Introduction

What is a tree? For lawyers, and litigants with trees on their land, this question could be important. 'Most of the ancients', according to the Severan legal commentator, Ulpian, thought that vines were trees, likewise ivies, reeds and willows. A plant could not be a tree unless it had developed roots and 'that also is deemed to be a tree, the roots of which have ceased to live' or which, if uprooted, could be put back again or transplanted. The stock of an olive was also a tree, whether or not it yet had roots. The roots were not included in the term 'tree'.[1]

Ulpian was a learned and prolific jurist, an expert commentator on law whose interpretations carried authority. His discussion of what a tree was is extracted from a work, not on arboriculture, but on detailed matters of law. The object of the discussion was to ascertain when, or in what circumstances, an action[2] for the secret felling of trees could be brought. In order to define the office, legal experts had to deliberate about what a tree was, how 'felling' should be defined (that was, not bark-stripping, cutting with a saw or pulling up by the roots), who was liable, what was due to the owner(s), what was meant by 'secret' and whether or not an alternative action, for theft, could also be brought. Authorities for one opinion or another, the 'ancients', unspecified, or named earlier experts in the law – Pomponius, Trebatius, Labeo – were cited and agreed with or refuted.

Jurists approached their learned discourses from a number of angles. One method was to define a problem and its solution in terms of question and answer. For example: 'It was asked whether an heir should be given a hearing, who, before a complaint of unduteous will is brought, wants payments made returned to him. He replied that a man who discharged a *fideicommissum* (trust), in the knowledge that he was not obliged to,

[1] *Dig.* 47. 7. 3 (Ulpian, *Ad Sabinum* 42).
[2] See Buckland (1966) 605, 'the Law of actions is the law of litigation, the law governing the submission of claims to a tribunal for settlement'. Cf. *Dig.* 44. 7. 51. Nihil aliud est actio quam ius quod sibi debeatur iudicio persequendi.

cannot reclaim on this ground . . .'[3] A second was to ask 'what if . . .' and answer in hypothetical terms; still on 'unduteous wills', Ulpian asked 'What, for example, if a brother was plaintiff and the heirs in the will were of different standing? In such a case, the deceased will be considered to be partly intestate, partly not.'[4] A third, in which one can detect the hand of a past or future imperial lawyer, was the prescriptive mode; 'One who administers justice should not do so in cases involving either himself, or his wife or his children or his freedmen or others, whom he has with him.'[5]

The last form, the statement of a rule, without discussion, was the one preferred by emperors. No author of an imperial law would have indulged himself with seeking to define a tree. While juristic commentators were, in general, deliberative and discursive, seeking to define principles and rules, emperors were concerned to tell people what to do, and what not to do. Prescription could, however, be combined with education: Theodosius II wrote of his planned Code of imperial law that its function would be to act as a 'teacher of life', telling the user 'what should be observed and what avoided'.[6] The demands of government therefore set imperial legislators on a potential collision course with the more deliberative aspects of the juristic legal tradition. Nor was the conflict resolved, and the extreme language of much of what survives in late antique imperial law-codes has caused scholars to despair of the law of late antiquity, or to ignore it altogether.

Late imperial law must be understood as a form of hybrid creation. Emperors themselves did not have a legal training or, indeed, in some cases, much education of any kind. They had the right to decide what the law was. On the other hand, many drafters of imperial laws, known from the mid-fourth century on as quaestors, were in fact men with a good understanding of law, who had read some juristic writings and had some understanding of legal principle. When, therefore, emperors deferred to the advice available, it became possible for the legal tradition reflected in the 'opinions of the ancients' to be merged discreetly with the apparent dirigisme of late imperial legislation. Not that this was always the case. Although many individuals pursued study of the law on a private basis, no independent judiciary existed to check the potential whims of the imperial legislator, or make rulings on whether a proposed constitution (imperial enactment) was 'lawful' or not. Emperors were therefore entitled to respond, or not, not only to legal pressures but to social and

[3] *Dig.* 5. 2. 21. 1. [4] *Dig.* 5. 2. 24.

[5] *Dig.* 2. 1. 10 (Ulpian, again, formerly *a libellis*, in charge of petitions, later to be Praetorian Prefect to Severus Alexander). For his career and writings, see Honoré (1982); Syme (1972).

[6] *CT* 1. 1. 5 (429). Compare, on Chinese law, MacCormack (1996) describing the Confucian vision of law as the educator of the people.

political pressures as well. This right was in fact essential to the emperor's own legitimacy as a law-giver; he could expect his constitutions to be backed by the consent of society as a whole, the 'consensus universorum'.[7]

For those purist lawyers who regarded their discipline as being, for the most part, hermetically sealed from the outside world, this was (and is) an unsatisfactory situation. The contamination of the purity of the legal discipline and the undermining of long-held legal principles by perhaps temporary or irrational social pressures is an understandable cause for concern. It is true that in Late Antiquity protests could be made, for example by persecuted Christians, that the emperor was acting unlawfully,[8] meaning that both proper legal process and legal safeguards had been abolished, but in the law-making process itself, 'political (i.e. imperial) interference' was built into the system and it occurred to no one to question that this should be so. The result may have been to undermine classical principles in some areas, but in other respects the emperors' openness to social change may have made their legislation more responsive to public needs and changing social mores than it would otherwise have been.

Nor were the demands of law necessarily in conflict with social change. Historically Roman law had always contained a moral dimension, meaning that it was responsive to the social mores of the time, and it was an accepted part of juristic theory that the application of some laws was heavily dependent on social attitudes.[9] For example, one of the defining texts for citizen law was the Praetorian Edict, codified in *c.* 130 CE. This declared that an action could be brought if someone were shouted at 'contrary to good morals'.[10] Having asserted that not all shouting was actionable, Ulpian answered the crucial question, 'whose morals' were to count. The answer, derived from the first-century jurist, Labeo, was that those of the city were to count, not those of the offender.[11] In other words,

[7] A debateable concept even now. For the 'lawfulness' of taking into account 'public clamour'/'genuine public concern', defined as 'a petition signed by some 287,300 members of the public, with some 4,400 letters in support . . . a petition signed by nearly 6,000 members of the public . . . and over 20,000 coupons cut out of a popular newspaper (*The Sun*), with over 1,000 letters . . .', see *The Times*, Law Reports, 13 June 1997. For ancient concepts, from Aristotle on, see Oehler (1961).

[8] Lactantius, *De Mortibus Persecutorum* 22. 4 (under Galerius), eloquentia extincta, causidici sublati, iure consulti aut relegati aut necati . . . Licentia rerum omnium solutis legibus adsumpta..

[9] Cf. Cicero, *Topica* 73, observing that 'vulgi opinio', popular opinion, influenced the decisions of *iudices*.

[10] *Dig.* 47. 10. 15. 2, qui adversus bonos mores convicium cui fecisse cuiusve opera factum esse dicitur, quo adversus bonos mores convicium fieret, in eum iudicium dabo.

[11] *Dig.* 47. 10. 15. 6. Idem (Labeo) ait 'adversus bonos mores' sic accipiendum non eius qui fecit sed generaliter accipiendum adversus bonos mores huius civitatis.

in this case, whether or not an offence had been committed depended, not on strictly defined legal rules but on what was acceptable social behaviour in the *civitas* or *polis* as a whole.

Jurists thought, and modern lawyers think, in terms of their own intellectual discipline, exhibiting, in varying degrees, concern for legal principle, justice and fairness, definitions, rules, precedents and all the intricacies of real or imagined courtroom situations. Much of what was written by legal specialists was (and is) hard to cope with for the non-specialist[12] (the tree example set out above was chosen for its, perhaps unrepresentative, accessibility), and the importance of Roman law as law in the wider administrative, social and literary culture of the Roman Empire has received, until recently, little attention. For further progress to be made, historians who use law as a source must be aware of, and respect, the separateness of law as a discipline, with its own assumptions and intellectual tradition. To treat laws as just another literary or documentary source, without considering how law as text came into being, is to risk misunderstanding the texts themselves and drawing from them highly questionable historical conclusions.

Much of this book is an attempt to provide an alternative reading of late Roman Law as a source for Late Antique history. The writings of Fergus Millar and Tony Honoré have drawn attention to the responsive character of imperial legislation and the importance of the mechanisms and the people who brought it into being. This has important implications for attitudes to law on the part of those who went to some lengths to get a (favourable) imperial ruling, and the multiple influences – legal, bureaucratic, social, rhetorical – which contributed to the generation of the text of an imperial constitution. It will be argued (chapter 4) that to discuss Roman Law in terms of 'obedience' or the reverse is a misconception of what law is for and contributes to a mistaken assessment of its real effectiveness, even in those limited areas of life where it might apply. For it must be remembered that law had its own tacit frontiers; many people went about their business, and even settled disputes with each other or before adjudicators under rules of their choosing without resorting to Roman law at all (chapters 9 and 10). It should not therefore surprise that systems not quite like those envisaged by the Theodosian Code crop up in the sources; customary or local usages worked and, provided all agreed to the outcome, it was in no one's interest to interfere.[13]

[12] Which makes the bridge-building between Law and Ancient History by Olivia Robinson (1997) especially welcome.

[13] 'Vulgar' and 'local' or 'provincial' law are outside the scope of this book. Traditional Roman tolerance of local practices, provided they were compatible with the aims of Roman government, would naturally extend to local methods of dispute-settlement and internal regulation.

It will also be argued that one should not believe everything emperors, or their elite imitators, said or wrote was true, even when there appeared to be consensus, on, for example, the corrupt behaviour of judges (see chapter 8). While perceptions are important for cultural history, their truth is not always self-evident. Emperors in their laws resorted to a language of power designed to hold their officials to account; this has been, wrongly in my view, interpreted as evidence of extensive wrongdoing on the part of officials, and especially of judges. A similarly assertive and critical attitude is also evidenced in the widespread condemnations of abuses of power in historians, speech-writers, bishops and other authors. What this reveals is a culture of criticism, not that there was, necessarily, more to criticise in the fourth or fifth centuries than there had been earlier. Of course, there was much to fear in the operation of the Late Roman autocracy, and every reason to conciliate its agents and palliate its worst excesses. But the powerful and the weak alike also actively exploited the content and the language of imperial law to further their own ends. Petitioners of moderate means insisted on justice, using the emperor's words against him, while, on a more socially elevated level, the eloquent advocate or patron, echoing the rhetoric of the emperor's laws, represented themselves, their friends or their clients as 'victims' of their 'powerful' opponents, and used their influence to highlight abuses perpetrated by others and, in the process, to make accountability a reality.

1 The law of Late Antiquity

Law was, in theory, the 'art of the good and the fair'.[1] Many citizens of the Roman Empire thought otherwise. As so much of what was written about the operation of law derived from a discourse about law, which confused perceptions, tendentious rhetoric and fact, some sense of the framework of the contemporary debate is required. The terms were cogently set out by Priscus of Panium, the Greek classicising historian, who, in 448, was sent with others on a delicate mission to Attila the Hun. In his *History*,[2] Priscus recalled an encounter with a Greek-speaking former citizen of the Roman Empire, who had been taken prisoner and settled with the barbarian. One reason for the latter's dislike of Roman rule was the iniquities of the legal system. His criticism focussed especially on the system in operation. The laws did not apply equally and if a wrongdoer came from the wealthy classes, then he might escape punishment, whereas a poor man, because of his ignorance of how to conduct such matters, would undergo the penalty prescribed by the law – if he did not die before the case was concluded, after protracted delays and much expense. The worst thing of all, he said, was that what should have been obtainable from the law could be acquired only by paying money.

In his defence of the Roman system, Priscus emphasised the ideal of law, rather than its malfunctions in practice. Justice, he argued, was administered according to rule and enforced, thus preventing one lawsuit leading to another, and, as law existed to help litigants, it was right that it should be paid for, just as farmers should pay to be defended by soldiers, and when litigants had wasted money on cases they had lost, this was their fault. The real grievance, which was the level of expense required to go to law, was not addressed. Nor was Priscus prepared to concede that the judiciary might be at fault. He attributed the law's delays to conscientious scruples on the part of judges, rather than the complexities of the judicial procedures of trial and appeal; it was right, he said, that a judge should take care not to make a mistake by being in too much of a

[1] *Dig.* 1. 1. 1 (Ulpian, *Institutes*), see n. 4. [2] Priscus, fr. 8, *FHG* 4, pp. 86–8.

hurry. The laws applied to everybody and even the emperor had to obey them.[3] If rich men oppressed the poor in lawsuits, they could only get away with it if no one noticed – and that was true of poor men also.

As the second speaker, Priscus had the advantage of being able to offer a refutation of his opponent point by point. His method was to act as an advocate for the ideals of fairness and justice on which the law was based, while glossing over its malfunctions in practice. Law was given its place in the balanced functioning of the state as a whole, as a system of enforceable justice, to which even the emperor was subject. The aim of the whole literary construct was that the empire, which Priscus served and was, at the time, representing as ambassador, should be vindicated and such, predictably, was the outcome. Faced with this eloquent reminder of the ideal of Roman citizen law (*ius civile*), Priscus' opponent broke down in tears: 'the laws were indeed noble and the Roman constitution good, and it was the magistrates (*archontes*) who failed to match those of long ago and undermined its reputation'. The fault, in other words, lay, not with the system of law itself, but with those who administered it.

Priscus and his friend were not alone in their idealisation of the Roman *politeia*. Writing in the early third century, Ulpian argued that law was virtually a religion and that legal experts, like himself, were its priests; 'For we serve the needs of justice and advance knowledge of the good and the just, distinguishing the just from the unjust, separating the legal from the illegal, seeking to make men good not only through fear of punishment but through the incentive of rewards, practising, if I am not mistaken, no fake philosophy but a true one.'[4] Idealism of a different kind was expressed by a former enemy of Rome. In the early fifth century, the Spanish historian, Orosius, heard tell that a citizen of Narbonne had had conversations with the Goth Athaulf, who had succeeded his brother Alaric as leader of the Goths a few months after the Sack of Rome in 410.

[3] This view contrasts with that of Ulpian, *Dig.* 1.3.31 (from *Lex Julia et Papia*). Princeps legibus solutus est (as was the empress), but for expression of imperial subjection to law, see *CJ* 1. 14. 4 (429, west), 'maius imperio est submittere legibus principatum'. It was, of course, in the interests of the powerful block of lawyers in the administration that the emperor be subject to law.

[4] *Dig.* 1.1.1 (from Ulpian, *Institutes* 1), iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram, nisi fallor, philosophiam, non simulatam affectantes. Cf. Honoré (1978) on the legal profession as 'a body of initiates, conscious of its moral worth, with a continuous history from the pontifical college of the republic to Tribonian's commission'. For a further encomium, with a sting in the tail, see Gregory Thaumaturge, *Address to Origen* 7, on 'these admirable laws of ours, by which the affairs of all men under Roman rule are governed and which were neither composed nor can be mastered without effort, being themselves wise, precise, varied, wonderful and, in short, – very Hellenic'. Gregory had chosen to drop out of his legal education.

After being at first hostile to Rome, Athaulf had come round to believing that laws were a pre-requisite for both civilisation (as opposed to barbarism) and statehood. Having seen, all too often, that the Goths were unable to obey laws because of their 'unrestrained barbarity', Athaulf further concluded that laws could not be banned from a state (*respublica*) because without laws a state could not be a state at all, therefore he would amalgamate his Gothic strength with the 'Roman name'.[5] This interpretation is not far removed from that of Priscus, in that both connected law and the state, but, while Priscus, the Roman citizen, saw law as being envisaged by the founders of the Roman constitution as an integral part of the state, Athaulf, the outsider, saw it as a precondition for having a state in the first place. However, the outsiders, Athaulf and Priscus' opponent, who had the advantage of surveying the Roman system from the standpoint of competing systems, those of the Huns and the Goths, also differed in one important respect; the former subject of the Empire was disaffected because of the unjust operation of law, while the Germanic observer set the issue of operation to one side, in the belief that, without any system of law, there could exist neither order nor a state.

Despite their differences, all the contemporaries thus far discussed subscribed to the existence of the ideal constitution or system of laws (*nomoi*) which, if observed, should guarantee order and justice. Priscus and his Greek-speaking acquaintance also both believed that this ideal system could be subverted by those who ran it, resulting in injustice. This simple opposition between the law, as a set of inviolable rules requiring to be obeyed, and extraneous factors, such as the exertion of arbitrary power by litigants through wealth or influence, or the susceptibility to extra-legal pressures of judges, tax-collectors or other officials,was one subscribed to by contemporaries, including emperors, and offers, at first sight, a convenient explanation for the malfunctioning, if not the decline, of the Later Roman Empire. It is the contention of much of this book that analysis of law and society based on a supposed conflict between the law (or rules) and power is simplistic and inappropriate. Instead, late Roman society must be viewed in terms of a multiplicity of relationships, in which the law was used as a tool of enforcement, an expression of power, or a pawn in the endless games played out between emperor and citizen, centre and periphery, rich and poor.

Confusion and ambiguities? The legal heritage

Not all were content to ascribe the failings of the legal system only to those who ran it. The law itself was regarded by some as being riddled

[5] Oros. *Historia adversus paganos*, 7.43.

with confusion, making it impossible to know what the law was. In the late 360s, an anonymous petitioner concluded a small treatise on military machines and other matters with a plea to the emperors to 'cast light on the muddled and contradictory rulings of the laws, throwing out unprincipled litigation, by the judgement of your imperial opinion'.[6] Although slow to take action, emperors, once convinced of the merit of systematising the law, took credit to themselves for addressing the problem. Launching his collection of imperial constitutions, the Theodosian Code, in 438, Theodosius II blamed the chronic shortage of legal experts on there being too many books, forms of bringing suit and heaps of imperial constitutions, which concealed knowledge of the law in a thick, dark fog.[7] This state of affairs (he claimed) was exploited by self-styled experts in the law to conceal their own ignorance and overawe their clients.[8] Nearly a century later, the emperor Justinian found the 'way of the law' in so confused a state that it appeared to be stretching ahead with no end in sight,[9] a situation which his *Digest*, a compilation of extracts from juristic writings, was designed to remedy.

Codifications of law had obvious attractions for emperors as prestige projects. It would have been less clear that the more the law was defined, the less scope there might be for emperors to exert discretionary powers as patrons. The confusion and ambiguities in the system so much deplored by the imperial codifiers had in fact given them greater scope to exercise discretion as patrons and innovators.[10] By contrast, given that rationalisation of law limited imperial discretion, codification should have worked to diminish imperial power. Yet neither Theodosius II nor Justinian seem to have regarded this as a problem. Perhaps they believed that adequate scope for patronage remained. More important would have been the conviction that the creation of a law-code incorporating the laws of predecessors set the codifier on a higher level than the legislators who had gone before him. Despite the rhetoric, emperors' reasons for authorising prestige projects like the codification of law were not wholly

[6] *De Rebus Bellicis* 21, ut confusas legum contrariasque sententias, improbitatis reiecto litigio, augustae dignationis illumines.

[7] *NTh.* 1.1 pr., quod ne a quoquam ulterius sedula ambiguitate tractetur si copia immensa librorum, si actionum diversitas difficultatesque causarum animis nostris occurrat, si denique moles constitutionum divalium principum, quae velut sub crassa demersae caligine obscuritatis valde sui notitiam humanis ingeniis interclusit.

[8] Id., ne iurisperitorum ulterius severitate mentita dissimulata inscientia velut ab ipsis adytis expectarentur formidanda responsa . . .

[9] *Const. Deo auctore* 1, repperimus autem omnem legum tramitem, qui ab urbe Roma condita et Romuleis descendit temporibus, ita esse confusum, ut in infinitum extendatur et nullius humanae naturae capacitate concludatur. See Note on abbreviations, p. 217.

[10] For imperial interest in maintaining confusion, see C. M. Kelly (1994).

based on an altruistic yearning for clarity or a reduction in the legal costs incurred by Roman citizens.[11]

What forms of law, then, combined to create this system? By the time of Justinian, what mattered, and what was therefore codified, was the *ius civile*, the citizen-law of the Romans. But, from early in the development of their law, Roman jurists were aware of the influence of external factors, and other, broader systems, with which the citizen-law would be required constantly to interact. As the small Republic gradually extended its dominance over its neighbours, it was forced to find ways of conducting legal dealings with people who were not Romans, but whose laws could have something in common with Roman law. The imperial jurists distinguished the *ius civile*, the law of the *civitas* from the *ius gentium*, law of peoples, and the *ius naturale*, the law of nature. The *ius gentium* did not refer to anything approximating to international law, but rather to the things that the Roman *ius civile* had in common with the usages of other peoples. Gaius, in the second century, assimilated the law of peoples to the law of nature, writing that the 'naturalis ratio' was observed equally among all peoples and was therefore called the law of peoples as all nations used it.[12] Ulpian, however, perhaps with Gaius' *Institutes* in mind, insisted that the law of nature was that which applied to creatures of the land and sea and to birds, as well as to man, citing procreation and the rearing of young as an example; the *ius gentium*, on the other hand, applied to men only, not to animals, and, as an illustration of this, slavery originated from the *ius gentium* and clearly could not be part of the *ius naturale*, under which all men were born free.[13] Although these contradictory statements, both later included in Justinian's *Digest*, indicate some uncertainty over the definitions, they had in common one important limitation: they were statements of fact, in juristic terms, not a moral prescription, that men ought to be equal, or on a level. The law of nature was, usually, the actual (and flawed) common practice of living creatures, not the divine law.[14] Not that there was agreement about this either. Some

[11] For Theodosius' political motives with regard to the West, see Matthews (1993) and below, pp. 37 and 64. For Justinian's justification for imposing his law (as the sovereign legislator) on ancient texts, see *Const. Deo auctore* 7.

[12] Gaius, *Inst.* 1. 1, quod vero naturalis ratio inter omnes honines constituit, id apud omnes populos peraeque custoditur, vocaturque ius gentium, quasi quo iure omnes gentes utuntur.

[13] *Dig.* 1.1.1. 4 (Ulpian), ius gentium est quo gentes humanae utuntur. Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit. Also id. 1.1.4, that slavery originates from the *ius gentium*, 'utpote cum iure naturali omnes liberi nascerentur'.

[14] Contrast Cicero, *De Officiis* 3.5.23, arguing, from Greek philosophy, that men would not cheat, or be acquisitive at another's expense, if they obeyed the law of nature: Atque hoc multo magis efficit ipsa naturae ratio, quae est lex divina et humana: cui parere qui velit – omnes autem parebunt, qui secundum naturam volunt vivere – numquam committet ut alienum appetat . . .