Epilogue

The classical period of Roman law is conventionally taken to have ended in AD 235 with the death of the emperor Severus Alexander. It is true that the line of independent classical jurists breaks off there. But this was not a collapse but a change of direction. The leading jurists increasingly became involved in the process of imperial law-making; and their works were the constitutions they composed in the name of their emperor. The constitutions of Diocletian in particular (AD 284–305) show that half a century after the end of the classical period the standards of classical jurisprudence had been maintained. But this was not a period in which new original juristic work appeared; instead the trend was towards the production of anthologies or epitomes of leading classical works. It therefore seems appropriate to refer to the period from about AD 235 to 305 as the 'epiclassical' period of Roman law and to date the decisive break between the classical and the post-classical to about AD 300 (Wieacker 1971).

Yet the culmination of the classical tradition of Roman law was still to come. It came in the shape of the classical revival which took place during the reign of the emperor Justinian, and whose leading event was the compilation of the various parts of the *Corpus iuris civilis*. But by this time the western half of the Roman empire had long since fallen to barbarian invasion. Although during his reign Justinian succeeded in reconquering Italy as well as north Africa and Spain, these gains were soon reversed. The result was that Justinian's compilations never became firmly embedded in the West. Instead, nations of the West lived by the law codes promulgated by their Germanic kings: the Visigoths by the *lex Romana Visigothorum*, the Burgundians by the *lex Romana Burgundionum* and the Ostrogoths by the *Edictum Theoderici*. All of these codes drew heavily on Roman materials but their analytical level fell far short of that of the Justinianic compilations. The *Corpus iuris civilis* would remain unknown in the West for the next five centuries.

It is around 1100 that the study of Roman law appears to have revived, most likely owing to the import of the Digest, Code and Institutes from the East where they had never been lost. This revival is associated with the figure of Irnerius and with Bologna. Here begins what Vinogradoff described as a 'ghost story', 'a second life of Roman Law after the demise of the body in which it first saw the light'. Certainly, this is the story of a ghost doomed to walk for an exceptionally long time (Vinogradoff 1909: 4).

The impetus given to the study of law by the rediscovery of legal materials so rich, so substantial and so elaborate is almost impossible to exaggerate. There is no better way to illustrate this than to say a few words about the various schools of jurists of the following centuries, each of which adopted a very different approach to the Roman texts. (An illuminating account of all of them may be found in Wieacker 1995.)

First came the glossators, who from the twelfth century wrote marginal comments ('glosses'), explaining the texts and cross-referring to others. Their concern was to explain the texts using scholastic and logical methods. They were quite unconcerned with the practical application of the texts but treated them as a pure and timeless object of study.

The glossators were followed by the commentators, so called because of their more sustained commentaries on the Digest and Code, which began to appear in the course of the fourteenth century. The commentators did not confine themselves to the study of Roman law alone, and they attempted to accommodate the Roman texts to the demands of legal practice, even although this naturally involved construing the texts in a way quite different from what their ancient authors had intended.

As early as the fourteenth and fifteenth centuries the first signs of the third movement, of humanists, appear. With them came a backlash against the practical application of the Roman texts: the humanists' concern was to understand the classical signification of each text, and their contempt for what they saw as the crude efforts of their predecessors was undisguised. The quest for the classical also led the humanists to make the first attempts to separate out the elements in the Digest written by the classical Roman jurists and the words put into their mouths by Justinian: in short, the humanists were the first interpolation hunters.

In the seventeenth century the natural lawyers, Grotius and those who followed him, used the Roman texts in yet another way. For their purposes, the texts were not authoritative but they could still be called into

service either as illustrations of the natural order of law or as rules of positive law to be compared with the rational tenets of natural law.

The Roman legal texts were therefore capable of inspiring quite divergent methodologies and conceptions about the nature of jurisprudence. But matters went further than this: it was not the least of the attractions of the Digest that it supplied a fund of texts to suit all tastes even in the sphere of political discourse. For instance, for debates about sovereignty the Digest could supply proponents of autocracy with the brocard that the emperor was not bound by statutes (*princeps legibus solutus est*, *D.* 1.3.31) and republicans with the proposition that he should profess himself to be subject to them (*digna vox maiestate regnantis legibus alligatum se principem profiteri*, *C.* 1.14.4).

Alongside all this scholarly activity it is important to remember too that the Roman texts represented positive law, applicable by the courts. It is true that Roman law was not the only law available: the Church began early to develop its own law, canon law, although this too was in parts substantially influenced by Roman law; local customs also played an important part; and feudal laws suppressed the Roman legal rules relating to land. None the less, there was an important residual role for Roman law to play right into the eighteenth century.

Roman legal concepts and institutions spread throughout Europe. It is often suggested that England was immune to these currents and remained in splendid isolation. But research is gradually redrawing this picture: although there is much work still to do, the relevance and the importance of the Roman-law tradition in England as early as the thirteenth century – and as late as the nineteenth century – have already begun to emerge (Helmholz 1990; Hoeflich 1997).

The Enlightenment represented a break with the old order, including unquestioning reliance upon Roman law. None the less, the law of reason did not cast aside all that had gone before. What it did demand was that law should be systematic and orderly, so as to serve the needs of society. This involved a preference for legislation and in particular for the codification of law. Of the earlier codes the most influential was the French Code civil of 1804, which applied not only in France but was imposed by Napoleon in the Netherlands, served as a model for Italy and Spain, and was adopted in Louisiana. Following these national codifications, it became inadmissible to rely on Roman law, since all the law was now contained in the code. While for this reason Roman law is now of no authority in countries which rely on national codes, the fruits of the Roman-law tradition are still clearly to be seen in codes such as

the Code civil or the German Bürgerliches Gesetzbuch of 1900. On the other hand, in uncodified systems such as those of Scotland and South Africa, Roman law continues in the absence of clear modern authority to be persuasive and is cited in the courts from time to time.

Much of the earlier history of the western European tradition was therefore formed by the differing reactions to, and uses made of, the *Corpus iuris civilis* by successive generations of jurists. But this is not simply a matter of history: elements derived from the Roman-law tradition remain present not just in continental legal systems but even in the common law. The Roman-law tradition therefore represents a small area of common ground among the legal systems of western Europe. For this reason it has its part to play in current debate about the formation of a new private law for Europe (Zimmermann 1998). Quite apart from this, however, the Digest represents a fund of ideas and principles which is a vital resource even for modern legal systems (Johnston 1997b).

The main concern of this book has been the attempt to explore Roman law in the light of the society which created it. It may seem paradoxical that law developed for the needs of a specific ancient society should have been found sufficiently resilient to serve in societies quite remote and wholly disparate. Is this because Roman law is the best of laws for the best of all possible worlds? Perhaps. But a more likely explanation is this: the history of the Roman-law tradition is not a history of the fettering of later generations by the Roman legal texts. It is a history of their liberation, by responding to and building upon a system of jurisprudence of extraordinary sophistication.