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Peter Stein

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# INTERPRETATION AND LEGAL REASONING IN ROMAN LAW

PETER STEIN\*

The Roman jurists, whose works are excerpted in Justinian's Digest,<sup>1</sup> are noted for their pragmatic approach to cases and for the subtlety of their casuistic reasoning. They did not generally indulge in discussions of legal theory. It should not, however, be assumed that because they did not articulate comprehensive legal theories, they lacked ideas about the nature of law. For the period of the Roman republic, these ideas have to be inferred from the bare decisions, but by the beginning of the empire, differences in the jurists' reasoning reveal more of their conceptions of the nature of the work in which they were engaged. The compilers of the Digest, our main source, were instructed to eliminate disagreements among the jurists whose works they excerpted. Some traces of these disagreements remain, however, and there is one text, Gaius's Institutes,<sup>2</sup> which is transmitted separately and contains several references to juristic disputes.

This Article illustrates, with examples taken from the Roman sources, the methods of interpretation and legal reasoning which characterized the jurists both in the formative period of Roman law and in its early maturity.

## WRITTEN LAW AND UNWRITTEN LAW IN THE ROMAN REPUBLIC

From the beginning those who expounded Roman law were well aware of the difference between unwritten law, which is not stated authoritatively in fixed texts, and written law, which is so stated. The distinction was expressly stated by Ulpian at the beginning of the third century A.D. He indicated that the classification is derived from Greek thought (D.1.1.6.1), but it was tacitly understood long before him.

\* Emeritus Regius Professor of Civil Law, University of Cambridge and Fellow of Queens' College, Cambridge. Throughout this article I have provided my own translation for many of the texts quoted.

1. The Digest of Justinian, Latin text, ed. T. Mommsen, and English translation, ed. A. Watson, Philadelphia 1985 (cited as D.).

2. The Institutes of Gaius, Latin text, ed. B. Seckel and B. Kuebler, and English translation by W.M. Gordon and O.F. Robinson, Ithaca, 1988 (cited as Gaius, Inst.).

Roman law, like most legal systems, began as a set of orally transmitted traditional norms, and written law began as written custom. In the first century of the Roman republic, in the mid-fifth century B.C., the popular assembly enacted the Twelve Tables,<sup>3</sup> which had been prepared by a commission established for the purpose of "writing down the laws." The contents were not so much new law as authoritative settlement of doubtful cases which had arisen in the application of the traditional customary law.

The general word for law was *ius* and enacted law was *lex*. *Lex* was an express statement of what was *ius*. It derives from *legere*, to read out, and indicates what is read aloud, or publicly declared. These *leges* were written down, but their most important characteristic was not the fact that they were committed to writing, but that their formulation was fixed and incapable of being altered, except by further legislation. The text of a statute was naturally subject to interpretation, but only within the limits of its wording. In the area of private law, legislation was rare in the republic after the enactment of the Twelve Tables (the main exception to this being the *lex Aquilia*, to be considered later).

Legal development was achieved in the second half of the republic through the creation of new remedies. A legal action had two stages. The first stage, before the magistrate, the *praetor*, was designed to decide whether the parties' dispute raised an issue recognized by the civil law and how it should be settled. In the second stage, the *iudex*, a layman chosen by the parties from a list of qualified citizens, conducted a trial and decided the issue.

By the end of the third century B.C., the *praetor* set out the issue in writing in a formula addressed to the *iudex* and expressed the issue in hypothetical terms in the following form: "if you are satisfied that the plaintiff has proved . . . , condemn, if you are not satisfied, absolve." Since the *praetor* controlled the grant of formulae, he could, like the English Chancellor in relation to the grant of writs, direct the course of legal development. Formulae that he was prepared to grant without argument were set out in the edict, which was published by each *praetor* upon taking office. As the *praetor* was a layman, he came to rely on specialist jurists for technical advice.

In early Roman law it was the pontiffs, those charged with the maintenance of the state religious cults, who were responsible for in-

3. H.F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed., Cambridge 1972, 108ff.

terpreting the law. They did not give reasoned opinions but “unmotivated” rulings, which carried authority because of their authors’ standing in the community. They had been accustomed to giving rulings on the scope and extent of the unwritten rules and, like the common law judges, could reformulate those rules with an eye to the facts of a particular case. The existence of a text must have constrained their freedom of decision making, as indeed it was probably intended to do, but they soon gained confidence in their task. Indeed, they were capable of creating new legal institutions in the guise of giving meaning to the text of the Twelve Tables.

For example, the Twelve Tables contained a provision designed to penalize a *paterfamilias* for abusing his power over his sons.<sup>4</sup> He was entitled to sell his son into forced labor to another, but the legislation provided that if he sold him three times, the son was to be free of his father’s power. Three sales were regarded as an abuse of the power of the family head. At the time of the Twelve Tables, it was not contemplated that a father might voluntarily wish to free his son, who constituted an important economic asset to the family unit. Later, circumstances made it desirable that the father should have the power to emancipate his son and the pontiffs advised that, provided the father went through three successive sales to a compliant friend, the son would be freed from paternal power by virtue of the Twelve Tables’ rule (Gaius, Inst. 1.132). Thus, an entirely new institution of voluntary emancipation from paternal power was created by interpretation.

Pontifical interpretation went further. The Twelve Tables referred only to sons, and where daughters and grandchildren were concerned, the *paterfamilias* could apparently sell them as much as he liked. Once the three sale rule was interpreted to refer to voluntary emancipation, the pontiffs declared that, whereas three sales were required in the case of sons, one sale was sufficient for the emancipation of daughters and grandchildren.

It should be noted that this pontifical innovation, while giving a family head a power that he previously did not enjoy, did not interfere with the interests of anyone outside the family. In most cases the pontiffs and the secular jurists, who succeeded them from the middle of the third century B.C., had to be more cautious. The way they expounded the law differed according to whether the law was in written or in unwritten form. If it was unwritten, they could gradually de-

4. Jolowicz and Nicholas, *op. cit.*, 88ff.

velop it on a case-by-case basis without any objection. If it was written, they had to keep within the terms of the *lex*.

This point may be illustrated by comparing the development of theft of property and of damage to property, both of which gave the victim a civil action for penal damages. Theft was recognized by the customary law before the enactment of the Twelve Tables and was regulated by that legislation,<sup>5</sup> whereas damage to property was wholly a creature of statute.

Two kinds of theft were recognized: (1) manifest theft, where the thief was caught in the act of theft, and (2) non-manifest theft, where the thief was apprehended later. The penalty was a function of this distinction. In manifest theft, the thief was scourged and handed over to work for the victim. In non-manifest theft, the penalty was monetary with the thief paying double the value of the thing stolen. A monetary penalty was later substituted for corporal punishment in the case of manifest theft with the thief paying quadruple the value of the thing stolen. These sums were penalties payable to the victim, irrespective of whether the victim recovered his property. What made the grant of such a remedy to the victim realistic was the existence of *noxal* surrender. If the thief was a slave or a son in the power of his family head who would not have funds of his own from which to pay the penalty, the action would be brought against the slave's owner or the son's family head. The latter then had the option of either paying the penalty or surrendering the delinquent *noxally* into the ownership or power of the victim.

The Twelve Tables did not, however, define theft (*furtum*). The idea was well-established and a definition was unnecessary. As the etymology from *ferre*, to carry, suggests, theft originally indicated taking away someone else's property. By the end of the republic, theft had been expanded to the extent that the jurists were granting the victim's remedy, the *actio furti*, for any dishonest interference with another's property, even if the thing stolen was not moved. In addition, the jurists were ready to give this remedy to non-owners who found themselves the victims of theft. As Buckland put it, "with the single word *furtum* to interpret, the lawyers had a free hand and there is probably no other institution in which the shaping hand of the jurist, untrammelled by legislation, is so evident as it is here."<sup>6</sup>

5. Jolowicz and Nicholas, *op. cit.*, 167ff.

6. W.W. Buckland, *The Main Institutions of Roman Private Law*, Cambridge 1931, 327.

The result was that they “assume a conception of theft so wide as to include almost any species of dishonesty.”<sup>7</sup> For example, it was theft for someone to cause the loss of a man’s mules by summoning him to court, so that he had to leave them unattended and they were taken by another (D.47.2.67.2). It was theft from a seller for someone to lend a buyer weights which were heavier than they should have been, so that he received from the seller more than he should have received (D.47.2.52.22). It was theft for a creditor to refuse to return a thing pledged with him as security, once the debt secured had been repaid (D.47.2.52.7).

The jurists were primarily concerned with the scope of particular actions, which were available on demand in the *praetorian* edict. Whether the remedy for theft was available in a particular case was discussed as a matter of legal policy. In a late republican text (D.47.2.77.1), B steals goods from A and then C steals them from B. The question is who should sue C. Is it A, the owner of the goods, or B, the victim of C’s theft? One jurist, Servius Sulpicius Rufus, took the view that the thief must be penalized at all costs, so that if A does not sue C, then B should be able to sue him. Another jurist, Quintus Mucius Scaevola, on the other hand, denied this possibility. He took the view that while it may be true that B, the first thief, has an interest in the goods being untouched, it is not an interest which the law should protect. Otherwise, an absurd result might ensue. If B’s theft from A was non-manifest, but C’s theft from B was manifest, then B would have to pay double damages to A but could claim quadruple damages from C and so make a handsome profit out of his own wrongdoing.

The point is that the two jurists could argue about what was the better rule without restrictive pre-conditions, because theft, although regulated by legislation, was a product of the traditional unwritten law. Damage to property, on the other hand, was introduced by a statute of the third century B.C., the *lex Aquilia*. In interpreting this statute, the jurists were restricted from the beginning by the words of the statute.

The first chapter of the statute provided an action for the unjustifiable killing of the plaintiff’s slave or larger animal. The penalty, payable to the victim, was the highest value of the slave or animal in the previous year, thereby taking into account seasonal fluctuations in value. The third chapter imposed a monetary penalty on one who

7. H.F. Jolowicz, *Digest XLVII.2 De Furtis*, Cambridge 1940, xx.

caused unjustifiable loss to another by burning, smashing, or breaking the plaintiff's property.

The word for breaking was *rumpere*. The gradual expansion of this expression was cautious. In the following century, the jurist Brutus was able to declare that if one struck a pregnant female slave, so as to make her abort, then one was liable to the slave's owner under the head of *rumpere* (*quasi rupto*, D.9.2.27.22). A century later, at the end of the republican period, almost all jurists were agreed that the word *rumpere* should be understood in the broad sense of *corrumpere*, which covered all kinds of physical damage, however caused.

Since the statute stated that the penalty was payable to the owner of the thing damaged, the jurists could not give the Aquilian action to anyone who was not owner, so that, in contrast with theft, a pledge-creditor or holder of a life-interest could not bring the statutory action. For such non-owners special actions had to be created ad hoc.

The first jurist to attempt to put some order into the mass of remedies and interpretations that constituted the civil law was Quintus Mucius Scaevola about a century before the end of the republic.<sup>8</sup> He identified a number of general rules, called *definitiones*, which were summary statements of the state of the law. He also wrote the first treatise which attempted to arrange the civil law in categories. By this time the jurists had confined the ambit of the civil law to essentially private law and had factored out the sacral law and public law, both of which had been included in the Twelve Tables. Quintus Mucius began with wills, legacies, and intestate succession, which together occupy a quarter of his whole work. Inheritance problems were clearly the most important area of the law for the practitioner in the republic. Mucius did not clearly demarcate any other area of the law. Instead he merely listed other topics without any semblance of order. Even theft of property and damage to property were not brought together.

## THE TWO SCHOOLS OF JURISTS IN THE EARLY EMPIRE

At the beginning of the empire, there were two contrasting movements at work among the Roman jurists.<sup>9</sup> On the one hand, there was pressure for more rationalism in the law, for identifying a coherent set

8. P. Stein, "The Development of the Institutional System," *Studies in Justinian's Institutes in memory of J.A.C. Thomas*, ed. P.G. Stein and A.D.E. Lewis, London 1983, 151ff.

9. P. Stein, "The Two Schools of Jurists in the Early Roman Principate," 31 (1) *Cambridge Law Journal* (1972), 8ff; D. Liebs, "Rechtsschulen und Rechtsunterricht im Prinzipat," *Aufstieg und Niedergang der Römischen Welt*, ed. H. Temporini and W. Haase, Berlin-New York 1976, II.15, 197-286; G.L. Falchi, *Le Controversie tra Sabiniani e Proculiani*, Milan 1981.

of rules and remedies, each with precisely defined limits, and for the use of logic in the application of those rules. On the other hand, there was a counter-movement to avoid too many precise rules, with a view to preserving as much flexibility as possible, to avoid logic as being too remote from experience, and to concentrate on the decision in the individual case.

These contrasting movements were represented by two schools of jurists, known as the Proculians and the Sabinians. The former was founded by Labeo and the latter by Capito and they "first made, as it were, two sects: for Ateius Capito held fast to what had been handed down to him, whereas Labeo, a genius, with confidence in his own scholarship, who had studied several other branches of knowledge, set out to make many innovations" (Pomponius in D.1.2.2.47).

Although Labeo is described as an innovator, a comparison of the substantive doctrines of the two schools does not show either the Proculians as reformers or the Sabinians as especially conservative. It seems that the differences were of method rather than doctrine and that Labeo used his expertise in other disciplines, particularly grammar and dialectic, to introduce into Roman juristic discourse more rigorous techniques of interpretation and argument than those of the republican jurists. His views are well represented in our sources. Capito's views are not, but we have many texts from his successor, Sabinus, and can draw comparisons between Labeo's methods and those of his opponents.

#### INTERPRETATION OF LEGAL TEXTS

Labeo and the Proculians adopted a different approach to cases involving interpretation of a written text, whether it was the text of a statute, a will, a contractual promise, or a procedural formula, and cases in which there was no such text. Where there was a written text, problems which, according to Labeo, involved "*verborum interpretatio*" (D.32.29pr.), the Proculians consistently advocated a strict, objective interpretation of the words used, whatever may have been the intention of the author of the text and often without regard to the consequences.

For example, the *praetor* granted the interdict *unde vi* to restore possession of property from which the petitioner had been evicted "by force." Labeo refused to recommend the grant of the interdict in favor of one who had received notice that armed men were on their



way to his land and had then abandoned it, without waiting to be expelled physically (D.4.2.9pr.).

With respect to the first chapter of the *lex Aquilia*, which seems to have caused little difficulty in the republic, Labeo held that the etymology of the word for kill (*occidere*, from *caedere*, to cut) covered only killing by violence and with a weapon. Therefore, in a case where a midwife gave a drug to a slave-woman, who then accepted it, consumed it, and died, Labeo argued that the action under the statute was not applicable and that the *praetor* should grant a special *actio in factum* (D.9.2.9pr.). Whenever the circumstances of a case could not be subsumed under the terms of the formula of a particular action, the *praetor* could grant an *actio in factum*. In it were set out the particular circumstances of the case, which the plaintiff had to prove at the trial if the lay judge was to find in his favor.

Celsus, a later Proculian, had to confront the fact that previous practice had already extended the word *rumpere* in the third chapter of the *lex Aquilia* to mean *corrumpere*. He engaged, however, in some damage limitation. How far did *corrumpere* extend? Celsus argued that it was not enough for the owner to be deprived of the thing by the defendant's act. In addition, it was necessary that the defendant should have caused some change in the thing itself. Celsus explains the interpretation of *rumpere* as *corrumpere* (to damage) in a typically Proculian way. Referring to its place in the text following "burn" and "smash," he added that "there is nothing new in that a statute, after enumerating some cases specially, should add a general term which embraces those specific things" (D.9.2.27.16).

With respect to the interpretation of contracts, Labeo held that what mattered was *quod actum est* (literally "what was transacted," D.18.1.77), and it is clear that by this phrase he referred to the objective agreement of the parties, as expressed in the formulation of the contract. For him certainty was all-important and if the parties were not prepared to exploit the potentials for certainty that language offered them, they should not expect the law to bail them out.

Sabinus and his followers favored a looser and less rigid approach to the interpretation of texts. For example, Sabinus held that the rule of the Twelve Tables that required three conveyances for a son to be freed from paternal power, referred only to voluntary conveyances, even though there was no such limitation in the statutory text. Therefore, when a *paterfamilias* surrendered the son *noxally* to the victim of

a delict committed by the son, one conveyance was sufficient (Gaius, Inst. 4.79).

Sabinus also held that the text of the third chapter of the *lex Aquilia* should be interpreted as if the word *plurimi* (highest) had been inserted before the reference to the value of the thing damaged, even though it was absent. Sabinus reasoned that the legislator must have considered it sufficient to use that word in the reference to assessment of the penalty in the first chapter (Gaius, Inst. 3.218).

When faced with the need to interpret the terms of a legacy in a will, Sabinus did not look for an objective meaning of the words used by the testator but rather looked to what the particular testator intended. For him the same expression could mean one thing in one will and something different in another will. According to Sabinus (D.33.6.9pr.), a legacy of "wine" included whatever that testator regarded as falling within that category (*omnia vini appellatione contineri quae vini numero paterfamilias habuit*), since the contents of such a category depended on human preferences and habit (*pro hominum affectione atque usu*). For Sabinus, what mattered was to reach a reasonable solution to the particular problem rather than to achieve consistency in the legal effect of a form of words.

The contrasting approaches of the Proculians and the Sabinians to textual interpretation are clearly illustrated in a text on the meaning of the phrase *bonorum pars* (part of the goods) in a legacy bequeathed by a testator (D.30.26.2). Sabinus and his follower Cassius regarded a legacy of part of the goods as a legacy of a fraction of the value of the estate. From the point of view of the administration of the testator's estate, such an interpretation was more convenient. On the other hand, Proculus and Nerva, followers of Labeo, considered such a position to be inadmissible. The phrase "part of the goods" was clear enough and could only mean a fraction of the goods themselves. If the testator had wanted to give the legatee a part of their value, he could have easily said so.

### THE PROPER SCOPE OF LEGAL ACTIONS

As we have noted in the case of the slave who died after consuming poison, Labeo was unwilling to assimilate under an action facts which did not strictly fall under the terms of the relative formula. Rather, he advocated the creation of a separate action for the special circumstances. Sabinus, on the other hand, preferred to squeeze new

situations under recognized formulae rather than create a plethora of particular remedies.

An example of the two approaches relates to the action *ad exhibendum*, under which a party could compel his opponent to produce in court a thing which was the object of the dispute. If the thing was present in court but in a damaged condition, Labeo held that the action was not applicable, since the party in question could not be said "not to produce" the thing. Sabinus, on the other hand, held that the party could be said "not to produce it" if it was in court in a damaged condition. It did not bother Sabinus that this involved a forced interpretation of the relevant words. If the party demanding the thing was to be accorded a remedy, it was convenient to give him the usual action (D.50.16.246pr.; D.10.4.9.3).

There was a famous school dispute as to whether in a contract of sale the price had to be in money, or, in other words, whether barter could be considered a form of sale (Gaius, Inst. 3.141; D.18.1.1.1). Sabinus held that barter and sale were the same contract. He based this view on custom and ancient authorities, such as the poet Homer, who had used the Greek word for sale to describe what from the context was clearly barter. Sabinus's argument seems to have been that if, in daily life, people had traditionally treated barter and sale as one transaction, then the law would be unnecessarily artificial to treat them differently.

Proculus and Nerva stated the opposite view, that the two transactions were distinct. By the first century of the empire, the law recognized that the contract of sale imposed distinct duties on the seller and on the buyer. These duties were protected by separate remedies, *actio empti* against the seller and *actio venditi* against the buyer. In barter, however, it was usually impossible to distinguish between buyer and seller, since each party was at the same time both buyer and seller. Therefore, the Proculians said that neither of the sale actions was applicable to barter and special actions had to be provided.

A dispute of a similar type is that concerning specification, where A creates something new out of material belonging to B (Gaius, Inst. 2.79; D.41.1.7.7). The Proculians attributed the new thing to A, the creator, whereas the Sabinians held that B, the owner of the material, owned it. The Proculians' decision seems to have been the result of their insistence that the plaintiff in an action claiming ownership of a thing (*vindicatio*) had to give a precise description of what he claimed to own. If the correct description of the thing had changed, he could

no longer claim it by the former description. It was considered a new thing, which belonged to the maker, A, for it never belonged to B.

The Sabinians, in taking the opposite view, held that it was in accordance with *naturalis ratio* (literally “natural reason,” but with the connotation of “common sense”) that the owner of the material should be the owner of the new thing made from it. The thought seemed to be that a thing is a thing, even when its form is changed and purely legal reasoning cannot alter nature. We shall return to this aspect of Sabinian thinking.

Labeo was critical of some of the extensions of theft allowed by the republican jurists.<sup>10</sup> In his view, it was necessary to establish criteria which would define the limits of the action for theft and so distinguish between theft and damage to property or fraud. One possibility was to stress the element of physical contact between the thief and the thing stolen. Labeo rejected this approach. Rather, he issued a number of rulings denying the action for theft in circumstances where another action was more appropriate.

For example, D.47.2.50.4 discusses whether a man who waves a red cloth at an animal to make it stampede is guilty of theft. Labeo said that if he did it in order that the beast should be taken by thieves, then the action for theft should be given against the waver of the cloth. But if the act, although deliberate, was part of a silly game (*ludus perniciosus*), then the action for theft was not suitable and the praetor should grant an *actio in factum*, limited to the specific facts of the case.

This distinction suggests that deliberately causing another person to lose his property was, in Labeo’s view, no longer sufficient to constitute theft, as some republican jurists had held. The thief must further be shown to have intended that the property should be acquired by someone else, i.e., he must intend to benefit himself or a third party.

Labeo did not require that all those liable for stealing the thing should have personally appropriated it. The formula for the action for theft required proof that the thing had been stolen *ope consilio* of the defendant. This was a compendious phrase, covering both the act of the delinquent, who took the thing, and the act of those who helped him to take it. In the republic, the phrase was normally understood conjunctively as meaning something like “by the act or design.” The

10. P. Stein, “School Attitudes in the Law of Delicts,” *Studi in onore di Arnaldo Biscardi*, II (1982), 281ff.

republican jurists regarded both the person who took the thing and the person who helped him as equally guilty as thieves. There had been a tendency to treat as a thief anyone who did something which resulted in making the victim lose his property to another, if he should have known that he was acting against the owner's will, whether he was subjectively dishonest or not.

Labeo held that the words should be read disjunctively as meaning "either by the physical act or by the design" of the defendant (D.50.16.53.2). Thus, he distinguished the principal who took the thing from the accomplice who helped him and, in the case of the latter, required specific, dishonest advice (*malignum consilium*) directed to the taking. Labeo was consistently scrupulous in requiring proof of actual subjective dishonesty on the part of the defendant.

Sabinus accepted that the republican jurists' views on theft needed tidying up but was reluctant to limit the scope of the delict. He adopted a broad definition, and did not insist on actual subjective dishonesty: "anyone commits theft who has handled another's thing, when he ought to know that he does so against the owner's will" (cited by Aulus Gellius, *Attic Nights*, 11.18.20). Sabinus held it to be theft where a stakeholder in a competition received the prize and then refused to hand it over to the winner (D.19.5.17.5).

Although the majority view was that theft was confined to moveables, Sabinus held that land could be stolen and that a tenant farmer who sold the land that he was renting committed theft against the owner, who was thus deprived of its possession (Aulus Gellius, *id.* 11.18.13). (In Roman doctrine the landlord was held to "possess" through his tenant.)

#### UNWRITTEN LAW

When they were not dealing with the interpretation of a fixed text or the limits of actions, the Proculians recognized the existence of an unstated structure of basic principles. They sought to apply those principles in circumstances where their rivals saw no connection. They looked for a logical structure to the law, whereas the Sabinians stressed custom and practice. Labeo held that one could use analogy to discover the law applicable to a problem which had not been the subject of a previous ruling. He was familiar with the dispute among grammarians between analogists, who viewed language as a structure of rules, and anomalists, who considered language as based exclusively

on popular usage.<sup>11</sup> He favored the analogist position and seems to have been the first jurist consistently to use analogy as a form of argument.

For example, Labeo noted the essential similarity between theft of property and damage to property, in effect recognizing the existence of a category of delict, all members of which should be governed by similar principles. Thus in the case of damage to property caused by an *infans*, a child under seven years, who did not understand what he was doing, Labeo held that there was no liability. If, however, the damage was caused by an *impubes*, a child over seven years, who understood what he was doing, there was liability (D.9.2.5.2). There was no text to interpret in this case. Labeo's reason for the decision was that the *impubes* was already held liable for theft. It would be irrational to have different rules for the two delicts and the law must be rational.

Through the use of the criterion of rationality (*ratio*), Labeo's followers saw connections between different fields of law. They observed that there was no essential difference between the duty of an heir to deliver to a legatee what had been bequeathed to the legatee in a will and the duty of a promisor in a formal contractual promise by stipulation. Gaius, Inst. 3.98, records a dispute on the effect of a legacy subject to an impossible condition. The Sabinians held that the heir was bound to hand over what was bequeathed as if it had been given unconditionally. The Proculians noted that a formal promise by stipulation which was subject to an impossible condition was void and that there was no justifiable reason to treat the legacy differently from the promise. It would be irrational to make the decisions in the two cases different. Even Gaius, who was himself a Sabinian, had to admit that there was no rational basis for the difference.

Sometimes the Proculians used *ratio* to reach a more liberal decision than the Sabinians. Roman wills depended for their validity on the institution of an heir to the testator's estate and normally the institution was the first clause in the will. There was a dispute on the validity of a clause nominating a guardian (*tutor*) for the testator's children, which was written before the institution of the heir (Gaius, Inst. 2.231). All jurists agreed that the grant of a legacy or the manumission of a slave which was written before the institution of the heir

11. P. Stein, "The Relations Between Grammar and Law in the Early Principate: The Beginnings of Analogy," *Atti Del II Congresso Internazionale della Società Italiana di Storia del Diritto*, Florence 1971, 757ff.

was void, and the Sabinians argued that the same rule must apply also to the nomination of a guardian.

The Proculians asked what was the reason for the rule and found that both legacies and manumissions of slaves reduced the amount of the residuary estate, which went to the heir. Therefore, it was logical that they should appear in the will after the institution. But this reason did not apply to the nomination of a guardian, and so the Proculians held such a nomination to be valid, even when it preceded the institution.

### THE CRITERIA OPPOSED TO RATIONALITY

Whereas the Proculians appealed to the criterion of reason, *ratio*, the early Sabinians preferred to cite precedents and practice. Sabinus is said to have continually approved the views of the old republican jurists (Ulpian, in D.12.5.6) and Aulus Gellius (*Attic Nights*, 5.19.13) notes that Sabinus was concerned that the antiquity of the law should be maintained.

Gradually it became accepted that logic and rationality, on the one hand, and settled practice, on the other, were alternative justifications for a decision. The Sabinians were prepared to tolerate a certain level of irrationality with equanimity. As Javolenus, a Sabinian, put it, "Labeo's opinion has reason in its favor, but the rule that we use is as follows," (D.40.7.39.4).

Typical of these two approaches were the views of the schools in the dispute over when an *impubes* reached puberty and so attained legal capacity (Gaius, *Inst.* 1.196). The Sabinians held that the time varied from one young man to another, according to their physical development. In the case of someone who was impotent, the Sabinians held that the normal age of puberty should be applied. The Proculians argued that the need for certainty required one time for every case and held that a young man should be considered to have reached puberty at the age of fourteen years, whatever his physical development. Not surprisingly, the Proculians' view prevailed.

Where there was no firm practice to follow, the Sabinians referred to the nature of things, a category in which, remarked Sabinus, "everything was certain" (D.5.1.28.5). I have argued elsewhere<sup>12</sup> that it was Sabinus who introduced the term "natural reason" (*naturalis ratio*) into legal discourse, as a counterweight to what he regarded as

12. P. Stein, "The Development of the Notion of *Naturalis Ratio*," Daube Noster, *Essays in Legal History* for David Daube, Edinburgh 1974, 305 ff.

the too legalistic reasoning (*civilis ratio*) of his opponent. The phrase is used in lay literature to explain, as natural, unusual events which have been attributed by others to supernatural causes. It has been noted that in the dispute over specification, Sabinus justified his view that the new thing belonged to the owner of the material by an appeal to natural reason.

In another dispute, there are traces of similar arguments (D.17.2.83). When a stone was embedded in the ground, partly in A's land and partly in B's land, A and B each owned that part of the stone which lay in his land. For when it was in the ground, it was not distinguishable from the ground. What is the position when the stone was removed from the ground? Some jurists (the Proculians?) argued that then the stone, as an object distinct from the ground, was owned in common by A and B in undivided shares, which bore the same relation to each other as the former separate portions. Others (the Sabinians?) differed. How, they asked, could the mere removal of the stone from the ground alter its ownership? The solution suggested by nature was that A and B each retained absolutely the same part of the stone as they had when the stone was in the ground. The law cannot alter what nature has settled.

Later Sabinians substituted "the general convenience" (*utilitas communis*) for nature as a criterion to set against Proculian logic.<sup>13</sup> Justifying a ruling that some might consider "absurd," Salvius Julianus remarked, a century after Sabinus, that "it can be proved in innumerable cases that many rulings have been accepted by the civil law contrary to logic for the general convenience." As an example, he set forth the case of several persons, intending to steal, who carried off another's timber beam, which none of them could have carried alone. They are all liable for theft, "although by subtle reasoning (*subtili ratione*), it might be argued that none of them is liable because no one person actually removed the beam" (D.9.2.51.2).

### THE NATURE OF LEGAL RULES

There are traces of a dispute over the nature of legal rules.<sup>14</sup> The late republican jurists, particularly Quintus Mucius Scaevola, tried to state the civil law in a series of *definitiones*, which were seen as summary descriptions of the law as revealed in practice. Labeo intro-

13. V. Scarano Ussani, *L'Utilita e la certezza: compiti e modelli del sapere giuridico* in Salvio Giuliano, Milan 1987, 3ff.

14. P. Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims*, Edinburgh 1966, 67ff.



duced a new word, *regula*, as an alternative to *definitio*. He took this word from grammatical language, where it had decidedly analogist overtones. A *regula* was something more than a *definitio*. It was a normative proposition which governed all situations which fell within its rationale. In contrast with *definitio*, which looked to the past, a *regula* looked to the future since its ratio was applicable to many cases which had not yet arisen.

A text of Paul (D.50.17.1), which cites Sabinus in support, combats this view.<sup>15</sup> It describes a *regula* as a brief account of the matter and goes on to say that, "it is not from the *regula* that the law is derived but the *regula* is made from the existing law." It is like the summary outline of a case (*causae coniectio*), made to the *iudex* by the parties, before the case is put in detail, and it loses its function if it is false in any particular.

The form of the statement "it is not from the *regula* that the law is derived," suggests strongly the existence of a dispute in which someone suggested that the law could be derived from the *regula*. Such a someone would be Labeo, whose view Sabinus countered with the argument that *regula* and *definitio* were synonymous.

It is of interest that two centuries later Paul took Sabinus's view. By his time, analogy was fully accepted as a legal argument and *regulae* were seen less as precise rules than as maxims, which had a general application but did not necessarily cover every situation which fell under their wording.

#### THE DEFINITION OF LAW

It was a Proculian, Celsus, who formulated the famous definition of law as "the science (or technique) of the good and fair" ("*ius est ars boni et aequi*," D.1.1.1). This has been understood by some scholars as merely a rhetorical slogan. Recently, however, there has been a tendency to take it more seriously.<sup>16</sup>

If law is an *ars* (in Greek *techne*), it must be an area of human activity (*artificialis*) with its own rules and methods, as opposed to a natural phenomenon. Although *ars* itself connotes human creativity,

15. *Regula est quae rem quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat. per regulam igitur brevis rerum narratio traditur, et ut ait Sabinus, quasi causae coniectio est, quae simul cum aliquo vitiata est, perdit suum officium.*

16. S. Riccobono, "La definizione del ius al tempo di Adriano," 53-54 *Bulletino del Istituto di diritto romano* (1948), 5ff; P. Cerami, "La Concezione celsina del 'ius'," 38 *Annali del Seminario giuridico dell'Universita di Palermo* (1985); F. Gallo, "Sulla definizione celsina del diritto," 53 *Studia et Documenta Historiae et Iuris* (1987), 7ff; V. Scarano Ussani, *Empiria e Dogmi: la scuola Proculiana fra Nerva e Adriano*, Turin, 1989, 91ff.

its object is understood not as something created but as something already there. The *ars* suggests the conversion of what is fair and equitable into law. Celsus's definition stresses that the activity of lawyers has an ethical purpose. He avoided the word justice, preferring to insist that the concern of the law was with what ordinary people regard as good, as opposed to bad, and fair, as opposed to unfair. *Aequum* has a sense of equality; the law must treat all equally. So far most jurists would have agreed with Celsus.

Celsus's definition is, however, more specifically Proculian in its reference to science. Law is not a vague undefined expression of goodness and fairness, but a science. The values of justice in the general sense may not be capable of being realized in every case through law, because, as a science, it is necessarily subject to particular limitations. These limitations are based on other values, such as certainty, regularity, and predictability. Law cannot be just a set of individual cases. It was Celsus who said that laws are not established in matters which may happen only in one case (D.1.3.4). Law is, therefore, a compromise between the demands of morality and those of science.

### CONCLUSION

The two schools of jurists, as representatives of two opposing approaches to law, did not survive much more than a hundred years among practitioners. By the beginning of the second century A.D., there was a tendency to merge the methods of both schools. As consultants, the jurists could deal with the cases that came their way individually, but as teachers they had to take a broader view.

Evidence for the existence of the schools as teaching institutions is sparse, but it is not difficult to believe that the differences between the schools survived in law teaching after they had ceased to have much significance in practice. Debates between teachers and students and alumni loyalty to their institutional attitudes would have ensured their survival in the academic environment. Even in the second half of the second century A.D., Gaius, who was exclusively a law teacher, treated the school disputes as alive and flourishing.

The lasting influence of those disputes was the creation of a tension between two ways of looking at law. This tension formed the parameters within which the later giants of classical jurisprudence operated. It is through their writings, particularly those of Paul and Ulpian in the early third century, as excerpted in Justinian's Digest, that later generations learned about the nature of law itself.

The famous aphorism of Oliver Wendell Holmes, Jr. in his lectures on *The Common Law*, "the life of the law has not been logic; it has been experience," was itself derived indirectly from Roman law.<sup>17</sup> Holmes went on to say, "it is something to show that the consistency of a system requires a particular result, but it is not all. . . . The law . . . cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."<sup>18</sup> Two years before he wrote those words, Holmes had been reading (in a French translation) Rudolph von Jhering's *Der Geist des römischen Rechts* ("The spirit of Roman law"). In this work Jhering says, "the desire for logic that turns jurisprudence into legal mathematics is an error and arises from misunderstanding law. Life does not exist for the sake of concepts but concepts for the sake of life. It is not logic that is entitled to exist but what is claimed by life, by social relations, by the sense of justice,—and logical necessity, or logical impossibility, is immaterial."<sup>19</sup>

In their debates, the Roman jurists were caught in the two contrasting characteristics that society still expects from law: certainty and rationality on the one hand, and a satisfactory solution of the individual case on the other.

17. P. Stein, "Logic and Experience in Roman and Common law," 59 *Boston University Law Review* (1979), 433; reprinted in P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, London-Ronceverte, 1988, 37ff.

18. O.W. Holmes, *The Common Law* (1881), 1.

19. 4 *L'Esprit du Droit Romain*, translated O. Meulenaere (3rd ed.1888), 311.