

## 1 The Roman law tradition

---

*David Ibbetson and Andrew Lewis*

Roman law was first the local law of a small central Italian city-state.<sup>1</sup> As the political boundaries of that state expanded, so did its law, until by the early centuries of our era its influence was widespread over and beyond the Mediterranean basin. Important evidence revealing the application of Roman law at local level has recently been dug up in southern Spain; the Roman lawyer and administrator Papinian is said to have been at the northern British capital York assisting the Emperor in dispensing justice in AD 208; and papyri from Egypt and the Arabian desert indicate the extent of penetration of Roman legal notions even in areas of strong local traditions. Conveyances written on wood in Transylvania testify to a near-obsessive desire to comply with metropolitan standards.

The Roman legal tradition was characterised not so much by its substantive rules as by its intellectual methodology. Between about 100 BC and AD 250 the Roman jurists developed techniques of analogical and deductive reasoning which produced a jurisprudence of enormous refinement and sophistication.<sup>2</sup> When the Emperor Justinian caused the substantial extracts from the writings of these classical jurists to be collected together in the early sixth century AD, he ensured the survival of their thought into subsequent ages. His Digest remains the finest monument of any legal culture.

<sup>1</sup> Studies of the history of Roman law are legion. The most recent comprehensive survey is F. Wieacker, *Römische Rechtsgeschichte*, vol. I (Berlin, 1988, continuing). A useful survey in English is the edition of H. F. Jolowicz's *Historical Introduction to the Study of Roman Law* by B. Nicholas (Cambridge, 1972), which was originally written to complement W. W. Buckland's *Textbook of Roman Law from Augustus to Justinian*, now in its third edition, by Peter Stein (Cambridge, 1963). There are numerous studies of the mediaeval development of Roman law in the collection *Ius Romanum Medii Aevi* (Milan, 1961–), which have full bibliographical references, and the ways in which Roman law came to influence western philosophy are well charted by J. M. Kelly, *A Short History of Western Legal Theory* (Oxford, 1992). Peter Stein's own contributions have spanned the whole field. Many of his essays are collected together in *The Character and Influence of the Roman Civil Law* (London, 1988); see too his *Regulae Iuris* (Edinburgh, 1966) and *The Teaching of Roman Law in England Around 1200* (London, 1990).

<sup>2</sup> For discussion of the jurists' techniques of interpretation, see Alan Rodger, 'Labeo and the Fraudulent Slave', below, pp. 15–31.

As the political fortunes of the Roman state waned, so did its direct legal influences. Nevertheless, albeit in Greek dress, it continued to apply within the limits of the Eastern Empire until the fall of Constantinople in 1453. During this long period it succeeded in directly influencing the legal traditions of neighbouring states. For example, its penetration into Slavic territories is well recognised, while significant parts of the Islamic law which developed after 661 have recently been traced to Roman roots.

The western successor states of the fifth and sixth centuries continued an administrative pattern modelled on that of the previous local Roman government, and this involved a commitment to Roman law, applied side-by-side with Germanic custom. Unsurprisingly, the law codes of these Germanic states reveal some infiltration of Roman legal ideas, though these survivals became progressively more corrupt. Still, the Christian Church continued to keep alive Roman ideas and solutions, even in such unpromising territory as Anglo-Saxon England, and the most fundamental ideas of Roman law were sustained in scholarly environments familiar with such works as Isidore of Seville's *Etymologia*.

The revival of the Roman law tradition stemmed from the concurrence of two conditions. First was the intellectual renaissance of the eleventh and twelfth centuries. While there may have been a continuous, if sparse, acquaintance with the Institutes, Code and Novels of Justinian from the time of their promulgation in the sixth century, there is no trace of the most important of the Justinianic tetralogy, the Digest, until the eleventh century, when two copies come to light. One, now known as the *Littera Pisana* or *Fiorentina* from the two Italian cities which successively preserved it, was a copy made within a generation of the original production. The other, known since Mommsen as the *Codex Secundus*, disappeared in the mediaeval period, though its contents were preserved in very many copies. All mediaeval scholarship was based on this text; the Florentine, treated almost as a sacred relic, was little studied before the Renaissance. The pattern of appearance of the *Codex Secundus* strongly suggests that it emerged into a strongly Lombardic legal world, perhaps into the well-known Lombard law school at Padua, though our earliest reliable evidence of its study fixes it in Bologna. Here there developed in the early twelfth century a strong scholarly tradition around Irnerius, and his pupils, the so-called Four Doctors: Hugo, Martinus, Bulgarus and Jacobus.

This intellectual resurgence provided no more than the launching-pad for the revival of Roman law. Setting it off were the political circumstances of the dispute between Pope and Emperor known as the Investiture Crisis, the question by whom and at what moment bishops and lesser clergy were to be invested with the symbols of their sacred and secular

functions. The heat of this dispute lasted between 1075 and 1122, and for a long period both the imperial and papal powers encouraged their supporters to seek for any and every argument to support their cause. Amongst the sources culled for this purpose were the written remains of Roman law preserved in the Digest, Code and Institutes of Justinian. Foremost amongst the scholars who applied this learning to the new political uses was the imperial apologist Peter Crassus. Significantly, Crassus was a citizen of Ravenna, the Byzantine capital of reconquered Italy; here the Roman traditions were most obviously retained, and it may be surmised that it was here that Justinian's texts had been preserved.

The first century of scholarly work on the Roman texts was largely devoted to teasing out the meanings of the very heterogeneous opinions and materials contained in Justinian's *Corpus Iuris Civilis*. Four generations of students link Irnerius, through the Four Doctors, their students Rogerius, Placentinus, Pillius and the student of these in turn, Johannes Bassianus, with Azo and Accursius in the early thirteenth century.<sup>3</sup> Whilst these teachers produced a great variety of literature in their exploration of the understanding of their texts, they are chiefly remembered (and were in due course execrated) for their glosses to the text. Accursius found fame and notoriety as the compiler of the fullest and most widely diffused gloss, known as the Great Gloss or *glossa ordinaria*, which eventually found its way into the standard manuscript tradition and ultimately into the printed editions of the *Corpus Iuris*.

Later generations criticised the glossators for their narrow-minded literalness and absence of a wider cultural context, but the very narrowness imposed upon them by their task gave them an unrivalled knowledge of the Roman law texts on which their successors could build. Moreover, it is as well to remember that the Bolognese school did not come into being as a research institute, but as a teaching institution for immediate practical need: it needs to be constantly re-emphasised that Roman law at this time was not a dry university subject, but a matter of everyday utility throughout Europe. The law school at Bologna became the centre for the scholarly study of the Roman law texts, and all who wished to advance themselves in literate employment outside the church obtained their training there. The link between law and public administration which remains strong in the continental European tradition began here.

This first wave of reception of Roman law into the European legal tradition had many, intertwined, aspects. Three principal lines stand out. Most obvious is the infiltration of Roman law into written texts; behind this lies a widespread acceptance of Roman law as a subsidiary source of

<sup>3</sup> See further William M. Gordon, 'Going to the Fair – Jacques de Révigny on Possession', below, pp. 73–97.

law, filling in the gaps left by customary law; and finally there is the general adoption of the refined Roman techniques of legal reasoning.

As the general rate of literacy increased, there was a consequent rise in the respect accorded to written text and a tendency to reduce law into writing. Roman law provided both a technical vocabulary and a conceptual structure with which local customary law could be explicated. By so affecting the way in which law was conceived and expressed, Roman ideas profoundly influenced – one might say determined – the course of European legal history. This is most visible in the writings of legal commentators; in England, for example, the debt of Glanvill in the twelfth century and that of Bracton in the thirteenth to Roman law are strikingly obvious: whole sections from the latter are copied directly from Justinian's Institutes or the commentaries of Azo, and even those sections apparently most English can be shown to have close connexion with the classical Roman texts. Less obviously, but no less significantly, as local customary law came to be committed to writing there was an infiltration of Roman ideas. Sometimes this might have been conscious and deliberate, as in those Italian city-states whose pro-imperial ideology had caused them to treat Roman law as properly a part of their own customary law. Sometimes, however, it was less conscious, the product of relying on university-trained lawyers to prepare the written text: hence – to select only a sample of geographically distinct examples – there are Roman characteristics in the earliest written Norwegian code, the *Gulathingslov*, in a substantial number of English and Irish borough customs, and in the majority of the French *Coutumes* of the thirteenth century. Even more, there was huge Roman influence on legislation, both national (the Spanish *Siete Partidas* and the French *Etablissements* of Louis IX, for example) and local. Urban codes were particularly influential in bringing about a diffusion of Roman ideas: the German laws of Lübeck and Magdeburg were widely adopted throughout central and eastern Europe, and the Spanish *Fuero Real* through much of Spain.

The use which had been made of the Roman legal texts in the Investiture controversy gave Roman law a status as essentially a supranational body of legal principles. In the hands of the Spanish scholastics of the sixteenth century and Grotius and his followers in the seventeenth and eighteenth, they were to form the base of an elaborate system of Natural law, an idealised system to which national laws might aspire. While the glossators and commentators similarly treated them as an ideal, they saw them as having a more practical relevance, supplementing the patchwork of local and national laws when these did not give any definitive answer to questions. There developed a widespread practice of academic lawyers giving *consilia* – opinions – to courts on disputed points of law. In some

places university-trained lawyers had more direct input into legal practice; in the multi-member parlements of France, for example, they ensured a place for Roman law solutions despite both local and regal opposition to it. Judges operating outside their own immediate region, such as the *podestà* imported into Italian city-states, inclined towards judgments which could be supported by appeal to the written texts of Roman law when local custom was lacking or uncertain, if only to minimise the risk that they might themselves fall foul of the rule which provided that they should be personally liable for a litigant's loss if they gave a wrong judgment. All of these had the effect of providing a common substructure to the laws of continental Europe, wherever the influence of the professors had been pronounced, underpinning the common heritage of the written texts.

Just as importantly, the activities of the mediaeval Roman lawyers had ensured the survival of the rigorous analytical method of the classical jurists. Treating the *Corpus Iuris* as an authoritative text, they attempted to harmonise the arguments found there; while this essentially quixotic task ultimately led to much criticism, it did require the development of increasingly refined techniques of analysis. Moreover, because of the work of the academic lawyers called on to apply Roman law in the courts, these techniques which had been developed within the universities became a ubiquitous feature of European legal practice.

This general infiltration of Roman legal ideas and practices in the thirteenth and fourteenth centuries can be regarded as the first wave of the reception of Roman law. It marked, most crucially, the absorption of the methodological aspects of the Roman tradition into mediaeval Europe, and thence into the modern world.

The second wave of the reception of Roman legal ideas occurred in the sixteenth century. At an academic level, this was a product of the humanist scholars' perception of antiquity, an important dimension of which was provided by Roman legal sources. Exploration of the juristic texts transmitted from the Middle Ages, alongside recently recovered inscriptional evidence, led Antonio Agustín, Alciatus and their contemporaries to the earliest understandings of the historical dimension of Roman law.<sup>4</sup> It was on the basis of these explanations that later generations of Roman law scholars like Cujas (1522–90) and Donellus (d. 1591), working in northern Europe, were able to establish more critical and reliable editions of the basic texts.

As well as this academic aspect there was, most notably in Germany, a practical side to the second wave of reception. At the beginning of the

<sup>4</sup> See Michael H. Crawford, 'Bembo giureconsulto?', below, pp. 98–103.

sixteenth century there was a large range of local customary jurisdictions, reflecting Germany's notorious political fragmentation. In 1495 the remodelled imperial Supreme Court, the Reichskammergericht, adopted a written procedure. This written procedure was modelled on that found in the ecclesiastical courts, akin to that of the late Roman legal sources (as the common term 'Romano-canonical' implies). Moreover, just as the ecclesiastical practitioners had naturally looked to Roman law for solutions to substantive legal problems, so too the Reichskammergericht applied the 'common law of the Empire', i.e. the Roman Empire, which naturally meant Roman law. While the ground had been prepared to some extent by the Roman ideas present in the urban codes of the thirteenth century, it was only in the sixteenth that there was any wholesale or conscious Romanisation of German law. The direct importance of this was at first limited as large portions of the Empire were in practice privileged from its jurisdiction, but under its influence the independent princes began in the course of the century to remodel their own high courts along the same lines. It was not, however, until it became general practice to give reasons for decisions and to report these that Roman law scholarship and the practice of the courts came together.

Elsewhere in Europe, too, this second wave of the reception of the Roman legal tradition was significant. The humanist scholars of the fifteenth and sixteenth centuries had introduced a more historical criticism of the Roman texts, associated with a weakening of the belief in the Roman texts as revealing a near-authoritative supranational law. There was, in consequence, a greater influence on the harmonisation of Roman law with national and local laws. Paramount in this regard was Hugo Grotius' *Introduction to the Jurisprudence of Holland* (*Inleidinge tot de Hollandsche Rechtsgeleertheit*), published in 1631. Writing in the vernacular rather than in Latin, he laid down the foundations of Roman-Dutch law which could be built on by his successors Vinnius, van Leeuwen, Voet and Noodt. A similar harmonisation was brought about in France by the works of Coquille and Dumoulin, for example, and in parts of Germany by Ulrich Zasius. But even where there was a move away from the traditional reverence for the Roman text, there was no such departure from the ideals of the Roman legal method: the practical dominance of reasoning by deduction and analogy was so deeply embedded that it was easily detachable from its roots in the writings of the Roman jurists.

This harmonisation of Roman law and customary laws reached its peak with the codification movement in continental Europe, beginning with the Prussian Code of 1794. Most important of these codes by far was the French *Code civil*, dating back to 1804, in part at least because it was



widely adopted in other countries. The heavy Roman influence – stemming from the pre-existing Roman substrate as well as from the university training of their draftsmen and of those writers such as Pothier on whom the draftsmen relied – is visible in all of these codes. At the same time, though, they introduced a formal diversity into the Romanised systems. Although as a matter of history it could be recognised that French law and German law, for example, had common roots in Roman law, as a matter of legal practice they were clearly distinct systems. No longer were the learned opinions of the professors of Roman law of any direct relevance to the determination of disputes in the courts; no longer was legal practice anchored on the rock of a common legal culture.

While legal humanism had its part to play in the balancing of Roman law and customary law, the older methods of textual analysis continued to play their part too. Such analytical jurisprudence reached its high point in the writings of the Spanish neo-scholastics such as Molina and Covarruvias in the sixteenth century. Their writings, and the shorter but no less profound works of Grotius, provided the base for two separate traditions of considerable importance. Most notable was the growth of international law; the influence of Grotius' *De Iure Belli ac Pacis* was of paramount importance in the formulation of this common law of nations, but behind lay a tradition of writers and practitioners including Oxford's Regius Professor of Civil Law, Alberico Gentili (1552–1608).<sup>5</sup>

The second tradition flowing from the *De Iure Belli ac Pacis* was that of secular Natural law. St Thomas Aquinas, writing in the thirteenth century, had laid down a firm framework of Natural law, but this was strongly anchored in the theology of the Roman Catholic Church. This was hardly congenial to the post-Reformation Protestants, and still less so to the thinkers of the Enlightenment. Basing themselves firmly on a perception of human reason, such writers as Wolff and Thomasius expanded Grotius' systematic analysis into an all-embracing framework of ideal law. The paternity of the substantial categories of Roman law is transparent, as is the theoretical rooting of their position in the implicit belief of the mediaeval civil lawyers that Roman law represented a universally valid supranational system of legal principles. The close parallel between this form of Natural law and Roman law is clearly shown by the ease with which the ideas of the Natural lawyers flowed into the writings of the German Pandectists, culminating with Windscheid's very influential *Lehrbuch des Pandektenrechts* in 1862.

Though it may not be so easily visible, Roman influence was none the less important in shaping the legal consciousness away from the principal

<sup>5</sup> See J. L. Barton, 'Gentilis and the *Interpretatio Duplex*', below, pp. 104–18.

centres of Roman law studies in continental Europe. In Scotland, for example, local customary and feudal law were dominant in the mediaeval period, though these owed much more to the Anglo-Norman influence introduced in the twelfth century than to native Celtic tradition. The constant interference of the more powerful state of England in its affairs, coupled with its less favourable commercial and agricultural base, prevented the emergence of a strong central government. Reforms and development of the judicature in the sixteenth century led to the introduction of Romano-canonical procedures into Scottish courts, which led in turn, as elsewhere, to the adoption of substantive Roman solutions.<sup>6</sup> The first universities had been founded in Scotland in the course of the fifteenth century, but they seem not to have flourished, and it became the recognised practice for young Scots lawyers to travel to the continent for their legal education. This ensured that there was a steady supply of lawyers versed in the latest civilian scholarship to staff the Scottish courts. No system of instruction in local law existed to maintain the defences against the Roman encroachment; so much so that when the Faculty of Advocates, who controlled admission to legal practice before the courts, reformed their admission procedures in 1610 to include an examination, a considerable part was devoted to Roman law. As happened elsewhere in Europe, though, the tension between Roman law and customary law was satisfactorily resolved, though in the case of Scotland this did not lead to any written code. The proximity and continued influence of the avowedly non-Roman English legal system, and the survival of a strong native feudal tradition, led to the establishment of a distinctly Scottish legal tradition founded on the institutional writings of the seventeenth and eighteenth centuries.<sup>7</sup>

England provides another variation on the theme of the infiltration of the Roman legal tradition into European legal culture. While there may have been some limited acquaintance with Roman legal ideas in the Anglo-Saxon period, it is not until the middle of the twelfth century that we begin to find evidence of detailed study of the Roman texts. At this time there was no gulf between the study and practice of law in England and the rest of Europe; and, as happened elsewhere in Europe, Roman ideas filtered into the English legal consciousness principally through written commentaries (Glanvill in the late twelfth century, Bracton in the mid thirteenth). Yet, again as occurred elsewhere, there may have been a

<sup>6</sup> For examples of the parallels between Roman law and Scots law, see David Johnston, 'Sale and the Transfer of Title in Roman and Scots Law', below, pp. 182–98, and Geoffrey MacCormack, 'The *Actio Communi Dividundo* in Roman and Scots Law', below, pp. 159–81.

<sup>7</sup> See John D. Ford, 'Stair's Title "Of Liberty and Servitude"', below, pp. 135–58.



more direct influence on actual legislation. The creation of new proprietary remedies closely resembling the possessory interdicts of the Romans in the middle of the twelfth century has been considered by many scholars to indicate both knowledge of the Roman law and perhaps conscious borrowing from it. And when in the fourteenth century the royal courts articulate the custom of the realm that an innkeeper should be strictly liable for the loss of his guest's goods, it is not easy to avoid the conclusion that at some stage in the past the quasi-delictual liability of the Roman *caupo* had found its way into accepted English practice.

This strong Roman influence on the Common law did not last beyond the end of the thirteenth century. Until the sixteenth century, English legal history is largely the story of the development of remedies based on indigenous procedures. There was little, if any, room for the use of Roman learning in such a context, and the vitality and apparent sufficiency of the local procedures prevented for some time the development of Romano-canonical alternatives in secular contexts. Moreover, the strong position of Roman law in continental universities was not mirrored in England, where its study was intermittently forbidden; advanced legal study (and education) in England took place in the Inns of Court rather than the universities, and was the study of the Common law rather than the Roman, of local procedure rather than general substance. Behind this, too, lay a strongly held ideological commitment to the insularity of the Common law and its separateness from the Civil law, which was seen to be at the base of continental systems. Those courts which did operate according to Civil law procedures – the ecclesiastical courts, the university courts of Oxford and Cambridge, and the Court of Admiralty<sup>8</sup> – were marginalised by the courts of Common law notwithstanding their importance in practice. A potentially greater channel for the infiltration of Roman procedures and substantive law was the Court of Chancery, which crystallised in the late fourteenth century, whose procedure was never forced into the rigorous straitjacket of the Common law, and whose judges – the masters – had frequently received a university education. Even here, though, there is little real evidence of the direct borrowing of Roman legal ideas.

The strength of the belief in the insularity of the Common law has protected it from wholesale supersession by Roman legal ideas. Nevertheless, from the later Middle Ages there have been several pulses of infiltration of Roman law into Common law. The first, rather ragged, movement occurred in the sixteenth and early seventeenth centuries. Most obviously there was a revival of the study of Bracton and of the use of his

<sup>8</sup> See Alain Wijffels, '*Ius Gentium* in the Practice of the Court of Admiralty around 1600', below, pp. 119–34.

text in Common law contexts in the wake of its printing in 1560; since Bracton had been a judge, the work attributed to him could be cited freely without any fear of being accused of trying to import Romanism into England. Less obviously, but more importantly, English lawyers seem to have had an increasing familiarity with the Roman texts. It was not merely that humanists like Thomas More were closely in touch with the principal currents in contemporary European culture, or even that scholarly lawyers at the end of the century – Thomas Egerton and Francis Bacon, for example – are known to have studied the Digest; the dearth of easily comprehensible texts on English law meant that reliance was increasingly placed on the basic literature of Roman law. Justinian's Institutes were widely recommended as an introductory legal text, and John Cowell transparently based his *Institutiones Iuris Anglicani* on them; the introduction to such a severely practical book as William West's *Symbolaeography* is a crude, and unacknowledged, translation of a contemporary civilian text.<sup>9</sup> A second pulse, briefer but sharper in its focus, occurred around 1700, when the Roman ideas contained in Bracton and in the seventeenth-century Natural lawyers' writings enjoyed a brief vogue. The best-known product of this movement is the adoption by the Common law of the Roman rules relating to the standard of care demanded of bailees; but it can hardly be coincidental that much of the articulation of the Common law of torts at this time closely followed the lines laid down by the Roman jurists.<sup>10</sup> After a period of relative quiescence, the Roman texts move into the light again in the first half of the nineteenth century.<sup>11</sup> Ambiguities in the law of contract were resolved by reference to Roman law, often mediated through the works of Pothier; the law of easements was transformed from a cumbersome mediaeval structure (itself with a Roman base imported from Bracton) into one more in keeping with an urbanised society by direct borrowings from Roman and contemporary civilian texts. It may be that each of these pulses should be regarded as no more than a brief fashion; but each time the fashion died out, it left its legacy in the form of rules embedded in English law.

In terms of substantive rules, one legacy of Roman law has been a considerable measure of uniformity throughout the legal systems of western Europe, stretching beyond this area into regions which adopted European-based codes. Most obviously, the Roman conceptual categories underpin both the structure of modern codified Civil law systems

<sup>9</sup> We are grateful to Peter Stein for bringing this to our attention some years ago.

<sup>10</sup> See Peter Birks, 'Doing and Causing to be Done', below, pp. 32–53.

<sup>11</sup> See Andrew Lewis, "'What Marcellus Says is Against You': Roman law and Common law', below, pp. 199–208.