

# Ancient and Modern Concepts of Lawfulness

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The legal system, in the broadest sense of the term, should ensure a community's basic cohesion, prevent severe forms of discord hazardous to its existence, and establish an effective social structure. That the community of Ancient Rome successfully accomplished these objectives was best proven by its longerrity. On the hills above the Tiber river the Latins established their *urbs*, which saw tremendous growth and fundamental transformations: *regnum – res publica – Imperium Romanum*. For centuries, the Roman community served as a model of government for other nations (1). The Romans' strength

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1) DE VISSHER, *L'espansione della civitas romana e la diffusione del diritto romano*, in *Conferenze romanistiche*, Milano, 1960, 181 ss. SESTON,

lay not only in their deep reverence for their own gods, customs and traditions, in their fighting spirit and their military prowess, but also in a marked adherence to the norms they had established. The greatest difference between the Romans and other ancient peoples, however, lay in the manner they looked upon the nature of these norms and on the origin of their binding force.

Heraclitus, for example, warned his contemporaries that the *polis* had to care as much about its laws as about its city ramparts (2). In *Crito* Plato describes how Socrates was condemned to death by certain laws. The following message still stands, engraved in the rocks of Thermopylae: “*Traveller, tell Sparta that we died here in obeisance to its laws*”. The Roman respect for the law derives from the fact that they were considered to be of divine origin and, as Plato said, obeisance to laws meant obeisance to the gods. Hence, the Lacedaemonians believed Apollo and not Lycurgus to be their supreme legislator; the Cretans did not attribute their laws to Minos but to Zeus; it was believed that a divine apparition has communicated a code of laws to Aristides of Theos in his dreams, while Zaleucus, the legislator of Locris, was similarly instructed by the goddess Athens; the Etruscans received their laws from the god Taghes, etc (3).

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*Le droit au service de l'impérialisme romain*, in *Scripta varia*, École française de Rome, Palais Farnése, 1980, 53ss.

2) DIELS, 44.

3) WESTRUP, *Introduction to Early Roman Law*, III/1, London-Copenhagen, 1939, 50ss. The author notes corresponding beliefs in other civilizations: the reformer Zarathustra acted under the divine inspiration of

Even Titus Livius claimed that king Numa Pompilius had written laws upon to the advice of the river nymph Egeria and "established that which was most acceptable to the gods". (Liv. 1,19,5). It can be assumed, however, that the earliest Roman laws did not have this aura of divine origin. Livius, for instance, was convinced that Numa had "invented" (*simulat*) the story of this divine guidance, since "fear could not be instilled in men's hearts without the aid of miracles". Furthermore, Livius' reference to this legend remains unique in the Roman tradition, as other writers make no mention of it (4). As a rule, analysts and ancient historians attribute the creation of *leges regiae* to the king, and even allow for popular participation in their making (5). Religion undoubtedly played an important part in the lives of the inhabitants of ancient Rome, but the application of *ius* and *fas* cannot entirely be likened to the legal customs of other nations in that era. Despite the tendency of many Romanists to describe the origin of early Roman law as divine, theocratic, religious, etc., it is by no means certain that the ancient *ius civile* embodied concepts indicating the existence of a rigid and permanent system

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Ormuzd, Hammurabi received laws from the sun god Shamash, Moses from Jehova (Yahweh), Mohammed from God, etc. Cfr. DE COULANGES, *La cité antique*, Paris, 1864, 147. PRINGSHEIM, *Some Causes of Codification*, RIDA 4(1957), 301ss.

4) ORESTANO, *Dal ius al fas*, BIDR 46(1939), 265ss. In reference to the mythological basis of *Numa-Egeria*, cfr. FRAZER, *The Golden Bough*, London, 1922, 186ss.

5) Liv. 1,8; 1,26. Dion. Hal. 4,13. Cfr. BUJUKLIC, *Leges regiae: pro et contra*, RIDA 45(1998), 133ss.

established by the gods and only promulgated by men (6). The Romans' religious concepts regarding the law never included ideas that specific norms or even entire normative codes were made known to man in the form of "revelations", as was the case in the Greek, Semitic, or Indian legal tradition in which laws were the products of divine will "revealed" through the prophets or individuals who were ascribed divine attributes (7). In fact, one of the main characteristics of the Roman tradition was the belief that divine will is never manifested as an absolute and unchangeable command, but that it must always be determined anew in reference to each specific case (8). The magistrate was obliged to say an appropriate prayer (*solemne precatiois carmen*) and to offer a ritual sacrifice prior to reading any proposed law and on the night before the *comitia* gathered he was required to find out the will of the gods with the aid of *auspicium*. (9). As a result, life in the earliest Latin society was determined by divine will but in a rather different form from that of other ancient civilizations. The legend regarding the advice Numa received

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6) SCHULZ, *History of Roman Legal Science*, Oxford, 1953, 8. Speaking about the Romans he concludes: "The idea that the law is a gift of God was entirely absent". A somewhat different approach: BOTSFORD, *The Roman Assemblies*, New York, 1909, 177, 230. WESTRUP, *Introduction to Early Roman Law*, V/2, London-Copenhagen, 1954, 61.

7) ORESTANO, *op. cit.*, 265, spec. n. 207b.

8) ORESTANO, *loc. cit.* Also KASER, *Das altrömische Ius*, Göttingen, 1949, 39. Cfr. KASER, *Religione e diritto in Roma arcaica*, Ann. Catania, 3 (1948-49), 77ss.

9) ROTONDI, *Leges publicae*, 139.

from the nymph Egeria was obviously intended to imply divine *inspiration* rather than *revelation* (10).

The two forms of obligatory norms existent in the earliest Roman society were embodied in the terms *ius* and *fas*, which indicates that even at this early stage the Romans made a clear distinction between norms of behavior established by man and those determined by gods or supernatural powers. As a logical consequence of this, they eventually came to consider the law as a secular phenomenon, and as the product of human rather than divine activity. Their *rationalistic approach*, based on the conviction that the making of laws requires rational thought and not obeisance to norms set by mystical forces, also affected the way in which Romans viewed the question of adherence to these rules. This is reflected in Cicero's criticism of the view that a legal directive must be evident in every established norm: "*If the law were to be based on the will of the people, on the decrees of rulers, and the sentences passed by judges, then robbery, forgery, and adultery could also be considered legal actions if such acts were confirmed by voting or by the will of the masses*" (11).

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10) ORESTANO calls the earliest Roman Law "*diritto ispirato alla divinità*", and concludes thus: "La norma consuetudinaria... pure non creata ed emanata dalla divinità, poteva considerarsi d'origine divina, traendo ispirazione da ripetute manifestazioni costanti dalla volontà divina ed essendo considerata dalla coscienza popolare conforme alla volontà degli Dei". *Op. cit.*, 266.

11) Cic. *de leg. 1*, 43-44: "*Quodsi populorum iussis, si principum decretis, si sententiis iudicum iura constituerentur, ius esset latrocinari, ius adulterare, ius testamenta falsa supponere, si haec suffragis aut scitis multitudinis probarentur*".

The Romans and the Greeks had different approaches to the concept of *legal positivism*. Plato considered respect for the law to be the absolute moral obligation of every citizen (*Apol. 32b*) and defined justice as that which the State defined as such (*Theatetos 67c*). In *Crito* (50a-50c) Socrates asserts the notion that even an unjust verdict must be respected and applied, otherwise all laws would become useless: “*virtue and righteousness are man’s greatest qualities, but law and order are equally important*”. True to his belief, Socrates refused to take advantage of the plan for escape, which Crito had prepared for him <sup>(12)</sup>. Romans, on the other hand, did not accept the notion of absolute respect of laws even when they are unjust, nor did they feel obliged to endure injustice on the part of the state. It would be difficult to find in ancient Rome an instance of such an extreme and abstract approach to legal positivism as was practiced by the Greeks. The pragmatic Roman spirit narrowed these categories down to reasonable proportions and adjusted them to the requirements of everyday life.

Cicero, evidently inspired by Plato’s teaching, pointed out in his rhetorical works that we are all slaves to the law, because that is the only way we can be free: “*Legum idcirco omnes servi sumus, ut liberi esse possimus*” (*pro Cluent. 53,146*) <sup>(13)</sup>. He, however, also thinks that senseless points contained in laws

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12) HONSELL, *Das Gesetzesverständnis in der römischen Antike*, in *Festschrift H. Coing*, I, München, 1982, 145. WOLFF, ‘*Normenkontrolle und Gesetzbegriff in der attischen Demokratie*’, München, 1970, 68ss.

13) Plato, however, used the term “servants of the law” only in respect to those who administered the state. *Nomoi, IV 715/d*.

should not be tolerated, since they are not an end unto themselves: “*nemo enim leges legum causa salva esse vult*” (*de inv. 1,38*), and says that it would be preposterous to believe that all laws are just: “*iam vero illud stultissimus existimare omnia iusta esse, quae scita sint in populorum instituis aut legibus*” (*de leg. 1,42*). But even he, with his rhetorical liberty of expression will not forget to emphasize the point that judges must respect the *leges* (*de inv. 2,127*), as well as the magistrates: “*magistratum esse legem loquentem, legem autem mutuum magistratum*” (*de leg. 3,2*). Although this figure of speech cannot be taken in the sense which Montesquieu attributed to it, namely that the judge was “*bouche de la loi*”, legal norms were undoubtedly considered to be an important source of the law (14).

There are obvious contradictions in Cicero’s ideas and views, certainly also affected by the character of his writings depending on whether they were written for the purpose of philosophical elaboration or with the desire to justify the rhetorical practice, which in some law suits was used to defend the principle that the text of the law (*scriptum*) should be literally adhered to, while in others it served the contrary purpose of evading it (*contra scriptum, interpretatio ex voluntate*) (15). It is important to note, furthermore, that an overly pedantic interpretation of the law and an exaggerated adherence to it was

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14) HONSELL, *op. cit.* 68.

15) On the technique of legal interpretation VONGLIS, *La lettre et l’esprit de loi dans la jurisprudence classique et la rhétorique*, Paris, 1968, *passim*. SERRAO, *L’interpretazione della legge (Diritto romano)*, in *Enciclopedia del Diritto*, XXII, Milano, 1972, 239ss.

precisely that which often made its evasion possible: “*summum ius, summa iniuria*” (Cic. *de off.* 1,33) (16). The same ingenuity was employed by the priests in interpreting pontifical law, the use of which became widespread and less formal only with the introduction of the legal fiction. These rhetorical statements do serve to show that quite contradictory arguments could be advanced in regard to these questions, and especially that the adherence to *leges romanae* and the principle of “lawfulness” were topics open for discussion. Experts in law did not allow for such a liberal approach to its interpretation. The famous maxim: “*dura lex, sed lex*” (17) was taken from Ulpian’s writings, but in *Scriptores Historiae Augustae* this lawyer is described as having “an exceptional sense for justice”. (*Alex. Sev.* 31,2) (18).

Likewise, when Livius speaks of the “*deaf and pitiless law*”, which shows “*neither mercy, nor laxity*” (19), one must consider the context in which this is said to understand that this statement did not contain the severity usually ascribed to it. It refers to the view of young aristocrats who had been granted certain privileges by the kings and for whom the introduction of the *Twelve Tablets* and the principle of equality before the law

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16) STROUX, *Summum ius, summa iniuria*, Ann. Palermo, 12(1929), 639ss. BRETONE, *Tecniche e ideologie dei giuristi romani*, Napoli, 1982, 204.

17) This legal maxim (*paroemia iuris*) derives from the following text: “*quod quidem perquam durum est, sed ita lex scripta est*” (D.40,9,12,1).

18) Cfr. *Lives of the Later Caesars* (transl. BIRLEY), Penguin Books, 1976, 201 ss.

19) Liv. 2,3,4: “*leges rem surdam et inexorabilem esse... nihil laxamenti nec veniae habere*”.



signified the loss of former favors and positions. Hence, the citation refers not to strict adherence to the law but, on the contrary, to an unwillingness to accept it. In this context legal *objectivity* is taken to be a defect, while the *subjectivity* of the kings is seen as a virtue.

Roman history has many instances of ruthless disciplinary judgements and measures, which were justified as being “in the interest of the state” (*utilitas publica*). There is no doubt that fear was considered an efficient instrument for ensuring discipline, so that mass executions were quite common as a form of prevention. A sufficient reminder is the practice known as *decimatio*, used to punish instances of military cowardice in the face of the enemy, or the multitude of crosses permanently posted on the Esquiline for the execution of slaves. But Romans did not need abstract, anonymous laws as an excuse for such punishments because orders to perform them were given according to measures issued by the higher magistrates on the basis of their *imperium* <sup>(20)</sup>. This does not, obviously, mean that extreme severity or ruthlessness cannot acquire the form of a general norm, as shown by *S.C. Silanianum*, which was applied in practice despite its excessive harshness <sup>(21)</sup>. Nevertheless, adherence to Roman law as a whole was inspired rather by respect for its quality and value, than by awe of the forces which imposed it.

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20) HONSELL, *op.cit.*, 148.

21) Tac. *Ann.* 14,43ss.

The radical reorganization of the Roman legal system, from one answering the needs of a simple village community to that regulating the life of a civilized and large empire based on trade and commerce, was not accomplished, as often assumed, through legislature. This fallacy is due to a lack of understanding of the specific Roman perception of the legal system, which can be thoroughly grasped only if we are able to put aside concepts typical of the modern legal reasoning. Namely, Roman law, and particularly private law, was never the closed system known to us today, weighed down by cumbersome codes based on a pyramid of highly determined notions, which were intended to regulate all legal matters in greatest detail. The Romans had an “open” legal system, whose flexibility ensured its quick adjustment to the needs of everyday life. So, the Roman *lex* did not bind the lawyer to “the spirit of the law”, by forcing him to adapt the life’s specific requirements to the guiding lines of the law itself, as modern codes do.

Plato’s idea presented in *The Laws*, which envisaged a comprehensive legal system in the *polis*, did serve as a model for Cicero’s *De legibus* (22) but Roman lawyers had too much practical sense ever to be tempted into taking the law as the only basis of the legal system as a whole. Plans for a systematic

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22) In his writings Cicero envisioned a legal science that would not be based on praetorial edicts or on the *Twelve Tablets*, but on the hidden secrets of philosophy: “*ex intima philosophia hauriendam disciplina iuris*” (*de leg. 1,5,17*). Cfr. RAWSON, *The Interpretation of Cicero’s ‘De legibus’*, ANRW, I, 1973, 340ss. TROIANI, *Per un’interpretazione delle ‘leggi’ ciceroniane*, Athenaeum, 70(1982) 315ss. CANCELLI, *Per l’interpretazione del ‘De legibus’ di Cicerone*, RCCM, 15(1975), 185ss.

codification of the existing *leges romanae* was as far from them as Plotinus' idea to found the city *Platonopolis* in the heart of Campania, in which the entire administration would be organized according to Plato's laws and philosophical concepts (23). Julius Caesar, inspired most probably by Hellenistic ideals, did in fact, towards the end of his life, attempt to codify the existing legislature, but his death put an end to the realization of this idea (24). From the time of the *Twelve Tablets* to Justinian's time this seems to have been the only undertaking of the kind (25).

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23) HONSELL, *op. cit.*, 134.

24) Suet. *Caesar* 44: "*ius civile ad certum modum redigere atque ex immensa difusaque legum copia optima quaeque et necessaria in paucissimus conferre libros*".

25) It is true that St. Isidore (*San Isidoro de Sevilla*) claims that before Caesar, Pompey wanted to codify the existing laws, but he abandoned the idea for fear of slanderers (*etym.* 5,1,5): "*Leges autem redigere in libris primus consul Pompeius instituere voluit, sed non perseveravit obtreptatorum metu...Deinde Ceasar coepit id facere, sed ante interfectus erat*". PÓLAY, *Der Kodifikationsplan des Pompeius*, *Acta antiqua Hungarica*, 13(1965), 85-95. Tacitus mentions that in Vespasian's time, the Senate appointed a committee "to put up again, publically, the bronze tablets containing laws, which had fallen off with time". (*Tac. Hist.* 4,40), while Suetonius wrote that this emperor ordered, after the fire on the Capitoline, the restoration, on the basis of preserved copies, of 3000 bronze tablets containing laws, and adds that this was the "most beautiful and the oldest collection of documents, containing decisions made by the Senate and the people regarding various alliances, contracts and privileges, practically from the time Rome was founded". (*Suet. Vesp.* 8). It is clear that these were not attempts at codifying laws but represented instead the official *restoration* of damaged and destroyed texts of legal character. An unsuccessful plan for a comprehensive codification existed during the time of Theodosius II. His *Codex Theodosianus* (the year 438) contained only constitutions issued by emperors during and after the time of Constantine. Cfr. ROTONDI, *Leges publicae*, 173. Schulz, *Principles of Roman Law*, Oxford, 1936, 7. DUCOS, *Les Romains et la loi*, 182ss.

Not even the *corpus* of the decemviral legislature offered, however, a complete system of legal regulations but, on the contrary, only made possible the precise stating of specific debatable questions from the sphere of private, criminal, and sacral law, and procedure law. The *Twelve Tablets* apparently supposed the existence of an earlier, established system of norms, which was based on an unwritten customary law and on the principles set by the *pontifices*, then the only experts in and interpreters of law. The decemvirs did not consider giving a legal form to all the rules and institutions which the priests had studied and collected for generations. This legal matter was already imperative, and the proclamation of its binding character in the form of a law would have been quite superfluous. The bronze tablets would contain only rules which regulated relations under dispute or those which established entirely new relations. When Livius says of the *Twelve Tablets* that they represent “*fons omnis publici privatique iuris*” (3,34,6), we could in fact be led to believe that this legal undertaking was aimed at ensuring a comprehensive presentation of the entire legal system. But if we bear in mind the historical context and the circumstances in which it was made, as well as its scope and content, it becomes clear that such an endeavor could not have been achieved with the spiritual resources of that time (26). On the other hand, the

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26) ROTONDI, *Scritti giuridici*, I, 29 thinks that this was a disorganized, almost “barbarian” conglomeration of disconnected, individual rules. But WIEACKER, *Vom römischen Recht*, Stuttgart, 1961, 56, does discern in the text of the *Twelve Tablets* “a monumental inner unity”, particularly in the regulations whose purpose was to protect the economically and socially underprivileged. Other see in them “la carta costituzionale della *civitas*”.

*Corpus iuris civilis* did not represent an attempt at a fundamental reorganization of the existing legal regulations either. It was primarily aimed (apart from many reforms referring to particulars) at reducing the huge mass of legal sources to relatively tolerable proportions, facilitating thereby their application (27). Nor can this codification, therefore, be taken as the counterpart of the modern meaning of that term.

The Romans were evidently more familiar with the concept by which laws were considered as restrictive; they were used only in exceptional cases, as a reaction to grave conflicts. The number of laws especially increases in times of crisis and in periods of intense political conflicts, as was the case in the late republic, about which Tacitus says: “*corruptissima res publica plurimae leges*” (*Ann.* 3,27). In such times laws were often imposed by force (*leges per vim latae*), without considering basic principles of democracy (28). An extensive legislative activity is connected to the period of Augustus’ rule. But even his thorough reconstruction of government administration and desire for a more extensive social reform did not receive an adequate legislative support. The laws concerned referred mainly to the regulation of specific issues in the sphere of the judiciary (*leges*

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COLI, *Il testamento nella legge delle XII tavole*, IVRA 7(1956), 26. SERRAO, *Classi, partiti e legge*, cit., 113.

27) BRETONI/TALAMANCA, *Il diritto in Grecia e a Roma*, Bari, 1981, 115.

28) SMITH, *The Use of Force in Passing Legislation in the Late Republic*, Athenaeum, 55(1977), 150ss.

*Iuliae iudiciariae*), family relations (*lex Papia Poppaea*, *lex Iulia de maritandis ordinibus*), and communal issues (*lex Quinctia de aquaeductibus*, *lex Iulia de modo aedificorum*), etc. (29).

Since the creation of laws was usually prompted by some specific occasion, a certain disparity existed between the reaction and the motive for making the law, as if Roman legislature had been incapable of bringing the cause and the countermeasure into proportion. This was particularly evident in the sphere of private law where sometimes the intervention entirely failed to address the reason for which the law had been made in the first place, so that there was no balance between the means and the end, or between the motive and the result (30). The reason for this discrepancy should be sought in the social environment in which the laws were made. The incongruity could be provoked by momentary relations between political forces, since it was quite customary to make use of legal forms in achieving specific political ends. A particular instrument of the “legislative technique” was the inciting of scandalous cases and the raising of public confrontation, in which political conflicts were presented as a clash of democratic and reactionary demagogy, while the agitation created around a certain law was used for the skillful manipulation of public opinion. It is impossible to perceive the true proportions of such actions without knowing their true historical background and solely on the basis of the contents of specific laws and the motivation expressed in them or in regard to

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29) ARANGIO-RUIZ, *La legislazione di Augusto*, Roma, 1938.

30) Illustrative examples of this are given by Wieacker, *op. cit.*, 70ss.

them. This game is more than evident in the constitutional and agrarian law in the time of the Gracchus brothers, because of the large political interests reflected in them. These demagogical features of Roman legislature were noted in literature long ago (Mommsen), sometimes they were even overstated (Jhering) <sup>(31)</sup>.

These defects lead to another specific trait of the Roman concept of law. Namely, the inability to form a general norm from clearly determined causes in some conflict, which would serve as an efficient and proportionate measure for the issue at hand, indicates the inability of creating a long-term legal policy, because the law was used only as an instrument of daily politics. Blaicken is right in concluding that even generally formulated laws in the Roman republic were not based on a common, or (as he calls it) “normative” idea: “it is not based on the abstract idea of a presupposed system, but always on a concrete situation” <sup>(32)</sup>. Wieacker sees the constitutional development of the Roman state as “a constant *muddle through* – an improvisation, constant improvement and elaboration, which is not guided by a unique spiritual outlook, but by freedom of contradictions in proceedings caused by the requirements of everyday life” <sup>(33)</sup>. Michèle Ducos reaches at a similar conclusion: “Roman legislature represents rather an improvisation than the realization of some set program; (...) It is the response to a scandal, the solution to a particular crisis and does not in any way represent a formula with which to

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31) WIEACKER, *op. cit.*, 73.

32) BLAICKEN, *Lex publica*, 186.

33) WIEACKER, *op. cit.*, 59.

determine the *ius*, but a simple political measure, the satisfaction made to suit the public opinion” (34). This is obviously another example of the Romans’ limited ability for generalization. Furthermore, this view of the law excludes the possibility that this source of law could be given a general educational function, a requirement so dear to the Greek philosophers (35).

The *lex*, therefore, does not serve to ensure general and abstract regulation, whose function would be deliberate planning or the establishment of a uniform legal system (36). Roman traditionalism was not a good basis for creating a comprehensive reformative legislature directed towards the future. The reluctance toward novelty is evident even in the linguistic form used to express the rejection of a law at popular assemblies: *antiquo legem (antiquo probo)* is the technical, legal term meaning “*I reject the law*” - but originally the word *antiquare* meant “*remain as before*” (37). Reformative laws were usually aimed at unsettling the existing regime and were faced with resistance on the part of the magistrates and the Senate. In this situation, those who proposed such laws (as a rule plebeian tribunes) endeavored to protect the future laws in various ways by introducing into

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34) DUCOS, *Les Romains et la loi*, Paris, 1984, 31, 34.

35) DUCOS, *Les Romains et la loi*, 452ss. BEHRENDTS, *Das römische Gesetz unter dem Einfluss der hellenistischen Philosophie*, in: *Nomos und Gesetz, Ursprünge und Wirkungen des griechischen Gesetzdenkes*, Göttingen, 1995, 135ss.

36) ROBINSON, *The Sources of Roman Law*, London-New York, 1997, 31: “Legislation generally was reactive, providing a solution for a particular problem or injustice, not creating social policy”.

37) HONSELL, *op. cit.*, 136. See Rotondi, *Scritti giuridici*, I, 1922, 388.



their basic stipulations numerous clauses, sometimes useless and exaggerated, whose purpose was to guarantee the law's implementation (38).

The Roman legal system did not start with legislature, it existed before: *ius (antiquum)* represented a previously established system, sporadically referred to in the *leges*. The *ius* was not a system in the modern sense of the word, but it did represent a set of norms of diverse origin which, as a whole, formed an active legal system, subject to change and adjustment. In this system, when considered necessary, the *leges* determined some relations individually or regulated the current practice in a different way in itself (39). The *lex* was a new creation, added to the existing "legal system", but at the moment of its application it already had become an integral part of that system. The *lex* was incorporated into this system after being elaborated and formulated by lawyers into a more or less organic element of the *ius*. This mutual connection is best shown by the binomial term *ius lexque* (40).

In Roman legislative practice, as in that of other ancient peoples, in the beginning new laws did not abolish the old ones, so that the *XII Tablets* did not automatically invalidate the *leges regiae*, just as Solon's legislature did not nullify Draco's law.

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38) For details see SERRAO, *Classi, partiti e legge*, cit., 83ss.

39) KASER, *Das altrömische Ius*, 69.

40) BROGGINI, *Ius lexque esto*, in *Ius et lex, Fests. Gutzwiller*, 1959, 23. Cfr. WIEACKER, *Ius e lex in Roma arcaica*, Sodalitas, 1984, 3105ss. BIONDI, *Lex e ius*, RIDA 13(1965), 169ss.

This principle caused considerable confusion characteristic of the ancient law. As a result, the law simultaneously contained regulations of a contradictory nature and stemming from different periods, but which were all equally binding <sup>(41)</sup>. Hence, an old law is preserved in *Manu's Code* which establishes the right of the firstborn son, and contains at the same time another prescribing equal division of patrimony among brothers; for the same reason, we can see, in a speech made by Isaeus, of two men in dispute over an inheritance, in which each of them cites a law in his own favor, and the laws are quite opposed in what they prescribe <sup>(42)</sup>. The more flexible approach to the concept of law evident in ancient Greece, derives from the fact that it did not encompass the whole law, but represented rather the feeling for or the interpretation of what was "just" (*dike*) in controversial cases, and this usually in the way in which the majority of citizens in the *polis* would have interpreted it. Furthermore, wishing to establish a certain amount of *equality (to ison)* and to attain *justice (gnome dikaiotate)*, the jury-members never rigidly adhered to the law, but used it only as another piece of evidence <sup>(43)</sup>. This calls into question the category of legal security, the

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41) Only later would the Romans arrive at the principle: *posteriores leges plus valent quam quae ante eas fuerunt* (D.1,4,4).

42) Cit. according to DE COULANGE, *op. cit.*, 148.

43) For details see AVRAMOVIC, *Isaeo e il diritto Attico*, Napoli, 1997, 17ss. The difference between the terms *psephisma* and *nomos* is debatable. According to Avramovic it could be narrowed down to the notion that *psephisma* represented a specific legal norm of limited duration (for example, decisions referring to foreign politics, international agreements, various administrative acts), and that *nomos* signified a general legal act, a regulation deriving from the traditional system, and one which is not limited in terms of

guarantee of which is the ultimate goal of the modern normative system. Rome had a legal system in which some laws remained in vigour for centuries, a system characterized by an aversion towards the abrogation of laws and which, as a rule, did not explicitly annul that which was old, but simply added new *leges* to the existing ones (44).

One must keep in mind, however, that after a certain *lex* had not been applied for a long time awareness of its binding force waned, and the *norme* itself gradually sank into oblivion. That this happened fairly frequently is demonstrated by the fact that Romans made many laws whose purpose was to reinforce the ones made earlier. This was the practice of *desuetudo*, which practically abolished such *leges* on the basis of the “tacit consent of the community” (*D.I,2,32,1*) (45). The will of the people, therefore, was needed not only to create laws, but the people’s consent (even if not formal) was also required to invalidate an

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time. In the fifth century B.C. and earlier, however, there was no difference between these two terms, and they were used concurrently, as synonyms with the shared meaning of *law*. AVRAMOVIC, *Elementi pravne drzave i individualna prava u Atini (The Elements of the ‘Rechtsstaat’ in Ancient Athens)*, in *Pravna drzava – pro et contra*, Beograd, 1998, 14, n.23. Cfr. also FREZZA, *Lex e nomos*, *BIDR* 71(1968), 1ss. OSWALD, *Nomos and the beginning of the Athenian Democracy*, Oxford, 1969, 20 ss. BRETONE/TALAMANCA, *Il diritto in Grecia e a Roma*, 51ss. GAGARIN, *Early Greek Law*, Los Angeles, 1986, 51ss.

44) ELSTER, *Studien zur Gesetzgebung der frühen römischen Republik. Gesetzanhäufungen und wiederholungen*, Bern-Frankfurt 1976, *passim*.

45) SOLAZZI, *La desuetudine della legge*, *Archivio Giuridico*, 102(1929), 3ss. THOMAS, *Desuetudo*, *RIDA* 12(1965), 469ss. BISCARDI, *Aperçu historique du problème de l’abrogatio legis*, *RIDA* 18(1971), 449ss.

existing regulation. Few romanists today would question the existence of *desuetudo* even in the later period of Roman history. With the gradual growth of praetorial freedom in creating the law and a more liberal interpretation of rules (gaining ground with the spreading of Greek philosophy and rhetoric), this practice became an increasing threat to “legal security” and to “the binding force of the law” (46).

The question of the law, justice, equality, which for centuries had concerned Greek philosophers, were not as important to the Romans. They were familiar with the concept of *iustum (iniustum)*, but only used it occasionally, in an extremely pragmatic sense. Paulus pointed out the following: “*in omnibus quidem, maxime tamen in iure aequitas spectanda est*” (D.50,17,90), and Celsus said: “*ius est ars boni et aequi*” (D.1,1,1,1), but the actual significance of the term “*aequus*” is not defined further.

The Romans nurtured a certain, it could be said, benevolent despise for philosophy. It was the orators, not the jurists that made the first attempts at formulating the Roman theory of the state and the law (47). Generally speaking,

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46) The *desuetudo* abolished the majority of the regulations on *XII Tablets* (e.g. the right to kill a thief at night, talio, etc.), and some other laws became void through disuse (*obsolet*): some agrarian law, *lex Voconia*, the law on luxury, and many others lost their significance even without formal abrogation. See HONSELL, *op. cit.*, 137ss, 143. BEHREND, *Das römische Gesetz unter dem Einfluss der hellenistischen Philosophie, cit.*, 135ss.

47) Gaius’ *Institutions* in the 2nd century were an isolated attempt at incorporate the entire matter of private law into a single system, which would be based on certain principles and objective criteria. But not even this

they were more susceptible to Greek influence since they were dealing with a discipline whose origins lay in the Greek *polis*.<sup>(48)</sup> In rhetoric references to *aequitas* were frequent because it could be used for a more liberal interpretation of the law <sup>(49)</sup>. Someone who is not a lawyer would rather base his arguments on justice than on legal security; and it would also be a more familiar concept to the ordinary citizen who attended the Forum. As a result, the “letter of the law” (*verba legis*) would carry less weight than the “spirit of the law” (*sententia legis*). The Romans reserved the term “*leguleius*” for those lawyers who

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systematic approach allowed any specific formal conclusions to be drawn. In any case, this attempt was made successful through Justinian’s *Institutions*, since modern civil codes are strongly influenced by this “tripartite” (or “institutional”) system. Cfr. KASER, *Über Gesetz und Recht in der privatsgeschichtlichen Erfahrung*, in *Gedächtnisschrift für Rolf Dietz*, 1973, 6.

48) It is no wonder then that Cicero would call philosophy the greatest gift of mankind: “*philosophia... qua nihil a dis immortalibus uberius, nihil florentius, nihil praestabilius hominum vitae datum est*” (*de leg. 1,58*), while Tacitus sought the reason for the decline of Roman rhetoric in the neglect of broader education, primarily of philosophy. Still, this influence should not be overstated, as in DUCOS work, *Les Romains et la loi, passim*. The Greeks themselves did not apply the fruit of their theoretical thought to legal matters. KASER, *Über Gesetz und Recht*, cit., 5.

49) Cicero even includes it among the sources of law: “*ius civile id esse quod in legibus, senatus consultis, rebus iudicatis, iuris peritorum auctoritate, edictis magistratum, more, aequitatae consistat*” (*Topica, 5,28*); “*ius civile est aequitas constituta iis, qui eiusdem civitatis sunt, ad res suas optinendas; eius autem aequitatis utilis congitio est; utilis ergo iuris civilis scientia...*” (*Topica 2,9*). More extensively, ROBINSON, *The Sources of Roman Law*, 26, Stein, *The Sources of Law in Cicero*, Ciceroniana, 3(1978), 19ss. SCHULTZ, *Principles of Roman Law*, 15-16, n.6, however, points out that the citation of the sources of law in rhetorical writings represent “directions for the pleadings, not for the judicial decisions”.

could be reproached of “*nimis callida, sed militiosa iuris interpretatio*” (*de off. 1,33*). Even Gaius (4,30) was of the opinion that the *veteres*, with their exaggerated pedantry (*nimia subtilitas*), caused ancient Roman institutions to become hated (*in odium venerunt*). The practice, however, of expressing formal respect for the law while acting contrary to its purpose would inevitably lead to the formulation of the term “evasion of the law”. This would distinguish practices which were “*contra legem*” from those that were “*facere in fraudem legis*”<sup>(50)</sup>.

The general binding force of norms, or the equality of the citizens before the law, was expressed in Greek law by the term “*isonomia*”, and was a particular subject of interest for the school of Stoics. Cicero, in his treatise *De republica* has Scipio saying, quite in keeping with the teaching of the Stoics, that he does not refer to equality in terms of property or intellectual ability, but that the rights of all citizens must be equal: “*iura certe paria debent esse eorum inter se qui sunt cives in eadem re publica*” (1,32,49). According to Cicero, the law is what keeps citizens in a single community, and to make it a stable one, the law must be equal for all: “*cum lex sit civilis societatis vinculum, ius autem legis aequale*” (1,32,49). It was well perceived that this equality before the law is identical to the one prohibiting both the rich and

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50) D.1,3,29 (Paul. *lib. sing.*): “*Contra legem facit, qui id facit quod lex prohibet, in fraudem vero, qui salvis verbis legis sententiam eius circumvenit*”. Similarly, in D.1,3,30 (Ulp. *lib., 3 ad edict.*): “*Fraus enim legit fit, ubi quod fieri noluit, fieri autem non vetuit, id fit: et quod distat dictum a sententia, hoc distat fraus ab eo, quo contra legem fit*”. Cfr. Rotondi, *Gli atti in frode della legge*, Torino, 1911, *passim*. Ducos, *Les Romains et la loi*, 312ss.

the poor from sleeping under bridges, begging or stealing bread (Anatole France) (51). How formally this proclaimed equality conceived is best illustrated by Cicero when he emphasizes that "aequalitas" must consider distinctions in social ranks (*gradus dignitatis*) and that different practice is inequitable (*iniquissima*), even though people exercise it with justice and moderation. Speaking of the defects of democracy, he states that this form of government is the worst and most unjust if in granting equal rights to everyone it does not match powers and honors to the merit and capabilities of each individual (*de rep. I, 27, 43*). Needless to say, Cicero, a member of the ruling oligarchy and a *pater patriae*, could not be expected to speak of political equality, nor did either he or the Stoics even consider the abolition of slavery.

Legal security was no more guaranteed in Roman criminal law, where it would be most logical to expect it. Laws in this sphere of legislature dealt primarily with various aspects of legal procedure, rather than establishing the true essence of the criminal act. The general principle by which the perpetrator of a crime is punished according to the regulations prescribed by law, i.e. the principle *nullum crimen sine lege, nulla poena sine lege* was quite foreign to Roman criminal law (52).

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51) HONSELL, *op. cit.*, 133.

52) SCHULZ, *Principles of Roman Law*, 173, 176, 247, and lit. cited there. A different opinion, but unsupported by a broad argumentation and referring only to the text of the *XII Tablets*, is expressed by KASER, *Die Beziehung von lex und ius und die XII Tafeln*, 535. Cfr. STRACHMAN-DAVIDSON, *Problems of the Roman Criminal Law*, I-II Oxford, 1912, *passim*.

An analysis of the procedure for passing the Roman *lex rogata* shows that it did not reflect ideas of direct democracy, as it is perceived today (53):

- only the higher magistrate could call a meeting of the assembly, since he had *ius agendi cum populo*, and he could only do this on fixed days of the year (*dies comitiales*);

- none of the existing assemblies included women, foreigners or slaves, and much time would pass before freed slaves (*libertini*) would acquire an equal status where *ius suffragii* was concerned. Their right to vote was regulated by several laws, the oldest of which was *lex Terentia* from 189 B.C.;

- legislative initiative was not in the hands of the ordinary citizens but belonged to the magistrates exclusively;

- voting by groups, and not *per capita*, in the assemblies ensured the majority vote to the wealthy classes (*nobili* and enriched plebeians);

- the work of the assembly could be interrupted by the magistrate (either by the one presiding or by another) if he judged that the preparatory auspices were unsatisfactory (*obnuntiatio*);

- legal proposals could refer to a variety of matters, so that voting in favor of certain regulations sometimes entailed the

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53) MOMMSEN, *Droit public romain*, *passim*. WILLEMS, *Droit public romain*, *passim*. ROTONDI, *Leges publicae*, *passim*. PACCHIONI, *Manuale di diritto romano*<sup>3</sup>, 1935, Torino, 83ss. SCHULZ, *Principles of Roman Law*, 170ss. STAVALEY, *Greek and Roman Voting and Elections*, London, 1972, 121ss. HANARD, *Droit romain*, I, Bruxelles, 1997, 23ss.



adoption of some which might not have been acceptable alone. It would not be until *lex Caecilia Didia* was passed in 98 B.C., that the practice of the so-called *rogatio per saturam* was stopped;

- between the time when the draft of a law was made public (*promulgatio*) to the call for a meeting of the assembly, the magistrates organized preliminary, informal popular gatherings (*contiones*), which presented the citizens with the only opportunity of speaking publicly in favor (*suasiones*) or against (*dissuasiones*) the passing of the proposed law. Even this public address depended on the magistrate's discretionary right to let an individual speak (*contionem dare*);

- a draft once promulgated could not be changed, and for any subsequent modifications the proposal had to be revoked and could not be submitted again (*ex novo*) until the following year. *Lex Licinia Iunia*, passed in 62 B.C., introduced the obligation of submitting a copy of the proposal to the state treasury (*aerarium*);

- assemblies gathered for the sole purpose of voting, and no one was allowed to deliver public speeches there;

- the voting was public and done in verbal form until 131 B.C. when *lex Papiria tabellaria* introduced the secret vote in written form (*tabellae, teserae*);

- the presiding magistrate could stop the voting procedure at any moment, especially if he got the impression that the voting would produce an undesired result;

- the voting served only to accept or reject a proposed draft and there was no way that an ordinary citizen could propose

an amendment to the draft of a law submitted by the magistrate. The same principle applied when the magistrate proposed a verdict to the assembly in criminal cases or a list of candidates for election to public office;

- at the conclusion of the voting the magistrate could accept the results of voting and officially proclaim that the decision had been passed (*renuntiatio legis*), but he could also refuse to do so;

- the will of the people could also be got around by the Senate if it refused to ratify (*auctoritas patrum*) a law which had been approved by voting; in addition to this, the Senate could revoke the law without any particular formalities.

Knowing this, it is easy to understand the extent of Cicero's partiality demonstrated in his famous speech *pro Flacco*, where he praised Roman democracy as opposed to that practiced in the Greek *polis*: while members of Greek popular assemblies sat, as if in a theatre, enjoying an exchange of opinions between wise men and making decisions under the sway of emotions, those present at Roman assemblies, on the other hand, stood in silence and voted without any discussion, under the presiding authority of the magistrate whom they had elected and whose authority ensured a disciplined adherence to the procedure; this system guaranteed that Roman citizens would never be tyrannized by the majority, as was sometimes the case in Greek democracy;

nothing – concludes Cicero – shows as clearly as this example that Roman discipline is the key to Roman freedom (54).

It is noteworthy to say that the Roman *comitia* never had an exclusively legislative authority, since elections and trials were also in their jurisdiction (55). Even when the legislative competence was centralized in the hands of the *princeps*, this was more a manifestation of the emperor's absolute power than a truly autonomous function.

On the other hand, laws were issued, or rather, they were imposed by the higher magistrates on the strength of their *imperium* (later by the emperor), when the status of newly conquered communities or territories was being settled (municipium, colonies, or provinces) in the occasion of their incorporation into the Roman state. Mommsen was the first to call these laws *leges datae*, although there is no reference to this term in any known source (56). As a result, the term itself and the content of the laws, as well as the legal nature of these magistrates' decisions have been the cause of much controversy

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54) Cic. *pro Flacco*, 7,15-16. On Roman concepts of democracy cfr. CATALANO, *Il principio democratico in Roma*, SDHI 28(1962), 316ss.

55) The separation of the powers was not characteristic of Greek society either, but the Greeks had at least established a political organization in which combined legislative, juridical, and executive functions were divided among its various organs (*ecclesia*, *boule*, *heliaia*, *nomophylax*). One must not forget, however, that as a result of the limited number of citizens in each *polis* the same persons often performed functions in several organs. Cfr. HANSEN, *The Athenian Ecclesia*, I-II, Copenhagen, 1983, 1989. Ibid., *The Athenian Democracy in the Age of Demosthenes*, Oxford, 1991.

56) MOMMSEN, *Droit public romain*, VI/1, 353ss. ROTONDI, *Leges publicae*, 14ss.

(57). The magistrates' issuance of such acts on the basis of a special decision of the *comitia* represented some sort of delegated legislative authority, while the *lex* imposed by Rome was in that case *rogata*. Here, too, the basic idea was clearly that only the people were sovereign (58).

We cannot obviously bring Roman legal concepts into immediate connection with modern categories, such as the *principle of legality*, *legal security*, *the rule of law*, etc. The statement referring to “*medieval and modern law sailing under Justinian's flag*” (59) is certainly true, but one must wonder whether the symbols on that flag had the same meaning in different ages. Each period and its legal institutions should be viewed and interpreted in the light of the specific conditions in which they evolved. Similarly, the phenomenon of law represents, like any other aspect of society, an expression of specific human needs arising in a particular social environment, which changes depending on the period under question. The modern lawyer or historian may find in the past certain features in human behavior that are constant, but he must be aware that the response to life's specific challenges came as a result of a particular tradition, mentality, spiritual maturity, moral principles, or some other characteristic of the people concerned. This is

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57) TIBILETTI, *Sulle 'leges' romanae*, Studi De Fancisci, 4(1956), 604ss. Ib. *Leges datae*, in NssDI, IX, 1963, 624ss.

58) SERRAO, *Classi, partiti e legge*, 100.

59) SCHULZ, *Classical Roman Law*, Oxford, 1969, 4.

especially true of the law, since it is here that these social conditions are best reflected.

Generally speaking, the laws today hold the position of absolute supremacy among the sources of the law, <sup>(60)</sup> as opposed to Roman times, when their position was quite different. *Lex publica*, including the later *plebiscita*, was undoubtedly the most immediate form of affirmation (for that period), of the people's legislative authority <sup>(61)</sup>. The significance of a specific source of the law, however, is determined primarily by the relation in which it is functionally adjusted to all the other sources, and by the sphere of social life which it is meant to regulate. This should be a primary concern in any attempt to compare Roman and modern legislature. Namely, during the period of the Republic the laws issued by the assemblies represented the most powerful instrument in forming the *public law* of the Roman state. In the sphere of private law, however, laws would only occasionally be used in Rome, to introduce important social reforms or to steer existing institutions toward a different course of development. It is no wonder that out of 800

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60) This refers to the so-called continental law, since the structural similarity of the Roman and Anglo-Saxon legal systems is much more pronounced: the casuistic approach in solving disputes; the secondary role attributed to legislature; the close connection between substantive law and the institutions of procedural law; the development of *equity law* simultaneously with the stable, traditional *common law*. Cfr. KASER, *Über Gesetz und Recht*, cit., 1973, 14.

61) WIEACKER, *op. cit.*, 67-68, notes that the assembly of citizens endowed with full civil rights and suffrage "only appeared to be the image of direct democracy in ancient times", and rightly concludes that democracy, in the modern meaning of the word, is not to be found in the term *lex rogata*.

issued laws, only about 30 referred to private law (62). This sphere would be left, on the one hand, to learned lawyers, and their creativeness expressed in the form of advice (the so-called cautelary jurisprudence) and the interpretation of existing norms (*interpretatio prudentium*), while on the other hand, it would be entrusted to the judiciary function of the Roman praetors (*iurisdictio*) (63). In this way the *responsa* and *edicta* assumed an extraordinary significance, while the legal system of the Roman republic acquired a very characteristic trait (64).

The analysis of preserved laws leads some authors to the conclusion that the participation of the comitial legislature in the sphere of private law, was inspired solely by reasons of “immediate interest”. In their opinion, this form of legislature was limited to ensuring the foundations of the political and social

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62) ROTONDI, *Scritti giuridici*, 4. There are some theories, however, which claim that the Romans issued a far greater number of laws than are known to us. Cfr. DUCOS, *Les Romains et la loi*, 28, who arrives at that conclusion on the basis of summary remarks made by Cicero (*pro Balbo* 8,21: “*innumerabiles alieae leges de civili iure sunt latae*”) and Livius (3,34,6: “*in hoc immenso aliarum super alias acervatarum legum cumulo*”). It is possible that the non-existence of a formal collection of laws led to the supposition of their larger number. This is what might have induced Suetonius to speak of “*immensa diffusaque legum copia*” (*Caes.* 44,2), and Tacitus about the existence of “*multitudo infinita ac varietas legum*” (*Ann.* 3,25). If in the course of the Roman half a millenium long history 800 laws were issued, then this number in itself shows clearly enough how rarely the Romans issued such regulations. Some Romanists, such as SCHULZ, *op. cit.*, 8, resolutely oppose the theory that many Roman laws may not be known to us.

63) SERRAO, *Classi, partiti e legge*, cit., 37, 112ss.

64) SERRAO, *Dalle XII tavole all'editto del pretore*, in *La certezza del diritto nell'esperienza giuridica romana*, Padova, 1987, 51ss.

system when these foundations were threatened in controversial cases in the sphere of private law. This set of regulations was meant to ensure society's basic safety and welfare (*Wohlfahrtsgesetzgebung*), the free functioning of a community's internal system, by establishing various obligations concerning marriage, the institution of the dowry, tutorship, purchase price maximization, the ban on usucapion on stolen goods, interest rates limitation and protection against usury, the ban on luxury, extravagant gifts, legacy limitation, etc (65). Some are even of the opinion that, parting from the division of Roman law into *ius publicum* and *ius privatum*, all laws regulating this matter must be ascribed to the first group (66). Rotondi rightly notes that this is a somewhat exaggerated view, since by insisting in the analysis of such laws only on "public interest", we are taking the risk that the term *ius privatum* might completely lose its significance. According to him, the reference of the magistrate to the legislative *comitia* in the sphere of private law was not prompted by the need to formulate any general, fundamental or systematic norm, nor was this done with the intention of advancing or accelerating the progress of private law along its traditional course; on the contrary, these instances always reflected a partial departure from the existing practice, external disturbances induced by the natural evolution of the existing law.

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65) WIEACKER, *op. cit.*, 66.

66) The idea that *ius publicum* incorporates some norms that concern private law is supported by many Romanists. See ROTONDI, *Scritti giuridici*, 25, n.4.

Still, we should guard against our fascination for the skill of Roman lawyers, on the one hand, and the scarcity of preserved Roman laws, on the other, lead us to the definite conclusion that jurisprudence had the sole function of perfecting the law, while denying – as do Savigny and his followers – this role to Roman legislature (67). Franz Schulz shared the views of Savigny, and succinctly expressed this idea in a famous maxim: “*Das Volk des Rechts ist nicht das Volk des Gesetzes*” (68).

Even in the period of the *princeps*, when the *comitia populi Romani* no longer convened (the last time would be in 98 A.D., under emperor Nerva) (69), the idea that the people were the creators of the law would persist, but would receive ideological support and become an instrument of demagogy in the political conflicts of that period. The principle *summa potestas populi Romani* would, therefore, become just an empty phrase used for the purposes of propaganda (70). Nevertheless, classical lawyers would still place laws topmost when enumerating the sources of the law: “*Lex est quod populus iubet atque constituit*” (Gai. *Inst.* 1,2), despite the fact that the legislative character of the emperors’ constitutions had already been established. The

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67) WIEACKER, *op. cit.*, 82.

68) SCHULTZ, *Prinzipien des römischen Rechts*, 1934, 4.

69) This conclusion was reached on the basis of *argumentum ex silentio*. Namely, the last law which can safely be assumed was adopted at the assembly was *lex Cocceia agraria*, whose *rogatio* was submitted by emperor Nerva. The only information regarding this law was left by the lawyer Callistratus (D.47,21,3,1).

70) BLEICKEN, *Lex publica*, 288ss.



idea of transferring legislative authority from the people to the emperor gradually became accepted: the emperor became the embodiment of the institution *tribunica potestas*, which he fictively acquired through *lex de imperio* (but now no longer *curiata*) (71). In this way, *iussum populi* progressively became *iussum Augusti*.(72) Although the term “*lex*” is retained in practice, it would no longer have much in common with the *law* of the previous period.

If the idea that the laws are an expression of the people’s will persisted in times when *lex* was anything but *iussum populi*, then we must assume that the origins of this idea should be sought in an earlier period, when *lex* did have this role. It would be difficult to suppose that this whole concept was only the result of skillful imagination on the part of legal experts, particularly because Roman *iurisprudentes* had little inclination for this type of generalization. Hence, the theory according to which the earliest Roman community evolved in such a way that the unlimited and centralized authority of the *rex* was gradually restricted by the participation of the *comitia curiata* in the decision-making process is hardly acceptable; it is far more

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71) SESTON, *Le droit au service de l'imperialisme romain*, 63, however, says: “Auguste vient de recevoir un *imperium* tout personnel, sans doute par une *lex curiata*”. It should be stressed that Augustus and his heirs did not have legislative initiative as an authority unto itself, it came instead as the consequence of other functions they had assumed, of which the only permanent one was the office tribune. ROTONDI, *Scritti giuridici*, I, 19. BRETONE, *Technique e ideologie dei giuristi romani*<sup>2</sup>, Napoli, 1982, 25ss.

72) SESTON, *Aristote et la conception de la loi romaine au temps de Cicéron, d'après la 'lex Heracleensis'*, in *Scripta varia*, 1980, 50.

logical to assume that quite the opposite occurred. This is corroborated by the fact that “immediate democracy” is more easily achieved in smaller communities, than in larger ones. The continual growth of both territory and population (with the greatest variety of social ranks) made the Roman state ever more complex while the citizens’ direct participation in government became less practicable. It is interesting to know that Augustus looked for solutions to the problem of gathering all the citizens in a single spot, without which immediate democracy of the old type could not be conceived. He allowed the procedure by which members of city councils (*decuriones*) from various colonies could send their sealed votes to the assembly in Rome (Suet. *Aug.* 46,1). Nevertheless, the true political will to change the situation most likely did not exist. From Augustus’ time the rank of *equites* established their supremacy in the Senate, after which they had no further need of the assembly, and it had never been of interest to the *nobili* in the satisfaction of their ambitions. Travelling to Rome from distant provinces presented more an obstacle than a solution, and would have reduced the realization of Augustus’ idea to a mere formality. One can, therefore, only speculate about the number of people who actually took part in the activities of the assemblies even in the period when they did exist. Cicero states that once, on the occasion of voting a law only five citizens were present: “*omitto eas (sc. leges) quae ferentur ita, vix ut quindi, et ii ex aliena tribu, qui suffragium ferant, reperiantur*” (*pro Sest.* 109). This might have been only a rhetorical exaggeration, but it is also probable that in Cicero’s time it had already become common that only a small group of

corrupt individuals would come to the assembly, which was not at all proportionate to the number of those who actually had the right to vote <sup>(73)</sup>. When assemblies were no longer places where decisions significant for the whole community were made, they would lose their political force and would cease to exist <sup>(74)</sup>.

The development of Roman democracy could, therefore, illustratively be compared with a *cone*, gradually narrowing towards the top, its cross-section representing decreasing surfaces. The bottom, where the segments are largest, could be compared to the wide popular participation in government characteristic of the Roman *regnum*: at that time all adult males gathered in the curiate assembly, while the most esteemed representatives of the existing *gentes* met in the Senate. During the Republic, the establishment of new forms of assembly and the collective office of magistrate with an annual mandate created the impression that the possibility of popular participation in government was being expanded, but in reality the basis of this government was considerably limited through economic census and requirements regarding descent or ethnic affiliation. At the time of the Principate the assemblies ceased to exist, and government was reduced to the figure of the *princeps* and the oligarchy of the Senate, while in the postclassical period only the

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73) HONSELL, *op. cit.* 146.

74) ROTONDI, *Scritti giuridici*, I, 19, is of the opinion that in the third century B.C. plebeians already represented almost the entire Roman population and that this made the patricians lose interest in taking part in the *comitia*, where their inferior number did not allow them to exert the type of influence they could much more easily wield in the Senate, magistratures or pontifical colleges.

emperor would remain at the top of the state hierarchy (and of our *cone*), with the characteristic title: *dominus et deus*.

In that period the term “*leges*” was used to denote orders which the ruler issued at his discretion, whose legal force was based on the principle *quidquid principi placuit habet legis vigorem*.<sup>(75)</sup> Even the decisions made in specific cases (*decreta, rescripta*), would not only have a binding force for the parties in the dispute but would also represent ‘the law’ for the judges in these and other similar cases <sup>(76)</sup>. Hence, the emperor’s constitutions are divided into those that contain a general rule (*leges generales, edictales*), and those that contain a specific order (*leges speciales, personales*) <sup>(77)</sup>. The emperor appears as the only ‘authentic’ interpreter of existing norms, because “*only the maker of laws is capable of revealing their mystery and of relating it to others*” (CJ. 1,14,12,4) <sup>(78)</sup>. He himself was not obliged to respect the law: “*princeps legibus solutus est*” (D.1,3,31). Justinian points out that the emperor is above the law because of the divine character of his person and because he

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75) ORESTANO, *Il potere normativo degli imperatori e le costituzioni imperiali*, Roma, 1937, (rist. 1962), *passim*.

76) BIANCHINI, *Caso concreto e “lex specialis”*, Milano, 1979. HONORÉ, *Emperors and Lawyers*, Oxford, 1998<sup>2</sup>, *passim*, gives a detailed analysis of over 2600 imperial *rescripta* in the attempt to prove the thesis that their creation was assisted by lawyers, and that this practice corresponds to the expression of their opinion (*responso*) on the part of jurists, acting in the capacity of private citizens, in earlier periods of Roman history.

77) BERGER, *Encyclopedic Dictionary of Roman Law*, Philadelphia, 1953, 546; GAUDEMET, ‘*Ius*’ et ‘*leges*’, IVRA 1(1950), 223ss. GUARINO, *Storia del diritto romano*<sup>4</sup>, 579ss.

78) CASAVOLA, *Legislatore interprete*, Labeo, 41(1995), 91.

represented “*the embodiment of the law sent unto the people*” (Nov. 105,2,4). This marks the end of the evolution of the concept of the *lex* in Roman law: its binding force is no longer even formally derived from popular sovereignty but rests solely in the absolute authority personified by the emperor. The popular assemblies became only a memory, but they would long retain the importance of fictitious legislative organs. A theoretician of the post-classical era, writing probably in late fourth century, would still speculate on the idea that “*leges nulla alia ex causa nos teneant quam quod iudicio populi receptae sunt...*”, and later still St. Isidor (*etym.* 5,10-11) describes laws and plebiscite as being *constitutiones* enacted at the assemblies: “*lex est constitutio populi... scita sunt quae plebes tantum constituunt*” (79). Justinian’s compilers of laws would also persist in the deep-rooted ideological tradition according to which the binding force of laws derived from the fact that they were founded on the will of the people (D.1,3,32,1).

So, even when the last echoes and whispers of the voices in the assemblies died down, the concept of the “law” - like a chimera - would continue its existence through the ages. In this form “*l’esprit des lois*” (Montesquieu) would survive to our times, together with “*l’esprit du droit romain*” (Jhering). In continental legal systems this “Roman spirit” would generate the idea that laws are the most important source of the law, and adherence to them the basis of the modern state organisation. The

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79) Cfr. D’ORS, *La ley romana, acto de magistrado*, Emerita, 37(1969), 144.

laws enjoy the highest esteem and have the strongest binding force, so that the value of other sources is measured by their authority. Inspiration for this is found in *lex publica populi Romani*, taken as “the formalized statement of the legislative will of the people” (80). Even in the Anglo-Saxon system legislature was not entirely abandoned (81).

It is obvious that no historical or modern legal system can even be exhausted in legal regulation, just as no system can do entirely without legislation. The crucial question of the law lies in the solution of specific cases, which must be resolved justly, and this cannot be changed by laws (or codes of laws), no matter how detailed or comprehensive they may be. The existence of any legal phenomenon evolves through a process of constant alternation of the *concrete* and the *abstract*. (82) In the mutual reciprocation of the *casuistic* and the *legislative* approach, regardless of their mutual relation, the values of any legal system must be confirmed in everyday practice (83). Good jurisprudence may somehow cope with bad legislature, but the reverse is far less likely.

The law (*lex, nomos*) therefore, is not just a philosophical and theoretical concept, an abstract idea or a subject for thought,

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80) KASER, *Zur Problematic der römischen Rechtsquellenlehre*, Festschrift Flume 1(1978), 105ss.

81) KASER, *Über Gesetz und Recht in der privatrechtsgeschichtlichen Erfahrung*, 14ss.

82) CASAVOLA, *Legislature interprete*, 90.

83) KASER, *ult. op. cit.*, 30.

it is the immediate reflection of human existence. It expresses the spirit and the will of the people, the desire to at least partially direct their own lives. The creation of universally binding norms, which in principle should refer to all members of a particular community equally and should limit the arbitrariness of powerful individuals or groups, has made the attainment of this objective more or less possible in the course of history.

The Romans see the beginning of their legislature as a liberation from subjection to the tyrants, whose rule was unrestricted: “*immoderata, infinita potestate, qui, soluti atque effrenati ipsi, omnis metus*” (Liv. 3,9,4), and who considered their own caprices and lust the law: “*ipsos libidinem ac lecentiam suam pro lege habituros*” (Liv. 3,9,5). Supposedly, the motive behind the creation of *XII Tablets* was equality for the great and the little: “*omnibus summis infirmisque iura aequare*” (Liv. 3,34,3), or rather equal freedom for all: “*aequandae libertatis*” (Liv. 3,31,7) (84). Roman tradition claims that *lex Valeria de provocatione*, enacted at the centuriate assembly immediately following the institution of the Republic, imposed the rule according to which “*no magistrate could execute the death penalty over a Roman citizen, nor could whip him, without allowing him the possibility of addressing the public*” (85). This law, therefore,

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84) POMA, *Tra legislatori e tirani. Problemi storici e storiografici sull'età delle XII Tavole*, Bologna, 1984, *passim*. CRIFÒ, *Normazione e libertà*, in *Staat und Staatlichkeit in der frühen römischen Republik*, Stuttgart, 1990, 344ss.

85) Cic. *de rep.* 2,31,53: “(Publicola)... *legem ad populum tulit eam, quae centuriatis comitiis prima lata est, ne quis magistratus civem Romanum adversus provocationem necaret neve verberaret*”. See also: Liv. 2,8,2: Pomp.

restricted the power of the magistrates and confirmed the principle that an individual, as a member of the community, had a certain amount of sovereignty himself. The ordinary citizen was thus given the opportunity of seeking protection from his fellow-citizens. In addition to this, a special norm of *XII Tablets* drew the decisions concerning the death penalty from the *imperium* of the magistrates and entrusted it to the centuriate assembly (Cic. *de leg. 3,4,11*), and it seems that this question previously belonged to the domain of the *leges sacratae* (Cic. *pro Sestio 30,65*). This points to the conclusion that the people were considered since time immemorial as “the bearer of supreme authority”, and that the said norms did not establish this concept for the first time but only provided guarantees that it would be respected in the new circumstances <sup>(86)</sup>.

One should believe, therefore, that some time in the past – before the formation of the ‘*contrat social*’ (Rousseau) or the

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D.1,2,2,16; Dion. Hal. 5,19,5. The recent discovery of the writing *Lapis Satricanus*, dating from the very end of the six century B.C., confirms the theory that *Publiae Valerie* (called *Publicola* or *Poplicola*) was a historical figure, and that the law mentioned by Cicero actually could have been enacted right after the deposition of the kings. SERRAO, *Diritto privato. Economia e società nella storia di Roma*, I, Napoli, 1987, 108. However, even before this discovery some Romanists did not doubt the authenticity of this law. Cfr. DEVELIN, ‘*Provocatio*’ and *Plebiscites. Early Roman Legislature and the Historical Tradition*, *Mnemosyne* 31(1978), 45ss.

86) Cicero refers to the writings of pontiffs and augurs in claiming that the institution *provocatio ad populum* already existed in the time of the kings and that this instrument could be used against their decisions. Cic. *de rep. 2,31,54*: “*Provocationem autem etiam a regibus fuisse declarant pontificii libri, significant nostri etiam augurales...*”



‘*Klassenstaat*’ (Marx) – the *sovereignty of the people* was an actual reality; but even if it is a myth, it is one created by men in their desire to give their primordial need for justice and equality the form of a legal norm. As with many others, this ideal, too, would turn, in the course of history, into its antipode by the ruthless struggle for power and domination over other people (87). The Roman legal heritage best confirms this dismal conclusion - but, unfortunately, it seems to have taught us nothing. It remains a bitter lesson from the past, and will remain such until it becomes clear that laws represent the foundation of human freedom: “*Libertas in legibus consistit*” (Cic. *de leg. agr.* 2,102).

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87) It is a paradox that the Italian Romanists studied the question of the Roman people’s sovereignty very intensively during Mussolini’s reign. Cfr. LOMBARDI, *La ‘sovranità popolare’ in Roma*, in *Civiltà fascista*, Roma, 1939, 1-22.