Chapter 1

Introduction

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The centre of gravity of legal development therefore from time immemorial has not lain in the activity of the state, but in society itself.

(Ehrlich 1962: 390)

In his 1995 book, The Spirit of Roman Law (Athens, GA 1995), Alan Watson included a chapter provocatively titled ‘Cicero the outsider’. By locating this chapter towards the end of the book, Watson hinted that any discussion of Cicero in the context of the spirit of Roman law (a difficult concept in itself) could only really form part of an appendix (in this case Appendix A) to a book of this kind. The gist of this chapter, following the then dominant Romanist view, is that ‘Cicero’s outlook [was] remarkably different from that of the Roman jurists’ (at 200).1 As this statement implies, for Watson, Cicero stood outside the traditional narrative of the Roman jurists.2

This view of Cicero as ‘an outsider’ is based on two assumptions. The first is that a fundamental distinction between the ‘jurist’ and the ‘advocate’ (orator) existed in Roman law – a distinction that, according to its supporters, seems to have originated already in the mid to late Republic. Jurists were engaged in an intellectual endeavour, removed from the cut and thrust of legal practice, while orators were very much at its centre and utilised the art of persuasion (rhetoric) in courts of law, often with limited attention to (or indeed need for) the intellectual intricacies of Roman law. Such a system was made workable by the formula procedure operating in the Roman courts where the praetor and the jurists dealt with matters of law, while the lay iudex merely decided on the application of the law to the facts of the matter. The origins of this view about the perceived divide between the jurist and the orator are complex and may be traced at least to nineteenth-century German conceptions of law as a Wissenschaft, in which the ‘scientific’ study of law and those who were engaged in it were foregrounded at the expense of

1 Cf. Dirksen 1858; Costa 1899; Greenidge 1901; Roby 1902a, 1902b; Costa 1927; Coşkun 2011 (reprint) as well as Thomas 11f. elsewhere in this volume.

2 This also explains the title of this book, a play on the famous statement in Top. 51: ‘Nihil hoc ad ius, ad Ciceronem.’
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legal practice.\(^3\) This view also finds support to some extent in Cicero’s own statements about the endeavours of jurists, of whom he seems at times quite critical (although these should be treated with circumspection as they were produced within a specific context).\(^4\)

The second assumption concerns the nature of Roman law in the late Republic itself. The narrative of the development of Roman law during this period (as found in many textbooks on Roman law) focuses on key figures (all great men belonging to the upper classes) such as Servius Sulpicius Rufus or the Scaevolae and their contribution to the creation of the ‘science’ of Roman law.\(^5\) Although information about these individuals and their contributions to the law are very limited, they have nonetheless been elevated in most of these works to the status of the vanguards, steeped in Greek philosophical learning, of the ‘classical period’ of Roman law in the following three centuries. They have also been used to justify various key features of the narrative about the shape and function of juristic interpretation in ‘classical’ Roman law (intellectual isolation and scientification).\(^6\) Owing to the belief that the ‘science’ of Roman law (whatever this means in the context of antiquity) was somewhat removed from the practice of law in the courts, the narrative concerning the development of Roman law in the late Republic has become largely insular (and rule-focused). Issues such as the impact of the political turmoil of the period (war, proscriptions, expropriation of land and the granting of greater rights to the Italian allies, and so on) on the development of Roman law and the operation of the courts are only occasionally investigated, and generally to a limited extent (for example largely with reference to criminal or public law).\(^7\)

Since then, this view of Cicero as ‘an outsider’ has undergone revision. Cicero has become part of a larger debate concerning the divide between the jurist and the orator in the last century of the Roman Republic and concerning the nature of Roman law itself.\(^8\) Not only has it been proposed that the dichotomy was not as watertight as previously assumed, but it has also been suggested that the legal world of the late Republic was far broader and more diverse than the picture presented by Cicero.\(^9\) In light of these new insights, Cicero and the state of the law of the late Republic need to be re-examined.

This book is designed to engage with this debate. If, as has been suggested

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\(^3\) See comprehensively Tellegen-Couperus and Tellegen in du Plessis 2013. See also the same authors elsewhere in this volume. An important work in this regard is that of Tuori 2007.

\(^4\) Cf. Gildenhard 2011. See the chapters by Benferhat 71f. and Hilder 166f. elsewhere in this volume.

\(^5\) Cf. Harries 2006. See also Harries 123f. elsewhere in this volume.

\(^6\) See, extensively, on law as a ‘science’ in antiquity, Giaro 2007.

\(^7\) Notable exceptions are Riggsby 1999 and Alexander 2002 for criminal law and the many publications of Lintott on public law.

\(^8\) Cf. Harries 2006; Saénz 2010.

\(^9\) Cf. Lehne-Gstreinthaler 88f. elsewhere in this volume.
by recent scholarship, Cicero should no longer be seen as ‘an outsider’ in the narrative of Roman law of the late Republic, the question must be asked whether and to what extent this narrative will change if Cicero is treated differently. At this point, a word of caution is required. For a project of this kind to deliver meaningful results, it is important to treat Cicero’s works with due sensitivity. Cicero always had his prospective audience firmly in mind, whether in private correspondence or in published speeches. Furthermore, as an orator, he was not averse to bending the facts to match his version of events (Lintott 2008: 33; Steel 2004: 233–52). As Lintott (2008) has therefore rightly pointed out, Cicero’s works can never be used as a factual account of historical events (at 3). Certain filters have to be applied in order to arrive at a more balanced picture. Nonetheless, if Cicero’s own comments are approached with caution (using the tools of our sister disciplines such as philology, literary criticism and more specifically narratology) and interpreted in light of the existing narrative about Roman law in the late Republic, a more balanced picture can be achieved. This is one of the aims of this volume.

In this book, Cicero’s contribution to modern understanding of the state of Roman law in the late Republic is treated under three headings: ‘the nature of law’, ‘the nature of the legal profession’ and ‘the impact of legal practice’. These three subheadings have been specifically chosen to provide a broad-spectrum view of the ‘legal world’ to use Fantham’s (2004) term, in which Cicero operated. This ‘legal world’ not only comprised legal theory as traditionally investigated by scholars of Roman law. It clearly also encompassed the practice of law in the courts. By sketching a panoramic view using these three broad headings, this volume aims to broaden the contemporary vision of the nature of late Republican Roman law by placing it in context (du Plessis 2013).

Already in his 1985 book on the rise of the Roman jurists, Frier argued that while the jurists played an important role during the late Republic, Roman law during this period was also influenced by larger societal factors. Since ‘society’ is also the natural province of culture, it seems logical also to investigate the idea of Roman ‘culture’ in this context, especially in light of an emergent strand of scholarship based on Lawrence Friedman’s concept of ‘legal culture’. First coined in the early to mid-1970s, the term has been

10 Lintott 2008.
12 Friedman 1969, 1969–70: 29–44. See also Smith and Reynolds 2014. Although contemporary socio-legal theory has moved beyond the idea of ‘legal culture’, it is my contention that ‘legal culture’ as a socio-legal concept remains particularly useful when dealing with the legal world of the late Republic, for two reasons. First, it draws many of its basic ideas from the first generation of socio-legal scholars such as Eugen Ehrlich (1862–1922) whose work grew directly out of their knowledge of Roman law. In second place, the concept of legal culture is particularly useful when analysing a period in Roman society when law and culture were
used with great effect in contemporary socio-legal scholarship. Though useful as a concept, it is not without its critics, who have focused their criticisms primarily on two points, namely the inherent vagueness of the term and a general inability by its supporters to explain whether legal culture is the cause or the effect when it comes to legal change.

In light of these criticisms, it seems important to explain how the concept of legal culture will present itself in this work. While there is something to be said for maintaining an air of vagueness when using this term, ‘legal culture’ in this context will be used to denote a subset of Roman culture more generally. Thus ‘Roman legal culture’ will be used to describe all those phenomena (including the economic) that can be related, whether directly or indirectly, to the workings of the law in the late Republic. This casts the net rather wide, and deliberately so. It is important to state at this juncture, though, that Roman legal culture is not a static concept. It changes with time and all that can really be attempted here is a ‘still picture’, to use the phrase of Crook, that captures the events of the late Republic. It is also important to remember that Roman legal culture is not modern legal culture and that conclusions about the behaviour of the legal profession in the modern period cannot necessarily be applied to the Roman situation. Thus, for example, Friedman, in his earlier works, distinguished between ‘internal legal culture’ (the culture of the legal profession) and ‘external legal culture’ (more general societal factors affecting the law). While useful to describe certain aspects of modern law in the USA, this distinction should be approached with great care in relation to the late Republic. In fact, I would go as far as to suggest that it should be abandoned altogether when investigating the legal world of the late Republic. The reasons for this are, as more recent research by Tellegen-Couperus and Tellegen have shown, that the legal ‘profession’ of Republican Rome was more porous than first imagined. Thus, Roman legal culture appears to have been far more embedded in Roman culture and society more generally.

One of the main criticisms of Friedman’s concept of legal culture is that closely linked, such as the late Republic. For a survey of the work of Eugen Ehrlich and a modern reassessment, see Hertogh and Oñati International Institute for the Sociology of Law 2009.

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13 See, for example, the criticisms of Cotterrell and Von Benda-Beckmann and Von Benda-Beckmann in their chapters in Nelken 2012.

14 See the chapter by Friedman in Nelken 1997.

15 Nelken 1994: 1–26. See Nelken for a survey of the range of meanings of the term. I have chosen the term ‘relate to’ rather than ‘impact on’ deliberately to enable the authors also to capture subtle influences.

16 Crook 1967.

17 Friedman and Schreiber 1996. The distinction between ‘external legal culture’ and ‘culture’ more generally has been one of the major sources of criticism of Friedman’s theory.

18 Compare the chapter by Tellegen-Couperus and Tellegen in du Plessis 2013. I use the term ‘profession’ here with some reservation as no ‘legal profession’ in the modern sense existed in the late Republic.
it fails to explain whether legal culture is the cause or the effect. It is not my intention to stake my claim regarding this matter here, since in my view much more work is required before an assessment can be made about the role of legal culture in the formation and change of law in Roman society.\footnote{There is something to be said for reflecting back upon Ehrlich 1962 and his use of the term ‘custom’ as the source of all law. ‘As late as the end of the Republic, the Romans considered their national customary law, the \textit{ius civile}, at least as valuable as a source of law as the \textit{leges}’ (at 18).}

It is perhaps best to state at this point both that culture can give rise to law, and that law can also change culture. Countless examples from history can attest to this. It is therefore perhaps wise not to draw the net too restrictively in this regard.

Having laid down these parameters, the astute observer may ask whether a focus on legal culture will add anything novel to the mix. Permit me to explain. Law is not insulated from society. It exists within and is surrounded by society. Law also responds to society in various ways. If this premise is used as a starting point, then the idea of legal culture becomes an important tool. The late Republic is a well-documented period in the history of Rome.\footnote{Treble and King 1930. See also the comprehensive recent works by May 2002 and Steel 2013 and the chapters collected therein. On Roman social history generally, see Alföldy 1975.}

Not only was it a period of great socio-political change, accompanied by violence and instability, but there is also clear evidence of a legal system in turmoil – the suspension of the courts, accusations of corruption in the courts and in the administration of justice, and widespread political meddling.\footnote{It is noteworthy that many of the ‘saviours’ of the Roman Republic served a term as praetor.}

Coupled with these are the profound changes to the legal system introduced under Sulla and a general sense, expressed by a number of influential figures during this period, that Roman law had become somewhat unmanageable and that it had to be written down. Among all of this, we find Cicero, legal practitioner and keen observer of the human condition. And it is in this respect that Cicero becomes indispensable. As someone who not only lived the period, but was also actively involved in legal practice, Cicero’s ‘legal consciousness’ (that is, how he responded to the law and turned to the law when it was required) provides a fascinating insight into the period.

Meta-level studies such as those by Frier 1985 and Harries 2006, coupled with the comprehensive investigations by Watson into various branches of private law of the late Republic, as well as the insightful 2004 collection by Powell and Paterson on Cicero’s practice as an advocate, provide a uniquely rich picture of Roman legal culture of the last century of the Republic. In addition, recent works on the Roman jurists and their dialogue with Cicero have done much to uncover the relationships between juristic pursuits and legal practice in this period.\footnote{For example, Fantham 2004.} The aim of this work is to call for a greater
synthesis between all of these different strands of scholarship, using Cicero and the concept of legal culture as its central focus. While a history of Roman law in the late Republic is yet to be written, this book is an initial attempt to start the conversation.

BIBLIOGRAPHY

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