Law-Making and the Roman Jurists

By PROF. J. AQUILINA, B.A., LL.D., PH.D. (LOND.)

THE "Law Journal" published by the Students' Law Society bears on its cover the very significant motto *legum servi sumus ut liberi esse possimus*. The motto is very significant. It may be considered as the historical synthesis of Man's efforts to establish the very basis of personal freedom within an organised community regulated by a set of laws, which guarantee him such freedom at the price of a partial restriction of his own liberty of action within the same society.

The word *lex*, derives probably from the same root *licet*, because laws to be effective must be binding upon us all, and for this reason the infringement of a law carries with it, as an inevitable consequence, a more or less serious punishment. And yet, as the Latin quotation says, in spite of the restriction of action that is inherent in every law, we are the willing servants of the *lex*. We willingly accept the *command* of the law-giver, the *obligation* imposed thereby upon us, and the *sanction* that is incurred in the event of disobedience. We accept the yoke of the law because survival without it is impossible, because where there is no law there is what is known as "anarchy", a Greek word meaning "without ruler". This blind hatred of a ruler who lays down the law restricting absolute freedom whether in the name of social security or morality, has found a poetical exponent in that great visionary Percy Bysshe Shelley, whom Matthew Arnold has aptly described as "an ineffectual angel beating in the void his luminous wings in vain". Unfortunately, less angelical anarchists than Shelley may be met with even in our troubled times, men whose anarchy being purely theoretical or philosophical, are otherwise harmless and law-abiding, and others, the really dangerous because they are the anti-socials, who blow up bridges or the headquarters of constituted authority for no better reason than that they cannot tolerate the existence of a law with its inevitable commands and sanctions. However, humanity as a whole, excepting the anti-social element, which is a social pathological incidence like any other disease of a people or nation, is instinctively the willing servant of the law for the very fundamental reason that, the alternative to law being anarchy, the preservation of the species

would otherwise be threatened with annihilation. Therefore we can describe the genesis of the law as Man's first weapon of self-defence and self-preservation against the attacks upon him and upon his dependents and his belongings from inside or from outside the community. For this reason, the judicial concept implied in the word *law* must have come into being ever since Man organised his family and his tribe into a communal unit deriving its life and strength from its own co-operation and co-prosperity even at the risk of such personal disadvantages of individual freedom as were necessitated by the larger interest of the communal unit as a whole. Hence, anarchy, though it may have always been a concomitant reality as a theoretical concept, like the two concomitant realities health and disease, has otherwise always been rejected and actively banned by social Man. I am not implying that the genesis of modern society as we know it to-day has had its beginning in a self-imposed contract, as expounded by Rousseau. The growth of law within organised society arose naturally as a matter of instinct with the very beginning of conscious human life. Had there been a time when man had no laws to regulate his actions, at least within his own family group or tribe, he would not have survived the impact of attacks mutually inflicted because everyone would be exhausted in the murderous struggle.

Speaking of law amongst primitive people this is what Sir E. B. Taylor says in his work "ANTHROPOLOGY" (Watts, Vol. 11, p. 134) : "Among the lessons to be learnt from the life of rude tribes is how society can go on without the policeman to keep order. It is plain that even the lowest men cannot live quite by what the Germans call "faustrecht" or "fist-right", and we call "club-law". The strong savage does not rush into his weaker neighbour's hut and take possession, driving the owner out into the forest with a stone-headed javelin sent flying after him. Without some control beyond the mere right of the stronger, the tribe would break up in a week, whereas in fact savage tribes last on for ages." Maine's contention that the early phenomena of law may be traced back to Themis of the Greek Homeric poems, the assessor of Zeus, who inspired kings to settle disputes by a sentence, is far-fetched. The more logical conclusion is that the law in its primitive genesis is an instinctive expression of human self-defence and self-preservation. This contention explains the fact why in early ancient laws purely religious and

civil matters are mixed up and dealt with together. Indeed, that mixture of religion and very often the super-imposition of religious matters on purely civil affairs and behaviours, arose later with the growth of priestcraft and the fear of the gods.

Laws must not only be made but transmitted; for in transmission lies continuity, the basis of which is tradition. Lycurgus, reputed founder of the Constitution of Sparta, who flourished about 800 B.C., did not permit his laws, which were few and simple, to be written. Men learned these laws from their parents and their masters and so they were handed down orally from one man to another.

Before Man found out that he could luckily perpetuate his thoughts by means of an alphabet, he had been transmitting the laws of the country orally within the community from generation to generation. Thus we find that the earliest human law is unwritten or customary law, which is of a vital importance to the study of written law that came into being long after, because customary law provided the first material of written law. Indeed, the famous XII Tables drawn up by the Decem Viri according to tradition, in 451-458 B.C., is considered to be the embodiment of customs orally transmitted. More than a thousand years after, Justinian wrote: "*Ex non scripto jus venit quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur*" and also in the Digest "*quod rectissime illud receptum est, ut leges non solum suffrage legislatoris, sed etiam tacite consensu omnium per desuetudinem abrogentur*". And again, making a strong defence of custom as the unwritten law of the people Julian says: "Since statutes themselves bind us only because they have been accepted by the judgment of the people, it is right that what the people has approved without any writing should be binding on all. For what does it matter whether the people declares its wishes by vote or by its actual conduct?"

Even the code of Hammurabi, about one thousand seven hundred years earlier than the XII Tables of Roman Law, which over four thousand years ago "served to mould and fire the ideas of right throughout the great empire (Babylon)" is presumably a reduction in writing of previous unwritten laws. This marvellous Code deals with such subjects as adoption, adultery, assessment of damages, oaths, privileges and responsibilities of doctors as well as dowry, not to mention other advanced ideas confirming our contention that the growth of law and human so-

ciety are simultaneous and concurrent phenomena.

Other codes of laws arising from unwritten or customary laws are books like the Hebrews' Deuteronomy and the Leviticus, which governed and regulated the communal behaviour and relations of the Jewish people, and Solon's code of Greek laws which followed, and improved upon, the very severe code of Draco (C. 621 B.C.) said to have been written not with ink but with blood though it was no more severe than other early codes of law.

The degree of a people's civilisation cannot be judged from the mere existence of social or communal life but from the degree of social complexity which underlies the structure of society. Now the structural complexity of a social organisation is determined by the relative provisions that it makes for its spiritual and material maintenance. A comparative study of early and later laws involves a comparison in the growth of Man's spiritual aspirations and material ambitions. This leads back to the highest examples of ancient social organisations that have left a permanent stamp on modern society and paved the way for the Roman Jurists. I have in mind the organisation of the Greek and the Roman states to which the world owes so much of its cultural legacy. You cannot assess the work of the Roman Jurists if you leave Greece out of the picture. Indeed, Greece and Rome are complementary to each other, the former being preeminent for its philosophical speculations and spiritual insight, the latter for its military exploits. Greece preceded Rome in the cultural field and when the latter vanquished her on the battle field, Greece in her turn led Rome captive with her art and her philosophy. The Greeks, who preceded the Romans in their role as torch-bearers of civilisation in a world still largely shrouded in the darkness of ignorance, unlike the hard-headed unspeculative Romans, were temperamentally philosophical, and their intellectual leaders, wonderful men like Socrates and his great pupil Plato, concerned themselves with the why and the wherefore of life and from these deep considerations which have taxed the finest brains of the world, they deduced guiding principles bearing upon the conduct of man. In this way Greek philosophers prepared the intellectual foundation of progressive laws based upon considerations of right and wrong.

Juristic morality is relative to Man's progress in thought and environment. Indeed, juristic morality may be considered as a people's temperamental reaction to social environment, and this

explains why certain norms that are repulsive to us were sensible and normal to other peoples, religiously advanced like the Hebrews or philosophically enlightened like the Greeks. To show how judgments regarding the punishment of crime vary according to the standard of a people's civilisation and the quality of its religious and political beliefs, I quote the following extract from A. F. Tytler's Universal History (Bk. 1, ch. , p. 34) who writes thus : According to the penal laws of Egypt whoever had it in his power to save the life of a citizen and neglected his duty was punished as his murderer..... If a person was found murdered, the city within whose bounds the murder had been committed was obliged to enbalm the body in the most costly manner, and bestow on it the most sumptuous funeral. Perjury was justly held a capital crime for there is no offence productive of more pernicious consequences to society. Calumniators were condemned to the same punishment which the calumniated person either had, or might have, suffered, had the calumny been believed. The citizen who was so base as to disclose the secrets of the state to its enemies was punished by the cutting out of his tongue; and the forger of public instruments or private deeds, the counterfeiter of the current coin, and the user of false weights and measures, were condemned to have both their hands cut off. Emasculation was the punishment of him who violated a free woman, and burning to death was the punishment of an adulterer''. But most of their fundamental ideas were progressive and the Greek thinkers provided the basis of Greek legislation which was in time embodied in the code of Solon, which in its turn is believed to have influenced later Roman jurists and legislators.

The XII Tables, though largely based on the customary laws of Rome herself, show evidences of Greek influence and ''the traditional story includes an embassy to Greece to study the laws of Solon and Ephesian named Hermodorus, is said to have assisted the Decemvirs'' (1).

The legal motto on the cover of the ''Law Journal'' reminds me of Socrates, the great master of a great disciple Plato, whose speculations led him not only to be a most willing servant of the laws of the state, but when these laws were turned against him, also their most submissive and uncompromising victim. Socrates,

(1) Jolowicz, Historical Introduction to Roman Law, p. 108.

as you know, on a charge by Meletus, a young man and a minor poet, that he had corrupted the young and held no doctrine, was condemned to die by a majority of sixty votes out of a jury consisting of about five hundred men. Crito, who was convinced that Socrates was condemned unjustly, tried in vain to persuade the great philosopher to run away from the prison and thus save his skin. Socrates's uncompromising argument was that he had no right to evade the very laws which had before protected his person and his property. Here is an example of the philosopher identifying the law with social morality. But let us hear Socrates himself explain to Crito his reverence for the laws: "Then the laws will say: 'Consider, Socrates, if we are speaking truly, that in your present attempt you are going to do us an injury. For having brought you into the world and nurtured and educated you, and given you and every other citizen a share in every good which we had to give we further proclaim to any Athenian by the liberty which we allow him that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance he may go where he pleases and take his goods with him. None of the laws will forbid or interfere with him. Anyone who does not like us and the city and who wants to emigrate to a colony or to any other city may go where he likes retaining his property. But he who has experience of the manner in which we order justice and administer the state and still remains, has entered into an implied contract that he will do as we command him. And he who disobeys us is, as we maintain, thrice wrong: first, because in disobeying us he is disobeying his parents; secondly, because we are the authors of his education; thirdly, because he has made an agreement with us that he will duly obey our commands; and he neither obeys them nor convinces that our commands are unjust; and we do not rudely impose them but give him the alternative of obeying or convincing us; — that is what we offer, and he does neither'."

Another example of respect for the laws of the State is shown by the following anecdote quoted from Gibbon's "The Decline and Fall of the Roman Empire" (ch. 22, p. 403): "During the games of the circus, Emperor Julian had, imprudently or designedly, performed the manumission of a slave in the presence of the consul. The moment that he was reminded that he had trespassed on the jurisdiction of *another* magistrate, he condemned himself to pay a fine of ten pounds of gold; and em-

braced this public occasion of declaring to the world that he was subject, like the rest of his fellow-citizens, to the laws, and even to the forms of the republic."

The Greek historian Thucydides (c. 464-404 B.C.) wrote: "Did justice ever deter anyone from taking by force whatever he could? Men who indulge in the natural ambition of empire deserve credit if they are in any degree more careful of justice than position demands." This statement might be described as applicable to political morality, such as might have guided the legislators and jurists of imperial Rome. Indeed, while the name "Greece" stands for philosophy and subtle speculation, from which moralists drew norms for individual and special rights and duties of the state and viceversa, the name "Rome" stands for a well-knit military empire.

The landmarks of Roman political and national history are the traditional foundation of Rome by Romulus and Remus about 753 B.C. and its growth from a tribal kingdom to a republic and finally, to a majestic empire. But the history of early Rome is one of incessant warfare, on the right bank of the Tiber with Etruscan tribes and in the mountains with troublesome and turbulent raiders who frequently carried out operations similar to those carried out by their modern equivalents, the bandits and the guerillas, till, in about 338 B.C. Rome obtained control over the League of Latin cities as well as of the Greek cities in Campania as a first step towards the growth of an Empire and by the third century B.C. this control extended over the whole peninsula. After that followed the development and consolidation of the Roman Empire overseas especially after the complete destruction of her formidable rival, Carthage, in the last of the three famous Punic Wars which took place about 146 years B.C. Then came the Christian era till we reach Augustus (63 B.C.-14 A.D.) who established the *Pax Romana* within the Empire till Diocletian (284-305 A.D.) reconstituted all the imperial Institutions dividing the Empire into an eastern and a western hemisphere, and Constantine in 330 A.D. deprived Rome of her political preeminence which he transferred to Byzantium calling it Constantinople after himself. Thereafter the tempo of the decline of the Roman Empire was quickened and by the end of the fifth century Italy was overrun by the Goths and in 410 Alaric sacked Rome which the Vandals plundered in 455. And that was the end of Imperial Rome, the external façade of which

was later revived under Charlemagne, sole king of the Franks since 771 who in 800 founded the Holy Roman Empire.

In this rapid sketch of Roman history we have seen the stupendous growth of Rome from (1) a tribe broken up by incessant warfare to (2) the unity of various tribes under the leadership of the powerful tribe of Latium, whence the name Latin, (3) the political unity of the whole peninsula till finally (4) the growth of a unique empire overseas. Now such political phenomena could not have taken place unless the various tribes were knit together by a set of laws which protected their individual and collective rights by inflicting adequate punishments on transgressors more or less proportionate to the infringement thereof according to the needs of the times. Thus within the tribe arose customary law which we finally see embodied in the mentioned XII Tables (451—448 B.C.) introducing the earliest period of written laws and thereafter the jurists who interpreted them and adapted them to the ever-changing conditions of the times.

Amongst other rules those relating to *patria potestas* and *sui haeredes* were taken over bodily from custom. Such was the importance of these XII Tables that according to Cicero they had been learned by boys at school. Now only fragments of these laws survive in various important quotations because the bronze or wooden tablets were very likely destroyed by the Goths when they burnt Rome in 390 B.C. These laws were brief and simply worded, containing a series of imperatives and in this sense they must have read like the Decalogue of the Old Testament, but with a greater stress on matters of a civil nature. In this connection Sir Henry Maine writes: "A body of law bearing a very close and instructive resemblance to our case law..... was known to the Romans under the name of the *RESPONSA PRUDENTUM*. The form of these responses varied a good deal at different periods of the Roman jurisprudence but throughout its whole course they consisted of explanatory glosses on authoritative documents; and at first they were exclusively collections of opinions interpretative of the XII Tables" (p. 27). The learned in law, or lawyers, who explained and interpreted the existing laws and their writings form a body of juristic literature which we call jurisprudence. These *prudentes* or eminent lawyers of the time answered questions upon points of law giving counsel's opinion (*respondere*), drawing up pleadings (*cavere*), acting for clients in suits (*agere*) and conveyancing (*scribere*). So great was the im-

portance of these jurists that their studied opinions were considered binding upon judges. As pointed out by Jolowicz (ibid. p. 91) "that these *juris prudentes* were not professional lawyers in our sense is clear; not only did they not receive any remuneration for their services, but they were public men who devoted only some of their time to law, and indeed did so as part of their public career. Many of them were consuls, which means that they had gone through the whole *cursus honorum*, and some were distinguished as generals and as provincial governors." Naturally, with all the best intention and competence in the world, uniformity of juristic opinion has always been, and still is, a desideratum, and difference of expert opinion among Roman jurists was on many occasions embarrassing. In order to avoid the embarrassment caused by conflicts of authoritative opinions the Law of Citations of Theodosius II published in 426 A.D. laid down that the works of Papinian, Paulus, Ulpian, Modestinus and Gaius were the principal authorities and by enactment of Valentinian III (1) any opinion of Papinian, with whom we shall deal further on, must be considered binding upon the judge, (2) when Papinian did not express an opinion the majority of opinions was to be taken and (3) if the opinions were equal, the judge could choose the one he considered best.

Jolowicz has divided the periods of Roman law into six classes: namely (a) the period of conjecture, including the period of the monarchy and of the early republic up to 451-450 B.C. when the XII Tables were inscribed, (b) the period from the XII Tables to the end of the Republic which saw the beginning of Roman Law, (c) the first century of the Empire which brought about very little change in private law, (d) the Classical period, covering the 2nd century and the first half of the 3rd Century, when Roman law reached its highest development in the hands of the great lawyers, this fourth period being subdivided into (1) an earlier classical period covering the reigns of Hadrian and the Antonine emperors and (2) a later classical period under the Severi, (e) the post-classical period down to the reign of Justinian, marked by a rather sudden decline in the value of the legal work, and finally (f) the reign of Justinian when the mass of existing authorities was reduced to one uniform code.

Indeed Justinian, in his Digest and his Code, included a considerable number of decisions from authoritative jurists and

in this way he salvaged the essentials of the legal jurists of previous times, thus replacing the previous legal compilations, namely (1) the institute of Gaius, (2) the Gregorian Code, (3) the Hermogenian Code, and (4) the Code of Theodosius II.

Following these historical divisions of Roman law we have the following classes of jurists: (1) the Pontiffs and earlier lay jurists whose chief work consisted in the interpretation of the XII Tables; (2) the Jurists coming after the period of interpretations; and (3) the Classical Jurists.

The Pontiffs were members of the sacred college called the College of Pontiffs out of whom one was annually elected to superintend disputes between citizens. Their business was to interpret the XII Tables and explain the law of which they had the monopoly. It is an early period of jurisprudence in which law and religion are treated together indiscriminately. Before the XII Tables were published at the request and insistence of the common people who objected to the monopolisation of the law, the Pontiffs were the only depository of customary law which they handed down orally and traditionally within the same college. Speaking of the period preceding written law, Sir Henry Maine (ibid. p. 10) says: "Before the invention of writing, and during the infancy of the art, an aristocracy invested with judicial privileges formed the only expedient by which accurate preservation of the customs of the race or tribe could be approximated to. Their genuineness was, as far as possible, insured by confiding them to the recollection of a limited portion of the community."

But as we have said, the monopoly of the Pontiffs who were drawn from the patrician class, was considered objectionable till the famous *Lex Ogulia* admitted plebeians to the sacred college, and these, naturally, used their influence inside the college to weaken the patrician hold.

The second class of jurists, that is, those following the period of interpretation are known as the *Veteres*. In this period something very important happened. C. M. Flavius, secretary to Appius Claudius, who was Censor in 312 B.C., appointed and published a collection of *legis actiones* made by his master Appius Claudius very likely at his own instigation or with his connivance. This publication was thereafter known as the *jus Flavianum*. This really finished the monopoly of the Pontiffs and once the law was made public many men devoted themselves to legal studies and were known as *jures consulti* and *juris pruden-*

tes. This is the period of plebeian pontiffs, of the democratisation of the Sacred College of Pontiffs, the first of whom, Tiberius Coruncanius, about 50 years after the promulgation of the *Jus Flavianum*, gave advice on legal questions publicly. In the year 204 B.C. Sextus Aelius published the legal formulae for actions for the second time, together with the XII Tables and their interpretation and his work was known as the *Jus Aelianum*, also called *Tripertita* because of its threefold division. This was another hard blow aimed at pontifical legal monopoly because in this way the knowledge of the laws was also extended to laymen from whom we have the class of "Early Late Jurists" who occupy an intermediate position between the Pontiffs and the classical Jurists, whom Gaius and Justinian described as "the makers of the law".

In the early empire the most important jurists of the time were: *Antistius Labeo*, a lawyer of original and independent mind who died before 92 A.D., leaving a library of 400 Volumes. A considerable number of quotations from his work can be found in later writers as well as in the Digest. He wrote, amongst other works, a treatise on Pontifical Law, a commentary on the XII Tables, and on the urban and peregrine edicts. This jurist was politically a republican, the son of a republican father who had committed suicide for political reasons. In legal studies he was an innovator, in this sense opposed to the other famous jurist Capito, who was a staunch conservative in matters juridical, resting on ancient authority while politically he was an adherent of the Imperial regime and, if his character has been dispassionately described by his biographers, also at times severe. He is the author of about 8 books of *coniectanea* (a miscellany); 7 books of *de iure pontifico*, and one *de officio senatorio*. Thus Labeo and Capito together represent in juristic literature two opposite attitudes, two schools of thought with which we shall deal at greater length later on.

Another famous and considerable jurist was *Massurius Sabinus*, born of humble parents, still alive when Nero was in power; he held no public office and earned his living teaching the law to his pupils. Because this jurist was upright, and no less learned in law, Tiberius granted him the *ius respondendi*. The author of several authoritative works, he was held in such high esteem that the satirist Persius Flaccus considered his rubric as a compendium of all the jurisprudence of the time ;—

"Cur mihi non liceat, jussit quodcumque voluntas?
Excepto si quid Massuri Rubrica vetavit" (satyr. 5).

Cocceius Nerva, designated as "the father" to distinguish him from his son, another little known jurist of whom we only know from Ulpian that he began to give *responsa* at the age of 17, was a follower and staunch supporter of Tiberius; was so honest and patriotic, that when he saw his country being overwhelmed with corruption he committed suicide in order to escape the possibility that he too might be exposed to corruption. Only a few fragments from his works have been preserved.

C. Cassius Longinus, head of the Sabinian School, of which more anon, consul in 30 A.D., governor of Asia in 40-41 and of Syria in 47-48 was related to Cassius the republican who murdered Julius Caesar. Because this Cassius Longinus was careless enough to keep amongst other images the image of his republican ancestor. Nero had him exiled to Sardegna but not before having ordered that his eyes were to be flushed out. His chief work was a treatise on the *ius civile*. Then came *Proculus*, a famous man, because he gave his name to the school of jurists originated by Nerva. He was the author of *epistulae* used in the Digest and of notes on Labeo. Some fragments of his work have been preserved in the Pandects. Though we have no records of his life, there is no doubt about his juristic importance. R.G. Pothier in the preface to Vol. I of his Pandects writes that "we can form an opinion of his great authority amongst jurists from the fact that the school of Labeo, abandoning the name of its original author, assumed instead the name of Proculeans".

The period of the Classical Jurists includes the Jurists who flourished in the time of Hadrian (117-138 A.D.) and Modestinus (middle of 3rd Century A.D.). A prominent jurist of the time is *Salvius Julianus*, author of the *Aedictum Perpetuum* and a Digest in 90 books, and presumably also of the *Interdictum Salvianum* which bears his name, and, according to Cutajus, of the interdict *De Conjungendis cum emancipatis liberis eius*.

Other prominent jurists are: *Africanus*, whose identity has not been definitely ascertained yet, wrote nine books on *Quaestiones*, many fragments of which have been preserved in the Pandects. He was so subtle and his vocabulary so obscure that students of Roman Law used to say: "This is the law of Africanus, therefore it is difficult"; *Terentius Clemens*, a follower of Salvius Julianus, wrote twenty four books on the new laws, the

Lex Papia, the *Lex Julia*, many fragments of which have been preserved in the Pandects; *Gaius* lived and wrote at the time of Marcus Antonius. Such was the authority of this *juris prudens* that before Justinian's time his work was used as a textbook in the schools and Justinian's institutes are partly based on his institutes and his *Res Cotidianae*. According to T. H. Erskine Holland (Institutes of Justinian 1892, 2nd. Edit.) "his fame was doubtless rather that of a teacher than of a practising lawyer and his manuals became the received textbooks in the regular course of legal study. About 15 works are attributed to him." Recently, fragments of a parchment manuscript of Gaius's Institutes according to Jolowicz, "the most important single addition to our knowledge of Roman legal history since the discovery of the Veronese manuscripts in 1863", was discovered in Egypt and various books, giving the text and the translation have been published since. English-speaking students will find all the interesting material in Professor De Zulueta's *Supplement to the Institutes*" (Oxford 1935). Buckland has included the new knowledge in his *Manual of Roman Private Law*.

Sextus Pomponius flourished under the Antonines. His work *Liber Singularis Enchiridii* (Single Volume Handbook) provides the only source for the jurists of the earlier republic. He is the author of 35 or 36 books *Ex Sabine* under Hadrian, and 39 *Ad Q. Mucium* under Pius, a commentary on the praetorian and Aedilician Edicts and several other works. In his work he showed very little creative power. *Quintus Cervidius Scaevola* perhaps the greatest of all the Roman Jurists was extolled for his legal proficiency by the Emperors Modestinus, Theodosius, Arcadius and Honorius. Many fragments from his works may have been preserved in the Pandects. *Papinianus*, believed to be a Syrian by birth, lived and wrote at the height of classical jurisprudence. Under the Emperors people seeking advice on points of law submitted petitions to the emperors and a special department concerning itself with such petitions was called *A Libellis*. Naturally the Head of the Department must possess legal knowledge and Papinian like *Ulpian* was one of the distinguished lawyers who held the post. We have already mentioned that in the *Valerian Law of Citations* Papinian's opinion tipped the balance. It is said that he held official posts ever since he was eighteen years old, wrote 37 books of *Quaestiones* and 19 books of *Responsa* till, in 212 A.D. he was executed by Caracalla.

Speaking of Papinian's fame and high esteem, Pothier writes: "St. Jerome mentions Papinian to indicate the *Jus Civile*, and when he compares the human law with the divine law, he contrasts him with St. Paul saying: *'Aliud Paulus noster, aliud Papinianus praecepit'*, and amongst other jurists, the learned Cujacus 'venerated Papinian' as if he were a deity of jurisprudence to such an extent, he said, that were it lawful for a Christian to do so he would have raised him an altar and sacrificed him victims"!

Tertullianus is another jurist whose identity has not been definitely established. He flourished under Severus. Some have identified him with the Christian theologian whose work, especially the sixth chapter *De Anima* abounds in legal phrases. The church historian Eusebius (264-340) describes Tertullian, the theologian, as "most proficient in the laws and Roman institutions". Pothier too identifies the jurist with the theologian while Jolowicz (ibid p. 40) says that "whether he is identical with the famous name is very much disputed." He wrote *De Castrensi Peculio* and 8 books of *Quaestiones*, the former mentioned by Ulpian. If Pothier's contention that the jurist and the theologian are the same person, is true, the jurist must have written his work before his conversion to Christianity because this is what the fiery theologian says in his work *De Pallio*: *"Ego nihil foro, nihil campo, nihil curiae debeo... nulla Praetoria observo... jura non conturbo: causas non elatro, non judico."*

Julius Paulus, an eminent lawyer who flourished under Alexander Severus and was for some time Papinian's assessor when *Praefectus Praetorio* and a holder of various official posts turned out a greater number of juristic literature than any other jurisprudent. From Paulus' writings about 10,000 laws have been taken and included in the Institutes. He wrote a commentary on the Edict in 80 books, 16 books *Ad Sabinum*, 23 books of *Responsa*, 26 books of *Quaestiones*, commentaries on a number of *Leges* and *Senatus Consulta*, works on the duties of various officials, notes on Julian, Scaevola and Papinian; two collections of *Decreta*, and some elementary work. A voluminous writer, he seems to have shared with Africanus, but on a smaller scale, obscurity and awkwardness of diction. Jolowicz (ibid. p. 401) says that "Jhering regarded him as a doctrinaire, capable of denying the facts of life if they conflicted with his theory" and this statement agrees with the opinion expressed by G. Gro-

tius in *Vita Pauli* quoted by Pothier. But other writers have held him in high esteem and the same Jolowicz adds that "his reputation and his influence was immense. About a sixth of the Digest is taken from his works; the *Sententiae* enjoyed particular popularity and their inclusion in the *Lex Romana Visigotorum* meant that they became one of the chief sources from which the nations of the West drew their knowledge of Roman Law" (ibid. p. 402). He was exiled by Heliogabalus and later recalled by Alexander who made him one of his chief counsellors. With Papinian and Ulpian about whom we are going to write now, he was one of the most eminent lawyers of the time.

Ulpian, the next great lawyer of the splendid triumvirate, was a native of Syria, very fond of his country, believed to have been exiled by Heliogabalus and later recalled by Alexander who protected him from the hatred of the soldiers who disliked him because he advised the Emperor Alexander to deprive them of privileges that Emperor Heliogabalus had granted them. After several unsuccessful attempts on his life, Ulpian was murdered by the soldiers. He was an upright and a learned man. Pothier quotes Lampridius's opinion that "Alexander was a great emperor because he governed the republic according to the advice of Ulpian". Unfortunately, this learned and upright man was the bitter enemy of the Christians whom he distrusted and persecuted even as Marcus Aurelius, the Christian-minded Emperor-philosopher persecuted the Christians in good faith and the Athenian Amytus, one of the most generous and disinterested leaders of Athenian democracy persecuted Socrates. Ulpian turned out a voluminous literature almost equal to that of Paulus. His chief works are 83 books on the Edict, 51 books *Ad Sabinum*, 4 books *De Appellationibus*, 10 books *De Disputationibus*, 6 books *De Fideicommissis*, 10 books *De Omnibus Tribunalibus*, 2 books of *Responsa* and treatises on special offices. Ulpian's ambitious aim seems to have been to cover the legal ground so extensively as to make it possible to dispense with previous authorities. His style is clear and his treatment exhaustive which explains why the compilers of Justinian's Digest drew upon his work much more than on those of any other writer. About one third of the whole compilation consists of excerpts from his work.

Aelius Marcianus, a younger contemporary of Ulpian and Paulus, wrote his work during and after the time of Caracalla. It is possible from what he says in his work *Ne De Statu De-*

functu that he served as an assessor, or as a president, in some tribunal. Many fragments of his work have been preserved in the Pandects. He was the author of 16 books of *Institutiones* and 5 of *Regulae*. *Haerennius Modestinus* one of whose students in law was *Massiminus Junior* who later became an emperor, is believed to have flourished principally under Alexander, living till the time of Giordanus. He is the author of many works, some of them in Greek.

The few names of the *jurisconsulti* we have mentioned does not exhaust the whole list of distinguished lawyers though they are the most important of the series. For a complete and exhaustive list read Pothier's Preface to his edition of Justinian's Pandects where the whole series of *jurisconsulti*, 92 in all, is distributed according as they flourished (1) at the time of the free Republic, (2) at the time of Cicero and at the end of the Republic, (3) under Augustus (27 B.C.—14 A.D.) and the succeeding emperors till the reign of Hadrian (117-138 A.D.), (4) from the time of Hadrian to that of Giordanus.

The list of jurists presents a variety of competent and authoritative lawyers who, as I have already pointed out, did not always reach uniformity in their *Responsa* because till the time of Gaius the jurists belonged either to the school of *Labeo* or to the school of *Capito*, the former an innovator in law who never accepted authority blindly, the latter a traditionalist who would not budge an inch from the teachings of the ancient lawyers. According to Pomponius "*hi duo, primum veluti diversas sectas fecerunt: nam Ateius Capito in his quae ei tradita fuerant perseverabat, Labeo, ingenii qualitate et fiducia doctrinae, qui et caeteris operis sapientiae operam dederat, plurima innovare instituit*". The respective schools, however, took their names not from their originators but the school of Labeo from Proculus, one of his disciples, whence his followers were known as the Proculeans and also as Pegasians from the name of Pegasus, another of his disciples, whereas the followers of Capito were known as Sabinians and also as Cassians from Massurius Sabinus and Cassius respectively, two jurists belonging to that school of thought.

It seems that the Proculeans far from accepting the decisions and pronouncements of ancient authorities re-submitted them to a critical examination in which they not only studied the merit of the question again, but even tried to find out the original idea of the law from what they thought was the histori-

cal etymology of the words used. At that time when scientific philology was unknown, some of the Proculeans' absurd derivations make amusing reading. Thus they derived *furtum* from *furvus* (dark) because they argued "theft is perpetrated secretly and by night" or from *ferendo* (carrying away) from which they laid down the rule that there could not be theft of immovables, but of movables only, since immovables could not be removed secretly and hidden away. Again, deriving *possessio* from *pedem* or *sedis positione*, Labeo argues that "the same thing cannot be possessed by two persons, just as you cannot be in the place where I am now or sit in the place where I am sitting." Needless to say, that this Proculean etymology is absurd, because *fur* like Greek *for*, links up with Sanskrit *Chur*, to steal, whereas *possessio*, from *possidere* is made up of *pot* the root or *potis* and *sedeo* from *sedere* which links up with Sanskrit *sad*, to sit. This absurd etymology notwithstanding, the Proculeans, like most innovators, are believed to have been more progressive and subtle, whereas the Sabinians who disregarded etymology and distrusted innovation, thought that two persons could claim possession of the same things by two different titles, and that there could be theft not only of movables but also of tenements.

We have also seen in our short notes on individual jurists that while Labeo was a staunch republican, Capito was a supporter of the imperial regime. But there is no evidence that their followers retained their political disagreements, because while some followers of Labeo were imperialists, other followers of Capito were republicans.

From the evidence available, it seems that though one school has been described as progressive and the other as conservative the real difference between them was not so substantial as to justify the existence of two schools in opposition to each other. Indeed, as Buckland points out (A Manual of Private Roman Law, p. 17) : "it has never been determined what if any was the basic difference of principle which divided the schools. Many differences are recorded, for the conflict seems to have been continued till the middle of the 2nd century but they are not enlightening. Of the many views the most recent is that the Proculeans (*analogists*) sought to make the law more logical, while the Sabinians (*anomalists*) rested on authority". And further on, "these are known to have been such *stationes docendi* in Rome and it may be that these were two famous *stationes* found-

ed by Proculus and Sabinus and the differences of doctrine may not express any fundamental difference of opinion at all".

The important point to remark in expressing our debt to the Roman jurists is not their differences and conflicts of opinion but the fact that they contributed to the growth of Roman juristic literature, which consisted of (1) *Institutiones* or *Enchyridi* dealing with the Civil Law and the *Jus Honorarium*; (2) *Definitiones* or *Sententiae*, more loosely arranged than the Institutiones, to which they bear a strong resemblance; (3) Treatises on the *Jus Civile;* (4) Commentaries of the Edict; (5) the *Gesta* which were treatises on the law as a whole including also criminal law (De Judiciis Publicis); (6) *Responsa*, *Quaestiones* and *Disputationes*, the first being a collection of answers, given by the writer in the course of his practice while the others are the subject matter of discussions with his pupils; and finally (7) Commentaries on individual *leges* or *Senatus consulta*.

Such a considerable volume of juristic literature threatened to get out of hand and by this time we should have lost most of it, as we have lost many early classics, had not Justinian very providentially appointed a commission in February 528 A.D., that is, one year after his accession to the throne, in order to prepare a code of the imperial constitutions which, on promulgation, superseded the previous compilations of Gregorius, Hermogenianus and Theodosius. On December 15, 530 Justinian, of whom Gibbon has said "that his genius like that of Bacon, embraced as his own, all the business and knowledge of his age", began to choose law professors to compile a Digest of Pandects of Juristic Literature. Subsequently Justinian requested the three principal Digest Commissioners, that is, Tribonian himself, Theofilus, Professor of Law at Constantinople, and Dorotheus, Professor in the Law School at Beyrouth, to compile the famous Institutes which were promulgated on the 21st November 533 A.D. On November 16, 534, owing to the growth of more juristic literature, and promulgation, a new edition of the Code was issued. In the Proem we read that the institutes have been compiled "*ex omnibus antiquorum institutionibus, et praecipuo ex commentariis Gaii nostri, tam institutionum quam rerum cotidianarum aliisque multis commentariis*". They explain "*et quod antea obtinebat, et quod postea desuetudine inumbratum ab imperiali remedio illuminatum est*". The instructions of the compilers were: "*quatenus libris quos veteres composuerunt, qu*

prima legum argumenta continebat, et institutiones vocabantur, separatim collectis, quidquid ex his utile et aptissimum et undique sit elimatum, et rebus quae in praesenti aevo in usu vertuntur consentaneum invenitur, hoc et capere studeant et quatuor libris reponere''. An ambitious work marking an unforgettable landmark in the history of Roman Law, especially if we consider that about two thousand books by various jurists had to be read and reduced by the Commissioners who accomplished their task in the record time of three years only.

Not without reason Justinian's work has been described as a salvage operation, which rescued the learning of Roman Jurists from the ruin and obscurity that time would otherwise have inflicted upon it. Those countries which, like Malta and Scotland, have laid the foundations of their Civil Laws on Justinian's Code owe a great debt to the eminent lawyers of Rome who, hundreds of years ago, prepared the way for the still more logical and liberal laws that Christianity and Canon Law in their turn gave to the civilised world in a more polished and humane form. They sought to be the servants of the law so that we might be the masters of our property and person.

WORDSWORTH AND LAWYERS:

A Lawyer art thou?—draw not nigh!
Go carry to some fitter place
The keenness of that practised eye,
The hardness of that sallow face.