

**THE IMPACT OF JURISTIC WRITINGS ON THE INTELLECTUAL DEVELOPMENT OF
ROMAN LAW AND THEIR PLACE AS A SOURCE OF LAW**

*Lily Blackburn**

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* LLB Candidate, University of Edinburgh.

A. INTRODUCTION

Until the third century BC, pontiffs (a form of priests)¹ were the only people learned in the law and able to interpret it.² They wielded control by withholding what the law was.³ In 312 BC, however, Appius Claudius publicised the actions-at-law. With legal knowledge no longer the exclusive preserve of the pontiffs, those with expertise began offering public legal opinions, effectively creating the profession of a ‘jurist’ – though this account may well be mythical.⁴ The first jurist to do so was Tiberius Coruncanius.⁵ From this point, jurists were generally aristocratic men who advised on legal matters, provided commentary, and essentially wrote law.⁶ The main juristic period spanned 150 BC to 250 AD, during which the nature of jurists and their influence continued to fluctuate.⁷ Most scholarly discussion accepts that the jurists were a source of law; the assertions of Cicero, Gaius, and Justinian on this point are incontrovertible.⁸ However, there is a continuous debate as to whether these writings enhanced the intellectual development of Roman law. This essay contends that juristic literature was both a source of law and a pivotal component in the intellectual development of Roman law. This will be demonstrated by the direct impact of juristic writings, like the *responsa*, on the Roman legal system; the indirect influence the jurists had on the law through the praetorian edict and the administration of imperial decrees; and the legacy of this juristic literature in later Roman times.

B. DIRECT IMPACT OF JURISTIC LITERATURE

(1) The *Responsa*

One important way in which juristic writings contributed to the development of Roman law is through their relationship with the public. One of the juristic writing categories was problematic literature which discussed both real and hypothetical legal or philosophical questions, giving answers to potential legal problems.⁹

¹ Fritz Schulz, *The History of Roman Legal Science* (Oxford Clarendon Press 1953) 7.

² O. F. Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (Routledge 2006) 32.

³ Alan Watson, *The Spirit of Roman Law* (The University of Georgia Press 1995) 38.

⁴ Schulz (n 1) 9.

⁵ Paul J. Du Plessis, *Borkowski's Textbook on Roman Law* (6th edn, Oxford University Press 2020) 36.

⁶ *ibid* 36; D 1. 2. 2. 35.

⁷ Arthur A. Schiller, ‘Jurists’ Law’ (1958) 58 *Columbia Law Review* 1226.

⁸ Robinson (n 2) 19.

⁹ Paul J. Du Plessis (n 5) 46.

These answers included the vital '*responsa*' which answered specific queries.¹⁰ This formally began in the first century AD as certain jurists were prompted to give public responses so that the people were informed. This ensured that the knowledge came from legal experts, with the answers generally being systematically written down, contributing to Roman legal literature.¹¹ Law was not a material force; it was something awaiting creation through human action, and the jurists fulfilled this responsibility.¹² Their *responsa* were amongst the vital components of the law, emanating from "those to whom it is granted to lay down the law."¹³ This alludes to the later phenomenon that jurists of a certain prestige and authoritative reputation were given the emperor's endorsement of their *responsa* through the '*ius respondendi*'.¹⁴

(2) The *Ius Respondendi*

The *ius respondendi* was first granted by Augustus and meant specific jurists could give public opinions with the emperor's affirmation.¹⁵ Although the passages informing this introduction have been subject to alteration, the weight of evidence suggests that some form of *ius respondendi* existed.¹⁶ Granted, prior to Augustus, the *responsa* literature still functioned as a source of legal development, since it was accepted that only those self-assured and proficient in their studies would publicise their opinions.¹⁷ Augustus' *ius respondendi*, however, conferred a new level of authority upon juristic literature, solidifying it as a source of law within the legal system – a status further entrenched by Hadrian's reform.¹⁸ Hadrian, in spite of what Gaius says,¹⁹ officially proclaimed that the *ius respondendi* were legally binding.²⁰ Papinian exemplifies how this solidification advanced Roman law: his published *responsa* comprised nineteen books.²¹ His work emphasised morality and introduced new ethical principles to Roman family law, as in his assertion that "where a dowry is confiscated because the marriage was unlawful, the husband must pay back all that he would have to in an action on dowry."²² Thus, juristic literature developed Roman law and was able to do

¹⁰ H. F. Jolowicz & Barry Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn, Cambridge University Press 1972) 90.

¹¹ Dario Mantovani, 'More than Codes: Roman Ways of Organising and Giving Access to Legal Information' in Paul J. Du Plessis, Clifford Ando, and Tuori Kaius (eds), *The Oxford Handbook of Roman Law and Society* (Oxford University Press 2016) 28.

¹² David Ibbetson, 'Sources of Law from the Republic to the Dominate' in David Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press 2015) 30.

¹³ G. Inst. 1.7.

¹⁴ D. 1. 2. 2.

¹⁵ Rafael Domingo, 'The Roman Jurists and the Legal Science' (2017) The Social Science Research Network, 2 <<https://ssrn.com/abstract=2994130>> accessed 27 January 2025.

¹⁶ Schiller (n 7) 1228.

¹⁷ Jolowicz & Nicholas (n 10) 359.

¹⁸ *ibid* 360.

¹⁹ W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (Cambridge University Press 1921) 24-25.

²⁰ Schiller (n 7) 1230.

²¹ Du Plessis (n 5) 48.

²² D. 23. 2. 61.

so by imperial validation – making the jurists the main instrument of legal development throughout the principate.²³ Although the *ius respondendi* gave authority to certain jurists, it is questionable whether this meant that these jurists actually contributed to the intellectual development of Roman law. Schulz alludes to a lack of juristic originality and to the absence of crucial change in jurisprudence methodology.²⁴ This would suggest that even where juristic literature constituted an explicit source of law, it did not necessarily advance the intellectual development of Roman law. Winkel disagrees, suggesting that Schulz’s description of the jurist creates the persona of an anomalous character²⁵ which is arguably due to later alterations to the jurist’s texts.²⁶ Ultimately, the development in Roman law through the *ius respondendi* is still unequivocal, but only until the third century since there is no trace of it after this – making the juristic impact through this mode temporary.²⁷

(3) Law of Citations

In 426 AD, the Law of Citations was introduced, giving authority to five jurists: Gaius, Papinian, Paul, Ulpian, and Modestinus.²⁸ Whether their work was inherently revolutionary is irrelevant in this context: the *index* was required to treat their work as primary authority where a majority agreed. If there was no majority then Papinian’s opinion prevailed, meaning that these specific five jurists heavily contributed towards the development of Roman law by influencing cases’ determinations.²⁹ However, this meant that those jurists who were not in the named five, were denied the authority some of their work deserved, stunting the further development of Roman law. Roman law was thereby deprived of literature which would have furthered its status as a science.³⁰ Buckland contends that this marked “the lowest point [in] Roman jurisprudence” since the notion that sheer numbers of jurists should override the content of juristic reasoning is absurd.³¹ Nevertheless, the authoritative jurists were able to highlight other juristic work and continue the process of development. This is evident in the “global [jurist] communication... within the Empire.”³² Paul references a letter sent by Nessenius Apollinaris, a jurist working in Ephesus, meaning that juristic literature which had not been given imperial sponsorship was still able to reach the public and influence the Roman legal system

²³ Jolowicz & Nicholas (n 10) 363.

²⁴ Jacob Giltaij, ‘Autonomy and Authority: The Image of the Roman Jurists in Schulz and Wieacker’ in Kaius Tuori and Heta Björklund (eds), *Roman Law and the Idea of Europe* (Bloomsbury Academic 2019) 75.

²⁵ *ibid* 75.

²⁶ *ibid* 75.

²⁷ J. A. C. Thomas, *Textbook of Roman Law* (North Holland Publishing Company 1976) 53-54.

²⁸ Du Plessis (n 5) 51.

²⁹ Jolowicz & Nicholas (n 10) 452.

³⁰ Ibbetson (n 12) 26.

³¹ Buckland (n 19) 35.

³² Mantovani (n 11) 32.

as a consequence.³³ This links to the interaction between jurists. From the reign of Augustus until the reign of Hadrian, there was a clear division between two groups of jurists: the Proculians and the Sabinians.³⁴ The former are regarded as more conservative and adherent to reason and principles, whereas the latter are considered more pragmatic and dynamic.³⁵ This means that jurists would have educated disagreements amongst each other based on their school of thought, as seen in the well-documented debate regarding the age of male puberty. The Sabinians advocated that it depended on the individual's bodily development, as opposed to the Proculians who contended that puberty should have a set, universal age of fourteen.³⁶ The debate was finally settled by Justinian who agreed with the Proculians.³⁷ This shows that not only were the jurists' writings a clear source of law, but that their academic disputes aided and enhanced the intellectual development of Roman law. However, Watson's criticism must be noted since he highlights that the jurists sometimes argued in isolation of societal factors, as if "in a vacuum, remote from economic, social, religious, and political considerations."³⁸ This might suggest that although the jurists did develop Roman law, their capacity to do so was limited by the lack of pragmatism and insufficient attention to how society functioned in practice. This may not have always been the case: Celsus commented on the politics of morality, proclaiming that "law is the art of the good and the fair"³⁹ and to know the laws one must grasp "their sense and application."⁴⁰ This demonstrates that the early jurists' literature still made reference to societal constructs and was not removed from practicality, and thus still able to effectively contribute to the intellectual development of Roman law. Despite this, the claims of innovation are undermined by the significant influence of Greek thought, particularly regarding the tension between equality and the law – eroding the originality one can attribute to the jurists.⁴¹ However, holistically, one must accredit the jurists with the praise they deserve for their refreshing developments upon Roman law. Ulpian displays this unique ingenuity as instead of treating law as a system of principles, he added layers of equality, justice, and dignity, with Honoré considering him to be a founding pioneer of human rights.⁴²

³³ *ibid* 32.

³⁴ Domingo (n 15) 18.

³⁵ Du Plessis (n 5) 45.

³⁶ Peter Stein, *The Two Schools of Jurists in the Early Roman Principate* (Cambridge Law Journal 1972) 27.

³⁷ J. Inst. 1.22.

³⁸ Du Plessis (n 5) 45.

³⁹ D. 1. 1. 1.

⁴⁰ D. 1. 3. 17.

⁴¹ Domingo (n 15) 21.

⁴² *ibid* 20.

C. INDIRECT IMPACT OF JURISTIC LITERATURE

(1) Praetorian Edicts

The jurists also had indirect influences on the law. An important way in which this transpired was through influencing the praetorian edict. The office of the praetor was created in 367 BC to administer justice. Praetors were involved in litigation but, most importantly, in issuing edicts.⁴³ Edicts were displayed on wooden boards outside the praetor's office to inform the citizens of the legal functions and procedures that they could use.⁴⁴ This praetorian system of law was called the *ius honorarium*. Since most praetors used the position as a stepping stone to higher political office, they generally lacked legal knowledge; consequently, the edicts evolved through consultation with, and consolidation by, the jurists.⁴⁵ Although Robinson advocates that this influence was more of a simple administration, advised by the jurists, it seems to be much more than this.⁴⁶ The jurists would answer judicial questions proposed by prospective litigants through the praetor and the *index* since neither were actually informed in the law.⁴⁷ This demonstrated that the jurists were effectively directing legal trials, constituting a source of legal development through a system of precedent – though not binding – that they explicitly shaped.⁴⁸ This was enabled through the formulary system which eventually expanded to both foreign and citizen usage around 140 BC.⁴⁹ This system meant that the praetor had more flexibility in terms of resolving disputes and did not have to strictly adhere to a narrow constraint of options. Thus, the praetor was afforded greater creativity, as were the jurists, with Schulz branding them the “real authors of the praetorian [...] edicts.”⁵⁰ Thus, they were enabled to pursue more adventurous, pragmatic solutions to trials, elevating the intellectual development of Roman law. Essentially, the praetorian discretion was managed by the jurist's interpretation⁵¹ and allowed academic discourse since formulae would be perfected by other jurists, strengthening its validity.⁵² This is reaffirmed by the fact that *ius honorarium* and *ius civile* merged into one, meaning the jurist's impact on the former ultimately influenced the latter as a consequence.⁵³ However, it should be recognised that the majority of litigation did not involve innovation and instead included an adherence to accepted outcomes in particular

⁴³ Du Plessis (n 5) 33.

⁴⁴ *ibid* 34.

⁴⁵ *ibid* 34.

⁴⁶ Robinson (n 2) 31.

⁴⁷ Schiller (n 7) 1227.

⁴⁸ Jolowicz & Nicholas (n 10) 95.

⁴⁹ Ibbetson (n 12) 28.

⁵⁰ Schulz (n 1) 53.

⁵¹ Mantovani (n 11) 34.

⁵² Schulz (n 1) 51.

⁵³ Robinson (n 2) 31.

situations, and so the jurist would plainly state the traditional solution, instead of creating pragmatic resolutions.⁵⁴ Regardless of this, when the law was evolving, it was invariably the jurists behind this, making the legal system a living, breathing body and exhibiting their clear position as a source of law.⁵⁵ This is seen through their establishment of good faith in contracts⁵⁶ as although in the background, the jurists were responsible for the revolutionary remedies of the edict, securing them as a major force in the development of Roman law.⁵⁷ Another mode in which the jurists influenced the use of the edict was through the edictal commentaries in the Republic, the first of which being completed by A. Ofilius.⁵⁸ By the later Republic, the practice of edictal interpretation was innovative, informing citizens of the edict's new mechanisms.⁵⁹ It should be considered that this form of legal influence was temporary; the final form of the edict was synthesised by Julian in the Empire.⁶⁰ Ultimately, this shows the power the jurists had in developing the Roman law as although the moulding of the edict ended, it was a jurist who delivered the conclusive edictal form.

(2) Imperial Decrees

The jurists indirectly developed Roman law through their literary influence on imperial decrees. In the classical period, the jurists aided in drafting imperial decrees, giving them an unprecedented level of legal command.⁶¹ This was facilitated by Septimius Severus, who created new posts for the jurists in the administration of justice; the jurists of the late classical period were of the equestrian order.⁶² This is shown through jurists like Papinian, Paul, and Ulpian holding the position of Praetorian Prefect.⁶³ This position enabled the jurists to exercise jurisdiction under the emperor's name and thus developed the Roman law incognito. However, the writings of the classical jurists lacked the philosophical depth and reasoning seen in the work of their Republican predecessors, diminishing the intellectual development of Roman law.⁶⁴ By the post-classical period (around 230 AD), jurists became more of anonymous bureaucratic employees than legal pioneers.⁶⁵ It was the emperor who had the role of shaping the law since although there is an account of an emperor being persuaded by Paul, there is also evidence of him following Papinian's advice contrary

⁵⁴ Schiller (n 7) 1227.

⁵⁵ *ibid* 1227.

⁵⁶ Alan Watson, *Law Making in the Later Roman Republic* (Clarendon Press 1974) 103.

⁵⁷ *ibid* 101.

⁵⁸ Robinson (n 2) 33.

⁵⁹ Mantovani (n 11) 29.

⁶⁰ Robinson (n 2) 9.

⁶¹ Du Plessis (n 5) 43.

⁶² Domingo (n 15) 16.

⁶³ Robinson (n 2) 11.

⁶⁴ Du Plessis (n 5) 46.

⁶⁵ *ibid* 50.

to suggestions of Paul.⁶⁶ This demonstrates that juristic influence had become sporadic and ultimately dependent on the emperor's legal views, for "what pleases the prince has the force of law."⁶⁷

D. LITERARY LEGACY

(1) The Digest

A final perspective in which juristic literature's impact as a source of law ought to be considered is through its legacy in Rome. The era following the classical period was bureaucratic in character, departing from classical jurisprudence owing to the transformed role of the jurist.⁶⁸ From the third century, the law became a simplistic network, with little originality.⁶⁹ Rather than creating law, jurists taught the existing state of law with a renewed urgency. This is seen through the makeup of Justinian's *Corpus Iuris Civilis*. This consisted of the Digest, the Institutes, the Novellas, and the Code.⁷⁰ In terms of juristic influence, the Digest and the Institutes are significant. The Digest was a compilation of Roman legal literature, with the five authoritative jurists named in the Law of Citations being heavily quoted.⁷¹ Bluhme theorises that when the Digest was being constructed, it was divided into three separate genres: observations on the *ius civile*, the *ius honorarium* and edictal commentary, and problematic literature like *responsas*.⁷² This reaffirms that the *ius honorarium* and *responsa* were pivotal sources of law and advanced the intellectual development of Roman law, ultimately showing the jurist's impact since they were the backbone of these two genres. However, the interpolations within the Digest compromise its authority as a source for assessing juristic impact, since one can "only observe the species [jurists] from far away through the bars of their cages," given that Justinian's editorial interventions may have altered the original juristic texts.⁷³ Although interpolations can, on occasion, be identified through faulty language or translation,⁷⁴ this nonetheless limits the conclusions one can draw about the jurists' impact on the subsequent intellectual development of Roman law. During compilation, sometimes if there was a difference of opinion amongst jurists, only one of the stances would be amended.⁷⁵

⁶⁶ D. 36. 1. 76. 1; D. 29. 2. 97.

⁶⁷ D. 1. 4. 1.

⁶⁸ Schulz (n 1) 262.

⁶⁹ *ibid* 290.

⁷⁰ Du Plessis (n 5) 54.

⁷¹ *ibid* 56.

⁷² *ibid* 59.

⁷³ Sebastian Stepan, 'History of Legal Concepts and Historical Individuality of the Classical Roman Jurists' (2011) *Glossae: European Journal of Legal History*, 2 <<https://glossae.eu/glossaeojs/article/download/133/108/117> > accessed 30 January 2025.

⁷⁴ Du Plessis (n 5) 57.

⁷⁵ Jolowicz & Nicholas (n 10) 486.

This limits the literary legacy of the jurists as it dispels academic debate which would have had the capacity to enhance Roman law. The credibility of the jurist's writings as a source of law can be critiqued since some of their commentaries on imperial enactments were to be 'corrected', obscuring what some laws were and emphasising the emperor as the primary source of law. Nevertheless, one must ultimately recognise that the fact that there even was a collection of juristic literature shows that they were, in their time and beyond, a valued source of law and separate from the emperor's imperial enactments.⁷⁶

(2) The Institutes and the Teaching of Roman Law

The very concept and structure of the Institutes can be traced to juristic literary development, since Justinian's Institutes drew heavily upon Gaius' Institutes.⁷⁷ Gaius' legacy of his famous legal division of 'persons', 'things', and 'actions' became the model for Roman legal textbooks.⁷⁸ Gaius, however, was not a well-renowned jurist in his own time, suggesting that some juristic literature was neither a source of law nor a driver of intellectual development during its period of composition, achieving this status only retrospectively. Similarly, since the jurist's Institutions were created to be simple for law students, their literary element was not inherently developmental, as they were summaries of the law as is, not intrinsically sources of law themselves.⁷⁹ The flourishing of legal teaching and law schools did little to counteract the debasement of legal science.⁸⁰ Although the Institutes and the Digest were made up of the juristic writings, prior to Justinian's reorganisation of legal teachings, students read straight from the jurists since they read Gaius' Institutes and Papinian's *responsa*.⁸¹ This means that there was now more likelihood of inaccuracy in Roman teaching since the jurist's writings were becoming a secondary source – eroding their impetus as an origin of law and their capacity to develop the law. Justinian, however, effectively abolished the Law of Citations,⁸² enabling past jurists outside the selected five to regain retrospective authority and re-establish themselves as sources of law. His codification drew upon a variety of jurists, underscoring that the validity of a juristic opinion should be assessed by its reasoning, not by the number of jurists who shared it.⁸³ In spite of this, the legacy of juristic writing continued to decline due to 'vulgar law'; misunderstandings of the law created erroneous proclamations like intention and negligence becoming blurred together in terms of

⁷⁶ Robinson (n 2) 80.

⁷⁷ Du Plessis (n 5) 48.

⁷⁸ *ibid* 48.

⁷⁹ Michael Peachin, *In Search of a Roman Rule of Law* (6th edn, Legal Roots – The International Journal of Roman Law, Legal History and Comparative Law 2017) 43-45.

⁸⁰ Thomas (n 27) 52.

⁸¹ Jolowicz & Nicholas (n 10) 498.

⁸² Buckland (n 19) 35.

⁸³ Thomas (n 27) 54.

obligations.⁸⁴ However, one must acknowledge that juristic work remained relevant: the *lex Romana Visigothorum* of the Western Empire comprised Gaius' Institutes alongside writings of Paul and Papinian.⁸⁵ Despite their works being used in a vulgar law practice, this clearly shows the legacy of the jurists as a prevalent source of law, just by this time they had little positive impact in the development of Roman law since they were commonly cited erroneously.

E. CONCLUSION

In conclusion, the writings of the Roman jurists were clearly a source of law to a significant extent, and these works played a crucial role in the intellectual development of Roman law. While some aspects of juristic work may be seen as a derivative of Greek thought, or as naive and impractical, the jurists' *responsa* nonetheless had a fundamental direct influence on the law through their engagement with moral principles. Similarly, jurists were the real authors of impactful works like the praetorian edict and imperial decrees which were the drivers of much of the law reform and development. Granted, this influence was temporary, as the emperor eventually became the only source of law – but nothing is eternal, and one must still credit the jurists for their unprecedented role in legal development during their era. Their legacy is just as important since they continued to be valued sources of law and develop the legal system even after their death. Interpolations and vulgar law do diminish this credibility, but one cannot scrutinise every statement and must take some assertions at face value to avoid an infinite regress of scepticism. It is true that the jurists' original work increasingly became secondary, supplanted by derivative sources, but this ultimately demonstrates the extent to which their writings had become an ingrained source of law within the Roman legal system – one that continuously shaped legal development. Thus, juristic literature was largely an explicit source of Roman law and was able to play a pivotal role in the intellectual development of Roman law.

⁸⁴ Jolowicz & Nicholas (n 10) 474.

⁸⁵ *ibid* 36-37.