The jurists

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1 Introduction

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

In the surviving writings of the Roman jurists there is no extended discussion of the nature of political society, the legitimacy of its rulers, or the laws which govern or ought to govern it. Nor is there any such discussion about justice, the sources of law, or the conflict between positive and natural law. The writings which survive indicate that, although such questions were not entirely neglected, little attention was lavished on them. Insufficient material survives in this area for any satisfactory evolution of juristic thought to be traced. It is clear that in roughly the last century of the Republic the jurists were particularly receptive to Greek influence, philosophical and rhetorical.

1 Cicero's 'agere cavere respondere' (de Orat. 1.212) as a description of the jurist's role is true only of the earliest period; later on respondere came to the fore.
also mediation of Greek thought through the philosophical and rhetorical works of Cicero. Characteristic of this influence was a new (if short-lived) concern for system: Cicero is known to have contemplated writing (or written) a work reducing the civil law to an art (de iure civili in artem redigendo);4 while the influence of dialectic is evident in the work of some late Republican jurists, notably Q. Mucius Scaevola and Cicero’s friend, Ser. Sulpicius Rufus.5 Many ideas found in the jurists which might loosely be described as ‘political thought’ can be traced back to Greek influence. This is the more striking since, from the beginning of the Principate, Greek discussions of legal or political institutions which were founded on the premise of a non-autocratic society were increasingly irrelevant; decidedly so by the second and third centuries AD, from which most of our sources come. These political realities matter in the case of the jurists, for they do not purport to write philosophy, and rarely allow themselves the luxury of reflection on purely abstract questions. Nonetheless, pragmatic considerations do not appear to have inspired much adjustment of received doctrine.

The juristic sources are transmitted almost entirely in Justinian’s Digest (AD 533), a fifty-book compilation of excerpts from the works of jurists of the ‘classical’ period.6 The excerpts are compiled into chapters or ‘titles’ with various themes; most of the material of interest for present purposes appears in the titles of the first book. Because the excerpts are filtered through the medium of this compilation, their original context is often uncertain; and what now seem sweeping statements of broad constitutional significance may have started from more humble origins and had more modest intentions.7 A clear example is Ulpian’s famous pronouncement that ‘the emperor is not bound by statutes’ (‘princeps Iegibus solutus est’, D. 1.3.31); it originally concerned only his exemption from the terms of the lex Iulia et Papia, a pair of statutes dealing with the rights of unmarried and childless people to inherit property. It is important therefore not to take the jurists’ remarks at face value for their own age; by transposition to a new context they may have taken on new meanings.

Section 2 of this chapter discusses the jurists’ views on the various types of law (ius), natural and positive, on justice, statutes, and the powers of the

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4 Gellius 1.22.7; cf. Quint. Inst. xii.3.10.
5 Schulz 1946: 62–9, Stein 1966, 1978; Cic. Brut. 152, D. 1.2.2.41; xii.2.3.23; Gaius Inst. 1.88; iii.183.
7 See Johnston 1989.
emperor; section 3 deals with public and private law, the powers of magistrates, and corporations. The sources dictate that the chapter focuses mainly on the second and third centuries AD. It does the jurists no injustice to say that their original contribution to the topics dealt with in section 2 was slight; and that the real significance of their thought lay in the adumbration of the concept of the constitutional office exercisable only within legally defined limits; and of the notion of the corporation as an entity capable of enjoying and exercising legal rights. While questions such as these are quite suitable for abstract reflection, the concerns of the jurists tend towards the practical. The focus of this chapter is therefore necessarily different from that of other more purely philosophical chapters.

2 General theory of law

In the writings of the Roman jurists there are few traces of any general theory about justice, or about law and its place within the state. Such statements as there are survive mainly in two introductory titles to the Digest, ‘On justice and law’ and ‘On statutes, decrees of the Senate and long-established custom’; excised from their original contexts, these statements are not easy to interpret.

2.1 Ius

The jurists expended little time on abstract questions such as the relations between positive and natural law. The little they said owed much to the influence of one philosophical school or another. During the Republic there is no doubt that some jurists were acquainted with philosophical doctrines about law and the state, and some with leading philosophers in person. Equally, the administration of provinces provided a motive for reflection about a law not purely for the citizens (cives) of Rome, and about a legal order going beyond that designed purely for those citizens (ius civile). Yet there is little sign that such considerations impinged much on the jurists’ practice of law: such theorizing as we do find appears only from the second century AD, and is typically to be found in textbooks rather than practical works. It is by being placed by Justinian’s compilers in the introductory title to the Digest, de iustitia et iure, that some state-

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8 Schulz 1946: 135-7; on Gaius, see Wagner 1978.
9 D. 1.1 de iustitia et iure; D. 1.3. de legibus senatusque consultis et longa consuetudine.
10 Tubero and Q. Mucius Scaevola augur were acquainted with Panaetius; Rutilius Rufus and Q. Mucius Scaevola pontifex with Posidonius: see Wieacker 1988: 641–3.
ments made by the jurists have acquired great prominence. Pre-eminent among these are the opening passage of Gaius' *Institutiones*, and the passage with which the *Digest* begins, which comes from Book 1 of Ulpian's *Institutiones*. First, Gaius.

Every people which is governed by statutes and customs uses partly its own law and partly the common law of mankind. The law which each people has established for itself is peculiar to it and is called civil law (*ius civile*) as the law peculiar to that state (*civitas*). But the law which natural reason has established among all mankind is observed by all peoples and is called the law of nations (*ius gentium*), as the law all nations use. The Roman people therefore uses partly its own peculiar law and partly the common law of mankind. (Gaius, *Inst.* 1.3)  

Gaius, who wrote in the mid-second century AD, is concerned to explain to his students that Roman law consists not merely of the positive law of Rome but also of a law which applies beyond the borders of the Roman empire. This is not a philosophical statement but one about the laws which the Romans and other peoples observe. It recognizes the reality that some rules of Roman law were open only to citizens of Rome, while others, owing for example to commercial pressures, were open to non-citizens too. That is the practical purport of the dichotomy between *ius civile* and *ius gentium*. To judge from Gaius' account, any given rule of law can be said to be part of *ius civile* or of *ius gentium* but not both; these are two types of law, each for different people; and they do not overlap. This is what distinguishes Gaius' taxonomy from one – superficially similar – set out by Cicero: the same dichotomy appears, and *ius gentium*, the law for all peoples, is said to be founded on nature; but for Cicero *ius gentium* is a higher law which binds citizens, just as does their own *ius civile*. The same people are therefore bound by two different types of law, while for Gaius the two notions are mutually exclusive. The conception which underlies these two accounts of *ius gentium* is therefore entirely different. It is not unreasonable to suppose that here – as often – the jurist's philosophy is tempered by pragmatic considerations. So long as jurisdiction was exercised over both Roman citizens and non-citizens, there was some practical purpose in distinguishing between two categories of law, one applicable and available only to citizens, and the other not restricted in that way.

Nothing is said in this passage of natural law, but Gaius hints at an
issue going beyond the purely pragmatic: the law which all peoples use (ius gentium) is said to be the product of natural reason. The train of thought appears to be that because a rule of law is universally observed, it is natural; and because it is natural, it is valid. Lurking behind Gaius’ matter-of-fact categorization of ‘positive’ law is the notion that ius gentium is motivated by, and legitimated by, its consonance with natural reason.16

In the passage with which the Digest begins, Gaius’ dichotomy is no longer to be found.

Private law is made up of three parts, for it is composed of principles of nature, nations and the state. Natural law (ius naturale) is what nature has taught all animals: for this law is not peculiar to mankind but common to all animals of earth, sea and air. From it comes the union of male and female which we call marriage, and the procreation and rearing of children. We see that other animals, including wild beasts, are familiar with this law. The law of nations (ius gentium) is what all human nations use. It is easy to appreciate that it is different from natural law, since that is common to all animals, while this is common only to men . . . Civil law (ius civile) neither departs from the law of nature or nations entirely nor follows them in every respect: when therefore we add something to, or subtract something from, common law we create a law peculiar to ourselves (ius proprium), that is, civil law. (D. 1.1.1.3–4 and 1.1.6. pr.)

Here dichotomy has given way to trichotomy.17 The principal distinction between ius naturale and ius gentium is said to be that the former is common (commune) to all animals, whereas the latter is common only to men. In turn, ius civile is defined essentially by its difference from the other types of ius: elements are added to or subtracted from the ius commune, making a particular law or ius proprium.18 The text is attributed to Ulpian (d. AD 223). Its authenticity has been questioned;19 and, since a somewhat different version appears in Justinian’s Institutes, its faithfulness to Ulpian is far from assured.20 Yet there is nothing in its content which could not have been said in Ulpian’s day: notions of ius naturale similar to this can be found among the philosophers. The real basis of the doubts about authenticity seems to be that this trichotomy has no evident practical value. In an

16 Cf. also Gaius Inst.i.1 and 89. Gaius does not observe the dichotomy throughout his work: references to ius naturale creep in in Inst. 1.156 and 158; 11.65 and 73; D. 11.14.7 pr.; see Schmidlin 1970: 178, Jolowicz and Nicholas 1972: 104–6, Wieacker 1988: 444.
17 Justinian’s Institutes employs parts both of this text and the text of Gaius in 1.1.4, 1.2.pr., 1 and 11, so arriving at a confusion between dichotomy and trichotomy.
18 D. 1.1.6; cf. Isid. Etym. v.2 ‘Divine laws are founded in nature, human laws in custom. The reason they differ is that different nations approve different laws.’
elementary work such as this, however, Ulpian may have been trying to do little more than introduce some basic concepts of ius. The practical value of the dichotomy between ius civile and ius gentium must have been much diminished by the extension of citizenship to all inhabitants of the Roman empire by the constitutio Antoniniana of AD 212. This may have freed the jurist to indulge in more purely philosophical remarks about the various types of law.

The source of these accounts of ius naturale and ius gentium has been disputed. It is generally accepted that the definition of ius gentium, with its reference to what men have in common, is of Stoic origin. Yet the drawing of a distinction between ius gentium and ius naturale is fundamentally un-Stoic, and so too is a definition of ius naturale as governing all living things, since for the Stoics ius is confined to rational beings. The source of this part of the passage may be Peripatetic or Neoplatonic. It seems necessary therefore to convict Ulpian of eclecticism. Yet in the works of the Roman jurists nothing could be less surprising. The legal enterprise, and legal argument, demand no rigid adherence to a particular philosophical position, but rather the adoption of the most convincing argument, regardless of origin. The once-popular notion that some jurists could be firmly assigned to one philosophical persuasion and others to another has now been generally abandoned.

The question what weight the jurists placed on considerations of natural law deserves brief mention, since terms such as ius naturale and naturalis ratio appear not infrequently in their writings. They rarely seem to be essential to the argument: where ius naturale conflicts with positive law, it does not prevail: most obviously so in the case of slaves since, under natural law, all men are equal but, under Roman ius civile, slaves are not persons. 'The Roman jurists to whom theory meant little and practical results meant everything cannot have looked upon natural law as an order of higher or even equal status. They did not deny its existence and credited it with the absence of slavery in prehistoric times. But within the framework of their actual system they must have thought of natural law as inferior rather than superior to the law in force.' It is here that later thought took a fundamentally different line: about AD 1140 Gratian, while adopting a definition of natural law not unlike the Roman, asserted that 'prevails in antiquity and dignity over all laws', and that 'whatever has

\[\text{\textsuperscript{21}}\text{ Winkel 1988, 1993a.}\]
\[\text{\textsuperscript{23}}\text{ Wieacker 1988:640-2, with lit.}\]
\[\text{\textsuperscript{24}}\text{ Vocabularium IV 22 s.h.v.; for post-classical developments, see Waldstein 1994.}\]
\[\text{\textsuperscript{25}}\text{ D. I.17.132.}\]
\[\text{\textsuperscript{26}}\text{ Levy 1949 (1963): 15.}\]
been recognized by custom or set down in writing must be held null and void if it conflicts with natural law. The matter-of-fact approach of the Roman jurists to natural law attracted few followers.

The very notion of *ius gentium* (as opposed to *ius civile*) reveals a consciousness of the idea of the state itself; and of the notion of a state as an entity governed by a *ius proprium* to itself. But neither this nor occasional references to natural law and reason seem to have led the jurists to engage in any profound reflection on the nature of law and the basis of its validity in time or space. If one asks in what the distinctive approach of the Roman jurists to thinking about *ius* consists, the answer can only be that they (especially Gaius) shaped the philosophers' conceptions into a form more fruitful for the practical demands of law. And there they let it rest.

### 2.2 Justice

The most celebrated definition of justice (*iustitia*) to be found in juristic writings is this: 'Justice is a constant and enduring will to attribute to everyone his own right. The precepts of law are these: to live honourably, not to harm another, to attribute to each his own' (*D. 1.1.10 pr.-i*).

This passage, accorded prominence by its appearance early in the *Digest*, as well as in the very first paragraph of Justinian's *Institutes* (1.1.1 pr. and 1.1.3) is attributed to Ulpian. Its authenticity is seriously doubtful. The content, however, is quite unexceptionable, since most of it can be traced back to Cicero or beyond. None of the propositions put forward as principles of law (*iuris praecepta*) shows much sign of originality. In Book 1 of his *de Officiis*, Cicero gives an account of the Stoic conception of justice: it is one source of what is honourable; it consists among other things in attributing to each his own; and its primary *officium* is not to harm others. The *Digest* passage is therefore a basic statement of the Stoic conception of justice.

But it cannot be said that these were guiding principles which shaped the making of Roman law. Indeed, had they operated as general tests of the validity of legal rules or institutions, Roman law would have had a rather different appearance. As it is, it is all too easy to find contrary assertions elsewhere in the *Digest*: 'nobody who exercises his own right is regarded as acting fraudulently'; 'not everything which is permitted is honourable' (*honestum*).

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27 *Decretum D. 5.1; 8.2.*
29 *Cic. Off. 1.15, 20; cf. also Leg. 1.18-19; Fin. 11.34, 111.29, 70; Inv. 11.160.
30 *D. 1.17.55 and 144 pr.; Levy 1949 (1963): 17.*
plane of abstraction quite separate from the considerations which they
marshall in determining questions about law. They necessarily do distin-
guish between legal and moral rectitude; and flourishes in the direction of
moral philosophy are simply that: flourishes.

2.3 Statute

'A statute is a common precept, a resolution of wise men, a restraint of
wrongs committed voluntarily or in ignorance, a common covenant of the
state' (D. 1.3.1). This paratactic definition of statute (lex) opens the Digest
title on statutes and other sources of law.\footnote{31} It comes from the first book of
Definitiones of the leading Severan jurist Papinian (d. AD 212). It empha-
sizes the role of statute in restraining the commission of wrongs, which is
certainly true of some statutes; and it stresses the involvement of the com-
munity, the making of a common covenant. But the definition does not
reflect the reality of Papinian’s day: by then the popular assemblies had
long since given up passing leges, and such legislation as there was was the
work neither of assembly nor of ‘wise men’ but of the princeps and his
advisers alone. This is a definition of lex of a distinctly Republican, and
therefore anachronistic, flavour.\footnote{32}

The last clause of the definition with its common sponsio (promise) of
the res publica has attracted attention. Promises in Roman private law
depended on question and answer; their correspondence generated
promissory obligation. Without too much procrustean effort, a lex can be
regarded as the answer of the people to a question (rogatio) from the mag-
istrate. Even so, it is not possible to treat this definition as Roman in
inspiration or origin: Papinian’s words pick up a definition which is in
origin Greek. It can be found in a speech attributed to Demosthenes, the
relevant passage of which is reproduced in Greek in the very next text in
the Digest, from the Institutiones of Marcian (early third century AD):

Law is what all men ought to obey for many reasons, and chiefly because
all law is a discovery and gift of god, and at the same time a resolution of
wise men, a correction of misdeeds both voluntary and involuntary, and
the common agreement of the polis according to whose terms all who
live in the polis ought to live. (D. 1.3.2)\footnote{33}

\footnote{31} It is important to distinguish between ius (law in the general sense) and lex (law in the sense of a
measure passed by one of the Roman voting assemblies). The term lex is here translated
throughout as ‘statute’. For general discussion see Stein 1966: 9–25.
\footnote{32} Mommsen 1887–8: iii, 301–2.
Some have seen in this a reference to the Epicurean notion of a social contract. However that may be, Marcian’s text continues immediately with a Stoic reference, in the shape of a quotation from Chrysippus’ *On law*: here we have another instance of the jurists’ eclecticism in matters philosophical.

Less decorative and more typical definitions of *lex* were given by other jurists: Gaius states that ‘a statute is what the people orders and decides’ (Gaius Inst. 1.3); the earlier jurist C. Ateius Capito (d. AD 22) had stated: ‘statute is a general order of the people or plebs on a proposal from a magistrate’ (Gellius x.20.2); while the later jurist Modestinus said in the early third century AD that ‘the effect of a statute is to order, to prohibit, to permit, to punish’ (D. 1.3.7). The question what makes a statute valid appears to be raised only by Julian (consul AD 148). In a discussion of the role of custom as a source of law, he observes that ‘statutes themselves bind us for no other reason than that they have been accepted by the judgment of the people’ and that the concept of a statute is that ‘by voting the people declares its will’. This again is a Republican notion about the legitimacy of statute, and hardly one which can have had any relevance in Julian’s day. Indeed, with the exception of Modestinus’ abstract definition of *lex*, in all these remarks about statute the Republican theme is to the fore. Here we have not coherent thinking about the binding force of statute under the principate, but merely the vestiges of a Republican myth of popular sovereignty. The lacuna is the more regrettable since newer ways of making law – by imperial *constitutio* or decree of the Senate – are said to have the force of *lex*; but the underlying basis of that force is never satisfactorily explored.

2.4 The powers of the emperor

An imperial constitution is what the emperor ordains by decree or edict or letter. It has never been doubted that this has the force of statute, since the emperor himself receives his power (*imperium*) by statute. (Gaius Inst. 1.5)

What the princeps decides has the force of statute: as the people, by the royal statute (*lex regia*) which was passed regarding his power, confers on him all his own power and authority. (D. 1.4.1 pr.)

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34 Gaudemet 1967: 383 n. 3. Triantaphyllopoulos 1985: 9–10 discusses the various possible influences (Platonic, sophistic, Peripatetic) on this definition; and at 83 n. 63 the authenticity of the speech to which it is attributed. 35 D. 1.3.32.1.
36 Gaius Inst. 1.4, 5 and 7; D. 1.2.2.12; D. 1.3.32.1.
These statements appear in the works of Gaius and Ulpian respectively. They come as close as the jurists ever do to explaining the sovereignty and legitimacy of the emperor (princeps). They may perhaps be taken to build on Cicero's proposition that 'all powers, authorities and offices derive from the Roman people as a whole' (Agr. 11.17). What lies behind the jurists' words is a democratic legitimation of the emperor by the people: the people conferred on him, by lex, its own power and authority (imperium and potestas). In the narrow sense in which the word is commonly used by the jurists, however, the people did not have imperium: that is the term for the power invested in the higher Roman magistrates. Here Ulpian is using imperium loosely; the people's transfer of all imperium and potestas can reasonably be interpreted as a transfer of their sovereignty. This may be no more than ex post facto rationalization of the emperor's powers, undoubted in the jurists' day. But a strong case has been made that their remarks are precise and refer to an actual lex de imperio passed at his accession. As we have seen, while the jurists are not above flourishes of legal theory, much more characteristic of them is argument precisely founded on rules of positive law.

3 Public law and private law

3.1 Public law

Cicero, in discussing what knowledge an orator must have, places particularly heavy demands on the public-law orator, whose knowledge must encompass the experience of the past, the authority of public law, and the method and science of governing the state. The jurists might have been expected to take the opportunity to supply this demand and, in studies on ius publicum, to consider questions such as the proper governance of the state. But there is little sign that they did.

The distinction between public and private law is brought to prominence by featuring in the very first text in the Digest: There are two branches of the study of law, public and private. Public law is concerned with the Roman state (status rei Romanae), while private law is concerned with the interests of individuals, for some matters are of public and others of private interest. Public law comprises religion, priesthoods, and magistracies. (D. 1.1.1.2)

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37 Brunt 1977b: 110-13. Reference to a lex imperii is also made in C. vi.23.3 (AD 232): it is said to have dispensed the emperor from the 'solemnities of law' (solemnia iuris); cf. dispensation from statute in D. 1.3.32. 38 Cic. de Orat. 1.201. 39 Repeated in Just. Inst. 1.1.4 as far as 'individuals'.
Ulpian's text was to have great influence: it was taken over by Isidore and from there it arrived in Gratian's *Decretum*. But the text does not reflect the real concerns of the Roman jurists. They rarely use the expression *ius publicum* and betray little interest in public law. These points must be considered in turn. First, the term *ius publicum*. It is striking that *ius privatum* and *ius publicum* are mentioned together in just one other text, and that is simply to the effect that the jurist Tubero was a great expert in both. Only five other texts in the *Digest* mention *ius privatum* at all. More use the expression *ius publicum*, but they do so in varying senses: sometimes as a term for the whole legal order of Rome, sometimes to refer to mandatory rules of law. Rarely do they suggest that *ius publicum* is conceived as a separate branch of the law of the state or constitution. From the reign of Hadrian there does emerge a connection between *ius publicum* and the common good or public interest, *utilitas publica*; that is cited as the motive for adopting a particular institution or rule, the institution or rule itself sometimes being described as *ius publicum*; it is in this sense that institutions such as marriage can be described as public law. For the jurists, therefore, *ius publicum* sometimes means the law of Rome as a whole, and sometimes institutions of private law which serve a particularly important purpose in the maintenance of civil society.

Second, the jurists show little interest in public law in the sense of the law of the state or constitution; in Cicero's day they made a point of disregarding it in favour of private law. In summarizing the period from the end of the second Punic war to the accession of Augustus, Schulz can write: 'Of the science of *ius publicum* there is little to be said.' Nonetheless, a few jurists are reported to have taken an interest in public law, notably Tubero (retired 46 BC); Ateius Capito (d. AD 22); and Aristo (late first to early second century AD). According to Aulus Gellius, Varro also wrote a book on constitutional questions, especially the Senate. This was done at the request of Pompey, when embarking on his first consulship: having experience of war but little of peace, he had little idea what to do in the Senate. The book was lost.

The tradition of neglect did not last, and under the principate 'the stir-

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42 D. 1.2.2.46.
43 The general statement attributed to Julian is well known among lawyers: *D. ix.2.51.2*: 'it can be shown by innumerable examples that many things have been accepted in private law contrary to logic, on account of the common good'.
44 Kaser 1986: 33-48; on the few 'public law' cases 53-4. 45 *Cic. Balb. 45; Leg. 1.14.*
48 Gel. x.20.2; xiv.7.12-13. 49 *Plin. Ep. 1.22.2; viii.14.1.* 50 Gel. xiv.7.
rings of a new life are discernible.\textsuperscript{51} Most notable among these is the emergence during the Antonine period of a new genre of juristic works dealing with the duties (\textit{officia}) of various magistrates. Many survive only in the most fragmentary form,\textsuperscript{52} and the only one extant to any appreciable extent is Ulpian’s ten books \textit{de Officio Proconsulis}. By the end of the Classical period there was a substantial literature \textit{de officio} of one magistrate or another. In the past it was generally assumed, with little justification other than the words \textit{de officio} in the title of these works, that they were treatises of constitutional and administrative law; that they set out the powers and duties of magistrates and the limits on the exercise of their \textit{imperium}; and that their intended readership was the magistrates themselves. But a study of the surviving material has clearly demonstrated that such questions of high constitutional law were not their concern.\textsuperscript{53} Instead they appear to be miscellanies devoted to jurisdiction and administration which have in common only the fact that they do not fit within the more traditional genres of Roman legal literature. While this means that the most obvious quarry for the extraction of Roman constitutional theory is largely barren, vestiges of constitutional theory may still be found.

\subsection*{3.2 Constitution and powers}

Although no systematic juristic account of magisterial power (\textit{imperium}) or jurisdiction (\textit{iurisdictio}) survives, it is possible from disjointed fragments to build up a picture of their legal regime. The fragments come overwhelmingly from the works of the jurists Papinian, Paul and Ulpian. What follows is therefore a sketch of early third century practice; sporadic earlier evidence suggests that the position in the early principate would have been similar.\textsuperscript{54} \textit{Imperium} and \textit{iurisdictio}, the terms for the powers of magistrates, did not cease to matter when principate replaced Republic.\textsuperscript{55} Although the jurists do not discuss any limits on the exercise of these powers by the emperor, they do elaborate such rules in connection with ordinary magistrates.

The main points made in our sources are these. \textit{Imperium} was a power held only by the higher magistrates and pro-magistrates.\textsuperscript{56} Pro-magistrates could exercise this power only within the bounds of the province assigned to them, and for the period for which it was assigned to them.

\textsuperscript{51} Schulz 1946: 138. \textsuperscript{52} Schulz 1946: 242. \textsuperscript{53} Dell’Oro 1960: esp. 275 ff. \textsuperscript{54} E.g. Labeo – Paul \textit{D. ii.1.6}, Jul. \textit{D. ii.1.5}, Cels. \textit{D. i.18.17}, Pomp. \textit{D. l.16.239.8}. \textsuperscript{55} The relations between them are, however, somewhat problematic: see Jolowicz and Nicholas 1972: 47. \textsuperscript{56} In general see Mommsen 1887–8: vol. 1.
There were degrees of *imperium* in two senses. First, one magistrate might have *imperium* greater than another: a consul had *imperium* greater than a praetor, and within his province a proconsul or governor had the next greatest *imperium* after the emperor. Second, *imperium* could be 'undi-luted' (*merum*): that included *jurisdiction* and also capital jurisdiction in criminal matters (*ius gladii* or *potestas*); or it could be 'mixed' (*mixtum*) and include *jurisdiction* only.\(^{57}\)

*Jurisdiction* was fundamentally different, although magistrates with *imperium* enjoyed this power too. Since certain powers fell within the sphere of *imperium* rather than *jurisdiction*, they could not be exercised by lower magistrates.\(^{58}\) Initially 'jurisdiction' meant only the magistrate's power to grant a civil-law remedy, but it came also to be applied to the magistrate's role in the new system of civil procedure which evolved during the principate; and, owing to the resemblance between the magistrate's acts in that system and his other official or administrative acts, the term came to be used more widely: \(^{59}\) in short, as a term denoting not merely certain civil-law functions but the legal authority of a magistrate tout court. A magistrate had *jurisdiction* only over those domiciled within his province, and the jurisdiction of municipal magistrates was subject not only to territorial but also to financial limits.\(^{60}\) A magistrate did not have jurisdiction over a magistrate having greater *imperium*.\(^{61}\) An order pronounced by a magistrate who lacked jurisdiction was null; so too perhaps if the magistrate was invalidly appointed.\(^{62}\) Jurisdiction could be exercised by the magistrate only in person, unless it was allowed by statute or convention to be delegated.\(^{63}\)

The question of delegation of powers is worth closer attention. It is developed in some detail by the jurists and was to be a fertile source for mediaeval jurists. Papinian discusses what powers a magistrate is able to delegate to others. A basic distinction is drawn between powers which are attributed to him by statute, resolution of the Senate or by the emperor, and those which arise by right of office (*iure magistratus*). The former cannot be delegated, while the latter can.\(^{64}\) The jurist Julian also speaks of a customary rule that only a magistrate who has jurisdiction in his own right, rather than by grant of another (*alieno beneficio*), can mandate it.\(^ {65}\)

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\(^{58}\) Ulp. D. 1.1.4 and Paul D. 1.1.26; the distinction mattered for the lower magistrates, who had no *imperium*.

\(^{59}\) See Lauria 1930.

\(^{60}\) C. VIII. 1.2 (260); Ulp. D. v.1.2.6 and 5, Paul D. II.5.2 pr., Paul D. II.1.20, Pomp. D. II.16.2.39.8.

\(^{61}\) Paul D. v.1.58; Ulp. D. xxxvi.1.13.4.


\(^{63}\) Pap. D. 1.21.1. \(^{64}\) D. 1.21.1. \(^{65}\) D. II.1.5.
From this several points follow. First, the distinction founded on the source of the powers indicates that there was an established concept of an office and the normal powers inherent in it. Plainly that is a prerequisite for any attempt to deal with the question whether or not a magistrate has exceeded his powers. Second, where delegation of powers is concerned, there are two restrictions: powers specially conferred, rather than inherent in an office, cannot be delegated; neither can powers which have themselves been delegated. Third, it is notable that the delegation or mandating of powers was treated much in line with the private-law rules of mandate: Labeo (d. c. AD 10–22) suggests that the death of a magistrate before his delegate has begun to exercise delegated powers terminates the authority to act, just as it does in cases of mandate in private law. Fourth, while the sources are not extensive, it is at least arguable that the analogy of the private-law mandate, in which one person is authorized to perform a task for another, was present to the jurists more generally in considering magistrates and their powers. In any event, there is a similarity between the two so far as excess and revocation of powers are concerned.

Some general conclusions can now be drawn. The most important point is that in these passages we find the jurists adumbrating the concept of an office which must be exercised according to law, and which confers on its holder powers which are defined and delimited by law. Some of those powers are taken to be inherent in the nature of the office; others are conferred expressly by legislation of one sort or another. But the magistrate must act within his powers, and acts which exceed them are void: for example, a magistrate who purports to act officially outside his province acts to no effect: as Paul notes, he is treated as a private individual. It is important too to note that there is a hierarchy of imperium: the acts of those lower in the pyramid can be controlled by those above. As Ulpian says, ‘a praetor has no imperium over a praetor nor has a consul over a consul’ (D. xxxvi.1.13.4), and the solution where there is an impasse, owing to equality of powers, is to seek assistance from the emperor. These ideas about the validity of the magistrate’s acts are developed particularly in connection with iurisdictio. This is no more than we might expect: that concept provided the very foundation of private-law (and other) procedure in the courts and therefore fell within the sphere the jurists regarded as their own.

66 D. ii.1.6; cf. D. i.16.6.1, Winkel 1993b: 60.
67 Paul D. xvii.1.3.2 and 5.1–4; Gaius D. xvii.1.4 and Inst. iii.159–60. 68 Paul D. i.18.3.
69 Later on similar points are made about judges in cognitio who exceed their authority: see C. vii.48, with imperial rulings dating from AD 323 to AD 379.
Here there is a recognizable idea of the constitutional state, in which limited powers are conferred on magistrates and must be exercised within their limits. There is a sharp contrast with the stateless political community of the polis, and the emergence here, perhaps for the first time, of a recognizably modern conception of the state. The scheme contains an obvious lacuna: no mention is made of the apex of the pyramid, the emperor. Paradoxically, therefore, the apparatus of a legal state where powers are conferred and controlled is created within a system of the most unrestrained absolutism. But to assert that the jurists developed a unitary theory about the nature of powers and legitimacy would anyway be to exaggerate. Papinian, for example, contemplates the attribution of powers to magistrates by decree of the emperor; while Ulpian indicates that the power of the emperor derives from the people, who conferred their imperium upon him. These two views do not sit well together: given the customary rule that delegated powers could not be delegated further, the emperor should have been unable to grant imperium to magistrates. That argument had its adherents in early modern discussion of sovereignty and powers. In general, the jurists' treatment of imperium and iurisdiction was to be a fertile source for arguments about political powers and legitimacy in early modern times. It was only then that apparent inconsistencies between their views had to be smoothed into a unitary theory of sovereignty.

3.3 Corporations

The bias of the Roman jurists towards private law and procedure means that it is necessary to look in unexpected places to find the glimmerings of what we would now recognize as political thought. And there too are to be found many of the texts most significant in the later history of political thought.

This is true of the notion of the corporation: that is, an entity having an existence separate from that of its members and accordingly having rights and duties separate from theirs. The development of the concept of a state or municipality as an entity existing apart from its members is of fundamental importance. But the difficulties in the way of developing the concept were equally fundamental. It is probable that the jurists made use of the writings of philosophers in developing their ideas. For example, Pomponius (late second century AD), writing about acquisition of property, refers to the Stoic classification of bodies (corpora). He gives exam-

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70 See Cartledge, ch. 1 section 3 above.  
71 See e.g. gloss alieno beneficio on D. I. 1. 5.  
72 Mitteis 1908: 339–416.  
73 Olivecrona 1949: 5–42.  
74 D. XLI. 3. 30 pr.
pies of a body composed of separate elements (*corpus quod ex distantibus constat*): a people, a legion and a herd. The much earlier jurist P. Alfenus Varus (consul 39 BC), under reference to the stock example of the ship of Theseus, also referred to the notion of a body whose members change yet which retains its identity. Here again the examples of a legion and a people appear. The notion that a body could retain its identity in spite of changes of membership was the essential background for the jurists' development of a theory of corporations.²⁵

By one philosophical route or another, the jurists appear to have satisfied themselves that there could be such a thing as a body of constant identity yet changing parts.²⁶ Yet philosophical doctrine did not answer the question what legal acts that body should be able to perform, or who should perform those acts for it; this was the work of the jurists. From time to time they encountered difficulty. There are clear statements recognizing the existence of a corporation: money owed to a collectivity (*universitas*) is not owed to the individuals who comprise it (and vice versa); such things as theatres and stadia belong to the *universitas* and not to the individuals who comprise it.²⁷ The jurists also developed notions about representation of the *universitas* by its ‘organs’. Although it is disputed which corporate bodies were regarded as having capacity to be represented in this way, it is quite clear that this was true of municipalities.²⁸ The praetor's edict itself provided remedies to be used in actions for and against *munipices*.²⁹ The municipality could be represented both by its magistrates and by agents specially appointed to represent it (*actores*); their election or appointment was a matter of public law, but they could represent the municipality in private-law transactions.³⁰ This is the basis of a theory of representation.

On the other hand, some confusion seems to have remained in the case of legal relations which required intention (such as acquisition of possession of an object). Even some late jurists seem to have perceived it as problematic that not all the individual members of a corporation could consent to an acquisition.³¹ But Ulpian tells us that in practice it was accepted in his day that municipalities could possess; and the way he puts it suggests that the solution was arrived at on pragmatic rather than technical legal grounds.³² What lies behind this problem is an ambivalence

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²⁹ Lenel 1927: 99–100. It is disputed whether the edict referred to municipalities alone or also to collectivities (*universitates*).
³⁰ Paul D. III.4.10, Ulp. D. XII.5.5.7–9, Paul D. XLIV.7.35.1; details of these developments are controversial: see Kaser 1971: 261, 304–7, Mitteis 1908: 376–90, Duff 1938: 62.
³¹ Paul D. XII.2.1.22. ³² Ulp. D. XII.2.2 and D. X.4.7.3.
about whose intention is relevant for the completion of certain legal acts. Against this background, it is not possible to say that any fully-formed or coherent theory of representation of the legal person can be uncovered in the Digest. But the essentials of those notions are present. The catalyst for their development was provided by the fact that there were private-law interests at stake, and there was an edict relating to municipalities which demanded interpretation. Corporations and municipalities occupy only the fringes of Roman private law, but it is there rather than in public law that they belong. Had the jurists regarded such matters as belonging centrally within the sphere of private law, this area of the law might have been better developed. Nonetheless, the private-law dimension and the presence of an edict meant that the jurists played a much more active role in discussing and developing this area than, for example, in the question of the representation of the Roman state by its magistrates. That fell squarely within the area of public law, and was not dealt with by the jurists to any significant degree.

This example allows us to conclude that the Roman jurists did develop concepts and arguments which would now be recognized as belonging to the realm of political thought: the notion of a political entity or state as the bearer of rights and duties. Some of their reasoning fell on deaf ears; for example, Accursius in the Gloss on the Digest (c. AD 1230) expresses the view that "a corporation is nothing other than the men who are there," leaving it to the Commentators to revive the notion of a corporation as an entity. The Roman jurists developed their thoughts not in relation to the institutions of the state but in relation to the polis or civitas. The reason for this was that polis and civitas were capable of generating problems which were regarded as belonging to the sphere of private law, and were accordingly regarded by the jurists as being within their purview.

4 Conclusions

The jurists’ discussions of ius, statute and justice do little more than attest what could hardly have been doubted: that they were educated in a tradition which instilled in them familiarity with the political thought of the main philosophical schools. Two general features of their discussions are quite striking: first, their statements of general theory are often taken not only from works of an elementary or educational rather than practical nature (Institutiones, Definitiones or Regulae), but also from the first book of

83 Ulp. D. l.16.15, Gai. D. l.16.16. 84 Schulz 1951: 88. 85 Gloss on D. iii.4.7.
such a work. They may therefore be little more than flourishes of learning intended to provide a suitably stately prooemium to those works. Second, they usually display little originality but can be connected with well-known philosophical positions, mostly of a Stoic orientation. What these two observations amount to is this: that so far as we do find any general theory in Roman juristic writings, it is mostly not integrated into any kind of reasoned philosophical position on law or political thought, and it plays no observable part in the approach taken by the jurists to questions of legal interpretation. In short, it appears to be little more than recital of educated commonplaces of the day.

The jurists’ treatment of the position of the emperor is not analytically profound, but does have the merit of founding his authority and power on a statute which transferred the sovereignty of the people to him. The difficulty is that, without any account of popular sovereignty, the nature of the statute or the use of the term imperium, which is ambiguous in that context, the remarks made by the jurists (at least in their surviving form) do not go below the surface. Whether they originally did is necessarily uncertain, but it remains clear that classic questions of political thought were not those in which the jurists either felt comfortable or made a decisive mark.

Instead the jurists’ significance for political thought is to be found in private law or on its fringes. Iurisdictio was a term which in origin concerned the magistrate’s authority to grant civil-law remedies: it was therefore very much within the field which the jurists saw as their own. For them it was important to know which magistrate had jurisdiction, where, and over whom; and, since imperium involved iurisdictio, those same questions were of significance in discussing the powers of magistrates in general. This is the background against which we find the development, admittedly piecemeal, of a theory of magistrates’ powers and their exercise within the limits of the law. That theory, to some (perhaps a large) extent relied on concepts already developed for use in private law. Its development is the more remarkable within a state composed on the absolutist model. Similarly, in their concern with the corporation, the jurists were seeking to do no more than establish a basis for the private-law rights particularly of municipalities. That necessarily involved them in developing ideas about the corporation as an entity capable of having its own rights and duties, and about the representation at least in legal questions of that corporation. Private law, therefore, is the key to understanding the.
nature and extent of the jurists’ contributions to political thought. General theories about law and justice could safely be left to philosophers; for the jurists, questions of political theory had to be resolved only as a means to an end, and that end was the administration and application of private law.