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The Roman Foundations of European Law

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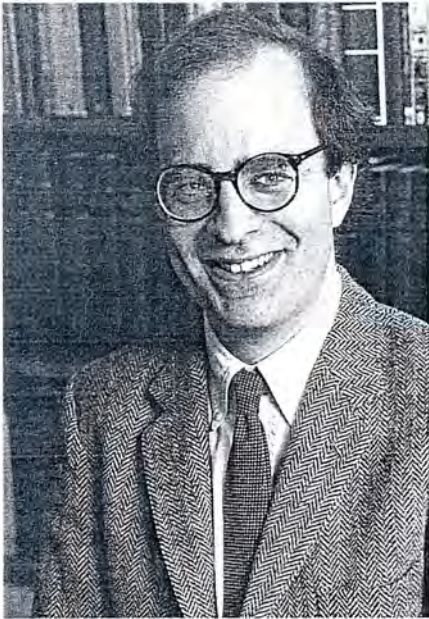
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Faculty Excerpts



William B. Ewald

THE ROMAN FOUNDATIONS OF EUROPEAN LAW

by William B. Ewald

In his recent presentation to the Philomathean Society of the University of Pennsylvania, PROFESSOR WILLIAM EWALD echoed the nineteenth-century jurist Rudolf von Jhering's remark that Rome conquered Europe three times: once with her legions, once with her Church, and once with her laws. The conquest of Europe by Roman Law has endured longer than the other two, Professor Ewald noted, and in a sense continues to the present day. There were in fact two conquests of Europe by Roman Law. The first came during classical times in the wake of the conquering legions, when Roman laws and Roman government spread across Europe, only to disappear as soon as the legions withdrew. The second conquest came in the Middle Ages and in early modern times, roughly from 1100 A.D. onwards. In this excerpt, Professor Ewald discusses these two conquests of Roman law, first describing how Roman Law developed in the period of the Roman Republic, and then explaining one of the strangest stories in the history of the law: the way in which Roman Law vanished, was rediscovered, and ultimately became the foundation for modern European law.

To explain how law developed in classical Rome, it will be best to start with an account of the Roman civil trial. The central administrative figure was the *Urban Praetor*, who was elected to a one-year term of office, and who was responsible for administering justice in civil suits between Roman citizens.

At the beginning of his year the Praetor would announce his *Edict* — in effect, a statement of the laws and remedies he proposed to enforce. In theory he was free to depart from the Edicts of his predecessors, but in practice the Edict would largely be carried over from the previous year.

Now, if a dispute arose between, say, Marcus and Julius over a piece of land, the two parties would come before the Praetor, who would consult with them and draw up the *formula* of the case. The formula was roughly equivalent to modern pleadings; it was in essence a command from the Praetor to the judge, telling him to decide for Marcus if certain conditions were met, and otherwise to decide for Julius.

The formula having been prepared, a judge for the case was then selected from a list of prominent laymen. The *iudex* (as he was called) was given the formula. He proceeded to hear evidence from both sides, and then to decide the case in accordance with the Praetor's instructions. The *iudex* had wide discretion, and in the end simply announced a

winner; he did not have to give his reasons, and never wrote a judicial opinion. (If you want an analogy, the Roman iudex was more like a modern juror than like a modern judge.) There was no appeal from his decision.

The important point to notice is that both the Praetor and the iudex were laymen. They had no training in the law; and if the administration of justice had been entirely in their hands the Romans would have possessed, not so much a system of *law*, as a mechanism for the *ad hoc* resolution of disputes.

The fundamental task of stating and developing and commenting on the law fell to a third class of people, the professional *jurists*. These jurists were in a sense gentlemen-amateurs: aristocrats who studied the law and gave legal advice, not for money, but for the honor and respect they earned in the process. They were not involved in the decision of cases, and seem to have looked with a scholar's disdain on the lowly practitioners. (Something of this tradition survives in modern Europe, where in general judges enjoy less prestige than legal scholars — a reversal of the common-law ranking.)

The jurists often held important offices within the Roman administration. Some commanded legions; others became Governors of such provinces as Asia or Nearer Spain. In other words, they were not mere bookworms, but men of affairs with wide experience in government. It was to them that the Praetor and the *iudices* turned for authoritative advice on questions of law; and it was they who, mostly in the first century through the third, built up the great body of juristic writing that forms the backbone of Roman Law.

At the end of classical Roman times (and in fact after Rome itself had fallen) the Emperor Justinian ordered a compilation of these juristic writings, which is known as the *Digest*; it makes up by far the largest part of the *Corpus Juris Civilis*, and was promulgated in 529. (The *Digest* fills some 2,000 large pages

of small print; the monumental English translation was published by the University of Pennsylvania under the guidance of Alan Watson, who used to teach at the Law School.) But Justinian was late. The Roman Empire was at an end, and in Western Europe the *Corpus Juris Civilis* sank from sight.

For the next 500 years the law of Western Europe was Germanic tribal law mixed with elements of Christianity, and the classical Roman Law of the jurists was entirely forgotten. Then, suddenly, Roman Law was rediscovered and spread throughout Europe, becoming the foundation for the continental legal systems. How did this surprising thing happen?

It will be helpful if we divide the *reception* of Roman Law (as it is called) into two phases.

The first phase begins in about 1100. That is roughly the date when the text of Justinian's *Corpus Juris Civilis* was rediscovered in Pisa. The date is important for another reason as well: for this was the time of the struggle between Gregory VII and the Holy Roman Emperor for control of the vast wealth and power of the Church; and if that struggle had not been going on, Roman Law would never have had the impact that it did. In essence, Gregory was poised to establish an international Church bureaucracy, encompassing all of Europe, in which every member of the clergy would ultimately report to the Pope in Rome. To establish such a massive administrative machine required sophisticated legal skills; and Justinian's *Corpus Juris* was rediscovered at just the right time.

During this first phase (whose dates are roughly 1100-1400) three things happened. First, Roman Law was taught in universities throughout Europe — initially in Bologna, and later in great centers of medieval learning like Paris and Oxford. Second, the Church took elements of Roman Law and combined them with the law of the Church to form the system of medieval Canon Law; this system was of great importance for the development of family law

and of trial procedure. (For many centuries the temporal courts continued to use trial by battle and trial by ordeal; the Church, in contrast, built on the sophisticated and highly rational procedures of Roman Law.)

Third, and perhaps most important, the medieval scholars applied Aristotelian logic and the scholastic method to Justinian's text. Strange though it may seem in retrospect, the Romans never reduced their legal rules to a logical and systematic order: the jurists were content to pronounce very specific rules for very specific issues, but never tried to bring them all into a system. It was the medieval Glossators and Commentators who edited the text of the *Corpus Juris*, reconciled conflicting passages, sought the underlying, abstract principles, and wrote commentaries and analyses of the most difficult legal questions.

Very roughly speaking, the result was that by 1400 or so you had, on the one hand, an orderly, scholarly, sophisticated system of law, in part administered by the Church, and taught in a universal language, in the universities throughout Europe. And, on the other hand, you had the mass of feudal law and local custom that were applied by the temporal courts.

At this point, the second phase of the reception of Roman Law begins. In this phase (and here I must oversimplify wildly) Roman Law in effect moved out of the universities and into the courts of the secular rulers. This development did not happen all at once, and the process varied throughout Europe. Let me tell you about how it happened in the Holy Roman Empire, since that is in many ways the most interesting case.

For much of the Middle Ages, the Holy Roman Empire had what is known as a *theoretical* reception of Roman Law. The German Emperors considered themselves the heirs of the Romans, and in theory Roman Law was supposed to apply as a kind of subsidiary law in their

courts. But in fact the imperial courts were weak, and this reception was more illusion than reality.

Then, suddenly, in about 1500, Roman Law was received almost in its entirety into the Empire. How did this happen? There are roughly speaking three reasons. First, the Emperor, in an attempt to consolidate his power, established a new imperial court of justice staffed by lawyers trained in Roman Law, and able to administer the highly efficient Roman trial procedure that had been developed by the Church. The idea proved a popular one, and the Imperial subjects began flocking to the Emperor's courts. The many German princes observed this development. They followed the Emperor's lead, and established their own courts based on Roman Law models.

Second, now that there was a booming market for Roman lawyers, Roman Law became throughout Germany a *genuine* subsidiary source of law. If a new statute had to be written, it was written by lawyers trained in the universities — and, of course, since Roman Law was the system they had studied, they used the language and the concepts of Roman Law. Or if a statute had to be interpreted, the lawyers interpreted it so as to diverge as little as possible from Roman Law. In this way Roman Law ideas were rather quickly imported into German law.

The third, and perhaps strangest, reason for the practical reception was what is known as the *Aktenversendung*. The most sophisticated legal talent in Germany at the time was in the universities, whose professors had the greatest mastery of the details of Roman Law. The courts decided to take advantage of this fact, and if a difficult case came to them they would send the entire trial docket to the professors for their collective, learned decision. A university like Heidelberg would decide cases from all over the Empire. The professors had no special expertise in the customary law of the various provinces, and indeed

basically regarded that law as primitive and backward. So they naturally decided these cases by invoking principles of Roman Law — all of which worked to make Roman Law the common law for all Germany.

In this way — and in similar ways throughout Europe — you had the gradual development of what is known as the *ius commune*, a common law, based on Roman Law principles, for all of continental Europe.

And so, over the centuries, the rules of Roman Law have gradually been absorbed and worked over and refashioned to form the basic building blocks for what are today known as the *Civil Law* countries. The process did not cross the Channel to England, which followed a separate legal development; but the influence of Roman Law rules has spread from the core legal systems of continental Europe — Italy and France and Germany — to Latin America, to Turkey, to large parts of Africa, and as far afield as Japan.

I am afraid I know of no satisfactory way to illustrate the influence of these rules, apart from burrowing into the legal details and trying to show you how they operate in practice. But time is too short for that.

The best I can do is leave you with an analogy. In addition to Roman Law, the Romans made a second great contribution to Western civilization: the Roman arch. And the importance of Roman Law to the law of modern Europe, it seems to me, is like the importance of the Roman arch to the architecture of Rome.

It is not as if the modern city of Rome would still be recognizable to Cicero or Diocletian: clearly it would not. Even the style of the arches themselves is different. There are Brunelleschian arches, and Palladian

arches, and Baroque arches — none of them quite like the arches of classical Rome. This is an important fact, and shows that things have not been standing still: each succeeding age has added something new, and has adapted the Roman pattern to its own ends.

The innovations are significant; and if you imagine every arch in Rome scoured of its Baroque trimmings or those from the Renaissance, it is clear that the city would not be the same. Entire districts would be mutilated. But the city itself would still be recognizable; certainly it would not be destroyed. And that is where the Roman arch is different. Knock down the arches themselves, and you have nothing left but a heap of rubble, punctuated by an occasional obelisk.

The same thing, I think, is true of Roman Law. You can go through the French and German codes and scrape away the contributions of the scholastics and the humanists, of the Renaissance and the nineteenth century; the damage would be grievous, but you would still have a recognizable body of law. But take away the contributions of Rome, and European law becomes no better than a heap of rubble.

These remarks are relevant to the future of European law, and it is generally agreed by Civil Lawyers that any unified system of law for Europe will have to be based on a Roman Law model. At this point let me remind you of the prophecy of Anchises which Virgil placed at the very center of the *Aeneid*. Aeneas is in the underworld, and his father Anchises has just been making prophetic remarks about the city that Aeneas is destined to found. Anchises sums up his view of the Roman mission in words that must have reflected Virgil's own attitude. "Remember, O Roman!" he says. "Other nations may surpass you at sculpture and oratory and astronomy. But your task is a different one: to rule over nations. These shall be your

arts: to spare the humble, to do war on the proud, and to consummate peace with law.”

A nice thing about prophecies is that they are not subject to any statute of limitations. Anchises's words are all the more remarkable when you remember that Virgil wrote them before the great creative period of Roman legal thought. So as prophecies go this is quite a good one. Certainly for a brief time after Virgil the prophecy held true, and all Europe was united under Roman laws and Roman rule: the only time in history that such a thing has happened.

And what of the future? There are encouraging signs that Europe is drawing together, and that it may once again get a unified system of laws. If it does, those laws will necessarily be based on Roman patterns. (It is no accident that the European Community was created by the Treaty of Rome.) If that should turn out to be what happens — if, as Jhering might have said, we are in for yet another conquest of Europe by Roman Law — then the prophecy of Anchises will once again have come true, but in a sense Virgil could never have anticipated.