

Introduction

This book is not primarily a political history of Rome in which a factual reconstruction and an account of struggles for power, and among powers, form the very fabric of the narrative; nor is it a social and economic history. I am mainly concerned with the collective norms and regulations that went into building Rome's institutional architecture.

The Continental – especially German and Italian – tradition of legal historiography abounds in studies on Roman public law or *Staatsrecht*, starting with Mommsen's masterpiece, whose influence can still be felt in all of our work. If I have ventured to add yet another volume to an already copious literature, however, it is because of my growing dissatisfaction with much of this scholarship. The formalism typical of our disciplines, including the history of the law, has very deep roots, and has lent the tradition the weight of scientific authority. A large number of important works have come out of this tradition that seek to describe and analyze in detail the countless component parts of the complex machine that was Roman law. Such works, however, seem less interested in examining how this machine functioned concretely. In short, they are unable – to use a well-known image by a great nineteenth-century Roman historian, Rudolf von Jhering – to move beyond a system's anatomy to the study of its physiology. In my experience of modern legal historiography, I have encountered impressive reconstructions that have had a lasting impact on the field, but which basically propose models that could not have worked in practice, making them of little use for an understanding of the way in which such a society operated.

At a time when continental legal science is moving beyond this traditional, heavily formalist approach, the fact that historians of the law are still engaging in this kind of analysis is evidence of their tendency to find more interest in the procedures themselves rather than the purposes for which they were conceived. This makes their work less and less relevant to the complexity of a rapidly changing world and the enormous challenges now

faced by positive jurists. But their approach also distances them from the questions other historians are now asking about ancient societies, which have inevitably come to focus more on how these functioned rather than on issues of structure and definition. A system that seeks only to define and classify our knowledge of ancient institutions ends up reinforcing the conviction – not infrequently expressed quite openly even in the most reputable scholarship – that the legal sphere is irrelevant or only marginal to our understanding of a society such as Rome's, despite the fact that the Romans developed and used the law systematically and intensively.

In response to this situation, my work has gradually taken a different turn, a change exemplified most clearly in this book, where I have employed a new approach, at the cost, inevitably, of simplifying the vast quantity of material it addresses. This is the price to be paid in order to produce a text that can be read rather than merely consulted, allowing the reader more direct access to what I consider its central subject. In this book I have tried to clarify – not least for my own benefit – how the Roman system actually worked in practice. I hope I have succeeded in providing both a clear and a plausible reconstruction of how Rome's legal mechanisms, formal rules, and institutional structures emerged out of a specific social context, serving to regulate it, as well as in examining how and why they evolved. My primary objective has been to relate these elements to each other, a focus that has necessarily entailed sacrificing some descriptive detail.

By dwelling on the constantly renewed tension between formal institutions and rules on the one hand, and competing forces and interests on the other, I have tried to capture the dynamic element of the Roman constitution, in which “the legal” was constantly being reshaped and redefined. Undoubtedly, working from the vantage point of a “constitution in the making,” as opposed to describing a set of norms defined once and for all, means that this book approximates more closely the way British jurists and political theorists have examined and discussed their institutions rather than the scholarship on constitutional law typical of the Continental tradition – a fairly obvious choice, since the Romans never dreamed of creating a definitive constitutional charter, much less of setting it down in writing.

This focus on the relationship between legal forms and political events also responds to a growing sensitivity to the “role of personalities in history” which in its youth my generation (especially in Continental Europe) so often sacrificed to a vision of impersonal forces operating autonomously and according to inherent necessity. Indeed, it is not only in political and other historical events that we can see the connection between larger underlying shifts, pertaining primarily to the structure of society, and the

impact made by individual personalities on key events. Rome's institutional development seems to replicate this pattern as well, and, as one might expect, this is most apparent at those times when Rome's legal or political institutions underwent particular or more pronounced changes. The history of the city "in the making" and the arc traced by the imperial republic is marked by a number of strong, if not exceptional, personalities who guided Rome's policy, shaping its institutions and contributing significantly to their development.

I have been highly selective in my choice of facts, with a view to stressing the nodal points in a long stretch of history, but I have sought to combine this selectiveness with another aim: that of helping the reader fully grasp the extraordinary complexity of the processes under consideration, where only seldom can we discern a confluence of forces and policies clearly pointing in one direction, without contradictions or ambiguities. These somewhat conflicting objectives have inevitably entailed making some subjective choices, and the results are of course debatable. I leave it to other scholars in the field to assess their validity and decide to what extent I have succeeded in sketching the essential outlines of the history of a whole system of power and government in a reasonably plausible way, and without oversimplifying or trivializing it.

The title of the book reflects its basic interpretive framework: power and the law are the two reference points whose complex interaction shaped the history of Rome. If I sometimes appear to overemphasize the divergence between the two, it is purely to avoid falling back into a conceptual cage from which we are only now breaking free, and which tended to conflate these categories. It is a cage largely constructed of concepts drawn from contexts alien to the Roman experience, such as "the state" or a "constitution." In this respect, it is important to point out how far we have shifted from Mommsen's perspective – a shift that started in the past century – and from the framework of modern statehood that was so central to his interpretation.

In accordance with this approach, I have thought it best to avoid referring to these concepts, and also tread carefully around another key term widely used by historians of classical antiquity: that of the "city-state," a seemingly innocuous and purely descriptive nineteenth-century coinage that is in fact quite otherwise. For the increasing reliance of contemporary historians and political scientists on this interpretive tool has, through apparently objective references and analogies that strike me as somewhat arbitrary, insensibly fostered interpretations of ancient societies that have strong ideological implications. This confirms, once again, how our work as historians of the

ancient world has always been informed by values relating to the present. To some extent this is unavoidable, but we must steer clear of the kind of historiographical naïveté that all too easily perpetuates, while masking it, a tendency to employ standard hermeneutic categories which flatten the past, crushing it under the weight of our contemporary reality, and colonizing it with our assumptions and frameworks. The danger here is that we lose the ability to perceive the past's very real difference, dissolving it into an eternal present.

It is well known that the Romans did not have a word to refer to their political system comparable to the one so familiar to us: "the state." This term cannot remotely convey the meaning of their usual terminology – *res publica*, *populus*, *civitas* – because it is the result of a slow process of elaboration that did not begin before the late Middle Ages. Unsurprisingly, the words the Romans used are based on a notion of community that lacks that pronounced separation between rulers and ruled which underlies our idea of the state.

A better choice would be "commonwealth," which I find more suited to the Latin *res publica* than "state," evoking the complex and elusive combination of communitarian aspects with a hierarchical structuring of the social order, and which brings up another and even more elusive feature of the Roman experience. I am referring to the singularly ambivalent process that enabled the parallel and synchronic development of forms of political domination (as the city's identity became consolidated) together with broader processes of circulation and integration. This speaks to Rome's unique open character, even in its first incarnation as a "city-state," and to the fact that it so early moved beyond the rigid separation between those "inside" and those "outside" the community, thus creating the preconditions for a process of transformation of its legal institutions that would eventually lead to universal empire.

Thinking in terms of the communitarian character of Rome's formation is also useful, however, to gain a better understanding of a central feature of Roman law, whose earliest core, like many of its later developments, appears to have evolved independently of the city's governing institutions – its organs of sovereignty. It will be easier for English-speaking readers to grasp this concept than for Continental ones, who have until recently been held captive by the wholly modern concept of the sovereign's legislative monopoly. This idea was utterly alien to the Roman experience, as it was to medieval and modern Europe before the eighteenth century.

This is one of the reasons why I dwell at some length on the nebulous origins of the city. It is true that the sources for this period are relatively

scarce and unclear, steeped in legend and combining references to the myth of Rome's foundation with distant echoes of events that are inexplicable to us, as they were even to the ancient authors who later recorded them. But it is also true that in these origins we find the seeds of those elements that would remain central to Rome's subsequent history: the importance of its formal customs – the *mores* – and the innovative and creative autonomy of the interpreters of Rome's legal heritage.

Even later, and for a long time, the Romans did not seek to attribute the entirety of their legal heritage to the *res publica*, basing the former's legitimacy on the latter. To be sure, the city adopted new regulations and developed new law, and its judicial magistrates defined new legal constraints, remedies, and procedures in their edicts, but the original kernel of the *ius civile*, which had a foundational value for the new political community, preexisted it. This original kernel, dating from "pre-civic" times, was already a sedimented, shared heritage by the time the city came into being as a single entity.

As for the republic's political organization, a number of things seem to confirm the remoteness of the Roman model from our own paradigms, which since the Middle Ages have tended to define political systems in terms of a unitary hierarchical order. The Roman republic, however, seems to have evolved a balance characterized primarily by the overlap and substantial competition between institutions. In short, the mutual controls and negotiations in Rome's political life were primarily marked by a confusion among the roles of the various power-bearing agents in the city. It is not possible to identify the distinct components of an abstract, unitary sovereignty, each associated with a different body and reflecting a system based on the balance of separate powers. On the contrary, what we see is rather a tension, and an unstable equilibrium, owing to the complex multiplicity of functions carried out by various co-holders of power, whose roles sometimes overlapped, and who had to cooperate and control each other's actions internally, without reference to any external framework.

This equilibrium would long remain a function of the *res publica's* aristocratic structure, which would survive into the late principate, helping to shape Rome's expansionist policy. The aristocracy's dominance was linked to its control of the sectors most vital to Rome's power: the military and politics. But also of the science of the law, since I believe that the monopoly over legal knowledge that the senatorial aristocracy held for so long was certainly enabled, if not produced, by its awareness that gaining mastery of legal techniques and the workings of institutional mechanisms was essential to handling and preserving power. It is one of the great

innovations introduced by the Romans: Rome and its *nobilitas* did not, of course, invent the law, but they did valorize, perhaps like no other ancient society, all those techniques of mediation and social – and political – dominance that this tool afforded, effecting a new soldering of “power” and “the law.” In this way they created, perhaps for the first time, a rational and “scientific” *modus operandi* for the definition, interpretation, and application of legal rules.

In this respect as well, our “statist” assumptions, and the crucial role played by the law in the history of modern political systems, seem to be inadequate hermeneutical tools for reconstructing the history of Rome. For the work of *interpretatio* conducted by Roman legal “experts” and “specialists” was for centuries legitimized by nothing more than the personal prestige and the social status of an aristocratic hierarchy. Clearly, in any social order the interpretation of the law has a creative dimension, allowing it to flourish and develop further; but in what state-centered system where the law is identified with the “command of the sovereign” would we witness such a clear expression of the idea that the legal system was also the product of the personal opinions of private citizens such as Rome’s *iuris prudentes*? It was almost as if it were an unquestioned assumption, even at the height of the empire, and of the centralized political control that went with it, that jurists were an authoritative source of law.

In the course of the book the reader will have occasion to note my avoidance of a certain modern tendency to interpret the political life and institutions of the republican age in terms of our notions of “democracy” – once again raising the age-old, never-ending debate on “the liberty of the ancients and the moderns.” This book is not a treatise of political theory or a history of modern constitutionalism, nor is it specifically concerned with ancient political thought, although it must of course be borne in mind. My historiographical interpretation, with its strong insistence on the persistent aristocratic and hierarchical character of Roman society, is informed by a conscious decision to exclude from my set of analytical tools the notion of “the state,” as mentioned above. For the modern political categories that revolve around the two concepts of “liberty” and “democracy,” and the concrete actualization of such values in the Western political experience, emerged within a new frame of reference centered on the nation-state. Naturally, the non-existence of this key concept in the theoretical universe of the ancients also means that ideas of freedom, as well as the particular physiognomy of certain forms of democracy or popular political participation, which were indeed significant in the Roman experience, were nevertheless configured in a thoroughly different way from our own.

The tension between Roman power and the law is perhaps even more striking where Rome's expansionist policy is concerned. For centuries, the vertiginous increase in the power wielded from Rome's imperial center was accompanied by a singular process of fragmentation – indeed, near-dissolution – of the *civitas Romana* as a result of the proliferation of personal and legal status categories that Rome devised as it created its *municipia* and founded its colonies. Such arrangements ensured the loyalty and dependence of this polymorphous constellation of communities, but they also postponed, and gradually worsened, a root problem: that of the growing inability of the great political instrument invented by classical antiquity – the “city” – to keep pace with the expansion of its power.

We can see here the irreconcilable contradiction at the heart of the city. The immense obstacles standing in the way of granting full citizenship to all Italians were not only due to the self-interested and egotistical impulses that put a stop to Rome's long-standing liberality in granting its citizenship – and which led to the downfall of Gaius Gracchus and then Drusus, and eventually to the Social War. What most weighed in the balance were the inherent limits of the original political edifice erected in classical antiquity, when the city was a sovereign and self-sufficient entity. The excessive “quantitative” growth of a city, as occurred with Rome, threatened the very nature of this model, which was based on the direct participation of the whole community of citizens in the political process. This problem was certainly not solved by the measures that the Roman ruling class was finally forced to adopt after the Social War. On the contrary, one can argue that granting Roman citizenship to all Italians further contributed to the irreversible legitimacy crisis of the *ancien régime*. The *civitas* now was at risk of dissolving into a new, but as yet “unfinished” Italy.

Although patron–client ties, hierarchical relationships, and institutional loyalties continued to ensure that the new *civitas* retained some degree of internal cohesion, the city-centered structure of the old political system was clearly inadequate to the task of governing an empire. All the more so since the formidable war machine the Romans had been building at least from the time of the Hannibalic wars, and which had allowed them to acquire an empire with relative ease, had now become an exorbitant burden, putting added strain on the political balance within the city. Here I have sought to move beyond the customary, and correct, account of the new political centrality of military commanders whose powers were conferred independently of the *cursus honorum*, and which overlapped with the powers of the city's institutions (and especially the senate), in order to examine more closely the nature of the tension between *optimates*

and *populares* that lasted throughout the last century of the republic. In my view, this tension was due to the fact that Rome's political system was now held hostage by its military success. It was not only that Rome's imperialist drive exerted a stranglehold on the political process in the late republic, when it seemed that popular pressure, rather than the senate's decisions, lay behind the granting of extraordinary powers and the creation of new military commands for overseas expeditions. The problem was, rather, that the massive growth of the Roman military machine itself stood in the way of the stable exercise of power in the Mediterranean basin, not least because much of its cost was shifted outside, onto the conquered populations.

It was owing to Octavian Augustus that the long crisis of the late republican period eventuated in an original compromise between emergent needs and aspirations, and traditional interests and values. The terms of this compromise would be constantly redefined, but it did produce a more balanced relationship between Rome's central power and the societies it governed. This would last a long time, shaping Rome's subsequent history. Here I have tried to highlight the blend of old and new elements through which the world of the *poleis* and an entire ancient civilization were ushered into the wider imperial context.

The innumerable pages written by historians and jurists in an attempt to identify the formal features of Augustus' principate, and their unsatisfactory results, attest to the impossibility of describing it in strictly formal and legalistic terms – those so beloved by the Romans themselves. For the seemingly indeterminate quality of Augustus' new construction is due to the fact that it preserved the singular separation between power and the law that was such an essential feature of the republic. And it was this, in turn, that made it possible to transfer the social and political culture of the “city-states” into another, new dimension, bypassing all the “supra-city” political models available at the time – Egypt under the pharaohs, or the Persian empire, or the Hellenistic kingdoms.

Without becoming enmeshed in the many twentieth-century debates on the topic, I rely largely on Mommsen's old interpretation here, while stopping short of adhering too closely to his notion of a senate–*princeps* diarchy: this relationship was certainly not a formal system set in place once and for all, but only the foundation for a lasting but constantly modified political compromise. My interpretation stresses how new layers of special powers and ad hoc functions were gradually inserted within the traditional republican system, with a view to resolving issues left unaddressed by the ordinary republican institutions. In time, these new offices became permanent, contributing to the dissolution of the old order. Most striking

here is the multiplicity of registers activated by Augustus' strategy, as new functions proliferated, some formally defined as government offices, others contributing to government indirectly, but all of them answering to the *princeps*' central authority. The still extant but much reduced republican edifice was thus completely absorbed into the new structure, and condemned to a slow decay. Meanwhile, the old aristocracy, weakened by decades of civil strife but still fairly sizeable, wealthy, and respected, became a crucial, even if not always docile – and in any case not exclusive – tool of the new government.

We find this same coexistence of old and new elements when we examine the rise of what I call Rome's "empire of cities," where the *poleis*, with their own political as well as administrative identity, far from disappearing, proliferated and were in some ways strengthened, to the point of becoming the most effective instrument for Romanizing the ancient world. This, finally, is the central ambiguity of Rome: it continued to retain its urban character, but its governing bodies were simultaneously also the organs of universal empire.

And indeed, as it expanded, the empire seems to have followed the same path previously taken by the republic, except that now a new stability was guaranteed by the figure of the *princeps*. This is what made possible the transformation of a city's empire into an empire of cities.

The outcome of this broad readjustment of the balance between center and periphery is well known, especially from an economic standpoint: it ensured Rome's continued existence. But the new equilibrium also greatly increased the channels for social circulation and advancement in the Roman world: if with Vespasian it was the Italian middle classes whose full integration into the central power system allowed them to reach the apex of government, one generation later, with Trajan, it was the provinces that produced their first emperor, demonstrating the relatively rapid rate at which a still ongoing process was already yielding results. This integration not only welded the empire's periphery to its center; it also reshuffled the social strata within Rome itself, where the principal government offices were increasingly staffed by the equestrian class.

The centuries in which this evolution occurred, between Octavian's rise to power and the Severan dynasty, coincided with the greatest efflorescence of Roman civilization and, with it, of its legal culture. By contrast with the more radical reforms of the law envisaged by his adoptive father, Augustus granted new legitimacy to the ancient creative role of Rome's jurists, who now enjoyed a privileged proximity to the *princeps* (albeit entailing some degree of control by him). The effectiveness of Augustus' broad strategy

of reconciling different interests can thus be seen in the legal sphere as well: the traditional techniques and practices of Roman jurisprudence were integrated into the new imperial edifice without much modification, becoming a pillar of support for the new system of government. Once the process of unifying Roman power and Roman law was largely complete, thanks to the gradual concentration of legislative and juridical powers in the *princeps*' hands, the highest phase of Rome's imperial history can be said to have reached its peak. And the extent to which Roman government and the production of law had become identified with the principle of sovereignty – a connection explicitly theorized by the jurists of the Severan era – would become even more apparent in the next phase of Rome's history.

Widely discussed and yet sometimes underestimated is the importance of the final moment of Rome's long process of political integration: the concession of Roman citizenship to all the inhabitants of the empire by the emperor Antoninus Caracalla in AD 212. This appears to be the natural outcome of the long history of integration that is such a defining Roman feature. It is a point that I will stress repeatedly and in various contexts: from the many contrivances to reduce the gap between citizens and foreigners, so typical of the ancient city and its strong but circumscribed identity, to the various mechanisms for the gradual absorption of conquered peoples – although nearly always confined to their elites – into the Roman *civitas*. Nor should we forget that other extraordinary mechanism for social mobility, already in operation during the republic, whereby a Roman citizen could award his slaves at once their freedom and Roman citizenship. Perhaps no other factor, not even the art of war and the Romans' strong social discipline, contributed as much as this to Rome's extraordinary and lasting success.

Rome's enemies were perfectly aware of this: one of the most formidable, Philip II of Macedon, observed in the second century BC that "the Romans, with manumission, admit to citizenship even slaves and allow them to participate in the government of the city."¹ For him, it was precisely this mechanism that had allowed them to expand their dominion. Many centuries later, Greek rhetoricians of the second century AD similarly praised Rome's ability to transform its enemies into new sources of political and military strength; it was not mere flattery, but the repetition of a *topos* of which the Romans were fully conscious, as is attested by a splendid oration by Claudius in the senate.²

¹ Dittenberger, *Syll. Inscr. Graec.*, lit. Fil. 214 BC, no. 543, l. 31s.

² Cited in Chapter 14, n. 6.

The fact that the Romans had fewer prejudices and ideological obstacles to overcome in advancing these processes – while retaining a strong and constantly replenished social hierarchy at the center – speaks to the radical difference between Rome’s history and that of other great empires of later periods. But if ethnic, cultural, and even religious barriers appear to have been less impassable here than elsewhere, it is due primarily to the centrality of the legal sphere in Roman society. The law did not suppress social hierarchies and even less so political privileges, but it did create the conditions for formal equality among all members of the community, enabling them to enter the field and play the game. What is more – and this is the main point – it allowed new contestants to vie for advancement without handicapping them in any particular way. It was thus the formal features of the law that imposed a framework in which the political community could continue to expand while undergoing a constant process of recomposition.

These are the things that, over time, would define the character of the entire imperial system and the form of power on which it rested, a power that – here as in the title of the book – I consider to have been expressed not only through material force but also through the binding force of historical and social factors (those that in Weberian terms we might call “irrational”). What we see here is “power” being transformed into “regulation” through the force of law, and thus becoming a fundamental and lasting factor in the integration of the different populations of the empire. In these pages, I have at times used the term “Romanization” in this context, although it has been widely criticized as inherently misleading; I use it primarily in relation to the legal aspects in play during the long historical period that coincided with Rome’s political domination over the whole Mediterranean basin and much of continental Europe. It was a “reluctant” Romanization, however, for the Romans were not generally intent on pursuing a massive expansion of Roman citizenship, or of the law to which it was so closely linked. They were even less interested in imposing on their subjects what we moderns would call their “culture” or, indeed, their “civilization.” Especially since the rulers, rather than “Romanizing” others, had themselves become “Hellenized” in so many aspects of their lives and their society. For the history of Rome’s political expansion into the Mediterranean was not unilateral but worked both ways, and it is precisely the sometimes deliberate transformation of the conquerors, no less than of the conquered, produced by this experience, that gave a universal quality to the political agglomeration of peoples and societies clustered around the Mediterranean.

An important interpretive key for understanding the underlying framework of the Romans' imperial construction is the extended range, but also the narrow focus, of their power politics. Military control and the peaceful subjection of the many communities under Rome's dominion, tax levies, and the subjects' ability to supply the material support necessary to fuel Rome's colossal political and military machine was what really mattered to the Romans, and what they pursued, sometimes very ruthlessly. Where all else was concerned, there was ample room for local autonomy and local identities to remain undisturbed. Only indirectly, and by virtue of that centripetal force exerted by every "strong" form of power, was a process sparked whereby Rome's subjects auto-assimilated, and this primarily concerned the urban elites. Rome's imperial history is therefore more a story of circulation, mutual exchanges, and integration rather than assimilation, let alone forced assimilation. Even more than the language of the dominant population, a remarkably effective tool facilitating this circulation was its law.

Roman law emerged and flourished for centuries outside the narrow confines of "the Law" understood as the expression of sovereign power. In time, however, the two would merge. The conditions for this were already in place at the time of the Severans, but it would be Justinian's great *summa* of the whole Roman normative system and jurisprudence that would mark the end point of this historical process – and the starting point of a new one. In this book, however, the story of Roman power stops sooner, with Diocletian.

This was a very important choice from my standpoint, which greatly altered the text with respect to the Italian edition, and which was the result of the different perspective gained during this long process of rewriting. It was not only a question of having a fresh opportunity to reflect critically and independently on a given historical period, but especially of recognizing the impossibility of projecting my perspective beyond a certain limit, and not just a chronological one.

My entire account is focused on the polarity between power and the law, and one of the points where this dialectic reaches its most fruitful expression is precisely on the eve of crisis, during the Severan age. This is when I believe we can discern the first signs of a "modern," "statist" conception, in which the sphere of sovereignty becomes fully identified with the sources of law. This was a thoroughly secular process, as we shall see, independent of any reference to a "higher" value system on which to lay the foundations of the legitimacy of the sovereign, which still rested wholly on the society that produced it and was governed by it. In this

construction, the history of Rome is firmly tied to the world we associate with “classical antiquity,” that of the Greek *poleis* and of Rome itself: a world that was full of religion and religiosity, but which was not governed by them. And it is here that a rupture occurs with the period following Diocletian, when this tradition begins to be challenged – and changed – in the name of other values.