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3 Sources of Law from the Republic to the Dominate

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The term 'sources of law' can be used in two distinct ways – historically and analytically. A historical treatment involves looking at where the law at any particular time and place could be said to have come from, as English Common law might be said to have its source in the customs of English people or of English lawyers, British colonial laws to have their main source in the English Common law, or much of modern European private law to have its source in the Roman law of Justinian. An analytical treatment, by contrast, looks to the places to which a lawyer at some particular time or place should go in order to identify the proper rules to apply to some legal situation. It is with the latter, analytical sense that this chapter is concerned.

It needs to be emphasized at the start that the analysis of law in this way leads almost inexorably to (or stems almost inexorably from) a model of law consisting of rules whose validity can be determined by reference to their sources. Even in modern, highly developed societies such a model of law would be contested by some on the basis that moral values or political sentiments play a dominant role in determining the outcome of legal disputes; in societies which are not so highly developed it is hardly meaningful to distinguish between legal and other rules of conduct. So far as Roman law is concerned, we can use such a source-based model without substantial qualification when dealing with the late Republic onwards, but the further before that we go, the more important it is to be aware that the distinction between legal rules and social rules might hardly have been meaningful.

Over the course of the millennium between the beginning of the Republic and the reign of Justinian there were inevitably very substantial changes in the way in which the law was perceived and operated in Rome. Although there was never any radical break with the past there were two major caesuras, the first occurring around 150 BC and the second around AD 200. In the first period the law was in what might be called a pre-scientific stage, largely based on custom and with very little in

the way of distinctively legal sources apart from scattered pieces of legislation; it can most usefully be thought of as a prologue to the second period. The three or four centuries between about 150 BC and AD 200 mark the mature period of Roman law, characterized most notably by the work of the jurists; it was an age of legal science, when highly able lawyers used their reason to identify ever more complex legal rules. Finally, after the deaths of Papinian, Paul, and Ulpian, the three great jurists of the late second and early third centuries, imperial power came to dominate all aspects of the law; if the second period was an age of science, the third was an age of authority.

1. The Pre-Scientific Stage

Examination of the extant sources of law before the end of the second century BC does not reveal a great deal. There is a certain amount of legislation, but little more than that. These legislative sources are undoubtedly important, but they need to be put in the context of the nature of law and the legal process of the period.

The first Roman legislation about which we have any real information is the XII Tables.[1] This is attributed by Livy to the years 451–450 BC,[2] and there is no strong reason to doubt this dating. No text of the XII Tables survives, but later writers, both lay and legal, refer to many of the provisions found in it; scholars from the sixteenth century onwards have consequently been able to reconstruct a plausible version of the original, though not its original language. As its name suggests, it would have been a substantial text; but with under 100 clauses (as reconstructed in the modern editions) it would probably have been only about one-third of the size of the so-called Code of Hammurabi promulgated over a millennium earlier in Babylon. The traditional account of the creation of the XII Tables, given by Pomponius and written around the middle of the second century AD, treats it as having been enacted in response to demands for greater certainty than could be provided by mere custom, and based on materials collected from Greece and other places.[3] It is impossible to be sure of this, although similarities of form to Greek (and perhaps also Mesopotamian) texts together with a number of substantive parallels make it possible, if not probable, that there was some foreign influence at work.[4] But one thing is clear: it would be a mistake to see the XII Tables as a code in the modern sense of being a complete statement of legal rules; its provisions are far too piecemeal to allow for any such conclusion. Its importance lay in the fact that henceforth some

rules would be in a fixed form and therefore resistant to the gradual shifts that are characteristic of customary law, and in the way in which many centuries later it could be seen as the foundational text of Roman law.

From the early Republic there were two representative assemblies with legislative power, the *comitia centuriata* and the *comitia tributa*, with the former being by far the more important; a third assembly, the *comitia curiata*, was concerned only with formal business such as the election of magistrates and the ratification of wills. Although authority was vested in the *comitia* the real power lay with the magistrates and the Senate, since the role of the *comitia* was limited to approving or rejecting proposals put before it by a magistrate. After 287 BC – though some sources put it as early as 449 BC– enactments of the plebeian assembly, the *concilium plebis*, were also given fully binding force.[5] The most important pieces of private law legislation of the Republic – perhaps all of them – were plebiscites.

We have references to an average of approximately one piece of legislation per year in the 350 years after the XII Tables,[6] although the earliest epigraphically attested *lex* dates only from a few years before 110 BC.[7] The vast majority of these are one-off determinations – to make war or peace, for example, or to allow a triumph or impose a fine – or are what we would regard as matters of constitutional importance or things which relate to the legal process. Very few deal with crimes, and only a tiny handful deal with private law – the legal relations between individuals.

Most substantive law at this time, therefore, would have been custom; or, more precisely, little distinction could have been drawn between legal and social rules. This is not surprising. Legal process at this time was based on the so-called *legis actiones*, a highly ritualized set of oral formulae within which any legal claim had to be framed.[8] There were only five types of these, shaped by reference to the remedy sought by the plaintiff rather than by the basis of his or her claim, sometimes supported by an oath or wager, with the decision falling to a single judge or a group of judges. But these judges were laymen, and their decisions would rarely have been based on any externally identifiable legal rules. Moreover, there was nothing in the *legis actio* system to upset this: provided the appropriate forms were gone through, all depended on the judges' sense of what was right and wrong. This is not to say that there was no room for legal expertise or innovation; but legal expertise was largely knowledge of the ritual forms and, aside from new acts of legislation, legal innovation could involve little more than the manipulation of the rules of the XII Tables. In all of this the College of Pontiffs was dominant, underscoring the lack of any specifically legal science at this time.[9] The College of Pontiffs

would similarly have been the body which had knowledge of other ritual forms, such as the proper way to transfer ownership in the most important items of property or the proper way to enter into a formal marriage. Individual pontiffs provided answers (*responsa*) to questions from individuals, initiating a practice which was to be of great importance in the following period of Roman law.

2. The Age of Science

The great flowering of Roman law occurred between the second half of the second century BC and the first quarter of the third century AD.[10] The change from the pre-scientific stage was triggered by two factors: the development of a different type of legal procedure, known as the formulary system, a remedial framework which gave sharper definition to the basis of claims; and the emergence of a class of jurists who applied a more sophisticated type of reasoning to the law than had previously been the case.

In all probability the formulary system emerged in the third century BC as a substitute for the *legis actio* procedure to deal with cases involving foreigners who could not swear the necessary oaths, but after the *lex Aebutia* (about 140 BC) it could be freely used by Roman citizens.[11] The plaintiff's claim still had to be framed in a predetermined form, but here – unlike in the *legis actio* procedure – the available forms were shaped by the cause of action: why the plaintiff was entitled to a remedy rather than what remedy was requested. These remedies were provided by the praetors, the officials responsible for the administration of the legal system in Rome.[12] New remedies could at first be invented relatively freely, but in practice they were largely settled by the end of the Republic. The edict, a list of remedies issued at the start of each praetor's year of office but increasingly building on his predecessor's edict, provided a framework for the beginnings of analysis of private law.

The second factor triggering the change was the application of more sophisticated types of reasoning to the law, very possibly under Greek influence. The earliest protagonists of this thinking, men such as P. Mucius Scaevola, were themselves pontiffs, but those of the first century BC were not. We can trace a degree of continuity from the pontiffs to them, as they continued the earlier practice of giving *responsa*, but there were two major differences. First, they began to produce written texts; and second, they did not speak with the pure authority that the status of pontiff had afforded their predecessors. Cicero recounts a

dinner-time discussion of a legal point, comparing the opinions of Sextus Aelius, Manius Manilius, and Marcus Brutus on the one hand, and Scaevola and Testa on the other.[13] That such a discussion could take place at all shows that judgments on matters of law by that time depended on criteria of reason which allowed the conclusions of different jurists to be evaluated. Elsewhere Cicero says that jurists had expertise in matters of written law (*lex*) and custom.[14] So far as the former was concerned, their skill lay in the interpretation of the texts. As for custom, their expertise lay both in the identification of general social practices and in the use of such techniques as reasoning by analogy to reach conclusions that went beyond what would generally have been recognized by citizens.

The best starting point for any study of the sources of Roman law in this period is the *Institutes* of Gaius, an introductory manual written in the middle of the second century AD and not superseded until the production of the *Institutes* of Justinian four centuries later. The *Institutes* begin with a list of the sources of law:

> The laws [*iura*] of the Roman people consist of *leges*, plebiscites, *senatusconsulta*, imperial constitutions, edicts of those possessing the right to issue them, and answers of the learned.[15]

We can usefully sub-divide this into three types: legislative sources, procedural sources, and juristic sources. Notably, for Gaius, there was no place for custom as an independent source of law, but we cannot completely ignore it.

Legislative Sources

Gaius launches into his treatment of the sources with *leges* and plebiscites:

> A *lex* is a command and ordinance of the *populus*. A plebiscite is a command or ordinance of the *plebs*. The *plebs* differs from the *populus* in that the term *populus* designates all citizens including patricians, while the term *plebs* designates all citizens excepting patricians. Hence in former times the patricians used to maintain that they were not bound by plebiscites, these having been made without their authorization. But later a *lex Hortensia* was passed, which provided that plebiscites should bind the entire *populus*. Thereby plebiscites were equated to *leges*.[16]

That *lex* took pride of place is very revealing, in two ways – all the more so given the relatively small number of legislative enactments in Rome. First, it shows that Gaius's conception of law (*ius*) had at its heart rules which had been consciously laid down after deliberation. Law was not principally something immanent, waiting to be discovered; it was something that could be, and in its paradigm form was, created by human act. Secondly, it was the *leges* of the three representative *comitia* that came first, with plebiscites coming after them. Not only was their authority chronologically later, but Gaius's language points to their being, in his eyes, a second-class form of legislation: it was only the *lex Hortensia* that had raised them up to the status of true *leges*. The reason for this is transparent in his text: *leges* were enacted by the whole of the citizenry, whereas plebiscites were enacted only by a subset of them – the plebeians. It was not just the fact that *leges* and plebiscites had been enacted in accordance with certain recognized procedures that was important, therefore, but that in their ideal form they articulated choices which had been made by the whole of the Roman people. Perhaps more than anything else this reveals the continuity of legal thinking across the political caesura of the transformation from Republic to Empire.

It is worth emphasizing just how few *leges* and plebiscites are referred to in Gaius's text: a total of around 35 in his 4 books. Of these, just under half regulated wills, personal status, and family relations, and about the same number regulated legal procedure. In the field of private law (the relations between free individuals), there are only 8. Moreover, by the time at which he was writing, the creation of law by *lex* or plebiscite was completely moribund; however, this did not prevent their appearance as the primary source in his list:

After *leges* and plebiscites in Gaius's list, there come *senatusconsulta*:

> A *senatusconsultum* is a command and ordinance of the senate; it has the force of *lex*, though this has been questioned.[17]

Again we see the binding force expressed in terms of *lex*. It is not simply that *senatusconsulta* are binding on the Roman people, but that in this respect they are equivalent to *lex* itself.

The doubt expressed at the end of Gaius's text demands some exploration. We may be sure that Gaius did not share it, since elsewhere in the *Institutes* he makes references to rules stemming from *senatusconsulta* without any qualification, but clearly there was at the time an element of ambiguity about their status. It seems clear that in the Republic the Senate, for all its political power, was not seen as having

the ability to legislate for Rome (legislation for the provinces was a different matter). It could make proposals to other bodies in the strong expectation that they would be adopted, but no more than that. However, in the early Empire, we find resolutions of the Senate being referred to as such, even though effect was given to them by clauses in the praetor's edict: the Augustan *senatusconsultum Silianum*, for example, or the *senatusconsultum Macedonianum* passed under Vespasian. Whether we treat the *senatusconsultum* or the edictal provision as the true source of the rule is largely a matter of semantics – hence, we can surmise, the doubt referred to by Gaius. From about the time of Hadrian, however, there are self-standing *senatusconsulta*, the first unequivocal one being the *senatusconsultum Tertullianum* (attributed to Hadrian by Justinian[18]). Very probably the shift can be attributed to the fact that by this time the text of the edict had been fixed,[19] so that it would not have been possible to engineer change in the law through this formal route. Gaius's text therefore probably represents the reality at the time when he was writing in the AD 150s and early 160s. It was not to be the end of the matter. Already the Senate was in practice doing little more than ratifying proposals made by or on behalf of the emperor, and before the end of the second century it could be said that the true source of authority lay in the emperor's *oratio* rather than in the Senate's resolution.[20] This fitted more easily with the political and juridical situation of the later Principate, and the notion of the *senatusconsultum* as an independent source of law faded away.

Gaius's final legislative source is in many ways the most problematic:

> An imperial constitution is what the emperor by decree, edict or letter ordains; it has never been doubted that this has the force of *lex*, seeing that the emperor himself receives his *imperium* [sovereign power] through a *lex*.[21]

That imperial constitutions were binding could hardly have been denied in the middle of the second century, but there are two elements of Gaius's statement which give grounds for pause. First, as with the other legislative sources he enumerates, their force is described by reference to *lex*, the ordinances of the whole of the Roman people. The belief that it is *lex* that represents the ideal source of law is unmistakable. Second, it is not merely stated that imperial constitutions have the force of *lex*, a reason is given for this: the emperor's power is given by *lex*. Even more strongly than in the first statement, then, Gaius here roots the emperor's law-making power in the resolution by the people

to recognize him as emperor, the so-called *lex regia*. It is appealing to see this as a reflection of a perhaps outmoded republicanism in Gaius's own beliefs, but exactly the same reason is given by Ulpian half a century later.[22] More probably it reflects the complex ideology playing through the law, and indeed elsewhere, stressing the continuity between the republican constitution and that of the Empire, at the same time as accepting the reality that imperial constitutions were indeed sources of law in their own right. A version of this principle ascribed to Ulpian was destined to become one of the most explosive statements in western political theory: *quod principi placuit legis habet vigorem* – 'what pleases the prince has the force of law'.[23]

Gaius enumerates three distinct forms of imperial constitution – decrees (*decreta*), edicts (*edicta*), and letters (*epistulae*). There was no magic in the ordering of the different forms; they simply reflect different ways in which imperial power might generate legal rules.

Imperial edicts were a type of legislation in its strictest form: rules deliberately introduced to make new law or amend the old.[24] Provincial governors and similar magistrates had the right to issue such edicts in the Republic, and the emperor, vested with magistral powers, was doing no more than exercising the same right. Most of the earliest imperial edicts of which we have evidence were of limited application, restricted either to particular localities or particular individuals or groups. There was nothing to prevent the making of edicts introducing general rules, such as that of AD 212 giving Roman citizenship to all free people in the Empire,[25] but it was not until the end of the third century that this practice became widespread. Analogous to these were *mandata*: administrative instructions to officials.

Decrees were rules derived from the decisions of the emperor sitting as a judge.[26] From the time of Augustus, the emperor might make decisions outside the normal course of legal procedure, by taking cognizance of a lawsuit; the procedure was therefore known as the *cognitio extraordinaria*. Although he would sit with an advisory *consilium*, it was the emperor who made the decisions. We have, for example, a report of his being on one occasion persuaded by the jurist Paul (a member of the *consilium*) to change his mind, and another of his following a view of Papinian contrary to the advice of Paul.[27] The decisions of the emperor were, of course, binding on the parties, but they might also go beyond this and allow the formulation of a general rule. Hadrian ruled, for example, that a child born to a woman eleven months after her husband's death might be legitimate, and Marcus Aurelius that violence did not necessarily involve any wounding.[28] Around the start of the third century

Paul collected three books of such decrees, extracts of which survive in Justinian's *Digest*.

Gaius's final category, letters (*epistulae*), is a composite term referring to all communications from the emperor.[29] Some of these were addressed to officials, but more important and apparently more numerous were those addressed to private individuals. These took the form of rescripts, answers to petitions (*libelli*), with the imperial response written below the request. Julius Caesar is known to have dealt with such petitions, and it is likely that the imperial practice was a continuation of this. By the reign of Tiberius at the latest these petitions might concern matters of law: Papinian cites a rescript of his on the subject of adultery by public officials.[30] The surviving evidence points to there having been a massive increase in the number of rescripts issued during the reign of Hadrian, probably associated with the increasing legalization of government at this time,[31] after which they became an increasingly important source of law. The rescripts were always given in the name of the emperor, and there is strong evidence that until the end of the second century the emperor's part in making them was not merely nominal, although he would presumably have taken advice from members of his *consilium*. A text of Ulpian records a rescript of Marcus and Verus (and hence of the AD 160s) making reference to what they had learned from 'those skilled in giving legal opinions' and to discussion with the jurist Volusius Maecianus and others, leading ultimately to the emperors favouring the view of Julian and others over that of Proculus.[32] From the start of the third century, however, the personal input of the emperor began to wane, as responsibility for the drafting of rescripts was delegated to jurists in the imperial service, in particular to the principal secretary *a libellis*.

While the first of Gaius's categories of imperial constitutions was unequivocally legislative, the second and third were far more ambiguous. On the one hand they purported simply to apply or state the law as it was, not to create anything new, and the recourse they had to legal experts emphasizes that this was taken seriously. On the other hand, since they were determinations of the emperor they were by definition authoritative statements of the law which took effect just as if they were genuinely legislative acts. As if to underscore this, by the time of Hadrian and probably earlier, rescripts were copied and recorded in the imperial archives, where they were available for consultation and hence came to be integrated into the legal fabric; the fact that at the beginning of the third century Paul could collect three books of decrees suggests that they too were recorded in some way, even if they might not have been so easy to consult.

Procedural Sources

After describing the various types of legislation, Gaius turned to what we might regard as procedural sources, the edicts of those possessing the right to issue them:

> The right of issuing edicts is possessed by magistrates of the Roman people. Very extensive law [*ius*] is contained in the edicts of the two praetors, the urban and the peregrine, whose jurisdiction is possessed in the provinces by the provincial governors; also in the edicts of the curule aediles, whose jurisdiction is possessed in the provinces of the Roman people by quaestors; no quaestors are sent to the provinces of Caesar, and consequently the aedilician edict is not published there.[33]

We need not concern ourselves with the elements of provincial administration, nor with the aedilician edict (although it was important, especially for the regulation of sales in the market place), but should focus on the praetor's edict.

As has been seen, from the third century BC the praetors had provided formulae structuring lawsuits.[34] These formulae were collected together in their edict by the first century BC, and constituted a catalogue of available civil law remedies and defences. Although change was still possible, the edict had ceased to be a creative force by the end of the Republic. A century and a half later Hadrian commissioned the leading jurist of the time, Julian, to produce a definitive text, after which no further changes were possible unless they were made by the emperor.[35]

Gaius's description of these procedural sources is telling: nowhere does he mirror his previous texts and say that they had the force of *lex*. Nor could he, since they did not create legal rules in the same way as *leges*, plebiscites, *senatusconsulta*, or imperial constitutions. They did not really create rules at all, but in so far as they constituted the categorical list of remedies and defences – most were articulations of custom or derived from legislation, while some had been invented by praetors themselves[36] – it was impossible for lawyers to ignore them. In reality, a knowledge of the edict was far more fundamental than a knowledge of legislation. Its inclusion in Gaius's list brings home the point that the separation between substantive law and procedure, explicit in his statement that all the law relates to persons, things, or actions,[37] is largely artificial, and that procedural law can have a direct effect on substantive legal rules.

The Jurists

The late second and early first centuries BC had seen the rise of a cadre of secular jurists, whose role, according to Cicero, was to know and advise on *lex* and custom.[38] In the early part of the Empire they developed a formidable expertise, with a range of techniques to identify what was the correct result to any legal question, so that at the time Gaius was writing a substantial part of Roman law would have been seen as jurists' law.

Gaius's brief description raises as many questions as it answers:

> The answers of the learned are the decisions and opinions of those who are permitted to establish the laws. If the decisions of all of them agree, what they so hold has the force of *lex*, but if they disagree, the judge is free to follow whichever decision he pleases. This is declared by a rescript of the divine Hadrian.[39]

The first point to note is that juristic opinion, provided it was unanimous, created a rule on a par with *lex*. This may seem surprising since jurists were not formally appointed in any way, and were no more than men who claimed to have the appropriate expertise and were recognized as having it. However, the way in which Roman law had developed over the previous two or three centuries meant that it was almost inevitable that such force should have been given to at least some juristic opinion. At the core of this was that a major task of the jurists had been to identify and formulate custom. Whilst it might be said that here the binding force of the jurists' statements lay not in their articulation of the custom but in the very fact that it was the custom of the Roman people, this would have been unsatisfactory in so far as it would have laid the way open for anyone – however unlearned – to deny that the custom was as it had been stated. For the purpose of identifying legal rules, which is the concern of any study of the sources of law, the unanimous view of the jurists was to be treated as conclusive.

On the other hand, if there was disagreement among the jurists the judge was free to decide as he pleased, and since there was room for a good deal of disagreement it would seem to follow that there was a very considerable area in which there was no law. We have no reason to doubt Gaius's statement, nor the existence of Hadrian's rescript on which he bases it, but it is nonetheless impossible to believe that the jurists of the second and third centuries would have accepted any conclusion of this sort without some qualification. Very much the reverse: their activity

from the late Republic onwards implicitly assumed that it was possible, by the exercise of reason, to identify accurately what the law was in any situation.[40] Gaius's statement needs to be understood in a more nuanced way. It was not that there was no law when there was juristic disagreement, but that the law was (as yet) indeterminate. There was no clear law that the judge had to follow, but he should take advice and use his own reason to discover what was the 'true' rule and to apply it.

It is this seeking after legal 'truth' (and the assumption that it exists) that characterizes much of the work of the jurists. Sometimes this involved the identification of the essence of some legal concept. The first-century jurist Labeo, for example, identified the idea of contract with exchange, the Greek *synallagma*; a century later Pedius identified it with agreement, an analysis that was adopted by Gaius in distinguishing between the claim for the repayment of a loan and the claim for the recovery of money paid by mistake.[41] Sale came to be recognized as an agreement to exchange a thing for money, thereby excluding agreements to exchange things.[42] Paul defined possession as having a mental and a physical aspect – *animus* and *corpus* – thereby framing a way to address the question of whether one still possessed one's home when away at the market.[43] But not all jurists were so happy with definitions. In the second century Javolenus is recorded to have said that 'All definitions in the civil law are dangerous, for there is hardly any that cannot be subverted.'[44] More commonly we see the sharpening up of the scope of a rule or legal institution by applying it to variant sets of fact. Thus it was said that ownership could be transferred by *traditio*, whose core meaning was delivery, without a physical handing over – for example, by pointing to a statue or other large object, or by climbing a tower and indicating the boundaries of land to be conveyed.[45] In the same vein, Ulpian explored the meaning of *corrumpere* (spoil), under the third chapter of the *lex Aquilia*, by examining a whole series of fact situations.[46] Equally, a rule might simply have been applied to facts without there necessarily having been any sharpening of its scope.

In doing this the jurists used a variety of techniques. Greek dialectic had brought about the division into *genus* and *species* in the late Republic, allowing the systematization achieved by Quintus Mucius Scaevola and later Sabinus, whose three books on civil law (his *Iuris Civilis Libri Tres*) were regularly commented on by the later classical jurists. Principles (*regulae*) were identified. Building on this, much argument proceeded by making analogies, together with its corollaries, the drawing of distinctions between different cases and the *reductio ad absurdum*. Etymology, sometimes fanciful, could be used to explore the meaning of words. Problems of the interpretation of legal acts – contracts, conveyances of property,

wills, and the like – might be elucidated by reference to the actual or presumed intentions of the makers, or by literally construing the terms in which they were couched. Arguments could be made from equity or fairness; Ulpian in particular may have been fond of these. Alternatively, reasoning might be based on *utilitas* – perhaps close to a modern idea of public policy.

With the notable exception of the *Institutes* of Gaius, which exists in a near-complete text probably dating from the fifth century, practically all of our knowledge of the work of the jurists comes from the extracts from their writings that appear in Justinian's *Digest*.[47] From this we can see that they composed a variety of types of works: commentaries on the praetor's edict (especially after Julian's consolidation) and Sabinus's *Ius Civile*; collections of real or hypothetical cases; and monographs on a wide range of subjects, including some like criminal law, military law, and testamentary trusts (*fideicommissa*) which did not fall within the edict. Within this literature they frequently refer to each others' works: sometimes they approve; sometimes they disagree, occasionally vigorously, as, for example, where Paul refers to an opinion of the great Quintus Mucius Scaevola as most inept;[48] and very often they simply cite without comment. Tellingly, they commonly use the present tense when referring to other jurists, even where the earlier writer might have died centuries previously: the common endeavour in which they were all engaged was one which transcended time and was fundamentally anti-historical, however much they were aware that their law had a long history.

It is, therefore, a serious error to suppose that there was a single, uncontroversial Roman law whose content can be discovered from the juristic texts. Its essentially controversial nature, except for the core on which everyone agreed, is brought out by the existence of two distinct schools of jurists in the first century and a half of the Empire: the Sabinians and Proculians. In the brief historical section at the beginning of the *Digest*, Pomponius, writing about the middle of the second century, describes these schools and allocates the principal jurists of the previous generations to one or other of them. We do not know whether these were educational establishments, although, since the individual jurists undoubtedly engaged in teaching, whether they did so as members of a particular school or not may be an empty question. Clearly, though, there were points of law on which they disagreed, as schools and not just as individual jurists, and substantial traces of these disagreements can be identified in both Gaius's *Institutes* and Justinian's *Digest*. Whether there was any consistent philosophical basis to their differences is uncertain, and there need not have been any, but their continuity over a century and a half is ample

testimony to the way in which Roman law at this time was able to tolerate and incorporate opposing points of view. The schools died out after the middle of the second century – Gaius, a Sabinian, is the last jurist whose allegiance to a school is recorded – but this did not mark an end to juristic disagreement; it was just that it took place at the level of the individual jurist and not by adherence to a group.

Although it is through their writings that the jurists are primarily known to us, an important part of their work was the giving of advice – *responsa*. Already in the early Republic the pontiffs had done this, and in the third century BC a *pontifex maximus*, Tiberius Coruncanius, began to give *responsa* in public,[49] a practice which continued on the part of the secular jurists from the latter part of the second century. According to Pomponius, a change occurred under Augustus, who granted to some the power to give *responsa* under the authority of the emperor – the *ius publice respondendi*.[50] What exactly this meant is desperately unclear,[51] but since Pomponius tells us that its purpose was to give greater authority to the law it is probable that it was a response to the uncertainty caused by (self-styled) jurists giving contradictory opinions to litigants and judges and thereby bringing the law into disrepute. Jurists need not seek the privilege – we only know of two who had it – so it is unlikely that it was a prerequisite to giving a *responsum* which could be cited to a judge, though we might guess that added weight would attach to the opinion of one of these patented jurists: an attractive parallel can be drawn with the appointment of a Queen's Counsel in the modern world.[52] It is not clear whether the institution continued in practice after Tiberius, nor whether it changed its function if it did; but in any event Pomponius's description of it makes it clear that it was abolished by Hadrian, by which time it might already have become moribund.

According to Pomponius, the *ius publice respondendi* allowed the favoured jurist to give *responsa* with the authority of the emperor, and the purpose of the institution was to enhance the authority of the law. But nowhere is it suggested that these *responsa* would have binding authority in the modern sense. In Gaius's terms, they did not have the force of *lex*. This was all the more the case with juristic writings, except where all the jurists agreed. Herein lay the fundamental difficulty of the scientific approach which characterized the jurists' work: any piece of analysis was provisional and at risk of being countered by another jurist with better, or perhaps just different, reasoning. And, paradoxically, the more sophisticated the jurists, the more likely it was that conflicting results might be reached.

The high point of Roman legal science was reached in the late second and early third centuries, with the three greatest of the jurists:

Papinian, Paul, and Ulpian. Extracts from the works of these make up a large proportion of Justinian's *Digest*, testifying to their reputation in the Byzantine world. While they had different approaches to the law – Papinian was perhaps more prone to draw fine distinctions, Paul to seek the essence of legal concepts, Ulpian to favour the pursuit of equity – all three of them were analytically flexible and imaginative in adapting the law to different circumstances. At the same time, *responsa* to specific questions became more concrete as those who needed to know what the law was in some particular case took advantage of the system of imperial rescripts[53] – what one scholar has referred to as a free legal advice service.[54] Both Papinian and Ulpian were probably secretaries *a libellis* with responsibility for the drafting of these rescripts, so there need be no doubt about their quality at this time. Nonetheless, there was an inevitable tension between authoritative rescripts, which determined the legal point once and for all since they were in theory decisions of the emperor, and the private works of jurists, which were true only to the extent that their reasoning was persuasive. Moreover, as the number of rescripts increased, the more problematic was the scientific approach, since each rescript marked a fixed rule which had to be incorporated into the legal system, however difficult was its fit.

The scientific period of Roman law – what is generally known as the classical period – came to an end in the decade or so after the murder of Ulpian in AD 223. The writing of reflective legal works died out. In part, this was no doubt because political unrest at this time stood in the way of devoting time to it, and the rescript system must have raised questions about the value of attempting to discover the law purely by the exercise of reason. This does not, of course, mean that jurists – legal experts – died out; it was simply that the energies of the best of them were focused on the production of rescripts.

Custom

Although Gaius does not include custom in his list of sources of law, elsewhere in the *Institutes* he does refer to a form of succession to property as not being introduced by the XII Tables or the praetor's edict but as 'law [*ius*] received by common consent'.[55] Julian – perhaps Gaius's teacher – also referred to custom as the basis of law in this context, but his thought is framed in language which was susceptible of a more general application.[56] In so far as *lex* gained its binding force from the consent of the people expressed in their representative assemblies,[57] all the more should long-standing practices create binding rules even though they

were not put into writing. In reality, there was probably little difference between Julian's position and Gaius's ascription of binding force to the unanimous opinion of jurists, except that Julian's treatment provided an intellectual justification for his conclusion whereas Gaius's did not.

3. The Post-Scientific Stage

Somewhere around AD 230 there was a major watershed in the functioning of Roman law. In particular, the scientific work of jurists seems to come to a very sudden halt, with the *Digest* preserving only a small number of texts extracted from the works of half a dozen jurists post-dating Paul and Ulpian. That said, just as the transition from Republic to Empire was achieved without the appearance of radical change, so the transition across this watershed retained the formal features of the earlier period. The treatment of the sources of law in Justinian's *Institutes*[58] is substantially derived from that of Gaius.

Against this background of substantial similitude, we should note three changes: first, a shift of juristic activity away from the production of scientific literature and towards the giving of rescripts as members of the imperial bureaucracy; second, a change in the way in which juristic literature (largely from earlier periods, of course) was treated; and third, a sharper focus on custom.

The sharp decline of juristic writing is immediately visible from Justinian's *Digest*. By contrast with the 2,000 extracts from Paul and approximately 3,000 from Ulpian, only one of the five or six post-Severan jurists is responsible for more than a tiny handful. This sole exception was Hermogenianus, probably writing in the fourth century: around 100 extracts from his *Iuris Epitomarum Libri* are found. But the title of his work is revealing: it was not a work of independent thinking, but a collection culled together from the writings of Paul and Ulpian and other major writers of a century or more earlier. Another work of the same kind is the so-called *Sentences* attributed (probably fancifully) to Paul, whose origins probably date from shortly before AD 300: a brief collection of texts constituting a conveniently accessible handbook for practitioners. What we lack, so far as our evidence goes, are juristic works revealing any real originality of thought.

This does not mean that jurists suddenly ceased to exist, nor that legal thinking disappeared. The successors of men like Papinian and Ulpian still worked in the imperial bureaucracy and prepared rescripts in the name of the emperor just as their predecessors had done,[59] and

through the work of these men which survives in the *Code* of Justinian we can see the continuity of legal thinking from the private writings of Papinian, Paul, and Ulpian. It was only after the reign of Diocletian, at the beginning of the fourth century, that this system died away, and with it the constructive work of the jurists.

A corollary of this decline in juristic science was an intellectual shift, as jurists' opinions took on a greater degree of authority. Rescripts, by their nature, created binding rules of law since they were in form determinations by the emperor himself. Collections of these imperial constitutions were made from the end of the third century – the *Codex Gregorianus* and the *Codex Hermogenianus*[60] – and hence formed a corpus of fixed legal rules. The works of earlier jurists could not be binding in this way, but they were cited in courts as evidence of what the law was, and even a mean work like the popular *Sentences* was used in this way. This tendency reached its peak with the Law of Citations of AD 426,[61] which limited citation in court to five named jurists – Gaius, Papinian, Paul, Ulpian, and Modestinus – and provided that the view of the majority should prevail, with Papinian to be followed if opinion was evenly split; only if there was no majority and Papinian was silent was the judge to exercise his own discretion. No longer was reason any test of legal validity.

From the beginning of the third century, greater weight was also put on custom as a formal source of law. The trigger for this, almost certainly, was the greater use of Roman law in the provinces after the extension of Roman citizenship to all free people in the Empire in AD 212. In so far as there was a theory grounding legal rules in popular consent, as Julian had argued,[62] where different practices had become established in different places it would have been difficult to argue that Roman law in its entirety should be applied. Hence Ulpian was able to contemplate the application of local custom even when it was contrary to Roman law, and Paul to argue that the customary interpretation of a *lex* in some particular place ought to be respected in that place.[63] Julian might well have agreed with this, since his text suggested that a *lex* could be impliedly repealed simply by being ignored by the people. However, the problem for Gaius and other jurists of the middle of the second century was that there was no easy way to identify custom, and the writings of the jurists had to serve as a proxy for this.[64] Yet half a century later legal process was changing, as the formulary system was being superseded by the *cognitio* procedure. Instead of a lay judge deciding a case within the terms of a formula approved by the praetor, there was a trial before a professional judge in which law and fact were intermingled. This allowed an alternative mechanism for the identification of custom: regularity of judicial decision. For Ulpian, local

custom would be recognized if it was embodied in a decision, and his contemporary Callistratus referred to a rescript of the emperor Severus to the effect that a stream of decisions would determine the interpretation of an ambiguous *lex*.[65] Custom, identified through decisions, was therefore able to replace the opinion of jurists as a source of law. This was confirmed, but also limited, by a constitution of Constantine of the early fourth century, providing that custom was of 'no mean authority' (the Latin word is *auctoritas*), unless it was contrary to *lex* or reason (*ratio*).[66] As a consequence, the risk that observing custom would degenerate into the mindless following of previous decisions was neutralized.

This recognition of custom as a formal source of law is reflected in the treatment of the sources of law in Justinian's *Institutes*.[67] The basic division here is between written and unwritten law. The elements of written law are the same as those dealt with in Gaius's *Institutes*: *lex*, plebiscites, *senatusconsulta*, imperial constitutions, magisterial edicts, and the opinions of jurists. Apart from the removal of the doubt expressed by Gaius as to the force of *senatusconsulta*,[68] the main differences visible in Justinian's treatment are that greater weight is given to the force of imperial constitutions (strengthened by the opening of the text with Ulpian's statement that what pleases the prince has the force of *lex*[69]), and that the weight given to juristic opinion is reduced by changing the tense of the text from the present to the imperfect, thereby giving it more of a flavour of historical reminiscence.[70] Offset against this is the unwritten law – custom – whose force derived from the tacit consent of the people.[71]

Notes

1. *Roman Statutes*, 555–721.
2. Livy 3.34; the final two tables were probably added later.
3. D. 1.2.4.
4. R. Westbrook, 'The Nature and Origin of the Twelve Tables', *ZSS* 105 (1988): 74.
5. The *lex Hortensia*; this chapter, 29–30.
6. G. Rotondi, *Leges Publicae Populi Romani* (Milan, 1912).
7. *Roman Statutes*, 39.
8. See the chapter by Metzger, 281–3.
9. A. Schiavone, *The Invention of Law in the West*, trans. J. Carden and A. Shugaar (Cambridge, Mass., 2012), 74–84.
10. Schiavone (n. 9), 131–306. Still useful, if dated, is F. Schulz, *History of Roman Legal Science* (Oxford, 1946).
11. See the chapter by Metzger, 282.
12. See the chapter by Metzger, 283.
13. Cic. *Fam.* 7.22.
14. Cic. *de Orat.* 1.212.
15. Gaius 1.2.

16. Gaius 1.3.
17. Gaius 1.4. For *senatusconsulta*, see R. J. A. Talbert, *The Senate of Imperial Rome* (Princeton, 1984).
18. Inst. 3.3.2.
19. 34, this chapter.
20. D. 2.15.8 pr.
21. Gaius 1.5; F. Millar, *The Emperor in the Roman World* (London, 1977), 228–259. With particular reference to the later Principate, see J.-P. Coriat, *Le Prince Législateur* (Rome, 1997).
22. D. 1.4 pr.
23. D. 1.4.1.
24. Millar (n. 21), 252–259.
25. D. 1.5.17; cf. the chapter by Lewis, 172.
26. Millar (n. 21), 228–240; T. Honoré, *Emperors and Lawyers*, 2nd edn. (Oxford, 1994), 28.
27. D. 36.1.76.1; D. 29.2.97.
28. Gell. *NA* 3.16; D. 4.2.13 (= D. 48.7.7).
29. Honoré (n. 26); Millar (n. 21), 240–252.
30. D. 48.5.39.10.
31. Honoré (n. 26), 14, based on G. Gualandi, *Legislazione Imperiale e Giurisprudenza* (Milan, 1963).
32. D. 37.14.17 pr.
33. Gaius 1.6.
34. 28, this chapter; O. Lenel, *Das Edictum Perpetuum*, 3rd edn. (Leipzig, 1927).
35. C. *Tanta* 18.
36. See the chapter by Metzger, 284.
37. Gaius 1.8.
38. 28–9, this chapter.
39. Gaius 1.7.
40. Schiavone (n. 9), especially at 285–306.
41. D. 50.16.19; D. 2.14.1.3.
42. D. 18.1.1.
43. D. 41.2.3.1.
44. D. 50.17.202.
45. D. 41.2.1.21.
46. D. 9.2.27.13–27.28.
47. See the chapter by Kaiser, 127–33.
48. D. 41.2.3.23.
49. D. 1.2.2.35, 38.
50. D. 1.2.2.49.
51. R. Bauman, *Lawyers and Politics in the Early Roman Empire* (Munich, 1989), 1–24, discussing earlier views; T. Leesen, *Gaius Meets Cicero: Law and Rhetoric in the School Controversies* (Leiden, 2010), 20–29, with further references at 22 note 51.
52. Bauman (n. 51), 17.
53. 33, this chapter.
54. Honoré (n. 26), 33.
55. Gaius 3.82.
56. D. 1.3.32.