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THE SOURCES OF LAW IN CICERO

Commenting on the list in Cicero's *Topica* 5, 28, of the *partes* of which the civil law consists, Watson observes that « one cannot take this enumeration of the parts of the civil law as a list of the sources of the civil law in the time of Cicero... Indeed Cicero's list of the 'parts' of the civil law itself shows that it is not really meaningful to talk on any one level of 'sources' of law in the late Republic... There is no theory of 'sources of law' in the Republic and in truth there could hardly be one. Indeed, the notion of 'source of law' is foreign to the Republican texts » (1).

These remarks are cited from a book called *Lawmaking in the later Roman Republic*. Watson devotes sections to the various organs of legislation, and the precise force to be attributed to *edicta*, *senatus consulta* and juristic opinions. He seems to regard a source of law as an answer to the question, what could make law in the Republic? He says, for example, that « *senatus consulta* were not thought of as making private law », whereas by inference other kinds of statement were thought of in that way. I suggest that we should consider whether any statement of the law was thought of as 'making' the law. Did the Romans of the late Republic really think of the law as something which was made or produced? This is how we think of law today, but we cannot assume that the Romans thought like us.

It is true that there is very little theory of law in the surviving writings of the Roman jurists. It is also true that Cicero, when writing about law, did not write as a jurist. The witty gibes that he levels at the jurists show that he did not think of himself as a jurist. Nevertheless he knew a lot about law, as it was understood by the jurists. He did not expect to be 'au fait' with every detail

(1) A. Watson, *Law Making in the later Roman Republic*, Oxford 1974, 3-4.

of the law of legacies or servitudes, but he was interested in how the lawyers looked on law and how law was related to other disciplines, and we can assume that his statements reflected the current late republican speculation about the nature of law. When non-lawyers write about law, they usually play safe and offer a fairly conventional view, often slightly out of date, compared with the views of professional lawyers.

Cicero uses the word *ius* in a variety of senses, which should be distinguished at the outset.

First *ius* indicates the ideal justice which is dictated by natural law. That law itself is called *lex*, and described as *ratio insita in natura* (*leg.* 1, 6, 18), which is implanted in man by the *mens divina* (*leg.* 2, 4, 10), but what it provides is *ius*. This terminology is significant. The *ratio* in man's mind is *lex*, and what it expresses is *ius*.

Secondly, *ius* indicates the whole law of a particular state. Although the individual laws are *leges*, the law of a people in general is *ius*. Thus the differences between states result in *varietatem iuris* (*Balb.* 13, 31). Frequently, of course, *ius* may mean specifically the law of Rome, as in the lists of *partes iuris*.

Thirdly, *ius* may indicate a particular part of Roman law, namely the core which on the one hand is *constitutum*, in the sense that it has been expressed, although on the other hand it has not been declared formally in a *lex*. In this sense *ius* may be contrasted with *aequitas* as in *off.* 3, 67: *Ius Crassus urgebat... aequitatem Antonius* (cf. *de orat.* 1, 240). Crassus is not defending law and Antonius a higher equity. They are both claiming that what they propose is *ius*, but Crassus argues that in the particular case, *ius* must be strictly confined to what has previously been recognised. In the numerous passages where *ius* or *ius civile* is coupled with *leges* (e.g. *de orat.* 1, 193), *lex* is not something different from *ius*. A *lex* expresses what is *ius*. The two expressions are complementary, but *ius* indicates the law whether or not formulated in *lex* (2).

So far as sources of law are concerned, Cicero in his philosophical works holds that the sole *fons iuris* is nature (*off.* 3, 72) and he specifically derides the view that the law is derived from the praetor's edict or the Twelve Tables (*leg.* 1, 16-17). In his earlier rhetorical works, however, he uses the term *fons legum*

(2) For *lex* and *ius*, P. Stein, *Regulae iuris: from juristic rules to legal maxims*, 1966, 9 ff.; F. Serrao, *Legge (diritto romano)* in «Enciclopedia del diritto» 23, 1973, 794 ff., now in *Classi Partiti e Legge nella Repubblica*

(although not *fons iuris*) when referring to the Twelve Tables (*de orat.* 1, 195). If we understand 'source' to mean where we may find the law, it seems proper to speak of sources of law in relation to the *partes iuris* (3).

Cicero discusses the constituent *partes iuris* in a number of passages. The earliest is in *De inventione*, 2, 65-68, where he mentions six *partes*: *natura*, *consuetudo*, *lex*, *pactum*, *par* and *iudicatum*. That this was a standard list of *partes iuris* is proved by the fact that the same list is given by the *auctor ad Herennium*, a work of approximately the same date as the *De inventione*, and based on similar sources.

There is, however, a significant difference between the ways the six *partes* are presented in the two works (4). The *auctor ad Herennium* (2, 13, 19 ff.) sets them out one after the other, without indicating any qualitative difference between them. Cicero demonstrates that there are big differences in the manner in which they may be regarded as *partes iuris*.

For the *auctor*, *natura* is the basis of those duties which we owe our relations by reason of kinship and family sentiment. For Cicero, *natura* is not merely the basis of certain rules; it is the foundation on which all law ultimately rests (cf. *off.* 3, 72). For him law arises out of the facts of life; it is rooted in the nature of man and his surroundings. However the obligations which nature imposes are much wider than those which come within the scope of law. They include religious and social as well as legal obligations. Legal duties, like the others, are rooted in nature but nature merely indicates their general tenor; it does not specify their precise limits.

Since law has to be more specific than nature allows, it develops for practical reasons into custom: *ex utilitatis ratione ... in consuetudinem venisse*. Many rules of law, which ultimately derive from nature, are in fact indicated more specifically in custom or in other ways. Consequently, there are few legal duties which are based directly on nature and they are relatively unimportant

*Romana*, Pisa 1974, 7 ff.; J. Bleicken, *Lex Publica: Gesetz und Recht in der römischen Republik*, Berlin-New York 1975, 67 ff.

(3) For discussion and literature, G. Crifò, *Attività normativa del senato in età repubblicana*, «BIDR» 71, 1968, 88 ff.; D. Nörr, *Divisio und Partitio*, Berlin 1972, *passim*, and reviews by G. Crifò, «Iura» 23, 1972, 246 ff., A. Guarino, «Labeo» 21, 1975, 68 ff., and F. Horak, «Tijdschrift voor Rechtsgeschiedenis» 43, 1975, 97 ff.

(4) L. Bove, *La consuetudine in diritto romano*, I, Napoli 1971, 27 ff.

in practice: *naturae iura ... neque in hoc civili iure versantur et a vulgari intellegentia remotiora sunt.*

*Consuetudo* itself is understood to be law by reason of the length of time for which it has been observed. It is unnecessary to have a *lex* in such a case, because with the passage of time (*propter vetustatem*) the limits of the rule have become fixed (*certa*).

The category of law designated *consuetudo* is very wide. Most of the law which the praetors are accustomed to publish in their edicts is of this kind. It is significant that the *auctor ad Herennium* cites as his only example of *consuetudo* a rule which was presumably introduced by the praetor. He says that *consuetudo* is law because although there is no *lex* on the matter, a rule is observed as if it were in a *lex*, such as the rule that a banker's partner is made liable on the banker's debts.

Other kinds of rules which have become law *certa consuetudine*, says Cicero, are *pactum*, *par* and *iudicatum*. The *auctor* placed these three forms of law on the same footing as *natura* and *consuetudo*, but Cicero ranges them within the category of *consuetudo*. *Pactum* shows us what is law between two contracting parties, because they have agreed it themselves. *Par* shows what is fair to all. *Iudicatum* shows what has been laid down in the opinion of some person or persons. In another passage of the *De inventione* (I, 30, 48) Cicero defines *iudicatum* as something approved by the assent or authority or decision of some person or persons. It is a mistake to think that *iudicatum* means here merely judicial decisions, although it includes them (5). The *auctor* defines it in a narrower way than does Cicero, *viz.* what has been decided by a judgment (*sententia*) or award (*decretum*), and these, he points out, are often contradictory, depending on the views of the particular *iudex* or magistrate. But for Cicero *iudicatum* seems to include any authoritative opinion, whether expressed in court or out of court, for example by a jurist.

It is clear that Cicero regards *consuetudo* as an inclusive category covering all law which has been recognised in some specified way (*certum*), but is not formulated in a *lex*. It is a residuary category and the account of it in the *De inventione* is not quite consistent. If age and long observance are its justification, it is difficult to see how pacts and authoritative opinions constitute *consuetudo*. Both Cicero and the *auctor ad Herennium* define *consuetudo* as 'excluding' *lex*, rather than 'including' other kinds of law.

(5) A. Michel, *Rhétorique et Philosophie chez Ciceron*, Paris 1960, 486.

*Lex* itself is the third stage in the evolution of law from nature through custom. Certain laws which have been approved by custom or are recognised to be expedient are confirmed in *leges*: *Post autem approbata quaedam a consuetudine aut vero utilia visa legibus esse firmata*. Thus enacted law begins as recorded customary law. *Leges* do not make new law; they confirm custom or what is recognised to be useful (and so in accordance with nature).

The account of the *partes iuris* given in 2, 65-68 is repeated in essentials in 2, 160-162. The origin of law is to be found in nature, then it develops into custom and later what has proceeded from nature and been approved by custom is sanctioned by *legum metus et religio*. In this account we are told for the first time what is a *lex*. A rule is law by *lex* which is contained in a written document, published to the people for them to observe it. The *auctor ad Herennium* says that *lex* is what is sanctioned by order of the people, such as the rules of the Twelve Tables concerning summons of a defendant. Cicero says nothing about the people ordering; the essence of a *lex* is that it is in writing and is published authoritatively. This is in line with the derivation of *lex* from *legere*, approved by Varro: *legere dictum, quod leguntur ab oculis litterae...; etiam leges, quae lectae et ad populum latae, quas observet*. (*ling.* 6, 66) (6).

The *De inventione* presents law as a natural phenomenon which has to be explained in the way that other natural phenomena such as the weather have to be explained. We do not ask how they are made; we take their existence for granted. Rather we seek to understand more clearly how they work, in what ways we experience them. Our knowledge of such phenomena can be vague or certain, and the degree of certainty, the degree of clarity, we have of them will largely depend on the forms in which they are manifested to us. Since they are natural phenomena, there is assumed to be consistency in the way they operate, so that the more we know about how they have appeared in the past the more we can predict how they will operate in the future.

The *partes iuris* are not productive sources of law. They attest what has been *ius* in the past and therefore they are guides to

(6) A. Cenderelli, *Varroniana: Istituti e terminologia giuridica nelle opere di M. Terenzio Varrone*, Milano 1973, 48, 122. Cf. P. Stein, *The meaning of 'Lex publica'*, *Studi Volterra* 2, 1969, 313 ff.; *Regulae iuris*, *cit.*; Serrao, *op. cit.* Cicero accepted the etymology from *legere* but in the sense of 'to choose', (*leg.* 1, 19).



what will be *ius* in the future. It is from them that the advocate and the judge must derive their knowledge of the law to be applied to future cases: *ex partibus iuris... sumi oportebit et ratiocinari quid in similibus rebus fieri soleat* (2, 61). It is noteworthy that Cicero regards the argument *in similibus rebus* as applicable to the *partes iuris* generally without distinction. They are all evidence of what is *ius*, although he is not saying that they are all of equal authority as evidence.

The development of Cicero's thought on the *partes iuris* continued in the *Partitiones oratoriae* (37, 130). Cicero is discussing how the exact nature of something may be explained and takes law as his example. To understand the whole theory (*ratio*) of law, one must first divide it into two basic parts, *natura* and *lex*. Each of these parts is concerned with both human law and divine law, but only human law involves equity. Equity is a feature both of *natura* and of *lex*, but, whereas *natura* is unwritten, *lex* contains both written and unwritten elements. Written law is subdivided into two groups, public and private, and three examples are given of each group: *lex* (in the narrower sense) *senatusconsultum* and *foedus* illustrate public written law, and *tabulae*, *pactum conventum* and *stipulatio* illustrate private written law. Unwritten law is what is observed by custom or general agreement or tacit convention (*quasi consensu*) (7).

The *De inventione* tended to explain custom as being based on immemorial usage (*propter vetustatem*), emphasising that customary rules are old. The *Partitiones oratoriae* stress rather the element of recognition and approbation as the basis of custom. What most people recognise to be a useful rule can become a customary rule, even though it has not been observed in the past. The *auctor ad Herennium's* example of the rule that a man over sixty years of age may appear in a legal action by a representative is a case in point. He cites it to illustrate *aequum et bonum* as a *pars iuris*. Once the rule has been accepted, it becomes custom through recognition of its equity.

The *Partitiones oratoriae* make two distinctions which were not present in the *De inventione*. First, they introduce a sharp

(7) The last category includes not only Roman custom but also practices recognised as *ius gentium: ea quae sine literis aut gentium iure aut maiorum more retinentur*; cf. A.H.J. Greenidge, *The Legal Procedure of Cicero's time*, Oxford 1901, 91 ff.

distinction between the undeclared and unarticulated law which is still secreted in the nature of man, the *aequitas non constituta*, on the one hand, and the declared or articulated law, expressed in practice or writing, the *aequitas constituta*, on the other. The *De inventione* had confined *lex* to its narrower sense of public enactments, and therefore had subsumed pacts and edictal law under the heading of custom. The *Partitiones* call all declared law *lex*, whatever its form of declaration.

Secondly, the *Partitiones* set apart all law in written form from unwritten law. This distinction does not seem to be based so much on the intrinsic difference of the two kinds of law as on the difference of approach which they required from the advocate or judge. Whenever the law is incorporated in a fixed text, the approach of the lawyer has necessarily to be different from what it is when there is no such text. Whether one is dealing with a statute of the *comitia*, a resolution of the senate, the will of a testator, or a contract agreed between two parties, the technique is basically the same. They all raise problems of *interpretatio verborum*, and the associated gamut of rhetorical *loci*, *scriptum et voluntas*, *ambiguitas*, *scripta contraria* (e.g. *top.* 25, 96) and so on come into play.

Where there is no fixed text, on the other hand, such techniques are not applicable. Most cases that form the subject of legal argument are borderline cases. Cicero himself makes this point when he observes in the *De oratore* (I, 57, 241) that many cases, in which the law is clear, never get as far as the courts at all. Litigation is concerned with cases, in which there is dispute even among the lawyers. Where the law is not written, the question is not one of *interpretatio*. It is not what does the law mean, but rather what is the law? There may be a customary rule or practice, but its precise limits and scope are not defined. If someone has given an opinion on the matter or if there has been a decision on it, that is evidence of the scope but it is not decisive. In such a case, it is possible to use arguments which would not be appropriate where the matter is one of *interpretatio verborum*. For example, one could argue about what in equity ought to be the scope of the rule, in order to settle the limits of the rule (8).

(8) The distinction between undeclared law, residing in nature, and declared law, with the latter subdivided into statute law and custom was adumbrated first in *de orat.* I, 216. *neque enim est interdictum aut a rerum natura aut a lege aliqua atque more.*

The same basic distinction between *aequitas* in its raw, unarticulated state (*natura*) and expressed *aequitas*, *institutio aequitatis*, is repeated in the *Topica* (23, 90) (9). Here *institutio iuris* or *aequitatis* (the *partes* of each are said to be identical, 24, 91) is used in place of the wider sense of *lex* in the *Partitiones oratoriae*. Cicero then subdivides *institutio aequitatis* into three *partes*: *una ... legitima, altera conveniens, tertia moris vetustate firmata*. Instead of the distinction between written and unwritten *lex*, Cicero now speaks of *lex* in the narrower sense, where there is a fixed text, and then distinguishes between the unwritten law based on agreement and unwritten law based on long usage. *Conveniens* does not refer primarily to pacts, but rather to usages which are justified on the basis of general recognition of their utility (the point made in the *Partitiones*). The third category is custom justified on the basis of long usage, according to the traditional explanation of the *De inventione*.

In another passage of the *Topica* (5, 28), Cicero offers an enumeration of the *partes iuris* as an example of definition by *partitio*, as contrasted with definition by *divisio*. We are being shown not all the species which make up the genus law but rather elements which together identify that *res infinita* (*leg. 2, 7, 18*) which is law. He names seven *partes*: *leges, senatusconsulta, res iudicatae, iuris peritorum auctoritas, edicta magistratuum, mos, aequitas*.

The order of the list is significant. Cicero proceeds from the most specific form of law, *leges*, to the least specific, *aequitas*. He thus follows the same order of treatment that he adopts in regard to *institutio aequitatis*.

*Leges* and *senatusconsulta* fall under the *legitima pars*; they each have a fixed, written text. Cicero is not concerned with the question of whether *senatusconsulta* are equivalent to *leges* in binding character. They are both authoritative statements of law, alike in their written form, and therefore to be approached in a similar way by the orator.

*Res iudicatae, iuris peritorum auctoritas* and *edicta magistratuum* fall under the *conveniens pars*. This is the unwritten law which was formerly described as *consuetudo*, and which is justified because

(9) B. Riposati, *Una singolare nozione di 'Aequitas' in Cicerone*, *Studi Biondi* 2, 1965, 447 ff.; cf. 2, 9: *Ius civile est aequitas constituta eis qui eiusdem civitatis sunt ad res suas obtinendas*.



of popular approbation, expressed in practice. The first two take the place of *iudicatum* in the *De inventione*. *Res iudicatae* are decided cases, in which a *iudex* settles what is *ius* for the parties to the action only, but they are evidence which will support an argument on what is law in similar cases (10). The opinions of jurists are likewise evidence of what the law is, but the extent to which they express the true law will depend on the individual jurist's *auctoritas*.

Edicts are also evidence of the law in that the function of the praetor is *ius dicere*, and Cicero calls him *iuris civilis custos* (leg. 3, 8). It is clear that Cicero does not regard the praetorian edict as a written *pars* like *leges* or *senatusconsulta*. It was a temporary statement valid only for the magistrate's term of office, and he had some discretion as to how far he would in fact state the principles that he proposed to follow and how far he would leave them unwritten. In discussing his own edict, issued as governor of Cilicia, which seems to have been unusually short, Cicero mentions certain subjects and concludes: *de reliquo iure dicundo ἄγραφοι reliqui* (*Att.* 6,1, 15) (11).

*Mos*, custom confirmed by long observance, is the third component of institutionalised equity. It had been developed to replace *consuetudo*, which was a wider and more general notion. *Consuetudo* was custom in the sense of convention and covered any law that was not formulated in *lex* including, for example, *ius gentium*. *Mos* was a set of traditional social practices, the heritage of a particular people (12). Much of its content fell outside the law, and as a *pars iuris*, its ambit was limited. In the disintegrating social values of the last century of the Republic there was a tendency to idealise the *mores maiorum* and conservative thinkers in particular stressed their importance. In practice, however, only infrequently would an orator have an occasion to base his argument on a Roman customary practice which was not already attested in some other way.

The last element in the list is *aequitas*, the equity which, unlike the other six *partes*, had not been institutionalised. Since the whole of law was conceived as based on equity, an orator might

(10) L. Vacca, *Contributo allo studio del metodo casistico nel diritto romano*, Milano 1976, 57 ff.

(11) A. J. Marshall, *The Structure of Cicero's edict*, « Am. Journ. Phil. » 85, 1964, 185 ff.; G. Pugliese, *Riflessioni sull'editto di Cicerone in Cilicia*, *Synthese Arangio-Ruiz*, Napoli 1964, 972 ff.

(12) D. Nörr, *Zur Entstehung der gewohnheitsrechtlichen Theorie*, *Festschrift Felgentraeger*, Göttingen 1969, 353 ff.; Bleicken, *op. cit.*, 354 ff.

cite it as a yardstick in cases of doubt. Often the argument from *aequitas* would be a plea for even-handed application of the law and that like cases should be treated in a like manner. *Valeat aequitas quae paribus in causis paria iura desiderat* (*top.* 4, 23) (13).

We may now summarise the development of Cicero's ideas on the *partes iuris*. It shows an increasing sophistication of analysis and adaptation of Greek theoretical notions to Roman experience.

The *De inventione* sets out the Stoic view that universal law exists in a community of itself. Growing out of nature (*φύσις*) it passes through convention (*θέσις*) to law (*νόμος*). The writing down of law was only a stage in its development. This broad framework fitted the old idea, current until the latter part of the second century at least, that the *ius civile* was something indivisible in time, that new law was a contradiction in terms, and that legislation was the declaration and clarification of what had always been law. The experience of the English common law shows that this is an idea which dies hard. Long after it was recognised that legislation makes new law and that judges' decisions can make new law, the language of the courts still assumed that no question could arise which would call for the application of any law but long-established law (14).

Although this Stoic framework fitted Roman law in general, Cicero's attempt to fit such disparate institutions as private contracts, ideas of equity and authoritative opinions under the umbrella of *consuetudo* is awkward and clumsy.

In the *Partitiones oratoriae* Cicero adopts the well-known Greek distinction between *ἔγγραφος νόμος* and *ἄγγραφος νόμος* but he uses it in a sense which was exceptional in Greek thought. There it usually meant all the law in force in a community contrasted with natural law, whereas Cicero applies it to law which is formulated

(13) P. P. Parpaglia, 'Ἐπιείκεια Greca, Aequitas Romana e Filosofia Greca a Roma, «SDHI» 40, 1974, 415 ff. (cp. the use of *par* for *aequum* in the *De inventione*). For the distinction between the internal justice of the legal system and the external criticism of its rules against the standard of justice, P. Stein and J. Shand, *Legal Values in Western Society*, Edinburgh 1974, 73 ff., 84 ff.

(14) Sir Henry Maine, *Ancient Law*, Chap. 2 (World's Classics ed. 26): 'It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only because the necessary patience, knowledge or *acumen* is not forthcoming to detect it'.

in an authoritative text, contrasted with law which is not formulated in such a text, although it may be evidenced informally in writing (15). This classification is exhaustive and covers all recognised law. *Ius scriptum* includes both public texts and private texts agreed by those affected, since the same techniques of interpretation are applicable to them. *Ius non scriptum* includes the *ius gentium* as well as Roman customs. To accommodate the *ius gentium*, the justification for unwritten law is now popular approbation rather than long usage. Although *natura* is still mentioned, it is evident that it belongs to the stage of pre-law rather than the law applicable in a court.

In the *Topica*, Cicero takes the restriction of the *partes iuris*, to the law to which an advocate could refer in court, a stage further. *Natura* is no longer mentioned, nor are the institutions, such as contracts, which merely state law for particular parties instead for all. Only elements on which an advocate could base a general argument are included. The advocate deals in borderline cases, where the law is not clear. He cannot expect certainty. His task is to establish what is probably the law, *ut in iudiciis ea causa, quamcumque tu dicis, melior et probabilior esse videatur* (*de orat.* 1, 10, 44) (16).

Thus the advocate can found his argument on any element which is recognised as evidencing what the law is, in the knowledge that he may be met by a counterargument based perhaps on a different ground. Each side looks to the past, on the assumption that the law will be as it has been. The good advocate must therefore know *monumenta rerum gestarum et vetustatis exempla* (*de orat.* 1, 46, 201), for the *ius civile* is essentially a matter of *auctoritates, exempla* and *testamentorum formulae* (*de orat.* 1, 39, 180). Of course the various *partes iuris* have differing authority. If one party can rely on a *lex publica*, his argument will carry greater weight than one based merely on *exempla* (cf. *de orat.* 1, 195; *leg.* 2, 18). Generally the more specific the *pars*, the greater its authority. As a last resort the advocate may call on equity to settle a doubtful point, on the ground that the whole law is institutionalised equity.

(15) A. A. Schiller, *Custom in Classical Roman Law*, «Virginia L. R.» 24, 1937, 270, now in *An American Experience in Roman Law*, Göttingen 1971, 43, citing Aristotle, *Rhetoric*, 1, 10, 1368b.

(16) For Cicero's equivocal position as an advocate, G. Pugliese, *Cicerone tra diritto e retorica*, *Scritti Iemolo*, Milano 1963, 561-87.

It is instructive, finally, to compare the list in *Topica* with that of Gaius, who approaches the subject from the point of view of a jurist instructing students. Gaius begins by stating that law in general is based on a people's *leges* and *mores*. When, however, he comes to list the elements from which the Roman people's legal position (he uses the plural *iura*) is derived, he mentions *leges*, *plebiscita*, *senatusconsulta*, imperial constitutions, magisterial edicts and the unanimous opinion of those jurists who have received the *ius respondendi* (*inst.* I, 2-7).

There is no mention of *mos* or *aequitas*. They are too imprecise to serve the purpose of a jurist who does not want an argument based on probabilities about what may be the law but an authoritative pronouncement of what is and will be the law. Gone too are *res iudicatae*. Decisions of one *iudex* did not bind another, so that they could not be taken to fix the law for the future.

The list is curiously old-fashioned for a work of the mid-second century A.D. Its main feature is the special position of *leges*, which are not merely the first of the *partes iuris*, but also the criterion by which others are judged. Unlike Cicero, Gaius restricts *leges* to enactments of the *comitia*, although there had been none dealing with private law for more than half a century. With pedantic antiquarianism he distinguishes *plebiscita* from *leges*, pointing out that they had to be given the effect of *leges* (they seem always to have been called *leges*) by the *lex Hortensia*. In the case of both imperial constitutions and *senatusconsulta*, he asks whether they have the force of *lex*, and concludes that they do. All these were authoritative and certain sources of law. Magisterial edicts, although not written law for Cicero, were by Gaius' time comparable with *leges*. Each year the magistrates had to publish the official version produced by Julian which, being fixed and unalterable, was the subject of commentaries like *leges*. Since only the unanimous opinion of certain chosen jurists approved by the Emperor was law, that opinion had equivalent authority to imperial rescripts.

Thus Gaius restricts his list to those authorities which were absolutely binding on a *iudex*, in the sense that he could exercise no discretion at all. That there was still scope for an advocate to refer to other elements particularly in regard to points not covered by such authorities, is, however, suggested by Quintilian: *Omne ius quod est certum aut scripto aut moribus constat. Dubium aequitatis regula examinandum est. Quae scripta sunt aut posita in more*

*civitas, nullam habent difficultatem, cognitionis sunt enim, non inventionis; at quae consultorum responsis explicantur, aut in verborum interpretatione sunt posita aut in recti praviue discrimine (inst. 12, 3, 6-7) (17).*

In matters of *inventio* and even in those of *cognitio*, insofar as *mores* are concerned, the *iudex* has a discretion; he can be persuaded. These matters are, therefore, as much the advocate's concern as are the binding sources of law. So they are Cicero's concern.

(17) Cf. *Inst. Orat.* 5, 10, 13: *pleraque in iure non legibus sed moribus constant.* In the Loeb edition by H. E. Butler (2, 209), this is wrongly translated: «there are, for instance, many rights which rest not on law, but on custom». This should be: «in law there are many matters which rest not on statute, but on custom».

PARTES IURIS A CICERONE EXPOSITAE

