
SACRED RATIONALISM OF ROMAN JURISPRUDENCE

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Abstract

The authors of the paper seek to trace the genesis of the political and legal institutions of ancient Rome and their features shaped by religious factors. In conquering the world, Roman Law promoted the statization of time, expecting to exist and act forever. This requires a metaphysical rapprochement between the people of today and the departed generations of the era of Rome's founding, that is, the continuity of tradition, coming from myth to religious norms. The Hellenization of Roman religion, which began with the reception of Etruscan cults, also brought with it Greek transcendence in the perception of the deities, previously alien to the Roman spirit. Religion was taking on new forms. The sacred law of the Romans was analogous to civil law. The religious dualism of the old and new gods quite corresponded to the legal dualism formed by Quiritian and Peregrine law. Just as the new Roman gods, censored by the sacred commission, actively crowded out the archaic gods, the law of peoples gradually eroded the rigidity of quiritic law and its formalism. Roman law is a phenomenon of world history; it is life translated into rigid conclusions and mathematically precise formulas in the form of Roman jurisprudence, which has glorified its people, its creators, up to the present day.

Keywords: rationalism, formalism, abstractness, authority, domination

1. Introduction

Ancient Rome gave humankind one of the most sought-after practical sciences - jurisprudence. The monumentality of Roman jurisprudence was grounded in the nameless greatness of the people [1]. Roman law was not the creation of individuals. The Romans themselves recognized this, proud of their wisdom. The Roman picture of the world is characterized by the thesis that all great things are anonymous - no great Roman exceeded the entire Roman people. Only the people have a unique experience, one that no genius can acquire. Marcus Porcius Cato, a paragon of ancient Roman valour, states:

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“...Our state system is better than that of other states for the reason that in the latter, we can say, individuals created the state system on the basis of their laws and regulations, for example, with the Cretans - Minos, with the Lacedæmonians - Lycurgus, with the Athenians, whose state system very often experienced changes, at first - Theseus, then Dracontus, then Solon, Clisthenes, and many others, and, in the end, a completely weakened state was not allowed to die by a learned man Demetrius of Falera; on the contrary, our state was created by the mind of not one but many men, and not during a single human lifetime, but over the course of several centuries and several generations” [2].

The unique military discipline may have influenced the political and legal mind-set of the Romans. The formalism of Roman law stemmed from the formalism of military discipline: order for the sake of order, clearly evident in that “discipline of legal transactions, which holds inexorably to only strict uniformity and punishes without leniency every transgression, every mistake” [3] and deviation from an intelligible order. For already in the military camp, the Roman people had undergone a similar school of discipline, where they had become accustomed to that obedience and strictness of the letter, which they later found in the forms of their legal life. “The beneficent influence which this military discipline of legal transactions produced on the development of Roman law also produced a more profound effect on the very national spirit of the nascent nation.” [3]

Only a civilization so powerful could have created jurisprudence, the science of Law. Such knowledge was the jurisprudence of natural justice, which reigned in free republics, where the peoples, for the private good of each individual, were compelled to make universal laws applying to the conditions of the age and requiring *equal utility for all*. The same jurisprudence also proved convenient to monarchs, who accustomed their subjects to observe private interests by taking over the care of public affairs. In monarchies, *all subject nations were thereby equalized by law, so that all were equally interested in the State*. For example, Emperor Hadrian reformed all natural Roman law by means of provincial edicts [4].

2. Literature review

The conducted literature review is presented in the form of a table listing researchers and the features of their understanding of the concept of Roman jurisprudence (Table 1).

The purpose of the current study is to determine the influence of religious factors on the formation of legal institutions in ancient Rome.

Table 1. Literature review.

Researchers	Features of the concept
Harold Berman [5]	Law and religion have certain elements in common, namely, ritual, tradition, authority, and universality.
Giambattista Vico [4]	The casuistry of the heroic times of ancient Rome, which preserved the literal meaning of legislative formulas, does not disappear in the development of statehood but changes into the formalism of lawyers, rational jurisprudence.
Rudolf von Jhering (Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung) [3]	The spirit of the times and the spirit of nations is also the spirit of law. The Roman spirit relegated religion to the degree of a means to an end: in the Roman state, it was not a mistress but a servant.
Aleksei Fedorovich Losev [6]	The Roman social idea is impersonal, formalized, schematic, and rationalistic. The grandiose and worldwide-historical phenomenon of Roman law confirms this characteristic of the Roman sense of social life.
Theodor Mommsen [7]	The real life of the Romans is best inscribed in the area of law, and the ideal, spiritual life - in the area of religious beliefs. It is by studying these aspects of life that one can best understand the historical development of a people.
Iosif Alekseevich Pokrovsky [8]	Roman law occupies a very special place in the history of mankind: it has outlived the people who created it and twice conquered the world.

3. Methods

The paper applies the principle of determinism. The genesis of the political and legal institutions of ancient Rome is considered in their cause-effect relationship with political, social and religious factors. The multicomponent nature of the research subject, as well as the specifics of its scientific problems, determine the work's interdisciplinarity. The study was based on an interdisciplinary approach and a database of materials, consisting of classic works by legal historians F.C. von Savigny, R. von Jhering, and I.A. Pokrovsky [3, 8-11], as well as modern scientific research in the fields of Philosophy, History, Political science, Religious studies, and Sociology, selected from the Scopus and Web of Science citation databases [12-17]. The combination of classical and modern studies as a theoretical basis for the work allowed us to consider both traditional debatable provisions and current assessments of the state and law of Ancient Rome.

The method of state-legal modelling, as well as functional, psychological, and political-legal methods, help reveal the issues of rationalization of the legal consciousness of the Romans, to determine the significance and place of jurisprudence and law in the Roman state in view of the spread of the power of the Roman public authority.

The study of the separation of Roman law into a special sphere that does not coincide with religion is built based on formal-legal, systemic-structural, functional, and psychological methods. The spirit of Roman law is refracted in the most intelligent and refined legal texts of different eras, the understanding of which is possible through interpretation, as well as historical-legal, comparative-legal and structural-normative analysis.

4. Results

4.1. Roman jurisprudence and religious syncretism

Rome conquered the world by jurisprudence, its law, and legislation, and not only by force and diplomacy. As noted by Montesquieu: “Rome was created to be exalted, and for this purpose its laws were excellent” [11].

The genesis of jurisprudence strongly testifies to the rise of Rome on the stage of world history through its law, which absorbed the ideas and images of different cultures. What was needed was a global, universal law, flexible and individual, which, on the one hand, gave clarity and solidity to its concepts, and on the other, “could equally satisfy the Roman and the Greek, the Egyptian and the Gaul” [8, p. 4].

Rome adopted from Greece, together with the myth of origins, the whole motley set of mysteries, only renaming its gods and heroes to include them in its own pantheon. From the cults and mysteries grew Roman religiosity itself. The sacred occupied such a vast sphere of life that it dictated its principles to the state, everyday life, and jurisprudence.

The peculiarity of Roman consciousness was that already at an early stage of its formation, it demonstrated an opposition of *fas* (i.e. a religious principle that has taken the form of law) and *jus* (human establishment, conventional law). The former relied on the will of the gods and remained unchanged, the latter was modifiable and quite capable of evolving. This dualism based on the analytical abilities of the Latin mind made it possible to maintain parity between the religious and political spheres of Roman society for a long time [16, 17]. For the Romans, political union without religious unity was inconceivable. The gods became gods of the state; their influence did not reach beyond its borders and expanded with them.

Roman religion was essentially a mystery religion, and its syncretism, especially in the later periods of Rome’s existence, certainly testified to this. Gods from around the known world came together in the temples of the City. The insistence on union with the deity was equally evident in the rituals of Isis,

Serapis, Mithras, etc., as in the notions of the divinity of the Caesars borrowed from the theocratic regimes of the East. The cult and politics merged, with politicians acting as judges and experts and senators - as defenders of religious orders and values.

A whole system of regimentation and ritual procedures was built around the cults of the main gods - *Jus sacrum*, a body of legal principles and institutions designed to ensure a state of public priesthood and sacred order. In the mind of ancient man, the concepts of holiness and defilement were not yet separate from each other. Individuals endowed with these qualities were in danger and dangerous themselves. This danger was spiritual and imaginary, but no less real. The purpose of the rationing taboo, therefore, was to isolate such persons from the outside world [18].

Eastern cults and Greek philosophy were a special symbiosis that gave Roman religiosity its unique characteristics. The fact that religion here was merged with politics and divine laws were equated with state laws only strengthened the impact of exotic cults on the formation of Roman statehood and jurisprudence.

4.2. Roman jurisprudence - the sacred space of power

In ancient Roman law, as in Egyptian law, the symbol of property and power was the spear. The idea that 'taking' was the true beginning of any legal dominion supported its various institutions from property law to family law. Power and force were the real foundations of ancient law and the identification of Law with the supreme power that was the function of the deity (Zeus, Jupiter, Mars, etc.) seemed quite justified. Then the transfer of this function and quality to the ruler remained only a technical problem. The very faceless 'power' could be attributed both to an imperial person and to the state as a whole. The increase in power that accompanied the growth of the state gave increasing importance to the very concept of the state, and the real contrast between the statuses of 'a lord and a slave' clearly demonstrated this tendency. The involvement of Eastern theocratic ideas and practices in the situation further exacerbated it. The notions of omnipotence, supported by the very mass consciousness without any special initiative from above, were soon extended to the sphere of both religious and political power. Emperors acquired at once both the status of 'divinity' and that of 'majesty' or 'power'.

By analogy with religion, law is commonly ascribed four of the most common elements that appear at all stages of its existence:

- ritual - symbolizing the objectivity of law in the form of a ceremonial procedure;
- tradition - language and customs borrowed from the past, indicating the continuity of law;

- universality - the universality or claim to embody the true concepts and meanings, which indicates the symbolic connection of law with comprehensive truth;
- authority - or reliance on oral and written sources considered credible - symbolizes the binding force of law [5].

Born of Roman law, authority was reduced to a sense of something immutable and conservative, preserving the connection of things between generations, the legal basis of people's lives. Here authority serves the function of the apparent legitimization of power:

- *potestas* - power, might, transient authority, which simply and bluntly imposes itself, belongs to the people, where the poor and the plebeians constitute an amorphous majority;
- *auctoritas* - authority, personal power, belongs to the Senate, the bearer of a lasting tradition.

A government is legitimate if it is established in accordance with the existing order of its purpose.

Instead of the idea of goodness, the religion of Rome created a kind of abstract idea of Fortune, which eclipsed but failed to organically unite the deified virtues. The subject of veneration became the 'genius of the emperor'. This, however, was not yet the final deification of a living person in the Eastern manner, because at that time, Romans worshiped not the emperor himself, but only his genius: "Rome was so imbued with the spirit of jurisprudence, with its subtle definitions and distances, that this difference, for all its subtlety, was understandable to it" [19].

The genius of the emperor took the place of the genius of the Roman people. There occurred the long-awaited centralization of rather speculative deified virtues, which finally found their tangible bearer. Fortune retreated into the shadows. The new deified being was now etymologically linked to the old gods by the double name 'Mercury-Augustus': the idea of a god-man, all-powerful and immortal, was born. Accordingly, his connection with his heavenly father was also revealed: essentially Hellenistic transcendence and substance were shortly incorporated into Roman religion. Roman legal thinking actively resisted this, but, being separated from the secular, the spiritual power, institutionalized in the pontificate and the augurs, it still implicitly maintained the tendency toward the expected new unification, realizing it precisely in the form of the 'genius of the emperor' and thus finding a much-needed synthesis for the now permanently deified power.

The mystical 'solar power of invincibility and glory', penetrating the leader and ruler, makes him more than just a man. The cult of the superhuman is thereby born. Accordingly, the empire he leads also acquires the status of a 'sacred empire' - an entity sustained by a transcendent power and acting as a visible manifestation of that power. Caesar now believes in something more than the capabilities of the mere human person. He believes not in external deification or Syrian-Semitic 'saviours' but in the mystical, mysterious power of fate and

victory - the fatalism of a higher and immanent character that conceals its original power. It was in the function of the 'Regnum' principle that the idea of the eternity of the Roman Empire was born. It was the metaphysical idea of bestowing eternal life and dignity 'always and everywhere', endowing the political world with the fundamental quality of civilization - courageous spirituality [20].

5. Discussion

5.1. The rational spirit of Roman law

The ritualism of Roman jurisprudence made it almost indistinguishable from Roman religiosity. Pragmatism and the will to power permeated both spheres. Having long since lost its democratic and republican principles, the empire was forming a sacralised space of power. The only centralizing force within it was now the cult of the state or the cult of the emperor (which was one and the same). Together with it, the institutions of power, cult, and law acquired external, transcendent features. The mechanism of the power machine transformed the law into an instrument removed from life and violently applied to it, rationalized and dead.

The virtue of Roman religious and juridical rationalism gravitating toward institutionalization was that it made the priesthood an official position. The Roman spirit thereby reduced religion to a means to political ends, a transformation facilitated by the very dualism of the Roman way of life and law. The two supreme officials, two legal systems (*jus civile* and *jus gentium*), two types of public assemblies, constant checks and balances - this was the political system of Rome. Religious theocracy (the fusion of the deities of the East and the West) aggravated the situation even further. The formalism and fictions allowed in the cult (substitution of the object for a symbol) were quite consistent with the dual role of the priest, pontiff, augur, etc. [9, 15].

Greek religious thinking was free to turn a simple and natural contemplation of nature into a metaphysically profound cosmic view, and a simple moral or legal concept into a comprehensive humanitarian view. The Roman embodiment of abstract conceptions of divinity was too transparent for this: God was a spiritualized but earthly phenomenon and found its adequate image in that very phenomenon, so that "the walls and idols built by human hands could only distort and obscure such subtle spiritual conceptions" [7]. Roman worship needed neither numerous images nor luxurious dwellings for the gods (the laws of Numa, except for the ancient symbol of the two-faced Janus, recognized no other personified images and injunctions); the priests and pontiffs themselves gave religious acts a strict and laconic form of moral law.

Roman law firmly rejected all symbolism and its principles, requiring instead, above all, a precise and clear expression of the will. Accordingly, all allegories, and with them, all kinds of personification, were pretty early

excluded from Roman religion as well. Such rationalism gave rise to a certain optimism in both Roman religion and Roman law: the fear felt was not similar to that secret trembling before an all-powerful nature or a powerful deity, nor those hierophanies peculiar to pantheistic or monotheistic religions. Examples of this can be found in Roman reality, which “was nothing but a field of force, its ideal being a world of relations formally ordered in time (reverence for ancestors, ownership of pater familias, laws of succession, etc.) and space (roads, armies, proconsuls, boundary ramparts, etc.)” [21].

The religious component of law prevailed. Sacred law dictated its general principles in legal theory and judicial practice. The abstract norms extended the scope of the application of laws and the field of judicial law. A broad field opened up for their interpretation. The algorithm of deduction led thought from general principles to concrete cases. Traditional values and principles were concentrated within the boundaries of quiritian law, innovations, and methods of freer interpretation within the field of ‘the law of nations’. However, time went on and “to the same extent that the Roman nation, in dominating the various nations, likened them to itself, and at the same time lost its identity in this vast and uncertain mass, to the same extent Jus gentium as a law more appropriate to this new condition was to become as predominant as it really appears in Justinian law” [10, p. 336].

The external character of Roman law determined its corporeality (the notion of a person, in general, appears in the process of strengthening the realistic perception and substantiality of legal realities). Together with it, the idea of the legal person is born, simultaneously reinforcing the formal aspect of law. The magical formula was able to generate a real relation or subject. Nomination becomes the favourite method of jurisprudence; the naming of a thing gives birth to the thing itself. At the same time, an abundance of legal fiction appeared in the law, which was hardly distinguishable from reality at the level of formal logic.

Thus, two qualities are characteristic of Roman law - logical consistency and conservatism [3, p. 307]. The Romans had a peculiar habit of reconciling any inconvenient pattern with a practical need, for which purpose their line of thought resorted to fiction. Fiction as a projective imaginary is based on a frank paradox, a form in which “a performance is played out in the theatre of the worldview” [22], vividly expressing the confrontation between the seeming and the existing.

5.2. The formula of Roman law

The personified Law of the Greeks was also truly corporeal and, at the same time, distant from humans. The logic of the Law was the logic of myth, inaccessible to mortals. Mythical and semi-mythical (like Solon, Lycurgus) characters themselves were lawmakers and made laws through heroes and geniuses. The daughters of Zeus - Dike, who personified justice and law as well

as the judicial process, and Eunomia, who was the guarantor of lawfulness, good laws, and the rule of law - ensured the flow of life; the goddess Ponia disposed of punishment and retribution by enforcing sentences.

The Roman gods were less attentive to jurisprudence. The law turns here into a kind of 'general oath of the state', having previously passed through the stages and forms of individual law - obligation and binding contract [23].

The Roman interpretation of the law takes on overtly formalistic features. The strict rule of law was thought to be contained in the very laws, constitutions of princeps, plebiscites, senatum consularies, and explanations by jurists (a Latin expression: 'The law is that which we explain'). Whoever executed the formalities accurately achieved the desired result: "The language of the Roman gods was generally limited to the words 'yes' and 'no', at most - to the expression of the divine will in the casting of lots, which seems to have been of native Italian origin, while already from ancient times, but certainly only as a result of the influence exercised by the East, the more verbose Greek gods uttered entire dictums" [7].

For a long time, laconicism and aphorism remained distinctive features of Roman law, facilitating its reception into foreign systems and stimulating the processes of codification. At the same time, they also made the law rather impervious to philosophical speculation, thus preserving its primordial conservatism. The law remained primarily a formula that was open to interpretation and application but strictly preserved its original meaning. It is a priori nature needed no additional argumentation, which gave it a deliberately sacral character, all the more pronounced because the spheres of law and religiosity were virtually indistinguishable, interpenetrating one another.

The pontiffs, priests of the cult of Jupiter, interpreted laws, giving them an actualized form, so the real power of the law resided not in the law itself, but in the external expression that the interpreters gave it. The very procedure for using the law changed: the legitimation process of literal application was replaced by the formulaic process, which allowed for a fairly free interpretation of the content of the law, although not beyond the formula. Finally, an extraordinary process was entirely at the mercy of the interpreting praetor.

Ordinary jurisprudence gave way to interpretive jurisprudence and judicial law, keeping the traditional principles intact:

- "He who has the right to interpret the law has the right to make it" (Celsus, P. 1, 14, 12, 3 (529));
- "In an obscure case, what is more plausible or usual should be taken into account" (Paulus, D. 50, 17, 114).

The subjectivism of Roman jurisprudence, produced by the features of the theological thinking of the Latins, proved to be a self-sufficient factor, permeating the whole legal life of Rome over the centuries: "There is no point in examining the foundations of the rules in force, otherwise much of what is stable hitherto will be overthrown" (Nerva, D. 1, 3, 21). Conservatism guaranteed the stability of the order, while formalism guaranteed its precision and articulation.

6. Conclusions

The Roman juridical world is predominantly a world of abstract maxims and rules, a majestic cruel machine. It is a power that destroys or subjugates everything. The fusion of formalism, systematization, regulation and subtle casuistry in Roman jurisprudence awakened the inhuman powers of reason, allowing all life to be scrupulously written down in schemes and equations [6, p 15].

In the Roman world, law was not a belief, an opinion, or a knowledge, but, above all, a will. Only the will could give law what its essence rested on - validity. Jurisprudence has outlived Rome and its creators, becoming one of the most popular and prestigious fields of human endeavor.

The Roman cultural-historical type was most grandiosely and distinctively reflected in state-legal relations. "Loyalty to the principles of the national state system made Rome relatively the most powerful political body that has ever existed" [24]. Domination operates when the power possesses corporality, which determines the reorganization of the matter of life. There is no potential power; it is always effective, even if it has not yet manifested itself. Persistent, tangible, and inexorable Law is the personification of such power in Roman civilization. The spirit of Roman law also carried irrational, sacred beginnings. However, even the mythologized and religious were clothed in a rational form, integrating into the architecture of abstract and timeless rules and norms.

Jurisprudence outlived Rome and its creators, becoming one of the most popular and prestigious areas of human activity. Today, citing R. von Jhering, we argue that the task of jurisprudence in the 21st century is "to follow the path of Roman law without stopping on it" [9, p. 573].

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