European Legal Culture: Sources of Law

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Selected meanings of the term "Roman law"
1) the law of Rome – from the beginnings of the City to the death of Justinian in AD 565.
2) Romanistic elements in the later history of law
3) ius commune – the common law of Europe from the 12th to the 18th century
4) usus modernus pandectarum and pandectism of the 18th-19th century
5) Academic study of Roman law
6) The romanist tradition, broadly understood
Periodisation of the history of sources of Roman law

- **Archaic law** – the kingdom and early republic through the Punic wars (753 – 265 BC).
- **Pre-classical law** – the republic during its development and decline (through 27 BC).
- **Classical law** – from the principate to the end of the Severan dynasty (through 235 BC).
- **Post-classical law** – the Dominate (from the crisis of the 3rd century to AD 565).
  [including Justynian law – reign of Justynian AD 527 – 565]
The concept of law

_ius_ – _Fas_

Human law – divine law
D. 1,1,1

Ulpian quoting Celsius from the 2nd century:

(...) ius est ars boni et aequi.

Law is the art of [applying the principles of] the good and the just.
• **Dura lex, sed lex** (ad D. 40,9,12,1) – The law is harsh, but it is the law.

• **Summum ius, summa iniuria** (Cic.off. 1,33) – Supreme justice, supreme injustice.

• **Male nostro iure uti non debemus** (Gai 1,53) – We ought not to abuse our legal rights.
• *Non omne quod licet honestum est* (D. 50,17,144 pr) – Not everything that is permitted is honest.

• *Hominum causa omne ius constitutum sit* (D. 1,5,2) – All law should be made for the sake of men.
Divisions of law

1/ *ius publicum* – *ius privatum*
- Public law – private law

2/ *ius civile* – *ius gentium* – *ius naturale*
- Citizen law – law of nations – natural law

3/ *ius civile* – *ius honorarium*
- Law enacted by citizens at assemblies – law created by civil servants
Divisions of law

- **4/ ius commune – ius singulare**
  - Common law – particular law
- **5/ ius vetus – ius novum**
  - Old law – new law, rule:
  - Lex posterior derogat legi priori
  - New law derogates old law
- **6/ ius strictum – ius aequum**
  - Strict law – law of equity
  - E.g. Loan contract – articles of association
Systematization – selected issues

• The Institutes of Gaius

  *personae – res – actiones*
  
  persons – things - actions

  (repeated in the Institutes of Justynian)

• Renaissance systematization

  The entirety of Roman law divided into substantive and procedural law (Donellus 16th century), and history of sources as a separate area of research
Pandectic systematization

- General part, including personal law
- Family law
- Property law
- Law of obligations
- Inheritance law

[Various orders of the individual parts of this systematization have been applied]
Latin thoughts (partially Roman) in contemporary international public law

Par in parem non habet iudicium - Equals have no jurisdiction over each other.”A maxim meaning that no state's courts may exercise jurisdiction over a foreign.

Lex posterior derogat legi priori - A later law repeals an earlier (law).”A maxim meaning that a legal rule arising after a conflicting legal rule

Pacta tertiis nec nocent nec prosunt - A treaty binds the parties and only the parties; it does not create obligations for a third state

Pacta sunt servanda - Agreement must be kept

Ne impediatur legatio - May the legation not be impeded.”A maxim expressing the immunity of diplomatic persons and their papers to detention, civil.

Aut dedere, aut iudicare - Extradite or prosecute

Ex iniuria ius non oritur - Right does not arise from injustice
Inadimplenti non est adimplendum - One has no need to respect his obligation if the counter-party has not respected his own.

Nemo potest commodum capere de iniuria sua propria - No one may gain profit from his own wrongdoing.”

Venire contra factum proprium nemini licet - No one may set himself in contradiction to his own previous conduct. (Estoppel)

Qui in territorio meo est, etiam meus subditus est - If somebody is in my territory he is also subjected to me

Quidquid est in territorio, est etiam de territorio - Whatever is in the territory is indeed of the territory.

Ex consensu advenit vinculum - The consent rises to obligation.
Customary law

*mos maiorum*

*consuetudo*

Developed out of the continuity and stability of a given social behaviour.

The Romans felt customary law was the silent expression of the will of the people.

They contrasted it with statutory law, which is an overt expression of that will.
The Law of the 12 Tables

462 BC the plebeians demand that the law be written down

452 BC *decemviri legibus scribundi*

451 BC first ten Tables

450 BC two addtionary Tables
12 Tables cont.

Tables I-III procedural law
Table IV and part of V organization of the family
Table V (partially) inheritance
Table VI elements of the law of contractual obligations
Table VII criminal law
Table VIII delicts of private law
Tables IX-X sacral and public law
Tables XI-XII various laws
Laws of the popular assemblies
Passed by *comitia* upon application by a civil servant who held *ius agendi cum populo*. Draft acts were first circulated (*promulgatio legis*). They were then discussed during informal meetings (*contiones*). After a *contio* the servant convened the assembly in order to pass the bill.
Laws of the popular assemblies cont.

Voting was initially done openly by voice; from the 2nd century BC voting was done in secret by ballot.

Each voter received two ballots:
UR – *uti rogas*
A – *antiquo*
Laws of the popular assemblies III

Plebeians also gathered in special assemblies called *concilia plebis*.

These assemblies, led by tribunes, voted on resolutions known as plebiscites (*plebiscita*). Initially they only applied to plebeians. From *lex Hortensia de plebiscitiis* in 286 BC they applied to all citizens.

From that time, many important laws were passed as plebiscites.
Laws of the popular assemblies IV

An act passed by the plebs required approval of the Senate to enter into force (*auctoritas patrum*).

In 339 BC the Senate gave its *auctoritas* to all future acts of popular assemblies.

In the 1st century BC the popular assemblies were convened very irregularly. They ceased entirely during the principate.

The last act passed in this way comes from the end of the 1st century AD, during the reign of Nerva.
The first Roman Senate from the era of Romulus had 100 senators. During the early Republic, the Senate was composed of 300 senators. Sulla expanded the Senate to 600 members. Caesar made it 900. Augustus limited the number of senators to 600. The Senate was made up of former high-ranking civil servants; it could be convened by a consul or a praetor, and in the late Republic by a plebeian tribune also.
Resolutions of the Senate

The magistrate presiding over the Senate presented the matter that was to be discussed (*relatio*). Next, he asked the most outstanding senators for their opinions. Less-important senators were not asked formally for their opinions. Voting was done by the senators going to one of two sides. At the end of a Senate's session, the presiding magistrate and a selected senator wrote down the Senate's resolution.
Resolutions of the Senate II

During the Republic, the Senate was primarily an advisory body. It held authority in matters of financial oversight and foreign policy. It gave up its powers to confirm acts in the 4th century BC.

During the principate, lawyers gave resolutions of the Senate the status of legislation. The jurist Gaius, from the 2nd century AD, had no doubt as to the status of these resolutions. During the Severan dynasty (at the turn of the 2nd and 3rd centuries) the Senate only considered imperial legislation (*orationes principum*).
Praetor

In 367 BC, the praetor was appointed as an officer of jurisdiction.

In 242 BC, a praetor for foreigners was appointed (*praetor peregrinus*), after which the first one was given the title of municipal praetor (*praetor urbanus*).

The praetors also deputized for the consuls in the City when the latter went to war.

The praetor’s term of office was for one year. Each new praetor published his edict in which he set out the principles he would follow in his office.

Beginning with *lex Cornelia* in 67 AD, praetors were bound by their own edicts.
Preatorian edict

The edict primarily contained a declaration regarding certain legal instruments.

It was divided into five parts:

1. *De iurisdictione* addressed the praetor’s scope of activity and proceedings before him.

2. *De iudicis* – presented particular cases in which the remedy of an action was made available (*actio*).

3. *De iuris auxiliis* was a continuation of the preceding part.

4. The fourth part contained the ways of enforcing judgements.

5. The fifth part concerned non-procedural remedies.
Praetorian edict cont.

Generally, a new praetor adopted the edict of the previous praetor.

This led to the formation of the primary, permanent portion of the edict, called *edictum tralaticium*.

Around AD 230, emperor Hadrian instructed the jurist Salvius Julianus to write down the provisions of the municipal praetor’s edict and the edict of the praetor for foreigners.

The unified edict was confirmed by a resolution of the Senate as the „eternal edict”, sometimes as the „Julian edict” „or the „Salvian edict”.

From then on, changes of this edict were the prerogative of the Caesar.
Edicts of other Republican offices

Jurisdiction over marketplaces belonged to Aediles.

He also issued his own separate edict. Provincial governors issued edicts similarly to the praetorian edict.

The quaestors were the provincial equivalents of the Aediles.

Law created by office holders was called *ius honorarium* from *honos*, meaning dignity, office.
Study of law during the Republic

luris prudentia – knowledge of the law, legal expertise.

From the most ancient times to the 3rd century BC, knowledge of legal formulae, the judicial calendar and interpretation of the law were the domain of the pontifices. This period is referred to as the era of the pontiffs’ jurisprudence or the esoteric age.
Study of law during the Republic cont.

Around 300 BC the pontiffs’ monopoly was broken by Gnaeus Flavius, who published the judicial calendar and collections of formulae for actions in civil procedure (ius Flavianum).

A short time later the first plebeian pontifex maximus (highest pontiff), Tiberius Coruncianus, began public teaching of the law.

The secularization of the law had begun.
Study of law during the Republic III

The first Roman jurists were from the richest classes of society. They gave advice for free. They received social recognition and stood out among their class, which made their public careers easier. They were called *iuris prudentes* or *iuris periti*. 
Study of law during the Republic

IV

Cicero named three types of activity by jurists:

Respondere – giving legal advice

Cavere – helping in preparing legal acts and preparing procedural formulae

Agere – help during lawsuits, generally consisting in instructing parties and speakers
Study of law during the Republic V

Jurists sometimes lost cases against orators. As representatives of the higher classes, there was no financial incentive to participate frequently in trials. This is why they generally sent parties in lawsuits to professional orators, who were better able to present the judge with the facts of the case.
Study of law during the Republic VI

Three jurists were spoken of as: *fundaverunt ius civile.*

These were:
Mucius Scaevola
Marcus Iunius Brutus
Manius Manilius
Study of law during the Principate

There were many jurists during this time. We know of at least 128 of them.

Jurisprudence became increasingly bureaucratised!

It was first made dependent on the princeps, and then incorporated into the imperial administration.

The most outstanding lawyers received the privilege of *ius publice respondendi*. We know of around 30 such cases.
Ius publice respondendi

• Privileged lawyers gave legal advice in the form of a sealed letter (responsum sigillatum) which bound the judge in respect of a specific case; with time, it came to be used in analogical cases.
• With time, the opinions of jurists written in their books also came to be given legal power!
Responsa prudentium become a source of law!

- G. 1, 7:
  - Responsa prudentium are the statements and opinions of those who were allowed to enact law. If all of their opinions were in agreement, this view acquired the force of an act. If they were not in agreement, the judge could choose what he preferred.
Jurists become the creators of law!

(*iuris auctores, iuris conditores*)

Jurisprudence incorporated into the imperial administration.

In the 2nd century emperor Hadrian made the *consilium principis*, a permanent advisory body of legislation and justice; its members were paid a salary.
During the reign of the Antonines, they became civil servants.

The Severians incorporated them into the structure of imperial administration.

The most outstanding jurists (Papinian, Paulus and Ulpian) were prefects of the praetorians; as commanders of the imperial guard, they were also the highest judges in the state.
Study of law during the Principate

Private tutoring of law students continues to exist.

The first law schools, however, are something new!

In the 1st and 2nd centuries there were two legal schools operating in Rome – the Sabinians and the Proculians.

It is believed that the Sabinians were more conservative, in favour of *ius strictum* and stoicism; Proculians were innovative, supporters of *aequitas* and Aristotle.
The Sabinians

The founder of the school was Ateius Capito. Massurius Sabinus, author of *libri tres iuris civilis*. This work was often commented on by many lawyers in the form of *libri ad Sabinum*.

Gaius Cassius Longinus (the Cassian school).

The last leader of the Sabinians was the outstanding lawyer Salvius Iulianus. Pomponius and Gaius are also associated with this school.
The Proculians

The school’s founder was Proculus, known for his 11-volume textbook *Epistulae*. After him, the school was taken over by the Celsiuses – father and son. The younger is the author of a famous definition of what is law.

The last leader of the school was probably Neratius Priscus, during the reign of Trajan and Hadrian.
Controversies among schools

• Around 60
• Concerning minor issues
• e.g. determining the age of maturity for boys (on an individual basis, or a fixed rule of 14 years old); who should be awarded ownership of a thing made in good faith from materials belonging to a third party?
The greatest jurists lived at the end of the classical period (reign of the Severans):

Papinianus, Paulus and Ulpianus.
Papinian

Because of the originality of his constructions, he was later named the prince of the Roman jurists.

Murdered in AD 212 on orders of Caracalla for refusing to justify the Caesar’s fratricide before the Senate (he is believed to have said "murder cannot be as easily justified as committed").
Creative forms of classic jurisprudence:

1. Responses to legal questions (*responsa, quaestiones, disputationes, epistulae*)
   - responsum:
     - *casus*
     - *quaestio*
     - *responsio*

2. *digesta* (from *digerere* – to collect, to order) – systematized collections of cases with opinions
3. textbooks (*institutiones*) – systematic lessons on the whole of private law, free of causistry

4. Instructional dictionaries (*sententiae*, *regulae*, *definitiones*, *differentiae*)

5. monographic treatments of selected issues

6. commentaries – both to laws and edicts, as well as to the works of jurists from previous generations
Law of Citations of Valentinian III (AD 426)

• The legislator named only five jurists who could be cited. They were: Gaius, Papinianus, Paulus, Ulpianus and Modestinus
• Concurring opinions of the jurists were binding on judges without exception
• If there were differences, the majority view was decisive
• If the opinions were evenly split, the view of Papinian was decisive
Imperial constitutions

The last phase of bureaucratization of jurisprudence!

Normative acts prepared in imperial chancelleries (*constitutiones*) become a source of law.

"The law is what pleases the ruler" (Ulpian)

We distinguish:
edicts, mandates, decrees, rescripts

Gradual replacement of the legal *responsum* with the imperial rescript!
Edicts

Edicts were general and abstract acts. They were in force across the entire Empire, or a specified province.

- e.g. *Constitutio Antoniniana* of Caracalla (AD 212).
Mandates

Instructions for provincial governors or other imperial officers. They generally concerned administrative matters, court law and criminal law.

Mandates were also used to deal with many matters concerning soldiers (cohabitation, soldiers’ wills and testaments)
Decrees

Verdicts of imperial courts in the first instance or on appeal. The legal interpretation contained in them was a model for judges across the state.

- e.g. *decretum divi Marci* – foresaw the loss of a receivable pursued without going through the courts.
Rescripts

• Responses to questions from officials or private individuals addressed to the Emperor, who responded as *viva vox iuris civilis*.

• The chancellery *a libellis* prepared responses to the questions of private individuals (*subscriptio*, an official reference on an applicant’s submission).
The chancellery *ab epistulis* prepared responses to public officials. They were personally signed by the emperor.

- There were so many queries that during the dominate we may speak of the rescript process, meaning one led by the emperor’s responses. Rescripts were often used in analogical cases.
Post-classical collections of law

The imperial constitutions were gathered into codes, which for a long time were only private compilations. **Codex Gregorianus** contained the constitutions from the reign of Hadrian (from AD 117) until AD 292. **Codex Hermogenianus** compiled the numerous constitutions of Diocletian issued in the following two years (293-94).
Codex Theodosianus

An official work. It was ordered to be written by Theodosius II. Published in 438 AD.
It contains the constitutions from the time of Constantine the Great to Theodosius II and Valentinian III (over 3000 legal acts).
It is composed of 16 volumes (private law is in only volumes 2-5)
Method of citation: C.Th. 2 (vol.), 3 (title), 4 (lex), 5 (paragraph)
Post-classical collections of law

It is believed that the following were not granted official status:

1. *Fragmenta Vaticana*
2. *Mosaicarum et Romanarum Legum Collatio*
3. *Consultatio Veteris Cuiusdam Iurisconsulti*
5. *Regulae Ulpiani*
After the collapse of the western portion of the Roman state, the German tribal rulers published the following compilations, referred to generally as *Leges Romanae Barbarorum*:

a) *Lex Romana Burgundionum*
b) *Lex Romana Visigithorum (Breviarum Alarici)*
c) *Edictum Theodorici*
Lex Romana Burgundionum was issued by king Gundobad (474-516), most likely in AD 500 for the Burgundy kingdom.

Lex Romana Visigithorum (Breviarum Alarici) was published by Alaric II (484-507) in 506 for southern Gaul.

Edictum Theodorici was issued around AD 508 by Theodoric the Great (474-526) for the Roman community of the Ostrogoth state in Italia.
Justinian I (b. AD 482) reigned from 527 – 565.

He intended to reconstruct the Roman state.

From around 530, he began recovering the African provinces from the Vandals. He also regained Italia in the Gothic wars. In 554 he imposed his laws on Italia. In 528-534 he codified or compiled the law.
Justinian convened a commission that worked from 528-534. It was headed by Tribonianus, *magister officiorum* and *quaestor sacri palatii*. The *Codex*, containing the imperial constitutions, was ready in 529. *Institutiones* – a textbook for the study of law, was issued in November 533. A selection of texts from the writings of jurists, *Digesta seu Pandectae*, was published in December 533.
Justinian law

After the Institutions and Digests were published, the existing Code was revised and its new version announced in November 534.

Constitutions issued by Justinian after 534 were called *Novellae*. They were not made into an official compilation.

We know of them thanks to several compilations that came to us in various ways.
Institutions

- An initial textbook for the study of the Junstinians law (4 vol.)
- Had the force of an Act
- Its classifications were based on Gaius’s *Institutions* (*personae, res, actiones*)
- Citations: I. 1 (volume), 2 (title), 3 (paragraph)
- Abstract presentation, no casuistry
Digesta seu Pandectae

- A compilation of fragments of writings by 39 jurists (mainly lawyers from the classical period, 3 from the republican period and 2 post-classical)
- The original texts were subjected to revision in order to adapt the work to the law that was in effect at the Justinian's time
- 50 volumes; citation: D. 1 (vol.), 2 (title), 3 (fragment), 4 (paragraph)
Codex repetitae praelectionis

- A collection of imperial constitutions from Hadrian to Justinian
- 4,600 legal acts
- 12 volumes (vol. 2-8 concern private law)
- Citations: C. 1 (vol.), 2 (title), 3 (constitutions chronologically), 4 (paragraph)
Novelae

• Constitutions issued in 535-582
• Several private compilations:
  - *Epitome Juliani* (124 novelae from 535-540)
  - *Authenticum* (134 novelae from 535-556)
  - Greek compilation (168 novelae of Justinian and his successors, Justin II and Tiberius II)
Justinian law - method of citation

C. 2, 55, 5, 1 – first paragraph of the fifth constitution of the fifty-fifth title of the second volume of the Justinian Code

IUST. A. IULIANO PP. *<A 530 D. VI K. APRIL. CONSTANTINOPOLI LAMPADIO ET ORESTE CONSS.

D. 4, 8, 7pr.

Ulpianus libro XIII. *ad edictum*

Beginning of the seventh fragment of the eith title of the fourth volume of Justinian’s Digests.
Justinian prepared his legislation mainly in Latin
It was forbidden to comment on the Digests.
They could be translated into Greek, summarized, and similar places could be compared.
The fate of Justinian legislation

After defeating the Ostrogoths, Justinian enforced his laws over all of Italia.

Three years after his death the Longobardi had already overrun Italia. Their invasion and other political events prevented the full implementation of his legislation.
Justinian legislation was in force in the Byzantine Empire until 1453.
In the West Justinian laws were main source of Roman law and were subject of reception from 11th century to XIX century.
In the 11th-13th centuries glossators of Roman law rediscovered Code, Digests, Institutions and Novelae and added *Libri Feudorum* along with the laws of Frederic I and II.
In 1583 Dionysius Gothofredus published the entire Justinian collection of legislation and called it *Corpus Iuris Civilis*. 