Roman Law under the Southern Cross: *Sidere Ius Civile Mutato*

By the Hon. Arthur Emmett AO KC

Launched by

The Hon. Andrew Bell

Chief Justice of New South Wales

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Salvete iudices amicique or, should I say, “Friends, Romans and countrymen” and, of course, countrywomen!

I have heard it said that, when he opened the Sculpture Garden at the Australian National Gallery, its then Chair, Gough Whitlam, emerged on a punt through the wonderful Japanese Fog Sculpture wearing a toga and laurel wreath!

I have failed in my mission to convince our author to be so attired for this evening’s significant event. I have always, however, thought of him as somewhat imperial, especially with that fine Roman proboscis of his. He has also always looked good in purple! The least I could do for this occasion was to have arranged a bunch of grapes to help him get through his remarks.

I shall later be referring to the Emperor Justinian although I do not want to draw too great a comparison between him and Arthur, not least because that may invite an invidious comparison between Sylvia and Justinian’s wife, the Empress Theodora, who, according to the unreliable Procopius, was known for her lustful urges and licentious early career as an actress. Theodora’s father is said to have been a bear keeper as opposed to the 14th Chief Justice of New South Wales, although the difference in their respective careers may have been more apparent than real.

Now, regular readers of the Adelaide Law Review (and I know there are a number of those in our midst) would be familiar with the article by Dr John Jefferson Bray, written

before his appointment as Chief Justice of the Supreme Court of South Australia, entitled "Possible Guidance from Roman law".[1]

Like someone else we all know, Dr Bray was a Roman law “tragic” and a great lawyer, scholar and character.[2] According to the *Australian Dictionary of Biography*, which I prefer to Wikipedia, Dr Bray commenced lecturing in Roman law at the University of Adelaide during World War II and continued doing so until 1967, the year of his appointment to the Bench.[3] Some 16 years later, in 1983 and as Chancellor of the University of Adelaide, Dr Bray penned his “Plea for Roman Law”,[4] to which I shall return. I was going to describe Dr Bray as a renaissance man but he would have deprecated that description as far too modern.

By any ordinary standards, Dr Bray’s was an impressive and dedicated tour of Roman Law duty as was the Hon. RP Meagher's lengthy tenure as Challis Lecturer in Roman Law at the University of Sydney.

By the standards of the Hon. Arthur Robert Emmett AO KC, however, Bray’s and Meagher’s commitment to the teaching of Roman law was but fleeting. Arthur has now taught Roman law at his *alma mater* for 45 years – an astonishing achievement and one that is ongoing. The numbers undertaking the study of the subject have swollen considerably since Arthur was one of Roddy’s two Roman Law students in 1964. That was, of course, the Age of Aquarius which I suspect Arthur may have bypassed and of which Roddy was either blissfully ignorant or else would surely have disapproved!

This book, which I have great pleasure in launching this evening, is based upon Arthur’s lecture notes and accumulated wisdom derived from that almost half century of teaching. It also builds upon earlier comparative scholarship such as his articles “Roman traces in Australian law”[5], “Roman Law and Equity: some parallels”[6],

[1] (1968) 3 Adelaide Law Review 145.
[2] See John Emerson *John Jefferson Bray: A Vigilant Life* Monash University Publishing, 2015.
[3] https://adb.anu.edu.au/biography/bray-john-jefferson-23550.
[4] (1983) 9 Adel Law Review 50.
[5] (2001) 20 Aust Bar Rev 205; “Introduction to Roman Law” *Bar News* Winter 2008 at 69.
[6] (2014) 38 Australian Bar Review 95.

"Succession in Roman Law and the Common Law"[7], his chapter 'Reception of Roman Law in the Common Law' in Gleeson, Watson and Higgins *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (2013) and his role as contributor of the Latin and Roman law entries for the *Australian Legal Dictionary* (Butterworths, 2016) and the *Concise Australian Legal Dictionary* (LexisNexis 2019).

Now it is a little known fact that the Roman law prize at Sydney University is known as the Thomas P *Flattery* Prize which, according to Sydney University's records, was founded in 1958 by a gift of 105 pounds from a Mr Thomas P. Flattery, MA LLB. It apparently now has no monetary value which makes clause 3 of the terms of the gift - namely that "in the event of more than one student gaining highest marks the prize shall be divided equally amongst such students" - something of a curiosity.

I have sometimes wondered who Thomas P Flattery was and whether he and the prize which bears his name may in fact have been conceived and donated by Roddy Meagher as a joke! I have subsequently discovered that Flattery was in fact a real person, graduated from Sydney Law School in 1920 and, as recorded in the best-selling history of that Law School, *A Century Downtown*,[8] was himself the Challis lecturer prior to RP Meagher. The same history records that his classes dwindled and "on one occasion he was observed busily translating Justinian with no students in attendance at all", giving new meaning to being in a class of his own![9]

Arthur Emmett *was* in a class of his own in the orthodox sense but whether being *flattered* annually by eager students has been the secret to his pedagogic longevity is a matter of speculation. After his appointment to the Federal Court, topping Roman Law at Sydney University also carried a standing offer to be Arthur's Associate for the following year, and that tradition continued when he saw the light and moved to the NSW Court of Appeal at which time, his classes were taught at the Court. Many of his former students and associates or tipstaves are here this evening.

[7] (2012) 50 Australian Bar Review 223
[8] John and Judy Mackinolty, Sydney University Law School, 1991.
[9] Ibid at p.121.

Arthur's contribution and commitment to the teaching of Roman Law was justly recognised with the award of an LLD (*honoris causa*) by Sydney University in 2009. As the citation accompanying that award stated:

> "From the moment he first undertook the study of Roman law, Arthur Emmett perceived its fascination as a system of intellectual taxonomy; its importance in the influence it still enjoys in the legal traditions of civil law countries; and its utility to our own legal tradition, in reasoning by analogy when resolving difficult questions."

The citation continued:

> "He offered his lectures on a voluntary basis because this was the only footing on which the University could continue to offer the subject for those students wishing to undertake it. This is a remarkable gift to the University of Sydney."

I would also add that it is a gift that has seen knowledge and appreciation of Roman law and of its importance survive in this country. That gift and mission will only be enhanced by the publication of this book.

When one appreciates all that studying Roman Law has to offer – and I will say a little bit more about that in a moment - its survival on the curriculum of the country's oldest university is a matter of some real significance, and many of Sydney University's finest law graduates of the past four decades have been the beneficiaries of Arthur Emmett's great skill as a teacher[10].

As I record in the Foreword to the book:

> "On Tuesday and Thursday afternoons in 1989, shortly after 4:30 pm, Mr Arthur Emmett QC (as he then was) would wander over from his Phillip Street Chambers to the old Sydney University Law School on the corner of King and Phillip Street, Sydney, to deliver two hours of lectures on Roman law to a curious cohort of final year students. … At the time he taught me, he was one of the leading commercial silks in the country and in huge demand. That he made the time to teach in these circumstances and did so with such skill, clarity and dedication, is testament to his character, scholarship and strong belief, which I share, of the great value of a knowledge of Roman law to a contemporary lawyer."

I have extremely fond memories of our Roman law classes. By recollection, there were about 20 of us in the cohort of 1989, including my friend Robert Dick, now of senior

[10] Thomas P Flattery Prize winners include Arthur Emmett himself, the Hon Justice Robertson Wright, Justin Gleeson SC, Alan Shearer SC, and, more recently, Timothy Cargill, Henry Cooper, Stephanie Glass, DCH Foong, Codey Swadling, Calida Tang, Henry Gallagher, Erik Pridgen and Jedda Elliott.

counsel. In a combination or *commixtio* of undergraduate humour, Monty Python and dog Latin, Robert quickly became known in the class as "Dickus Maximus". To this day, I still refer to Robert, affectionately, as "Maximus"!

Roman Law had its written *origo* in the Twelve Tables which have been dated to 449 BCE but its true *fons*, to continue with the Latin (as is only appropriate) was even earlier, as the Twelve Tables documented centuries of *customary* Roman law. But we really need to go a further 900 years *on* from 449 BCE to the 6th century AD and to the great city of Constantinople (as it then was) and the Emperor Justinian to explain how Roman law survived the Dark Ages and came to be the foundation of the great system of civil law by which so much of the modern world remains regulated.

The Emperor Justinian was described by Procopius as "The Emperor who never slept".[11] 2029 will mark 1500 years since Justinian launched his ambitious project to codify Roman Law in the *Corpus Iuris Civilis*, comprising the Code, the Digest, the Institutes and the Novels. This was completed six years later in 535 AD. The Roman Empire in the West had fallen some 50 years or so earlier to the barbarians, but it survived for another millenium in the East. Not only did Justinian commission the *Corpus Iuris Civilis;* he also commissioned the construction of the Hagia Sophia, an image of which appears on the cover of *Roman Law under the Southern Cross*. What two extraordinary legacies.

Justinian's *Institutes*, conceived as a textbook, are still used for that very purpose, including by Arthur in his lectures. I still cherish my copy.

At this stage of proceedings, I must return to the subject of the Flattery Prize for Roman Law. It was referred to in the 2005 winter edition of *Bar News* which was the first issue of that great journal of record which I had the honour to edit, following the distinguished editorship of Justin Gleeson SC, another of Arthur's Roman Law students. In that issue, I felt constrained to publish the following letter to the editor (that is to say, me) from Arthur:

> "Dear Sir,

[11] Procopius, *The Anecdota (Secret History)* Chapter XIII.

> My attention has been drawn to an article in the summer 2004/2005 number of Bar News, a journal which I understand is now published under your editorship. The article is attributed to AW Street SC and deals with amendments to the Trade Practices Act 1974 (Cth).
>
> On page eight of the journal, the article cites a passage that is said to be from 'paragraph 224 of De Iniuriis in Book II of the Institutions of Gaius'. It is not. Both you and your predecessor as editor should well know that Gaius Book II.224 refers to the Lex Falcidia. 'De Iniuriis' is the title heading of Justinian's Institutes Book IV.4, where Gaius III.224 is substantially reproduced, at IV.4.7. Both Gaius and Justinian refer to the XII Tables.
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> If two recipients of the Thomas P Flattery prize were unable to discern the difference between the *Lex Falcidia* and the XII Tables, what hope would there be for the *iuventus legum cupida* of the future? I can only assume, therefore, that the solecism was, to employ a term used by my predecessor, as Challis Lecturer, when addressing the predecessor of Mason P, merely intended to tease.
>
> Arthur Emmett"

Returning to the past, some 610 years *after* the completion of the *Corpus Iuris Civilis*, in 1143 AD, Master Vacarius, a Mantuan jurist and a teacher at the University of Bologna, was brought to England by Archbishop Theobald and introduced the study of Roman civil law to English Universities.[12] At the University of Oxford (or, perhaps Canterbury),[13] Vacarius taught Roman law and Canon law in the tradition of the Italian glossators.[14] In about 1149, Vacarius published a book to provide his students with a "trim and ready-made clearing" to navigate "the trackless forests" of Justinian's codification of Roman Law.[15] Much later texts have continued this tradition, including in the last century, Professor Barry Nicholas' *Introduction to Roman Law* and Buckland and McNair's *Roman Law and Common Law.* There is a valuable bibliography of the secondary literature in the Epilogue to Arthur's book.

It is no coincidence that Professor Peter Birks, a towering intellectual figure in Oxford in the 1980s and 90s before his untimely death, was a Roman law scholar of note and his famously taxonomical approach to the law of restitution was no doubt in part inspired by Justinian's codification all those centuries before.[16] And going back 250

[12] See P Stein, "The Vacarian School" (1992) 13 (1) *Journal of Legal History* 23, 23.
[13] F De Zulueta, "The Bruges Manuscript of Vacarius" (1924) 5(3) *Tijdschrift voor Rechtsgeschiedenis* 323, 324.
[14] See H D Hazeltine, "Vacarious as Glossator and Teacher" (1928) 44 (3) *Law Quarterly Review* 344; E D Re, "Roman Contribution to the Common Law" (1961) 29 (3) *Fordham Law Review* 447; P Stein, "The Vacarian School" (1992) 13 (1) *Journal of Legal History* 23, 23.
[15] L E Boyle O.P, "The Beginnings of Legal Studies at Oxford" (1983) 14 *Viator* 107, 121.
[16] See fn 30 below.

years earlier, Lord Mansfield was described in Lord Campbell's *Lives of the Chief Justices of England*[17] as having "attended [whilst at Oxford] lectures on the Pandects of Justinian, which gave him a permanent tase for that noble system of jurisprudence" and that he considered the Roman Civil Law "a splendid monument of human wisdom" and that he made " … ample use of the compilation of Justinian but only for a supply of principles to guide him upon questions unsettled by prior decisions in England."[18] Lord Mansfield's detractors took the view that he was far more liberal in his resort to Roman Law than was desirable.

The High Court of Australia has on at least 75 occasions referred, principally by way of analogy, to Roman Law and its codification in Justinian's *Digest*.[19] Such references have been made in relation to a range of legal issues including but not limited to judicial immunities,[20] apprehended bias,[21] accession,[22] the change of position defence to restitution,[23] the scope of the marriage power in s 51(xxi) of the Constitution,[24] the dismissal of jurors and the discretion to proceed without twelve of them,[25] vicarious liability,[26] non-delegable duties,[27] the action *per quod servitium amisit*,[28] and the statutory definition of pawnbroking – and its Roman law analogue, *pingus*, in *Palgo Holdings Pty Ltd v Gowans*,[29] that great forensic triumph of Professor LJW Aitken appearing unled in the High Court.

It must be said that a number of these High Court cases were argued by Arthur Emmett or involved appeals from his judgments!

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[17] Lord J Campbell, *The Lives of the Chief Justices of England, Vol 2: From the Norman Conquest Till the Death of Lord Tenterden,* John Murray*,* Albemarle St, 1858 at 327.
[18] Ibid at 438.
[19] I am grateful to my tipstaff, Mr Sebastian Braham, for the following references.
[20] *State of Queensland v Mr Stradford (A Pseudonym)* (2025) 99 ALJR 396; [2025] HCA 3.
[21] *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; [2011] HCA 2.
[22] *Commonwealth v Yunupingu (on behalf of Gumatj clan or estate group)* (2025) ALJR 519; [2025] HCA 6
[23] *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560; [2014] HCA 14.
[24] *Commonwealth of Australia v Australian Capital Territory* (2013) 250 CLR 441; [2013] HCA 55.
[25] *Wu v R* (1999) 166 ALR 200; [1999] HCA 52; *Katsuno v R* (1999) 199 CLR 40; [1999] HCA 50.
[26] *Bird v DP (A Pseudonym)* (2024) 98 ALJR 1349; [2024] HCA 41; *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161; [2006] HCA 19.
[27] *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165; [2023] HCA 21.
[28] *Barclay v Penberthy and Ors* (2012) 246 CLR 258; [2012] HCA 40.
[29] (2005) 221 CLR 249; [2005] HCA 28.

There is so much for a common lawyer to learn from Roman law. This is wholly unsurprising when one reflects that both civil law and common law are addressed to the enduring problems of human nature: the enforcement of obligations, compensation for injury, damage to and interests in property (both real and incorporeal), the transfer and possession of that property, marriage and death. Some common law concepts such as quasi-contract and bailment trace their origins directly to Roman law[30] as does the *lex mercatoria* or law merchant.

One of the great virtues of this book, reflecting Arthur's great skill as a teacher, lies in the *comparative* insights it provides to a reader in relation to the oldest and most enduring legal system in the world. As Dr Bray wrote in 1983:

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[30] See P Birks, *An Introduction to the Law of Restitution*, Clarendon Press, Oxford, 1989 at 29-31:
"Quasi-contract' is a noun formed by anglicising the phrase *quasi ex contractu* which itself was coined by Roman jurisprudence. If the texts were taken at face value it was invented by Gaius in the second half of the second century AD; but it may be due to Justinian's commissioners working in the sixth. For, in discharging the task of producing a slim-down law library, the commission had the emperor's authority to interpolate changes into the original material.

The phrase came into existence in this way. Dividing obligations by reference to the events which brought them into being Gaius affirmed, at his first attempt, that all obligations arose either from contract or from tort. A few lines later he stumbled on the obligation to repay a mistaken payment, which arose from neither. But for the moment he did no more than raise his eyebrows. Later, in another book, he cured the defect of the dichotomy by proposing a third category: other miscellaneous events. This time he affirmed that every obligation arose either from contract or from tort or from various other causes. And either he or someone later interfering with his text then broke down the residual miscellany into two 'quasi' categories.

Justinian's *Institutes* adopt the resulting fourfold division. They say that obligations arise either from contract or *quasi* from contract, or from tort or *quasi* from tort. The common law has found no use for quasi-tort. It has borrowed the term 'quasi-contract' but has not given it the same content as it had in Roman law. Indeed the use of the term by the common law can be best understood by going back to the three term division – contract, tort, and miscellaneous others – which was proposed by Gaius before the *quasi* categories were used to divide the miscellany.

For completeness and not because the content of the Justinianic category has a bearing on the common law story, it should be said that Justinian's quasi-contract was not exclusively a category of restitutionary obligations triggered by unjust enrichment, though it did amongst others include obligations having that content and origin. Its unity was different. It comprised all those obligations which arose from permitted, as opposed from forbidden, acts which were not contracts. Such lawful acts, though they were not contracts, nevertheless gave rise to consequences similar to those produced by one or other figure in the Roman list of contracts. Thus the consequences of receiving a mistaken payment were the same as the consequences of receiving a loan (*mutuum*) and were sanctioned by the same action, the *condictio.* Again, one who intervened in the affairs of another without invitation (*negotiorum gestor*), incurred by that lawful act an obligation to conduct his intervention with care. The action which sanctioned that obligation, nothing to do with restitution at all, exactly resembled the action on the contract of mandate. Hence the intervener was in a real sense subjected to a regime 'as though there had been a contract of mandate' even though in fact there had been no agreement between him and the plaintiff."

> "The very strangeness and unfamiliarity of many aspects of Roman society are in one sense advantages; they help to emancipate the mind from the tyranny of the contemporary [a wonderful phrase] and to point up the enduring nature of fundamental legal concepts and modes of reasoning in very different settings."[31]

Therein lies the significance of this subject. There are two great western systems of law which have underpinned civilized society, the civilian and the common law. The former is much older and has greater reach, supplying the foundation not only for modern European law but also Japanese, Indonesian, Egyptian, Latin American, Louisiana, Quebec and, of course, Roman-Dutch law in South Africa.

Speaking personally, it was the study of Roman law in my final year at law school that allowed the various siloed subjects of the modern syllabus to coalesce in my mind: the penny dropped as to how a sophisticated, integrated system of law operated to regulate the quotidian issues of human life. There is not a better way to teach comparative law than through Roman law, and there is great merit in any lawyer having an appreciation of how other legal systems operate.

Roman Law under the Southern Cross is a splendid publication. Once again, the Federation Press (and its mysterious proprietors) have demonstrated what a wonderful publisher it is, and although the book's subject matter makes a second edition unlikely, I am told that it is selling like Roman hotcakes and Pope Leo XIV memorabilia in St Peter's Square!

You must all buy this book for your essential education, intellectual nourishment and sheer enjoyment. It is a tribute to Arthur who is a quite wonderful man and friend, the very epitome of a scholar and a gentleman.

I declare *Roman Law under the Southern Cross* duly launched. *Sidere ius civile mutato!*

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[31] (1983) 9 Adel Law Review 50.