THE EVOLUTION OF THE ROMAN LEGAL SYSTEM AND THE CONFLICT BETWEEN THE PATRICIANS AND THE PLEBS

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INTRODUCTION

Under the Roman monarchy, legal, political and religious power vested with the king and the patrician aristocracy. During much of the Roman republic, there was an almost permanent state of civil war between the patricians and the plebian class. This conflict existed from shortly after the ousting of the Etruscan dynasty in 509 BCE until the elimination of these political distinctions in the middle of the third century BCE. This paper provides a background of the legal system under the monarchy and the republic. It also discusses the evolution of the legal system caused in large part by the conflict between the patricians and the plebs.

DISCUSSION

Livy and Machiavelli's Agenda

This analysis should begin by noting that Livy and Machiavelli are not legal scholars and their agendas do not include providing a complete or unbiased explanation of how the legal system operated and developed. It is therefore sometimes necessary to refer to other works. As the Roman legal historian George Mousourakis points out, and as was discussed in class, "Livy viewed historical writing as a literary category based

upon the narration of dramatic events. He was interested, not so much in historical research as in digesting materials taken from earlier sources and then preserving them in his own unique literary style." *[Mousourakis, A Legal History of Rome (2003) Pg. 11, footnote 18.]* Or, as Livy described his agenda in a period after Rome stayed from the ideals of its founders, "[T]o behold object lessons of every kind of model as though they were displayed on a conspicuous monument. From this, you should choose for yourself and for your state what to imitate and what to avoid as abominable in its origin or as abominable in its outcome." *[The History of Rome Books 1 – 5, Livy Translated With Introduction and Notes by Valerie M. Warrior (2006), Preface 4.]*

Similarly, Machiavelli's agenda includes examining historical facts to provide support for his views on politics, morality, fortune and necessity. *[Machiavelli Discourses on Livy, Translated by Harvey C. Mansfield & Nathan Tarcov (1996), Introduction xvii, xviii.]* This often results in Machiavelli, providing arguably biased and inaccurate interpretations of Livy's writings and historical references – not the presentation of an accurate legal history.

The Legal System in the Monarchy

For Livy and Machiavelli, the creation of laws, in the early stages of the monarchy, was essential to the survival of Roman society. Specifically, Livy notes that after Romulus, "duly performed religious observances," his next task was to give the people laws, "since there was no way other than by law that they could become a unified community." *[Livy, Bk. I, Ch. 8.]* Similarly, Machiavelli writes that "necessities the laws made by Romulus, Numa, and the others" were essential to not only the survival of

the monarchy, but also "the greatness of its empire" which "could not corrupt it for many centuries." *[Machiavelli, Bk., I, 4.]*

Notably absent from Livy's history and Machiavelli's discourse are explanations of specific private or civil laws adopted during the monarchy. It is a reality, moreover, that we have a very limited record of the laws during this period. According to Roman tradition, some were collected and recorded at the end of the regal era by Sectus Papirius. Only a few rules, however, supposedly promulgated by kings were preserved in the works of later Greek and Roman Historians. *[Mousourakis at 23.]*

The absence of a record of specific laws during the monarchy is not, in my opinion, problematic for this discussion. It is most likely that during this period there were few of what we would refer to as written or codified private or civil laws. Arguably, Livy and Machiavelli when they use the term "the laws" during the monarchy as being critical to the success of Rome are probably referring to what more accurately is described as a "legal system" and adherence to "the rule of law." Moreover, there are significant elements of Rome's pubescent and somewhat amorphous legal system that are highly relevant in the conflict between the patricians and the plebs. Namely, that power and control remained vested with the patricians, and monarchs exercised restraint in enforcing customs, norms and laws.

The Creation of the Senate

One of Romulus' first acts was to create the senate. It is generally accepted that the patricians became senators because they were descendants of early clan patriarchs and the clan patriarchs were the leaders in what was to become Rome. *[Id. at 43.]* It is also believed that the patriarch class developed as a result of the progressive differentiation of

wealth in the families that controlled large tracts of land. These patricians, because of their wealth and positions of power within their clans, formed the members of the senate, and also nominated and gave advice to the kings.

On the other hand, plebs constituted a large majority of the population and initially were comprised mostly of small farmers, laborers, artisans and tradesmen. While the plebs had the right to vote in the assembly, they enjoyed no rights to hold political, military or religious office. *[Id. at 44.]*

The Monarchs Exercise of Restraint

Under the Roman monarchy, kings had the power to decide matters of private and civil concerns, but exercised significant restraint in this area. They generally allowed disputes involving households to continue to be resolved by clan leaders based on customs and norms that existed before and during the monarchy. *[Id. at 54.]* When the kings did get involved, it was generally to pronounce "general norms" but leaving the actual adjudication to judges and arbiters from the patrician aristocracy. As to protecting public interests, the kings would sometime be the trier of important cases, but it was customary for the king to seek the advice of the senate. The king could also delegate important cases to specially appointed officials. *[Id.]* Only the king had the right to convene and address the assembly of the people and the senate and to put proposals before them. *[Id.]*

Differing Agendas Within the Patrician Aristocracy

As Rome expanded, its wealth grew. As it made Roman citizens of people from other territories, divisions and mistrust grew within the now more diversified patrician aristocracy. Stated simply, various factions of patricians had different agendas. The

informal and immature legal system began to show signs of failure because as Livy would state, it relied to large extent on the "good judgment" of the monarch and the senate. And, arguably for many in power, "good judgment" equates to what is best for one's own self interest – not what is best for the citizens at large.

For example, after Romulus' death, some Sabine and Etruscan patricians wanted the king to be elected from within their groups. Or as Livy states, they desired a king chosen from "their side" to not lose control of government despite their purported "equal status." *[Livy Bk. I, Ch. 17.]* Rather than concede authority to a new king, and diminish power, the senate decided that they would create a new legal system or rule of law whereby they all share and rotate power by appointing groups of ten senators, with ten men exercising authority, but only one having the insignia of command and the lictors; with command limited to five days and passing in rotation. *[Livy Bk. I, Ch. 17.]* This new structure, however, quickly proved to be unworkable and extremely unpopular with the citizens.

The Senate Mollifies the People

According to Livy, the senate appeared to mollify the people by agreeing to eliminate the rotation system and by stating that if the people choose a king acceptable to the senate, the senate would elect the king. Livy suggests that this appeasement was sufficient enough to avoid further conflict on the issue, and the senate elected the next king. *[Id.]* Arguably, the system survived this test because the patricians in power recognized the importance in Roman society for all citizens, including the plebs, feeling as though they have a role in the selection of the king. But the stresses within the mostly unstructured and oral legal system were become more apparent.

Changing of the Monarchs and Continued Stresses on the System

Livy does not go into detail regarding the laws enacted by Numa, the next king. Livy notes generally that Numa gave a "new foundation in justice and law." *[Id. at Bk. I, Ch. 19.]* Among the reasons Numa is regarded as having a successful reign, is "the state was governed by regard for good faith and oaths, rather than fear of punishment and the law." *[Id. at Bk. I, Ch. 21.]* In other words, Numa apparently exercised the right amount of restraint and was fortunate not to have been presented with compelling and immediate reasons to dramatically alter the political and legal system.

After Numa died, the people selected Tullus Hostilius, who was ratified by the senate. *[Id.]* And later, Ancus Marcius was elected and the senate once again confirmed the choice. *[Id. at Bk. 1, Ch. 32.]* With the next king, Tarquinues Priscus, there is a noticeable increase in stresses within the legal and political system. Prior to Tarquinues, kings purportedly were selected because of some virtuous acts or notably qualities. They could maintain power, by recognizing the interests of the citizens, successes in battle, not alienating too many patricians, and by delegating authority. Livy notes, however, that Tarquinues abandoned the fundamental tenants of the system. He was the first king "to canvas votes for the kingship." *[Id. at Bk. I, Ch. 35.]* Moreover, Tarquinues solidified his power and control by adding a hundred members to the senate, all of whom "whose favor they owed their admission to the senate." *[Id.]* It is probably historically accurate to state that these acts were not only factors leading to Tarquinues' assassination, but evidence of why this non-hereditary monarchy in a diverse patrician society which relies on "good judgment" eventually failed.

After the assassination of Tarquinues, Servius Tullius further stressed the Roman monarchial system when he assumed the power of the kingship without being chosen by the people, and with the consent of the senators. *[Id. at Bk. I, Ch. 41.]* The monarchy came to an abrupt end with a patrician uprising when the next king, Tarquin assumed absolute control and did so without the consent of the senate or the people. *[See Id. at Bk. I, Ch. 47 – 48.]*

Livy devotes significant detail to the excesses and abuses of power, which led to the revocation of Tarquin's power and exile. *[Id. at 1, Ch. 59 – 60.]* One of Tarquin's first acts as king was to kill "those leading senators whom he believed had been Servius supporters." *[Id. at Bk. I, Ch 59.]* Tarquin was required to rely on his bodyguards "and the sword" to stay in power because he had "no judicial right to the kingship, since he ruled without the bidding of the people or consent of the senators." *[Id. at Bk. I, Ch. 59 - 60.]* Tarquin was also the first of the kings to break with the custom of consulting the senate on all matters, a custom handed down by his predecessors. *[Id.]*

As Machiavelli discourses, a monarchy relying solely on force is destined not to survive. "For in those governed by the good he will see a secure prince in the midst of secure citizens, and the world full of peace and justice; he will see the Senate with its authority, the magistrates with their honors, the rich citizens enjoying their riches, nobility and virtue exalted; he will see all quiet and all good, and, on the other side, all rancor, all license, corruption, and ambition eliminated." *[Machiavelli I, 10.]*

In other words, arguably the monarchy came to an end because it was increasingly unlikely that a monarch with the qualifications sufficient to be selected by a majority of the fractioned senate would have the qualities to successfully govern the growingly

diverse population in a society often at war with its neighbors. And, even if the monarch could objectively have the perfect qualifications to be king and enforce the rule of law, there were too many in positions of power seeking control to allow this to continue.

The Legal System in the Republic

Historically, changes to legal systems are the result of actual or perceived need and this is no different in Rome's transition from a monarchy to a republic. As with the monarchy, our knowledge of the development of the Roman system of government and laws in the early republic is incomplete. Livy, however, describes generally the beginning of the republic as a period in which the "rule of laws" overrides "the rule of men." *[Generally Livy, Bk. II.]* The leaders sought to build upon the legal system. And, apparently recognized, it was the years of "calm and moderate exercise of government" that "nurtured the state to the point at which its mature strength enabled it to bear the good fruits of liberty." *[See id.]*

Machiavelli recognizes that a successful form of government cannot forever rely upon the virtue of its rulers. For under a monarchy, there is always the risk of "being ruined under a king either weak or malevolent." *[Machiavelli, I, 19.]* Instead, a government must "prudently order laws" so as not to rely on any one individual for stability and success. *[Id. at I, 2.]*

The Creation of Consuls by the Senate

At the beginning of the republic in 509 BCE, one of the first fundamental changes in the form of governance and the legal system was creating consuls, who shared power for one-year terms. *[Livy Book 2, i.]* Dividing authority and instituting term limits was intended to provide stability within the system and protection against long-term

tyrannical rule. It also had the benefit of allowing the senate more opportunities to change leaders. The functioning of the legal and political system, however, still relied to a large extent on the "good judgment" of the senate and the consuls, but at least now there was a mechanism to limit the damage that could occur with the selection of a king "wrong" for the job or the time. For a long period, only patricians could be consuls or have consul authority.

The Appointment of Dictators for Specific Purposes

Recognizing that in a democracy the decision making process may be time consuming and that sometimes survival requires that ultimate authority rest with an individual, the Romans appointed a dictator for the first time in 501 BCE. *[Livy, Bk. II, Ch. 18.]* A dictator was usually appointed in times of emergency and held office for no more than six months or until the problem was resolved, at which time he was expected to resign. *[Id. at Bk. II, P. 104 note 27.]* Under a dictatorship, scrupulous obedience was required. *[Id. at Bk. II, Ch. 18.]* With a few notable exceptions beyond the limited scope of this paper, the dictator system in the republic worked because dictators measured their success by how quickly they could resolve the problem and then turn control back.

The Plebs Obtain Protection with the Tribunes

The creation of the tribunes in 494 BCE is the first tangible shift in power towards the plebs. And, marks the beginning of a halting march towards elimination of the legal distinctions between the plebs and the patricians. It is inaccurate to suggest that the Roman legal system got to the point where tribunes were created because the plebs suddenly began to question in philosophical terms why they had no access to state

offices. Rather, there were significant political and economic factors leading to this development.

During the early period of the republic, the plebian class continued to grow, while the old patrician aristocracy rapidly declined in numbers. *[Mousourakis, 44.]* The plebs were also no longer a relatively homogenous group of small farmers, laborers, artisans and tradesmen. The growing segment of wealthy plebs began looking for a share in the government, while the poor were interested in improving living conditions and securing protection from the arbitrary power of the patricians. *[See Id. at 62.]* As to the legal system, the plebs were still disenfranchised because the patricians selected the magistrates enforcing the laws. Private judgments were summarily exercised and there was no right to appeal. Lictors were also used for punishment without any sort of trial. And, rulings were made without the benefit of recorded legal precedent.

At this time, the plebs strength and ability to seek real change resulted from the fact they comprised a significant portion of the military. Rome could not defend itself or go to war without the plebs. In 494 BCE, according to traditional dating, the plebs refused to serve in the army, left the city, and established a settlement nearby in *Mons Sacrum*. To avoid a civil war, the patricians had no choice but to modify the legal system by granting the plebs the right to elect their own officials, the tribunes. Although not regarded as magistrates, the tribunes of the plebs had the critical right to veto acts of magistrates threatening the interests of the plebs and the power to protect the plebs against abuses of patrician offices. The plebs own assembly also elected the tribunes.

Further Modifications to the Legal System

After the creation of the tribunes, further changes to the legal system occurred whenever conditions were right for the plebs to assert and enforce their demands, or when the leaders believed that the benefit of granting rights to the plebs outweighed the consequences of not doing so. Notably and with some historical irony, the senate often was able to derail the plebs attempts to obtain more control by speaking of, and sometimes even seeking war, so that the plebs would be required to become part of the war effort and discontinue attempts at political reforms. *[See Livy, Bk. 3, Ch. 10.]* Sometimes the patricians were successful in convincing the plebs it was unpatriotic to seek these advances when the republic should be focusing its efforts on fighting its enemies.

Efforts to Have Laws Written

As noted, the plebs were disadvantaged because the legal system was comprised of unwritten laws known only to the patricians and controlled by them. The tribune Terentilus Harsa in 462 BCE demanded that the laws of the consuls be written down and made public. *[Livy, Bk. 3, Ch. 9.]* Terentius attempted to inflame the plebs by telling them that the "magistrates had unrestrained and infinite power" and they were "free and unbridled" they "turned all the terrors of the law and all its punishments upon the plebs." *[Id.]* The measure did not pass and was postponed. Shortly thereafter and in response to the law not changing, the tribunes exercised their authority by preventing a levy. For the ensuing decades, there were constant struggles between the tribunes and the patricians and attempts to pass numerous laws, such as Terentilus' law.

The Passing of the Twelve Tablets

In 450 BCE, the Decemvirate in the "Twelve Tablets" codified laws. Although the history of the Decemvirate is worthy of a complete paper for why they were willing to give over complete authority and the efforts to maintain such authority, it is worth noting that this marked a significant change in what Livy refers to as the "Constitution" of the Republic. *[See Livy Bk. 3, Ch. 33.]* Here, there was an attempt to codify laws. To accomplish this, complete authority over the administration of justice without appeal was placed in the hands of ten men. Livy describes the Twelve Tablets as "the fountainhead of all public and private laws." *[Id. at Bk. 3, Ch. 34.]*

In actuality, the Law of the "Twelve Tablets was not really a constitution or a comprehensive code of laws. It was merely a "compilation of basic customary civil and criminal laws and rules of procedure." *[Mousourakis at 63.]* What we would refer to as "constitution laws" remained under the inclusive control of the patricians. Rather, it is more accurate to state that customary norms such as the ban on intermarriage between the patricians and the plebs, along with prison and slavery for debts were now part of the legislative code, which were not beneficial to the plebs. *[Id.]*

What is most significant about the Twelve Tablets in terms of a progression of legal changes, however, is that these customs, norms and procedural laws, were for the first time available to the plebs. In a society where legal precedent was important, the plebs, for the first time had the ability to defend themselves with knowledge of rules and procedures. *[Id.]*

Passage of Laws Further Enfranchising the Plebs

In 449 BCE, after the near disastrous experience of unchecked power of the Decemvirate, the plebs and the patricians were given the right to appeal to the assembly of the people to anyone sentenced to capital punishment. *[Livy, Bk. 3, Ch. 55.]* A law was enacted confirming the inviolability of the plebian tribunes and their rights to block by veto acts of the magistrates considered detrimental to the plebs. *[Id.]* Shortly thereafter in 445 BCE, the ban on intermarriage was removed. *[Id. at Bk. 4, Ch. 1]*

It is worth noting that Livy's oration discussing the removal of this ban is in my opinion the most compelling passage we read in class. Historians also view this as an extremely significant event in the evolution of the patrician and plebian conflict. The reason simply is that for the first time, wealthy plebian families, who were leading the fight for political equality, had the ability to contract alliances by marriage with patrician families with "which they shared potentially common economic and political interests." *[Mousourakis, 64.]* The boundaries between the plebs and the patricians were thereby continuing to fall.

In 367 BCE a series of laws were passed which recognized the right of the plebs to hold the consulship, by providing that at least one of the two consuls elected each year should be chosen from the plebian class. By the close of the Fourth century BCE, the plebeians had gained access to all the highest magistrates of the state. As Livy stated, "Consulship is open to all, to us patricians and to you plebeians, and is the reward not of birth, as before, but of merit." *[Livy, Bk. IX, Ch. 33.]* Laws were then passed limiting the amount of public land that could be held by individuals and regulating oppressive debt

practices, including one in 326 BCE abolishing the rule codified in the Twelve Tablets that allowed creditors to sell their insolvent debtors into slavery.

The same year plebeians were admitted to the priestly colleges and laws were enacted which provided that new members to the pontiffs and augurs must be from the plebian class. Historians believe this was another very significant event because it granted plebeians access to the formulae used in legal transactions and the members of their class acquired the right to at be interpreters of the law. *[Mousourakis at 64.]* In 304 BCE, Gnaeus Flavious published the forms of civil law, which "had been hidden away amongst the secret archives of the pontiffs, and posted the official calendar on white notice boards around the Forum, or the date to be generally known when a legal action could be brought." *[Livy, Bk. IX, Ch. 46.]*

Finally, in 287 BCE a law was passed providing that enactments of the plebian assembly were given the full force of laws binding on all Roman citizens. This meant that the senate was no longer necessary for laws to be legally valid. *[Id. at 64 – 65.]* Thereby, marking the end of the evolution of laws distinguishing between the patricians and the plebs.