Roman Law

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I. Introduction

The source of Roman law is the family or *gens*. The proprietary rights of the *pater familias* as head of this primitive unit of organization are fundamental in private law, and the scope of the criminal jurisdiction of the state was limited by the power of life and death exercised by the head of the family over those under his authority. Their transgressions were tried before the domestic tribunal.

At one time many different classes of crime must have been punished by the priests as sacrilege, in accordance with the divine law (*fas*); the offender would have been put to death as a sacrifice to the offended deity. Restitution for private violence or injustice would have been left to private initiative. Thus avenging the death of a kinsman was more than a right; it was a religious duty.

The law of the Twelve Tables that allowed the nocturnal thief and the adulterer caught in the

act to be killed was a survival of primitive private vengeance. Survivals of the old religious rules demanded condemnation to death for sacrilegious acts. The secular conception of crime as an offense against the welfare of the state gradually superseded the older conception. Private law arose when the community eliminated an individual's or a family's right directly to seek justice, which caused societal disorder. The parties to a disagreement were compelled to submit their claims to an arbitrator.

II. Roman Private Law

A. The Twelve Tables

Roman private law was at first a body of unwritten usages handed down by tradition in the patrician families. The demands of the plebeians to know the laws by which they were governed and taxed resulted in the publication of the famous Twelve Tables (449 b.c.), which were later regarded as the source of all public and private law (Livy iii.34.6). But the code was not scientific or comprehensive. To meet the growing requirements of the republican community, its primitive form was expanded, chiefly by interpretation and the *jus honorarium*.

B. Civil Procedure

The *praetor*, or magistrate, listened to the claims of the litigants and prepared an outline (*formula*) of the disputed issues. He submitted it to a *judex*, or arbitrator, a one-man jury, who decided the questions of fact involved. Neither *praetor* nor *judex* had special legal training. The court therefore had recourse to authorities on the law (*jurisprudentes*), whose opinions (*responsa*) formed a valuable commentary on the legal institutions of the time. The body of rules amassed by such interpretative adaptation would never have been recognized by the authors of the Twelve Tables.

C. Jus Honorarium*

Jus honorarium* was so named because this law rested upon the authority of magistrates (*honor* = magistracy). It was composed of orders that had been issued in cases for which the existing law did not make adequate provision. This second agency for legal expansion may be compared with English equity (chancery-court legal and procedural rulings that enforce common and statute law by supplementing or overriding it). These orders were issued by the praetors and had legal force during only the tenure of their office. But succeeding praetors usually reissued the ones that had proved just and expedient, and in time there arose a large and uniform body of rules which praetors issued in an edict before beginning their term of office. Thus Roman law maintained a proper balance between elasticity and rigidity.

D. Praetor Peregrinus

The institution of the *praetor peregrinus* (241 b.c.) to hear cases in which parties were foreigners led to a series of similar edicts. Since most of the foreigners were Greeks from southern Italy, these edicts formulated principles based on the spirit of Greek law, which became an important means for gradually broadening Roman law.

E. Imperial Ordinances

Under the empire direct legislation superseded the other sources of law — enactments of the senate (*senatus consulta*), imperial ordinances, and occasional bills ratified by the people (*leges*). Imperial ordinances eventually superseded all other types; they consisted of *edicta* (issued by the emperor as orders, similar to those of the republican magistrates), *decreta* (decisions of the imperial tribunal, of force as precedents), and *rescripta* (replies by the emperor to requests for interpretation of the law). All these imperial acts were known as *constitutiones*.

F. Golden Age of Juristic Literature

In the 2nd cent a.d. Salvius Julianus was commissioned to invest the praetorian edict with definite form. The Institutes of Gaius that appeared around the same time became a model for subsequent textbooks on jurisprudence. This was the Golden Age of juristic literature. A succession of able thinkers, such as Papinian, Paulus, Ulpian, Modestinus, and Gaius (cf. Codex Theodosianus ii.4.3), applied to the incoherent mass of legal materials the methods of scientific investigation, developing a system of Roman law and establishing a science of jurisprudence.

G. Codification in the Later Empire

The emperor Justinian (a.d. 527–565) finally codified the immense body of Roman law. The board of eminent jurists engaged in the great work published (1) the *Code* in twelve books, a selection of imperial enactments from Hadrian onward; (2) the Digest or *Pandects* in fifty books, extracts from the juristic literature; and (3) the *Institutes*, a textbook in four books. Most Roman private law has come down to modern times in this form. Next to the Christian religion, it is the most plentiful source of the rules governing actual conduct in Western Europe (J. Bryce, *Studies in History and Jurisprudence* [1901]).

III. Roman Criminal Law

A. Jurisdiction in the Royal Period

In the royal period criminal jurisdiction, insofar as it was a function of secular administration, was the right of the king. The titles *quaestores parricidii* ("prosecutors of murderers" [lit "parent-murderers"]) and *duumviri perduellionis* (lit "two-man commission for treason") indicate the kind of crimes first brought under secular jurisdiction. The republican magistrates inherited the royal right to punish crimes and the power to compel obedience to their own decrees by means of penalties (*coercitio*).

B. Right of Appeal

The right of the people to final jurisdiction in cases involving the life or civil status of citizens was established by an enactment (perhaps 509 b.c.) granting the right of appeal to the assembly (*provocatio*) against a capital or other serious sentence pronounced by a magistrate (Cicero *De re publica* ii.31 [54]; Livy ii.8.2). This right of appeal was extended by subsequent enactments (*leges Valeriae*, Valerian laws) in 449 and 299 b.c. Generally the magistrates made no provisional sentence of their own but brought their charges directly before the people.

1. Penalties

The death penalty was practically abrogated in republican times, for the accused was allowed to go into voluntary exile. The Romans rarely imposed imprisonment and granted the right to appeal heavy fines. A right of appeal was granted ca 300 b.c. against decisions of the dictator, who previously had held the power of life and death over the citizens (Livy xxvii.6.5).

2. Porcian Law

The right of appeal to the people was valid in Rome and as far as the first milestone from the city. The Porcian Law virtually secured this protection for all Roman citizens, wherever they might be, by establishing their right to a trial at Rome. Thus Roman citizens in the provinces, in all serious cases, were sent to Rome for trial; other persons were subject to the criminal jurisdiction of the municipalities unless the governor summoned them before his own tribunal.

C. Popular Jurisdiction Curtailed

The exercise of this popular jurisdiction was gradually curtailed by the establishment of permanent courts. The people delegated their authority to judge certain classes of cases. The first of these courts (149 b.c.) was authorized for the trial of charges of extortion against provincial governors. Compensation was the main purpose of accusers in bringing charges before this and later permanent courts. The procedure was similar to that in civil cases. A praetor presided over the tribunal; a number of *judices* replaced the single juror. Sulla provided seven courts — each dealing exclusively with extortion, treason, embezzlement, corrupt electioneering, murder, fraud, or assault.

D. Jurors

Jurors were originally chosen from the senate, but C. Gracchus transferred membership in all the juries to the equestrian class. Sulla admitted three hundred members of the equestrian class to the senate, to which he then restored the exclusive control of the juries. In 70 b.c. a judicial law gave equal representation in the courts to all three classes of the people; 1080 names were then on the list of jurors (Cicero *In Pisonem* xl). Caesar abolished the plebeian jurors. Augustus restored them but confined their action to civil cases of minor importance (Suetonius *Caesar* 41; *Augustus* 32). He excused senators from service as jurors.

E. Disappearance of Criminal Courts

The system of criminal courts diminished in importance under the empire and disappeared in the 2nd century. They were replaced by the senate, over which a consul presided, then by the emperor, and later by officials delegated by the emperor. At first the senate functioned as had the jurors in the permanent courts to the praetor. Then the emperor and imperial officials decided without a jury, and the judicial competence of the senate was gradually lost. After the 3rd cent trial by jury ceased to exist.

An important innovation was the right to appeal the decisions of lower courts to higher tribunals. The emperors and eventually their delegates (usually the two prefects) heard appeals from Roman and Italian magistrates and provincial governors.

F. Right of Trial at Rome

Under the early empire provincial governors were generally obligated to grant Roman citizens' demand to be tried at Rome (Digest xlvii.6f), although this rule apparently had exceptions (Pliny Ep. ii.11; Digest xlviii.8, 16). Lysias, tribune of the cohort at Jerusalem, sent Paul as a prisoner to Caesarea, the capital of the province, so that Felix the procurator might determine what to do since Paul was a Roman citizen (Acts 23:27). Two years later Paul asserted his privilege of being tried at Rome by the emperor (25:11–21). Roman citizens who were sent to Rome might be brought before the senate or the emperor, but usually the imperial tribunal handled these cases and eventually supplanted senatorial jurisdiction over them. The formula of appeal became proverbial: "I am a Roman citizen, I appeal unto Caesar" (cf. 25:11).

As Roman citizenship became more and more widely extended to people throughout the empire, its relative value diminished. Many of its special privileges, such as the right of trial at Rome, must have been gradually lost. It became customary for the emperors to delegate their power of final jurisdiction over the lives of the citizens (*jus gladii*, "right of the sword") to the provincial governors. After Caracalla had conferred Roman citizenship upon the inhabitants of the empire generally, the right of appeal to Rome remained the privilege of certain classes, such as senators, municipal decurions (Digest xlviii.19, 27), officers of equestrian rank in the army, and centurions (Dio Cassius lii.22, 33).

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