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ROMAN LAW AS A CIVILIZING INFLUENCE

CHARLES H. KINNANE

FOREWORD¹

LAW does not just happen. At any given time and place municipal law is, and must be, accorded secular sanction. It is, then, the handiwork of socially organized man. But that handiwork is the reflection of accepted ideas as to the proper bases for the government and regulation of social relationships, and also, in the decent societies, for the dispensing of justice.

However, the underlying, basic, ideas do not just happen either. They vary and have varied infinitely, from time to time and from place to place. And as they vary, law can range from the horribly savage, through the crudely barbaric, to the most highly civilized. For ideas must compete with each other for acceptance, and for acceptance in the form of law no less than in other ways.² But having won in the competition for recognition, and for embodiment in law by a particular society, it may happen that the legal embodiment of superior ideas is of such an excellent character that the law itself may be a principal instrument in transmitting those ideas to other, and culturally inferior, societies.

Roman law in a most notable way served in a double role. For approximately a thousand years, until roughly the year 500 A.D., when it reached its highest development, its growth was a reflection of the continuing and increasing acceptance by the Romans of superior

¹ Certain of the material contained in the latter portion of this article appears in Section 77 of the author's *A First Book on Anglo-American Law* (2d ed., 1952), and is presented here with the permission of the publisher, The Bobbs-Merrill Company, Inc.

² Without dwelling on the matter of the competition, it may be illustrated briefly by the present world-wide competition between the totalitarian idea that law is an instrument of unlimited power, and the democratic idea that there are just limitations on the power of government.

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ideas regarding the government of social relationships;³ thereafter, for many more centuries and into our own time the Roman law has served both to supply legal institutions to different societies, and also to transmit to them the ideas implicit in such institutions.

The Romans developed superior law by utilizing two of the greatest, highest, law- and culture-generating ideas that man has ever known, but by way of borrowing the ideas of earlier peoples, rather than by way of inventing such ideas for themselves for the first time. One of those ideas was contributed by Babylon, "The Mother of Law."⁴ Hammurabi, the Babylonian law-giver, when he promulgated his Code, about 2100 B.C., stressed not one but two things: he was providing law, *and justice as well*. Here, if not for the first time, at least for the first noteworthy time in the history of secular legal development, we find expression of an idea and an ideal toward which all later superior law-making was to be directed, namely, that society and government and law should provide not only order but a just order.⁵

The other of these ideas is referable to the religion, the morals, the natural law, of the Jews, and it appeared among them long before there was a Roman law to merit our esteem. The Jewish contribution was of the most fundamental and basic component of the idea of justice. The Jews, certainly as early as the Mosaic legislation, had adopted the idea of individual moral responsibility. In the Ten Commandments, for example, we are told as individuals, and not as groups or classes, wherein our moral duty lies. In secular matters this became translated into the idea of individual moral personality before the law. In order to lead a moral life, the individual must be left free to per-

³ Ignoring whatever there may have been of law in Rome at the time of its traditional founding, about 750 B.C., the thousand years of legal development range from the Twelve Tables of about 450 B.C., to the Corpus Juris of Justinian at the end of the first third of the sixth century, A.D. See, among others, the recent (1951) book by Wolff, *Roman Law—An Historical Introduction*, at page 59, on the archaic and harsh character of the law of the Twelve Tables, and on its reflection of a primitive, agricultural culture of believers in witchcraft. On the other hand, the Corpus Juris is considered to set forth the Roman law at the height of its development.

⁴ See 1 Sherman, *Roman Law in The Modern World*, § 16 (1933).

⁵ Unhappily, it is necessary to note that even modern law-making has not all been directed to the ideal of a just society. See, for example, Redden, *An Introductory Survey of The Place of Law in Our Society*, 11-15 (1946), for various views as to what law is and what its function should be; and the shocking contrast between the decency in the view of Suarez that law can be only that which is right, and the view expressed in the Russian Penal Code that law is the tool of the ruling classes—and so an instrument of policy and of power, rather than of justice.

form his moral obligations. He must, in such matters, be free of the aggressions of other individuals; and law, in order to be just, must at the least afford such freedom. But also, and no less significantly, man as a moral being must, in certain vital areas of social living, be free from the aggressions of society, or of the state, itself.⁶

The superior societies have all worked in the direction of acceptance both of the Babylonian idea that law must be just, and of the Hebrew idea that certain large elements of freedom are essential to justice. Greek philosophy welcomed and refined these ideals and passed them on to Rome.⁷ Christianity, when it came, also supported those essential principles.

But neither the Jews nor the Greeks, although they had the fundamental ideas on which all great law-making was to be done, succeeded in making superior secular law. It remained for the Romans, with their flair for practical administration, to compose the conflicts between theory and practice, to deal with the ideal in the light of the attainable, to translate elevated concepts of right and justice from philosophical theory into workable jurisprudence—in short, to devise law as a great and practical instrument of government and of justice.

Thus Roman law came to reflect the best ideas that mankind in the course of thousands of years had been able to devise—and gain acceptance for.

So superior was the law that embodied those ideas that the knowledge and study of the Roman system of jurisprudence, with its ecclesiastical counterpart in the Canon Law, and with its secular derivatives under the name of the civil law, has spread throughout the world. More than that, it is the basis of the law of much of the world; in rude, law-hungry, medieval Europe, it became a kind of universal common law, except in England; later, European colonizing powers carried it to Quebec, Louisiana, most of the West Indies, all of Latin

⁶It may be worth while to ponder the notion that the American idea of constitutional limitations was not devised out of whole cloth for the first time by the "founding fathers;" and that much of modern American constitutional law theory goes back to a time before there was either Roman law or Christianity, much less an American revolution. The same line of thought should help to develop an awareness of how anachronistic the totalitarian political philosophy is—for instead of being something new in the world, it is so old and evil that it was repudiated, morally and philosophically, at least as early as the Mosaic law.

⁷See Maine, *Ancient Law* 163 (1878), regarding acceptance in the progressive societies of the idea of individual moral responsibility. On the Greek elevation of natural law philosophy, largely based on the two ideas mentioned, to the status almost of religion, see the very interesting article by Stanley, *The Greek Conception of Law and Its Later Influence*, 28 *Can. Bar Rev.* 367 (1950).

America, the Philippines, and elsewhere. Japan has adopted much of it in the last century. China drew heavily on civil law sources when it modernized its law some twenty years ago. In short, the Roman system has governed more millions of people, of more races and countries, through more centuries, than any system the world has ever known.⁸

We should be prepared, therefore, for the idea that the Roman legal system, as a practical instrument of government, has been held in high esteem by many peoples of many times and places. However, it is possible that such esteem could be attributable merely to the factor of utility in the Roman jurisprudence as a governmental tool, and that it was adopted by other peoples solely for that reason, and although the Roman system contributed nothing to the cultures of those adopting it, or even less than nothing, as by retarding or even debasing such cultures.

Such, however, was, and is, not the case. On the contrary, the Roman jurisprudence was a generating source of much of the highest culture that the world has ever known. We shall now consider briefly how, and why, that could be so.

ROMAN LAW AS A CIVILIZING INFLUENCE

The Roman system spread through much of the world, and the influence of the Roman law has persisted over the centuries for some

⁸The matter of the spread of the Roman legal system is treated, at least in outline, in the author's *A First Book on Anglo-American Law* 194 et seq. (2d ed., 1952); and see the references there to Sohm, *Institutes of Roman Law* (1907); 1 Sherman, *Roman Law in The Modern World* (1933); Hunter, *Roman Law*; and 1 *Continental Legal History Series* (1912). See also, Morris, *History of The Development of Law* 181 et seq. (1916), and Wolff, *Roman Law—An Historical Introduction*, c. VII (1951), entitled "Roman Law in Medieval and Modern Times." As to the English-speaking countries, it is for many purposes conventional to speak of the Anglo-American legal system as an independent development in the history of legal systems. But in such a statement much depends on the meaning ascribed to "independent:" for while there was comparatively little *direct* borrowing of Roman legal rules into Anglo-American law, nevertheless it is clear that much of Anglo-American legal philosophy, doctrine and principle, if not detailed rules, were borrowed from Rome. Directly, or through the Canon Law, broad Roman and civil law doctrinal fundamentals came to be utilized in Anglo-American Equity Law, Commercial Law, Admiralty Law, and even the Common Law. On this, see also one—but a very recent—assertion that there can be little doubt that much Roman law came into the Anglo-American law, in Gutteridge, *Comparative Law* 37-38 (2d ed., 1949). See also the treatment of this matter, and the authorities cited, in the various chapters on the systematic components of the Anglo-American law in the author's *A First Book on Anglo-American Law* (2d ed., 1952), particularly the chapters on pre-Norman law in England, the Common Law, the Equity Law, the Canon Law, and the Law Merchant.

two thousand years. But, in order to appreciate the world-importance of the Roman law—including in that term the bodies of law, secular and ecclesiastical derived from, or closely connected with it—it is necessary to examine other than temporal and spatial considerations.

One of these matters is the cultural condition of the various peoples to whom the Roman legal system spread. Very briefly, and in the main, the Roman legal ideas came to be used originally by peoples, who, in many respects, were culturally inferior to those ancient Romans who lived under the Roman law during the centuries of its high development. From the fifth century onward for much of a thousand years, nearly all of what is now France, Germany, Spain, Italy, Russia, the Baltic countries, England, and also eastern Europe in general, was definitely barbarous. The same thing was substantially true of various areas east and south of the Mediterranean. Other vast areas to which the Roman law has spread were in the even worse condition of complete savagery—as, for one example, the entire western hemisphere.

How did savagery progress to barbarism, and in turn barbarism to civilization? We shall not now try to define too precisely just what is meant by civilization; but we shall not go too far wrong if we consider it to be a way of life suitable to the requirements, if not of strictly urban, at least of social, living, and if we include among such requirements the opportunity for improvement of both the physical and mental environment of members of society.⁹

A body of law such as that of Rome afforded the basis for that extensive social cooperation that is best realized when men generally are convinced that society can afford to them not only peace and order, but also justice. With such a basis, men can cooperate to build safe cities and adequate housing; they can cooperate to develop adequate supplies of water, food, clothing, arms, and other necessities, and luxuries as well. With order and law and justice available, trade, commerce, and wealth in new forms become possible. With commerce, exposure to new ideas occurs. With some of the energy of

⁹ For those who would like more specification in regard to the "requirements" of civilized social living, reference is made to Webster's International Dictionary, Standard, Unabridged, which offers the following definition of civilization: "a state of social culture characterized by relative progress in the arts, science and statecraft; also, the progressive development of these and of the means of expressing the aspirations of the human spirit. . . ." Fundamental in both views, at any rate, is the idea of human values, including spiritual ones, and improvement, through orderly governmental processes, of opportunities for recognition and protection of such values.

society left free as a result of the attainment of security and the accumulation of wealth, it is possible to proceed from the changes in the physical environment to the changing of the mental. There is time to learn new things, to speculate about ideas, to philosophize and moralize, and in that way to compare bad with good, good with better, and better with best.

The less advanced societies had need of the good things that attended the utilization of the Roman law, and for exactly the same reasons that the Romans themselves and their predecessors in civilization in Greece, in Mesopotamia, in Egypt, and elsewhere, had need of civilized institutions.

The Romans in their law reflected and embodied much of the best that man had been able to devise as the result of thousands of years of experience in social living raised to the level of civilized living. The Jews and the Greeks had devised ideals, or had refined those of earlier peoples, and had passed them on to Rome. The Romans themselves had had a signal success in translating such ideals, through their laws, into workable instruments of government, improving on the governmental devices of their predecessors, so that on the one hand government was not a mere act of power, and so that on the other, ideas of morals, ethics, goodness, and justice were not confined to the realm of the purely ideal. The Roman genius in government and in law was adequate to the task of taking from the realm of speculative thought vast amounts of what the mind and heart of man had devised as worthy of human social aspiration, and of putting such aspiration in the way of practical social and individual realization by means of government under laws of a high, and indeed in many respects of a noble, character.¹⁰

It cannot be said too emphatically—or too appreciatively—that the Roman law, especially the part comprised within the term “private law,” at the time of highest development, from about 300 A.D. to 600 A.D., reflected the culminating point of thousands of years of antecedent civilization. It is very important to notice, in that connection, two more things. This culminating point was at so high a level that,

¹⁰ The nobility was not, of course, universal. In the field of public law, dictatorship was not unknown in imperial days; nor in the matter of the public revenues was the “sweating” and “farming” of taxes a rarity. In the field of private law, to mention only one instance, the legal toleration of slavery was an abomination. But, as in many other human matters, so in the field of law and government, relative superiority deserves appropriate credit, even though it falls short of absolute perfection.

nearly two thousand years later, we still admire, and even marvel at, the Roman legal and governmental genius. The other point is that peoples who had less than we have, and who had even less than the Romans had, admired and marvelled no less than we, and for the same reasons.

The barbaric Gauls and Iberians and Slavs and Germans—and many others (excluding, unhappily, to such a large extent, the Angles, Saxons, and early Danes in Britain)—had ready at hand for the taking, the means of short-cutting the ages-long struggle which earlier peoples had endured in their efforts to secure acceptance of superior ideas and to build a better society. And they took what was ready and available.

From the beginnings of civilization in Babylon and Egypt, to the culminating time, mentioned above, there was a period of some four or five millennia—more than twice the time that has since elapsed. With this long time-element in mind, it should not be considered wrong to refer to the period of a century as a brief one, or to say that within the brief period of a century or two the post-Romanic peoples mentioned above were able, as a rule, after they took what Rome had devised, not only to pass from barbarism, or even from savagery, to civilization, but also to achieve a higher type of civilization than the pre-Roman world (with the possible exception of some of the Greeks) had been able to achieve in a period forty to fifty times as long.

Not the least, and indeed, probably the most, important thing that Rome had devised, was its system of law. It was a system that made rapid civilizing possible. As a civilizing tool it was a magnificent one. Perhaps it is not too much to say also that it was an amazing one.

Due credit must, of course, be given to the religious ideas of the Jews and to the philosophic ideas of the Greeks, and due note must be taken of the later blending of large elements of these two vital contributions to civilized living in the Christian ethics. It is possible, it should be noted, that if Rome had not devised its legal system, a civilizer of comparable excellence might otherwise, and at other times, have been devised on the basis of Christian doctrine. For such doctrine contained essential moral elements which made the later law of Rome the civilized body of law that it was. In fact, the Church did devise a splendid system, known as the Canon Law, which at times and places served as a practical instrument of government, and with considerable effectiveness, among various barbaric European peoples prior to their reception of the Roman secular law. But we will not

linger to speculate about this.¹¹ For the Roman law was there; and even the Church used it as a model for the Canon Law; and even Christian countries came to receive the Roman secular law; and non-Christian countries as well.

With special regard to the culture of modern, western Europe, and our own Anglo-American culture as an offshoot, if not a part of it, two more observations will be made—although much more briefly than the importances of their subject matters deserve. The first such observation is that those cultures are based primarily upon two institutions, Christianity and the Roman law.¹² Which of these two was the more important, we need not pause now to inquire, and in fact it hardly seems that an answer could be given in any case, although the great Roman law scholar, Buckland, puts the influence of Roman law next after that of Christianity.¹³ We will only say that, ready-made, the Roman law was available and was utilized as a tool, or as a model

¹¹ A check on the possibly too easy assumption that religion and morality alone could have done the job is at least suggested by two matters: the Jews with religion, and the Greeks with ethics, each of a high order, both failed to match the Roman achievement in government and in law; and in any event, *both* Christianity and the Roman jurisprudence seem to have been required, for nearly two thousand years, to produce the western culture that we now know.

¹² As respects even the Anglo-American culture, it is insisted that correctness of this statement is not subject to modification out of regard for making all due allowance for the splendor of the Anglo-American legal system. English law in its Anglo-Saxon origins was brutish and barbaric—at times shockingly and revoltingly so; it was in any event quickly submerged, after the Norman conquest, by the hardly less barbaric, but certainly wretchedly incomplete, Common Law; this in turn had to be supplemented by the Equity Law, the Law Merchant in its two branches of the Commercial Law and the Admiralty Law, by the Canon Law, by huge amounts of legislation, and by vast quantities of Administrative Law—all involving more or less large amounts of legal elements foreign to the indigenous English product. Instead of the Anglo-American legal system being one of the foundations of our culture, our culture (Jewish, Greek, Roman, and Christian) has been forcing modifications on that system for centuries. That the Anglo-American legal system is a splendid one now is an effect, rather than a cause, of our culture.

¹³ See the reference to Buckland's statement in Yntema, *Roman Law and Its Influence on Western Civilization*, 35 *Cornell L. Q.* 77, 79 (1949); and see the same article for a somewhat different treatment from that herein, of the matter of the civilizing influence of Roman law, and for the further (but largely undetailed) projection of Roman legal influence into Anglo-American law, international law, and jurisprudence generally. See also Coleman-Norton, *Why Study Roman Law?* in 2 *J. Legal Educ.* 473, 474 (1950), for a somewhat different (and regrettably brief) weighting of influences on our civilization, the chief elements being set forth as religion, attributable to the Jews; culture, including philosophy, science and art, attributable to the Greeks; and jurisprudence, to the Romans. The present writer, of course, takes the position that much of religion and of philosophy enter into jurisprudence, and all three into culture.

for a tool, of government essential to, and contributing to, civilization of a high order; and that in any respects in which from time to time it was regarded as defective, Christianity provided the moral and ethical bases for the correction of such defects.

The second observation is that Roman law had an indirect, as well as a direct, civilizing influence, and that this indirect influence may not be less important than the direct one. The knowledge of the Roman legal system was important not only because it could be used, either directly or as a model or pattern for similar bodies of law, as a basis for governing, but, also, because it was important as an intellectual inheritance of the first order of importance.

It reflected the accumulated experience of centuries and millennia of human social living; it reflected the thought and speculation about morals and ethics and natural law and religion of many generations and races of men; it contained an epitome of the results of centuries of practical experience in making and administering law for the government of men, not merely by acts of power, but by using law as a synthesis of the ideal with the practical, by combining the speculative with the attainable, and by considering the desirable as well as the feasible. In short, it was, as a minimum, the answer to much of the problem of how, consistently with recognition of deep-seated human aspirations, we may live a social life, and a challenge of the highest intellectual character as to how we might live better.

To test it, to discard part of it, to improve on it, man had again to study morality, philosophy, politics, nature, and mankind. It is not surprising that, at one time, when the west of Europe had re-learned about the Roman law, it comprised practically the entire secular subject matter of university study. There was little science then to engross us, as there is today. But the study of the matters that go into the making of a decent system of law persisted, and still persists, against the competition of many new fields of knowledge. Furthermore, nothing indicates that it will not continue to persist forever. And for any foreseeable time in the future, it seems likely that those who study deeply the problems of social living and of governing social man, will continue to study the Roman law for the light it throws on such problems.

But in any event, in the past, the Roman solutions directed attention back to the matters underlying them, namely, to the matters of the nature of the world and of man, and as to how social man should live,

as well as to how he can live, and the reasons why; and thereby generated in large part the period of intellectual rebirth, called the Renaissance, which has not only continued but gives every promise of continuing in, and through, and beyond our time—for such problems, and the fundamentals underlying them are, and will be, universally significant, and as resolutely persistent as social mankind itself.

The search for a better understanding and application of such fundamentals is a search for the materials out of which good, better, and best societies are, and are to be, built; and the fruits of such searching constitute a cultural asset which is one of the most important that our civilization has.

May we say again that law—and above all, good law—does not just happen? Law is the fruit of ideas; good law is the better fruit of superior ideas; and superior law is the result of the best ideas. Conceiving, and gaining acceptance for, the very best ideas is absolutely essential to good law-making. Roman law has helped and stimulated us, over the centuries, in the search for and support of the acceptance of ideas of the very best kind.

We will not pause to dwell on this point; we will only indicate one application of it, at what is probably its maximum illustrative significance. The adoption of Roman and civil law ideas in very recent times in Japan and China demonstrates most forcefully the fact that not only western peoples, who have had the Roman culture for centuries, but also other peoples, whose cultures have been almost wholly alien to that of the Jewish-Greek-Roman-Christian west, respect and value the cultural inheritance that Rome has left us.¹⁴

In summary, then, Roman law has fostered civilization in two ways: by providing, directly, superior law upon which civilization of an advanced character could be built, and maintained; and also by providing the same underlying moral and intellectual materials, that the Romans themselves used, for our own further use, and refinement, in the devising of even better law for the decent and just government of civilized man.

¹⁴It is likely that India should not be overlooked in this connection. The new constitution of India seems immediately to be based in important parts on certain fundamentals in English—and indeed, Anglo-American—public law. But the English idea of political freedom, and its concomitant principle of a government of laws, with its American counterpart in a system of constitutional limitations on the powers of government over the individual, in the interest of respecting the moral integrity and personality of the individual, is at least as old as the natural law of the Hebrews and of the Greeks, of which it formed an essential part; and the Roman law was largely built upon such natural law.

A few concluding words about our own country, even though they may seem unduly to narrow the scope of our main interest herein, may not be inappropriate. In the United States we have valued the Roman culture no less than other western peoples in spite of our rejection of the Roman law as a directly applicable instrument of government; for nonetheless, we have received and used the moral and intellectual bases of the Roman goodness in law to make over (if not, indeed, largely destroy) our older, and distressingly inferior, original law. We did this by infusing the Common Law with the superiorities of the Equity Law; by adding to both of these the supplements and refinements of the Canon Law; by borrowing from afar and adding to all of these the Law Merchant, in part by incorporating the commercial branch of it into the Common Law, and in part by maintaining the supplementary but separate system of the Admiralty Law; by making over or superseding many parts of the aggregate of the foregoing by floods of legislation,¹⁵ designed to increase both the utility and justness of it; and by granting to administrative authorities broad powers to make rules and adjudicate controversies under standards of fairness, equity, and reason, so as to inject even into the equity of our law a new "equity on equity"—and, thus, we have used, although not the corpus juris of Rome, at any rate the more important soul and spirit of that body.

¹⁵ The nineteenth century, notable for reforms of English law, is at times referred to as the "century of legislation"—which is one way of stressing the point that legislation also has had its way with the older "common law." Another way is to note that the twentieth century to date has also witnessed the even more extensive "torrential" use of the legislative tool. For a third way, see the article by Mr. Justice Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535 (1948), where, as an incident to developing a main point about the need for new aids in interpreting the large mass of federal legislation in the United States, reference is made to Lord Macmillan's "dismayed realization" that soon little will be left of the common law in England.