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THE JURISPRUDENTIAL BASIS OF ROMAN LAW*

I

For the past few years, there has been an increasing interest in the study of jurisprudence. In the United States, as well as in foreign countries, the bases of positive law have been re-examined. This modern renaissance of jurisprudence is just one of many revivals throughout the course of history. These periodic re-evaluations of the positive law always approximately coincide with great social upheavals and restlessness, when men's principles and faith in the established order of things are sorely tested. Perhaps the Great War and the socially depressive era through which this nation has passed have been the coactive pressures which have produced the present widespread interest in the philosophy of law. The most recent development of this subject relates to the field of political philosophy and constitutional theory.

But as the concepts included in a philosophy of law are fixed, though the means by which they are made effective are variable, it is possible to apply modern jurisprudential techniques to old systems of law. What were the theodicean, ethical, and metaphysical controls of the Roman legal system, for example, in reference to the judicial and legislative processes, as distinguished from the mere content of specific, technical segments of formulated rules, necessary administratively for the well ordering of Roman society, and the supremacy of Roman authority? It will be seen that in the Roman legal world, as in the Anglo-American, great socio-economic movements, which necessitated a liquidation of outmoded, solidified legal regulations, have forced legalists to fall back on ultimates, by a re-appraisal of the positive law in the light of specific, philosophical tenets.

*This paper was originally read before the Riccobono Seminar of Roman Law in America, of which the author is *Scriba* (Secretary).

The influences which mould law, determining its scope and function, are at work everywhere, whether or not they are consciously recognized. These *stimuli* are variable in character. They may proceed from the controlling norms of a Divine Will, or Intellect, the ethics of some type of natural law, the shifting opportunism of experimentalism, or the fetish of a temporal, economic, material well-being for specific groups, or for the whole social group. The age and continuity of the Roman law, its survival under various forms of political organization, and its success in many lands and among divers peoples make it an excellent specimen for the dissecting knife of the jurist who is in search of wisdom.

A philosophical interpretation of Roman law does not preclude an over-lapping explanation from the viewpoints of politics, sociology, or economics. Most likely all these factors have contributed to the development of Roman law, perhaps concurrently. Indeed, Roman law was based upon a non-philosophic paganism, from the foundation of Rome in 754, B. C., to the period of Servius Tullius [1] (566-52 B. C.). This paganism was mythological, deifying the emotions and endorsing irrational excesses, such as those included in the worship of Bacchus. The earliest Romans did not develop a philosophy of religion, a theodicy. Faith and Reason were not integrated. Law was identified with Roman Paganism, but not with reason. The will of the gods was then the basis of law. *"Fas"* was the source of this most ancient Roman law. It was the era of the *Jus Quiritium.*[2]

The next period was that of the *Jus Civile,* the law for citizens, both Patricians and Plebians. With the inscription of the Twelve Tables in the fifth century, B. C., Roman law was no longer a Patrician mystery and monopoly. But during the era of the *Jus Civile* the "oughtness" of the interven-

[1] See: LOBINGIER, THE EVOLUTION OF THE ROMAN LAW (2d ed.) 11, 57 ff; SOHM, THE INSTITUTES OF ROMAN LAW (4th ed. trans. from the German by Ledlie) 15 n. 2, 28 n. 2.

[2] LOBINGIER, *op. cit. supra* note 1, at 12 ff.

tion of positive law was pivoted upon Roman citizenship.[3] Inasmuch as the *Jus Civile* was intended only for Roman citizens, and was referable to such concepts as race and religion, essentially it was not in sympathy with the jurisprudence of a natural law. It was fideistic and nationalistic, but not rational. It sought to protect the rights, claims, and equities of Roman pagans. Was the identification of the ancient pagan Roman religion with positive legal rule, without reference to the intermediate element of Reason, chiefly responsible for the Romans refusing to apply the *jus civile* to foreigners, or was the reason primarily social, racial, or political?

But the *Jus Civile*, to the extent that it was an admission of the necessity of the positive law's enforcement of equities based upon the ethical personality of the individual, as distinguished from the personateness of the familial group, was an advancement beyond the most primitive condition of Roman jurisprudence. Then, apparently, there was dominant a familial totalitarianism, in which the individual was outside the purview of positive law, for at one time only *status* existed between the members of the Roman family.[4] A transition to a stage in which the rights of individuals began to be recognized may be interpreted as an ethical and metaphysical change in the jurisprudential basis of Roman law. A group ethics yielded to the ethics of an individuated rationality. Metaphysically there was a piercing of the veil of the reality of the corporealized kindred, and a juridical acceptance of the actualistic personalities of ethical units.

As long as Roman society was not infiltrated by foreigners, at first members of the old, neighboring, Italian tribes, who went to Rome as traders, the juridical ethics sanctioning the conference of the benefits of legal processes, only in so far as a person possessed a qualification of the positive law, namely, citizenship, seemed adequate. But when alien

3 1 SHERMAN, ROMAN LAW IN THE MODERN WORLD (1917) 32-37.
4 MAINE, ANCIENT LAW (1888) 178 ff.

freemen began to demand a mechanism for the adjustment of their alleged rights in reference to counter-equities, there arose a broadened juristic conception.[5] Ultimately, the Roman social and legal consciousness bowed to the powerful control of the natural law or reason.[6] The result was the rise of the *jus gentium* (about 243 B. C.), which was a body of positive law, made up of rules generally applicable among the alien races in Rome, in virtue of natural reason. It was invoked to determine juridical conflicts not only between foreigners, but also between foreigners and Romans. It was not statutory but customary.

Behind the legal, positive phase of the *jus gentium*, there was a broad basis of rational speculation, with the central core of a natural law.[7] Reason and humanity were the authoritative bases of the *jus gentium*, while religious faith or political expediency justified the intervention of the *jus civile*. Greek philosophy, particularly Stoicism, and rhetoric were utilized by the Roman legalists, at least from the first century, B. C., onwards, in developing Roman jurisprudence. To quote Professor Zulueta of Oxford University:

> "Forms being national and intention universal, the practical needs of an empire must in any case have given over the future to the *jus gentium*, but the same period which saw the consolidation of the *jus gentium* saw also the beginning of the reign of Greek thought at Rome." [8]

A distinction was made between the *jus gentium* and the *jus naturale*. The former was positive law, while the latter comprehended the fixed, immutable, ethical and moral norms of control, relative to human conduct.[9]

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5 RADIN, HANDBOOK OF ROMAN LAW (1927) 37 ff.

6 See POUND, OUTLINES OF LECTURES ON JURISPRUDENCE (4th ed.) 2.

7 See LOBINGIER, *op. cit. supra* note 1, at 110, where there is a reference to INSTITUTES (Gaius) 1, 1, containing a description of the *jus gentium* by Gaius, namely, "the rules constituted by natural reason for all are observed by all nations alike and are called *jus gentium*."

8 ZULUETA, 9 THE CAMBRIDGE ANCIENT HISTORY, THE DEVELOPMENT OF LAW UNDER THE REPUBLIC (1932) 868.

9 BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE (1901) 575 ff. At p. 582, he writes: "The blending of the notion of Natural Law, as the ethical standard

The history of Roman jurisprudence, in the sense of a truly organized body of legal philosophy, dates from the time of Cicero (106-43 B.C.). Then it was that the Roman intellectual world felt the full impact of Greek culture and rationalization.[10] In several of his works, Cicero, devotee of Stoic ethics, brought to the attention of Roman jurists the philosophical bases of law.[11] He appears to have been an exponent of a theophilosophical school of jurisprudence, holding that there is no essential conflict between Faith and Reason.[12]

Particularly did a matured Roman law afford opportunities for juridical speculation in the era of the great jurisconsults in the first few centuries, A. D. From the end of the Republic, Roman jurisprudence identified law and morals, subordinating law and the makers of law, whether judges or legislators, to the overriding veto power of the ethics of a natural law. A jurisprudential climax was reached with the

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of conduct and the ideal of good legislation, with the notion of the law formed by the usages and approved by the common sense of all nations as embodying what was practically useful and convenient, satisfied both the philosophical and the historical instincts of the jurist." See WALTON, HISTORICAL INTRODUCTION TO THE ROMAN LAW (2d ed.) 355 ff.

10 ZULUETA, *op .cit. supra* note 8, at 868 ff.

11 Thus in his work *De Republica* (Bk. III, ch. 22), Cicero wrote: "Right reason is indeed a true law, in accord with nature, diffused among all men, unchangeable, eternal. By its commands, it calls men to their duty, by its prohibitions it deters them from vice. For the upright, it commands and prohibitions are not in vain, but neither by commanding nor by prohibiting does it move the wicked. To pass laws contrary to this law is impious, to derogate from it is unlawful, to do away with it is wholly impossible. Neither the Senate nor the people can dispense from it, nor is any ulterior expounder and interpreter to be sought for. There shall no longer be one law at Rome and another at Athens, nor shall it prescribe one thing today, and another tomorrow, but one and the same law eternal and immutable shall be prescribed for all nations and all times, and the god who shall prescribe, introduce and promulgate this law shall be the one common lord and supreme ruler of all, and whosoever will refuse obedience to him shall be filled with confusion, as this very act will be a virtual denial of his human nature; and should he escape a present punishment, he shall have to endure heavy chastisement hereafter." In the *Pro Milone*, he stated: "There is a law, judges, not written, but born within us, which we have not learned or received by tradition, or read but which we took in and imbibed from nature itself, which we were not trained in, but which is ingrained in us."

12 For example, he wrote in his *Philippics* (xi, 12): "Law is nothing else than right reason derived from the gods, commanding what is honorable and forbidding the contrary."

entrance of the immortal Ulpian in the juristic arena. Adopting a Stoic concept of natural law, he wrote:

> "Natural law is that which nature teaches to all animals, for this law is not peculiar to the human race, but affects all creatures which deduce their origin from the sea, or the land, and it is also common to birds . . . for we see that all animals and even wild beasts appear to be acquainted with this law." [13]

Positive law, which of course is not philosophy, was obviously affected at this time by this Stoic concept of natural law.

The *jus gentium,* with its sustaining philosophical ally, namely, Stoicism, triumphed in 212, A. D., when the Emperor Caracalla conferred Roman citizenship upon practically all freemen of the Empire.[14] Perhaps there was a causal connection between this extension of citizenship, and Stoic philosophy which resisted narrow nationalism. But the philosophy of Stoicism began to be superseded by that of Christianity, when about a century later, Constantine recognized Christianity as the religion of the Roman state. Thereafter Roman law responded to the influence of a new concept of natural law, more authoritative, and more discriminating than the Stoical, as to the difference between Reason and Instinct. A personal God was now postulated instead of a materialistic pantheism. The result was that the law of Rome became even more sensitive to the necessity of discriminating between *mala fides* and *bona fides,* between the deliberate and the accidental, and between the letter and the spirit of law, than ever before.

At the time of Justinian (483-565, A. D.), Roman jurists were continuing to insist upon the highly ethical character of Roman jurisprudence. Thus, in his *Institutes,* the maxims of law are "to live honorably, not to injure another, to give to every one his due."[15] The second sentence of his *Institutes* defines jurisprudence as the "Knowledge of things divine

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13 DIGEST 1, 1, 1 (3).
14 WALTON, *op. cit. supra* note 9, at 291.
15 INSTITUTES (Justinian) 1, 1, 3.

and human, the science of that which is just, as distinguished from that which is unjust." [16]

But during the Patristic era, the "ought" element in law was usually more theological than philosophical. It seems that that was a lack of accuracy in legal theophilosophy at that time. Thus, while the *Corpus Juris Civilis* of Justinian refers to Christ as the Authority upon which the sanction of his legal compilation rests,[17] still the insertion of Ulpian's interpretation of natural law, which is obviously pagan, reveals a failure of philosophical discrimination. It is common knowledge that it remained for the scholastics, particularly Thomas Aquinas, in the thirteenth century, to show the possibilities of an adequate theophilosophical jurisprudence. From about 754, B. C., to the beginning of the *jus gentium* in 243, B. C., approximately, and from the period of Constantine to the era of the scholastics, the Roman law, perhaps, derived its chief, though not exclusive, sanctioning force from belief in some type of divine power perceived by Faith, rather than by Reason. But this was not true of the *jus gentium,* nor of the Roman law after the time of the scholastics.

II

Ethics, metaphysics, and logic were the three divisions of philosophy which exercised indirectly, though the *media* of Roman judicial and legislative processes, the greatest influence upon the course of Roman jurisprudence. Many examples may be cited to indicate the change which was induced in Roman law by an evolving concept of ethics. Thus, in the earliest Roman law of contracts, the controlling ethics had to do with the preservation of prescribed rituals, and the adherence to definite formalisms.[18] These were the sources of legal right. Later with the introduction of a

16 INSTITUTES 1, 1, 1.
17 Thus see the *Prooemium* of the Institutes of Justinian.
18 MAINE, *op. cit. supra* note 4, at 303 ff.

system of natural law ethics, first, in the Stoic sense, and finally, in the form of Christianity, the consensual element in contract law became uppermost. The outer forum became related to the inner forum. Intent and good faith became important. Roman jurisprudence began to show and coordinate "in various rules of law, the value and function of the will (*mens, animus*), of agreement and of the consequences of the elements of deceit and *bona fides,* thus opening up new pathways for the progress of law." [19]

In the law of *delict,* the Stoic concept of natural law and subsequently the ethics of Christianity upheld the theory that the mental state was important relative to culpability and blameworthiness in reference to negligence. It is a commonplace that the Roman law of *delicts,* regulated in considerable detail as early as the Twelve Tables, was originally based on a penal conception. Despite the reforming effect which the *Lex Aquilia* (287, B. C.) had upon the Roman law of *delicts,* the *interpretatio* of *lex* "stereotyped ideas and rules only to be explained as survivals of a primitive system of vengeance." [20] The specific effect of natural law jurisprudence may be discerned, for example, by the work of the jurisconsult, C. Aquilius Gallus, during the last years of the Republic when Stoic speculation had become dominant. He is credited with the *formulae de dolo malo,* most likely proposed by him in a *responsum,* and with the modernizing of the old law.[21] The ethics of Christianity carried forward the concept that the law of torts was to be primarily compensatory instead of retaliatory.

Ethics of a natural law entered into the forging of the Roman law of trusts. Their validation was apparently the result of the developing philosophical sense of Roman jurisprudence. These testamentary requests, *fidecommissa,* were

19 Riccobono, *Outlines of the Evolution of Roman Law* (1925) 74 U. PA. L. REV. 3.

20 ZULUETA, *op. cit. supra* note 8, at 861.

21 ZULUETA, *op. cit. supra* note 8, at 851.

useful when testators were desirous of giving an inheritance or legacy to persons, to whom they could not directly give either.[22] It is significant that these devices received legal recognition in Rome during the period of Augustus, when natural law ethics predominated.[23]

The history of Roman family law is a movement from formalism to rationalism. The *manus*-marriage of the old Roman law became gradually supplanted by the free-marriage, that is, the concept of the subjection of the wife to the husband disappeared with the rise of the *jus gentium*. Necessary verbal formularies in reference to the marriage ceremony disappeared, and *consensus* became important.[24] The ethics of a natural law philosophy similarly broke down the objectivism of *patria potestas*.[25]

Metaphysically, the Roman law, both public and private, was affected by a supra-actual, generalizing manner of viewing things and groups of individuals. In no small measure, Roman law owes its superiority, its world-wide appeal, and its lasting quality, to the strongly supra-physical features which characterize it. With the introduction of rational speculation into Rome, jurists there began to perceive the metaphysical relationships between realities. They started to fabricate juristic universals, such as maxims and general principles in the field of law.

Roman jurisconsults, praetors, legal authors, jural philosophers, and wielders of the legislative authority forged specific legal positive rules under a metaphysics of personality. Various applications were made of the principle which justified jurists giving new forms to actual entities by a process of imagination. Thus the treasury of the State and various groups were personified, giving rise to the corpora-

22 INSTITUTES (Justinian) 2, 23, 1.
23 SOHM, *op. cit. supra* note 1, at 477.
24 SOHM, *op. cit. supra* note 1, at 359 ff.
25 SOHM, *op. cit. supra* note 1, at 385 ff.

tion and the notion of Roman legal personality.[26] Again, the concept of the Roman universal successor,[27] who, by a fiction, was regarded as the deceased, and the *hereditas jacens,*[28] that is, an inheritance not yet vested, which assumed legal personality by a metaphysical process, are further examples of the exercise of the imaginative faculty, functioning in accordance with reason.

The efficient overcoming of legal difficulties sometimes demanded a combination of metaphysics and ethics. For example, reason, conceding that the personified group, in the instance of the *universitas personarum,* the quasi-fictionalized mass of money, land, or property, in the case of the *universitas bonorum,* and the anthropomorphized charitable foundation, in regard to the *pia causa,*[29] after the ascendency of Christianity at Rome, were useful metaphysical, juristic instruments for the attainment of unity and continuity, attributes of philosophical perfection, demanded, nevertheless that the new realities should be responsible for their acts on the basis of moral necessity. Thus metaphysics served the ends of right reason.

But the conflict of ethics and metaphysics in the very early Roman law might be seen in the personification of the kindred, which alone was the unit of legal rights and duties. As this metaphysical *formula* excluded the individual from participation in the benefits of positive law, on the theory that the fiction should blot out the underlying substratum of rationality, this device was evidently being used to override reason. Since reason was superior to imagination, however, this personification was gradually demolished by an irresistibly emergent ethics of a natural law.

A by-product of the metaphysical method was the widespread employment of fictions. A legal fiction has been de-

26 AMOS, THE HISTORY AND PRINCIPLES OF THE CIVIL LAW OF ROME (1883) 119 ff.

27 RADIN, *op. cit. supra* note 5, at 397.

28 RADIN, *op. cit. supra* note 5, at 398 ff.

29 2 SHERMAN, *op. cit. supra* note 3, at 120.

scribed by Sir Henry Maine as "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." [30] Illustrations of this device in Roman law include, for example, the fiction of the *Lex Cornelia,* by means of which a Roman citizen, if he died a captive, was regarded as having died at the very instant of his capture for the purpose of allowing testamentary laws to be operative,[31] the fiction of Adoption, which allowed the family bond to be fashioned artificially,[32] and the *"actio fictitia,"* which permitted the praetor to pretend that there had been a compliance with a condition of the law contrary to actuality.[33]

Finally, the Roman law owed much to Greek logic and rhetoric.[34] The beginning of the science of Roman law coincided with the Stoic era. Numerous illustrations of the influence of Greek logic may be given. For instance, it was during the Stoic era of Roman history that Q. Mucius first applied definitional methods to the juristic field, and utilized the idea of classification by means of *species* and *genera.*[35] The rhetorical, interpretative technique, borrowed from Greek philosophy, was the proximate reason for the substitution of *voluntas* in place of *verba,* as the ultimate determinant of legal meaning.[36]

In retrospect, therefore, the principal basis of Roman jurisprudence seems to have been different in the various epochs. At first, it was, in a general way, pagan theology

30 MAINE, *op. cit. supra* note 4, at 25.

31 See DIGEST 28, 1, 12.

32 MAINE, *op. cit. supra* note 4, at 25, 26.

33 SANDARS, THE INSTITUTES OF JUSTINIAN (1876) 508, 509.

34 See STROUX, SUMMUM JUS SUMMA INJURIA (1926). Note EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (trans. by Moll 1936) 268, where it is stated: "The fact that the Roman law, as early as the days of the jurists of the later Republic, seems to be a well ordered and perfect structure, containing a great number of universal legal propositions, must be attributed to the fact that the Roman jurists were not only practicing lawyers, but also writers and teachers."

35 ZULUETA, *op. cit. supra* note 8, at 869.

36 ZULUETA, *op. cit. supra* note 8, at 870.

and patrician infallibility, later on the Stoic concept of natural law, eventually Christian theology, which modified the Greek notion of natural law, and lastly, the theophilosophical culture of the scholastics. A knowledge of this shifting of background makes more intelligible such phases of the Roman law as those of the pagan pontifical monopoly, of the *jus civile,* of the *jus gentium,* and of the later *jus gentium,* as worked out under the sway of Christianity. Manifestly there were other considerations which were also material in the process of evaluating and deciding upon rules of law, but they do not seem to have changed materially the general direction which had been ordained by the pole star of theophilosophy. It appears that the great stages in the history of Roman law, however, were not created by constitutional changes, for the second or classical or Romano-Hellenic period of Roman private law began prior to the termination of the Republic.[37]

In this day of jurisprudential emphasis, and politico-constitutional controversy, perspective and illumination may be had by recourse to the history of the philosophy of the world's most famous legal system, Roman law. Because of the universality of human nature, the lessons which may be learned from that system must command the attention of the American jurist. From the jurisprudence of the Roman law, may not several major conclusions be drawn? Does it not show, first, that law cannot be indefinitely divorced from philosophy, particularly ethics, metaphysics, and logic; secondly, that the philosophy of a natural law, inasmuch as it is more ultimate than other systems of philosophy, will ultimately prevail; and thirdly, that the respective weights of formalism and equity ought to be weighed in the scales of reason?

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37 ZULUETA, *op. cit. supra* note 8, at 842.