

## SOME VIEW-POINTS OF ROMAN LAW PRIOR TO THE TWELVE TABLES.

*"Le plus fort n'est jamais assez fort pour être toujours le maître, s'il ne transforme sa force en droit, et l'obéissance en devoir."*

The History of a Body of Private Law enters the domain of Public Law so far as to note where at each step of development reside certain functions of Sovereignty—such as the *legislative* and *judicial*, and, in so far as concerns the execution of decrees of court, the *executive* or *administrative*.

Wherein the  
History of Private  
Law enters Public  
Law

The early customs and institutions of a people are both a symptom and a cause. As a cause, they institute a trend of thought and action, and hence, even before the existence of positive law, they predetermine to a certain degree its content and the methods of procedure which will be followed in realizing the rights which it will confer and in enforcing the duties or obligations which it will impose.

Significance of  
Early Customs  
and  
Institutions

A good "working hypothesis" is that the Roman Kingdom developed from the family by the successive steps of the *Gens*, the *Curia*, the *Tribus*, the Kingdom. Certainly the essential element of the early Latin social life was religion,—with its priest.

Working  
Hypothesis of  
Origin of  
Roman Kingdom

The early Aryan Family might be characterized in modern phraseology as a Close Religious Corporation whose sole Head and Representative was the *Paterfamilias*, primarily the Priest of the "silent majority" of that family, *i. e.*, the *Manes* or deceased ancestors. Ancestor worship made the *Familia* and gave rise to certain legal institutes which lasted over a thousand years. The essential features of the *Familia* are as follows:

Early Aryan  
Family

The *Patria Potestas* over all unemancipated male descendants through the male line, whether by birth or adoption, as well as over the wives of such,

*Patria  
Potestas*

<sup>1</sup> Rousseau: Du Contrat Social, Livre I, Chap. III.

over female unmarried descendants through the male line (all such were classed under the term *liberi*, while *filius fam.* and *filia fam.* indicated the sex); and the *Manus*<sup>2</sup> over the wife of the *Paterfamilias*, *i. e.*, the *materfamilias*. Of the woman it must be said that by marriage she passed *in manum* of her husband, or, if he were unemancipated, of his oldest

**Manus**

agnatic ascendant. So she ceased to be a member of her father's family, abjuring the former family gods, and subjecting herself to the new

It would seem that the early *Manus* hardly differed at all from the *Patria Potestas*. The reason would seem to be a false biological theory as to the respective importance of male and female in procreation. The woman was taken for the sole purpose of rearing new priests *in prospectu* for the "silent majority." If she were barren, divorce necessarily followed. If it became clear that the man was impotent, the tremendous legal fiction (second only to that of the early marriage), the legal fiction of adoption was initiated that

**Adoption**

the worship might be perpetuated. The *Paterfamilias* had originally the power of life and death over wife and agnatic descendants, as well as slaves (*i. e.*, *Dominica Potestas*).

He (*P. fam.*) was absolute priest, king, judge, executioner within his little kingdom of the *Familia*.

**Resumé**

In the matter of succession, therefore, descent through the male line (called *agnatio* as contrasted with *cognatio* relationship through married daughters, sisters, etc., or *mere* blood relationship), *agnatio* ruled. Property was conceived as that of the deified ancestors and could be managed solely by their priests.

**Succession**

In strict accordance with what we have said there was no primogeniture in Roman law. Each son became a priest upon the death of his ascendant. Herein we have the starting-point for the development of the *Gens* or clan.

**No Primogeniture**

<sup>2</sup> Strictly speaking, *manus* was originally the generic term for the Power of the *Paterfamilias* over wife, children, slaves and property in general. Philology shows this in connection with words meaning "sale," etc.: *mancipatio*, *mancipare*, *emancipatio*, *emancipare*, etc.

(a) It will be noted that a strict sequence of this theory would be the impossibility of making a testament.<sup>3</sup>

No Testaments

(b) It will further be noted that each unemancipated son was obliged upon his ascendant's death to take the priestly duties, *i. e.*, enter upon and administer the estate even if it were insolvent.

Succession  
Obligatory

(c) Further, it may be inferred that adult sons, having to provide for the guardianship of infants and unmarried sisters, also of the widowed mother, would form a union for such purposes. Such union would ripen into the *Gens* or clan.

Union for  
Guardianship

The Roman *Gens*, again, was a religious clan bound together by the remote common ancestors, the latest of whom was the eponymous founder of the clan, all of whose members had for their *nomen* or chief name his name with the affix-*ius* (*e. g.* Julius). While each family in the *Gens* had its specific worship of *patres* who had died since the splitting-up of the original family, yet all were bound as a clan in a peculiar way, certainly more closely than a Celtic clan. They lay under the obligations of mutual assistance, of obedience to the chief (or sheik) of the clan—its Priest, King and Commander in War (*e. g.*, Fabii against Veii, 306 and *circa* 4,000 clients).

Gens

We have no proof as to whether such chieftainship was elective, but may infer that such came to be the case, from the fact that the kingship later was elective.

Chief  
Elective?

The necessity (as we have noted) of providing for the care of the infants and widows, and unmarried daughters, of deceased *patres* would early have suggested a union—in such a clan—of the families of surviving adult sons. Naturally, too, an advisory council or committee to counsel the chief would be formed—the prototype of the Roman Senate.

Origin of Clan  
Union

Council

<sup>3</sup> And the early testament was, in fact, a Private Bill of the Legislature.

The importance of the *Gens* in its effect on Roman law may be inferred from the fact that for a long period of the law the *Gentiles* or members of the same clan stood in the third grade of intestate succession; *i. e.*, failing *sui heredes* and agnates (family relatives) the *Gentiles* became the *heredes*, heirs and administrators or even guardians of infants of deceased.

The Celtic race has shown as a rule, in the past, inability to organize politically above the clan. The Greek had organized as far as the city. But Rome was to develop a new thing in the history of the world—an *imperium* pervaded by law. The steps by which *gentes* federated into a *civitas*, or city organization, are left to inference. Very likely such a federation took place before the selection of that site, so unique up to that time, for a city.

At any rate, out of the maze of tradition,—for the Celts had burned the early records,—we have the right to infer an early elective monarchy, the king being elective by vote of the heads of all the Roman families; (*i. e.*, voting under the form of suffrage known as the *comitia curiata*), and having as *merely advisory council*, the Senate. It is important to remember that in the theory of the Roman constitution such remained the function of the Senate throughout the Republican period.

A people endowed with political genius does not passively rest under any form of government. (No other people has equaled in political genius the Roman, unless it be the Teutonic races in the modern constitutional states.) The people represented by heads of families voting in the *comitia curiata* elects chiefs. Eventually one desires to found a dynasty. So we find the tradition of the Tarquins. But Rome, located venturesomely and, for commercial purposes, most wisely, attracts or by war forces to herself a multitude of non-patricians—clients and plebeians. Now is initiated a three-fold struggle: monarchy, aristocracy, democracy contending.

The legendary Servius Tullius perceived that he could weaken his immediate antagonists, the aristocracy, by adopting a new principle of political rights. So he created the form of suffrage known as the *comitia centuriata*, a method of voting based on property qualification: *i. e.*, in the *comitia centuriata* all Roman citizens voted; but their votes were grouped in classes according to their property holding. Put concretely, the vote of a millionaire would count far more (be a far larger fraction of a class-vote) than that of a man in moderate circumstances.

At the time when the fairly reliable internal history of Roman law begins we find that the Roman people, voting in the *comitia centuriata*, *i. e.*, according to property qualification, was the actual legislature.

We have then under the later kingdom, an executive, priestly and judicial head, the *Rex* or king; his cabinet or advisory council, the *Senatus*, or Senate; a purely patrician body, the *comitia curiata*, possessing still very important functions; and the *comitia centuriata*, in which suffrage is proportionate to wealth.

From what has been said it will be seen that religion was the basis of the Roman kingdom, as it had been of other ancient communities. It might be inferred that religion controlled the beginnings of legal development at Rome, as it had those of other cities. But herein we see the legal genius of the Roman, in that, confining the sway of religion to *Fas* or *Jus Divinum*, under which, to be sure, he brought much that later came under criminal law, he understood more clearly than any other ancient people that Positive Law means human, changeable legislation.

Roman law, as we meet it in historical times, has for its basis the law of that branch of the Aryan race which occupied Latium, and was built upon that basis as an independent, Roman development. The Roman's religion was affected by Sabine

**Servius Tullius**  
creates  
**Comitia**  
**Centuriata**  
**Description**

**The Legislature**  
**at the Beginning**  
**of Reliable**  
**History**

**Constitution**  
**at End of**  
**Kingdom**

**Roman**  
**Divorced Law**  
**from Religion**

**Roman Law**  
**Original**

and Etruscan influences; but his language and private law were swayed exclusively by the Latin element.

The basal principle of the Roman constitution, under both kingdom and republic, was that all legislation in the realm of private law lay in the hands of the people upon the initiative of the presiding magistrate. (Under the kingdom, the *Rex*.)

Statements of the Roman historians regarding the Regal period are unreliable. No development of private law can be definitely traced during the first three hundred years of Rome,<sup>4</sup> *i. e.*, prior to B. C. 454, and the statements of historians to the contrary may be dismissed as figments.

On the other hand, certain provisions relating to the *sacra* and evidently coming from this period, would to-day be classed under public law, especially criminal law, or even, in some cases, under private law. Such provisions related to divorce, physical injuries to parent, infanticide, removing a boundary mark, murder, etc. (See *Addenda*.)

In the political contest the Tarquins lost and were expelled.

The new constitution distributes the functions of the king. Its main changes (not all *immediately* introduced) are: to make the central executive office weak, elective, held but a year, and shared by two Consuls. The judicial magistrate becomes the Praetor: The religious supremacy is bestowed on the *Pontifex* and, subject to him, the *Rex Sacrificulus*. The function of making up the roll of the Senate, citizens, and their property, was given to the *Censor*. Whatever functions the *comitia centuriata* may have had, it now was the legislative body.

This constitution, ingeniously weakening the central executive office, had a *defect*, in that it permitted the Senate, theoretically merely the advisory council of the executive, to encroach upon executive functions. (Life tenure, etc.) But, on the other hand, senatorial ambition finding this outlet in

<sup>4</sup>For the opposite view see Muirhead's Roman Law.

the executive direction and particularly in directing foreign affairs, the Senate never successfully usurped the legislative function of the people, which long legislated in the *comitia centuriata* on the initiative of the consul.

The aristocracy, having overthrown the monarchy, is to meet its antagonist in the democracy. Rome in its commercial growth and by the importation of whole conquered populations, had won an overwhelming plebeian element. Rome must choose between the Spartan method (with subject helots), and the grant of rights to the plebeians. Again the political genius of Rome will show itself. But the contest for civil rights on the part of plebeians was long.

It appears that the plebeians were allowed to meet by themselves in the *Concilium Plebis* (Council of Plebeians) and pass regulations binding only upon themselves. Gaining a sense of power by organization, they forced the *comitia centuriata* to allow them a special magistrate, the *Tribunus Plebis* (Tribune of the Plebeians), yearly elected, whose person was inviolable, and whose house was a "city of refuge" for plebeians. He presided at the meetings of the *concilium plebis*.

Realizing the numerical preponderance of the plebeians, and feeling the injustice done them by the Patrician magistrate in the name of an unwritten and hence easy-to-be-perverted law, the *Tribuni Plebis* begin to urge on the codification and publication of the law.

*Edgar S. Shumway.*

*Addenda.*

JUSTINIAN'S DIGEST, BOOK I. TITLE 2, FRAG. 2.

Pr. "It appears to us necessary to set forth the origin and progress of the law."

1. "At the beginning of our state, the people had no definite statutes or law. Kings exercised arbitrary authority."

2. "Tradition says that, as the city grew, Romulus di-

vided the people into thirty divisions, and called these divisions *curiæ* because he was utilizing their views in the care (*cura*) of the commonwealth.

"So certain *curiate* laws (*Leges Curiatae*) were enacted by the people on his initiative; others, by his successors. All these stand written in the book of Sextus Papirius, a man of rank in the time of Tarquin, the Proud. This book is called the 'Civil Law of Papirius' (*Jus Civile Papirianum*), not that Papirius there added aught of his own, but because he classified the statutes and set them in order."

3. "When the kings were expelled from Rome all these statutes lost their validity, and the Roman people again began to be rather under uncertain law and custom than under definite written law. This state of things lasted about twenty years."<sup>5</sup>

#### LAWS OF KINGS.

(1) "Si qui hominem liberum dolo sciens morti duit, Paricidas esto."

(Whoever with malice aforethought kills a freeman shall be adjudged guilty of murder.)

(2) "Si parentem puer verberit, ast olle plorassit, puer divis parentum sacer esto: Si nurus, sacra divis parentum estod."

(If legal descendant [male or female] or daughter-in-law strike his or her ascendant, and if said ascendant cry out, said descendant shall be sacrificed to the gods of parents.)

(3) "Patronus si clienti fraudem fecerit sacer esto."

(If a patron deal fraudulently with a client let him be sacrificed.)

<sup>5</sup> In this statement, Pomponius' views respecting the *Leges Curiatae* of the Kings and their abolition on the banishment of the Tarquin, as occasioning a chaotic state of law, also his statement respecting an early *Jus Civile Papirianum* compiled under the Kings, may be set down as a chimera—an error into which he was led by overtrust in the unreliable antiquarians of the last century before Christ. The work of Papirius was in fact called *De Ritu Sacrorum* "On Sacrifices," and was annotated first in Cæsar's time, *i. e.*, is of late origin.—E. S. S.