

A PLEA FOR ROMAN LAW

by

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Until our own times Roman law was a staple subject of the law course in the English universities and the older universities of Australia. Now, however, it is falling on evil days. It began to be taught in Oxford at the end of the twelfth century and at Cambridge a little later.¹ For long it was thought that the eminent Civilian Vacarius lectured at Oxford. Whether he did or not, he certainly taught in England and wrote a book which was a text book in the law school at Oxford about 1195.² No English law was taught at Oxford in the Middle Ages. What was taught was the civil law (ie Roman law) and the canon law. The canon law was dropped in the reign of Henry VIII for obvious reasons: in return, however, the matrimonially-minded monarch established lectures on the civil law at both universities.³ The course was for long a real and exacting test of knowledge,⁴ but in the eighteenth century it succumbed to the general academic torpor and degrees in civil law could be obtained by mere residence in college for three years without the tedious necessity of examination or test.⁵ In the nineteenth century the universities awoke; the law course became a reality and judiciously selected topics of English law took their place alongside Roman law in the curriculum.

The prominence of Roman law gradually declined. Even so, it is still taught at the Universities of Oxford, Cambridge and London and, without attempting a precise analysis of the various courses, it seems to me from a general survey of the calendars that the prevailing tendency in these universities at the present time is for it to be a compulsory subject for the preliminary or initial examination and an optional subject in more depth later on.

In Adelaide Roman law was a first year subject when the course began in 1883 and has continued in some form or other to figure in the curriculum ever since, though between 1935 and 1952 it was compressed into an uneasy union with Jurisprudence. In 1952, after the advent to

1 Holdsworth, *A History of English Law* vol IV (1924) 228 f.

2 *Ibid* vol II (3rd edn 1923) 147-149.

3 Holdsworth, *supra* n 1 at 232.

4 *Ibid* 229.

5 Lawson, *The Oxford Law School 1850-1965* (1968) 1.

the Chair of Professor Blackburn,⁶ it was restored to its rightful and independent place. Until 1960 it was a compulsory subject for the degree of LL. B. Since then it has been an optional subject with a varying number of alternatives.

I will not attempt to trace its history in the other Australian universities. In recent years up to 1981 it was offered at Sydney and Adelaide alone and as an optional subject. I was delighted to read that in 1981 it figured, apparently for the first time, in the Monash law course, not surprisingly as an optional subject. It is to be hoped that it will maintain its place and that the example will prove infectious.

The chief reason for the eclipse of Roman law is, of course, the steady erosion of Latin as a school subject and a matriculation requirement. The old type of Roman law examination, with its large component of passages for translation from the Institutes of Gaius or Justinian, demanded some knowledge of the language. But this linguistic kind of course is not the only possible one, perhaps even not the most suitable one for an undergraduate. No doubt without a knowledge of Latin it is hardly possible to reconcile apparently conflicting texts, still less to sever in the Digest the interpolations of Justinian's commissioners from the pure milk of the word of the classical jurists.⁷ But these are skills which could hardly ever have been reasonably demanded of first degree students. There have been in recent years studies of sociological and historical aspects of Roman law which have opened new lines of approach. A panoramic comparative view of the subject in what was in one sense its final form under Justinian, comparing and contrasting its leading features with those of English law, is possible without any knowledge of the Latin language, except the names of persons, concepts and institutions, and is in my view of great benefit to the interested student. Just so, the subject of Classical Studies is being taught to those who have no Greek and hardly any more Latin.

The uninstructed student may not at first be the interested student, nor is he or she greatly to be blamed for this. The forces which are turning the study of English into a study of contemporary literature and the study of history into a study of contemporary politics would like to turn the study of law into a study of contemporary sociological theory and practice. The curious unexpressed assumption that you can understand trees by dissecting fruits and ignoring roots should be energetically exposed for the barbarous fallacy that it is. "Our culture's indifference" says Christopher Lasch⁸ "to the past — which easily shades off into active hostility and rejection — is the most telling proof of that culture's bankruptcy." It is one of the primary duties of the academy at all levels to rescue the past from this indifference, in the hope that, even if our culture cannot be restored to solvency, it can at least be led to pay a dividend of a respectable number of cents in the dollar. I wish there were a more general awareness of this duty. However, I must not mount this hobby horse here. I can only repeat that, once the initial barrier interposed by the *Zeitgeist* is overcome, the study of Roman law can be

6 Now Sir Richard Blackburn, Chief Justice of the Supreme Court of the Australian Capital Territory.

7 Or perhaps, in view of recent research, one should say from post-classical versions of them: see Schulz, *Roman Legal Science* (1963) 141-144, 322.

8 *The Culture of Narcissism: American life in an age of diminishing expectations* (1978) xviii.

of absorbing interest and lasting benefit to a mind of reasonable intelligence.

In an article entitled "The Purpose and Method of a Law School"⁹ Jethro Brown, who occupied the chair of law at Adelaide from 1906 to 1916, gave reasons for including comparative law in the law course and for choosing Roman law as the comparative system to be studied.

In the preface to the first edition of Lee's *Elements of Roman law* the arguments in favour of the study of Roman law are summed up as follows:¹⁰

"The reasons which justify it, particularly for students who breathe a Common Law atmosphere, are principally these:—

- (1) Roman Law is one of the great things which have happened in the world. It is part of a liberal education to know something about it.
- (2) Roman Law is an introduction to the study of Science of Law, or as we call it, Jurisprudence. For many centuries the Science of Law *was* Roman Law. If in modern times it has widened its outlook and improved its methods, its debt to Roman Law remains unquestioned.
- (3) Roman Law is a key to the terminology and, to a great extent, to the substance of foreign systems.
- (4) Roman Law enlarges the mind. Burke has well said that 'the science of law does more to strengthen the mind than to liberalise it'. The study of Roman Law liberalises the mind by expanding the range of vision."

This is an excellent summary. I develop it somewhat. Broadly speaking, I think the arguments in favour of Roman law fall into two classes:

- (1) arguments in favour of the study of comparative law and of Roman law as the system to be studied;
- (2) arguments in favour of Roman law as an intellectual discipline in its own right.

I will deal with the topic under these two heads, only pausing to note that to a minor but not trifling extent Roman law has entered into the formation of the common law, in such varied areas as bailments, servitudes, suretyship, and unjust enrichment, to mention only a few examples, and is still capable of being cited with effect in a common law court where no other authority exists: see eg *Acton v Blundell*,¹¹ *Dalton v Angas*,¹² *Sinclair v Brougham*.¹³ I once cited it in a licensing appeal.¹⁴

9 (1902) 18 LQR 78 and 192.

10 See Lee, *Elements of Roman Law* (4th edn 1956) viii, extract from preface to first edition.

11 (1843) 12 M & W 324, 353.

12 (1881) 6 AC 740, 818-822.

13 [1914] AC 398, 431-435.

14 *Smith v Kite* [1939] SASR 79, 84.

I do not think I need spend much time defending the merits of comparative law. In the article above referred to, Jethro Brown says:¹⁵

“In law, as indeed elsewhere, an account of the resemblances and differences between two objects is a certain way to bring out their true meaning... Comparative study puts new life in the legal formulae with which the student will have to deal in everyday life, and thus gives to him a power of vision which must prove of the highest value when he is called upon to deal with new combinations of facts which have not hitherto been made the subject of legislative or judicial interpretation.”

The learned author goes on to quote the words of “a late Lord Chief Justice”¹⁶ concerning Benjamin, the Louisiana lawyer who was the Confederate Attorney-General and became highly successful at the English bar after the Civil War, besides writing *Benjamin on Sale*. The Lord Chief Justice said that Benjamin’s acquaintance with the Code Napoleon, “to a great extent founded on Roman law”, was not only “of great advantage to him in actual practical argument, because it gave a breadth, and grace, and facility of illustration which might have been wanting otherwise”, but also “gave him a grasp of larger, wider, more general principles”.

Roman law is the foundation of the European systems of law, at least west of the Vistula, and of their offshoots outside Europe, such as the law of Quebec, the Roman-Dutch law of South Africa, and those parts of the continental codes which have been adopted by countries like Japan. Even if we grant that under the exigencies of modern life English law and, say, French or German law may often produce roughly similar results, it remains true that the concepts and modes of reasoning are different, the terminology is different, the historical foundations of the rules of law and the unexpressed assumptions behind them are different. Moreover, even if, as I have said, the end results are often similar, they are also often not identical and may well be different in complex and interstitial situations. These are just the situations where legal expertise is needed.

I was once as a young practitioner called upon to consider a power of attorney in the French language to be given by a local resident to a notary in Switzerland. It was gratifying to be able to understand such powers as the power “to accept inheritances with or without benefit of inventory”.

All this may be granted and yet it may be asked, “Why Roman law? Why not French or German or Japanese law?” Jethro Brown says¹⁷ that the continental codes are not accessible to English students but this is no longer true.

Roman law, as I have said, lies behind the European codes. Who knows its fundamental concepts and methods knows theirs. It is in a smaller compass; it is easier to grasp as a whole. It can, as Jethro

¹⁵ Brown, supra n 9 at 194 f.

¹⁶ The article was written in 1902: I think the reference must be to Lord Russell of Killowen.

¹⁷ Brown, supra n 9 at 196.

Brown says,¹⁸ "be studied within the limits of a single volume". Moreover, it is in one sense completed and crowned in the legislation of Justinian, which can be regarded as the summing up of a long historical process by which the rigid, cumbrous, archaic, narrowly nationalistic *ius civile* of the Twelve Tables became the flexible, informal, generalised cosmopolitan law of the world empire and as such was finally encapsulated in an easily accessible form. The contemplation of that process is of high educational value for more than legal purposes. So, of course, is the subsequent history of Roman law by which it eventually became received as the common law of Europe. But not everything can be compressed within the limits of a single course, though a competent course in Roman law will make some reference to the subsequent fate of some of its more important concepts.

The very strangeness and unfamiliarity of many aspects of Roman society are in one sense advantages; they help to emancipate the mind from the tyranny of the contemporary and to point up the enduring nature of fundamental legal concepts and modes of reasoning in very different settings. A modern exposition of Roman law should cast its emphasis on those parts of it which relate to such enduring topics, rather than on those which were peculiar to the Roman environment and are now chiefly of antiquarian or historical interest.

I now turn to the group of arguments relating to Roman law as a fitting object of intellectual study in its own right apart from the comparative aspect.

As Lee says in the passage quoted, it is one of the great things which have happened to the world. It is not only, as I have said so many times, the foundation of modern European systems, it is also the foundation of theoretical jurisprudence as it has developed in the West and also of no small part of international law, which in its origin drew heavily on Roman concepts like occupation, possession and succession. Indeed the nascent science had no other source on which to draw.

As Lord Bryce said in a passage quoted in Lawson's book previously referred to,¹⁹ Roman law is "necessary to a philosophical grasp of our own or any other legal system".

One of the features of Roman law which strikes most forcibly the enquirer who approaches it from a common law background is its general methodology. It attempted to chart and classify the whole field of law. It classified it in two ways, according to its source or according to its content. Classification according to source is of historical, political or theoretical significance rather than of immediate practical interest. If you do not know where to look for light upon your problem it is not much help to be told that it might be found in a written or an unwritten source, in statute, praetor's edict, imperial rescript, juristic writing or immemorial custom. But classification according to content is very different. The Romans divided the field of law into public and private law; private law into the law of persons, the law of things and the law of actions; the law of things into the law of property and the law of obligations; and the law of obligations into the law of contract, quasi-contract, delict and quasi-delict. These classifications fall considerably

¹⁸ Ibid.

¹⁹ Lawson, *supra* n 5 at 30.

short of scientific perfection. They have been developed and improved by later European jurisprudence. But at least the effort was made. The common law hardly makes any effort at all. The general digests or compendia, such as Halsbury, or the *English and Empire Digest* or the *Australian Digest*, seem to despair of any more logical classification than the alphabetic. Agreeably to the well-known Anglo-Saxon pragmatism, you start with "Action" and you finish with "Work". I might add that I am drawing here and hereafter on an article I wrote for the *Adelaide Law Review* several years ago.²⁰ I do not want to be accused of passing off second-hand goods as new.

The first task of a lawyer confronted with a legal problem is to categorise it so as to know where to search for authority. This is often very hard to do in English law. On certain types of problem a search has to be made under Contract, Trust and Equity before the answer is found and, if it is a family dispute, under Husband and Wife as well. Categorisation is much easier under the Roman system. Indeed, when I was in practice, both at the Bar and on the Bench, I often found it helpful to ask myself what Roman law rubric would cover the question. That might well suggest the appropriate English equivalent.

A scientific study of law ought to be able to map out the field, as sciences like zoology or botany map out their subject matter into classes, orders, families, genera, species, with every creature in its appropriate place. Roman law tried to do this. As I have said, its attempts were improved upon in later times. As far as I know no radically different approach has ever attracted wide support.

The talent for classification, definition, distinction, analysis, simplification is characteristic of Roman legal genius at its highest. I would quote from Schulz, *Principles of Roman Law*:²¹

"In the beginning all things were as one; then came understanding, distinguished between them and created order.' This saying by Anaxagoras describes a task essential to every science, including the science of law: the fine art of drawing distinctions is part of the very nature of the science of law."²²

I do not want to exaggerate. The qualities I have mentioned manifested themselves with different emphases at different times, and there were counter-tendencies to formalism, rigidity and complication. Nevertheless, in the broad sense, there is no reason to distrust the judgment of Sohm:²³

"This wonderful power of discrimination; this clear-sightedness in the adjustment of conflicting principles, guided by a never-failing instinct for discerning the common elements; this unique faculty for giving outward expression to the law inherent in the concrete circumstances, which law, when found supplies the rule — with many practical variations of course — for all other circumstances of the same kind: — these are the

20 "Possible Guidance from Roman Law" (1968) 3 *Adel LR* 145.

21 (1936) 19.

22 Here the learned author refers to R von Ihering, *Geist des Römischen Rechts auf den Verschiedenen Stufen seiner Entwicklung* vol ii (4th edn) 39 and Vol iii (3rd edn) 1.

23 Ledlie (ed), *Sohm's Institutes of Roman Law* (3rd edn 1907) 102.

features that give to the writings of the Roman jurists their incomparable charm, and to the work they have achieved its indestructible force. It was no mere 'arithmetic of abstractions', as it has been called, that made the Roman jurists as great as they were, it was rather that practical tact which, without always being intellectually conscious of the abstract conception, nevertheless invariably acted in accordance with it, and thus succeeded in bringing out, in the individual case, the general law inherent in all cases of a similar description."

To this it might be added that later generations were able and willing to supply those abstractions from which, for whatever reason, the classical jurists sometimes refrained.

In my article in the Adelaide Law Review previously referred to, I gave some examples of what seemed to me the superior elegance and simplicity of Roman law as compared to the common law. I will not recapitulate them. I merely give two instances. As Rome never had a feudal system there was no necessity for two different sets of law, one for real property and one for personal property. Land, of course, because of its nature, demands some special rules but these can easily be grafted on to a generalised law of property. There is no real need for one set of rules dealing with the sale of land and another set of rules dealing with the sale of goods, one set of rules dealing with the hire of land (in other words the law of landlord and tenant) and another set of rules dealing with the hire of goods. Roman law dealt with sale and hire, under general rules irrespective of the nature of the property sold or hired with some special qualifications rendered necessary by the nature of land.

Roman law evolved a generalised delict — or in our language "tort" — called *iniuria*. An *iniuria* was any wilful invasion of, or injury or insult to, the personality of another. It covered assault and defamation but also much else, including unjustified violation of privacy and indeed, as Justinian says,²⁴ innumerable other acts. The famous dentist of Balham,²⁵ real or imaginary, who had no remedy against his malicious neighbours who set up a series of mirrors in their garden which reflected the occurrences in the surgery to the amusement of themselves and their guests at afternoon tea parties in the summer, could have sued for *iniuria* at Rome.

There was one simple generalised principle as opposed to our heterogeneous collection of torts into one of which the successful plaintiff has to fit his claim. The intention to insult or injure without lawful justification is the gist of the Roman action. I might add that truthful imputations are not unjustified.

There are many other topics which I might mention where in my view our law has something to learn from Roman law, such as the analysis of possession (where indeed the common law owes much to Roman law but has engaged in bewildering complications of its own, particularly in the criminal law) or the treatment of mistake, fraud and unjust enrichment,

²⁴ *Institutes* IV, 4, 1.

²⁵ *Kenny's Select Cases on Tort* (1904) 367.

but this article must not degenerate into a wilderness of single instances. Nor am I concerned to deny the superiority of the common law in some fields, such as those concerned with the rights of the citizen against the State, or that Roman law had its own component of formalism, antiquarianism and arbitrariness, such as any system of law tends to accumulate in the course of its history.

Instead, I will give some examples of the acuteness of juristic reasoning and of the purposes behind it. The examples I have chosen may seem fantastic but it is in fantastic or unusual situations that the special skills of legal analysis can be seen to best advantage.

What is the position when the children of X are entitled to some testamentary benefit and X dies leaving his wife pregnant? Must the existing children wait until the birth before they can take anything, since until then their precise fraction of the gift cannot be determined? It was held that there could be an interim distribution on the basis that triplets would be born, any greater number of multiple births being regarded as so extraordinary as to be out of the range of reasonable expectation. The records and circumstances of such births are considered and discussed. After the birth, of course, appropriate adjustments can be made.²⁶

Professor Daube in his penetrating and entertaining book, *Roman Law: Linguistic, Social and Philosophical Aspects*²⁷ discusses inter alia the social purpose and philosophical reasoning behind certain legal rules. I mention two examples.

He refers²⁸ to what he describes as a "strange dispute among Republican lawyers". I follow him in using English rather than Roman currency. A owes B £50. He pays him £5. B immediately returns to him the £5 note by way of gift. A pays it back again to him, it is returned to him by way of further gift and so on until A has handed the same note to B ten times. Has A paid £5 or £50?

It was eventually decided that the whole debt had been paid. At first sight this looks like an idle exercise in logic chopping. But there was a sound reason behind it. At the time bankruptcy led to unpleasant and lasting disabilities and compounding for less than a hundred cents in the dollar was regarded as a form of bankruptcy for this purpose. The combination of a friendly creditor and an acute adviser was able to avert these consequences. The full amount of the debt had been paid. It might be asked why not hand over the whole £50 at once and get £45 of it back as a gift? I should think obviously because A could not raise more than £5.

At a later stage Professor Daube discusses the use by the Roman lawyers of the *reductio ad absurdum*, a concept familiar to the Greek philosophers.²⁹ This technique of course is in common, and sometimes effective, use in contemporary courts.

He gives two examples:³⁰

26 Jolowicz, *Roman Foundations of Modern Law* (1957) 110 f: D. 5.1.28.5; 5.4.3; 34.5.7 pr.

27 (1969).

28 Ibid 93.

29 Ibid 176-194.

30 Ibid 176.

“A husband in his will bequeaths to his wife the utensils for beautification, the toilet articles. Under this legacy, it is held, she gets only what objects had been set aside for her use, not, for example, a mirror in his study. Otherwise — here we come to the *reductio ad absurdum* — if he happened to be a manufacturer of such articles, she would practically dispossess the proper heir. Again, I sell you a major piece of land, say, for £50,000 reserving for myself the quarries, the beds of stone, on it. Some time later a quarry we had not known of when we concluded the contract comes to light. Held, finally, that you may keep it since, otherwise, if the whole estate turned out to rest on beds of stone, you would just lose the full price of £50,000 and I remain with the land.”

This type of dialectic may not appeal to all minds. The *reductio ad absurdum* particularly is often fallacious, because as you extend the proposition towards absurdity, new principles and considerations often intervene to block or deflect its path. In the case of the legacy, for example, I think I might have included all the articles of the kind in question in the house without finding it necessary to consider the hypothetical stock in trade in the hypothetical factory, in other words without passing from the domestic to the business area. Still there is no doubt about the ingenuity involved and it is ingenuity of a peculiarly legal kind.

Finally, for those who are so minded, Roman law can be studied historically. From the law of the little republic of farmers and artisans, formal and exclusive, to the law of the cosmopolitan world empire, first pagan then Christian, is a long procession, and to watch its course in an impressionistic survey like the historical section of Sohm³¹ or in the more detailed pages of Jolowicz³² can be an intensely stimulating and rewarding experience to those who are willing to undergo it.

I would conclude with three reflections.

The first is that it is Roman private law, the law of property, inheritance, contract and delict which is the field of study, not criminal or administrative law which have proved far less fruitful for future ages. It can be said, and with some justice, that the social system of the Republic, and in a somewhat different way of the Empire too, was based on privilege, privilege of birth, wealth or office, that it was in its essence an unjust society, and that its law, or the part of it we study, was a law for property owners only. There is some, but not complete truth in this; but so long as individual ownership of property endures, property owners are entitled to justice inter se and a large part of all systems of law for more than three thousand years has been devoted and still is devoted to providing it. The theory of Roman law did provide it. I am not concerned here with whatever shortcomings there may have been in practice. Our law provides it too, though often by a different method of approach to the same fundamental problems.

As a matter of historical fact, law in the lawyer's sense owes its origin to the settlement of disputes between equals. Slaveowners do not need

31 Ledlie (ed), *supra* n 23 at 34-131.

32 Nicholas (ed), *Historical Introduction to the Study of Roman Law* (3rd edn 1972).

law to deal with their slaves. That can be left to force. A quarrel between two slaveowners is a different matter. The community has to provide some means of settling that to preserve the peace. The point is well brought out by early primitive Roman procedures like the *sacramentum*, a mimic impending combat aborted by the intervention of the praetor who persuades the parties to wager on the validity of their respective contentions and to accept impartial arbitration to decide the winner.³³

I would add too, that there is a well-known historical process by which what is law for the privileged classes eventually becomes law for the whole community. There are examples of that in Roman law, such as the gradual extension of the Roman citizenship to all the free inhabitants of the Empire, or, in a somewhat different way, the beginnings of legal protection for the slave.³⁴

Secondly, if I may be pardoned for doing so, I would refer to my own experience as a student. I approached Roman law without much more than a schoolboy's knowledge of the Latin language and of Roman history. Sohm's *Institutes* (above referred to) opened a new world of legal reasoning to me and gave me in brief a panoramic view of a majestic movement of world history. I think the Roman law course gave a faint Romanistic tinge to my subsequent approach to legal reasoning, not so great, I hope, as to disqualify me as an expounder of the common law, but sufficient to clarify my thought and sharpen whatever powers of analysis and distinction I possessed. I would like to think that a similar experience remains possible for those who are minded to undergo it.

Thirdly, I say this. It is fashionable to urge for a sociological approach to the law, to treat it as merely one member of the class misleadingly called the social sciences, to canvass its social purposes and assess its social consequences rather than to explore its traditional legal content. I would not unduly deprecate these considerations; law exists for the community, not the community for the law, though in general the community is best served by the legal profession when it does its best to procure for it, as swiftly and as cheaply as possible, justice on traditional lines, but according to a modernized system of law. Sociology and law are not the same and nothing is gained by treating them as if they were.

However all this may be, the fact remains that the successful, indeed the competent, lawyer needs skills of legal analysis, legal distinction, legal definition and legal dialectic, however repugnant to some minds the so-called "jurisprudence of conceptions" may be. No doubt the possession of these qualities is not a sufficient condition for the highest legal attainments: the lawyer also needs a sense of justice and humanity and an awareness of contemporary demands and contemporary modes of thought. The Roman lawyers at their best had these things. But for those highest legal attainments the possession of the skills I have mentioned is still a necessary condition. Legal argument, particularly before appellate courts, still demands it. The ability to compile a Brandeis brief — the contents of which would probably not be admissible in Australia anyhow

33 Hunter, *Roman Law* (4th edn 1903) 976-978, citing Maine, *Ancient Law* (4th edn) 376.
34 Gaius, *Institutes* I, 53.

— is no substitute for it. Other things being equal, legal success will go to those who are most proficient in its exercise. There is no better illustration of these skills than the techniques of Roman law and I hope that the study of those techniques will long remain available to the Adelaide law student. However, my fear is that Roman law may be superseded in the curricula of Australian law schools by subjects such as the analysis of comparative statistics relating to the non-medical use of drugs of addiction.

Justice, says Justinian, adopting the words of Ulpian³⁵ is "*suum cuique tribuens*" giving to each his due. The due of the student is a liberal education as well as a professional qualification; and it is the duty of the University to give him a chance of getting it and to encourage him to seize the chance.

35 *Institutes*, I, 1, 3.