

The Evolution of Roman Legal Language

Patrick Miller

In their language, early and late Roman law differ in three general ways: first of all, early law is more poetic; secondly, early law favors narrative while late law favors abstraction; and thirdly, early law is syntactically much simpler.

These general linguistic differences become evident when we isolate examples of each sort of law and compare them on more specific points: for early law, our example will be the code of the XII Tables (449 BC); for late law, it will be the Theodosian Code (438 AD) and especially its provision concerning the *Praepositus Sacri Cubiculi*.

More precisely, we find the XII Tables exhibiting the following eight specific features: of poetry, they show alliteration, rhythm, and rhyme; of narrative, we find conditional statements, and few nominalizations (otherwise known as action-nouns or deverbals); and of simplicity, finally, their sentences are short, with few qualifications, and mostly active and imperative verbs.

By contrast, the Theodosian Code lacks these eight specific features: being written in prose, it has little alliteration, rhythm, or rhyme; rather than conditional statements, it features indefinite relative clauses, and this abstraction is complemented by many nominalizations; of syntactic complexity, finally, it exhibits long sentences, many qualifications, and passive and subjunctive verbs.

Unfortunately, there won't be time today to survey the details of these *linguistic* differences. Instead, we will discuss a few of the *cultural* differences between the early and late Rome that produced these linguistic differences, hoping thereby to explain their causes.

The XII Tables

Beginning with the XII Tables, we must always keep in mind the primitive Rome that produced them. By "primitive," of course, I don't mean inferior -- in the manner of a 19th century anthropologist. Rather, I mean to emphasize an economic, political, and even ethnic simplicity, as compared, for instance, with the late Empire.

According to Warde Fowler, the Pontifices held great power in this little town. Naturally, they administered the *ius divinum*; but because the procedure of the *ius civile* was originally quite similar, Fowler argues that they also administered it. As he writes, "Action and formula in civil law belong to the same class of practices as sacrifice and prayer in religious law, and spring from the same mental soil." (p.277) After all, the Pontifices were trained to address the gods in appropriate votive forms; legal forms would thus have come easily to them. The picture Fowler thus paints is of a civil law gradually emerging from a divine law.

In the beginning, then, the Pontifices withheld the secrets of their procedures from the people. Later, as these procedures became public in the XII Tables, the people may have learned their secrets, but the Pontifices still administered these procedures. As Fowler argues, "these acts and formulae . . . could not suddenly or rapidly pass out of the hands of that body of skilled experts which had so long been in sole possession of them." (p.277) They therefore kept two tasks: the development of new actions and formulae, as well as the interpretation of the XII Tables.

Poetry

Fowler's picture gives us a readily accessible, indeed a plausible, explanation of the language of the XII Tables. For if he is right, we should expect these laws to resemble prayers. And to some extent, this is what we find. The prevalence of alliteration, rhythm

and rhyme all contribute to the poetic and even liturgical sound. In the least, the fact that early Roman law was mostly an oral practice would explain the need for this sound. Each of the poetic devices makes legal rules more memorable. Moreover, the resonant language of poetry marks a ritual boundary that helps to distinguish legal events from everyday life; it warns those who cross this boundary to beware what they say and do, as everything on the other side has well-defined consequences.

One additional fact must not be forgotten. This is the peculiar insistence of early law on the exact repetition of formulae. Take the procedure of *mancipatio* for example. Besides involving a purely symbolic transfer of bronze (Nicholas, p.63), it required the exact repetition of a formula. Other ancient procedures are similar: e.g., *in iure cessio* (with its more elaborate formula of *vindicatio*), and *sponsio* (Nicholas, p.193). Indeed, this peculiar insistence continued through the classical period of Roman law in the guise of the formulary system.

All the while, though, it bears a striking resemblance to the insistence of Roman religion upon the exact repetition of prayers. In Roman prayers, the prayer had to be incanted precisely as prescribed; for if there were any mistake, it had to be repeated from the beginning (Fowler, p.188). In some cases of early law, furthermore, were the plaintiff to utter the correct formula and oath, he would thereby win his case (Crook, pp.68-97). Implied by this procedure is a belief not only that certain formulae are needed to engage justice, but also that the gods safeguard the sanctity of oaths. Both beliefs invest words with talismanic power.

Narrative

The narrative style of the XII Tables is also fruitful soil for suggestions.

According to Daube, the usual syntax of early law, be it Roman or Jewish (1956, p.8), is the conditional statement. As he writes, a conditional such as, "If a man does this

or that' tells you a story -- though of something yet to come. It puts a situation which may arise, and informs you how to meet it." (p.6). By contrast with the conditional, later law favors the use of indefinite relative clauses, which is what we find in the Theodosian Code. Daube theorizes that an indefinite relative clause such as, "'Whoever does this or that' refers not to a situation, but to a category, a person defined by this action . . . It is more general, abstract, detached." (p.6)

"This change," he adds, "reflects an evolution from what we might call folk-law to a legal system." This is just the sort of evolution reflected by our quick comparison of the XII Tables and the Theodosian Code. By Daube's terms, then, the XII Tables are folk-law. In this way, both the narrative and syntactic simplicity of the XII Tables, including their use of conditional statements, were probably caused by the simplicity of early Rome itself.

But how? Following Daube, we might argue that the greater cohesion of simpler societies produces a greater moral consensus. With this consensus as a background, they do not need laws telling them what can and cannot be done; none of their citizens disagrees about this. Instead they require only laws that tell them which consequences follow from which actions. And this information is better expressed in a conditional mode: do this and you will suffer that.

By contrast, when societies grow and become more complex -- politically, economically, ethnically -- there is less moral consensus. Therefore, their citizens need laws to tell them what can and cannot be done, as well as what follows when they break them. And this information is better expressed in an indefinite relative clause: no one should do this; whoever does will suffer that.

More prosaically, conditional statements are easier to remember than relative clauses defining abstract types and categories, just as stories are more memorable than theories. If so, conditional statements may be favored by early law because, like poetry, they are more memorable. Likewise, early law may favor verbs and avoid abstract

nominalizations because such laws are more vivid and thus easier to memorize.

(Compare memorizing a parable versus a paragraph from Kant.)

However, if this need for memorability weren't enough to banish nominalizations from the XII Tables, the simplicity of early Rome would be. For the formation of nouns from verbs, argues Daube, is the result of, "some reflection on the activity in question, there is some trend towards abstraction, systematization, classification perhaps, the thing is becoming an institution." (1969, p.11)

A society without elaborate institutions -- in other words, without an elaborate bureaucracy such as that of the late empire -- won't need to make the fine legal distinctions that nominalization allows. Rome of the XII Tables was just such a society. In all the direct quotations of this early legal code there are only two: *comitio* (I,6), from *comeo*, and *iniectio* (III,1), from *inicere*. And both were processes upon which early Roman jurists had meditated.

Simplicity

As for those elements of syntactic simplicity in the XII Tables that we notice -- short sentences, few qualifications, and verbs in the active voice and imperative mood -- these are easily and quickly explained by a combination of the above suggestions. If we were right about the poetry of the XII Tables -- that it arose from the oral, therefore memorable, and maybe even religious origins of early law -- then it is self-evident why their laws had to have short sentences. Likewise for few qualifications, if not also because the XII Tables stood at the beginning rather than the end of the legal tradition whose quibbles would add innumerable accretions to the antique simplicity. And finally, active and imperative verbs would have been the natural complement of narrative, let alone the requirement of divine command.

The Theodosian Code

This brings us to the Theodosian Code, and just as we had to keep in mind the simpler Rome which produced its ancestor, the XII Tables, so too we must keep in mind the complex society that produced it. This complexity goes a long way toward explaining the prose, abstraction, and complexity of its own language.

Prose

To begin with, the preference for prose, rather than poetry, is easily explained by the introduction and later domination of writing in Roman legal culture. By 438 AD, to be sure, Roman law was no longer the mostly oral tradition it had been in the time of the XII Tables. Even in the first century BC, for instance, Cicero spoke loosely of the *stipulatio* as a written act (Nicholas, p.194). Originally, it had been an oral promise with sacramental overtones: one party asked whether the other would promise, with these words and these words only: *spondesne?*; if the other party wished to promise, he had to say *spondeo*. As Barry Nicholas writes, "if the promisor, for example, answered *promitto* to the promisee's question *spondesne?* there was no contract." (p.193) When there *was* a contract, though, more than just the contracting parties became involved. Like the solemn words of the original *mancipatio*, these words of the original stipulation seemed to engage the gods.

But as Greek law, with its written tradition, gradually influenced Roman law, sacramental rituals like these gave way to documents. This written influence accelerated after the the *constitutio Antoniniana* in 212 AD, which granted Roman citizenship to thousands of subjects who had formerly followed the Greek practice of writing. These new citizens forsook the earlier ritual and simply added stipulations as codas to their written contracts. In this way, by the time of Justinian, we find even the established legal

authorities of the Emperor saying that the exact form of the promise is irrelevant (Justinian, 3.15.1).

Now that writing has superseded ritual, and any form of words will serve to initiate a binding contract, the earlier need to memorize exact formulae has vanished. This is what our earlier conclusions should have led us to expect. For if the function of poetry in early law had been to facilitate memorization, and perhaps also to resemble religious incantations, we should expect later written law to abandon poetry in favor of prose.

Complexity

But furthermore, written prose became more useful on its own merits. Roman society was now immeasurably more complex. Roman law therefore had to adapt and become more complex itself. This complexity was not only a matter of content but also a matter of syntax, as a brief look at the Theodosian Code reveals. Written prose allowed this syntactic complexity, and even promoted it.

Needless to say, the XII Tables themselves were written, but they emerged from an oral tradition of even earlier law. Consequently they bear few of these hallmarks of writing. The Theodosian Code, by contrast, is both written and born of writing -- centuries of legal writing, in fact, with all the accretions such a tradition inevitably adds. These additions are inevitable because written law is inherently conservative: for instance, only with writing can a doctrine of precedent arise.

There is no mention in the XII Tables of earlier decisions or laws. Compare this conspicuous absence with our excerpt's mention of the precedent of Macrobius. Or consider the contemporaneous Law of Citations (426 AD), which not only singled out as authoritative the writings of Papinian, Paul, Ulpian, Modestinus, and Gaius, but also added an elaborate algorithm for deciding among them when they disagreed. This degree

of conservatism, one should say fundamentalism, would have been impossible without writing.

Such conservatism, combined with the precision afforded by the written word, partly explains why the prose of the Theodosian Code became so complex. When traditional and sacramental forms of oral law yield to new and secular forms of written law, the meanings of these forms become ambiguous. Competing claimants inevitably feed on such ambiguities, and the result is an ever more complex law.

Take, for instance, the *stipulatio* discussed above. In early law it had the rigidity of a sacrament. Once it had been engaged, with precise words, there was no question of its meaning. However, if you and I may enter a stipulation by the numerous and varied words listed in the *Institutes* (3.15.1), it may sometimes become unclear whether we have entered anything legally binding at all. For if you say *faciesne?* and I reply *faciam* but do nothing afterwards, you will claim that I stipulated, while I, being an incorrigible procrastinator, may cavil that in my personal lexicon *faciam* is less a promise and more a hope.

Here we see the advantage of distinctly marking the beginning of legally binding relationships with some unequivocal formality; like *spondere*, or bronze scales. When these formalities lose their appeal, lawyers gain theirs. This point requires no explanation; we are more than familiar with this phenomenon in our own time. But we should notice how quickly legislators and contractors will anticipate it, qualifying their documents with subordinate clauses and lists of near-synonyms, hoping thereby to stop up all the gaps.

Consider the exhaustive list of tenses in the first two lines, and again in the last two lines, of our excerpt from the Theodosian Code. Similarly, consider the exhaustive list of offices with which the Praepositus is made equal in dignity, or the exhaustive list of occasions on which his dignity must be respected. Written law not only allows the proliferation of such qualifications, its inherent conservatism preserves them, stacking

them up throughout a long tradition. This is one explanation, then, of the syntactic complexity of the Theodosian Code.

Abstraction

A second explanation of this linguistic complexity is simply the complexity of the society that late Roman law needed to manage. Such cultural complexity certainly helps explain the abstraction of late laws. Consider nominalization. As we saw, nominalizations were almost totally absent from the XII Tables. But as Roman society and thus Roman law became more complex, later Roman jurists meditated upon more and more such processes, naming them as they went, developing finer and finer nominalizations.

But a third explanation of late Roman legal language is more ambitious. It concedes that the development of writing sufficiently explains the supremacy of prose over poetry; however, it thinks that this development, even when conjoined with the cultural complexity of the late Roman empire, is insufficient to explain the inflation of that prose with both abstraction and syntactic complexity.

After all, complex ideas can be stated with simple syntax: St. Thomas's *Summa Theologiae* is an enduring example of this ideal. And although a more precise law will indeed need nominalizations to make finer distinctions, many of the instances in our excerpt are superfluous. After all, according to *Bradley's Arnold*, Latin typically prefers the concrete to the abstract -- a participle, therefore, or even a relative clause, rather than a nominalization (Mountford, p.304). In this way, the nominalizations of our excerpt deflate with a little ingenuity. And this is the point of the third explanation: that which could be said simply assumes grandiloquence. But why?

Although this abstraction and complexity may have been due in part to written law, and in part to the precise demands of a complex society, it may also have been due to the strategic effect of overwhelming prose. For by writing in a way that no-one can

understand immediately, and that few will have the patience to penetrate, the legislator can achieve two goals.

First of all, he can obfuscate an unpopular provision; or secondly, he can cow the average subject into obedience by placing before him a law that is beyond not only his control but also his comprehension. On the one hand, complex syntax achieves this by embedding subordinate clauses, placing them between subject and verb, and lengthening sentences to the point where no one can keep any whole one in mind at once. On the other hand, nominalizations achieve this by reifying processes and making the agent disappear.

For instance, *administratio* obviates any mention of the Emperors. This effect is doubled, moreover, by the bombastic titles which replace any explicit mention of them: *nostra liberalitas*, and *imperium nostrae serenitatis*. The effect is tripled by the passive voice of many of the verbs describing their action. Three-times removed, the subject now stands before a shrouded government, which distributes *provectiones* from the recesses of a *sacrum cubiculum* -- all in a Sibylline prose designed to provoke awe and compel obedience. Or so this third explanation would suggest.

This therefore brings us to a final comparison of early and late Roman legal language. We have seen how the archaic oral law required rituals to initiate its legal relationships: bronze scales were needed to signal the beginning of a *mancipatio*, the verb *spondere* was needed to signal the beginning of a *stipulatio*, etc. If we take the authors of the *Institutes* at their word, however, late Roman law contemptuously dispenses with such rituals. To them, it no longer matters what words are used: subjects initiate legal relationships so long as they share the same intentions.

This may be true of contracts, but not of laws. After all, here among the laws of the Theodosian Code we have found an elaborate, pretentious, and dare we say liturgical language. To mention just the most outstanding rituals: officers must be flattered with the right adjectives, commands must be qualified with an exhaustive list of verb tenses, the

passive voice and subjunctive mood must be used to pacify objectors and occlude the activity of the Emperors. Most striking of all: these Emperors must be given the right titles. For now they resemble the gods of Roman prayer, who must be addressed properly lest they ignore suppliants. Accordingly, late legal language assumes a new sacramental dimension. Early contracts failed if they used the wrong verb or flouted traditional ceremony. Late laws must correctly name the Emperor and heed these other major rituals.

If this third explanation is correct, then, abstract and complex prose has been used by late Roman law to distinctly mark a ritual entry into the presence of the sacred. Should this be correct, notice, the basic cause of the unique characteristics of late Roman legal language would not differ much from that of early Roman legal language. Each would stem from a sacramental impulse; they would differ only inasmuch as they disagree about the holy.

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