

## Chapter XLIV: Idea Of The Roman Jurisprudence.--Part I.

Idea Of The Roman Jurisprudence.--The Laws Of The Kings--The Twelve Of The Decemvirs.--The Laws Of The People.--The Decrees Of The Senate.--The Edicts Of The Magistrates And Emperors--Authority Of The Civilians.--Code, Pandects, Novels, And Institutes Of Justinian:--I. Rights Of Persons.--II. Rights Of Things.--III. Private Injuries And Actions.--IV. Crimes And Punishments.

Note: In the notes to this important chapter, which is received as the text-book on Civil Law in some of the foreign universities, I have consulted,

I. the newly-discovered Institutes of Gaius, (Gaii Institutiones, ed. Goeschen, Berlin, 1824,) with some other fragments of the Roman law, (Codicis Theodosiani Fragmenta inedita, ab Amadeo Peyron. Turin, 1824.)

II. The History of the Roman Law, by Professor Hugo, in the French translation of M. Jourdan. Paris, 1825.

III. Savigny, Geschichte des Romischen Rechts im Mittelalter, 6 bande, Heidelberg, 1815.

IV. Walther, Romische Rechts-Geschichte, Bonn. 1834. But I am particularly indebted to an edition of the French translation of this

chapter, with additional notes, by one of the most learned civilians of Europe, Professor Warnkonig, published at Liege, 1821. I have inserted almost the whole of these notes, which are distinguished by the letter W.--M. The vain titles of the victories of Justinian are crumbled into dust; but the name of the legislator is inscribed on a fair and everlasting monument. Under his reign, and by his care, the civil jurisprudence was digested in the immortal works of the Code, the Pandects, and the Institutes: [1] the public reason of the Romans has been silently or studiously transfused into the domestic institutions of Europe, [2], and the laws of Justinian still command the respect or obedience of independent nations. Wise or fortunate is the prince who connects his own reputation with the honor or interest of a perpetual order of men. The defence of their founder is the first cause, which in every age has exercised the zeal and industry of the civilians. They piously commemorate his virtues; dissemble or deny his failings; and fiercely chastise the guilt or folly of the rebels, who presume to sully the majesty of the purple. The idolatry of love has provoked, as it usually happens, the rancor of opposition; the character of Justinian has been exposed to the blind vehemence of flattery and invective; and the injustice of a sect (the Anti-Tribonians,) has refused all praise and merit to the prince, his ministers, and his laws. [3] Attached to no party, interested only for the truth and candor of history, and directed by the most temperate and skilful guides, [4] I enter with just diffidence on the subject of civil law, which has exhausted so many learned lives, and clothed the walls of such spacious libraries. In a single, if possible in a short, chapter, I shall trace the Roman

jurisprudence from Romulus to Justinian, [5] appreciate the labors of that emperor, and pause to contemplate the principles of a science so important to the peace and happiness of society. The laws of a nation form the most instructive portion of its history; and although I have devoted myself to write the annals of a declining monarchy, I shall embrace the occasion to breathe the pure and invigorating air of the republic.

[Footnote 1: The civilians of the darker ages have established an absurd and incomprehensible mode of quotation, which is supported by authority and custom. In their references to the Code, the Pandects, and the Institutes, they mention the number, not of the book, but only of the law; and content themselves with reciting the first words of the title to which it belongs; and of these titles there are more than a thousand. Ludewig (Vit. Justiniani, p. 268) wishes to shake off this pendant yoke; and I have dared to adopt the simple and rational method of numbering the book, the title, and the law. Note: The example of Gibbon has been followed by M Hugo and other civilians.--M]

[Footnote 2: Germany, Bohemia, Hungary, Poland, and Scotland, have received them as common law or reason; in France, Italy, &c., they possess a direct or indirect influence; and they were respected in England, from Stephen to Edward I. our national Justinian, (Duck. de Usu et Auctoritate Juris Civilis, l. ii. c. 1, 8--15. Heineccius, Hist. Juris Germanici, c. 3, 4, No. 55-124, and the legal historians of each country.) \* Note: Although the restoration of the Roman law, introduced

by the revival of this study in Italy, is one of the most important branches of history, it had been treated but imperfectly when Gibbon wrote his work. That of Arthur Duck is but an insignificant performance. But the researches of the learned have thrown much light upon the matter. The Sarti, the Tiraboschi, the Fantuzzi, the Savioli, had made some very interesting inquiries; but it was reserved for M. de Savigny, in a work entitled "The History of the Roman Law during the Middle Ages," to cast the strongest light on this part of history. He demonstrates incontestably the preservation of the Roman law from Justinian to the time of the Glossators, who by their indefatigable zeal, propagated the study of the Roman jurisprudence in all the countries of Europe. It is much to be desired that the author should continue this interesting work, and that the learned should engage in the inquiry in what manner the Roman law introduced itself into their respective countries, and the authority which it progressively acquired. For Belgium, there exists, on this subject, (proposed by the Academy of Brussels in 1781,) a Collection of Memoirs, printed at Brussels in 4to., 1783, among which should be distinguished those of M. de Berg. M. Berriat Saint Prix has given us hopes of the speedy appearance of a work in which he will discuss this question, especially in relation to France. M. Spangenberg, in his Introduction to the Study of the Corpus Juris Civilis Hanover, 1817, 1 vol. 8vo. p. 86, 116, gives us a general sketch of the history of the Roman law in different parts of Europe. We cannot avoid mentioning an elementary work by M. Hugo, in which he treats of the History of the Roman Law from Justinian to the present Time, 2d edit. Berlin 1818 W.]

[Footnote 3: Francis Hottoman, a learned and acute lawyer of the xvith century, wished to mortify Cujacius, and to please the Chancellor de l'Hopital. His Anti-Tribonianus (which I have never been able to procure) was published in French in 1609; and his sect was propagated in Germany, (Heineccius, Op. tom. iii. sylloge iii. p. 171--183.) \* Note: Though there have always been many detractors of the Roman law, no sect of Anti-Tribonians has ever existed under that name, as Gibbon seems to suppose.--W.]

[Footnote 4: At the head of these guides I shall respectfully place the learned and perspicuous Heineccius, a German professor, who died at Halle in the year 1741, (see his Eloge in the Nouvelle Bibliotheque Germanique, tom. ii. p. 51--64.) His ample works have been collected in eight volumes in 4to. Geneva, 1743-1748. The treatises which I have separately used are, 1. Historia Juris Romani et Germanici, Lugd. Batav. 1740, in 8 vo. 2. Syntagma Antiquitatum Romanam Jurisprudenciam illustrantium, 2 vols. in 8 vo. Traject. ad Rhenum. 3. Elementa Juris Civilis secundum Ordinem Institutionum, Lugd. Bat. 1751, in 8 vo. 4. Elementa J. C. secundum Ordinem Pandectarum Traject. 1772, in 8vo. 2 vols. \* Note: Our author, who was not a lawyer, was necessarily obliged to content himself with following the opinions of those writers who were then of the greatest authority; but as Heineccius, notwithstanding his high reputation for the study of the Roman law, knew nothing of the subject on which he treated, but what he had learned from the compilations of various authors, it happened that, in following the

sometimes rash opinions of these guides, Gibbon has fallen into many errors, which we shall endeavor in succession to correct. The work of Bach on the History of the Roman Jurisprudence, with which Gibbon was not acquainted, is far superior to that of Heineccius and since that time we have new obligations to the modern historic civilians, whose indefatigable researches have greatly enlarged the sphere of our knowledge in this important branch of history. We want a pen like that of Gibbon to give to the more accurate notions which we have acquired since his time, the brilliancy, the vigor, and the animation which Gibbon has bestowed on the opinions of Heineccius and his contemporaries.--W]

[Footnote 5: Our original text is a fragment de Origine Juris (Pandect. l. i. tit. ii.) of Pomponius, a Roman lawyer, who lived under the Antonines, (Heinecc. tom. iii. syl. iii. p. 66--126.) It has been abridged, and probably corrupted, by Tribonian, and since restored by Bynkershoek (Opp. tom. i. p. 279--304.)]

The primitive government of Rome [6] was composed, with some political skill, of an elective king, a council of nobles, and a general assembly of the people. War and religion were administered by the supreme magistrate; and he alone proposed the laws, which were debated in the senate, and finally ratified or rejected by a majority of votes in the thirty curiae or parishes of the city. Romulus, Numa, and Servius Tullius, are celebrated as the most ancient legislators; and each of them claims his peculiar part in the threefold division of

jurisprudence. [7] The laws of marriage, the education of children, and the authority of parents, which may seem to draw their origin from nature itself, are ascribed to the untutored wisdom of Romulus. The law of nations and of religious worship, which Numa introduced, was derived from his nocturnal converse with the nymph Egeria. The civil law is attributed to the experience of Servius: he balanced the rights and fortunes of the seven classes of citizens; and guarded, by fifty new regulations, the observance of contracts and the punishment of crimes. The state, which he had inclined towards a democracy, was changed by the last Tarquin into a lawless despotism; and when the kingly office was abolished, the patricians engrossed the benefits of freedom. The royal laws became odious or obsolete; the mysterious deposit was silently preserved by the priests and nobles; and at the end of sixty years, the citizens of Rome still complained that they were ruled by the arbitrary sentence of the magistrates. Yet the positive institutions of the kings had blended themselves with the public and private manners of the city, some fragments of that venerable jurisprudence [8] were compiled by the diligence of antiquarians, [9] and above twenty texts still speak the rudeness of the Pelasgic idiom of the Latins. [10]

[Footnote 6: The constitutional history of the kings of Rome may be studied in the first book of Livy, and more copiously in Dionysius Halicarnassensis, (l. li. p. 80--96, 119--130, l. iv. p. 198--220,) who sometimes betrays the character of a rhetorician and a Greek. \* Note: M. Warnkonig refers to the work of Beaufort, on the Uncertainty of the Five First Ages of the Roman History, with which Gibbon was probably

acquainted, to Niebuhr, and to the less known volume of Wachsmuth, "Aeltere Geschichte des Rom. Staats." To these I would add A. W. Schlegel's Review of Niebuhr, and my friend Dr. Arnold's recently published volume, of which the chapter on the Law of the XII. Tables appears to me one of the most valuable, if not the most valuable, chapter.--M.]

[Footnote 7: This threefold division of the law was applied to the three Roman kings by Justus Lipsius, (Opp. tom. iv. p. 279;) is adopted by Gravina, (Origines Juris Civilis, p. 28, edit. Lips. 1737:) and is reluctantly admitted by Mascou, his German editor. \* Note: Whoever is acquainted with the real notions of the Romans on the jus naturale, gentium et civile, cannot but disapprove of this explanation which has no relation to them, and might be taken for a pleasantry. It is certainly unnecessary to increase the confusion which already prevails among modern writers on the true sense of these ideas. Hugo.--W]

[Footnote 8: The most ancient Code or Digest was styled Jus Papirianum, from the first compiler, Papirius, who flourished somewhat before or after the Regifugium, (Pandect. l. i. tit. ii.) The best judicial critics, even Bynkershoek (tom. i. p. 284, 285) and Heineccius, (Hist. J. C. R. l. i. c. 16, 17, and Opp. tom. iii. sylloge iv. p. 1--8,) give credit to this tale of Pomponius, without sufficiently advertng to the value and rarity of such a monument of the third century, of the illiterate city. I much suspect that the Caius Papirius, the Pontifex Maximus, who revived the laws of Numa (Dionys. Hal. l. iii. p. 171) left

only an oral tradition; and that the Jus Papirianum of Granius Flaccus (Pandect. l. L. tit. xvi. leg. 144) was not a commentary, but an original work, compiled in the time of Caesar, (Censorin. de Die Natali, l. iii. p. 13, Duker de Latinitate J. C. p. 154.) Note: Niebuhr considers the Jus Papirianum, adduced by Verrius Flaccus, to be of undoubted authenticity. Rom. Geschichte, l. 257.--M. Compare this with the work of M. Hugo.--W.]

[Footnote 9: A pompous, though feeble attempt to restore the original, is made in the Histoire de la Jurisprudence Romaine of Terasson, p. 22--72, Paris, 1750, in folio; a work of more promise than performance.]

[Footnote 10: In the year 1444, seven or eight tables of brass were dug up between Cortona and Gubio. A part of these (for the rest is Etruscan) represents the primitive state of the Pelasgic letters and language, which are ascribed by Herodotus to that district of Italy, (l. i. c. 56, 57, 58;) though this difficult passage may be explained of a Crestona in Thrace, (Notes de Larcher, tom. i. p. 256--261.) The savage dialect of the Eugubine tables has exercised, and may still elude, the divination of criticism; but the root is undoubtedly Latin, of the same age and character as the Saliare Carmen, which, in the time of Horace, none could understand. The Roman idiom, by an infusion of Doric and Aeolic Greek, was gradually ripened into the style of the xii. tables, of the Duillian column, of Ennius, of Terence, and of Cicero, (Gruter. Inscript. tom. i. p. cxlii. Scipion Maffei, Istoria Diplomatica, p. 241--258. Bibliothque Italique, tom. iii. p. 30--41, 174--205. tom.

xiv. p. 1--52.) \* Note: The Eugubine Tables have exercised the ingenuity of the Italian and German critics; it seems admitted (O. Muller, *die Etrusker*, ii. 313) that they are Tuscan. See the works of Lanzi, Passeri, Dempster, and O. Muller.--M]

I shall not repeat the well-known story of the Decemvirs, [11] who sullied by their actions the honor of inscribing on brass, or wood, or ivory, the Twelve Tables of the Roman laws. [12] They were dictated by the rigid and jealous spirit of an aristocracy, which had yielded with reluctance to the just demands of the people. But the substance of the Twelve Tables was adapted to the state of the city; and the Romans had emerged from Barbarism, since they were capable of studying and embracing the institutions of their more enlightened neighbors. [1211] A wise Ephesian was driven by envy from his native country: before he could reach the shores of Latium, he had observed the various forms of human nature and civil society: he imparted his knowledge to the legislators of Rome, and a statue was erected in the forum to the perpetual memory of Hermodorus. [13] The names and divisions of the copper money, the sole coin of the infant state, were of Dorian origin: [14] the harvests of Campania and Sicily relieved the wants of a people whose agriculture was often interrupted by war and faction; and since the trade was established, [15] the deputies who sailed from the Tyber might return from the same harbors with a more precious cargo of political wisdom. The colonies of Great Greece had transported and improved the arts of their mother country. Cumae and Rhegium, Crotona and Tarentum, Agrigentum and Syracuse, were in the rank of the most

flourishing cities. The disciples of Pythagoras applied philosophy to the use of government; the unwritten laws of Charondas accepted the aid of poetry and music, [16] and Zaleucus framed the republic of the Locrians, which stood without alteration above two hundred years. [17] From a similar motive of national pride, both Livy and Dionysius are willing to believe, that the deputies of Rome visited Athens under the wise and splendid administration of Pericles; and the laws of Solon were transfused into the twelve tables. If such an embassy had indeed been received from the Barbarians of Hesperia, the Roman name would have been familiar to the Greeks before the reign of Alexander; [18] and the faintest evidence would have been explored and celebrated by the curiosity of succeeding times. But the Athenian monuments are silent; nor will it seem credible that the patricians should undertake a long and perilous navigation to copy the purest model of democracy. In the comparison of the tables of Solon with those of the Decemvirs, some casual resemblance may be found; some rules which nature and reason have revealed to every society; some proofs of a common descent from Egypt or Phoenicia. [19] But in all the great lines of public and private jurisprudence, the legislators of Rome and Athens appear to be strangers or adverse at each other.

[Footnote 11: Compare Livy (l. iii. c. 31--59) with Dionysius Halicarnassensis, (l. x. p. 644--xi. p. 691.) How concise and animated is the Roman--how prolix and lifeless the Greek! Yet he has admirably judged the masters, and defined the rules, of historical composition.]

[Footnote 12: From the historians, Heineccius (Hist. J. R. 1. i. No. 26) maintains that the twelve tables were of brass--aereas; in the text of Pomponius we read eboreas; for which Scaliger has substituted roboreas, (Bynkershoek, p. 286.) Wood, brass, and ivory, might be successively employed. Note: Compare Niebuhr, vol. ii. p. 349, &c.--M.]

[Footnote 1211: Compare Niebuhr, 355, note 720.--M. It is a most important question whether the twelve tables in fact include laws imported from Greece. The negative opinion maintained by our author, is now almost universally adopted, particularly by Mm. Niebuhr, Hugo, and others. See my Institutiones Juris Romani privati Leodii, 1819, p. 311, 312.--W. Dr. Arnold, p. 255, seems to incline to the opposite opinion. Compare some just and sensible observations in the Appendix to Mr. Travers Twiss's Epitome of Niebuhr, p. 347, Oxford, 1836.--M.]

[Footnote 13: His exile is mentioned by Cicero, (Tusculan. Quaestion. v. 36; his statue by Pliny, (Hist. Nat. xxxiv. 11.) The letter, dream, and prophecy of Heraclitus, are alike spurious, (Epistolae Graec. Divers. p. 337.) \* Note: Compare Niebuhr, ii. 209.--M. See the Mem de l'Academ. des Inscript. xxii. p. 48. It would be difficult to disprove, that a certain Hermodorus had some share in framing the Laws of the Twelve Tables. Pomponius even says that this Hermodorus was the author of the last two tables. Pliny calls him the Interpreter of the Decemvirs, which may lead us to suppose that he labored with them in drawing up that law. But it is astonishing that in his Dissertation, (De Hermodoro vero XII. Tabularum Auctore, Annales Academiae Groninganae anni 1817, 1818,) M.

Gratama has ventured to advance two propositions entirely devoid of proof: "Decem priores tabulas ab ipsis Romanis non esse profectas, tota confirma Decemviratus Historia," et "Hermodorum legum decemviralium certi nominis auctorem esse, qui eas composuerit suis ordinibus, disposuerit, suaque fecerit auctoritate, ut a decemviris reciperentur." This truly was an age in which the Roman Patricians would allow their laws to be dictated by a foreign Exile! Mr. Gratama does not attempt to prove the authenticity of the supposititious letter of Heraclitus. He contents himself with expressing his astonishment that M. Bonamy (as well as Gibbon) will be receive it as genuine.--W.]

[Footnote 14: This intricate subject of the Sicilian and Roman money, is ably discussed by Dr. Bentley, (Dissertation on the Epistles of Phalaris, p. 427--479,) whose powers in this controversy were called forth by honor and resentment.]

[Footnote 15: The Romans, or their allies, sailed as far as the fair promontory of Africa, (Polyb. l. iii. p. 177, edit. Casaubon, in folio.) Their voyages to Cumae, &c., are noticed by Livy and Dionysius.]

[Footnote 16: This circumstance would alone prove the antiquity of Charondas, the legislator of Rhegium and Catana, who, by a strange error of Diodorus Siculus (tom. i. l. xii. p. 485--492) is celebrated long afterwards as the author of the policy of Thurium.]

[Footnote 17: Zaleucus, whose existence has been rashly attacked, had

the merit and glory of converting a band of outlaws (the Locrians) into the most virtuous and orderly of the Greek republics. (See two Memoirs of the Baron de St. Croix, sur la Legislation de la Grande Grece Mem. de l'Academie, tom. xlii. p. 276--333.) But the laws of Zaleucus and Charondas, which imposed on Diodorus and Stobaeus, are the spurious composition of a Pythagorean sophist, whose fraud has been detected by the critical sagacity of Bentley, p. 335--377.]

[Footnote 18: I seize the opportunity of tracing the progress of this national intercourse 1. Herodotus and Thucydides (A. U. C. 300--350) appear ignorant of the name and existence of Rome, (Joseph. contra Appion tom. ii. l. i. c. 12, p. 444, edit. Havercamp.) 2. Theopompus (A. U. C. 400, Plin. iii. 9) mentions the invasion of the Gauls, which is noticed in looser terms by Heraclides Ponticus, (Plutarch in Camillo, p. 292, edit. H. Stephan.) 3. The real or fabulous embassy of the Romans to Alexander (A. U. C. 430) is attested by Clitarchus, (Plin. iii. 9,) by Aristus and Asclepiades, (Arrian. 1. vii. p. 294, 295,) and by Memnon of Heraclea, (apud Photium, cod. ccxxiv. p. 725,) though tacitly denied by Livy. 4. Theophrastus (A. U. C. 440) primus externorum aliqua de Romanis diligentius scripsit, (Plin. iii. 9.) 5. Lycophron (A. U. C. 480--500) scattered the first seed of a Trojan colony and the fable of the Aeneid, (Cassandra, 1226--1280.) A bold prediction before the end of the first Punic war! \* Note: Compare Niebuhr throughout. Niebuhr has written a dissertation (Kleine Schriften, i. p. 438,) arguing from this prediction, and on the other conclusive grounds, that the Lycophron, the author of the Cassandra, is not the Alexandrian poet. He had been

anticipated in this sagacious criticism, as he afterwards discovered, by a writer of no less distinction than Charles James Fox.--Letters to Wakefield. And likewise by the author of the extraordinary translation of this poem, that most promising scholar, Lord Royston. See the Remains of Lord Royston, by the Rev. Henry Pepys, London, 1838.]

[Footnote 19: The tenth table, de modo sepulturae, was borrowed from Solon, (Cicero de Legibus, ii. 23--26:) the *furtem per lancem et licium conceptum*, is derived by Heineccius from the manners of Athens, (Antiquitat. Rom. tom. ii. p. 167--175.) The right of killing a nocturnal thief was declared by Moses, Solon, and the Decemvirs, (Exodus xxii. 3. Demosthenes contra Timocratem, tom. i. p. 736, edit. Reiske. Macrob. Saturnalia, l. i. c. 4. Collatio Legum Mosaicarum et Romanatum, tit, vii. No. i. p. 218, edit. Cannegieter.) \*Note: Are not the same points of similarity discovered in the legislation of all actions in the infancy of their civilization?--W.]