INTRODUCTORY READINGS

I. TRADITIONS

A. THE WEST

Some Western countries are said to have a "civil law system," others a "common law system." There are two differences. A modern difference is that today, civil law systems are generally codified. Private law, including the law of contract, tort, unjust enrichment, and property, is governed by the provisions of civil codes. In common law systems, most of private law rests on the decisions of judges. These decisions have authority: in new cases courts are supposed to follow the precedent set in earlier cases. Statutes have a higher authority: in case of a conflict between precedent and statute, courts are supposed to follow the statutes. Yet, for the most part, the statutes fill in the gaps and make corrections in the law made by courts.

The second difference is that the law of civil law systems was originally based on the law of ancient Rome. The law of common law systems was originally based on the decisions of English courts. We will first describe how the two legal systems originated. We can then better understand the role of codification.

1. The Civil Law Tradition

a. Roman Law

i. The Roman Jurists

The Jurists

The West has been shaped by two great intellectual traditions: Greek philosophy and Roman law. Ultimately, both influenced the development of the civil law. In the beginning, however, the two seemed to have little in common. They sought the answers to different questions and by different methods.

In philosophy, literature, art, and architecture, the Romans borrowed from the Greeks. In engineering, war, and law they were their own masters. In law, they produced a learned tradition in the hands of a distinct class of men with a specialized education: the jurists (*iurisconsulti*). There was no equivalent group in ancient Greece.

The jurists were not appointed by the state. They held no regular office. They did not become jurists by studying in a law school or university or by passing examinations.

A young man who wished to become a jurist would attach himself to an established jurist. He would listen as the older man discussed how the law

of Rome applied in actual cases or hypothetical cases that were raised for purposes of argument. The young man became a jurist when people began to seek his opinions as to the law.

The jurists played no direct role in the Roman procedure for settling disputes. In this procedure, as it had developed by the late Roman Republic, the first step for a party who wished to bring a lawsuit was to have a government official, called the *praetor*, appoint a judge (*iudex*) and issue an instruction (*formula*) telling the judge what to do. The instructions were very general. They might tell the judge that if Octavius had bought a horse from Titius for 100 sesterces and had not paid, Octavius must pay him that amount. Or they might tell the judge that if he found that Marcus had unlawfully damaged Julius' horse, he must pay its value. The judge would then listen to the parties or their representatives, consider whatever evidence he deemed relevant, and make a ruling. Surprisingly, there were no state officials charged with enforcing his ruling. The loser was expected to pay out of respect for law, out of the desire to maintain the respect of others, and out of fear of whatever harm the winner and his friends could do to him if he refused.

The *praetor* and the judge were prominent men, but neither had any specialized legal training. Neither did the representatives who argued on behalf of the parties. The *praetor* was chosen for a term of one-year, and the judge was appointed to resolve a particular case. The parties' representatives were not jurists. They were orators (*oratores*). They were trained in rhetoric, the art of making speeches, which had been perfected by the Greeks. One of the most famous was Cicero, who had studied Greek rhetoric carefully, and whose speeches to the Roman senate became models of the effective use of language. They were studied in the West, and, until perhaps a century ago, were known to everyone with a university education. But Cicero had no special training in law.

The *praetor*, the judge and the orators depended on the jurists for their knowledge of law. The *praetor* promulgated a list or edict at the beginning of his term of the types of instructions that he would issue to judges. He did so in consultation with the jurists, and on the basis of the lists of previous *praetors*, who had also consulted with jurists. The instructions were very general. To determine their meaning, judges and orators would again consult with jurists.

Their Method

The jurists developed an intellectually sophisticated comprehensive body of law, the like of which the Western world, at least, had never seen. It was so sophisticated that many historians have thought that the Romans borrowed it from the Greeks, whom the Romans admired, and who were intellectually able philosophers. Nevertheless, a few comparisons will show how different the Roman method of reasoning was.

In discussing the branches of law that we call contracts and torts, Greek philosophers were concerned not with the specifics but with the underlying principles of justice. Aristotle distinguished distributive justice which provided each citizen with a fair share of resources, from commutative justice, which preserved his share. What was deemed a fair share would vary with the type of constitution: in an aristocracy, or rule by the best, the wiser and more virtuous would ideally have a larger share than others; in a democracy, or rule by the many, each citizen ideally would have an equal share.

Aristotle distinguished between commutative justice in involuntary and voluntary transactions. In involuntary transactions, one person enriched himself by taking another's resources, and the law required that he restore the victim to his original position. In voluntary transactions, each person exchanged resources, and commutative justice required that they exchange resources of equal value so that their share of resources stayed the same. Aristotle's distinction not only resembles the distinction between torts and contracts, but may be the origin of that distinction. Gaius (fl. 130–180 AD) was the first Roman jurist to distinguish between contract (*contractus*) and tort (*delictus*);[1] historians believe he was following Aristotle.[2]

Nevertheless, the Roman jurists were concerned with what we would call particular contracts and torts, each with its own rules. Having distinguished contract and tort, Gaius immediately turned to describing the particular contracts and torts recognized in Roman law and the rules peculiar to each.

The Romans did not have a general law of contract. When a contract was binding, for example, depended on what kind of contract it was. Some were binding on consent such as sale, lease, partnership and mandate (a contract in which one person does another a service without compensation). Some were binding when an object was actually delivered: for example, gratuitous loans for use or for consumption, gratuitous deposits for safekeeping, and pledges. Some were binding only if a formality was completed. Others were not binding until performance. An example was barter: one party agreed to trade his horse for the other party's mule. Eventually, a party who had performed could compel the other party to return his performance or to perform in return. The jurists understood that a party must consent in order to enter into any of these contracts. They did not explain why only some of them are binding on consent.

Similarly, Roman tort law was a law of particular torts. One was an action for *iniuria*: injuries to dignity or reputation, which the Romans explained by particular examples. A person could recover for *iniuria* if

1. G. Inst. III.88.

2. Reinhard Zimmermann, *The Law of Obligations Roman Foundations of the Civilian Tradition* (Capetown, 1990), 10–11; Max Kaser, *Römische Privatrecht* (Munich, 1959), 522; A.M. Honoré, *Gaius* (Oxford, 1962), 100; Helmut Coing, "Zum Einfluß der Philosophie des Aristoteles aud die Entwicklung des römischen Rechts," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Rom. Abt*. 69 (1952), 24–59.

another composed or recited a song attacking him,[3] or if someone beat his slave.[4] He was liable for *iniuria* if he made an indecent proposal to a woman[5] or followed her "assiduously."[6]

Another was an action under the *lex Aquilia*, one of the earliest plebiscites enacted by the people when they first acquired authority to make their own laws. The language of the law said that one had to make compensation for harm done "*iniuria*," which, in this context, meant without right or unlawfully. The jurists decided that a person was liable only if he was at fault, either by causing the harm intentionally or negligently. This is the first time that a legal system adopted the general principle of liability for fault, and specified that one might be at fault in either of these two ways. That principle is to be found in all modern legal systems, and all of them, directly or indirectly, borrowed that principle from Roman law, including common law systems. Roman law, like most modern legal systems, also recognizes cases in which a person might be strictly liable, which means liable without fault.

Characteristically, the jurists explained fault by particular illustrations. A pruner is negligent if he harms someone by cutting off a branch over a public way without calling out.[7] If a farmer burns stubble and the fire gets out of control, he is negligent if he did so on a windy day but not if the day was calm and the fire spread because of a sudden gust of wind.[8] A javelin thrower is negligent if he kills someone by throwing it in an inappropriate place,[9] and so is the stoker of a furnace if a fire starts because he fell asleep instead of watching it,[10] and a barber who shaves a customer out of doors near a playing field and cuts him when a ball strikes the hand holding the razor.[11] So is one who digs a pit to catch a deer or bear in a public place where someone might fall in rather than in the usual place for such pits.[12] A mule driver is negligent if he is too inexperienced to control his mules,[13] as is a carter if he loaded stones badly so that one fell out of his cart,[14] and a doctor if he was too unskillful to perform an operation properly[15] or to prescribe the right drug.[16]

This method was not that of Greek philosophers. Aristotle, for example, discussed when, in principle, a person has done what is right or wrong. He explained that the source of his action must be in his intellect and will, since man is a rational animal who acts through reason and will. He is not responsible if some external force moves his arm so that it strikes someone else. Aristotle considered to what extent a person acts voluntarily when he acts under duress. He never discussed negligence.

Similarly, when the Greek philosophers discussed property, they discussed the justification for it. Plato proposed that in the ideal state, there

3. Dig. 47.10.15.27.
4. Dig. 47.10.15.34.
5. Dig. 47.10.15.20.
6. Dig. 47.10.15.22.
7. Dig. 9.2.31.
8. Dig. 9.2.30.3.
9. Dig. 9.2.9.4.
10. Dig. 9.2.27.9.
11. Dig. 9.2.11.pr.
12. Dig. 9.2.28.pr.; see Dig. 9.2.29.pr.
13. Dig. 9.2.8.1.
14. Dig. 9.2.27.33.
15. Dig. 9.2.7.8.
16. Dig. 9.2.8.pr.

should be no private property. Aristotle, who had been his pupil, argued that without private property, those who worked much would receive the same as those who worked little, and there would be constant quarrels over the use of things.[17] Centuries later, Aristotle's arguments were used to justify private property by medieval philosophers such as Thomas Aquinas and early modern philosophers such as Hugo Grotius. But the theories of Plato and Aristotle did not interest the Roman jurists. Their concern was not the principles that justify private property but with the rights that attach to various kinds of property and how these rights are acquired.

Again, they discussed particular situations. The sea and seashore are "common things" that belong to everyone, and so everyone can use them.[18] But an individual owns gems or pebbles he takes from the shore.[19] Moreover, an individual can build a hut on the shore.[20] Others must keep clear of the hut.[21] But his ownership lasts only as long as the building remains. If it collapses, someone else can build on the site.[22] Wild animals, birds, and fish belong to no one, but become the property of the person who captures them.[23] Rivers and harbors are "public things." They belong to the public, and everyone can fish or boat on them.[24] The river banks are owned by those whose lands border them, yet everyone using the river is free to beach boats, dry nets, and haul fish onto the banks, and to tie up to trees there even though the trees belong to the owner of the land.[25] Theaters and stadiums are "civic things." They belong to the citizen body as a whole, not to the citizens as individuals.[26] An individual citizen, however, has a right of action against anyone who prevents him from using them.[27]

Out of this attention to particulars grew what are still regarded as some of the basic distinctions of property law. One is between ownership and possession. Roman law protected not only the owner but the possessor of property. If someone takes the goods or the land that is in my possession, I do not have to prove that I was the owner in order to get it back from him. Who, then, is a possessor? Certainly, if I leave my land for an errand in a nearby village, I am still in possession of it: if I find that a stranger moved in while I was out I can get the land back without proving I was the owner.[28] Do I have to walk over every foot of the land to gain possession? Certainly not.[29] Is it necessary that I at one time did have physical possession? Suppose land that I purchased was pointed out to me from a terrace on neighboring property, or that goods were delivered to my door, but I had not yet touched them? According to the jurists, I was in possession.[30]

This method of the Roman jurists was at once concrete and abstract. It was concrete in that each example concerns a particular factual situation. It is abstract in that each factual situation is chosen to make a legal point, and the facts presented leave out everything that is not relevant to that

17. *Politics* V.ii 1263[a].
18. I. 2.1.1; I. 2.1.5; Dig. 1.8.2.1.
19. Dig. 1.8.3.
20. I. 2.1.5; D. 1.8.3.
21. Dig. 1.8.4.
22. Dig. 1.8.6.pr.
23. I. 2.1.12.
24. I. 2.1.2; Dig. 1.8.5.pr.
25. I. 2.1.4; Dig. 1.8.5.pr.
26. I. 2.1.6; Dig. 1.8.6.1.
27. Dig. 47.10.15.7.
28. Dig. 43.16.1.24.
29. Dig. 41.2.3.1.
30. Dig. 41.2.18.2.

legal point. For that reason, it is hard to tell, reading the Roman jurists, whether they are describing a real case, but leaving out facts that they deem to be irrelevant, or whether they are inventing a hypothetical case, putting in only the fact relevant to the point they wish to make.

The Roman jurists were concerned with the meaning of concepts: ownership, possession, negligence, sale. But while the Greek philosophers explored the meaning of concepts by defining them, the Roman jurists did so in the way just described: by describing one situation after another in which the concept did or did not apply.

The concepts of the Greek philosophers were often new and technical, and had no meaning outside their own philosophies, but were meant to describe aspects of reality for which ordinary concepts were inadequate. Plato thought that the forms or abstract ideas of things were ultimately real. Aristotle thought that individual things were real, but each thing had an essence, an end, an efficient and a material cause. In contrast, the concepts that were fundamental to the Roman jurists were often taken from ordinary life. Indeed, they were often so common that one cannot easily imagine a society without them. In every society that has developed the use of money, people will buy and sell. In every society, children will be taught not to be negligent in handling sharp objects or fire. In every society, someone will sometimes possess something that is not his own: a bow, a pot, a skin. The genius of the Roman jurists was not to invent new concepts but to see the legal significance of ordinary ones, and then to make them precise by a string of particular examples.

The Work of Justinian

For reasons that no one understands, the last great Roman jurists wrote no later than the third century AD. Their works continued to be read. As the Empire became more bureaucratic, Roman law was taught in law schools whose graduates staffed the courts that decided cases. Yet the classical age of Roman law was over. The teachers in the law schools confined themselves to the work of the classical jurists, without either adding to it or refining and systematizing it.

In the sixth century, after the western Roman Empire had fallen to barbarian invaders, the Emperor Justinian decided to preserve the work of the classical jurists while simplifying the law. His officials prepared a compilation of Roman law later called the *Corpus iuris civilis* (the body of civil law) which is sometimes referred to as "Justinian's Code." It was not a code in the modern sense. The largest part of it, the Digest, was more like a scrapbook. The compilers excerpted short quotations from the works of the classical jurists and arranged them roughly by topic. Two other parts of Justinian's *Corpus* consisted of imperial legislation since the classical era. The last part was an edited version of an introduction to Roman law by the jurist Gaius.

It is said that the compilers examined ten thousand books on law, "book" meaning a scroll. Because Justinian provided that only his compilation would have the force of law, these scrolls were not recopied. All of them have been lost except for the introduction to law written by Gaius,

and it was only rediscovered in the nineteenth century. In the Empire, Justinian's compilation fell into disuse, and it was no longer copied. Indeed, only one copy survived. It had been left in Italy during one of the short intervals before imperial forces were driven out. If that one manuscript had been lost, the Roman legal tradition would have been lost as well, since it contains almost all that is known about Roman law.

ii. The Medieval Jurists

The Jurists

In the East, the Roman Empire endured until 1453, when its capital, Constantinople, was captured by the Turks. In western Europe the Empire was destroyed by barbarian invasions beginning in the fifth century. The next five centuries are remembered as the Dark Ages. In the late eighth century, Charlemagne, the king of the Franks, temporarily reunited much of western Europe. The Pope – the leader of the Catholic Church – recognized him as Emperor, a title that was borne by his successors. But his empire collapsed when a new series of invasions began in the ninth century. In the eleventh century, the invasions came to end, peace was restored, cities and trade grew, and a new civilization began to develop. Roman law was revived, and provided a legal system far more sophisticated and in tune with the needs of society than the law of the barbarians. From the very beginning of the revival, the teaching and interpretation of Roman law was the task of jurists. This time, however, the jurists were professors in universities.

According to a traditional story, around the year 1070, the surviving copy of the *Corpus iuris civilis* came into the hands of a man named Irnerius, who began to lecture on the Roman law in the city of Bologna in Italy. His four most prominent students were called "the four doctors of Bologna." Later medieval jurists traced their pedigrees through them. It is unlikely that Irnerius was the first or the only one to lecture on Roman law. Nevertheless, the revival of Roman law began around 1100 in what Kenneth Pennington called "the big bang."[31] The law school at Bologna became one of the first universities in the West, attracting students from all over Europe. Gradually, Roman law became accepted throughout most of the European continent as the "*ius commune*" – literally, a "common law" – binding whenever there was no local law to the contrary. The exception was England, where Roman law was never accepted; English "common law" developed on the basis of judicial decisions. After continental countries adopted civil codes, the Roman law was no longer a *ius commune* or common law of Europe. Today, the term "common law" is used to distinguish the law that developed in England from continental civil law.

In medieval Europe, as in ancient Rome, the jurists were a distinct class of men with a specialized education. Unlike the Roman jurists, they

31. Kenneth Pennington, "The 'Big Bang': Roman Law in the Early Twelfth-Century," *Rivista internazionale di diritto comune* 18 (2007), 43 at 70.

acquired this education by studying in universities. The curriculum was the *Corpus iuris civilis* of Justinian, which they studied, text by text, over a period of four to five years. There were no entry requirements. Anyone could study who had learned enough Latin to do so. There was no university administration to appoint the professors. Anyone could give lectures if he had graduated from a university and received the title of *Doctor iuris* – Doctor of Law. There was no university budget. Professors were paid by their students, and so, to make a living as a professor, one had to attract a large number of students by being very prestigious or very popular. Classes were held, at first, in churches, which at that time were often used for many non-religious purposes. Students lived in inns, which became the first dormitories. The professors examined the students and conferred a doctor's degree on those who passed their examinations. The students formed associations to protect themselves against merchants who charged too much for food or inns that charged too much for lodging. These associations also ensured that the students were fairly treated by the professors. They fined professors who were late for their lectures, or who spoke too long, or who taught materials that were of interest more to themselves than to their practically minded students.

The Roman jurists had held no official position and had advised the *praetors*, judges, and orators who had no legal education but were engaged in administering the law. In contrast, in medieval Europe, wherever Roman law spread, cases were argued by lawyers and decided by judges with a university degree in law. Even where Roman law was not yet accepted, kings, nobles, and city authorities hired law graduates to help with the legal aspects of governing.

To be a jurist now meant to be an expert in law in a different way than in ancient Rome. The Roman jurists were experts in a law that was largely unwritten, or to be found in the writings of other jurists like themselves. There were few statutes, and the edicts or instructions of the *praetors* were general. A jurist was a person who, after years of study with an established jurist, could give his own opinion on questions of Roman law that other jurists would respect when asked how the law would apply to a certain factual situation. He would not cite any authority for his opinion except, possibly, the opinion of another jurist.

The medieval jurist was an expert on the texts found in the *Corpus iuris civilis*. He explained what these texts meant. The medieval jurists who were active from the twelfth to the mid-thirteenth centuries are called the Glossators because their writings consisted largely of *glossae* or notes written in the margins of manuscripts of the *Corpus iuris*. The notes might clarify an obscure term, or interpret a rule, or reconcile one text with a seemingly contradictory text that appeared elsewhere in the *Corpus iuris*, or simply list all the texts relevant to the same legal issue. The work of the Glossators culminated in the *Glossa ordinaria* or Standard Gloss compiled by Accursius (1182–1263). It contained over 100,000 individual glosses, many of them taken from the work of earlier Glossators. It had immense influence, and printed editions were still being published in the seventeenth century. Later jurists are referred to as Commentators because