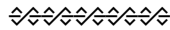


1. INTRODUCTION



ROMANS AND ROMAN LAW

Lawyer joke 1:

Q: Why don't sharks eat lawyers?

A: Professional courtesy.

Lawyer joke 2:

Q: How many lawyers does it take to screw in a light bulb?

A: None. They'd rather keep their clients in the dark.

Today the ancient Romans are probably best known for the dramatic and bloody parts of their world (say, gladiators and legions) or for the quaint details (think aristocrats wearing togas and carried in sedan chairs). But if we ask what their most important or most lasting mark on the world was, the answer would almost certainly be their legal system. Of course, many other ancient societies had legal codes, some long before the Romans'. A famous inscription now housed in Paris gives us the Code of Hammurabi, a set of nearly 300 legal rules from eighteenth-century B.C. Babylon. The five Old Testament books of the Torah offer us much Jewish law from rather later. The

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other great “classical” civilization, that of Greek Athens, has left us a substantial legacy of courtroom oratory. Yet over the course of centuries, the Romans developed something genuinely different. Their legal system was vastly larger, more encompassing, more systematic, and more general than anything else that existed at the time. Moreover (and through different routes) it returned to life even after the fall of the Roman Empire. The written remains of Roman law became the fundamental source for the so-called civil law that governs most European countries, and it has had a significant (if less direct) effect on the “common law” of England and the United States. These kinds of facts, combined with a certain amount of prejudice, have come together as parts of a common stereotype of the two classical Mediterranean civilizations: the Greeks were artists, thinkers, and writers; Romans were more practical people: soldiers, engineers, and lawyers.

Like many such grand generalizations, this one contains a small kernel of truth, but that should not distract us, especially when we want to look at the world experienced by individual Romans. *They* didn’t organize their entire lives to be the sober, methodical ones in contrast to the more creative Greeks for our convenience. In fact, their attitudes toward the law were more complicated than the sketch I’ve just given might suggest, and in some respects were surprisingly modern. To get a clear view of this, we could do worse than to look at two texts written in the middle of the first century B.C. by the same person, but from two very different points of view. The person is Marcus Tullius Cicero, a politician, orator, and amateur expert on the

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law, and he will reappear throughout this book. The first text is a eulogy he delivered in 43 B.C. for the even greater legal expert Servius Sulpicius Rufus. It reads in part:

He always approached matters arising from the laws and legal principles by appealing to convenience and fairness. He never thought it better to stir up lawsuits than settle disagreements.

The law is a noble, honorable calling. It settles disputes rather than creating them, and in general makes life better. Servius is the opposite of the lawyer as “shark” in the first joke just quoted.

The second is a bit of a speech delivered in late 63 B.C. At that time, Cicero was one of the two “consuls” (chief executives of the Roman government), but he was simultaneously acting as an advocate for a man who was on trial for (allegedly) using bribery in the election to succeed Cicero in office. Cicero argued (among other things) that his client didn’t need to bribe anyone since he was obviously going to win anyway – the defendant was a war hero, while his opponent was a lawyer. While parts of the speech have a serious tone, this part works by using humor, and humor of a type more than a little familiar today. Cicero’s weapon of choice is, in so many words, the lawyer joke. His point is not that lawyers are vicious (as in the shark joke), but that they obscure the issues behind clouds of artificial detail and complexity (as with the lightbulb example):

It could be so easy. “The Sabine farm is mine.” “No, it’s mine.” Then the trial could begin. But the lawyers won’t

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allow it. They say “The farm which is in the territory which is called ‘Sabine.’” Plenty of words already, but they’re not done yet. “I affirm that it is mine in accord with the law of the Roman people.”

From there he goes on to play out all the technical moves and responses required to actually bring a case to trial. Imagine a modern document full of legal phrases like “party of the first part” and “collateral estoppel”; this is the Roman version. In one sense, Cicero’s mockery is fair. Most of the legal language he quotes is well attested in reality (see [20] for the roundabout way of naming a piece of property). But it is less clear that the bits of legalese he has made up are *just* a wordier translation of the simple Latin he started with. In the real world, and especially in trials in which the other side may try to pick apart the language being used, those “extra” words may actually be necessary for clarity and precision.

For precisely the reasons many admire Roman law today, it generated a certain amount of suspicion in its own day. Its scope and sophistication made it the territory of experts. Ordinary people might not have objections to any particular law or regulation, but they could feel that the whole system was just a little beyond their control. There were similar objections to rhetoric in the ancient world. On the one hand, the art of public speaking was extremely important in a world without modern mass media. On the other, it involved special skills not available to most people. In either case (law, rhetoric), there was a system that was designed to achieve ends like

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justice and dispute resolution, but those systems were elaborate enough to take on lives of their own. To the extent that the law (or rhetoric) had internal goals, those might conflict with the broader society's desire for justice, fairness, peace, and so on. You should keep this tension in mind as you read this book. We sometimes talk as if ancient Rome were a nation of lawyers. Not only was this not the case, but many Romans were actively suspicious of lawyers. But they did generally recognize the value of a working legal system, and at a minimum they recognized the state's ability to impose law on parts of their lives. In what follows I will spend a lot of time talking about law as a Roman lawyer might have, but I will try to keep in sight the fact that most users of the law were not legal professionals.

PURPOSES

This book is meant to introduce you to the basics of the legal world of the Romans. I use the phrase "legal world" to bring together a number of different things. On the one hand, it includes the law roughly as it was understood by the Romans themselves. This kind of "law" has been used and studied almost continuously from Roman times. What rights and responsibilities were assigned by the laws? What procedures could be used to enforce these substantive rules? How, somewhat more practically, should or could you act in various situations to take advantage of the law (or at least to make sure you weren't tripped up by it)? But on the other hand, I also want to

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take into account the various ways in which the law interacted with the rest of the social world. How could actual people get access to the legal system? How much difference did various kinds of individual identity (age, sex, nationality, economic class, social status, etc.) make in legal matters? What kinds of cultural and economic values did the law support or assume? How much voluntary cooperation did the legal system assume or receive from individuals? How did the lawmaking and law-enforcing processes fit into the government more broadly?

One of the most important and broadest of these questions about the interaction of Roman law with the rest of society will not get its own chapter. Much of our information on Roman law comes from legal experts (see Chapter 3 for details). At first sight this would seem to be a clear advantage. Why wouldn't we want information direct from the best authorities? But in fact this set of sources may distort our perspective. Suppose two neighbors were involved in a property dispute, and imagine that the "correct" resolution was clear to a Roman expert. This expert opinion still might not control the actual outcome for a variety of reasons. One or both parties might distrust legal or governmental institutions in general. (Lawyer jokes haven't changed much since the first century B.C.) The parties might avoid a specific process because they misunderstood their actual rights. Or they might feel that compromise with a long-term neighbor was more important than enforcing abstract rights. Even if they did go to court, bribes, political favors, or stubborn local traditions might override the theoretical "right" outcome. The lack of a chapter on the broad version of this

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topic does not mean that it is not important. The discussion is broken up for two reasons. One is that the question is too big. Some of the individual questions I have just raised will get their own chapters (like Chapter 8 on social inequality and the law), and others will come up in multiple chapters. The other reason to break up the topic is that the evidence is scattered. As already noted, much of our information is from Roman lawyers. To compare their view to “what really happened,” we need to have some other source of information. This is often lacking, and it is hard to predict where it will appear. Thus we generally have to wait for particular points of comparison to come up in their individual contexts.

Roman law’s recorded history as a living system spans over 1,000 years. Over that time it went from being the municipal ordinances of the city of Rome to being the principal code governing tens of millions of people living throughout the Mediterranean basin and beyond. As a living law it naturally changed considerably over that time. Those changes were accelerated by the political fact that Rome grew from a modest Italian city-state to a vast, culturally diverse empire. This book will focus on what historians would describe as the late Republic and the Principate and legal scholars sometimes call the formative or pre-classical and classical periods (roughly 133 B.C. to A.D. 235; see Chapter 2 for details). This is in part because this period has drawn the most historical attention generally, and in part because many of the most important legal developments had taken place by the end of that time. For the most part, however, I will try to avoid chronological

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complexities and state much of the law dogmatically unless there is some specific historical point to be made. This creates some danger of oversimplification, but I hope the increased clarity will be worth it.

STRUCTURE

The main body of the book consists of twenty substantive chapters. Roughly speaking, the first half of the book is on the broader context, while the later chapters mostly treat the law itself. The chapters are short and are designed to be as independent of each other as possible. That is, it should be possible to read them out of the order in which they are presented. However, Roman law does not naturally break down so easily, and no two topics are ever genuinely independent. For the sake of space and to avoid boring repetition, I have tried to explain each major idea only once. As a result, there are a number of cross-references in each chapter to help the reader find those explanations. For the same reasons, I have included a glossary. This glossary serves another purpose as well. As you would expect from a legal system, Roman law uses a lot of technical terminology. Naturally, this terminology is in Latin. (In fact, scholars today sometimes use Latin terms differently than the Romans did and occasionally even make up Latin of their own. I will not burden the reader with which is which.) To keep the main body of the book as readable as possible, I have generally tried to keep the use of these Latin terms to a

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minimum. However, the reader who wishes to refer to more advanced works may find it handy to have access to the technical terminology. Thus I have tried to lay it out simply and conveniently in one place. I have also supplied an annotated bibliography of a few of the most accessible works on Roman law.

The most important supplementary chapter is a collection of documentary sources with commentary. In part, these documents will help illustrate the general principles discussed in the main chapters by showing actual individual cases. They also help address the questions raised earlier about the relationship between theory and practice. The items selected for this chapter will all be keyed to issues raised in the main chapters, but they should also be legible in themselves. As a result, this chapter should give a cross-sectional view of Roman law.

While this book is not intended as a general introduction to law or to any non-Roman legal system, I have tried to introduce modern comparisons that may be useful to the reader. In some cases the parallel (or contrast) is helpful for clarification, for additional explanation of just what is going on in the Roman case. Elsewhere there are broader and more substantive considerations in play. Many legal rules (in any system) involve compromises between different values, like fairness versus efficiency versus certainty of getting the right answer or interests of the parties in court (say, divorcing parents) versus those of persons not represented (say, children or society at large). As a result, there will obviously be different solutions

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to similar legal problems, and the contrasts will be instructive about Roman society more generally. Since the audience for this book is English-speaking, the modern system (or family of systems) most referred to will be the “common law,” which arose in England and forms the basis for much of the law of the United States and other former British possessions. Keep in mind, however, that common law systems can differ from each other on individual points, and I have introduced only enough information to make points about Rome. Do not expect practical legal advice here!

In light of contemporary concern for sexist language, I have made an effort to vary the gender of pronouns referring to indefinite persons. It should be noted, however, that the society being described was a very male-dominated one, and so many (mostly masculine) pronouns should be understood to have their literal force.

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