

LAWGIVERS

Ancient societies traditionally refer to a stage in their history when laws were created and written down. They ascribe it to mythical or historical lawgivers, prophets, or charismatic figures, who played an important part in resolving political or social disputes and in creating a national identity. The Near East produced the Code of Hammurabi (nineteenth century BCE), and Mosaic law preserved in the Torah/Pentateuch (traditionally dated to the early thirteenth century BCE, but probably much later). Some Greek city-states recorded similar phenomena. The best-known Greek lawgivers were Lycurgus at Sparta (date unknown), Draco and Solon at Athens (late sixth/early fifth century), Zaleucus and Charondas in South Italy and Sicily (respectively, seventh and sixth century). They produced clusters of laws rather than full-scale codifications, but these set the basis for a state-enforced legal system and a constitutional framework. However, Greek laws remained rather limited in their scope and impact, in comparison with Roman law and Jewish law (Mishnah, c. 200 CE; Talmud, c. 200–500 CE).

Roman law is one of the most enduring creations of antiquity, as it shaped most modern legal systems. Its development can be attributed to various sources of law, the nature and importance of which changed over time without affecting the coherence of the system slowly emerging from it. Unlike its Near Eastern and Greek predecessors, Roman law emerged from the cumulative production of a large variety of lawgivers over a millennium. It was thereafter used as a source of positive law in many countries or as a model and inspiration in the so-called civil law tradition.

In a textbook (*Institutiones*) that miraculously survived until modern times, the mid-second century CE law teacher Gaius lists the sources of law (*jus*) known to him: statutes (*leges*), plebeian decisions (*plebiscita*), the senate's resolutions (*senatusconsulta*), the emperor's enactments (*constitutiones*), the magistrates' pronouncements (*edicta*), and the jurists' opinions (*responsa*). Gaius's lawgivers are thus easily recognizable and fall into four categories: the Roman people, gathered in assemblies, in various capacities, but excluding women, resident aliens, and slaves; the Roman Senate, an oligarchic body (composed of former magistrates) whose prestige and authority bore on political life throughout Roman history; the elected—later appointed—

magistrates of the Roman people, on the basis of their right to issue edicts and of their competence in controlling judicial procedure, until the Roman emperors took over most of their powers; and, more surprisingly, private individuals (*prudentes*), who issued legal opinions, often at the request of judicial authorities, to fill the juristic gaps left by all other sources of law. These various lawmakers were not equally creative and productive in Gaius's time. Although it reflects Roman law as it had developed over the last half millennium, since the mid-republican period, Gaius's list conceals the changing status of authorities in charge of law-making. Conspicuously absent from the list are custom and court decisions used as precedents, the basis of common law and an important source of law in civilist systems.

In Gaius's time, statutes (*leges*), although still very much enforced, were a thing of the past, first the result of the kings' legislating activity (*leges regiae*), soon to be entrusted to popular assemblies (*comitia*), eventually under the responsibility of republican magistrates, who gave the various laws their names (e.g., *Lex Tullia de ambitu*, named after M. Tullius Cicero, consul in 63 BCE). Statutes were drafted and proposed (*rogatio*) by magistrates, debated in the Senate and subsequently voted by one of the popular assemblies (*comitia centuriata* or *tributa*, occasionally by the *comitia curiata*), publicly proclaimed by the magistrate in charge of the process, registered in writing on wooden or bronze tablets or on stones, and exposed in a public place for everyone to take notice of and to consult. This process of lawmaking could be interrupted at any time for religious reasons (*nefas*) or by a veto from a peer or ranking magistrate or from one of the popular tribunes (*tribuni plebis*). Despite the formal and public aspects of the legislative process, statutes were often very specific in purpose, occasionally retroactive, and altogether lacking in systematization. Roman statutes were not meant to constitute anything resembling a modern law code. They were devised as ad hoc, politically motivated responses to given problems or situations.

One exception is perhaps found in the so-called *Law of the Twelve Tables*, which the historiographical tradition (Livy) assigned to a mid-fifth century BCE committee appointed to provide the city of Rome with the kind of written law code that

Greek cities ascribed to lawgivers (cf. above). The 10-member committee (*decemviri*) was expected to write down existing customary/oral laws and to supplement them on the basis of analogy with existing legislation found in various Greek cities at the time. In Roman minds, the provisions of the Twelve Tables constituted the foundation of the Roman civil law (*jus civile*) and were studied by law students until the first century BCE, at least. This code, far from comprehensive, retained great authority even later because some imperial jurists (e.g., Gaius) still commented on it. No more attempt at codification was made before the late third century CE. The text is preserved in a fragmentary form thanks to quotations by literary writers, historians, and antiquarians. Its inner organization is a matter of controversy, and its content deals with private and criminal/sacral law.

Because the voting arrangement of comitial assemblies heavily favored the upper classes, the Roman plebs eventually gathered into *concilia* to vote their own statutes, the scope of which was originally limited to the plebs. This was a natural outcome of the struggle of the orders that plagued the history of Rome from the fifth to the fourth/third century BCE, according to Roman tradition. A *Lex Hortensia* of 287 BCE extended the application of plebiscita to the whole of Roman society, and much of the later republican legislation was enacted as plebiscita (for instance, the *plebiscitum Claudianum* of 218 BCE restricted the right of senators to own freight ships of a certain size; and the so-called *lex Aquilia*, also a plebiscitum traditionally dated c. 286 BCE, provided the legal basis for civil liability up to modern times). The plebs lost most of its legislative powers at the same time as the other popular assemblies, with the transition to the Principate.

Plebiscita, unlike statutes (*leges*), did not require the formal approval of the Senate. But the senate could also make a resolution on its own, without the participation of popular assemblies. The *auctoritas* of the senate was such that what the *Patres* considered adequate had a binding status on the whole community and was enforced by magistrates who belonged to the same social stratum. One famous example of this is known in the context of the repression of the Bacchanalia in 186 BCE. The text of the *senatusconsultum* was preserved both as part of Livy's narrative and in a bronze inscription

found in south Italy (*Ager Teuranus*, Bruttium). It regulated the rights to form religious associations and had an influence on the later law governing professional associations (*collegia*).

Magistrates' Edicts

The main and most fruitful source of private law during the republican period was, undoubtedly, the magistrates' edicts or *jus honorarium*. As they assumed their yearly functions, Roman magistrates, mostly praetors, aediles, and provincial governors (*proconsules*, *propraetores*), were required to announce ahead of time the framework of their judicial activities. The edict was merely a list of legal principles that the magistrate took on himself to respect and enforce in matters of private law and civil procedure. It amounted to the promise to grant a legal remedy (*actio*) in given circumstances. Legal rights were inferred from the existence of an appropriate action. According to the famous jurist Papinian (early third century CE), the praetor was thus supposed to "assist, supplement, or correct the civil law (*jus civile*)." Inexperienced magistrates had a tendency to take over some or all of their predecessors' edicts, with the result that major innovations were left to a handful of enterprising magistrates and the edict became more or less fixed as time went by. The most creative phase falls during the last century of the republican period and the early part of Augustus's reign. Under the reign of Hadrian (c. 130), the jurist Salvius Julianus turned the (urban) praetor's edict into an *edictum perpetuum*, the organization of which is reflected in later compilations (Justinian's Code and Digest).

Imperial Enactments

After the reign of Augustus, Roman emperors, as holders of the bulk of political powers, were making judicial decisions (*decreta*) and sending out orders (*mandata*) to their representatives in various parts of the empire. They were also endowed with the right to issue edicts (*edicta*). Besides, as the highest judicial authorities, they were the recipients of numerous petitions from officials and private individuals to which they (mostly through their chancery) responded with binding decisions (*rescripta*, *epistulae*). These four types of imperial enactments

are called constitutiones. All constitutiones were registered in the imperial archives (*ab epistulis, a libellis*), ready to be pulled out when a similar case arose. Over the centuries, these enactments piled up and became hard to manage without proper codification. A first attempt was successfully carried out under Diocletian (284–305 CE), with the making of the Gregorian and Hermogenian codes, a compilation (and its supplement) of imperial constitutiones from Hadrian (117–138 CE) to Diocletian. Both codes are now lost but were used by Justinianic compilers to make the Justinianic Code in 529 (second edition in 534). A second endeavor of the kind resulted in the making of the Theodosian Code (438), a compilation of imperial enactments dating from Constantine (306–337) to Theodosius II (408–450), by a team of civil servants and law specialists. Most of it has been preserved or could be reconstructed on the basis of later abridgments (*Leges Romanae Barbarorum*, especially the *Breviarium Alarici*). It was also supplemented with the legislation (*Novellae*) passed by Theodosius II and his joint emperor Valentinian III after the promulgation of the Theodosian Code. The last stage of codification was made by Justinian and consisted of a selection from the Gregorian, Hermogenian, and Theodosian Codes and *Novellae*, again supplemented by *novellae* later in his reign. These codifications provide us with a rich collection of imperial enactments in the field of private and public (criminal, administrative, fiscal) law spanning more than four centuries. Most interestingly for historians of Roman law, each *constitutio* is provided with a—sometimes inaccurate—date and provenance, and organized by subject along the same line as the *edictum perpetuum*.

So is Justinian's Digest (published in 533), which preserves an impressive collection of juristic opinions going back to the early first century BCE (Quintus Mucius Scaevola) through the late third century CE (Arcadius Charisius). The jurists of the classical period (first to mid-third century CE) were the functional descendants of the early republican pontiffs officially in charge of preserving and interpreting the civil law, and *ipso facto* in control of it. By the first century BCE, some people, originating mostly but not exclusively from the upper classes, were willing to assist magistrates and judges in administering justice by providing technical support in legal

matters on a friendly basis (*amicitia*), as members of a consulting group (*consilium*). According to Cicero, juriconsults were instrumental in defining abstract notions such as “malice aforethought” (*dolus*), good faith (*bona fides*), or equity (*aequitas*). The evidence from the *Digest* suggests that they did much more, commenting on all aspects of private, criminal, and administrative law and engaging in debates on legal issues. The importance of the jurists in lawmaking derives from the lack of professional expertise of both magistrates and judges in charge of the judicial system.

We do not really know how individual juristic opinions fared in courts of law at the time they were issued, but we may presume that some jurists must have enjoyed a significant authority based on the fineness of their legal thinking rather than on their political or socioeconomic background. The second-century law teacher Pomponius wrote a textbook (*Enchiridion*) on the history of Roman political institutions, with due regard to the jurists and their contribution to lawmaking up to the time of Hadrian (117–138 CE). This work has been partly preserved in Justinian's *Digest*. Pomponius recalls the case of Massurius Sabinus: Before being considered the leader of one of two schools of thought (*Sabiniani* as opposed to *Proculiani*), Sabinus was living off his wages as a teacher and reached equestrian rank only late in life, after being promoted by the emperor with the grant of a *jus respondendi*, or permission to produce (legally binding?) juristic opinions, a grant said to have been extended to others but not attested otherwise in our sources. In the late republican period, however, most juriconsults were part of the senatorial elite. With the change to the Principate, some (e.g., Antistius Labeo) were occasionally at odds with the new political regime but nevertheless could operate freely as consultants. By the second century CE, the jurists had been absorbed by the system and were often holders of high official positions, such as praetorian or Urban prefects, consuls, provincial governors, or civil servants employed in imperial services. The great lawyers of the late second and early third centuries CE, Papinian, Ulpian, Paul, and Modestinus, were very prolific, and remained standard reference for centuries to come, even more so because the strain of great jurists dried up in the mid or late third cen-

tury CE. Their status as authority in lawmaking was enhanced in the early fifth century, when Theodosius II published his law of citations (426), whereby he gave preeminence to some jurists (those cited above, in addition to Gaius) over others in solving legal issues. The lawgivers of late antiquity were the emperors and their staff, mostly the *quaestor Sacri Palatii*. However, the jurists continued to be active as consultants, lawyers, judges, or teachers. Their opinions, as opposed to those of their predecessors, seem to no longer carry force of law.

Roman Customary Law

No legal system arises out of nothing or operates in isolation. Roman law developed out of Roman customary law and next to other legal systems, which it eventually absorbed or superseded. Many legal concepts and institutions cannot be ascribed to a law and go back to undocumented times and circumstances. This is what the Romans called *mos maiorum* or ancestral tradition. Lawyers and parties could refer to it in courts. Sometimes referring to it got them a hearing; but they got a hearing more by chance than because custom was recognized as a source of law on a par with the other sources already mentioned. Laws and customs from annexed peoples found their way into Roman law. We know from Cicero that written contracts (*syngraphai*, *cheirographai*) were borrowed from the Greek world and recognized as valid by magistrates. Likewise, the so-called *Lex Rhodia de iactu* governing jettison possibly originated in the customary maritime law of the island of Rhodes in the classical or Hellenistic period and was commented on by classical jurists and expanded by some second or early third-century emperor. Less specifically, the jurists occasionally refer to *mos regionis* to fill voids in Roman law. Contamination could result in a hybrid legal system as evidenced in the papyri from Graeco-Roman Egypt, showing significant discrepancies between theoretical Roman law and its practical application in a multicultural society.

All the above concern mostly Roman civil law (*jus civile*). The Romans, however, were aware of the fact that they shared some of their legal institutions with other peoples, if not with the whole of mankind, or even the animal kingdom. Justinian opens his own textbook, published in 533, with a reference to “Nature” as a teacher of law: As animals instinctively develop a kind of *matrimonium*

opens his own textbook, published in 533, with a reference to “Nature” as a teacher of law: As animals instinctively develop a kind of *matrimonium* (*coniugatio*) with a view to procreating and rearing offspring, all men endowed with a *naturalis ratio* are bound to produce universal and permanently valid laws (*jus naturale* and *jus gentium*), guaranteed by “a certain divine Providence.” These were out of reach for Roman lawgivers, who were to focus instead on the more volatile and adaptable *jus civile*.

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See also Ancestral Tradition (*Mos Maiorum*); Ancient Democracy; Assembly; Cicero, Marcus Tullius; Civil Law; Equity; Justice, Theories of; Roman Commonwealth; Roman Law

Further Readings

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