Roman Law

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Abstract

The Romans developed a sophisticated body of law over one thousand years. The law was consulted and used in medieval and modern Europe, and from Europe it was exported around the world. Many modern legal systems are based, or partly indebted to, Roman law. The Roman legal tradition endured, even as specific rules fell away. The success of the legal tradition is due to the quality of the legal materials that the Romans produced. Roman office holders were eager to extend new rights to the public, and a professional body of lawyers were skillful in developing those rights and bringing them to a high degree of precision. The Romans eventually produced a systematic framework for their law, and that framework is still reflected in many modern legal systems. The framework paired two diverse bodies of law, property and obligations, which together reflected a person’s economic affairs. The two bodies are unequal; far more rights are treated under obligations than property, and the law of obligations is, to a large extent, an accessory to the law of property. The central role of property in Roman private law indeed proved to be a hindrance in the modern era, when states sought to use Roman private law as a foundation for their own legal systems.

Roman law has a special place in the study of antiquity. It survived as a living system of law beyond its thousand-year history as the law of the Roman people, and became a permanent part of many modern legal systems, both west and east. Therefore when we study Roman law we are, at the same time, studying the modern law, and more generally, discovering the subtle ways that we tacitly think about justice. This makes the study of Roman law powerful.

When we talk about the presence of Roman law in the modern law, we are not simply talking about rules. Though some Roman rules are still followed, Roman law is much more than a collection of rules: it is an intellectual tradition. This means that it contains a structure, a vocabulary, a manner of expression, and a stock of ideas about how people should live together. For example, rules are classified into separate groups, so that each group becomes a self-standing system; general and abstract ideas are fixed in certain words like ‘bond’ and ‘good faith’; generations of lawyers continue to speak in the same patterns, using cases, logic, and commands; and last, property is a central feature of most private relations. All of these elements, and many others, come together to form an intellectual tradition, which survives, century after century, even as the rules change.

Why has the Roman legal tradition survived for so long? If we can answer this question, we will understand the Roman achievement. The answer is found in the special character of Roman law, or more specifically, in the special character of the people who made it. Two groups of persons were most responsible for the success of the Roman legal tradition.

Urban praetor

The first group includes the various men who held annual public office and administered justice from the fourth to the first century BC. Of these, the urban praetor is the most important. Under the republican constitution, the urban praetor would allow persons to come to him with their legal complaints. They might be complaining about a neighbour with a badly maintained estate; about property that someone had taken away; about being cheated out of money. The urban praetor’s task was to supervise the creation of a legal claim, i.e. to turn the complaint into a form of words (in early Rome, spoken) that a different person, a judge, could use to assess the dispute.

In these cases, the main difficulty facing urban praetors of early Rome was that the formal and traditional Roman law used by Roman citizens was very limited. There simply was not enough of it. It allowed Roman citizens to deal with one another (for example, make an agreement) only in limited ways, and protected Roman citizens from loss and injury only in limited circumstances. Also, it did not offer any protection to foreigners when those foreigners engaged with or disputed with other foreigners, or even with Roman citizens.

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This was an intolerable situation for a society that, by 300 BC, was highly civilised and commercially important. Because most complaints came to the urban praetor, it was he who saw most clearly how the law fell short. His formal powers were restricted: he was empowered to administer justice, but not to make new law. Nevertheless, successive urban praetors, over 150 years, indirectly made new law by announcing that they were willing to hear new complaints. These announcements were set out in a public document, the Edict. The Edict was revised each year as a new urban praetor took office, and was on display near his tribunal. It described each new measure in a separate sentence, so that people could see whether justice was being extended to their particular complaint.

The urban praetors were very skilful in creating these new 'paths to justice'. Sometimes they modified the existing law, to make it less archaic. Sometimes they allowed the traditional law to be used by non-Romans. Sometimes they recognised that people were using new and different practices when they engaged with each other commercially, and that those new practices should be acknowledged in the law. And sometimes they simply invented new types of claims, particularly in cases where people were injuring other people, or harming other people's property. Most of these new paths to justice were open to both Romans and foreigners. The Edict grew and grew.

The purpose of a legal system is to give justice, but not every legal system is equally enthusiastic about doing it. Some legal systems, in fact, are not enthusiastic at all. They are slow to give justice; they are more concerned with process than with rights; they are reluctant to acknowledge new wrongs; they give priority to state power over individual rights. The urban praetors of the republic had none of these vices. They actively tried to give new remedies to the people who needed them. They were not worried that, in doing so, they were enlarging the powers of private persons to arrange their own affairs and pursue their private injustices. In short, they showed a great deal of energy and courage in the cause of giving justice. The success of the Roman legal tradition is substantially the result of their energy and courage.

Jurists

Perhaps the urban praetors found it easy to be courageous: they were responsible for announcing new rights, but not for developing all of the complex law that made the rights effective. A strange fact about law-making during this period is that rights were announced by the urban praetor before the law that underlay each right was developed. Modern justice is very different: the written law is large and complete, and rights are 'found' within the written law by an intellectual process. The praetorian law-making of the republic was the opposite of this. But the system worked, and it did so because the urban praetors did not promise a person he would win against his opponent, but only that he would have an opportunity to be heard at trial. His success at trial would depend on whether the law, with all of its complexity, favoured him. And developing that law was in the hands of a different group of persons, the jurists.

'Jurists' is a very general term to describe Romans who took a special interest in the law and found a vocation working in it. But the term is almost too general. Different jurists offered very different services, and over the centuries their professional profile changed a great deal.

Until the late fourth century, the development of the law was under close state control. To an early Roman, it was important that legal events be performed correctly. And because they put so much confidence in the power of words, it was important also that any words used to effect legal change (e.g. adoption, wills, promises, litigation) be in every way correct. A group of aristocrats, called the College of Pontiffs, supervised the words used in legal affairs. They instructed others in the proper forms of words, and gave opinions in cases where the form of words was uncertain.

None of this activity is part of the great Roman achievement of later centuries, and its importance lies in its decline around 300 BC. As long as the College kept its hold on legal interpretation, the opinion of a private person on the law was of no value to anyone. But when the College's hold on legal interpretation was broken and private persons were allowed to offer the same services, a new private vocation was born. These private persons were the earliest jurists, and performed the same tasks as the College was performing; they advised others on how to navigate the legal world of words and formulas, and interpreted the law when it was uncertain. Some measure of the College's role and prestige passed to these early jurists, and in many ways it was a permanent inheritance.

But these jurists, who for example drafted wills or provided the right words for speaking in court, are not the jurists for which Rome is remembered. It is instead the jurists who wrote sophisticated books about the law, and the first writing of such books did not occur until about 200 BC. It is difficult now to imagine how revolutionary this was. Until then, law was something that a
higher authority announced, and the people acted upon. The idea that law was a suitable subject for intellectual discussion, and that private persons could contribute to the law by thinking and writing about it, was utterly new.

In the beginning, the books were modest in scope, treating mainly the traditional law and providing commentary on it. As the centuries passed, it became obvious that the urban praetor’s edict was also an important source of law, and law books became more comprehensive. They also became more varied, as well as books of commentary, there were educational books, case books, and books with practical advice. Over time, their contents relied less on formal language and formulas, and more on deep analysis.

The books produced by these jurists were of such a high quality that juristic interpretation was accepted as a source of law. This did not mean that every jurist was a law maker (they frequently disagreed), but that the writings of jurists were used as authority to resolve legal disputes. This is notwithstanding the fact that jurists, at least until the middle empire, were not office holders or legislators, but private persons. They won their authority purely on the quality of their writings, and through their writings they became indispensable to the legal system.

The jurists made law, not by stating it outright, but by discussion and debate. Here is an example. The urban praetor announced in the Edict that he would give a person the opportunity to sue if that person had suffered in some way from another person’s fraud (dolus malus). But what does ‘fraud’ mean? One jurist, Servius Sulpicius Rufus (middle first century BC), said that fraud requires a lie: ‘Fraud is a trick to deceive, where one thing is pretended and another thing is done.’ If, for example, you tell me falsely that my property is worthless so that I will give it to you, then you have pretended that something false is true. But suppose the property is worthless today, but you know it will be valuable tomorrow. That should count as fraud, even though there is no lying. Or, suppose you lie to me about the worth of the property, but you are trying to help me in some way. That should not count as fraud, even though there is lying. So on reflection, Servius’ description of fraud is poor. By exploring examples, the Roman jurists improved their law, and a generation after Servius, the jurist Marcus Antistius Labeo gave a better description of fraud: a scheme to cheat another person.

The jurists used this kind of discussion and debate to build up the law. The challenge was to improve the law without abruptly changing it. Examples, real or hypothetical, were their most important instruments when they resolved a new controversy. After all, new controversies were never completely new: similar examples will have been discussed in the past, and these examples could not be ignored. The jurists therefore had the task of resolving the new controversy while being at least respectful of past examples. At the same time, they expected their resolution to be respected in the future, and they tried hard to find a resolution that would, if possible, solve controversies that might arise later. What this means is that every juristic opinion looks to the past (past examples), to the present (the present controversy), and to the future (possible future controversies).

This is the core of a legal tradition. It is a continuous discussion about law in which every statement aspires to be part of something permanent and ‘timeless’. Not every legal tradition, of course, deserves the attention of modern readers. The centuries-long discussion of the Roman jurists might have been mostly ignored by history, if not for two facts. First, for obscure reasons concealed in their own unique character, Roman jurists were unusually eager to resolve controversies correctly, and devoted an astonishing amount of energy in finding the most just result for each controversy. Second, the European successors to the Romans were so impressed by the quality and timelessness of the juristic literature that they continued the discussion the jurists had started. That discussion continues in the modern day.

How Roman law is expressed

When we talk about a law, we often do so indirectly. We ask: where does this law fit within the legal system? What law came before this one? How does this law affect people economically? We ask questions like this as part of our education. But any law is originally written for the people who use it, not for the people who want to learn about it. So to understand it properly, we need to begin with a different set of questions: who is this law addressed to? What authority does this law have? What other laws are needed to understand this one? In Roman law these are particularly important questions, because the answers are so often different from what we expect.

The Roman laws we usually study are those that deal with relations between private persons: disputes about agreements between people, or about the harm done by one person to another. We call this ‘private law’. In any private law matter, a person with a legal problem had to assemble the relevant law from several different sources. Among the several sources there was often a ‘first
source’, which occupied a special place because it was the original source of the right or remedy being sought.

For a small number of disputes, the first source was a statute. A Roman statute was not too different from a modern one: a formal statement by a lawgiver allowing or prohibiting some act. A famous example is the lex Aquilia, which created a remedy for damage to one’s property. But statutes could be difficult to read, and a litigant with a specific problem could not see clearly what remedy he could expect. For this purpose, the urban praetor ‘translated’ the statute into a simple pattern of words, making the wrong and the remedy clear. These patterns, published in the Edict, were a litigant’s second source of law. A litigant completed the pattern with his relevant details, and thereby produced a cogent statement of his problem (‘formula’) in order to help the judge at trial. But even these two sources of law were not enough. A dispute under the statute could raise many difficult legal questions about, for example, the blameworthiness of the act or the amount of money recoverable. For questions like these, a litigant needed a third source of law, the interpretations of jurists. This is broadly how law was collected from different sources, when the first source was a statute.

For most private law disputes, however, there was no statute, and the ‘first source’ was a statement by the urban praetor in his Edict that he was willing to consider a complaint. For illustration, we can use the law on fraud, discussed above. Below is the Edict’s statement on fraud:

For that which is said to have been done fraudulently, if no other action would cover the matter and there appears to be a just basis, I will grant a trial within one year of the time when it first might have been brought.

In many ways this is a very typical edictal statement. It is addressed to any member of the public. It is constructed as a promise: if a person believes he has been a victim of fraud, then the urban praetor promises him he will have the opportunity to bring the dispute to trial. There are also a few details which are special to actions on fraud: if the person might sue on some other ground (for example, theft), or if he waits too long before coming to the urban praetor, then he may not sue for fraud.

The second source is the pattern formula. As just mentioned, the formula is a statement in which the law and the allegations come together. It is addressed to the judge. For actions on fraud, the urban praetor provided this pattern:

If it appears that the defendant did something fraudulently and it has been no more than a year from the time the action might first have been brought, the judge shall condemn the defendant to pay to the plaintiff as much money as the matter is worth. If it does not so appear, he shall absolve.

The two litigants, together with the urban praetor, would adapt this pattern to their specific case. They would replace ‘defendant’, ‘plaintiff’, and ‘judge’ with the actual names of the participants, and instead of ‘the defendant did something fraudulently’, they would describe specifically what the defendant was alleged to have done. The completed formula would be passed to the judge.

The edictal statement and the pattern formula, however, did not provide enough law for the litigants to make a good argument, or for the judge to make a decision. In fact, they probably needed a great deal more. The third and perhaps most important source is, once again, the interpretations of jurists. Every word of the edictal statement was uncertain in some respect, and needed a professional explanation. A jurist might give his interpretation directly to the litigants or judge, or they might find it in the vast literature that the jurists produced about fraud. For illustration, this is the juristic text from which we took our discussion above:

Servius defines dolus malus as a kind of device by which we deceive another by acting one way and pretending another. Labeo however says that it is possible for one to act to deceive another without any pretence: he also holds that one can act one way and pretend another even without dolus malus, as those who perform this kind of dissimulation in order to protect themselves or others. Accordingly he defines dolus malus as any trick, deceit or device brought on to cheat, fool or deceive another. Labeo’s definition is the correct one.

This was written by the jurist Domitius Ulpianus around 200 AD. He is giving the opinions of two jurists from several generations earlier. He is disagreeing with one and agreeing with the other. By discussing them together and giving their reasoning, he gives rhetorical force to his view that the second opinion is better. A great many texts like this one began as advice to clients (litigants, judges,
the urban praetor himself). They are addressed to those with training and experience in the law. This very fact makes the interpretations of jurists the most valuable source of law.

How Roman law is organised

When we speak about the organisation of the law, we are speaking about its content, for example ‘property law’, rather than its outward form, for example ‘Edict’. The Romans recognised early that organising the content of their law was a desirable goal. If the law was organised in a systematic way, then it was easier to find solutions to problems, and easier also to teach and learn the law. But more important: if the law was organised in a systematic way, then it was far easier to criticise the law, develop the law, and render justice according to the law.

The Roman jurists, as already discussed, relied heavily on past examples (real or hypothetical cases). Like modern lawyers, they expected similar cases to be treated similarly. The very act of selecting similar cases (and excluding dissimilar ones) is a tacit act of organisation, and is a crucial first step for everything that follows, whether it be improving the law or solving a single controversy.

For example, there are many ways to harm a person. If we could group together all of these many ways, we could ensure that the law treated ‘harm to a person’ appropriately across its different manifestations. And we could do so without being distracted by a lot of irrelevant rules on, for example, property damage or contract.

The Romans achieved a proper and systematic organisation of private law in the middle of the second century AD. The jurist Gaius is usually credited with the achievement. He himself was a law teacher, and he prepared a book for students, the Institutes, that reflected the new organisation. The Institutes broadly divides private law into three: the law of persons (status under the law, for example ‘spouse’, ‘slave’, ‘citizen’), the law of things (the law that affected a person economically), and the law of actions (rights in court). Modern civil codes still retain some aspects of this ‘institutional system’.

Gaius’ real achievement, however, took place in the subdivisions within these three divisions, and in particular the subdivisions within the law of things. The law of things included property rights of all kinds, but also debts, which could be good or bad, depending on whether they were owed or owing. In Roman law, the formal word for these debts is ‘obligations’. These two strands, property and obligations, had historically occupied separate parts of the law. In fact, suing on a property right was completely different from suing on an obligation. The pattern formulas used very different words, and conceptually, they were utterly unlike each other: in a property action, a person claimed a thing as his own, while in an action on an obligation, a person called on another person to perform.

Gaius recognised that, despite their differences, property and obligations were economically meaningful to people in a similar way. Common legal events, like sale, partnership, settlement agreements, and inheritance, used both bodies of law quite freely. And together, the two bodies of law represented almost the entire economic life of a person. So Gaius’ achievement was this: he synthesised two completely separate bodies of law, while at the same time acknowledging their differences.

Gaius subdivided obligations even further, in a way that is familiar to all modern civil law systems. An obligation could be created in distinct ways. If it was created by an unperformed agreement or promise, it was a contractual obligation, and if it was created by an independently harmful act, it was a delictual obligation. Contract and delict are therefore, at once, the same and different. Both are obligations, and are sued on and enforced in a similar way. But their utterly different origins require different outcomes, so that, for example, a victorious claimant typically receives more on a delictual obligation; a defeated debtor suffers civic disability (infamia) in a delictual obligation; and contractual obligations can be charged against the debtor’s heir, if the debtor dies. This is the virtue of classification: it sharply identifies the similarities and differences among laws, so that when a particular law is applied, the correct cases and principles are brought forward and the irrelevant ones are ignored.

The central place of property law

In the institutional system, the law of property and the law of obligations are united under the law of things. We typically say that, though united, each deals with a different kind of relationship. The law of property deals with relationships between a person and a piece of property (for example, ownership), while the law of obligations deals with relationships between persons (for example, a money debt owed by one person to another). This is accurate, but it hides the deeper differences
between the two. They are, in fact, unequal partners. The law of property is mainly concerned with a single right, the right to claim a piece of property as one's own. The law itself is complex, but it tends to focus on this single right. The law of obligations, in contrast, is concerned with many different rights, with the rights hidden under the broad description 'relationships between persons'. Under the law of obligations we find, for example, the right to claim money from a buyer, the right to demand a service, the right to seek damages for theft, and many more.

The two bodies of law are unequal in this respect because they have very different histories. The law of obligations was largely created by the urban praetor and the jurists. The multiplicity of rights, added over many years, was a deliberate response to a changing society. Property rights, on the other hand, are truly ancient, and the Roman right of dominium (similar to 'ownership'), along with other, lesser property rights, were permanent features of the law long before the jurists appeared. When the jurists ultimately engaged with disputes over property, their role was mostly confined to determining when a person had, or did not have, a property right. This means that when we study only the law of property, we learn rather little about the broad nature of property, the role of property in Roman society, or the impact of property on the Roman economy. In fact, we learn rather little about property beyond how to acquire it.

Ironically, if we wish to learn about the deeper aspects of property, we have to study the law of obligations. Most of the laws that are classed as obligations deal, directly or indirectly, with property: keeping it safe, handing it over, lending it, damaging it, stealing it. And each of these individual laws protects an owner's property in some way. For example, when you temporarily surrender your property to another person under the contract of hire, the law ensures that the property remains yours, that it is returned to you, and that the borrower does not damage it. When a person injures you and forces a visit to the doctor, the doctor's fees are treated as property which you may claim from the wrongdoer. Obligations like these show very clearly, in a way the law of property does not, the different situations in which property interests were valued and protected in Roman law.

In the modern era, when states sought to use Roman law as a foundation for their own private law, the dominance of property rights provoked dissent. Material interests seemed to outweigh other interests, such as welfare and family rights, and this was considered unsuitable for the modern age. Modern states with a Roman legal tradition have therefore altered the underlying framework to soften the emphasis on property.

The study of Roman law

Roman law had a very long history in antiquity, from the fifth century BC to the sixth century AD. During that time its law evolved, and its people produced very different legal materials. Each period offers a different opportunity for study.

It can be very exciting to see a community experience rapid and sophisticated legal development. So for many, the most interesting period is the late republic, when the urban praetor expanded the reach of the law, and the jurists became professionalised and respected. The early empire, in contrast, represents a period of legal stability, and while legal development is less apparent, legal doctrine comes to the fore. This makes it the most attractive period for those who wish to study the complexity of what the Romans had produced, at the peak of their achievement. But the very opposite also has its attractions: legal material from archaic Rome gives legal anthropologists an early view of property, punishment, dispute settlement, and much more. Finally, for many, the focus is the modern world and its Roman law inheritance. For this, the key period is the sixth century AD and the great re-promulgation of Roman law by the emperor Justinian. This was a project that preserved a large body of classical law for future generations. It is largely due to Justinian that we can find Roman law without returning to the ancient world at all.

Further reading