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ROMAN AND COMMON LAW

A COMPARISON IN OUTLINE

CHAPTER I. THE SOURCES

1. LEGISLATION

With us legislation has always been in form the act of the King, though for many centuries the co-operation of the two Houses of Parliament has been necessary and, for two centuries, the Royal veto has not been exercised so far as the English law is concerned. But, in Rome, the legislative power shifted in much more striking ways. During the Republic it was in the hands of Assemblies of the people, not representative bodies such as our House of Commons, but bodies in which all male citizens sat and voted. There were several such Assemblies and we need not here consider the vexed questions of their relations to each other and their respective competences.[1] The different Assemblies were grouped in different ways and while the voting within each group was by head, this decided only the vote of the group, which was the effective vote in the Assembly. As might have been expected the legislative power was at first in the hands of the Assembly (*comitia centuriata*) in which the grouping was such that an overwhelming preponderance was given to the wealthy and noble, but passed ultimately to the Tributal Assembly, arranged on democratic lines. But the machinery was very different from that by which an Act of Parliament is produced. There was no such thing as a 'Private Member's Bill': every measure had to be proposed by the

[1] Jolowicz, *Historical Introduction to Roman Law*, 2nd ed. ch. v.

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presiding officer, himself an elected 'magistrate', i.e. a high officer of State. There could be no amendments: the measure must be passed or rejected as it stood. Even the presiding magistrate had not a free hand in early times; no measure could become law without 'auctoritas patrum', the approval of a body which seems to have consisted of the patrician members of the Senate. And, till the bad times at the close of the Republic, all measures were previously considered by the Senate and submitted to the Assembly in a form which the Senate had approved.[1] The Senate was not elective; vacancies were filled by nomination, at first by the Consul, later by the Censor, for the time being.

By the end of the Republic, when the Empire had become a vast area, popular Assemblies of the old type had become impracticable, and, early in the Empire, by no act of legislation, but by the Emperor's influence, legislation passed to the Senate, which was now substantially nominated by him. Its enactments (*senatusconsulta*) show a gradual transition from instructions to the magistrates, which had always been within the province of the Senate, to direct legislation. Here, too, the measures were proposed by the presiding magistrate, who was the Emperor or his nominee, so that the Senate had very little independence. And when in the second century the Emperor claimed to legislate directly, *senatusconsulta* soon ceased to be utilised: thenceforward the Emperor was the sole legislator. Thus the evolution of legislative power was from popular legislation to legislation by the Head of the State, exactly the opposite course to that which it has hitherto taken with us, though it must be admitted that to-day the tendency is for very few bills to become law which are not prepared by the government and then submitted to the legislature.

In addition to these methods, there existed in the later centuries of the Republic and in the first century of the

[1] Jolowicz, *cit.* pp. 30, 31.

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Empire a method of legislation to which the common law has no real parallel. The administration was in the hands of annually elected magistrates, and the more important of these, Consuls, Praetors, Aediles, had the *ius edicendi*, i.e. the power of issuing proclamations of the principles they intended to follow. For the most part these seem to have been no more than declarations of policy, but that of the Praetor became a great deal more. The Praetor Urbanus had charge of the administration of justice. All ordinary litigation came before him in the first instance and the issue was framed under his supervision, though the actual trial was before a *iudex*, who was not a professional lawyer, but a mere private citizen of the wealthier class, aided by professed lawyers. At some time in the second century B.C., a statute, the *l. Aebutia*, authorised a more elastic system than the *legis actio* hitherto in force.[1] The new method, by *formulae*, needed explanation, and the Praetor's Edict at once assumed great importance as the agency by which this was given. The power of moulding the procedure and the forms of action carried with it, inevitably, much power over the law itself, though there is no reason to suppose this was originally contemplated. However this may be—it may have been only a tolerated usurpation of power—the Praetor began to give actions where the civil law had given none and defences which the civil law had not recognised, in such a way as to create a great mass of law. The Edict was valid only for the year, but in fact it was renewed from year to year by the successive Praetors, with only such changes as experience suggested. It was thus a convenient mode of experimental legislation. A good rule survived: a bad one was dropped or modified. The tendencies of change were of course in the direction of equity and thus it is common to speak of praetorian law as the Roman Equity. And, apart from the general equitable

[1] It is probable that the formula was in use for some purposes before this enactment. (Jolowicz, *cit.* pp. 226 *sqq.*)

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trend of his innovations, the Praetor, like the Chancellor, respects the earlier law: he does not set aside the civil law, but he circumvents it.

Herein is another similarity. The fundamental notions, the general scheme of the Roman law, must be looked for in the civil law, a set of principles gradually evolved and refined by a jurisprudence extending over many centuries, with little interference by a legislative body. The Edict is a collection of ordinances issued by the Praetor, by virtue of his *imperium*, which, while formally respecting the civil law (for the Praetor cannot alter this) practically modifies its working at a number of points where conditions called for such modification. The Edict can hardly be said to express any general principle: even in its latest form as *ordinatum* by Julian, it remained a set of sporadic rules (it has been called 'chaotic'[1]), a mere appendage to the civil law. All this may be said equally well of our Equity, except that in the nineteenth century it became much more systematised than ever the Roman Edict was. On this it is enough to cite a few words of Maitland:[2]

> Equity was not a self-sufficient system, at every point it presupposed the existence of Common Law. Common Law was a self-sufficient system.... If the legislature had passed a short act saying 'Equity is hereby abolished', we might still have got on fairly well; in some respects our law would have been barbarous... but still the great elementary rights... would have been decently protected.... On the other hand had the legislature said 'Common Law is hereby abolished', this decree...would have meant anarchy. At every point equity presupposed the existence of common law.... It [equity] is a collection of appendixes between which there is no very close connexion.

All this might have been said, *mutatis mutandis*, of the Praetor's Edict.

It would be hard to find a better description of the functions of English Equity than Papinian's words (D. 1. 1. 7. 1): 'ius praetorium est quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris

[1] Biondi, *Prospettive Romanistiche*, p. 40.
[2] *Equity*, p. 19.

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civilis gratia propter utilitatem publicam'. And, just as the personality of the Praetor seems to have exercised a considerable influence on the Edict during his term of office, at any rate in early times, so we may say that the personality of the Chancellor, for a long time the sole, and until the nineteenth century the dominant, judge in Equity, was a powerful factor in the development of Equity.

Some of the Edict, however, has nothing particularly equitable about it, and a great part of the Roman equitable development owes nothing to the Edict. And the Edict differs from Equity in many ways. It was not administered by a separate tribunal, like the Chancellor's Court, or by a Court acting in special capacity, like the Exchequer. It did not acquire a special ethos through being handled by a separate Bar. A praetorian action was formulated before the Praetor and tried by a *iudex*, like a civil action. And the fields are very different. The Praetor never developed the Trust concept, which is probably the most important product of Equity, and he revolutionised the law of succession not only under wills, but in intestacy, which the Chancellor never touched. There is for the Praetor no question of the principle that 'Equity acts *in personam*': he creates both actions *in rem* and actions *in personam*. There is nothing corresponding to the writ of Subpoena. He has means of putting pressure on parties, but he applies them in civil actions as much as in praetorian. And the rules are not established, as those of Equity are, by a gradual crystallisation out of a series of cases, but by definite acts of legislation, though it is legislation of a peculiar kind. In fact the Edict is much more like a series of reforming statutes than it is like Equity as conceived in common law countries. Most law reform is equitable in some sense.

One further parallel between the Praetor and the Chancellor may be drawn. Just as the Praetor introduced by his Edict new actions, so, in the early years of our writ system,

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and before the growth of parliamentary power in the thirteenth and fourteenth centuries, the Chancellor, by reason of his control, as the head of the royal secretariat, over the issue of original writs, had a quasi-legislative power of developing the common law. To quote Pollock and Maitland:[1] 'A new form of action might be easily created. A few words said by the chancellor to his clerks: "such writs as this are for the future to be issued as of course"—would be as effective as the most solemn legislation.'[2]

2. CASE LAW

The Romans had, in principle, no case law: the decision of one Court did not make a precedent binding if the point arose again. This was inevitable. In a system in which the *iudex* was not a lawyer, but a private citizen, little more than an arbitrator, it would be impossible for his judgements to bind. It is true that he usually acted with legal advisers, but this would not suffice, for to make the decisions binding on others would be to give legislative power, within limits, to indeterminate groups of irresponsible advisers.[3] This does not indeed apply with the same force in the later Roman law, when, in principle, cases were tried to decision by the magistrate himself, who was often a distinguished lawyer; and when they were, as they might be, delegated for trial, the *iudex datus* was normally a lawyer chosen from those practising in the Court.[4] But it is not surprising that no such innovation was made as to give their judgements force as precedents. The later Emperors were autocrats, not likely to allow to the lawyers what was in effect legislative power.

[1] i. p. 171.

[2] See also Holdsworth, i. pp. 397, 398: 'writ, remedy and right are correlative terms'.

[3] On the *consilium* of the *iudex*, Wenger, *Römisches Zivilprozessrecht*, pp. 29, 194. It is quite possible that some of the advice so given found its way into the writings of the jurists, and so acquired authority.

[4] Bethmann-Hollweg, *Civilprozess*, iii. pp. 121 *sqq*.

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It is sometimes said, and it is literally true, that decisions by the Emperor constituted an exception. His *decreta* were binding precedents, at least if they were meant to be such.[1] This however is not really the introduction of a new idea into the law. The Emperor was a legislator with a free hand and he could lay down the law in any way he thought fit. Whether he decided a point in a general enactment or in the course of the hearing of a case, what he said was law. Our books too contain cases which definitely break with pre-existing law and introduce absolutely new principles,[2] but in general, each decision is only a step forward on a way already marked out. However, the *decreta* of the Emperor are under no such limitation. We have remains of some collections of *decreta*[3] from which it is plain that the Emperor often establishes what he thinks a salutary rule without reference to its relation to the earlier law.[4] In fact, the usual mode of statement puts the emphasis wrongly. We ought not to say that decisions were binding if they were by the Emperor, but that what the Emperor laid down was law even if it was merely in a decision.

It is, however, clear that though decisions were not binding precedents, a current of decisions in the same sense did in fact influence judges.[5] But this is a very different matter. It is no more than evidence of general expert opinion regarding the law on the point. It is exactly what happens, e.g., in France, where our doctrine of 'case law' is rejected and called 'la superstition du cas', but the

[1] G. I. 5; D. I. 4. I. I; Buckland, *Text-book*, p. 18.

[2] E.g. restraint on anticipation, see *Parkes* v. *White* (1805), 11 Vesey 209, 211; *Jackson* v. *Hobhouse* (1817), 2 Mer. at p. 487; see Hart, 40 *L.Q.R.* (1924), pp. 221 *sqq.*; support for buildings, *Dalton* v. *Angus* (1881), 6 App. Cas. 740; deserted wife's right to remain in matrimonial home, *Bendall* v. *McWhirter* [1952] 2 Q.B. 466.

[3] See Lenel, *Palingenesia*, I. 159.

[4] In Buckland, *Equity in Roman Law*, pp. 11 *sqq.*, will be found instances of such unheralded decisions and there are many more.

[5] See Allen, *Law in the Making*, 6th ed. pp. 159, 160, on the evidence from Cicero and others. We have not much information on the matter from juristic sources.

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'jurisprudence', i.e. the current of decisions of one or more tribunals on the point, is constantly cited in support of an argument.[1] It must not however be supposed that case law is inherent in the common law and inconceivable in other systems. If Roman law countries have not adopted the principle it is either because they lack our wealth of reported decisions or because they think it a bad one. We shall not here consider what it is which is binding in a case, interesting and unsettled as the question is,[2] but will merely observe that some of the dislike of the English doctrine expressed by foreign lawyers is probably due to some misconception of its nature.[3] On the other hand the common law has not always admitted it. The doctrine of precedent does not appear in the Year Books. Throughout the period covered by them the tendency to refer to previous decisions is growing, though usually with no precision of citation and often by memory, and the judge is apt to say something like: 'Never mind that! Go on with your argument.'[4] It seems indeed that it is only in what, in the history of the nation, is a recent time that the principle has prevailed with any strictness.[5] And even where the common law prevails, e.g. in the greater part of the United States of America, local conditions have led to a certain distrust of the notion of precedent, or at least to a certain freedom in handling it, greater than that admitted by

[1] See K. Lipstein, 'The Doctrine of Precedent in Continental Law', *Journal of Comparative Legislation*, 3rd ser., xxviii. pp. 34–43. It is becoming evident that the differences between the English and Continental practices have been greatly exaggerated. See, in particular, Gutteridge, *Comparative Law*, pp. 90–93.

[2] See Goodhart, *Essays in Jurisprudence and the Common Law*, pp. 1 *sqq*.

[3] For an excellent recent description of the English system by a French author, see R. David, *Introduction à l'Étude du Droit privé de l'Angleterre*, pp. 142–154; see also Goldschmidt, *English Law from the Foreign Standpoint*, pp. 34–47.

[4] Ellis Lewis, 46 *L.Q.R.* at p. 220; and generally *ibid.* pp. 207–224, 341–360; 47 *L.Q.R.* pp. 411–427; 48 *L.Q.R.* pp. 230–247; Goodhart, 50 *L.Q.R.* pp. 40–65, 196–200; Holdsworth, *ibid.* pp. 180–195.

[5] See Allen, *Law in the Making*, 6th ed. pp. 183–230.

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British Courts. Apart from the Courts of the State, there are the Federal Courts, and also the Courts of other States, the decisions of which though not binding are of 'persuasive authority'. This has led to the existence of a great unmanageable mass of case law, often conflicting, and American lawyers seem to be coming to think rather in terms of a course of decisions, a 'jurisprudence', like the French and German lawyers, though, in principle, in the United States as in England, a decision is binding in future cases.[1]

The fact that the Romans had no case law does not mean that their method was less casuistic than ours. If we may judge from what is preserved, it was unusual for a Roman lawyer, except in elementary books, to enter on abstract general statements of the law on a topic: he nearly always put the matter as a concrete case. The main difference is that with us the case is an actual one which has been decided in Court, with the Romans it is one which has been discussed in the lawyer's chambers and may be quite imaginary. In the great formative periods neither the Roman lawyers nor ours have been great theorists: they rarely get back to first principles. Both argue from cases more or less like the one under discussion and rules gradually emerge which sometimes find expression in a terse *regula*. But this *regula* is not a first principle: we are told that we must not take our law from a *regula*; it is only an attempt to state a rule deducible from the cases.[2] It is true that Justinian tells judges that they are to decide not by precedent but according to the *leges*,[3] but he has specially in mind imperial legislation: it is plain that the Roman common law was built up like ours by argument

[1] See Goodhart, *Essays in Jurisprudence and the Common Law*, pp. 50–74.

[2] D. 50. 17. 1. See Lord Esher M.R. in *Yarmouth* v. *France* (1887), 19 Q.B.D. at p. 653: 'I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.'

[3] C. 7. 45. 13.

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from case upon case, with the difference that ours are decided cases and theirs are discussed cases, more open to dispute. The underlying principles are there and sometimes come to the surface, but it has been left to modern Romanists to work them out, and it is not surprising that in setting them forth for the purposes of the modern Roman law they have often arrived at principles which are not Roman law at all. Nothing could be more unlike the method of Papinian than that with which Windscheid started on his great work. The 'Willenstheorie' which pervades his *Allgemeiner Teil* (it is much less traceable in the detailed treatment of the law) is not Roman at all. It comes from Kant, who expressly warns his readers that he is not expounding any actual system of law.[1] Even the Byzantines, though they speak more readily of *voluntas* than the Roman jurists did, have nothing on which the 'Willenstheorie' can reasonably be based.[2]

3. JURISTIC WRITINGS

From the absence of authority attaching to cases it followed as a corollary that the opinions of learned lawyers enjoyed a much greater authority than with us. Our Courts do not indeed go so far as to refuse all help in a difficult case from the writings of one known to have, or to have had, profound knowledge of the matter in hand, but recourse is not often had to this kind of writing, and it is always done with a clear recognition of the fact that, however sound the propositions may be, they are 'not authority'.[3] It is

[1] *Philosophy of Law*, trans. Hastie, p. 44.

[2] But it is certainly present in the Prussian Code of 1794, whence it can be traced back, through the Natural Lawyers, to the maxims contained more especially in the final title (50. 17) of the Digest. This at least appears from a study of such a book as Zouche's *Elementa Jurisprudentiae, etc.*, 1629.

[3] Allen, *Law in the Making*, 6th ed. pp. 264–9, has pointed out that in two branches of our law, namely, real property and conflict of laws, our Courts have been readier to resort to the works of text-writers and to allow to them a considerable influence.

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