IMPACT OF EMPIRE · VOLUME 34

The Impact of Justice on the Roman Empire

Proceedings of the Thirteenth Workshop of the International Network Impact of Empire (Gent, June 21–24, 2017)

Edited by
Olivier Hekster and
Koenraad Verboven

BRILL

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Impact of Empire

ROMAN EMPIRE, C. 200 B.C.–A.D. 476

Edited by

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Editorial Board

VOLUME 34

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LEIDEN | BOSTON

Library of Congress Cataloging-in-Publication Data

Names: Impact of Empire (Organization). Workshop (13th : 2017 : Ghent, Belgium). | Hekster, Olivier, editor. | Verboven, Koenraad, editor.
Title: The impact of justice on the Roman Empire : proceedings of the thirteenth workshop of the International Network Impact of Empire (Gent, June 21-24, 2017) / edited by Olivier Hekster, Koenraad Verboven.
Description: Leiden ; Boston : Brill Nijhoff, 2019. | Series: Impact of empire, Roman Empire, c. 200 B.C.-A.D. 476 ; Volume 34 | Includes bibliographical references and index.
Identifiers: LCCN 2019011698 (print) | LCCN 2019013016 (ebook) | ISBN 9789004400474 (ebook) | ISBN 9789004400450 (hardback : alk. paper)
Subjects: Subjects: LCSH: Roman law–Political aspects–Congresses. | Justice, Administration of (Roman law)–Congresses. | Rome–Politics and government–30 B.C.-476 A.D.–Congresses.
Classification: LCC KJA147 (ebook) | LCC KJA147 .I47 2019 (print) | DDC 340.5/4–dc23
LC record available at https://lccn.loc.gov/2019011698

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISSN 1572-0500
ISBN 978-90-04-40045-0 (hardback)
ISBN 978-90-04-40047-4 (e-book)

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CHAPTER 1

Introduction

Koenraad Verboven and Olivier Hekster

> esse aliquam in terris gentem quae sua impensa, suo labore ac periculo bella gerat pro libertate aliorum, nec hoc finitimis aut propinquae vicinitatis hominibus aut terris continentibus iunctis praestet, sed maria traiciat, ne quod toto orbe terrarum iniustum imperium sit, ubique ius fas lex potentissima sint
>
> There is a people on earth that wages wars for the freedom of others, at its own expense, its own toils and risk—and stands firm not just for those at its borders, or peoples in its near vicinity, or those joint by connecting lands, but crosses the seas so that there would be no unjust rule in the world and justice, and divine and human law would everywhere prevail.
>
> Livy, 33,33

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For Romans, justice was the value that most legitimised their right to rule other peoples. Internally, it was a leading political principle that justified the power entrusted to emperors and senatorial, equestrian, and decurional elites. This seems paradoxical in modern eyes. The violence and brutality with which Rome conquered its empire and subdued the nations in it was on a scale rarely witnessed before.[1] Its rule relied on structural violence towards slaves, lower class, and conquered people, and on massive inequality between differ-

1 C.B. Champion, 'Conquest, liberation, protectionism, or enslavement? Mid-Republican Rome from a Greek perspective', in A. Ñaco del Hoyo and F.L. Sánchez (eds.), *War, Warlords and Interstate Relations in the Ancient Mediterranean* (Leiden, Boston 2018), 254–265; A.M. Eckstein, *Mediterranean Anarchy, Interstate War, and the Rise of Rome* (Berkeley 2009); S.P. Mattern, *Rome and the Enemy. Imperial Strategy in the Principate* (Berkeley, London 2002); C.A. Barton, 'The price of peace in ancient Rome', in K.A. Raaflaub (ed.), *War and Peace in the Ancient World* (Oxford 2007), 245–255.

 | DOI:10.1163/9789004400474_002

ent social groups. The empire was a monarchy dressed up as a Republic. Yet, it nonetheless addressed elites, city-dwellers, land-holders and peasants from widely different ethnic, cultural, and social backgrounds as stakeholders of a social order governed by law and justice. Remarkably, many genuinely believed they were. The 'rule of law' imposed by Rome was eventually—if not initially—accepted as legitimate by the vast majority the empire's inhabitants. During the first centuries of our era up to a quarter of the entire human race expected justice from Roman authorities or Roman backed local authorities and arranged their lives accordingly.[2]

The ways in which the notion and practice of justice impacted on the functioning of the Roman Empire formed the subject of the thirteenth workshop of the international network *Impact of Empire* (*Roman Empire, 200 BC–AD 476*), held at Ghent University from 21 to 24 June 2017. Inevitably, the writings of Roman jurists provide a great deal of the source basis for this project, but jurisprudence as such was not at the centre of the workshop or of this book. Neither is our project intended as a contribution to the history of philosophical ideas. Both during the workshop and in reworking the papers the emphasis has been on notions of justice and related workings and perceptions of legal systems within Roman society. We have avoided imposing modern notions on what is just or not on the ancient material. Instead we focus on what was considered just in various groups of Roman subjects, how these views were legitimated, shifted over time (or not), and how they affected policy making and political, administrative, and judicial practice.

Underlying many of the chapters in this book is the tension between the preconceptual values of *iustitia* and *aequitas* on the one hand and 'law'—in the sense of a body of legal regulations and of the practice of justice—on the other. Notions of justice and fairness not only shift through time. They are also tied to social realities in complex, sometimes self-contradictory, ways, to which laws and practical justice need to accommodate themselves. The role of Roman jurists, both inside and outside the imperial administration, was crucial in bridging this gap.

At the same time, however, law also constitutes a separate reality of binding texts and institutional practices. These texts and practices reflect not (only) developing notions of what is just and fair, combined with practical considerations on how to impose them on reality. They also reflect tangible political, social, and economic interests. Law is as much (if not more) a device to protect interests than it is to ensure the realisation of abstract notions of justice

2 C. Ando, *Imperial Ideology and Provincial Loyalty in the Roman Empire* (Berkeley 2000).

and fairness. It may not have been in the interest of slaves that they could be freely abused by their masters and suffer the harshest punishments imaginable when convicted of crimes for which senators and equestrians would merely have been exiled—it was in the interest of their masters and the society that privileged them. It may not have been in the interest of freedmen that they had to perform personal labours (*operae libertorum*) for their former masters—it was of their *patroni* and the society that privileged them.[3] It may not have been in the interest of women that they were barred as heirs of patrimonies exceeding the estimated value of 100,000 sesterces—it was in that of men and the society that privileged them (see Köstner in this volume).

This function of the law as 'protectress of interests' is more than an objective reality. Law is potentially a highly effective ideological construct to convince those who are subject to it that structural inequalities in wealth or power are for the common good, even if they are not good for everyone.[4] It is "a thing unavoidable, a necessary ingredient in the best of worlds."[5] Serving the common good means accepting that the private interests of some are better served than those of others. "Better, never means better for everyone … it always means worse for some".[6]

Notions, practice, and ideology of justice are the three strands that tie this book together. In the rest of this introduction, we briefly survey the common themes discussed by the different chapters, which also form the organisational structure of the volume: the emperor and justice; justice in a dispersed empire; differentiation of justice.

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3 W. Waldstein, *Operae libertorum. Untersuchungen zur Dienstpflicht freigelassener Sklaven*, Forschungen zur antiken Sklaverei 19 (Stuttgart 1986); H. Mouritsen, *The Freedman in the Roman World* (Cambridge, New York 2011), 36–65; H. Mouritsen, 'Roman freedmen and the urban economy. Pompeii in the first century', in F. Senatore (ed.), *Pompei tra Sorrento e Sarno: Atti del terzo e quarto ciclo di conferenze di geologia, storia e archeologia, Pompei, gennaio 1999–maggio 2000* (Naples 2001), 1–27; K. Verboven, 'The freedman economy of Roman Italy', in S. Bell and T.R. Ramsby (eds.), *Free at last! The Impact of Freed Slaves on the Roman Empire* (London 2012), 88–109.

4 Admittedly, the relation between 'law' and 'ideology' is a complex one as law itself, through the work of jurisprudents, influences ideologies; see R. Cotterrell, *Law's Community. Legal Theory in Sociological Perspective* (Oxford 1997); A. Halpin, (2006). 'Ideology and law', *Journal of Political Ideologies* 11:2 (2006), 153–168.

5 Voltaire, *Candide. With Twenty-Six Illustrations by Paul Klee* (New York 1920), 18.

6 M.E. Atwood, *The Handmaid's Tale* (Toronto 1985), 222 (chapter 32).

1 The Emperor and Justice

The relation of the emperor to the law and to justice is one of the more central themes of this book. The emperor was guarantor of justice, source of statutory and precedent law, the highest judicial authority, and the ultimate enforcer of distributive and corrective justice. Emperors were judges who received petitions and issued rescripts on paper involving litigants who wanted a ruling on a legal point. Emperors also heard lawsuits or prosecutions themselves and issued verdicts (*decreta*). This was mostly but not exclusively on appeal. Fergus Millar famously summarized this as the petition-and-response model, showing how emperors were expected to be approachable by their subjects and guarantee justice.[7] Emperors were also legislators of general laws, holding extraordinary legislative powers from Augustus onwards, ultimately even allowing Ulpian to argue that *princeps legibus solutus est*.[8]

The ideological and practical importance of the Roman emperor as an administrator of justice is addressed in several of the chapters in this volume. It is at the core of the argument by Benoist and Gangloff who trace back the effectiveness of the law as a potential ideological force to the Ciceronian conception of *iustitia* as inherent to the *Res Publica*. In their view, this made 'imperial' justice not primarily a private virtue of the emperor—the subject of philosophical reflections—but a political virtue and principle of good imperial government—the subject of political practice. As such, the virtue of justice was inextricably bound up with other political virtues, such as *clementia*, *liberalitas*, or *pietas*. Noticeably, the virtue of justice was not very prominent on coins and Latin literature (more so in Greek literature) partly because it could be shown at work as a practice of government, but partly also because imperial imagery preferred to stress related virtues such as *clementia*.[9] Over time, especially under the Antonines, justice became a more central element in the construction of the 'good' emperor, and the opposition just Prince / unjust Prince continued to be a central focus in the Severan age. The opposition between justice as a virtue and as a practice, however, continued to produce ambiguities. An emperor could be just in his actions, but morally reprehensible in his

7 F.G.B. Millar, *The Emperor in the Roman World* (London 1992, 2nd ed.), esp. 465–477 on access to the emperor and 537–549 on petition and response, with K. Tuori, (2012), 'Greek tyrants and Severan emperors. Comparing the image', *Bulletin of the Institute of Classical Studies* 55 (2012), 111–119: 113–114.

8 *Dig*. 1.3.31 (cf. *Dig*. 32.23, Paulus). On the emperor as *lex animata* see J.-P. Coriat, *Le prince législateur* (Rome 1997), 657, 662, with 8–11 on emperors and legal integration.

9 Cf. O. Hekster, 'Imperial justice? The absence of images of Roman emperors in a legal role', (forthcoming).

private life. Thus, Benoist and Gangloff compare Galba and Severus, both of whom were praised for their sense of justice, but criticised for their severity bordering on cruelty. The rule of one may not have been in the private interests of some but it was in that of all who had private interest to protect. This explains the central role of 'justice' in Roman political culture and imperial ideology.

There were several ways to emphasise legislative and judicial practices that were prominent features of a ruling emperor's public *persona*. As Benoist and Gangloff demonstrate, coins and Latin literature were less prominently employed, but there were alternative ways in which emperors could be shown as legislators and supreme judges. Noticeably, this was done through inscriptions highlighting imperial interventions and by performing justice as judge and interpreter of legal cases. For the Severan age, these performances seem to have been actively broadcast through two works of the jurist Julius Paulus, as argued in Daalder's chapter. She studies thirty fragments in the *Digest* attributed to those two works on imperial judicial decisions. They contain more or less elaborate descriptions of twenty-nine court-cases presided over by Septimius Severus. Since Paul himself served as legal advisor to the emperor he had first-hand knowledge of the cases and provides a unique insight in imperial court proceedings. Daalder argues that Paul's collection was not intended as a legal collection of valid precedents, as scholars mostly believe, but rather highlight Severus as conforming to the model 'emperor-judge' found also in literary sources. The legal status of imperial judicial decisions in early third century was still undetermined. Jurists citing imperial rules rarely mention court decisions. About half of the judgments studied by Daalder concern highly specific cases. They would have been what Ulpian described *constitutiones personales*, without value as precedents but highly effective to represent Severus as the ideal 'emperor-judge'. Imperial decisions had force of law. Conversely, however, while the emperor was not himself bound by any law, it was deemed improper for him not to respect the law. How an emperor dealt with this ambivalence determined how he was perceived by the general population and the elite. This was especially apparent when the emperor himself sat as judge. Paul's collection shows Severus being accessible to litigants from different gender, age, and social background, actively intervening, consulting, and deliberating with his legal advisers on a variety of cases. He allowed his advisers to speak freely and listened in earnest, but showed also his own expert knowledge of the law and did not hesitate to deviate from the opinions expressed, especially to protect litigants against too strict an application of existing laws. Thus, Paul shows Severus as a *bonus princeps* in the same category as Hadrian, Antoninus Pius or Marcus Aurelius.

If good emperorship and justice were so intrinsically linked, the judicial actions of 'bad' emperors could be problematic. This tension is explored by Bono, who in his chapter focuses on the opposition between justice by legitimate emperors and perceived injustice by usurpers. This was a major point in late-antique political thinking. If tyrants were not legitimate, then neither were their legal decisions and verdicts. As a rule, therefore, usurpers' enactments were nullified as the victorious legitimate emperor restored the *status quo ante*. This, however, was neither possible or desirable for the usurper's private legal acts because it would inevitably result in social and economic disruption. Bono argues that this tension was ideologically resolved by construing the victorious legitimate emperor as the restorer of order and protector of the stability of the law. The construction of the victorious legitimate emperor is clearly reflected in the *constitutiones* collected in the legal *Codices*, which were as much part of imperial representation as *Panegyrics*, images on coins or legal collections like Paul's. The recognition of the force of law of decisions in compliance with previous law (i.e. not based on statutes of the usurper) was unproblematic. Yet even decisions based on the usurper's own statutes could be upheld by the victorious legitimate emperor and thereby receive legitimacy. More generally, as Bono shows, private legal acts performed under the usurper's rule were upheld because they expressed the free will of the participants. Formal requirements for legal documents, such as the mention of the consuls' names were waived if the deletion was the result of the *damnatio memoriae* of the usurper. Because the legitimate victor himself was the embodiment of justice and legality, his decision to uphold these acts itself made them legitimate.

Clearly, then, in Late Antiquity at least, emperors were seen as the living embodiment of justice and law itself. Consequently, Wibier argues in his chapter, studies of imperial justice have mostly focused on the emperor and his immediate circle or on the 'users' of the legal system, who sought justice through petitions. Instead, he looks at the 'socialisation through education' process of those at lower levels. Legal textbooks imbued their students with a particular world view and the place of the emperor as legislator and supreme judge. Wibier focuses on the *Fragments of Autun* and compares these to contemporaneous imperial Panegyrics from Autun to show how legal students in the late-third and early-fourth century approached and used legal textbooks to navigate existing power structures ('to play a political game') and thus improve their social and political status.

In the process, Wibier also shows how these legal textbooks were part of a change in discourse that made emperorship increasingly synonymous with embodying justice. In the work of Gaius, he shows, the ultimate source of law is still the *populus*. Imperial decisions had force of law only because emper-

ors were given that authority by the *populus* through a *lex imperii*. In general imperial decisions are only mentioned in passing. The later *Fragments of Autun* on the other hand, focus strongly on imperial decisions. These are elaborately commented upon as precedents that can be invoked and make much of the 'beneficent' nature of emperors and the 'gratitude' owed to them. The 'sovereignty' of the people was simply not an issue in this emperor-centric discours.

This imperial focus was already present in at least some second-century handbooks, as the *Fragmenta Dositheana* show. While Gaius' *Institutiones* seems to have been popular mainly in law schools, the *Fragmenta Dositheana* stems from a manuscript tradition of texts used in Latin teaching and thus addressed a wide non-specialist audience. Specialist juristic works from at least the time of Severus show a shift towards the more emperor-centric views. Wibier argues that this gradual shift is part of 'discursive practices' which themselves contributed to the creation of a new reality. The drivers behind this evolution, he argues, were teachers of rhetoric, such as Menander Rhetor who instructs his student on how to write emperor-friendly speeches by emphasizing (*inter alia*) the emperor's concern for justice. By delivering their speeches these rhetoricians hoped to gain materially, for instance by appointments for positions in the imperial bureaucracy. In the process they taught their students to think in an emperor-centric way.

2 Justice in a Dispersed Empire

Roman emperors may have been strongly linked to all aspects of justice at an ideological level, yet at the same time local laws and legal procedures determined the practice of justice in large parts of the Roman empire. Roman law was the law of the dominant polity, but it was not the only legal system that operated in the empire. Even decades after the promulgation of the *Constitutio Antoniniana* extended Roman citizenship and law to nearly all inhabitants in the empire such local practices remained in use. Yet, as Cortés-Copete notices at the beginning of his chapter, already in his *Oration on Rome* (seventy-five years before Caralla's *Constitutio*) Aelius Aristides' presents the Roman empire as a legally unified empire founded on justice. Cortés-Copete argues that the harmonization of central imperial and provincial local law, which is a central theme in Aristides' oration, reflects legal and judicial reforms promoted by Hadrian in the Greek cities.

That did not imply, however, that Hadrian aimed to replace local laws with imperial regulations. On the contrary, he appears to have strengthened local

authorities and local legal traditions by explicitly confirming cities' rights to follow their own laws. In some cases Hadrian acted as *nomothetes*, lawgiver. Thus, in Athens, he remodelled the city's laws on those of Draco, Solon and other illustrious men from Athens' days of glory. So, while Hadrian promoted legal diversity within the framework of the empire as a whole and under the *aegis* of the emperor, he actively intervened, as emperor, in local legislation, harmonising conflicting local laws and adapting them to the 'common laws' (*koinoi nomoi*) of the empire. One important result (linking this section of the volume to the previous one), was that the emperor emerged from the process as the ultimate source of law and judicial authority. Hadrian pursued this policy through his chancellery by sending letters containing instructions on how local laws and jurisdictions should implement the principles of 'common law'. Thus, his reign became a milestone in the evolution towards emperors being the sole legislators in a legally uniform empire.

Because of the sheer size and diversity of the empire, however, judicial institutions inevitably had to operate on different levels: local, provincial and central. Hurlet, in his chapter, focuses on the central role of justice and judiciary institutions at these different levels in the daily life of the empire's inhabitants. As he shows, there were two main principles which governed the system: subsidiarity and hierarchy. Local courts operated independently according to local law, but Roman law was the universal law of reference and higher courts overruled local ones. Cases of criminal law and financial disputes surpassing a fixed amount fell under the direct jurisdiction of the provincial governor, regardless of the civic status of the accused. It created what Hurlet calls a 'judicial consensus' that united 'the governors and the governed'. This 'judicial consensus', however, was subject to constant negotiation between local, provincial, and imperial powers. Wealthy and influential defendants and accused could circumvent local courts. As Hurlet notices, the less wealthy ones could not (one case of the differentiation of justice which is at the core of the last section of the volume). An undesirable effect was that provincial courts were flooded with appeals against local verdicts in addition to cases brought before the court *ab initio*. Since at least the Principate of Claudius appeals to the *princeps* had to pass the provincial governor first and appeals to the governor required a security deposit of 2500 *denarii*. Nevertheless, this system of subsidiarity and hierarchy remained flexible even on these points. Hurlet shows that it was more easily implemented in the eastern provincies, where local authorities had long been used to royal overlordship, than in the western provinces, in which local peoples had never been subjected to hierarchical institutions before. He suggests that the loss of Germania was ultimately caused by the failure to realise the 'judicial consensus' that formed the corner-stone of imperial success else-

where. This judicial consensus was not based on justice as a moral value, but on the self-interest of the parties concerned. In many cases this included the ability to use (or even abuse) the system to one's personal advantage. From the imperial perspective, justice and judicial practice were instruments of domination.

Ando, in his chapter, approaches the problem of central justice in a dispersed empire from a different angle. The question central to his argument is whether Roman magistrates would honour decisions of local courts that violated their notions of substantive justice if local rules of procedure had been carefully followed? Or were central Roman notions of substantive justice deemed sufficient ground to overrule local courts? This is linked to a tension between a concept of the legal system as inherently just, and concerns that too much attention to specific wordings could lead to a substantively unjust outcome.

Ando shows that there were demonstrable concerns about these tensions between procedural rectitude and substantive justice in nearly every reflection on the legal-historical change offered in Roman jurisprudential writings. These arguments developped, *inter alia*, via reflections on social change. Society changed, with as inevitable result that wordings of older *formulae* were no longer adequate. Early juridical considerations of this process concern issues of legal legitimacy, but by the Antonine period they lead to discussions of substantive justice. A similar development occurred in provincial law, whereby Roman governors' first concern was the technical justiciability of disputes between autonomous communities or individuals from communities with different legal systems. Even in Gaius' description of *ius civile* as opposed to *ius gentium* there is no formal presumption that *ius civile* was dictated by concerns for substantive justice. Likewise, Julian prescribed that governors should first use local written law, then customs and usage, then to what is closest to or implied by these, and only in the last instance Roman law. Concerns for substantive justice (*iustitia, humanitas, benignitas, aequitas* ...) were irrelevant. Nevertheless, as Ando notices, by the early-second century CE the practice of judging specific cases by standards of substantive justice begins to emerge. Again, then, there seems to be a chronological development toward a notion of justice that places substantive justice over procedural correctness. One central conclusion from this section of the volume as a whole, then, seems to be increasing centralisation of Roman notions of justice. This, at least, was a real impact of continuing empire.

The final chapter in this section discusses the tension between the practicalities of justice at the local level and the above-mentioned notion of central imperial justice. Like Cortés-Copete, Herz starts his chapter with Aelius

Aristides' portrayal of the Roman empire as a harmonious and legally unified empire. This portrayal, however, must have been substantially different from practicalities. Herz notes how most of policing and fighting unrest in the empire was 'delegated' to the local levels, and that, furthermore, these local levels were no homogeneous units. This lead to organisational difficulties. Problems must have been especially severe in areas with a low urbanisation level—since it is likely that security control there was rudimentary at best. There was, as Herz emphasises, a clear difference between the official claim to guarantee security, peace and justice for all and the practical possibilities to accomplish these goals. On the opposite, there is substantial evidence that outside of the larger Roman cities and their hinterlands there were areas that should better be characterised as effectively lawless. Rather than Aristides' imperial justice, local experience must have highlighted a high level of (social) inequality, with the vast majority of subjects fighting for survival at a daily basis. Conflicts were often solved through violence, with a state that could only guarantee public security and justice in a very limited part of its territory. The difference between Roman justice as embodied through the emperor, and subjects' experiences in the provinces of that imperial justice must often have been pronounced.

3 Justice for All?

Clearly, not all individuals in the empire experienced the same level of justice. In the chapters discussed above, differentiation in wealth and geographical differentiation were already signalled as factors that made substantial difference in what justice was bestowed. But difference of (social) status was also a structural feature of Roman law, pertaining to citizenship, gender, freedom, and to some extent freedmanship.

The first two chapters in this section place the ambiguous position of women in Roman law at the centre. Roman women were disadvantaged in many ways but also enjoyed full property rights and legal agency. In theory this was curtailed by the requirement for a male *tutor* to approve anything they did. In practice by the late Republic this guardianship had become a formality. When Augustus created the *ius trium/quattuor liberorum* the justification itself for the institution disappeared. Women who had given birth to three children (or four in the case of freedwomen) could apply for exemption of the requirement. Many did.

Still, women were not equal to men before the law. How did this observation relate to Ulpian's well-known statement that 'justice is the constant and unwavering determination to give to each his right' (*iustitia est constans et per-*

petua voluntas ius suum cuique tribuendi)?[10] Köstner, in her chapter, discusses this question by focusing on the role of women in Roman inheritance law, in particular the *lex Voconia*. The law forbade wealthy testators to appoint women as heirs. How did that accord with Roman notions of justice? Was the law perceived as unjust, or was Roman *iustitia* gender-specific? Significantly, Cicero (*Rep*. 3,17 (x)) notes the apparent injustice of the law, passed for the benefit of men (*utilitatis virorum gratia*), full of injustice towards women (*plena … iniuriae*). These words were echoed by Augustinus of Hippo (*Civ*. 3.21), yet the law was never abolished. Moreover, Köstner notes how Cicero's opinion will have been influenced by his personal position as father to a sole female heir. There is, she argues, a potential tension between perceiving justice as an all-encompassing virtue, and seeing it as an instrument for interpersonal relations. In the latter context, it would be easy to take *mos maiorum* as a guideline for justified actions—as conservative Roman men did. Consequently, one could argue that the 'new' independence and visibility of Roman women did not fit the proper *mores* and was therefore unjust. Any law curtailing that behaviour would by implication be just. Questions about gendered justice, Köstner argues, relate closely to questions about wether justice was deemed to be good for some*thing*, some*one*, or *every*one. In Rome, it was perceived as fully justified to see laws as a guideline for social interactions, with different sets of rule for men or women.

Pavón, in her chapter, focuses further on the less favourable status of women in Roman law. Jurists were well aware of this but did not consider it as unjust. It was, as also noted by Köstner, in accordance with the general position of women in Roman society and linked to the importance of *mos maiorum*, which was considered valuable in its own right. Additionally, the different treatment of women was defended by pointing at female physical and emotional 'weakness', which made women unsuited for leading positions and diminished their *dignitas*. Pavón traces these perceptions—still held by Papinian and Ulpian in the early third century CE—back to the debates on the repeal of the *lex Oppia sumptuaria* in 195 BCE. She furthermore discusses how a number of laws clearly put forward different norms for women, many of them linked to a general desire to curtail the sexual behaviour of respectable women, such as the Augustan marriage laws and laws against adultery, or the *SC Claudianum de contubernio*. Did women believe these laws to be just? There is little evidence at hand to answer this question, but Pavón notes the protests of Roman women against the *lex Oppia* and the exactions of the *triumviri* in 42 CE.

10 *Dig*. 1.1.10. Cf. Cic. *Inv*. 2.53.160; *Rep*. 3.11.18; *Leg*. 1.6.19; *Off*. 1.5.15.

Apparently, these women protesters felt unjustly treated and did not hesitate to take action. Pavón also interprets the self-declaration of women to be prostitutes as a protest against the restrictions imposed on 'respectable' women by the Augustan law on adultery. These are glimpses of female disagreement with Roman male justice. Conversely, Pavón notes evidence for women who used the discourse of female weakness to appeal to the protection of government officials, using the discourse to their advantage.

As these two chapters show, there is a sustained ambiguity in Roman society. Women were not allowed to fulfill public offices apart from some priesthoods but we do find them entering into contracts, acception obligations and imposing them on others, and we see them acting as patrimonial managers. In practice women were caught in a vicious circle. Because social and cultural considerations did not allow them to fulfil official duties and to participate in male circles, women's options in life were severely limited. Families were hardly inclined to invest in women studying law or rhetoric when they would never be able to practice these professions. Social and cultural reality *made* women more vulnerable to fraud, which in turn confirmed their *fragilitas* in the eyes of men. Roman law never aimed to reform this reality, causing it to get caught up in a dual logic. On the one hand, women could not be allowed to perform all legal actions because they were socially and culturally firmly set apart. On the other hand, the social and cultural discrimination they suffered had to be remedied because they did have legal agency in private affairs.

Women are only one example of the social variety that Roman law took into account. Slavery and freedmenship is another. The distinction between *honestiores* and *humiliores* (formalised only in the third century) yet anothter. Since the essence of distributive justice was to give each person his or her due, the diversity of social statuses implied that equality in law would be unjust in fact. So what a person's due was depended on gender and legal and social status.

This type of differentiation of justice was made highly visible in a much-discussed form of Roman justice: the 'display of cruelty'. Carucci, in the final chapter of this volume, highlights how justice must not only be done; it must also be seen to be done. As in most preindustrial societies, executions in the Roman world were carried out in public. But Roman culture was exceptional in embracing the principle that the form of punishment should reflect the nature of the crime. Moroever, in line with what we discussed above about social differentiation of justice, the social status of the perpetrator was much more developed Roman punishment culture than in most other historical societies we know of. This may be linked to the incorporation of executions in public games. The well-known use of criminals in the re-enactment of myths is a spectacular (although in practice probably exceptional) example of how

this works.[11] Carucci discusses unique north-African mosaics showing such displays. These may reflect border raiders by real 'barbarians' rather than executions of 'home-grown' criminals. But the practice is widely attested in literary and legal sources as well as in other iconographic sources. While it may not have been frequent outside major cities, it will have been a conspicuous reality to most inhabitants of the empire.

Those inhabitants themselves, as Carucci recognsises, were also on display. The seating arrangements in theatres, amphitheatres, circuses, and *odea* visually reproduced social order. Civic elites had seats of honour on the front benches, followed by male citizens, women, and slaves. In many cities respected associations had blocks of reserved seats.[12] Throwing a condemned criminal to the wild beasts or burning him alive was more than just 'thrilling' or 'fun to watch'. As argued by Carucci in this book, it symbolised the expulsion of the condemned from civilisation and human society, which itself was watching, neatly seated in a grand expression of social order. The same logic applied to condemned Christians. By refusing to acknowledge the state gods, the divine power (*numen*) of emperors, the strength of their protective *Genii* and the divinity of the *Divi* Christians knowingly placed themselves out of civilised society and forfeited the protection that came with it.

As gallows were a familiar feature of the monumental landscape around medieval and early modern towns and villages,[13] so in Roman times crosses with convicts dead or dying in agony would have been an unexceptional sight. Roman citizens were spared death on the cross, making it a mark of slaves and non-citizens. As a rule (although there were exceptions) convicted Roman citizens in the arena were swiftly executed with a blow of the sword rather than thrown *ad bestias* or burned alive. Over time the dichotomy *honestiores* ('the honourable' classes) versus *humiliores* (everyone else) superseded the distinction between citizens and non-citizens. But the principle never changed. *Honestiores* were generally spared the harshest or most shameful forms of punishments; *ingenui* were preferably not subjected to torture or whippings. The *cognitio extraordinaria* provided scope for exceptions, but these rather underscored the exceptional nature of the crime or the exceptional depravity of the

11 Cf. K.M. Coleman, 'Fatal charades. Roman executions staged as mythological enactments', *Journal of Roman Studies* 80 (1990), 44–73.

12 K. Verboven, 'Guilds and the organisation of urban populations during the Principate', in K. Verboven and C. Laes (eds.), *Work, Labour, and Professions in the Roman World* (Leiden, Boston 2017), 173–202: 189–190.

13 J. Coolen, 'Places of justice and awe. The topography of gibbets and gallows in medieval and early modern North-Western and Central Europe', *World Archaeology* 45:5 (2013), 762–779.

convict than infringe the principle of status-based differential punishments. Justice must not only be shown to be done. In Roman eyes it had also to be shown *to whom* it was done and in what way.[14]

4 Final Reflections

How effective was Roman justice? There is more than one answer to this question. Practising justice was (and still is) costly. It required time and resources that the imperial administration alone could not muster. The severity of punishments is equally (if not more so) an indication of the small chances of being caught or convicted. It has often been said that Roman cities had no police force. That is not entirely true. Local magistrates could use their *lictores* (perhaps also public slaves) to perform justice and small detachments of soldiers could and were called upon to perform police duties. But it is true that these quasi-police forces were wholly inadequate. The centrality of justice in imperial ideology and practice nevertheless argues against too bleak a view of the impact of law and justice on life and administration in the Roman empire. Even in a context of weak formal institutions, law and justice create a powerful cultural frame and a cognitive template that allowed the prevention and handling of conflicts in relatively peaceful ways. It legitimised interventions by public authorities and shaped expectations people had from them. Equally, perhaps even more, important is the effectiveness with which law and justice successfully integrated culturally and socially different groups with sometimes opposing interests into a single empire that in cultural terms outlasted even the political institutions that formed it. This book, we believe, will contribute to a better understanding of how this was possible.

Last but not least, it is our pleasure here to thank the people and funding bodies that helped us to realise the workshop and this ensuing book. In the first place we wish to thank dr. Wouter Vanacker, who helped to write the position paper to start the project, select speakers and contributing authors, and took upon himself most of the logistics of organising the workshop. Thanks are further due to Joost Snaterse for copy-editing. As always, the management team of the Impact of Empire network has been instrumental in continuing our successful series of workshops. This 13th Impact of Empire workshop was made possible thanks to generous financial support from Flanders Research

14 For an in depth treatment with numerous examples see J.-J. Aubert, 'A double standard in Roman criminal law?', in J.-J. Aubert and B. Sirks (eds.), *Speculum iuris. Roman Law as a Reflection of Social and Economic Life in Antiquity* (Ann Arbor 2002), 94–133.

Foundation (FWO), the Ghent-Brussels Roman Society Research Centre, the Department of History and the Faculty of Letters and Philosophy of Ghent University, and the Faculty of Arts of Radboud University Nijmegen.

PART 1

The Emperor and Justice

CHAPTER 2

Culture politique impériale et pratique de la justice : Regards croisés sur la figure du prince « injuste »

Stéphane Benoist et Anne Gangloff

1 Introduction : discours impérial et culture politique, vertus et figures modèles, bons princes et tyrans.

Afin de placer les propos au cœur des pratiques du politique à Rome, et partant dans le monde romain impérial, des dernières décennies de la République au tournant des III^e^ et IV^e^ siècles de notre ère, il s'avère judicieux de prendre la mesure, en introduction, du projet cicéronien de définition de la *res publica* et du rapport entre la société politique, ses institutions et ses modes de fonctionnement, à partir des quelques figures envisagées, notamment les *rectores rei publicae*[1]. Les comportements des magistrats, et plus particulièrement leurs dérives, ô combien mises en scène dans nombre de traités et discours de Cicéron, sont un excellent observatoire de l'usage politique, sinon idéologique[2], des vertus en politique. Les débats de la République finissante nourrissent les enjeux des réflexions politiques des *imperatores*, puis de l'*Imperator Caesar Augustus*, même s'il convient de s'accorder sur la distance qui sépare les analyses du consul de 63 av. notre ère et les lectures mises en pratique par le jeune César, de la période triumvirale à l'installation proprement dite du principat augustéen[3].

1 En partant notamment des études réunies par J. Powell & J. North, in *Cicero's Republic* (Londres 2001) et de l'étude de J. Powell, 'The *rector reipublicae* of Cicero's *De Re Publica*', *Scripta Classica Israelica* 13 (1994), 19–29.

2 Sur la notion d'idéologie à la fin de la République, les propositions de lecture de Ph. Le Doze, que l'on peut toutefois discuter en détail, dans les trois articles publiés par la *Revue historique* : 'Les idéologies à Rome : les modalités du discours politique à Rome de Cicéron à Auguste', *Revue historique* 654 (2010), 259–289 ; 'Horace et la question idéologique à Rome : considérations sur un itinéraire politique', *Revue historique* 664 (2012), 863–886 ; 'Rome et les idéologies : réflexions sur les conditions nécessaires à l'émergence des idéologies politiques', *Revue historique* 675 (2015), 587–618.

3 Il ne s'agit pas de faire de la réflexion de Cicéron une quelconque préfiguration du régime augustéen, ce qui est notamment réaffirmé par Powell 1994, op. cit. (n. 1) et dans Powell &

 | DOI:10.1163/9789004400474_003

Ancré dans les réalités de son temps, le projet cicéronien, primitivement conçu comme devant constituer un seul ouvrage qui réunirait la matière du *De Re Publica* et du *De Legibus*, postérieurement scindé en deux publications séparées[4], prend à témoin des situations passées afin d'étayer son propos. Dans la perspective que nous nous proposons de suivre, deux éléments méritent attention : – la définition de la *res publica* comme une *res populi* (*Rep*, I, 39), affirmant l'unité du *populus* en raison d'intérêts communs, d'une communauté de droits et d'institutions ; – ainsi que la question de la justice et de l'injustice dans tout gouvernement. Ce dernier point est développé dans une section perdue du livre II que l'on peut reconstituer grâce à saint Augustin[5] ; il est abordé par L. Furius Philus dans un dialogue censé se dérouler en 129 av. notre ère, qui aurait conduit Scipion Émilien à exiger une argumentation plus serrée, résumée pour nous par Lactance[6] et les *Fragmenta Vaticana*. L'importance de la justice dans toute pratique politique (le gouvernement de la chose publique) conduit à suggérer une identité de sort entre *iustitia* et *res publica* : toute absence de justice implique la disparition pure et simple de la *res publica*. C'est pourquoi, si l'on pouvait être amené à considérer que la *iustitia* est absente de l'interprétation augustéenne de la *res publica*, alors il ne pourrait s'agir d'une véritable *res publica* ! On ne peut qu'inscrire les débats nourris à propos d'une quelconque *res publica restituta* dans ce contexte prégnant. Dans cette perspective, le *rector rei publicae* est bien cet *optimus ciuis* qui prend part activement à la vie de sa cité, qui pratique la politique comme une profession et agit pour le bien commun[7]. Que cette conception soit

North 2001, op. cit. (n. 1). On trouvait déjà cette prudence exprimée par J. Béranger dans sa thèse, *Recherche sur l'aspect idéologique du Principat* (Bâle 1953) et la plupart de ses articles, par exemple ceux regroupés dans Principatus. *Études de notions et d'histoire politiques dans l'antiquité gréco-romaine* (Lausanne 1973). Sur les rapports entre Cicéron et Octavien, S. Benoist, 'Cicéron et Octavien, de la *res publica* au *princeps*, lectures croisées', in R. Baudry & S. Destephen (eds), *La société romaine et ses élites. Hommages à Élizabeth Deniaux* (Paris 2012), 25–34. On peut poursuivre la réflexion à partir de l'enquête récemment publiée de C. Moatti, Res publica. *Histoire romaine de la chose publique* (Paris 2018).

4 P. Schmidt, 'The original version of the *De Re Publica* and the *De Legibus*', in Powell & North 2001, op. cit. (n. 1), 7–16.

5 Lire par exemple l'étude de M. Kempshall, *'De Re Publica* 1.39 in medieval and renaissance political thought', in Powell & North 2001, op. cit. (n. 1), 99–135.

6 À propos de Lactance, assurant que les arguments avancés sont de Carnéade, lors de son ambassade romaine en 155 av. n. è., J. Glucker, 'Carneades in Rome. Some unsolved problems', in Powell & North 2001, op. cit. (n. 1), 57–82, qui rejette cette interprétation.

7 Cic., *ad Q. fr.*, 3.5.1. Cf. Powell 1994, op. cit. (n. 1). Il y a matière à reconsidérer le début des années 20, en particulier depuis le retour d'Octavien à Rome, de ses triomphes de l'été 29, aux séances sénatoriales de janvier 27, dans cette perspective d'une définition concrète de la *res publica* et de son *princeps*.

imprégnée de stoïcisme ne saurait surprendre, Cicéron s'incluant naturellement dans cette posture de guide de la *res publica*.

Dès lors, il importe d'aborder le thème de la justice à deux niveaux : en prenant, d'une part, la mesure de ce qui met en scène les vertus des hommes politiques eux-mêmes – ce que les situations rapportées par nos sources développent à l'envi, Cicéron le premier, par exemple avec la figure « exemplaire » d'un Verrès –, et, d'autre part, ce qu'il en est d'une pratique de la *iustitia* sur un registre qui lui est propre, celui de la construction d'un pouvoir normatif du prince que les sources juridiques permettent de suivre sur une très longue durée[8]. Les deux niveaux ne s'opposent nullement mais interagissent : d'une figure ayant construit au sein du discours impérial des couples antinomiques de bons et mauvais souverains, les fameux *boni et mali principes* de l'Histoire Auguste, cette source se plaçant au terme d'une très longue construction rhétorique des *personae* impériales[9] ; aux données juridiques (sources épigraphiques et papyrologiques) qui mettent en avant les qualités premières d'un empereur bienveillant, en tant que praticien du droit, du bouclier augustéen aux linéaments du discours impérial reproduit dans de nombreuses inscriptions et monnaies : la mise en scène de *Iustitia*, moins fréquente qu'il n'y paraît, la construction en écho de l'*Indulgentia principis*, et la fréquence des mentions de l'*Aequitas* et de la *Liberalitas*[10]. On peut dans cette perspective relier aisément les *uirtutes* de l'homme de gouvernement, telles qu'elles apparaissent dans le vocabulaire des sources littéraires de la fin de la République[11],

8 S. Benoist, 'Le prince, *magister legum* : réflexions sur la figure du législateur dans la Rome impériale', in P. Sineux (ed), *Le législateur et la loi dans l'Antiquité. Hommage à Françoise Ruzé* (Caen 2005), 225–240.

9 Cf. à propos de l'Histoire Auguste, S. Benoist, 'Usurper la pourpre ou la difficile vie de ces autres "*principes*"', in S. Benoist & Chr. Hoët-van Cauwenberghe (eds), *La vie des autres. Histoire, prosopographie, biographie dans l'Empire romain* (Villeneuve d'Ascq 2013), 37–61. De manière plus générale, les recherches récentes d'A. Gangloff, *Pouvoir impérial et vertus philosophiques : l'évolution de la figure du bon prince sous le Haut-Empire* (Leyde, Boston, 2018).

10 En partant des recensements opérés à partir du site OCRE (*Online Coins of the Roman Empire*, American Numismatic Society & Institute for the Study of the Ancient World, New York) : *Iustitia*, quatre-vingt-onze occurrences de Tibère à Carausius ; *Indulgentia*, cinquante-deux occurrences, d'Hadrien à Quietus ; *Aequitas*, quatre cent cinquante-six occurrences, de Galba aux Constantinides ; *Liberalitas*, cinq cent dix occurrences, de Néron à Constantin. Cf. l'Annexe numismatique, avec les monnaies n^{os} 1, 2, 3, 4, 5, 8, 9, 11 et 13 pour *Iustitia*, et les n^{os} 6, 7, 10, 12, 14 et 15 pour *Indulgentia*.

11 Pour un inventaire toujours d'actualité, J. Hellegouarc'h, *Le vocabulaire latin des relations et des partis politiques sous la République* (Paris 1972^2 [1963]), notamment 265–267, à propos de *iustitia*, en complétant par les réflexions de J. Béranger 1953 & 1973, op. cit. (n. 3).

aux figures impériales célébrées ou dénoncées dans les portraits des princes qui nous sont parvenus.

Avec Cicéron, on retiendra que la *iustitia* est bien la vertu de quelqu'un qui exerce une autorité et qu'elle prend deux formes distinctes et complémentaires : si la *iustitia animi*, considérée comme la volonté de justice, est bien propre à chaque individu, la *iustitia agendi* en tant qu'action juste, est réservée aux hommes d'État et constitue un principe de gouvernement[12]. Cette distinction fondamentale permet de mieux mesurer les enjeux d'une approche limitée aux vertus des princes, dans la plupart des portraits qui nous en sont dressés, qui repose finalement sur une forme se restreignant à la simple analyse de l'*habitus* de l'*Imperator Caesar Augustus*, tandis qu'une prise en compte de l'action de l'homme d'État ressortit à cette *praxis* qui s'inscrit pleinement dans l'étude de la construction progressive du pouvoir normatif des princes[13]. On comprend mieux en conséquence les spécificités des relevés dont nous allons faire état dans ce qui suit, en particulier une présence en retrait de la *iustitia* en tant que telle dans les sources des deux premiers siècles du Principat. Placée au centre de l'interprétation cicéronienne de la société politique, la *iustitia* s'identifie à ce qui fait la nature même du régime des *boni*, favorisant la *concordia* entre les citoyens, idéal du bon gouvernement de la *res publica*[14]. Dans les siècles qui suivent, elle participe des vertus et des ressorts de l'activité du prince, au fur et à mesure de l'élaboration d'un discours, au diapason d'une culture politique impériale qui mêle héritage républicain et approfondissement des formes monarchiques du pouvoir des *principes*.

C'est donc en trois temps que nous nous proposons de dresser l'inventaire des situations, des *exempla* des bons princes aux figures des princes injustes. Dans une première section, ce sont les mots et la chose, *iustitia*, *iustus*, *iniustus* qui seront présentés, afin de relever les diverses postures et dérives. Dans

12 Cf. Hellegouarc'h 1972², op. cit. (n. 11) mentionnant notamment : Cic., *Inu.* 2.160 ; *Nat. D.* 3.38 ; *Fin.* 5.65. Voir *infra*.

13 On peut renvoyer en ce qui concerne le pouvoir normatif des princes et sa progressive élaboration à l'œuvre pionnière de T. Honoré, *Emperors and Lawyers* (Oxford 1994² [1981]), magistralement mise en lumière par F. Millar, 'A new approach of the Roman jurists', *Journal of Roman Studies* 76 (1986), 272–280 = *Id., Government, Society and Culture in the Roman Empire, Rome, the Greek World, and the East*, vol. 2, H.M. Cotton et G.M. Rogers (eds) (Chapel Hill & Londres 2004), 417–434.

14 Hellegouarc'h 1972², op. cit. (n. 11), citant Cic., *Off.* 3.28 : *Iustitia enim una uirtus omnium est domina et regina uirtutum* ; de même *Off.* 1.20 ; 56 ; 2.38 & *Rép.* 2.29 ; *Off.* 2.81–83. L'ensemble de cette lecture cicéronienne de la justice, de ses rapports à la *liberalitas*, la *prudentia* et l'*aequitas*, imprégnée assurément de stoïcisme, est largement partagée par ses contemporains, comme par exemple dans ce discours au Sénat de César : *Se uero, ut operibus anteire studuerit, sic iustitia et aequitate uelle superare* (Caes., *Ciu.* 1.32.9).

une deuxième partie, quelques figures exemplaires, ces couples antithétiques et leurs évolutions remarquables, viendront compléter le propos, selon une progression chronologique en trois étapes, le Ier siècle – et plus particulièrement l'articulation entre l'époque julio-claudienne et la crise de 68–69 –, puis le siècle des Antonins, et finalement un premier tiers du IIIe siècle centré sur la période sévérienne. La troisième et dernière partie permettra d'envisager les transitions entre *iustitia* et *indulgentia*, *seueritas* et *saeuitas-crudelitas*, en faisant retour sur des personnages controversés et des attitudes contestées.

2 Les mots et la chose : de la *iustitia* au prince injuste

Commençons par souligner une observation un peu surprenante, relative au vocabulaire employé dans les textes latins du Haut-Empire qui développent une pensée politique autour de la figure du prince : la *iustitia* n'y compte pas parmi les vertus le plus souvent mentionnées ; ni *iustitia* ni *iustus* ne sont des termes très fréquents, ce qui est encore plus vrai pour *iniustus* et *iniustitia*, ce dernier mot, rare en lui-même, n'apparaissant jamais. On peut prendre l'exemple du *Panégyrique* composé par Pline entre 100 et 103 pour louer Trajan tout en lui proposant un modèle de prince-magistrat : on y trouve trois occurrences de *iustitia*, dont deux concernent l'empereur, et une occurrence de *iustissimus* appliqué à Trajan[15]. On y relève en revanche 19 occurrences de *cura* et *labor*, 16 de *uirtus* et *modestia*, 15 de *moderatio* : c'est le travail du prince sur lui-même et au service de la République qui est prôné, bien davantage que sa justice[16]. On constate ainsi dans le discours littéraire latin un phénomène analogue à celui qu'avait relevé Carlos F. Noreña dans les monnaies en Occident[17]. Celui-ci suggérait, de manière intéressante, que le rôle judiciaire de

15 *Iustitia* : Sen., *Clem.* 1.19 et 1.20 ; Plin. *Pan.* 33.2 ; Suet., *Aug.* 2.3 ; *Galba* 7 ; *iustus* : Sen., *Apoc.* 14 ; Plin., *Pan.* 59, à propos du second consulat de Trajan : *Diceris iustissimus, humanissimus, patientissimus fuisse.* La recherche lexicale, non exhaustive, a été faite dans le *De Clementia* de Sénèque, les *Vies* de Suétone, la correspondance et le *Panégyrique* de Pline pour les textes latins, les *Écrits pour soi-même* de Marc Aurèle, Dion Cassius et Hérodien pour les textes grecs, à l'aide des indices des éditions françaises, du site *itinera electronica* de l'Université catholique de Louvain et du TLG.

16 Voir J. Béranger, 'Pour une définition du principat, Auguste dans Aulu-Gelle, XV, 7, 3', *REL* 21–22 (1943–1944), 144–154.

17 C.F. Noreña, 'The communication of the emperor's virtues', *Journal of Roman Studies* 91 (2001), 146–168. Même constat sur la discrétion de la *iustitia* dans les monnaies par M.P. Charlesworth, 'The virtues of a Roman emperor : propaganda and the creation of belief', *Proceedings of the British Academy* 23 (1937), 105–133, p. 113 ; B. Lichocka, Justitia *sur les monnaies impériales romaines* (Varsovie 1974).

l'empereur possédait d'autres moyens d'affichage, comme les édits et décrets, et qu'il apparaissait donc davantage dans l'épigraphie[18].

Ce relatif effacement de la justice et de l'injustice n'est pas avéré, en revanche, dans les discours en grec plus directement centrés sur les vertus philosophiques cardinales – courage, justice, sagesse et tempérance – et fondés sur la réflexion politique grecque sur le tyran injuste. Dans le premier discours *Sur la royauté* que le sophiste Dion de Pruse a adressé à Trajan vers 100, la justice est la vertu la plus mentionnée pour définir le bon roi[19]. Elle est également la principale vertu dans les *Écrits pour soi-même* de Marc-Aurèle[20]. À la toute fin du IIIe siècle, dans le *basilikos logos* attribué à Ménandre le rhéteur, la justice est précisément ce qui distingue le bon roi du tyran dans leur activité législative, car le tyran est défini par la recherche de son profit personnel, alors que le roi se soucie du bien-être des sujets ; elle fait du bon roi un bienfaiteur cosmique[21].

Mais, chez les Grecs comme chez les Latins, on peut souligner l'absence, sous le Haut-Empire, de réflexion philosophique ou rhétorique nouvelle qui soit centrée sur la justice. Les textes sur le prince se réfèrent à une définition de la justice qui était devenue traditionnelle au sein des grandes écoles philosophiques et rhétoriques ; c'est la définition platonicienne, mais aussi stoïcienne et pythagoricienne, d'une justice distributive, respectant l'égalité géométrique : la justice est ce qui donne à chacun la part qui lui revient selon ses mérites[22]. Une autre question connexe semble être placée au cœur de la réflexion philosophique et rhétorique : celle de l'importance de la loi écrite et non écrite, et donc de la place du prince par rapport aux lois[23]. La réflexion sur

18 Noreña 2001, op. cit. (n. 17), 156–157.

19 Voir par exemple *Or.* 1.42 et 45 ; sur l'injustice du tyran, *Or.* 62.2 et 7, par opposition à la justice du bon roi, § 3.

20 Une recherche dans le TGL donne 35 références à la justice, 25 références à la vérité, 9 à la tempérance (*sôphron* et *sôphrosunè*), 5 au courage (*andreia* ou *andreion*), 4 à la sagesse ou prudence (*phronesis*).

21 Mén., 2.375.31–376.2 ; 377.22–24. Même importance de la justice pour définir le bon roi chez Musonius Rufus, qui fut le maître de Dion de Pruse, dans la *Vie d'Apollonios de Tyane* écrite par Philostrate à la demande de Julia Domna, et qui développe une réflexion philosophique influencée par celle du sophiste de Pruse (voir notamment *VA* 1.28.1 ; 1.37 ; 2.39.3–4 ; 5.28.1–2 ; 6.34 ; dans ces passages la justice est associée à la clémence et à la douceur). Voir aussi *En l'honneur d'un roi* 16–20 (le discours est probablement adressé à Philippe l'Arabe) ; *RIC* IV.3 Philippe 1.27a–b, 54–55, 57, 82.

22 *Rh. Her.* 3.3 : *Iustitia est aequitas ius unicuique rei tribuens pro dignitate cuiusque* ; Cic., *Inu.* 2.160 ; *Nat. D.* 3.38 ; *Fin.* 5.65 ; Hellegouarc'h 1972², op. cit. (n. 11), 265.

23 Benoist 2005, op. cit. (n. 8). Plin., *Pan.* 65 ; 77.3 ; D. Chr., *Or.* 3.43. Au début du IIe siècle ap. J.-C., l'éloge de la loi est un sujet de déclamation sophistique, comme le montrent les deux

le pouvoir normatif du prince a été développée par les juristes des Sévères au début du IIIe siècle, notamment par Ulpien, qui fut préfet du prétoire de Sévère Alexandre en 222/223–224, après avoir œuvré pendant une vingtaine d'années comme *procurator a libellis* ou bien comme son adjoint, et qui se présentait lui-même comme un véritable philosophe[24].

Dans les discours littéraires latins et grecs sur le prince, justice et injustice sont cependant des critères importants, parfois déterminants, parfois seulement en arrière-plan de la figure du bon ou du mauvais prince, mais toujours présents, et ce depuis la fondation du principat : la justice figure en effet parmi les quatre vertus du bouclier doré offert à Auguste par le Sénat en janvier 27 av. J.-C.[25]. Mais justice et injustice sont plus représentées par des pratiques, des exemples concrets, qu'elles ne sont développées dans des réflexions théoriques sur la vertu et le vice en soi.

La justice étant conçue comme distributive, elle peut s'exercer (ou faire défaut) dans des domaines variés, en lien avec, d'une part, la répartition des honneurs et des châtiments, ce qui implique le respect de la *dignitas* des ordres, et, d'autre part, les relations du prince avec son entourage, avec le peuple, avec les ennemis extérieurs, et enfin pour la gestion des finances. Les situations où la justice ou bien l'injustice du prince sont flagrantes sont cependant récurrentes, ce qui permet d'établir la typologie suivante :

1) le prince rend la justice ou, plus rarement, élabore sa législation. C'est de très loin le contexte dans lequel sa propre justice ou son injustice sont le plus souvent représentées[26]. Il convient de rappeler dans ce cadre la distinction entre *iustitia* et *clementia*, qui a été exposée par Sénèque dans le premier traité *Sur la clémence*[27]. Si la seconde revient à adoucir la peine méritée, la première est caractérisée par l'objectivité, la recherche du vrai, la protection de l'innocence, la responsabilité du prince *iudex*.

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discours *Peri nomou*, sur la loi et sur la coutume, qu'on a conservés dans le corpus de Dion de Pruse (*Or*. 75 & 76).

24 Ulp., *Dig*. 1.1.1.1. Cf. *Dig*. 1.1.10.1. Voir M.J. Schermaier, 'Ulpian als "wahrer Philosoph". Notizen zum Selbstverständnis eines römischen Juristen', in M.J. Schermaier & Z. Végh (eds), *Ars boni et aequi: Festschrift für Wolfgang Waldstein zum 65 Geburtstag* (Stuttgart 1993), 303–322.

25 *RG* 34 : *uirtutis clementiaeque iustitiae et pietatis*. Voir Tac., *Ann*. 12.11, pour une définition du principat, développée par Claude, mettant en avant les principes de justice et de clémence.

26 Plin., *Ep*. 6.31 ; *Pan*. 40 et 46 ; 77.3 ; Suet., *Cl*. 14–15 ; *Ner*. 15 ; *Galba* 7 ; *Vesp*. 9–10.15 ; DC., 76/77.17.

27 Sen., *Clem*. 1.20.2 : *Superuacuum est hoc loco admonere ne facile credat, ut uerum excutiat, ut innocentiae faueat et, ut appareat, non minorem agi rem periclitantis quam iudicis sciat ; hoc enim ad iustitiam non ad clementiam pertinet.*

2) Vient ensuite le domaine financier : la répartition et le poids des impôts[28], la mesure conservée par le prince dans les dépenses apparaissent comme de bons étalons de sa justice ou de son injustice. Chez Suétone, par exemple, les dépenses excessives d'un Néron se traduisent par des actes d'injustice et de cruauté (vols, captations d'héritages et meurtres)[29]. À cheval entre le domaine financier et celui des mœurs, l'exercice par le prince de sa *liberalitas* peut donner la mesure de sa justice : ainsi Pline a-t-il loué Trajan d'avoir respecté les goûts des sénateurs et les affinités des spectateurs pour tel ou tel gladiateur lors des jeux qu'il avait offerts à la fin de l'année 99 ou en 100, contrairement à Domitien qui aurait accusé de crime d'impiété ou de lèse-majesté ceux qui manifestaient leur préférence pour un gladiateur qui n'avait pas la faveur du prince[30].
3) Dans le domaine moral, l'empereur donne aussi la preuve de sa justice ou de son absence de justice quand il revêt des fonctions censoriales[31]. Son attitude face aux plaisirs relève également de la justice ou de l'injustice : l'excès dans le libertinage ou le faste engendre des injustices et des crimes[32].
4) Dans le domaine militaire, la justice réside dans le respect des serments, et Caracalla en particulier est critiqué, chez Hérodien, pour n'avoir pas respecté ses accords avec le roi des Parthes Artaban en 216[33]. Elle apparaît aussi, *a contrario*, dans le fait de combattre un ennemi injuste[34], et de montrer la clémence traditionnelle qui était de mise envers le chef ennemi vaincu[35].
5) Dans le domaine religieux, enfin, l'impiété est considérée comme une injustice envers les dieux[36]. Cette idée renvoie à la définition de la piété qui apparaît au livre I du traité *De natura deorum* de Cicéron : « la piété est la justice à l'égard des dieux », auxquels les hommes sont tenus de rendre

28 Suet., *Ner.* 10 ; *En l'honneur d'un roi* 16 ; voir *P. Fay.* 20, pour l'association de la justice et de la philanthropie du prince en matière de fiscalité, probablement au début du règne de Sévère Alexandre.

29 Suet., *Ner.* 32.

30 Plin., *Pan.* 33.2. Voir Suet., *Dom.* 10.

31 Suet., *Cl.*, 16 ; *Vesp.* 9.

32 Les exemples sont nombreux : Néron, Vitellius, Élagabal incarnent notamment le lien entre libertinage, goût pour le luxe et cruauté.

33 Hdn., 4.14.6 ; 4.15.7 (voir aussi 6.3.4, à propos des Perses). Sur le lien entre justice et tempérance : Hellegouarc'h 1972², op. cit. (n. 11), 265.

34 Hdn., 3.6.4 ; 6.3.4.

35 Fronton, *Prémisses de l'histoire* 18 : le texte est un bon témoignage du glissement de la justice vers la clémence. Voir *infra*.

36 D. Chr., *Or.* 1.15–16 ; DC., 79/80.11.

les honneurs qui leur sont dus[37]. Dans cette perspective, l'instauration d'un nouveau culte solaire à Rome par Élagabal a pu être interprétée comme un acte d'injustice à l'égard de Jupiter, dans la mesure où elle remettait en cause sa préséance dans la Ville[38].

Cette typologie met en lumière toute la complexité de la vertu de justice, attachée à des champs d'activités très divers et à d'autres vertus (*clementia*, *liberalitas*, *pietas*), dont elle est à la fois distincte et interdépendante, selon la conception stoïcienne qui veut que celui qui possède une vertu les possède toutes, et aussi selon l'usage des vertus dans les traités rhétoriques où elles étaient subdivisées et accompagnées par d'autres vertus.

L'exercice de la justice par le prince dans le contexte judiciaire a ses propres dérives qui sont surtout attachées à l'exemple de Claude et qui contribuent, sous les Julio-Claudiens, à construire la figure du prince injuste. La première dérive réside dans la pratique d'une justice privée, personnelle du prince, une justice qui échappe de plus en plus aux autres aristocrates, avec le développement notamment des procédures de *cognitio* à partir d'Auguste. C'est probablement la raison pour laquelle le zèle de Claude pour la justice a été critiqué, comme en témoignent Suétone et Tacite[39]. L'adresse programmatique aux sénateurs, composée par Sénèque pour Néron, à l'automne 54, contient une critique de l'exercice de la justice par Claude, « enfermé dans sa demeure », image qui évoque le procès *intra cubiculum* de Valerius Asiaticus en 47. Tacite a présenté ce procès de manière presque caricaturale, comme un exemple d'injustice due à l'influence exercée sur l'empereur par son entourage, en l'occurrence sa femme Messaline et son favori Vitellius[40]. Un autre exemple

37 Cic., *Nat. D.* 1.116 : *est enim pietas iustitia aduersum deos.*

38 DC., 79/80.11.

39 Le lien entre critique des pratiques judiciaires de Claude et développement de la *cognitio* a été souligné par M.T. Griffin, *Seneca. A Philosopher in Politics* (Oxford 1992[2] [1976]), 161–163 ; B. Levick, *Claude* (trad. I. Cogitore) (Gollion 2002) (= *Claudius* [Oxford 1990], chapitre « La loi, la justice et la société », 151–166). Suétone a distingué dans sa *Vie de Claude* la *iuris dictio ordinaria* (*Cl.* 14), où Claude juge *ex bono et aequo*, des *cognitiones* (*Cl.* 15), où son humeur est présentée comme changeante : il s'y montre tantôt *sagax*, tantôt inconséquent. Voir aussi Suet., *Ner.* 15.

40 Tac., *Ann.* 13.4.2 : *Tum formam futuri principatus praescripsit, ea maxima declinans quorum recens flagrabat inuidia : non enim se negotiorum omnium iudicem fore, ut, clausis unam intra domum accusatoribus et reis, paucorum potentia grassaretur ; nihil in penatibus suis uenale aut ambitioni peruium ; discretam domum et rem publicam.* « Puis il traça les lignes de son futur principat, écartant surtout les abus dont l'odieux souvenir restait brûlant ; il ne se ferait pas le juge de toutes les affaires, enfermant à l'intérieur de sa seule demeure accusateurs et inculpés pour faire progresser la puissance de quelques hommes ; rien dans ses pénates ne serait vénal ou accessible à la brigue ; sa maison serait distincte de l'État … »,

de cette confiscation de la justice par l'empereur, dont les aristocrates latins de la fin du Ier et du début du IIe siècle avaient une conscience aiguë, apparaît dans la lettre IX.13, de Pline le Jeune. Pline y explique comment il a décidé, au printemps 97, de rétablir la justice en intentant une action judiciaire contre Publicius Certus, le délateur d'Helvidius le Jeune[41]. Nerva, qui avait choisi d'appliquer au début de son règne une politique de conciliation, ne permit pas que le procès soit poursuivi, mais Certus ne fut pas désigné pour le consulat de 98. Pline choisit alors une autre voie que la voie judiciaire pour achever sa vengeance, la voie du libelle : il tira de sa plaidoirie des livres *Sur la vengeance d'Helvidius* qui auraient, selon lui, peut-être provoqué la maladie mortelle qui emporta Certus, celui-ci ayant été perdu de réputation. Pour faire régner la *iustitia*, le sénateur Pline a donc eu besoin de recourir à un autre biais que celui du *ius*. La *iustitia* apparaît de plus en plus comme une vertu privée, accaparée par le prince.

La seconde dérive menaçant la justice du prince est sous-jacente dans l'exemple du procès de Valerius Asiaticus : il s'agit de l'absence d'objectivité du prince, lorsque celui-ci est sous l'emprise des passions qui sont incompatibles avec la justice[42]. Le meilleur exemple est celui de l'édit sur la colère publié par Claude sans doute au début de son règne, soit au début de l'année 41, en réaction contre le comportement de son prédécesseur Caligula. Dans cet édit rapporté par Suétone, l'empereur promettait « que ses emportements seraient courts et inoffensifs, et que sa colère ne serait point injuste », et la suite de la citation replace cette promesse dans un contexte judiciaire et, de manière plus générale, dans le contexte des rapports de l'empereur avec le peuple[43]. La justice, devenue personnelle, dépend donc des passions d'un seul homme et de la capacité qu'a celui-ci à maîtriser ses passions.

Le discours sur la justice du prince n'est ainsi pas dépourvu d'ambiguïté, dans la mesure où la justice apparaît comme une vertu importante, qui em-

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trad. P. Wuilleumier (éd. CUF). Voir Tac., *Ann.* 11.3 pour le procès *intra cubiculum* de Valerius Asiaticus.

41 M. Corbier, *L'*Aerarium Saturni *et l'*aerarium militare*, administration et prosopographie sénatoriale* (Rome 1974), 111–115.

42 Sur cette incompatibilité, Plin., *Pan.* 33.2 ; *Ep.* 9.13. Suet., *Cl.* 29, a aussi dénoncé l'injustice de Claude, livré à ses affranchis et à ses femmes.

43 Suet, *Cl.* 38 : *Irae atque iracundiae conscius sibi, utramque excusauit edicto distinxitque, pollicitus alteram quidem breuem et innoxiam, alteram non iniustam fore*, trad. H. Ailloud (éd. CUF) ; c'est le seul exemple où le biographe a utilisé le terme *iniustus* par référence au prince. La vocation du prince à juger et la nécessité pour le juge impartial d'être dépourvu de colère sont aussi affirmées dans le traité de Sénèque, *Sur la colère* 1.16. Chez le sénateur philosophe, la thématique de la colère en lien avec la cruauté est centrale.

brasse un vaste champ de la vie sociale romaine, mais qui n'est pas forcément mise en avant ; sa relative discrétion, sur les monnaies et dans les textes latins, peut aussi s'expliquer parce que l'accent est placé davantage sur la pratique de la justice que sur une réflexion théorique, parce que la justice est de plus en plus confisquée par l'empereur sous les Julio-Claudiens, et, ce qui est lié, parce que les textes se recentrent sur la clémence du prince, et non sur sa justice. De fait, c'est dans la construction de couples antithétiques assemblant un prince juste et un prince injuste que l'on peut le mieux observer la figure du prince injuste et son exploitation.

3 Quelques figures exemplaires

En dépit de la volonté de Claude de se démarquer des colères de Caligula, en dépit aussi de son attachement à la justice, c'est lui qui constitue la première figure, ambiguë, du prince injuste, soumis à ses affranchis et à ses femmes : Tacite et Suétone ont en effet été tributaires de la construction de la figure de Claude en prince injuste, qui a été opérée par Sénèque et Néron au début du règne de celui-ci. Nous avons déjà évoqué le discours programmatique dans lequel le jeune prince, au début de son règne, affirmait devant le Sénat sa volonté de se démarquer des dérives judiciaires de son père adoptif. Quelques mois plus tard, vers la fin de l'année 54, Sénèque composa très probablement la satire intitulée *Apocoloquintose*, qui ridiculisait la mémoire de Claude et construisait en contrepoint un nouveau modèle de bon prince destiné à Néron. Ce modèle fut développé un an plus tard dans le premier traité *Sur la clémence*, dans lequel l'importance du contexte judiciaire a été soulignée[44].

L'*Apocoloquintose* représente Auguste en posture de *iudex*, tandis que Claude est figuré en mauvais prince et mauvais juge : c'est essentiellement la cruauté de ses jugements qui est dénoncée. Le défunt empereur est à son tour jugé et reçoit une condamnation posthume : dans la satire, il descend aux Enfers, les divinités refusant d'achever le processus de l'apothéose décrétée par le Sénat ; dans un sens plus réaliste, Sénèque a cherché à rendre la mémoire de Claude odieuse et à rendre inopérante la divinisation du prince injuste[45]. Selon Suétone, Néron aurait également annulé des décisions juridiques prises par son

44 M. Fuhrmann, 'Die Alleinherrschaft und das Problem der Gerechtigkeit (Seneca *De clementia*)', *Gymnasium* 70 (1963), 481–514 ; Griffin, *Seneca*, op. cit. (n. 39), 161–162.

45 Sur ce thème du tyran châtié, de façon posthume, par la condamnation de sa mémoire, voir aussi D. Chr., *Or*. 1.44–46.

père adoptif, sous prétexte de folie ou d'extravagance[46]. On constate cependant que la figure du mauvais juge Claude est fondamentalement ambiguë, comme on le voit surtout chez Suétone qui a utilisé des sources ambivalentes : le prince injuste n'est pas forcément un tyran, et la *lex de imperio Vespasiani* le mentionne à côté des « bons princes » Auguste et Tibère, en passant sous silence Caligula et Néron[47].

La deuxième grande étape déterminante dans la construction du prince injuste qui sert de repoussoir au prince juste apparaît au début du règne de Trajan, qui a lui-même encouragé les critiques envers le dernier représentant des Flaviens, Domitien[48]. La mise en contraste est très sensible dans le *Panégyrique* de Pline, qui oppose Trajan, le meilleur des princes, à Domitien le « tyran » injuste envers les hommes et impie envers les dieux[49]. Trajan semble avoir particulièrement veillé à mettre en avant sa *iustitia*[50], et Pline lui a fait de la publicité, mettant en scène cette vertu politique dans sa lettre VI.31, à Cornelianus, datée probablement de l'été 107, dans laquelle il fait l'éloge des pratiques judiciaires du prince :

> Appelé en conseil par notre César à Centumcellae (c'est le nom de l'endroit), j'y ai pris beaucoup de plaisir. Quoi de plus agréable, en effet, que d'observer la justice du prince, sa dignité, son amabilité, jusque dans l'isolement, là où elles se révèlent le mieux. Il y eut à juger d'affaires différentes, propres à mettre à l'épreuve les vertus du juge à travers divers cas de figure[51].

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46 Suet., *Ner*. 33.

47 *ILS* 244 ; *Lex de Imperio Vespasiani*, in *Roman Statutes I*, M. Crawford (ed) (Londres 1996), n° 39, 549–553.

48 C'est le cas dans le discours qu'il a prononcé devant les sénateurs le 1er janvier 100, au début de son troisième consulat : Plin., *Pan*. 67.3.

49 Pour l'injustice envers les hommes, voir Plin., *Pan*. 33.2 (déjà cité *supra*) ; par rapport aux dieux, *Pan*. 52.7.

50 Dans le domaine financier, voir la réponse de Trajan à Pline, *Ep*. 10.55 : *Et ipse non aliud remedium dispicio, mi Secunde carissime, quam ut quantitas usurarum minuatur, quo facilius pecuniae publicae collocentur. Modum eius, ex copia eorum qui mutuabuntur, tu constitues. Inuitos ad accipiendum compellere, quod fortassis ipsis otiosum futurum sit, non est ex iustitia nostrorum temporum*, « Moi non plus je ne vois pas d'autre remède, mon très cher Secundus, que de diminuer le montant des taux d'intérêt, pour faciliter le placement de l'argent public. Son niveau, tu le fixeras toi-même d'après le nombre de ceux qui emprunteront. Contraindre des gens à accepter contre leur gré ce dont eux-mêmes n'auront peut-être pas l'emploi n'est pas conforme à la justice de notre temps », trad. N. Méthy (éd. CUF, Paris 2017).

51 *Euocatus in consilium a Caesare nostro ad Centum Cellas – hoc loco nomen –, magnam*

Cette lettre très construite s'inscrit complètement dans la codification du bon et du mauvais prince, en faisant référence aux contre-exemples constitués par Claude et Néron. C'est en effet dans le cadre de la *cognitio*, et dans sa propre demeure, que Trajan, d'une certaine façon en *priuatus*, révèle le mieux ses vertus, qui sont des vertus à la fois politiques et personnelles[52]. Il incarne une figure du prince juste, alliant la traditionnelle *grauitas* du juge romain à la *comitas* qui avait fait le succès de Néron au début de son règne[53]. Les trois cas jugés – celui de Claudius Aristion d'Éphèse, de l'adultère Gallitta et du testament de Julius Tiron[54] – sont effectivement propres à faire ressortir toutes les facettes de la justice de Trajan : les fausses accusations sont punies, la faiblesse excessive montrée par le mari trompé est refusée. L'empereur juste protège l'innocence, se montre impartial, ferme, recherche la vérité, fait preuve de *grauitas* et de *moderatio*. Trajan lui-même, dans cette lettre, prend soin de tirer des leçons de ces cas : il souligne l'importance de la discipline militaire ainsi que sa propre impartialité – et indépendance – par rapport à ses affranchis ; à cette occasion, il se distingue explicitement de Néron dont la dépendance envers son affranchi Polyclitus est soulignée (*Nec ille Polyclitus est nec ego Nero*)[55]. Trajan insiste sur l'idée que l'empereur doit être au-dessus de tout soupçon, et ses pratiques judiciaires lui fournissent donc l'occasion de démontrer sa justice ainsi que son *humanitas* et sa *simplicitas* envers son conseil. Le fait de rendre la justice apparaît alors comme un bon révélateur, un test des vertus du prince et de l'homme

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cepi uoluptatem. Quid enim iucundius quam principis iustitiam grauitatem comitatem in secessu quoque ubi maxime recluduntur inspicere ? Fuerunt uariae cognitiones et quae uirtutes iudicis per plures species experirentur ; trad. N. Méthy (éd. CUF), légèrement modifiée. La datation proposée est celle d'H. Zehnacker, ibid., 221.

52 Même le lieu où la justice est rendue est significatif, § 14 : *Sed mihi ut grauitas cognitionum, consilii honor, suauitas simplicitasque conuictus, ita locus ipse periucundus fuit*. Le cadre (§ 15–17) est celui d'une villa maritime protégée de la violence de la mer par le port en construction, qui est une création de Trajan à Civitavecchia. Ce port artificiel devait doubler celui d'Ostie pour l'approvisionnement de Rome. La villa de Trajan était située au lieu dit Belvedere, à environ un km de la côte : I. Caruso, 'Traiano, Plinio ed il porto di Centumcellae', *Rivista di cultura classica e medioevale* 40 (1998), 33–40 ; G. Marconi, 'Le origini di Centumcellae', ibid., 195–214 ; H. Zehnacker (éd. CUF), 224.

53 Sur la *grauitas*, voir Hellegouarc'h 1972², op. cit. (n. 11), 279–290, part. 282–283. Sur la *comitas* de Néron : Suet., *Ner*. 10.

54 Claudius Aristion d'Éphèse fut trois fois asiarque et archiereus d'Asie (en 89, 92/93, vers 110) ; sa famille avait reçu la citoyenneté romaine sous Claude ou Néron : D. Campanile, *I sacerdoti del koinon d'Asia* (*I sec. A.C.–III sec. D.C.*) (Pise 1994), 37–38, n° 12 ; le sénateur de rang prétorien C. Julius Tiro Gaetulicus est connu par l'inscription *CIL* II.3661 ; voir H. Zehnacker (éd. CUF), 221.

55 Sur Polyclitus l'affranchi de Néron, voir Tac., *Ann*. 14.39 ; *Hist*. 1.37.9, et 2.95.4 ; DC. 62/63.12.3.

privé[56], et les bonnes pratiques judiciaires sont présentées comme un élément essentiel de la réputation du bon prince.

On peut prolonger cette remarque à la période antonine, en soulignant la régularisation de cette vertu déjà observée par A. Wallace-Hadrill[57] : la *iustitia* apparaît de manière régulière comme légende dans le monnayage impérial à partir d'Hadrien (de même que les autres vertus philosophiques cardinales) en même temps que son iconographie se fixe dans l'image d'une femme assise, portant une patère à main droite tendue et un sceptre droit à main gauche, ce qui renvoie à la double dimension de la justice, envers les dieux et envers les hommes (cf. Annexe, n^{os} 4 & 5). Les *Écrits pour soi-même* montrent toute l'attention que Marc-Aurèle attachait à cette vertu, au moment où se diffusait un idéal politique qui était celui d'une monarchie aristocratique ou démocratique, reposant sur la méritocratie. L'existence de celle-ci dépendait de la justice du prince, qui devait permettre à tous les habitants de l'Empire de participer au gouvernement de celui-ci, s'ils en étaient capables ; c'est cette justice géométrique qu'a louée Aelius Aristide dans le discours *En l'honneur de Rome* qu'il a prononcé durant le printemps ou bien l'été 144[58].

L'antithèse du prince juste et du prince injuste a continué d'être exploitée au III^{e} siècle sous les Sévères. En témoigne la figure exemplaire de Pertinax, très liée à celle de Marc-Aurèle dont il avait été proche, et dont la justice est opposée par Hérodien à la tyrannie de Commode[59]. Macrin constitue un exemple intéressant, car il semble avoir lui-même utilisé cette antithèse pour se donner une légitimité par rapport à Caracalla, après le meurtre de celui-ci en 217. Sa justice est en effet mise en avant par des monnaies portant les légendes *Aequitas Augusti* et *Dikaiosunè*, tandis qu'Hérodien rapporte un discours et des lettres successivement adressés par le nouvel empereur à ses soldats, au roi des Parthes et au Sénat, dans lesquels il souligne l'injustice de Caracalla, qui n'a pas respecté son engagement matrimonial envers Artaban, ou bien sa cruauté, par

56 On peut mettre en parallèle cette lettre avec la lettre 8.2, dans laquelle Pline définit la justice – comme une justice distributive où chacun reçoit selon ses mérites – et explique qu'il cherche à l'appliquer aussi bien en rendant la justice qu'en réglant ses affaires privées, financières. Dans ce dernier cas de figure, Pline lui a donné de la publicité et il s'estime payé par la réputation qu'il en retire.

57 A. Wallace-Hadrill, 'The emperor and his virtues', *Historia* 30 (1981), 298–323, part. 323 pour le tableau récapitulatif des vertus dans le monnayage impérial de la fin de la République à Pertinax.

58 Aelius Aristide, *En l'honneur de Rome* 60. Sur la datation du discours, voir le résumé des arguments donné par L. Pernot, *Éloges grecs de Rome, traduits et commentés par L. P.* (Paris 2007^{2} [1997]), 163–170.

59 Hdn., 2.3.9 ; 4.3.

opposition à sa propre humanité, douceur et modération[60]. Sévère Alexandre est de même opposé à son cousin Élagabal, qui est surtout présenté par Hérodien et Dion Cassius comme cruel, injuste envers les dieux et les coutumes et mœurs traditionnelles[61].

Il faut cependant nuancer ce tableau moral de la dynastie sévérienne. Si l'on a l'impression que la justice est toujours un critère utilisé pour construire la figure du bon prince par opposition à celle du prince injuste, ce n'est pas un critère aussi discriminant qu'il l'a été au IIe siècle : non seulement parce que l'opposition entre prince cruel et prince clément, doux, est toujours accentuée par rapport à l'antithèse entre prince injuste et prince juste, mais aussi et surtout à cause de la figure ambiguë du fondateur de la dynastie, Septime Sévère. D'une part en effet, celui-ci a revendiqué et justifié politiquement devant le Sénat son recours à la proscription après la défaite de son rival Clodius Albinus en 197. D'autre part, il avait reçu lui-même une solide formation juridique et a fait preuve, durant son règne, d'une pratique de la justice admirée et d'une œuvre législative considérée comme équitable[62].

4 De la *iustitia* à l'*indulgentia*, de la *seueritas* à la *saeuitas*/*crudelitas*, retour sur des *principes* contestés

Prenons la mesure d'un discours en mots et en actes qui permet d'illustrer ce rapport ambigu, relevé dans les deux parties précédentes, entre vertu de justice et pratique concrète de la justice, figure du bon prince et figure du tyran, un même personnage pouvant s'avérer tel un Janus à deux têtes : celui qui s'apparente à l'homme de gouvernement cicéronien faisant preuve d'une justice en actes, manifestant notamment cette *indulgentia* qui en fait le pro-

60 *Aequitas Aug.* : *RIC* IV Macrin 52a, 52b, 52c (*aurei*, Rome), 53a, 53b, 53c (deniers, Rome), 167b, 167c (sesterces, Rome), 168 (dupondius, Rome) ; *Dikaiosunè ou Dikaiosunè/Nemesis* : N. Moushmov, *Ancient Coins of the Balkan Peninsula* (Sofia 1912), 565 (Marcianopolis) ; 1243, 1265 (Nicopolis ad Istrum) ; Y. Varbanov, *Greek Imperial Coins* (Bourgas 2005), 3385 (Nicopolis ad Istrum [nos remerciements vont à Julie Dalaison pour son aide précieuse]). Hdn., 4.14.6 ; 4.15.7 ; 5.1 ; DC., 79/80.11, a souligné la justice de Macrin dans le portrait qu'il en a fait (dont les composantes sont l'origine obscure du nouvel empereur, de rang équestre à son avènement à l'Empire, la modération, la justice et l'habileté), après avoir mis en avant la cruauté de Caracalla.

61 DC., 79/80.2–8, 11–12 ; Hdn., 5.6.1 ; 6.1.7 ; 6.9.8.

62 DC., 76/77.17 ; Hdn., 3.8.3 ; 3.8.8 ; Aur. Vict., *Caes.* 13.23 ; voir aussi HA, *Seu.* 18 (« S'il se montrait implacable envers les délits, il faisait preuve d'une rare sagacité pour promouvoir les gens de valeur », trad. A. Chastagnol).

tecteur naturel des citoyens romains, mais dont le comportement privé est loin d'être irréprochable. Nous allons envisager pour ce faire quelques dossiers épigraphiques et numismatiques, en partant d'une période tout à fait exemplaire à ce propos, l'époque flavienne qui dut jouer avec les héritages contrastés et croisés des Julio-Claudiens et de l'année des quatre empereurs, pour déboucher finalement sous les Sévères sur une figure remarquable de duplicité, le fils aîné de Septime Sévère, ce Caracalla aux traits changeants qui participe d'une construction toute rhétorique, assassin de son frère, protecteur des frontières de l'empire et dispensateur d'une *ciuitas Romana* universelle.

Il est possible de débuter cette approche comparée des situations par la mise en regard de deux séries de documents. Deux inscriptions, provenant de Bétique (Munigua[63]) et de Maurétanie tingitane (Banasa[64]), offrent à un peu

63 *CILA* II.4.1052 (*AE* 1962.147 = *AE* 1962.288 = *AE* 1972.257) ; *Hispania Epigraphica* 4996, *Mulva* (Munigua), Bétique, le 7 septembre 79 : *Imp*(*erator*) *Titus Caesar Vespasianus Aug*(*ustus*) *pontif*(*ex*) *max*(*imus*) / *trib*(*unicia*) *potest*(*ate*) VIIII *imp*(*erator*) XIIII *co*(*n*)*s*(*ul*) VII *p*(*ater*) *p*(*atriae*) *salutem* / *dicit* IIIIuir(*is*) *et decurionibus Muniguens*(*ibus*) / *cum ideo appelauerit*{*is*} *ne pecuniam quam debebatis Seruilio* / *Pollioni ex sententia Semproni Fusci solueretis poenam* ***iniustae*** / *appelationis exsigi a uobis oportebat sed ego malui cum* ***in/dulgentia*** *mea quam cum temeritate*{*i*} *uestra loqui et sester/tia quinquaginta mil*{*l*}*ia nummorum tenuitati publicae* / *quam praetexitis remisi scripsi autem Gallicano amico* / *meo proco*(*n*)*s*(*uli*) *pecuniam quae adiudicata est Pollioni nume/rassetis ex die sententiae dictae usurarum uos co*⟨*m=N*⟩*puta/tione*{*m*} *liberaret* / *reditus ue*⟨*c=S*⟩*tigali*{*or*}*um uestrorum quae conducta habui*{*e*}*sse Pol/lionem indicatis in rationem uenire aequom est ne quid* / *hoc nomine rei publicae a*⟨*b=P*⟩*sit uale*(*te*) / *dat*(*um*) VII *Idus Septembr*(*es*).

64 *IAM* 2.100, Banasa, 216 : [*Imp*(*erator*) *Caes*(*ar*) *diui Seueri Pii Arab*(*ici*) *Adiab*(*enici*) *Parth*(*ici*) *max*(*imi*) *Brit*(*annici*) *max*(*imi*) *filius diui M*(*arci*) *Antonini Germ*(*anici*) *Sarm*(*atici*) *nepos diui Antonini Pii pronepos*] / [*diui H*]*adria*[*ni adnepos diui Traiani Parth*(*ici*) *et di*]*u*[*i*] *Neruae adnepos* / *Marcus Aurelius Antoninus Pius Aug*(*ustus*) *Part*(*hicus*) *max*(*imus*) / *Brit*(*annicus*) *max*(*imus*) *Germ*(*anicus*) *max*(*imus*) *pont*(*ifex*) *max*(*imus*) *trib*(*uniciae*) *potestatis* / XVIIII *imp*(*erator*) III *co*(*n*)*s*(*ul*) IIII *p*(*ater*) *p*(*atriae*) *proco*(*n*)*s*(*ul*) *dicit* / *obsequium et fidem uestram remunerans omnia quaecumque sunt debita fis/calia frumentaria siue pecuniaria pendentium quoque causarum concedo* / *uobis exceptis de quibus pronuntiatum est prouocatione non secuta et hoc* / *amplius eas quoq*(*ue*) *causas at beneficium meum profiteor ipse pertinere in qui/bus appellationem interpositam probatum fuerit etiam si non sit admissa* / *certum habens quod* ***indulgentiam*** *meam obsequio sitis remuneraturi cum* / *uicor*(*um*) *et prouinciarum bene de re p*(*ublica*) *merentium non tantum uiris fortibus* / *in omni ordine spectatissimis castrensium adque ciuilium officiorum ue/rum etiam siluis quoque ipsis caelestium fertilibus animalium meritum* / *aput me conlocaueritis hoc beneficio meo praesumo omnes de cetero an/nuas pensitationes siue in frumento seu in pecunia eo promptius datu/ros quo me reputabitis non expectasse quin ultro offerrem neque petenti/bus uobis neque sperantibus noua remedia et magnificam* ***indulgentiam*** / *curantibus L*(*ucio*) *Ant*(*onio*) *Sosibiano et Aulo Pompeio Cassiano* / *d*(*u*)*umuiris.* Cf. M. Corbier, 'Le discours du prince d'après une inscription de Banasa', *Ktèma* 2 (1977), 213–232, repris et complété

moins d'un siècle et demi de distance deux situations très proches mettant en scène l'*indulgentia* des princes, Titus (le 7 septembre 79, le terme *indulgentia mea* est employé une fois à la ligne 6–7) et Caracalla (en 216, *indulgentiam meam* à la ligne 11 et *magnificam indulgentiam* à la ligne 18), dans le cadre de remises de dettes ou d'arriérés fiscaux[65]. Les monnayages complètent fort judicieusement le discours de célébration de l'action du prince : sur chacune des inscriptions, la titulature au nominatif des deux empereurs est suivie du verbe *dicere-dicit* qui exprime concrètement le pouvoir normatif du prince, qui « dit » le droit comme tout magistrat supérieur[66]. La monnaie de Livie (Annexe, n° 1) incarnant la *Iustitia* est restituée par Titus au profit de son action (titulature au revers) et se fonde sur des modèles du début du principat, comme le *dupondius* de l'atelier de Rome frappé en 22–23 (Annexe, n° 2) qui place également une incarnation de la justice au droit, tandis que les deux revers ne portent pas de portrait du prince mais seulement leur titulature entourant la mention S.C. Les parallèles sévériens concernant le jeune Caracalla, porté à l'Augustat par son père – nous sommes en 198 (Annexe, n° 11) –, puis quelques années plus tard sous son propre règne – en observant les changements apportés au portrait du prince, sous les traits désormais de ce *custos imperii* qui « monte la garde en sentinelle » pour reprendre l'expression de Paul Veyne[67] (Annexe, n° 12) –, permettent de souligner la proximité des représentations de la *Iustitia* et de l'*Indulgentia principum*.

Il est important de souligner dans ce dernier cas les variations d'approche des portraits dressés d'un prince, que nos sources littéraires assimilent volontiers à un tyran, le meurtrier de son frère Géta, celui qui est à l'origine de

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dans *Ead.*, *Donner à voir, donner à lire. Mémoire et communication dans la Rome ancienne* (Paris 2006), chap. 8, 197–213.

65 Le détail des deux interventions impériales importe moins dans le cadre de cette présentation, même si les deux inscriptions permettent d'établir les mécanismes et ressorts du droit impérial aux différents niveaux de la procédure (communautés locales, gouvernement provincial, chancellerie impériale). L'analyse rhétorique du discours sévérien sous Caracalla a été menée naguère par Corbier 2006, op. cit. (n. 64), « Le réseau des mots », 205–209.

66 Il est aisé de se reporter, à dix ans d'intervalle en ce qui concerne Titus, aux expressions qui ont prévalu afin de rendre compte du pouvoir normatif de son père dans la *lex de imperio Vespasiani* : cf. *Lex de Imperio Vespasiani* in Crawford, op. cit. (n. 47).

67 P. Veyne, *L'empire gréco-romain* (Paris 2005), 35, n. 96, à propos de la *statio principis*. Les portraits du prince suivent une évolution remarquable à partir de la mort de son père, tandis que le discours impérial en mots et images est sensiblement infléchi à partir de l'élimination de Géta. Une étude systématique des modes d'expression et de diffusion de ce discours manque afin de suivre au plus près les inflexions de la *persona* de Caracalla de 212 à 217.

l'extrême sévérité dans l'application de la procédure d'*abolitio memoriae* le concernant[68], confrontés aux fragments du discours impérial qui nous sont parvenus, et qui tous mettent l'accent sur les traits caractéristiques de l'action du prince – comme le font les *papyri* attestant, lors du séjour conjoint de Septime Sévère et Caracalla à Alexandrie (199–200), leur activité très prenante de juges, siégeant longuement et se devant d'être accessibles, y compris pour statuer sur les questions les plus triviales[69]. L'empereur fait montre de sa bienveillance à l'égard des habitants de Banasa dans son édit (texte *supra* n. 64) par une remise des *debita fiscalia* (lignes 6–7, *frumentaria siue pecuniaria*), tout comme il est l'origine, quelles que soient les circonstances de la promulgation de cette décision, de l'octroi de la citoyenneté à tous les hommes libres de l'empire en 212[70].

Dans cette confrontation des identités et *personae* des princes, soulignons un dernier aspect fondamental de ce petit dossier, dont on pourrait approfondir les données rhétoriques et normatives. Une recherche, facilitée par les banques de données en ligne, des occurrences de « *iniust-* » dans les inscriptions latines livre un résultat sans appel : un seul document peut être associé, mais de loin puisqu'il s'agit là d'une véritable construction en écho des qualités du prince et de l'injustice des demandes des plaignants, la lettre précédemment citée (n. 63) de Titus aux citoyens de Munigua[71]. Le prince fait montre de sa bienveillance en accédant partiellement à la demande de remise de dettes

68 Afin de replacer le « cas Géta » dans le cadre plus général d'application d'une procédure de condamnation de mémoire, S. Benoist, 'L'usage de la *memoria* des Sévères à Constantin : notes d'épigraphie et d'histoire', *Cahiers du Centre Gustave-Glotz* XIX (2008) [2010], 129–143, et l'inventaire exhaustif d'A. Mastino, *Le titolature di Caracalla e Geta attraverso le iscrizioni* (*indici*) (Bologne 1981). De manière plus spécifique concernant la titulature impériale et son usage, S. Benoist, 'Identité(s) du prince et discours impérial, l'exemple des titulatures, des Sévères à Julien', in M. Crété (ed), *Discours et systèmes de représentation : modèles et transferts de l'écrit dans l'Empire romain* (Besançon 2016), 17–37.

69 Cf. *P. Col.* 123, pour les 13 *apokrimata* rendus par Septime Sévère à Alexandrie en 200. Pour une bibliographie exhaustive et une approche globale du dossier : J.-P. Coriat, *Le prince législateur. La technique législative des Sévères et les méthodes de création du droit impérial à la fin du Principat* (Rome 1997), prolongé par *Id., Les constitutions des Sévères. Règne de Septime Sévère*, vol. I (Rome 2014).

70 *P. Giss.*, I, 40 (en 212) = Girard[7], II, p. 478 et suiv. = *FIRA*, I, n° 88. Pour une première analyse du style employé dans les documents normatifs du règne de Caracalla, Coriat 1997, op. cit. (n. 69), 555–557, avec ce que l'auteur nomme une « idiosynchrasie ». Trois thèmes sont dominants – grandeur, universalité et générosité –, le dernier s'insérant dans notre perspective d'étude (*indulgentia*) et trouvant des échos dans les deux autres au service d'un discours impérial tout à fait élaboré.

71 Cf. Fr. Hurlet, *Le proconsul et le prince d'Auguste à Dioclétien* (Bordeaux 2006), cat. 62, 270–271.

mais ne peut toutefois s'empêcher de parler sans détour d'une *iniusta appelatio* (à la ligne 5), la témérité de la demande étant opposée à l'*indulgentia* du prince. Le gouverneur de Bétique Sempronius Fuscus (en 78–79) avait rendu un jugement défavorable aux *Muniguenses* qui refusaient de payer une somme due au fermier des *uectigalia* Servilius Pollio. Ce jugement est confirmé en appel par Titus (*iniusta appellatio*), qui toutefois accorde une remise de 50 000 HS.

Quoi qu'il en soit, l'épigraphie officielle ne peut guère dépeindre sous des traits négatifs le souverain, une mémoire condamnée jouera sur la disparition plus ou moins définitive des actes du tyran, des inscriptions et portraits qui lui sont attribués, sur un oubli instrumentalisé de ce mauvais prince, mais ne peut en aucun cas construire une figure de l'*iniustus princeps* diffusée par les canaux habituels de ce que l'on voudra bien appeler la communication impériale. Les biais sont plus discrets quand il s'agit d'évoquer les circonstances d'un mauvais gouvernement de l'empire, le plus souvent lié à une constante républicaine : la dénonciation des mauvais gouverneurs ou des autorités locales[72].

Il n'est pas inutile d'évoquer, dans ces jeux habiles de masques qui mettent au jour des figures impériales à contre-courant des opinions traditionnellement émises, en dehors toutefois de la stricte observance du discours « officiel » qui nous est parvenu sur divers supports (épigraphiques, numismatiques, papyrologiques, voire dans les mises en scène figurées), le cas bien connu du portrait proposé par Fronton dans ses *Principia historiae* d'un Lucius Verus devenu modèle des comportements de bon gouvernement, à l'égal des magistrats républicains évoqués par nos sources du dernier siècle de la République et des premières décennies du Principat. Le propos est conforme à une présentation idéalisée des vertus du bon prince, *iustitia* et *clementia* en tête, selon la liste élaborée et diffusée à l'époque augustéenne, avec une mise en scène subtile des faiblesses d'un *optimus princeps*, Trajan jouant les faire-valoir du frère de Marc Aurèle[73]. Citons les premières phrases du paragraphe 18 des *Principia* :

> De même, la réputation de **justice** et de **clémence** de Lucius chez les barbares était entière ; Trajan n'était pas également innocent pour tous. Personne ne se repentit d'avoir placé son royaume et sa fortune dans la

72 Voir l'enquête menée par R. Haensch, 'Un discours épigraphique sur les faiblesses de l'*Imperium Romanum* ? Le regard des princes et de leurs sujets', *Cahiers du Centre Gustave Glotz* XXV (2014) [2015], 297–306.

73 À propos des pratiques du discours officiel à l'époque antonine, S. Benoist, 'Pline le Jeune et Fronton, deux protagonistes d'un discours impérial en actes', in O. Devillers (ed), *Autour de Pline le Jeune, en hommage à Nicole Méthy* (Bordeaux 2015), 37–48, en partant de l'étude pionnière de N. Méthy, 'Une critique de l'*optimus princeps*. Trajan dans les *Principia historiae* de Fronton', *Museum Helveticum* 60 (2003), 105–123.

> **protection** [l'emploi de fides est fort judicieux dans le contexte des relations romano-barbares] de Lucius …[74]

Cet écrit de circonstance, dont on a pu mesurer le rôle, dans le contexte du retour de Lucius Verus de sa campagne parthique en 165–166, puisqu'il s'agissait là pour Fronton de porter un jugement déguisé sur le comportement de son impérial élève Marc Aurèle, peut à cet égard être mis en relation avec d'autres traités plus anciens, comme le *De Eloquentia*, que l'on peut dater de 161 très probablement[75]. Il importait pour lui de faire l'éloge de la rhétorique contre le stoïcisme pratiqué par l'empereur, et de placer l'éloquence au cœur du métier d'empereur : dans ses relations avec le Sénat, le *populus Romanus* (en *contio*), afin de corriger le *ius iniustum*, dans les lettres rédigées et adressées au monde entier (*per orbem terrae*), dans les relations avec les rois étrangers (*reges exterarum gentium*), etc.[76]

Comme on l'a vu précédemment, la *Iustitia* apparaît régulièrement à partir d'Hadrien sur les monnayages (cf. Annexe, n^{os} 4 & 5), tout comme l'*Indulgentia* (Annexe, n^{os} 6 & 7, dans ce dernier cas, il s'agit de l'impératrice Sabine), Marc Aurèle ne dérogeant pas à cette mise en scène publique de la *statio principis* (Annexe, n^{o} 8), reflet officiel des propos de son précepteur destinés à une diffusion plus restreinte, en tant que lettres adressées au prince et à ses proches.

Achevons ce parcours par des figures impériales contrastées qui permettent d'envisager sur la longue durée, au travers de nos sources littéraires d'une part, et par l'observation des linéaments du discours impérial d'autre part (inscrip-

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74 *Iustitiae quoque et clementiae fama apud barbaros sancta de Lucio ; Traianus non omnibus aeque purgatus. Regnum fortunasque suas in fidem Luci contulisse neminem paenituit …* ; On renverra à l'édition et au commentaire de M.P.J. van den Hout : Fronton, *Epistulae*, coll. Teubner, 2^{e} ed. (Leipzig 1988), 202–214 ; *Id., A Commentary on the letters of Marcus Cornelius Fronto* (Leyde, Boston 1999), 462–487. L'épisode concernant le meurtre du prince parthe, roi d'Arménie, Parthamasiris sur ordre de Trajan, après avoir été détrôné est rapporté par DC., 68.17–20 et brièvement mentionné par Plin., *Pan*. 16.5, parlant de l'*insolentia* d'un *barbarus rex*.

75 Van Hout 1988, op. cit. (n. 74), 133–152 ; Ed. Champlin, *Fronto and Antonine Rome* (Cambridge [Ma.], Londres 1980), 122–126, sur les questions de datation de ce traité et son rapport au *De Oratoribus*.

76 Le passage de Fronton, *De Eloquentia*, 2, 7 (van Hout 1988, p. 138) sert d'introduction au chapitre consacré par F. Millar à « l'empereur au travail », in *The Emperor in the Roman World* (Londres 1992^{2} [1977]), 203 ; de même Champlin 1980, op. cit. (n. 75), « The teacher of emperors », 123. À la suite, d'autres recommandations associent la justice, la piété et l'éloquence (2.10 : *Si tibi placebis quod iuste iudicaris,* ***iustitiam*** *repudiabis ? Si placebis tibi pio aliquo cultu parentis, pietatem spernabere ? Places tibi cum facundus : igitur uerbera te ; quid facundiam uerberas ?*).

tions et monnaies), des oppositions de comportement de la part de princes qui furent contestés et dont les vertus et les actes ont été diversement appréciés. Nous prendrons à témoin deux figures impériales aux destins forts différents : le premier prince de l'année des quatre empereurs, Galba, et le vainqueur des compétitions impériales de la fin du IIe siècle, Septime Sévère. Le premier se place au tout début d'une période de crise et ne règne qu'un peu plus de sept mois, le second réussit à installer au pouvoir une nouvelle dynastie et ce pour une quarantaine d'années, à l'issue d'une période qui le conduit à éliminer successivement trois opposants, Didius Iulianus à Rome, Pescennius Niger en Orient et Clodius Albinus en Bretagne[77]. L'un et l'autre font l'objet d'avis très contradictoires, qu'il s'agisse des vertus qui leur sont reconnues ou des actes portés au crédit ou au débit de leur action politique.

Il convient de relever en premier lieu le portrait dressé du gouverneur Galba, proconsul d'Afrique en 44–46 et *legatus Augusti pro praetore prouinciae Tarraconensis* de 60 à 68. Suétone décrit l'action du proconsul en prenant des exemples afin de justifier l'association de la justice et de la sévérité :

> Il fut deux ans proconsul d'Afrique. On l'avait nommé sans tirage au sort pour rétablir l'ordre dans cette province, troublée par des divisions intestines et inquiétée par les incursions des Barbares. Il s'acquitta de cette tâche *avec beaucoup de sévérité et de justice*, même dans les plus petites choses[78].

Ce que confirme Tacite dans ses *Histoires* :

> Dans la force de l'âge, il s'illustra par les armes dans les Germanies. Proconsul, il gouverna l'Afrique avec modération ; plus âgé, l'Espagne citérieure avec le même esprit de justice ; il paraissait supérieur à la condition privée tant qu'il fut homme privé et, de l'aveu unanime, digne de l'empire, s'il n'avait pas été empereur[79].

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77 Deux références suffiront quant au contexte général de ces deux expériences impériales : on peut se reporter d'une part au livre de P. Cosme, *L'année des quatre empereurs* (Paris 2012), ainsi que d'autre part à la biographie d'A. Birley, *Septimius Severus, The African Emperor* (Londres 1999³ [1971]).

78 Suet., *Galba* 7.3 : *Africam pro consule biennio optinuit extra sortem, electus ad ordinandam prouinciam et intestina dissensione et barbarorum tumultu inquietam ; ordinauitque magna seueritatis ac iustitiae cura etiam in paruulis rebus*. Trad. modifiée H. Ailloud (éd. CUF).

79 Tac., *Hist*. 1.49.4 : *Dum uigebat aetas militari laude apud Germanas floruit. Pro consule Africam moderate, iam senior citeriorem Hispaniam pari iustitia continuit, maior priuato uisus*

Ces témoignages sont tout à fait remarquables. Un bon gouverneur de province, sachant allier avec mesure justice et sévérité, devient un prince qui pêche par son excès de *seueritas* confinant à une véritable *saeuitia* ou *crudelitas*, comme le confirme l'épisode célèbre du massacre des rameurs de la flotte, réunis en légion par un Néron aux abois et désireux d'être maintenus, à l'occasion de l'*aduentus* du nouveau prince à Rome[80]. Cette faute politique, d'un prince qui ne fit pas preuve de *clementia*, est avancée comme l'une des causes du soulèvement des prétoriens à la mi-janvier 69, qui vit Othon prendre la tête du mouvement et obtenir par là le principat, après l'assassinat de Galba et Pison au forum[81]. De fait, les propos de Tacite sur ce *capax imperii* qui n'eut pas dû recevoir l'*imperium* trouvent un écho tardif dans le jugement sénatorial rapporté (inventé) par l'*Histoire Auguste*, dans sa *Vie de Septime Sévère* :

> Voici le jugement que porta sur lui le sénat : « Il aurait dû ne jamais naître ni mourir, car il paraissait à la fois trop cruel et trop utile à l'État »[82].

La figure de Septime Sévère est de fait diversement appréciée. Comme nous l'avons déjà vu, l'activité normative du prince est riche en attestations de toutes sortes et repose en partie sur un entourage de juristes de très grand talent, comme Paul, Papinien ou Ulpien. Dion Cassius tout comme Aurelius Victor louent l'activité judiciaire et législative du prince[83], ce qui n'empêche nullement la plupart des sources, contemporaines ou plus tardives, d'insister sur sa cruauté, attitude qui est envisagée comme une « injustice », mais est revendiquée par le prince lui-même quand il célèbre la sévérité et la cruauté de Sylla, Marius et Auguste[84], afin de justifier son comportement à l'égard de ses opposants et de leurs partisans, qui s'apparente à une répression féroce, même s'il n'est pas toujours facile d'en mesurer l'entendue[85]. Il n'est pas inutile de

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dum priuatus fuit, et omnium consensu capax imperii nisi imperasset. Trad. P. Wuilleumier et H. Le Bonniec (éd. CUF).

80 Cf. Plut., *Galba* 15.6–8 ; Tac., *Hist.* 1.6.2 ; Suet., *Galba* 12.2 ; DC., 63/64.3.2.

81 Lecture des enjeux spatiaux et idéologiques de cette crise de 68–69 à Rome dans S. Benoist, 'Le prince, la cité et les événements : l'année 68–69 à Rome', *Historia* 50.3 (2001), 279–311.

82 HA, *Seu.* 18.7 : *De hoc senatus ita iudicauit illum aut nasci non debuisse aut mori, quod et nimis crudelis et nimis utilis rei publicae uideretur* (trad. A. Chastagnol). Le propos est repris d'Aurelius Victor, 20.6, tandis que l'*Épitome*, 1.28, le rapporte à Auguste.

83 DC., 76/77.7 ; Aur. Vict., 20.23 : *Legum conditor longe aequabilium.*

84 DC., 75/76.8, à propos de leur αὐστηρίαν τε καὶ ὠμότητα.

85 En partant de l'analyse méthodique de Fr. Jacques, 'Les *nobiles* exécutés par Septime Sévère selon l'Histoire Auguste : liste de proscription ou énumération fantaisiste ?', *Latomus* 51 (1992), 119–144.

relever que l'injustice apparaît désormais comme synonyme d'un comportement politique sans retenue, violent et cruel, comme de nombreux exemples l'attestent chez Hérodien[86]. Il s'agit en définitive d'assimiler l'absence de clémence à cette cruauté qualifiée d'injustice. Le discours évolue mais maintient une forte distinction entre l'*habitus* et la *praxis* des princes, leur production normative faisant rarement l'objet d'un rejet systématique. Les actes des tyrans semblent devoir perdurer par-delà les époques, en particulier quand il s'agit d'expressions de leur bienveillance : octroi de la citoyenneté romaine, remise d'impôts, etc.[87]. C'est en ce sens qu'il convient d'interpréter les usages épigraphiques et monétaires qui portent sur des vertus pratiques attachées à l'activité des princes (cf. pour *Iustitia* et *Indulgentia* : Septime Sévère, Annexe, n^{os} 9 & 10 ; Sévère Alexandre, n^{o} 13 ; Gallien et Macrien le Jeune, n^{os} 14 & 15).

5 Conclusion : pouvoir normatif des princes et construction d'une *persona* impériale, des faits, des actes et des paroles

Il est temps de conclure très brièvement cette enquête, nourrie par un inventaire très large des sources disponibles à propos de la *iustitia* et de l'« injustice » impériales, durant les trois premiers siècles de l'Empire, en prenant soin de relier cette construction rhétorique et normative aux héritages républicains, en particulier l'œuvre de Cicéron. C'est ainsi qu'il nous apparaît que la distinction opérée par ce dernier entre *iustitia animi* et *iustitia agendi* peut s'appliquer plus largement aux données qui nous sont parvenues à propos de la *iustitia*, en tant que l'une des quatre vertus du bouclier d'Auguste, mais aussi en tant que pratique normative en construction des princes, depuis la mise en place du

86 Un relevé systématique des mentions de la justice et de l'injustice dans les comportements et discours des princes chez Hérodien serait éclairant. Par exemple, à propos de Pertinax (2.3.9 et 4.3), de Septime Sévère (3.8.3 et 8), de ce dernier parlant de l'injustice d'Albinus (3.6.4), de Macrin fustigeant le comportement de Caracalla (4.14.6 & 15.7), de Sévère Alexandre à propos de l'injustice des Perses (6.3.4), ou dans la lettre adressée par Gordien III au Sénat (7.6.4).

87 L'exemple fourni par la *tabula Banasitana* de 177 de n. è. suffit à rappeler la réintégration des mauvais princes du I^{er} siècle, « oubliés » dans la *lex de imperio Vespasiani*, comme Caligula, Néron, Galba, mais présents au titre de l'octroi de la *ciuitas Romana* dans le *commentarium* : *Descriptum et recognitum ex commentario ciuitate Romana /donatorum diui Aug*(*usti*) *et Tib*(*eri*) *Caesaris Aug*(*usti*)*, et C*(*aii*) *Caesaris, et diui Claudi, / et Neronis, et Galbae, et diuorum Aug*(*ustorum*) *Vespasiani et Titi et Caesaris / Domitiani …* Cf. W. Seston et M. Euzennat, 'Un dossier de la chancellerie romaine : la *Tabula Banasitana*, étude de diplomatique', *Comptes rendus de l'Académie des inscriptions et belles-lettres* (1971), 468–490 = W. Seston, *Scripta varia* (Rome 1980), 85–107.

Principat. On peut dès lors parler en termes d'*habitus* et de *praxis* de ces différents empereurs à ce sujet. Le portrait moral de chacun des princes, tel qu'il est rapporté par Sénèque, Tacite, Pline, Suétone, Fronton, l'Histoire Auguste ou les abréviateurs d'une part, Plutarque, Dion Cassius, Hérodien, mais également Ménandre le Rhéteur d'autre part, permet de construire des couples antinomiques de *boni et mali principes*. Cette rhétorique nous informe *a posteriori* sur la *persona* des *Imperatores Caesares Augusti* telle qu'elle s'est construite progressivement. Le tyran est injuste, cruel … Mais sa pratique de la justice ne diffère pas foncièrement de celle du bon souverain. Il y a ainsi une différence majeure entre les sources qui participent de l'élaboration d'un discours impérial de commémoration et de reconnaissance du pouvoir impérial romain – pour le dire autrement de la *statio principis* – et les *uitae* construites sur des modèles rhétoriques éprouvés.

Sur le temps long, la célébration tardive de la *Iustitia* et l'*Indulgentia* sur les monnayages impériaux (principalement à partir d'Hadrien) accompagne la construction de la figure impériale en *magister legum*, ce juge éminent qui est diversement apprécié dans les portraits plus ou moins orientés de nos sources littéraires. L'injustice des uns s'avère de plus en plus, au tournant des IIe et IIIe siècles de notre ère, l'expression privilégiée de la violence d'un pouvoir tyrannique, en particulier dans le contexte disputé des usurpations et du processus consécutif de légitimation d'un pouvoir impérial chèrement conquis. De la même façon, *indulgentia* et *philanthropia* recouvrent au IIIe siècle de nombreuses postures supposées rendre compte du bon gouvernement, termes instrumentalisés dans le discours impérial officiel pour célébrer l'action efficace du souverain. Les conséquences de l'octroi généralisé de la *ciuitas Romana* par la *constitutio Antoniniana*, puis des transformations de l'État romain au terme d'un long IIIe siècle incluant l'époque tétrarchique, expliquent le retour à une expression toute républicaine faisant du gouverneur de province, le juge en son ressort administratif.

Ainsi, culture politique impériale et pratique de la justice, héritées dans un premier temps des modes de fonctionnement d'une *res publica* aristocratique, puis façonnées par la mise en place du pouvoir normatif des princes, prennent place au cœur d'un discours impérial nourri de philosophie politique, notamment de ce stoïcisme dominant qui permit à Tony Honoré de sous-titrer la deuxième édition de sa monographie consacrée à Ulpien, « Pioneer of Human Rights » et de s'exprimer ainsi en avant-propos : « The values of equality, freedom, and dignity, to which human rights give effect, formed the basis of Ulpian's exposition of Roman law as the law of a cosmopolis[88]. »

88 T. Honoré, *Ulpian. The Pioneer of Human Rights* (Oxford 2002² [1982]), IX.

Annexe Numismatique

N° 1. RIC II².1, Titus, 424, *dupondius, en 80–81, atelier de Rome* (*American Numismatic Society, 1951.61.50, http://numismatics.org/collection/1951.61.50*)*:*

Droit: IVSTITIA; Buste de Livie en *Justitia*, drapée, vers la droite, portant une couronne.
Revers: IMP T CAES DIVI VESP F AVG REST; légende entourant la mention S C.

N° 2. RIC I², Tiberius, 46, *dupondius, en 22–23, atelier de Rome* (*American Numismatic Society, 1944.100.39280, http://numismatics.org/collection/1944.100.39280*)*:*

Droit: IVSTITIA; Buste de femme, drapée, à droite, portant une couronne décorée avec des motifs floraux; ses cheveux tirés en arrière et formant un chignon.
Revers: TI CAESAR DIVI AVG F AVGVST P M TR POT XXIIII; légende entourant la mention S C.

N° 3. RIC II, Nerva, 18, *denier, en 97, atelier de Rome* (*Museo de Prehistoria de Valencia, 36258, http://www.museuprehistoriavalencia.org/nomisma/id/es/36258*)*:*

Droit : IMP NERVA CAES AVG P M TR P COS III P P ; Tête de Nerva, laurée, à droite.
Revers : IVSTITIA AVGVST ; *Justitia*, drapée, assise sur une chaise basse à dossier, les pieds sur un tabouret, à droite, portant un long sceptre droit à main droite et une branche allongée à main gauche.

N° 4. RIC II, Hadrien, 19a, *denier, en 117, atelier de Rome* (*American Numismatic Society, 1916.192.204, http://numismatics.org/collection/1916.192.204*)*:*

Droit : IMP CAESAR TRAIAN HADRIANVS AVG ; Buste d'Hadrien, lauré, drapé sur l'épaule gauche, à droite.
Revers : P M TR P COS DES II IVSTITIA ; *Justitia* assise à gauche, tenant une patère à main droite tendue et un sceptre à main gauche.

N° 5. RIC II, Hadrien, 362e, *denier, en 134–138, atelier de Rome* (*American Numismatic Society, 1948.19.1209, http://numismatics.org/collection/1948.19.1209*)*:*

Droit : HADRIANVS AVGVSTVS P P ; Buste d'Hadrien, lauré, drapé, à droite.
Revers : IVSTITIA AVG COS III ; *Justitia*, drapée, assise sur un trône à gauche, portant une patère à main droite tendue et un sceptre droit à main gauche.

Nº 6. RIC II, Hadrien, 213a, *denier, en 132–134, atelier de Rome* (*American Numismatic Society, 1996.4.5, http://numismatics.org/collection/1996.4.5*)*:*

Droit : HADRIANVS AVGVSTVS ; Tête d'Hadrien, barbu, à droite.
Revers : INDVLGENTIA AVG P P COS III ; *Indulgentia*, drapée, assise à gauche sur un trône, la main droite levée, portant de travers à main gauche un sceptre droit.

Nº 7. RIC II, Hadrien, 417, *denier, en 128–136, atelier de Rome* (*British Museum : 1930,1003.28*)*:*

Droit : SABINA AVGVSTA IMP HADRIANI AVG P P ; Buste de Sabine, portant diadème, drapée, à droite ; ses cheveux sont noués à l'arrière et tombent en vagues sur le cou, ils sont aussi remontés au-dessus du diadème.
Revers : INDVLGENTIA AVG P P COS III ; *Indulgentia*, drapée, assise à gauche sur un trône, la main droite levée, portant de travers à main gauche un sceptre droit.

Nº 8. RIC III, Marc Aurèle, 401, *denier, en 179, atelier de Rome* (*Museo Prehistoria de Valencia, 39151, http://www.museuprehistoriavalencia.org/nomisma/id/es/39151*)*:*

Droit : M AVREL ANTONINVS AVG ; Tête de Marc Aurèle, laurée, à droite.
Revers : TR P XXXIII IMP X P P COS III IVSTITIA AVG ; *Justitia*, drapée, assise vers la gauche sur un siège bas, portant une patère à main droite tendue et un sceptre droit à main gauche.

N° 9. RIC IV, Septime Sévère, 505, *denier, en 198–202, atelier de Lattaquié* (*American Numismatic Society, 1948.19.1483, http://numismatics.org/collection/1948.19.1483*)*:*

Droit : L SEPT SEV AVG IMP XI PART MAX ; Tête de Septime Sévère, laurée, à droite.

Revers : IVSTITIA ; *Justitia*, drapée, assise vers la gauche, portant une patère à main droite tendue et un sceptre droit à main gauche.

N° 10. RIC IV, Septime Sévère, 80, *denier, en 196–197, atelier de Rome* (*American Numismatic Society, 1986.161.101, http://numismatics.org/collection/1986.161.101*)*:*

Droit : L SEPT SEV PERT AVG IMP VIII ; Tête de Septime Sévère, laurée, à droite.

Revers : INDVLGENTIA AVG ; *Indulgentia*, drapée, assise à gauche sur un siège bas, portant une patère à main droite tendue et un sceptre à main gauche.

N° 11. RIC IV, Caracalla, 335, *denier, en 198, atelier de Lattaquié* (*American Numismatic Society, 1944.100.51576, http://numismatics.org/collection/1944.100.51576*)*:*

Droit : IMP C M AVG ANTON AVG P TR P ; Buste de Caracalla, lauré, drapé, cuirassé, à droite.

Revers : IVSTITIA ; *Justitia*, drapée, assise à gauche, portant une patère à main droite et un sceptre droit à main gauche.

N° 12. RIC IV, Caracalla, 300, *denier, en 213–217, atelier de Rome* (*American Numismatic Society, 1985.140.157, http://numismatics.org/collection/1985.140.157*)*:*

Droit : ANTONINVS PIVS AVG GERM ; Tête de Caracalla, laurée, à droite.
Revers : INDVLGENTIAE AVG ; *Indulgentia*, drapée, assise à gauche, portant une patère à main droite tendue et un sceptre en travers à main gauche.

N° 13. RIC IV, Sévère Alexandre, 507, sesterce, atelier de Rome (*American Numismatic Society, 1944.100.53286, http://numismatics.org/collection/1944.100.53286*)*:*

Droit : IMP SEV ALEXANDER AVG ; Buste de Sévère Alexandre, lauré, drapé sur l'épaule gauche, à droite.
Revers : IVSTITIA AVGVSTI / S C ; *Justitia*, drapée, assise à gauche, portant une patère à main droite et un sceptre droit à main gauche.

Nº 14. RIC V, Gallien, 206, *antoninianus, en 260–268, atelier de Rome* (*Münzkabinet Wien, RÖ 19363, http://www.ikmk.at/object.php?id=ID71473*)*:*

Droit : GALLIENVS AVG ; Tête de Gallien, radiée, à droite.
Revers : INDVLGENTIA AVG ; *Indulgentia*, drapée, jambes croisées, appuyée à une colonne, portant un bâton à main droite et une corne d'abondance à main gauche ; à ses pieds, une roue.

Nº 15. RIC V, Macrien le Jeune, 8, *antoninianus, en 260–261, atelier d'Antioche* (*American Numismatic Society, 1958.45.4, http://numismatics.org/collection/1958.45.4*)*:*

Droit : IMP C FVL MACRIANVS P F AVG ; Buste de Macrien le Jeune, radié, drapé, cuirassé, à droite.
Revers : INDVLGENTIAE AVG ; *Indulgentia*, drapée, assise à gauche, portant une patère à main droite et un sceptre à main gauche.

CHAPTER 3

The *Decreta* and *Imperiales Sententiae* of Julius Paulus: Law and Justice in the Judicial Decisions of Septimius Severus

Elsemieke Daalder

1 Introduction: The *Decreta* and *Imperiales Sententiae* of Paul

At the end of his description of the reign op Septimius Severus (193–211 CE), the Roman senator and historiographer Cassius Dio recounts the daily routine of the emperor and describes how he managed the affairs of state in peacetime. He mentions that Severus used to spend a considerable part of his day hearing cases and that he did so most excellently:

> The following is the manner of life that Severus followed in time of peace. He was sure to be doing something before dawn, and afterwards he would take a walk, telling and hearing of the interests of the empire. Then he would hold court, unless there were some great festival. Moreover, he used to do this most excellently; for he allowed the litigants plenty of time and he gave us, his advisers, full liberty to speak. He used to hear cases until noon;[1]
>
> Dio, *Hist*. 76(77).17.1–2

Severus' conduct was nothing out of the ordinary: it has been accepted generally that the administration of justice was one of the most important tasks of Roman emperors.[2] The administration of justice created an important instance

1 (…), ἐχρῆτο δὲ ὁ Σευῆρος καταστάσει τοῦ βίου εἰρήνης οὔσης τοιᾷδε. ἔπραττέ τι πάντως νυκτὸς ὑπὸ τὸν ὄρθρον, καὶ μετὰ τοῦτ' ἐβάδιζε καὶ λέγων καὶ ἀκούων τὰ τῇ ἀρχῇ πρόσφορα· εἶτ' ἐδίκαζε, χωρὶς εἰ μή τις ἑορτὴ μεγάλη εἴη. καὶ μέντοι καὶ ἄριστα αὐτὸ ἔπραττε· καὶ γὰρ τοῖς δικαζομένοις ὕδωρ ἱκανὸν ἐνέχει, καὶ ἡμῖν τοῖς συνδικάζουσιν αὐτῷ παρρησίαν πολλὴν ἐδίδου. ἔκρινε δὲ μέχρι μεσημβρίας, (…). All translations of Dio's *Historia Romana* are derived from the LCL translation by E. Cary & H.B. Foster (Cambridge (MA) 1914).

2 See for example F. Millar, *The Emperor in the Roman World* (London 1992), 528; R. Färber, *Römische Gerichtsorte. Räumliche Dynamiken von Jurisdiktion im Imperium Romanum* (Munich 2014), 67; K. Tuori, *The Emperor of Law. The Emergence of Roman Imperial Adjudication* (Oxford 2016), 159 and J.-P. Coriat, 'L'empereur juge et son tribunal à la fin du principat:

 | DOI:10.1163/9789004400474_004

of close contact between the ruler and his subjects and offered the emperor ample opportunity to present himself as their benevolent and just ruler, who showed a keen interest in the (sometimes petty) problems and concerns of regular citizens.[3] Accordingly, the way an emperor dealt with the administration of justice was a substantial aspect of his public image and the general perception of his reign.[4] At the same time the administration of justice gave the emperor a stage to communicate his power and more in particular assert his position as the ultimate source of law and justice within the Roman legal system.[5] He was the final and sole authority on questions of the content and meaning of the law and on how it should be applied in a specific case.

Most of our information on imperial court cases originates from literary descriptions similar to Dio's description and has a rather anecdotal character. However, in the case of Septimius Severus we have another source available. Scattered throughout the Digest are fragments from two remarkable works by the Roman lawyer Paul, which contain reports of judicial decisions taken by the emperor Septimius Severus.[6] The works were originally entitled 'Three Books of Imperial Judgments' (*Decretorum Libri Tres*, hereafter referred to as 'the *Decreta*') and 'Six Books of Imperial Decisions made in Judicial Proceedings' (*Imperialium Sententiarum in Cognitionibus Prolatarum Libri Sex*, hereafter referred to as 'the *Imperiales Sententiae*').[7] Only 38 fragments have been excerpted into

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un essai de synthèse', in: R. Haensch (ed.), *Recht haben und Recht bekommen im Imperium Romanum* (Warsaw 2016), 41.

3 Millar 1992, op. cit. (n. 2), 229, Tuori 2016, op. cit. (n. 2), 246 and Coriat 2016, op. cit. (n. 2), 41. Also L. Bablitz, *Actors and Audience in the Roman Courtroom* (London 2007), 35.

4 Millar 1992, op. cit. (n. 2), 528–529; Färber 2014, op. cit. (n. 2), 67; Tuori 2016, op. cit. (n. 2), 127.

5 Tuori 2016, op. cit. (n. 2), 291 and Coriat 2016, op. cit. (n. 2), 41. Also B. Stolte, 'Jurisdiction and representation of power, or, the emperor on circuit', in: L. de Blois (ed.), *The Representation and Perception of Roman Imperial Power. Proceedings of the Third Workshop of the International Network Impact of Empire* (*Roman Empire, c. 200 B.C.–A.D. 476*), *Netherlands Institute in Rome, March 20–23, 2002* (Amsterdam 2003), 261–268: 263 and F. De Angelis, 'The emperor's justice and its spaces in Rome and Italy', in: idem, *Spaces of Justice in the Roman World* (Leiden, Boston 2010), 137.

6 See for this dating for example: O. Lenel, *Palingenesia iuris civilis* (Leipzig 1889), I.959; H. Fitting, *Alter und Folge der Schriften römischer Juristen von Hadrian bis Alexander* (Halle a. S. 1908, 2nd edition), 93; P. Krüger, *Geschichte der Quellen und Litteratur des römischen Rechts* (Munich 1912), 236; C. Sanfilippo, *Pauli Decretorum Libri Tres* (Milan 1938), 8.

7 Both works are listed in the *Index Florentinus*: XXV.10 and 15. For a long time the last published monograph on both works was Sanfilippo 1938, op. cit. (n. 6). See, however, recently E.S. Daalder, *De rechtspraakverzamelingen van Julius Paulus. Recht en rechtvaardigheid in de rechterlijke uitspraken van Septimius Severus* (The Hague 2018).

the Digest. Since at least some of the cases were treated in both works,[8] there has been an extensive scholarly debate about their relationship.[9] Some authors contend that Paul compiled and published two different collections of imperial *decreta* with two different titles, while others argue that the two works available to the compilers of the Digest were excerpts of one, otherwise unknown, Pauline original.[10] Modern scholarship has generally accepted the second view.

Eight of the texts transmitted in the Digest are not very instructive, since they probably have been heavily edited by Justinian's compilers and do not mention the proceedings or the imperial judgment at all.[11] The other 30 texts, however, contain more or less elaborate descriptions of 29 different court cases.[12] Since Paul served as one of Severus' legal councilors during the imperial judicial hearings, he had first-hand knowledge of the proceedings in Severus' court, explaining the high level of detail of many of his descriptions.[13] Not only does he state the real names of the litigants, the facts and the imperial judgment, but Paul also often elaborates on the proceedings and sometimes even mentions the deliberations between the emperor and his advisory council (*consilium*) afterwards. His reports therefore provide us with a unique insight in the imperial court proceedings and the judicial decision making-process.

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8 Dig. 28.5.93(92) (*Paulus imperialium sententiarum in cognitionibus prolatarum ex libris sex primo seu decretorum libro secundo*) and Dig. 36.1.83(81) (*Paulus imperialium sententiarum in cognitionibus prolatarum ex libris VI libro primo seu decretorum libro II*). One case has been incorporated in two different titles of the Digest, the *leges geminatae* Dig. 10.2.41 and Dig. 37.14.24. On these two texts, see M. Peachin, 'The case of the heiress Camilia Pia', *Harvard Studies in Classical Philology* 96 (1994), 301–341.

9 See for the most recent overview of this debate Daalder 2018, op. cit. (n. 7), 104–140.

10 The first theory goes back to Friedrich Bluhme, F. Bluhme, 'Die Ordnung der Fragmente in den Pandectentiteln. Ein Beitrag zur Enstehungsgeschichte der Pandecten', *Zeitschrift für Geschichtliche Rechtswissenschaft* 4 (1820), 313 n. 30. The second view was first put forward by Fritz Schulz, F. Schulz, *History of Roman Legal Science* (Oxford 1946), 154 and 340 with additions and amendments in F. Schulz, *Geschichte der römischen Rechtswissenschaft* (Weimar 1961), 181–183.

11 Dig. 4.4.38.1; 20.5.13; 22.1.16 *pr.*; 35.1.113; 46.1.68.2; 47.2.88(87); 50.2.9 *pr.* and 1.

12 Four of these texts only contain the imperial judgment: Dig. 16.2.24; 44.7.33; 46.1.68 *pr.*; 48.19.40. The others texts also give a description of the facts and/or court proceedings: Dig. 4.4.38 *pr.*; 10.2.41; 14.5.8; 22.1.16.1; 26.5.28; 26.7.53; 28.5.93(92); 29.2.97; 32.27 *pr.*; 32.27.1; 32.27.2; 32.97; 36.1.76(74) *pr.*; 36.1.76(74).1; 36.1.83(81); 37.14.24; 40.1.10; 40.5.38; 46.1.68.1; 48.18.20; 49.14.47 *pr.*; 49.14.47.1; 49.14.48 *pr.*; 49.14.48.1; 49.14.50; 50.16.240.

13 On Paul's career most recently C.A. Maschi, 'La conclusione della giurisprudenza classica all'età dei Severi. Iulius Paulus', *Aufstieg und Niedergang der römischen Welt* II.15 (1976), 667–707; H.T. Klami, 'Iulius Paulus: comments on a Roman lawyer's career in the III century', in: V. Giuffrè (ed.), *Sodalitas. Scritti in onore di Antonio Guarino* IV (Naples 1984–1985), 1829–1841 and D. Liebs, *Hofjuristen der römischen Kaiser bis Justinian* (Munich 2010), 55 ff.

It has generally been contended that Paul published his collection of imperial judgments for the benefit of the legal practice. Modern scholars argue that since imperial judicial decisions had force of law (e.g. Dig. 1.4.1.1 and Gai. *Inst.* 1.5), either Paul or Severus himself wanted them to be published for the benefit of the general legal public so that litigants, lawyers and judges could cite and/or apply these imperial decisions in other procedures in the lower courts.[14] In this paper I will argue that the motives behind the publication of Paul's collection were of a different kind. From his reports emerges a clear picture of Septimius Severus as a conscientious and benevolent judge, which fits strikingly well within the traditional image of the good 'emperor judge' that can be found in various literary sources, such as Tacitus, Pliny the Younger, Suetonius, Cassius Dio and Herodian.[15] Paul's collection of imperial judgments should therefore not be perceived as a traditional legal publication, but as a unique piece of legal writing with a specific political purpose.

2 The Imperial Administration of Justice

The imperial competence to adjudicate cases goes back to the age of Augustus. Its origins are much disputed, but will not be dealt with in this paper since the jurisdictional powers of the emperor were already well established at the time of Severus' reign.[16] From the second century onwards, the emperor had jurisdiction in both criminal and civil cases and could act as a judge of first instance or accept appeals against sentences of the lower courts. The procedural hearing at the imperial court took place in the form of a *cognitio extra ordinem* and was therefore not governed by the traditional Roman law of civil procedure, as codified in the *leges Iuliae iudiciariae*. In principle, this meant that the emperor could shape the procedure at his court in any way he saw fit. However, it is probable that the proceedings at the imperial court ideally consisted of the same elements as the procedures in the lower imperial law courts, such as the *praefectus urbi*, the *praefectus annonae*, the *praetor fideicommissarius* and imperial law courts in the provinces.[17] The main actors in the imperial

14 Maschi 1976, op. cit. (n. 13), 677–678; Peachin 1994, op. cit. (n. 8), 333 ff.; M. Rizzi, *Imperator cognoscens decrevit. Profili e contenuti dell'attività giudiziaria imperiale in età classica* (Milan 2012), 133.

15 On the literary '*topos*' of the good emperor judge, see Tuori 2016, op. cit. (n. 2), and see Benoist/ Gangloff in this volume.

16 The most recent contribution to the debate is Tuori 2016, op. cit. (n. 2).

17 Cf. M. Kaser & K. Hackl, *Das römische Zivilprozessrecht* (Munich 1996, 2nd ed.), 448.

courtroom were the emperor, who was usually seated on a tribunal, and the parties and their legal representation.[18] In addition to this, literary sources often explicitly mention the presence of a *consilium*, an advisory board of jurists and notable citizens, assisting the emperor in performing his judicial duties.[19] There exists a general consensus amongst scholars that there was no such thing as 'the' *consilium principis*, i.e. one imperial council with a fixed composition, advising the emperor in all matters of state. Emperors were generally assisted by different *consilia*, which were composed on an *ad hoc* basis depending on the question at hand.[20] However, it has been argued that the *consilium* advising the emperor in the performance of his *judicial* duties ('das Gerichtskonsilium') might have consisted of several regular members, who were probably all jurists.[21] Especially for the reign of Septimius Severus, both legal and papyrological sources do indeed seem to point in this direction,[22] suggesting that Paul might have been one of these regular members of the Severan judicial *consilium*.

During the hearing, the emperor was required to give the litigants or their lawyers the opportunity to assert their claims and defenses, plead their case and present legal and factual evidence to substantiate their argument.[23] In addition, he interrogated the parties or even entered into debate with them if he wished to do so.[24] After both parties had sufficiently explained their point

18 Emperor on a tribunal: Bablitz 2007, op. cit. (n. 3), 37. For the presence of lawyers during the proceedings at the imperial court, see for example Dig. 28.4.3 and *SEG* 17.759 (= Dmeir-inscription).

19 See for example Dio, *Hist*. 60.4.3 (Claudius), Suet., *Nero* 15 (Nero), Dio, *Hist*. 68.2.3 (Nerva) and Dio, *Hist*. 69.7.1–2 (Hadrian). The *Historia Augusta* also mentions the presence of jurists in the *consilia* of Hadrian (Hist. Aug., *Hadr*. 18.1) and Marcus Aurelius (Hist. Aug., *Aur*. 11.10).

20 This theory goes back to J.A. Crook, *Consilium principis. Imperial Councils and Counsellors from Augustus to Diocletian* (Cambridge 1955).

21 W. Kunkel, 'Nachträge zum RAC, s.v. *Consilium, Consistorium*', *Jahrbüch für Antike und Christentum* 11/12 (1968/1969), 230–248.

22 In Dig. 27,1,30 *pr*. Papinian mentions that Septimius Severus and Caracalla provided that the jurists (*iuris periti*), who were '*in consilium principum adsumpti*', should be excused from a tutelage, since they had to be available to the emperor at all times. This suggests that these jurists were not called upon by the emperor on an *ad hoc* basis, but held some kind of permanent position within the imperial council. The Greek equivalent of the expression '*in consilium principum adsumpti*', 'οἱ εἰς τὸ συμβούλειον κεκλημένοι', is also used in P. Oxy. 42, 3019, a report on a court case heard by Severus in the presence of a *consilium* in Egypt on 9 March 200 CE.

23 E.g. legal documents such as wills and deeds (Dig. 36.1.76(74) *pr*.; Dig. 46.1.68.1), witness reports (Dig. 22.5.3.3) and copies of imperial enactments (Dig. 36.1.76(74).1).

24 Dig. 28.4.3 (Marcus Aurelius debates about a legal matter with the lawyers of both sides);

of view, the emperor withdrew with his *consilium* to deliberate on the case.[25] During these deliberations, a conscientious emperor asked the opinion of the members of his *consilium* and listened to what they had to say.[26] Their role was, however, in the end purely advisory; the emperor could either side with (one of) their view(s) or choose to take a different view and decide the case according to his own conviction.[27]

The imperial judgment, which was called a *decretum*, could take different forms. When no previous applicable law existed, the emperor had the power to establish a new legal rule to decide the case. Since he was conceived of as the chief source of law, all his acts—including his judicial decisions—had force of law. In a famous text on the sovereign power of the emperor the Roman jurist Ulpian writes:

> A decision given by the emperor has the force of a statute. This is because the populace commits to him and into him its own entire authority and power, doing this by the *lex regia* which is passed with regard to his authority. 1. Therefore, whatever the emperor has determined by a letter or a subscript or has decreed on judicial investigation or has pronounced in an interlocutory matter or has prescribed by an edict is undoubtedly a law. These are what we commonly call *constitutiones* (enactments).[28]
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> Dig. 1.4.1 *pr*. and 1: *pr*

When the dispute was governed by existing rules of law, i.e. the *ius civile, ius honorarium* or imperial laws, the emperor could choose either to apply these

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Dig. 32.97 (Septimius Severus asks one of the parties a (rhetorical?) question); *SEG* 17.759 (Caracalla replies to a plea of inadmissibility of one of the lawyers).

25 That the deliberations between the emperor and his advisers took place behind closed doors becomes clear from Dig. 28.4.3 and Suet., *Nero* 15. Also see Färber 2014, op. cit. (n. 2), 84.

26 E.g. Plin. *Epist*. 4.22.3 (Trajan) and Dio, *Hist*. 76(77).17.1–2 (Septimius Severus). Also see Millar 1992, op. cit. (n. 2), 238.

27 Millar 1992, op. cit. (n. 2), 238.

28 Ulpianus libro primo institutionum. Pr. *Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat*. 1. *Quodcumque igitur imperator per epistulam et subscriptionem statuit vel cognoscens decrevit vel de plano interlocutus est vel edicto praecepit, legem esse constat. Haec sunt quas vulgo constitutiones appellamus*. Cf. Gai. *Inst*. 1.5 and Fronto, *Ad M. Caes*. 1.6.2–3. The basis of all translations of texts from the Digest is the translation by Watson c.s. (A. Watson, *The Digest of Justinian* (Philadelphia 1998)). I have, however, amended his translations at some points in accordance with my own interpretation of the Latin texts.

rules or set aside the law and decide the case on the basis of general legal concepts, such as equity (*aequitas*). This was the emperor's prerogative: as the pinnacle of the Roman legal system he could decide on the equity of the law and, if such an occasion arose, consider it inapplicable in an individual case. In the Roman legal tradition, this principle is expressed by the well-known maxim '*princeps legibus solutus est*', which can be found in the works of Ulpian and Paul:

> The emperor is not bound by statutes. And though the empress is bound by them, nevertheless, emperors give the empress the same privileges as they have themselves.[29]
>
> Dig. 1.3.31

> For the emperor to vindicate legacies or *fideicommissa* under an imperfect will is shameless. For it is proper that so great a majesty should observe the laws from which he is deemed to be himself exempt.[30]
>
> Dig. 32.23

Paul's addition to the maxim is instructive. He argues that although the law did not bind the emperor, it befitted him to live in accordance with it. In other words, even though there were no legal restrictions to the power of the emperor, moral values and traditions dictated at least some restraint in using them.[31] There are many examples in literary and legal texts of emperors who adhered to this principle. To name just a few: Pliny praises Trajan for his *reverentia legum* ('respect for the law');[32] Antoninus Pius answered to a petition that he might be the master of the world (*tou kosmou kurios*), but still abided by the *lex Rhodia de iactu* when it came to disputes concerning the sea;[33] and the *Institutes* of Justinian state that Septimius Severus and Caracalla themselves explicitly mentioned in some of their rescripts that they would live in accor-

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29 Ulpianus libro XIII ad legem Iuliam et Papiam. *Princeps legibus solutus est: Augusta autem licet legibus soluta non est, principes tamen eadem illi privilegia tribuunt, quae ipsi habent.*

30 Paulus libro quinto sententiarum. *Ex imperfecto testamento legata vel fideicommissa imperatorem vindicare inverecundum est: decet enim tantae maiestati eas servare leges, quibus ipse solutus esse videtur.*

31 Tuori 2016, op. cit. (n. 2), 236. Also see Krüger 1912, op. cit. (n. 6), 101 and M. Peachin, 'Rome the superpower: 96–235 CE', in: D.S. Potter (ed.), *A Companion to the Roman Empire* (Malden (MA) 2006), 147.

32 Plin., *Paneg*. 77.3–4. Also Plin., *Paneg*. 65.1.

33 Dig. 14.2.9.

dance with the laws, even though they were not bound by them.[34] The way an emperor dealt with these two aspects of his position, i.e. his unrestricted legal power on the one side and the generally accepted principles of good governance on the other, was an important factor in the way his reign was perceived by his subjects and more in particular, the Roman elite. Striking the right balance between imperial power and the law was especially important in the process of imperial adjudication.

3 The Publication of the *Decreta* and the *Imperiales Sententiae*

Even though the Roman jurists considered the imperial judicial decisions to be a source of law, they never showed great interest in them. They rarely cite imperial *decreta* in their works,[35] let alone composed and published collections of imperial judicial decisions.[36] In slightly generalizing terms, one can argue that the compilation and publication of collections of imperial legislation was not part of the traditional genre of legal writing during the first two centuries CE. This poses the question as to why Paul decided to compile and publish a collection of judicial decisions of Septimius Severus. As mentioned in the introduction of this paper, modern scholars have generally argued that Paul's collection should be perceived as an effort to make the Severan judgments in general and their legal content in particular accessible to the legal public. Several aspects of this theory are problematic. First of all, even though the Roman jurists mention imperial judicial decisions as one of the sources of Roman law, their legal force remained to be called into question until the age of Justinian.[37] This becomes clear from a *constitutio* of Justinian, confirming the legal status of imperial judgments once and for all:

34 Inst. 2.17.8.

35 Coriat's monograph on Severan legislative techniques illustrates this point. He counts only 58 citations of imperial judgments in the works of contemporary jurists (193–235 CE) included in the Digest, see J.-P. Coriat, *Le prince législateur. La technique législative des Sévères et les méthodes de création du droit impérial a la fin du Principat* (Rome 1997), 138. His research shows that the same jurists cited imperial rescripts much more often: 270 times.

36 W.J. Zwalve, 'Decreta Frontiana. Some observations on D. 29,2,99 and the 'law reports' of Titius Aristo', *Tijdschrift voor Rechtsgeschiedenis* 83 (2015), 365–391.

37 Cf. F. von Schwind, *Zur Frage der Publikation im römischen Recht. Mit Ausblicken in das altgriechische und ptolemaïsche Rechtsgebiet* (Munich 1940), 139 ff. and M. Kaser, 'Zur Problematik der römischen Rechtsquellenlehre', in: idem, *Römische Rechtsquellen und angewandte Juristenmethode* (Vienna 1986), 18.

> Emperor Justinian to Demosthenes, Praetorian Prefect. If the imperial majesty has judicially examined a cause and has given a decision in the presence of the parties, then all judges within our empire must take notice that this is the law not only in that particular case but also in all similar causes. 1. (…) 2. Since we have also found it doubted in the ancient laws whether, when the emperor has interpreted a statute, this interpretation should have the force of law, we have both laughed at this foolish subtlety and have deemed it proper to correct it. 3. We therefore decide that every interpretation of laws by the emperor, whether made on petitions, in judicial tribunals, or in any other manner shall be considered valid and unquestioned. For if at the present time it is conceded only to the emperor to make laws, it should be befitting only the imperial power to interpret them.[38]
>
> Cod. 1.14.12 *pr.*–3

The problematic legal status of the imperial judicial decisions is also reflected in the works of the second- and third-century Roman jurists, who (as mentioned above) rarely mention imperial judgments as a source for a specific legal rule. When referring to imperial law they usually cite another type of imperial legislation, i.e. the *rescripta* of the emperor.[39] In a legal context, an imperial rescript was the answer of the emperor to a petition on a question of law posed by a civilian, official or judge.[40] These legal opinions of the emperor

38 Imperator Justinianus A. Demostheni pp. *Si imperialis maiestas causam cognitionaliter examinaverit et partibus cominus constitutis sententiam dixerit, omnes omnino iudices, qui sub nostro imperio sunt, sciant hoc esse legem non solum illi causae, pro qua producta est, sed omnibus similibus. 1.* (…). *2. Cum igitur et hoc in veteribus legibus invenimus dubitatum, si imperialis sensus legem interpretatus est, an oporteat huiusmodi regiam interpretationem obtinere, eorum quidem vanam scrupulositatem tam risimus quam corrigendam esse censuimus. 3. Definimus autem omnem imperatoris legum interpretationem sive in precibus sive in iudiciis sive alio quocumque modo factam ratam et indubitatam haberi. Si enim in praesenti leges condere soli imperatori concessum est, et leges interpretari solum dignum imperio esse oportet*. English translation: F.H. Blume (edited by T.G. Kearly), 2nd edition available at http://www.uwyo.edu/lawlib/blume-justinian/. Cf. Cod. 1.14.3 (426 CE), on which N. van der Wal, *'Edictum* und *lex edictalis*. Form und Inhalt der Kaisergesetze im spätrömischen Reich', *Revue Internationale des Droits de l'Antiquité* 28 (1981), 292–294.

39 Besides *decreta* and *rescripta* Gaius and Ulpian mention a third type of imperial legislative act, the so-called *edicta* (cf. Gai. *Inst*. 1.5 and Dig. 1.4.1.1), which were imperial ordinances of a more general character. They often dealt with matters of public or criminal law, whereas their impact on private law has been limited, see Millar 1992, op. cit. (n. 2), 253 and Coriat 1997, op. cit. (n. 35), 113 ff.

40 On imperial rescripts in general, see U. Wilcken, 'Zu den Kaiserreskripten', *Hermes* 55 (1920), 1–42; D. Nörr, 'Zur Reskriptenpraxis in der hohen Prinzipatszeit', *Zeitschrift der*

were considered to be authoritative interpretations of the law, which in a sense competed with the traditional *responsa* of the Roman jurists. The similarities between *rescripta* and *responsa* also explain the preference of the Roman legal writers for this type of imperial legislation. Although both *decreta* and *rescripta* were decisions in individual cases, rescripts usually contained a specific answer to an abstract legal question. This meant that rescripts often contained a generally formulated legal rule, which made them easier to apply in similar types of case, whereas imperial judgments on the other hand were often closely connected with the facts of the specific case at hand and with the individual interests of the parties involved in the dispute. The importance of the imperial *rescripta* for legal practice in general and the development of the law in particular cannot be underestimated: fifth and sixth-century codifications of imperial law, such as the *Codex Theodosianus* and the *Codex Justinianus*, consist to a large extent of imperial *rescripta* exclusively.[41] This raises the following question: if Paul intended to make the legislative acts of Septimius Severus known to legal practitioners, why did he decide to publish a work which only contained the judicial decisions of that emperor? Why did he not include other—probably much more relevant—types of imperial legislation, such as rescripts? For this kind of enterprise there even existed a precedent. During the reign of Marcus Aurelius (161–180 CE), another jurist named Papirius Justus had published a collection of imperial enactments, entitled 'Twenty Books of Constitutions' (*Constitutionum Libri XX*).[42] Although the title of this work suggests it consisted of different types of imperial legislation (i.e. rescripts, judgments and edicts), the 43 surviving fragments in the Digest exclusively contain rescripts.[43]

Secondly, if making Severus' judicial decisions known to legal practitioners was the sole intention of Paul's work, one would expect the collection to

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Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 98 (1981), 1–46; T. Honoré, *Emperors and Lawyers* (Oxford 1994, 2nd edition) and A.J.B. Sirks, 'Making a request to the emperor: rescripts in the Roman Empire', in: L. de Blois (ed.), *Administration, Prosopography and Appointment Policies in the Roman Empire. Proceedings of the First Workshop of the International Network Impact of Empire* (*Roman Empire, 27 B.C.–A.D. 406*) (Amsterdam 2001), 121–135. Also Millar 1992, op. cit. (n. 2), 240 ff. and Tuori 2016, op. cit. (n. 2), 253–267.

41 L. Wenger, *Die Quellen des römischen Rechts* (Vienna 1953), 430.

42 On this work, see Schulz 1961, op. cit. (n. 10), 179–180. He argues that its author is identical with M. Aurelius Papirius Dionysius, who had a successful career in the imperial bureaucracy during the reigns of Marcus Aurelius and Commodus: *CIL* 10.662 (= *ILS* 1455) and *IG* 14.1072 (= *CIG* 5895).

43 Lenel 1889, op. cit. (n. 6), 1.947 ff. For this reason, Schulz 1961, op. cit. (n. 10), 179–180 even argues that the collection consisted exclusively of *rescripta*, even though the title of the work suggests otherwise.

consist mainly of decisions which either gave an authoritative interpretation of the law or even contained a new legal rule. Like rescripts, these types of decision actually could be applied in other cases and therefore would be useful to legal practitioners, such as lawyers and judges. This turns out not to be the case. A closer analysis of the cases included in the *Decreta* and the *Imperiales Sententiae* shows that Paul's collection also included decisions of a completely different nature. One can distinguish four basic types of judgment:

1. judgments in which the emperor applies existing law;[44]
2. judgments in which the emperor elucidates an unclear point of law or even creates a new rule;[45]
3. judgments in which the emperor construes specific legal documents, such as wills, codicils and contracts;[46]
4. judgments in which the emperor leaves aside the rules of existing law and decides the case on the basis of general legal concepts, such as *aequitas* ('equity'), *humanitas* ('humanity') or *pietas* ('piety').[47] These decisions usually concern so-called 'hard cases', cases in which strict application of the law would lead to an undesirable or unjust outcome.

One can surely argue that the first two types of judgment (category 1 and 2) held a certain value for the general legal practice. Both types of decision usually had a general character and were therefore at least to some extent suitable for application to other disputes: the application of an existing law or legal rule in a certain case could be regarded as an authoritative interpretation of the scope of that law or rule, while it goes without saying that the decisions by which the emperor created a new rule of law were applicable in other cases. But they only make up about half of the collection. The decisions belonging to the other two categories, i.e. interpretations of legal documents (3) and decisions based on general legal concepts (4), are a different story. These types of judgment usually had a highly individual character and consequently, they were ill-suited for application in other cases. It is hard to see how decisions on the interpretation of specific legal texts or decisions tailored to the circumstances and interests of an individual litigant could be of any use in other disputes, since these judgments are completely subordinate to the characteristics of the specific document or the particular case at hand. On the other hand, they are

44 Dig. 10.2.41 = 37.14.24; 36.1.76(74) *pr.*; 40.1.10; 46.1.68.1; 48.18.20; 48.19.40; 49.14.47.1; 49.14.48 *pr.*; 49.14.48.1.

45 Dig. 14.5.8; 16.2.24; 22.1.16.1; 26.5.28; 26.7.53; 44.7.33; 46.1.68 *pr.*; 49.14.47 *pr.*

46 Dig. 32.27 *pr.*; 32.27.1; 32.27.2; 32.97; 36.1.76(74).1; 36.1.83(81); 50.16.240.

47 Dig. 4.4.38 *pr.*; 28.5.93(92); 29.2.97; 40.5.38; 49.14.50. Also Dig. 32.27.1 and Dig. 36.1.76(74).1.

a very effective means to represent the character of Severus as a judge and as a ruler. Three examples from the *Decreta* and the *Imperiales Sententiae* might serve to illustrate this point.

In Dig. 28.5.93(92) Paul describes the case of a woman named Pactumeia Magna.[48] She probably was the daughter of the distinguished *eques* Titus Pactumeius Magnus, who served as *praefectus Aegypti* from 176 until 179 CE.[49] Her freedman Pactumeius Androsthenes had initially named her as his sole heir in his will. When the rumor spread that Commodus had murdered her and her family, Androsthenes revoked his first will and named a certain Novius Rufus as his heir in a second will.[50] The freedman died soon afterwards. By a twist of fate, his inheritance ended up in the hands of the *fiscus*. Several years later, Pactumeia Magna resurfaced and, trying to recover what was once hers, she petitioned the emperor for the restitution of Androsthenes' inheritance. Even though her claim had no foundation in law since the first will had been revoked lawfully,[51] Severus still ruled in her favor. He ordered the *fiscus* to hand Androsthenes' former properties over to her, but at the same time compelled her to pay out the legacies (*legata*) which had been included in the second will. The judgment of Dig. 28.5.93(92) is an example of tailor-made decision, which did not only benefit Pactumeia Magna, but also made sure that the *legatarii* of the second will were not left empty handed.

Paul also mentions a case concerning the will of a man named Pompeius Hermippus, an *eques* from Ephesus, Dig. 32.27.1.[52] In his will Hermippus had

48 On this text, see Sanfilippo 1938, op. cit. (n. 6), 67–71 and Rizzi 2012, op. cit. (n. 14), 349–356. Also F. Schulz, 'Der Irrtum im Beweggrund bei der testamentarischen Verfügung', in: E. Genzmer et al. (ed.), *Gedächtnisschrift für Emil Seckel* (Berlin 1927), 96–100, H.J. Wieling, *Testamentsauslegung im römischen Recht* (Munich 1972), 189–190; C. Paulus, *Die Idee der postmortalen Persönlichkeit im römischen Testamentsrecht* (Berlin 1992), 178–181 and U. Babusiaux, *Wege zur Rechtsgeschichte: Römisches Erbrecht* (Cologne 2015), 318–320.

49 On Pactumeius Magnus, see *PIR*^{2} P 39, A. Stein, *Die Präfekten von Ägypten in der römischen Kaiserzeit* (Bern 1950), 98 and M. Christol, 'Le préfet d'Egypte Titus Pactumeius Magnus et la diffusion de la cité romaine', *Revue Historique de Droit Français et Étranger* 71 (1993), 405–410.

50 The Novius Rufus from Dig. 28.5.93(92) is often identified as Lucius Novius Rufus, the governor of Hispania Tarraconensis from 192 until 197 and a supporter of Severus' rival to the throne Clodius Albinus. See for example Liebs 2010, op. cit. (n. 13), 53. On his life and career see *PIR*^{2} N 188–189.

51 Gai. *Inst*. 2.144 and Dig. 38.2.1.2.

52 On Pompeius Hermippus and his son, see *PIR*^{2} P 614–615 and Liebs 2010, op. cit. (n. 13), 53. See on this text in general Sanfilippo 1938, op. cit. (n. 6), 75–77 and Rizzi 2012, op. cit. (n. 14), 175–179; M. Meinhart, 'D. 38,17,1,6. Ein Zeugnis für 'humana interpretatio'', *Tijdschrift voor Rechtsgeschiedenis* 33 (1965), 256–257; F.B.J. Wubbe, 'Benigna interpretatio als Entscheidungskriterium', in: F.B.J. Wubbe & P. Pichonnaz (ed.), *Ius vigilantibus scriptum*:

appointed his son, also called Hermippus, as heir to three quarters of his estate and his daughter Titiana to a quarter. He also ordered that if the son died without children, an additional piece of land should also be transferred to his daughter Titiana. After that he had amended his will by means of a so-called *codicil* stating that his daughter should only be given certain pieces of land instead of the quarter of the inheritance he had devised for her originally. Hermippus died and soon after his son was tried for high treason and executed. His property was forfeited to the *fiscus*. At this point, Titiana claimed the other piece of land, arguing that the *codicil* made no mention of striking the arrangement with regard to the childless death of her brother. The *fiscus* however argued that the testator had also intended to deprive his daughter of her claim to that possession. It all came down to the interpretation of the wording of the *codicil*, which Paul unfortunately does not cite in his report. He does, however, mention that he himself was of the opinion that Hermippus also had intended to strike the childless death arrangement. In the end, Septimius Severus adopted a more 'humane' interpretation of the *codicil* (*humanius interpretari*) and decided in favor of Titiana.

The third case, Dig. 40.5.38, concerns the testamentary manumission of an *alumna*.[53] A certain testator had provided for the manumission of his *alumna* in his will and had also bequeathed some possessions to her. Unfortunately, he suffered an untimely death and was not able to complete his will, which meant that the inheritance was administered as if the testator had died without a will. The question was raised whether or not the girl had been manumitted lawfully. Since the will had not been completed, it was, according to the rules of Roman private law, null and void.[54] This meant that the manumission of the girl was also invalid.[55] The emperor, however, decided otherwise. He based his decision on *pietas*, arguing that dutiful sons of the testator (*pii filii*) were obliged to set

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ausgewählte Schriften (Freiburg 2003), 432–435; E.J. Champlin, 'Miscellanea testamentaria', *Zeitschrift für Papyrologie und Epigraphik* 69 (1987), 200–202; A. Palma, *Humanior interpretatio. "Humanitas" nell' interpretazione e nella normazione da Adriano ai Severi* (Turin 1992), 93–95 and T. Kleiter, *Entscheidungskorrekturen mit unbestimmter Wertung durch die klassische römische Jurisprudenz* (Munich 2010), 71–73.

53 On this case, see Sanfilippo 1938, op. cit. (n. 6), 103–105 and Rizzi 2012, op. cit. (n. 14), 195–205. Also G. Negri, *La clausola codicillare nel testamento inofficioso* (Milan 1975), 34–39; D. Johnston, *The Roman Law of Trusts* (Oxford 1988), 130–131 and W. Litewski, 'Zwischenbescheide in römischen Prozess', *Revue Internationale des Droits de l'Antiquité* 44 (1997), 211–213.

54 Dig. 28.1.29 *pr*.

55 W.W. Buckland, *The Roman Law of Slavery* (Cambridge 1970 [reprint of the 1908 edition]), 470.

the girl free, since their father had loved her so dearly. And, he added in a second judgment, because she had been freed validly (*recte manumissa*), the girl should be able to claim the possessions that the testator had bequeathed to her as well. This decision is an obvious example of the application of the principle of *favor libertatis*, i.e. the tendency to render judgments in favor of manumission in doubtful or hard cases, in combination with the *voluntas testatoris*, the intention of the testator.

Because of their close connection with the specific circumstances of each case, all the decisions mentioned above are ill-suited for application by lower judges in other cases. Indeed, according to a text of Ulpian the Roman jurists themselves did not regard this type of imperial judicial decision as legally binding:

> Plainly, some of these [i.e. imperial enactments] are purely *ad hominem* and are not followed as setting precedents. For only the specific individual is covered by an indulgence granted by the emperor to someone because of his virtues or by a penalty specially imposed or by a benefit granted in an unprecedented way.[56]
>
> Dig. 1.4.1.2

The fact that Paul included a fair number of these *personales constitutiones* in his collection cannot be reconciled easily with the assumption that he intended to publish his compilation of judgments of Septimius Severus for the benefit of general legal practice. Their inclusion in Paul's work suggests that the jurist had different motives for its publication.

4 Septimius Severus: The Ideal Emperor Judge

To understand the intentions behind the publication of Paul's collection of judicial decisions, one has to pay attention to the context in which the work was created. Second- and third-century jurists like Paul, Ulpian and Papinian held a special position within the Roman legal system. On the one hand they were still a part of the normal legal practice: they gave *responsa* to clients and officials seeking legal advice, wrote extensive commentaries on Roman private law and taught students. On the other hand they also often held influential

56 Ulpianus libro primo institutionum. *Plane ex his quaedam sunt personales nec ad exemplum trahuntur: nam quae princeps alicui ob merita indulsit vel si quam poenam irrogavit vel si cui sine exemplo subvenit, personam non egreditur.*

positions within the imperial bureaucracy and were a part of the advisory *consilia* of high officials such as the *praefectus preaetorio* and of the emperor himself. Their activities within the imperial administration have demonstrably influenced the themes and contents of their works.[57] The *Decreta* and *Imperiales Sententiae* are an example of this influence. The detailed case reports of Paul did not just make the imperial judgments known to the general public, they offered readers an insight into the decision-making process at the top of the imperial bureaucracy with Septimius Severus at its center. From this point of view, the *Decreta* and the *Imperiales Sententiae* are not simply collections of random imperial judgments, but should be regarded chiefly as a portrait of the emperor Septimius Severus at work. The picture of Severus painted by Paul is a very favorable one and fits well within the traditional image of the good 'emperor judge'.

Paul's case reports present us with a wide variety of litigants. Men as well as women were given the opportunity to bring their case before the emperor and although most of the cases concern senators or *equites* (either from Rome or the provinces), some of them do deal with the claims and interests of less influential persons, such as minors, freedman and even slaves. This great diversity of litigants renders an image of Severus as an accessible judge to all of his subjects, whose attention was not limited to spectacular criminal cases and other sensational disputes of the elite.[58] According to Paul's descriptions, Severus' conduct was exemplary inside and outside the courtroom. During the court hearing he allowed litigants to present their case and to substantiate their claims with all sorts of evidence.[59] At times he intervened to question the parties himself.[60] The existence of the case reports of Paul attests to the fact that a *consilium* of both lawyers and notable citizens was present at the hearing and was involved in the decision making-process.[61]

The description of Severus' relationship with his *consilium* is an important feature of Paul's work. From literary sources it becomes clear that a good emperor should not just have a *consilium* present when he administered jus-

57 For example, Paul and Ulpian wrote several works on the legal position and competences of magistrates and imperial officials. On these works, see Schulz 1961, op. cit. (n. 10), 309 ff.

58 On the prerequisite of accessibility, see Plin., *Paneg*. 80.3 and Dio, *Hist*. 69.6.3. Also Stolte 2003, op. cit. (n. 5), 262 and Tuori 2016, op. cit. (n. 2), 136, 159, 164 and 231.

59 Dig. 10.2.41 (= 37.14.24); 14.5.8; 26.5.28; 26.7.53; 32.97; 36.1.76(74).1; 48.18.20; 49.14.47 *pr*.; 49.14.48 *pr*.; 49.14.48.1; 49.14.50. Cf. Dio, *Hist*. 76(77).17.1–2.

60 Dig. 32.97.

61 In his reports, Paul mentions the presence of Papinian, Tryphonin and Messius at the deliberations (cf. Dig. 29.2.97; 49.14.50). See for the presence of notable citizens Dio, *Hist*. 75(76).16.4; 76(77).17.1.

tice, but was also supposed to actively consult his advisors and let them speak freely. This expectation is voiced clearly in the speech of Maecenas, which is part of Cassius Dio's description of the reign of Augustus:

> Grant to every one who wishes to offer you advice, on any matter whatever, the right to speak freely and without fear of the consequences; for if you are pleased with what he says you will be greatly benefited, and if you are not convinced it will do you no harm.[62]
>
> Dio, *Hist*. 52.33.6

Seven texts of the *Decreta* and the *Imperiales Sententiae* contain a description of the deliberations between Severus and his *consilium*.[63] Paul usually starts his narrative with the opinion or opinions of the jurists in the *consilium*, suggesting that Severus allowed his advisers to open the discussion by giving their opinion before he himself expressed his point of view.[64] The legal debate between the emperor and his advisers is often of a high quality: the emperor and his jurists do not shrink from raising and discussing highly technical legal matters. The fact that the emperor could participate in this type of debate shows his legal knowledge and expertise.[65]

As has been mentioned above, the emperor and his *consilium* did not decide on the case by a majority vote. The emperor could follow the advice of his councilors or come up with a decision on his own. The case reports in the *Decreta* and the *Imperiales Sententiae* reflect this practice: some of Severus' decisions are consistent with the views of his *consilium*, while other judgments are based on Severus' own opinion.[66] When the emperor deviates from the opinions of his jurists—and more in general, from the existing rules of the *ius civile*—, he usually does so to protect one of the litigants against the unjust consequences of the strict application of the law, the *rigor iuris*. These litigants are often

62 τήν τε παρρησίαν παντὶ τῷ βουλομένῳ καὶ ὁτιοῦν συμβουλεῦσαί σοι μετὰ ἀδείας νέμε· ἄν τε γὰρ ἀρεσθῇς τοῖς λεχθεῖσιν ὑπ' αὐτοῦ, πολλὰ ὠφελήσῃ, ἄν τε καὶ μὴ πεισθῇς, οὐδὲν βλαβήσῃ.

63 Dig. 4.4.38 *pr*.; 14.5.8; 29.2.97; 32.27.1; 36.1.76(74).1; 49.14.50; 50.16.240. On the debate in the Severan *consilium*, see Honoré 1994, op. cit. (n. 39), 20–25 and A. Lovato, 'Giulio Paolo e il *decretum principis*', in: *Studi in onore di Remo Martini* II (Milan 2008–2009), 495–508.

64 Dig. 4.4.38 *pr*.; 14.5.8; 29.2.97; 32.27.1; 49.14.50.

65 The *Historia Augusta* mentions that Severus studied law with the famous jurist Quintus Cervidius Scaevola (Hist. Aug., *Car*. 8.2), which, if true, would explain his considerable knowledge of the law.

66 Severus follows his advisers in Dig. 29.2.97, Dig. 49.14.50 (2nd decision), Dig. 50.16.240 and (according to Honoré 1994, op. cit. (n. 39), 23) Dig. 14.5.8. He decides the case on his own in Dig. 4.4.38 *pr*., Dig. 32.27.1, Dig. 36.1.76(74).1 and Dig. 49.14.50 (1st decision).

socially disadvantaged or vulnerable persons who deserve the protection of the emperor, such as women, minors and slaves.[67] This interest in the concerns and (legal) problems of the less influential members of society can also be found in the legal pronouncements of emperors such as Hadrian, Antoninus Pius and Marcus Aurelius and thus strengthens the association between Severus and these 'good' emperors.[68] These decisions therefore depict Severus as a humane and benevolent ruler, protecting the interests of his subjects against the consequences of an unjust application of the law, and present him as the ultimate dispenser of justice in the Roman Empire. At the same time, Paul is careful not to create the image of an emperor who disregards the law all together. In a considerable number of decisions, Severus acts like a regular judge and adheres to the rules of existing law. Notable are the judgments in which Severus explicitly applies the rules of the *ius civile* in disputes concerning the imperial treasury (*fiscus*), often to the detriment of the latter.[69] The refusal to award a special legal position to the *fiscus* is—of course—characteristic of a good emperor judge.[70]

From Paul's use of the word *imperator*, which Roman legal writers use to refer to a reigning emperor, one can deduce that his work was published while Severus was still alive.[71] The portrait of the emperor as painted by Paul must have pleased Severus.[72] After a time of relative peace and prosperity under the rule of the so-called 'adoptive emperors',[73] Severus had come to power in 193 CE by means of two bloody civil wars, in which many Roman lives were lost. Tales

67 See for example Dig. 4.4.38 *pr*. (female minor), Dig. 28.5.93(92) (woman), Dig. 32.27.1 (woman), Dig. 36.1.76(74).1 (female minor) and Dig. 40.5.38 (female slave/*alumna*).

68 E.g. on the treatment of slaves: Dig. 1.6.2 (Hadrian), Dig. 1.6.2/Gai. *Inst*. 1.53 (Antoninus Pius) and Dig. 28.4.3 (Marcus Aurelius). More in general Tuori 2016, op. cit. (n. 2), 211–212 (Hadrian and Antoninus Pius) and A.R. Birley, *Marcus Aurelius. A Biography* (New York 2000), 133–139 (Marcus Aurelius).

69 Dig. 40.1.10; 46.1.68.1; 49.14.47.1; 49.14.48.1.

70 Plin., *Paneg*. 80.1.

71 Th. Mommsen, 'Die Kaiserbezeichnung bei den römischen Juristen', in: idem, *Juristische Schriften* II (Berlin 1905), 156–157. Cf. p. 170, where Mommsen explicitly states that the *Decreta* where published before Severus' death.

72 On other forms of 'Herrscherlob' in the works of the Severan jurists, see U. Babusiaux, 'Lob des Tyrannen? Juristentaktik in der Severerzeit', in: N. Jansen & P. Oestmann (ed.), *Rechtsgeschichte heute. Religion und Politik in der Geschichte des Rechts. Schlaglichter einer Ringvorlesung* (Tübingen 2014), 1–26.

73 There is a long lasting and pervasive view that describes the reigns of the five adoptive emperors (Nerva, Trajan, Hadrian, Antoninus Pius and Marcus Aurelius) as one of the most prosperous periods in Roman history, e.g. C. Ando, *Imperial Rome AD 193 to 284: the Critical Century* (Edinburgh 2012), 5–6. See for examples from antiquity Aristid. *Or*. 35.36–37 and Dio, *Hist*. 71(72).36.4.

of his cold-hearted and sometimes even cruel conduct in these wars must have circulated throughout the Empire and caused at least part of the Senate to consider him unfit to rule, as Dio attests.[74] To legitimize his position and improve his public image, Severus stressed the continuity between his reign and that of his Antonine predecessors in his propaganda. From 195 CE onwards, he presented himself as the adoptive son of Marcus Aurelius[75] and claimed to be the same type of ruler, a *bonus princeps* who would rule in a similar fashion as his illustrious predecessors had done.[76] As mentioned above, the way an emperor performed his judicial tasks was an important aspect of the public perception of his *persona* and his reign: the *bonus princeps* was expected to be a committed and righteous judge. The image created by Paul in his reports of cases decided by Severus creates the impression of the latter as an accessible, dedicated, competent and benevolent judge. It was in complete accordance with Severus' own public imagery and will have been a welcome addition to it.

5 Conclusion

At the end of the second century CE the Roman emperor had developed into the apex of the Roman legal system and was perceived by his subjects as the chief source of law and justice. His legislative powers were unfettered: when dealing with legal matters, the emperor was not bound by the existing rules of the *ius civile, ius honorarium* or even the laws of his predecessors. It was, however, expected of a good emperor to exercise restraint in using them and abide by the existing laws as much as possible. This balance between power

74 Dio, *Hist*. 75(76).7.4, whose negative depiction of Severus is echoed by Herodian and the *Historia Augusta*. It must be stressed that Dio himself seems to (at least partially) reconsider his judgment of Severus' rule at the end of the description of his reign: Dio, *Hist*. 76(77).16.1–3. However, the narrative of Severus as a cruel and even barbarian ruler has resonated until well into the 20th century, see for example the descriptions of his conduct and reign by Gibbon (E. Gibbon (ed. J.B. Bury), *The History of the Decline and Fall of the Roman Empire* (New York 1906), part 1, 159 and 161) and Kornemann (E. Kornemann, *Römische Geschichte. II: Die Kaiserzeit* (Stuttgart 1954), 304).

75 Dio, *Hist*. 75(76).7.4 and Hist. Aug., *Sept. Sev*. 10.6. See on Severus' dynastic claims most recently O.J. Hekster, *Emperors and Ancestors. Roman Rulers and the Constraints of Tradition* (Oxford 2015), 205 ff.

76 Cf. Dio, *Hist*. 74(75).2.1. Furthermore most recently A.E. Cooley, 'Septimius Severus: the Augustan Emperor', in: S. Swain, S. Harrison & J. Elsner (ed.), *Severan Culture* (Cambridge 2007), 385; S.S. Lusnia, *Creating Severan Rome. The Architecture and Self-image of L. Septimius Severus (A.D. 193–211)* (Brussels 2014), 49 and J. Rantala, *The Ludi Saeculares of Septimius Severus. The Ideologies of a New Roman Empire* (London 2017), 33.

and restraint is especially apparent when the emperor administered justice. A *bonus princeps* took his judicial duties seriously and always tried to reach the most righteous outcome of a conflict. In some cases this meant a strict application of the law, in other cases the emperor was inclined to bypass the law to come to a more equitable solution of the conflict. The primary purpose of Paul's collection of imperial judgments is to show how Septimius Severus dealt with the administration of justice and to represent him as a *bonus princeps* with a keen interest for the administration of the law. According to his descriptions Severus was an accessible, knowledgeable and conscientious judge, who was able to strike the right balance between power and restraint when judging a specific case. In some cases he abided by the existing laws, even when this meant that his own treasury would miss out on considerable income. In other cases, when the strict application of the law would have had undesirable and unjust consequences, he protected his subjects against the *rigor iuris* and created a tailor-made decision, doing justice to the circumstances and interests of the parties involved in the dispute. The elaborate case reports of Paul offer his readers a unique insight into the imperial judicial decision making-process. They create the impression that every decision is made on the basis of a thorough examination of the case by the emperor and the members of his *consilium*, thereby fashioning Severus as a symbol of law and justice for the empire and all of its inhabitants.

CHAPTER 4

The Value of the Stability of the Law: A Perspective on the Role of the Emperor in Political Crises

Francesco Bono

1 Emperors and Usurpers in Conflict in Late Antiquity

The great Church father Augustine, speaking from the pulpit of the *Tricilarum Basilica* around 413, offered a comment on the Apostle Paul's passage *Non regnet peccatum in vestro mortali corpore*.[1] The bishop of Hippo urged the people not to be overcome by the lust of the flesh, describing this situation as a civil war of the fifth century.[2] Christians faced the conflict between flesh and spirit just as citizens of the empire faced the choice between a usurper, or *tyrannus*,[3] and an emperor:

> Languor iste tyrannus est. Si vis te tyranni esse victorem, Christum invoca imperatorem.
>
> This disease is like a tyrant. If you want to defeat this tyrant, you shall invoke Christ the real emperor.

Augustine's speech, in its imagery, had a direct connection with the daily life of Christian believers. The bishop's audience had experienced such a clash between a usurper and the emperor;[4] for in that very same year, Heraclanius, *comes Africae*, had been declared *hostis publicus*.[5]

1 Rom. 6.12: For this reason do no let sin be ruling in your body, which is under the rule of death.

2 Aug., *Serm.* 30.41; on this text: S. Poque, *Le langage symbolique dans la prédication d'Augustin d'Hippone. Images héroiques* 1 (Paris 1984), 34–35; 57–60.

3 On the meaning of *tyrannus*: T.D. Barnes, 'Oppressor, persecutor, usurper: the meaning of tyrannus in the fourth century', in G. Bonamente and M. Meyer (eds.), *Historiae Augustae colloquium Barcinonense* (Bari 1996), 55–65; V. Neri, 'L'usurpatore come tiranno nel lessico politico della Tarda Antichità', in F. Paschoud and J. Szidat (eds.), *Usurpationen in der Spätantike. Akten des Kolloquiums Staatsstreich und Staatlichkeit 6.–10. März 1996 Solothurn/Bern* (Stuttgart 1997), 71–87.

4 In Aug. *Serm. Denis* 16.1, a sermon preached in *Basilica Novarum*, Augustine may have referred again to Heraclianus: *Inimicus est? Homo est. Hostis est? Homo est* (Is he a personal enemy? He is a man still. Is he a public enemy? He is a man still). See, S. Lancel, *Saint Augustine* (Paris 1999), 268.

5 CTh. 9.40.21.

 | DOI:10.1163/9789004400474_005

Usurpation was very frequent in the Late Empire, as depicted by the historical sources. Beside the list of *triginta tyranni* in the *Historia Augusta*,[6] Orosius mentions a *catalogus tyrannorum* in his *Historiae adversus paganos* when describing the usurpers Constans, Maximus, and Jovinus in the year 409.[7] Furthermore, in Polemius Silvius' annotated Julian calendar in honor of Eucherius (Bishop of Lyon) of December 448, we find a copy of an *enumeratio principum cum tyrannis*, a list of Roman emperors and usurpers from Julius Caesar to Theodosius II and Valentinian III.[8]

Usurpation in Late Antiquity took diverse forms, ranging from emperors being declared enemies of the state to rebellious generals. Nonetheless, usurpation constituted a political problem, not only a military one, because the claimant wanted to be recognized as a legitimate ruler[9] and acted as such.[10] The opposition between an emperor and his rival for the title of Augustus had been a political matter since its genesis. Once such usurpers were suppressed, the legitimate emperors continued a propaganda war against their defeated opponents.[11] Late imperial coinage celebrated the successes over the usurpers through depictions of the goddess Victoria promoting the triumph of the emperor.[12] Monuments were another medium of representation for a

6 Hist. Aug., *Trig. tyr*.

7 Oros., *Hist*. 7.42; G. Gaggero, 'Le usurpazioni africane del IV–V secolo d.C. nella testimonianza degli scrittori cristiani', *L'Africa romana* 10 (1993), 1111–1127.

8 Th. Mommsen, *Chronica minora*, I [MGH AA XIII] (Berolini 1898), 518–551, esp. 520–523. On this text, R.W. Burgess, 'Principes cum tyrannis. Two studies on the Kaisergeschichte and its tradition', *The Classical Quarterly* 43 (1993), 491–500.

9 Modern scholarship connects the phenomenon of usurpation with the absence of an institutionalized process governing the transfer of power at the head of the empire; see: F. Amarelli, *Trasmissione, rifiuto, usurpazione. Vicende del potere degli imperatori* (Naples 1998); E. Flaig, 'Für eine Konseptionalisierung der Usurpation in Spätrömischen Reich', in Paschoud and Szidat 1997 op. cit. (n. 3), 15–34; J. Szidat, *Usurpator tanti nominis. Kaiser und Usurpator in der Spätantike* (*337–476 n. Chr.*) (Stuttgart 2010). Still relevant is the formulation already found in Bartolo da Sassoferrato's *Tractatus de tyranno*: *ex predictis constat quod tyrannus civitatis est qui in civitate non iure principatur* (D. Quaglioni, *Politica e diritto nel Trecento italiano. Il De tyranni di Bartolo di Sassoferrato* (*1314–1357*) (Florence 1983), 184); and very perspicuous, even in its brevity, is the definition given by John Locke (*Two treatises of government* (London 1690), 420): "usurpation is the exercise of power which another hath a right to".

10 S. Benoist, 'Usurper la pourpre ou la difficile vie des ces "autres" princes', in S. Benoist and C. Hoët (eds.), *La vie des autres. Histoire, prosopographie, biographie dans l'Empire romain*, (Villeneuve d'Ascq 2013), 37–61.

11 The scholarly debate on the concept of propaganda in Roman history is carefully explained by: A. Maranesi, *Vincere la memoria, costruire il potere. Costantino, i retori, la lode dell'autorità e l'autorità della lode* (Sesto San Giovanni 2016), 19–26.

12 C. Doyle, 'Declaring victory, concealing defeat: continuity and change in imperial coinage

legitimate ruler. The Senate built an arch at the foot of the Palatine to commemorate Constantine's victory against Maxentius at the Milvian Bridge;[13] Theodosius I decided to erect an obelisk on the central *spina* of the hippodrome at Constantinople in order to celebrate his victory against the usurper Magnus Maximus.[14] Finally, public ceremonies indicated the return of peace after the usurper's defeat.[15] A triumph of Honorius in Rome in 416, for instance, symbolically ended the political crises caused by attempted usurpations in Gaul.

In view of these various "imperial" manifestations, sharing an intent to reaffirm the emperor's legitimacy, a question arises: what did the law say? The war of a legitimate emperor against a usurper continued on an administrative and legal level. A usurper used the same legal forms as a legitimate ruler,[16] because he *usurparet imperium*.[17] For example, Eugenius[18] appointed consuls and sent his officials to Africa, and he provided grain supplies as well.[19] Usurpers typically also enacted a number of statutes and/or grants of *beneficia* and *privilegia*.[20]

Consequently, usurpation created a fracture in the legal order because emperors, after defeating their rivals, removed the effects that the usurpations had produced. The condemnation of a usurpation to oblivion was carried out with legal instruments. For the period that runs from Constantine to Theodosius II, imperial constitutions are the most vital witnesses of the actions taken by the emperors. On the one side, in public law, emperors professed to be restoring the *status quo ante*; in particular, they tended to order that enactments

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of the Roman West. c. 383–c. 408', in G. Greatrex and H. Elton (eds.), *Shifting Genres in Late Antiquity* (Farnham 2015), 157–171.

13 A. Bravi, 'L'arco di Costantino. Un monumento dell'arte romana di rappresentanza', *Costantino I. Enciclopedia costantiniana* (Rome 2013), 599–613.

14 CIL 3.737. The inscription, on the base of the monument, displays the palm of victory for *extinctis tyrannis*. See, B. Kiilerich, *The Obelisk Base in Constantinople. Court Art and Imperial Ideology* (Rome 1993).

15 J. Wienand, 'O tandem felix civili, Roma, victoria! Civil-war triumphs from Honorius to Constantine and back', in J. Wienand (ed.), *Contested Monarchy. Integrating the Roman Empire in the Fourth Century AD* (Oxford 2015) 169–197.

16 Benoist 2013, op. cit. (n. 10), 37–61.

17 Paneg. Lat. 7.16.1.

18 H. Leppin, *Teodosio il Grande* (Naples 2003), 247–255.

19 R. Delmaire, 'Les usurpateurs du Bas-Empire et le recrutement des foncionnaires (Essai de réflexion sur les assises du pouvoir et leurs limites)', in Paschoud and Szidat 1997 op. cit. (n. 3), 111–126.

20 The concession of *fundi perpetui iuris* is recorded for the usurper Maximus by: CTh. 15.14.10.

issued under the usurper should be nullified (*rescissio actorum*).[21] On the other side, they tended to confirm all private legal acts which had been enacted during the time of "tyranny", because the danger of collapse in social and economic relationships had to be avoided.

Even if different points of view emerge from public and from private law, imperial statutes show a consistent image of what constituted a legitimate ruler. As words of the emperor himself, constitutions are part of the ideological system centred on the figure of the emperor and made up of many different elements, for example rhetorical texts as Panegyrics or images on coins. All these objects and texts played a role in the representation and promotion of imperial power to the population of the Roman empire. By examining several constitutions from the Theodosian Code,[22] I argue in this paper that the imperial statutes promote the emperor who has vanquished a usurper as the person who re-established order and protected the stability of the law.[23]

2 Annulling a Usurper's Legislation: Between Commands and Political Communication

Removal of a rival generally forced emperors and their administration to review the enactments that the usurper had issued. The question is not simple, as in some cases a usurper may have exercised power for a long period and over an extensive area.

Constantine, to use an important example, had to solve such a situation after defeating Licinius, who had been *Augustus* for more that fifteen years. Constantine branded him a *tyrannus*—a term which defines a political enemy but also a usurper—in order to recast his own conquest of the East as a restoration of

21 G. Sautel, 'Usurpations du pouvoir impérial dans le monde romain e rescissio actorum', in *Studi in onore di Pietro de Francisci* III (Milan 1956), 463–491.

22 On the code's title *De infirmandis his, quae sub tyrannis aut barbaris gesta sunt*: A. Lovato, 'Osservazioni minime sulla composizione del titolo De infirmandis his, quae sub tyrannis aut barbaris gesta sunt del Teodosiano (15.14)', *Atti dell'Accademia Romanistica Constantiniana* 20 (2014), 345–355; Id., 'Les actes juridiques privés, entre légitimité et usurpation', in J.J. Aubert and P. Blanchard (eds.), *Droit, religion et société dans le Code Théodosien* (Geneva 2009), 401–408; M.V. Escribano, 'La ilegitimidad politica en los textos historiograficos y juridicos tardios (Historia Augusta, Orosius, Codex Theodosianus)', *Revue internationale des droits de l'antiquité* 44 (1997), 85–120; J.J. Aubert, 'La validité des actes des déchus (Codex Theodosianus XV 14)', *The Journal of Juristic Papyrology* 24 (2016), 581–595.

23 See also the contribution by Daalder in this volume on the role of imperial enactments and legal decisions as part of the ideological construct of the 'good' emperor.

liberty and the rule of law. Constantine addressed an *epistula* to the praetorian prefect Constantius, ordering that all inhabitants should obey only his constitutions and the *vetus ius* because the constitutions and the *leges* of Licinius[24] had been declared void, probably by an *edictum* previously issued:

> Imp. Constantinus a. ad Constantium praefectum praetorio. Remotis Licini tyranni constitutionibus et legibus omnes sciant veteris iuris et statutorum nostrorum observari debere sanctionem. Proposita XVII kal. iun. Crispo III et Constantino III caess. conss.[25]
>
> Emperor Constantine Augustus to Constantius, Praetorian Prefect. All men shall know that the constitutions and laws of the tyrant Licinius are abolished and that the sanctions of ancient law and of Our statutes must be observed. Posted on the seventeenth day before the kalends of June in the year of the third consulship of Crispus and Constantine Caesars—May (December) 16, 324[26]

The words used in the constitution are extremely clear. They communicate the point of view of the winner, who wants to show strength and authority. The existing body of law from then on included ancient law followed by the enactments of Constantine, while the constitutions of the usurper completely lost their power.[27] The vacuum that was potentially created by the deletion of Licinius' laws was filled by the constitutions of Constantine, who connected his own legislation to the ancient law (*ius vetus*), thus creating a continuation of the legal order. The constitution, however, was less effective in practice, since the historical record has preserved many traces of Licinius the legislator.[28] Moreover, coeval Christian sources confirm that Constantine abrogated

24 S. Corcoran, 'Hidden from history: the legislation of Licinius', in J. Harries and I. Wood (eds.), *The Theodosian Code. Studies in the Imperial Law of Late Antiquity* (London 1993), 97–119.

25 CTh. 15.14.1.

26 C. Pharr (ed.), *The Theodosian Code and Novels and the Sirmondian Constitutions* (Princeton 1952), 437. On the correction of the date (from May to December), see, O. Seeck, *Regesten der Kaiser und Papste fur die Jahre 311 bis 476 n. Chr. Vorarbeit zu einer Prosopographie der christlichen Kaiserzeit* (Stuttgart 1919), 174; Corcoran 1993 op. cit. (n. 24), 99.

27 In another constitution, concerning private contracts, Constantine restated his decision to cancel all the legislation of the usurper Licinius: CTh. 15.14.2 *Tyranni et iudicum eius gestis infirmatis*. See, Corcoran 1993, op. cit. (n. 24); J.N. Dillon, *The Justice of Constantine. Law, Communication, and Control* (Ann Arbor 2012), 95–96.

28 Corcoran 1993 op. cit. (n. 24), 105–119.

only the enactments against the church.[29] The proclaimed complete annulment of Licinius' legislation seems rather part of the political message of the Constantinian regime,[30] absorbed in manipulating the past and celebrating a new vision of government.

The link between the emperor and ancient law (*vetus ius*), stressed in CTh. 15.14.1, was already expressed in an earlier constitution that Constantine issued in an analogous situation in 313, namely the overthrow of Maxentius. The arrival of Constantine in Rome was followed by a widespread promotion of his person, which had to counteract the city's preference for his rival. Constantine characterized his opponent as a tyrant, providing, at the same time, a revealing self-portrait in the role of *liberator urbis*.[31] In this context of vilifying Maxentius, Constantine dealt with his enactments:

> Idem a. Antiocho praefecto vigilum. Quae tyrannus contra ius rescripsit non valere praecipimus, legitimis eius rescriptis minime impugnandis. Dat. VIII id. iul. Romae Constantino a. VII et Constantio caes. conss.[32]
>
> The same Augustus to Antiochus, Prefect of the City Guard. We direct that if the tyrant issued any rescripts contrary to law, they shall have no validity, but his lawful rescripts shall not be impugned. Given on the eighth day before the ides of July at Rome in the year of the seventh consulship of Constantine Augustus and the consulship of Constantius Caesar.—July 8, 326; January 6, 313.[33]

In CTh. 15.14.1, Constantine referred to the "tyrant" Licinius's enactments, *leges* and *constitutiones*. In the statute about Maxentius, the same oblivion was imposed on the imperial rescripts, i.e. the answers to petitions, that the usurper had pronounced "against the law" (*contra ius*).[34]

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29 Soz., *HE* 1.8; Eus., *De vita Constantini* 43.

30 The communicative schemes used by Constantine are analysed by: Dillon 2012, op. cit (n. 27); A. Maranesi, 'Demersa quondam tyrannidis impiae malis: reconsidering the political storytelling in the early Constantinian age', *Koinonia* 41 (2017), 211–228.

31 E. Marlowe, 'Liberator urbis suae. Constantine and the ghost of Maxentius', in B.C. Ewald and C.F. Noreña (eds.), *The Emperor and Rome. Space, Representation, and Ritual* (Cambridge 2010), 199–210.

32 CTh. 15.14.3; The *subscriptio* of the constitution is emended by: Seeck 1919 op. cit. (n. 26), 160.

33 Pharr 1952 op. cit. (n. 26), 437.

34 The same principle of law is affirmed by Constans in CTh. 15.14.5. The legislation on *rescripta contra ius* is analysed by: P. Voci, 'Note sull'efficacia delle costituzioni imperiali.

However, the acts of Maxentius were not abolished in their entirety, for Constantine ordered that the lawful rescripts were not to be challenged. It is important to focus on this decision, because the lawful rescripts received their validity not only because they complied with the *ius vetus*, but also because Constantine forbade opposition against them. The constitution thus points to an implied evaluation of what valid law is. Even if the usurper as illegitimate legislator has no competence to make law, and his acts must therefore be abolished, some of his rescripts may be granted existence because the legitimate emperor gives them a new life in the world of the law. The criterion that allows these rescripts to retain their validity is their adherence to the *ius vetus*. In other words, the non-existence of the usurper's acts can be overcome by the connection between the *ius vetus* and the legitimate emperor; the former exists independently, the latter is the guarantor of the body of law in its entirety.

The sources show that the discourse linking the emperor and the *ius* found expression in various ways, even though in terms of semantics and ideology the range was quite narrow. The virtue of justice in the legitimate ruler is more intensely denoted as opposed to the iniquity of the usurper. For instance, in October 388, Theodosius I condemned every law and verdict that Magnus Maximus[35] had conceived during his usurpation:[36]

> [Impp. Valentinianus et Theodosius et Arcadius] aaa. Trifolio praefecto praetorio. Omne iudicium, quod vafra mente conceptum iniuriam, non iura reddendo Maximus infandissimus tyrannorum credidit promulgandum, damnabimus. Nullus igitur sibi lege eius, nullus iudicio blandiatur. Dat. VI Id. Octob. Mediolano Theodosio a. II et Cynegio conss.[37]
>
> Emperors Valentinian, Theodosius, and Arcadius Augustuses to Trifolius, Praetorian Prefect. We condemn every decision which Maximus, the most nefarious of tyrants, conceived in his crafty mind and supposed that he

I. Dal principato alla fine del IV secolo', in P. Voci, *Studi di diritto romano*, II (Padova 1985), 307–309; Id., 'Note sull'efficacia delle costituzioni imperiali. II. Il V secolo', in Voci 1985 op. cit., 365–366.

35 H.R. Baldus, 'Theodosius der Grosse und die Revolte des Magnus Maximus. Das Zeugnis der Münzen', *Chiron* 14 (1984), 175–192.

36 T. Honoré, *Law in the Crisis of Empire. 379–455 AD. The Theodosian Dynasty and its Quaestors* (New York 1998), 59 n. 6 remarks that, although Maximus laws were nullified, the consulship of Evodius, praetorian praefect under Maximus, is acknowledged in: CTh. 8.5.48; CTh. 3.4.1; CTh. 2.33.2; CTh. 12.6.21.

37 CTh. 15.14.7.

> should promulgate, thus rendering injustice instead of justice. Therefore, no man shall boast about any law or decision of the tyrant. Given on the sixth day before the ides of October at Milan in the year of the second consulship of Theodosius Augustus and the consulship of Cynegius.—October 10, 388.[38]

Maximus was described as the most nefarious and the most monstrous of the usurpers.[39] He devised laws and judgments with a wily mind, and he supposed that he should promulgate them. In reality, according to Theodosius, he was not a legitimate lawgiver, he was a source of injustice: he did wrong, rather than making law (*non iura reddendo*). The strong language of the constitution made the abstract idea of justice appear in the figure of Theodosius. The emperor was the personification of this principle, and his authority took away all the effects of the usurper's legal actions, in order that no-one could take advantage of any law or decision of Maximus.

We can thus say that the usurper is the living sign of *iniuria*, i.e. the absence of the law, while the emperor is the source of the justice. The same characterization is adopted by the rhetor Pacatus. His panegyric dedicated to Theodosius has the usurper's suppression as its major theme and shows a shared background with the text of the constitution. While the usurper Magnus Maximus carries with him *perfidia*, *nefas*, and *iniuria*, the legitimate emperor is the one who gives *fides*, *fas* and *ius*:

> Tecum fidem, secum perfidiam; tecum fas, secum nefas; tecum ius, secum iniuriam; tecum clementiam pudicitiam religionem, secum impietatem libidinem crudelitatem et omnium scelerum potremorumque vitiorum.
>
> On your side there was loyalty, on his, treachery; you had right on your side; he, wrong; you had justice, he injustice; you had clemency, modesty, religious scruple, he impiety, lust, cruelty and a whole company of the worst crimes and vices.[40]

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38 Pharr 1952 op. cit. (n. 26), 437.

39 The constitutions of the emperors allude to Maximus with expressions emphasizing his role of usurper: in CTh. 15.14.6 *tyrannica audacia*; in CTh. 15.14.8 *tyranni usurpatione*.

40 Pan. Pacatus II (XII), 31 (C.E.V. Nixon and B. Saylor Rodgers (eds.), *In Praise of Later Roman Emperors. The Panegyrici Latini, with the Latin Text of R.A.B. Mynors* (Berkeley 1994), 495, 664). On the panegyric of Theodosius: S. Lunn-Rockliffe, 'Commemorating the usurper Magnus Maximus. Ekphrasis, poetry, and history in Pacatus' Panegyric of Theodosius', *Journal of Late Antiquity* 3 (2010), 316–336.

Despite the technical legal contents of the laws, the style of the constitutions emulates the panegyrics and their persuasive purpose; the broad circulation of the edicts allowed the emperors to build a common and loyal consent to imperial authority among the population of the empire.[41] The need for approval became more pressing when emperors had to support their legitimacy at the end of a political crisis, and the emphatic formulation of the enactments conveyed the idea of reinstating justice:

> Omnia penitus amputentur, quae tyrannicum tempus poterat habere tristissima; universos ergo praecipimus esse securos.[42]
>
> All the most unhappy circumstances which the time of the tyrant could afford shall be abolished entirely. Therefore We command that everyone shall be secure.[43]

3 Safeguarding the Daily Life of the Empire's Inhabitants

Erasing the usurper's actions in terms of public law, such as by abolishing constitutions or rescripts and removing officials who had collaborated with the tyrant, was bound to have severe repercussions. At the same time, however, emperors chose to confirm the validity of transactions by private citizens during the period of usurpation. During the reign of a usurper, people evidently concluded contracts, manumitted slaves, and litigated in the courts. In order to avoid the chaos resulting from cancelling all legal actions, emperors tried to mitigate the consequences of the *damnatio memoriae* by preserving the stability of the law.

In November 352, Constantius II issued an edict to the population of the Roman provinces and to the people of Rome, after defeating Magnentius with his troops in the Battle of Mursa Major and forcing him to retreat back to Gaul.[44] Even though the usurper was still alive at this time, the emperor wanted to reassure the inhabitants of the empire:

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41 A. Eich and P. Eich, 'Genese des Verlautbarungstils der spätantiken kaiserlichen Zentrale', *Tyche* 19 (2004), 85–87; Dillon 2012 op. cit. (n. 27), 82–89.

42 CTh. 9.38.2. The conciliatory attitude of Constantius is recognized by the emperor Julian, who refers to a specific act of grace ('Εγκώμιον εἰς τὸν αὐτοκράτορα Κωνστάντιον, 31.6). On the treatment of the usurper's supporters and the emperors' amnesty: H. Leppin, 'Copying with the tyrant faction. Civil war amnesties and Christian discourses in the fourth century AD', in Wienand 2015, op. cit. (n. 15), 198–214.

43 Pharr 1952 op. cit. (n. 26), 253.

44 On the Frankish usurper Magnentius: J.F. Drinkwater, 'The revolt and ethnic origin of the

> Imp. Constantius A. et Constans C. ad universos provinciales et populum. Quae tyrannus vel eius iudices contra ius statuerunt, infirmari iubemus reddita possessione expulsis, ut qui vult ab initio agat. Emancipationes autem et manumissiones et pacta sub eo facta et transactiones valere oportet. Dat. III non. Nov. Mediolano Constantio A. V et Constante conss.[45]
>
> Emperor Constantius Augustus and Constans Caesar to all the Provincials and the People. We order that all the regulations established by the tyrant and his judges contrary to law shall be invalidated. Possession shall be restored to those persons who were evicted, so that any person who wishes may litigate as from the beginning. But emancipations, manumissions, pacts, and compromises made under the tyrant, must remain valid. Given on the third day before the nones of November at Milan in the year of the fifth consulship of Constantius Augustus and the consulship of Constans—November 3, 352.[46]

At the opening of the constitution, the emperor ordered the invalidation of the regulations that Magnentius and his judges had established contrary to the law (*contra ius*).[47] The emperor also decreed that possessions should be restored to the people who had been evicted.[48] Next, however, he ordered that emancipations, manumissions, pacts and compromises that were made under the *tyrannus* were to remain valid.

Valentinian decided to preserve the effects of the same legal acts, after commanding that any declaration of law and any decisions taken by judges appointed by the usurper Magnus Maximus should be cancelled:

> [Imppp. Valentinianus, Theodosius et Arcadius] aaa. Constantiano praefecto praetorio Galliarum … Exceptis his tantum negotiis adque in sui

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usurper Magnentius (350–353), and the rebellion of Vetranio (350)', *Chiron* 30 (2000), 131–159.

45 CTh. 15.14.5.

46 Pharr 1952 op. cit. (n. 26), 437.

47 The expression *ab initio agere* possibly refers to a *in integrum restitutio*: the evicted regain the situation before the usurpation and can litigate as from the beginning, because the judgment is invalid. The principle of law affirmed in this constitution is in compliance with the jurists' writings. Modestinus explains that a judgment *contra iuris rigorem* is null and void, and a new claim can't be precluded by anything (Mod. *l. s. de enucl. cas.* D. 49.1.19). On D. 49.1.19: F. Pergami, *Nuovi studi di diritto romano tardo antico* (Turin 2014), 195–196.

48 The restoration of possessions is also mention by the emperor Julian in his Ἐγκώμιον εἰς τὸν αὐτοκράτορα Κωνστάντιον (35,15).

> integra firmitate mansuris, quae conventionibus pactisque finita sunt, si dolo metuve caruerunt: his quoque pariter exceptis, quae donatio transtulit, emancipatio liberavit, contulit manumissio praemia meritae servitutis, quia in his omnibus voluisse sat iuris est. Dat. XVIIII kal. feb. Mediolano Timasio et Promoto vv. cc. conss.[49]
>
> Emperors Valentinian, Theodosius, and Arcadius Augustuses to Constantianus, Praetorian Prefect of Gaul … Only those suits shall be excepted and remain in their complete effectiveness which were terminated by agreements and pacts, provided that fraud and fear were absent. Those legal acts are likewise excepted whereby a gift was transferred, freedom was conferred by emancipation, or the reward of manumission was bestowed upon meritorious slaves, because in all such matters the intention is a sufficient law. Given on the nineteenth day before the kalends of February at Milan in the year of the consulship of the Most Noble Timasius and Promotus.—January 14, 389.[50]

Pacts and agreements, such as gifts, emancipations, and manumissions, were to be excepted from the sanction of invalidation, unless all these private agreements were the consequence of fraud and fear.[51] Valentinian considered that these acts were effective because they were based on the will of the person who had concluded them. *Sat iuris esse* means that, even in a period where there had been no law because of the illegality of the usurper's reign, the citizens of the empire had preserved the respect for the rules, which were now protected by the emperor. The emperor, in this way, recognized that the people had continued to be free in regulating on their own their economic and domestic affairs.

The opposite decision was taken when a usurper participated directly in the legal acts. Honorius, after suppressing the usurpation of Heraclianus[52] and

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49 CTh. 15.4.8.

50 Pharr 1952 op. cit. (n. 26), 438.

51 The decision of Valentinian followed the principles of the Roman legal system and seemed to have declaratory effects, not innovating. The invalidity of fraudulently induced contracts is a general remedy in the Roman law, as the *actio doli* in the praetorian edict shows (D. 4.3.3.1). Costantine, also, in a previous constitution, decreed that no man could invalidate what he himself willingly did and what was done according to the law during the usurpation: CTh. 15.14.2 *nemo per calumniam velit quod sponte ipse fecit evertere nec quod legitime gestum est*. See, Corcoran 1993 op. cit. (n. 24), 100; Dillon 2012 op. cit (n. 27), 95–96.

52 H. Menard, 'La mémoire et sa condamnation d'après les codes tardifs: l'exemple de la révolte d'Héraclien en 413 après J.C.', in S. Benoist (ed.) *Mémoire et histoire. Les procédures*

commanding his *damnatio memoriae*,[53] ordered that grants of freedom were revoked and had to be redone because the usurper had influenced directly the will of the masters:

> Impp. Honorius et Theodosius aa. Hadriano praefecto praetorio … Libertates quoque, quoniam certum est scelere eius sollemnitatem consulatus esse pollutam, in melius revocamus, sciatque dominorum voluntas iterandum esse, quod illo auctore advertit stare non posse; semel tamen mutatae condicionis beneficium implendum esse praecipimus et ita repeti manumissionum consuetudines nunc iubemus, ut nullus sub hac occasione incipiat nolle quod voluit. Dat. III non. aug. Ravennae post cons. Honorii VIIII et Theodosii v. aa.[54]

> Emperors Honorius and Theodosius Augustuses to Hadrianus, pretorian prefect, we also revoke for the better all grants of freedom, since it is certain that the legal formalities of the consulship were polluted by his criminality, and masters shall know that they must repeat their action, expressing their will, which they observe cannot be valid under his sponsorship. We direct, however, that the benefit of the changed condition of slaves must be fulfilled when the change is once made, and We now order that the customary rites of manumission shall be so repeated that no man under such pretext shall begin to unwill that which he once willed. Given on the third day before the nones of August at Ravenna in the year after the ninth consulship of Honorius Augustus and the fifth consulship of Theodosius Augustus.—August 3, 413.[55]

The manumissions that Heraclianus promoted personally or that were celebrated solemnly in front of him as consul were not the free and independent desire of the masters of the freed slaves, but were polluted by the criminality of the usurper. Heraclanius' presence during the ceremony undoubtedly affected

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de condamnation dans l'Antiquité romaine (Metz 2007), 267–278; J.W.P. Wijnendaele, 'The manufacture of Heraclianus' usurpation (413 CE)', *Phoenix* 71 (2017), 138–156.

53 CTh. 15.14.13: *Heracliani vocabulum nec privatim nec publice ulla memoria teneat, ideoque submovenda esse censemus, quaecumque sub eo gesta esse dicuntur* (Pharr 1952 op. cit. (n. 24), 438: The name of Heraclianus shall not be preserved in private or public recollection, and We therefore decree that all the acts that are said to have been done under him shall be nullified). The decision to cancel all the acts, as affirmed in the beginning of the constitution, is very emphatic and regards the statutes of Heraclanius as well as the administrative acts of his illegitimate officials.

54 CTh. 15.14.13.

55 Pharr 1952 op. cit. (n. 26), 439.

the masters' behaviour. The usurper might also have leveraged the masters' fear to induce them to manumit their slaves, perhaps in order to conscribe them for his own troops.[56] Honorius renewed the decision of his predecessor Valentinian (CTh. 15.14.8), and accepted that the intention of releasing someone from slavery was legally sufficient if it was independent from the negative and illegal authority of a *tyrannus*. When, on the contrary, manumissions were affected by the pernicious influence of the usurper, he ordered that the masters had to repeat the acts.

The respect of people's liberty in performing legal acts comes to light in another constitution of Honorius, dated about eighteen years before CTh. 15.14.13 to 21 April 395:[57]

> Impp. Arcadius et Honorius aa. Andromacho praefecto Urbi. Valeat omnis emancipatio tyrannicis facta temporibus; valeat a dominis concessa libertas; valeat celebrata et actis quibuslibet inserta donatio; valeat deficientium omne iudicium; valeat universa venditio; valeant sententiae iudicum privatorum—convelli enim iudicium non oportet—quos partium elegit adsensus et compromissi poena constituit; valeant conceptae sollemniter pactiones; valeant scripturae, quibus aut fides rerum aut ratio probatur aut debitum; valeant apud quemlibet habitae spontaneae professiones; valeat deposita super instituenda lite testatio; valeat impetratio iuris communium liberorum; valeat procuratio scaevis mandata temporibus; datus tutor vel curator optineat firmitatem; valeat in sponsam perfecta largitio; doli ac vis et metus inchoata actio in tempus legitimum perseveret; bonorum admissa possessio et adfectus adeundae hereditatis obtineat et interdicti beneficium non amittat; valeat in integrum restitutionis petitum auxilium; valeat vindicatio .... identidem desiderata tribuatur; locatio et conductio inviolabilem obtineant firmitatem; interdicti beneficia tempora infausta non mutilent; postulata inofficiosi actio et inmodicarum donationum rescissio petita servetur; beneficia transacta non titubent; sacramento terminata permaneant; pignoris adque fiduciae obligatio perseveret. Stent denique omnia, quae in placitum sunt deducta privatum, nisi aut circumscriptio subveniet aut vis aut terror ostenditur. Funestorum tantum consulum nomina iubemus aboleri, ita ut his reverentia in lectione recitantium tribuatur, qui tunc in Oriente annuos mag-

56 J.M. Kondek, 'Abrogation of legal effects of usurpations in the Late Roman Empire', *Miscellanea Historico-Iuridica* 11 (2012), 53.

57 On this constitution: Lovato 2014 op. cit. (n. 22), 349–351; Lovato 2009, op. cit. (n. 22), 405–406; Aubert 2016 op. cit. (n. 22), 588–591.

istratus victuris perpetuo sunt fascibus auspicati; tempus vero ipsum, ac si non fuerit, aestimetur, si quidem tunc temporis omissa aliqua praescriptio taciturnitatis etiam de illis, quae confirmavimus, non possit obponi. Dat. XI kal. mai. Mediolano Olybrio et Probino conss.[58]

Emperors Arcadius and Honorius Augustuses to Andromachus, Prefect of the City. Every emancipation made in the times of the tyrant shall remain valid; all grants of freedom by masters shall remain valid; all gifts made and registered in any records shall remain valid; every will of deceased persons shall remain valid; every sale shall remain valid; the decisions of private judges, chosen by the assent of the parties and appointed under penalty of a mutual promise to abide by the award, shall remain valid, since judgments once rendered must not be disturbed; pacts that were formally made shall remain valid; written documents by which the trustworthiness of transactions or the reason there for or debts are proved shall remain valid; declarations voluntarily made before any person shall remain valid; attestations filed for the institution of suits shall remain valid; impetrations of special privileges that accrue to parents on account of their common children shall remain valid; procurator ships entrusted during the untoward times shall remain valid; the appointments of tutors and curators shall retain their validity; a completed gift to a betrothed woman shall remain valid; an action for fraud or one on account of violence and intimidation, when once instituted, shall remain effective during the statutory time limits; a grant of the possession of the goods of an inheritance and the expressed will to enter on an inheritance shall prevail, and shall not lose the benefit of the interdict; the aid sought for restoration to the original condition shall remain valid; vindications shall remain valid, and any such action often requested shall be granted; letting and hiring shall retain inviolable effectiveness; the inauspicious times shall not mutilate the benefits of an interdict; requested actions against inofficiosity and the petitioned rescission of immoderate gifts shall be preserved; completed benefits shall not waver; transactions terminated by an oath shall remain valid; the obligation of a pledge or a trust shall persist. Finally, every transaction shall stand firm which was embodied in a private pact, unless either circumvention entered therein or duress or intimidation is shown. We order that the names of the calamitous consuls only shall be abolished, but reverence shall be paid in the public recital

58 CTh. 15.14.9.

> of readers to those persons who at that time in the Orient administered the annual magistracies under Our ever victorious fasces. The very time of the tyranny shall be considered as though it had not been, since any prescription of silence omitted at that time cannot be brought, even in regard to those matters which We have confirmed. Given on the eleventh day before the kalends of May at Milan in the year of the consulship of Olybrius and Probinus.—April 21, 395[59]

Addressed to Andromachus, *praefectus urbis*, this imperial enactment concerns the usurper Eugenius.[60] Honorius preserved the effects of the legal acts performed by citizens during the usurpation. The emperor tried to cover all private law, and the constitution implied a very good knowledge of the praetorian edict, as the references of many of its institutions show. For contracts, both formal and informal, he listed e.g. sale, hire, agency, pledge and *fiducia*; for the law of succession, he cited the acquisitions of inheritance, the *bonorum possessio*, as well as the remedies of the heir; for the law of procedure, he remembered the *litis contestatio* and the *in integrum restitutio*; he did not forget the law of family, quoting emancipation, guardianship and gifts for marriage. The long list of legal acts ends with a general provision. The emperor recognized the validity of all acts that had not been indicated in the list and that were embodied in a private agreement (*omnia, quae in placitum sunt deducta privatum*), provided that they had not been concluded *dolo* or *vi*.

The constitution then resolved the problem of the formality of the acts that was the result of deleting in the documents[61] the names of the consuls[62] appointed by the *tyrannus*. The *nomen consulis* was a necessary requirement for an act to be legally valid, and its importance is clearly evoked by John Chrysostom.[63] Yet, in the present case, the emperor decreed that the

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59 Pharr 1952 op. cit. (n. 26), 438.

60 J. Szidat, 'Die Usurpation des Eugenius', *Historia* 28 (1979), 487–508; Leppin 2003 op. cit. (n. 18), 247–255.

61 On the cancellation in official documents: H.I. Flower, 'Memory sanctions and the disgrace of emperors in official documents and laws', R. Haensch (ed.), *Selbstdarstellung und Kommunikation. Die Veröffentlichung staatlicher Urkunden auf Stein und Bronze in der Römischen welt*, (Munich 2009), 409–421.

62 For Hendrick (*History and Silence. Purge and Rehabilitation of Memory in Late Antiquity* (Austin 2000), 95) those who served as consuls under Eugenius have their names struck from the record. Contrary, Honoré 1998 op. cit. (n. 36) 65 suggests that the constitution concerns the annulment of the consular appointment; the same idea is accepted by: Kondek 2012 op. cit. (n. 50), 49.

63 Jon. Chrys., *In illud vidi dominum*, Hom. 2.3: Αἱ διαθῆκαι καὶ τὰ γραμματεῖα τὰ περὶ γάμων, τὰ περὶ ὀφλημάτων, τὰ περὶ τῶν ἄλλων συμβολαίων, ἐὰν μὴ τῆς ὑπατείας τοὺς χρόνους ἄνωθεν

omission of the consuls' names did not invalidate the contracts and all the other private regulations. Using a *fictio*, he denied that the *praescriptio* was able to invalidate these agreements, which the authority of the legislator confirmed.

From a political and ideological point of view, the constitution clearly states that there was a time of the usurper (*tyrannicis temporibus* / *scaevis temporibus* / *tempora infausta*), but that now the time of justice is back. Honorius wanted to erase the time of usurpation, *tempus vero ipsum, ac si non fuerit, aestimetur*: the time of usurpation must be considered as having never existed, as if no usurpation had ever occurred. However, asserting that the time of the usurpation had never existed threatened the certainty and the stability of relations between the individuals. For this, the emperor gave effect to all private acts, and he based this solution on his power, which was legitimately exercised. The emperor presents himself as the only one able to guarantee the existence and effectiveness of all the actions taken by the citizens during the time of usurpation. The repetition of the verb *valeat* stresses that the emperor assures the serenity and the prosperity of the empire and safeguards peace among the citizens.

The idea that power is now legitimately exercised after the usurper's fall also emerges in the decision to ensure *reverentiam in lectione recitantium* only for legitimate consuls. In the courts of the empire, only the emperor's time would resound, while oblivion fell on the usurper's period. The same emperor emphasized this thought in CTh. 9.38.12, in which he released an act of grace for those awaiting trial and for the convicted. By celebrating the defeat of the usurper Priscus Attalus in 410, he affirmed that the state had been freed from *tyrannidis iniuria*, i.e. a period of no law (*in-ius*).[64]

Honorius' validation of private acts answers to the need to secure the trust of his subjects in imperial power and to strengthen the period of peace after the conflict with the usurper. By doing this, he protects the principle of legal certainty, because the law is certain when the subjects can predict the consequences of their conduct and see the effects of their legal action maintained over time. This principle of law, adopted in the Roman legal system, is a con-

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ἔχῃ προγεγραμμένους, πάσης ἔρημα τῆς οἰκείας ἐστὶ δυνάμεως (wills, deeds, nuptial gifts, and all other contracts are not valid and are void of any effectiveness, if the indication of the consulship is missing at the beginning of the document).

64 CTh. 9.38.12 *Liberata re publica tyrannidis iniuria omnium criminum reos relaxari praecipimus*. On this constitution, O.F. Robinson, 'Unpardonable crimes. Fourth century attitudes', in J. Cairns and O. Robinson (eds.), *Critical Studies in Ancient Law, Comparative Law and Legal History* (Oxford 2001), 121.

stant in the political programme of all the emperors. For example, Marcianus, in a *lex* of 4 April 454, stated that he wanted to remove *obscuritas* and bring certainty to the laws:

> Si quid vero in iisdem legibus latum fortassis obscurius fuerit, oportet id imperatoria interpretatione patefieri, ut omnis sanctionis removeatur ambiguum et in suam partem iuris dubia derivare litigatorum contentio alterna non possit.[65]
>
> If any regulation issued in the aforesaid laws should perhaps be rather obscure, it must be clarified by the interpretation of the Emperor. Thus the ambiguity of every sanction shall be removed, and the alternate contention of litigants cannot divert doubtful points of law to their own advantage.[66]

4 The Emperor is also νόμος ἔμψυχος during Political Crises

This brief survey of texts has demonstrated how constitutions function as vehicles for the public advertisement of emperors' legitimacy after political crises caused by usurpation. Constantine and Theodosius emphasized that they restored the law, while the usurper was turned into the personification of the absence of any kind of order and justice. In addition, Valentinian and Honorius claimed that they were guardians of the stability of the rules by recognizing the validity of the legal acts of private citizens while they were subject to the power of the *tyrannus*.

This account traced the connection between emperors and law, which characterized all legal experience in Late Antiquity. The power of issuing enactments was not simply a prerogative of the emperor, but became one of the essential features of his *persona*. In Late Antique imperial ideology the emperor was not only the source of the law but the law itself.[67] Libanius defines the emperor as master of the law,[68] an expression which evokes the phrase τοῦ

65 Nov. Marc. 4. See, D. Mantovani, 'Per una mappa concettuale della certezza del diritto: idee romane e contemporanee' (forthcoming).

66 Pharr 1952 op. cit. (n. 26), 565.

67 G. Bassanelli Sommariva, *L'imperatore unico creatore ed interprete delle leggi e l'autonomia del giudice nel diritto giustinianeo*, Milano 1983, 5–33; S. Puliatti, *Il diritto prima e dopo Costantino*, in *Costantino* I (Rome 2013), 599–613.

68 Lib., *Or.* 59.162: κυρίους μὲν εἶναι τῶν νόμων.

κόσμου κύριος, used by Antoninus Pius in answering the petition of Eudemone.[69] Themistius, in his encomium, displays Theodosius as living law and superior to all the written rules.[70]

The ideological system that the emperors manipulated to obtain the subjects' *consensus* survived also during usurpations, a period where rival claims of succession in the imperial power shook the routine of the empire's life. After the removal of the defeated enemy, the language of power, through imperial constitutions, aimed to convince all inhabitants of the empire that the triumph of the emperor restored the rule of law, which had been lost under the "tyranny" of the opponent. Legislation, connected to the communicative framework of the imperial regime, promoted in a very effective way the image of an emperor as *legum dominus Romanorum, iustitiae aequitatis rector*.[71]

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69 Vol. Maec. ex lege Rhodia D. 14.2.9. On this text: V. Marotta, *Onnipresenza dell'imperatore e ubiquità dell'urbs. Esercizio e trasmissione del potere imperiale* (*secoli I–IV d.C.*) (Turin 2016), 99–103.

70 Them., *Or*. 16.213a. On Themistius and the emperor Theodosius: J. Vanderspoel, *Themistius and the Imperial Court. Oratory, Civic Duty, and Paideia from Constantius to Theodosius* (Ann Arbor 1995), 187–216; P. Heather, 'Themistius: a political philosopher', in M. Whitby (ed.), *The Propaganda of Power. The Role of Panegyric in Late Antiquity* (Leiden 1998), 125–150; P. Heather, 'Liar in winter. Themistius and Theodosius', in S. McGill, C. Sogno and E. Watts (eds.), *From the Tetrarchs to the Theodosians. Later Roman History and Culture, 284–450 CE* (Cambridge 2010), 185–214.

71 ILS 765; L. De Giovanni, 'L'esperienza giuridica nella Tarda antichità', in S. Puliatti (ed.), *L'ordine costituzionale come problema storico* (Turin 2017), 4.

CHAPTER 5

Legal Education, Realpolitik, and the Propagation of the Emperor's Justice*

Matthijs Wibier

Narrative histories of the Principate often stress that one of the big transformations of the period was the increasingly central role of the emperor in relation to the law. While the writers of such narratives may see it as their task to disagree vehemently about many finer points, it is hard to deny that a third-century emperor such as Diocletian, in taking legal and legislative initiatives, found himself in a situation that was significantly different from that of an earlier princeps such as Augustus. The casting of the latter's famous legislative programme in the form of *leges*, rather than as rules simply instituted by decree, followed Republican tradition in recognising several established loci of legal authority that coexisted with a certain independence, such as the praetors, the senate, and the jurists.[1] The source record indicates that later emperors were increasingly interested in asserting their presence and in monopolising legal authority. For example, Hadrian ended with his Perpetual Edict the prerogative of praetors to produce their own edict, while also intensifying the issuing of imperial rescripts. The Severan emperors worked so closely with the jurists Papinian, Paul, and Ulpian that they were practically speaking imperial employees. Finally, Diocletian, after stabilising his position, not only organised his bureaux so that they might address petitions at an unprecedentedly large scale, but in the process he also encouraged lawyers to produce the big collections of imperial rescripts known as the *Codex Gregorianus* and the *Codex Hermogenianus*.[2] The studies of scholars such as Millar, Honoré, Peachin, and Tuori have traced in much greater detail the changing nature of the emperor's activities, empha-

* I am grateful to the organisers and participants of *Impact of Empire* 13 in Ghent for a wonderful and stimulating workshop, and to O. Hekster and K. Verboven for their feedback. Due to limitations on the length of this paper, I have had to keep footnotes and engagement with the scholarship to a minimum. All translations are mine.

1 The programme's exact legal nature is in fact controversial, since later sources depict Augustus more like a sole legislator. A recent starting-point is K. Tuori, 'Augustus, legislative power, and the power of appearances', *Fundamina* 20:2 (2014), 938–945.

2 On legal culture under Diocletian, including the collections, see S. Corcoran, *The Empire of the Tetrarchs: Imperial Pronouncements and Government, AD 284–324* (Oxford 2007, rev. ed.).

 | DOI:10.1163/9789004400474_006

sising in particular their role as adjudicators.[3] The precise focus of these studies ranges from Millar's concern with laying out emperors' daily routines to Tuori's analysis of the discourses about the emperor as supreme judge, and of the complex ways in which these affected imperial and legislative ideologies. Overall, however, this scholarship has approached the issue mainly through the top of the hierarchy, studying the emperor and his bureaucrats while paying less attention to those at the receiving end. The perspective of recipients and audiences has been served primarily by studies of the petitioning process, which have examined questions about who took the step to file a petition as well as why, and what happened once a rescript had been received.[4] Yet it is important to note that as soon as issues of ideology and shifts in power balances are on the table, further questions emerge about how and why those in lower positions felt pressure or saw advantages in echoing and amplifying the idea of the emperor's centrality.[5]

One way to approach this rather large question is to analyse the socialisation through education of those who would go on to have dealings with the law and the emperor's presence in the legal world. It has been pointed out ubiquitously that educational texts and practices convey a particular view of the world. The issue has been well studied for Latin literary education, for which scholars have shown that it provided a type of cultural knowledge to engage with the socially privileged, who were often in control of resources and in positions to bestow benefits.[6] Education in Roman law has been much less studied from this perspective, even though much the same must be true for it as well. Most straightforwardly, acquiring knowledge of the law and of legal procedure empowered the individual in various ways, for example to take action in court, to advise friends, or to seek employment in the Empire's bureau-

3 F. Millar, *The Emperor in the Roman World* (London 1984, 2nd ed.); M. Peachin, *Iudex vice Caesaris. Deputy Emperors and the Administration of Justice during the Principate* (Stuttgart 1996); T. Honoré, *Emperors and Lawyers* (Oxford 2003, 2nd ed.); K. Tuori, *The Emperor of Law. The Emergence of Roman Imperial Adjudication* (Oxford 2016).

4 e.g. S. Connolly, *Lives behind the Laws. The World of the Codex Hermogenianus* (Bloomington 2010); B. Kelly, *Petitions, Litigation, and Social Control in Roman Egypt* (Oxford 2011); A. Bryen, *Violence in Roman Egypt. A Study in Legal Interpretation* (Philadelphia 2013).

5 Good observations at C. Ando, *Imperial Ideology and Provincial Loyalty in the Roman Empire* (Berkeley 2000), 374, addressing in more general terms the question why people accepted Roman rule. See on this also O. Hekster, *Emperors and Ancestors. Roman Rulers and the Constraints of Tradition* (Oxford 2015).

6 From the vast bibliography, see first and foremost G. Woolf, *Becoming Roman: The Origins of Provincial Civilization in Gaul* (Cambridge 1998); R. Hingley, 'Cultural diversity and unity: empire and Rome', in S. Hales and T. Hodos (eds.), *Material Culture and Social Identities in the Ancient World* (Cambridge 2010), 54–75.

cracy. An additional aspect is, however, that the way in which Roman law is expounded in legal textbooks also projects a certain view of Roman society, of power structures, and of Roman self-perceptions, much like literary education provides an introduction to narratives about the world from a Roman perspective.

This paper explores in more detail how texts that were used for legal instruction communicate particular views of the sources of law and justice, how views of the power structure changed over time, and how the elite audiences of these texts deliberately appropriated and exploited changing ideas about the relation between the princeps and the law in their own interest. The survival of the so-called *Fragments of Autun* (*FA*), lecture notes based on the *Institutes* of the second-century CE jurist Gaius, is particularly helpful here. First of all, they allow us to trace how a later educational text uses and adapts Gaius' work for its own purposes and in new times and settings. Furthermore, the work's dating and circulation offer a precious opportunity for further contextualisation. We will see in the next section that the work should be dated to the late third/early fourth century, and that it can with some confidence be located in a Western provincial setting. This means that we are in a position to compare and contrast our text meaningfully with several works stemming similarly from the world of higher education, namely the Tetrarchic speeches from and about the rhetorical school in Autun that have been preserved as part of the *Latin Panegyrics*. As we will see, reading these texts in the light of one another not only allows us to explore to what extent forensic rhetorical education projected a similar view of power as did the more technical legal handbooks,[7] but it also provides some invaluable insights into the motivations of individuals to internalise and promote the message they were being exposed to. To put it differently, any analysis of the increasing centrality of the princeps in relation to the law raises rather fundamental questions about the relation between shifting discursive ideologies and power shifts in "real", material terms—not least questions about agency and "enforcement". The evidence allows us to make a good case that many educated people were fully aware that they needed a sense of the right way to speak to the powerful, i.e. to play a political game, in order to be successful in elite circles.

7 On the forms and formats of legal education in the Roman Empire, see the next section below.

1 Lecture Notes and Legal Education: A Very Brief Introduction to the *Fragments of Autun*

The *FA* are the remains of a set of lecture notes used for fairly elementary instruction in Roman private law, probably in the context of a rhetorical school. It is clear from references to Gaius by name and the presence of commentary-style lemmas that the *FA* are based on Gaius' *Institutes*, a work that was written in the later second century CE and that enjoyed great popularity in legal circles until at least the age of Justinian.[8] Spanning twenty-five pages in the edition of Krüger,[9] the *FA*'s text survives as the lowest layer of writing on fifteen palimpsest folios. At some point, these were joined with further parchment sheets to form a larger codex carrying the *Institutes* of Cassian as its over-text.[10]

The background of the *FA*, both in terms of its geographical origins and its dating, cannot be established with great precision. Several observations, however, point to a circulation in Gaul in the fourth century. In the first place, it has been argued repeatedly that the handwriting of the manuscript preserving the *FA* is consistent with fifth-century hands known from South-Eastern France and Northern Italy.[11] This puts us on firm ground for locating an effort to pass down and preserve the text in Roman Gaul.

Secondly, even if the manuscript may well date to the Later Roman world, there is in fact little reason to suspect that it is the author's original copy. On the basis of considerations of legal doctrine, Nelson has convincingly shown that the *FA* must predate the fifth century and therefore the manuscript witness.[12] Most importantly, the surviving text deals extensively, in the present tense, with a legal institution known as *cretio* (34–60). This was a formal declaration of heirs that they accepted the inheritance. As Nelson has pointed out, however, the *cretio* fell out of use in the earlier fourth century. Similarly, the *FA*

8 On the *FA*, see first and foremost J.-D. Rodríguez Martín, *Fragmenta Augustodunensia* (Granada 1998), who also reprints Krüger's ed. The appreciation of Gaius' work is illustrated most strongly by Justinian's decision to base his *Institutes* on those of *Gaius noster* (*C.Imperatoriam* 6).

9 P. Krüger, 'Fragmenta interpretationis Gai Institutionum Augustodunensia', in P. Krüger, Th. Mommsen and W. Studemund (eds.), *Collectio librorum iuris anteiustiniani in usum scholarum* (Berlin 1923, 7th edn.), vol. 1, xlii–lxvi. Repr. in Rodríguez Martín 1998, op. cit. (n. 8).

10 The *FA* are preserved by folios 97–98, 98b–110 of Autun, Bibliothèque Municipale S 28 (24). Paris, Bibliothèque Nationale de France, NAL 1629 belongs to the larger Autun ms. as well.

11 Latest discussion at S. Ammirati, *Sul libro latino antico: ricerche bibliologiche e paleografiche* (Rome 2015), 104.

12 H.L.W. Nelson, 'Das Fragment über die cretio in der Autuner Gaiusparaphrase', *Subseciva Groningana* 2 (1985), 15, with further references about doctrinal points.

include a lengthy treatment of the law of actions, the procedural *actiones* (79–114). While Gaius' *Institutes* devote the entire fourth book to the *actiones*, Nelson signals that this type of procedure was abolished in 342 if not before. In short, then, both these cases concern legal instruments that had become outdated by the fifth century, when the manuscript was produced. Could they have been included as legal-antiquarian digressions, something Gaius himself seems to have had an interest in as well? This suggestion becomes implausible as soon as we consider the consistent use of the imperfect tense in the discussion of the *ius Latii*, the existence of which is clearly located in the past. This indicates that the *FA* cast legal-antiquarian notes in the past tense. The ample presence of the *cretio* and the *actiones* in the *FA* suggests, therefore, that the work should not be dated much later than the first half of the fourth century. In addition, the extinction of the *ius Latii* at the time of writing points out that the *FA* must be placed after the Constitutio Antoniniana granted near universal citizenship in the year 212. All this leaves a window stretching from the mid third to the first half of the fourth century.[13]

Finally, much less certainty is possible about where the text can be located before the production of the manuscript. But if the manuscript was produced in Southern Gaul over the course of the fifth century, it is very well possible (although it cannot be proven) that its immediate exemplar had been in circulation in this area earlier on, perhaps already in the fourth century.[14] In any case, a provincial readership is likely, since the work consistently pairs the praetor and the provincial governor as legal authorities.

The vagaries of the transmission process have resulted in a text with many gaps. Nonetheless, the modern edition by Krüger gives us a text that runs and reads well. In terms of content, the extant parts cover several main areas of Roman private law, in particular the law of status, the law of succession, and the law of actions. The notes, which at certain places are attached to lemmas taken from Gaius' *Institutes*, are extensive explanations of legal doctrine; they paraphrase Gaius, they explain and update legal doctrine, and they provide

13 Further precision seems impossible. Although Nelson 1985, op. cit. (n. 12), 15 suggested that the note on the family *sacra* in the perfect tense points to a mostly Christian (and hence later rather than earlier) context, Gaius already discussed them in the past tense. There is thus no marked contrast. See: D. Liebs, *Römische Jurisprudenz in Gallien* (*2. bis 8. Jahrhundert*) (Berlin 2002), 123.

14 A more complex argument can be made: J. de Churruca, *Las instituciones de Gayo en San Isidoro de Sevilla* (Bilbao 1975) 125–134 demonstrates on the basis of comparing various adaptations of Gaius that the *FA* draw from an earlier Gaius adaptation of Western circulation.

examples. In this way, the work projects for itself an audience of those who were studying the basics of Roman legal doctrine at a fairly elementary level.

It is likely that we should situate this type of basic legal instruction in Roman law primarily in the rhetorical schools. The source record about legal education in general is very thin and extremely polemical. Authors such as Cicero, Quintilian, and Libanius repeatedly insist that forensic rhetorical education and technical legal training were completely separate affairs, and that the teachers of the one specialism were highly competitive, if not outright hostile, towards those of the other. However, it has been pointed out on the basis of scattered evidence that technical legal training could be obtained via various routes that did not necessarily involve law schools.[15] One important avenue was to take up an apprenticeship with an experienced forensic lawyer so as to observe the ways of the forum (*tirocinium fori*). This is the form Cicero's legal education took, and Quintilian and Tacitus say it was still prevalent in their days.[16] Another important venue were the rhetorical schools. The surviving declamatory speeches show that rhetorical education consisted for a large part in training students to argue in favour of one of the parties in fictitious legal cases. While the case descriptions often involved fictitious legal provisions, there are nonetheless cases in which it is clear that the declaimer had considerable technical knowledge of Roman law.[17] Moreover, Libanius appears to have employed a law tutor in his school on a steady basis.[18] The legal instruction offered in these schools must have been relatively elementary; Libanius tells of some of his students that they had forensic careers before they sought more profound legal expertise in the law schools of Beirut or Rome.[19] This suggests that schools such as those of Libanius, perhaps in combination with apprenticeships of some sort, may have provided a basis in law solid enough to sustain a forensic career up to a certain point. Finally, a third route for obtaining legal knowledge was to study extensively with a well-known jurist.

15 Recent surveys and discussions: A. Riggsby, 'Roman legal education', in W.M. Bloomer (ed.), *A Companion to Ancient Education* (Chichester 2015), 444–451; J. Harries, 'Legal education and training of lawyers', in C. Ando, P. du Plessis, and K. Tuori (eds.), *The Oxford Handbook of Roman Law and Society* (Oxford 2016), 151–163; and M. Wibier, 'Legal culture and legal education in Gaul during the Principate', in K. Czajkowski, B. Eckhardt and M. Strothmann (eds.), *Law in the Roman Provinces* (Oxford 2020, forthcoming).

16 Cic. *Lael.* 1.1, Cic. *Brut.* 89.306; Quint. *Inst. or.* 12.6; Tac. *Dial.* 34.

17 Most importantly, ps.-Quint. *Decl. mai.* 13; with B.W. Frier, 'Bees and lawyers', *Classical Journal* 78 (1983), 105–114.

18 Lib. *Epist.* F433/B162.

19 E.g. Lib. *Epist.* F653/B164 and F1171/B166. See S. Bradbury, *Selected Letters of Libanius from the Age of Constantius and Julian* (Liverpool 2004), 201.

We hear about the possible existence of a *schola* for legal studies, run by the jurist Cassius Longinus, in Rome in the days of Pliny,[20] and the jurists Pomponius and Gaius both make references to two circles of law teachers that Gaius calls *scholae* as well. While it is impossible to say in detail what these *scholae* were, it is reasonably clear that they offered in-depth study of Roman law.[21] The same is the case for the dedicated law schools that are attested later, those of Beirut, Rome, Constantinople, and possibly Alexandria and Caesarea.[22] At the end of the day, given the *FA*'s elementary character, and given that rhetorical schools must have been much more common than exclusive law schools, it is most plausible to consider the setting in which the *FA* were used the rhetorical schools for which Gaul was famous throughout the imperial period.[23]

The following final note about the *FA* as evidence is in place. The connection of the manuscript with Autun is suggestive, since the town was known as an educational centre in the period to which the *FA* should be dated. In a speech from approximately 298, an orator named Eumenius asked a high-ranking official, possibly the provincial governor, for permission to use part of his imperial salary to rebuild the school buildings in Autun.[24] As we will see further below as well, Eumenius and the contemporary anonymous author of *Panegyric* 6 were both teachers of rhetoric at the school, displaying an interest in law as well.[25] It should come as no surprise, then, that the discovery of the *FA*'s manuscript was hailed by some scholars as confirming that intense law teaching took place at Autun in Eumenius' days.[26] This is certainly not impossible. But given the uncertainties of where exactly the manuscript was written as well as about when it came to Autun, the presence of the manuscript may not be the right evidence to support this claim. Rather, we have seen that the ancient record shows that, more generally speaking, rhetorical schools facilitated legal instruction. It is plausible that this was also the case in Autun—as it must have been in other towns, such as Lyon and Bordeaux. The *FA* should thus

20 Plin. *Ep*. 7.24.8.

21 For a recent discussion of the evidence and the immense scholarly debate, see T. Leesen, *Gaius Meets Cicero. Law and Rhetoric in the School Controversies* (Leiden 2010).

22 The school in Beirut is the best attested one; see P. Collinet, *Histoire de l'école de droit de Beyrouth* (Paris 1925). On Alexandria and Caesarea as sites of legal education (in unspecified format), see Justinian's *C.Omnem* 7.

23 See Wibier 2020, op. cit. (n. 15).

24 *Pan. Lat*. 9. See the introduction to and notes on this speech in C. Nixon and B. Rodgers, *In Praise of Later Roman Emperors. The Panegyrici Latini* (Berkeley 1994).

25 The authors of *Panegyric* 5 and 8 were also teachers in Autun.

26 E.g. H.L.W. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones* (Leiden 1981), 123.

be seen as a concrete example of the type of text that was used for basic legal instruction. The school of Autun, in turn, is a concrete example of the type of setting in which this happened.

2 Legal Textbooks on the Princeps and the Law

In order to present the clearest picture of how legal textbooks present the position of the emperor in relation to the law, including shifts in the discourse over time, I begin with an analysis of Gaius' *Institutes* and their reception by the *FA*. I will then address the question of how representative the case of Gaius is of legal textbooks more widely,

Gaius opens his *Institutes* with a series of definitions of law. After making a distinction between law that is common to all mankind (*ius gentium*) and law that is specific to each individual people (*ius civile*), he lists the various sources of law that make up the *ius civile* of the Romans. These include *leges*, *plebiscita*, *senatusconsulta*, imperial constitutions, edicts of the magistrates, and the *responsa* of jurists. This enumeration is followed by a brief discussion of each of these in turn. We should note, as Ibbetson has pointed out, that Gaius has a profound interest in *leges*, statutes approved and enacted by the *populus* as a whole. Not only does Gaius put the *leges* at the front of his list and his discussions, but he also proceeds to define almost all the other forms of legal rule explicitly by means of the term *lex*.[27] Thus we hear that, while a *plebiscitum* originally did not bind patricians, the *lex Hortensia* elevated this type of act to the status of *lex* (*legibus exaequata*, 1.3). Next, *senatusconsulta* are said to have the force of law (*legis vicem*, 1.4). Emperors can similarly issue constitutions with the force of a *lex* because the people grant them the right to do so *per legem* (1.5). Finally, the views of jurists, who had the authority to establish law (*quibus permissum est iura condere*), are said to have the force of *lex* in those cases in which a view is universally held (1.7).[28] Gaius' treatment indicates strongly that he considered *leges*, laws based on popular consent, the ultimate source of legal authority. And while the pronouncements of emperors clearly carried the weight of laws as well, they did so, according to Gaius, because they ultimately derived their status from a *lex* in which

27 D. Ibbetson, 'Sources of law from Republic to Dominate', in D. Johnston (ed.), *The Cambridge Companion to Roman Law* (Cambridge 2015), 29–33.

28 Strikingly enough, Gaius does not use the term *lex* in his discussion of the edicts. Perhaps, as Ibbetson 2015, op. cit. (n. 27), 34 suggests, this reflects a conception on Gaius' part of the edict as a procedural rather than legislative source.

the *populus* authorised the princeps to legislate.[29] In sum, even though the princeps was an important presence in the world of law, Gaius presents him as a sort of agent for the *populus*, who remain the top of the legal hierarchy.

For the purposes of this paper, it would be extremely interesting to compare the explanations that the *FA* gave on these programmatic passages. Unfortunately, however, this part of the text has been lost. The surviving text offers a different opportunity to see how the *FA* rewrite Gaius' own treatment of the princeps' legal importance. On the possibility for those under the age of 25 to renounce an inheritance that was unexpectedly debt-ridden (*damnosa hereditas*), Gaius writes as follows:

> nam huius aetatis hominibus, sicut in ceteris omnibus causis deceptis, ita etiam si temere damnosam hereditatem susceperint, praetor succurrit. scio quidem divum Hadrianum etiam maiori XXV annorum veniam dedisse, cum post aditam hereditatem grande aes alienum, quod aditae hereditatis tempore latebat, apparuisset.
>
> Gai. *Inst.* 2.163

> For the praetor comes to the help of people of this age; just as in all other cases with a catch, so also if they by accident have accepted an inheritance that is debt-ridden. Indeed, I know that the deified Hadrian relieved even a person older than 25 years when, after entering on the inheritance, a great debt appeared that lay hidden at the time of acceptance.

Rounding off the discussion of a legal remedy known as *restitutio in integrum* for inheritances with unforeseen financial burdens, the last sentence appends a brief report about the existence of a Hadrianic rescript that granted a similar solution to heirs over the age of twenty-five. The information about this piece of imperial law is very succinct; the next sentence starts a new discussion on the topic of extraneous heirs. When we turn to the *FA* for the parallel discussion, a marked difference is that the *FA* focus their audience's attention almost completely on the imperial rescript by discussing it at much greater length. After

29 It has been debated whether Gaius' remarks correspond precisely to Roman political practice, including such epigraphically attested statutes as the *Lex de imperio Vespasiani*. As a starting-point see M. Pani, 'L'imperium del principe', in L. Capogrossi Colognesi and E. Tassi Scandone (eds.), *La lex de Imperio Vespasiani e la Roma dei Flavi* (Rome 2009), 187–204.

a brief mentioning of the doctrine, an elaborate reworking follows at sections 29–33. I quote at some length:[30]

> **28.** quod si maior [fuerit] extraneus qui adierit vel suus qui miscuerit se bonis, [in integrum] restitui non potest, omnimodo tenetur oneribus hereditariis, quia deest ill[i auxili]um nec potest maiori, nisi exhibeantur interdum iustae causae, [in in]tegrum restitui; nec enim maioribus [------] generale beneficium d[-----]tor quidem hoc contigit. **29.** quidam, cum maior esset aetate, contra opin[ionem] adiit hereditatem, quam putabat non esse damnosam. ideo [puta]bat eam non esse damnosam, quod aes alienum in occul[to erat]. emerserunt plures creditores, coeperunt proferre t[abulas] * cum debitum fecit apparere hereditatem damnosam. [heres, qui] maior adierat, tenebatur. dedit ergo preces impera[tori ------] non sit quod fuerat, meruit speciale rescriptum, ut recede[ret] ab hereditate. **30.** ita dixit: ignorans, cum lateret aes alienum, [adii] hereditatem, postea emersit grande debitum, apparuit damnosa [ea hereditas]. ergo a te peto ut liceat mihi discedere. concessit ei imperator. **31.** hoc ergo [exem]plo hodieque, si tali re procedis, possumus dare consilium ut [suppl]icetur. nam facile impetrantur ab imperatore ea quae iam ab [aliis] impetrata sunt: aliud est novum beneficium petere, aliud est id pe[tere cui]us extant exempla. **32.** nam per gratiam factum est, ut si maior [sit qui] licet per ignorantiam omnimodo heres fit, ei discedere ab hereditate [-----] cum habet. propter quod exemplo eius alii possunt in integrum restitui a praetore. **33.** ergo ubi [is mi]nor est qui adiit vel qui se miscuit, per praetorem vel per praesidem provinciae potest [in integrum] restitui; sed qui maior est sine beneficio principali non poterit in [integrum restitui neque] auxilium exorari ei heredi, secundum ea quae tractavimus.

> **28.** because if a legal major was an extraneous (heir) who had accepted or an immediate (heir) who had meddled with the estate, he cannot be restored *in integrum*, he is bound entirely to the burdens of the inheritance, because help is not available to him nor is it possible for a major to be restored *in integrum*, unless a just cause is revealed in the meantime; for neither to legal majors [-----] a general favour [-----] covered this. **29.** Someone, though of legal age, accepted an inheritance ignoring advice, thinking that it was not debt-ridden. He thought it was not debt-ridden for this reason, namely because the debt was concealed. Many creditors

30 Krüger's ed. Square brackets indicate supplements of damaged parts, not deletions.

> appeared: they began to bring forth legal documents; since the debt made the inheritance appear debt-ridden, the heir, who accepted while of legal age, was bound. Therefore, he sent a petition to the emperor [-----] is not what it had been, he deserved a rescript for his specific situation so that he might withdraw from the inheritance. **30.** He said thus: "I accepted the inheritance out of ignorance, because a debt lay hidden; afterwards a great debt came to light, this inheritance turned out to be debt-ridden; therefore, I ask you that I be allowed to give it up". The emperor granted this to him. **31.** Therefore, on the ground of this precedent we can still give the advice, if you move forward with such a case, to petition. For those things are easily obtained from the emperor that have already been obtained by others: it is one thing to seek a new favour, it is another thing to seek that of which there exist precedents. **32.** For it was done out of goodwill, if for instance there was a legal major who became heir to the full extent through ignorance, that for him (it was made possible?) to withdraw from the inheritance [-----] (?) he had; hence, on account of that man's precedent, others can be restored *in integrum* by the praetor. **33.** Therefore, when he who accepts or he who meddles is a minor, he can be restored *in integrum* by the praetor or by the governor of the province; but he who is a legal major cannot without a favour of the emperor be restored *in integrum*, nor can help be obtained for this heir, according to what we have discussed.

The text is considerably expanded from Gaius' original. Perhaps most strikingly, Gaius' allusion to the existence of Hadrian's rescript has been transformed into a fairly extensive dramatised interaction between petitioner and the emperor, who then by way of climax concurs with the petitioner.[31] Next, the author dwells extensively on how effective it is 'in his time' (*hodie*) if one can get a rescript from the emperor. While we hear that it is more difficult (but possible) to obtain a rescript in cases for which there is no precedent yet, it should be relatively easy to get one if there are precedents. The point is then repeated three or four times more, thus conveying that it is really of central importance to address the emperor in this type of case and in others as well. The term *beneficium* occurs three times in this short text, with *gratia* expressing a similar idea as well. On the other hand, the source passage in Gaius makes no such claims. And although his *Institutes* repeatedly reference imperial rescripts, they are not very interested in the emperor's legislative position other than what we have

31 It is not known whether the author drew on a source that contained more information about the rescript and the case that prompted it, or whether this is first and foremost a case of rhetorical amplification.

already seen above. The *Institutes* also do not offer explicit encouragements to obtain one's justice from the emperor. In this way, the *FA*'s rewriting of Gaius here projects a different view of the relative importance of the sources of law, giving much more prominence to the emperor than Gaius did. It is true that this is only one case, and that it does not explicitly mention the emperor in relation to *leges*. But given how much Gaius' single sentence has been inflated, and given the repeated advice about approaching the emperor, it is likely that other parts of the *FA* also stressed the emperor's privileged position in the world of law.

An obvious question at this point is: how representative are the perspectives that we find in Gaius' *Institutes* and the *FA* of legal instructional texts more generally? The main problem in answering this question is that almost no texts of a similar type survive that are not highly fragmented.[32] Any inference beyond the comparison of these cases must thus remain somewhat speculative. Yet we might see traces of a similarly shifting discourse in some of the fragmentary juristic texts. An example is the so-called *Fragmentum Dositheanum* (*FD*), a sizeable fragment that mainly (but not exclusively) discusses manumission and that was excerpted from a longer legal handbook dating to the second century. A careful study of the presentation and the order of topics has revealed that the *FD* and Gaius' *Institutes* both go back to the same handbook tradition and are hence relatively closely related.[33] But unlike Gaius' focus on *leges*, the *FD* quite clearly foregrounds imperial constitutions as the most important sources of law. The text mentions the *leges* last, without defining what they are but just mentioning the *Lex Iulia et Papia* as an example.[34]

The attention of the *FD* for imperial constitutions is of interest for at least two reasons. In the first place, it should be reiterated that the *FD* and the *Institutes* stem from the same source tradition but that they used and adapted the source material in very different ways. This observation goes to underscore an important conceptual point, namely that discourses about the emperor and the law are not monolithic entities.[35] On the one hand, Gaius' widely circulating work is relatively reticent about the emperor's prominence, and it was up to

32 The Ulpianic *Liber singularis regularum* (also known as the *Tituli ex corpore Ulpiani*) is a short work that survives in a single manuscript and probably has its main source in common with Gaius' *Institutes*. Unfortunately, the opening section of this work dealing with the sources of law is damaged. Neither does it mention the Hadrianic rescript. On this text, see first and foremost M. Avenarius, *Der pseudo-ulpianische liber singularis regularum. Entstehung, Eigenart und Überlieferung einer hochklassischen Juristenschrift* (Göttingen 2005) and Nelson 1981, op. cit. (n. 26), 338–361.

33 Nelson 1981, op. cit. (n. 26), 361–370.

34 This is an observation of P. Mitchell, *''Fragmentum Dositheanum''* (forthcoming).

35 See on this Tuori 2016, op. cit. (n. 3).

users such as the author of the *FA* to reformulate things and shift the emphasis. On the other hand, the *FD* show that more emperor-centric texts were already produced by Gaius' time as well.

Secondly, we should note that the *FD* has survived through the manuscript tradition not as part of a legal collection but through its inclusion among materials used for teaching Latin in Antiquity. The work was thus able to broadcast its assumptions about the power structure of the Roman state to a considerable audience of students throughout the Late Antique world, also beyond the wide readership of popular legal handbooks such as that of Gaius.

It is harder to find further examples that are as illustrative as the *FD*. Perhaps Pomponius' listing of the sources of law and his repeated mentions of *lex* suggest a perspective somewhat similar to that of Gaius, while the persistent interest in bringing up imperial rescripts in the fragments of Marcian's *Institutes* could point to an outlook closer to that of the *FA* or *FD*.[36] Any inferences drawn from these last instances must, however, remain somewhat speculative. Finally, from the later second century, we also begin to see juristic works that collect and disseminate the legal views and outputs of emperors. Important cases are Papirius Justus' *Constitutiones* and, a generation later, Paul's *Decreta* and *Imperiales Sententiae*.[37]

3 Power Structures and the Game of Politics

I have tried to show, by focusing on Gaius and the *FA*, a development in legal educational textbooks towards a more emperor-centric representation of the legal system. In unpacking the question of how and why this happened, we may at first simply suggest that it reflects—if not merely follows—developments in the "real" political system. This must certainly be part of the explanation. Yet studies of discourse and ideology have emphasised consistently that discursive practices may also be constitutive of "reality", thus suggesting that the process analysed above must have been more complex and interactive.[38] If this is indeed a plausible point of view, we will have to face several thorny questions

36 Pomponius, *Ench. l.s.* (*Dig.* 1.2.2.12); for the fragments of Marcian's *Institutes*, see O. Lenel, *Palingenesia iuris civilis* (Berlin 1889), 1.652–675.

37 On Paul's *Decreta* and *Imperiales Sententiae*, see the contribution of E. Daalder to this volume.

38 For a conceptual discussion from the field of communication studies, see the classic account of O. Craig, 'Communication theory as a field', *Communication Theory* 9:2 (1999), 124–132. For an exploration of the usefulness of this model for studying Roman imperial ideology, see Hekster 2015, op. cit. (n. 5), 29–36.

about who did what: who were the players driving and cementing the change? Here we cannot simply point to the emperor or the "state", except perhaps for creating a critical mass and/or providing a reward structure for certain types of behaviour. After all, matters such as education and public oratory were not really state run, let alone that there was anything like a state-approved curriculum in the third and earlier fourth century. If we want to resist the idea that following "reality" is the full explanation, we should consider in more detail the role of authors, orators, teachers, and their audiences in echoing and amplifying discursive shifts. In order to explore this matter, I would like to reframe the question one more time: can we find any contextual evidence that shows self-awareness about the need to play along—to make the emperor look more and more central in relation to justice and the law, as well as why? I think such evidence exists. I limit myself to the following observations, drawn from educational texts.

For starters, there is the so-called second treatise on composing epideictic speeches associated with Menander Rhetor, dating to the late third/early fourth century. The work contains among other things instructions for writing a good βασιλικὸς λόγος. As part of its advice to praise the emperor's virtues, it emphasises that it is a productive strategy to dwell on the emperor's justice. One way to bring out the emperor's excellence in this respect, the text continues, is to highlight his 'humane stance towards those who are petitioning' (τὴν πρὸς τοὺς δεομένους φιλανθρωπίαν, 2.375). The work never makes very explicit what the precise purpose of such speeches is, and what would constitute success, but it is probably safe to infer that acclaim and perhaps benefits in a more material sense were among them. This is at least the point that is rather extensively made at the end of the sixth *Latin Panegyric*, written by an anonymous author from Autun in the year 310.[39] The text rehearses the importance of the emperor in relation to justice and alludes to the kind of material benefits a self-respecting emperor will give, which include a cityscape replete with splendid public buildings that are said to rival those of Rome.[40] The longer passage below from the same speech is more shameless about the benefits to be obtained, namely working in the emperor's bureaucracy and as such being involved in the very process of administering the emperor's justice.

> **1.** sed enim ista felicitas viderit an adhuc meae debeatur aetati. interim quoniam ad summam votorum meorum tua dignatione perveni, ut hanc meam qualemcumque vocem diversis otii et palatii officiis exercitam in

39 See the introduction to this speech in Nixon and Rodgers 1994, op. cit. (n. 24).

40 *Pan. Lat.* 6.22.5–6.

tuis auribus consecrarem, maximas numini tuo gratias ago tibique, quod superest, commendo liberos meos praecipueque illum iam summa fisci patrocinia tractantem, in quem me totum transtulit pietas, cuius felix servitus, si quando respexeris, maxime tuae conveniet aetati. **2.** ceterum quod de omnibus liberis dixi, lata est, imperator, ambitio; praeter illos enim quinque quos genui, etiam illos quasi meos numero quos provexi ad tutelam fori, ad officia palatii. multi quippe ex me rivi non ignobiles fluunt, multi sectatores mei etiam provincias tuas administrant. quorum successibus laetor omniumque honorem pro meo duco et, si forte hodie infra exspectationem mei dixero, in illis me confido placuisse. **3.** si tamen hoc quoque mihi tuum numen indulserit ut ex hac oratione non eloquentiae, quod nimium est, sed quantulaecumque prudentiae et devotae tibi mentis testimonium referam, cedant privatorum studiorum ignobiles curae; perpetua mihi erit materia dicendi, qui me probaverit, imperator.

Pan. Lat. 6.23

1. But for that reason let that good fortune see whether it is owed to still my lifetime. In the meantime, since I have through your esteem arrived at the fulfilment of my wishes, in order that I devote to your ears my voice here, of whatever quality it may be, well-practised through the diverse duties of intellectual life and the palace, I give the greatest thanks to your divine majesty; and as for what remains, I commend to you my children and most of all him who is now in charge of the supreme guardianship of the fisc, to whom my parental feelings have been completely directed, whose propitious service, if you ever look at him, will fit perfectly with your age. **2.** Moreover, as for what I have said about all my children, Emperor, my desire for honour is wide; for apart from those five that I have fathered, I count even those as if they are mine who I have led on the path to guardianship of the forum, to official positions in the palace. For many not undistinguished streams flow out of me, many of my retinue even govern your provinces. I am joyful about their successes and I hold the honours of all of them as my own, and, if by any chance I say anything today below what was expected of me, I trust that through them I have pleased. **3.** However, if your divine majesty would show me such courtesy as well that I may carry away from this oration evidence not of eloquence, which is too much to expect, but of some small degree of good judgment and of a mind devoted to you, let base concerns about private studies make way; the emperor who has shown me his favour will give me material for orations for all time.

The text is crystal clear about how education in a school such as that of Autun is in the interest of the emperor, and how employment in the imperial bureaucracy is something that has the interest of those in the school. The speaker in sections 2 and 3 leaves no doubt that he wants and expects jobs for his students; section 3 has not unreasonably been read as the speaker fishing for a job for himself. Apparently, then, these positions were very desirable—probably not simply in remunerative terms but also for the prestige and honour that came with them. In short, the speaker must have considered that flattering and extolling the emperor is part of the game if one wanted to make a career in the bureaucracy. In other words, the speech implies that rhetorical-legal education, especially that offered by the speaker, will make the reinforcement of the emperor's position efficient in practice.

Finally, two passages from the orator Eumenius and the historian Ammianus Marcellinus are quite unabashed about the fact that some saw this as a political game. Eumenius mentions how 'minds' are being 'carefully cultivated by singing the emperor's praises' (*ut ingenia quae canendis eorum virtutibus excoluntur*, Eum. *Pan. Lat*. 9.9.1). It may sound somewhat absurd to those raised in liberal democracies that Eumenius would claim that this is such a central part of education. But he is probably quite serious about it; for it is hard to avoid the impression that this is the kind of thing his audience, which included the provincial governor and presumably others in control of potential benefits, would like to hear. The following passage of Ammianus then suggests that such claims were indeed frequently made, but that it was a public secret that it was all somewhat of a sham: 'and as part of the heaping-up of idle praises and of the parading of things that were clear as day to all, they puffed up the emperor as usual' (*interque exaggerationem inanium laudum ostentationemque aperte lucum inflabant ex usu imperatorem*, Amm. 16.12.68).

It is my contention that the *FA*'s rewriting of Gaius should be seen in a similar light. Rather than simply reflecting a changed political system, the text is implicated in the political historical changes by teaching its students to think in a more emperor-centric way than older texts did, as becomes particularly clear from the advice to petition the emperor whenever possible. The work itself plays a role in the complex process discussed above.

4 By Way of Conclusion: Law Books and Their Readerships

This paper has offered an exploratory analysis of how juristic textbooks reflect and affect changes in the ideology surrounding the emperor's importance in relation to justice and the law. Throughout, I have focused on the use of these

books in educational settings and on their role in socialising students. This is arguably the prototypical situation in which they were used. But we should also keep in mind that legal textbooks were used widely as works of reference by professional lawyers and administrators.[41] As such, their contents and their representations of the legal world must have reached a potentially immense audience. Although they may come across as highly technical texts with little connection to a very specific and concrete historical here and now, approaching juristic texts as works that were widely read should make clear that they have the historian a lot to offer.

41 See e.g. Lact. *Div. Inst.* 1.1.12; the papyrus and parchment fragments of Gaius' *Institutes* may very well be the remnants of such user copies.

PART 2

Justice in a Dispersed Empire

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CHAPTER 6

Koinoi Nomoi: Hadrian and the Harmonization of Local Laws*

Juan Manuel Cortés-Copete

For a number of years now, Aelius Aristides' *Roman Oration* has enjoyed a well-deserved reputation among historians of antiquity.[1] However, this has not always been the case. Despite describing it as 'the best general picture of the Roman Empire in the second century,'[2] not even the prestige of the Russian scholar M. Rostovtzeff was sufficient to defend the *Roman Oration* from the disdain of his colleagues. The flowery prose of the Greek sophist seemed to most scholars at the time as pointless as it was ponderous, for which reason quotes from the *Roman Oration* were few and far between. This began to change from the 1960s onwards, when it was discovered that the Second Sophistic was not only a worthy object of literary but also social study. This revival of literary studies at the end of the twentieth century heralded an awakened scholarly interest in Aristides' oration.[3] An important factor for its historiographical renaissance has been the incorporation of 'narrative' as a category of historical analysis. For this reason, the *Roman Oration* is nowadays considered a magnum opus not only as regards ancient rhetoric but also with respect to the narrative construction of the Roman Empire,[4] and should thus regain its rightful place as 'the best general picture of the Roman Empire in the second century'.

In the first decades of the second century, the Roman Empire had set out on the path towards the harmonisation of local and regional laws whose origins, in

* This article is part of the project 'Adriano y la integración de la diversidad regional' (HAR2015-65451-c2-1 MINECO/FEDER), financed by the Ministerio de Economía y Competititvidad, Government of Spain.

1 Excellent translation, accompanied by the Greek text, and commentary: Elio Aristide, *A Roma* (*a cura di F. Fontanella*) (Pisa 2007). I have used the English translation by C. Behr, *P. Aelius Aristides*, *The Complete Works*, *II* (Leiden 1981).

2 M. Rostovtzeff, *The Social and Economic History of the Roman Empire* (Oxford 1926), 125.

3 S. Swain, *Hellenism and Empire* (Oxford 1996), 254–297.

4 L. Pernot, 'Aelius Aristides and Rome' in W.V. Harris (ed.), *Aelius Aristides between Greece, Rome and the Gods* (Leiden 2008), 175–201; S.C. Jarratt, 'An imperial anti-sublime: Aristides' Roman Oration (or.26)' in L. Pernot, G. Abbamonte and M. Lamagna (eds.), *Aelius Aristides écrivain* (Turnhout 2016), 213–229.

 | DOI:10.1163/9789004400474_007

my judgement, can be found in the Emperor Hadrian's political and legal undertakings. The purpose of this paper is twofold. On the one hand, I will explore how this process of legal harmonization became a central phenomenon in the Aristides' narrative of the Roman Empire. On the other hand, I will propose the hypothesis that the legal and judicial reforms promoted by Hadrian in the Greek cities are the historical background of the Aristides' picture of Rome as an empire founded on Justice.[5]

1 Common Laws

Aristides arrived in Rome in the fullness of youth in AD 142 or 143, all set to embark on a successful literary and political career. Although his hopes were dashed by ill health, he nevertheless had the opportunity to read the *Roman Oration* in public.[6] He had arrived in the Empire's capital barely four years after the death of Hadrian, to whom he owed the name Aelius and the urban development of his birthplace Mysia. 'The best of emperors' (Aristid. 23.73) was his political barometer.

Therefore, I would like to start this study of the legal harmonisation of the Empire under the auspices of Hadrian with a quote from the *Roman Oration*:

> And now, indeed, there is no need to write a description of the world, nor to enumerate the laws of each people, but you have become universal geographers for all men by opening up all the gates of the inhabited world; and by giving to all who wish it the power to be observers of everything and by assigning common laws for all (νόμους τε κοινοὺς ἅπασι τάξαντες) and by stopping practices which formerly were pleasant to read about, but were intolerable if one should actually consider them …
>
> Aristid. 26.102

In fewer than eight lines, Aristides paints an impressionist portrait of the Roman Empire, a picture imbued with his own personal experience. As noted, it should be remembered that the oration was read in Rome during the young sophist's Grand Tour of the Mediterranean, which gives new meaning to 'the open gates' of the world. Moreover, he intended to proclaim that one of the

5 K. Tuori, *The Emperor of Law* (Oxford 2016), 196–199.

6 L. Pernot, *Éloges grecs de Rome* (Paris 2004), 19–21, 163–170, with references to previous debates; Pernot 2008, op. cit. (n. 4), 176.

oldest literary genres of Greek culture, the geographical and ethnographical narrative whose model derived from Herodotus, had finally been surmounted. The 'Father of History' had defined a method for fulfilling his historiographical purpose, since his idea was to 'move forward in my account, describing alike the small and large cities of humankind.'[7] This unique itinerant method is what Aristides declared obsolete. With this announcement of the demise of the *Periegesis* as a literary genre, he also intended to sanction the end of Roman expansion, now that the Empire dominated the largest and best part of the *ecumene*.[8]

In these lines, however, Aristides also seems to refute Plutarch's opinion that had Alexander the Great not died so young, 'one law would govern all mankind (ἂν νόμος ἅπαντας ἀνθρώπους διῳκεῖτο), and they all would look toward one rule of justice as though toward a common source of light (πρὸς κοινὸν φῶς).'[9] I believe that it would not be farfetched to say that Aristides was familiar with this passage and that, in some way, he was challenging it. He claimed that the world had been immersed in chaos until the advent of Rome, a moment at which 'the confusion and faction ceased and there entered in universal order and a glorious light (φῶς λαμπρὸν) in life and government and the laws came to the fore (νόμοι τε ἐξεφάνησαν) and the altars of the gods were believed in.'[10]

The references to laws and light in life are clear evocations of the passage from Plutarch. In this way Aristides argued against the assertion that Alexander had already established a world order. The *Roman Oration* is based on a number of comparisons between the Roman Empire, the Greek hegemonies and past kingdoms which served to demonstrate the historical superiority of Rome. Alexander had never reigned over the territories that he had conquered. Alexandria was his only legacy which, however, 'he generously founded for you, so that you might possess and rule over the greatest city after your own.' Aristides had declared, 'What laws did he institute for each people?'[11] 'None' was the obvious reply. The legal unification of the world was thanks to Rome, rather than to the conqueror's unfinished work.

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7 Hdt. 1.5.3. K. Karttunen, 'Phoebo vicinus Padaeus: reflections on the impact of Herodotean ethnography', in J. Pigon (ed.), *The Children of Herodotus. Greek and Roman Historiography and Related Genres* (Newcastle 2009), 17–25; J.E. Skinner, *The Invention of Greek Ethnography* (Oxford 2012).

8 Aristid. 26.28, 70, 99.

9 Plut. *De Alexandri Fortuna aut Virtute* 330d. C.P. Jones, *Plutarch and Rome* (Oxford 1972), 68: 'Plutarch has drawn on the same stock of themes as Aristides, but his purpose is entirely different.'

10 Aristid. 26.103.

11 Aristid. 26.26. Fontanella 2007, op. cit. (n. 1), 95–96.

The trumpeted demise of that ethnography focusing on the analysis of the laws of each nation as a means of better understanding local customs had its particular echo at schools of rhetoric. At the end of the third century, Menander Rhetor recognised the futility of addressing the topic of laws in praise of cities, insofar as all of them were governed by 'the common laws of the Romans'.

> Nowadays, however, the topic of laws is of no use, since we conduct public affairs by the common laws of the Romans (κατὰ γὰρ τοὺς κοινοὺς τῶν Ῥωμαίων νόμους). Customs however vary from city to city, and form an appropriate basis of encomium.
>
> Men. Rh. I 363, ll. 11–14[12]

M. Talamanca can be credited with having introduced this passage in the debate on the effects of the *Constitutio Antoniniana*.[13] Since the end of the nineteenth century, it has been claimed that the universal grant of Roman citizenship had put an end to the multiplicity of local and regional public and private rights which had survived since the times of the conquest and which were then replaced with Roman laws.[14] In this passage, Talamanca held, it was possible to glimpse the real confirmation of this thesis. Recognising the absurdness of resorting to the topic of local laws to praise a city was tantamount to ratifying its obsolescence. For this reason, 'the topic of laws is of no use, since we conduct public affairs by the common laws of the Romans.'

In contrast to the hypothesis that local laws ceased to exist after AD 212, there are those who, through the study of specific documents, have been able to show that different legal systems and traditions were still in place in the provinces and cities of the Empire after the proclamation of the *Constitutio Antoniniana*.[15] The strongest evidence against the thesis of the end of the multiplicity

12 English translation: D.A. Russell and N.G. Wilson, *Menander Rhetor, edited with a translation and commentary* (Oxford 1981).

13 M. Talamanca, 'Su alcuni passi di Menandro di Laodicea relativi agli effetti della Constitutio Antoniniana', *Studi in onore di E. Volterra* V (Milano 1971), 433–560.

14 L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (Leipzig 1891); P. Garnsey, 'Roman citizenship and Roman law in the Late Empire', in S. Swain and M. Edwards (eds.), *Approaching Late Antiquity* (Oxford 2006), 133–155. The broad historiographical debate is summarised, with references, in V. Marotta, *La cittadinanza romana in età imperiale* (Torino 2009), 133–164, and more recently in G. Kantor, 'Local law in Asia Minor after the *Constitutio Antoniniana*', in C. Ando (ed.), *Citizenship and Empire in Europe 200–1900* (Stuttgart 2016), 45–62.

15 J. Modrzejewski, 'Ménandre de Laodicée et l'édit de Caracalla', in *Symposion 1977: Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Cologne 1982), 335–363.

of local rights in AD 212 can be found in the letter of Gordian III to Epaphras, a citizen of Aphrodisias. In it, the Emperor, some thirty years after the proclamation, promised the local aristocracy to preserve and protect τῶν τῆς πατρίδος σου νόμων, 'the laws of your motherland'.[16] Hence, it is evident that the universal grant of Roman citizenship did not imply the immediate replacement of local legal systems which, subject to a long and complex process of harmonisation and substitution, continued to be effective.

To this debate should be added two well-known but barely appreciated arguments. The first is obvious. Menander Rhetor does not mention the *Constitutio Antoniniana* anywhere in his work.[17] This omission could, of course, be due to the fact that there was no need to mention the universal grant of Roman citizenship by Caracalla in a treatise on epideictic rhetoric. However, as a literary precedent for the Menander's statement about the common laws of the Romans, the cited passage from Aristides—and this is the second argument—may rekindle doubts about the existence of a cause-effect relationship between the *Constitutio Antoniniana* and Menander's text. Menander did not need the universal grant of Roman citizenship to write those lines about common laws: he could simply have been inspired by what Aristides wrote a century earlier.

I believe that it can be said that, in this regard too, Menander drew directly from Aristides' *Roman Oration*. The author of the epideictic treatise was familiar with the second-century sophist's oeuvre and used it as a model and benchmark for many of his opinions. As a matter of fact, Menander cites Aristides' *Romaikos logos* as one of the sources for composing the praise of the cities and, particularly, for the topic of constitutional rule.[18] In the absence of prior evidence, the phrase *hoi koinoi nomoi* could thus be understood as a rhetorical innovation of Aristides, borrowed by Menander. With this expression, the intention of the Mysian sophist would have been to rebut the arguments of those who attributed to Alexander the idea of introducing a sole legal system for the whole ecumene. Rome's common laws were superior over what Alexander accomplished in his unifying project, for both their variety and because of their status as 'common', viz. shared by all.[19] To my mind, it is possible to hold that Menander's claim regarding the governing of public affairs by the common laws of the Romans was directly inspired by the *Roman Oration*, one of

16 J. Reynolds, *Aphrodisias and Rome* (London 1982), no. 22; Kantor 2016, op. cit. (n. 14), 47–49.

17 As indicated by Modrzejewski 1982, op. cit. (n. 15), 343.

18 F. Gascó, 'Menander Rhetor and the works attributed to him', *ANRW* II 34.4 (Berlin 1998), 3127. Men. Rh. I 360, l. 5.

19 Aristid. 23.64–65: a praise of 'the common', *koinon*, as political concept.

the models that he admired most, where it had already been noted that Rome had established 'common laws for all'. But over and above any new meanings that the expression may have had in the third century, it is necessary to delve into the origin and essence of the words of Aristides. And by my reckoning, Aristides' statement about "common laws for all" was none other than a reflection of the legal and political reforms undertaken by Hadrian. I will now set out my arguments in this respect.

2 Hadrian and City Laws

The passage from Aristides under study here has not gone unnoticed by modern scholars who have either been inclined to glimpse in it a vague reference to the *ius gentium* or, in line with Bleicken, to the regulatory activity of the emperors.[20] Indeed, it was the emperors who, through new forms of lawmaking, the *constitutiones*, were becoming the driving force behind legal integration.[21] As I see it, the Emperor Hadrian was one of the prime movers in this process,[22] not only because of his desire to maintain a constant presence in the provinces and their cities, which he favoured like no other emperor had done before, but also because he explicitly and practically expressed that the legal diversity of the Empire was an asset worthy of being preserved.[23] Nonetheless, the preservation of this legal diversity in the imperial context called for a process of legal harmonisation.

A good point of departure may be the Emperor's own comments on the Italicans, as transmitted by Aulus Gellius.

> … and we think that colonies are of a better station than municipalities. About the delusions of this belief, which is so widespread, the deified Hadrian spoke most knowledgeably in the address he gave in the senate about the city of Italica (*de Italicensibus*) whence he has his own descent,

20 Departing from the seminal study conducted by J.H. Oliver, *The Ruling Power* (Philadelphia 1953), 959–980, although overly focused on collateral issues. V.J. Bleicken, 'Der Preis des Aelius Aristides auf das römische Weltreich', *Nachrichten der Akademie der Wissenschaften in Göttingen. Philologisch-Historische Klasse* 7 (1966), 243; Fontanella 2007, op. cit. (n. 1), 151.

21 J.-P. Coriat, *Le prince législateur* (Rome 1997), 8–11.

22 C. Ando, *Imperial Ideology and Provincial Loyalty in the Roman Empire* (Berkeley 2000), 319.

23 B. d'Orgeval, *L'Empereur Hadrien, ouvre législative et administrative* (Paris 1950), 193–200; A. D'Ors, 'La signification de l'ouvre d'Hadrien dans l'histoire du droit romain', in *Les empereurs romains d'Espagne* (Paris 1965), 147–161.

> and he revealed that he was amazed because both the citizens of Italica themselves, and likewise certain other long-established municipalities (*municipia antiqua*) amongst which he names Utica, although they could use their own customs and laws (*cum suis moribus legibusque uti possent*), were very eager to be changed to the juridical status of colony.
>
> Gell. *NA* 16.13.4. Translated by Boatwright

This extract has been used to discuss the nature of *municipia* and how that differed from the status of Roman colonies.[24] What interests me about it here, however, are the principles on which Hadrian based his political action in the cities of the Empire.[25] It is extremely interesting that he stressed that the right of the *municipia* to use their own laws and customs, *suis moribus legibusque uti*, was a thing of great value that the Empire should cherish. His amazement[26] at the Italicans' pretensions to the status of a Roman colony was based on the fact that, for him, the particular legal and political systems of *municipia* were assets in themselves which should not be sniffed at or allowed to dwindle because of their desire to become colonies. Only if we accept this assumption as a principle of Hadrian's administration—the conviction that it was good that cities used their own laws—can we fully understand the far-reaching, systematic political and legal intervention in the cities of the Empire. This political principle can be even more clearly seen in the Emperor's relationship with some Greek *poleis*.

Let us first take a look at a text that is as important as it is controversial due to the substantial deterioration that it has suffered over the centuries: the decree of Synnada published at Athens. Although Graindor, the first scholar to study the inscription, believed that it was a decree of the city of Athens in honour of Hadrian, it was L. Robert who correctly identified it with a decree of the city in Asia Minor issued in Athens.[27] New fragments and a detailed study of the

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24 F. Millar, *The Emperor in the Roman World* (London 1992), 394–410; M.T. Boatwright, *Hadrian and the Cities of the Roman Empire* (Princeton 2003), 37.

25 F. Grelle, *L'Autonomia cittadina fra Traiano e Adriano* (Naples 1972), 65 ff., 116: '*l'oratio de Italicensibus* postula quindi una sostanziale analogia fra la situazione dei *municipia* e quella delle *civitates peregrinorum* (…) nel rispetto formale della loro libertà.' This analogy may be even truer in the case of the *municipia antiqua*.

26 Gell. *NA* 16.13.4: *mirarique se ostendit*. W. Williams, 'Individuality in the imperial constitutions: Hadrian and the Antonines', *Journal of Roman Studies* 66 (1977), 69–74. In some rescripts and letters Hadrian clearly demonstrated anger and emotion on the matter in question.

27 P. Graindor, 'Études épigraphiques sur Athènes à l'époque impériale', *Revue des Études Grecques* 31 (1918), 227–237; L. Robert, *Bulletin Épigraphique* (1966), no. 144; D.J. Geagan,

decree of Thyatira,[28] which is similar in nature, have contributed to a better understanding of the monument. Graindor, however, believing that it was an Athenian decree, proposed a reconstruction for several lines of the fragment edited as IG II^2 1075 which is still valid. It reads as follows:

---------- ἀφῖκτο ἔδωκεν ἐπιδη-
[μήσας ἀξιώσασιν ἡμῖν --- χρῆσθαι τ]οῖς παλαιοῖς τῆς πόλε-
[ως νόμοις---]

… [after] his arrival, and during his sojourn, he granted those who had so requested the right to use the ancient laws of their city.

For Graindor, this fragment had to be related to the Athenian constitutional reform sponsored by Hadrian.[29] But since the decree was not Athenian but pertained to the city of Synnada, it can be deduced that the Emperor had also granted the city the right to 'use its ancient laws', just as he intended the Italicans to continue to do. Nonetheless, his involvement in traditional local laws was not limited to ratifying their effectiveness.

Thanks to different pieces of epigraphic evidence, we now know that the Emperor assumed the role of legislator, *nomothetes*, in some cities including Cyrene, Megara, Sparta and, of course, Athens. Unfortunately for us, in the first three cases nothing more is known of this initiative except that the Emperor was attributed the title of *nomothetes* on the public monuments of those cities.[30] Yet, we have some further non-epigraphic evidence in the case of Athens.

The late chronicles tell us how Hadrian, at the request of the Athenians themselves, 'modelled the laws of the city on those of Draco, Solon and others.'[31] Beyond the slight differences between the chronicles, the explicit inten-

'Hadrian and the Athenian Dionysiac technitai', *Transactions and Proceedings of the American Philological Association* 103 (1972), 158–160; SEG 30 (1983), 89.

28 D. Peppas-Delmousou and S. Follet, 'Le décret de Thyatire sur les bienfaits d'Hadrien et le Panthéon d'Hadrien à Athènes', *Bulletin de Correspondance Hellénique* 121 (1997), 291–307; C.P. Jones, 'A decree of Thyatira in Lydia', *Chiron* 29 (1999), 1–21.

29 Graindor 1918, op. cit. (n. 27), 233–235; P. Graindor, *Athènes sous Hadrien* (Cairo 1934), 30–32.

30 Cyrene: SEG 17,809; Megara: IG VII 70–72; Boatwright 2003, op. cit. (n. 24), 91–92; Sparta: I.E. Petrocheilos, 'An unpublished inscription from Kythera', *The Annual of the British School at Athens* 83 (1988), 359–362.

31 Euseb. *Chron*. ed. A. Schöne II p. 166; Hieron, *ab Abr*. 2138; Sync., 659, 9. Graindor 1934, op. cit. (n. 29), 30.

tion of recouping the ancient laws of the city to construct a new political and legal order is quite remarkable. However, the real content of Hadrian's legislative and constitutional reform in Athens is difficult to pinpoint. With more or less justification, it has been credited with the creation of a new urban tribe, the rearranging of the political calendar, the restoration of the Council of Five Hundred, the enactment of the law on debtors, the reorganisation of the opisthodomos, etc. It can also be safely said that the regulation of the exporting of Athenian olive oil formed part of the new Hadrianic laws inspired by ancient traditions.[32]

There are two reasons justifying the soundness of this last assumption. The first is the heading of the inscription which contains the Oil Law as it was published in the Roman Agora of Athens. The heading, although somewhat difficult to interpret, leaves no doubt as to its consideration as part of Hadrian's law.[33] If the attribution of this law to the Emperor is indisputable, his desire to present it as an example of his intention to reinstate the ancient laws of the city is supported by a singular bit of information conveyed by Plutarch. The biographer had attributed to Solon the general ban on exporting agricultural produce with a view to ensuring the adequate provisioning of the city. Notwithstanding this, Solon would have authorised oil exports, which is precisely the issue regulated in Hadrian's Oil Law.[34] Thus, the Emperor is yet again seen to have respected the use of Athens' own laws and customs, *suis moribus legibusque uti*, while intervening directly in the political, constitutional and legislative framework of a free city. His legal and constitutional reforms were based on his power as Roman emperor but, at the same time, were presented as a recovery of the traditional laws of a free Greek city. For all this reasons he enacted them as an Athenian *nomothetes*, equating himself with Draco and Solon and avoiding a direct intervention which could recall the unfortunate precedent of Sulla.[35]

This combination of two attitudes seemingly at odds with one another, i.e. respect for the city's ancient laws and their restoration and the Emperor's decisive involvement in its affairs as the supreme authority of the Empire, is clear from the content of the law itself. It did not only mean that the regulation of oil sales and exports was a way of fleshing out a reputedly Solonian law. In the

32 S. Follet, *Athènes au IIe et au IIIe siècle* (Paris 1976), 116–125.

33 IG II^2 1100. The abbreviations appearing in the first line should be developed as Κε(φάλαια) νό(μου) θε(οῦ) Ἀδριανοῦ or, probably to a lesser extent, as proposed by Oliver 1953, op. cit. (n. 20), 960, Κ(εφάλαια) νο(μο)θε(σίας) Ἀδριανοῦ.

34 Plut., *Sol.* 24; D. Flach, 'Solons volkswirtschaftliche Reformen', *Rivista Storica dell'Antichità* 3 (1973), 13–27.

35 Paus. 1.20.7; D.J. Geagan, *The Athenian Constitution after Sulla*, Hesperia: Supplement XII (Princeton 1967).

Athenian Oil Law, the city's political institutions appear to be in full administrative, political and legal control. The *elaionai* and the Herald of the Areopagus were tasked with handling Athenian oil production and export declarations. And for their part, the Council of Five Hundred and the Athenian People, the city's assembly, were reaffirmed as the institutions responsible for legal procedures. These procedures had to be assigned to one or other body depending on the greater or lesser magnitude of possible frauds. If, as is usually held, the civic institutions, and particularly the assemblies of the Greek cities, were gradually undermined during the imperial period, a reading of the Oil Law clearly shows that they were fully in charge and supported by the imperial power itself.[36] There is, however, a new element in this law which obliges us to rethink the limits of an apparently enhanced civic autonomy.

Firstly, the Oil Law established that if the fraudster who was trying to export a larger amount of oil than permitted had already left Athens when his fraud was discovered, the people should submit complaints to the city of origin of the shipping agent and to the Emperor.[37] Moreover, it decreed that appeals against judgements handed down by the Council of Five Hundred and the Athenian Assembly could be lodged with both the governor of the province, despite the fact that Athens was a free city, and the Emperor himself.[38]

To all of this must be added that the model for ensuring a plentiful supply of oil in Athens was inspired by Roman, rather than Greek, practices of market regulation.[39] The only conclusion that can be drawn from this is to admit that the recuperation and revitalising of local laws was being carried out in a higher legislative framework which, born from the very existence of the Empire, tended to harmonise local laws, without this necessarily meaning that they were eroded in the process. And the driving force behind this transformation was none other than the Emperor himself.

Hadrian's *modus operandi* seems clear enough: steps were taken to review local laws which, without being revoked, were amended or corrected to adapt them to the rules and principles prevailing in the Empire. The emperor emerged as the universal source of law and the ultimate judicial authority for appeal against sentences of any civic court. The new Athenian legal code,

36 J. Fournier, *Entre tutelle romaine et autonomie civique. L'administration judiciaire dans les provincies hellénophones de l'Empire romain (129 av. J.C.–235 apr. J.C.)* (Paris 2010), 159–161.

37 IG II² 1100, ll. 46–47: γραφέσθω καὶ τῇ πατρίδι αὐτοῦ ὑπὸ τοῦ | δήμου κἀμοί.

38 IG II² 1100, ll. 55–57: ἐὰν δὲ ἐκκαλέσηταί τις ἢ ἐμὲ ἢ τὸν ἀνθύπατον, χεροτονονείτω συν|δίκους ὁ δῆμος. J.H. Oliver, 'Hadrian's reform of the appeal procedure in Greece', *Hesperia* 39 (1970), 332–336; Fournier 2010, op. cit. (n. 36), 520–524.

39 K. Harter-Uibopuu, 'Hadrian and the Athenian oil law', in R. Alston and O. van Nijf (eds.), *Feeding the Ancient Greek City* (Leuven 2008), 137–139.

although inspired by the ancient laws of Draco and Solon, included the emperor as the supreme judge and the universal court of appeal for the empire, listening to cases judged by local councils and assemblies. The aim was thus to ensure legal uniformity on the basis of the diversity of traditions, thus reconciling apparently conflicting principles.

One of the most interesting extant letters sent by the imperial chancellery to the city of Delphi in AD 125 addresses many issues relating to the Delphic Amphictyony: the reform of the council, the organisation of the games, the use of sacred land, etc.[40] At some point, Hadrian makes it clear that Claudius Timocrates, an agent of his, is reviewing and organising the Amphictyonic decrees, about which he has the following to say:[41]

> ἐνετ[ειλ]άμεν Κλαυδίῳ Τειμο
> [κρ]άτει σ[υναγ]αγόντι τῶν Ἀμφικ[τυιονικ]ῶν δογμάτων
> ὅσα ἢ ἐνα[ντί]α ἀλλήλοις ἐστὶν[ἢ νόμοις τοῖ]ς κοινο[ῖς]
> πέμψαι μο[ι] ἵνα καὶ τούτων τις ἐ[ξέτασ]ις γένηται.
>
> I have ordered Claudius Timocrates, who is collecting the Amphictyonic decrees, to send to me those decrees which are in conflict with one another or with the common laws, in order that an investigation also of these may be made.

This testimony is crucial to understanding the process of political and legal unification in the Empire. Firstly, Hadrian enjoyed the prerogative to intervene in the internal affairs of the Amphictyony and to review its rules and decrees. In this connection, he did not act any differently than in other Greek cities where he was hailed as legislator, *nomothetes*. Secondly, it is obvious that the Emperor did not intend to abolish the Amphictyony's legal and political structure, repealing its traditional laws and substituting them with new ones. Quite to the contrary, his involvement in the Amphictyonic decrees had a dual objective: to preserve them by means of a process of ordination, standardisation and resolving incompatibilities and to bring them into line with what he called 'the common laws'. This does not seem to be any different from what he planned to do, or was already doing, in Athens and other Greek cities.

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40 CID IV 152; J.M. Cortés-Copete, 'El fracaso del primer proyecto panhelénico de Adriano', *Dialogues d'Historie Ancienne* 25 (1999), 91–112.

41 CID IV 152, II, 37–40; J.H. Oliver, *Greek Constitutions of Early Roman Emperors* (Philadelphia 1989), no. 75.

3 The Imperial Chancellery and Legal Harmonisation

The procedures followed by Hadrian in the cases analysed here could be described as ones aimed at generally reviewing the laws of a city or the Amphictyony. These were doubtless exceptional circumstances in which to undertake the harmonisation of traditional laws with those 'common laws' invoked by the Emperor himself. It must be noted, however, that these procedures had their limits. A systematic review of the constitutions of all the Greek *poleis* and *koina* to bring them into line with Roman legal practices seems an incredible undertaking for an emperor at the beginning of the second century. Nevertheless, Hadrian had another instrument to carry out that harmonisation in specific cases and whenever necessary: the imperial chancellery.

As is well known, the number of letters that Hadrian sent to Greek cities and institutions doubles that of all the extant letters of his predecessors. It is my belief that the abundance of Hadrianic letters is the result of the Emperor's desire for a rapprochement with his subjects and to intervene politically and legally in Greek cities and leagues.[42] Through these letters, he not only granted privileges and honours but also resolved many new legal and political quandaries deriving from the integration of these cities in the Empire. Despite the fact that the issues addressed are specific, a grammar tending to legal harmonisation can be recognised in imperial decisions. The Emperor's reaction was always to adapt local laws and traditions to 'the common laws'. A few examples may help to clarify this procedure.

From Piraeus there are fragments of a letter of Hadrian's which have been traditionally interpreted as pertaining to both the regulation of the sale of fish in Eleusis and part of the new Athenian constitution dictated by him.[43] On a previous occasion, I have had the chance to review this interpretation of the letter, before reaching different conclusions.[44] The document's epistolary format rules out the possibility that it might have formed part of the Athenian constitution, although the provisions established for its obligatory publication

42 J.M. Cortés-Copete, 'Governing by dispatching letters: the Hadrianic chancellery', in C. Rosillo-López (ed.), *Political Communication in the Roman World* (Leiden 2017), 107–136; T. Carboni, *La parola scritta al servizio dell'imperatore e dell'Impero* (Bonn 2017), 103–128.

43 A. Wilhelm, 'Inschriften aus Erythrai und Chios', *Jahreshefte des österreichischen archäologischen Instituts in Wien* 12 (1909), 146–148; Graindor 1934, op. cit. (n. 29), 127–129; Oliver 1989, op. cit. (n. 41), no. 77.

44 J.M. Cortés-Copete, 'Adriano y la regulación de los mercados cívicos: una nueva lectura de IG II^2 1103', *Habis* 46 (2015), 239–261.

lend it a special normative value.[45] Moreover, I believe that, according to the hypothesis put forward by Kirchner,[46] this imperial letter had nothing to do with the regulation of the sale of fish in Eleusis, but with banning the activities of middlemen who, through successive purchase and sale transactions, speculatively forced up the price of imported products. In this regard, I have attempted to demonstrate how the Athenian letter contained no more than imperial instructions on how the edict against speculators, τοὺς πληστηρριάζοντας, of which a very damaged copy has come down to us from Nicomedia, should be enforced.[47] The proposed restoration of lines 6 and 8 reads as follows:

τ[οὺς δὲ κομίζοντας]
καὶ τοὺς πάλιν καπηλεύοντας πεπαῦσθ[αι τοῦ πλειστηριασμοῦ]
βούλομαι

It is my desire that importers and those who again resell (the merchandise) abstain from driving up prices.

So this may provide us with a connection between one of those common laws, the edict of Nicomedia, and its enforcement in a specific city, Athens. This enforcement would have been achieved by means of an imperial letter in which the specific jurisdictions of the Athenian institutions, the Herald and the Council of the Areopagus, were also established, as in the edict of Nicomedia.[48]

This procedure by which the general rules governing particular realities were applied was resorted to on other occasions and in other places. Let us now take a look at a second example that did not affect the life of a city but the *Koinon* of Macedonia, to which the Emperor sent a letter in AD 137. After excluding the formulas of greeting and leave-taking, the letter's text reads as follows:[49]

As you requested, whoever at end of his term of office proposes others as candidates should inform those whose names are to be put forward with thirty days' notice (αὐ|τοῖς ἐκείνοις οὓς προβάλλεσθαι | μέλλουσιν πρὸ τριάκοντα ἡμέ|ρων παρανγελλέτωσαν).

45 IG II² 1103, ll. 12–13: Ταύτην τὴν ἐπιστολὴν στήλῃ ἐ[γ]γράψαντες ἐν Πειραεῖ| στήσατε πρὸ τοῦ δείγματος.

46 IG II², 1103. F.F. Abbott and A.Ch. Johnson, *Municipal Administration in the Roman Empire* (Princeton 1926), 413–414.

47 TAM IV I 3. Hsch. *s.u.* πλειστηριάσαντες· πλείονος πωλήσαντες οὗ ὠνήσαντο. Fournier 2010, op. cit. (n. 36), 520–524.

48 IG II², 1103, ll. 7–9. TAM IV I 3, l. 5: εἴ τινος ἡ βουλὴ μὴ δικαίω [---.

49 SEG 37, 593, II. 8–13.

The letter provides a good example of the thesis that I am defending here. Possibly, the post to which Hadrian is referring is that of *politarcha*, a magistrate inherent to Macedonia before the Roman domination, but which, as can be read at the bottom of this same letter, was still in place in the imperial period.[50] The *politarchai* were undoubtedly the most senior magistrates in the *Koinon* of Macedonia. The question put to the Emperor had to do with the procedure for choosing successors to the different posts, which was called *nominatio* in Latin and *probolé* in Greek.[51] Without explaining the reasons behind his decision, he established a thirty-day period between the *nominatio* and the taking up of office. I think that the reason could have been to establish, according to Roman legislative tradition, a period during which the candidates could exercise their right of appeal to the governor and even to the Emperor himself.[52] As a matter of fact, in Oinoanda the procedure, *probolé*, to nominate the *agonotheta* among the *bouleutai* was enacted 'according to the laws concerning the elections', probably Roman laws rather than local ones.[53] The functioning of the *Koinon* of Macedonia would have been thus adapted to another of those Roman rules that tended to harmonise the Empire's legal system, but without supressing the peculiarities of each one of the bodies, cities and leagues comprising it.

4 Conclusion: Hadrian and the *koinoi nomoi*

One of the most significant processes in the historical evolution of the Roman Empire was that by which the emperors ended up becoming its exclusive lawmakers. This tendency towards monopolising the law reached an important milestone during Hadrian's reign.[54] This meant that, as regards his provincial

50 F. Gschnitzer, s.v., *RE* Suppl. XIII (1973), 43–50; F. Papazoglou, *Les villes de Macédoine à l'époque romaine* (Paris 1988), 50–51.

51 M. Wörrle, *Stadt und Fest im kaiserzeitlichen Kleinasien* (Munich 1988), 14 (ll. 89–92), 86–97; S.V. Dmitriev 'Προβολή and ἀντιπροβολή in electoral procedure in Oinoanda', *Latomus* 55 (1996), 112–126, 119: nominatio/ὀνομασία could be a particular asptect of προβολή.

52 C.J. X 32.2: *qui fuerit nominatus per officialem publicum perferre curent, habituro appellandi, si voluerit, atque agendi facultatem apud praesidem causam suam iure consueto*. A subsequent case, in which recourse was had to the *apellatio*, had to do with the legal vicissitudes of Aristides: V. Marotta, 'Le strutture dell'amministrazione provinciale nel quarto libro dei Discorsi Sacri', in P. Desideri and F. Fontanella (eds.), *Elio Aristide e la legitimazione greca dell'impero di Roma* (Bologna 2013), 147–184.

53 Wörrle 1988, op. cit. (n. 51), 14, l. 92: κατὰ τοὶς περὶ τῶν ἀρχαιρεσιῶν νό[μους].

54 D'Ors 1965, op. cit. (n. 23); T. Honoré, *Emperors and Lawyers* (Oxford 1994), 12–16.

subjects, he had the undisputed capacity to intervene, reform, adapt and enact new laws for the cities and *koina* in the provinces. Furthermore, he became the court of last resort or, in the words of Tuori, he was seen 'as the ideal judge'.[55]

The entire process by which Hadrian became the driving force behind the enactment and enforcement of laws is eloquently described in three letters sent to the Synod of Dionysiac Artists, dated AD 134 and engraved on a large stele set up in Alexandria Troas.[56] After the customary greeting, Hadrian starts by saying (ll. 8–9):

> I ordain that all the contests be celebrated; and a city is not to be permitted to apply to other expenditures the revenues of a contest that are managed according to law or decree or contractual agreements (κατὰ νόμον ἢ ψήφισ|μα ἢ διαθήκας).[57]

This extract is extremely valuable for understanding the legal harmonisation process promoted by Hadrian. He regarded the Greek games as an essential part of the civilisation that Rome should defend and decided to protect them against any threat.[58] As is well known, the main danger facing the games was the misappropriation of funds earmarked for their organisation and celebration. For this reason, in the letter addressed to the *synodos* of the *technitas* the Emperor proclaims himself a champion of the laws and civic decrees under which they are created and organised, as well as of the private institutions, *diathekai*, testaments and foundations that contribute to their functioning and funding. But that desire to protect the invaluable asset symbolised by the *agones* had an aftereffect that was just as important as the main objective. The protection established by the emperor over games, and over the local laws and decrees that ruled them was so powerful that the institutions that had enacted them lost the capacity to modify them without the Hadrian's consent. (ll. 12–13):

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55 Tuori 2016, op. cit. (n. 5), 196–240.

56 G. Petzl and E. Schwertheim, *Hadrian und die Dionysischen Künstler* (Bonn 2006); SEG 56, 1359; C.P. Jones, 'Three new letters of the emperor Hadrian', *Zeitschrift für Papyrologie und Epigraphik* 161 (2007), 145–156.

57 Translation by W.J. Slater, 'Hadrian's letters to the athletes and Dionysiac Artists concerning arrangements for the circuit of games', *Journal of Roman Archaeology* 21 (2008), 610–620.

58 Ll. 16–17: καὶ οὐχ ὡς δίκαιον κελεύω τοῦτο, ἀλλ' ὡς τὸ ἄγειν τοὺς ἀγῶνας | καὶ ταύτην [?] ἀναν-καῖον γείνεσθαι, 'and I ordain this not only because it is fair but because holding the games and this [?] is something that is necessary.'; Z. Newby, *Greek Athletics in the Roman World* (Oxford 2009).

> Without my approval (ἄνευ δὲ ἐμῆς συνχωρήσεως) in no way is it permissible to expend for any such purpose these funds that are set aside for the games.

Throughout these pages, I have attempted to show that in his *Roman Oration* Aristides managed to reflect the profound changes occurring during Hadrian's reign in both local and Roman legislation and laws governing the inhabitants of the Empire. As claimed by the Emperor in his letter to Delphi in AD 125, it had been his idea to establish a set of common laws that served as a benchmark for the legal harmonisation of the plethora of constitutions, statutes and regulations that were in force in each place. The result was, in Aristides words, that 'all actions everywhere are full of justice and respect, and the reward of virtue escapes no one.'[59] Through his endeavours as *nomothetes* of several Greek cities and, especially, the new and intense activity of his chancellery, Hadrian appears as a central figure in the legal harmonisation of the Empire, creating a more just world, 'such indeed is Olympian Zeus' empire within.'[60] It is not necessary to insist that in the Greek East, in the year AD 143, Hadrian's Olympian nature was obvious for everyone.[61]

In all of his letters, Hadrian uses the first person singular to embody authority. The pronouns I, me, to me and mine—ἐγὼ, με, μοι, ἐμῆς—are also omnipresent, as are the verbs I want, I ordain, I will call, etc.—βούλομαι, κελεύω, καλέσω. The Emperor was becoming the sole guarantor of legal certainty and safety in the Empire. His mission as the protector of the Roman world and the defender of concord amongst his subjects increased, by leaps and bounds, his absolute power as the only source and guarantor of law in the Empire. Under Hadrian, the idea that the will of the emperor had the force of law and that the emperor decided what the law was had already been firmly established in the writings of jurists.[62] At any rate, the result was not the legal unification of the Empire under one sole law, but the reinforcement of local laws insofar as they were adapted to a number of common principles firmly inspired by the idea of justice. It is thus possible to fully understand Aristides' opinion of the Romans who were

59 Aristid. 26.89. *Diké* and *Aidós* are the fundamentals of the political system: Pl. *Prot.* 320c–322d.

60 Aristd. 26. 89. Aristides cites an Homeric verse (*Od.* 4.74) but changes the last original word, ἀυλή, 'court', into ἀρχή 'empire'.

61 M. Galli, 'Theos Hadrianos: le élites delle città greche e il culto dell'imperatore filelleno', in A.D. Rizakis and F. Camia (eds.), *Pathways to the Power* (Athens 2008), 73–105.

62 Pomp. 1 *Enhir* (D. 1.2.2.11); Gaius *Inst.* 1.5; Ulp. *Inst.* 1 (D. 1.4.1); Honoré 1994, op. cit. (n. 54), 12.

'assigning common laws for all', which were already being established a century before the *Constitutio Antoniniana* and greatly surpassed any similar enterprise that might have been attributed to Alexander the Great.

CHAPTER 7

Justice, *Res Publica* and Empire: Subsidiarity and Hierarchy in the Roman Empire

Frédéric Hurlet

The objective of this study is to synthesize and extend research conducted in connection with the series of three international conferences held at the Villa Vigoni (Menaggio, Como) from 2010 to 2012, on the exercise of justice in the Roman Empire during the High Empire and late Antiquity. As indicated by the title chosen for the publication (*Recht haben und Recht bekommen im Imperium Romanum: das Gerichtswesen der römischen Kaiserzeit und seine dokumentarische Evidenz*), the purpose of these meetings was notably to underscore the wealth and diversity of documentation on the subject of judicial practice.[1] With this in mind, it was less a matter of focusing on normative sources—late-antique compilations that have been amply explored since the nineteenth century—than of emphasizing what the large number of inscriptions and papyri discovered during the twentieth and twenty-first centuries have contributed to our knowledge of how justice operated on an everyday basis and how it was experienced by those subject to it. This work has certainly fulfilled its goal in this regard through the use of epigraphic and papyrological documents, some of which had never been published.

1 The Intrinsic Links between Justice and Power in Antiquity

The relative documentary abundance on the exercise of justice in the Roman Empire is in truth not surprising. It is a consequence of the central role that justice, as well as the functioning of the judiciary institutions tasked with applying law, played in the everyday life of the Empire's inhabitants, whether in a global (imperial) or local setting (on the level of the different types of communities that formed the Empire's base units). There is hardly a need

1 R. Haensch (ed.), in collaboration with Fr. Hurlet, S. Strassi, K.-L. Link, and A. Teichgräber, *Recht haben und Recht bekommen im Imperium Romanum. Das Gerichtswesen der römischen Kaiserzeit und seine dokumentarische Evidenz*, The Journal of Juristic Papyrology Supplement 24 (Warsaw 2016).

 | DOI:10.1163/9789004400474_008

to point out that those who exercised one form of power or another in the Roman Empire were all involved in judiciary duties, to such an extent that they undoubtedly devoted the greater part of their time and energy to it. This reality has already been assessed for imperial service, which was classified as an "occupation" and considered the *princeps* as a full-fledged judge from the Principate of Augustus onward.[2] During the same period, the Senate transformed into a court of law.[3] In the provinces, governors were "overwhelmed" by pressure from the many requests submitted by those subject to the laws,[4] so much so that a complex system of delegation was implemented, which took the form of initial filters and referral to other jurisdictions. Furthermore, the Romans did not have a monopoly over justice and jurisdictional activity, notably because Roman authorities and their courts could not absorb the large body of cases emanating from the entire imperial space. As a result, one must also take into account local jurisdictions that were active in both Italy and the provinces, to which surviving municipal laws devote a number of chapters.[5]

Such a "mosaic" of courts was absolutely necessary. On the scale of the Roman Empire, it was one of the obligatory forms taken by the exercise of power, which the governed expected to render justice: this is illustrated by the well-known anecdote of a woman who scolded both the Greek king and the Roman emperor—in this case Hadrian—because he did not have time for her case, thereby calling into question the legitimacy of a power that neglected those accountable to its laws, even the most modest.[6] As a form of power, the *imperium populi Romani* was thus inseparable from the exercise of justice, one that had to be exerted across the entire imperial territory and that was inconceivable without the operation of judicial practice, regardless of locale or level. If we extend this reasoning, justice becomes one of the instruments used by

2 Cf. F. Millar, 'Emperor at work', *Journal of Roman Studies* 57 (1967), 9–19 (= F. Millar, *The Greek World and the East* II, *Government, Society and Culture in the Roman Empire*, ed. by H.M. Cotton and G.M. Rogers (Chapel Hill, London 2004), 3–22) and F. Millar, *The Emperor in the Roman World* (London 1977), *passim*.

3 On this subject see Fr. Hurlet, 'Les origines de la juridiction impériale: *Imperator Caesar Augustus iudex*', in: Haensch 2016, op. cit. (n. 1), 16–18.

4 R. Haensch, 'Des empereurs et des gouverneurs débordés', *Cahiers du Centre Gustave Glotz* 19 (2008), 177–186.

5 On this subject see the contribution of the *lex Irnitana* to our understanding of the subject.

6 On the subject of Hadrian see Cassius Dio 69.6.3: 'At any rate, once, when a woman made a request of him as he passed by on a journey, he at first said to her, 'I haven't time', but afterwards, when she cried out, 'Cease, then, being emperor,' he turned about and granted her a hearing'.

Rome to keep a grip over its Empire, as well as one of the primary operating methods of that Empire, in much same way as the army, the census, or taxation.[7]

2 The Two Great Principles of the Exercise of Justice during the Imperial Period: Subsidiarity and Hierarchy

The Roman emperor was in theory the supreme judge: he had issued decisions on first hearing since the Principate of Augustus,[8] and was gradually recognized as having a right of appeal that enabled him to serve as an appellate judge.[9] Yet this general and even universal overview leaves a number of chronological and practical difficulties in the dark. It should firstly be pointed out, with regard to the now-dominant position, that the right to issue judgments on appeal in the context of appellate procedure was not granted to the *princeps* from the beginning, a point to which I will return. It should also be emphasized that imperial power strictly speaking could not exercise its occupation as full-fledged judge in a uniform way across the scale of an Empire numbering dozens of millions of inhabitants. The anecdote of the woman reproaching Hadrian says a great deal about the judicial expectations of those subject to its laws, but in practice these expectations could be met only if the *princeps* was accessible, that is to say primarily in Rome or wherever he went during his tours of the provinces—an itinerant practice of which the frequency varied depending on the emperor.

Given these conditions, Roman authorities implemented a system of delegation based on two complementary principles, which were the key to the whole system. The first is subsidiarity, which helped a potentially congested imperial judicial machine function more fluidly by allowing local authorities to judge local cases of lesser importance, with no need to call on a superior body—an opportunity seized by local jurisdictions.[10] The second is the uncontestable

7 On the concrete manifestations of Roman administrative activity including justice, see Fr. Hurlet, 'Introduction. Gouverner l'Empire: les modalités de l'emprise de Rome sur l'Occident', in: Fr. Hurlet (ed.), *Rome et l'Occident* (*II^e siècle av. J.-C.–II^e siècle ap. J.-C.*). *Gouverner l'Empire* (Rennes 2009), 18.

8 On this subject see Hurlet 2016, op. cit. (n. 3), 18–29; see also K. Tuori, *The Emperor of Law: the Emergence of Roman Imperial Adjudication* (Oxford 2016).

9 On this subject see Fr. Hurlet, 'Entre juridiction civique et juridiction impériale. La sphère de compétences du proconsul', in: Haensch 2016, op. cit. (n. 1), 71–72 and 76–87.

10 For an application of the principle of subsidiarity in the Roman Empire, see the illuminating remarks by J.-L. Ferrary in an interview published in *Figaro Histoire*, April–May 2017: 'Une dernière remarque sur ces cités grecques dans l'Empire, c'est leur formidable

principle of hierarchy,[11] which considered Roman law as the law of reference superior to all others, and resulted in a functioning pyramidal system based on the distinction between what local courts adjudicated and what came under the jurisdiction of Roman courts. From this point of view, the central problem was to connect the different jurisdictions: local justice and Roman justice on the one hand, and with respect to Roman justice, imperial power and various provincial Roman authorities on the other, for instance that of the governor. In the end, the Roman judicial machine of the imperial period proved to be flexible enough to operate on a daily basis, but also highly unequal, for accessing Roman justice required the person subject to trial to have sufficient financial means for travel, as well as the required aristocratic networks in a world characterized by the importance of personal relations.

3 The Division between Different Jurisdictions: The Norms

Research has made progress on this question over the last decade, partly thanks to the work of Julien Fournier. His monograph on "judicial administration" in Continental Greece and the province of Asia during the Roman period is now considered as a point of reference, but he also took an interest in the provinces of the Roman West.[12] Among the findings of these studies was the demonstration that the fundamentally hierarchical and unequal character of the exercise of Roman justice, which hardly disappeared with the creation of the Principate by Augustus, was reconfigured with the change in political system. A crucial evolution was the granting of access to Roman courts not just

capacité à résoudre sur place, en interne, ce qui peut l'être avant d'interpeller une instance supérieure, le gouverneur de la province. Une sorte de principe de subsidiarité qui est valable, cependant, pour tout l'Empire'.

11 Regarding hierarchy as a principle of government under the High Empire, including its methods and how it was connected to the principle of delegating authority, I would refer readers to a study conceived as a synthesis: Fr. Hurlet, 'Les modalités de la hiérarchie et de la délégation. Les rituels de médiation entre le prince et le gouverneur sous le Haut-Empire romain', in: A. Bérenger and Fr. Lachaud (eds.), *Hiérarchie des pouvoirs, délégation de pouvoir et responsabilité* (Metz 2012), 161–177.

12 J. Fournier, 'Rome et l'administration judiciaire provinciale', in: Fr. Hurlet (ed.), *Rome et l'Occident* (*II^e siècle av. J.-C.–II^e siècle ap. J.-C.*). *Gouverner l'Empire* (Rennes 2009), 207–227; J. Fournier, *Entre tutelle romaine et autonomie civique. L'administration judiciaire dans les provinces hellénophones de l'Empire romain* (*129 av. J.-C.–235 apr. J.-C.*) (Athens 2010); J. Fournier, 'L'administration de la justice dans le monde romain. I^er siècle av. J.-C.–I^er siècle ap. J.-C.', in: N. Mathieu (ed.), *Le monde romain de 70 av. J.-C. à 73 ap. J.-C. Voir, dire, lire l'empire*, (Rennes 2014), 171–208.

on the criterion of possessing Roman citizenship, but also based on the legal classification of the case being adjudicated. Civil jurisdictions were set aside in favor of Roman jurisdictions for trials falling under criminal law, regardless of the status of the individuals involved. The same was true for financial disputes under civil law that surpassed a certain amount. One can cite a number of cases that fell under the jurisdiction of Roman law due to the nature of the case.

3.1 *The Edict of Cyrene*

The first evidence of this reconfiguration of the courts on the scale of the full Empire appeared during the Principate of Augustus in the 4th Edict of Cyrene, which set apart those accused of a capital crime, "for whom the governor of the province is required to either investigate and judge himself, or to gather a jury (consisting of Romans and *peregrini*)".[13]

3.2 *Edict of M. Petronius Mamertinus*

Another record suggesting the same, this time a papyrus dating from the Principate of Hadrian, is the edict by a prefect in Egypt named M. Petronius Mamertinus, who provided a list of matters, most likely taken from an imperial constitution, that the governor had to investigate by way of a *cognitio*: cases involving murder, robbery, poisoning, abduction, livestock theft, armed violence, forgery and false testimony, premature opening of wills, serious offenses, and complaints by patrons against their freed slaves as well as parents against their children. A final category was added with regard to appeals, specifying that those who made recourse to this law would be heard only if they left a security deposit equal to a quarter or a third of the amount involved in the matter to be adjudicated.[14]

3.3 *Lives of the Sophists by Philostratus*

A third document to include is an excerpt from the *Lives of the Sophists* by Philostratus, which put in the mouth of the sophist Polemon of Smyrna words that distinguish between trials "for money" that were likely to be adjudicated by a

13 E-J, n° 311 = J.H. Oliver, *Greek Constitutions of Early Roman Emperors from Inscriptions and Papyri* (Philadelphia 1989), n° 8–11 = R.K. Sherk, *Roman Documents from the Greek East. Senatusconsulta and* Epistulae *to the age of Augustus* (Baltimore 1969), n° 31, l. 65–66; cf. F. De Visscher, *Les édits d'Auguste découverts à Cyrène* (Leuven 1940), 62–69.

14 *SB* XII 10929; on this text see A. Jördens, 'Eine kaiserliche Konstitution zu den Rechtsprechungskompetenzen der Statthalter', *Chiron* 41 (2011), 327–355; Eadem, 'Die Strafgerichtsbarkeit des *Praefectus Aegypti*', in: Haensch 2016, op. cit. (n. 1), 93–94.

civic court, and other trials falling under the jurisdiction of a judge possessing the *ius gladii*, in this case the governor, such as cases of adultery, sacrilege, and murder.[15]

3.4 *Lex Irnitana, lex Rubria, Fragmentum Atestinum*

With regard to cases for money, to use the expression of Philostratus, we know from a number of other texts that for each city there was a financial limit below which the governor did not intervene, and for which we have a number of examples: 1,000 sesterces for the city of Irni in Baetica (art. 84);[16] 10,000 or 15,000 sesterces for the cities of Cisalpine Gaul, with the praetor of Rome handling cases above this amount.[17]

4 The Creation of Judicial Consensus

A consequence of the new jurisdictional division was that *peregrini* could henceforth be judged by Roman judges, regardless of whether this was in their interest or to their detriment. It consequently helped create a new consensus that united the governors and the governed, and formed one of the bonds within the Roman Empire. It did so by presenting Roman authority, especially that of the emperor and the governor, not as an external authority but as the highest and most legitimate of jurisdictions, in short as the judicial authority of reference.[18] The real or at the very least potential presence of Roman jus-

15 Philostratus, *Life of the Sophists*, 1.25.2 (532): 'The suits which they brought against one another he did not allow to be carried anywhere abroad, but he would settle them at home. I mean the suits about money, for those against adulterers, sacrilegious persons and murderers, the neglect of which breeds pollution, he not only urged them to carry them out of Smyrna but even to drive them out. For he said that they needed a judge with a sword in his hand.'

16 See F. Lamberti, *Tabulae Irnitanae. Municipalità e ius Romanorum* (Naples 1993) and Idem, 'La giurisdizione nei municipia dell'occidente romana e il cap. 84 della lex Irnitana', in: Haensch 2016, op. cit. (n. 1), 183–211.

17 Regarding the *lex Rubria*, which is dated 41 BCE, and Cisalpine Gaul (which had been attached to Italy in 42 BCE), see M.H. Crawford, ed., *Roman Statutes* (London 1996), 1, 28, chap. 22; see also the *Fragmentum Atestinum*, which mentions an amount of 10,000 sesterces for the late Republican period (Crawford 1996, op. cit., n. 14, I, 16, col. I 6).

18 On this subject see C. Ando, *Imperial Ideology and Provincial Loyalty in the Roman Empire* (Berkeley, Los Angeles, London 2000) and Idem, 'La forme canonique de l'empire antique: le cas de l'Empire romain', *Ius Politicum. Revue de droit politique* 14 (2015): http://juspoliticum.com/article/La-forme-canonique-de-l-empire-antique-le-cas-de-l-empire-romain-972.html.

tice throughout the imperial space, along with its accessibility to all free men living within that space, were the institutional facts that contributed the most toward making the Roman Empire a reality experienced on a daily basis by all of its inhabitants.

The notion of consensus, which was expressed in the Roman Empire through reference to the *consensus uniuersorum*, should certainly not be underestimated or disqualified on the pretext that it was no more than a source-based (re)construction seeking to establish order in a naturally conflictual world, to "create a shared direction" in Claudia Moatti's fine phrase.[19] It should instead be presented as an ideal that imperial authorities sought to apply in the exercise of justice, and one that consequently had concrete repercussions. Yet it is also true that acceptance of Roman presence and justice resulted from a process that was under permanent (re)negotiation. While the redistribution of judicial roles helped to better integrate all of the provinces within the imperial space, it fell far short of resolving all problems. It led to new difficulties of a practical nature, which were essentially caused by the increased pressure exerted on Roman courts by those subject to its jurisdiction, who sought out the jurisdiction that would prove the most favorable to them. A distinction should therefore be made between the consensus as it was presented and sought by imperial authorities, and the consensus as it was perceived and used by the governed.

5 The Consensus as Tested by the Realities of Judicial Practice

The superimposition of Roman justice on local civic justice had an immediate and natural consequence: those governed by it, and likely to be subject to it, developed individual strategies for making recourse to a Roman justice whose disconnection from the local context supposedly made it impartial, or at least less partial. The reconfiguration of different jurisdictions on the level of the Roman Empire as sketched out above is indeed theoretical. It could not always resist the reality on the ground, which was expressed through power relations between individuals subject to the laws, a reality that could prompt Roman authorities to intervene on the local judicial scene.

An example involving a remarkable case is that of a couple of citizens from Knidos, named Euboulos and Tryphera, who during the final decade BCE

19 C. Moatti, 'Historicité et 'alteronomie': un autre regard sur la politique', *Politica antica* 1 (2011), 108; see also now C. Moatti, Res publica. *Histoire romaine de la chose publique* (Paris, 2018), *passim*.

fled for Rome after one of their slaves killed—accidentally according to the couple—a free man also named Euboulos during a night-time disturbance of the peace. The homicide took place in a free city, which meant that there was a civic court in Knidos, one that was authorized to deliver and execute a death penalty verdict against its citizens condemned for murder. We know nothing of the local context during this period, but the fact that the couple preferred to leave Knidos and go halfway across the Mediterranean to take refuge in the Empire's capital says a great deal about the risks they believed they ran in their city, as well as the lack of confidence they had in the local court. One must suppose that the aristocratic alliance networks present in the city of Knidos locally played out against Euboulos and Tryphera and in favor of their adversaries. The case did not end there. Ambassadors from Knidos were sent to Rome to give Augustus a decree from their city and to accuse in his presence both Euboulos, who had died in the meantime, and Tryphera. The decision of the *princeps* was unambiguous: he exculpated the couple, affirming that they had "committed no injustice," and ascribed the fault to those who had disturbed the peace by annoying Euboulos and Tryphera at night in front of their house. Not everything is clear in the case, although the great visibility of Augustus was an unquestionable reality, as was the drawing power of the imperial court that stemmed from this visibility. These were so many elements that prompted a couple from Knidos to go to Rome, knowing that they would find a court of law that was supposed to be more favorable, or in any case less unfavorable than the local civic court. Furthermore, from a hierarchical point of view, this court was the highest jurisdiction, against which there could be no recourse.[20]

The case of Euboulos and Tryphera is an example that most probably was not an isolated case. Of course not everyone subject to the laws had the financial and logistical means to go to Rome, or to wherever the *princeps* was when away from Rome, something that occurred quite often during the first half of the Principate of Augustus. Imperial authority had nevertheless become a point of convergence on the scale of the Empire, so much so that the strategic circumvention of the local civic court took place on other occasions. It is unfortunately difficult to evaluate how frequently this practice took place, due to the small number of sources on the subject: the traditional and ephemeral mediums

20 This inscription, which has been known since the nineteenth century, was the subject of a useful publication in Sherk 1969, op. cit. (n. 13), n° 67, 341–345 (with an exhaustive bibliography for the period); see also E-J, 312 and, more recently, Oliver 1989, op. cit. (n. 13), n° 6, 34–39; W. Blümel, *Die Inschriften von Knidos* I, IK 41 (Berlin 1992), n° 34, 34–37, and V. Wankerl, Appello ad Principem. *Urteilsstil und Urteilstechnik in kaiserlichen Berufungsentscheidungen* (*Augustus bis Caracalla*) (Munich 2009), 3–4.

for administrative communication were written on papyrus or wood, which explains for example why we have good information in the case of Egypt. The continual discovery of papyri has helped improve our knowledge of judiciary practices in this province, although the documentary situation for the remainder of the Empire is less favorable. The letter from Augustus to the city of Knidos is an exception in this regard, and one that is difficult to explain. It was discovered in the neighboring city of Astypalaea, which was a free city like Knidos, although we do not clearly understand the reasons for its presence there, a central element in explaining its unusual engraving on a lasting material.[21]

The case of Tryphera raises the potential of another problem, namely the risk of Roman courts being congested by requests from Italians or members of the provinces potentially tempted to bypass local authorities when it suited them. Whatever its form, Roman authority gained legitimacy in presenting the image of an accessible judicial authority, and in making the exercise of justice an activity that stemmed from the exercise of *imperium*. Over time, however, it had to absorb the large number of cases that presumably reached it, as well as the large amount of information that had to be mastered to render an equitable judgment in each of the cases. This practical difficulty was true not only for an imperial power that was in theory active across the entire imperial space, but also for Roman authorities acting in the provinces, most of which were quite large. This challenge became even more acute with the implementation of the right of appeal, which naturally prompted those individuals whose case was dismissed, or who were condemned on first hearing by a local civic jurisdiction, to call on Roman authorities to be judged anew on appeal.

The trip to Rome made by Tryphera and Euboulos took place during the Principate of Augustus, that is at a time when the new authority was becoming aware of its new judicial attractiveness on the scale of the Empire and exploring its repercussions. The date of this case—6 BCE—makes the notion that Augustus rendered an appeal judgment on this occasion unlikely, for this procedure appeared on a regular basis beginning with the Principate of Claudius. In any event, the system was initially quite empirical, a reality that explains why the approach taken by the couple from Knidos was successful before Augustus. This situation, however, did not last, for it ran the risk of bombarding imperial authorities with similar requests. In any case, it was probably to avoid the risk of congesting Roman courts that Roman authorities put in place a system of filters, the first clear evidence of which can be found in a fragmentary letter

21 On the different explanations possible, see my analysis in Hurlet 2016, op. cit. (n. 3), 19, n. 37.

dating from the Principate of Claudius that was addressed by the proconsul of Asia, Cn. Domitius Corbulo, to the city of Kos.[22] What this document teaches us, among other things, are two important elements for this demonstration: first, in a case involving an individual from the provinces, the grounds for the appeal must be examined by the governor before being transmitted to the *princeps*;[23] second, a security deposit to the substantial amount of 2,500 denarii had to be paid to the governor for any appeal appearing before his jurisdiction, so as to limit the number of pleas. As a result, a pyramidal structure emerged for a jurisdiction based on both incontestable hierarchy (ranging from the local civic jurisdiction to that of the provincial governor and ultimately imperial jurisdiction) and the implementation of safeguards, in order to prevent the system from being a victim of its own success or of the strategies used by those subject to the laws, who tried to take advantage of the system and its flaws to cast a favorable light on their case.

If you look closely, the situation revealed by the letter of the proconsul of Asia to the city of Kos is in substance very similar to the approach taken half a century earlier by the couple from Knidos, although the resulting decision was different. This letter was justified as a reaction to the stance taken by a citizen of Kos, whose name we do not know, but who seems to have brought an appeal directly to the Emperor Claudius after a decision against him by the city, and who did so without obtaining the agreement of the proconsul in advance. Even though the appeal most likely did not exist as an official procedure during the first half of the Principate of Augustus, Euboulos and Tryphera acted in a similar way by going directly to the *princeps* without seeking out the proconsul beforehand. At the time this was probably C. Asinius Gallus (consul 8 BCE and proconsul of Asia in 6/5 BCE), who at the request of Augustus subsequently intervened in Knidos to conduct a complementary investigation. It should be pointed out that these citizens of Knidos and Kos were all from a free city, although the similarities end there. What was in fact possible and successful during the time of Augustus proved problematic approximately fifty years later: it was not that seeking out the *princeps* directly was impossible—the exact opposite is true, as we know that a citizen of Kos

22 The letter, which consists of three fragments, is damaged on its left side. The edition of reference is now *IG* XII, 4, 261 [2010], although we will continue to consult the earlier editions of J.H. Oliver, 'Greek Applications of Roman Trials', *American Journal of Philology* 100 (1979), 551–554, and M. Segre, *Le iscrizioni di Cos* I (Rome 1993), no. 43, which have proposed different restitutions for lines 4–10, none of which clearly asserts itself.

23 See lines 13–16, which present no problems in establishing the text: Δέ/[ον τ]οίνυν, εἰ μὲν ἐπὶ τὸν Σεβαστὸν / [ἡ ἐπί]κλησις γείνεται, πρότ[ε]ρον ἐμὲ / [ἐξε]τάσαι τὴν αἰτίαν.

sought Claudius directly—but that this approach was explicitly condemned. We do not know what came of the appeal brought by the anonymous citizen of Kos.

The very necessity for the proconsul of Asia to have to write a letter pointing out that no appeal could reach the *princeps* without his approval indicates that the pyramidal character of Roman jurisdiction was not a foregone conclusion for everyone. This was true for two reasons, which are not necessarily exclusive, and can be combined. First, one may suppose that such an obligation had just been implemented through the introduction or widespread availability of a right of appeal under the Principate of Claudius, a right that naturally had to spread so that people in the provinces who were subject to the law were informed thereof. Second, the very existence of the letter of the proconsul of Asia proves that in contrast to practice, it was simply impossible for a governor to prevent one of his citizens from seeking out the *princeps*, all the more so if it involved a case in which the provincial individual subject to trial had nothing to lose. This reality thus suggests that the imperial judicial system should not be considered as a structure that was bureaucratic and fixed, but rather one marked by a flexibility specific to the imperial constructions that preceded the modern form of the nation state. The categories in book XLIX of the *Digest*, which discusses the *appellatio*, solidify the situation. They refer to a rescript by Marcus Aurelius and Lucius Verus, according to which "appeals addressed directly to the emperor—and ignoring those before whom lower-level appeals had to be brought—must be sent back to the governors."[24] The existence of this normative framework should not obscure the fact that this final result was the product of an evolution, and that this rule was established to do away with potential congestion of the imperial court.[25]

There is perhaps a final reason why the Roman judicial system put in place a system of filters between imperial authorities and those subject to the laws: the emperor's desire to avoid directly punishing possible abuses by his own soldiers,[26] and therefore to delegate to an intermediary authority, such as the governor, the power to issue a judgment without the emperor having to intervene in a potentially sensitive case. This motivation remains a possibility,[27]

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24 Papirius Iustus *Dig*. 49.1.21.pr.: *Imperatores Antoninus et Verus rescripserunt appellationes, quae recto ad principem factae sunt omissis his, ad quos debuerunt fieri ex imo ordine, ad praesides remitti.*

25 And even then, the emperor could decide otherwise, as in the Goharian inscription (*SEG* 17.759).

26 See the imperial third-century decisions, as collected in T. Hauken, *Petition and Response. An Epigraphic Study of Petitions to Roman Emperors, 181–249* (Bergen 1998).

27 I would like to thank Lukas de Blois for drawing my attention to this point.

without for all that being certain. This possibly explains why we have no evidence of a judgment issued by the *princeps* regarding soldiers during the first two centuries CE, although the gaps in our documentation should also be taken into account. However, we know of a subscription by Caracalla from the Severan period regarding illegal requisitions made by soldiers to the detriment of the city and the imperial domain of Takina in Phrygia. This offers evidence that such a case was elevated to the highest judicial level of imperial authority, which condemned the Roman soldiers.[28] Moreover, we know from a rescript of Severus Alexander addressed to the Greek community of Bithynia that nobody could be prevented from appealing to its judges, for everyone subject to the laws was allowed to pursue another path and seek out the *princeps* more quickly. This means that imperial authorities accepted to hear an appeal involving its own administration and members of its own army.[29] The primary reason for the existence of this pyramidal system remains, after all, the application of what was defined at the outset as the principle of subsidiarity.

The functioning of justice on the scale of the Empire should be studied using a method that combines institutions and practices, and that does not lose sight of the fact that law was permanently tested by reality, and could partly adapt to it.[30] There were norms of division between the different jurisdictions present on the scale of the Empire, which were implemented gradually and with disparities between them. The rules in effect within this domain have been studied over the course of the last decade with great acuity, however they should include an additional and more practical criterion, that of access to Roman justice, which could disturb the pyramidal arrangement of jurisdictions in both directions: either the person subject to trial was unable to go to a Roman court, whether it was that of the *princeps* or of the governor, with the latter being located in the provincial capital or the various headquarters of the *conuentus*; or he had the financial and material means to be mobile, and used them to go to one of the Roman authorities in spite of not meeting all of the legal conditions.

28 *AE*, 1989, 721 = *SEG*, XXXVII, 1186.

29 Paul. *Dig*. 49.1.25. The content of this rescript has also been conserved in two papyri (*P. Oxy* 17.2104 and 43.3106), which have gaps in addition to a few modifications as compared to the text transmitted by Paul. On this rescript of Severus Alexander see F. Nasti, *L'attività normative di Severo Alessandro. I. Politica di governo. Riforme amministrative e giudiziarie* (Naples 2006), 41–70.

30 See Ando in this volume.

6 Roman Justice, between Acceptance and Rejection

So far we have considered examples in which the superimposition of Roman jurisdiction on a local jurisdiction was accepted in principle, and contributed to the global consensus on the scale of the Empire. Such an acceptance was self-evident in the Latin and Roman communities of the Empire, which thought of themselves as emanations of Rome, and therefore copied Roman law by adapting it to the local setting. Citizens of such cities had their own court of law, and naturally accepted a hierarchy whose principle was to refer all cases falling under Roman jurisdiction to the higher level, whether provincial or imperial. With regard to communities of *peregrini*, the connection between local and imperial justice, which was hardly a novelty in the Greek world, had been tested in the past by *poleis*, which had already been through royal experiences, and were therefore accustomed to seeing one or more citizens call on either one of the jurisdiction depending on the case. Some people in the provinces of the Greek world perceived the advantages offered by this system, notably the existence of a right of appeal, which Aelius Aristides presented in a general manner as one of the specific features and advantages of Roman hegemony: 'How is this form (imperial) of government not beyond every democracy? There it is not possible after the verdict is given in the city to go elsewhere or to other judges, but one must be satisfied with the decision, unless it is some small city which needs outside judges. But among you now a convicted defendant or even a prosecutor, who has not won his case, can take exception to the verdict and the underserved loss. Another great judge remains, whom no aspect of justice ever escapes. And here there is a great and fair equality between weak and powerful, obscure and famous, poor and rich and noble'.[31] This stance was also expressed by a Roman authority in an inscription originating from Sparta (presumably a letter sent by the proconsul of Achaea to this city): 'it is not right, I think, for the victims of injustice to be deprived of the relief they can get by appeals'.[32]

There remains the case of cities of *peregrini* in the Roman West, which is specific because the very principle of a non-local, non-native, and superior justice system did not exist before the Roman conquest. We know that Roman justice ultimately was gradually imposed on all people in the provinces as conquered territories in the provinces were subdued, yet it was a process that required that

31 *Éloge de Rome* 26.38–39. On differences between theory and practice, see Herz in this volume.

32 *IG*, V, 1, 21 = Oliver 1989, op. cit. (n. 13), n° 91: Οὔτε ⟨τ⟩ὴν ἐκ τῶν ἐπικλήσεων βοήθειαν τοὺς ἀδικουμέ/νους οἴομαι δεῖν ἀφειρῆσθαι. Cf. J. Fournier, 'Sparte et la justice romaine sous le Haut-Empire. À propos de *IG* V 1, 21', *Revue des Études Grecques* 118 (2005), 117–137.

they learn Roman judicial practices. Some regions were more recalcitrant than others to this new Roman judicial practice, which disturbed age-old customary practices. The failure to establish Roman justice was one of the factors in the ultimate failure of the imperial project in the areas concerned. Germania offers an emblematic example of this, in the sense that the exercise of Roman justice was never accepted, no more so than the other indicator of imperial presence, taxation. This is what Velleius Paterculus explained in a fairly detailed passage, in which he describes the situation that preceded the rebellion of Arminius in 9 CE, and emphasizes the behavior of the Roman governor Quinctilius Varus, which was characterized by a kind of judicial mania. Quinctilius Varus was present during the period preceding the rebellion as a judge, so much so that he forgot he was also a military leader, naively believing that "the novelty of unfamiliar discipline" that Roman justice represented for the Germans would be enough to soften their savage customs.[33] Beyond the moral judgment of a governor responsible for one of the worst military disasters Rome ever experienced, it is on the contrary quite possible to suppose that Roman judiciary practice, which was indeed new in Germania, broke with traditional customs that favored the resolution of conflict through private justice and arms. It was therefore not at all self-evident given how different it was from the practices used in the area at that time, and prompted distrust and even hostility. One of the numerous reasons for the ultimate failure of the Romans in Germania came down to their inability to connect their own justice with local jurisdictions, and to create, as they had elsewhere, a functional pyramidal system based on the distinction between what fell under the jurisdiction of local courts and what was a matter for Roman courts. The German reaction to the exercise of Roman justice therefore confirms that the primary difficulty in integrating them resided in the most concrete manifestations of Roman administrative activity.[34]

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33 Vell. 2.118.1: *At illi* (the Germans) … *simulantes fictas litium series et nunc prouocantes alter alterum iniuria, nunc agentes gratias quod ea Romana iustitia finiret feritasque sua nouitate incognitae disciplinae mitesceret et solita armis discerni iure terminarentur, in summam socordiam perduxere Quintilium usque eo ut se praetorem urbanum in foro ius dicere, non in mediis Germaniae finibus exercitui praeesse crederet* ('But the Germans … by trumping up a series of fictitious lawsuits, now provoking one another to disputes, and now expressing their gratitude that Roman justice was settling these disputes, that their own barbarous nature was being softened down by this new and hitherto unknown method, and that quarrels which were usually settled by arms were now being ended by law, brought Quintilius to such a complete degree of negligence, that he came to look upon himself as a city praetor administering justice in the forum, and not a general in command of an army in the heart of Germany').

34 On this subject see Fr. Hurlet, 'Rejeter le contrôle de Rome. Les formes de résistance

7 Conclusion

This negative conclusion conversely reinforces the notion that the functioning of Roman justice was inseparable from the *imperium* exerted by the person representing Rome in the provincial territory, and as such was one of the primary hallmarks of imperial power over the space it controlled. The example of Germania—or that of Britannia—indicates that the hierarchical superimposition of Roman justice in a spirit of subsidiarity was not automatic, and had to take into account the pre-Roman context. Yet these failures should not cast a shadow over the fact that Roman justice was generally well accepted within the vast space of the Roman Empire over the long term. The chronological dimension should be taken into account here, and it should be noted that presenting a synthesis of the functioning of Roman justice during the entire three centuries of the Roman High Empire is highly difficult, if not impossible. For all that, there was an evolution toward the reinforcement of Roman justice and a general consensus regarding this process: the more time that passed, the more Roman citizens there were—until the Antoninian Constitution of 212—and the more Roman justice asserted itself as a foundation of 'imperiality' to which the provinces adhered. Roman judges were subsequently considered in the provinces as a third party or an arbitrator, who was supposed to be impartial because of his distance from local events, and as such more capable of resolving internal conflicts.

It is important not to stop at a naively consensual or even irenic vision of Roman justice. Some of those subject to the law took advantage of this situation to circumvent their own law, or to delay the resolution of conflict and thereby maintain a status quo favorable to one of the two parties involved. Roman justice was first and foremost an instrument of imperial domination, for it could prove both flexible and strict in applying sentences. Furthermore, it was not always easily accessible. Individuals subject to trial had to present themselves at a Roman court, whether it was the court of the governor in their capital or the different seats of the *conuentus*, or directly at that the court of the *princeps*,

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aux structures fiscales et administratives de l'Empire romain', in. S. von Reden (ed.), *Ressources, environnement, échanges et pouvoir dans l'Antiquité classique*, Entretiens de la Fondation Hardt 63 (Geneva 2017), 214–216 and 226–227. While the passage from Velleius Paterculus quoted in the previous note tells us more about how the Romans saw their imperialism than about how the Germans experienced Roman justice, it cannot be dismissed as a source of information: far from inventing, Velleius in fact makes a moral judgement by emphasizing the inability of the Germans to accept the greatly superior and impartial Roman justice.

which was normally even more complicated. They also had to overcome the obstacles resulting from the filters that Roman justice put in place for those who wanted to be judged by a Roman court, in an effort to prevent congestion by a flow of requests from people in the provinces. All of these elements underscore the idea that in addition to subsidiarity, the dominant principle of Roman justice was its highly hierarchical character: from an institutional point of view, Roman jurisdiction was first and foremost the authority that applied Roman law, and as such was superior to any other jurisdiction, so much so that Roman judges ended up becoming appellate judges, whose decisions could not be challenged. With regard to practices, it was far from being accessible to everyone who was subject to the laws, and reinforced inequalities through a series of concrete factors: differentiated access to Roman justice based on greater or lesser spatial proximity to the Roman court; economic considerations, which took the tangible form of being able to pay a sizeable amount to bring an appeal before the governor or the emperor; and integration within aristocratic networks, which facilitated access to the court of the governor or that of the *princeps*.

CHAPTER 8

Substantive Justice in Provincial and Roman Legal Argument

Clifford Ando

1 Introduction

There is more than one discourse of law in the Roman world, and justice plays several complicated roles in all of them. To the Roman world at large, the Romans promised to restore and sustain the rule of law.[1] At a technical level, this generally meant supporting the on-going validity of local systems of law. More specifically, the Romans identified political units as sovereign within territories and allowed their law-making and law-applying institutions to operate throughout.[2] But because the courts of Roman magistrates often functioned as courts of the second instance—in lay terms, they functioned as courts of appeal—Roman magistrates occasionally had to choose between local law and their own notions of justice or, one might say, between fulfilling, in any given decision, substantive or procedural justice.[3] In short, if local rules of procedure had been carefully followed, would Roman magistrates honor the decisions of local courts, even if they did not like the outcome at a substantive level? Or would they invoke their own (Roman) notions of substantive justice, and overrule the local court? As it happens, in the discourse of law at Rome, there also

1 On the discourse of law and legal culture as features of empire and ideology, see A.Z. Bryen, 'Judging empire: courts and culture in Rome's eastern provinces', *Law and History Review* 30 (2012), 771–811; A. Bryen, 'Martyrdom, rhetoric and the politics of procedure', *Classical Antiquity* 33 (2014), 243–280; see also C. Ando, *Imperial Ideology and Provincial Loyalty in the Roman Empire* (Berkeley 2000).

2 J. Fournier, *Entre tutelle romaine et autonomie civique. L'administration judiciaire dans les provinces hellénophones de l'Empire romain (129 av. J.-C.–235 apr. J.-C.)* (Paris 2010); C. Ando, 'Law and the landscape of empire', in S. Benoist, A. Daguey-Gagey, and C. Hoët-van Cauwenberghe (eds.), *Figures d'empire, fragments de mémoire. Pouvoirs et identités dans le monde romain impérial (IIe s. av. n.è.–VIe s. de n.è.)* (Paris 2011), 25–47; G. Kantor, 'Law in Roman Phrygia: rules and jurisdictions', in P. Thonemann (ed.), *Roman Phrygia. Culture and Society* (Cambridge 2013), 143–167; C. Ando, 'Legal pluralism in practice', in P. du Plessis, C. Ando, and K. Tuori (eds.), *The Oxford Handbook of Roman Law and Society* (Oxford 2016), 283–293.

3 C. Ando, 'Pluralisme juridique et l'intégration de l'empire', in S. Benoist and G. de Kleijn (eds.), *Integration in Rome and in the Roman World* (Leiden 2013), 5–19.

 | DOI:10.1163/9789004400474_009

operated a tension between some understanding of the legal system as inherently just, on the one hand, and contingent concerns that excessive attention to rules or words might lead to a substantively unjust outcome, on the other. One object of the present paper is to bring these two conversations into comparative and historical relation.

Over the last generation, and with perhaps increasing stridency in recent years, Roman legal historians have sought to distinguish forms of inquiry that focus on law-in-books, which is to say, dogmatic legal history, from law-in-action.[4] Another move distinguishes law at Rome from law in the provinces. These distinctions are of course related, evidence for legal practice under the Principate deriving largely from provincial evidence, just as the evidence for doctrine derives from jurists who worked at the capitol. The distinction between law-in-books and law-in action is, of course, a theoretical distinction that goes back a century in American legal scholarship.[5] Virtually nothing of the debate about the utility or salience of this distinction in other contexts of inquiry has penetrated Roman legal scholarship: for those who invoke it, it has the status of a self-evident truth. It deserves more careful scrutiny than this.

In two bodies of recent work—both are in fact ongoing—, I have tried to push back against any easy invocation of these distinctions, both more broadly against that between law-in-books and law-in-action, at least as the distinction is drawn by recent Roman legal historians, and more narrowly against that between law at Rome and law in the provinces. I did so first in respect of legal fictions and more recently in respect of analogical argumentation and rules of precedent.[6] With regard to fictions, I showed that fictions were an essential tool in the writing of statute commencing from the very earliest surviving texts, figuring prominently in both the *lex repetundarum* and the *lex agraria*, especially in clauses that concern alien persons, land and actions. With regard to analogical argumentation, I have argued that it is visible to us in the records of pleadings in Roman courts first in the evidence of Roman Egypt.[7] In both cases, therefore, the evidence from practice precedes the use and theorization of this material by the jurists. To be sure, the path that leads from procedu-

4 For a bibliography of recent surveys of legal historical research on Roman law see C. Ando, 'Roman law', in M. Dubber and C. Tomlins (eds.), *The Oxford Handbook of Legal History* (Oxford 2018), 663–679.

5 R. Pound, 'Law in books and law in action', *American Law Review* 44 (1910), 12–44.

6 C. Ando, 'Fact, fiction and social reality in Roman law', in M. del Mar and W. Twining (eds.), *Legal Fictions in Theory and Practice* (Boston 2015), 295–323.

7 C. Ando, *'Exemplum*, analogy and precedent in Roman law', in M. Lowrie and S. Lüdemann (eds.), *Between Exemplarity and Singularity: Literature, Philosophy, Law* (New York 2015), 111–122.

ral and statutory fictions to the jurists is shorter and invites greater confidence than does that from provincial courts to Roman theory in the case of rules of precedent. But one need not insist on historical influence; the two bodies of evidence for analogical argumentation can be studied as merely mutually illuminating. The same, I think, can be said for the relationship of procedural and substantive justice in Roman and provincial legal argument.

2 Procedural and Substantive Justice at Rome

When writing about Roman law, one regularly confronts the temptation to commence from Gaius or, better yet, from some obiter dictum of the Severan jurists, Papinian, Paul and Ulpian (or even Marcian). There is just a very great likelihood that one of these jurists will offer a formulation of economy and elegance in respect of the problem that one investigates. The problem, of course, is that economy and elegance of formulation are symptomatic not simply of the skill with language of some lone individual, but of hard-won clarity at the level of conceptualization—and, where institutionalized interpretive communities are concerned, like that of the jurists, conceptualization is a task of distributed agency. To begin with Ulpian is to begin when the brush has been cleared and the roads paved, and many problems have been resolved.[8]

As regards the topic of this paper, however, one of the more remarkable features of Roman debates regarding procedural and substantive justice is how mature the conversation appears as soon as its contours are visible to us. I am frequently skeptical that claims by jurists and other antiquarians of the high empire regarding the fourth, third and second centuries BCE should be trusted—most of the time, when they were not simply inventing, they had no empirical basis for their representations. So, for example, figures of the imperial period regularly attribute the motivation for the transition from *legis actiones* to *ius honorarium* to a concern for substantive justice, which is narrated as the process of overcoming the rigidity of actional formalism.[9] That said, what we in fact see in some of the earliest texts that engage this and related issues, is instead a concern for justiciability. Consider, for example, the formulations offered by Cicero in his speech on behalf of Aulus Caecina, both in his own voice and in the words he attributes to Caecina's opponent, Sextus Aebutius:

8 A further problem is of course that in commencing with a normative account provided by the jurists, one is strongly urged to think and write dogmatically.

9 For the term 'actional formalism' see F. Schulz, *History of Roman Legal Science* (Oxford 1953 [1946]), 24–29.

> Quaero, sitne aliqua huius rei actio an nulla.
>
> [Cicero, speaking in his own voice:] "I ask you, is there a legal process available in my case, or not?"
>
> Cicero, *Caec.* 33; trans. after Hodge

> Feci equidem quae dicis omnia; et ea sunt et turbulenta et temeraria et periculosa. Quid ergo est? Impune feci: nam quid agas mecum, ex iure civili et praetorio non habes.
>
> [Cicero imagines the response of the legal opposition to his appeal for justice:] "I did indeed act in all respects as you describe, and such actions are riotous, reckless and dangerous. What of it? I acted with impunity, for in respect of your dealing with me, you have no recourse in either civil or praetorian law."
>
> Cicero, *Caec.* 34; trans. after Hodge

Cicero's point, as will become clear, is that narrow punctiliousness in the interpretation of statutory language will issue in a non-fit between the facts of the case and the framework of the law, and the inability of the law to embrace such cases will produce a crisis of legal legitimacy.[10] The problem of justice is not foregrounded, but it is latent.

Similar concerns about gaps between procedural rectitude and substantive justice emerge in nearly every reflection on the legal-historical change offered in Roman literature, and these provoke reflection by the jurists in at least three directions.

- First, the jurists ponder the nature and inevitability of historical social and linguistic change. On their representations, the content of statutes must first be accessed via the language and customs of their context of production, and yet language and customs change. Every aspect of the application of statute—the intelligibility of its language; the relationship of its terms to contemporary mores; the ability of a given statute to give normative description to the world it is called upon to regulate—is vulnerable to such processes of simple, inevitable historical change.
- Second, some of the problems that arise from such historical change can be redressed via the development of conventionally accepted modes of statu-

10 The testimony of this speech about the rise of praetorian law and jurisprudential reasoning is the subject of Bruce Frier's remarkable monograph, *The Rise of the Roman Jurists. Studies in Cicero's Pro Caecina* (Princeton 1985).

tory interpretation. By this means, the fit between the language of statute and the world of contemporary language and social action can be repaired. That said, to acknowledge the need for interpretation is to acknowledge that a gap has opened up between the *ipsissima verba* of statute, narrowly construed, and contemporary modes of acting on statute that focus on its intent or meaning, what a Roman would call its *vis*. Acknowledgement of this gap involves a risk, namely, that it will summon forth advocates of fundamentalist or originalist literalism. How to constrain or foreclose the power of such claims of the past on the present is a major problem for many legal systems.

– Third, the jurists understand the legal system to have several means to close such gaps. In the Roman case, the means of choice in the classical period was, of course, praetorian law, which functioned, in Papinian's turn of phrase, "to aid, supplement or correct" statute law.[11] It did so via a form of supersession, by simply establishing a new legal action, with different procedural requirements and often different outcomes. One might imagine that an effect of so proceeding was that statute law would lapse, via desuetude. But this is not how the jurists imagined the situation. Rather, the praetor simply ceased to grant actions narrowly on the basis of statute law, and instead granted actions grounded on his powers of jurisdiction. At this juncture there arose new problems of legal legitimacy with regard to recognition and respect among the sources of law at Rome. This is a problem about which I have written elsewhere, but I will write one word about it in this context, in just a moment.[12]

In what follows, I cite a few of the many reflections by Roman jurists on these issues by way of illustrating significant aspects and developments in their discourse on procedural and substantive justice.

Virtually every account of the replacement of the *legis actiones* by the formulary system is apposite to this argument. Here, for example, is the start and end of one such account, that of Gaius:

> Actiones, quas in usu ueteres habuerunt, legis actiones appellabantur uel ideo, quod legibus proditae erant, quippe tunc edicta praetoris, quibus conplures actiones introductae sunt, nondum in usu habebantur, uel ideo, quia ipsarum legum uerbis accommodatae erant et ideo immutabiles proinde atque leges obseruabantur. unde eum, qui de uitibus suc-

11 Papinian, *Definitiones* bk. 2 frag. 46 Lenel = *Dig*. 1.1.7.1 (trans. G. de St. Croix): *Ius praetorium est, quod praetores introduxerunt adiuuandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam*.

12 C. Ando, *Law, Language, and Empire in the Roman Tradition* (Philadelphia 2011), 19–36.

> cisis ita egisset, ut in actione uites nominaret, responsum est rem perdidisse, quia debuisset arbores nominare, eo quod lex XII tabularum, ex qua de uitibus succisis actio conpeteret, generaliter de arboribus succisis loqueretur.
>
> The actions of the practice of older times were called *legis actiones*, either because they were the creation of statutes (of course in those days the praetorian edicts, whereby a large number of actions have been introduced, were not yet in use), or because they were framed in the very words of statutes and were consequently treated as no less immutable than statutes. Hence it was held that a man who, when suing for the cutting down of his vines, having used the word "vines," had lost his claim, because he ought to have said "trees," seeing that the law of the Twelve Tables, on which his action for the cutting down of his vines lay, spoke of cutting down trees in general.
>
> Gaius, *Inst.* 4.11; trans. after Zulueta

> Sed istae omnes legis actiones paulatim in odium uenerunt. namque ex nimia subtilitate ueterum, qui tunc iura condiderunt, eo res perducta est, ut uel qui minimum errasset, litem perderet.
>
> But all of these *legis actiones* gradually become unpopular. For because of the excessive punctiliousness of those who then established the law, matters were carried so far that someone who made the slighted mistake lost his case.
>
> Gaius, *Inst.* 4.30; trans. after Zulueta

I limit myself to two observations about these passages. First, even here, in a passage that deplores the rigidity of the *legis actiones*, there is already visible a convention whereby a first-order term in statute, namely, trees, is treated as synecdochic of a second-order category or genus—"plants," I suppose—of which the non-tree object at issue in any given dispute is also a particular or species. The legitimacy of this move is purchased via an historical sleight of hand that attributes this conception of language to the authors of the XII Tables, for it is the *lex* itself that is described as using the term "trees" in order to speak *generaliter*.[13]

13 For a sketch of Roman legal argument and language—and argument about language—in this domain, see C. Ando, *Roman Social Imaginaries. Language and Thought in Contexts of*

My second observation concerns something that is *not* stated here, namely, that the production and especially the publication of the *legis actiones* were originally understood as democratic acts. For example, in his *Handbook* Pomponius interprets the history as follows:

> Deinde ex his legibus eodem tempore fere actiones compositae sunt, quibus inter se homines disceptarent: quas actiones ne populus prout vellet institueret certas solemnesque esse voluerunt: et appellatur haec pars iuris legis actiones, id est legitimae actiones.
>
> Then about the same time actions-at-law were composed out of these statutes [i.e., the laws of the Twelve Tables], on the basis of which people could resolve their disputes among themselves. To prevent the citizenry from initiating litigation any old how, the lawmakers' will was that the actions-at-law be in fixed and solemn terms; and this branch of law has the name *legis actiones*, that is, statutory actions-at-law.
>
> Pomponius, *Encheiridion* frag. 178 Lenel = *Dig*. 1.2.2.6; trans. after G. de St. Croix

Both Gaius and Pomponius imagine legal history as determined by developments endogenous to legal institutions but above all as responding to exogenous pressures. Likewise, each thematizes issues of knowledge of law, legal legitimacy, formalism and justice. It is in keeping with their concern for legitimacy that Pomponius and, to a point, Gaius understand the *legis actiones* to have operated by giving procedural form to postulates of positive law enacted in the Twelve Tables. To my mind, this is obviously a fig leaf, genuflecting before some ideological principle of the simultaneous legitimacy of all unabrogated statutes. Nevertheless, the point remains that it had once been possible to understand the entire tradition of establishing and publicizing the *legis actiones* via statute—of using fixed and certain wording to solve a problem of knowledge of law—as democratic rather than pernicious. In this perspective, that the *legis actiones* eventually needed to be replaced was due not to some fault in their composition or even in the intent of those "who then established the law," but merely to the social change entailed by long passage of time.

Further reflection on these issues may be found in Gaius's contemporary Aulus Gellius, whose *Attic Nights* is our best contemporary source for the his-

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Empire (Toronto 2015), 29–51; for a very different account, reaching different conclusions, see F. Schulz, *Principles of Roman Law*, trans. M. Wolff (Oxford 1936), 40–65.

tory of Roman jurisprudence of the early imperial period. One of his tales—perhaps the most famous in the tradition of literary reflection on the law[14]—derives from the Augustan jurist Antistius Labeo, namely, the anecdote about Lucius Veratius, who made sport of the law after the fashion of Sextus Aebutius as ventriloquized by Cicero. Sextus Aebutius, as we have seen, was imagined by Cicero to flaunt the lack of any remedy at law for Caecina, despite the avowed injustice of Aebutius' action. Veratius made sport of the law in a slightly different fashion:

> Itaque cum eam legem quoque vester in libris, quos Ad Duodecim Tabulas conscripsit, non probaret: quidam, inquit, L. Veratius fuit egregie homo inprobus atque inmani vecordia. Is pro delectamento habebat, os hominis liberi manus suae palma verberare. Eum servus dequebatur ferens crumenam plenam assium; ut quemque depalmaverat, numerari statim secundum Duodecim Tabulas quinque et viginti asses iubebat. Propterea, inquit, praetores postea hanc abolescere et relinqui censuerunt iniuriisque aestumandis reciperatores se daturos edixerunt.
>
> "And therefore your friend Labeo also, in the work that he wrote *On the Twelve Tables* [Huschke–Seckel–Kübler fr. 25], expressing his disapproval of that law, says: 'One Lucius Veratius was an exceedingly wicked man and of cruel brutality. He used to amuse himself by striking free men in the face with his open hand. A slave followed him with a purse full of *asses*; as often has he had buffeted anyone, he ordered twenty-five *asses* to be counted out at once, according to the provision in the Twelve Tables. Therefore,' he said, 'the praetors afterwards decided that this law was obsolete and invalid and declared that they would appoint arbiters to appraise damages.'"
>
> Gellius 20.1.13; trans. after Rolfe

In the Lucius Veratius, the source of his power was not that he thought he had discovered a loophole in the language of statute, but that a rigid adherence to its terms exposed to mockery the diminution in value in real terms of the monetary penalty imposed by the law for simple assault.

The anecdote from Labeo is told by Favorinus in the course of a long conversation between the sophist and the jurist Sextus Caecilius, in which they

14 For a brilliant reading of this text see A.Z. Bryen, 'Crimes against the individual: violence and sexual crimes', in Du Plessis, Ando and Tuori, 2016, op. cit. (n. 2), 322–332.

discuss how to understand legal change in relation to changes in language and mores. The arguments that Gellius attributes to Favorinus and Sextus Caecilius deserve attention, representing as they do a development on that employed by Labeo. That said, I am more interested in the other examples cited by the speakers in Gellius, for the framework of evaluation attributed to them also marks a development on Augustan jurisprudence:

> Sed non levis existimator neque aspernabilis est populus Romanus, cui delicta quidem istaec vindicanda, poenae tamen huiuscemodi nimis durae esse visae sunt; passus enim est leges istas de tam inmodico supplicio situ atque senio emori. Sicut illud quoque non humaniter scriptum improbavit, quod, si homo in ius vocatus morbo aut aetate aeger ad ingrediendum invalidus est, arcera non sternitur, sed ipse aufertur et iumento imponitur atque ex domo sua ad praetorem in comitium nova funeris facie effertur.
>
> Favorinus: "But the Roman people is a judge neither insignificant nor contemptible, and while they thought such crimes ought to be punished, they yet believed that punishments of that kind were too severe; for they have allowed the laws that prescribed such excessive penalties to die out from disuse and old age. Just so they considered it also to be not humanely prescribed that, if a man has been summoned to court, and being disabled through illness or years is too weak to walk, 'on a covered wagon he need not be spread'; but the man is carried out and placed on a beast of burden and conveyed from his home to the praetor in the *comitium*, as if he were a living corpse."
>
> Gellius 20.1.10–11; trans. after Rolfe

> "Quod si ita est, ut dico et ut ipse aequitatis habitus demonstrat, taliones illae tuae reciprocae argutiores profecto quam veriores fuerunt."
>
> Caecilius: "But if this is as I say, and as the condition of fairness itself dictates, those mutual retaliations that you imagined were certainly more ingenious than real."
>
> Gellius 20.1.35; trans. after Rolfe

It is a minor point, but Labeo is described as offering judgment on the character of Lucius Veratius: he was an *egregie homo inprobus atque inmani vecordia*. By contrast, although Favorinus and Caecilius disagree on the origin and location of the apparent severity of the law, they share a framework of substantive moral

evaluation in light of which statute law, and rigid procedural acquiescence to it, should be assessed.

A final example derives from Hadrianic jurist Julian, and concerns testamentary succession. Wills are of course linguistic instruments, and they present to courts many of the same challenges of interpretation as were presented by the language of statute, and to them the jurists bring many of the same solutions. Hence, if we agree that a gap yawns between the *voluntas* of the testator (as between the *vis* of the law) and the effects that will issue from rigid adherence to the language of the will (as to statute), we require *both* conventional justifications for departing from that language, *and* conventional means for obtaining the result that we desire:

> Si ita scriptum sit: "si filius mihi natus fuerit, ex besse heres esto: ex reliqua parte uxor mea heres esto. si vero filia mihi nata fuerit, ex triente heres esto: ex reliqua parte uxor heres esto," et filius et filia nati essent, dicendum est assem distribuendum esse in septem partes, ut ex his filius quattuor, uxor duas, filia unam partem habeat. Ita enim secundum voluntatem testantis filius altero tanto amplius habebit quam uxor, item uxor altero tanto amplius quam filia. licet enim suptili iuris regulae conveniebat ruptum fieri testamentum, attamen cum ex utroque nato testator voluerit uxorem aliquid habere, ideo ad huiusmodi sententiam humanitate suggerente decursum est, quod etiam Iuventio Celso apertissime placuit.
>
> If a will was drawn up as follows, "If a son is born to me let him be heir in respect of two thirds, let my wife be heir in respect of the remaining part; but if a daughter is born to me, let her be heir to the extent of a third; let my wife be heir in respect of the remaining part," and both a son and a daughter were born, the decision must be that the whole inheritance should be divided into seven parts, so that the son gets four of them, the wife two, and the daughter one. For in this way, in accordance with the wishes of the testator, the son will have as much again as the wife and the wife as much more again as the daughter. For although it was agreed that by a nice rule of law the will was broken, yet, as the testator wished his wife to have something against both children, humanity suggests that a decision of this kind should be reached, which very clearly had the approval also of Juventius Celsus.
>
> Julian, *Digesta* bk. 29 frag. 420 Lenel = *Dig*. 28.2.13.pr.; trans. W.M. Gordon

The contrast between *subtilitas*, procedural or interpretive punctiliousness, and *humanitas* (in this case), or *benignitas* or *aequitas* (in others), gets to the

heart of my problem, and there may be just enough evidence to reveal a gradual change in the nature of the argument made by Romans about these problems.[15] In the case of Roman theory about law at Rome, arguments over the relationship between procedural and substantive justice develop via reflection on social change. The earliest considerations of the issue concern narrowly justiciability and incommensurate punishments; they might therefore be said to focus on issues of legal legitimacy. But these debates give way by the Antonine period to a moral vocabulary that invokes standards of substantive justice, even among those, like Sextus Caecilius, who insists that neither the age of the decemviri nor his own was more just than the other. In his view, they are simply different. Furthermore, the arguments of the jurists in justification of their own practices of interpretation at the level of theory can be shown to follow upon the self-understanding of legal writers at Rome when they reflected on law-in-action.

3 Choice of Law, Legal Legitimacy and Substantive Justice in Provincial Contexts

I want now to trace a similar arc from the early first century BCE to the Antonine period, commencing with documents that arise from law-in-action before turning to theorizations on practice performed at Rome. I start with the *Tabula Contrebiensis* of 87 BCE.[16] The inscription records the outcome of a legal procedure designed by the Roman governor Gaius Valerius Flaccus to resolve a dispute between two communities in Spain, the Sosinestani and Allavonenses, over the rights of one party to sell land and grant rights to dig a water channel to a third party. The procedure designed by Flaccus was based on the formulary procedure employed at Rome in private (civil-law) disputes: he wrote a formula, to wit, an authoritative description of the issues under dispute, and then appointed of a body of judges to hear the case and resolve exactly the questions framed in the formula. I focus on two aspects of the formula, namely, the meaning of the fiction in lines 6–8, and also its relationship to the *praeiudicium* of ll. 1–5:

15 H. Hasmaninger, 'Subtilitas Iuris', in H.-P. Benöhr (ed.), *Iuris Professio. Festgabe für Max Kaser zum 80. Geburtstag* (Vienna 1986), 59–72.

16 A text, translation and admirable exposition may be found in J.S. Richardson, 'The *Tabula Contrebiensis*: Roman law in Spain in the early first century BC', *Journal of Roman Studies* 73 (1983), 33–41.

1 Senatus Contrebie[n]sis quei tum aderunt iudices sunto. sei par[ret ag]rum quem Sallvienses
2 ab Sosinestaneis emerunt rivi faciendi aquaive ducendae causa qua de re agitur Sosinestanos
3 iure suo Sallviensibus vendidisse inviteis Allavonensibus; tum sei ita parret eei iudices iudicent
4 eum agrum qua de re agitur Sosinestanos Sallviensibus iure suo vendidisse sei non parr[e]t iudicent
5 iure suo non vendidisse.

6 Eidem quei supra scriptei sunt iudices sunto. sei Sosinestana ceivitas esset tum qua Sallviensis
7 novissume publice depala[r]unt, qua de re agitur, sei [i]ntra eos palos Sallviensis rivom per agrum
8 publicum Sosinestanorum iure suo facere liceret aut sei per agrum preivatum Sosinestanorum

(1–5) Let those of the Senate of Contrebia who shall be present at the time be judges. If it appears, with regard to the land that the Salluienses purchased from the Sosinestani for the purpose of making a canal or channeling water, which matter is the subject of the dispute, that the Sosinestani were within their rights to sell it, although the Allavonenses were unwilling, then, if it so appears, let the judges judge with regard to the land which is the subject of the dispute that the Sosinestani were within their rights to sell it to the Salluienses; if it does not so appear, let them judge that they were not within their rights to have sold it.

(6–8) Let the same persons who are written above be judges. If it is supposed that ⟨there is, in fact, a Sosinestan *civitas*⟩, then, in the place where the Salluienses recently and officially put in stakes, which matter is the subject of this action, if it would be permissible for the Salluienses within their rights to lead a canal within those stakes through the public land of the Sosinestani …

The overall procedure is, of course, Roman. Many understand it on analogy with the formulary process, insofar as joinder of issue was conducted before the magistrate, while the trial itself was conducted before *iudices* appointed by him, and that is held to be a remarkable and noteworthy thing. Nor do I dispute this, though there is in fact every reason to believe that many trials before provincial governors were conducted in precisely this way. This text is remark-

able because it is early, and because it concerns a matter of public law. All that to one side, I focus on the fiction because, on my reading, it addresses the questions of what standards of justice and rules of evidence are to be applied by the judges in this case. The answer supplied by the fiction is that they are those of the Sosinestan *civitas*, whose status as an autonomous polity with its own law-making institutions is contingently resolved by the fiction.[17]

On this reading, the fiction might be understood as a violent intervention in the case, resolving as it does precisely the issue apparently disputed by the Allavonenses, who are revealed by the *praeiudicium* to have denied that the Sosinestani were within their rights in selling the land in the first place (line 3). But of course the fiction of the autonomy of the Sosinestani only becomes operative once the judges have ruled on the *praeiudicium*: in the cascading sequence of conditionals that make up the *formula*, the (indigenous) judges must first settle the question of whether the Sosinestani were within their rights to sell. On this reading, the fiction in the *intentio* performs two tasks: it glances back to the question posed in the *praeiudicium* and so acknowledges the protest of the Allavonenses; it then allows the case to proceed only under the condition of a ruling in the affirmative on the question that they have deemed paramount. The fiction might therefore appear tautological or simply pleonastic. To my mind, it is both clever and correct. This reading has the benefits of treating the Latin of the *fictio* as saying what it most obviously does and of bringing the two parts of the formula into close convergence with one another.

Substantively, then, the fiction is intended to resolve the question of choice of law. That the Romans had long reflected on principles of choice of law in situations of international private law is clear from the treaties that Rome struck with Carthage, and a mature language for discussing and resolving such issues is eminently on display in the *Senatus consultum de Asclepiade* of the year 78.[18] In that text, individuals who are denominated friends of the Roman people are given the right to forum-shop, namely, to take their dispute either to a court in the city of their citizenship, or a nearby city, or to have it heard by the Roman governor, according to their view of which jurisdiction's positive law was most favorable to them. My point is simply that the Tabula Contrebiensis exhibits in a particularly clear fashion a sophisticated capacity to distinguish

17 For specialists, I acknowledge that I understand the nature of the fiction differently than do Birks, Rodger and Richardson: P. Birks, A. Rodger and J.S. Richardson, 'Further aspects of the *Tabula Contrebiensis*', *Journal of Roman Studies* 74 (1984), 45–73.

18 A. Raggi, 'Senatus consultum de Asclepiade Clazomenio sociisque', *Zeitschrift für Papyrologie und Epigraphik* 135 (2001), 73–116.

the technicalities of procedure from choice of law, even when, as in this case, the standards are those of positive law rather than substantive justice.

The practice attested by these texts of the late republic is given normative description in Antonine texts of the second century in two significant respects. The first is the definition of *ius civile* provided at the opening of Gaius' *Institutes*:

> Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur: nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.
>
> All peoples who are governed by statutes and customs observe partly their own peculiar law and partly the common law of all human beings. The law that each people establishes for itself is peculiar to it, and is called *ius civile*, being, as it were, the special law of that *civitas*, that community of citizens, while the law that natural reason establishes among all human beings is followed by all peoples alike, and is called *ius gentium*, being, as it were, the law observed by all peoples.
>
> Gaius, *Inst* 1.1

The heart of Gaius's claim is contained in the distributive and reflexive pronouns *quisque* and *sibi*: *ius civile* denotes those bodies of law that each political community makes *for itself*. No evaluative framework—no transcendent standard of substantive justice—is offered to adjudge between these codes of law. The operative assumption would seem to be that local social orders are best secured by adherence to locally-generated norms, and, as a related matter, the legitimacy of those codes of law is underwritten by a commitment to democratic authorization.

With these remarks in mind, let us turn to a similar Roman account, that provided by the jurist Julian of the sources of norms to which Roman governors should have recourse when functioning as a court of the first instance in provincial contexts. If the relevant statute is available in written form, that has preference by default. Hence, Julian specifies a cascading series of norms only when written law fails:

> De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc

> quod proximum et consequens ei est: si nec id quidem appareat, tunc ius, quo urbs Roma utitur, servari oportet.
>
> What ought to be held to in those cases where we have no applicable written law is the practice established by customs and usage. And if this is in some way deficient, we should hold to what is closest to and entailed by such practice. If even this is obscure, then we ought to apply the law which the city of Rome uses.
>
> Julian, *Digesta* bk. 84 fr. 819 Lenel = *Dig*. 1.3.32.pr.; trans. G. de St. Croix

Here it is essential to attend to what is *not* specified as relevant to adjudication, and that is justice: *iustitia* is not cited, nor is reference made to *humanitas*, nor should one deliberate *benigne*, nor proceed *ex bono et aequo*. As with Gaius's resolute parallelism of codes of citizens' law, which derive their legitimacy solely from their authorization via local law-making institutions, so for Julian, the norms to be applied by Roman courts are those of positive or customary law, or such principles of conduct as can be abstracted from patterns in conventional practice. No normative framework, whether of morality or transcendent justice or what have you, is cited with which one might evaluate those norms prior to their application to the case at hand.

Nevertheless, already in the age of Julian, a discourse and practice of evaluating specific local practices, and in particular of judging specific cases, by standards of substantive justice was starting to emerge.[19] One of the most notable early cases is known via its citation in the petition of Dionysia.[20] Dionysia filed a petition with the prefect of Egypt sometime after 27 June 186, seeking resolution to a dispute with her father, in part of which her father insisted upon his right, grounded in local law, to order her daughter to divorce her husband against her will. The text has been the subject of some superb scholarship, but some of its details nevertheless repay further attention. In particular, Dionysia's petition is notable not simply for her own commitment to textualism, but

19 For an exemplary study of a related problematic, with different emphases than my own, see C. Kreuzsaler and J. Urbanik, 'Humanity and inhumanity of law: the case of Dionysia', *Journal of Juristic Papyrology* 38 (2008), 119–155: 142–153. They focus on appeals to humanity and especially inhumanity as moral values that enable revision or abrogation of law, but their exploitation of both Roman and provincial evidence is wholly consonant with the form and thrust of my own text.

20 On the petition of Dionysia see C. Kreuzsaler, 'Dionysia vs. Chairemon: ein Rechtstreit aus dem römischen Ägypten', in U. Falk, M. Luminati, and M. Schmoeckelin (eds.), *Fälle aus der Rechtgeschichte* (Munich 2008), 1–13; and especially Kreuzsaler and Urbanik 2008, op. cit. (n. 19).

that of nearly every actor in the system to whom she alludes. So, for example, Dionysia cites an extract from a hearing before the prefect Titianus in the twelfth year of Hadrian concerning divorce, in which the judgment of Titianus is that the preference of the woman should determine where she lives. Dionysia next cites a hearing before Paconius Felix, *epistrategus* of the Sebennyte nome, from the eighteenth year of Hadrian, where *an interpretation* is offered, or, you might say, a rationale is ascribed to Titianus in so ruling: he had not wanted to follow "the inhumanity of the law" (*P.Oxy*. 2.237, col. 7, ll. 34–35: μὴ ἠκολουθεκέναι τῇ τοῦ νόμου ἀπανθρωπίᾳ). In no extant text does Titianus himself justify his judgment in these terms: this is a matter of what we might call rational reconstruction on the part of another official, who needs to use an earlier judgment. He might have done so via narrowly analogical argumentation. He chooses instead to abstract from the earlier judgment—which is to say, he ascribes to the holder of jurisdiction in that earlier situation—a concern for transcendent principles of substantive justice. That is a wholly different basis for establishing precedental value.

We see similar justifications emerge even in what we might call public law contexts, or, at least, in contexts of policy regarding public law, in just this period. Its condition makes it impossible to know the context in which it intervenes or its exact date—it has been assigned by various critics anywhere from the reign of Hadrian to the reign of Antoninus Pius; its condition likewise precludes a continous translation. Nevertheless, the inscription from Nicomedia published as *TAM* 4.1.3 clearly imagines conditions under which the local *boulê* acts unjustly, μὴ δικαίως (l. 5):

[----------]
[----------]ντο [διά]ταγμα διὰ τὸ τοὺς πολλο[ὺς------]
[----------γ]λώσσης τὸ περὶ τοὺς πληστηρ[ιάζοντας---]
[----------]ν ἀναγκαῖόν ἐστιν καὶ οἱ παρόν[τες--------]
[----------]ρως ἔχοντες οὐκ ἔφασκον ἀλλο[----------]
[----------]ξαι, εἴ τινος ἡ βουλὴ μὴ δικαίως [----------]
[----------] ἀνθυπάτους ἐκκαλῆσθαι, μη [----------]
[----------] βουλευταῖς κατὰ τῶν θορυβούντ[ων ------]
[----------]ως νομίζετε, ἔστιν, ἀλλὰ στάσ[εις ----------]
[---------- θο]ρυβήσαντα οἱ ἄρχοντες εἰς τ[----------]
[----------] βούλοιτο καταγορεῖν [----------]
[----------]

What is more, it is apparently precisely the fact of an unjust decision by the local council that is imagined to motivate an appeal to Rome (l. 6). That is to

say, in line 5, a conditional commences, "If the city council unjustly …," while in line 6 an appeal is made to the proconsular governor. Select words in the rest of the text suggest varied forms of local political disturbance or even upheaval, but the details elude us. Nevertheless, either we must imagine that Rome concerned itself with the possibility that the local decision violated local norms, or it here invokes a transcendent—a substantive—notion of justice, as a framework of evaluation for the operation of local institutions of government.

4 Conclusion: Procedural Justice, Roman-Style

I have surveyed legal argument at Rome and in the provinces from the first century BCE to the Antonine period, and I have suggested that each displays a limited form of chronological development, toward the rise to salience of appeals to substantive justice over against procedural correctness or positive or immanent law, with their separate commitments to democratic notions of legal legitimacy. But no such history can be unitary, particularly as the relationship between procedure and positive law in the Roman formulary process was so complex.[21] What is more, procedural justice is not defined by a concern merely for procedural correctness, but for transparency, fairness and so forth. I would therefore like to close by reminding us that the Romans also sought to actualize standards of justice through the imposition of standards of procedure, most notably in criminal law. The most famous example derives from the governorship of Antoninus Pius in the province of Asia, as it is cited by Marcian and apparently elaborated upon by himself and later emperors:

> Sed et caput mandatorum exstat, quod divus Pius, cum provinciae Asiae praeerat, sub edicto proposuit, ut irenarchae, cum adprehenderint latrones, interrogent eos de sociis et receptatoribus et interrogationes litteris inclusas atque obsignatas ad cognitionem magistratus mittant. igitur qui cum elogio mittuntur, ex integro audiendi sunt, etsi per litteras missi fuerint vel etiam per irenarchas perducti. sic et divus Pius et alii principes rescripserunt, ut etiam de his, qui requirendi adnotati sunt, non quasi pro damnatis, sed quasi re integra quaeratur, si quis erit qui eum arguat. et

21 See, e.g., the hugely insightful observation by Birks, Rodger and Richardson 1984, op. cit. (n. 17), 60: 'Nowadays we easily think of pleading and procedure as matters separable from the substance of the law. But under the formulary system, the texts of the formulae were the foundations of substantive law, and innovation in their wording was the principal means by which that substantive law was changed.'

ideo cum quis anakrisin faceret, iuberi oportet venire irenarchen et quod scripserit, exsequi: et si diligenter ac fideliter hoc fecerit, collaudandum eum: si parum prudenter non exquisitis argumentis, simpliciter denotare irenarchen minus rettulisse: sed si quid maligne interrogasse aut non dicta rettulisse pro dictis eum compererit, ut vindicet in exemplum, ne quid et aliud postea tale facere moliatur.

There is indeed extant a chapter of the rules that the deified Pius issued under his edict when he was governor of the province of Asia: that irenarchs, when they had arrested robbers, should question them about their associates and those who harbored them, include their interrogatories in letters, seal them, and send them for the attention of the magistrate. Therefore, those who are sent [to court] with a report [of their interrogation] must be given a hearing from the beginning although they were sent with documentary evidence or even brought in by the irenarch. The deified Pius and other emperors have written in rescripts to this effect: that even in the case of those who are listed as wanted, if anyone appears to prosecute one [of these], they should not be treated as condemned but as though a charge were being laid afresh. Accordingly, when someone carries out an examination, the irenarch should be ordered to attend and to go through what he wrote. If he does this painstakingly and faithfully, he should be commended; if [he does it] with insufficient skill and not with thorough reasoning, [the judge] simply notes that the irenarch has rendered an inadequate report; but if [the judge] finds that his interrogation was in any way malicious, or that he reported things that were not said as if they had been said, he should impose an exemplary punishment, to prevent anyone else trying anything of the kind afterward.

Marcian, *De iudiciis publicis* bk. 2 frag. 204 Lenel = *Dig*. 48.3.6.1; trans. O. Robinson

On the representation provided by Marcian, the edict of Pius imposed procedural standards on non-Roman communities, at least in those cases where a Roman court would serve as court of the first instance. The purpose of those standards is then clarified by the commentary provided by Pius as emperor (along with unnamed others), whose attention in this text focuses on the moral character of the irenarch as it is actualized and then revealed through procedure. It is the irenarch who is the object of the magistrate's *anakrisis*; it is the irenarch who might act *diligenter ac fideliter* and so earn praise; or *parum prudenter non exquisitis argumentis*; or even *maligne*, reporting things not as they were said, and so earn punishment *in exemplum*.

The case of criminal law is of course special: in criminal jurisdiction, it is common to say that power was taken out of the hands of local officials because Rome sought to monopolize the right to authorize the use of force in violent punishment. But it would perhaps also be accurate to say that in criminal law, local officials were instrumentalized in order to extend the reach of the Roman state. That being so, the non-hierarchical modes of recognition practiced by Rome in respect of systems of civil law could not be sustained in criminal law.

That said, discourses on justice in civil and criminal law, both Roman and provincial, have similar trajectories in the high Roman empire, and even similar chronologies. This must surely result in part from cognitive pressures that inhere in metropolitan epistemes within pluralist empires. The full unfolding of that history is, of course, ongoing.

CHAPTER 9

Zwischen Theorie und Wirklichkeit: Römische Sicherheitsgesetze und ihre Realisierung

Peter Herz

Wenn man einem griechischen Intellektuellen des 2. Jahrhunderts n. Chr. wie Aelius Aristides unbedingt Glauben schenken möchte, dann muss das Imperium Romanum während seiner Lebenszeit ein wahres Paradies auf Erden gewesen sein. So macht uns Aristides in seinem Panegyricus *Eis Romen* mit einem Imperium Romanum vertraut, dessen Lebensumstände eher an das Goldene Zeitalter der Mythen erinnern als dass es einen Platz in der Realität hätte.[1] Ausgangspunkt für meine Überlegungen sind die beiden folgenden Abschnitte aus dieser großen Rede:

> (66) οὕτω καὶ πένεσι καὶ πλουσίοις εἰκότως τὰ παρόντα καὶ ἀρέσκει καὶ συμφέρει, καὶ ἄλλως οὐ λέλειπται ζῆν. καὶ γέγονε μία ἁρμονία πολιτείας ἅπαντας συγκεκληκλυῖα, καὶ τὸ πρόσθεν δοκοῦν οὐ δυνατὸν εἶναι συμβῆναι συνῆλθεν ἐφ' ὑμῶν, κράτος ἀρχῆς ἅμα καὶ μεγάλης γε ⟨κατέχειν⟩ καὶ οὐκ ⟨ἄνευ⟩ φιλανθρωπίας ἄρχειν ἐγκρατεῖς.
>
> (66) So sind die bestehenden Verhältnisse naturgemäß sowohl für die Armen als auch die Reichen befriedigend und nützlich, und eine andere Art zu leben gibt es nicht. So hat sich eine einzige Harmonie staatlicher Ordnung entwickelt, die alle einschließt, und was früher offensichtlich nicht zusammentreffen konnte, hat sich unter euch vereinigt: Ihr seid fähig, zugleich die Macht über ein Reich, und dazu ein gewaltiges, auszuüben und es nicht ohne Menschenfreundlichkeit (φιλανθρωπία) zu beherrschen.

1 R. Klein, *Die Romrede des Aelius Aristides. Einführung* (Darmstadt 1981) und ders., *Die Romrede des Aelius Aristides*, herausgegeben, übersetzt und mit Erläuterungen versehen (Darmstadt 1983); P. Desideri, F. Fontanella, *Elio Aristide e la legittimazione greca dell'impero Romano* (Bologna 2013). Immer noch grundlegend J.H. Oliver, *The Ruling Power. A Study of the Roman Empire in the Second Century After Christ Through the Roman Oration of Aelius Aristides* (Philadelphia 1953) (Paperback Nachdruck o. O. 2013).

 | DOI:10.1163/9789004400474_010

> (67) οὕτω δὴ καθαραὶ μὲν φρουρῶν πόλεις, μόραι δὲ καὶ ἴλαι ἀποχρῶσιν ἐθνῶν ὅλων εἶναι φυλακή, καὶ οὐδ' αὗται κατὰ τὰς πόλεις ἐν ἑκάστῳ τῶν γενῶν πολλαὶ ἱδρυμέναι, ἀλλ' ἐν ἀριθμῷ τῶν ἄλλων ἐνεσπαρμέναι ταῖς χώραις, ὥστε πολλὰ τῶν ἐθνῶν ἀγνοεῖν ὅπου ποτ' ἐστιν αὐτοῖς ἡ φρουρά. εἰ δὲ που πόλις δι' ὑπερβολὴν μεγέθους ὑπερῆσκε τὸ δύνασθαι σωμφρονεῖν καθ' αὐτήν, οὐδὲ τούτοις ἐφθονήστατε τῶν ἐπιστησομένων τε καὶ διαφυλαζόντων …
>
> (67) So sind die Städte frei von Besatzungen, Kohorten und Reiterabteilungen genügen zur Beaufsichtigung ganzer Provinzen, und nicht einmal jene sind in größerer Menge auf die Städte der einzelnen Stämme verteilt, sondern sie leben entsprechend der übrigen Bevölkerung verstreut im Land, so dass viele der Provinzen gar nicht wissen, wo ihre Besatzung steht. Wenn aber irgendwo eine Stadt wegen ihrer übermäßigen Größe aus eigener Kraft die Ordnung nicht aufrechterhalten kann, so habt ihr auch dieser die Leute, die sie regieren und schützen sollen, nicht vorenthalten …

In den Augen eines Aelius Aristides repräsentierte die hier geschilderte Ordnung der Welt einen geradezu paradiesischen Zustand. Und, ohne dass er dies ausdrücklich ausspricht, wird sehr deutlich, dass es sich dabei in seinen Augen um einen Zustand handelt, an dem man tunlichst nicht rühren sollte. Zu den bedeutenden Denkern, die Aelius Aristides Glauben schenkten und daher diesem phantastischen Bild etwas auf den Leim gegangen sind, gehörte auch keine geringere Persönlichkeit wie Edward Gibbon, der u. a. auf der Grundlage eines Aelius Aristides die Epoche der Antonine zu einer der glücklichsten Epochen in der Geschichte der Menschheit deklarierte.[2]

Es sollte aber zum alltäglichen Handwerkszeug eines Historikers gehören, solche globalen Aussagen, vor allem wenn sie ein so strahlendes Bild einer Epoche zu vermitteln suchen, kritisch zu hinterfragen und das von ihnen präsentierte Bild mit zusätzlichen Informationen zu konfrontieren, die von anderen Quellen bereitgestellt werden. Daher möchte ich dieses Bild zunächst mit einem Zeugnis aus dem Lykien des späten 2. Jh. konfrontieren:

> Imperator Caesar Marcus Aurelius Commodus Antoninus Pius Felix Augustus Sarmaticus Germanicus maximus Britannicus, *Sohn des* divus Marcus Antoninus Augustus Germanicus Sarmaticus [*es folgt die gesamte*

2 Ed. Gibbon, *Verfall und Untergang des römischen Imperiums 1*, aus dem Englischen von M. Walter (Darmstadt 2016), 106.

Abfolge der Vorfahren bis auf Kaiser Nerva], pontifex maximus, *im 15. Jahr seiner* tribunicia potestas, *mit der 8. Imperatorischen Akklamation, zum sechstenmal* consul, pater patriae, *grüßt die Archonten und die boulé und den Rat der Bouboneoi.*

Ich habe euch wegen eures Mutes und eurer Tapferkeit gelobt und habe den gemeinsamen Beschluß des lykischen Volkes angenommen, daß ihr mit einem solchen Mut zur Ergreifung der Räuber aufgebrochen seid, sie besiegt und einen Teil von ihnen getötet, einen anderen Teil lebendig gefangen genommen habt. Diesbezüglich hat euch das Koinon der Lykier richtig die passende Ehre erwiesen, euch noch eine Stimme dazuzuerteilen, wodurch ihr noch berühmter werden müsstet, und es hat auch die anderen mutiger gemacht zu solchen Heldentaten. Daher habe ich auch den Antrag des gemeinsamen Beschlusses bestätigt und euch erlaubt, fortan unter die Städte mit einem dreifachen Stimmrecht gezählt zu werden.

Die Gesandtschaft hatte Meleager, Sohn des Meleager, Enkel des Artemon, zweimal unternommen. Lebt wohl![3]

Die Gemeinde von Bubon hatte also mit ihren eigenen Ressourcen erfolgreich den Versuch unternommen, nicht genauer charakterisierte Räuber zu verfolgen und auszuschalten. Die Gemeinde hatte damit in ihrer eigenen Verantwortung und wohl auch auf ihre eigenen Kosten eine Aufgabe geschultert, die an sich in fast allen (antiken und modernen) Staaten zu den Kernaufgaben der staatlichen Autorität zählt: die Aufrechterhaltung der öffentlichen Sicherheit mit polizeilichen Mitteln.

Der Fall von Bubon stellt aber offensichtlich kein singuläres Ereignis dar, sondern wie die juristische Literatur dieser Epoche andeutet, dürfte es sich hier eher um den Regelfall der lokalen Sicherheitsarbeit und nicht um die Ausnahme gehandelt haben. Dies wird deutlich, wenn der Jurist Marcianus im *liber* 2 seines Werkes ‚*De iudiciis publicis*' problemlos auf ein *edictum* zurückgreifen kann, das der spätere Kaiser Antoninus Pius während seiner Amtszeit als *proconsul Asiae* (135/136?) verkündet hatte.[4] (see also pp. 153–154).

3 Fr. Schindler, *Die Inschriften von Bubon, Nordlykien*, SBAW 278 III, Wien 1972, 12–23 Nr. 2 = Bull. épigr. 1973, 451 = AE 1979, 624 = Freis 111. Die von mir verwendete Übersetzung ist die von H. Freis, *Historische Inschriften zur römischen Kaiserzeit von Augustus bis Konstantin* (Darmstadt 1984) (Texte zur Forschung 49), Nr. 111.

4 Vgl. dazu A. Nogrady, *Römisches Strafrecht nach Ulpian. Buch 7 bis 9 De officio proconsulis* (Berlin 2006) (Freiburger rechtshistorische Abhandlungen Neue Folge 52), 28 ff.

> Sed et caput mandatorum exstat, quod divus Pius, cum provinciae Asiae praeerat, sub edicto proposuit, ut irenarchae, cum adprehenderint latrones, interrogent eos de sociis et receptatoribus et interrogationes litteris inclusas atque obsignatas ad cognitionem magistratus mittant. Igitur qui cum elogio mittuntur, ex integro audiendi sunt, etsi per litteras missi fuerint vel etiam per irenarchas perducti (…). Et ideo cum quis ἀνάκρισιν faceret, iuberi oportet venire irenarchen et, quod scripsit, exsequi; et si diligenter ac fideliter hoc fecerit conlaudandum eum. si parum prudenter non exquisitis argumentis, simpliciter denotare irenarchen minus rettulisse; sed si maligne interrogasse aut non dicta retulisse pro dictis eum comperit, ut vindicet in exemplum, ne quid et aliud postea tale facere moliatur.
>
> Es existiert aber noch der Anfang der mandata, die der vergöttliche (Antoninus) Pius, als er die provincia Asia verwaltetete, in der Form eines Ediktes veröffentlichte. Demnach sollten die Irenarchen, wenn sie Übeltäter festgenommen hätten, diese über ihre Komplizen und Hintermänner ausfragen und die schriftlichen und unterzeichneten Verhörprotokolle zur Untersuchung durch den Magistraten senden. Folglich sollen diese (scil. die Übeltäter) mit dem Schreiben überstellten (Übeltäter), erneut gehört werden, obwohl sie zusammen mit einem Schreiben überstellt wurden oder sogar durch den Irenarchen (persönlich) überführt wurden (…). Und daher ist es notwendig, wenn jemand eine ἀνάκρισις durchführt, dass er den Irenarchen kommen lässt und das, was dieser geschrieben hat, überprüft. Und wenn er dies sorgfältig und getreulich gemacht hat, dann soll man ihn loben. Wenn er es weniger weise gemacht hat, dann soll man dies nicht in ausgewählten Formulierungen, sondern ganz einfach festhalten und den Irenarchen darauf hinweisen und sich weniger darauf beziehen. Wenn er aber feststellt, dass er allerdings etwas mit übler Absicht untersucht hat und etwas, was nicht ausgesagt wurde, als etwas gemeldet hat, was ausgesagt wurde, dann soll er ihn exemplarisch bestrafen, damit er es nicht wagt, später etwas anderes in dieser Art zu machen.
>
> Dig. 48.3.6.1

Aus dem hier geschilderten und durchaus differenzierten Verfahren wird sehr deutlich, dass die Hauptlast der Polizeiarbeit ebenso wie die Bekämpfung der lokalen Unruhen von der römischen Provinzialverwaltung überhaupt nicht selbst verantwortet wurde, sondern freundlicherweise auf die Schultern der lokalen Verantwortlichen abgeladen worden war. Das hier beschriebene Verfahren war wohl ursprünglich, wie der Verweis auf das *edictum* des Antoninus

Pius deutlich macht, lediglich für die *provincia Asia* eingeführt worden. Allerdings macht die Art und Weise, wie dieses *edictum* später von Marcianus in seiner eigenen Erörterung eingeführt wurde, deutlich, dass wir hier wahrscheinlich eine Art von Blaupause für die analoge Anwendung dieser Vorschriften auf andere Provinzen vor uns haben.

Damit beginnen allerdings die Schwierigkeiten, denn selbst die *provinca Asia* präsentierte sich keineswegs als ein homogenes Territorium, das durchgehend durch ein engmaschiges Netz von städtisch organisierten Gemeinden kontrolliert werden konnte. Denn es gab, abgesehen von den großen kaiserlichen und senatorischen Domänen,[5] mit deren Existenz wir in dieser Weltgegend rechnen müssen, einige Bereiche im Binnenland, bei denen man vermuten darf, dass selbst in den spätesten Phasen der römischen Herrschaft der Grad der Urbanisierung und damit auch die damit einhergehende Kontrolle durch Sicherheitskräfte bestenfalls rudimentär gewesen sein dürfte.[6] Die Sicherheitsprobleme in vielen anderen Regionen des Imperium Romanum, in denen es selbst nach Jahrhunderten nicht gelungen war, eine an Städten orientierte staatliche Struktur zu entwickeln, soll nur kurz erwähnt werden.[7]

Aber selbst die Existenz von Städten garantierte nicht unbedingt für Sicherheit. Dies beweist der berühmte Brief des Augustus an die Gemeinde Knidos (see also pp. 129–130). Hier wird deutlich, dass es den lokalen Autoritäten kaum möglich war, starke lokale Kräfte mit ihren Eigeninteressen wirksam unter Kontrolle zu halten.[8] Man kann dem in einer Inschrift überlieferten Text dieses Briefes entnehmen, dass es offensichtlich zwischen zwei angesehenen Fami-

5 Vgl. u. a. Th. Corsten, *Bauern und Bürger. Einflußmöglichkeiten von Landbesitzern auf das städtische Leben des kaiserzeitlichen Kleinasiens*, in: F. Lerouxel, A.-V. Pont (Edd.), *Propriétaires et citoyens dans l'Orient romain* (Bordeaux 2016) (Ausonius 84), 261–273. M. Christol, *Les domaines de Claudii Severi en* Asie Mineure, in: F. Lerouxel, A.-V. Pont (Edd.), *Propriétaires et citoyens dans l'Orient romain* (Bordeaux 2016) (Ausonius 84), 275–287.

6 Vgl. dazu C. Brélaz, *La sécurité publique en Asie Mineure sous le Principat (1er–IIIème s. ap. J.-C.). Institutions municipales et institutions impériales dans l'Orient romain* (Basel 2005) (Schweizerische Beiträge zur Altertumsiwssenschaft 32) 52 ff. Für die allgemeine Entwicklung vgl. S. Mitchell, *Anatolia. Land, Men, and Gods in Asia Minor I. The Celts in Anatolia and the Impact of Roman Rule* (Oxford 1993). Ebenso für die Motive, römische *coloniae veteranorum* anzulegen: B. Levick, *Roman Colonies in Southern Asia Minor* (Oxford 1967), 21 ff. Für die ländliche Unsicherheit vgl. R. MacMullen, *The Enemies of the Roman Order. Treason, Unrest, and Alienation in the Empire* (London, New York 1992), 255–268.

7 Dazu P. Herz, *Das Entstehen einer Provinz. Gedanken zum römischen Recht und zur römischen Politik*, in: U. Lohner-Urban, P. Scherrer (Hrsg.), *Der obere Donauraum 50 v. Chr. bis 50 n. Chr.* (Berlin 2015), 185–197.

8 R.T. Sherk, *Roman Documents from the Greek East. Senatus Consulta and Epistulae to the Age of Augustus*, (Baltimore 1969), 341–345 Nr. 67.

lien dieser Gemeinde zu heftigen Streitigkeiten gekommen war. Im Verlauf dieses Streites hatten die beiden Söhne der einen Familie versucht, das Haus ihres Gegners zu stürmen, wobei einer der Söhne ums Leben gekommen war. Obwohl dies offenkundig durch einen Akt der Selbstverteidigung geschehen war, war die Familie des Getöteten nicht bereit gewesen, dies so einfach zu akzeptieren, und hatte versucht, diese Tat als Mord durch ein Gericht ahnden zu lassen.[9] Selbst als ein Vertreter des Augustus die Angelegenheit persönlich untersucht hatte, hatten die Verwandten des Getöteten nicht aufgegeben und hatten das Verfahren bis zu einer Entscheidung in letzter Instanz, d. h. durch Augustus selbst, vorangetrieben.

Aus diesem Verfahren wird deutlich, dass die lokalen Kontrollmechanismen spätestens dann nicht mehr funktionieren konnten, wenn die Vertreter der Führungsschicht untereinander zerstritten waren oder deren privaten Interessen wie in diesem Fall unmittelbar betroffen waren. Spätestens dann war die Funktionsfähigkeit dieser Gemeinde ernsthaft in Frage gestellt.

Diese hier erkennbaren strukturellen Defizite waren den Verantwortlichen in Rom sicherlich bekannt. Sie haben allerdings die römische Zentralregierung zu keiner Zeit daran gehindert, an ihre lokalen Repräsentanten Erwartungen zu richten, die nur wenig an der Realität vor Ort orientiert waren. Deutlich wird dies in der Einleitung des Werkes ‚*De officio proconsulis*', in der der Jurist Ulpianus am Beispiel der Aufgaben eines Provinzstatthalters die Grundzüge des römischen Herrschaftsmodels erläutert.[10]

> congruit bono et gravi praesidi curare, ut pacata atque quieta provincia sit quam regit
>
> es geziemt sich für einen guten und respektablen Statthalter, Sorge dafür zu tragen, daß die Provinz, die er regiert, befriedet und ruhig ist.
>
> Dig. 1.18.13 pr. (lib. vii off. procos.)

Wenn man Ulpianus Glauben schenken möchte, dann war ein solcher Zustand für einen in seinem Sinne guten Provinzstatthalter recht leicht zu erreichen, denn er fährt dann fort:

> quod non difficile obtinebit, si sollicite agat, ut malis hominibus provincia careat eosque conquirat: nam et sacrilegos, latrones, plagiarios, fures con-

9 Die Kapitalgerichtsbarkeit konnte nicht eigenverantwortlich von einem lokalen Gericht ausgeübt werden, sondern fiel natürlich in die Kompetenz des *proconsul Asiae*.

10 T. Honoré, *Ulpian. Pioneer of Human Rights* (Oxford 2002).

> quirere debet et prout quisque deliquerit in eum animadvertere, receptores eorum coercere, sine quibus latro duitius latere non potest.
>
> dies wird er ohne Schwierigkeit erreichen (können), wenn er so handelt, dass die Provinz keine schlechten Menschen hat und er diese aufspürt. Denn er mussß die Tempelschänder, die Übeltäter, die Menschenräuber und die Diebe festnehmen und aburteilen, so wie es jeder nach seinem Vergehen verdient, und ihre Hintermänner in den Griff bekommen, ohne die sich kein Übeltäter längere Zeit verbergen kann.[11]

Diese sehr allgemein gehaltenen Staatsziele finden sich auch noch in zwei weiteren juristischen Quellen aus der severischen Periode ausformuliert. So kann Marcianus im 14. Buch seiner *institutiones* festhalten:

> Mandatis autem cavetur de sacrilegiis, ut praesides sacrilegos latrones plagiarios conquirant et ut, prout quisque deliquerit, in eum anmadvertant.
>
> In den Anweisungen wird über die Schänder von Heiligtümern bestimmt, dass die Provinzstatthalter die Tempelschänder, die Räuber und die Menschenräuber ermitteln und über sie ein Urteil fallen sollen, so wie es jeder von ihnen verdient.
>
> Dig. 48.13.4.2

In noch knapperer Form findet sich dieser Grundsatz bei Paulus ausformuliert (*liber xiii ad Sabinum*).

> Nam et in mandatis principum est, ut curet is, qui provinciae praeest, malis hominibus provinciam purgare …
>
> Denn auch in den Dienstanweisungen (*mandata*) der Kaiser steht, dass derjenige, der eine Provinz führt, (diese) Provinz von schlechten Menschen reinigen soll.
>
> Dig. 1.18.3

11 Mit ‚*coercere*' wird ein wesentlicher Bestandteil der statthalterlichen Befehlsgewalt angesprochen, also das Recht, zur Durchsetzung eines Befehls Zwangsmittel einsetzen zu dürfen (*ius coercitionis*).

Wir dürfen wohl davon ausgehen, dass der hier deutlich gewordene Widerspruch zwischen dem sehr optimistisch formulierten Katalog an Anforderungen und der Realität nicht nur einem modernen Historiker, sondern auch den damals verantwortlichen Personen ins Auge fiel. Wie ist man also vorgegangen, um zumindest ein gewisses Äquilibrium zwischen einem solchen Anspruch und seiner Realisierung zu erreichen?

Einen gewissen Einblick liefert dazu ein sehr umfangreicher *titulus* im Corpus Iuris Civilis, der der ‚*Lex Iulia de vi publica*' gewidmet ist.[12] Dieser Abschnitt ist unter zwei Aspekten bemerkenswert. Er macht uns zunächst mit einer sehr großen Bandbreite an Straftatbeständen vertraut, die allesamt regelmäßig mit dem Einsatz von physischer Gewalt verbunden waren. Zur gleichen Zeit offenbart er auch etwas, was man als administrativen Generalverdacht gegenüber den eigenen Untertanen bezeichnen könnte. Offensichtlich hegten die römischen Autoritäten grundsätzlich den Verdacht, dass ihre Untertanen kaum bereit waren, ihre eigenen Streitigkeiten friedlich, d. h. etwa in den Formen eines regulären Gerichtsverfahrens, beizulegen, sondern eher dazu tendierten, gleich zu den Mitteln des Faustrechtes zu greifen. Man musste also auf Seiten der römischen Verwaltung davon ausgehen, dass es unmöglich sein würde, eine im Sinne der römischen Staates ‚friedliche' Lebenssituation herzustellen, ohne gleichzeitig für die Missachtung der Regeln die schwersten Strafen anzudrohen.

Diese Einstellung wird besonders deutlich, wenn man etwa die Ausführungen des Juristen Marcianus, also eines Vertreters der severischen Zeit, zum Besitz und Einsatz von Waffen prüft.

> Lege Iulia de vi publica tenetur, qui arma tela domi suae agrover inve villa praeter usum venationis vel itineris vel navigationis coegerit.
>
> Nach der *lex Iulia* über die öffentliche Gewalt wird derjenige belangt, der Schutz- und Trutzwaffen in seinem Haus oder auf seinem Land oder in seinem Landgut hinausgehend über den Gebrauch bei der Jagd oder auf der Reise oder für die Seefahrt angesammelt hat.
>
> Dig. 48.6.1 (Marcianus libro xiv institutionum)

Neben dem wahrscheinlich eher theoretisch bleibenden Versuch, neben wenigen genau spezifizierten Ausnahmen bereits den bloßen Besitz von Waffen grundsätzlich unter eine Strafandrohung zu stellen, ist dabei interessant, dass

12 Dig. 48.6 (*passim*).

man auf Seiten der Juristen bei vielen Tatbeständen des Strafrechtes fast wie selbstverständlich davon ausging, dass bei einer solchen Gelegenheit sofort Waffen oder etwas allgemeiner gesprochen, physische Gewalt zum Einsatz kommen könnte. Dabei scheint der Gesetzgeber nicht nur an Waffen im klassischen Sinne gedacht zu haben, sondern wie eine Stelle aus den Paulus-Sentenzen (*liber v de sententiis*) deutlich macht, dachte man dabei an alle Gegenstände, mit denen ein dazu entschlossener Mensch einem anderen Menschen körperlichen Schaden zufügen konnte.

> Telorum autem appellatione omnia, ex quibus singuli homines nocere possunt, accipiuntur.
>
> Unter der Bezeichnung ‚*tela*' wird alles verstanden, mit dem einzelne Menschen Schaden zufügen können.
>
> Dig. 48.6.11.1

Die Grenzen zwischen einer heftigen verbalen Auseinandersetzung und der direkten Drohung, physische Gewalt einzusetzen, scheinen in der Realität sehr fließend gewesen zu sein. Dies galt offensichtlich nicht nur für Auseinandersetzungen zwischen zivilen Parteien, sondern es hat ganz den Anschein, dass selbst die Vertreter der staatlichen Autorität unter der ständigen Bedrohung leben mussten, Opfer von offener Gewalt zu werden.

Denn anders lässt sich kaum die staatliche Drohung verstehen, durch die sich bereits die Behinderung eines Gerichtsverfahrens oder generell die Behinderung eines Amtsträgers bei der Ausübung seiner Amtspflichten zu einer Anklage nach der *lex Iulia de vi publica* auswachsen konnte. Ulpianus hat dazu einen ausführlichen Katalog an möglichen Delikten in seinem Edikt-Kommentar überliefert (*liber lxviii ad edictum*).

> Qui dolo malo fecerit, quo minus iudicia tuto exercantur aut iudices ut oportet iudicent vel is, qui potestas imperiumve habebit, quam ei ius erit, decernat imperet faciat; qui ludos pecuniamve ab aliquo invite polliceri publice privatimve per iniuraim exegerit; item qui cum telo dolo malo in contione fuerit aut ubi iudicium publice exercebitur. Exceptus est, qui propter venationem habeat homines, qui cum bestiis pugnent, ministros ad ea habere conceditur.
>
> Wer mit schlechtem Vorsatz bewirkt, dass weniger sicher Urteile vollstreckt werden oder Richter, so wie es notwendig ist, recht sprechen, oder dass derjenige, der eine Amtsgewalt (*potestas*) oder ein Imperium besit-

zen wird, wenn er das Recht ⟨dazu⟩ besitzt, ⟨etwas⟩ entscheidet, befiehlt oder macht.

Wer von jemand gegen dessen Willen durch Unrecht erzwingt, dass er öffentlich oder privat verspricht, dass er Spiele oder Geld geben werde.

Ausgenommen ist derjenige, der wegen (der Abhaltung) Tierhetzen Menschen besitzt, die mit wilden Tieren kämpfen. Zu diesem Zweck ist es erlaubt, ⟨solche⟩ Diener zu haben.

(1) Hac lege tenetur et qui convocatis hominibus vim fecerit, quo quis verberetur et pulsetur.

Nach diesem Gesetz wird auch derjenige bestraft, der mit zusammengerufenen Menschen Gewalt ausübt, durch die jemand verprügelt oder gestoßen wird.

(2) Damnato di vi publica aqua et igni interdicitur.

Einer Person, die wegen öffentlicher Gewalt verurteilt wurde, wird der Gebrauch von Wasser und Feuer untersagt [d.h. er wird aus der römischen Bürgerschaft ausgestoßen = der Schuldige wurde hingerichtet].

Dig. 48.6.10

Unter diesen sehr strikten Rahmenbedingungen konnten viele damals gesellschaftlich durchaus akzeptierte soziale Verhaltensformen, die in einem modernen Strafrecht relativ leicht bestraft werden würden, sehr schnell dazu führen, dass man sich plötzlich mit einer Kapitalstrafe bedroht sah. Denn die Bestimmungen dieses Gesetzes waren so allgemein formuliert und wohl auch ganz bewusst so breit angelegt worden, dass bereits eine spontane, aber nicht genehmigte Zusammenrottung einer größeren Menschenmenge auf öffentlichen Plätzen völlig ausreichen sein konnte, um einen Straftatbestand zu konstituieren, bei dem die öffentliche Gewalt mit allen Mitteln bis hin zur Verhängung der Kapitalstrafe einschreiten konnte.[13]

13 Wie brutal die römischen Autoritäten in solchen Fällen vorgehen konnten, beweisen die massenhaft verhängten Todesurteile nach den Unruhen unter den Gracchen oder dem Volkstribunat des Saturninus. Vgl. dazu immer noch J. Ungern-Sternberg von Pürkel, *Untersuchungen zum spätrepublikanischen Notstandsrecht. Senatusconsultum ultimum und hostis-Erklärung* (München 1970), 29 ff.

Suetonius überliefert dazu in seiner Vita des Tiberius einen bezeichnenden Vorfall aus der italischen Stadt Pollentia, der sogar zum Einsatz von regulären Truppen in dieser Gemeinde führte.[14]

> cum Pollentia plebs funus cuiusdam primipilaris non prius ex foro misisset quam extorta pecunia per vim heredibus ad gladiatorium munus, cohortem ab urbe et aliam a Cotti regno adsimulata itineris causa detectis repente armis concinentibusque signis per diversas portas in oppidum immisit ac partem maiorem plebei ac decurionum in perpetua vincula coiecit.
>
> Als einmal die Volksmasse von Pollentia nicht zugelassen hatte, daß sich der Leichenzug für einen Primipilaren eher vom Marktplatz in Bewegung setzen konnte, bis sie den Erben durch die Androhung von Gewalt Geld zur Veranstaltung eines Gladiatorenspiels abgetrotzt hatte, ließ er [scil Tiberius] eine Kohorte von Rom aus, eine andere aus dem Königreich des Cottius losmarschieren, ohne den Grund für den Marsch zu offenbaren. Plötzlich ließ er sie in voller Kampfbewaffnung und mit Signalen, die zum Angriff bliesen, durch die Tore in die Stadt einmarschieren. Einen großen Teil der Volksmasse und der Gemeinderäte ließ er auf Lebenszeit ins Gefängnis werfen.
>
> Sueton Tib. 37.3

Ein solches Vorkommnis, wie es hier von Sueton beschrieben wird, hätte nach den Kriterien, die wir bei Ulpianus finden, problemlos als strafwürdiges Vergehen nach der *lex Iulia de vi publica* eingestuft werden können, d. h. es wäre im Prinzip jederzeit möglich gewesen, nicht nur eine lebenslängliche Gefängnisstrafe, sondern auch die Hinrichtung zumindest der Wortführer anzuordnen. Wahrscheinlich schreckte man aber etwas vor diesem sehr radikalen Schritt zurück, denn die Tatsache, dass offensichtlich nicht nur die *plebs* der Stadt, sondern auch ein Teil des Stadtrates von Pollentia in diese Affaire verwickelt gewesen war und auch deswegen anschließend bestraft wurde, macht deutlich, dass es bei dieser heftigen öffentlichen Auseinandersetzung wahrscheinlich um wesentlich mehr als nur um die Abhaltung von Spielen ging. Es steckte also wahrscheinlich deutlich mehr hinter diesem Vorfall als uns Suetonius berichten kann. Es ist dabei eine durchaus mögliche Variante, dass der unbekannte

14 H. Galsterer, ‚Politik in römischen Städten. Die ‚seditio' des Jahres 59 n.Chr. in Pompeii', in: W. Eck, H. Galsterer, H. Wolff (Hrsg.), *Studien zur antiken Sozialgeschichte. Festschrift Friedrich Vittinghoff* (Köln, Wien 1980), 323–338.

primipilaris, dessen feierliches Begräbnis von der aufgebrachten Volksmasse zunächst verhindert wurde, entweder zu seinen Lebzeiten oder in seinem Testament seiner Heimatgemeinde die Abhaltung von *ludi gladiatorii* versprochen hatte und sich seine Erben jetzt geweigert hatten, dieses Versprechen umzusetzen.

Die römische Zentralregierung war bei solchen Ausbrüchen lokaler Gewalt durchaus in der Lage, differenziert darauf zu reagieren. Dies beweisen zwei Ereignisse aus der Regierungszeit Kaiser Neros, von denen Tacitus berichtet. Das erste Ereignis betraf die Gemeinde Pompeii.

> (1) Sub idem tempus levi contentione orta atrox caedes colonos Nucerinos Pompeianosque gladiatorio spectaculo, quod Livineius Rufus, quem motum senatu rettuli, edebat, quippe oppidana lascivia in vicem incessente probram dein saxa, postremo ferrum sumpsere. validiore Pompeianorum plebe, apud quos spectaculum edebatur, ergo deportati sunt in urbem multi e Nucerinis trunco per vulnera corpore, ac plerique liberorum aut parentum mortes deflebant.
>
> (2) cuius re iudicium princeps senatui, senatus consulibus permisit, et rursus re ad patres relata, prohibiti publice in decem annos eius modi coetu Pompeiani collegiaque, quae contra leges instituereant, dissolute; Livineius et qui alii seditionem conciverant exilio multati sunt.

> (1) Etwa um diese Zeit ereignete sich aus kleinen Streitigkeiten zwischen den Bürgern von Nuceria und Pompeii ein schreckliches Gemetzel und zwar bei einem Gladiatorenspiel, das Livineius Regulus, von dem ich berichtet habe, dass er aus dem Senat entfernt worden war, gab. Weil die städtische Unbeherrschtheit sich gegenseitig anheizte, griffen sie (erst) zu Beschimpfungen, dann zu Steinen, dann zu Waffen (ferrum), wobei die plebs der Pompeianer, bei denen dieses Schauspiel veranstaltet wurde, die Oberhand behielt. Daher sind viele von den Nucerinern, deren Körper durch Wunden entstellt waren, in die Stadt (Rom) gebracht worden und viele beweinten den Tod ihrer Kinder oder Eltern.
>
> (2) Das Urteil in dieser Sache überließ der Kaiser dem Senat, der Senat den Konsuln. Und diese berichteten wiederum dem Senat. Den Pompeianern wurden auf zehn Jahre öffentliche Zusammenkünfte dieser Art untersagt und es wurden die Vereine aufgelöst, die sie gegen die Gesetze eingerichtet hatten. Livineius und die anderen, die diesen Aufstand angezettelt hatten, wurden mit der Exilierung bestraft.
>
> Tac. Ann. 14.17

Die Besonderheit des Vorgehens in diesem Fall und auch die vergleichsweise milden Strafen, immerhin waren ja Menschen getötet worden, wird noch deutlicher, wenn man das Verhalten des Kaisers mit seinem Verhalten aus dem Vorjahr vergleicht.

> Isdem consulibus auditae Puteolanorum legationes, quas diversas ordo plebs ad senatum miserat, illi vim multitudinis, hi magistratuum et primi cuiusque avaritiam increpantes. eaque seditio ad saxa et minas ignium progressa ne c⟨aed⟩dem et arma proliceret, C. Cassium adhibendo remedio delectus. quia severitatem eius non tolerabant, precante ipso ad Scribonios fratres ea cura transfertur, data cohorte praetoria, cuius terrore et paucorum supplicio rediit oppidanis concordia.
>
> Unter denselben Konsuln wurden Gesandtschaften der Puteolani gehört, die Rat und Volk getrennt zum Senat entsandt hatten. Jene beklagten die Gewalt der Masse, jene die Habgier der Magistrate und der ersten (Bürger). Damit sich dieser Aufstand, die sich schon zum Steinewerfen und zur Drohung, Feuer zu legen, fortentwickelt hatte, nicht Mord und Totschlag hervorrufe, wurde C. Cassius ausgewählt, um Heilung zu bringen. Weil sie aber seine Strenge nicht ertragen konnten und weil er selbst darum bat, wurde diese Aufgabe auf die Gebrüder Scribonius übertragen. Diesen wurde eine Prätorianerkohorte mitgegeben. Durch die Furcht vor dieser und die Hinrichtung von einigen wenigen Leuten wurde den Stadtbewohnern die Eintracht wiedergegeben.
>
> Tac. *Ann.* 13.48

Wir haben zwei Beispiele für schwere Unruhen in italischen Gemeinden und zur gleichen Zeit zwei völlig unterschiedliche Behandlungen für solche Probleme. In Pompeii war die höchste Strafe das Exil für die Verantwortlichen, obwohl es während der Unruhen eine ganze Reihe von Todesopfern gegeben hatte. In Puteoli hingegen wurden Todesurteile verhängt, obwohl die dortigen Unruhen noch im Anfangsstadium (Drohungen und Steinwürfe) gewesen waren. Wie können wir diese Diskrepanz in der Strafzumessung erklären und was sagt uns dies über die Praxis der römischen Strafgerichtsbarkeit?

Zunächst scheint dies dafür zu sprechen, dass ein römischer Richter einen relativ großen Ermessensspielraum bei der Frage hatte, wie er eine Straftat bewertete und welches Strafmaß er für angemessen hielt. Er war nicht gehalten, unbedingt eine bestimmte Strafe zu wählen, sondern er konnte sich innerhalb eines relativ großen Spielraumes entscheiden.

Ein weiterer Punkt, der hier wahrscheinlich eine bedeutende Rolle spielte, dürfte der rechtliche Status der beteiligten Personen gewesen sein. In Pompeii handelte es sich bei allen Personen, die an den Unruhen beteiligt gewesen waren, eindeutig um römische Bürger, während wir in einer großen Hafenstadt wie Puteoli wahrscheinlich mit einem sehr hohen Anteil von Leuten *peregrini iuris* in der lokalen Bevölkerung rechnen müssen. Es gibt sehr viele Indizien für die Vermutung, dass die römische Strafjustiz bei der Bestrafung von Nichtrömern wesentlich weniger Bedenken hatte, zu der Höchststrafe zu greifen (see also pp. 222–223).

Ein weiterer Punkt, der hier wahrscheinlich eine wichtige Rolle spielte, betrifft die Zusammensetzung der an diesen Streitigkeiten beteiligten Parteien. In Puteoli richteten sich die Proteste der Bevölkerung gegen die Stadtregierung. Dies bedeutet, dass sie damit die etablierte staatliche Ordnung nicht nur in dieser Stadt in Frage stellten. Dies erklärt auch den massiven Einsatz von militärischer Gewalt durch die zentralen Institutionen des römischen Staates. Die Unruhen in Pompeii waren zwar bedauerlich gewesen, sie hatten sich aber nicht gegen staatliche Institutionen gerichtet. Diese sehr unterschiedliche Strafzumessung entspricht zwar nicht unbedingt den Normen unseres modernen Rechtsempfindens, nach dem vor dem Gesetz alle Menschen gleich sein sollten, doch dies war sicherlich nicht die damals vorherrschende Rechtsauffassung.

Der ausufernde Einsatz von Gewalt war nicht nur auf die Städte beschränkt, sondern er scheint auch durchaus im ländlichen Raum üblich gewesen zu sein, um etwa Streitigkeiten zwischen Nachbarn zu lösen. Dieses deuten die entsprechenden Zeugnisse bei Marcianus (*liber xiv institutionum* = Dig. 48.6.3.2 und 6) und Paulus an (*liber v de sententiis* = Dig. 48.6.11). Dabei scheinen die hier angesprochenen Personen Angehörige der ländlichen Oberschicht gewesen zu sein, die ihre Streitigkeiten auf diesem Weg lösten.

Marcianus

> (2) In eadem causa est, qui pessimo exemplo convocatu seditione villas expugnaverit et cum telis et armis bona rapuerit.
>
> (6) Eadem lege tenetur, qui hominibus armatis possessorem domo agrove suo aut navi sua deiecerit expugnaverit.

> (2) „Unter dasselbe Gesetz fallen (auch) diejenigen, die in einem äußerst schlechten Beispiel bei einer Zusammenrottung oder bei einem Aufstand Landgüter erobern oder mit Waffengewalt Besitztümer rauben".
>
> (6) „Nach eben diesem Gesetz wird derjenige belangt, der mit bewaff-

neten Männern einen Besitzer aus seinem Haus oder Land oder von seinem Schiff herauswirft oder vertreibt."

Paulus

Hi, qui aedes alienas aut villas expilaverint effregerint expugnaverint, si quid in turba cum telis fecerint, capite puniuntur.

„Diejenigen, die fremde Gebäude oder Landgüter plündern, aufbrechen oder erobern, werden mit der Todesstrafe bestraft, wenn sie dies in einer Gruppe mit Waffen tun sollten".

An diesem Punkt unserer Diskussion müssen wir uns auch einmal den folgenden Fragen stellen: 1. Warum war das Gewaltpotential in der Gesellschaft des Imperium Romanum überhaupt so hoch? 2. Warum ließ sich dieses Gewaltpotential nur so schwer kontrollieren bzw. im Sinne der römischen Gesetzgeber in ‚zivilisierte' Bahnen lenken? Ich habe dazu eine Reihe von Argumenten zusammengestellt, die in ihrer Summe mögliche Erklärungswege aufzeigen können.

1. Es existierte in dieser Zeit ein sehr hohes Niveau der sozialen und wirtschaftlichen Ungleichheit.[15]
2. Für die Masse der damaligen Bevölkerung galt, dass sie wahrscheinlich in der Regel unter höchst prekären Umständen ihr Leben fristen musste, d. h. diese Menschen lebten permanent knapp am Existenzminimum.[16]
3. Es gab in allen Schichten der Bevölkerung eine große latente Bereitschaft, vorhandene Meinungsverschiedenheiten in gewaltsamen Formen zu artikulieren und auszutragen.[17]
4. Es gab auf allen Ebenen der staatlichen Verwaltung (Einzelgemeinde, Provinz) nur ein sehr eingeschränktes Instrumentarium an Mitteln, um den staatlichen Anspruch auf Gewährleistung der öffentlichen Sicherheit wirklich durchsetzen zu können.[18]

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15 Vgl. Etwa M. Prell, *Armut im antiken Rom* (Stuttgart 1997) (Beiträge zur Wirtschafts- und Sozialgeschichte 77).

16 B. Tenger, *Die Verschuldung im römischen Ägypten (1.–2. Jh. n.Chr.)* (St. Katharinen 1993) (Pharos 3). E. Schaub, *Studien zur Lebenssituation der Bevölkerung Ägyptens als Ursache der Revolten unter römischer Herrschaft. 30 v.Chr. bis 300 n.Chr.* (Rahden 2014) (Pharos 31).

17 Für Ägypten vgl. A.Z. Bryen, *Violence in Roman Egypt. A Study in Legal Interpretation* (Philadelphia 2013). Vgl. Auch M. Gaddis, *There is No Crime for Those Who Have Christ. Religious Violence in the Christian Roman Empire* (Berkeley, London, Los Angeles 2005).

18 W. Nippel, *Public Order in Ancient Rome* (Cambridge 1995). Ch.J. Fuhrmann, *Policing*

5. Selbst nach Jahrhunderten der römischen Herrschaft befanden sich große Bereiche des Imperium Romanum immer noch in einem eher präurbanen Stadium einer kulturellen Entwicklung, d. h. dort lebte eine vorwiegend nomadische bzw. seminomadische Bevölkerung. In diesem Stadium der Entwicklung stellte der Einsatz von physischer Gewalt ein allgemein akzeptiertes Instrument dar, um Streitigkeiten auszutragen.
6. Es gab in der damaligen Gesellschaft latent schwere interne Spannungen zwischen den unterschiedlichsten ethnischen und/oder religiösen Gruppierungen, deren Konflikte in der Regel gewaltsam ausgetragen wurden.[19]

Wir können also durchaus konstatieren, dass es einen eklatanten Widerspruch zwischen dem offiziell vertretenen Anspruch, Sicherheit und Frieden für alle Untertanen zu garantieren, und den Möglichkeiten gab, diese Ziele auch wirklich zu realisieren. Ganz im Gegenteil sprechen viele Indizien für die Vermutung, dass es außerhalb der größeren Städte und der großen Verkehrsmagistralen eine große Sphäre gab, in der wir durchaus von einem Zustand der weitgehenden Rechtsfreiheit sprechen können.

Spätestens wenn die etablierte staatliche Ordnung durch Krisen geschwächt war, zeigt sich sehr deutlich, dass sich unter der polierten Oberfläche der ‚Pax Romana' viele Konflikte verbargen, die vorher lediglich kaschiert worden waren, jetzt aber nicht mehr mit den Mitteln eines rigorosen Strafrechts kontrolliert werden konnten. Dies wird erstmals während der Krisenjahre unter der Regierung von Marcus Aurelius erkennbar, als etwa der hochrangige Offizier Valerius Maximianus auf dem Südbalkan gegen den Hirtenstamm der Brisei vorgehen musste oder sich das latente Unruhepotential der einheimischen Bukoloi in Ägypten zeigte.[20]

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the Roman Empire. Soldiers, Administration, and Public Order (Oxford 2012). E. Künzl, *Achtung Lebensgefahr! Die Legende von der inneren Sicherheit im antiken Rom* (Mainz 2016).

19 Für die Streitigkeiten etwa der Juden mit den Angehörigen anderer ethnischer bzw. religiöser Gruppen vgl. etwa die Ereignisse in Caesarea Maritima zu Beginn des großen jüdischen Aufstandes (Ios. BJ 2.266 ff.) oder die ständigen Auseinandersetzungen zwischen Juden und Nichtjuden in Alexandria. Dazu vgl. Philons Schrift ‚In Flaccum'. Für das jüdische Alexandria vgl. die Beiträge in T. Georges, F. Albrecht, R. Feldmeier (Hrsg.), *Alexandria* (Tübingen 2013).

20 Für Valerius Maximiaus vgl. AE. 1956, 124, Zeile 15 f.: *praeposito vexillationibus et ad detrahen/dam Briseorum latronum manum in confinio Macedon*(*iae*) *et T*(*h*)*rac*(*iae*). Für die Bukoloi vgl. K. Blouin, *Triangular Landscapes. Environment, Society, and the Stae in Nile Delta under Roman Rule* (Oxford 2013).

Es waren aber keine externe Feinde des Reiches, die man hier bekämpfen musste, sondern Teile der einheimischen Bevölkerung, die man nicht länger unter Kontrolle halten konnte. Dies alles unterstreicht nachdrücklich, dass zwischen der offiziell propagierten Sicherheit und der Realität doch ein großer Unterschied bestand.

PART 3

Justice for All?

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CHAPTER 10

Geschlechterrollen im römischen Erbrecht im Spiegel des zeitgenössischen Gerechtigkeitsverständnisses und am Beispiel der *lex Voconia*

Elena Köstner

1 *Exempla*, Gerechtigkeit und ihre kohäsive Wirkkraft

Jede Zeit hat ihre sozialen Normen und Wertvorstellungen und das spiegelt sich wieder in der zeitgenössischen Gesetzgebung und im Verständnis von Gerechtigkeit. Neue Gesetze können gewöhnlich als Reaktion auf bereits erfolgte Entwicklungen gesehen werden. Der Gesetzgeber reagiert damit auf soziale, ökonomische und politische Veränderungen. Das trifft auch auf das römische Erbrecht zu. Der Fokus meiner Untersuchung liegt dabei auf dem römischen Konzept von Weiblichkeit, das in Gesetzen zum römischen Erbrecht – im Besonderen im Fall der *lex Voconia* – ersichtlich wird sowie auf seiner Reflexion im zeitgenössischen Gerechtigkeitsverständnis.

Im römischen Kulturkreis existierte eine ausgeprägte Ambivalenz der Genderverhältnisse: Die römische Gesellschaft war patriarchalisch organisiert, was sich einerseits in ihren Gesetzen widerspiegelt und darin, dass Frauen von bestimmten Bereichen der gesellschaftlichen Partizipation und Interaktion ausgeschlossen blieben (sehe auch der Beitrag von Pavon). So durften Frauen nicht wählen oder wählbar sein, keine Ämter in der *res publica* bekleiden oder in den Streitkräften tätig sei.[1] Jedoch haben Frauen am Wirtschafts- und

1 Vgl. *Dig*. 50.17.2pr.–1; N. Benke, ‚Gender and the Roman law of obligations', in Th.A.J. McGinn (Hrsg.), *Obligations in Roman Law, Past, Present, and Future*, Papers and Monographs of the American Academy in Rome 33 (Ann Arbor 2012), 215–246: 220; J.F. Gardner, ‚Gender-role assumptions in Roman law', *Echos du monde classique* 39 (1995), 377–400: 377–378; N. Benke und V.T. Halbwachs, Rezension zu G. Rizzelli, *Le donne nell' esperienza giuridica di Roma antica. Il controllo dei comportamenti sessuali. Una raccolta di testi, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 119 (2002), 472; C.W. van Galen, *Women and Citizenship in the Late Roman Republic and the Early Empire* (Nijmegen 2016), 51; Barbara Levick (‚Women and law', in: S.L. James und S. Dillon (Hrsg.), *A Companion to Women in the Ancient World* (Malden, Oxford, Chichester 2012), 96–106: 98) findet folgende Erklärung für den Ausschluss von Frauen von der Bekleidung öffentlicher Ämter: Als ursprünglich militärisch orientierte

 | DOI:10.1163/9789004400474_011

Rechtsleben partizipiert. Nach Nikolaus Benke wurden rechtliche Artikulationen erzeugt, die Frauen gegenüber Männern ausdrücklich unter Bezugnahme auf die Geschlechtszugehörigkeit unterschieden.[2] Als *sui iuris* war die römische Frau von *manus* oder *patria potestas* befreit und nur noch der *tutela mulierum* unterworfen, wobei dieses Kontrollinstrument nicht zu allen Zeiten regulierend eingriff. Sie war vermögens- und verpflichtungsfähig, d. h. sie konnte Eigentum besitzen und verkaufen, Verhandlungen tätigen und Verträge schließen. Diese Ambivalenz findet sich auch im römischen Erbrecht wieder. Seit der römischen Frühzeit und den Zwölf Tafeln hatten Frauen umfassende Rechte im Rahmen der gesetzlichen Erbfolge.[3] Die römische Erbrechtsordnung basierte auf der agnatischen Familienstruktur: Nach dem *ius civile* waren nur Agnaten (in erster Linie die *sui heredes*) erbberechtigt, falls kein Testament vorlag. Unter den *sui heredes* waren Söhne und Töchter des Erblassers gleichberechtigt. Doch kam es in der Folgezeit zu Einschränkungen, die u. a. mit dem Geschlecht der Erbin bzw. des Erben begründet wurden, wobei die Motive dafür vielmehr in sozialen und politischen Veränderungen zu suchen sind: „While the agnate system of succession lost considerable ground to the cognate, the structure of the Roman family and of Roman property-holding remained essentially patriarchal throughout the classical period."[4] Die Gesetze, die sich auf das testamentarische Erbrecht bezogen und die uns zumindest in Teilen überliefert sind, sind die *lex Furia, lex Voconia* und *lex Falcidia*. Ihr Anliegen war es, testamentarische Legate zu begrenzen. Der Interpretation des Gaius folgend sollte auf diese Weise das Familienvermögen konserviert und den Erben ein Minimum an Vermögen zugesichert werden.[5] Von diesen

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Gemeinschaft gestand Rom nur denjenigen politische Macht und Ämter zu, die für die Gemeinschaft gekämpft hatten oder kämpfen konnten und das waren Männer.

2 Vgl. *Dig*. 1.5.5pr., 1.5.9; Benke und Halbwachs 2002, a. a. O. (Anm. 1), 470; im Gegensatz dazu vgl. Detlef Liebs (‚Römische Gerechtigkeit durch fairen Prozess. Juristen mit Autorität und allgemeingültige Maßstäbe', in: I. de Gennaro (Hrsg.), *Value, Sources and Readings on a Key Concept of the Globalized World* (Leiden, Boston 2012), 57–82: 78–79), der Rom eine Gleichstellung von Männern und Frauen vor dem Gesetz attestiert, da agnatisch verwandte Frauen im Erbfall ebenso viel erbten wie Männer. Liebs Ansatz greift zu kurz, da er sich nur auf die gesetzliche, nicht aber auch auf die testamentarische Erbfolge fokussiert.

3 Vgl. XII Tab. 5.3–7.

4 J.F. Gardner, *Women in Roman Law and Society* (London, Sydney 1986), 163.

5 Vgl. Gai. *Inst*. 2.224–227; Cic. leg. 2.48–53; U. Wesel, ‚Über den Zusammenhang der *lex Furia, Voconia* und *Falcidia*', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 81 (1964), 308–316; J.F. Gardner, ‚Nearest and dearest: liability to inheritance tax in Roman families', in: S. Dixon (Hrsg.), *Childhood, Class and Kin in the Roman World* (London, New York 2001), 205–220: 213; J.F. Gardner, *Family and* Familia *in Roman Law and Life* (Oxford, New York 1998), Gardner 1998, a. a. O., 15–46; Van Galen 2016, a. a. O. (Anm. 1), 116–117, 177.

Gesetzen weist lediglich die *lex Voconia* eine weitere Klausel auf, nämlich ein Erbeinsetzungsverbot von Frauen, das jedoch nur Erblasser der 1. Censusklasse betraf.[6]

Zur Untersuchung von Genderrollen und zeitgenössischem Gerechtigkeitsverständnis möchte ich das Augenmerk auf die Nutzung von *exempla* in der historiographischen und juristischen Narration lenken, da diese in diesem Kontext eine nicht zu unterschätzende Rolle einnehmen. Es ist eine weit verbreitete und kulturübergreifende Tradition, mythische oder historische Figuren, Handlungen oder Ereignisse als *exempla* – Vorbilder bzw. Rollenbilder – zu nutzen, da ihnen ein spezifischer kultureller Habitus innewohnt, der helfen kann, gesellschaftliche Unterschiede und Umbrüche erklärbar zu machen.[7] Ein *exemplum* oder Vorbild ist also etwas oder jemand, das oder der kopiert werden kann. Es verkörpert ein Ideal mit normativem Charakter, das eingesetzt werden kann, um soziale Kohäsion herzustellen oder zu vertiefen.[8] Gleichzeitig werden von einem Vorbild tatsächlich nur ein oder zwei Verhaltensweisen bzw.

6 Vgl. Paul. *Sent*. 4.8.20; Gai. *Inst*. 2.274; Gardner 1986, a. a. O. (Anm. 4), 170–179; R. Vigneron und J.-F. Gerkens, ‚The emancipation of women in Ancient Rome', *Revue Internationale des droits de l'antiquité* 47 (2000), 107–121; J.A.J.M. van der Meer, *The* Lex Voconia*: Made for Men*. Mulier heres institui non potest (Eijsden 1996), 5–13, 23–43; A. Weishaupt, *Die* lex Voconia, Forschungen zum Römischen Recht 45 (Köln, Weimar, Wien 1999), 40–54; 107–116; N. Benke, Rezension zu A. Weishaupt, *Die lex Voconia*, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 119 (2002), 488–510; A. McClintock, ‚The lex Voconia and Cornelia's jewels', *Revue internationale des droits de l'antiquité* 60 (2013), 183–200: 186–188; B. Hopwood, ‚Livia and the lex Voconia', in E. Herring und K. Lomas (Hrsg.), *Gender Identities in Italy in the First Millenium BC* (Oxford 2009), 143–148; J.P. Hallett, *Fathers and Daughters in Roman Society, Women and the Elite Family* (Princeton 1984), 92–95; E. Baltrusch, Regimen morum*. Die Reglementierung des Privatlebens der Senatoren und Ritter in der römischen Republik und frühen Kaiserzeit*, Vestiga 41 (München 1989), 75–77; K. Verboven, *The Economy of Friends. Economic Aspects of* Amicitia *and Patronage in the Late Republic*, Collection Latomus 269 (Brüssel 2002) 221; S.B. Pomeroy, ‚The relationship of the married woman to her blood relatives in Rome', *Ancient Society* 7 (1976), 215–227: 222; R. Vigneron, ‚L' antiféministe loi Voconia et les "Schleichwege des Lebens"', *Labeo* 29 (1983), 140–153; J. Pölönen, ‚Lex Voconia and conflicting ideologies of succession, privileging agnatic obligation over cognatic family feeling', *Arctos* 33 (1999), 111–131; S. Dixon, ‚Breaking the law to do the right thing. The gradual erosion of the Voconian Law in Ancient Rome', *Adelaide Law Review* 9 (1985), 519–534; J.K. Evans, *War, Women and Children in Ancient Rome* (London, New York 1991), 75–76; A.J.B. Sirks, ‚Sacra, succession and the lex Voconia', *Latomus* 53 (1994), 273–296; S. Hähnchen, ‚Ratio Voconiana. Gedanken zur erbrechtlichen Benachteiligung', in: J.D. Harke (Hrsg.), *Facetten des römischen Erbrechts. Studien zur Geschichte und Dogmatik des Privatrechts* (Berlin, Heidelberg 2012), 35–54: 39–41, 46–48.

7 Vgl. S. Bell, ‚Role model in the Roman world', in: S. Bell und I.L. Hansen (Hrsg.), *Role Models in the Roman World. Identity and Assimilation* (Ann Arbor 2008), 1–40: 2.

8 Vgl. Bell 2008, a. a. O. (Anm. 7), 4; Liv. 1.10–11.

Charakteristika situationsspezifisch zur Nachahmung ausgewählt, weshalb sie eine stereotypisierte Konnotation erhalten. Werden *exempla* in eine Narration integriert, bieten diese moralische Orientierung, die nicht auf die Vergangenheit beschränkt sein muss, denn es handelt sich vielmehr um eine Interaktion zwischen einem *exemplum* der Vergangenheit und den Rezipienten der Gegenwart. In diesen Dialog möchte ich die Frage nach Geschlechterrollen und dem Konzept von Weiblichkeit im römischen Erbrecht verorten sowie das zeitspezifische Gerechtigkeitsverständnis.

In das Spannungsverhältnis von Recht und Gesetz wirkt das Konzept der Gerechtigkeit ein, das sich auf das zwischenmenschliche Verhalten bzw. das Verhältnis zwischen Menschen und Normen bzw. Normsystemen bezieht. „Gerechtigkeit impliziert einen Maßstab, der im Verhältnis der Menschen zueinander und ihrer Ordnung auf ein angemessenes Verhältnis von Geben und Nehmen, von Fordern und Verweigern abzielt."[9] Gerechtigkeit kann also auch als reziprokes Prinzip verstanden werden, das der Einhaltung von Recht dient. Sowohl in der platonischen als auch in der aristotelischen Ideenlehre wird Gerechtigkeit (δικαιοσύνη) als oberste Tugend (ἀρετή) verstanden, die einerseits als Richtlinie für das Verhalten des Individuums im Sozialen fungiert, andererseits innerhalb des idealen Staatsgefüge.[10] Gerechtigkeit wird darin ersichtlich, dass jede und jeder die ihr oder ihm zugewiesenen Aufgaben erfüllt. Die grundlegenden Aspekte von Gerechtigkeit wie Gleichheit, Gegenseitigkeit, Leistungsausgleich und Entgeltlichkeit wurden erstmals im römischen Recht realisiert, genauso wie der Anspruch auf Gerechtigkeit *per se*. Nach Ulpian sei Gerechtigkeit der beständige und unveränderliche Wille, einem jeden das Seinige zukommen zu lassen:

9 Vgl. W. Brugger, ‚Gesetz, Recht, Gerechtigkeit', *Humanistische Bildung* 13 (1989), 65–85: 66–67, 70–71; U. Kornblum, ‚Bemerkungen zum Thema "Recht und Gerechtigkeit"', *Humanistische Bildung* 13 (1989), 7–26: 7–8.

10 Vgl. Plat. *Pol.* 4.433a, 453a–d; Aristot. *Eth. Nic.* 5.3.1129b, 5.10.1137b17–18; H.W. Arndt, ‚Philosophische Aspekte des Begriffs Gerechtigkeit', *Mannheimer Berichte aus Forschung und Lehre* 21 (1981), 591–598: 591; G. Santas, ‚Justice and gender in the laws and the Republic', in: S. Scolnicov und L. Brisson (Hrsg.), *Plato's Laws. From Theory to Practice. Proceedings of the 6th Symposium Platonicum* (Sankt Augustin 2003), 237–242: 237–238; J. Barnes, ‚Justice writ large', in: R. Kamtekar (Hrsg.), *Virtue and Happiness: Essays in Honour of Julia Annas* (Oxford 2012), 31–50: 31–37. Der Terminus „der Gerechte" bedeutet dann die strukturelle Zugehörigkeit und Zuordnung zu einem gesellschaftlichen Ganzen (vgl. Plat. *Pol.* 4.435e–436a). Die drei Stände in Platons Idealstaat Καλλίπολις entsprechen den drei Seelenteilen (vgl. Plat. *Pol.* 4.438d–441c, 4.443c–445e, 4.580e–581a–e).

> iustitia est constans et perpetua voluntas ius suum cuique tribuendi.
>
> Gerechtigkeit ist der unwandelbare und dauerhafte Wille, jedem sein Recht zu gewähren.[11]

In diesem Verständnis erscheint Gerechtigkeit als Tugend, aber nicht als abstraktes Prinzip.[12] Als eine kultur- und zeitübergreifende Prämisse kann eine enge Verbindung zwischen Recht und Gerechtigkeit attestiert werden, wobei Gerechtigkeit objektiv als „die inhaltliche Richtigkeit des Rechts" und subjektiv als „die Rechtschaffenheit einer Person" verstanden wird.[13] Gerade die objektive Komponente des Gerechtigkeitsbegriffs kann als „ein Grundbegriff menschlichen Verlangens" verstanden werden, d. h. der Mensch sehne sich danach, würde es aber auch gleichzeitig einfordern.[14] Durch diese ethische Konnotation wirkt Gerechtigkeit als Konnektiv von Recht und Gesetz, als theoriebezogener Leitgedanke und schafft gleichzeitig eine Verbindung zu Gesellschaft und sozialer Realität. Aufgrund dieser Prämissen stellen sich mir folgende Fragen hinsichtlich der Rolle von Frauen im römischen Erbrecht und im Besonderen im Fall der *lex Voconia*: (1) Unter welchen Bedingungen wird Gerechtigkeit herausgefordert? (2) Ist die *lex Voconia* ungerecht? (3) Gibt es im römischen Erbrecht im Bereich der Gesetzgebung zu Testamenten eine genderspezifische *iustitia*?

2 Intentionen einer Erbschaft und familiäre Strategien zur testamentarischen Vererbung

In seiner philosophischen Abhandlung *De finibus bonorum et malorum* spricht Cicero mit zwei Freunden des Brutus u. a. auch über das Abfassen von Testamenten:

> quoniamque illa vox inhumana et scelerata ducitur eorum, qui negant se recusare quo minus ipsis mortuis terrarum omnium deflagratio consequatur […], certe verum est etiam iis, qui aliquando futuri sint, esse prop-

11 *Dig*. 1.1.10 (*Corpus Iuris Civilis*, Text und Übersetzung, Digesten 1–10, übers. und hrsg. von O. Behrends, R. Knütel, B. Kupisch, H.H. Seiler (Heidelberg 1995)); vgl. Cic. *Inv*. 2.53.160; *Rep*. 3.11.18; *Leg*. 1.6.19; *Off*. 1.5.15.

12 Vgl. Cic. *Leg*. 1.45; W. Waldstein, ‚Was ist Gerechtigkeit? (Zu Ulpians Definition, Digesten 1.1.10pr.)', *Wiener Humanisitische Blätter* 21 (1979), 1–16: 10.

13 O. Höffe, *Gerechtigkeit. Eine philosophische Einführung* (München 2001), 9.

14 Höffe 2001, a. a. O. (Anm. 13), 9.

> ter ipsos consulendum. ex hac animorum affectione testamenta commendationesque morientium natae sunt.
>
> So hält man denn auch jene Äußerung für unmenschlich und verbrecherisch, in der einer erklärt, ‚es sei ihm durchaus recht, wenn nach seinem Tode die ganze Welt in Flammen aufginge'. […] Da außerdem niemand in der völligen Einsamkeit sein Leben zu führen wünscht, nicht einmal in einer unendlichen Fülle an Lust, so ergibt sich leicht, daß wir zur Verbindung und Geselligkeit mit den Menschen und zu einer naturgemäßen Vergesellschaftung geboren sind.[15]

Die Verantwortung des Erblassers für die Hinterbliebenen kollidierte also mit seinem Recht aus den Zwölf Tafeln, frei und widerrufbar über die Verteilung seines Vermögens und die Erbfolge zu entscheiden, wobei Landbesitz eine nicht unwesentliche Rolle spielte, galt dieser doch nicht nur als vorherrschende Vermögensform und bevorzugtes Investment, sondern auch als begehrtes Erbgut. Dabei war es wichtig, diesen Landbesitz über Generationen für die Familie zu bewahren, denn sozialer Status und Prestige waren nicht vollumfänglich vererbbar, sondern u. a. an Eigentum geknüpft.[16] In diesem Zusammenhang kann *familia* als ein Syndikat mit drei wesentlichen Zielen verstanden werden: Zum einen dem Erhalt des Familienkults, zum anderen zur Vergrößerung des Wohlstands und des Weiteren zum Erwerb von Ansehen.[17] Dieses Bestreben sollte erreicht werden durch die *patria potestas* des *pater familias* sowie durch die Separierung von Vermögen, wenn zwei Familien durch Heirat miteinander verbunden wurden.[18] Die Rolle der römischen Frau in diesem *familia*-Konzept

15 Cic. *Fin*. 3.64–65 (M. Tullius Cicero, De finibus bonorum et malorum. *Über die Ziele menschlichen Handelns*, hrsg., übers. und komm. von O. Gigon und L. Straume-Zimmermann, Sammlung Tusculum, (München, Zürich 1988)); vgl. XII Tab. 5,3.

16 Vgl. R.P. Saller, ‚Roman heirship strategies in principle and in practice', in: D.I. Kertzer und R.P. Saller (Hrsg.), *The Family in Italy from Antiquity to the Past* (New Haven, London 1991), 26–46: 26–27; Levick 2012, a. a. O. (Anm. 1), 100; Wesel 1964, a. a. O. (Anm. 5), 308 ff.; Van Galen 2016, a. a. O. (Anm. 1), 84–94; Gai. *Inst*. 2.224, 3.1, 3.3; XII Tab. 5.3; Paul. *Sent*. 4.8.20; *Iust*. *inst*. 3.2.3a; *Cod. Iust*. 6.58.14; *Dig*. 50.16.195.2; 50.16.195.4–5.

17 Vgl. N. Benke, ‚Why should the law protect Roman women? Some remarks on the *Senatus Consultum Velleianum* (ca. 50 A.D.)', in: K.E. Børresen, S. Cabibbo and E. Specht (Hrsg.), *Gender and Religion Genre et religion* (Rom 2001), 41–56: 43–44; Van Galen 2016, a. a. O. (Anm. 1), 60–62.

18 In der *familia communi iure* machte der Tod des *pater familias* alle Agnaten zu *sui iuris*. Agnation war v. a. für die gesetzliche Erbfolge von Bedeutung, da an erster Stelle die hauseigenen, gewaltunterworfenen Personen standen, also die *sui iuris*. „[…] nach diesem Prinzip [werden] Männer und Frauen gleich behandelt". (E. Höbenreich und G. Rizzelli,

bestand einerseits darin, Kinder zu bekommen und andererseits den guten Ruf der Familie zu bewahren. Letzteres galt sowohl für ihre Handlungen innerhalb als auch außerhalb der *domus*. Römische Frauen waren zwar freie Bürgerinnen, aber ihre Rechte waren eingeschränkt. Solange Frauen unter der *patria potestas* ihres Vaters oder der *manus* ihres Ehemannes standen, waren sie nicht rechtsfähig, unfähig eigenes Vermögen zu besitzen, denn ihr ganzer Besitz gehörte dem *pater familias* bzw. dem Ehemann.[19]

3 Das Erbeinsetzungsverbot der *lex Voconia* und die Rolle der Frau im römischen Erbrecht

Die *lex Voconia* wurde 169 v. Chr. von Q. Voconius Saxa als Plebiszit eingebracht und von M. Porcius Cato unterstützt.[20] Neben einer Beschränkung testamentarischer Legate beinhaltete dieses Gesetz noch eine weitere Klausel: Frauen durften von Bürgern der 1. Censusklasse nicht mehr als Erbinnen eingesetzt werden.[21]

Scylla. Fragmente einer juristischen Geschichte der Frau im antiken Rom (Wien, Köln, Weimar 2003), 14; vgl. Levick 2012, a. a. O. (Anm. 1), 99; S. Dixon, *The Roman Mother* (London 1988), 44; Gai. *Inst*. 1.55). Zur *potestas* des *pater familias* vgl. B.D. Shaw, ‚Raising and killing children: two Roman myths', *Mnemosyne* 54 (2001), 31–77; Van Galen 2016, a. a. O. (Anm. 1), 68–71.

19 Es existierte die Möglichkeit, ein *peculium* zu erhalten, also eine Art Sondervermögen, das der *pater familias* an eine gewaltunterworfene Person übergab und das diese dann selbständig verwalten konnte. Rechtlich blieb der *pater familias* Eigentümer und verfügungsberechtigt (vgl. *Dig*. 34.4.31.3; Gardner 1986, a. a. O. (Anm. 4), 9; Levick 2012, a. a. O. (Anm. 1), 99; Pomeroy 1976, a. a. O. (Anm. 6), 215, 222; Plut. Rom. 22,3).

20 Vgl. Liv. *Per*. 41; Cic. *Cato* 5,14; Gell. 7.13.3; zu dem Volkstribunen Voconius vgl. Cic. *Balb*. 8.21; Ps.-Asconius, Cic. *Verr*. 2.1.41.106; zu Cato als Unterstützer der *lex Voconia* vgl. Gell. 6.13.3, 17.6.1. Zur Einschätzung der Quellen zur *lex Voconia* vgl. Weishaupt 1999, a. a. O. (Anm. 6), 1–34.

21 Der freie Gestaltungswille des Erblassers aus den Zwölf Tafeln wurde hinsichtlich der Legate durch die *lex Furia testamentaria*, die *lex Voconia* und die *lex Falcidia* eingeschränkt: vgl. Gai. *Inst*. 2.224–227, 3,14; XII Tab. 5.3; *Dig*. 35.2.1pr, 35.2.73.5; *Inst*. *Iust* 2.22; Theoph. *Inst*. paraphrasis 2.22; Cic. *Verr*. 2.1.43.110; Weishaupt 1999, a. a. O. (Anm. 6), 6, 73–101; 122–124; Hähnchen 2012, a. a. O. (Anm. 6), 38–40; Baltrusch 1989, a. a. O. (Anm. 6), 70–77; Wesel 1964, a. a. O. (Anm. 5), 308–314; Van der Meer 1996, a. a. O. (Anm. 6), 14–25; Vigneron und Gerkens 2000, a. a. O. (Anm. 6), 107–121; P. Stein, ‚Lex Falcidia', *Athenaeum* 65 (1987), 453–457: 453. Eine dritte Klausel der *lex Voconia* wird bei Paul. *Sent*. 4.8.20 genannt. Sie beinhaltet, dass Frauen nicht nur als testamentarische Erbinnen eingeschränkt würden, sondern auch in der gesetzlichen Erbfolge. Auch die *declamationes minores* des Quintilian (264) nennen eine dritte Klausel, die besagen soll, dass einer Frau generell nicht mehr als die Hälfte des Vermögens vermacht werden dürfe. Zu einer potentiellen dritten

> Item mulier, quae ab eo, qui centum milia aeris census est, per legem Voconiam heres institui non potest, tamen fideicommisso relictam sibi hereditatem capere potest.
>
> Ferner kann eine Frau zwar von jemandem, dessen Vermögen auf 100 000 As eingeschätzt worden ist, aufgrund des Voconischen Gesetzes nicht zur Erbin eingesetzt werden, doch kann sie eine Erbschaft, die ihr durch ein Fideikommiss hinterlassen worden ist, erwerben.[22]

Die Forschung geht mehrheitlich davon aus, dass einerseits jede Frau dem Einsetzungsverbot unterlag, andererseits nur Testatoren der 1. Censusklasse.[23] War ein Erblasser nicht zensiert, so kam die *lex Voconia* auch nicht zur Anwendung, selbst wenn ihn sein Vermögen eindeutig für die 1. Censusklasse qualifizierte.[24] Mit der *lex Voconia* wurde das Intestaterbrecht der Frau nicht angetastet; eine Beschränkung von Frauen in diesem Bereich wäre jedoch weitaus tiefgreifender gewesen und hätte sie von einer bedeutsamen Vermögensquelle abgeschnitten.[25]

Vor dem Jahr 169 v. Chr. hatte die Senatorenschaft anscheinend keine Bedenken gehabt, Frauen zu Erbinnen zu bestimmen.[26] Es stellt sich die Frage, was sich *de facto* oder auch nur im Empfinden der Senatoren geändert hatte, dass

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Klausel der *lex Voconia* vgl. u. a. Van der Meer 1996, a. a. O. (Anm. 6), 23–43; Weishaupt 1999, a. a. O. (Anm. 6), 107–116; Benke 2002, a. a. O. (Anm. 6), 494–495.

22 Gai. *Inst*. 2.274 (Gaius, *Institutiones*, hrsg., übers. und komm. von U. Manthe, Texte zur Forschung 81, (Darmstadt 2010)).

23 Vgl. Weishaupt 1999, a. a. O. (Anm. 6), 40–54; Van der Meer 1996, a. a. O. (Anm. 6), 5–13; McClintock 2013, a. a. O. (Anm. 6), 186–188; Hopwood 2009, a. a. O. (Anm. 6), 142 ff.; Gardner 1986, a. a. O. (Anm. 4), 170–179; J. Le Gall, *Un critère de différenciation sociales. La situation de la femme. Recherches sur les structures sociales dans l'antiquité classique* (Paris 1970), 176–177; Hallett 1984, a. a. O. (Anm. 6), 92–95; Hähnchen 2012, a. a. O. (Anm. 6), 39–41; Baltrusch 1989, a. a. O. (Anm. 6), 75–77; Van Galen 2016, a. a. O. (Anm. 1), 177–178; 184; 187.

24 Vgl. Cic. *Verr*. 2.1.43.104–114. Die Wertgrenze der 1. Censusklasse ist unterschiedlich mit 100.000 Assen (Gai. *Inst*. 2.274), 125.000 Assen (Gell. 7.13) und 100.000 Sesterzen (Ps.-Asconius, Cic. *Verr*. 2.1.43.104; Cass. Dio 56.10.2) angegeben (vgl. T.P. Wiseman, ‚The census in the first century B.C.', *Journal of Roman Studies* 59 (1969), 59–75).

25 Vgl. Weishaupt 1999, a. a. O. (Anm. 6), 54–62. Zur Ahndung von Verstößen gegen die *lex Voconia* vgl. Weishaupt 1999, a. a. O. (Anm. 6), 116–128; Benke 2002, a. a. O. (Anm. 6), 496; Van der Meer 1996, a. a. O. (Anm. 6), 7–11; Cic. *Verr*. 2.1.40–44; Plin. *Paneg*. 42.1. Zu ihrer Geltungsdauer bis ins 2. Jahrhundert n. Chr. vgl. Gell. 20.1.23; Gai. Inst. 2.268, 2.274, 2.284. Für ein Ende der Geltungsdauer der *lex Voconia* bereits während der späten Republik vgl. Van der Meer 1996, a. a. O. (Anm. 6), 115; Suet. Aug. 27.5; Cass. Dio 52.42.1; Weishaupt 1999, a. a. O. (Anm. 6), 47–51; Wiseman 1969, a. a. O. (Anm. 24), 59–75.

26 Vgl. Pomeroy 1976, a. a. O. (Anm. 6), 222.

dieses Gesetz mit dem Erbeinsetzungsverbot von Frauen erlassen wurde.[27] Wenn es das Ziel der *lex Voconia* gewesen sein soll, Frauen der Nobilität ihres Vermögens zu berauben, um ihre angebliche *superbia* und *luxuria* zu unterbinden, dann war diese Maßnahme nicht zielführend. Denn es gab ausreichend Möglichkeiten, die *lex Voconia* zu umgehen und Frauen doch noch mit Vermögen zu bedenken. Eine besonders einfallsreiche Strategie verfolgte Aemilia mit ihrem Testament: Als reiche Witwe setzte sie Scipio Aemilianus als Erben ein, hinterließ aber nichts ihrer biologischen Tochter Cornelia, die Mutter der Gracchen und die Ehefrau des Scipio Nasica. Nach dem Tod der Aemilia 162 v. Chr. erklärte Scipio Aemilianus, er würde die Abschlussraten der Mitgiften an seine Adoptivtanten zahlen und so erhielt auch Cornelia ihren Anteil am Vermögen ihrer Mutter.[28] Auf diese Weise konnte Aemilia ihre Tochter über Umwege letztwillentlich bedenken und die *lex Voconia* umgehen.

In seinem 1983 erschienenen Aufsatz listet Roger Vigneron diese „Schleichwege des Lebens", wie er es nennt, auf: ein vorsätzliches Umgehen des *census*, der Verzicht auf ein Testament, das Einrichten eines *fideicommissum*, das Nutzen eines *legatum ususfructus* oder *legatum partitionis* sowie die Entscheidung eines Prätors.[29] Eine weitere Möglichkeit, die *lex Voconia* zu umgehen und das Vermögen von Frauen zu vergrößern, bestand darin, Töchtern eine opulente Mitgift auszuhändigen. Die Regularien zur *dos* wurden auch nach 169 v. Chr. nicht verändert.[30] Gründe und Motive, die für das Erlassen der *lex Voconia* in der Forschung bislang gefunden wurden, sind die Begrenzung der Vermögens-

27 Vgl. Cic. *Rep*. 3.10.17; Verr. 2.1.43, 110–114; *Fin*. 2.17.55; Balb. 21; Cato 5.14; Cluent. 7.21; Caec. 4.11; Gell. 7.13, 17.6.1, 20.1.23; Aug. *Civ*. 3.21; Weishaupt 1999, a. a. O. (Anm. 6), 8–19; 26–28; Van der Meer 1996, a. a. O. (Anm. 6), 73–79; Gardner 1986, a. a. O. (Anm. 4), 173–178; Vigneron 1983, a. a. O. (Anm. 6), 144; Vigneron und Gerkens 2000, a. a. O. (Anm. 6), 107–121. Zum *fideicommissum*: Cicero hatte ein *fideicommissum* für Publilia erhalten, doch er heiratete sie und erhielt den Erbteil des *fideicommissum* durch ihre Mitgift (Plut. Cic. 41.4).

28 Vgl. Polyb. 31.26.1, 31.28.13; A. McClintock, ‚Polyb. 31.26–28: la successione di Emilia', *Index* 33 (2005), 317–336; Hähnchen 2012, a. a. O. (Anm. 6), 46–48.

29 Zu den Tricks, die *lex Voconia* zu umgehen vgl. Gai. *Inst*. 2.224; *Dig*. 35.2.1.7; Cic. *Att*. 1.18; Verr. 2.1.43.110–114; rep. 3.10; fin. 2.17.55; Caec. 4.11, 4.10; Cluent. 7.21; Vigneron 1983, a. a. O. (Anm. 6), 140–153; Weishaupt 1999, a. a. O. (Anm. 6), 41; 108–115; Verboven 2002, a. a. O. (Anm. 6), 220 ff.; Evans 1991, a. a. O. (Anm. 6), 76–77: „The Voconian law appears, therefore, to have been a dead letter literally from the moment of its inception."

30 Pomeroy 1976, a. a. O. (Anm. 6), 221–222; Van Galen 2016, a. a. O. (Anm. 1), 111–114. Während des 2. Punischen Kriegs waren so viele Männer gestorben oder in Gefangenschaft geraten, so dass das *tributum* nicht die Ausgaben des Staates decken konnte (Liv. 23.48.8–9; Van Galen 2016, a. a. O. (Anm. 1), 20; S. Northwood, ‚Census and tributum', in: L. de Ligt und S. Northwood (Hrsg.), *People, Land, and Politics. Demographic Developments and the Transformation of Roman Italy 300 BC–AD 14* (Leiden 2008), 257–270: 265–266). Trotzdem gab es noch immer wohlhabende Männer, die der obersten Censusklasse angehörten

akkumulation von Frauen und stattdessen die Förderung der Vermögensakkumulation von Männern, die Erhöhung des *tributum* zur Sanierung des Militärhaushalts als Reaktion auf den Einfluss der *sine manu*-Ehe, als Anreiz zur *tutela legitima*, als Beschneidung des Instituts der Einsetzung von *extranei* als Erben, zum Schutz vor der Aufsplittung großer Vermögen, zur Fortführung der *sacra familiaria*, zur Einschränkung von Luxus, als antifeministische und antiemanzipatorische Repression.[31]

Es kann m. E. vermutet werden, dass die Senatorenschaft unterschiedliche Motive mit der *lex Voconia* verfolgte. Einigkeit wird darüber bestanden haben, dass sie dieses Gesetz als probate Maßnahme erachteten, um drängende soziale und ökonomische Probleme des 3. und 2. Jahrhunderts v. Chr. anzugehen. Dabei dürfen nicht pauschal misogyne Motive angenommen werden. Denn auch in den Jahren nach dem Erlassen der *lex Voconia* wurden ihre Schlupflöcher und Schleichwege nicht beseitigt, obwohl sie spätestens jetzt – nach einigen Jahren Praxis – bekannt waren. M. E. wurde mit der *lex Voconia* die Steigerung des Sozialprestiges der biologischen Familie indirekt kritisiert, indem man der Frau – Ehefrau oder Tochter – *superbia* und *luxuria* vorwarf. Im Zuge der höheren Mitgiften wurde auch die Ehe *sine manu* populärer, denn auf diesem Weg erschien die Tochter weiter unter den *sui heredes* ihres Vaters und die biologische Familie verlor ihr Vermögen nicht an die Familie des Ehemannes.[32]

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und ihre militärischen Pflichten erfüllten: „This, I believe, was the principal motive for the passage of the *lex Voconia*," so Sarah Pomeroy (1976, a. a. O. (Anm. 6), 222).

31 Vgl. u. a. Van der Meer 1996, a. a. O. (Anm. 6), 53–71; Weishaupt 1999, a. a. O. (Anm. 6), 129–141; Vigneron und Gerkens 2000, a. a. O. (Anm. 6), 107–121; Vigneron 1983, a. a. O. (Anm. 6), 140–153; Pölönen 1999, a. a. O. (Anm. 6), 111–131; Dixon 1985, a. a. O. (Anm. 6), 519–534; Pomeroy 1976, a. a. O. (Anm. 6), 221–222; Evans 1991, a. a. O. (Anm. 6), 75 ff.; Hähnchen 2012, a. a. O. (Anm. 6), 44–52; Weishaupt 1999, a. a. O. (Anm. 6), 128–141; U. Manthe, ‚Das Erbrecht der römischen Frauen nach der lex Papia Poppaea und die ratio Voconiana', in: P. Nève und C. Coppens (Hrsg.), *Vorträge gehalten auf dem 28. Deutschen Rechtshistorikertag Nimwegen* (Nimwegen 1992), 33–47: 40–42; Baltrusch 1989, a. a. O. (Anm. 6), 75–77; Sirks 1994, a. a. O. (Anm. 6), 183–186; McClintock 2013, a. a. O. (Anm. 6), 188 f.

32 Vgl. Evans 1991, a. a. O. (Anm. 6), 80; Pölönen 1999, a. a. O. (Anm. 6), 127. Zur Zeit der *lex Voconia* war die *manus*-Ehe noch die Regel, doch bereits für Gaius ist die *manus*-Ehe zu Beginn des Prinzipats ein historisches Relikt (Gai. inst. 1,109–113; vgl. Van der Meer 1996, a. a. O. (Anm. 6), 51 sowie Anm. 58; Pomeroy 1976, a. a. O. (Anm. 6), 222; Evans 1991, a. a. O. (Anm. 6), 78–79). Coen van Galen (2016, a. a. O. (Anm. 1), 28–31, 171–180) verortet den Paradigmenwechsel hinsichtlich der Formen der Eheschließung um die des 1. Jahrhunderts v. Chr.

4 Die reiche, geschminkte und gut gekleidete Frau mit Schmuck als Chiffre für Wandel und Gefahr?

4.1 *Zwischen domus und levitas – Die Insignien einer römischen Frau*

Die Tugenden einer römischen Frau waren auf die *domus* als traditionellem und idealisiertem Wirkungsbereich begrenzt, wie uns u. a. inschriftliche Belege zutragen: „[…] *lanifica pia pudica frugi casta domiseda*".[33] Die Stein gewordenen *laudationes funebris* dienten einerseits dem *self-fashioning* des Ehemannes.[34] Andererseits konnten sowohl Werner Riess als auch Emily Hemelrijk und andere aus zahlreichen Inschriften einen Kanon an weiblichen Tugenden extrahieren, wobei in den meisten Fällen *castitas*, *pudicitia, modestia, obsequium, lanificium* und *decus muliebris* genannt wurden.[35] Diesen Tugenden wird eine eklatante Schwäche der römischen Frau gegenübergestellt. Ausgangspunkt dieser *levitas*- und *fragilitas*-Konzeption ist ihre geringere körperliche Kraft, dem zwei weitere Aspekte jenseits der Physis angefügt werden: Eine römische Frau benötigte einerseits männliche Hilfe zum Ausgleich geistiger Insuffizienz und andererseits männliche Disziplinierung zur Kontrolle charakterlicher Schwäche. Diese naturgegebene Schwäche einer Frau (*fragilitas*) würde nach Justinian ihre *ratio* verlangsamen und außerdem in einem wankelmütigen Gemüt (*levitas animi*) zum Ausdruck kommen.[36] Die Transformation

33 CIL 6.11602 = ILS 8402: „[…] spann Wolle, [war] fromm, züchtig, ordentlich, rein und häuslich."

34 Vgl. CIL 6.1527; 37053; AE 1951.2; W. Riess, ‚*Rari exempli femina*: female virtutes on roman funerary inscriptions', in: S.L. James und S. Dillon (Hrsg.), *A Companion to Women in the Ancient World* (Malden, Oxford, Chichester 2012), 491–501: 495–497; D. Flach, *Die sogenannte* Laudatio Turiae. *Einleitung, Text, Übersetzung und Kommentar* (Darmstadt 1991), 2 ff., 12, 15; E.A. Hemelrijk, ‚Masculinity and femininity in the Laudatio Turiae', *Classical Qarterly* 54 (2004), 185–197; J. Osgood, *Turia. A Roman Woman's Civil War* (Oxford 2014); H. Lindsay, ‚The man in Turia's life, with a consideration of inheritance issues, infertility, and virtues in marriages in the 1st c. B.C.', *Journal of Roman Archaeology* 22 (2009), 183–198; 185–189; W. Kierdorf, Laudatio funebris. *Interpretationen und Untersuchungen zur Entwicklung der römischen Leichenrede*, Beiträge zur klassischen Philologie 106 (Meisenheim am Glan 1980), 33–48.

35 Vgl. Riess 2012, a. a. O. (Anm. 34), 491–501; Hemelrijk 2004, a. a. O. (Anm. 34), 188; B. von Hesberg-Tonn, Coniunx carissim. *Untersuchungen zum Normcharakter im Erscheinungsbild der römischen Frau* (Stuttgart 1983), 103–104; Lindsay 2009, a. a. O. (Anm. 34), 183–198; H. Lindsay, ‚The *Laudatio Murdiae*: its content and significance', *Latomus* 63 (2004), 88–97; CIL 6.1527; Liv. 1.57.6–11, 1.58–60. Werden einer Frau jedoch männliche Tugenden im Übermaß attestiert, dann ist auch das nicht zuträglich für ihre Reputation (vgl. Hemelrijk 2004, a. a. O. (Anm. 34), 191–196).

36 Vgl. Cod. *Iust*. 4.29.22. Zur Anfälligkeit von Frauen für Krankheiten vgl. *Dig*. 27.10.9, 22.6.9pr.; 48.16.1.10, 49.14.18pr.; *Cod. Theod*. 12.1.137.1, 9.14.3.2.

des *levitas*- und *fragilitas*-Konzepts von einem literarischen Topos hin zu einer allgemein akzeptierten Aussage zeichnete Suzanne Dixon bereits in einer Studie von 1984 sorgfältig nach.[37] Die *levitas* der Frauen wird jedoch nicht nur als Wankelmütigkeit oder Schwäche des Geistes gesehen, sondern sehr wohl auch als Unfähigkeit, die eigenen körperlichen Bedürfnisse zu kontrollieren, woraus ein allgemeiner Schutz für Frauen abgeleitet wird. Dieser Ansatz ermöglicht es, Frauen im öffentlichen Raum von politischen Funktionen und staatlichen Ämtern auszuschließen und sie für private Rechtsgeschäfte unter die *auctoritas* eines Tutors (*tutela mulierum*) zu stellen.[38] Männer hingegen seien von Natur aus beherrschter und rationaler, was auch ihr Handeln in allen Lebensbereichen bestimmen würde. Gleichzeitig prädestiniere sie diese Charaktereigenschaft auch zur Kontrolle über Frauen, was zur „Konstruktion männlicher Selbstverständlichkeit" führte.[39] In dieser Ideenwelt gingen Psychologie und Physiologie eine folgenreiche Allianz ein und erzeugten so ein Bild, dass ein starker Geist nur in einem starken Körper wohnen könnte, wobei beides durch den Mann verkörpert würde. Gleichzeitig erwuchsen weibliche Zerbrechlichkeit und Schwäche, kombiniert mit ihrer Unbeständigkeit und Wankelmütigkeit, zu einem pathologischen und bedrohlichen Zustand.

Auch Historiographen, Literaten und Juristen bedienten sich dieser Stereotype und Rollenbilder und transferierten diese in andere literarische Gattun-

37 Vgl. S. Dixon, ‚*Infirmitas sexus*: womenly weakness in Roman law', *Tijschrift voor Rechtsgeschiedenis* 52 (1984), 343–371.

38 Vgl. *Dig*. 50.17.2pr.; Cic. Mur. 27: *Mulieres omnes propter infirmitatem consilii maiores in tutorum potestate esse voluerunt* […] – Unsere Vorfahren wünschten, daß alle Frauen wegen der Unsicherheit ihres Urteils der Gewalt eines Vormundes unterstünden […] (M. Tullius Cicero, *Sämtliche Reden* II, eingel., übers. und erläut. von M. Fuhrmann, Bibliothek der Alten Welt (Zürich, Stuttgart 1970)). Mit dieser Aussage gibt Cicero nicht an, ob Frauen an einem Defizit leiden, das eine *tutela mulierum* notwendig machen würde. Benke (2002, S. 476) stützt sich auf Gaius (*Inst*. 1.189–190) und geht davon aus, dass seit der späten Republik die *tutela mulierum* weniger strikt praktiziert wurde (vgl. ebs. B. Feldner, ‚Zur Vermögensverwaltung durch Frauen im klassischen römischen Recht', in S. Meder, A. Duncker und A. Czelk (Hrsg.), *Frauenrecht und Rechtsgeschichte. Die Rechtskämpfe der deutschen Frauenbewegung* (Köln, Weimar, Wien 2006), 1–20: 4; Levick 2012, a. a. O. (Anm. 1), 99–100; Gardner 1995, a. a. O. (Anm. 1), 377). Seit der späten Republik und in der frühen Kaiserzeit erlangten Frauen mehr Selbständigkeit in geschäftlichen Angelegenheiten, da die *tutela mulierum* meist nur noch als bloße Formsache praktiziert wurde. Zum Ausschluss von Frauen von der Bekleidung öffentlicher Ämter vgl. *Dig*. 50.17.2pr.–1; Benke 2012, a. a. O. (Anm. 1), 220; Benke und Halbwachs 2002, a. a. O. (Anm. 1), 472; Gardner 1995, a. a. O. (Anm. 1), 377–378; Levick 2012, a. a. O. (Anm. 1), 98; Van Galen 2016, a. a. O. (Anm. 1), 51.

39 Vgl. Höbenreich und Rizzelli 2003, a. a. O. (Anm. 18), 40.

gen.[40] Zur Verdeutlichung dieses stereotypisierten Rollenverhaltens und der als Bedrohung empfundenen unterstellten Rolleninversion wurden Attribute und Eigenschaften eingebracht, die die schwache Frau beschreiben sollten. In der Selektion bestimmter Momentaufnahmen aus dem weiblichen Alltag erfahren diese Ausschnitte eine Überhöhung und Verzerrung. Eines dieser Bilder ist das der sehr wohlhabenden Frau, die einerseits ihren Reichtum – wahrscheinlich großen Landbesitz und Erbschaften – durch zahlreiche Schmuckstücke und kostbare Kleidung nach außen trägt.[41] Andererseits werden diese Dinge auch als Symbol der weiblichen Rolle in der Gesellschaft gelesen.[42]

Im Kontakt mit dem sozialen Umfeld, mit den Anderen, ist der Körper das zuerst Sichtbare und deshalb wichtig für die soziale Identität und ihre Außenwirkung. In der männlichen Narration zu Frauen liegt der Fokus u. a. auf Schmuck, Kleidung und Körperpflege sowie auf damit in Zusammenhang stehenden Utensilien.[43] Das stereotypisierte Bild der römischen Frau entstand in einem Spiegel, war konstruiert als Objekt männlicher Interessen und Motive: „Through descriptions of women's bodily adornment, a constellation of negative values is attached to the female sex."[44] Die Fokussierung auf die Frau in der männlichen Narration lässt sie als auf Äußerlichkeiten und Körperlichkeiten reduziertes Individuum erscheinen.[45] Auch ist auffällig, dass Frauen lediglich über Äußerlichkeiten definiert wurden: Einerseits wird der Frau vorgeworfen, dass sie Aufwand betreibe, um schön und attraktiv zu wirken, andererseits erscheint die geschminkte und Schmuck tragende Frau als probate Chiffre, um ihren hohen sozialen Stand zu indizieren.[46] Des Weiteren wird sie als Gefahr

40 Gardner 1995, a. a. O. (Anm. 1), 378.

41 Vgl. McClintock 2013, a. a. O. (Anm. 6), 183.

42 Vgl. McClintock 2013, a. a. O. (Anm. 6), 18–185; Polyb. 31.26.1; Diod. 31.27.3–4.

43 Vgl. Gardner 1995, a. a. O. (Anm. 1), 381–382. Der Aspekt der Körperpflege erhält in Zusammenhang mit Männern eine andere Konnotation: Die Körperpflege, *cultus*, sei notwendig für jeden römischen Bürger, da sich der Mann in der Öffentlichkeit aufhielt und Ämter bekleidete. Durch den männlichen Körper und sein Erscheinungsbild wurde also Menschsein und Bürgersein ausgedrückt (vgl. M. Wyke, ‚Woman in the mirror: the rhetoric of adornment in the Roman world', in: L.J. Archer, S. Fischler und M. Wyke (Hrsg.), *Women in Ancient Societies. An Illusion of the Night* (London 1994), 134–151: 135; Liv. 2.23.4). Zu einem gepflegten Äußeren gehörten u. a. gewaschenes und geschnittenes Haar und Bart. Zur angemessenen Kleidung im Sinn des *mos maiorum* vgl. Gell. 11.2 und bei der Amtsbewerbung vgl. u. a. Liv. 36.22–27, 37.57.9–15.

44 Vgl. Wyke 1994, a. a. O. (Anm. 43), 136.

45 Vgl. Plaut. Poen. 203–231; Iuv. 6.461–674.

46 Vgl. Wyke 1994, a. a. O. (Anm. 43), 137; Hemelrijk 2004, a. a. O. (Anm. 34), 188; H. Matthäus, ‚Untersuchungen zu Geräte- und Werkzeugformen aus der Umgebung von Pompeji', *Berichte der Römisch-Germanischen Kommissionen* 65 (1984), 73–158: 92; L. Shumka, ‚Designing women: the representation of women's toiletries on funerary monuments in Roman

für die *res publica* erachtet: „[…] men are given the power to paint gender definitions on to the bodies of women and then to erase the potential danger which those definitions articulate."[47]

4.2 *Regulierungsversuche: Die lex Voconia in der Tradition der lex Oppia?*

Wenn sich hinsichtlich des Erbeinsetzungsverbots von Frauen vermögensrelevante Folgen ausschließen lassen, dann kann vermutet werden, dass Frauen von der Rolle als testamentarische Erbinnen ausgeschlossen werden sollten aufgrund der Wirkkraft ihrer Rolle in Privatheit und Öffentlichkeit.[48] Welche Rollenbilder und welches Genderverständnis lagen diesen Überlegungen, die zur *lex Voconia* führten, zugrunde? Idealiter war die römische Frau der Oberschicht limitiert auf bestimmte Rollen und Relationen, auf ein spezifisches Rollenverhalten und auf ausgewählte Tugenden, was in einer Überhöhung ihres Wirkungsbereichs *domus* ersichtlich wird. In Anlehnung an diese Topoi und in Abgrenzung durch die Chiffre der geschminkten und Schmuck tragenden Frau sollte das Sozialprestige und die Reputation des Erben exklusiv Männern vorbehalten bleiben.[49]

Diese Argumentation möchte ich zunächst an einem anderen Beispiel verdeutlichen: Eine vergleichbare Motivation kann nämlich auch der *lex Oppia* aus dem Jahr 215 v. Chr. zugeschrieben werden, gegen die sich 195 v. Chr. der Protest römischer Frauen richtete.[50] Im Kontext des 2. Punischen Kriegs und der

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Italy', in: J. Edmondson und A. Keith (Hrsg.), *Roman Dress and the Fabrics of Roman Culture* (Toronto 2008), 172–191; Sen. Cons. 16.

47 Wyke 1994, a. a. O. (Anm. 43), 146; vgl. Levick 2012, a. a. O. (Anm. 1), 102. Die Keuschheit und Reinheit einer Frau genauso wie ihre sexuelle Unantastbarkeit symbolisierten die Unverletzbarkeit Roms. „The honorable female body stood for the Roman body politic as a whole. […] *pietas* [was] regarded as the pivotal core of Rome's social and political cohesiveness" (Riess 2012, a. a. O. (Anm. 34), 492).

48 Nikolaus Benke (2002, 505) greift hier eine Argumentation von Edouard Lambert (*La tradition romaine sur la succession des formes du testament devant l'histoire comparative* (Paris 1901), 100–103) auf, doch mit einer anderen Erklärung: Die *lex Voconia* sollte ein angeblich altrömisches Prinzip wiederherstellen, demzufolge Frauen überhaupt nicht als Erbinnen eingesetzt werden durften (vgl. ebs. Vigneron 1983, a. a. O. (Anm. 6), 143–144; Vigneron und Gerkens 2000, a. a. O. (Anm. 6), 107–121; Gai. *Inst.* 2.274; Dig. 16.1.1.1; 50.16.195.2, 50.16.195.4–5; im Gegensatz dazu vgl. Weishaupt 1999, a. a. O. (Anm. 6), 128–141; Manthe 1992, a. a. O. (Anm. 31), 40–42).

49 Vgl. Benke 2002, a. a. O. (Anm. 6), 506.

50 Vgl. Liv. 34.2.8–12, 34.6.11–16. Die *lex Oppia* in Livius Darstellung unterrichtet uns nicht etwa über die römische Republik des 3. und 2. Jahrhunderts v. Chr., sondern vielmehr über die Zeit des Livius (vgl. B. Hopwood, ‚Livy and the Repeal of the *lex Oppia*', in P. Keegan (Hrsg.), *Text, Artifact Context. The Interactions of Literature, Material Culture and Mentality*

Gefährdung Roms war mit der *lex Oppia* ein Plebiszit erlassen worden, das allen Römerinnen untersagte, einen luxuriösen Lebensstil im öffentlichen Raum zu zeigen, was sich im Falle von Frauen – so zumindest das Verständnis römischer Männer – u. a. an einem übermäßigen Gebrauch von Schmuck und auffälliger Kleidung zeigte.[51] Während der Kriege Roms im 3. und 2. Jahrhundert v. Chr. und der damit verbundenen Absenz der Männer übernahmen Frauen – Mütter, Ehefrauen und Töchter – vermehrt Aufgaben, die ursprünglich der männlichen Domäne zugerechnet worden waren.[52] Diese scheinbare Inversion von althergebrachten Asymmetrien, die für konservative Männer wie Cato saturnalischen Verhältnissen gleichkam, führte zu konservativen und konservierenden Reaktionen, wie sie in der *lex Oppia* und *lex Voconia* gesehen werden können.[53]

Dem Protest der Frauen Roms gegen die *lex Oppia* stellt Livius in der Figur des Cato einen Verteidiger des Gesetzes mit einem dystopischen Angstszenario entgegen: Frauen müssten repressiv behandelt werden, um die Gefahr zu bannen, dass sie noch einflussreicher werden und noch auffälliger im öffentlichen Raum erscheinen würden.[54] In seiner Replik auf Catos Rede betont Valerius, dass Frauen auch nach der Abschaffung der *lex Oppia* keinerlei Gefahr darstellen würden: Ihr Interessenshorizont würde sich auf ihr Aussehen, ihren

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in the Ancient World (Armidale 2001), 121–139: 122; Baltrusch 1989, a. a. O. (Anm. 6), 56 f.; Van Galen 2016, a. a. O. (Anm. 1), 22 ff.; 171; E.A. Hemelrijk, ‚Women's demonstrations in Republican Rome', in J. Blok and P. Mason (Hrsg.), *Sexual Asymmetry. Studies in Ancient Society* (Amsterdam 1987), 217–240). Zur *lex Iulia Caesaris* und *lex Iulia de maritandis ordinibus* vgl. Baltrusch 1989, a. a. O. (Anm. 6), 59–60. Zu einer weiteren überlieferten Demonstration römischer Bürgerinnen vgl. App. civ. 4,32–34; Van Galen 2016, a. a. O. (Anm. 1), 20–24.

51 Vgl. Liv. 34.7.1–3. Liv. 34.1.2–3. Die zahlreichen Feldzüge forderten einen hohen finanziellen Einsatz. In dieser Zeit wurden weitere Luxusgesetze erlassen, die den verschwenderischen Lebensstil einzelner anprangerten und gleichzeitig die Entbehrungen der Gemeinschaft vor Augen führten.

52 Vgl. Baltrusch 1989, a. a. O. (Anm. 6), 54–58.

53 Gellius (17.6.1, 17.8–10) schildert den Fall einer *manus*-freien Ehe, über den sich Cato sehr echauffiert haben soll: In diese Ehe brachte die Frau eine Mitgift ein, aber nicht ihr weiteres Vermögen, das wahrscheinlich von ihrer biologischen Familie stammte. Sie gewährte ihrem Mann ein Darlehen, das dieser aber zurückzahlen sollte. Cato störte sich an dem Verhalten der Frau, ihrem Ehemann nicht das gesamte Vermögen zur Verwaltung überlassen zu haben, sowie an ihrer Forderung nach Zurückzahlung des Darlehens (vgl. Höbenreich und Rizzelli 2003, a. a. O. (Anm. 18), 108–110; G. van Niekerk, ‚Stereotyping women in Ancient Roman and African societies: a dissililarity in culture', *Revue Internationale des droits de l'antiquité* 47 (2000), 365–379: 371–374).

54 Vgl. Liv. 34.2.13–14, 34.3–2; Benke 2002, a. a. O. (Anm. 6), 509; McClintock 2013, a. a. O. (Anm. 6), 185–186; Höbenreich und Rizzelli 2003, a. a. O. (Anm. 18), 99 ff.; Vigneron und Gerkens 2000, a. a. O. (Anm. 6), 107–121; Wyke 1994, a. a. O. (Anm. 43), 139–140; Hähnchen 2012, a. a. O. (Anm. 6), 45; Levick 2012, a. a. O. (Anm. 1), 102; Hopwood 2001, a. a. O. (Anm. 50), 124–128; Van der Meer 1996, a. a. O. (Anm. 6), 47.

Schmuck und ihre Kleidung beschränken, denn das seien ihre Insignien.[55] Beide berufen sich, obwohl sie unterschiedliche Positionen einnehmen, auf althergebrachte Argumentationsstränge und zeichnen in ihren Plädoyers das Bild der tugendhaften römischen Frau, die der *domus* verhaftet bleiben sollte, als Gegenentwurf: Ihre Chiffre ist die Wolle spinnende Frau.[56] Damit stellt Livius in seiner Narration die Ordnung der römischen Gesellschaft wieder her.

Das Konzept der römischen Familie gründete sich vor allem auf die *patria potestas*, mit dem *pater familias* als ausführendem Organ. Es existierte keine vergleichbare Macht und Rolle für eine Frau innerhalb der *familia* und damit waren römische Frauen ausgeschlossen, andere zu repräsentieren.[57] Der Ausschluss von Frauen von der Repräsentation wirkte daher konservierend, d. h. alte, überkommene Strukturen wurden auf diese Weise manifestiert bzw. zementiert. Ihre visuelle Expression zeigt sich in der geschminkten und Schmuck tragenden Frau; mit der *lex Oppia* und der *lex Voconia* sollte sie – als Chiffre eines Wandels und als *role model* einer neuen Zeit – aus dem öffentlichen Raum entfernt werden. Wurde eine Frau Erbin, dann war es ihre Aufgabe, den letzten Willen des Erblassers zu realisieren: In diesem Zusammenhang war sie Gläubigerin ererbter Forderungen, Schuldnerin übernommener Verbindlichkeiten und zuständig für die Verteilung von Legaten und Fideikommissen.[58] In der Folge würde sie als selbständige und Entscheidungen treffende Frau im öffentlichen Raum in Erscheinung treten, in der Privatheit könnte sie auf diesem Weg ihre Position innerhalb der familiären Hierarchie stärken. Mit dieser vermeintlichen Inversion weiblichen Rollenverhaltens würde die Ursituation funktionierender gesellschaftlicher Kohäsion infrage gestellt und nur über patriarchalische Strukturen sei diese zu erhalten.[59]

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55 Vgl. Liv. 34.7.5–13. Zu den Reden des Cato und des Valerius vgl. Hopwood 2001, a. a. O. (Anm. 50), 122–139; Höbenreich und Rizzelli 2003, a. a. O. (Anm. 18), 102 ff.; Wyke 1994, a. a. O. (Anm. 43), 139–140; H. Cancik-Lindemaier, ‚Die Welt der Frau', *Metis* 14 (1998), 21–29. McClintock 2013, a. a. O. (Anm. 6), 186: „The repeal of the *lex Oppia* resulted in the restitution of their jewels. The restored *insignia* were the emblem of a social compromise between the sexes."

56 Vgl. Suet. Aug. 64.2, 73.

57 Vgl. Benke 2012, a. a. O. (Anm. 1), 224; Dixon 1995, S. 377; 384–388.

58 Vgl. McClintock 2013, a. a. O. (Anm. 6), 192: „Evidently as heirs they had gained independence in managing the key-estates of Rome."

59 Coen van Galen (2016, a. a. O. (Anm. 1), 114) macht in seiner Studie „Women and Citizenship in the Late Roman Republic and the Early Empire" die Unsichtbarkeit der römischen Bürgerin sichtbar: „In societies with a focus on male inheritance line women are also somewhat suspect."

5 Fazit: *mulier autem familiae suae et caput et finis est*[60]

Nach Jack Goody bestimmten die in einer Gesellschaft vorherrschenden Formen der Vererbung auch den Umgang der Gesellschaft mit Frauen: Einerseits waren sie potentielle Erbinnen, andererseits wurde ihnen diese Rolle nicht immer vollumfänglich zugestanden, ihr Verhalten in Öffentlichkeit und Privatheit reglementiert.[61] Eine der Klauseln der *lex Voconia* schließt Frauen als Erbinnen aus den letzten Willen der Erblasser der 1. Censusklasse wegen der mit Familiendominanz, Repräsentation in der Öffentlichkeit, politischem Potential und Sozialprestige verbundenen Rolle der testamentarisch bestimmten Erben aus. Der *lex Voconia* liegt m. E. ein idealisiertes und stereotypisiertes Rollenbild und Gender-Verständnis zugrunde, dass römische Frauen der Oberschicht auf ein spezifisches Rollenverhalten und bestimmte Tugenden limitierte, was in einer Überhöhung ihres Wirkungsbereichs *domus* ersichtlich wird. In Anlehnung an die Topoi der tugendhaften Frau und in Abgrenzung durch die Chiffre der geschminkten und Schmuck tragenden Frau sollte auch das Sozialprestige und die Reputation des Erben exklusiv Männern vorbehalten bleiben. Wie kann *iustitia* in diesem Kontext verortet werden?

Gerechtigkeit wird angesichts von Konflikten, Umbrüchen und Verknappungen herausgefordert. Die Expansion Roms und die Feldzüge bewirkten auch einen Wandel im Inneren, im Sozialen, wobei Veränderungen und die damit einhergehende Aktivität und Neuausrichtung der sozialen Rolle Männern zugestanden wurde, Frauen jedoch nicht. Während die Rolle des Mannes und sein Handeln weiterhin mit dem *mos maiorum* im Einklang standen, galt das nicht für Frauen. Durch ihr in der Literatur gezeichnetes Bild erhält der Transformationsprozess ein Gesicht, nämlich das der geschminkten und Schmuck tragenden Frau, die ein verändertes Sozialprestige verkörpert. Für konservative Kreise – wie Cato und Valerius in Livius *Ab urbe condita* – gilt sie als Chiffre einer dystopischen Gegenwart und gleichzeitig als Prophezeiung einer ebensolchen Zukunft. Um dies zu verdeutlichen wurden traditionelle Stereotype bemüht: Das Rollenverhalten der körperlich und geistig schwachen Frau wurde kombiniert mit der aktuellen Situation. In diesem Dialog wurde ein negatives und warnendes Rollenbild kreiert, also die geschminkte und

60 *Dig.* 50.16.195.5: „Eine Frau ist aber sowohl Oberhaupt und Anfang als auch das Ende ihrer eigenen Familie." Vgl. Benke 2002, a. a. O. (Anm. 6), 507.

61 Vgl. J. Goody, ‚Inheritance, property and marriage in Africa and Eurasia', *Sociology* 3 (1969), 55–76; J. Goody, *The Oriental, the Ancient and the Primitive: Systems of Marriage and the Family in the Pre-industrial Societies of Eurasia* (Cambridge 1990), 70–71, 78; Van Galen 2016, a. a. O. (Anm. 1), 43 ff.

Schmuck tragende Frau, deren Äußeres Reichtum und ein Mehr an Unabhängigkeit zum Ausdruck bringt. Sie steht als Chiffre für eine Veränderung, die ein Teil der Senatorenschaft nicht wollte und nicht goutierte. Das Verhalten, das ihrer Rolle zugeschrieben wird, ist Fiktion und dient der Abgrenzung.

Die Auseinandersetzung um die Rolle und das Rollenverhalten von römischen Frauen wird mit Rollenbildern, Stereotypen und Chiffren geführt, wobei sich die Frage stellt, ob die *lex Voconia* ungerecht war. Gerechtigkeit kann als Prinzip einer ausgleichenden Ordnung in der Gesellschaft gesehen werden, als moralisch-ethische Kohäsion von Recht und Gesetz. Findet der Ausgleich nicht statt, wird die soziale Kohäsion aufgehoben, dann werden Prozesse und Entscheidungen als ungerecht wahrgenommen. In seiner staatstheoretischen Schrift *De re publica* bezeichnet Cicero die *lex Voconia* als „voller Unrecht gegen die Frauen", als ein Gesetz, das nur Männern nützen würde.[62] Auch in seiner zweiten Rede gegen Verres, die nicht mehr vor Gericht vorgetragen, sondern lediglich in schriftlicher Form publiziert wurde, erachtete Cicero das Erbeinsetzungsverbot als ungerecht, wobei diese Einschätzung einerseits aus der Intention der Gerichtsrede erwächst, nämlich die Deklassierung des Verres durch Habgier und seine Verurteilung.[63] Andererseits wird wohl auch Ciceros persönliche Situation eine Rolle gespielt haben bzw. er nutzte sie, um seine Argumentation zu stärken und überzeugend zu präsentieren. Denn ähnlich wie der Fall des Erblassers Publius Annius Asellus, der seine Tochter Annia als sein einziges Kind zur Universalerbin machte sowie einen Verwandten namens L. Annius als Ersatzerben einsetzte, hatte Cicero im Jahre 70 v. Chr. nur seine Tochter Tullia.[64]

Gab es also eine genderspezifische *iustitia* im römischen Erbrecht? Jede Gerechtigkeit hat unterschiedliche Gestaltungsmöglichkeiten und nimmt deshalb eine unterschiedliche Art von Bewertung vor: sozial (gut für irgendetwas), normativ (gut für jemanden) und moralisch (gut für jeden einzelnen). Den gesamten Bereich der Moral deckt Gerechtigkeit aber nicht ab.[65] Sowohl Platon und Aristoteles als auch Ulpian sehen in Gerechtigkeit einerseits eine alles umfassende Tugend, andererseits aber auch ein Regularium für interpersonale Beziehungen. Konservative Kreise erachteten den *mos maiorum* als Richtli-

62 Vgl. Cic. *Rep*. 3.10.17; Weishaupt 1999, a. a. O. (Anm. 6), 18–19; Gardner 1986, a. a. O. (Anm. 4), 175; Hähnchen 2012, a. a. O. (Anm. 6), 46. Auch Augustinus von Hippo (*Civ*. 3.21) äußert ähnliche Vorbehalte gegenüber der *lex Voconia*, wobei er sich wahrscheinlich auf Ciceros Ausführungen in *De re publica* stützte.

63 Vgl. Cic. *Verr*. 2.1.43.104–114.

64 Vgl. Van der Meer 1996, a. a. O. (Anm. 6), 73–79; Weishaupt 1999, a. a. O. (Anm. 6), 8–14; Vigneron 1983, a. a. O. (Anm. 6), 144. Zu weiteren Erwähnungen der *lex Voconia* bei Cicero vgl. fin. 2.17.55; Balb. 21; Cato 5.14; Cluent. 7.21; Caec. 4.11.

65 Vgl. Höffe 2001, a. a. O. (Anm. 13), 30.

nie für gerechtes Handeln. Da die neue Selbständigkeit und Sichtbarkeit der römischen Frau als nicht deckungsgleich mit den altehrwürdigen *mores* deklariert wurde, war nicht das Vorgehen gegen Frauen ungerecht, sondern vielmehr deren Verhalten. Cicero spricht zwar von der Ungerechtigkeit der *lex Voconia*, doch erlebt der Leser die ciceronische Empfindung entweder als Bestandteil einer juristischen Argumentation zulasten des Verres oder als Resultat seiner persönlichen Situation. Er lässt jedoch keine auf Prinzipien der Gleichheit und Gleichberechtigung gegründete Ablehnung des voconischen Gesetzes erkennen. Gleichzeitig fand die Frage nach Gerechtigkeit in Zusammenhang mit der *lex Voconia* in einem spannungsgeladenen Gefüge von Ideal und Realität statt: Das dem voconischen Erbeinsetzungsverbot von Frauen zugrundeliegenden Frauenbild entstammte einer idealisierten und stereotypisierten Καλλίπολις und fungierte gleichzeitig als Richtlinie für soziales Interagieren: Gerechtigkeit wird darin ersichtlich, dass jede und jeder die ihr oder ihm zugewiesenen Aufgaben erfüllt.

CHAPTER 11

La femme : objet et sujet de la justice romaine*

Pilar Pavón

1 Introduction

Au début du IIIe siècle, Papinien, *magister libellorum* et préfet du prétoire de Septime Sévère, énonçait au livre 31 de ses *Quaestiones* l'affirmation suivante : *in multis iuris nostri articulis deterior est conditio feminarum, quam masculorum*[1]. Cette phrase reflète, selon nous, non seulement l'impartialité et l'indépendance du jugement que l'on attribue habituellement à ce juriste, mais également la place de la femme face au droit et à la justice, vue par l'un de ses plus grands connaisseurs[2].

Nous pouvons dès lors inférer que Papinien, en tant que jurisconsulte capable de discerner ce qui était juste de ce qui ne l'était pas, observait une différence de traitement dans le droit romain, en fonction du genre des personnes ; le genre féminin, de ce point de vue, était inférieur (*deterior*) comparé aux hommes. On peut se demander si le juriste romain formulait une opinion personnelle sur la position d'infériorité qu'occupaient les femmes dans ce domaine, ou bien, s'il s'agit au contraire d'une simple observation de la réalité normative. Pour ma part, je considère que, dans un cas comme dans l'autre, la réponse peut être affirmative, puisque Papinien ne se réfère pas à la totalité du droit romain, mais à *multi articuli*. Cela indiquerait, d'après le point de vue de l'auteur, que dans d'autres articles de loi, la condition féminine devait

* Le présent travail a été réalisé dans le cadre du Projet de Recherche I+D+i "*Conditio Feminae*. Marginación política, jurídica y religiosa de la mujer durante el Alto Imperio romano (siglos I–III)" (HAR2014-52725-P) du Ministerio de Economía y Competitividad et dans le cadre du groupe de recherche (HUM 441) de l'Université de Séville. Je remercie le Dr. A. Álvarez Melero et la Doctorante en Études Hispaniques M. Albisson qui ont eu l'amabilité de traduire en français cet article. De même, je voudrais exprimer ma profonde gratitude envers les Professeurs O. Hekster, M.-Th. Raepsaet-Charlier, F. Cenerini pour leurs commentaires et critiques qui ont contribué à améliorer ce texte. Je suis l'unique responsable des erreurs qui y subsisteraient.

1 D. 1.5.9, Pap. *lib. 3 Quaest*.

2 Sur Papinien *vid*., entre autres, V. Giuffrè, "Papiniano : fra tradizione ed innovazione", in *ANRW* 2.15 (1976), 632 *sqq*. ; H. Ankum, "Papiniano, un jurista oscuro ?", *Seminarios Complutenses de Derecho Romano* 1 (1989), 33 *sqq*. ; U. Babusiaux, *Papinians* Quaestiones*. Zur rhetorischen Methode eines spätklassischen Juristen* (München 2011).

 | DOI:10.1163/9789004400474_012

faire l'objet d'égards différents de ceux évoqués précédemment. En outre, son observation personnelle n'entre pas en contradiction avec une réalité tangible dans une société patriarcale comme la romaine, dans laquelle la femme occupait une place différente de celle des hommes. Toutefois, il me faut souligner, comme beaucoup d'autres chercheurs l'ont fait avant moi, le caractère novateur de la remarque de Papinien, qui souligne l'oscillation des déférences, dans le monde romain, selon que l'on soit un homme ou une femme[3].

Il est vrai que l'évolution politique et sociale de Rome oscilla au cours du temps et qu'il existe en outre une typologie fort variée de femmes, en fonction de leur situation – libre, affranchie ou servile –; de leur statut social comme citoyenne ou pérégrine; de l'appartenance de leur famille à un certain *ordo*; de leur position au sein de celle-ci comme épouse, veuve, célibataire, mère, fille, sœur, demi-sœur …[4]. À cela, j'ajouterais aussi l'origine géographique. Quoi qu'il en soit, toutes les femmes furent mises sur un plan d'égalité par un fait sans appel et inhérent au monde antique, contenu dans la réflexion de Papinien: sa position d'infériorité par rapport aux hommes[5].

Nous devons être conscients, d'une part, de la diversité et de la nature des sources dont nous disposons et, d'autre part, de leurs limites, car non seulement elles reflètent le point de vue masculin mais aussi celui des secteurs privilégiés de la société, qui étaient mus par des intérêts idéologiques et politiques concrets. Ces faits offrent une vision considérablement partielle et biaisée de la réalité. En ce sens, il convient de signaler, comme on le verra dans les pages qui suivent, la dichotomie existante entre la définition de la condition des femmes dans les sources littéraires et juridiques, qui contrastent avec certains témoignages issus de l'épigraphie et de la papyrologie.

La présente contribution proposera une approche de la position de la femme comme objet et sujet de la justice romaine. Nous établirons tout d'abord

3 Entre autres, R. Quadrato, "*'Infirmitas sexus' e 'levitas animi'*: il sesso "debole" nel linguaggio dei giuristi romani", in *'Scientia iuris' e linguaggio nel sistema giuridico romano*. Atti del Convegno di Studi Sassari 22–23 novembre 1996 (Milano 2001), 155 *sqq*. = Id., *'Gaius dixit' la voce di un giurista di frontera* (Bari 2010) 137 *sqq*.; F. Mercogliano, *"Deterior est condicio feminarum …"*, *Index* 29 (2001), 209 *sqq*.; Id., "La condizione giuridica della donna romana: ancora una riflessione", *Teoria e storia del diritto privato*, 4 (2011), 10 (http://www.teoriaestoriadeldirittoprivato.com/index.php?com=statics&option=index&cID=248#_ftnref32); J. Evans Grubbs, *Women and the Law in the Roman Empire. A Sourcebook on Marriage, Divorce and Widowhood* (London 2002).

4 Cf. P. Resina Sola, "La mujer ante el derecho penal romano", in R. Rodríguez López et M.ª J. Bravo Bosch (éds.), Mulier. *Algunas Historias e Instituciones de Derecho Romano* (Madrid 2013), 265, n. 4.

5 *Vid*. Resina Sola 2013, op. cit. (n. 4), 263.

les arguments avec lesquels les Romains justifièrent les différences entre les hommes et les femmes, puis nous présenterons quelques exemples tirés de divers types de sources, avant de déterminer, dans la mesure du possible, quel était le point de vue des femmes sur la façon dont elles se sentaient traitées dans ce domaine.

2 Arguments qui justifient les différences entre les hommes et les femmes

Nous commencerons par rappeler le plus récurrent d'entre eux, que l'on rencontre dans les sources : la faiblesse du sexe féminin face à la force du sexe masculin, ce qui apparaissait comme une évidence pour la mentalité romaine[6]. Basée sur des principes biologiques, la masculinité était entourée de vertus et de qualificatifs positifs, tandis que la féminité impliquait toutes sortes de déficiences et de lacunes marquées par une vision patriarcale et anthropocentrée de la société et, par conséquent, de l'État.

Nous disposons de l'exemple offert par le témoignage de Cicéron dans son *De officiis*. L'auteur y égrène les vertus masculines par excellence : la prudence, la justice, la force et la tempérance, fondements du stoïcisme et qui constituaient les quatre parties essentielles de l'honnêteté[7]. Cicéron exhorte son fils Marcus à faire montre de grandeur d'âme (*animi excellentia magnitudoque*) pour réaliser ses actions avec décence, constance et ordre, en s'éloignant de l'indécence et de tout ce qui était efféminé (*ne quid indecore effeminateue faciat*)[8]. Dans la pensée cicéronienne, la connotation négative du féminin et son étroite relation avec le manque de retenue est clairement affichée. Et ce qui est encore plus évident : la grandeur d'âme de l'homme apparaît en contrepoint à la faiblesse d'âme de la femme.

6 Sur le vocabulaire des juristes romains et les qualificatifs employés pour définir la femme *vid.* J. Beaucamp, "Le vocabulaire de la faiblesse féminine dans les textes juridiques romains du III^e^ au IV^e^ siècle", *Revue historique de droit français et étranger* 54 (1976), 486 *sqq.* ; S. Dixon, "*Infirmitas sexus* : womanly weakness in Roman law", *Revue d'histoire du droit* 52 (1984), 343–371 = Ead., *Reading Roman Women* (London 2003, 1^e^ éd. 2001), 73 *sqq.* ; N. Criniti, Imbecillus sexus. *Le donne nell'Italia antica* (Brescia 1999) ; N.F. Berrino, Mulier potens : *realtà femminile nel mondo antico* (Lecce 2006) ; Quadrato 2001, op. cit. (n. 3), 162 *sqq.* ; R.P. Rodríguez Montero, "Hilvanando "atributos" femeninos en la Antigua Roma", in P. Resina Sola (ed.), Fundamenta iuris. *Terminología, principios e interpretatio*, (Almería 2012), 213 *sqq.*

7 Cic., *De off.* 1.5.15–18.

8 Cic., *De off.* 1.4. 14.

Sur cette dissemblance prend corps la division des rôles remplis dans la société par les deux sexes, qui ressort de la lecture des sources juridiques, telle que l'a observé Thomas[9]. Et c'est précisément cette disparité caractéristique du binôme *uir-mulier* qui marque les modèles positifs et négatifs de la femme, en accord avec certains *mores* qui paraissent immuables, étudiés par Cantarella et Cenerini[10]. Je partage l'opinion de Rodríguez Montero, qui considère que «la discriminación entre sexos se construye sobre una diferencia biológica, natural. La fuerza masculina y la debilidad femenina se reconducen al lenguaje, fijado en palabras, y de esta forma se provee de un soporte filológico a un prejuicio legitimando y codificando una opinión general aceptada por todos»[11]. Selon Quadrato, la différence physique entre les deux sexes, qui sert d'argument aux juristes romains pour employer un vocabulaire discriminatoire par rapport à la femme (*leuitas animi*, *imbecillitas* e *infirmitas sexus* …), est un préjugé qui n'a aucun fondement dans la nature et s'appuie sur les *mores*[12]. Les auteurs anciens, à l'inverse, soutiennent que les distinctions entre l'homme et la femme sont basées sur la nature et constituent les piliers de la tradition et de la loi.

Ainsi, par exemple, dans le débat sur la dérogation de la *Lex Oppia* de l'an 215 av. J. C., relayé entre autres par Tite-Live, Caton rappelle que ce furent les ancêtres (*maiores*) qui placèrent les femmes sous le contrôle d'un tuteur et il compare leur nature sauvage (*imponens natura*) à celle d'un animal indomptable, aspirant au libertinage[13]. L'argument de la peur est celui qu'emploie

9 Y. Thomas, "La division des sexes en droit romain", in G. Duby, M. Perrot (dirs.), *Histoire des femmes en Occident*, tome 1, P. Schmitt Pantel (dir.), *L'Antiquité* (Paris 2002, 1e éd. italienne 1990), 131 *sqq*. On constate également cette division notamment dans le domaine de la religion publique romaine, comme l'ont montré J. Scheid, "D'indispensables «étrangères». Les rôles religieux des femmes à Rome", in G. Duby-M. Perrot (éd.), *Histoire des femmes en Occident*, tome 1, P. Schmitt Pantel (dir.), *L'Antiquité* (Paris 2002, 1e éd. italienne 1990), 495 *sqq*. et M.-Th. Raepsaet-Charlier, "Indispensables pero incapaces: las mujeres romanas en el Derecho y la Religión", *Annaeus* 3, 2006, 161 *sqq*.; Ead., "La place des femmes dans la religion romaine: marginalisation ou complémentarité? L'apport de la théologie", in P. Pavón (éd.), *Marginación y mujer en el Imperio romano* (Roma 2018), 201 *sqq*. Voir aussi P. Pavón, "La mujer en la religión romana: entre la participación y la marginación" en E. Ferrer et A. Pereira (coords.), *Hijas de Eva. Mujeres y religión en la Antigüedad, Spal Monografías XIX* (Sevilla 2015) 115 *sqq*.

10 E. Cantarella, *Pasado próximo. Mujeres romanas de Tácita a Sulpicia* (Madrid 1997, 1e éd. italienne 1996); F. Cenerini, *La donna romana. Modelli e realtà* (Bologna 2002, 2e éd 2009, rééd. 2013).

11 Rodríguez Montero 2012, op. cit. (n. 6), 207.

12 Quadrato 2001, op. cit. (n. 3), 191.

13 Liv. 34. 1.3. Le même argument est utilisé par Cicéron (*Pro Mur*. 27).

le consul pour prévenir ses confrères de ce qui se passerait s'ils accédaient aux demandes des femmes : dès l'instant précis où elles commenceraient à être nos égales, elles seraient supérieures (*extemplo simul pares esse coeperint, superiores erunt*). La réponse du tribun de la plèbe, Lucius Valérius, à Caton consista à citer quelles étaient les limites imposées aux femmes, auxquelles n'incombaient aucune magistrature, sacerdoce, triomphe, médailles ou butin de guerre, et en quoi consistait le *mundus muliebris* : l'élégance et les parures[14]. La loi fut finalement abrogée en 195 av. J. C. Cependant, le discours sur la nécessité de contenir la volonté des femmes, faible et capricieuse, reviendra en l'an 21, à en croire Tacite, à l'occasion d'un débat houleux sur le souhait des gouverneurs d'emmener leurs épouses en province[15]. Finalement, les sénateurs appuyèrent cette idée, afin qu'elles ne soient pas exposées à toutes sortes de dérives et de vices inhérents à leur *imbecillus animus*.

En effet, l'argument de la faiblesse du sexe féminin, implicitement lié à la condition de la femme, était le même que celui établi par la tradition pour écarter les femmes des hommes, comme on l'a vu dans le discours du tribun L. Valérius en 195 av. J. C. et qu'Ulpien rappelle à nouveau au début du III^e^ siècle[16]. Mais pour quelle raison le juriste s'exprimait-il de la sorte ? À mon avis, son intervention s'explique par la promulgation récente de la *Constitutio Antoniniana*. En effet, à l'heure où beaucoup de femmes accédaient à la citoyenneté romaine, il s'avérait nécessaire de leur rappeler quelles étaient les limitations que posait la tradition romaine pour gérer des *officia uirorum*[17].

De fait, elles ne pouvaient pas, par exemple, être tutrices, puisqu'il s'agissait d'un *munus masculorum* que se situait *ultra sexum feminae infirmitatis*[18]. Elles ne pouvaient pas non plus être garantes de tierces personnes et, par conséquent, assumer les obligations de leurs maris et de leurs proches. Le sénatus-consulte *Velleianum* de l'an 46 de notre ère leur interdisait d'intercéder économiquement en faveur d'autres individus. Ulpien rappelle dans son *ad Edictum* qu'aussi bien Auguste que Claude, avant l'entrée en vigueur dudit sénatus-consulte, avaient émis un édit qui empêchait les femmes d'être garantes de

14 Liv. 34.5.8.

15 Tac. *Ann*. 3.33–34. *Vid*. J.A. Marshall, "Roman women and the provinces", *Ancient Society* 6 (1975), 109 *sqq*. ; Id., "Tacitus and the governor's lady : a note on Annals iii.33–4", *Greece and Rome* 2, 22 (1975), 11 *sqq*.

16 D. 50.17.2, Ulp. 1 *Sab*.

17 P. Pavón, *"Feminae ab omnibus civilibus vel publicis remotae sunt* (D. 50.17.2, Ulp. 1 Sab.) : Ulpiano y la tradición a propósito de las mujeres", in P. Pavón (éd.), *Marginación y mujer en el Imperio romano* (Roma 2018), 33 *sqq*.

18 D. 26.1.18, Ner. 3 *Reg*. ; C 5.35.1 (a. 224) ; *Vid*. Pavón 2018, op. cit. (n. 17) et la bibliographie qui y est citée.

leurs époux[19]. D'après le juriste, le Sénat, à l'époque de Claude, agit de la sorte au motif que la femme pouvait être dupée ou séduite, en raison de leur *imbecillitas sexus*[20]. C'est pourquoi il fallait les en empêcher. Il est symptomatique que l'argument de la faiblesse du sexe et du manque de force d'esprit attribué au genre féminin soit utilisé dans ce cas concret, quand les propres sources juridiques et les témoignages épigraphiques fournissent des exemples sur la capacité des femmes à se mouvoir dans le monde des affaires[21]. Dans le texte du sénatus-consulte, transcrit par Ulpien, on découvre les raisons d'une telle disposition: *cum eas uirilibus officiis fungi et eius generis obligationibus obstringi non sit aequum*. Autrement dit, il n'était pas juste que les femmes remplissent ce genre de fonctions masculines[22].

Les femmes ne pouvaient pas être non plus *argentariae* ou banquières, parce qu'il s'agissait d'un *officium uirile*. Pourtant, certaines d'entre elles disposèrent d'importants patrimoines, remplissant la fonction d'évergètes et exerçant une influence politique non négligeable dans leurs communautés[23]. De même, la profession d'avocat, *postulare pro aliis*, était strictement réservée aux hommes et interdite aux femmes dans l'Édit du préteur, comme le rapporte Ulpien[24]. L'une des raisons qui justifiaient cette prohibition résidait dans la protection de leur *pudicitia*: elles ne devaient aucunement se trouver mêlées à des litiges auxquels elles étaient étrangères. Elles ne pouvaient non plus assurer la défense de leurs enfants dans le cas d'un veuvage, comme en témoigne la réponse

19 D. 16.1.2.pr., Ulp. 29 *ad Ed.*

20 D. 16.1.2.2, Ulp. 29 *ad Ed.*

21 Par exemple, sur une *debitrix ex conductione uectigalis*, D. 49. 14.47 pr. Sur les noms de femmes parmi les *diffusores olearii*, *vid.* G. Chic García, *Epigrafía anfórica de la Bética*. II (Sevilla 1988), n. 4, 9, 11, 16, 22, 33, 34, 41.

22 D. 16.1.2.1, Ulp. 29 *ad Ed.*

23 D. 2.13.12., Call. *1 ed. Mon.* Sur l'évergétisme et les interventions publiques des élites féminines, *vid.*, entre autres: D. Gourevitch et M.-Th. Raepsaet-Charlier, *La femme dans la Rome antique* (Paris 2001); M.-Th. Raepsaet-Charlier, "L'activite évergétique des femmes clarissimes sous le Haut-Empire", in M.L. Caldelli et al. (éds.), *Epigrafia 2006. Atti della XIV^e^ rencontre sur l'épigraphie in onore di Silvio Panciera con altri contributi di colleghi, allievi e collaboratori*, III (Roma 2008), 1029 *sqq.* = Ead., Clarissima femina. *Études d'histoire sociale des femmes de l'élite à Rome*. Scripta varia (Bruxelles-Roma 2016), 287 *sqq.*; E.A. Hemelrijk, "Female munificence in the cities of the Latin West", in E. Hemelrijk et G. Woolf (éds.), *Women and the Roman City in the Latin West*, Leiden-Boston, 2013, p. 65 *sqq.*; M. Navarro Caballero, Perfectissima femina. *femmes de l'élite dans l'Hispanie romaine* (Bordeaux 2017).

24 D. 3.1.1.5, Ulp. 6 *ad Ed.* Sur cette interdiction, *vid.*, entre autres, Cantarella 1997, op. cit. (n. 10), 141, n. 83; E. Höbenreich, "Andróginas y monstruos: mujeres que hablan en la antigua Roma", *Veleia* 22 (2005), 176; cf. N. Benke, "Women in the courts, an old thorn in men's sides", *Michigan Journal of Gender and Law* 3/1 (1995) 211, n. 67.

formulée par Dioclétien et Maximien à Dionysia, à qui ils rappellent que le métier d'avocat est un *uirile officium et ultra sexum muliebrem esse constat*[25]. Les femmes ne pouvaient pas non plus porter des accusations lors un procès criminel, sauf en cas d'homicide de leurs parents, lorsqu'elles étaient les seuls membres de la famille proche en vie, et dans des cas de *maiestas*[26]. Elles n'avaient pas davantage la possibilité d'ester en justice contre un époux adultère, car la *lex Iulia de adulteriis coercendis* ne le leur permettait pas[27]. Les différences entre les sexes dans le monde romain peuvent se résumer en deux phrases du juriste Ulpien à propos des plus hautes dignités de l'État, dans lesquelles il indique qu'entre un homme et une femme, le premier sera toujours favorisé par rapport à la seconde[28]. Il ajoute à cela une appréciation personnelle : entre la femme consulaire et le préfet, il accorde indéniablement sa préférence à ce dernier, alléguant une norme profondément ancrée dans la société romaine, directement liée à l'affirmation de Papinien qui ouvrait notre étude : *quia maior dignitas est in sexu uirili*.

3 Exemples de l'application de la justice romaine aux femmes

Dans le monde romain, la dignité du sexe masculin était supérieure à celle du féminin. Ce principe se retrouve également dans le domaine judiciaire. Sans prétention d'exhaustivité, puisqu'il nous est impossible dans le cadre de ce travail d'analyser tous les exemples dont il est fait mention dans les sources, nous examinerons certaines situations dans lesquelles on observe comment la justice s'appliquait au sexe féminin, conformément à la condition de la femme dans le monde romain. Dans certaines circonstances, cette dernière semble avoir été victime, selon une optique actuelle, d'une « discrimination négative » ; dans d'autres circonstances, elle semble, en revanche, avoir été exposée à une « discrimination positive ».

La femme est à la fois objet et sujet de la justice. Dès lors, elle réclame ses droits ou ceux qu'elle croit avoir sur des domaines qui la concernent directement, comme ceux qui concernent la famille, les enfants, le patrimoine et

25 C. 2.13.18 (a. 295–305).

26 D. 48.2.1, Pomp. 1 *ad Sab.* ; D. 48.2.2 pr., Pomp. 1 *de ad.* ; C. 9. 1.12 (293) ; D. 48.4.8, Pap. 13 *Resp.*

27 C 9.9.1 (197) ; *vid.* P. Pavón, "*Impp. Severus et Antoninus AA. Cassiae* (CJ, 9,9, 1). El caso del esposo adúltero", *Studia et Documenta Historia et Iuris* 77 (2011), 385 *sqq.*

28 D. 1.9.1, Ulp. 62 *ad Ed. Vid.* P. Resina Sola, "*Maior dignitas est in sexu uirili*", in R. Rodríguez et M. López (coords.), *Casos prácticos de Derecho romano, Filología latina e Historia*, (Almería 2009), 140.

les affaires. On trouve plusieurs exemples de telles situations dans des documents de nature diverse, tels que des rescrits impériaux dont elle est la destinataire, dans la documentation papyrologique issue d'archives publiques ou privées, dans le cas de l'Égypte, et dans les *tabulae ceratae* de Pompéi et d'Herculanum[29]. Ces documents reflètent l'activité des femmes dans des litiges, où elles interviennent comme accusatrices ou accusées, faisant appel à la justice à différents niveaux (local, provincial et impérial) et pour toutes sortes de sujets ayant trait à des procès civils ou administratifs. On ne doit pas oublier qu'on leur reconnaît la capacité de commettre des délits et des crimes, dont elles seront tenues pour responsables de la même manière que les hommes, comme le signalent Gaudemet et Resina Sola[30]. Ulpien énumère les lois en vertu desquelles on confisquait la dot de la femme condamnée : *leges de maiestate*, *de ui publica*, *de parricidiis*, *de ueneficis*, *de sicariis*[31]. En outre, comme il ne pouvait en être autrement, elle était à la fois sujet et objet des célèbres lois d'Auguste sur le mariage et la répression de l'adultère.

Un des aspects où l'on observe le mieux l'effet de la justice romaine sur la femme concerne la répression de l'impudicité et du désir sexuel. Cette circonstance apparaît de façon évidente dans la législation augustéenne et dans sa volonté de retrouver un modèle de femme vertueuse, conforme aux regrettés *antiqui mores*, réélaborés aux Ier et IIe siècles[32].

Grâce à la *lex Iulia de adulteriis coercendis*, Auguste fit de l'adultère un délit contre l'État[33]. L'empereur cherchait, à travers cette loi, à contrôler et

29 E. Volterra, "Les femmes dans les "inscriptiones" des rescrits impériaux", in E. von Caemmerer et al. (éds.), *Xenion, Festschrift P.J. Zepos*, Vol. I. (Athens, Freiburg/Br., Köln 1973), 717 *sqq*. = Id., *Scritti Giuridici*, Vol. V (Napoli 1993), 339 *sqq.*; L. Huchthausen, "Frauen fragen den Kaiser. Eine soziologische Studie über das 3 Jh.n. Chr., in XENIA 28 (Konstanz 1992), 7 *sqq.*; E. Osaba, Gordianus rescripsit. *Rescriptos de Gordiano III en materia dotal dirigidos a mujeres* (Bilbao 2000); J. Rowlandson (éd.), *Women and Society in Greek and Roman Egypt. A Sourcebook* (Cambridge 1998); B. Anagnostou-Cañas, "La femme devant la justice provinciale dans l'Egypte romaine", *Revue historique de droit français et étranger* 62.3 (1984), 337 *sqq.*; F. Reduzzi Merola, "Le donne nei documenti della prassi campana", *Index* 40 (2012), 380 *sqq*.

30 J. Gaudemet, "Le statut de la femme dans l'Empire romain", in AAVV, *La femme. Rec. Soc. J. Bodin XI*, (Bruxelles 1959), 177 *sqq.*; Resina Sola 2013, op. cit. (n. 4), 264 *sqq*.

31 D. 48.20.3, Ulp. lib. 33 *ad Ed.*; *Vid*. Resina Sola 2013, op. cit. (n. 4), 269.

32 *Vid*., Cenerini 2002, op. cit. (n. 10); P. Pavón, "Mujer y *mos maiorum* en la época de Trajano y Adriano", in A. Caballos Rufino (éd.), *De Trajano a Adriano*. Roma matura, Roma mutans (Sevilla 2018) (sous presse).

33 D. 48. 5; C.I. 9.9. Il existe sur cette loi une abondante bibliographie. Entre autres, L.F. Raditsa, "Augustus' legislation concerning marriage, procreation, love affairs and adultery", in *ANRW* 2.13 (1980), 310 *sqq.*; C. Edwards, *The Politics of Immorality in Ancient Rome* (Cambridge 1993); G. Rizzelli, Lex Iulia de adulteriis. *Studi sulla disciplina di* adulterium,

réguler le comportement sexuel des femmes respectables, mais aussi celui de groupes considérés comme plus vulnérables par la société romaine traditionnelle : veuves, divorcées et jeunes gens des deux sexes en âge nubile[34]. En raison de sa situation distincte par rapport à l'homme, la femme mariée qui aurait des relations hors mariage avec des individus de n'importe quelle extraction sociale commettrait, selon cette loi, un délit, tandis que le mari ne pourrait être accusé d'adultère s'il en faisait de même avec des personnes de basse condition sociale telles que des prostituées ou des esclaves[35]. De plus, comme je l'ai signalé plus haut, la capacité d'intenter une action en justice d'une épouse contre son mari adultère était extrêmement limitée[36]. Dans ces cas de figure, on pourrait observer des exemples de « discrimination négative » en fonction du sexe, mais si l'on s'en tient aux seules peines stipulées contre les coupables d'adultère, elles sont pratiquement aussi sévères. Les deux amants étaient relégués dans des îles différentes et souffraient au surplus des peines pécuniaires qui attentaient à leur capacité économique, puisque l'homme se voyait amputé de la moitié de son patrimoine tandis que la femme perdait la moitié de sa dot et un tiers des biens paraphernaux[37]. Les deux *Iuliae*, fille et petite-fille d'Auguste sont les exemples les plus manifestes et rigoureux de l'application de cette loi, dans lesquels se trouvent également imbriquées des implications de type politique[38]. La validité de cette disposition impériale s'observe durant le règne de Trajan, qui, selon Pline le Jeune, condamna l'épouse d'un tribun militaire qui avait entretenu une relation avec un centurion[39]. Ce dernier reçut un châtiment exemplaire, car à la peine infligée pour ce délit, l'empereur ajouta une référence à la discipline militaire ; il fut dès lors licencié de manière ignominieuse et expulsé de l'armée[40].

Dans le cas référé par un rescrit destiné à une certaine Théodora émis en 258 par Valérien et Gallien, on constate que la justice intervint en faveur d'une

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Lenocinium (Lecce 1997) ; Th.A.J. McGinn, *Prostitution, Sexuality and the Law in Ancient Rome* (Oxford 1998) ; Pavón 2011, op. cit. (n. 27), 385 *sqq.* ; L. Caldwell, *Roman Girlhood and the Fashioning of Feminity* (Cambridge 2015).

34 *Vid.*, Pavón 2011, op. cit. (n. 27), 385 *sqq*. Caldwell 2015, op. cit. (n. 33), 47, n. 4.

35 Caldwell 2015, op. cit. (n. 33), 47, n. 3.

36 Pavón 2011, op. cit. (n. 27), 385.

37 Paul. *Sent*. 2.26.14. *Vid*. B. Santalucia, *Diritto e processo penale nell'antica Roma* (Milano 1998 2e éd.), 201 *sqq*.

38 Cf. F. Cenerini, *Dive e donne. Mogli, madri, figlie e sorelle degli imperatori romani da Augusto a Commodo* (Imola 2009), 24 *sqq*. *Vid*. également, T. Spagnuolo Vigorita, Casta domus. *Un seminario sulla legislazione matrimoniale augustea* (Napoli 2002 2e éd.), 43 *sqq*.

39 Plin. *Ep*. 6. 31.

40 *Vid*. Pavón 2018, op. cit. (n. 32).

femme, même si toutes ses réclamations n'ont pas été prises en compte[41]. Dans cette réponse, on déduit qu'elle fut trompée par un homme qui avait l'intention de l'épouser, bien qu'étant déjà marié à une autre femme. Le faux célibataire fut accusé de stupre, délit que, en revanche, n'avait pas commis Théodora, qui ignorait l'état-civil du mari. Les empereurs lui assurèrent qu'elle obtiendrait la restitution de tout ce qu'elle avait remis à son époux supposé, mais ceux-ci rejetèrent sa requête relative aux biens que ce dernier avait promis de lui donner lorsqu'elle deviendrait son épouse. Comme on le voit, les rescrits des empereurs aux demandes des sujets, devinrent, selon Coriat, un acte de nature juridictionnelle dans lequel le juge devait prendre en considération ce qui était énoncé dans les réponses impériales et veiller à l'application de ce qui était exposé par les parties impliquées[42]. Dès lors, il nous est permis de penser le juge qui fut chargé du cas de Théodora délibéra vraisemblablement en vertu de ce qui était stipulé par les empereurs.

Le contrôle du comportement sexuel de la femme respectable de tout âge concernait également l'apparence extérieure. Properce, comme l'observe Spagnuolo Vigorita, fait notamment allusion au droit de la femme mariée, mère d'au moins trois enfants, de porter une *stola* ornée avec l'*institа*, conformément à la *lex Iulia de maritandis ordinibus*[43]. Cette loi marquait une différence de statut et de privilèges entre les femmes. Le reflet de la décence et de la morale dans leur habillement était très important, à tel point qu'une tenue inadéquate pouvait être considérée comme un facteur aggravant dans le cas d'une injure, considérée par l'édit comme une *ademptata pudicitia*, contre celle qui aurait été outragée, violentée ou aurait été victime d'agressions sexuelles[44]. Par conséquent, l'individu qui profèrerait des injures envers une jeune fille

41 C. 9.9.18 ; cf. C. 5.3.5. *Vid*. P. Pavón, "Teodora, víctima de un bígamo infame, estuprador y estafador (C. 9.9.19)", in *Academia Libertas : Essais en l'honneur du Professeur Javier Arce – Ensayos en honor del Profesor Javier Arce – Saggi in onore del Professore Javier Arce – Essays in honor of Professor Javier Arce – Aufsätze zu Ehren von Professor Javier Arce* édité par D. Moreau et R. González Salinero avec la collaboration de J.-Y. Marc, *Antiquité Tardive. Revue Internationale d'Histoire et d'Archéologie* 2018 (sous presse).

42 J.-P. Coriat, *Le prince législateur. La technique législative des Sévères et les méthodes de création du droit impérial à la fin du principat* (Roma 1997), 506 *sqq*.

43 Prop. 4. 11. 60. *Vid*. Spagnuolo Vigorita 2002, op. cit. (n. 38), 24, n. 75. Cette même référence à la femme honorable qui porte la *stola* apparaît dans les vers du poète Ovide (*Ars*. 1.31) et avec davantage d'ironie chez Horace (*Sat*. 1.2. 94–100). *Vid*. A. Álvarez Melero, « *Matronae stolatae* : Titulature officielle ou prédicat honorifique ? », *Cahiers du Centre Gustave Glotz*, XXVIII (2017), 61 *sqq*.

44 D. 47.10.15.15, Ulp. 56 *ad Ed*. Sur l'*Edictum de adtemptata pudicitia vid*. M. Marrone, "Considerazioni in tema di iniuria", in *Synteleia Arangio-Ruiz* I (Napoli 1964), 480 *sqq*. ; D. Puerta Montoya, *Estudio sobre el Edictum de adtemptata pudicitia* (Valencia 1999) ; N. Benke, "On the Roman father's right to kill his adulterous daughter", in M. Lanzinger (éd.), *The Power*

nubile (*uirgo*) marchant dans la rue, vêtue comme une esclave, verrait sa faute allégée en raison de la tenue inadéquate de celle-ci, qui constituait un facteur atténuant. La peine était encore plus réduite si les femmes étaient vêtues avec les indécents atours des prostituées au lieu des honorables tenues des matrones. Cet édit rendait les femmes de l'élite responsables des possibles injures et offenses qu'elles subissaient, au motif qu'elles ne portaient pas vêtements adéquats, et assumait, socialement et juridiquement, l'absence de contrôle de l'agresseur sur ses impulsions et instincts les plus primaires. La justice s'incline toujours en faveur de ceux qui s'en tiennent aux normes sociales.

Une des lois les plus nuisibles pour les femmes de condition libre était le sénatus-consulte *Claudianum de contubernio* de l'an 52, qui était destinée à contrôler et réguler le nombre d'unions entre femmes et esclaves[45]. Le décret sénatorial exposait les options qui se présentaient à celles qui entretenaient ou avaient l'intention d'entretenir une relation « pseudo-maritale » avec un esclave, et essayait de réglementer la condition juridique de cette dernière et des enfants nés de cette union. S'il était *ciuis Romanus*, le *dominus* de l'esclave qui s'opposait à cette relation et avait averti la femme des conséquences faisait, de cette dernière et des enfants qu'elle avait mis au monde, des esclaves[46]. Mais si le maître de l'esclave consentait à cette union, la femme continuerait à subir les conséquences de sa décision, puisqu'elle perdrait son *ingenuitas* et sa fortune, car elle serait dès lors considérée comme une affranchie et ses enfants, comme des esclaves[47]. Si la première alternative supposait une *capitis deminutio maxima* pour la femme libre[48], la seconde ne suivait pas la *regula iuris gentium* qui impliquait que le fils qui naissait héritait de la condition de sa mère, mais elle épargnait toutefois la femme de la servitude si le *dominus* donnait son accord[49]. L'État veillait ainsi à contrôler la volonté et les émotions

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of the Fathers. Historical Perspectives from Ancient Rome to the Nineteenth Century (London and New York, 2015), 8, n. 41.

45 Tac. *Ann.* 12.53.1; Gai. *Inst.* 1.84; 91; 160; *PS.* 2.21a.1; 9–10; 4.10.2. *vid.* C. Masi Doria, "La *denuntiatio nel senatusconsultum Claudianum* : i legittimi e la struttura del procedimento", in C. Cascione, E. Gemino, C. Masi Doria (éds.), *Parti e giudici nel proceso. Dai diritti antichi all'attualità* (Napoli 2006), 125 *sqq.*; Ead., "*Ancilla efficitur … In eo statu menebit* : Le conseguenze del *SC. Claudianum* per le donne di status libertino", in R. Rodríguez López, Mª J. Bravo Bosch (éds.), Mulier. *Algunas Historias e Instituciones de Derecho Romano* (Madrid 2013), 157 *sqq*.

46 Gai. *Inst*. 1.91.

47 Sur la perte de l'*ingenuitas vid.* Tac. *Ann*. 12.53.1; sur la perte de la fortune, voir aussi 1.3.12.1.

48 Gai. *Inst*. I. 160.

49 *Vid.* Masi Doria 2013, op. cit. (n. 45), 165. Selon P.R.C. Weaver, "The status of children in mixed marriages", in B. Rawson (éd.), *The Family in Ancient Rome : New Perspectives* (Ithaca

de la femme *ingenua*, en appliquant, dans tous les cas, une peine qui pesait sur elle et ses enfants. Cette mesure concernait aussi l'État, puisqu'elle entraînait la perte de citoyennes libres et de leurs enfants, qui passaient à la condition d'esclaves[50]. Cependant, les unions de ce type continuèrent à être célébrées, en dépit des conséquences. Le juriste Gaius signale que l'empereur Hadrien, *iniquitate rei et inelegantia iuris motus*, rétablit la règle du droit des gens en permettant que, lorsqu'une femme resterait libre, ses enfants le seraient également[51]. Par conséquent, cette situation favorisait les femmes dont les unions avec des esclaves avaient obtenu l'assentiment de leurs maîtres.

Une réponse impériale destinée à une femme appelée Diona par Dioclétien et Maximien traite de ce type d'union. D'après le contenu du rescrit, on apprend que Diona était en concubinage avec un homme qui l'accusait d'adultère[52]. Les empereurs répondirent qu'elle était protégée par la loi, parce que le concubinage n'était pas considéré comme un *matrimonium iustum*, et de ce fait, l'accusation d'adultère n'était pas recevable[53]. Le fait que les empereurs répondent à un *libellus* présenté par une femme de basse extraction sociale montre leur proximité et leur préoccupation pour tous les types de sujets et de situations.

Au vu des exemples précédemment examinés, on peut se poser la question suivante : les Romaines considéraient-elles l'action de la justice était-elle différente envers elles ?

4 Point de vue féminin sur le traitement de la justice à leur égard

Répondre à la question posée n'est pas chose facile, étant donné que l'opinion directe formulée par une femme sur le sujet n'apparaît que dans les sources en de très rares occasions. Dans la plupart des cas, c'est un homme qui transmet cette information ; par conséquent, son point de vue prévaudra sur celui de la femme. Quoi qu'il en soit, je ne crois pas que l'on puisse répondre unilatérale-

1986), 150 *sqq*., le sénatus-consulte tâchait de favoriser les fréquentes unions de ce type au sein de la *familia Caesaris*.

50 Selon M. Brutti, *Il diritto privato nell'antica Roma* (Torino 2015), 121 il devait exister dans dans ce type d'union une proximité sociale entre la femme humble et un esclave jouissant d'une certaine autonomie.

51 Gai. *Inst*. I. 84.

52 C. 9.9.24. Sur ce type d'union, *vid*., entre autres, L.M. Robles Velasco, "Ritos y simbolismos del matrimonio romano arcaico. Uniones de hecho, concubinato y *contubernium* de Roma a la actualidad", *Revista Internacional de Derecho Romano*, (2011), 281 *sqq*.

53 *Tit. Ulp*. 5.5 ; *PS*. 2.19.6.

ment à la question – positivement ou négativement –, car la réponse dépend des circonstances, du moment concret, des résultats, des intérêts et sentiments des parties concernées.

Venons-en à présent à l'examen de témoignages indirects sur cette question. Comme on l'a déjà préalablement exposé, durant l'époque républicaine, les matrones romaines manifestèrent contre le maintien de la *Lex Oppia* de 215, qu'elles considéraient contraire à leurs intérêts et par conséquent injuste envers elles. Selon Tite-Live, les matrones furent capables de faire pression et de faire valoir leur opinion, non à l'endroit spécifique où l'on débattait de l'abrogation de la loi, puisqu'il ne leur était pas permis de s'y trouver, mais chez elles, sur le forum, dans les rues, autant de lieux où leurs voix pouvaient être écoutées et prises en compte[54]. De même, à la fin de la République, nous rencontrons un autre type de manifestation féminine, également de matrones romaines, relatif à l'édit de l'an 42[55]. Les arguments sur lesquels s'appuyaient les matrones pour refuser de payer la quantité exigée par les triumvirs furent exposés par Hortensia, fille de l'orateur Q. Hortensius Hortalus et retranscrits ensuite par Appien. Les matrones considéraient que les exigences de l'édit n'étaient pas équitables (quantité d'argent, raisons de sa perception, nombre de matrones auxquelles il s'appliquait …) et n'hésitèrent pas à le faire savoir en imitant les procédés masculins employés dans les mêmes circonstances : elles confièrent la défense de leurs intérêts à l'art oratoire et en particulier à une femme convenablement préparée et formée, qui s'y adonna une seule fois, mais avec un succès indéniable.

Le sentiment qu'elles éprouvaient à l'idée qu'elles puissent être traitées de manière injuste dans un procès ou que leurs intérêts ne soient pas suffisamment protégés semble confirmé par l'exemple de l'amulette d'Amisos, ville de la province du Pont, du Ier siècle av. J. C., qui comportait une formulation en grec, fidèle aux traditions magiques locales, dont le but était de protéger une femme dénommée Rufina au cours d'un procès[56]. Cette dernière se sentait en

54 F.J. Casinos Mora, *La restricción del lujo en la Roma republicana. El lujo indumentario*, Madrid 2015, 246–250 met en doute la participation des femmes dans le processus qui a mené à l'abrogation de la *lex Oppia* et considère que c'est Tite-Live qui s'exprime à travers le discours de Caton.

55 Val. Max. 8.3.3 ; Quint. 1.1.6 ; App. *BC*. 4.32–34 ; D.C. 47.16. Sur Hortensia : Cantarella 1997, op. cit. (n. 10), 139 ; A. López López, "Hortensia, primera oradora romana", *Florentia Iliberritana* 3 (1992), 326 *sqq.* ; Höbenreich 2005, op. cit. (n. 24), 174.

56 R. Kotansky (éd.), *Greek Magical Amulets : the Inscribed Gold, Silver, Cooper, and Bronze Lamellae*, 1 : Published Texts of Known Provenance. Text and Commentary. Papyrologica Coloniensia 22.1 (Opladen 1994), n. 36 ; D. Ogden, *Magic, Witchcraft and Ghosts in the Greek*

outre menacée par la possibilité d'avoir été victime d'un *pharmakon*. Ce témoignage met en évidence, selon moi, la méfiance de Rufina envers la justice et le recours à la magie pour défendre ses intérêts.

L'adoption d'une attitude provocatrice envers l'autorité judiciaire et le pouvoir s'observe, par exemple, chez certaines matrones qui se déclarèrent prostituées, se livrèrent au proxénétisme ou participèrent à des représentations théâtrales, ou bien pour fuir la stricte *lex Iulia de adulteriis coercendis*, ou bien pour défier cette réglementation[57]. La loi ne concernait pas les femmes qui faisaient commerce de leur corps, ni celles qui étaient unies à un homme par le concubinat. Cette disposition légale n'a pas non plus contribué à réduire les relations adultères[58]. Sous le règne de Tibère, afin de faire appliquer la loi augustéenne et empêcher la désobéissance des matrones, fut créé un sénatus-consulte *de matronarum lenocinio*, qui envoyait en exil les femmes qui avaient été condamnées[59]. Ni la fermeté de la loi sur les adultères, ni le contrôle spécifique du sénatus-consulte sur les matrones désobéissantes ne parvinrent à éliminer les causes qui les motivèrent.

Sans aucun doute, les femmes eurent recours aux moyens mis à leur disposition pour réclamer justice, mais aussi pour s'informer de leurs droits acquis et indiscutables, comme le *ius liberorum*. Les femmes qui en étaient les bénéficiaires pouvaient traiter des affaires légales sans l'aide d'un tuteur[60]. Dans un papyrus d'Oxyrhynchos de l'an 263, Aurelia Thaïsous, mère de trois enfants, demande l'autorisation au préfet d'Égypte pour mener à bien une série d'actions sans tuteur[61]. Dans sa requête, Aurelia nous renseigne, en outre, sur sa condition de femme bien formée intellectuellement. Ce même document conserve la brève réponse du préfet – ou d'un fonctionnaire –, qui l'assure que sa demande sera examinée. Par ailleurs, nous constatons dans les papyrus que les femmes assumèrent le stéréotype traditionnel et le discours du pouvoir sur la fragilité féminine ; comme par exemple, cette veuve propriétaire de terres,

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and Roman World. A Sourcebook (Oxford 2000) n. 267. Je remercie le Dr. C. Sánchez Natalías pour m'avoir fourni l'information sur cette amulette.

57 Cantarella 1997, op. cit. (n. 10), 198–197.

58 Cantarella 1997, op. cit. (n. 10), 197.

59 Suet. *Tib*. 35.2 ; Tac. *Ann*. 2.85.1 ; D. 48.5.10.2, Pap. 2 *de Adult*.

60 Paul. *Sent*. 4.9.9 ; Gai. *Inst*. 1.145 ; 194 ; Ulp. *Reg*. 11.28a. Sur le maintien de la *Lex Voconia vid*. D.C. 56.10.2. R. McMullen, "Women in the Public in the Roman Empire", *Historia* 29 (1980), 208–218 = Id., *Changes in the Roman Empire. Essays in the Ordinary* (Princeton 1990), 162–168. Sur la *tutela mulierum*, entre autres : C. Fayer, *La familia romana. Aspetti giuridici ed antiquari. Parte Prima*, Roma, 1994, 563 *sqq.* ; Evans Grubbs 2002, op. cit. (n. 3), 43 *sqq*.

61 *P.Oxy* XII 1467 (*BL* VIII 246) (a. 263) ; Rowlandson 1998, op. cit. (n. 29), 193.

spoliée et trahie par ses assistants, qui sollicite la protection du préfet en raison de sa vulnérabilité et de son manque d'aptitude pour administrer ses terres sans l'aide d'un homme[62]. Comme le signale Anagnostou-Cañas, des formules flatteuses sont parfois adressées à ceux qui réclament une protection juridique, en se situant, à mon sens, dans une situation d'infériorité consciente et non face à l'agent qui doit rendre justice[63].

Les rescrits impériaux, de même que la documentation papyrologique, sont indispensables pour connaître la réalité pratique d'une société dynamique et multiculturelle, qui tente de s'adapter à l'état de droit romain. Elles offrent l'occasion à des femmes de solliciter des éclaircissements ou des informations sur des points précis en relation avec la vie quotidienne, par exemple, sur la reconnaissance d'un fils né après le divorce[64], la garde des enfants après la dissolution du mariage[65], le droit d'une mère à succéder à ses enfants décédés à un jeune âge[66], ou, fréquemment, sur des questions en rapport avec le sénatusconsulte Velléien[67], entre autres thèmes. Les empereurs tentèrent d'offrir des réponses et des explications en tenant compte des particularités des situations, en exerçant leur capacité en tant que source de lois au moment où ils introduisaient des nouveautés dans le droit traditionnel[68]. C'était, en outre, une façon de manifester leur volonté dans la quête de ce bien-être, allant parfois jusqu'à montrer un caractère paternaliste et familier, qui sensible à la fragilité du sexe féminin. Les rescrits servaient en quelque sorte de propagande politique de l'empire.

Le quotidien devait présenter une grande complexité et une vaste casuistique de situations différentes, qui ne sont pas parvenues jusqu'à nous, notamment, en ce qui concerne l'application des dispositions légales et l'administration de la justice par les empereurs, les gouverneurs et les fonctionnaires impériaux. Comme on l'a vu au long de cette étude, la place de la femme romaine était caractérisée par une série d'incapacités et de préjugés anciens, qui s'appuyaient sur des justifications biologiques et des coutumes ancestrales. C'était le sexe faible ou le second sexe, comme le signale Corbier, à la suite de

62 *P.Oxy.* I. 71 (*BL* I 314) (a. 303).
63 Anagnostou-Cañas 1984, op. cit. (n. 29), 359 avec des références sur les papyrus dans lesquels apparaissent ces formules.
64 C. 5.25.3 (a. 162).
65 C. 5.24.1 (a. 294–305).
66 C. 6.56.1 (a. 291).
67 C. 4.29.1 (a. 211) ; 2 (a. 213) ; 5 (a. 224).
68 *Vid.* Volterra 1973, op. cit. (n. 29), 720 s. ; Coriat 1997, op. cit. (n. 42), 169 *sqq.* ; 212 ; 419.

S. de Beauvoir[69]. Elle fut objet et sujet de la justice, preuve également que, bien qu'étant empêchée dans de nombreux domaines, elle demeurait indispensable dans beaucoup d'autres.

69 M. Corbier, "Le deuxième sexe à Rome" in P. Pavón (éd.), *Mujer y marginación en el Imperio romano* (Roma 2018), 13 *sqq*.

CHAPTER 12

The Spectacle of Justice in the Roman Empire

Margherita Carucci

1 Introduction

In a wealthy house of El Djem, in Roman Africa, a late 2nd century-early 3rd century C.E. floor mosaic illustrates the spectacles of the amphitheatre (fig. 12.1).[1] The heavily damaged panel shows a platform or scaffold in the centre and beasts (bears and leopards) distributed along the sides; the two surviving corners include representations of men being delivered up to a wild beast: one is pushed by a handler, his face being devoured by a leopard, which has planted its claws in the victim's thighs; the other is held by two handlers, while a leopard is ready to attack him; blood streams from their wounds and forms paddles beneath them similar to other pools of blood irregularly covering the surface of the arena. These two scenes are a clear illustration of the *damnatio ad bestias*, that is, the condemnation of criminals to wild beasts as a form of capital punishment, which was performed during the games of the amphitheatre. Laid out in a reception room for being seen by a number of guests, the whole mosaic probably served to celebrate the munificence and the wealth of the house-owner, who paid for the games and offered spectacular entertainment as a *munus* including the punishment of criminals. However, inserted within the wider framework of Roman ideology and values, this figurative mosaic is also a clear illustration of the workings of penal justice in the Roman Empire.

Throughout human history, public executions of criminals have been carried out in a variety of modes as an expression of changing mentalities. Rome, however, remains extraordinary for the scale and method of its violence, for the systematic punishment and destruction of convicted criminals, and for its exuberance.[2] The arrangement of spectacular shows that the whole population was invited to attend, the intentional and orchestrated killing of criminals

1 M. Carucci, *The Romano-African Domus. Studies in Space, Decoration, and Function* (Oxford 2007), 57, 148–150.

2 For a more detailed discussion on the exuberance of Roman executions, see J.-J. Aubert and A.J.B. Sirks (eds.), *Speculum iuris. Roman Law as a Reflection of Social and Economic Life in Antiquity* (Ann Arbor 2002).

 | DOI:10.1163/9789004400474_013

FIGURE 12.1A El Jem, Sollertian Domus, mosaic of amphitheatre scenes: at corners scenes of *damnati ad bestias* devoured by leopards

by the state in public areas and occasions for entertainment, the adoption of torture methods designed to prolong severe physical pain till death, and the performance of ritualised and even mythologised executions make the public executions distinctly Roman. No pre-modern culture seems to rival ancient Romans in the extent and duration of their institutional murder. The deadly games in Roman society have been widely discussed by modern scholars, who have used a number of theories or models to explore origins, nature, and function of Roman shows. Some scholars highlight the religious roots and overtones of the early games, which retained their cultic significance in imperial times;[3] others link the games to Roman militarism or imperial politics;[4] social, moral, and psychological interpretations are also offered to explain the arena's excessive violence.[5] However, an aspect of the Roman shows that has not been fully explored in modern scholarship is the conceptual link between the execution of convicted criminals in the public area of the amphitheatre and the imperial notion of justice. For the *summa supplicia* as staged during the shows in the arena were aggravated and ultimate punishments inflicted on wrong-doers for their crimes in front of their community.[6]

The inclusion of capital punishments within the ludic setting of the arena shows is a further element that makes public executions distinctly Roman: convicted criminals were brought into the amphitheatre and killed in front of the audience as part of a programme including gladiatorial fights, exhibitions of animals, and the slaughter of wild beasts. Charting the typical arena spectacle is a difficult task, since the ancient sources are scattered. The standard 'classical' form of *munus* with morning *venationes*, lunchtime executions, and afternoon gladiatorial combats is a modern reconstruction that is not supported by ancient textual sources. Literary evidence, on the contrary, attests a great variety in the types and combinations of events, which makes it difficult to ascertain that public executions were always performed at lunchtime or along with *venationes* and gladiatorial fights in the same *munus*.[7] What ancient evidence seems to allow us to confirm on more secure grounds is that with the urban development of Roman society, punishment became a matter of pub-

3 A. Piganiol, *Recherches sur les jeux romains* (Strasbourg 1923).

4 K. Hopkins, *Death and Renewal. Sociological Studies in Roman History* II (Cambridge 1983).

5 P. Plass, *The Game of Death in Ancient Rome. Arena Sport and Political Suicide* (Madison 1995); G.G. Fagan, *The Lure of the Arena: Social Psychology and the Crowd at the Roman Games* (Cambridge 2011).

6 E. Cantarella, *I supplizi capitali. Origine e funzioni delle pene di morte in Grecia e a Roma* (Milano 2005).

7 G. Ville, *La gladiature en Occident des origines à la mort de Domitien* (Rome 2014), 386–430.

lic display.[8] Crosses along the roads leading into major centres and parades of *delatores* in the amphitheatre are just a few examples of Roman attitude toward the publicity of physical chastisement.[9] Accordingly, the shows of the amphitheatre, with their emphasis on body and pain, became the most convenient venue for the performance of corporeal punishments in full view before a massed large audience. However, the variety of the events included in the shows warns us from searching for a common theme or aim. I find it difficult to see the performance of Roman justice in the fights against wild beasts or in the gladiators' combats, while this is more evident in the punishment of wrong-doers. Rather, it was the particular combination or isolation of the events during the shows that gave *munera* a distinct potency and forced spectators to confront some fundamental themes of Roman culture (e.g. the extent of Roman power in the exhibition and killing of exotic beasts, the skills and bravery of gladiators and *venatores*, the centrality of military activity). In the case of *summa supplicia*, the most important value that the audience was asked to celebrate was justice.

The concept of justice as visualised in the performance of the deadly games challenges us to confront a number of questions that our modern ideal of state executions to be carried out with discretion prompts when dealing with ancient *summa supplicia*: How did the spectacular killing of condemned criminals convey ideas of justice and fairness? How was capital punishment associated with the Roman value of *iustitia*? How did ancient Romans use violence and death to practice the law? A full and satisfactory answer to these questions will prove to be extremely difficult, since the Romans said very little explicitly about the notions of justice and capital punishment in relation to public shows.

A few references can be found in the *Corpus Iuris Civilis*. Although the legal material compiled in the *Digest* has been excerpted, arranged, and sometimes updated by the compilers, it still provides useful insights into the practice of criminal law in earlier imperial times. The brevity of the legal sources may be completed by the narrative sources, which supply a window on public opinion and attitudes toward spectacular killing and justice with either their detailed accounts of public executions in the amphitheatre or brief references to them. However, literary record has some limitations. Ancient writers, belonging to the elite class of the Roman Empire, were not especially interested in writing

8 For the evolution of capital punishments from domestic to public, see Cantarella 2005, op. cit. (n. 6).

9 K.M. Coleman, '"Informers" on parade', in B. Bergmann and C. Kondoleon (eds.), *The Art of Ancient Spectacle* (New Haven and London 1999), 231–245.

about *summa supplicia* in the arena. When they report facts about shows and capital executions, they tend to focus on those details that revealed something about the emperor's personality or could be used as an opportunity for wider considerations on values and principles of conduct. The gladiatorial combats, for example, were often described by the educated elite as a lesson of courage and bravery exciting the noblest sentiments, such as love of glory and scorn of death. The executions of low-status criminals, by contrast, were seen as a sign of moral degradation and a manifestation of vulgarity typical of bloodthirsty masses from which the elite should keep some distance.[10] However, the ancient elite authors rarely go beyond what seem mere generalisations taken from a stock pile of 'philosophical' commonplaces. The inclusion of public executions in the shows of the arena throughout the imperial times attests their popularity among the larger masses.

Unlike the pagan sources, Christian writings contain a large number of documented traditions about Christians executed during the pagan games in the arena. However, since their main aim was to celebrate the heroism of saints and martyrs, who endured any sort of atrocities and physical abuse by cruel pagans without losing their faith, Christian authors end up creating a one-dimensional approach toward Roman justice.

The limited historical perspective of both legal and literary sources can be enhanced by the use of archaeological and iconographical evidence. In fact, artistic representations of executions in the shows, along with the physical remains of Roman amphitheatres, where the shows were held, may help widen the interpretative framework of a discourse on Roman justice and spectacular killing by reminding us of an important element that is not often fully considered: watching criminals being executed in the arena, as well as viewing them represented on a floor mosaic, was fundamentally a visual experience.[11]

The discussion of the mosaic representations of *summa supplicia* will serve to fill the gap of textual record and to highlight the visuality of executions, the experience of the audience as viewers, and the concept of justice as performance. The mosaics will be discussed just as a starting point for wider considerations on Roman idea of justice and will be complemented by tex-

10 See, for example, Seneca, *Ep*. 7.2.

11 The use of the notion of visuality as an interpretative framework for discussing spectacular killing is drawn upon a number of publications exploring Roman ways of seeing, e.g. J. Elsner, *Art and the Roman Viewer. The Transformation of Art from the Pagan World to Christianity* (New York 1995); R. Nelson (ed.), *Visuality Before and Beyond the Renaissance* (Cambridge 2000); D. Fredrick (ed.), *The Roman Gaze. Vision, Power, and the Body* (Baltimore and London 2002).

tual record and archaeological evidence for the structural arrangement of the Roman amphitheatre.

The view of wrong-doers being punished for their offences, of the seating arrangement in the amphitheatre, whereby spectators were allocated to specific areas according to their social rank, and of the spectators participating in the shows with their vocal expressions and emotional reactions turned the abstract concept of justice into something tangible and visible for the audience to understand and reproduce. To demonstrate this, I will discuss some Romano-African mosaics illustrating capital executions in the arena[12] and some relevant passages in ancient writings as the basis for exploring the concept of Roman justice in the early and mid-imperial times. I will then suggest that for ancient Romans *summa supplicia* in the arena were not brutal forms of entertainment for bloodthirsty audiences. They were, rather, a powerful means for visualising the workings of imperial justice as a sign to see, a value to share, and a performance to play with the ultimate goal of restoring and reaffirming the established order. As a starting point, I will go back to the El Djem mosaic mentioned above, since this mosaic is a clear illustration of the main points of my discussion: spectacular killing, the notion of justice, the role of the audience, and visual impact.

2 Viewing summa supplicia on Mosaics

To the modern viewer the El Djem mosaic, with its representation of spectacular killing to be displayed in a house for its owner's guests, may appear somewhat disturbing and distasteful when viewed through our ideological lenses. However, placing this mosaic within the context of Roman society and ideology may help us to understand Roman attitudes towards institutionalised violence and justice.

The shows of the amphitheatre were a popular subject of Roman art.[13] Scenes of wild beasts, hunters, and gladiators illustrated either as inactive or in combat formed a stock repertoire that was widely used in domestic art for

12 To my knowledge, these mosaics are the only surviving examples of artistic representations of *summa supplicia* in the arena.

13 For the analysis of Roman mosaics illustrating *summa supplicia*, see K.M.D. Dunbabin, *The Mosaics of Roman North Africa. Studies in Iconography and Patronage* (Oxford 1978), 65–87; S. Brown, 'Death as decoration: scenes from the arena in Roman domestic mosaics' in A. Richlin (ed.), *Pornography and Representation in Greece and Rome* (New York 1992), 180–211.

evoking the games of the amphitheatre whose main events were combats of gladiators, hunting of wild beasts (*venatio*) by skilled hunters (*venatores*) or less well-trained fighters (*bestiarii*), and executions of wrong-doers (*summa supplicia*). Whereas gladiatorial combats, *venationes*, and display of wild beasts were the most-illustrated amphitheatre scenes on mosaics across the Empire, the owner of the Sollertiana Domus at El Djem chose a less popular subject for decorating his reception room: the executions of criminals condemned to wild beasts. Though the figures of the wild beasts are taken from the standard decorative repertory, the scenes of execution in the surviving corners seem to evoke a particularly memorable incident that may have occurred during the games offered by the house-owner. For the representation of *damnati ad bestias*, the mosaicist used specific details, such as shaggy hair, reddish-skin, and the fringed loincloth as their own peace of garment, that may not have been intended for a portrait, but clearly characterise these figures as non-Romans. The characterisation of the convicted criminals as barbarians served to highlight the cultural and social distance between the Roman viewers and the barbarian criminals and to create some kind of moral barrier that blocked the viewer's empathy with the victims represented on the mosaic.

The opposition between Roman and barbarian, innocence and guilty, safe and exposed is more evident in another floor mosaic (fig. 12.2), which decorated the room of a villa at Zliten, in modern Libya. Dated to the late 1st century C.E., the well-preserved mosaic illustrates the various events of an entire *munus* on a narrow frieze running along the central portion of the floor: fights of different types of gladiator, *venationes* and combats of wild beasts, musicians, and executions of criminals. In one corner a man tied to a stake is mauled by a leopard clinging to his chest; at his back another criminal is tied to a stake on a movable cart that two attendants are manoeuvring with long handles towards a big cat. A third scene shows a man being gripped by the hair and propelled towards a lion by an attendant who has a whip in his other hand. Salvatore Aurigemma identifies the *damnati ad bestias* as the Garamantes (inhabitants of the area around Tripoli), who were captured during the incursion into the area of Leptis Magna in 70 C.E., as Tacitus reports in his *Historiae* (4.50): the whole mosaic would record the games held in celebration of the Garamentes' defeat on that occasion.[14] Though it is difficult to ascertain whether the Zliten mosaic records this particular encounter,[15] it is evident that the mosaicist intended to characterise the convicted criminals as barbarians. Their dark skin in con-

14 S. Aurigemma, *I mosaici di Zliten* (Roma 1926), 269–278.

15 Dunbabin 1978, op. cit. (n. 13), 235.

FIGURE 12.1B El Jem, Sollertiana Domus, mosaic of amphitheatre scenes: at corners scenes of *damnati ad bestias* being attacked by a leopard

FIGURE 12.2A Zliten, Villa, mosaic of amphitheatre scenes: detail illustrating man tied to a stake and mauled by a leopard

trast to the pinkish-brown skin of the nearby gladiators and their passive position in contrast to the dynamic action of the surrounding figures (gladiators, *venatores*, and musicians, and indeed animals) visualise the social and moral distance between the Romans and the 'Other'. Ancient viewers of these two mosaics would have immediately recognised the convicted criminals as barbarian invaders who deserved to be subject to Roman justice for their attack against the Roman insiders. However, the representation of spectacular killing in the arena may have reminded the viewers of other types of criminals that were commonly executed during the shows in the amphitheatre for their being 'Other', not only barbarian outsiders but also home-grown criminals, that is, individuals who could not be integrated in the Roman social structures because they were did not accept and perform those values on which Roman morality and identity were.

These two Romano-African mosaics may leave us with the false impression that in Roman eyes only barbarians deserved to be executed through exposure to wild beasts during the games of the amphitheatre. Textual evidence shows that the victims of staged executions in public were drawn from all over the Empire: they included prisoners of wars, captured rebels, deserters, brigands,

FIGURE 12.2B Zliten, Villa, mosaic of amphitheatre scenes: detail illustrating man pushed towards a lion

fugitive slaves, forgers, abductors, and murderers.[16] However, the representation of the barbarian type was more visually accessible: the viewer was able to recognise the barbarian origin of the figure depicted on the mosaic from a few stock details and immediately read his execution as the just punishment that members of the rebellious barbaric tribes deserved. Moreover, the figure of the barbarian as the more immediately recognisable type of non-Roman served to assure the house-owner and his wealthy guests that capital executions in the public were reserved only to non-Romans or Romans of inferior rank. Roman modes of punishment, in fact, were a matter of social status.

16 For a list of textual references to *damnati ad bestias* in Roman imperial times see Ville 2014, op. cit. (n. 7), 236–237 note 21.

3 The Inequality of Roman Justice

In Roman social practices and codes of criminal law, the political semantics of punishment rested on a close correlation between status and penalty.[17] In the Early Empire, penalties were meted out according to the criminal's legal status and social standing. A Roman citizen of high status and a non-citizen could be brought up on the same criminal charge and yet be punished differently: the former was exempt from the harsh penalties that were commonly inflicted upon the latter. Citizenship and social standing were the determinants of penal status. The differentiation in penalties according to the social status of the offender was maintained even when the granting of citizenship to all free persons throughout the Empire by the *Constitutio Antoniniana* of 212 C.E. made the distinction between Roman citizens and others obsolete. In the hierarchy of the criminals' rights, the Roman penal system continued distinguishing between *honestiores* (senators, soldiers and others in the emperor's service, members of municipal councils and their families) and *humiliores* (every free citizen of lower status). *Honestiores* retained traditional legal privileges, while the less fortunate rest of the population (*humiliores*) became subject to those aggravated forms of punishment to which non-citizens had been liable in the earlier centuries. In this dual penal system, protection from corporal punishment ceased to be the hallmark of Roman citizenship, as Ulpian clearly states in the *Digest* (48.19.28.2):

> Non omnes fustibus caedi solent, sed hi dumtaxat qui liberi sunt et quidem tenuiores homines: honestiores vero fustibus non subiciuntur.
>
> It is not customary for all persons to be whipped, but only men who are free and of lower rank; those of higher rank are not subjected to the penalty of castigation.[18]

Citizens of low status were left physically vulnerable by the law and liable to the harshest forms of capital punishment, that is, crucifixion, exposure to wild

17 P. Garnsey, *Social Status and Legal Privileges in the Roman Empire* (Oxford 1970); R.A. Bauman, *Crime and Punishment in Ancient Rome* (London and New York 1996), 124–140; J.-J. Aubert, 'A double standard in Roman criminal law? The death penalty and social structure in Late Republican and Early Imperial Rome', in Aubert and Sirks 2002, op.cit. (n0.2), 94–133.

18 All translations are my own.

beasts (*damnatio ad bestias*), and burning alive (*crematio*), which had been traditionally reserved to slaves. In the traditionally hierarchical structure of the Roman society, the unequal treatment of people was a widely accepted customary behaviour that was never abandoned. In *Epistula* 9.5, Pliny the Younger praises his friend Calestius Tiro for the administration of justice in his province by preserving distinctions of class and rank:

> Temperare mihi non possum, quominus laudem similis monenti, quod eum modum tenes, ut discrimina ordinum dignitatumque custodias; quae si confusa, turbata, permixta sunt, nihil est ipsa aequalitate inaequalius.
>
> I cannot restrain myself from sounding as if I were proffering advice when I mean to praise you for the way you preserve the distinction of class and rank; if they are thrown in confusion and disorder and mixed up, nothing is more unequal than the same equality.

From the point of view of the elite class, to which Pliny and Caelestius Tiro belonged, social and juridical equality would have collapsed the traditional social hierarchy, in which people were classified by rank, and diminished the elite's entitlement to privileges and ranked penalties.[19]

The illustration of barbarian prisoners being punished with death on the Romano-African mosaics described above functions not just as a mirror image of the double standard of Roman criminal law but also as reassuring message to the commissioner and his influential guests that inequality before the law is guaranteed, while reminding domestic servants of the fatal consequences of their offences.

Transposed into the shows, where wrong-doers were executed in the presence of the whole community, this message was amplified. The physical destruction of convicted criminals in front of spectators of every social status showed in its powerful immediacy that justice and worthy inequality of the Roman social order were not mere concepts to contemplate but something that was actually exercised and expected. The *summa supplicia* were certainly a very evocative moment for the communication and performance of the established order, but the spectators too were expected to confirm, reinforce, and enact the inequality of social order and justice by sitting in specific areas of

19 See Cicero *Rep*., 1.43: "The same equality is unequal, when it does not recognise grades of dignity."

the amphitheatre. The spectacle of justice started in the very beginning of the games, when spectators entered the amphitheatre and sat in well-defined areas of the building.[20]

4 A Seat for the Social Order

When viewing the amphitheatre scenes illustrated on the mosaics, we cannot help noticing that the spectators are left out of the picture. The absence of spectators is quite remarkable, considering the enormous number of people that could be seated in buildings such as the amphitheatre at El Djem. The representation of the audience in the shows is rare, even in the mosaics illustrating other types of games, such as *venationes* and gladiatorial fights. When there is a presence of the audience, it is reduced to sketchy representations of a few men, like in the 3rd-century mosaic of a *venatio* from a house in Thelepte near Kasserine in North Africa.[21] The two surviving panels show the heads and shoulders of ten male spectators (five in each panel) watching a *venator* in the act of transfixing a lion with his spear in the central scene below. It is difficult to ascertain the reason for the schematised representation of ordinary spectators, or for their total removal from the scenes of the amphitheatre games. Perhaps the mosaicist followed a set of artistic conventions; perhaps the inclusion of spectators would have reduced the space for the main subject of the floor mosaic, that is, the representation of the games and their performers; perhaps the individual patron did not want to include ordinary onlookers in the mosaic he was paying for. Wherever the reason may lie, the inclusion of a few onlookers in the mosaic or their total absence helped the viewer focus on the central action taking place and on its symbolic content.

In the floor mosaics from El Djem and Zliten, the artistic arrangement of the scene with the representation of *damnati ad bestias* in the corners invited the viewers to walk around the outer band of the mosaic in order to appreciate the figurative scenes facing outwards. In their physical presence, the viewers replaced the absent onlookers in the mosaic and re-enacted their role as spectators of the shows not just in their act of viewing the spectacle but also in

20 E. Rawson, 'Discrimina ordinum: the Lex Julia Theatralis', *Papers of the British School at Rome* 55 (1987), 83–114.

21 Dunbabin 1978, op. cit. (n. 13), 69–70; R. Lim, 'In the "Temple of Laughter": visual and literary representations of spectators at Roman games' in Bergmann and Kondoleon 1999, op.cit. (no.9), 343–365: 347 (the paper focuses on the representation of spectators in Late Antiquity).

their location in the stands of an amphitheatre. In fact, the position of the viewers of the mosaic along the walls of the room and of the mosaic in the middle recalled the architectural arrangement of the amphitheatre with its seats for the spectators placed around the central area where the show was performed. The arrangement of the audience around the central area of the stage may appear as a simple architectural device for directing the spectators' gaze toward the same direction and helping them focus their attention toward the action taking place in the middle. However, in the hierarchical structure of Roman society, the precise geometry of the arena's architecture served also to reflect and reinforce the Roman social order (fig. 12.3). For the seating area of the amphitheatre was divided horizontally into several zones which were assigned to specific groups of spectators according to their social rank. The result was a clear division between the front rows reserved for the privileged members of Roman society, such as the emperor and his family, senators, and Vestals, and the back area for the mass of ordinary citizens and the poor. Specifically assigned seats were not the only means for emphasising the social division within the assembled crowd. Distinction of dress too visibly advertised social differences.[22] When, for instance, Corydon went to Rome and attended a *venatio* staged in the wooden amphitheatre that Nero wanted erected in the Campus Martius in 57 C.E.,[23] the poor countryman had to sit where the dirty-cloaked mob usually watched, while the *equites* and tribunes down below were glowing in the sun in their white togas.[24] Corydon, in Siculus' Eclogue, wishes that he had not been clad in peasant garments that prevented him from taking a more forward seat and getting a better view of the god-like emperor Nero, who was watching the show.[25] The distribution of seats and dress code at Roman spectacles mirrored the social and juridical stratification of Roman society. As Corydon's experience as spectator of a show in Rome highlights, the segregation of the spectators into peer groups according to their social rank and visible dress singled out three main social groups: the emperor, the elite, and the rest of the population.

Yet, as a whole the audience formed a single group embodying the Roman good order, while the wrong-doers being killed in the central stage of the arena

22 J.C. Edmondson, 'Dynamic arenas: gladiatorial presentations in the city of Rome and the construction of Roman society during the Early Empire', in W.J. Slater (ed.), *Roman Theater and Society. E. Togo Salmon Papers* I (Ann Arbor 1996), 69–112: 84–86.

23 Tac. *Ann.* 13.31.1; Suet. *Nero* 12.1; Plin. *HN* 16.200.

24 Calpurnius Siculus, *Ecloga*, 7.26–29; G.B. Townend, 'Calpurnius Siculus and the Munus Neronis', *Journal of Roman Studies* 70 (1980), 166–174.

25 Calpurnius Siculus *Ecloga*, 7.79–84.

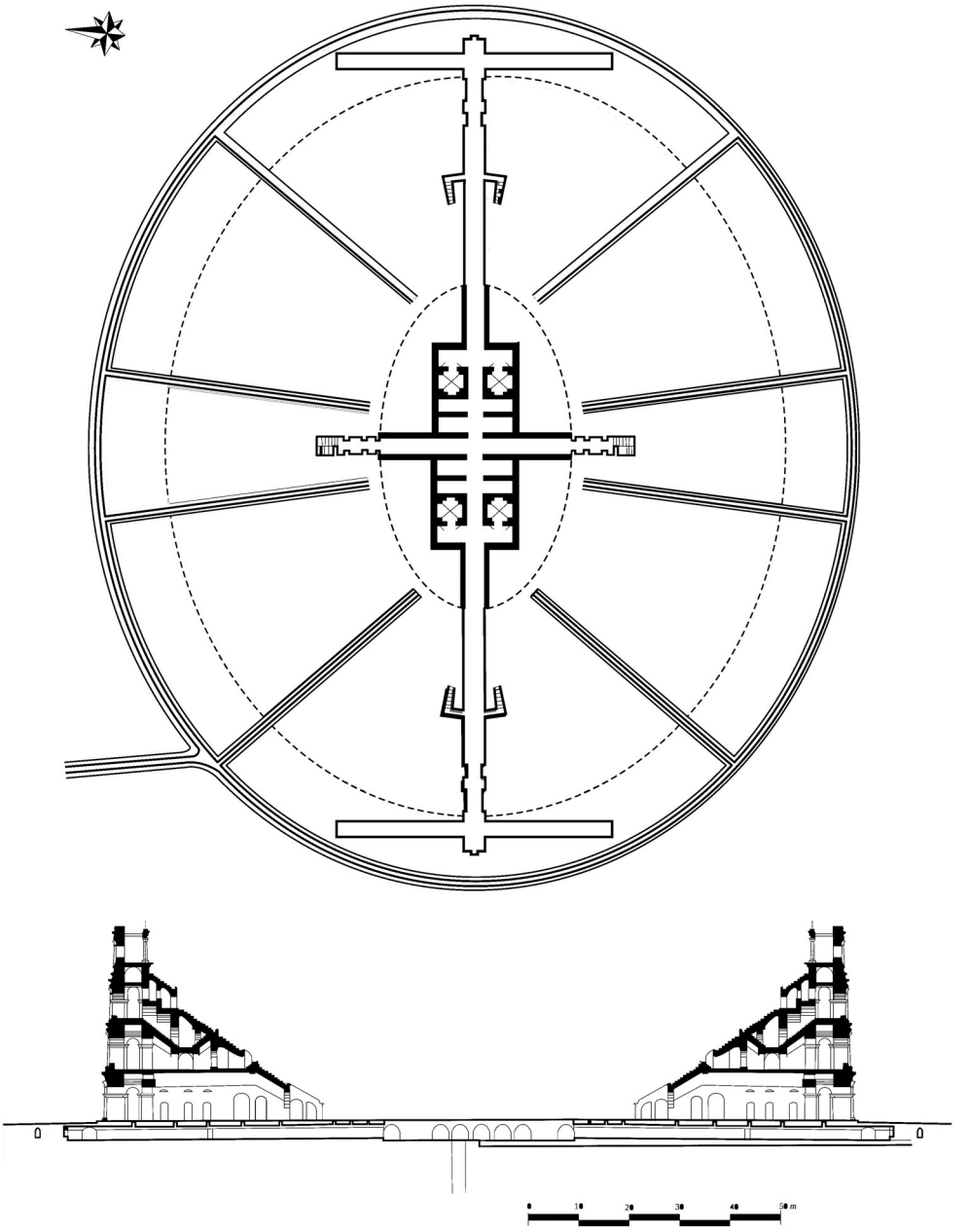

FIGURE 12.3 El Jem, Amphitheatre: ground plan

represented the social outcasts whose offences had degraded and deprived them of their identity and position in the community. The result was a clearly visible opposition between two main groups: the good and innocent Us in the upper seating zones and the bad and guilty Other in the lower central area. The architectural layout prevented the audience from coming into contact with the convicted criminals but facilitated the imposition of an axial visibility on them as objects to be seen and violated: the right to a viewing invested the audience with the authority to impose their punitive and judgemental gaze upon the wrong-doers. However, visualising the physical and social opposition between these two groups was not the only means for reaffirming the established social order. The execution of convicted criminals was a show of death in which both criminals and audience had to play their role.

5 Playing Justice

In Roman eyes, the wrong-doers displayed in the shows of the amphitheatre were *noxii*, a term from the verb *nocere* ("to harm, injure") to describe those who have caused harm and are therefore liable to punishment. Being guilty, the *noxii* deserved to be humiliated through the disposal of their bodies. On some occasions, their physical humiliation and degradation was staged in the more spectacular form of what Kathleen Coleman describes as "fatal charades", that is, the execution of criminals staged as the enactment of a famous death of myth or legend.[26] Visual record of these deadly dramas entailing real death on stage may be the floor mosaic of the Villa du Taureau at Silin, in modern Libya (fig. 12.4).[27] The mosaic shows two small figures being tossed by a huge white bull, while a third one is pushed towards the animal by a man wearing an animal skin; another figure hands out a hooked staff towards the two figures in the air. Above the scene is an inscription, *Filoserapis comp*.

The identity of the *damnati ad bestias* represented on the Silin mosaic remains unknown. G.Ch. Picard identifies the victims as easterners for their specific costume (tunic and trousers) and suggests that the mosaic may represent the punishment of the prisoners captured during Caracalla's eastern campaigns in 216.[28] While agreeing with Dunbabin that this hypothesis seems

26 K.M. Coleman, 'Fatal charades: Roman executions staged as mythological enactments', *Journal of Roman Studies* 80 (1990), 44–73.

27 The mosaic may be dated to the 3rd or 2nd century: see Carucci 2007, op. cit. (n. 1), 78, 165–166.

28 As the name *Filoserapis* is an epithet of Caracalla, Picard suggests that the villa-owner

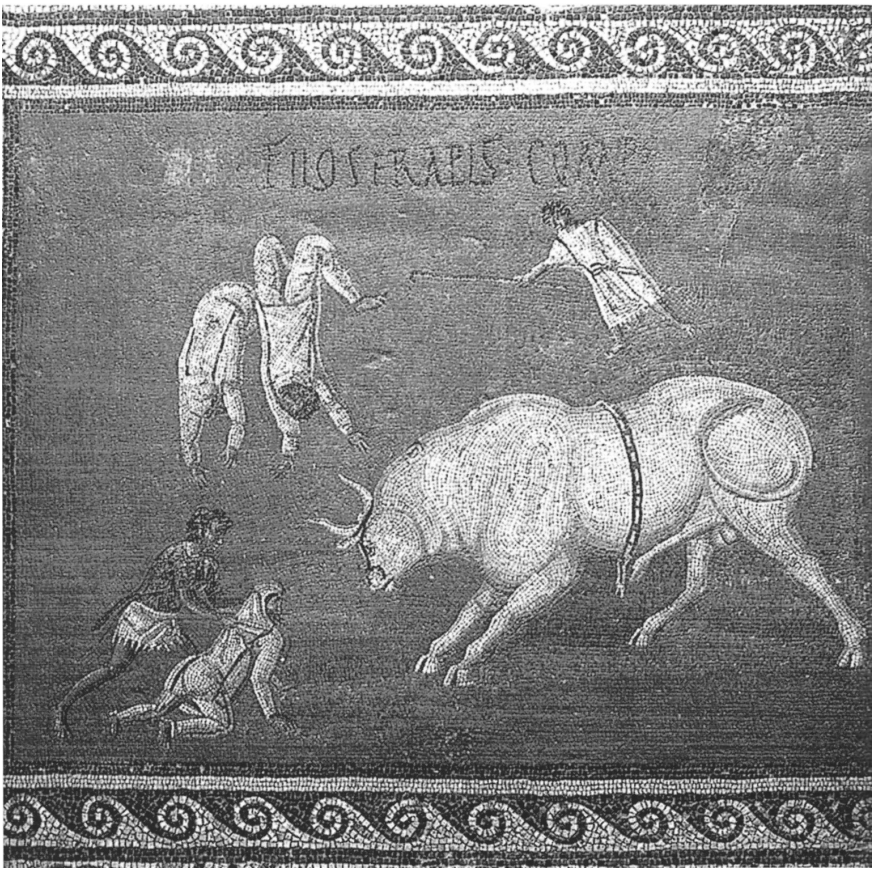

FIGURE 12.4 Silin, Villa du Taureau, mosaic of scene with bull tossing victims

too speculative,[29] I suggest that the costume served to highlight the status of the criminals as foreigners who do not participate to the workings of the Roman social system. The victims' costume may indicate also an execution staged in the guise of mythological enactments, in which the criminals were dressed up and suffered the punishment that was proper to the plot. The depiction of a large white bull reminds us of the 'union' between Pasiphae and the bull that Martial states was truly enacted in the amphitheatre during the games cele-

used this epithet to show off his devotion to the emperor (G.Ch. Picard, 'La villa du taureau à Silin (Tripolitaine)' *CRAI* (1985), 227–241). Filoserapis may be also the name of who organised the show.

29 K.M.D. Dunbabin, *Mosaics of the Greek and Roman World* (Cambridge 1999), 124 note 57.

brating Titus' dedication of the Flavian Amphitheatre in 80 C.E.[30] With their two-way traffic between fiction and reality, the fatal charades highlight the theatrical character of the show of death, in which the convicted criminal played the main role on the central stage.

However, the description of the *summa supplicia* as a trivial form of drama staged merely for the entertainment of the audience does not capture the complex dynamics of the spectacular killing. In the Roman shows, the audience was not a group of passive spectators to be entertained: for the show to be performed, spectators had to play their role, too. Like the *chorus* of the ancient Greek tragedy, the audience in the arena participated in the fatal action with their comments, their applause,[31] and their appeal for justice.[32] In the drama of death, audience and convicted criminal were the two main characters each playing a specific role: the embodiment of the 'Normal' as just and good the former and the visual symbol of the Other as threatening and abnormal the latter.

The performance of their role was supported by the visual dynamics that the structural arrangement of the amphitheatre contributed to enact. From the upper rows the audience could cast their punitive gaze over the condemned on the lower stage: the power of the spectators' gaze turned the criminals into an object to be disposed of. The intentionally degrading and humiliating executions performed in full view before the massed audience served to strengthen the social distance between spectators and criminals and remove any possibility of empathy or pity on the part of the audience. The physical and emotional detachment of the spectators watching the blood spectacle is visualised in the depiction of the onlookers in the Thelepte mosaic as physically and emotionally removed from the central scene of *venatio*. Though the mosaic illustrates the killing of a lion and the executions of criminals was a different kind of visual experience, perhaps ancient Roman spectators viewed the violent and bloody executions of the criminals with the same kind of detachment, because criminals were merely objects to be disposed of.[33]

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30 Mart. *Lib. Spect.* 5.

31 On the applause in the theatre as an active instrument of participation, see H.N. Parker, 'The observed of all observers: spectacle, applause, and cultural poetics in the Roman theatre audience', in Bergmann and Kondoleon 1999, op. cit. (n. 9), 163–179.

32 For the use of the shows by the crowd as a form of communication with the emperor, see T.W. Africa, 'Urban violence in imperial Rome', *The Journal of Interdisciplinary History* 2:1 (1971), 3–21.

33 For a discussion of violence as part of the ordinary experience, see G.G. Fagan, 'Violence in Roman social relations', in M. Peachin (ed.), *The Oxford Handbook of Social Relations in the Roman World* (Oxford 2011), 467–495; M. Carucci, forthcoming, 'Domestic violence in

However, the dynamics of the audience's emotional responses at play during the shows were more complex than what the artistic evidence seems to suggest. Though the Romans have left us very little comment on the effects of their shows upon the spectators, some textual passages show that the spectators were actively engaged with the suppliers of their entertainment.[34] Ancient written record of the public's reactions to the games, though mostly focusing on gladiatorial combats, shows that watching the deadly games in the arena was a powerfully visual experience that was difficult to resist with emotional detachment, as the onlookers portrayed in the Thelepte mosaic may suggest.

The emotional engagement of the spectators as revealed through the physicality of their vocal expression across the social strata was a complimentary part of the shows, since it increased sensations of solidarity. For witnessing the staged executions of criminals in their role as dangerous outsiders of the social order enhanced the value of conformity and the spectators' solidarity in the face of threats to the established order. The play of justice in the arena required the audience members to be drawn in the act and contribute actively through their physical presence in the allocated seats, their vocal expression, their emotional engagement, and ultimately their acceptance of the imperial ideology.

This still leaves some questions: why did killing of wrongdoers have to be so spectacular? Why did it have to be staged in public areas and times dedicated to entertainment? Why did the Romans go so far in making a spectacle out of these punishments?

6 Conclusion: Visualising and Publicising Justice

As a Mediterranean community whose members place a high value on visibility and interaction in public spaces, Roman society was fundamentally public. Here, every individual could exercise what Foucault calls the "disciplinary gaze"[35] on his fellows in a mutual action of watching and being watched. This reciprocity of the gaze had a double advantage for the community and the individual. On the one hand, the individual's act of watching over the behaviour of

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Roman imperial society: giving abused women a voice', in M.C. Pimentel and N. Simões Rodrigues (eds.), *Violence in the Ancient and Medieval Worlds* (in press, 2018), 57–73.

34 See, for instance, St Augustine's description of his young friend and countryman Alypius' reaction to the gladiatorial combat (*Confessions*, 6.8). For more references, see M. Wistrand, *Entertainment and Violence in Ancient Rome: the Attitudes of Roman Writers of the First Century A.D.* (Göteborg 1992).

35 M. Foucault, *Discipline and Punish. The Birth of Prison*, trans. Alan Sheridan (New York 1977).

his fellows guaranteed the reproduction of forms of behaviour and norms on which the traditional order of the community was based. On the other hand, being the object of the community's gaze was for the individual a means by which to prove the standards of his morality and hence his right of membership to that community.[36] This right was irremediably lost when individuals disrupted the traditional order with their criminal offences or threatened the security of the state as enemies or rebels. Those individuals ought to be punished for their crimes[37] in a variety of modes each fulfilling specific purposes, such as correction,[38] retribution,[39] and deterrence.[40] However, the ultimate aim of every form of punishment was the protection and reinforcement of social harmony, order, and security of the whole community. In order to communicate this message in the most effective way, the various modalities of punishment needed to be publicised and witnessed. As discussed above, in the dual penal system of Roman law, whereby penalties had to be correlated with the crime and status of the offender, the most aggravated forms of punishment were exile and suicide for the *honestiores* and public executions for the *humiliores*. Though exile and suicide may appear as more privileged alternatives to ultimate penalties, I argue that *exilium*, political suicide, and *summa supplicia* functioned equally as visual modalities in the enactment of justice. The punishment of an elite member through his physical removal from the community, either in the form of exile or forced suicide, was visualised in his physical absence and in the removal of anything he could be remembered by (*damnatio memoriae*). Similarly, executions of low-status criminals were staged in highly public venues as a visual sign of imperial justice for the whole community to witness. Regardless of the social status of the offender and the type of penalties, punishments of the wrong-doers ought to be visible and public for

36 Even emperors ought to be visible for communicating and reinforcing their power: see O. Hekster, 'Captured in the gaze of power, visibility, games and Roman imperial representation', in O. Hekster and R. Fowler (eds.), *Imaginary Kings: Royal Images in the Ancient Near East, Greece, and Rome* (Munich 2005), 157–176.

37 Seneca (*De Ira* 2.2.4) accepts the violent execution of criminals during the games of the amphitheatre as unquestionably just. In his report on how Nero blamed the Christians for the fire at Rome in 64 C.E. and ordered their public execution, Tacitus describes the killing of the Christians as just and legitimate, though it could not meet with general approval because their execution did not seem to bring any public utility (*Ann*. 15.44.5). For a discussion of Roman writers' attitudes to violent entertainment see Wistrand 1992, op. cit. (n. 34).

38 Sen. *Clem*. 1.22.1; Gell. *N.A*. 7.14.3.

39 Gell. *N.A*. 7.14.3.

40 Gell. *N.A*. 7.14.4; Sen. *Clem*. 1.20.1; Quint. *Decl. Mai*. 274.13. For a full discussion of the penal aims in Roman juridical system, see Coleman 1990, op. cit. (n. 26), 44–49.

the community to approve, and hence to reinforce the importance of the social good to which the members of the community were requested to contribute. In a society where the individual had strong obligations to the community and most actions were subject to public inspection, staged executions in the hugely attended shows of the amphitheatre communicated a powerful message: whoever endangers the Empire's moral stability with his heinous crimes is subject to moral evaluation, degradation, and punishment in front of the whole community. Convicted criminals were branded as *infames* ('without reputation'), a legal stigma attached to anyone who was deemed not trustworthy by society, such as individuals performing in public (actors, gladiators, and prostitutes),[41] procurers, and soldiers dishonourably dismissed.[42]

In this context, criminal justice was a *spectaculum*, that is, a sight, an event or performance, which was enacted mainly to be seen and evaluated through the standards of public morality, a visual event created by the interaction between viewers and viewed. The audience was invited to see the criminal, the excruciating pain that his body's reactions and facial expressions made evident, and his physical and moral isolation, and made sense of this visual experience as a source of information about the values on which the community was based: justice, social order, conformity, and high moral standards.

The visually accessible execution affirmed the heinous character of the crimes in the body of the wrong-doers to be executed and hence justified justice. If the crime attacked justice and the moral values on which the very existence of the Empire was based, justice attacked the criminals to reinforce the authority of the law.[43] The drama of death in the arena amplified this message by means of an apparent paradox in which both criminals and spectators became entangled. For the condition of the criminals on stage is somewhat

41 C. Edwards, 'Unspeakable professions: public performance and prostitution in Ancient Rome', in J.P. Hallett and M.B. Skinner (eds.), *Roman Sexualities* (Princeton 1997), 66–95.

42 Those who were legally and morally branded as disgraceful were denied a number of legal rights, e.g. they could not witness wills or other legal transactions; they could not appeal (Paul. *Sent*. 5.26) or make accusations against others (*Dig*. 48.2.4); they could not marry freeborn Romans (Ulpian, *Frag*. 13). For a discussion of *infamia*, see Edwards 1997, op. cit. (n. 41), 69–76.

43 The writers of the elite class judged severely those emperors that threw spectators into the shows or threatened them to be 'turned from spectator into spectacle' (Plin. *Pan*. 33): see, for example, Suet. *Calig*. 35.3; Dio, 59.10.3–4; Suet. *Dom*. 10 When the emperor threw spectators into the shows, the people were denied the opportunity to affirm their cohesiveness and superiority over the convicted criminals. Any crossing of boundary that the emperor permitted between the empowered spectators and the powerless performers was seen as a threat to social order and justice and led to question the legitimate power of the emperor himself.

paradoxical: with their crimes they threatened the social order and security of the Empire and were therefore the enemies of the society as a whole; as *infames*, they had no place in the social and political hierarchy; however, they participated in a punishment that involved the whole society. The spectators, too, found themselves caught into this paradox through their role in the play: as the auxiliary of justice in the punishment of criminals, the socially variegated mass of anonymous spectators participated into the process of bestowing justice. Punishing criminals was an act of performance staged for reaffirming the specific values, behaviours, and cultural practices of Roman society.

In the arena, death becomes a spectacle on a grand scale, a form of entertainment with striking effects, an event with a strong visual impact. Yet, the killing of criminals in public venues was a performance inside the rituals of justice, which makes public executions distinctly Roman. The excessively violent death of the wrong-doers within the splendid apparatus of the shows in the amphitheatre was a means by which to visualise and reinforce the notion of imperial justice. Spectacular killing served as a very important occasion for articulating in a highly visible and public manner the hierarchical structure of the social order, the importance of the membership in the just and legitimate group, and the power of the law.

Played out in the arena and before the collective gaze, the drama of death was a form of spectacle communicating powerful messages: the significance of the social order, the authority of the spectators, the force of the *communitas*, and the legitimacy of the imperial power. This form of spectacle was performed inside the rituals of justice to be intended not as an abstract concept for imperial propaganda and philosophical discussions. Roman justice was rather a sign to visualise, a value to publicise, a performance that the whole community including the convicted criminals was required to play. As a collective performance, the drama of death in the arena was a spectacle of justice.

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