

A Critical Review of Peter Stein's *Roman Law in European History*

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In many ways, Peter Stein's *Roman Law in European History* is a story about path-dependence, or about how the "legal notions worked out by the Romans have usually survived, in a recognizable form, all the current changes imposed on them by those seeking to adapt them for current needs" (Stein 2010: 130). While Stein's objective is not to offer an explanatory theory of the Roman law's resilience, his historical narrative outlines several mechanisms that prompted Europeans to consistently recognize the benefits of relying upon Roman law. This review derives three such path-dependent mechanisms and concludes with a brief critical appraisal of Stein's work.

I: Professors: An Enduring Constituency of Consumers and Authors

A student of the common law would be struck by the degree to which Stein's historiography probes deeply the academic debates concerning Roman law and its constitutive elements. Indeed, legal scholars emerge as an enduring constituency of consumers and authors of Roman law, and it would not be far-fetched to posit that their counterfactual absence would have spelled its demise.

The prominent role of academics in the Roman law's development begins in the first two centuries of the Roman Empire, through 200AD. This period "marked the high point of European legal development [...] and the period is known as the classical period of Roman law" (ibid: 15-16). The agents responsible for elevating Roman law to "its most sophisticated and refined form" were the jurists, "both those in the imperial service and those conducting a private practice" (ibid). Jurists focused primarily on private law – on family law and property law – and it is for this reason that religious and public law were "factored out" of Roman law, a development of substantial consequence as it is precisely in the domain of private law that Roman law gained the greatest authority throughout European history (ibid: 13). The jurists of the classical period enjoyed complete academic freedom, and it was through disputes between the Proculians, who favored the strict interpretation of the texts, and the Sabinians, who were

more concerned with finding equitable resolutions to disputes, that the classical law developed (ibid: 17). The jurist Gaius, who was relatively unknown during his lifetime, constructed a student's manual on Roman law, known as the Institutes, where he divided Roman law into three parts – laws relating to persons, things, and actions (ibid: 19). This framework became exceptionally influential and would continue to structure the civil law's development into 16th and 17th centuries (ibid). Papinian, Paul, and Ulpian, each holding the high office of praetorian prefect, were considered the three most distinguished jurists of the classical period, and their analyses and commentaries also had lasting influence (ibid: 21). Indeed, the Law of Citations promulgated in 426AD by Theodosius II and Valentinian III (the emperors of the eastern and western empire, respectively) elevated all three jurists, along with Gaius, to the “status of primary authorities” whose works had the force of law (ibid: 28). And though the subsequent drafting of the *Corpus Juris Civilis* under Justinian I is often taken as a symbol of the importance of legislation for the civil law's development, the most important part of Justinian's code was the Digest – a series of concatenated excerpts of the writings of Rome's most famous jurists. Indeed, “over one-third of the Digest being taken from Ulpian and a sixth from Paul,” and Justinian aimed for it to be supplemented “by a new Institutes, based on Gaius's Institutes of nearly four centuries earlier” (ibid: 33; 35).

Where jurists constructed Roman law during the classical period, so too it was jurists who rediscovered Justinian's code in the 11th and 12th centuries following the revitalization of legal studies in Italian city-states. At the newly-founded University of Bologna, Bassianus and his pupil, Azo, sought to dialectically harmonize apparent contradictions in the code via elaborate glosses, or commentaries, a craft that their students perfected and earned them the title of glossators (ibid: 48-49). Indeed, “the authority of the Gloss is the origin of the idea, still characteristic of the continental civil law, that authoritative academic comment on a legal text is itself an authentic source of law” (ibid: 49). In the 14th and 15th centuries, the jurist Bartolus rose to prominence by demonstrating how, by extending the logic behind the Justinian code, one could “produce a set of new rules, which could claim to enjoy the authority of imperial law” (ibid: 73). His pupils came to be known as the commentators, and jurists were agreed that *nemo jurista nisi Bartolista* – “no one could be a lawyer who was not a Barolist” (ibid: 73). By the early 16th century scholars at Pavia had established their own humanist approach, which became particularly influential in France at Bourges. By highlighting the poor grammatical form and

mutilated Latin contained in the commentaries of the Digest, they sought to shed the Justinian code of the blemishes appended to it by subsequent generations of legal scholars. Yet as they returned to the classical roots of Roman law, they stressed “the connection between Roman law and ancient Roman society [...] in effect challenging the claims of the Roman civil law to universal validity” (ibid: 79).

The humanists became particularly influential with the rise of the modern state, as sovereigns sought legal justifications for incorporating customary law within Roman law (Ibid: 83). The *avant garde* in this respect were the Dutch professors, including Hugo Grotius, “who most intensively developed a national law [...] that was called Roman Dutch law, since it was based partly on Roman and partly on Dutch sources” (ibid: 104; 98). The humanists also pioneered the influential approach of treating law as rationally derivable from human nature, and of its study as an extension of science, particularly mathematics and logic (ibid: 79). The distinctive trait of deductively and logically proceeding from the general to the particular achieved its most significant expression in German legal science. Beginning in the early 18th century, the German scholars Christian Thomasius and Christian Wolff developed a jurisprudence where “natural law became even more abstract, a series of logical deductions from the rational and social nature of man” (ibid: 110). Despite the opposition of Karl von Savigny and the historical school which he founded, which held that “[law] was not [...] purely a construct of reason [...] but a product of the tradition and the ethos of a particular society,” the influence of the natural law scholars and their legal science was evident in the 1896 German Civil Code (ibid: 123). The code was divided into three sections, beginning with the General Part, and subsequently moved “from the general to the particular” (ibid). These intellectual rendered German universities the home of the civil law’s 19th century development, as “students flocked to the great German law faculties in the way they had gone to Italy in the twelfth century, France in the sixteenth century, and the Netherlands in the seventeenth” (ibid).

II: A Superior Conceptual and Procedural Framework

Another source of Roman law’s path dependence lies in the superior conceptual framework that it supplied. Indeed, Gaius’ Institutes achieved influence only once the need for a “systematic order” became necessary, namely with the decline of the Roman Empire and the end of the classical period of Roman law: “The Institutes and its author gained greatly in prestige in the

post-classical period. What lawyers of the time wanted were rules of thumb, which they could apply without bothering about their rationale” (ibid: 21; 27). During the same period the Catholic Church was gaining in influence, and it began to develop its own legal system. While substantively canon law relied on “resolutions of Church councils, the Bible and papal decisions, known as decretals,” conceptually the canon law was organized based on “Roman secular law, from which the Church lawyers derived their basic categories” (ibid: 30). Indeed, it was the Church which became the “custodian of the Roman legal tradition” in the Dark Ages (ibid: 40).

The Justinian code would come to supply a similar conceptual framework for the development of the civil law following its rediscovery. Principles contained in the *Corpus* – the maxim that *quod omnes tangit debet ab omnibus approbari* (“what touches all should be approved by all”); that “what pleases the prince has the force of law;” that *non exemplis sed legibus iudicandum* (“judges should interpret the law and not just follow precedent”) – came to have substantial influence in political debates from the Middle Ages through the modern era (ibid: 51; 66). A discernable *modus operandi* emerged: “Bishops and secular princes alike looked for men who could deploy arguments, based on principles which were objective and rational and had a universal authority. Only the Roman texts could provide such principles” (ibid: 53). Indeed, Stein concludes that “[w]hat the civil law supplied was a conceptual framework, a set of principles of interpretation that constituted a kind of universal grammar of law, to which recourse could be made whenever it was needed” (ibid: 61). Strikingly, this reliance on the concepts of Roman law was equally important for the development of English common law. In the 1230s, the customs and laws of England were recorded in what was known as the “Bracton,” and although substantively it differed from Roman law, its organization borrowed heavily from it: “The author of Bracton understood that if the laws of the king’s court were to be set out in a manner approaching coherence, he would need a structure of general notions, which were articulated only in Roman law [...] His treatise equipped the nascent common law with the minimum theoretical structure that it needed to grow in a coherent way” (ibid: 64).

Four centuries later across the English Channel, even the humanists of Bourges, whose jurisprudence made it acceptable to criticize the Justinian code, “recognized that, for rational and equitable solutions to many perennial legal problems, the work of the classical Roman jurists was unrivalled” (ibid: 79). Indeed, for the areas of France and Germany governed by amorphous customs, the written framework of Roman law, and particularly its Romano-canonical procedure,

proved more desirable, “[for] in certain types of case litigants preferred professional judges and written procedure to lay judges and oral procedure” (ibid: 89). Yet it was not just litigants that recognized this fact. Indeed, the organizational superiority and the efficient rules of civil procedure that the Roman law supplied also “offered the means of establishing a bureaucratic state, by which princes could counter the independence of over-mighty feudal lords” (ibid: 91). While subsequently Roman law was manifestly rejected in favor of statist civil codes constructed to capture the character of the nation, its conceptual relevance remained, as “certain ideas of Roman law could be brought back under the guise of natural law” (ibid: 113).

III: Cultural Embeddedness and Modularity

A final mechanism explicating the resilience of Roman law lies in its treatment as a constitutive element of European culture, one shared most widely amongst elites, which served to socially entrench the civil law across the continent. In 800AD, the Frankish king Charlemagne and Pope Leo III sought to exploit “the mystical memory of Rome and her universal empire” via a coronation ceremony in Rome: “The Roman crowd acclaimed Charlemagne as ‘crowned by God’ and he could thus call his empire both ‘Holy’ and ‘Roman’” (ibid: 42). This symbolized the beginnings of an emerging sense of “Europe as a Christian entity,” juridically integrated via both canon law and Roman law (ibid: 43). With the rise of the Italian universities and the scholars they produced, the legal faculties of all European jurisdictions were comprised of jurists trained in Roman law (and often both Roman and canon law). “Such lawyers,” Stein writes, “came to share a common legal culture, based on the same texts, expounded in the same language, Latin” (ibid: 57). What emerges is a portrait of a Europe which, despite the balkanization of sovereign power following the collapse of the Roman Empire, remained united via the spiritual, juridical, and linguistic bundle of canon law, Roman law, and Latin, whose disciplinary study was “shared by those who occupied positions of authority, both law and ecclesiastical” (ibid: 66).

The cultural embeddedness of Roman law also endowed it with greater authority, facilitating its reception and diffusion. As such, Roman law constituted more than a juristic framework; it was a “‘mind-set’, which formed the basis for political and legal thought throughout Europe” (ibid: 67). Hence some of Europe’s most prominent political philosophers readily incorporated principles of Roman law. St. Thomas Aquinas’s *Summa Theologica*, for example, derives its definition of justice – “the constant and perpetual will to attribute to each his

due” – from Ulpian’s writings (ibid). When Dante wrote his immensely influential *Divina Commedia*, he included Justinian as a sacred figure in paradise, and elsewhere he associated the *Corpus Juris Civilis* “with Reason itself” (ibid). Thus knowledge of Roman law became part of a “general educated discourse, even among non-lawyers” (ibid). Even in the 19th century Karl von Savigny argued that Roman law “could no more be considered an exclusive possession than could religion or literature” – rather, it was part of a cultural heritage that should transcend the rise of the modern nation state (ibid: 117).

Yet it would be a mistake to conclude that Roman law’s cultural embeddedness was dependent upon the existence of universal values or its association with Latin and the Catholic Church. Roman law exhibited impressive modularity – an ability to fuse with local knowledge even where it vastly differed from the culture promoted by the Vatican. Hence by the 17th century Roman law was received even in Protestant northern Europe, and in Germany efforts were made to popularize its tenets via short summaries, aphorisms, and verses written in the vernacular (ibid: 101). Later with the 19th century rise of the bourgeoisie and the correlative displacement of religious values for secular materialism, it was Roman law’s central focus on property that allowed it to express the “materialist values of a bourgeois society” (ibid: 120). The cotemporaneous rise of liberalism and its constitutive emphasis on individual rights and economic freedom similarly found a voice in Roman law. The critics of liberal thought recognized this, proceeding to cast Roman law as “a highly individualist law [that] encouraged freedom of contract without any recognition of the inequality of bargaining power” (ibid: 122). Yet what is significant here is that this critique applies not to Roman law *in vacuo*, but only to Roman law when contextualized within a broader sociocultural shift which Henry Sumner Maine characterized as the movement of progressive societies “from Status to Contract” (ibid: 127).

IV: A Critical Appraisal

It would be wholly inappropriate on my part to evaluate the substance of Peter Stein’s audacious historical narrative, for he undoubtedly possesses unrivaled knowledge of the history of Roman law. A more appropriate and fertile way forward is to draw attention to what Stein fails to cover. In particular, his book provides little, if any, discussion of the place for Roman law and its study in the 20th century. Indeed, his summary of 20th century developments constitutes just three pages (pgs. 128-130). Thus the effect of World War I and World War II on the civil law is not

discussed, nor is the development of modern international law, which borrows substantially from Roman conceptions of natural law and the law of nations.

Relatedly, Stein's brief mention of the emergence of the European Community with which he concludes his work is problematic. In particular, he cautions that "the difference, which is sometimes overlooked," between the *jus commune* and EU law is that "the medieval *ius commune* was adopted throughout Europe voluntarily, whereas the new *ius commune*, such as, for example, the rules of product liability, is imposed from above in the interest of uniformity" (ibid: 130). This distinction is I think an artificial one: there is no EU army that can enforce compliance with EU law, nor can the European Court of Justice force domestic tribunals to refer cases to it and to comply with its preliminary rulings. The word "reception" is therefore appropriate for describing the entrenchment of both the *jus commune* and EU law. A greater distinction may be that European law is being voluntarily enforced in domestic jurisdictions because it serves the economic interests of member state governments, import-export companies, and multinational corporations, and hence references to European law have less to do with their domestic cultural entrenchment and more to do with instrumental economic behavior. Yet even this distinction is contestable, as Stein highlights that some scholars, such as 19th century German academic Rudolf von Jhering, held that "Roman law [...] was based not on moral principle, as the natural lawyers maintained, but on economic necessity" (ibid: 121). Stein himself notes that the Enlightenment's codification movement, in which Roman civil law "was caught up," was strongly endorsed by "mercantilist thinkers who argued that commerce was impeded by the diversity of laws and would benefit from a uniform law" (ibid: 110). This statement strikingly captures the functionalist rationale outlined by the European Court of Justice in its teleological interpretation and construction of European law (ibid: 110).

The foregoing discussion reveals yet another point that could have used further elaboration: the extent to which the legal scholars involved in the construction of a modern European legal state have turned to Roman law and the *jus commune* for reference or inspiration. Perhaps it is not Stein's purpose the focus on such contemporary developments; nevertheless, this endeavor would seem an appropriate and fertile extension of his magisterial historical work.