

THE HISTORICAL  
AND INSTITUTIONAL  
CONTEXT OF ROMAN LAW

GEORGE MOUSOURAKIS

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# The Historical and Institutional Context of Roman Law

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# Preface

The law of ancient Rome, as transmitted through the sixth century codification of Emperor Justinian, has been one of the strongest formative forces in the development of what we now think of as the Western legal tradition. It furnished the basis of the Civil law family of legal systems – one of the major groups of legal systems in the world today – and supplied an almost inexhaustible reservoir of legal concepts, doctrines and principles the influence of which can be traced in any body of law, both national and international, and in any system of courts and procedures. The history of ancient Roman law spans a period of more than twelve centuries. Initially the law of a small rural community, then that of a powerful city-state, Roman law became in the course of time the law of a supranational empire which embraced a large part of the civilised world of its time. During its long history Roman law went through a remarkable process of evolution. It passed through different stages of development and underwent important transformations, both in substance and in scope, keeping up with changes in society, especially with those changes brought about by Rome's expansion in the ancient world. During this long process the interaction between custom, enacted law and case law led to the formation of a highly sophisticated system, gradually built up from layers of different elements. But the great bulk of Roman law, especially Roman private law, was not a result of legislation but of jurisprudence. This unenacted law was not a confused mass of shifting customs, but a steady tradition developed and handed down by specialists, at first members of the Roman priestly class and later by the jurists. In the closing stages of this process, as law-making became more and more centralised, this law, together with statutory law, was compiled and then 'codified'. The codification of the law both completed the development of Roman law and became the means by which Roman law was subsequently transmitted to the modern world.

The aim of this book is to show how Roman law emerged, how it became a universal system and how it was transmitted to the modern world. The book traces the evolution of Roman law from the primitive law of a small rustic community in Italy into a highly refined system continuously adapting itself to the needs of a commercial society extending over a vast empire and embracing many different races. It examines the development of the various sources of Roman law in their social and political setting and attempts to explain how in practice a source was made

effective. And since so much of Roman law hinged upon forms of legal process, the book also discusses the evolution of Roman legal procedure and outlines the mechanisms by which legal judgements were put into effect. Although the growth of Roman criminal law is also considered, the emphasis is upon the development of Roman private law. This is largely because private law was the chief interest of the most creative makers of law, the Roman jurists, but partly too because the later influence of Roman law has been predominantly in this field. In this survey I have tried to encompass the history of Roman law as a whole and to convey it in such a way as to avoid the fragmentation which has become usual in the subject. While principally concerned with the historical development of Roman law, I have made a sincere effort to combine the perspectives of social, political and economic history with those of legal history. In the foreground are those historical events which had the strongest impact on Roman law. Special emphasis is placed on the development of the Roman political institutions and the historical evolution of the Roman state. In the final chapter of the book attention is paid to the factors which, in later times, warranted the preservation and continuing influence of the Roman legal inheritance in continental Europe.

This introductory book on the history of Roman law has been written primarily for law students whose course of studies includes Roman law, legal history and comparative law. It is also designed to meet the needs of the general reader of history who would like to know about the main features of Roman law and the social, political and cultural processes that contributed to its development. However, the details of the development of particular legal doctrines or branches of law are not within the scope of this book. There is abundant material available in English and other languages to enable the student to examine selected topics in depth. But any detailed study in Roman law should be carried out only when some understanding of the system as a whole has been attained. It is hoped that this book will provide an accessible historical introduction to the development of Roman law and will encourage students of all kinds to carry out further work in this area of study.

I am grateful to a number of people who have helped me in the preparation of this book. First I should like to thank my colleagues and students at the University of Auckland for their encouragement and constructive criticism. I also wish to thank Professor Alberto Burdese of the University of Padova, Professor Pietro Costa of the University of Florence, Professor Vito Mangini of the University of Bologna, Professor Alfons Bürge of the University of Munich and Professor Nikolaus Benke of the University of Vienna, who enabled me to spend several months in Italy, Germany and Austria as a Research Scholar and to make use of the

libraries and facilities of their Institutions. Mr Ian McIntosh, with his eye for detail and acute insight, has been a superb editor and has made a number of helpful suggestions for improvement. Finally, I wish to thank Chapman Tripp law partnership for one year's financial grant towards the research for this book and my publishers for their courteous assistance.

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# Abbreviations

<i>Bas</i>	<i>Basilica</i>
Bruns, <i>Fontes</i>	<i>Fontes iuris romani antiqui</i> , ed. C. G. Bruns, Tübingen 1909, repr. Aalen 1969
C	<i>Codex</i> of Justinian
C Th	<i>Codex Theodosianus</i>
D	<i>Digest</i> of Justinian
FIRA	<i>Fontes Iuris Romani Anteiustiniani</i> , I-III, ed. S. Riccobono, J. Baviera and V. Arangio-Ruiz, Florence 1940-1943, 2nd edn, 1968
G	<i>Institutes</i> of Gaius
Girard, <i>Textes</i>	<i>Textes de droit romain</i> , ed. P. F. Girard and F. Senn, 7th edn, Paris 1967
<i>Inst</i>	<i>Institutes</i> of Justinian
MGH	<i>Monumenta Germaniae Historica</i>
<i>Nov</i>	<i>Novels</i> of Justinian
SZ	<i>Zeitschrift der Savigny Stiftung für Rechtsgeschichte</i>
P.Oxy.	<i>The Oxyrhynchus Papyri</i> , ed. B. P. Grenfell, A. S. Hunt, et al., London 1898
PS	<i>Pauli Sententiae</i>
UE	<i>Tituli ex corpore Ulpiani</i> in FIRA II, 261-301
XII T	<i>Twelve Tables</i>

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# 1 Introduction

## **Divisions of Roman Legal and Constitutional History**

The history of Roman law may be divided into periods in different ways, depending on the nature of the developments taken to provide the requisite historical landmarks. Although these divisions have facilitated the study of Roman law, one must bear in mind that Roman law evolved gradually and therefore no clear-cut lines separate the different stages of its development. The sources of Roman law were, in varying degrees of strength from period to period, all present and in force at one and the same time, and in various ways qualified the influence of each other.

In general, Roman history falls into three major periods that correspond to Rome's three successive systems of political organisation:

- (i) The Monarchy – from the founding of Rome in the eighth century BC to the end of the sixth century BC.
- (ii) The Republic – from the end of the sixth century BC to the battle of Actium in 31 BC, or the transformation of the Roman constitution under Augustus in 27 BC. The republican era is subdivided into two phases: the early Republic (509 BC to 367 BC), and the later Republic (from 367 BC to 31 or 27 BC).
- (iii) The Empire – this period begins in 31 or 27 BC and ends, for the western Roman empire in 476 AD with the overthrow of the last emperor of the West, and for the eastern Roman empire in 565 AD with the death of Emperor Justinian. The imperial era is subdivided into two parts: the Principate (from 31 or 27 BC to 284 AD), and the Dominate (from 284 AD to 476 AD for the western empire and to 565 AD for the eastern empire).

According to one approach, Roman legal history follows these divisions as the various legal institutions adapted themselves to the type of government in power.

Roman legal history may also be divided into periods by reference to the modes of law-making and the character of the legal institutions that came to prevail in different epochs. In this respect, the history of Roman law may be divided, roughly, into four phases:

## 2 *The Historical and Institutional Context of Roman Law*

- (i) The archaic period – from the eighth century BC to the third century BC. This period includes the Monarchy and the earlier part of the Republic.
- (ii) The pre-classical period – from the third century BC to the beginning of the Principate in the first century AD. This phase covers the later Republic and the early years of the Principate.
- (iii) The classical period – from the first century AD to the middle of the third century AD.
- (iv) The post-classical period – from the middle of the third century AD to the middle of the sixth century AD. This period covers the later part of the Principate and the Dominate.

The above divisions will provide a suitable framework for the discussion of Roman legal history as presented in this book. Before we proceed to examine the development of Roman society and its law in some detail, an outline of the general features of each historical period will be offered in the following paragraphs.

### **The archaic period**

The earliest Rome was an agricultural community which differed little in its social and political organisation from its neighbours in central Italy. The mass of the population was composed of small freeholders and economic life was based largely on cattle-raising and the cultivation of the land. Political power was in the hands of a landowning aristocracy, the patricians, which dominated the most important political body, the senate, out of which the highest magistrates of the state were chosen. Social life revolved around the family (*familia*), the basic social unit, whose head (*pater familias*) had absolute authority over all persons and all property in his family group. A turning-point in the history of this period was the overthrow of the Monarchy, Rome's earliest system of government, at the close of the sixth century BC and the establishment of an aristocratic Republic. During the period from the sixth to the mid-third centuries BC Rome's social and political organisation underwent a series of important changes – a process marked by the 'struggle of the orders', the internal political strife between the old aristocracy, the patricians, and the lower classes, the plebeians. By the middle of the third century BC a precarious equilibrium between the classes had been established and the Roman state came to be dominated by a new nobility composed of both patrician and wealthy plebeian families.

During the earlier phase of the archaic period Roman society was governed by a body of customary norms of a largely religious nature. There

appear to have been no written laws, although the jurist Pomponius, who lived in the second century AD, does allude to certain *leges regiae* (laws of the kings) in his description of the state of the law during this period. In the archaic era the formulation and articulation of the law was in the hands of the priestly class, the *pontifices*. In their capacity as custodians of religious law (*ius divinum*) the pontiffs were concerned with, among other things, the punishment of violations of religious norms and the regulation of the calendar; at the same time they supervised the application of private law (*ius civile*). They alone were acquainted with the technical forms employed in the making of the typical transactions of private law, and they alone were entitled to give official advice and authoritative opinions on questions of law. Like the law of other primitive societies, the Roman law of the archaic period was characterised by its extremely formalistic nature. A legal transaction or procedure could not produce the desired results unless it was performed in accordance with strictly prescribed rituals. And once the prescribed ritual had been observed, the transaction was regarded as binding irrespective of the parties' real intentions. A momentous event that marks the development of Roman law during this period was the codification of the customary norms that governed the life of the Roman citizens by the Law of the Twelve Tables, enacted around 450 BC. With the introduction of this law, the first binding written record of the rules and procedures by which justice might be done, a new source of law came into existence, in addition to the unwritten customary law. In the years that followed the promulgation of the Law of the Twelve Tables legal development was based largely on the interpretation of its text, a task carried out by the pontiffs and, in later ages, by the juriconsults. Moreover, in this period the office of praetor was introduced (367 BC), a new magistracy entrusted with the administration of the private law. In the course of time the praetor's edict became one of the strongest formative forces in the development of Roman civil law and provided the basis for a distinct source of law known as *ius praetorium* or *ius honorarium*.

### **The pre-classical period**

This period witnessed Rome's ascendancy as the dominant power in the ancient world. By the middle of the third century BC Rome had conquered most of the Italian peninsula and, by the end of the first century BC, she held sway over the entire Mediterranean basin. It was during this period that the Romans came into direct contact with the Greek world and were fully exposed to the influence of the Greek and Hellenistic culture. But Rome's rapid growth in territory, wealth and political influence had far-reaching consequences for the social and economic life of the later

Republic. The new conditions brought about by Rome's expansion generated a social and political crisis which was accompanied by an increasingly violent internal strife, both between rival factions and individuals within the ruling classes and between the aristocracy and various disadvantaged groups. This state of affairs degenerated into an almost permanent state of civil war which led to the erosion and final collapse of the republican system of government.

The legal history of this period is marked by the emergence of the first juriconsults (*iurisconsulti* or *iurisprudentes*), a group of jurists who, without being members of the pontifical college, acted as interpreters of the law. Like the pontiffs, these secular jurists were members of the Roman aristocracy. They were men actively engaged in public life and many of them were elected to the highest offices of the state. The main focus of their activities was the giving of legal advice on difficult points of law to judicial magistrates, judges and parties at law. They were also engaged in drafting legal documents, such as contracts and wills, and in advising state organs on legal matters. At the closing stages of this period there appeared the first systematic treatises on civil law – a development associated with the influence of Greek philosophy and rhetoric or Roman legal thought. The legal history of the pre-classical period is marked also by the development of the *ius honorarium* or magisterial law as a distinct source of law. As was mentioned before, early Roman law was rigid, narrow in scope and resistant to change. As a result of the changes brought about by Rome's expansion, the Romans were faced with the problem of how to adjust their law so that it might meet the challenges imposed upon it by new social and economic conditions. In response to this problem the law-dispensing magistrates, and particularly the praetors, were given the power to mould the law in its application. A new flexible system of legal procedure was developed, known as the *per formulam* procedure, under which the magistrates were given much more discretion in deciding whether to grant or to refuse a legal action. Although the magistrates had no legislative authority, by making an extensive use of their right to regulate legal process they did in fact create a new body of law which was progressive and free and subject to continual change and development.

### **The classical period**

The classical period of Roman law largely coincides with the first part of the imperial era, referred to as the Principate. With the establishment of a new form of government under Augustus in the late first century BC the political and social upheaval that marked the closing years of the Republic came to an end. During the first two centuries of the Empire Rome

consolidated its position as the dominant power in the Mediterranean world and, under the conditions of peace and security that prevailed within the boundaries of the empire, trade and industry flourished and Roman culture reached its highest level of achievement. However, the first symptoms of a new crisis began to appear in the second century AD and became more apparent in the closing years of that century: a weakening of Rome's political system and the rise of the army as the decisive power factor, lack of economic equilibrium and economic stagnation, social unrest, and the emergence of new enemies on the empire's frontiers. All these and other factors interacted to intensify and spread the crisis during the third century. In the closing years of that century, under a line of strong emperors, the crisis was finally checked and a temporary revival materialised, but only at the cost of establishing a despotic government and a rigidly regulated society.

Roman law reached its full maturity in the classical period and this was largely due to the creative work of the jurists and their influence on the formulation and application of the law. From the early years of the Principate it became customary for the emperors to grant to the most influential jurists the right to give opinions on questions of law (*ius respondendi*) and to deliver them by the emperor's authority. In the later half of the second century the opinions of the jurists who had been granted this right, when in agreement with each other, came to be regarded as authoritative sources of law and as legally binding. Besides dealing with questions pertaining to the practical application of the law, the jurists were also engaged in the teaching of law and the writing of legal treatises. Most of the fabric of Roman law, as it is known to us today, was built upon the writings of the leading jurists of this period. During the same period the resolutions of the senate and the decrees of the emperors came to be regarded as authoritative sources of law. On the other hand, the influence of the magisterial law (*ius honorarium*) on the development of Roman law gradually weakened as praetorian initiatives became increasingly rare. The final codification of the praetorian edict in 130 AD put an end to the *ius honorarium* as a distinct source of law.

### **The post-classical period**

The unity of the Roman state, badly shaken by the crisis of the third century, was gradually restored in the later half of that century by a line of capable emperors elevated to the throne through the support of the army. The work of these emperors was completed by Diocletian (284-305 AD), whose rise to power is traditionally taken to mark the beginning of a new phase in Roman history known as the Dominate. Under Diocletian and his

successors the imperial government was transformed into an absolute monarchy of an Oriental-Hellenistic type. The administration was reorganised and measures were introduced aimed at the stabilisation of the economy and the strengthening of the empire's defences. But most of these measures proved short-lived and, as the empire's problems escalated, the forces of dissolution gathered momentum. In the later part of this period civil wars, invasions and economic decay plagued the empire, which was finally divided into an eastern and a western part in 395 AD. Within less than a century the western Roman empire finally succumbed to the invading Germanic tribes (476 AD). The eastern empire was transformed into the medieval Byzantine empire and, with Constantinople as its capital, survived for another 1100 years as an essentially Greek state.

The legal history of this period is marked by the general decline of jurisprudence. The interpretations of the jurists ceased to be a living source of law and earlier juristic works came to be regarded as a body of finally settled doctrine. The only effective source of law was imperial legislation, largely concerned with matters of public law and economic policy. At the same time custom began again to play a part as a secondary source of law – a development which, in the western provinces in particular, led to what is referred to as the 'vulgarisation' of Roman law. As the body of imperial legislation continued to grow, there emerged the need for the codification of the law. In addition to that, direction needed to be given concerning the use of the classical literature – a vast body of legal materials stretching back over hundreds of years of legal development. The process of codification began with the publication of two private collections of imperial law which appeared at the end of the third century AD: the *Codex Gregorianus* (291 AD) and the *Codex Hermogenianus* (295 AD). These were followed by the *Codex Theodosianus*, an official codification of imperial statutes published in 438 AD. The process of codification came to an end in the middle of the sixth century AD with the great codification of the Roman law – both of juristic law and imperial enactments – under Emperor Justinian.

### **Sources of Roman Legal History**

Our knowledge of the history of Roman law is derived from a number of different sources. Depending upon the nature of the relevant historical material a distinction is drawn between literary sources, epigraphic evidence and the unwritten archaeological record. Of particular importance for our reconstruction of Roman legal history are documents of a specifically legal nature, such as various legislative texts, the surviving

body of juristic literature, records of legal transactions and statutes inscribed on tablets of bronze, stone or copper.

### Juridical literature

Of the literary sources of particular importance are the surviving works of the Roman jurists of the pre-classical and classical periods. Most of these works have come down to us in a fragmentary form and only indirectly through the codification of Justinian and other post-classical compilations of law. But questions arise as to whether many of the surviving fragments accurately reflect the original sources from which they were derived, as they may have been simplified and in various ways adapted to the needs and purposes of the post-classical compilers. The only juristic work from the classical period that has survived in its entirety is the Institutes of Gaius, a textbook dating from the middle of the second century AD. Although the manuscript containing this work dates from the fifth or early sixth century AD – more than three centuries after Gaius's time – it is believed that it is a faithful reproduction of the original text. This was confirmed after the discovery in 1933 in Egypt of fragments of another manuscript of Gaius's Institutes, probably of the late fourth century, matching the text of the first manuscript. About a tenth of the manuscript's content is lost or totally illegible, but some of the missing parts have been reconstructed from extracts included in later compilations.

Another important source of juristic literature is the so-called Vatican Fragments (*Fragmenta Vaticana*), a general collection of juristic opinions and imperial legislation discovered in the Vatican library in 1821.<sup>1</sup> A further collection, known as the *Collatio legum Mosaicarum et Romanarum* (A Comparison of Mosaic and Roman Law), dates from the late fourth or early fifth century AD and was first published in Paris in 1573.<sup>2</sup> This collection has been particularly helpful in reconstructing the *Pauli Sententiae*, an important work based on the writings of the classical jurist Paul. Extracts from the latter work, which was produced by an unknown author in about 300 AD, have been included in a number of post-classical compilations besides the *Collatio*, as well as in the Digest of Justinian. In this connection the *Ulpiani Epitome* may be mentioned as well. This was probably an abridgment of the *liber singularis regularum*, a

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<sup>1</sup> This collection was published in Rome in 1823. See chapter 10 below.

<sup>2</sup> The original title of this manuscript is *Lex dei quam praecipit dominus ad Moysen* (The divine law which the Lord gave to Moses). It appears that in this work the author wanted to demonstrate that Roman law agreed with or possibly even was based on Mosaic law. See chapter 10 below.

work of the jurist Ulpian, produced by an unknown author at the beginning of the fourth century AD. A manuscript of Ulpian's *Epitome* dating from the tenth century and first published in 1549 is now kept in the Vatican library. An additional source of juristic literature is the *Consultatio* (*consultatio veteris cuiusdam iurisconsulti* or 'a Consultation with an Ancient Jurisconsult'), first published by Cujas in 1577.<sup>3</sup> In this work a number of legal questions are defined and then answered on the basis of statements drawn from classical and post-classical authorities. These include various passages from Paul's *Sententiae* and extracts from collections of imperial legislation (the Gregorian, Hermogenian and Theodosian Codes). Among the main surviving sources from the eastern part of the Roman empire are the *Scholia Sinaitica*<sup>4</sup> and the Syrio-Roman Book of Law. The former consists of extracts from a commentary in Greek on Ulpian's *libri ad Sabinum*, probably of the late fifth century. The Syrio-Roman Book of Law consists of imperial constitutions and juristic writings and appears to have been used at the law schools of the East as a textbook for students.<sup>5</sup>

Important sources of information on the development of Roman law are also the legal codes of the post-classical period. Among the earliest of these codes were two private collections of imperial laws, the *Codex Gregorianus* and the *Codex Hermogenianus*, compiled at the end of the third century AD. Although neither has survived, parts of these codes have come down to us through other post-classical compilations.<sup>6</sup> The first official codification of imperial legislation was the Theodosian Code (*Codex Theodosianus*), published in 438 AD. Fragments of this code have been included in later collections, such as the Code of Justinian and the *Lex*

<sup>3</sup> Cujas, who taught at the University of Bourges, was one of the leading representatives of the Humanist School of the sixteenth and seventeenth centuries. See chapter 11 below.

<sup>4</sup> So called because the relevant manuscript was found, in 1880, at the monastery of St Catherine of Sinai, in Egypt.

<sup>5</sup> Most of the surviving legal literature of the pre-Justinianic period can be found in a number of easy-to-use collections produced by modern scholars. See e.g., T. Baviera & J. Furlani, *Fontes Iuris Romani Anteiustiniani* (FIRA) II, *Auctores*, Florence 1940, repr. 1968; P. Girard & F. Senn, *Textes de droit Romain* I, 6th edn, Paris 1937, repr. 1967; O. Lenel, *Palingenesia Iuris Civilis* I-II, Leipzig 1889, repr. Graz 1960 – a reconstruction of the texts of the classical Roman jurists; Lenel also produced a reconstruction of the praetorian Edict entitled *Das Edictum Perpetuum*, 1927, repr. 1966 and 1985. For more on modern sources see chapters 8 and 10 below.

<sup>6</sup> Extracts can be found in the Code of Justinian, the Vatican Fragments, the *Collatio*, the *Consultatio*, and in Germanic codes of Roman law, such as the *Lex Romana Visigothorum* and the *Lex Romana Burgundionum*.

*Romana Visigothorum*. Moreover two manuscripts, one dating from the fifth and the other from the sixth century, have been found containing parts of the code's original text. Several important reconstructions of the Theodosian Code have been published since the sixteenth century.<sup>7</sup> Another collection of imperial laws is the so-called Sirmundian Constitutions (*constitutiones Sirmondi*).<sup>8</sup> This contains a number of imperial constitutions dating from the first half of the fifth century AD. Besides the above compilations of Roman origin, important sources are also the Germanic codes of Roman law (*leges Romanae Barbarorum*) issued by Germanic kings after the fall of the Roman empire of the West for use by their Roman subjects. These compilations include the *lex Romana Visigothorum*, also known as the Breviary of Alaric (*Breviarium Alarici*), the *lex Romana Burgundionum*, and the *Edictum Theodorici*. Although the Roman law contained in these compilations is but a crude and diluted version of the law of the classical period, their importance for the study of Roman law today is great. Besides offering a vivid account of the stage of the law and society at the beginning of the early Middle Ages, these codes have preserved valuable legal records from earlier times which cannot be found in any other sources.<sup>9</sup>

But the most important source of our knowledge about the historical development of Roman law, especially during the late classical and post-classical periods, is the great codification of the law which was carried out in the middle of the sixth century on the orders of Emperor Justinian. It was Justinian who finally succeeded, at a moment when the ancient world was dissolving, in putting together, in a form which could survive, the vast literature of Roman law stretching back over hundreds of years of legal development. The Justinianic codification is made up of four parts: a) the Digest (*Digesta*), containing a large number of excerpts from the works of the classical jurists;<sup>10</sup> b) the Code (*Codex*), a collection of imperial constitutions from the time of Emperor Hadrian (middle of the second century AD); c) the Institutes (*Institutiones*), an introductory textbook on law based on the Institutes of Gaius and d) the Novels (*Novellae leges*),

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<sup>7</sup> One of the earliest editions of the Theodosian Code is that of Gothofredus, published in Lyons in 1665.

<sup>8</sup> So called from the fact that it was first published by Sirmond (J. Sirmondus) in 1631.

<sup>9</sup> For more on the character of these works and for information about modern reconstructions see chapter 10 below.

<sup>10</sup> The earliest surviving copy of the Digest dates from the middle of the sixth century AD. This manuscript, which provided the basis for the modern editions of the Digest, is kept in Florence (it was moved there from Pisa at the beginning of the fifteenth century), and is known as '*Codex Florentinus*'.

containing enactments of Justinian subsequent to the publication of the Code. The term *Corpus Iuris Civilis*, by which the Justinianic codification is known, was first introduced by Dionysius Gothofredus, who edited the work in 1583.<sup>11</sup>

### **Other literary sources**

Much of what we know about the history of Roman law is derived from the surviving works of Roman and Greek historians, geographers, grammarians and lexicographers, orators, poets and philosophers. These sources provide valuable information about the socio-economic, political and cultural context within which the Roman legal institutions developed. The beginning of Roman historical writing coincides with the emergence of Latin literature at the end of the third century BC.<sup>12</sup> The earliest Roman historians, referred to as 'annalists', are believed to have had access to Rome's official records (*annales maximi* or *tabulae pontificum*) which, from an early age, were under the supervision of the *pontifex maximus*, head of the most powerful of Rome's priestly colleges. These records chronicled important events, such as eclipses and other natural phenomena of a religious significance, wars and the names of the elected magistrates, on a year-by-year basis. But almost all documentary evidence for the period preceding the fourth century perished – according to some annalists this occurred during the sack of Rome by the invading Gauls in c. 390 BC. As a result, the annalists tended to describe Rome's remote past by filling in the scanty documentary evidence at their disposal with materials derived largely from the oral tradition, which consisted chiefly of folk-tales and the traditions of the Roman nobility. Although these stories tell us much about the cultural framework of the early Roman society, their value as sources of historical information is regarded as highly questionable. And since later Roman historians relied on the annalistic inheritance for their own reconstructions of Rome's early history, their accounts are not taken at face value but are viewed in the light of the findings of modern scientific archaeology, linguistics and comparative philology. Moreover, one has to keep in mind that, as most of the leading historians were members of the Roman upper classes, the world-picture they convey is often affected by their ideological and family bias and their political affiliations. Of

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<sup>11</sup> For a closer look at Justinian's codification and information on modern editions see chapter 10 below.

<sup>12</sup> Among the earliest writers of Roman history were Fabius Pictor and Cincius. On the origins of Roman historical writing see M. L. W. Laistner, *The Greater Roman Historians*, London 1947, repr. 1977, ch. 1.

particular importance are the works of Greek historians who, insofar as they can be seen as outside observers, probably offer a more disinterested description of events than Roman writers.

Of the Greek and Roman historians of the late Republic and early Empire, the following are among the most important: Polybius of Megalopolis (c. 208-118 BC), whose *Universal History* offers a vivid account of Rome's wars of expansion from 220 to 145 BC;<sup>13</sup> Diodorus Siculus (c. 80-20 BC), who composed a general history of the world from the earliest times down to the first century BC;<sup>14</sup> Dionysius of Halicarnassus (first century BC), author of the *Roman Antiquities*, a comprehensive narration of Roman history down to the middle of the third century BC;<sup>15</sup> Posidonius of Apamea (first century BC), also a celebrated scientist, geographer and philosopher, who wrote a history of Rome from 145 BC down to his own times;<sup>16</sup> Plutarch (c. 46-120 AD), author of the *Parallel Lives*, a work that compares the lives of famous figures of Greek and Roman history; Sallust (c. 87-35 BC), whose subsequent reputation as one of the foremost historians of his time rested mainly upon his *Histories*, an exhaustive account of the period 78-67 BC, and to a lesser extent on his monographs on the Catilinarian conspiracy (*Bellum Catilinae*) and the Jugurthine War (*Bellum Jugurthinum*);<sup>17</sup> Livy of Padua (Titus Livius, 59 BC-17 AD), whose monumental history of Rome (*Ab urbe condita*), covering the whole span of Roman history from the foundation of Rome down to the early years of the first century AD, was well-known all over the Roman world;<sup>18</sup> Tacitus (Publius Cornelius Tacitus, c. 55-123 AD), author of a series of famous works providing valuable information about

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<sup>13</sup> But only the first five books of Polybius's work, covering a period down to 216 BC, have come down to us complete. Of the rest only fragments have been preserved through later historical works.

<sup>14</sup> Of the 40 books of Diodorus's *World History* only books 1-8 and 11-20 are fully preserved; of the rest we have only fragments.

<sup>15</sup> Of the 20 books of the *Roman Antiquities* only the first 10 survive complete.

<sup>16</sup> Only fragments of Posidonius's works have survived.

<sup>17</sup> Of Sallust's *Histories* very little has come down to us, but both his shorter works have survived.

<sup>18</sup> Of the 142 books of Livy's history only books 1-10 (covering the period 753-243 BC) and 21-45 (covering the period 218-167 BC) have survived complete; from the lost books we have fragments as well as two sets of abridgments. Livy viewed historical writing as a literary category based upon the narration of dramatic events. He was interested not so much in historical research as in digesting materials taken from earlier sources and then preserving them in his own unique literary style.

the history of the early imperial era;<sup>19</sup> Dio Cassius Cocceianus (c. 155-235 AD), who composed a general history of Rome from the beginning of the archaic era down to 229 AD;<sup>20</sup> Pliny the Younger (Gaius Plinius Caecilius Secundus, c. 61-114 AD), whose Letters include an account of speeches he made as an advocate in extortion trials before the senate; Suetonius (Gaius Suetonius Tranquillus, c. 70-150 AD), whose writings include the Biographies and the Lives of the Caesars (*De Vita Caesarum*).<sup>21</sup> Another source of information is the *Historia Augusta* (probably the work of six authors), a collection of biographies of Roman Emperors, Caesars and usurpers from 117 to 284 AD.

Among the best known historians of the later imperial period are: Ammianus Marcellinus (c. 330-395 AD), whose History (*XXXI Libri Rerum Gestarum*) covers the period 96-378 AD;<sup>22</sup> Flavius Josephus (c. 38-95 AD), who in his work the Jewish Antiquities, a history of the Jews from the Creation to 66 AD, has preserved many Roman edicts and rescripts as well as information about several Roman emperors taken from authoritative Roman sources; Lactantius (c. 240-320 AD), author of a work describing the trials of the Christians under Emperors Diocletian and Galerius;<sup>23</sup> Eusebius, Bishop of Caesarea (c. 260-340 AD), who composed a Church History covering the period down to 324 AD, as well as

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<sup>19</sup> The earliest of Tacitus's five works, entitled *Agricola* and *Germania*, were written in 98 AD. The first is a short biography of Agricola, his father-in-law, who played an important part in the Roman conquest of Britain. In this work Tacitus gives us a clear picture of the moral beliefs and political ideas prevailing among the members of the newly formed imperial aristocracy. The second work is a description of the geographical, social and cultural characteristics of Germany. Between the years 104-109 AD Tacitus wrote his Histories, an account of the period 69-96 AD in five books. About 107 AD he wrote his Dialogue on Orators (*Dialogus de Oratoribus*), a treatise of literary criticism discussing the decline of forensic eloquence in his times. His famous Annals, probably written between 115-117 AD, cover the history of the period 14-68 AD.

<sup>20</sup> But many parts of Dio's work are lost. Of the 80 books of his Roman History we have only books 36-60 complete; the others are known through the summaries of the Byzantine historians Zonaras (twelfth century), who prepared an epitome of books 1-21, and Xiphilinos (eleventh century), who wrote an epitome of books 36-80.

<sup>21</sup> Suetonius's Lives of the Caesars contains the biographies of Rome's rulers from Julius Caesar (first century BC) up to Domitian (late first century AD).

<sup>22</sup> Of this work only books 14-31 (dealing with the period 353-378 AD) survive.

<sup>23</sup> Lactantius's work is entitled On the Deaths of the Persecutors.

comprehensive chronological tables of the Greek and Roman history;<sup>24</sup> Cassiodorus (c. 490-538 AD), writer of numerous works, including the *Chronica*, a summary of the Roman history down to 519 AD; and Procopius (sixth century AD), thanks to whom we have a vivid account of the age of Justinian.<sup>25</sup>

Besides the historical works, important sources of Roman legal history are the writings of political and forensic orators, such as Cato the Elder (Marcus Porcius Cato, 234-149 BC), Cicero (M. Tullius Cicero, 106-43 BC), known also for his writings on philosophy and political theory,<sup>26</sup> the philosopher Seneca (Lucius Annaeus Seneca, 4 BC-65 AD) and Pliny the Younger, mentioned before.<sup>27</sup> Our sources include also the works of Greek and Roman geographers, such as Strabo of Amasia (64 BC-21 AD), whose *Geographica* survived almost intact;<sup>28</sup> biographers, such as Cornelius Nepos (first century BC), and Plutarch and Suetonius, mentioned before; antiquarians and philologists, such as Varro (Marcus Terentius Varro, 116-27 BC),<sup>29</sup> Aulus Gellius (second century AD),<sup>30</sup> and Valerius

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<sup>24</sup> Eusebius' chronological tables, which have survived both in Latin and in an Armenian translation, provide us with valuable information about ancient chronology.

<sup>25</sup> Procopius wrote the History of the Wars of Justinian in 8 books. As he was among the officials who accompanied Justinian's generals in their campaigns, he gives us a first-hand account of events. Besides his historical writings, Procopius produced a number of other works, including a book called the *Anekdotia* or Secret History in which he criticises the private lives of Justinian and his wife Theodora.

<sup>26</sup> Cicero expressed his views on ethics, politics and law in a series of celebrated treatises. In his *De re publica* (On the State), a work inspired by Plato's Republic, Cicero delineates the actual constitution of the ideal state. His famous works *De legibus* (On the Laws), *De officiis* (On Duties) and *De senectute* (On Old Age) reflect Cicero's political, ethical and philosophical thinking. Besides his oratorical and philosophical works, Cicero left an extensive collection of letters which contain valuable information about Roman society and politics during the last century of the Republican era.

<sup>27</sup> Orations, one of the chief weapons employed in political contest, were addressed to political bodies, such as the senate or the assemblies of the Roman people. Among the greatest orators of the republican period were the Gracchi brothers, Lucius Licinius Crassus and Quintus Hortensius Hortalus.

<sup>28</sup> In this Strabo describes the countries of the Roman world, their geographical characteristics, their peoples and their histories. Besides his Geography, Strabo also composed an extensive historical work from which only some fragments survive.

<sup>29</sup> Varro's main work, Antiquities, did not survive, however. Only parts of his treatises On the Latin Language and On Rural Conditions have come down to us.

Maximus (first century AD). Of some importance for the study of Roman legal life during the pre-classical period are the comedies of Plautus (c. 254-184 BC) and Terentius (c. 190-159 BC), although it is difficult to say whether their works give an accurate picture of life in Rome or they reflect the Greek models upon which they are based. Finally, information relevant to the history of Roman law is derived from the works on agriculture of Cato (Marcus Porcius Cato, second century BC) and other writers.<sup>31</sup>

### Epigraphic sources

Besides the various literary sources, valuable information about the development of Roman law is derived from a variety of authentic records of Roman date. These include inscriptions on tablets of stone or metal, inscriptions on the walls of arches, temples and other buildings, writings on leaves of papyrus or parchment and other documents. A large number of epigraphic texts reproduce statutes, decisions of the senate, imperial decrees, municipal charters, calendars and official records, speeches of the emperors, judicial decisions, military discharge certificates and agreements concerning private transactions. To this category of sources belongs, for example, the *Res Gestae Divi Augusti*, a text recording the most important events of the reign of Augustus. This is also known as *Monumentum Ancyranum*, because a copy of it was found inscribed on the wall of a temple in Ankara, Turkey.<sup>32</sup> Other examples of documents of this kind include: an inscription from Cyrene containing four edicts of Augustus and a senatorial decree concerning matters of procedure in extortion cases;<sup>33</sup> a bronze plaque found in Lyons with the text of a speech delivered by Emperor Claudius,<sup>34</sup> and an inscription reproducing the text of a law conferring on Emperor Vespasian the same legal powers as his predecessors (the famous *lex de imperio Vespasiani*).<sup>35</sup> An important

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<sup>30</sup> Author of a book on literary criticism entitled *Attic Nights (Noctes Atticae)*.

<sup>31</sup> A collection of extracts from the various literary sources concerning Roman law can be found in C. G. Bruns, O. Gradenwitz, *Fontes iuris romani antiqui*, Tubingen 1909, repr. Aalen 1969; see also P. F. Girard & F. Senn, *Textes de droit romain*, 6th edn, Paris 1937, repr. 1967.

<sup>32</sup> For the text see P. A. Brunt & J. M. Moore, *Res Gestae Divi Augusti: The Achievements of the Divine Augustus*, Oxford 1967; J. Gagé, *Res gestae divi Augusti*, Paris 1950; H. Volkmann, *Res gestae divi Augusti*, Berlin 1969.

<sup>33</sup> These can be found in F. De Visscher, *Les édits d'Auguste découverts à Cyrène*, Louvain and Paris 1940.

<sup>34</sup> See H. Dessau, *Inscriptiones Latinae Selectae*, Berlin 1892-1916, 212.

<sup>35</sup> See P. A. Brunt, 'Lex de imperio Vespasiani', *Journal of Roman Studies* lxxvii 1977, 95-116.

document dating from the early fifth century AD is the *Notitia Dignitatum*, an official list of all administrative and military posts in the empire from provincial governors upwards. This document provides important information about the organisation of the imperial administration during the late imperial epoch.<sup>36</sup> Another inscriptional text from the same period offering us a picture of the social and economic conditions of the times is the famous Edict of Prices (*Edictum de pretiis*, 304 AD) of Emperor Diocletian who, in an effort to stabilise the currency, stipulated maximum prices and wages over a detailed range of goods and services.<sup>37</sup> Information on the social and economic conditions that prevailed at different stages of Roman history is derived also from inscriptions on tomb-stones and mausoleums of various ages.<sup>38</sup> A rich source of information about every aspect of Roman life are, moreover, the numerous letters and other documents which have been preserved on leaves of papyrus, parchment and on clay and wooden tablets. Recorded on leaves of papyrus are, for example, records of legal proceedings, legal decisions, tax records, official memoranda, leases, sales, petitions to the imperial government, contracts and wills, private accounts and letters. This category includes also ostraca, bits of broken pot on which are recorded, for instance, tax receipts and receipts for military rations.<sup>39</sup>

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<sup>36</sup> For the text see O. Seeck (ed.), *Notitia Dignitatum, Accedunt notitia urbis Constantinopolitanae et latercula provinciarum*, Berlin 1876, repr. 1962.

<sup>37</sup> The text of this law can be found in M. Giacchero (ed.) *Edictum Diocletiani et Collegarum de pretiis rerum venalium*, Genoa 1974; see also S. Lauffer, *Diokletians Preisedikt*, Berlin 1971.

<sup>38</sup> Modern collections of inscriptional texts include: *Corpus Inscriptionum Latinarum*, Berlin: Deutsche Akademik der Wissenschaften 1863; H. Dessau, *Inscriptiones Latinae selectae*, Berlin 1892-1916; A. Degrassi, *Inscriptiones Latinae liberae rei publicae*, vls 1-2, Florence 1957-1963; A. E. Gordon & S. Joyce, *Album of Dated Latin Inscriptions*, Berkeley 1958; E. H. Warmington, *Remains of Old Latin*, London 1940; R. Cagnat, J. Toutain, P. Jouguet, G. Lafaye, *Inscriptiones Graecae ad res Romanas pertinentes*, 1,3,4, Paris 1906-1927, repr. Rome 1964. And see L. Keppie, *Understanding Roman Inscriptions*, London 1991; J. E. Sandys, *Latin Epigraphy: An Introduction to the Study of Latin Inscriptions*, Cambridge 1926, repr. Chicago 1974; B. W. Jones & R. D. Milns, *The Use of Documentary Evidence in Roman Imperial History*, Sydney 1984.

<sup>39</sup> Modern collections of this type of material include: L. Mitteis & U. Wilcken, *Grundzüge und Chrestomathie der Papyrskunde*, Leipzig 1912, repr. Hildesheim 1963; P. M. Meyer, *Juristische Papyri*, Berlin 1920, repr. Chicago 1976; A. S. Hunt & C. C. Edgar, *Select Papyri* (text and English translation), London 1932, 1959, 1963; W. L. Westerman & A. A. Schiller, *Apokrimata – Decisions of Septemius Severus on Legal Matters*, New York 1954. And see V.

## The unwritten archaeological record

Finally, an important source of information about the historical framework of Roman law is archaeological evidence – the evidence of buildings and structures surviving above ground or brought to light by archaeological excavations, together with the artifacts and other finds connected with them. By comparing remains from different sites and from different periods of the same site archaeologists can reconstruct, by reference also to other sources of historical information, the social and cultural history of a region. Of special interest for the legal historian are coins, commemorative medallions and seals, illustrations and sculptures. Coins, in particular, often used for propaganda purposes in both the Republican and imperial epochs, can supply valuable information about the political and economic conditions that prevailed at the period of their issue.<sup>40</sup>

## Fundamental Concepts and Distinctions

### *Fas* and *ius*

During the earliest phase of Roman history<sup>41</sup> social life was governed by a body of customary norms, the *mores maiorum* or 'the ways of our forefathers', which the Romans had inherited from their ancestors. Some of these norms were regarded as being of human creation, whilst others derived their binding force from their supposed divine origin. The divine

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Arangio-Ruiz, *Studi Epigrafici e Papirologici*, Naples 1974; R. Taubenschlag, *The Law of Greco-Roman Egypt in the light of the Papyri*, Warsaw 1955. See also R. Cavenaile, *Corpus Papyrorum Latinarum*, Wiesbaden 1958; E. G. Turner, *Greek Papyri: an Introduction*, Oxford 1968. Collections of legislative acts and private transactions taken from various literary and epigraphic sources can be found in the *Fontes iuris romani anteiustiniani* (FIRA) I, *Leges*, by S. Riccobono (ed.), Florence 1941, repr. 1968, and III, *Negotia*, by V. Arangio-Ruiz (ed.), Florence 1943, repr. 1969. See also C. G. Bruns (ed.), *Fontes iuris romani antiqui* I, *Leges et negotia*, Tübingen 1909, repr. Aalen 1969. Many of the legislative enactments contained in these collections have been translated into English by A. C. Johnston, P. R. Coleman-Norton & F. C. Bourne in *Ancient Roman Statutes*, Austin 1961.

<sup>40</sup> See M.H. Crawford, *Roman Republican Coinage*, Cambridge 1974; H. Mattingly, *Roman Coins from the Earliest Times to the Fall of the Western Empire*, 2nd edn, London 1960, repr. 1967; M. Grant, *Roman History from Coins*, 2nd edn, Cambridge 1968.

<sup>41</sup> The Monarchy and early Republic.

element in this system was signified by the word *fas*.<sup>42</sup> The norms associated with *fas* occupied a higher plane and had a fuller scope and wider range than man-made rules. These norms demanded, for example, that no military operation or other public undertaking should be embarked upon without the sanction of the divine will (as revealed through the prescribed religious rituals). They enjoined hospitality to foreigners because strangers were regarded as being under the protection of the gods. They punished murder as an offence against the gods. They forbade the displacement of boundary stones, for boundary stones were regarded as being under the protection of the gods. Conduct that violated the divine law was referred to as *nefas*, and was regarded as disrupting the harmonious relationship between the community and its gods (the Romans believed that such conduct could arouse the wrath of the gods and that the whole community could be struck by misfortune as a result). The enforcement of the norms of *fas* was entrusted to the priests who discharged their task in their own way by means devised and administered by them. The breach of a rule associated with *fas* rendered the offender impious and the punishment inflicted upon him was expiatory in character. Its purpose was to heal the condition of collective impurity and thus to restore the state of harmony (*amicitia*) between the community and the gods.

Behaviour that caused no harm to others was regarded as conforming with *ius*, the man-made norms of social conduct governing human relations. The term *iniuria* was used to denote any violation of the *ius*. The word *ius* originally signified that which is due in human relations, the power of a human being to act with reference to other human beings. In historical Latin the word *ius* was taken to mean 'right' or 'power'.<sup>43</sup> With the gradual differentiation of human and divine law and the development of Roman legal thinking the term *ius* came also to denote what we mean by the word 'law' in a broad sense: the entire system of norms, whether written or unwritten, by which the rights and concomitant powers of the members of a community are defined, protected and enforced. In this respect *ius*, or law in a broad sense, was distinguished from morals (*mos, mores*). The latter referred to the rules of conduct which are addressed to the conscience of a person and which are not formally enforceable.

But in the archaic period the two spheres of *ius* and *fas* largely overlapped. The link between the two concepts is evident from the fact that for a very long period the interpretation and application of the norms of *ius*

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<sup>42</sup> The word *fatum* denoted that which has been decreed by the gods and which, for that reason, must inevitably occur.

<sup>43</sup> Such as a person's right to seize by force a thing justly claimed or a person liable to retributive punishment.

was in the hands of the priesthood. Their connection is manifested also by the fact that, during the regal era, the king performed functions pertaining to both human and divine law. Every important act of a Roman citizen, whether of a public or a private nature, assumed a religious character and its validity was made to depend upon the determination of the divine will. Even after the Romans began to distinguish between divine and human law, in the later archaic period, the connection between *ius* and *fas* continued to exercise an influence on Roman legal thinking and practice. Thus, both legislative acts and private agreements usually began with some reference to the gods and ritual continued to play an important part in legal transactions.

Moreover, the term *ius*, besides its purely descriptive function, was always perceived as embodying a strong normative element reflecting the relationship between law and justice (*iustitia*). Thus, *ius* has been defined by classical jurists as 'the art of good and equitable',<sup>44</sup> and as that which is always 'just and fair'.<sup>45</sup> The same relationship is also reflected in Ulpian's definition of jurisprudence as 'the knowledge of things divine and human, and of what is just and unjust'.<sup>46</sup> From this viewpoint, Ulpian says that *ius* requires living honestly, harming no-one and giving each one his due'.<sup>47</sup> *Ius*, in this broad normative sense, is not the same as morality nor, of course, the same as posited law; rather, it is right law, or posited law as it ought to be in the light of what morality and justice ordain.<sup>48</sup> The impact of morality on law is evidenced by the fact that, in the administration of justice, reference was often made to general moral standards, as in cases where legal transactions were declared null as being contrary to generally accepted moral norms (*contra bonos mores*).

But the Romans interpreted the term *ius* in more than one way, depending upon the context in which the term was used or the legal relationship it referred to. Sometimes it was used to denote a specific public or private right or power granted to an individual by law for the pursuance of a legally recognised interest.<sup>49</sup> *Ius* also indicated the personal

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<sup>44</sup> '*Ius est ars boni et aequi*.' See D. 1. 1. 1. (Celsus).

<sup>45</sup> D. 1. 1. 11. (Paulus).

<sup>46</sup> '*Iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia*'. See D. 1. 1. 10. 2; *Inst.* 1. 1. 1. Ulpian defines justice as the constant and perpetual will to give each one his due (*iustitia est constans et perpetua voluntas ius suum cuique tribuere*). See D. 1. 1. 10; *Inst.* 1. 1.

<sup>47</sup> '*Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*'. D. 1. 1. 10. 1; *Inst.* 1. 1. 3.

<sup>48</sup> This meaning of *ius* is better conveyed in English by the word 'right' as a noun.

<sup>49</sup> For example, the phrase *ius in re aliena* denoted a right in another person's property, such as a servitude or a pledge. The term *ius honorum* signified the

legal status of a person, as in the phrases *persona sui iuris* (a person in charge of his own affairs), and *persona alieni iuris* (a person under the power of another). Moreover, in procedural language the term *ius* denoted the place where a Roman magistrate performed his judicial functions.<sup>50</sup> In a similar way, the word *iniuria* was capable of several interpretations, depending upon the nature of the violation of *ius* it was used to describe. In general, any act that was done contrary to *ius* (*contra ius*) was called *iniuria*. The same term was used to signify a specific offence against one's person or reputation.<sup>51</sup>

### ***Ius* and *lex***

*Ius*, as defined above, was distinguished from *lex* (plural *leges*). The latter term refers to a law enacted by a competent legislative organ in accordance with a prescribed procedure. In the archaic and pre-classical periods the term *leges* was used to denote statutes enacted by the Roman popular assemblies.<sup>52</sup> In the classical and post-classical periods the term *leges* referred to laws originating from a number of sources, such as decrees of the senate and imperial constitutions. Sometimes the term *leges* was used to signify the entire body of posited law, irrespective of its sources.

A *lex*, which by definition pertained to a specific type of legal relationship, drew upon *ius* but was not identified with it. The normative principles of *ius*, under which the question of lawfulness or unlawfulness was decided, were not reducible to the body of formally enacted laws. These principles were perceived of as pre-existing and transcending the enacted law, which merely prescribed how *ius* was to be implemented under certain circumstances. Unlawfulness was defined primarily in relation to *ius*, for an unlawful act was taken to encroach upon the principles of *ius* which informed the particular legislative enactment under which the act was subsumed. From this viewpoint, the word *iniuria* signified any infringement of the law as an act done '*contra ius*'. Furthermore, the application of a *lex* was typically strict ('*dura lex sed lex*'), for an act or dispute was dealt with according to the letter of the law, without reference to the circumstances of the individual case. Thus, under the system of *legis actiones* (actions based on the law) of early law, a person suing another had to make his claim strictly according to the

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right of a Roman citizen to stand for public office. The term *ius intercessionis* referred to the power of a higher magistrate or a tribune to block by veto official acts of other magistrates.

<sup>50</sup> D. 1. 1. 11. (Paulus).

<sup>51</sup> *Inst.* 4. 4. pr.

<sup>52</sup> G. 1. 3.

formula prescribed by the statute he was relying upon. If the wrong formula was used the action was rejected.<sup>53</sup> On the other hand, the application of *ius* was seen as flexible and thus adaptable to the circumstances of each particular case. Whereas the implementation of a *lex* was based on purely formal criteria, the implementation of *ius* was based on its intrinsic rightness. As we will explain later, it is the modification and refinement of enacted law, through the application of equitable principles – principles pertaining to *ius* – that characterises the praetors' and, in later years, the jurists' contribution to the development of Roman law.<sup>54</sup>

In the post-classical era the term *ius* came to denote the entire body of law based on the works of the leading jurists of the classical period. *Lex*, on the other hand, signified the law contained in the enactments of the emperors, the principal source of law of this period.

### *Ius non scriptum, ius scriptum*

The Romans distinguished between two general categories of *ius*, or law in a broad sense, unwritten law (*ius non scriptum*) and written law (*ius scriptum*). In the category of unwritten law belonged the customary law of the archaic period. Custom (*consuetudo*) was a source of norms which derived their binding force from the tacit consent of the people and their long-standing practice within the community.<sup>55</sup> As was noted earlier, during the Monarchy and the early years of the Republic there appears to have been no written law in Rome. Knowledge of law was handed down as a tradition (*mos maiorum*) in the patrician families. But as legal relations grew more complicated and the population increased in size, the role of

<sup>53</sup> See chapter 4 below.

<sup>54</sup> The distinction between and interrelationship of posited law and right (as a noun) is a characteristic feature of Continental European legal systems based on the Roman legal inheritance. The Germans distinguish between *Gesetz* and *Recht*, the French between *loi* and *droit*, the Italians between *legge* and *diritto*, the Greeks between *nomos* (Nomos) and *dikaion* (Dikaion). *Ius* in the sense of right (like the words *Recht*, *droit*, *diritto*, *dikaion*) is a normative concept emphasising the relationship between justice and sound (posited) law. On the concept of *ius* see A. A. Schiller, *Roman Law: Mechanisms of Development*, New York 1978, 224 ff; M. Kaser, *Römische Rechtsgeschichte*, Göttingen 1976, 59 ff; F. Wieacker, *Römische Rechtsgeschichte*, Munich 1988, 267 ff; A. Guarino, *Storia del diritto romano*, Naples 1996, 124 ff, 420 ff.

<sup>55</sup> See D. 1. 3. 32. (Julianus); *Inst.* 1. 2. 9. Consider also Cicero, *de invent.* 2. 22. 67. Besides *consuetudo*, custom was also referred to as *usus* or *mos*. None of these terms had a fixed or specific meaning however. The term *mos regionis* was used in later years to signify local custom, although no clear distinction between this and general custom seems to have been recognised.

custom as the main source of social regulation began to diminish. The existing customary norms, often uncertain and difficult to prove, could no longer provide the certainty and security which a complex system of social and economic relations required. Thus, the need arose for the development of legislation, i.e. the organisation of law by public authority. The decline of custom and the emergence of legislation was accompanied by the strengthening of the role of the state and the improvement of the position of the lower classes. But the introduction of written law did not eliminate the role of custom as a source of social regulation. Customary norms continued to govern aspects of social life left outside the state's sphere of control. In addition to that, custom played an important part in the interpretation of the law<sup>56</sup> and many of the laws which the state, through its organs, formally enacted were based on existing customary norms. Many of Rome's social, political and legal institutions were derived from custom, such as the family and clan structures, the institution of patronage and clientship, the earliest forms of property ownership and property transference and a great deal of the formalities associated with legal procedure. Some of these institutions have had their origin in customs whose roots lay in the most remote past of Roman history while others in customs that emerged later, during the formative years of the Roman state. Many of these later customs reflected the strong Etruscan and Greek influence on aspects of Roman social and cultural life. Although custom has always had an indirect influence on law, for a very long time, especially during the classical period, it was not included among the sources of law, having been entirely superseded by legislation. Custom began again to be regarded as a source of law during the post-classical period.<sup>57</sup>

In the category of written law (*ius scriptum*) fell the statutes (*leges*), the resolutions of the plebeian assembly (*plebiscita*), the decrees of the senate (*senatus consulta*) and the edicts of those magistrates who possessed the *ius edicendi* (the right of issuing binding ordinances). To these were in later times added the imperial constitutions (*constitutiones principum*) and the written answers of those jurists whose opinions on questions of law had been recognised as authoritative (*responsa prudentium*).<sup>58</sup> The publication of the laws of the Twelve Tables, in the middle of the fifth century BC, marks the starting-point in the development of written law.<sup>59</sup>

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<sup>56</sup> The jurist Paul referred to custom as 'the best interpreter of laws'. See D. 1. 3. 37.

<sup>57</sup> See *Inst.* 1. 2. 9-10.

<sup>58</sup> G. 1. 2; *Inst.* 1. 2. 3.

<sup>59</sup> On the distinction between *ius non scriptum* and *ius scriptum* see A. A. Schiller, *Roman Law: Mechanisms of Development*, New York 1978, 254 ff; R. Monier,

***Ius civile, ius gentium***

The term *ius civile* denoted, in a broad sense, the law which governed a political community and prescribed the rights and obligations of its members.<sup>60</sup> Thus, with respect to the Roman state, *ius civile* signified the entire body of Roman law, irrespective of its sources. This understanding of the term was associated with the principle of the 'personality of the laws' – a principle widely recognised in antiquity. According to this principle, it was nationality rather than place of residence that determined a person's legal status. A person lived under the law of the state or political community to which he belonged. In this respect, the Roman *ius civile* (also known as *ius Quiritium*)<sup>61</sup> was the law that applied only to Roman citizens (*cives Romani*), and the term *ius civitatis* was used to denote the legal rights to which only Roman citizens were entitled.<sup>62</sup> The Romans drew a distinction between two categories of such rights: public rights (*publica iura*) and private rights (*privata iura*). The former category included, for example, the right of voting in a popular assembly (*ius suffragii*), the right of standing for public office (*ius honorum*) and the right of appealing from a magistrate to the people's assembly against sentences involving death or the loss of personal freedom or citizenship (*ius provocationis*). In the category of private rights fell the right of contracting a regular Roman marriage (*ius connubii*), the right of acquiring, owning and transferring property according to law (*ius commercii*) and the right of making or inheriting under a Roman will (*ius testamenti factio*). A person entitled to all the rights of the citizenship was referred to as *civis optimo iure*. But not all Roman citizens were *civis optimo iure* (for example, Roman women did not enjoy the *ius suffragii* and the *ius honorum*). The primary rights of the citizens entailed a number of derivative rights or privileges. For example the *ius itineris*, i.e. the right of a person to go through another person's property, was a secondary right with respect to *ius commercii*. The *ius intercessionis*, i.e. the right of the

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*Manuel élémentaire de droit romain*, Aalen 1977, 7; A. Guarino, *Diritto privato romano*, Naples 2001, 136 ff.

<sup>60</sup> According to Gaius 'the rules enacted by a given state for its own members are peculiar to itself and are called civil law' (G. 1. 1.).

<sup>61</sup> *Quirites* was the name by which the early Romans called themselves in early times (*populus Romanus Quirite* or *populus Romanus Quiritium*).

<sup>62</sup> Hence the description of the Roman *ius civile* as '*ius proprium Romanorum*'. On the notion of *ius civile* see A. A. Schiller, *Roman Law: Mechanisms of Development*, New York 1978, 366 ff, 525 ff; M. Kaser, *Römische Rechtsgeschichte*, Göttingen 1976, 130 ff; A. Guarino, *Diritto privato romano*, Naples 2001, 128 ff.

higher magistrates to veto official acts of other magistrates, was a secondary or derivative right with respect to the *ius honorum*.<sup>63</sup>

From an early period, communities affiliated with Rome were granted limited rights under the Roman *ius civile*. The members of these communities occupied an intermediate position between Roman citizens and foreigners. Thus, what was referred to as Latin law (*ius Latinum* or *ius Latii*) applied to certain groups who enjoyed some of the rights of Roman citizenship. These groups included the inhabitants of communities in Latium, colonies founded by Romans and members of other Latin states (*coloniae Latinae*), as well as certain categories of freedmen. The term *peregrinus*, on the other hand, was used to denote any free person who was not a citizen of Rome.<sup>64</sup> Initially foreigners (*peregrini*) living in Rome had no rights under Roman law.

From an early period the Romans came to realise that certain institutions of their own *ius civile* could also be found in the legal systems of other nations. As contracts of sale, service and loan, for example, were recognised by many systems, it was assumed that the principles governing these were everywhere in force in the same way. These institutions which Roman law had in common with other legal systems were thought of by the Romans as belonging to the law of nations (*ius gentium*) in a broad sense. But this understanding of the *ius gentium* was of little practical value for the Roman lawyer, for the specific rules relating to the operation of such generally recognised institutions differed considerably from one legal system to another. Related with the above understanding of *ius gentium*, as the legal principles observed by all nations, was the development of a body of law which was of particular importance to the Roman lawyer. As the number of foreigners living in Rome continued to increase, especially after the third century BC, the need arose for formulating rules to regulate legal transactions involving foreigners living in Roman territory. What emerged as a response to this need was a distinct body of law which, although thoroughly Roman in origin and content, lacked the rigidity and complexity of the Roman *ius civile*. Thus, by contrast with *ius civile* as the law that applied exclusively to Roman citizens, the term *ius gentium*, in a narrow, practical sense, came to signify that part of Roman law governing relations between citizens and foreigners and between foreigners belonging to different states. This body of law was built upon the edicts of the *praetor*

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<sup>63</sup> The words *facultas* and *potestas* were also used to denote a specific right or power based upon a primary right.

<sup>64</sup> But the term *peregrini* did not apply to all foreigners indiscriminately, but only to those who had some sort of relationship with Rome (for example, citizens of states in alliance with Rome). Those who had no connection with Rome were usually referred to as *barbari* (or *hostes*, if they were at war with Rome).

*peregrinus*, the special magistrate appointed to deal with legal disputes involving foreigners and, to a lesser degree, upon the edicts of provincial governors.<sup>65</sup> Dealing with disputes involving people of diverse nationalities and customs would have been difficult without appealing to generally recognised and understood principles. Thus, what characterised *ius gentium* was its simplicity and adaptability and its emphasis upon general principle rather than form. For that reason not only foreigners but also Roman citizens often relied on it as a means of resolving legal disputes. Moreover, elements of the *ius gentium* entered the edict of the *praetor urbanus* (the magistrate in charge of the administration of the *ius civile*) and, through it, the domain of *ius proprium Romanorum* (i.e. the domestic Roman law). But not all legal institutions associated with the Roman *ius gentium* belonged to the 'law of nations' in a broad sense, for certain institutions open to both citizens and foreigners alike had no place in any other system except the Roman. For example, the form of verbal contract known as *stipulatio*, although not found outside Roman law, was available to both citizens and foreigners alike.<sup>66</sup>

### *Ius naturale*

The second century AD jurist Gaius defines *ius gentium* as 'the rules prescribed by natural reason for all which are observed by all nations alike'.<sup>67</sup> And in the Institutes of Justinian is stated that 'the laws of nature, which all nations observe alike, being established by divine providence, remain ever fixed and immutable'.<sup>68</sup> These statements may be taken to suggest that, in the eyes of Roman jurists, *ius gentium* was associated with the philosophical ideal of natural law (*ius naturale*, *ius naturae*), understood as a set of precepts valid everywhere in the world. But this

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<sup>65</sup> Disputes involving Roman citizens only fell within the jurisdiction of the *praetor urbanus*, the magistrate entrusted with the administration of the Roman domestic law (*ius civile*).

<sup>66</sup> On the concept of *ius gentium* see W. Kunkel, *An Introduction to Roman Legal and Constitutional History*, 2nd edn, Oxford 1973, 77; H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd edn, Cambridge 1972, 102 ff; B. Nicholas, *An Introduction to Roman Law*, Oxford 1962, repr. 1991, 54 ff; H. J. Wolff, *Roman Law, An Historical Introduction*, Oklahoma 1951, 82-84; M. Kaser, *Römische Rechtsgeschichte*, Göttingen 1976, 134 ff; *Ius gentium*, Cologne, Weimar and Vienna 1993; R. Monier, *Manuel élémentaire de droit romain*, Aalen 1977, 5-6; A. Guarino, *Diritto privato romano*, Naples 2001, 128 ff.

<sup>67</sup> G. 1. 1.

<sup>68</sup> *Inst.* 1. 2. 11.

connection has been far from clear, as no generally accepted definition of *ius naturale* can be found in the sources, and the meaning of the term appears to vary depending upon the point of view from which it is contemplated.

Cicero and other Roman thinkers embraced the idea of the Stoic philosophy that the world is permeated and governed by a universal soul, a divine reason, whose dictates constitute an 'eternal law' (*lex aeterna*). This eternal law is reflected in the law of nature (*ius naturale*). The law of nature, as the embodiment of divine reason, is everlasting, immutable and universal, knowing no limitations by people, place or time, and transcending the laws of any particular state or political community.<sup>69</sup> It is engrafted in the souls of all human beings, directing them by a kind of innate apprehension, since they all participate in the universal rationality.<sup>70</sup>

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<sup>69</sup> This understanding of natural law had its origin in the thought of Zeno and other Greek and Roman philosophers who belonged to the Stoic school of philosophy. It was also influenced by the Platonic and Aristotelian philosophies, although it differs from them in some important respects. For a closer look at the origins and claims of Stoicism see E. V. Arnold, *Roman Stoicism*, London 1958; F. H. Sandbach, *The Stoics*, London 1989; C. J. Friedrich, *The Philosophy of Law in Historical Perspective*, 2nd edn, Chicago 1963, 27 ff; A. Erskine, *The Hellenistic Stoa: Political Thought and Action*, London 1990; R. M. Wenley, *Stoicism and its Influence*, New York 1963; W. Ebenstain, *Great Political Thinkers: Plato to the Present*, 4th edn, New York 1969, 139-48.

<sup>70</sup> Cicero, writing in the first century BC, expounded the philosophers' conception of natural law as follows: 'True law is right reason in agreement with nature, diffused among all men; constant and unchanging, it should call men to their duties by its precepts, and deter them from wrongdoing by its prohibitions; and it never commands or forbids virtuous men in vain, while its rules and restraints are lost upon the wicked. To restrict this law is unholy, to change it illicit, to repeal it impossible; nor can we be exempt from it by the order either of senate or of popular assembly; nor need we look for anyone to clarify or interpret it; nor will it be one law at Rome and a different one at Athens, nor otherwise tomorrow than it is today; but one and the same law, eternal and unchangeable, will bind all peoples and all ages; and God, its designer, expounder and enactor, will be as it were the sole and universal ruler and governor of all things; and whoever disobeys it, because by this act he will have turned his back on himself and on man's very nature, will pay the heaviest penalty, even if he avoids the other punishments which are considered appropriate for his conduct'. (*de re publica* 3. 22. 33.) A different definition of *ius naturale*, attributed to the third century jurist Ulpian, is found in Justinian's Digest (D. 1. 1. 1. 3.) and Institutes (1. 2.). According to this 'the law of nature is that law which nature teaches to all animals. For this law does not belong exclusively to the human race, but belongs to all animals, whether of the air, the earth, or the sea. From this law

This universal ability to reason and the fact that the law of nature is applicable everywhere resulted in the Stoic emphasis on equality and the unity of humanity, and the ideal of a world state governed by one system of law based on reason. The Stoics viewed natural law as the source of fundamental ethical principles governing human conduct and human relations and as furnishing the standards to which the institutions of positive law should conform. But *ius gentium* and *ius naturale*, in the sense the philosophers understood it, did not necessarily concur. For example, whereas under natural law all people were born free, slavery was widely recognised in antiquity as an institution of the law of nations.<sup>71</sup> The obvious problem here is that *ius naturale* alludes to law which ought to be observed, whereas *ius gentium* refers to law that was actually in force among nations. Considering this, the most one can say is that, from a philosopher's point of view, the universal recognition of a legal institution or principle as part of the law of nations might be taken to imply that such an institution or principle has its origin in natural reason.<sup>72</sup>

Now, the philosophers' conception of *ius naturale* had no direct effect on Roman law, for the Roman lawyers were practical and down-to-earth in their attitude, preferring to deal with legal problems on a case by case basis instead of attempting to construct general philosophical theories of law.<sup>73</sup>

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comes the union of male and female, which we call marriage, and the begetting and education of children. For we see that all other animals are likewise governed by a knowledge of this law'. This definition, which probably derives from the Pythagorean philosophers, appears to confuse between animal instincts and the demands of reason and law on human conduct. See B. Nicholas, *An Introduction to Roman Law*, Oxford 1962, repr. 1991, 54 ff.

<sup>71</sup> As stated in Justinian's Institutes, 'The law of nations is common to all mankind, for nations have established certain laws, as occasion and the necessities of human life required. Wars arose, and in their train followed captivity and then slavery, which is contrary to the law of nature; for by that law all men are originally born free'. (*Inst.* 1. 2. 2.)

<sup>72</sup> In the words of C. J. Friedrich, 'the most that can be admitted is that there is a presumption in favor of the contention that a legal institution found in diverse *civitates* is part of the law of nature'. *The Philosophy of Law in Historical Perspective*, Chicago 1963, 32.

<sup>73</sup> As H. J. Wolff points out, 'the Roman jurists. for all their philosophical and rhetorical education, never showed more than a superficial interest in purely philosophical problems. The originality of their approach lay in their interest in, and intimate connection with, the practical application of Roman law as it was. Their efforts were directed not at building a purely theoretical jurisprudence, but at demonstrating from every possible angle the practical use to which the institutions of their law could be put'. *The Western Idea of Law*, S. C. Smith and D. Weisstub (eds), London 1983, 322.

Although they were aware of the distinction between positive law and law as it ought to be, they took little interest in linking philosophical speculation with everyday disputes and mundane practices, or in questioning the validity of positive law on the grounds that it conflicted with a higher law. This does not mean, however, that the concept of *natura* was of no significance to them. But for the Roman lawyers its content was defined not so much by reference to divine reason, or God's plan for the universe, but by reference to the qualities of things worldly, to states of affairs and modes of thought and action that were commonly accepted as reflecting the realities of everyday life.<sup>74</sup> From their viewpoint, working out the appropriate course of action, or arriving at an acceptable legal solution, presupposed reasonable familiarity with the nature of things on the ground (*natura rerum*), including human nature (*natura hominum*), and with the ordinary expectations that social and legal relations entailed. Hence the Roman lawyers spoke of the nature of an obligation (*natura obligationis*), the nature of a contract (*natura contractus*), etc. The term *natura hominum* or *natura humana*, in particular, referred to the physical and mental qualities and the psychological characteristics and attitudes common to all human beings. In this respect, the postulates of nature emanated not from metaphysical speculation, but from the findings of common sense and the need for order in human relations.<sup>75</sup> This understanding of *natura* was of great importance to the Roman lawyers, for legal rules were constructed, interpreted and applied by reference to the nature of the things or legal relationships with which the rules were concerned. Thus, in the eyes of the Roman lawyers, it was 'natural' that certain things found in the open should belong to the person who found them;<sup>76</sup> or that a structure built on a person's land with materials belonging to another should belong to the owner of the land.<sup>77</sup> It was the nature of certain things, such as the open sea or the air, that precluded their being subject to private ownership;<sup>78</sup> and one

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<sup>74</sup> As Ernst Levy explains, 'nature is here the order inherent in the conditions of life as the Romans saw it'. *Studia et Documenta Historiae et Iuris*, 15 (1949), 9.

<sup>75</sup> In Levy's words, "natural' was to them not only what followed from physical qualities of men or things, but also what, within the framework of that system, seemed to square with the normal or reasonable order of human interests and, for that reason, not in need for further evidence'. *Ibid* at p. 7.

<sup>76</sup> *Inst.* 2. 1. 18: 'Precious stones, gems, and other things, found upon the sea-shore, become immediately by natural law the property of the finder'.

<sup>77</sup> *Inst.* 2. 1. 29: 'If a man builds upon his own ground with materials of another, he is considered the proprietor of the building, because everything built on the soil accedes to it'.

<sup>78</sup> *Inst.* 2. 1. 1: 'By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea'.

could not legally own animals that are wild by nature unless he was able to exercise physical control over them.<sup>79</sup>

Did the philosophers' conception of *ius naturale* have any influence on Roman legal thought? Our evidence suggests that the Roman jurists, as members of the educated higher classes of society, were familiar with Greek philosophy and the ideas of natural law and natural justice. And although they did not view *ius naturale* as a juristic category, nor did they regard it as capable of invalidating positive law, by recognising it as a source of universally applicable principles they were doing something more than simply conveying their philosophical views: they were calling attention to the important relationship between legal rules and ethical principles – between positive law and justice as it relates to *ius* in a broad normative sense.<sup>80</sup> The impact of *ius naturale*, as a philosophical idea, can be traced not so much in specific legal doctrine or in the technical aspects of the law but, rather, in the general spirit and method of Roman jurisprudence, as reflected in the legal literature of the classical period. The philosophers' conception of *ius naturale*, despite its lack of a precise definition, came to play a part in the working out by the classical jurists of the principles of justice in the light of which the rules of positive law should be interpreted and applied. The jurists sought to express these principles in the form of general maxims capable of guiding the application of law in different situations. Principles such as equity (often referred to in the texts as *naturalis aequitas*), good faith (*bona fides*), humanity (*humanitas*) and others were now perceived as stemming from an all-embracing ethical and logical scheme.<sup>81</sup> These principles, which in earlier times were attributed only an instrumental value, came to be regarded as universal principles transcending and qualifying the norms of positive law. Furthermore, the Stoic notion of the unity of humanity under natural law, as an element of the ideological foundation upon which the political theory of the empire was built, played a part in the process towards the universalisation of Roman law. Notwithstanding the fact that the *Pax Romana* was established by conquest and the use of violent means

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<sup>79</sup> *Inst.* 2. 1. 14: 'Bees also are wild by nature. Therefore, bees that swarm upon your tree, until you have hived them, are no more considered to be your property than the birds which build their nests on your tree'.

<sup>80</sup> Hence Paul's definition of natural law as 'that which is always just and right' (*quod semper est bonum et aequum*). See D. 1. 1. 11. pr.

<sup>81</sup> According to Wolff, 'for the first time, the Roman lawyers were really able to see their system as a whole. Familiarity with Greek logic and ethics made them more fully aware of the sociological function of legal institutions and, consequently enabled them to look behind and overcome the rigid formalism of the old *ius civile*'. *Supra* note 73, 324.

(contrary to Stoic principles), Rome as a world empire governed by one system of law moved Stoic universalism from the plane of philosophical speculation to that of political reality.<sup>82</sup>

### *Ius civile, ius honorarium*

By reference to the sources of law, the term *ius civile* was used to denote that part of Roman law which was derived from statutory enactments (*leges* and *plebiscita*), the resolutions of the senate (*senatus consulta*), the interpretations of the jurists (*responsa prudentium, interpretatio prudentium*) and imperial enactments (*constitutiones principis*). *Ius civile*, in this sense, was distinguished from the *ius honorarium*, i.e. the law derived from the edicts of the magistrates, especially the praetors (*ius praetorium*). According to Roman jurists, the role of the *ius honorarium* was to assist, correct and supplement the *ius civile*.<sup>83</sup>

### *Ius publicum, ius privatum*

With respect to the scope and range of the law, Roman lawyers drew a distinction between public law (*ius publicum*) and private law (*ius privatum*).<sup>84</sup> Public law was concerned with the administration of the affairs of the state and the interests of the Roman people as a whole.<sup>85</sup> Roman jurists associated public law with what is now known as *ius cogens*, i.e. law that cannot be changed by agreement between private individuals.<sup>86</sup> To the category of *ius publicum* belonged, for example, the law governing the functions of magistrates and other state organs. Sometimes the law regulating relations between private citizens was associated with *ius*

<sup>82</sup> On the idea of *ius naturale* see A. A. Schiller, *Roman Law: Mechanisms of Development*, New York 1978, 556 ff; M. Kaser, *Römische Rechtsgeschichte*, Göttingen 1976, 137-38; A. Guarino, *Diritto privato romano*, Naples 2001, 128 ff.

<sup>83</sup> D. 1. 1. 7. 1. (Papinianus). On the category of *ius honorarium* see in general A. A. Schiller, *Roman Law: Mechanisms of Development*, New York 1978, 422 ff; M. Kaser, *Römische Rechtsgeschichte*, Göttingen 1976, 138 ff; W. Kunkel/M. Schermaier, *Römische Rechtsgeschichte*, Cologne 2001, 102 ff; A. Guarino, *Diritto privato romano*, Naples 2001, 93 ff; M. Talamanca (ed.), *Lineamenti di storia del diritto romano*, Milan 1989, 153 ff.

<sup>84</sup> The technical distinction between private and public law was for the first time elaborated by the jurists of the imperial period.

<sup>85</sup> *Inst.* 1. 1. 4; D. 1. 1. 1. 2. (Ulpianus).

<sup>86</sup> D. 2. 14. 38. (Papinianus). The term *ius cogens* does not belong to the Roman legal terminology.

*publicum*, when a general public interest concurred with a private one. Private law, on the other hand, was concerned with the interests of private citizens (their legal status, property, transactions between them etc.).<sup>87</sup> Roman jurists adopted a division of private law into three parts: the law of persons, the law of property and the law of actions.<sup>88</sup> It was private law that Roman jurists were primarily interested in, and it was in the sphere of private law that their contribution to the development of Roman law for the most part lay.<sup>89</sup>

In connection with the distinction between public and private law judicial proceedings were divided into *iudicia publica* and *iudicia privata*. The former were concerned, in particular, with wrongful acts affecting the interests of the community as a whole (*crimina publica*), such as treason, murder, embezzlement of public funds and abuse of power by state officials. But Roman criminal law was narrower in scope than modern-day criminal law, for many wrongdoings which are today treated as criminal offences, such as theft and damage to property, were regarded, under Roman law, as affecting the interests of the individual alone. These wrongdoings were referred to as *delicta privata* and fell in the sphere of private law. In contrast with the *iudicia publica*, the object of the *iudicia privata* was the resolution of private disputes between individuals, such as disputes relating to property rights, the fulfilment of contractual obligations or the question of compensation for personal harm. While the state had no direct interest in the outcome of these disputes, it guaranteed the stability of social and commercial life by supplying the organs and procedures required for their resolution.<sup>90</sup>

### *Ius commune, ius singulare*

Roman law recognised a distinction between *ius commune*, i.e. the law that applied to all Roman citizens indiscriminately, and *ius singulare*, i.e. the law applying to a specific category of persons, things or transactions. The term *privilegium* was used to denote a legal enactment concerning a specific person or case and creating an exception from a generally

<sup>87</sup> D. 1. 1. 1. 2. (Ulpianus); *Inst.* 1. 1. 4.

<sup>88</sup> According to Gaius, 'The whole of the law by which we are governed relates either to persons, or to things, or to procedure'. (G. 1. 8.)

<sup>89</sup> The term *ius civile*, which originally denoted domestic Roman law in general, came to be used as synonymous with private law.

<sup>90</sup> On the distinction between *ius publicum ius privatum* see M. Kaser, *Römische Rechtsgeschichte*, Göttingen 1976, 128-29; A. Guarino, *Diritto privato romano*, Naples 2001, 123 ff; R. Monier, *Manuel élémentaire de droit romain*, Aalen 1977, 6-7.

applicable rule. The Law of the Twelve Tables included a provision which prohibited the introduction of special rules for the purpose of granting privileges or imposing restrictions to particular persons.<sup>91</sup>

### *Interpretatio*

The word *interpretatio* signified the intellectual process through which the true meaning of a legal rule, term or institution was brought to light. As has been noted, the first interpreters of the law were the pontiffs. In the second century BC the first secular jurists (*iurisprudentes* or *iusconsulti*) appeared on the scene. The activities of these jurists consisted in giving advice or opinions on questions of law to magistrates, judges and litigating parties, drafting legal documents and assisting litigants on points of procedure. The earlier jurists occupied themselves with practical questions of law arising from given situations and did not attempt to develop a systematic approach to law or a theoretical analysis of its concepts. Their chief concern was with the letter of the law and its technical application in individual cases. But in the later pre-classical period, under the influence of Greek rhetoric and philosophical logic, the jurists began to apply in the interpretation of the law the dialectical method for purposes of definition and classification. This was a form of logical analysis that both distinguished between the various concepts and, at the same time, subsumed concepts sharing the same essential characteristics under common heads. By applying the dialectical method the jurists were able to systematise legal knowledge and to explain the nature of the various legal institutions through general organising concepts.<sup>92</sup> The later jurists did not confine themselves, like their predecessors, to the discussion of isolated cases, but sought to bring to light the logical connections between their institutions as parts of an all-embracing logical system. They arrived at the contents of the law by means of deduction from extant sources, but also by intuitive insight into the nature of legal problems, although that insight was prepared by a close study of legal decisions and juristic responses of the past. From this knowledge they drew general principles and then applied them to the case at hand. In interpreting legal rules the jurists sometimes

<sup>91</sup> XII T. 9. 1. See Bruns, *Fontes* I, p. 34; and see Cicero, *de leg.* 3. 4. 11. and 3.19. 44. On the notions of *ius commune* and *ius singulare* see A. Guarino, *Diritto privato romano*, Naples 2001, 138 ff.

<sup>92</sup> For instance, the jurist Scaevola, in his comprehensive treatise on the *ius civile*, written about 100 BC, first defined the general nature of institutions such as possession, guardianship, partnership, sale etc., and then described the various categories (*genera*) of these recognised by the law. Consider G. 1. 188. And see B. W. Frier, *The Rise of the Roman Jurists*, Princeton 1985, 95 ff.

gave a rule a broader meaning and sometimes a narrower one depending upon the nature and function of the relevant rule and the legislator's intention. They also utilised, although to a limited degree, the method of interpretation by analogy. This allowed them to apply a legal rule to cases that fell outside the scope of the rule, provided that these cases were in some important respects similar to that which the rule was intended to cover. Moreover, in the work of interpretation the jurists relied upon general ethical principles, such as equity (*aequitas*), good faith (*bona fides*), legitimate interest (*utilitas*) and, in later ages, humanity (*humanitas*), to ensure that the law was interpreted and applied in a way that accorded with common values and expectations.<sup>93</sup> Although the Roman jurists did not develop a comprehensive theory of interpretation, some principles of juristic interpretation can be found in various parts of Justinian's Digest. Many of these principles emphasise the importance of the purpose and spirit of the statute.<sup>94</sup> Principles of interpretation relating to legal acts (both unilateral and bilateral) proceed from the assumption that priority should be given to the parties' real intentions (*voluntas*) over the words or form in which a legal act had been expressed (*verba*).<sup>95</sup>

### *Aequitas*

In juristic literature the notion of *aequitas* is associated with justice or fairness, as the substance of *ius*, or law in a broad normative sense.<sup>96</sup> It is

<sup>93</sup> In the words of J. Declareuil, the *interpretatio* of the jurists 'organised and classified the means by which every legal problem could be brought to a solution which should at the same time satisfy the mind and the sense of equity'. *Rome, the Law-Giver*, London 1927, repr. 1996, 26.

<sup>94</sup> See, e.g., D. 1. 3.13. (Ulpianus): 'Whenever a law provides something, there is a good opportunity to add further rules which aim at the same benefit through interpretation or jurisdiction'; D. 1. 3. 17. (Celsus): 'To know the laws means to adhere not to their words but to their force and sense'; D. 50. 16. 6. 1. (Ulpianus): 'The term 'according to law' (*ex legibus*) should be understood as meaning 'according to both the sense and to the words [of the laws]'

<sup>95</sup> See, e.g., D. 50. 17. 96. (Marcianus): 'If ambiguous utterances occur, the intention of the person who used them should be taken into consideration'; see also D. 34. 5. 21. (Paulus); D. 32. 25. 1. (Paulus). On the nature of juristic interpretation see also chapters 4, 6 and 8 below.

<sup>96</sup> The concept of *aequitas* had its origin in Greek philosophical thought. Aristotle defined equity (*epieikeia*) as a principle of justice aimed at the correction of the positive law where the latter is defective owing to its universality. (*Nic. Ethics* 5. 14.) According to Cicero, 'the law is the established *aequitas*'. (*Top.* 9.) And the jurist Celsus speaks of the law as 'the art of finding the good and the just' (*ius est ars boni et aequi*). (D. 1. 1. 1. pr.)

also linked with the notion of *lex naturae*, the command of an inner voice through which speaks the *ratio* of the *natura rerum* immanent in things (hence it is often referred to as *aequitas naturalis* and as being connected with *naturalis ratio*). Recourse to *aequitas* permitted the infusion of moral values into the law and, as such, it constituted an effort to go beyond the formal sources of law and to reach for a higher, enduring, normative plane. When the existing norms of positive law became inadequate to meet the social and economic needs of the times the notion of *aequitas* was relied upon to make the necessary corrections. In this respect, *aequitas* is compared and contrasted with the law in force (*leges* or *ius* in a descriptive sense).<sup>97</sup> In the eyes of the Roman jurists *aequitas* coexisted with positive law, amending, and supplementing it, but was not viewed as an independent source of law.<sup>98</sup> It postulated the interpretation of the law in terms of its purpose, the interpretation of a legal act by reference to the real intention of the parties or, more generally, an interpretation that would produce a fair result.<sup>99</sup> The incorporation of principles of equity into the law through the praetorian edict and the interpretations of the jurists enabled the Romans to break free from the rigid formalism of the old *ius civile* and to develop a system of law that could meet the needs of a constantly changing society. After the Christianisation of the empire in the fourth century AD the notion of *aequitas* was considered in the light of Christian ethical principles. This new approach to the meaning of *aequitas* is reflected in the Justinianic codification, where *aequitas* is linked with notions such as piety (*pietas*), affection (*caritas*), humanity (*humanitas*), kindness (*benignitas*) and clemency (*clementia*).

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<sup>97</sup> Law which accords with the principles of *aequitas* is called *ius aequum*; its opposite is *ius iniquum*.

<sup>98</sup> As J. A. Crook explains, equity 'was not so much a source of law as a principle by which cases could be judged and the law be interpreted and developed'. *Law and Life of Rome*, London 1967, 27.

<sup>99</sup> But no single straightforward definition of *aequitas* can be found in juristic texts. See W. W. Buckland (revised by P. Stein), *A Text-Book of Roman Law from Augustus to Justinian*, Cambridge 1963, 55; see also J. M. Kelly, *A Short History of Western Legal Theory*, Oxford 1992, 52. On the concept of *aequitas* see in general A. A. Schiller, *Roman Law: Mechanisms of Development*, New York 1978, 551 ff; A. Guarino, *Diritto privato romano*, Naples 2001, 135-36; F. Wieacker, *Römische Rechtsgeschichte*, Munich 1988, 506 ff.