

Paper #2

ROMAN LAW AND LEGAL THEORY

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While but a sprouting seedling in the Aegean, law grew to be a mighty oak in Rome; and its many branches have shaded western civilization for many centuries since Rome's fall. "Thrice," says Ihering, "did the Romans conquer the world: by her arms, by her church, and by her law."¹ The task before us is three-fold: first, to describe the origins and developments of this Roman law; second, to analyze the impact upon it of the historical and philosophical milieu in which it developed; third, to study the avenues by which Roman law, indeed, conquered the world.

Rome's Law Before Her Expansion (510-281 B.C.)

The earliest era of Roman history, known as the period of the monarchy (753-510 B.C.), contributed little to the development of Roman law. Rome was but a small city-state on the Italian peninsula struggling to survive in an hostile environment of warring tribes. Its society remained patriarchal and undifferentiated: judicial, economic, political, and cultic functions were readily intertwined and confused, and the king held authority over every institution of society. What pleased the king had the force of law in every aspect of that primitive culture.

The expulsion of the last king Tarquinius Superbus in 510 B.C., however, set afoot a number of deep-seated social alterations. No longer was Rome to be the private affair of the king (res privata), it was henceforth to be the affair of the people (res publica). As a result, the sovereign authority of the king over matters cultic and non-cultic was divided respectively between two bodies of authority: the college of pontiffs² and the two praetors (sometimes called consuls before 367 B.C.), with their two assistants known as aediles. It fell to the praetors in the early years of the Republic to draft new laws and to the pontiffs to interpret the laws.

Interpretation of the law remained a jealously guarded exclusive task of the college of pontiffs, i.e., the body of priests until the fourth century B.C. The pontiffs occupied the highest rung on the social ladder, and every member of Roman society paid homage to these honoratiores (genteel men) and sought their interpretation of the law. Pontifical interpretations were of a variety of types. They included: instructions for the performance of certain acts within the bounds of the law, formulae (leges actione) to be followed in order to make a given law binding in a judicial process, and opinions (responsa) on questions of law. The responsa were clearly the most important interpretations. Two types of responsa were distinguished: the cautelary

responsa and the judicial responsa. The cautelary reponsum was the pontiff's response to a question put to him as to whether a given act was admissable in the view of the law, and, if so, in what form. The judicial reponsum was a general opinion (not a judicial verdict) on the legality of an act already performed. Although the pontiff was not the judge (iudex) of the law, his interpretation in the responsa and his drafting of the legal formula often determined the nature of the judicial process and the judge's decision.

It is not by mischance that a religious body of priests acquired the exclusive task of interpreting every law of early Roman society.³ For, in the early years of the Republic, the parity of and confusion between the cultic law and non-cultic law and between fas and ius, a confusion inherited from the monarchical period, lived on. Since the pontiffs knew the cultic law well, they were called upon to interpret all laws, regardless of their (lack of) applicability to cultic matters. As a result, law was intrinsically bound to the elaborate cultic rituals of the pontifical priests.⁴ But the pragmatic blending of cultic and non-cultic law stemmed from a more basic obfuscation. For, originally, ius and fas were seen as the double foundation of all law in the world: ius being the human ordinance, fas being the divine promulgation. Such an

intrinsic tie between the human and the divine law was the natural consequence of the Romans' anthropomorphic descriptions of the deities. The deities were merely powerful beings in the cosmos wrought with the same virtues and vices common among men. Hence their laws bore no especial preponderance in the world. Humans, on the other hand, needed the support of the gods. Thus it was believed that the founders of the Roman state had made a compact with certain deities, who thereupon were made the national gods of Rome in return for protection and favour and respect for human law. The divine law and human law together dictated what was legal and just. And only from this foundation could both cultic and non-cultic law be developed. Overlap of the two law-types was thus inevitable.

By the third century, however, ius and fas were sharply distinguished and the private law of the Roman citizen (ius civile) clearly identified. 'Fas' came to mean that precept of a religious or moral character that was enforced through priestly coercion and censorial reproof. 'Ius' was used to denote a system of claims and rights of an individual (such as marriage or property rights), each protected by its own judicial procedure and by a number of specific statutes (leges).⁵ The civil law (ius civile) assumed the meaning of "that set of rights of the private individual citizen, which the community was to

protect through its constitutionally established organs, because they resulted from legal institutions and principles rooted in the collective conscience of the Roman people and sanctioned by ancestral usage, common recognition, or legislative fact of the political community."⁶ As the ius civile freed itself from cultic law, the once long arm of the pontiff was made shorter and weaker in matters of civil law such that by the dawn of the third century, the pontiffs no longer held a monopoly in judicial interpretation. While the pontiffs retained their interpretative function in cultic law, a new breed of jurists arose in the third century to usurp ius civile interpretation. We shall discuss these jurists in more detail below (p. 17ff).

We must first discuss the two praetors, whom we earlier introduced as the individuals who had inherited the legislative function of the king. In the early years of the Republic, the praetors' function was rather simple. They adapted the law code of Rome by appending existing laws and adding further laws to conform to new situations that arose as Rome expanded. In 367 B.C., however, the praetors were stripped of this legislative function and were given a strong hand in judicial affairs. (Two consuls assumed the original praetorian functions.) In the judicial process, the praetors were given the power of iurisdictio, i.e.,

the authority to decide whether a plaintiff in an individual case should be permitted to pursue his claim before the iudex.⁷ Only with the praetor's consent could the plaintiff legally press a claim before the iudex in whom was vested the power of iudicatio, i.e., the authority to pronounce judgement.⁸ In fulfilling this important duty in the first step of the two-step judicial process, the praetors had to make important judgements about the ius civile and the judicial process. Often such judgements involved making changes in the law. It thus grew customary that, upon assuming his office, the praetor issued an edictum, which was, in effect, his program of adapting, altering, and appending the ius civile for his year in office. By the end of the Republic these praetorian edicta (along with the edicta of their aediles) had become instruments of legal reform.⁹ By way of the edicta, then, the praetors were able to promulgate new civil laws. The passage of important new laws often extended over the course of a number of praetorships. Thus one praetor adopted the edicta of the previous praetors in his own edictum and thereby furthered the effort to introduce new legislation. The part of a given edictum taken over by the praetor was called the edictum tralatitium; his own original part was called the edictum novum. Once a given proposal was completed and received ratification by the

Roman Senate (senatusconsultum), a new law, the ius honorarium or ius praetorium, took effect.¹⁰

The other constitutional developments of Rome in the first two centuries of the Republic were very much determined by the conflict between two opposed social groups: the socially superior patricians and the inferior plebians.¹¹ Historical understanding of the origin of and reasons for the patricians' aristocratic domination over the beleaguered plebian class is stymied by the dearth of adequate documentation. And thus classical historians have forwarded a plethora of theories to explain the patrician/plebian dichotomy.¹² This lack of evidence notwithstanding, we do have proper documentation of the course of the patrician/plebian controversy.

Much of the patrician/plebian controversy was a struggle of the plebians to achieve a greater social and political equality with the patricians. For the first sixty years of the Republic, no law code regulated the relationship between plebians and patricians. Two assemblies existed, the Curiate Assembly (Comitia Curiata) and the Centuriate Assembly (Comitia Centuriata), but these were dominated by patricians. Real political power was vested in the praetors and the aediles, who also were exclusively patrician. The assemblies merely approved the measures of the praetors and other

measures of the praetors and other magistracies, thereby depriving the plebians of all political power. In the impasse, a series of events opened the way toward a solution to the patrician/plebian controversy. Between 494-449 B.C., the plebians hit upon a novel means of wringing concessions from the patricians. This was the process of secession, by which at crucial times when the patrician aristocrats most needed help, the entire plebian segment of the population removed itself a short distance outside the city and continued to negotiate until the particular problem was resolved. In time, the plebians thus developed a sense of identity and began to view themselves as constituting a quasi-independent political community within the Roman state. From this consciousness derived the third major assembly of Rome, the Council of the Plebs (Consilium Plebis), an assembly whose power was quickly transferred to the later developed Tribal Assembly (Comitia Tributa) which thereafter existed side by side with the Council of the Plebs. The Tribal Assembly became the alternate and parallel assembly to the Centurate Assembly.¹³

It was under the concentrated plebian pressure of the Council of the Plebs that Rome's first law code was drafted, the Twelve Tables (c. 449 B.C.).¹⁴ A group of ten patricians (decemviri) formulated the first ten tables in which laws and rights concerning family, wills, succession,

property, marriage, contracts, torts, and cultic rituals were outlined. A second group of ten men, composed of both patricians and plebians, drafted an appendix of two laws. The Twelve Tables dominated the next two centuries of Roman law. Generations of children learned the code by heart, and it played a role in Rome analogous to that played by the Magna Carta in medieval England. The general idea of establishing a single code that applied to all by an uniform process and that was universally known was a step of major importance. For therein, for the first time in Rome, law was moulded to serve the needs of the people.¹⁶

Yet, the passage of the Twelve Tables did not immediately dissolve the conflict between the patricians and the plebians. For the de facto custom of barring the plebians from admission to the praetorship, the Senate, the consulships, and to the Curiate and Centuriate Assemblies continued for nearly a full century after the drafting of the Twelve Tables. Patricians jealously dominated these highest magistracies and assemblies, passing their offices from one generation to the next. Hence the social disadvantages of the plebians continued virtually unabated, since magisterial patricians regularly looked out for one another at the expense of justice towards the plebians.

A number of ensuing constitutional developments in the fourth century B.C. broke the patricians' political stranglehold on Roman society. In 367 B.C., laws were passed that stipulated that at least one of the aediles (who, after 367 B.C., became judicial officers in the Rome) had to be a plebian. The following year a similar law decreed that at least one plebian had to hold the consulship each year. In 336 B.C., the plebians were given access to the important praetorship.¹⁷ In 300 B.C., they were awarded positions in the college of pontiffs by the Ogulnian Law (Lex Olgunia) and took up the aforementioned task of interpreting the cultic law. The final step to the plebians' rise to power was the passage of the Hortensian Law (Lex Hortensia) of 287 B.C. By virtue of this law, the Tribal Assembly became the premier law-making body of the state, and its decrees, the plebiscites, acquired the force of law without requiring ratification and endorsement of the Senate. (Previously, the Senate could easily void any plebian legislative proposals in the last step of the plebian legislation.) Henceforth, the Centuriate Assembly (still dominated by patricians) became the prime elective body and the primary court of appeal in capital cases and those involving loss of citizen status. The Tribal Assembly became the prime legislative body and served as the final court of appeal in cases involving fines. With this final

separation of duties, the assemblies were made equal and their enactments became binding on all citizens, whether rich or poor.¹⁸

In summary, we note a number of important trends in the development of Roman law in the first half of the Republic. First, we see the range of the sources of law. These include:

1) the mos maiorum--ancestral custom that was not written yet recognized as law

2) the plebiscites of the Tribal Assembly

3) the magistratum edicta and iures honorarium of the praetors

4) the responsa of the pontiffs and, after the fourth century, of the juriconsults.

Second, we note some characteristic tendencies of the science of law, jurisprudence. For the most part, jurisprudence was a task relegated to the honoratiores--the pontiffs, the praetors, etc. Jurisprudence was also heavily traditional. The Romans were far more comfortable with the endless tinkering with and adapting of old laws than with the drafting of totally new ones. Hence old laws were constantly appended but rarely discarded. Jurisprudence and judicial proceedings were highly formalistic. Jurists were required to follow definite rigid procedures in drafting new formulae; plaintiffs had to bide

by the letter of the formula. Third, and we have only touched upon this aspect by innuendo, Roman law was authoritarian, to the point of being dictatorial. The Romans revered their law and all who held legal positions. Because of this authoritarian character of Roman law, the Romans saw no need to develop an apologia or rationale for their law. Law was seen as a natural concomitant of civil life whose authority was assumed by all.¹⁹

Roman Law in the Expanded Republic (281-27 B.C.)

Rome's expansion from the confines of her walls to the ends of the known world is a tale of her remarkable military genius. Each time the Roman armies expanded a little further, they infringed upon areas under the auspices of another power. At times she was forced, at other times Rome chose, to challenge this domain. By so doing, Rome quickly took to herself the entire orbis terrarum (the lands encircling the Mediterranean Sea).

As a result of the Samnite Wars (326-290 B.C.), Rome had extended herself into the predominately Greek area of Apulia in Southern Italy. Rome's appearance in Apulia put her in competition with the Greeks of the important city of Tarentum which had hitherto assumed a protectorate over the other Greek cities of Southern Italy. In 282 B.C., one such

Greek city, Thurii, appealed to Rome for protection against the assailing Oscans of Lucania. Rome complied and sent troops and a flotilla to Thurii, much to the chagrin of Tarentum. In retaliation, Tarentum sunk part of the Roman flotilla and called upon Pyrrhus of Epirus to aid in fighting Rome. In two battles in 280, and 279, Pyrrhus defeated the Romans; but in two later battles, in 275 and 272, Rome routed Pyrrhus and sacked the whole of Southern Italy.²⁰

Rome's aggressive presence in Southern Italy occasioned the First Punic War (264-241 B.C.) with the Carthaginians. A conflict on the island of Sicily, off the coast of Southern Italy, beckoned the involvement of Rome. Campanian mercenaries in the service of Syracuse had revolted and seized the city of Messana. In 264 B.C. they were assailed by Hiero of Syracuse and different factions within the city appealed to the Romans and to the powerful Carthaginians of North Africa for aid. The Carthaginians were closest and came to the aid of Messana first, putting a garrison in the citadel.²¹ Carthage's presence in nearby Sicily was unsettling to the Romans, and they thus challenged the Carthaginians. The twenty years of bitter fighting that ensued proved no side superior, and the war ended in an uneasy stalemate in 241 B.C.

It was inevitable that the bitter enmity between Carthage and Rome engendered in the First Punic War would soon compel both sides again to take up arms against each other. Within twenty-five years, the fighting resumed in what was known as the Second Punic War (218-202 B.C.). The first years were greatly successful for the Carthaginian general Hannibal who conquered and occupied the whole of the Italian Peninsula, save Rome. Under the leadership of Scipio Africanus (Maior), however, the Romans beat back the Carthaginians in Spain in 205 B.C., in Italy in 204 B.C., and in 202 B.C. totally annihilated the Carthaginians in the Battle of Zama.

An important aside to the Second Punic War was the shifting allegiance of the Macedonian Greeks of the Aegean from Rome to Carthage. In the face of Hannibal's brilliant success in the Italian peninsula, Philip V of Macedon officially declared Macedonia an ally of Carthage and an enemy of Rome. After Hannibal's acclaimed victory at Cannae in 216 B.C., Rome could not leave such action unpunished, and hence, after the Battle of Zama, she turned her imperialist eyes from the South to the East. After she gained allies in the Aetolian League and won the favour of Rhodes and Pergamum across the Aegean, Rome challenged Philip to withdraw from the Aegean. When he refused, war broke out. At the Battle of Cynoscephalae in 197 B.C.,

Philip went down to defeat and Rome had wrestled to the leadership of the Aegean. In a series of ensuing battles, she slowly engulfed the various independent Greek states and rounded out her success by seizing the frail Egyptian region in 168 B.C.²²

Rome's rapid expansion in the third and second centuries B.C. opened the doors to both a brimming reservoir of novel Greek (and other) cultural and philosophical values, ideas, and conceptions as well as a plethora of administrative problems. Rome retained her characteristic devotion to tradition, however; she dipped into this reservoir only with reserve and caution, and only when the need was pressing. Only after many years did the Greeks finally take her ingenuous Roman captors captive.

Constitutional alterations were but few in the second half of the Republic. The most important change lay in the praetorship. As Rome acquired new provinces, judicial administration had to be expanded to these provinces. In 242 B.C., therefore, the Romans separated the judicial administration of the city of Rome from that of the outlying provinces, and assigned the domestic administration to one praetor and the foreign administration to the other. The former praetor was accordingly named the praetor urbanis (praetor of the city of Rome), and the latter praetor peregrinus (the praetor who travelled from province to

province). Administration of the lesser provinces was often left in the hands of the aediles. To keep pace with increases in the number of provinces, four new praetors were added in the first century B.C. (exact date unknown), and, in 81 B.C., Sulla raised the number to eight, seven of whom were praetores peregrines. The praetor peregrinus took charge of all cases involving foreigners. The rapid increase in the number of actions to which aliens were parties had an important effect on Roman law developments, for these court cases were often of a character for which the existing ius civile did not make provision. Thus the praetor peregrinus had perforce to borrow elements of law from elsewhere to fill the lacunae in the Roman ius civile. Hence in their courts the ius civile began to be overlaid with a composite code called the ius gentium pieced together out of the current usage of surrounding cities and the praetor's own adaptations of the ius civile. In the application of this non-Roman ius gentium, the praetor was not fettered by the rigid formalism and proceduralism of the Roman ius civile but was free to use his own discretion in conducting the preliminary hearings and formulating his instructions to the iudex who was to judge the case.²³ By the end of the Republic, the ius gentium had become a well-recognized body of law that

defined the rights and privileges of the non-Romans in the Roman Republic.

A concomitant of this tremendous growth of the Roman law in the second half of the Republic was the rise of the juriconsults. We have had occasion to see how the interpretation of cultic and non-cultic law, originally commissioned together to the pontiffs, was bifurcated such that the pontiffs assumed interpretation of the cultic law while the juriconsults took over the interpretation of the ius civile (cf. p. 6). We have now to trace the development of Roman jurisprudence under the juriconsults.

At the dawn of the fourth century B.C., the juriconsults were largely politically active figures who volunteered their interpretation of the ius civile to those requiring it. Since the political positions in early fourth century B.C. Rome were, in the main, dominated by the aristocratic patricians, jurisprudence quickly became a pursuit of the aristocracy alone. By the second century B.C., however, plebians, too, were active in jurisprudence. But, by then, the character of the juriconsult's task had been altered. No longer was the juriconsult a politically active figure who volunteered his interpretation of the law; he was a paid scholar who devoted all his life to the study of law. Such a development belies a clear Hellenistic influence, since the jurists of the

Aegean had long specialized exclusively in law and were paid for their services. Another clear Hellenistic influence was the advent of forensic jurisprudence. Forensic jurists, called advocates, though trained in the rudimentary aspects of law, did not study and develop the law as did the jurisconsults. Rather, they were largely involved in rhetorical debate in the courts on behalf of plaintiffs and defendants. Classical Athens, of course, had, with the rise of the Sophists in the fifth century B.C., perfected the rhetorical technique of the jurists.

The tasks of the jurisconsults divulge that the Romans were still bred to the practicalities of law. The jurisconsults' primary function was still the dispensation of cautelary and judicial responsa which, like those of the pontiffs, were recognized as legitimate sources of law. The jurisconsults were also heavily involved in the drafting of wills and contracts. In addition, they set the legal formulae (leges actione) to be followed in pursuing a claim before the praetor and iudex respectively. Unlike the pontiffs and early jurisconsults, however, the jurisconsults of the later Republic paid close attention to the systematization of the formulae and responsa. Their exposure to the dialectic method of the Greeks, particularly of Aristotle, left a distinct mark on their work. For they now stressed the accuracy of definitions, the logical

patterns of the law, and the strict separation of distinctive areas of law. The juriconsults recorded the results of this logical systematizing of the law, and we know from the later jurists of the Empire of a number of important works. The first known summary of the juriconsults' responsa was the Ius Flavianum (or Ius Aelianum) of 198 B.C. This was soon followed by the massive Triperitita of Sextus Aelius, a summary of all the responsa and legal formulae in effect since the Twelve Tables. In 100 B.C., Quintus Mucius Scaevola expanded this work by eighteen volumes. And the list of jurists and their writings could go on for a number of pages.²⁴

It was in their systematization of the ius gentium that the juriconsults of the later Republic came to full theoretical awareness of a certain commonality among the laws of various peoples, regardless of their race or domicile. Doubtless, the praetors, who had spurred the development of the ius gentium, were aware of the commonalities of laws in unrelated provinces, yet it was the jurists who made special mention of them in their writings.

As one may expect, such an highly empirical account of the commonalities of law in the various provinces of the Roman Republic did not remain like this for long. It soon drew to itself a philosophical theory.²⁵ Although the juriconsults eschewed this speculation, the question was

soon raised as to why two groups of people, with no apparent contact, should draft laws markedly similar. Since Rome could find no answers to such questions in her strictly practical jurisprudence, she stooped to dip into the newly available reservoir of Greek philosophy. There she found the elaborate and grandiose natural law theories of Stoicism by which a segment of the Greeks explained the commonalities of the laws of foreign nations. It was Stoic natural law theory that gradually won over the cautious Roman jurisconsults and advocates and that laid down the foundations for the jurisprudence of the Roman Empire.

Roman Law and Stoic Natural Law Theory

Rome's exposure to Stoicism was most pronounced in the second century A.D., after she had conquered Philip V of Macedon and had allied herself with the cultural centers of Pergamum and Rhodes.²⁶ But the brand of Stoicism common in these second century B.C. Hellenistic centers was the product of a lengthy period of maturation in Greece. To this historical genesis of Stoicism we must first turn.

The extensive and belligerent conquests of the two Macedonians Philip II and his son Alexander at the end of the fourth century B.C. not only broke the cultural stranglehold that the Greeks of the Aegean had for so long

held on the world, they also engendered a series of foundational reconstructions of traditional legal and philosophical values and conceptions in subsequent years. The intellectual changes wrought in the Hellenistic world were, for the most part, an eclectic blending of what had been minor Hellenic philosophies with the philosophies of the more significant Pythagoreans, Sokratics, Platonists, and Aristotelians. An especially large number of thinkers claimed to be followers of the late Hellenic Sokrates. Though this Sokratic school of thought had a number of sub-schools in Megara, Elis, Eretria, and Cyrene, the most significant Hellenic Sokratics for our purposes are the Cynics.

The important influence of Antisthenes (460-366 B.C.), the founder of the Cynic school, on the philosophical and legal conceptions of his day is due particularly to his peculiar emphasis upon freedom and cosmopolitanism. Freedom has two connotations for Antisthenes. First, "freedom signifies the independence of the soul vis-à-vis the passions and cravings of the body." Antisthenes suggested that a man can attain this inter^{ra}-personal freedom, albeit only partially in this life, through attainment of a freedom in intra^{ra}-personal relations. This second type of freedom he called autarkeia, suggesting therewith the self-sufficiency of the individual, i.e., his independence

vis-à-vis the external world.²⁷ A truly free man (in this latter sense) cannot live in accordance with such political structures of the polis, said Antisthenes, for such structures promote human interdependence and consequently constitute a restraint upon the individual's autarkeia. A man can only be truly free as a member of a cosmopolitan society where no such narrow political boundaries prevail.²⁸

Diogenes of Sinope (412-323 B.C.), perhaps the most infamous Cynic, developed Antisthenes' themes of freedom and cosmopolitanism still further. Diogenes reduced all freedom to an unrestrained life according to the dictates of nature herself. Such freedom will not permit the infringement of human law and convention upon the individual. For such laws and conventions merely obfuscate the voices of nature, which are to guide the wise man who is attuned to them.²⁹ The virtual nihilism and hedonism into which such doctrines steered Diogenes and other Cynics, however, eventually led Cynicism, as a socio-political philosophy, into popular disfavour.

The Cynic doctrines of life according to nature and of cosmopolitanism, however, remained strident in Hellenistic philosophy, particularly among the early Stoics. Yet the early Stoics cast these Cynic doctrines into a new philosophical mould. The principal ethical demand of the

early Stoics was to live in accordance with a nature which they assumed to be a fully rational emanation from a rational divine being. Since every man is a rational and social creature, and since natural law is a rational norm for social interaction promulgated by a fully rational divine being, a man's living in accordance with nature is fundamentally a socially-attuned compliance to his own reason.³⁰ As such, every man is equal under the law of nature.

The early Stoics went on to suggest that justice and positive law, which are invariably part of any social organization, also emanate from the divine being. Justice and law are a priori which guide the individual's rational development so that he can live according to nature in a cosmopolitan society and thereby live in freedom. As third century Stoic Chrysippus puts it: "Law is the ruler over all the acts of gods and men. Law must be the director, governor, and guide with respect to what is honorable and base, and therefore the standard of the just and the unjust; for all beings that are social by nature, it directs what must be done and forbids what must not be done."³¹

Of the many branches of post-third century middle Stoicism that grew out of these early Stoic doctrines, the Stoicism of Panaetius of Rhodes (c. 185-109 B.C.) was

especially important. In rejection of certain Stoics who separated wise men, whose wisdom allows them to be virtuous and moral in accordance with the law of nature, from fools, who are not wise enough to attain rational virtues and morals, Panaetius reaffirms the universal rationality of all men and, subsequently, their equality under the rational natural law. Reason, says Panaetius, is the law for all men, not merely for the wise. It dictates to man what is just.³²

Guided by these tenets, Panaetius goes on to posit the relation between the positive law of the state (ius gentium) and the natural law (ius naturale). Since all men are rational, he argues, the ius gentium must be based on rationality. Thus, since reason furnishes the law for all men, the ius naturale must be the foundation for the ius gentium. And since the ius gentium always seeks social justice, it must accordingly be the source and protector of justice in the state.³³

Panaetius' erudite writings found formidable support in the Roman Scipionic Circle, an organization structured in 129 B.C. primarily for the continued study of Greek literature and traditional Roman law. Although, in the late second and early first centuries B.C., certain members of the circle postulated that the ius gentium and the ius naturale are one and the same, the Scipionic Circle on the

whole is said to have maintained an unaltered Panaetian Stoic natural law theory. It was via this agency, then, that Panaetian Stoic conceptions of law and justice came to the Roman jurists.

The impact of Stoic natural law theory on the first century B.C. Roman jurisconsults is not known. Yet its general reception by an advocate is well-illustrated in the extant works of Marcus Tullius Cicero (106-43 B.C.). That Cicero's writings have survived is particularly valuable for our purposes since his eminence lies not so much in the profound originality of his thinking, but in the eclectic fashion in which he summed up the Stoic common-places of the first century B.C. Roman jurists.³⁴

Adapting the teachings of Panaetius and other Stoics, Cicero asserts that God is the perfect embodiment of reason, and thus nature, which is ruled by God, is ultimately ruled by a natural law of reason emanating from this God.³⁵ This true law (vera lex), which impinges itself upon all men, expresses the purpose and authority of God. Any human cultural activity, if it is to have truth or validity at all, must conform to reason, the vera lex.³⁶ Says Cicero in summation of his view:

There is in fact a true law; right reason in accordance with nature; it applies to all men and is eternal. It summons men to the performance of their duties: it restrains them from doing wrong...to invalidate this law is never morally right; nor is it permissible

ever to restrict its operation, and to annul it wholly is impossible.³⁷

The vera lex is the foundation of any and every state constitution, says Cicero. And for that reason, every constitution will share common laws. Cicero lays this out clearly in the Laws:

Atticus: Then you do not think that the science of law is to be derived from the praetors' edict, as the people do now...but from the deepest mysteries of philosophy.

Marcus: Quite right; for in our present conversation, we are not learning how to protect ourselves legally, or how to answer clients' questions. Such problems may be important, and in fact they are...But in our present investigation we intend to cover the whole range of universal Justice and Law in such a way that our own civil law, as it is called, will be confined to a small narrow corner...Well, then, the most learned men have determined to begin with Law...according to their definition, Law is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed in the human mind, is Law...³⁸

The law of the state (ius gentium) is the very encapsulation of the common understanding of the vera lex. It is only upon the drafting of such a constitution that a group of individuals actually can be called a republic or commonwealth. Cicero asserts this understanding succinctly: "The commonwealth is the affair of the people, but the people is not an assemblage of men, gathered together in any fashion, but a gathering of the multitude united together under a common law and in the enjoyment of a common

well-being."³⁹ It is only with such a common recognition of the vera lex that the state can even exist.

Although the natural law theory of the Romans reached its most mature formulation in the writings of Cicero, many tenets of Cicero's theory were absorbed by the jurists of the Roman Empire. Although these jurists' primary concern was the interpretation and application of the Roman law, their occasional turn from this engrossing practical work to speculation upon the foundation of the state and its laws led them to Stoicism. Stoic natural law provided suitable answers to their speculations.

The writings of the jurists of the Empire are available to us largely through the compilations of their writings in the Digest (or Pandects-533 A.D.) and the Institutes (533 A.D.), two parts of what, since the Middle Ages, has been called Justinian's (529-565) Corpus Iuris Civilis. Although Tribonian, and the other jurists Justinian commissioned to the drafting of the Digest and the Institutes, was eager to combine the writings of the second and third century jurists in a collective homogeneous whole, no such homogeneity of natural law conceptions existed. For two broad theories evolved out of the second century A.D. to explain the ius naturale and its relation to the ius gentium and ius civile. One group of jurists recognized no difference between the ius naturale and the

ius gentium; another group sharply distinguished the one from the other.⁴⁰

The great second century A.D. jurist Gaius equates the ideas of the ius naturale and ius gentium, and labels them the ius gentium. The term 'ius naturale' is not found in his extant writings. In the first title of his own Institutes (discovered in 1816), he proposes: first, that the ius gentium is universal and embodies principles common to all men; second, that men are aware of these principles by naturalis ratio. Says Gaius:

All peoples who are ruled by laws and customs partly make use of their own laws, and partly have recourse to those which are common to all men; for what every people establishes as law for itself is peculiar to itself and is called the civil law (ius civile), as being that peculiar to the state; and what natural reason establishes among all men and is observed by all people alike, is called the law of nations (ius gentium),⁴¹ as being the law which all nations employ.

Thus the ius civile consists of laws which a particular nation has established for its own government and which apply to a particular people only, whereas the ius gentium, being the same as the ius naturale, is the law which natural reason constitutes for all mankind and which must, consequently, be respected by all people.⁴² Whereas the ius gentium is primitive, universal, and rational, the ius civile is its nice encapsulation.⁴³

In the third century, we find three jurists Tryphoninus, Florentinus, and Ulpianus (d. 226 A.D.) who separate ius naturale from ius gentium and support a tripartite theory of law.⁴⁴ The most important of these jurists is Ulpianus, whose writings constitute nearly one-fifth of the Digest. Says Ulpian:

Law is three-fold in its nature, for it is derived from natural precepts (ius naturale), from those of nations (ius gentium), or from those of civil law (ius civile).⁴⁵

Ulpianus' rendering of the ius civile and the ius gentium is typically Roman:

Private law is that which concerns the interests of the individual...The law of nations is that used by the human race and it...only concerns men in their relations to one another.⁴⁶

Ulpianus gives us a rather idiosyncratic definition of the term 'ius naturale', however:

Natural law is that which nature teaches to all animals, for this law is not peculiar to the human race, but affects all creatures...From it proceeds the union of male and female which we designate as marriage; hence also arises the procreation of children and the bringing up of the same; for we see that all animals, and even wild⁴⁷ beasts, appear to be acquainted with this law.

Thus the ius naturale has no rational or political connotation; it is an universal law binding all creatures.

"Marriage, procreation and upbringing of children are institutions of natural law; slavery and manumission, on the other hand, are not natural law conceptions since people are

born free." Slavery and manumission are unnatural and sanctioned by the *ius gentium* only.⁴⁸ At another point, Ulpianus reduces the gist of the *ius naturale* to the maxim: "Honeste vivere, alterum non lardere, suum cuique tribuere" ("to live honorably, to injure no one, and to give to everyone his due")⁴⁹

We have before us, then, significant evidence of a Stoic natural law pervading the jurisprudence of the Roman Empire.⁵⁰ By the sixth century A.D., the idea of *ius naturale* took on the meaning it was to retain throughout the Middle Ages and to assume in the eighteenth century French Enlightenment: a principle of law apprehended by reason to be lying behind all positive law and embodying justice and reason.⁵¹

*The third part of our thesis (viz., "to study the avenues by which Roman law, indeed, conquered the world."-p. 1) will be treated in a separate paper, entitled 'The Medieval Development of Roman Law and Canon Law on Natural Law Foundations'. (Forthcoming)

Footnotes

1 C. H. Haskins, The Renaissance of the 12th Century (New York: Meridan, 1927), p. 193.

2 Fritz Schulz, History of Roman Legal Science (Oxford: 1946), pp. 2-6 suggests that the interpretation of the law fell to four priestly colleges; the pontiffs, the rex sacrorum, the Flamines, and the Vestal Virgins. Others have questioned Schulz's envisioning of four colleges of priests and have claimed that the rex sacrorum, the Flamines, and the Vestal Virgins were in one college with the pontiffs.

3 Ibid., p. 8.

4 H. J. Wolff, Roman Law: An Historical Introduction (Norman: 1951), pp. 49 ff.

5 loc. cit.

6 Ibid., p. 62.

7 Fritz Schulz, Classical Roman Law (Oxford: The Clarendon Press, 1951), p. 13.

8 loc. cit.

9 "Roman Law," Encyclopedia Britannica, (1979), Vol. 15, p. 1055.

10 R. W. Leage, Roman Private Law, 3rd ed. (London: 1961), pp. 21-29.

11 Ibid., p. 3.

12 For a summary of some of the important arguments and for a more comprehensive compendium of the course of the patrician/plebian controversy cf. B. D. Nagle, The Ancient World: A Social and Cultural History, (Englewood Cliffs, NJ: 1979), pp. 257-267.

13 Ibid., p. 262.

14 An English translation of the Twelve Tables is available in The Civil Law, trans. and ed. S. P. Scott (Cincinnati, OH: The Central Trust Co., 1932), Vol. I, pp. 57-81.

15 H. F. Jolowicz, Historical Introduction to the Study of Roman Law (Cambridge: 1954), p. 8.

16 Nagle, op. cit., p. 263.

17 Other offices to which the plebians succeeded to gain admission were the dictatorship (in 356) and the censorship. The dictatorship was a special magistracy appointed by the consuls and senate in times of exceptional crisis, during which the power of the consuls was suspended. A dictator served for the duration of the crisis, or for a maximum period of six months. The censor, too, was a special magistrate, elected every five years. The censors' tasks included: supervising the registration of citizens and property, exercising moral censorship, and judging the propriety of citizens' conduct.

18 Nagle, op. cit., pp. 266-67.

19 Schulz, History of Roman Legal Science, pp. 23-32.

20 M. Cary, A History of Rome Down to the Reign of Constantine, 2nd ed. (New York: 1965), pp. 196-7.

21 Nagle, op. cit., p. 277.

22 168 was by no means the last date in which Rome expanded her empire. A Third Punic War (149-146) was soon to follow as was the conquest of Spain and Gaul. Yet, for the purpose of seeing how this rapid expansion affected Roman law and legal history, the tale has been told sufficiently.

23 Cary, op. cit., p. 245.

24 For the most complete listing of all the pontiffs and jurisconsults of the Republic and all the literature attributed to them cf. Schulz, Roman Legal Science, pp. 12-14, 33-37, 40-48, 87-98.

25 R. Wollheim, "Natural Law," Encyclopedia of Philosophy, ed. P. Edwards (New York: 1967), Vol. 5, p. 452.

26 Historians of philosophy make no mention of a vital Stoic philosophy in the Greek cities of south Italy conquered by Rome in the mid-3rd century B.C. Thus we conclude that the 2nd century conquest of a Stoic-laced Aegean was Rome's first exposure to Stoicism.

27 Johan VanderVyver, "The Concept, Origin, and General Characteristics of the Idea of Natural Law," Unpublished Lecture Series, University of Potchefstroom, South Africa, Lecture 2, pp. 15-16.

28 G. H. Sabine and S. B. Smith. "Introduction," Marcus Tullius Cicero on the Commonwealth (Columbus, OH: 1929), pp. 12-18.

29 Ibid., p. 17.

30 Ibid., pp. 22-3.

31 Chrysippus, cited by Ibid., p. 22.

32 Ibid., pp. 31-2.

33 loc. cit.

34 A. J. Carlyle and R. W. Carlyle A History of Medieval Political Theory in the West (New York: 1903), Vol. I, p. 3.

35 M. T. Cicero, Laws, trans. C. W. Keyes (Cambridge: Loeb Classical Library), I, 6-7

36 Carlyle and Carlyle, op. cit., Vol. I, p. 17; Cicero, op. cit., I, 6.

37 Cicero, Republic, trans. C. W. Keyes (Cambridge: Loeb Classical Library), III, 20-24.

38 Cicero, Laws, I, 5.

39 Cicero, Republic, I, 25. For this particular translation, cf. Carlyle and Carlyle, op. cit., p. 4.

40 Carlyle and Carlyle, op. cit., p. 36.

41 "The Institutes of Gaius," The Civil Law trans. and ed. S. P. Scott (Cincinnati, OH: 1932), Vol. I, p. 81. Digest I, l. 9.

42 VanderVyver, op. cit., Lecture 2, p. 17.

43 Carlyle and Carlyle, op. cit., p. 37.

44 Ibid., p. 38. A similar understanding of the relationships of ius naturale, ius gentium and ius civile is articulated by Paulus, a later jurist. Digest I, l. 11.

45 "The Digest or Pandects," trans. and ed. S. P. Scott, op. cit., Vol. II, p. 209. Digest I, l. 2.

46 Digest I, l. 2, 4. cf. Institutes I, 2.

47 Ibid. I, l. 3.

48 Institutes, I, 4, 5. Digest I, 17. 32.

49 Ibid., I, l. 3; Digest I, l. 10. 1.

50 For a complete list of all the extant writings of the jurists of the Empire, cf. Schulz, Roman Legal Science, pp. 102-110, 141-261.

51 Carlyle and Carlyle, op. cit., pp. 74-75.

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