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PART I



INTRODUCTION

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## I INTRODUCTION

*David Johnston*

This *Companion* brings together in a single volume essays that reflect the wide range of modern scholarship on Roman law. A conventional textbook on Roman private law would explain in turn the law of persons (family, slavery, citizenship); property (ownership and possession and how they are acquired and transferred, subsidiary real rights, testate and intestate succession); obligations (contract, delict, unjustified enrichment); and actions (the courts and civil procedure). This is the scheme pioneered by the second-century Roman jurist Gaius, whose *Institutes* is still perhaps the best introductory textbook ever written on Roman law.

This *Companion* is not a textbook of that kind. It does cover the traditional institutional topics, but it seeks to range much more widely. Before examining *how*, we should ask *why*? Why is it, in the twenty-first century, that Roman law is still studied and is still important? Here are several possible answers, although this is by no means an exhaustive list.

First, Roman law provides what might be called a vocabulary of rights and obligations. The institutional scheme just described provides the analytical structure for most modern systems of private law. Even nowadays a good grasp of that essential structure and vocabulary is a powerful tool in the hands of a lawyer wrestling with the correct analysis of a legal problem. That is why in some universities Roman law is still a compulsory subject for first-year law students: nothing else conveys the vocabulary of rights and obligations so clearly and economically, without an untidy accretion of case law.

Second, even beyond the field of private law, the contribution of Roman law to the western legal and political tradition has been enormous. Roman law was the foundation for the law of the church – canon law. And within political discourse it was the source of central ideas about empire – doctrines drawn from Roman private law were deployed in order to elaborate concepts of public law, as well as in argument about the relationship between rulers and those they ruled.

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Third, it is no accident that Roman law has had such influence. The surviving sources, especially as transmitted in Justinian's *Digest* and *Code*, present a legal system of extraordinary sophistication. The sheer intellectual challenge involved in seeking to understand Roman law does much to explain why for centuries it has attracted the attention of scholars. Since about 1100 Justinian's *Digest* and *Code* have been subjected to a process of minute textual interpretation and criticism in a way paralleled in the western tradition only by the attention given to the Bible. It is therefore safe to say that all surviving Roman legal works have been interpreted, reinterpreted, and re-reinterpreted. That being so, one might reasonably ask: is it possible nowadays to say anything new and interesting about Roman law?

The answer (as is to be expected in a companion to Roman law) is 'yes'. The foci and approaches adopted by scholars have of course varied over the centuries. Initially, the main concern was to understand the legal doctrines set out in the Roman texts, especially Justinian's *Digest* and *Code*. Only much later did the focus shift from viewing the *Digest* as a unified body of law to a body containing the work of numerous different Roman jurists of different periods. That was a decisive shift from viewing Roman law as a source of doctrine to viewing it as a product of history. The shift made it possible to consider what differences of opinion could be discerned between early and late jurists, or between jurists of different schools of thought, and more generally to examine the evolution of legal rules and doctrines over the centuries. More recently still, legal historians have begun to focus on wider contexts. Some have been concerned to locate Roman law in its intellectual context, by reference to philosophy, rhetoric, or literature. Others have attempted to understand how Roman law worked in Roman society, how it influenced particular kinds of economic activity; or, conversely, how it was itself shaped by the demand to be able to engage in certain economic activities within a legal framework.

This *Companion* aims to explain how Roman law was formed, especially from the late Republic onwards; how it was applied in practice in Rome and its empire; the various ancient sources of information about Roman law; the main institutions of Roman law, private, public, and criminal; and the later life of Roman law in Byzantium and beyond, in civil society, in the church, and in political discourse.

Chapter 2 considers the Roman jurists within the wider intellectual and cultural context of their times. The chapter identifies three different schools in modern scholarship on Roman law. At one extreme is a close but somewhat ahistorical focus on legal doctrine; at the other an emphasis on law in context, whether the context is intellectual, social, or economic.

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The third school adopts an intermediate position. The editor of this *Companion* has made no attempt to impose uniformity of approach (even if such a thing were possible), so the various essays reflect these diverse perspectives.

It may be helpful to add a few words on the remaining chapters. Chapter 3 deals with the ways in which the law was made in Roman antiquity, from the Republic through to the late empire. There are important elements of continuity in the development of the law under changing political structures, but the differences are equally striking. As a result of Roman imperialism, Roman law came to be the law not just of the city of Rome but also of the territories into which Rome had expanded. Chapter 4 looks at how far Roman and how far local law applied within various provincial communities.

Part III contains four chapters on the sources of evidence for Roman law. The most important source remains Justinian's compilation, discussed in Chapter 8. The excerpts from classical writings contained in the *Digest* and the legal pronouncements of emperors brought together in the *Code* reflect the law as it stood at different times. Studying how the Justinianic compilations were put together is an important part of recreating a picture of the evolution of Roman law over the preceding centuries. Yet there is also much Roman law to be found outside the *Corpus iuris civilis*. Much can be found, for instance, in literary works such as those of Cicero. Documentary sources are also a vital resource for understanding Roman law in practice. Chapter 5 discusses the documents preserved as a result of the eruption of Vesuvius in AD 79. They illustrate everyday legal transactions such as borrowing and granting securities. It is also important to understand the changing role that writing played in legal documents, so Chapter 6 explores the apparent shift towards greater dependence on legal documents. One very rich vein of material on Roman law, little explored so far, is to be found in the patristic sources, the subject of Chapter 7. Not only do they attest forensic activity and settlement of disputes, they also provide a wealth of information about Roman law as social practice. Conversely, they illustrate how Roman law served as a natural reservoir of metaphors for late Roman theologians.

Part IV explores the main areas of Roman private law. Chapter 9 on slavery, family, and status considers the key legal institutions that governed the lives of Roman citizens. The central question is how a person could become a legitimate Roman citizen; interlinked with this is the unique Roman institution of paternal power. The chapter also deals with the place occupied by slaves and freedmen. Chapter 10, 'Property', first surveys the structure of the Roman law of property in the schemes

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presented in the *Institutes* of Gaius and of Justinian and argues for the need to pay more attention to the concepts and categories that underpin these schemes. It goes on to give a brief historical survey of the law of property, emphasizing that an adequate survey, especially where land is concerned, needs not just to consider the law but also to include a social, economic, and political perspective. Chapter 11, 'Succession', is concerned with how property was transferred on death. There were detailed rules about the formal validity of wills, but the emphasis in the chapter is on what could be done in a Roman will and by what means. It attempts to understand the legal rules in the context of the society in which they operated. Chapter 12, 'Commerce', reviews how the various sources of Roman law contributed to the legal aspects of business life. It surveys the Roman law of contracts and such topics as sale, hire, lending, banking, securities, organization of businesses, use of slaves, partnership, and insolvency. Chapter 13 is concerned with delicts. Its main topics are the broad scope of the law of theft; *iniuria*, a delict which covered a wide range of violations of what we might call the right to respect for one's person and personality; and the *lex Aquilia*, which provided remedies for damage to certain kinds of property. In all of them close attention is paid to the interpretative techniques elaborated by the jurists. Litigation, the subject of Chapter 14, is the final topic in this part. Rules in law books cannot be understood in context except against the framework of civil procedure. This chapter considers the various types of court procedure; judges; evidence; representation in court; rhetoric; and advocacy. It also gives an outline of the rules and, where possible, the working practices under the various procedures.

Part V deals with criminal and public law. Chapter 15 on crime and punishment traces the law from the Republican period through to the Dominate. Among the themes pursued are the centrality of revenge and compensation in Roman thought, and the belief that communities have a necessity to reward virtue and punish vice; the relatively limited field of criminal law under the Republic, its extension in the late Republic through the system of jury-courts, and reforms under the emperor Augustus; and the introduction of imperial jurisdiction and trials in the senate. Chapter 16 considers public law, one of the more neglected areas of the work of the Roman jurists: while they devoted most of their energies to work on private law, they also produced significant work on constitutional and administrative law. Even before the emergence of an imperial bureaucracy, the jurists had elaborated public-law concepts such as *imperium* and *iurisdictio*, and the late classical jurists had written treatises on various public offices and other aspects of public law and life.

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Part VI, 'Byzantium and Beyond', deals with the afterlife of Roman law. Chapter 17 concerns Byzantine law. It began as Roman law but followed its own course, in a different language and a different cultural environment; nonetheless, it never lost sight of its Roman origins. This chapter points out that it sometimes seems that an ever-greater divide separates scholars of East and West and emphasizes the importance of looking across the divide. Chapter 18, 'The Legacy of Roman Law', traces the development of a European *ius commune* from its starting point in northern Italy in the eleventh and twelfth centuries. Bologna was the centre for the study of the newly rediscovered *Corpus iuris civilis* of Justinian, and Irnerius the leading figure there in the early twelfth century. A line of scholars became established in Bologna who based their instruction on close study and annotation of the Justinianic texts. This method gradually spread beyond Italy. In the second half of the thirteenth century attention turned to writing commentaries and treatises as well as giving advice (*consilia*) on specific legal questions. These writings laid the foundation for a *ius commune* which by the end of the middle ages had spread into Germanic lands too. Canon law, the subject of Chapter 19, is concerned with the place occupied by Roman law in the law of the church. It examines in turn three historical periods and the differing role played by Roman law in solving the legal and administrative problems faced by the church at those times. It shows how Roman law played a part in the formulation of the *Corpus iuris canonici*, the basic source collection of law for the church in the West, by filling in gaps, supplying legal principles, and adding scholarly weight to the canons. It also considers the developed *ius commune* and how this amalgam of the canon and Roman laws was the foundation for the church's law, taught in the European universities, long served as a standard for interpretation and a source of law in both church and secular courts, and was developed by a host of learned commentators. Chapter 20, 'Political Thought', introduces the main ideas about empire which were current in the law schools and looks at how concepts of private law were applied by medieval jurists to the relationships between the rulers and the ruled. Legal education changed significantly in the late thirteenth century as lawyers embraced the political problems of their day in their teaching; the corollary was that political debate took on legal characteristics.

Chapter 21, on Roman law in the modern world, asks what it means to say that the modern continental civil codes are based on Roman law. While there are usually Roman foundations, often a very un-Roman edifice has been built on them. Even where modern rules in various codes are based on Roman law, they are hardly ever identical; there is

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considerable diversity within a fundamental intellectual unity. The chapter considers in what sense Roman law became the basis of a *ius commune* or civilian tradition, and explores the extent to which it is possible to speak of a European tradition. That raises the question of the influence of Roman law in England and elsewhere.

The chapters of this *Companion* show that Roman law can be – and actually is – studied in many different ways and for many different purposes. Among them are: understanding how the law grew and evolved in ancient Rome; investigating how it worked in the daily life of the Roman citizen; studying the crystallization and development by the Roman jurists of key legal concepts and doctrines; and pursuing the deployment of those concepts and doctrines through the ages and to the present day, in contexts variously civil, ecclesiastical, and political. There is room for all of these approaches. Diverse as they are, they represent responses to one and the same thing: the sheer intellectual vitality of Roman law. It is that vitality that has secured the position of Roman law as a central element in the intellectual tradition and history of the West.



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## 2 ROMAN LAW AND ITS INTELLECTUAL CONTEXT

*Laurens Winkel*

Roman law in the form of the legislation of the emperor Justinian has been studied in Western Europe since the end of the eleventh century in Bologna.<sup>1</sup> It has had enormous authority – mostly on an informal basis, but bolstered by a strong ideology.<sup>2</sup> Since 1900, the year in which the German civil code came into force, hardly anywhere in Europe has it been possible to speak of Roman law as a direct source of current private law.<sup>3</sup> Nevertheless, it was – and still is – a ‘common frame of reference’ long before this expression was coined in the framework of European private law of the future.<sup>4</sup>

### I. THE STUDY OF ROMAN LAW IN ITS INTELLECTUAL CONTEXT

It is possible to distinguish at least three different ways of studying Roman law today. A first approach starts with actual legal problems. One can certainly ask about the historical background of these problems, but the actual problems remain the centre of attention. So Roman law is a kind of auxiliary tool for the understanding of modern private law. It is a treasury of legal ideas that can be put to use in solving today’s legal problems. Institutions of Roman law are detached from their original context and so take on an air of timelessness. Examples are the clauses that accompany the contract of personal security: the *beneficium divisionis* or the *beneficium excussionis*. The *lex commissoria* in the law of sale and of pledge is another example. This is the timeless and the ‘infallible’ part of private law, useful for understanding modern private law.<sup>5</sup> This approach has its roots in the Historical School of German jurisprudence of the nineteenth century and appears to be totally ahistorical. But that is not necessarily so: see, for example, the impressive book by Reinhard Zimmermann.<sup>6</sup> He deals with the general structure of the law of obligations and explains clearly its historical roots, starting with the elliptical texts of the Roman jurists and

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going on to the legal scholars of the nineteenth century, the German Pandectists, who built complex dogmatic structures on the basis of Roman legal texts. For real rights there is now a comparable work by Willem Zwolve.<sup>7</sup> It explains the law of ownership and other real rights using examples from historical sources and comparative law.

There is a second approach to Roman law.<sup>8</sup> In it the emphasis is also on matters of private law, but there is a far greater sensibility to legal evolution within Roman law itself. This approach began as early as the nineteenth century, when Roman law gradually ceased to be a direct source of current (private) law. Early representatives of the approach are Alfred Pernice (1841–1901)<sup>9</sup> and Otto Lenel (1849–1935).<sup>10</sup>

We owe to Lenel two of the most important modern tools for the study of classical Roman law: first, the reconstruction of the writings of classical jurists in the so-called *Palingenesia*<sup>11</sup> by using the inscriptions at the beginning of each fragment of the *Digest*. These are carefully preserved in the most important manuscript of the *Digest*, the *Littera Florentina*, which is the point of reference for all modern editions.<sup>12</sup> The second tool is in a sense a continuation of the *Palingenesia*. Here Lenel collected quotations from the *Edictum Perpetuum* set out in the commentaries written by the classical Roman jurists and rearranged them so far as possible in their original order.<sup>13</sup>

This neo-humanistic approach only had its true breakthrough in the seventies of the last century. In the initial period of historical studies of Roman law, the trend was to identify massive changes to the classical texts ('interpolations') attributed to the law-making process in the time of Justinian.<sup>14</sup> That trend began in the second half of the nineteenth century.<sup>15</sup> Only a century later was this approach at last fundamentally questioned; in retrospect the assumption of interpolations was found to be totally unfounded. With some justification, these first attempts at a historical approach to Roman law were criticized, on the grounds that they dealt in legal phenomena which were a construction and which never existed in reality. That was to a certain degree true in the heyday of interpolationism: Romanists<sup>16</sup> developed all kinds of ideal concepts, such as the notion that the jurists wrote Ciceronian Latin, which is nowadays regarded as untenable. Today the approach to interpolations is far more prudent. The great majority of Romanists think that the only unquestionable interpolations are to be found in the substitution of words referring to institutions abolished by Justinian (for example, the informal transfer of ownership by way of *traditio* replaces the references to the formal *mancipatio*; *fiducia* as an older form of security is replaced by *pignus*). For other interpolations one has to look first at the Justinianic constitutions in the *Code*, which contain much information on Justinian's