development of international law. It was one of the ideas of the eighteenth century Enlightenment. Finally, it has been one of the foundation stones of the American constitutional system.