CHAPTER 6

Litigation

The last three chapters have been concerned with substantive law: the rules which governed everyday life and its transactions. But, in the end, the question whether a person enjoys a particular right comes down to whether he or she is able to enforce it in practice. This is where the issue of procedure, of litigation, is important. The first section of this chapter gives a sketch of the workings of the various Roman civil procedures in the classical period; to a large extent this is confined to the bare facts. The second section then attempts to draw out the significance of the procedural rules for the vindication of rights in practice, and also deals briefly with access to the courts and legal representation.

I CIVIL PROCEDURE IN THE CLASSICAL PERIOD

1. Formulary procedure

The standard classical civil procedure is known as the formulary system, for reasons which will become obvious. It was neither the first nor the last of the Roman civil procedural systems, but it held sway for most of the classical period; the writings of the leading jurists were written in connexion with it; and to some degree they depend on understanding it.

Characteristic of formulary procedure is that it took place in two stages, the first before the praetor, the magistrate charged with the administration of justice, and the second before a judge. To initiate civil litigation a plaintiff had to obtain a formula from the praetor, which encapsulated the essence of the dispute. This could be done only in the presence of the intended defendant, since the defendant too had to have some say in what was included in the formula. The case was then sent by the praetor for trial before a judge. The formula set out the full extent of the issue or issues to be decided by the judge on the evidence. The judge was given authority by the praetor to judge only on the issue as set

out in the formula; and nothing else was either relevant or within the judge's competence to determine. This two-stage procedure bears some resemblance to Athenian procedure, in which the appropriate magistrate, the *archon*, conducted an inquiry into the facts (*anakrisis*) and arrived at an issue which was to be put before the court; in the second stage of proceedings the parties appeared and made their speeches before the court (Sealey 1994: 118–19; Todd 1993: 126–7). The difference was that the Athenian court consisted of many judges, not just one.

Getting the defendant before the praetor

Since the procedure could not commence without the defendant, it was necessary to have a means of compelling his attendance before the praetor, a stage of proceedings known as proceedings *in iure*. The opening provisions of the Twelve Tables were already concerned with this (they are cited in chapter 1).

Under the formulary system, it was not uncommon for the parties to agree to meet at a certain place for the purpose of then going before the praetor to obtain a formula. The prospective defendant would promise to appear at a certain place and time near the court, so that the plaintiff could then formally summon him before the magistrate (*in ius vocatio*). A number of surviving documents deal precisely with this (Wolf 1985).

There was nothing necessarily extended about these proceedings: on the whole the praetor did not investigate the rights or wrongs of the matter but simply granted a formula which covered the pleas of each party. There was, however, a group of cases in which the formula would be granted only after scrutiny of the case; and if the plaintiff sought an action which did not appear in the edict this too would presumably require more time.

The formula

In book 4 of his Institutes Gaius gives a clear account of the way in which formulae were composed (*Inst.* 4.39–52; see also Jolowicz and Nicholas 1972: 203–15). The essence is this: formulae were built up of clauses, some mandatory, others optional, so as to encapsulate in a single sentence all the issues which the judge must determine. The judge was therefore faced with an (admittedly complex) question to which the answer must in effect be 'yes' or 'no'. Plainly this limited his scope for error; not an unimportant consideration, given that he would be a lay judge. Some examples should help.

A basic formula

Here is the formula for the basic action for recovery of property, the *vindicatio*, discussed in chapter 4:

> Let Gaius be judge. If it appears that the slave which is at issue belongs to Aulus Agerius at civil law, and it has not in the opinion of the judge been restored to Aulus Agerius, whatever its value shall be let the judge condemn Numerius Negidius to pay that to Aulus Agerius; if it does not so appear, let him absolve.

The formula necessarily begins with the appointment of the judge, in this case Gaius. It is this sentence which gives him authority, which as a private citizen rather than an official he would not otherwise have, to determine the dispute. The stock names used for the parties to the action are conventional, playing on words: the plaintiff because he sues (*agere*), the defendant because he denies or refuses to pay or both (*negare*, *numerare*). This formula faces the judge with the task of assessing whether the slave does belong to the plaintiff at civil law or not. We shall return to the judge's decision shortly.

A modified formula

It has already been mentioned that the defendant must be present when the formula was issued; the reason is that the parties must agree what all the issues between them were, and it might be appropriate for defences put forward by the defendant to be inserted as additional clauses in the formula. Take the example of the basic action for payment of a sum owed (*condictio*), which would be used in the case of a loan (*mutuum*) or *stipulatio* of a sum of money:

> Let Gaius be judge. If it appears that Numerius Negidius ought to give Aulus Agerius 1,000 sesterces, let the judge condemn Numerius Negidius to Aulus Agerius for 1,000 sesterces; if it does not so appear, let him absolve.

This is an entirely straightforward formula. But what should be noted is that the formula as it stands will allow the defendant to advance only one defence: that he does not owe the money. Suppose, however, that he admits he owes the money but alleges that the parties had made an agreement that for a period of five years the plaintiff would not sue for repayment. To raise this issue before the court, so as to be entitled to lead witnesses or produce other evidence about it, the defendant will have to plead a further defence. Here the appropriate one would be the defence that there was an agreement (*exceptio pacti*): the words 'unless it was agreed between Aulus Agerius and Numerius Negidius that no action for this money should be brought for five years' would simply be added to the formula.

Similarly, if the defendant admitted the debt but alleged that he was tricked by the plaintiff into entering into the contract, he would have to plead a defence. Here the appropriate one might be the *exceptio doli*, which was a general plea to the effect that the plaintiff was acting fraudulently or in bad faith: the words 'if in this matter nothing has been or is being done in bad faith by Aulus Agerius' would be added to the formula.

The pleading of a defence (*exceptio*) by the defendant may well not have been the end of the matter: the plaintiff might have wished to plead a further point in reply to it. This would be known as a 'reply' (*replicatio*); a further reply by the defendant would be a *triplicatio* (more or less untranslatable); and so *ad infinitum*. Here is the formula for the *actio Publiciana*, which was discussed in chapter 4. This version includes the modifications necessary to reflect the fact that the action is being brought by the bonitary owner of a slave against the true owner, and the true owner has pleaded his civil-law title as a defence.

Let Gaius be judge. If Aulus Agerius had for one year possessed the slave which he bought in good faith and which was delivered to him, then if that slave which is at issue would have belonged to him at civil law, unless the slave which is at issue belongs at civil law to Numerius Negidius, and Numerius Negidius did not sell and deliver the slave at issue to Aulus Agerius, and it has not in the opinion of the judge been restored to Aulus Agerius, whatever its value shall be let the judge condemn Numerius Negidius to pay that to Aulus Agerius; if it does not so appear, let him absolve.

The resemblance between this formula and the basic *vindicatio* with which we began is clear. One can therefore get an impression of the versatility of this system of pleading, where a new block is added to the formula to deal with a new complexity, and there is in effect no limit to the ultimate extent of the formula. It has of course to be conceded that the longer and more complex the formula became, the more problematic it must have been for a lay judge to apply it. Help would be required.

Discretion

Some actions were known as 'good faith actions' (*bonae fidei iudicia*). This was true of all of the most important contracts, with the exception of *stipulatio* and the loan of *mutuum* (for both of which, provided the *stipulatio* was for a fixed sum of money, the appropriate action was the *condictio* mentioned above). The formulae for good faith actions – unlike the *condictio* – included specific reference to good faith. Here is the formula for the buyer's action under the contract of sale.

Let Gaius be judge. Whereas Aulus Agerius bought from Numerius Negidius the slave which is at issue, whatever as a matter of good faith Numerius Negidius ought to give to or do for Aulus Agerius, let the judge condemn Numerius Negidius to Aulus Agerius in respect of that; if it does not so appear, let him absolve.

The significance of this reference to good faith was that the judge had much more discretion: he was not left simply to determine whether 1,000 sesterces were owed or not owed but was able to decide exactly what the defendant ought to pay. The most important consequence of the reference to good faith was that there was no need for a defendant to plead defences – such as that there had been an agreement or that the plaintiff was acting fraudulently – since the judge would be able to take evidence about these into account anyway, simply as a matter of applying the standard of good faith.

Non-standard formulae

The praetor's edict contained only the standard formulae. Not all cases would be covered. It was possible none the less for a plaintiff to seek a formula even in a novel case. In these instances the formula would often set out the facts on which the plaintiff relied, rather than the brief legal narrative given in the examples already mentioned. Actions with formulae of this sort were known as *actiones in factum* or *actiones utiles*, and were particularly important in extending the law. For example, the Digest title on the *lex Aquilia* (*D.* 9.2) frequently refers to such actions: this was because they were of the greatest significance in bringing up to date and expanding the scope of a statute which had been drafted in rather narrow terms. The statute itself gave a remedy in damages only to the owner of a thing which had been harmed, and only where loss had been directly caused; *actiones in factum* or *actiones utiles* extended the scope of liability in this area and so, for instance, gave a remedy to other people who had interests in the thing, and for loss which had been indirectly caused.

From praetor to judge

Once the formula was settled and the judge appointed, the praetor's role was over, and the parties' dispute went before a judge or *iudex* (proceedings *apud iudicem*). The task for the judge was to hear the evidence led by the parties in order to determine whether he should condemn the defendant to pay or absolve him.

Judgment in money

The judgment would simply be a determination whether the plaintiff had proved the necessary facts set out in the formula: in effect, this was a 'yes or no' decision by the judge, since he need only pronounce that the defendant was condemned or that he was absolved. In actions where the formula was not directed at a fixed sum, the judge would also need to make an assessment of the amount the defendant must pay the plaintiff.

No reasons were given in the judgment, nor was any appeal possible against it (although it might in exceptional circumstances be set aside as void). It would be difficult in any case to appeal against a judgment without knowing how the judge had arrived at it.

It was fundamental to the formulary system that the only judgments the judge could pronounce were monetary. It did not matter that what the plaintiff really wanted was the return of his property; the judge was able only to award a sum of money.

There was a device, however, for encouraging the defendant to return the property rather than paying its value. It is reflected in the formula of certain actions by the presence of what is known as the *clausula arbitraria* ('discretionary clause'). The clause simply provided 'and it has not in the opinion of the judge been restored to the plaintiff'; this appears, for instance, in the formula for the *vindicatio* quoted earlier. The presence of this clause allowed the judge, when he had concluded that the plaintiff was the owner, to delay pronouncing judgment against the defendant if he returned the object. If he did, no judgment was pronounced. If he did not, the judge would ask the plaintiff to value the object. Although the plaintiff had to swear an oath as to the value of the object, it seems clear that he or she could err on the side of generosity; after all this was expropriation of the plaintiff's property. The upshot was that, if the defendant elected not to return the object, he would have to pay an inflated value for it. Indirectly, therefore, some pressure was put on him to perform rather than pay.

This clause appeared in other actions besides the *vindicatio*: for example, in the action for warding off rainwater discussed in chapter 4. Its presence there again gave a defendant whom the judge had provisionally found liable an incentive to take down the construction that was causing rainwater to damage the plaintiff's land. If he did so, judgment would not be pronounced against him.

This seems a very cumbersome method, which prompts the question: why? The answer probably lies in the fact that the judge was a lay judge:

once he had pronounced his judgment, he had no further power. He had no chance to supervise what then happened, and no standing to do so. He had no court officials to execute the judgment or to provide means for its enforcement. A monetary judgment was a straightforward end of the proceedings so far as he was concerned; if its enforcement involved the insolvency of the defendant, that was a matter for the praetor.

The question arises whether the monetary judgment was of greater advantage to the plaintiff or the defendant. Both views have been held; and a good deal must turn on the ease with which the defendant could come up with money, and so to some extent on how scarce money was (Kelly 1966: 73–84; de Neeve 1984: 154–7). It is clear enough from literary sources that from time to time there were monetary crises (for instance, in 88 BC, 66–63 BC, 49–45 BC and AD 33; Duncan-Jones 1994: 20–32), and no doubt in those periods a defendant might find it particularly convenient to return the property rather than pay. Apart from this, it seems doubtful whether there is much to be gained by generalization: everything must have turned on the particular parties and property involved.

Execution of judgments

The execution of a judgment was either personal (against the person of the judgment debtor) or real (against his property). The system was described in section VI of chapter 5 in the context of insolvency.

2. Other procedures

The praetor was not confined to granting formulae for actions going to trial but was also as part of his power of jurisdiction empowered to grant orders of other types. It is worth noting the most important ones here; they have been mentioned where appropriate in earlier chapters.

(1) Interdicts. The praetor's edict contained a lengthy list of interdicts; book 43 of the Digest contains titles on thirty-three of them. They range widely. Interdicts were of exceptional importance in the law of property, where they regulated not just possession (*D.* 43.16, 17 and 31) but also rights of way, water and watercourses, drains, overhanging branches, windfall fruit from trees and other such things (*D.* 43.18, 20–3, 27–8). Some of them have already been discussed in chapter 4. Other interdicts were concerned largely with questions of municipal administration: preventing building in public or sacred places; enabling road repairs to be carried out; preserving access to public waterways (*D.* 43.6–15).

The principal advantage of interdict proceedings was that they were swift. This was to a large degree because they were primarily concerned with preserving the status quo and involved no inquiry into the merits of the case. So, for example, someone could obtain an interdict to prevent his neighbour building, or interfering with his water supply, or carrying out any activity contrary to his prohibition: in each case the praetor was prepared to maintain the status quo by granting the interdict. The person seeking the interdict need not show entitlement, but simply a *prima facie* case, for example that he had been accustomed to use the water source.

(2) 'Sending into possession' (*missio in possessionem*) was a remedy made available by the praetor in a wide range of circumstances: examples include the safeguarding of a legacy where there was doubt about the heir's solvency; where a neighbour sought possession to secure himself against the threatened collapse of an adjacent building (*damnum infectum*: see chapter 4); and also as a preliminary step to insolvency proceedings (see chapter 5).

(3) *Restitutio in integrum*. This remedy, which means roughly 'restoration of the status quo', was a means by which the praetor could relieve someone of the consequences of a transaction into which he or she had entered. The best-known example was mentioned in chapter 3, namely the relief of minors who had been imposed upon or deceived into entering a transaction. But the praetor also offered this remedy in general to people who had entered into a transaction under the influence of fraud or duress. The effect was in each case that the transaction was set aside.

3. Other civil jurisdictions

Although the Digest gives the strong impression that litigation was a matter of appearing before a single judge, a few words should be said here about two other civil jurisdictions which operated in the classical period (for further discussion, see Kelly 1976).

(1) *Recuperatores* ('recoverers'). A court of *recuperatores* was essentially a court composed of several persons eligible to be appointed as judges, usually but not always three. The cases in which recuperatorial procedure was appropriate are not quite clear, although they were supposed to involve a greater public interest than ordinary cases. The *lex Irnitana* indicates that there was a known list of cases or categories of case which went before *recuperatores*: it says that at Irni cases which would in Rome

be heard by *recuperatores* should be treated in the same way at Irni (*lex Irn.* ch. 89). But we are not told which cases were on this list.

(2) *Centumviri.* Details about the court of *centumviri* (literally, 100 men) lack. It seems to have sat in divisions rather than as a whole, but the numbers sitting were clearly large. Its jurisdiction was very limited. Two of its principal concerns were evidently cases where inheritances in excess of a certain value were being claimed and cases where the validity of wills was being challenged, again probably only where the estate exceeded a certain value. The ancient sources indicate that the centumviral court was the forum for forensic advocacy, and that there might be considerable public interest in litigation there (Cic., *de oratore* 1.180; Plin., *ep.* 6.33.3; Quintilian, *inst.* 12.5.6; Crook 1995: 181, 184–5).

4. Provincial practice

In the provinces, it was the provincial governor who exercised jurisdiction. As already mentioned in chapter 1, there are marked similarities between his role and that of the praetor at Rome; and jurisdiction was exercised in accordance with the governor's edict.

It does not appear, however, that in the provinces the two-stage formulary procedure was normally used. Instead, provincial jurisdiction seems to have operated under a single-stage procedure in which the governor or a deputy appointed by him heard the whole of each case. It seems probable that this is one of the roots of the various systems of non-formulary civil procedure which became established in the later classical period (see below). The provincial governor evidently went on circuit around the province; the *lex Irnitana* provides for promises for appearance to be made before him at the place where he is expected to be on the day in question (*lex Irn.* ch. 84).

5. Municipal jurisdictions

Municipal magistrates (or *duoviri*) also had a limited jurisdiction, under the supervision of the praetor (in Italy) or appropriate provincial governor. The details of this have become fairly clear since the discovery of the *lex Irnitana.* It contains provisions on the limits which applied to the jurisdiction of the local magistrates, and provisions for appointing judges and *recuperatores* and arranging for trials to begin. Actions which exceeded the jurisdiction of the local magistrates had to be remitted to the provincial governor. In Irni this applied in particular to actions which

concerned or raised an issue about a person's freedom, and to so-called 'infaming' actions, that is, actions condemnation in which involved dishonour (*infamia*) and certain civil disabilities. It is clear that the defendant could agree to an infaming action's being heard locally, although he was not obliged to do so; it is equally clear that under no circumstances could an action involving a person's freedom be heard locally. There was also a financial limit on the jurisdiction of local magistrates: at Irni this was 1,000 sesterces; in larger communities this figure will have been larger. Whether an action for a larger sum could take place there with the agreement of the defendant is disputed (*lex Irn.* 84).

6. Extraordinary proceedings

Ordinary formulary procedure came to be described as the *ordo*; any procedure which fell outside it was *extra ordinem*. The term used for a later type of civil procedure, *cognitio extra ordinem* ('extraordinary *cognitio*'), does not therefore refer to a single unitary procedure but is simply a collective term for completely different procedures whose only common feature was that they did not fall under the ordinary procedure. Provincial governors, for instance, had long exercised their jurisdiction in a way which did not fall within the ordinary procedure: as mentioned already, this is thought to be one of the roots of the *cognitio* procedure.

One instance of a new use of *cognitio* under the principate was the jurisdiction for *fideicommissa*, 'trusts', established by the emperor Augustus (see chapter 3). Rather than leaving them to the ordinary jurisdiction of the praetor, he entrusted *fideicommissa* to the consuls, magistrates who ordinarily played no part in civil jurisdiction. Under Claudius two special *praetores fideicommissarii* were appointed; later this was reduced to one. Their jurisdiction and that of the consuls seem to have been concurrent; probably the consuls dealt only with the most important cases. Regardless which magistrate had jurisdiction, the procedure remained an extraordinary one (Just., *Inst.* 2.23.pr.–1; Pomponius, *D.* 1.2.2.32). Other special praetors for such things as fiscal matters, and various prefects, also exercised jurisdiction which falls within this category. So did the emperor.

The central characteristic of these extraordinary procedures is that they had a single stage only, and the case was not remitted in a separate stage for trial by a judge but was disposed of by the magistrate. In practice a busy magistrate will not have been able to deal with many cases in person, from start to finish, and the practice was therefore to appoint a

deputy to determine the case (*iudex pedaneus*). Even the emperor might sit as a judge; again, it is more likely that he would appoint a deputy to sit in his place (Peachin 1996).

The judge was for the first time an official (although still not necessarily a lawyer). But this had an important consequence: for the first time there could be an appeal against the judgment to a higher-ranking official. Ultimate appeal would lie to the emperor as the pinnacle of this hierarchy of officialdom.

Although *cognitio* was conceptually different from the formulary system, the differences between the two systems can be exaggerated. The critical points are that in formulary procedure the parties were entitled to select their own judge, while in *cognitio* they were not; in formulary procedure the magistrate was obliged to appoint someone else as judge, while in *cognitio* he was not; in formulary procedure there was no appeal, while in *cognitio* there was.

It will be clear even from this sketch that *cognitio* had many roots, and that it is not possible to settle on a date at which it became 'the procedure' for civil business. Formulary procedure was formally abandoned only in the fourth century, although it had probably fallen into desuetude by the end of the third (Kaser 1996: 435–45). For much of the classical period the two types of procedure must have co-existed.

II VINDICATION OF RIGHTS IN PRACTICE

The last section attempted to sketch out the workings of the various systems of civil procedure, so far as we are now able to reconstruct them. But an even more difficult task of reconstruction is that of procedure in practice, and how parties would actually have experienced the workings of these systems. Here there are several topics worth considering.

1. Procedural advantage

A knowledge of procedure brings its advantages, first at the stage of setting up arrangements which are intended to produce certain legal effects; and second at the stage of deciding which form of legal action to employ.

Probably the best examples of the first are to be found where two different methods of achieving a result were available, one of which would give rise to an ordinary action under the formulary procedure and the other to an action justiciable under *cognitio extra ordinem*. The clearest

example is probably that of legacies and *fideicommissa*. In formulary procedure, to which a legatee must resort, only money judgments could be pronounced, so that the legatee could never be assured that he would actually obtain the property bequeathed. In the extraordinary jurisdiction responsible for *fideicommissa*, however, the judge could pronounce an order for delivery of the actual property. A testator who really thought about these questions, and to whom it was really important that a beneficiary should receive a specific piece of property rather than its value, would therefore be inclined – or at least well-advised – to use the method of *fideicommissum* rather than legacy. Whether this entered into the calculations of many testators is an open question. This procedural issue is one which would have arisen only in Roman practice and presumably not in the provinces: there the governor or his deputy disposed of all cases and will hardly have switched from one procedure to another according to what sort of case he was hearing.

The second context in which procedural advantage can be exploited simply involves assessing what must be proved in order to obtain a remedy and taking the most advantageous course. To take an example from chapter 4: using the *actio Publiciana* to recover property would be simpler than using a *vindicatio*; instead of proving absolute ownership, it would be necessary to prove only that one had acquired possession in good faith and for a good cause. To use an interdict to recover possession would often (depending on the facts) be simpler still. Similarly, if a neighbour was constructing a dangerous edifice, the choice would lie between *operis novi nuntiatio*, *damnum infectum* and the interdict *quod vi aut clam*: the first of these would do if the work was still proceeding, the third if it was not; the second would require that there be some defect in the construction. The point is simply that knowing your remedy was a vital part of successful litigation. And the law was sufficiently complex that knowing your remedy meant knowing a man who did: a jurist.

2. How easy was it to get the defendant into court?

Suing those who are wealthier and more powerful is never easy, and the need to do so must have been a deterrent to some would-be litigants. It may be, however, that this was not the greatest of the plaintiff's difficulties (though for a different view see Kelly 1966: 6–11, 27–9). The praetor took measures to preserve the dignity of his own jurisdiction: where a defendant failed to respond to a summons before him, he was

treated as being in hiding, and the praetor would grant the plaintiff's request for an order giving him possession of the defendant's property (Lenel 1927: 415; Kaser 1996: 222). Once in possession, the plaintiff would be able to take steps to sell property in order to satisfy his claim. Of course, this procedure might be thwarted if the praetor refused to grant the order (an issue to which we shall return), or if the defendant had no property within the jurisdiction. But for many cases it should have been adequate.

The praetor (or, presumably, the provincial governor in the provinces) also stepped in to support the jurisdiction of municipal magistrates, by promulgating an edict for the event that a defendant failed to answer a summons to court. The law was clear: even a defendant who claimed that the court had no jurisdiction over him or the particular case was obliged to answer a summons to it; from there the case would, if appropriate, be remitted to a higher court (Lenel 1927: 51–3).

3. Could magistrates be relied upon?

So far it has been assumed that the praetor could be relied upon, taking legal advice where necessary from jurists, to grant the appropriate formula *sine ira et studio*. But even in the Digest we hear of unfair or incompetent praetors or provincial governors (Paul, *D.* 1.1.11; Papinian, *D.* 29.5.21.2; Maecianus, *D.* 36.1.67.2; Ulpian, *D.* 37.10.3.5). At least so far as incompetence is concerned, matters could be improved by taking advice; and we hear of no less a jurist than Ulpian sitting as assessor to a praetor (Ulpian, *D.* 4.2.9.3). Unfairness must have been a much more intractable problem.

Part of the problem, at least while the edict continued to develop, must have been the immense discretion conferred on the praetor to grant remedies, including remedies which did not appear in the edict itself (actions *in factum*), or to refuse them. In 67 BC a statute, the *lex Cornelia*, was enacted to require praetors to publish their edicts and administer justice in accordance with them. So there was plainly an awareness of the risks of wholly unfettered discretion; yet on the other hand the flexibility of the edict was its chief advantage as a fertile source of new law.

The problem must have been exacerbated by the political nature of the praetor's office: this was just one step in a political career, and advancement to the next step, the consulship, depended at least on retaining existing, and preferably on acquiring new, powerful friends.

Pressure must have been acute: after Sulla each year offered only two consulships, yet each created eight praetors eager to go on to occupy them. The scope for a less than wholly impartial administration of justice is obvious.

It may be that matters were worse in the provinces, although our evidence is thin. In Cicero's speeches against Verres we have an entire catalogue of the wrongdoing of a provincial governor, when exercising essentially the same control as a praetor over the grant or refusal of remedies (Cic., II *Verr.* 1.119–21; Frier 1985: 57–78).

The *lex Cornelia* therefore provides one early indication of a need to curb praetorian discretion. Another is provided by the presence in the edict of a curious clause translatable only awkwardly 'That he who has established a matter of law in relation to another person should be governed by the same law himself' (*quod quisque iuris in alterum statuerit, ut ipse eodem iure utatur*). A litigant who alleged that his adversary in court had, while himself a magistrate, made a particular decision could demand under this edict that the same decision be applied against him, and so require him to live by his own rule in his own case. The number of times it can have happened that a magistrate made a decision on the very point which then subsequently confronted him in his own case seems unlikely to have been very great, and the incentive to good behaviour provided by this edict correspondingly modest. None the less, the existence of this edict does seem to suggest that some effort may have been necessary to keep the magistrates in order (Lenel 1927: 58–9).

So far as municipal jurisdiction is concerned, it is likely that the same sorts of problems occurred. It is interesting that the municipal statutes not only provide what legal documents are to be displayed in the local forum but also take the trouble to spell out that they must be displayed 'so that they can be properly read from ground level' (*ut de plano recte legi possint*; *lex Irn.* ch. 85).

We can detect some institutional safeguards against abuse of their position by local magistrates. Chapter 84 of the *lex Irnitana* establishes a rather low limit on the jurisdiction of the local magistrates at Irni. In particular, as we have seen, any case in which condemnation would lead the defendant to suffer *infamia* could not be heard at Irni unless the defendant consented to it. Instead it must be remitted to the provincial governor. For a small community such as Irni it might well have been difficult for a defendant to obtain justice at the local level, if he happened to have alienated key figures in the administration of justice. It was therefore vital that he be entitled to insist on his case going before a court at

some remove, where personal prejudice within the local community would play a much less significant role.

4. Could judges be relied upon?

The judges under the formulary system were not lawyers, but individuals selected by the parties to determine their dispute. They were there to get the answer to the (implied) questions in the formula right, by hearing the necessary evidence. Whether they succeeded in doing so is impossible to tell: it is obscured to a large degree by the 'yes or no' judgment, with absolutely no reasons, which the formulary system entailed; and by the fact that there was no appeal from the judge, so that we never hear of judges being put right by higher courts. Naturally, mistakes were made; and from time to time jurists speak of the ignorance or stupidity of judges; the same happens nowadays, of course (Ulpian, *D.* 21.2.51 pr.; Paul, *D.* 24.3.17.2). Where legal problems arose in relating the facts to the formula, the judge would require to call for legal advice. Judges tended to sit with a panel of advisers (*consilium*), at least one of whom might have had legal expertise. Although our evidence is late, it also seems that judges often sat with assessors, who are likely on the whole to have had legal knowledge with which they could assist the judge (Paul, *D.* 1.22.1). It is true that there is no guarantee that an assessor would be appointed on grounds of professional competence rather than personal favour. But this, and the additional possibility of consulting jurists, must have introduced at least an element of legal rigour into proceedings.

The second-century author Aulus Gellius in a well-known passage describes his difficulties on being appointed judge in a case. In the end, having taken advice, he was simply unable to reach a decision and took the only way out open to him: to swear an oath that he could not decide (*sibi non liquere*). That was one possibility, although the judge would be expected preferably to return a decision to absolve or condemn (*Noctes atticae* 14.2).

Judges then were not appointed for their legal knowledge. It might be hoped that they would be appointed for their fair-mindedness and independence of mind. Is that hope warranted? In the past, considerable pessimism has been expressed about their honesty and their openness to corruption (Kelly 1966: 31–68). But it is worth bearing in mind evidence on the selection of judges which has come to light since these negative assessments were made. For the first time, the *lex Irnitana* gives us full information about the criteria for eligibility to be a judge and the proce-

dure for selecting a judge in a given case. It is true that the *lex* relates to municipal procedure, but there are strong reasons for thinking that it was modelled on the procedure applicable in Rome itself. (See chapter 1 above and *lex Irn.* chs. 89, 91 and 93.)

The essential point is that the parties could agree on their own judge. Only in the event of the parties' failure to agree on a name did the criteria in the *lex Irnitana* for eligibility to be a judge and the procedure for appointment come into play. Chapter 86 requires that the magistrates should within five days of entering office publish a list of those eligible for appointment as judges, divided into three panels of equal size. The number to be appointed is fixed by the provincial governor. The main criteria are that the person should be a decurion or councillor, or otherwise be of free birth, over the age of twenty-five, and meet a certain property qualification. (It seems likely that the property qualification varied according to the municipality in question, so there is no reason to think that the extremely modest qualification demanded at Irni – 5,000 sesterces – would apply in larger municipalities.) In addition, those who were ill or over sixty-five were not to be appointed.

From chapter 87 of the *lex* we learn that, if the parties could agree on a judge, it was open to them to have the praetor appoint him as judge in the case. If they could not agree, there was a system for arriving at a name from the published lists. First, starting with the plaintiff, each party would reject one of the three panels. From the remaining panel, the parties would then alternately reject a name until only one was left. If the number of names in the panel was uneven, the plaintiff had the first rejection; if it was even, the defendant did: so in either case the defendant had the right to make the final rejection. The rigorousness with which the *lex* attempts to eliminate possible partiality of the judge is striking.

If both parties trusted a given individual sufficiently to agree to him as their judge, the chances are that as a rule he would not be open to bribery by either. Of course, we cannot assess how often agreement would have been reached. It seems likely that very often it would have been necessary to go through the process for selection of a judge. Here too our new evidence suggests that great care was taken to devise a system under which one could have some confidence that the judge ultimately appointed was not *parti pris*. Of course, it must be the case that some judges, once appointed and in a position to determine the outcome of the case, would have seen this as an opportunity to earn some money. There is no shortage of literary references to corrupt judges, and even

the jurists from time to time refer to the unfairness of judges (Ulpian, *D.* 3.6.1.3; *D.* 49.1.1 pr.). There were, however, procedures for replacing judges who had a conflict of interest: such as the one who was appointed heir by one of the litigants (Ulpian, *D.* 5.1.17).

There were other devices to attempt to keep the judge in order. There is, for example, an institution in Roman law known as the 'judge who makes the case his own' (*iudex qui litem suam facit*). This falls within the category of quasi-delicts, a rather miscellaneous category of civil wrongs which imposed liability in damages on the wrongdoer. The evidence on this is very meagre, although it has again been usefully supplemented by the *lex Irnitana*. It now seems that the judge was regarded as making the case his own, and therefore as becoming personally liable to satisfy the plaintiff's claim, if he exceeded his powers by failing to deliver a judgment, or validly adjourn proceedings, within the time provided for him; but also if his judgment was tainted by bad faith (*lex Irn.* ch. 91; Ulpian, *D.* 5.1.15.1).

So far as the *cognitio* procedure was concerned, much of what has been said above does not apply, since the parties did not select their own judge. Here they were effectively at the mercy of the magistrate, who decided that question for them. In essence, therefore, this comes back to the question whether the magistrate himself could be relied upon. To that, little can usefully be added to what was said above, other than to note that imperial guidance was given that it would be inappropriate to appoint as judge a person specifically requested by one of the parties (Callistratus, *D.* 5.1.47).

Yet matters go further than the legal knowledge and fairness of the judge: the question also arises how the judge would actually discharge his role. Since in formulary procedure the judges were not professional, there is a limit to what can usefully be said in general about judicial behaviour. So far as the evidence is concerned, there were established rules about which party bore the burden of proof: in broad terms, the plaintiff must prove the essence of his case, and the defendant the essence of any defence (Celsus, *D.* 22.3.13; Ulpian, *D.* 22.3.19 pr.; Kaser 1996: 363). Matters are vaguer when it comes to the witnesses and other evidence actually led in court. The material preserved in the Digest (*D.* 22.3) and Code (*C.* 4.19) is of limited value here, since nearly all of it appears to be concerned with the *cognitio* system of procedure.

There can be little doubt that the Roman judge might take into account factors which to a modern judge would seem irrelevant. Considerations about the relative worthiness and social status of the

parties played an open part, greater (it is to be hoped) than they do today. The issue of worthiness is the first point mentioned by the jurist Callistratus in his remarks on weighing up the credibility of witnesses' testimony, and his approach is supported by the rescript of the emperor Hadrian which he goes on to quote (*D.* 22.5.3). (Although this is clearly a case of *cognitio*, the same seems likely to have applied in the formulary procedure too.) The same concern surfaces in Gellius' case: he was urged that his was a court of law not of morals, and his *consilium* of advisers took the view that he should absolve the defendant owing to lack of evidence, but a philosopher he consulted advised him to place more weight on the character of the parties involved (14.2.8–9, 21–3). The fact that insufficiency of evidence was not itself decisive for Gellius speaks volumes.

It is clear from the literary sources that 'evidence' was often produced to make an emotional impact, or because of the favourable light it cast upon a party in general terms, rather than because it was germane to the point at issue. Cicero's speeches, even in civil litigation, contain (by modern standards) extraordinary abuse of the defendant, his witnesses, and – this is barely an exaggeration – his relatives and friends. The same was true of litigation in Athens. It may be that running this gauntlet was a deterrent to some litigants (Kelly 1976: 97–8). It does, however, seem doubtful that this was absolutely standard practice for civil proceedings before a single judge, on whom such outpourings of rhetoric might well have been wasted. In the early second century AD Pliny implies that the place for real rhetorical flights was the centumviral court, where there was a much larger audience. As in Athens, the popular entertainment provided there must have been not least at the expense of the litigants and their good names.

Until Justinian's day, in the ordinary case no special importance seems to have been attached to written evidence, so the judge's assessment of the credibility and reliability of the witnesses must have been decisive (Scaevola, *D.* 22.3.29 pr.; Gel., 14.2.7; Kaser 1996: 369, 600; Peachin 1996: 70; Crook 1995: 144).

5. Representation in court

Although the legal sources say little about it, it seems that as a matter of course litigants would usually be represented by advocates, practitioners of rhetoric rather than law. This was quite the opposite of the position in Athens, where the rule was that the litigant would present his case in

person, although this might just amount to delivering a speech composed by someone else, and it was also possible to enlist another person to make a supporting speech (Crook 1995: 30–4). But in Rome representation was normal in civil, as in criminal, and administrative cases. The evidence does not suggest that cost stood in the way of people getting advocates or that they were instructed purely by those of the highest social classes: the papyri indicate rather that advocates might appear even for parties of apparently modest means and in cases of modest significance (Crook 1995: 62–9, 131–5).

Nowadays the costs of litigation are high, and it is well known that there is a poverty trap: the rich can afford to litigate and so can those who are sufficiently badly off that they are eligible for legal aid from the state. The situation in Rome was different. There was no legal aid. But neither advocates nor jurists were paid. Instead, litigation meant undertaking social obligations, which might be called upon in the future; it meant entering upon the network of patron and client relationships. It would of course be naive to assume that justice was therefore open to everyone. The reality must have been that success in litigation depended on interesting the best possible jurist in giving advice, and the best possible advocate in presenting the case. In a way, such things are more easily managed if it is a simple matter of paying for them.

6. Other obstacles

Access to knowledge of the law must have been difficult for both litigants and judges, especially outside Rome and major provincial centres. The edict itself was a model of concision and precision rather than clarity. The writings of the jurists, if available, were alarmingly extensive: every edictal provision and more besides had been scrutinized and closely commented on in detail.

There were problems of legal certainty induced by the fact that the jurists conspicuously failed to agree on certain issues: the outcome of a case might turn on the chance of which jurist of which persuasion happened to be consulted by the judge. (On the other hand, much turns today too in British courts on the chance which judge is allocated to hear a particular case.)

From Pliny's experience in Bithynia it is clear that in the provinces access even to a basic library of legal materials could not be taken for granted. As the volume of imperial law-making grew, so did the problems of knowing where to find a given rescript; so even did the difficulties

in knowing whether a rescript relied upon by one of the litigants was genuine (Plin., *ep.* 10.65–6; also *C.* 9.22.3 (AD 227)). These difficulties would not be resolved until systematic attempts were made to collect and order imperial rescripts. But this was not to happen until the end of the third century.

The massive edictal commentaries, especially those of Ulpian and Paul of the early third century, may have done something to satisfy this need for knowledge. Clear and comprehensive, authoritative, and in a sense consolidating the work of their predecessors in the two centuries before, these works may well have helped to fill the gap in knowledge about the law and the helplessness inspired by its immense volume.

7. *Conclusions: the quality of justice*

Litigation in Rome was fraught with more difficulty than the works of the Roman jurists may suggest. There were difficulties of access to knowledge about the law; difficulty in activating its procedures; doubts about the quality and impartiality of both magistrates and judges. To draw firm conclusions about the quality of justice in a system of this sort is literally impossible. But three final points may be made.

First, it is essential to remain constantly aware of the nature of our sources. To read modern books of law would not give a perfect picture of the realities of vindicating rights in practice. No more should we expect the writings of the Roman jurists to achieve that. A fuller picture requires the use of other kinds of sources.

Second, the Roman system – extraordinary and brilliant though the achievements of its jurists were – is not above criticism. Is that surprising? In any system run by humans, as the Roman one apparently was, there will be human error, and scope for human frailty and prejudice. The aim can only be to attempt to reduce these failings to proportions which are tolerable. In this chapter we have seen some of the safeguards which were introduced in the attempt to achieve precisely that. Of these perhaps the most notable is a general tendency towards centralization: if justice was hard to obtain in a local jurisdiction because of the lack of knowledge or competence or the prejudice of local magistrates, the solution lay in directing decision-making onward and upward. Under the formulary procedure, although there was no appeal, there was concern, attested by the municipal statutes, to direct important cases to regional or central jurisdictions. While this must have caused delay and expense, both of which might have been unwelcome and prejudicial, it must have

done much to improve the quality of the administration of justice. Under the *cognitio* system, a system of appeals from lower magistrates to higher ones and finally to the emperor ought again to have given hope that justice would ultimately be achieved.

Third, it is vital to avoid the dangers of anachronism. Acceptable Roman law is law that was acceptable in Rome. Our own standards and expectations are plainly different. Although Roman judges undoubtedly could and did consider material which would be inadmissible in a modern court, in their judgments they embodied the values of their society. It is hard to claim that they should have done anything else.