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CHAPTER I

Introduction

I WHAT IS NOT IN THIS BOOK

To begin with what is not in this book may seem odd; but it will otherwise remain unknown until the end, which seems unsatisfactory. This is not a comprehensive account of Roman law, or even of Roman law in its social setting. It is highly selective. There is nothing here about criminal law, and next to nothing about public or constitutional law. The focus is on the so-called classical period of Roman law, from about the end of the Roman republic in 31 BC until the death of the emperor Severus Alexander in AD 235. There is nothing here about post-classical law; and there is almost nothing about pre-classical law.

The warning about non-comprehensiveness is seriously intended. Law does not consist in generalities, and it is often said that the devil is in the detail. Undoubtedly that is right. But for present purposes it has been necessary to focus only on details which seem germane to the exploration at hand, of law and society. Many other details are glossed over, so anyone wanting a full account of the rules must look at one of the textbooks on the law. They are cited in the bibliographical essay at the end.

This chapter gives a rapid outline of the sources of Roman law, essentially for the purpose of making the ensuing discussion of substantive law comprehensible (fuller discussion may be found in Jolowicz and Nicholas 1972: 86–101, 353–94). The expression 'sources of Roman law' can mean two things: in the first sense it refers to where the law came from, statute, custom, decisions of courts and so forth; in the second it refers to how we know what we know about Roman law, our literary or documentary evidence of the past. The first of these senses is dealt with in this chapter; the second in the next. This chapter also deals briefly with the question how far the law at Rome was also the law in the provinces of the Roman empire.

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II SOURCES OF LAW

From 509 BC the system of Roman government was republican. The popular assemblies elected magistrates, who held office for a year. The leading magistrates were the consuls, of whom there were two at a time, allegedly to prevent autocracy; next after them in the hierarchy were the praetors; and below them a range of other lesser magistrates. A senate of magistrates and former magistrates was the oligarchical element in the constitution, which advised the magistrates, and forwarded proposals for legislation to the popular assemblies.

1. *The Twelve Tables*

What we know of Roman private law begins in about 450 BC with the promulgation of the Twelve Tables. Livy and Cicero describe them as the source of all public and private law (Liv., *ab urbe condita* 3.34.6; Cic., *de oratore* 1.195); Cicero recounts how schoolchildren had to learn them (*de legibus* 2.59). What these Twelve Tables contained was not quite a law code in the modern sense but a list of important legal rules. The rules were extraordinarily laconic and nowadays are hard to understand, not least since the subject of successive clauses changes without warning. An example: 'If he summons him to law let him go; if he does not go, let him call witness; then let him take him' (1.1).

Since the Twelve Tables do not survive, our knowledge of them is extremely fragmentary, and the order in which provisions appeared in them is mostly not known. The provisions which are known indicate that matters of family law, property and succession were prominent, as is perhaps to be expected at this period, but they also attest great concern with setting out the rules for legal process.

2. Ius

Apart from the Twelve Tables, the early law of Rome consisted in customary or common law, which had not been created by enactment but was simply recognized as being the law. Some of this, of course, was what was ultimately embodied in the Twelve Tables. This old, unwritten, undeclared law was known as *ius*.

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3. Statutes

Statutes were passed by the popular assemblies voting on proposals put before them by magistrates. Ancient authors liked to complain about the volume of legislation (Cic., *pro Balbo* 21; Liv., 3.34; Suetonius, *Iulius* 44.2; Tacitus, *Annals* 3.25). But so far as the private law was concerned, very little was made by statute (*lex*). There are notable exceptions, such as the statute on damage to property, the *lex Aquilia* of about 286 BC, and the *lex Falcidia* of 40 BC, which placed restrictions on legacies. But they are exceptions to a clear rule.

Statutes tended to be drafted in a very narrow and literal manner. Presumably this reflected extremely rigid canons of construction. An egregious example is provided by the *lex Rubria* dating from the 40s BC. Here, after setting out a model formula for trying an action which used the stock names 'Q. Licinius' and 'L. Seius' and the place name 'Mutina', the statute goes on to provide that the magistrate 'shall ensure that the names written in any of the foregoing formulae, and the name "Mutina" shall not be included or adopted in the said action, unless the said names written in any of the foregoing formulae shall belong to the persons who shall be parties to the said action, and unless the said matter shall be dealt with at Mutina . . .'.

None the less, there are clear signs of much bolder construction in other contexts: for example, the *lex Aquilia*, a much more concise statute (whose precise text is not preserved) gave damages for various wrongs including the breaking (*rumpere*) of a thing. Even in the later republic this statute was interpreted rather adventurously: *rumpere* came to be interpreted as damaging or impairing a thing in any way (*corrumpere*), and this interpretation greatly extended the scope of the statute (Ulpian, *D.* 9.2.27.13–35). But neither statutes nor statutory interpretation were characteristic of the development of Roman private law.

4. Praetor and edict

The formal source of most of Roman private law was the edict of the urban praetor, an office created in 367 BC which in the hierarchy ranked second only to the consuls. The praetor was the magistrate charged with the administration of justice. At the beginning of his year of office each praetor would publish in the forum his edict, which set out the legal remedies he would grant, together with the formulae for those remedies. How this system worked in litigation is discussed in chapter 6. A person

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who wished to raise legal proceedings would come before the praetor and request a particular formula from the edict. Equally, if he had a case which was not covered by an existing remedy in the edict, he might try to persuade the praetor to add a new remedy to the edict. In both the drafting of the initial edict and in its supplementation by new remedies the praetor, who would only rarely have knowledge about the law, would be assisted by the advice of legal experts, jurists. Behind the scenes, it was they who shaped the development of the praetor's edict.

Through his responsibility for granting legal remedies the praetor exercised control over the development of new causes of action. He could also lead to the suppression of old causes of action by refusing to grant remedies based on them, or by developing new defences available against them. The important point is that formally the praetor was not making new (substantive) law, a power which he as an individual magistrate did not have; all he was doing was creating new remedies or eroding old ones, exercising a procedural power. Indirectly, of course, the grant of a remedy in a new case was tantamount to the recognition of a new right; and the denial of an old remedy to the abolition of the right on which it was based. The Romans adhered to the theory that the praetor had no law-making power, but the jurists still referred to these new remedies as *ius honorarium*, 'law made in office', to be contrasted with *ius civile* (the law of the Twelve Tables, custom, and statute). While *ius civile*, which of course the praetor administered at the same time, theoretically ranked higher, in practice it was superseded where the *ius honorarium* took a different path.

The edict was a flexible instrument for reforming and modernizing the law, since changes could be made every year; and rejected again if need be. The greatest activity on the part of the praetors and the heyday of the edict as a source of law appear to have been in the second and first centuries BC. In practice much of the material must have continued unchanged from year to year; stability in the administration of justice required no less. Under the emperor Hadrian the jurist Julian was commissioned to draw up a finalized version of the edict; apparently he added only one clause (Marcellus, *D.* 37.8.3). It would be wrong to suppose that this was a strike by the emperor against the praetor's freedom to make new law; all the evidence suggests that edictal innovation had long since slowed to a trickle.

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5. Jurists

There grew up a professional class of lawyers. These 'jurists' were originally priests, but in the course of the third century BC they came to profess a secular jurisprudence. Their role in the Roman legal system was pivotal: neither the magistrates responsible for granting legal remedies nor the judges who decided cases were lawyers; all looked to the jurists for legal advice. Although the jurists did not in the modern sense practise law, this contact with practice shaped their distinctly pragmatic approach to it. But in debate and in their writing, they also developed a sophisticated analytical jurisprudence; and particularly during the 'classical' period of Roman law – from the late republic until the early third century AD – they produced a substantial legal literature. Typical of their works were large-scale commentaries on civil law and the remedies contained in the magistrate's edict, and books of collected legal opinions. While some of their works played their part in argument of interest only to the jurists themselves, others were suited to, and written to satisfy, the diverse demands of practice or even teaching.

During the early and high classical period, jurists seem to have adhered to one of two schools, the Proculians and Sabinians. In precisely what sense these were schools (of thought, of education) has been much debated; and many have been the attempts to pin them down to divergent political, philosophical or ideological positions. One point, however, is perfectly clear: the two schools differed on a number of quite fundamental legal principles and doctrines (Stein 1972; Liebs 1976; Falchi 1981). Here are two examples:

(1) Oxen and horses and other beasts of draught and burden were *res mancipi*, a type of property which required formal conveyance. The schools differed on whether an animal became a *res mancipi* at birth or only when it was actually capable of drawing or bearing burdens. In abstract terms this amounts to a difference over the question whether it is legitimate to describe something in a particular way on purely nominal grounds or whether it must be capable of functioning in the terms described (Gaius, *Inst.* 2.15).

(2) They differed on whether a new product (such as wine) made from someone else's materials (grapes) belonged to the maker or to the owner of the original materials. It is possible that this difference was founded on philosophical reasoning about the identity of matter (Gaius, *Inst.* 2.79).

Although doctrinal disputes are commonplace in any legal system, it

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is difficult completely to suppress the feeling that some of these disputes were tainted by the luxury of self-indulgence and at the same time undermined legal certainty.

It is invidious to single out names, but space allows no alternative. Of the early classical jurists, leading figures were Proculus, Labeo, Sabinus. In the high classical period the leading figure is clearly Julian, head of the Sabinian school and author of a work entitled 'Digest' (*digesta*) in ninety books. His principal rival was Celsus, head of the Proculian school. Other notable jurists of the high-classical period were Neratius, Marcellus, Pomponius, Iavolenus and Scaevola. Gaius, the author of the Institutes, an elementary textbook, is in a peculiar position: unlike other leading jurists, he is not known to have held any political office and, in spite of his evident attachment to Sabinian views, there is little reason to associate him with Rome. But he is spoken of warmly by Justinian (*Gaius noster*), and it may well be that later law paid more attention to him than did his contemporaries.

In the late classical period the names of Papinian, Ulpian and Paul stand out: Papinian, author in particular of books of legal problems (*quaestiones*) and opinions (*responsa*) was regarded as the finest of the jurists. Under the system of ranking legal authorities devised in the fifth century his views were given exceptional weight. Ulpian and Paul were authors, among other things, of extensive commentaries on the praetor's edict (eighty-one and seventy-eight books *ad edictum*, respectively) and on the civil law in general (fifty-one and sixteen books *ad Sabinum*, respectively).

To give a sense of the range and style of juristic work is difficult in a short space; the excerpts from their works which appear in the following chapters may help. Here it must be sufficient to give just three examples. What emerges quite clearly from this is that the jurists were highly individual in style and in manner; this makes it all the more surprising that last century they were regarded as interchangeable or 'fungible'. That view has fortunately faded into history. Here are three opinions, *responsa*, very different in style.

> Domitius Labeo to Celsus, greetings. I ask whether a person who is asked to write a will, and who not only wrote it but also signed it, can be regarded as one of the witnesses to it. Iuventius Celsus to Labeo, greeting. Either I do not understand your question or it is exceptionally stupid: it is quite absurd to doubt whether someone is a lawful witness because he also wrote the will himself. (Celsus, *D.* 28.1.27)

> 'I wish the income from the Aebutian farm to be given to my wife as long as

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she lives': I ask whether the heir's tutor can sell the farm and offer the legatee an annual payment of the rental income which the testator used to derive from the farm. He replied that he could. I also ask whether she can without penalty be prevented from living there. He replied that the heir was not obliged to provide accommodation. I also ask whether the heir is obliged to maintain the farm. He replied that, if the heir's actions cause a reduction in the income from the farm, the legatee can reasonably claim for that reduction in income. I also ask what the difference is between this legacy and a usufruct. He replied that the previous answers made the difference plain. (Scaevola, *D.* 33.2.38)

After a better offer has been made by a second buyer, the first buyer cannot sue him to recover money which he paid to the seller in advance against the price, unless there has been delegation by means of a promise. (Papinian, *D.* 18.2.20)

These opinions give a sense of the different characters and styles of the jurists. They also demonstrate the self-consciousness with which such opinions are given: Celsus bridles at being asked a stupid question; Scaevola comes close to doing the same. But what the opinions do have in common is an oracular style. Opinions are exactly that: opinions, and they rest on the prestige of the jurist. On that account the jurists can be brief, extremely brief, and they feel no need to give detailed reasons if any at all. Often the recital of the facts takes up most of the text; and the jurists confine themselves to giving an opinion 'on those facts' (*secundum ea quae proponerentur* is a frequent refrain). But they never express an opinion on whether the facts are correct, and they avoid answering factual questions: 'This is not a legal question.' Opinions in one or two words are far from uncommon; even 'why not?' is still an opinion, because it rests on the jurist's authority (Scaevola, *D.* 33.7.20.9; *D.* 34.1.19).

In the ancient world this self-conscious, perhaps arrogant, cultivation of authoritative knowledge about the law was peculiar to Roman legal culture. But legal culture was not, of course, impervious to outside influence. It is clear that in roughly the last century of the republic the jurists were particularly receptive to Greek influence, philosophical and rhetorical. Equally, from the late republic there was also mediation of Greek thought through the philosophical and rhetorical works of Cicero. Characteristic of this influence was a new (if short-lived) concern for system: Cicero is known to have contemplated writing (indeed perhaps he wrote) a work reducing the civil law to an art (*de iure civili in artem redigendo*); while the influence of dialectic is evident in the work of some late republican jurists. Some ideas found in the jurists can be traced back to Greek influence. On the extent of that influence a

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lively debate continues (Wieacker 1988: 618–62). However great it was, it is undeniable that the concerns of the Roman jurists were not philosophical: such material as they absorbed was turned to their own purposes, and was necessarily tempered with grosser unphilosophical considerations about reaching a workable result.

It was not only during the republic that the jurists were the key figures behind the scenes in the development of the law. Under the principate, the popular assemblies ceased to meet to pass statutes; in about AD 125 the praetor's edict was frozen in the form which it had then reached. Law which had previously been made by these means was now made by the emperor. But emperors were not lawyers. They too depended on the jurists for advice; and some of the leading jurists served in the imperial administration. Both Papinian and Ulpian had the distinction of holding the highest office of praetorian prefect. And the additional distinction of being murdered in office.

6. Emperor

The general term for law made by the emperor is 'constitution' (*constitutio*). This took many forms: if the ruling was made in court, it was known as a decree (*decretum*). Some emperors, such as Claudius and Septimius Severus were apparently fond of hearing court cases themselves (Suetonius, *Claud.* 14–15; Wolf 1994). Here is one of Paul's collection of *decreta* pronounced by Severus, which also gives a sense of the legal debate that might surround the emperor's decision:

> Clodius Clodianus made a will and then in a second, invalid, will appointed the same heir: the heir wanted to accept the estate under the second will, since he thought it was valid, but then it was discovered not to be. Papinian thought he had repudiated the estate under the first will, and could not accept it under the second. I said he had not repudiated, since he thought the second will was valid. He [Severus] pronounced that Clodianus had died intestate. (Paul, *D.* 29.2.97)

Emperors might also issue general orders, known as edicts (*edicta*). Or they might reply to official inquiry by letter (*epistula*); or to inquiries made by private petitions, by writing the answer at the bottom of the petition: hence the name 'subscription' given to these replies. (In the third century 'rescript' comes to be the term applied to replies both to petitions and to letters.) Justinian's Code contains constitutions of all these sorts.

The surviving material makes it clear that the volume of material was massive. Two points follow. First, as would be expected, the emperor rarely initiated contact; mostly he merely responded to questions (Millar

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1977). Second, the emperor had assistance. He had an office for answering letters and another for petitions; officials known as the secretaries *ab epistulis* and *a libellis* ran those offices, in which other staff worked. It seems likely that run of the mill inquiries would have been dealt with at a low level. The rescripts which survive in the Codes, which on the whole will have raised more difficult and interesting questions, were probably dealt with by the secretary *a libellis* personally, and from time to time the emperor is likely also to have been involved (Honoré 1994: 1–56).

Whenever a constitution required legal advice, it is the jurists who will have supplied it. It seems that under the empire a new class of civil-servant-jurists grew up. But in addition, as already mentioned, the great offices of state were sometimes held by leading jurists, and some (notably Papinian) are known to have held office as secretary *a libellis*.

III ROME AND THE PROVINCES

In the two and a half centuries of the classical period of Roman law the boundaries of the empire expanded. It covered a vast area, from Asia to Britain. Did the same law apply across this expanse, or was Roman law the law of Rome alone?

This is a difficult question, and a categorical answer to it would be ill-advised. Indeed, even to mention it is perhaps incautious. There must have been local and regional differences in the extent of Romanization. But the following points suggest that, in some areas at least, there were substantial similarities between Roman and provincial practice.

Governors of provinces were responsible for the administration of justice in their provinces, just as the praetors were in Rome. In just the same way they issued edicts. From the republic we have reasonable information about this, since one of Cicero's charges in his speeches against Verres is that he abused his position as governor by tampering with his edict (Cic., II *in Verrem* 1.119–21). That charge itself, while likely to be rhetorically exaggerated, does perhaps hint at an expectation that the provincial edict would remain fairly stable. Indeed, the administration of justice more or less requires that. In the second century AD Gaius wrote a commentary on the provincial edict, and it seems likely therefore that its text had been settled by then, just as had that of the urban edict about AD 125. It seems probable that the governor's edict in essentials mirrored the edict promulgated in Rome by the praetor.

It remains a matter of dispute whether the formulary system of Roman civil procedure (discussed in chapter 6) was applied throughout

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the provinces or was essentially confined to those classified as public provinces. The present concern, however, is with the question of Romanization, and it can be said with confidence that Roman legal practices were widely diffused through the provinces. Formulae which are faithful to the practice attested by juristic writings for Rome have been found in the Babatha archive in the province of Arabia, and in Transylvania, as well as in Spain and in the south of Italy (Wolff 1980; Kaser 1996: 163–71).

The Flavian municipal laws, of which substantial remnants survive for various Spanish municipalities, make very frequent reference to Roman practice, and indicate that the same procedures are to be followed in the municipality as in Rome. It is probable, however, that these represent an extreme of Romanization, so to treat them as representative of the rest of the empire would be unwise.

The extent of Romanization in these laws is particularly clear in the recently discovered *lex Irnitana*, a municipal statute originally set out on ten bronze tablets, from a town in Spain so small that it had never previously been heard of. Several chapters contain references to Roman practices for such things as which cases should be heard by single judges and which by several judges (*recuperatores*), and what time limits applied for hearing cases and for adjourning them (*lex Irn.* chs. K=49, 89, 91).

The most striking chapter of all is chapter 93, which provides 'For matters for which it is not expressly written or provided in this statute what law the citizens of the municipality of Irni should use among themselves, for all those matters let them use the civil law which Roman citizens use and shall use among themselves . . .'.

This is very remarkable. The provisions of Roman law were not merely displayed, laboriously engraved in bronze, but intended to be applied. The same picture is confirmed by two more chapters of the *lex Irnitana*: the first is concerned with setting the limits on the jurisdiction exercisable by the local magistrates at Irni and contains a long list of matters reserved to the higher authority of the provincial governor. What is interesting here is that for a wide range of legal actions it was actually the provincial governor who had jurisdiction: this will have served to reinforce the consistency with which Roman law was applied even in outlying parts of the empire. It is likely that the same would apply to outlying parts of Italy, except that there the higher jurisdiction would be that of the praetor (*lex Irn.* ch. 84).

The second of these chapters provides that the local magistrates are to display and to exercise their jurisdiction in accordance with the 'inter-

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