Chapter 1

Introduction

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In the introduction to *Law and Life of Rome* (1967), John Crook described the aim of his book as follows:

> This is not quite a book about Roman law, on which there already exist any number of excellent treatises. Neither is it quite a book about Roman social and economic life; that subject, too, is already illuminated by massive works of scholarship. It is a book about Roman law in its social context, an attempt to strengthen the bridge between two spheres of discourse about ancient Rome by using the institutions of the law to enlarge understanding of the society and bringing the evidence of the social and economic facts to bear on the rule of law.[1]

As an ancient historian with a keen interest in Roman law, Crook must have been aware that he was courting controversy with this statement which essentially called for a broadening of disciplinary horizons and greater collaboration between both 'spheres of discourse'. Not only did this approach expect historians to take greater account of Roman law, but it also expected legal scholars to look beyond the then prevailing dogmatic approach to the study of Roman law practised by most.[2] It was perhaps owing to an awareness of the complexity of what Crook was advocating, since the crossing of disciplinary boundaries is never easy, that he took great care to explain what he meant by a 'law and society' approach to the study of Roman law. While Crook was undoubtedly influenced by contemporary debates in jurisprudence regarding the relationship between law and society, he was also aware that these debates had limited use in the study of ancient Rome.[3] The study of Roman law could not be subjected to a sociological enquiry in the contemporary sense, since too much of the empirical data required for such an enquiry was lacking.[4] Furthermore, as Crook pointed out, controversies

[1] Crook (1967), p. 7.

[2] For perspectives on the dogmatic methodology, see Ernst and Jakab (2005), p. v; Tuori (2006), p. 13.

[3] See Crook (1967), p. 7. On the purpose of a 'law and society' methodology in modern legal scholarship, see Cotterrell (2006), p. 5.

[4] Crook (1967), p. 9. See also Cotterrell (2006), pp. 17, 54; and Travers (2010), pp. 5–6, 9, 19 for a summary of the prerequisites of the modern sociological study of law.

surrounding the meaning of concepts such as 'Roman society', 'Roman law' and the fact that both law and society change with time also complicate matters.[5] Nevertheless, Crook maintained that since some relationship between law and society existed, it was possible to provide a broader context for Roman law using elements of social and economic history.[6]

> [L]aw is certainly some reflection of society (usually of its more conservative aspects, because of the law's function as a guarantor of stability), and not only a reflection, but also in some degree an influence upon it (usually a brake, providing only cautiously and tardily the mechanisms to fulfil the changing desires of society as a whole, but sometimes an accelerator, a tool in the hands of a particular section of the community such as an intelligentsia for achieving new ends that people in general do not actively want but will not positively oppose).[7]

It is not the aim of this introduction to engage once more with the critics of Crook's approach as this debate has been comprehensively explored recently elsewhere.[8] Studies such as those by Cairns and du Plessis have shown that Alan Watson's view on 'law and society' in the Roman world, sometimes cited as being in opposition to that of Crook, is in fact complementary and that new insights can be achieved, provided that scholars are sufficiently sensitive to the methods, perspectives and legitimacy of the conclusions of the other 'sphere of discourse'.[9]

Since the ground rules for interdisciplinary collaboration have now been established, further exploration of the emergent field of research relating to 'law and society' in the Roman world has become possible. This is what this book seeks to do. It is designed to be read as an integrated whole. The chapters have been grouped into three larger themes and within these, individual chapters have been arranged in a specific order to form a cumulative picture.

The first theme explored in this book, 'perspectives on Roman legal thought', addresses issues of Roman juristic writing and its contexts. The chapter by Howley, which introduces this theme, examines the place of Roman juristic writing within the broader context of Roman society using the work of Aulus Gellius as his example. By investigating the way in which Gellius used juristic writing when compiling his own works, Howley provides a fascinating external perspective on the way in which these works were perceived and utilised by the Roman educated classes at large. In doing so, Howley demonstrates that Roman juristic writing formed part of the broader intellectual culture of the Roman world and was used by the elite for

[5] Crook (1967), pp. 9–10.
[6] Crook (1967), p. 7; see also Treggiari (2002), p. 47.
[7] Crook (1967), p. 7.
[8] See Watson in Cairns and du Plessis (2007), pp. 9–23.
[9] See Sirks (2002), pp. 169–79; Aubert (2002), pp. 183–6; Cairns and du Plessis (2007), pp. 3–8. On the dangers of interdisciplinarity with reference to modern socio-legal scholarship, see Cotterrell (2006), p. 18.

a variety of different purposes, apart from merely as juristic authority. The theme is continued by Tellegen-Couperus and Tellegen on the relationship between law and rhetoric. Their elegant chapter explores the extent to which Roman juristic thought as recorded in the works of the jurists was doctrinal and thus removed from the demands of legal practice dominated by orators trained in rhetoric. The authors argue that the prevailing orthodoxy whereby Roman juristic thought is said to be removed from legal practice in the courts based on rhetoric is incorrect and should be abandoned in favour of a more integrated assessment whereby Roman juristic thought and rhetoric are seen as two sides of the same coin. The last chapter on this theme is that of Harries who, using a controversial senatorial decree relating to slavery as an example, argues in favour of a greater appreciation of the context in which law was created and developed and the interest groups which drove the enactment of a law.

The second theme, 'interactions between legal theory and legal practice', explores Roman law as a working 'legal order'. This theme is introduced by a fascinating chapter by Humfress in which she challenges the prevailing view about the universal application of Roman law in the Roman Empire post 212 CE. Using elements of an anthropological approach, Humfress argues that the notion of an Empire-wide 'legal system' imposed from above by the Roman state onto its people should be rejected in favour of a more nuanced, pluralist understanding of Roman law as a number of interconnected 'legal orders' in terms of which individuals had access to different legal solutions based on status and affiliations to local communities. In reaching this conclusion, Humfress advocates that research in this area should not merely focus on the perceived 'gap' between legal theory and legal practice, but on the motivations of individuals for choosing to use one legal solution over another and the manner in which this informs modern understanding about the concept of an Empire-wide 'Roman law'.[10] This challenge is reflected in the remaining chapters on this theme in which three authors explore the relationship between legal theory and legal practice in three different periods of Roman society. The first of these, by Roselaar, is devoted to the notion of *conubium* and the legal significance of this concept in the early Roman Republic. Through a re-examination of the sources, Roselaar shows that *conubium* was an instrument that the Roman state employed strategically to secure allegiances in order to gain political supremacy on the Italian mainland. The second chapter explores the legal world of the Sulpicii archive with a view to assessing the role of women in commercial transactions. This chapter challenges the accepted view that women, owing to various legal restrictions and social conventions in Roman society, did not engage in commerce directly, but relied instead on (mostly male) relatives or business

[10] Humfress's chapter also ties in with recent advances in 'law and society' research in relation to 'community'; see Cotterrell (2006), pp. 62–9.

agents. From Jakab's analysis of the sources, it becomes clear that women engaged far more actively and fully (albeit sometimes indirectly on account of their status) in Roman commercial transactions, and that some of the legal impediments which appear to have inhibited their participation in commerce could be circumvented. The last chapter in this theme, by Urbanik, investigates the use of 'classical' Roman law in sixth-century Byzantine legal practice. Using the contract of pledge as an example, Urbanik assesses whether the legal needs of society were met by the existing law, and highlights certain creative legal solutions to new problems.

The last theme explored in this book is 'economic realities and law'. Three chapters examine the interplay between law and economic considerations in the context of the Roman world. Kehoe uses a 'law and economics' approach to investigate the law of agency. He argues that in developing the Roman law of agency, the jurists and the Imperial bureaucracy were aware of and driven by the economic implications of law. The remaining two chapters explore related issues. Aubert focuses on the liability of slave agents for debts incurred in relation to their *peculium* and argues that the legal rules in this area of law cannot be fully understood without an appreciation of the economic realities in which commercial transactions by a slave operated. Bannon's account of fixtures and fittings in relation to the sale of property demonstrates that the jurists were aware of the commercial reality of such sales and factored these into their legal thought.

The final chapter by Thomas is meant to provoke further thoughts on interdisciplinarity. Thomas explores a topical theme in modern historical scholarship, namely plurality of perspective, which has yet to make a significant impact on traditional Roman-law scholarship.[11] He argues that it is possible to look at Roman legal texts from different angles to appreciate the full complexity of their different layers of meaning. In a certain sense, Thomas's chapter represents the very essence of the approach of this book. When read as a whole, the themes explored in this book demonstrate that it is possible, to paraphrase John Crook, to ask 'new questions about Roman law'.[12] These are the new frontiers of 'law and society' in the Roman world.

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[11] For the effect of post-modernism on 'law and society' scholarship, see Cotterrell (2006), pp. 19–20, 62, 66; Travers (2010), pp. 144–8; Southgate (2001), pp. 61–2, pp. 115–16, 158.

[12] Crook (1996), pp. 31–6.

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