Chapter 2
The Sources of Roman Law

2.1 Introductory

The Romans called their own law *ius civile*: the legal order of the Roman citizenry (*cives Romani*). Like other peoples in antiquity, the Romans observed the principle of personality of law, according to which the law of a state applied only to its citizens.[1] Thus the Roman *ius civile* was the law that applied exclusively to Roman citizens.[2] However, Roman law underwent an important expansion in the course of time. With the gradual enlargement of the Roman city state and the increasing complexity of legal life, Roman jurisprudence adopted the idea of *ius gentium*: a body of legal institutions and principles common to all people subject to Roman rule regardless of their *civitas*. By the introduction of the *ius gentium* within the body of Roman law, the scope of the law was considerably enlarged. Nevertheless, technically the position remained that some legal institutions were open only to Roman citizens. Such institutions were classified as belonging to the *ius civile*, while other institutions were regarded as belonging to the *ius gentium* in the sense that they were applicable to citizens and non-citizens alike. After the extension of the Roman citizenship to all free inhabitants of the empire by the constitution of Emperor Caracalla in AD 212, this technical distinction in effect vanished: in principle every free man within the empire was now a citizen, subject to the same law.

The term 'sources of law' denotes the ways in which law is created or comes into being. The Roman jurists, notwithstanding their liking for classification, were never

[1] In a broader sense, the term *ius civile* denoted the law peculiar to a particular state or political community. According to Gaius, 'the rules enacted by a given state for its own members are peculiar to itself and are called civil law' (G. 1. 1.).

[2] Hence the description of the Roman *ius civile* as '*ius proprium Romanorum*'. It should be noted here that from an early period, communities affiliated with Rome were granted limited rights under the Roman *ius civile*. The members of these communities occupied an intermediate position between Roman citizens and foreigners (*peregrini*).

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very subtle in their approach to this term and different sources were highlighted as they existed in different historical epochs to reflect their predominance as vehicles of legal development. Reference may be made to a number of statements in which the sources of Roman law are listed, apparently without any specific order. In his *Institutes*, the second century AD jurist Gaius states that Roman law consists of statutes (*leges*), plebiscites (*plebiscita*), senatorial resolutions (*senatus consulta*), enactments of the emperors (*constitutiones principum*), edicts of the magistrates (*edicta*), and answers of those learned in the law (*responsa prudentium*).[3] Gaius' treatment was adopted by the drafters of Justinian's *Institutes* in the sixth century AD, with the exception that the latter make a preliminary distinction between written and unwritten law.[4] In Justinian's textbook the specific sources mentioned by Gaius are subsumed under the category of written law (*ius scriptum*), while unwritten law (*ius non scriptum*) or custom is discussed briefly a few paragraphs below.[5] The view that custom (also referred to as *mos* or *consuetudo*) was a source of law can also be found in the work of the first century BC orator and philosopher Cicero, who also included in his list of sources equity (*aequitas*) and decided cases.[6] It should be noted, however, that Cicero's conception of custom differed from that of the drafters of Justinian's *Institutes*. Whilst for Cicero the term custom denoted ancestral tradition (*mos maiorum*) in the context of the Roman *ius civile*, the same term in the *Institutes* referred to regional and local variations on the law of the Roman Empire. The omission of custom from Gaius' and other classical jurists' accounts can probably be explained on the grounds that these authors did not view custom as a source of law distinct from jurisprudence, but regarded it as being connected with jurisprudence as "a special form of civil law that is founded without writing solely on the interpretation of the jurists."[7]

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[3] G. 1. 2.

[4] *Inst* 1. 2. 3: "Our law is partly written, partly unwritten. The written law consists of statutes, plebiscites, decrees of the senate, enactments of the emperors, edicts of the magistrates and answers of the jurists." It should be noted that the Roman distinction between *ius scriptum* and *ius non scriptum* was based on the Greek distinction between written law (*nomos eggraphos*) and unwritten law (*nomos agraphos*), which goes back to Aristotle (*Rhetorica* 1. 10. 1368b). The Greek distinction, however, was normally used to depict a contrast very different from what the Romans had in mind; namely that between the (written) positive law of a particular state and (unwritten) natural law. Only in exceptional cases did the Greeks employ the term unwritten law to describe the unformed positive law of a particular people. When the Romans came to borrow the relevant Greek terms, inasmuch as they possessed a Latin equivalent for the term natural law, namely *ius naturale* (usually identified with *ius gentium*), they restricted unwritten law, or *ius non scriptum*, to the exceptional Greek usage, i.e. to customary law.

[5] *Inst* 1. 2. 9: "The unwritten law is that which usage has approved, for all customs established by the consent of those who use them obtain the force of law."

[6] *Topica* 5. 28: "The civil law is to be found in statutes, resolutions of the senate, decided cases, opinions of the jurists, edicts of the magistrates, custom and equity." Other rhetorical writers of the early imperial age likewise regard custom as one of the sources of law. See, e.g., Quintilian, *Inst. Orat*. 12. 3. 6.

[7] D. 1. 2. 2. 12. (Pomponius).

2.2 Sources of Law in the Archaic Age

2.2.1 Customary Law and the Leges Regiae

The earliest source of Roman law was unwritten customary law, comprising norms (referred to as *mores maiorum*: the ways of our forefathers) that had grown from long-standing usages of the community, as well as from cases that had evolved from disputes brought before the clan patriarchs or the king for resolution. However, archaic Roman law was not marked by uniformity, since the two classes, the patricians and the plebeians, which made up the bulk of the population, appear to have been distinguished not only by the possession of different political privileges but also by the possession of different systems of customary law.[8] A further divergence of practice in the primitive society out of which the city-state of Rome gradually evolved derived from the considerable amount of autonomy in legal relations that existed in the clans (*gentes*) out of which the earliest Roman community was formed. One might perhaps say that the earliest phase of Roman history is marked by a fundamental dualism: the *civitas* (in the sense of state or political community) on the one hand and the *gentes* on the other. Rome evolved politically as a unitary state when the gentile organization declined and the sense of unity among the population intensified. Thus, the initially diverse customs of the different *gentes* underwent a process of assimilation that engendered a common body of customary norms for governing the whole community. Furthermore, as the Roman state evolved, an attempt was made to create a uniform system by making the law of the patricians approximate as closely as possible to that of the plebeians.

Although the Romans themselves never analysed the concept of customary law and the classical jurists did not regard custom as a distinct source of law, there is no doubt that Roman law was almost entirely customary in its origin. Rome owed to custom an essential part of her family organization, such as the norms prescribing the rights and duties of family members and the position of the head of the family (*paterfamilias*); the rules regulating the formation of marriage; the earliest forms of property ownership and transfer; and a great deal of the formalities employed in legal procedure. Many of the relevant customary norms went back to the remote past of the Roman people, while others emerged later, during the formative years of the Roman city-state. The rules and procedures created in this way were characterized by extreme formalism, indeed ritualism: the casting of all juridical acts into an

[8] This seems to be evidenced by the existence of dual forms for the attainment of the same end in some areas of Roman law. E.g., we have the marriage by *confarreatio* (a form of marriage involving an elaborate religious ceremony) side by side with marriage by *usus* (an informal variety requiring simply mutual consent and evidence of extended cohabitation); and the testament in the *comitia curiata* (now referred to as *comitia calata*) (*testamentum calatis comitiis*) side by side with the testament '*per aes et libram*' ('with the copper and the scales') or mancipatory will. The exclusion of the plebeians from political office and the priesthood and the denial to them of the right of *conubium* (marriage, intermarriage) with members of the patrician class also point in the direction of a fundamental division between the two classes.

unchangeable form where successful completion depends upon strict adherence to a set ritual engaging certain words or gestures. This kind of formalism has a socio-psychological explanation: public opinion and, subsequently, public authority, refused to recognize rights or allow their enforcement, unless the act that created them had been performed with such publicity and formality as may draw the attention of society and leave no possibility of doubt as to its existence. In this respect it appeared fitting that the material signs (words or gestures) that accompanied the relevant act should be so precise that no doubt could arise with respect to its nature and object. It should be noted, further, that for a long time law (*ius*)[9] was hardly distinguished from religion, being entirely a matter of ritual, and that the pontiffs (*pontifices*), the priests who were the first regulators of customary law, maintained in it this ritual and symbolic character.[10]

In the course of time, as Roman society continued to grow both in numbers and complexity, the role of custom as the principal source of law gradually diminished, for the customary norms, often vague and limited in scope, could not provide the certainty that a more intricate system of social and economic relations required. Thus, with the rise of the Roman city-state, the need emerged for the development of all-embracing legislation, i.e. the organization of law by public authority. While sanctioning the majority of customary norms already in existence, the state reserved to itself the right of making law in the future, and this opened the way to the ascendancy of written law (*ius scriptum*), initially in the form of statute. In later times, when law became subject to authoritative interpretation by the jurists, custom ceased to be regarded as a formal source of law having been incorporated into a variety of other sources, such as statutory law, the edicts of the magistrates and the responses of the jurists. However, customary norms continued to indirectly affect both the content and scope of laws. For instance, many transactions of private law became enforceable by actions with respect to which the judge was instructed to take into consideration matters relating to good faith (*bona fides*), a legal concept relating to the enforcement by legal means of what was generally viewed as social or moral obligations. Furthermore, it must be noted that the Romans did recognize local custom (*mos regionis*), especially in connection with customary usages prevailing in the provinces. In the post-classical period, well-established local customs were acknowledged as a supplementary source of law and exercised a considerable influence on both legislation and the administration of justice.

In the archaic period, legislation in the modern sense and as the Romans understood it in their politically mature eras, was practically unknown. The law

[9] Originally, the term *ius* (plural, *iura*) referred to a course of conduct that the community would take for granted and in that sense endorse. The existence of a *ius* was determined by securing, probably through ordeal, the sanction of the gods. And see relevant discussion in Chap. 3 below.

[10] The rules of law, consisting of fact-decision relationships, could not be argued for; similarly, a minister of religion was unable to present a rational justification for his prophesies. In each case the link between the facts (the judicial proof, the flying bird) and the decision (a legal judgment or a statement concerning divine law – *fas*) remained an inexplicable norm. This perspective emphasizes the *irrational* aspect of archaic legal procedure.

was mainly construed as a sacred custom and thus not subject to change by direct legislative means. The classical jurist Pomponius describes the state of the law during this period as featuring a series of laws, referred to as 'laws of the kings' (*leges regiae*), which supposedly emanated from some of the early kings. According to Roman tradition, these laws were collected and recorded at the end of the regal era by Sextus Papirius, a *pontifex maximus*.[11] The *ius civile Papirianum*, as this collection was known, if it ever existed, is lost to us, but a number of rules ostensibly promulgated by kings have been preserved in the works of later Greek and Roman authors. The *leges regiae* were probably little more than a gloss on the prevailing customary law that assumed the form of declarations composed by the kings and publicly announced during an assembly. The surviving fragments of these laws, as far as they are authentic, attest to the close connection between law and religion that marks the character of archaic law. For the most part, the kings' laws were prescriptive or condemnatory in character. Examples of prescriptive laws, i.e. laws prescribing 'correct' behaviour, include a law of Romulus, Rome's first king, prohibiting a wife from divorcing her husband[12]; and a law of King Numa according to which a *pater familias* could not sell a son to slavery after he had given him permission to marry.[13] Condemnatory laws, on the other hand, laid down penalties for various forms of wrongdoing. These penalties sometimes consisted of private redress against the wrongdoer; e.g. retaliation (*talio*) was allowed in some circumstances as satisfaction for certain forms of personal injury. However, offences of a particularly serious nature, such as certain religious crimes, entailed more public forms of punishment, including ritual execution. Such punishments were primarily expiatory in character: they were aimed at eliminating the state of collective impurity created by the commission of the offence.[14]

[11] D. 1. 2. 2. 1–2: "At the outset of our state, the citizen body decided to conduct its affairs without fixed statute law or determinate legal rights; everything was governed by the kings under their own hand. When the state had subsequently grew to a reasonable size, then [King] Romulus himself, according to tradition, divided the citizen body into thirty groups, and called them *curiae* on the ground that he improved his curatorship of the commonwealth through the advice of these groups. And accordingly, he himself enacted for the people a number of statutes passed by advice of the *curiae* … [and] his successor kings legislated likewise. All these statutes have survived written down in the book by Sextus Papirius, who lived in the time of Superbus. This book is called the Papirian Civil Law, not because Papirius added anything of his own to it, but because he compiled in a single work laws that had been passed without observing any order."

[12] Plutarch, *Romulus* 22.

[13] Dionysius 2. 27.

[14] See relevant discussion in Chap. 4 below.

2.2.2 *The Law of the Twelve Tables and the Growth of Statutory Law*

As previously noted, archaic Roman law initially consisted of a body of unwritten customary norms, the nucleus of which had its origins in the period when the gentile organization of society was still effective. These norms were characterized by a high degree of uncertainty and, when a legal question arose, it fell to the college of the pontiffs to give an authoritative answer thereto. As the members of this college, like all state magistrates, were at this time exclusively patricians, it is reasonable to suppose that the plebeians frequently accused them of showing class bias in their determinations. It is thus unsurprising that one of the plebeians' chief demands during the struggle of the orders was that the customary law in force be written down and made public so that it could no longer be applied arbitrarily by the pontiffs and other magistrates charged with the administration of justice. After several years of strife, it was agreed that a written code of laws applicable to all citizens should be compiled. The idea of codification was probably borrowed from the Greeks, who had established colonies in Southern Italy and Sicily and with whom the Romans had from an early period come into contact.

According to the traditional account, before embarking on the work of codification, the senate dispatched a three-member commission to Greece to study the laws of the famous Athenian lawgiver Solon, and those of other Greek city-states.[15] On the return of this commission it was decided that the constitution should be virtually suspended and that the reins of government should be placed in the hands of an annually appointed board of ten magistrates (all of them patricians). In addition to their regular governmental functions, these magistrates were to be assigned the special task of drafting a written code of laws (*decemviri legibus scribundis*).[16] In 451 BC the decemvirs produced a series of laws inscribed on ten tablets (*tabulae*). These laws were considered unsatisfactory, which prompted the election of a second commission of ten men (now incorporating some plebeians) to complete the work.[17] In 450 BC two further tablets of laws supplemented the existing ten and, after it was ratified by the centuriate assembly (*comitia centuriata*), the work was published under the name *lex duodecim tabularum*. According to Roman tradition, the second decemviral board refused to resign after completing their legislative work and endeavoured to retain their office by ruling as tyrants. Eventually, however, they were deposed following a popular revolt and the constitutional order of the Republic was restored.

The traditional account of the events leading to the enactment of the Law of the Twelve Tables, embellished with myths and legends, contains several

[15] Livy 3. 31. 8. and 32. 6. 7.

[16] Livy 3. 32–33; Dionysius 10. 55–57. See also D. 1. 2. 2. 4. (Pomponius). The idea of a suspension of the constitution and the temporary conferment of supreme authority on a law-giver, seems likewise to have been borrowed from the Greeks.

[17] Dionysius 10. 58. 4.

inconsistencies and anachronisms. In modern times, the queries over the origin and nature of the decemviral legislation have generated much controversy. Some scholars have challenged the historicity of the second decemvirate and argued that the work of the original commission was probably completed by the consuls of the following year. Moreover, historians contend that the dispatch of a commission to Greece is highly unlikely and, even if such a mission existed, it may have visited only Greek cities in Southern Italy. The preserved fragments of the Law of the Twelve Tables reveal scant material that could be directly traced to a Greek influence, although certain parallels with the laws of other early societies can be observed.[18] A Greek influence on the code, slight though it may have been, was the inevitable result of the prolonged influence of the Greek civilization, through its outposts in Southern Italy and Sicily, on Rome from the days of her infancy. But, in spite of the fact that a few of its ideas may have been borrowed from Greek sources, the Law of the Twelve Tables was basically a compilation of rules of indigenous Roman customary law, designed not to reform but to render the existing law more certain and more clearly known to the populace. Only the most important of these rules were included, while the general framework of the customary law was taken for granted. At the same time, an important objective of the compilers was to eliminate, as far as possible, the divergence in legal systems within the state and to make a common law for Roman society considered as a whole. In pursuance of this goal, certain disputed or controversial points must have been settled and some innovations made.

With regard to the nature of the particular rules themselves, the vast majority were concerned with matters of private law, in other words, with the rights and duties of individuals amongst themselves (not with the relationship between the individual citizen and the state). Special attention was given to matters of procedure in court actions and enforcement, as in this area the unskilled parties to a dispute, usually plebeians, could be misled by those conversant with the law. This was especially because the bringing of legal suits at this time was surrounded by a host of forms and technicalities. One can detect in these procedural rules the origins of the Roman state: they were in many ways a form of regulated self-help.[19] There

[18] The Law of the Twelve Tables does have some elements in common with Athenian law, but these are not of the kind that could suggest a direct influence. The relevant provisions that, according to Cicero, were extracted from the laws of Solon, pertain mainly to the settling of disputes between neighbours, the right of forming associations (*collegia*) and restrictions on displays at funerals. Cicero, *de leg*. 2. 23. 59.; 2. 25. 64.

[19] Table I prescribes the way a defendant could be summoned by the plaintiff to appear before a jurisdictional magistrate: if the defendant refused to go to court, force may be employed to secure his appearance; but if he was ill or aged, the plaintiff was required to provide a means of transportation. Table II lays down the amounts that had to be deposited in court by the parties prior to the commencement of certain forms of action. Finally Table III is concerned with the enforcement of judgments: a debtor was allowed 30 days after the judgment to pay the debt; if he failed to do so, he could be seized by the creditor and brought before the court; if the debt was not discharged, the debtor could be detained by the creditor who, after keeping him in bonds for sixty days, was entitled to put him to death or sell him into slavery.

were also rules prescribing the monetary penalties required to be paid for wrongs done, and rules concerning family, property and succession rights. The treatment of private wrongs shows that the law had reached a phase of transition between a primitive state of permitted self-redress and the state at which the appropriate remedy had to be sought by legal process. It was provided, for example, that if a person was caught stealing by night, he might be lawfully slain on the spot[20]; but a man whose limb had been fractured might only revenge himself by inflicting the like injury on his assailant provided that no agreement had been reached for rendering compensation, in which case the remedy would be to take legal action against the wrongdoer if the promised ransom was not paid.[21] With respect to other offences the law itself fixed the amount of compensation that could be demanded for the wrong done, and the victim was restricted to claiming that redress, thus being placed in the position of creditor rather than an avenger. In these provisions one might trace the origins of what was eventually to become a contractual obligation, a relatively advanced notion that was virtually unknown at the time of the Twelve Tables. The family law of the Twelve Tables revolves around the notion of *patria potestas*: the absolute power of the head of the family (*paterfamilias*) over his children and other family members.[22] With respect to the law relating to property, the Law of the Twelve Tables shows the rigidity and formalism that prevailed, but rights in both movables and immovables were clearly recognized.[23] During this early age a mere expression of intention was not enough to create liability or covey rights from one individual to another; some visible formality was necessary, by which the requisite intention was manifested to witnesses. Table V of the Law contained rules dealing with matters of succession and guardianship. It provided, among other things, that if a person died intestate, or if his will was found to be invalid, his property should pass to his nearest agnates (*agnati, sui heredes*) or, in the absence of agnates, to the members of the clan (*gentiles*) to which he belonged. The Law of the Twelve Tables contained also some provisions of a constitutional or religious character. For example, Table IX rendered it unconstitutional for a magistrate to propose a law imposing penalties or disabilities upon a particular person only, and declared that no one should be put to death except after a formal trial and sentence. It stated, moreover, that only the assembly of the centuries could pass laws affecting the political rights of citizens, and that no citizen should be condemned on a capital charge without the right of appeal

[20] Table VIII 12.

[21] Table VIII 2.

[22] See e.g. Table IV.

[23] Table VI includes provisions regulating the acquisition and transference of property. It is stated, among other things, that a person would acquire ownership upon two years of uninterrupted possession of landed property, or one year in the case of other property (this mode of acquiring property was termed *usucapio*). The transference of property by *mancipatio* (a formal transaction involving an imaginary sale and delivery) is also recognized together with an early form of contract known as *stipulatio* (a verbal contract consisting in a formal question and an affirming answer: 'do you solemnly promise to do X?' – 'I solemnly promise').

(*provocatio*) to the assembly. Table X addressed sacral law and matters relating to the burial or cremation of the dead.[24] Finally Tables XI and XII contained certain provisions of general character, such as the prohibition of intermarriage between patricians and plebeians (Table XI)[25] and rules relating to the liability of a master of a slave for offences committed by the latter (*noxae deditio*).

The Law of the Twelve Tables is a highly casuistic, case-oriented (in contradistinction to generalizing, principle-oriented) piece of legislation reflecting the life of a fairly primitive agricultural community. However, even though archaic in form and content, it contains elements indicative of a legal system that had advanced considerably beyond its original, primitive stage. Of particular importance for the subsequent development of the law were the rudiments of inter-organ controls to prevent excesses in the administration of justice. But the significance of the Law of the Twelve Tables lays not so much in its contents as in the fact that it opened up new possibilities. Considered from a political angle, its main achievement was vindicating the monopoly of state authorities over all acts of judicial administration. As it produced a common body of law for the populace regarding the legal matters most important for daily life, private citizens and magistrates alike were made subject to the sovereignty of the law and members of the plebeian class were no longer exposed to the vagaries of customary rules administered by patrician officials. At the same time, the process towards the secularization of the law was accelerated: conduct patterns that were in the past shrouded in religious ritualism were rationalized by general rules of substantive and procedural law in a written form, and thus ascertainable by all people. As the law was now publicized, it began to lose the immutable quality of a religious mystery and evolved into a conventional, human form that was therefore subject to change.

Later generations of Romans felt the greatest veneration for the Law of the Twelve Tables, which was described as the 'foundation of all public and private law'.[26] Indeed, for a thousand years, this enactment remained the only attempt by the Romans to comprehensively record their laws. This first attempt ushered in the history of Roman law as discernible today and for a thousand years it formed the basis of the whole legal system, despite changes in social, economic and political conditions. Legal development in the succeeding centuries was effected without directly repealing the provisions of the Law of the Twelve Tables, but mainly

[24] It contained provisions forbidding burial and cremation within the city; the immoderate wailing or tearing of their faces by women at funerals; and the burial of gold ornaments with the dead.

[25] This was a highly controversial measure that was repealed within a few years.

[26] Livy, 3. 34. 6. Cicero states: "It seems to me that the small booklet of the Twelve Tables, if one looks to the origins and sources of law, surpasses the libraries of all the philosophers in weight of authority and wealth of utility. . . .It is the spirit (of Rome), the customs and the principles that first ought to be remarked; both because this country is the parent of all of us and because that wisdom which went into the establishment of her laws, is as much to be counted as it was in the acquisition of the vast might of the empire." (*De oratore* 1. 44. 195–196).

through their interpretation by trained jurists, who adapted them to the changed conditions of later eras.[27]

In the period following the enactment of the Law of the Twelve Tables, legislation by popular assembly evolved as a generally acknowledged source of law. However, in contrast to the role of legislation in the Greek world, Roman legislation remained largely underdeveloped. Controversy still prevails as to the extent (or the exact time) it was deemed legally viable to modify the ancient *ius civile*. The Romans' disinclination to apply legislation derived from their conservative attitude towards law and the deeply rooted conception of the merits of their ancient customs reinforced by the special position accorded to the Law of the Twelve Tables. It was not easy to frame statutes in a way that avoided infringement of these established norms, especially in the field of private law. Therefore, the necessary reforms were fashioned in an indirect manner by means of interpretation. Accordingly, statutes remained relatively rare and dealt only with certain special matters. Statutes were enacted, for instance, to incorporate in the constitution the gains forged by the plebeian movement and to create new magistracies. In matters of social concern, legislation was occasionally relied upon to instigate reforms or merely to appease the populace. Some legislation had a hybrid character displaying a political basis and also elements that affected the private relations of citizens—this embraced specific laws relating to civil procedure, marriage, debts and testamentary benefits.

Important statutes of this period in the field of public law encompass: the *lex Valeria Horatia* (449 BC), which recognized the inviolability of the plebeian tribunes; the *lex Canuleia* (445 BC), which removed the rule prohibiting intermarriages between patricians and plebeians; the *leges Liciniae Sextiae* (367 BC), which admitted plebeians to the office of consul and established the praetorship; the *lex Publilia Philonis* (339 BC), which removed the rule directing that the legislative enactments of the popular assemblies had to obtain senate approval after their passage; and the *lex Hortensia de plebiscitis* (287 BC) that rendered the resolutions

[27] The original text of the Law of the Twelve Tables has not been preserved (the tables on which it was written were probably destroyed during the sack of Rome by the Gauls in 387 BC). Our knowledge of its contents is based on various later sources (the oldest source dates from the period of the late Republic). However, the contents were not recorded in their entirety by the relevant authors like Livy, Dionysius, Cicero, Aulus Gellius and Gaius. They only reproduced fragments that were relevant to them, modernizing the text in language and consciously or subconsciously adapting it to the conditions of their own times. The precise quantity of missing text is unknown as is the arrangement of the original provisions of the enactment. Thus, the reconstructions by contemporary Romanist scholars that draw on the extant literary sources are largely hypothetical. Modern reconstructions of the Law of the Twelve Tables include: H. Dirksen, *Übersicht der bisherigen Versuche zur Kritik und Herstellung des Textes der Zwölf-Tafel Fragmente* (Leipzig 1824); R. Schöll, *Leges duodecim tabularum reliquiae* (Leipzig 1868); E. H. Warmington, *Remains of Old Latin* III, Loeb Classical Library (Cambridge, Mass. 1938), 424 ff. FIRA I, 23 ff. Bruns, *Fontes* I, 15 ff. A. C. Johnson, P. R. Coleman-Norton and F. C. Bourne, *Ancient Roman Statutes*, (Austin, Texas 1961), 9 ff. P. F. Girard and F. Senn, *Les lois des Romains* (Naples 1977), 25–73; M. Crawford (ed.), *Roman Statutes* (London 1996).

of the plebeian assembly binding on all citizens. In the fourth century BC a number statutes were passed that established a limit on the interest rate charged on debts for borrowed money, such as the *lex Duilia Menenia* of 357 BC and the *lex Genucia* of 342 BC. Other statutes eased the debtors' burden with respect to the securities they could be requested to provide against the risk of non-payment, as well as pertaining to the sanctions they incurred for non-payment. Thus the *lex Poetelia Papiria* of 326 BC forbade the private imprisonment of the debtor by the creditor, which entailed the former becoming a slave of the latter.

2.2.2.1 Law-Making in the Roman Assemblies

As elaborated in the previous chapter, the Roman popular assemblies existed in two forms: those including all citizens, who voted either according to wealth (*comitia centuriata*) or tribe (*comitia tributa*); and the assembly of the plebeians (*concilium plebis*), which excluded the patrician upper class from its membership. Statutes (*leges*) enacted by the *comitia centuriata* and the *comitia tributa* were binding on all citizens, whilst the resolutions of the plebeian assembly (*plebiscita*) were initially only binding on the plebeians.[28] Since the enactment of the *lex Hortensia* in 287 BC, at the latest, the *plebiscita* were considered as complete laws binding on the entire citizenry.[29] Thereafter, the *concilium plebis*, convened under the presidency of a *tribunus plebis*, became the most active legislative body and the great majority of the statutes that we can observe in the sources were, strictly speaking, *plebiscita*.

The Roman assemblies could only meet to discharge their functions when formally summoned by a magistrate empowered to convene and preside over a popular assembly (*ius agendi cum populo*).[30] When a magistrate submitted a proposal to an assembly he was said to ask or request (*rogare*) the people. Thus,

[28] As Gaius observes, "A law [*lex*] is what the people orders and ordains. A plebiscite is what the plebs orders and ordains. The difference between the people and the plebs is that by the term 'people' all the citizens are meant including the patricians, by the term 'plebs' the other citizens without the patricians. For this reason the patricians in the old days declared that they were not bound by plebiscites, because they were made without their authority." G. 1. 3. And see *Inst*. 1. 2. 4: A law [*lex*] is what the Roman people ordered on the proposal of a senatorial magistrate, e.g. a consul. A plebiscite is what the plebs ordered on the proposal of a plebeian magistrate, e.g. a tribune of the plebs. The plebs differs from the people as species from genus. For all the citizens are meant by the term 'people', the other citizens excluding senators and patricians by the term 'plebs'."

[29] Aulus Gellius, *Noctes Atticae* 15. 27. 4: "He who does not require the presence of all, but only of a portion of the people, must proclaim not a *comitia* but a *concilium*. The tribunes cannot summon the patricians, nor refer to them concerning any matter, so that measures passed on the proposal of the tribunes of the plebs are not called *leges* but *plebiscita*, by which bills the patricians were not bound formerly, until Quintus Hortensius, dictator, passed a law, that whatever law the plebs should pass should be binding on all citizens." And see D. 1. 2. 2. 8; G. 1. 3.

[30] The assembly of the centuries (*comitia centuriata*) was convened usually by a consul; the assembly of the tribes (*comitia tributa*) by a consul or praetor; and the plebeian assembly (*concilium plebis*) by a tribune.

his proposal was called *rogatio legis* and the resultant laws were identified as *leges rogatae*.[31] Custom and eventually law dictated that the full text of a proposed measure must be publicly posted 24 days before its formal submission to the assembly (*promulgatio*, *promulgare rogationem*). During this interval the citizens had the opportunity to discuss the bill and recommend changes, or even its withdrawal, to the magistrate in informal gatherings (*contiones*). It should be noted that legislative measures proposed by magistrates were normally debated in the senate before promulgation. This debate was much more important than any public discussions that might occur in *contiones*. Once the bill was presented to the assembly it could not be modified; the assembly could either accept (*iubere rogationem*) or reject the bill as a whole and in the precise form it was delivered by the magistrate.[32]

In all Roman assemblies voting was by group rather than by individual suffrage. For example, in the assembly of the centuries (*comitia centuriata*) decisions were reached by considering the number of centuries that voted in favour of or against a proposal; the vote of each century was determined by the majority of the individual voters it comprised.[33] During the early republican age voting was done orally. The method of voting by ballot (*per tabellas*) was introduced in the later Republic by a series of laws referred to as *leges tabellariae*.[34] When an assembly was summoned to decide on a legislative proposal, each voter-member was given two wooden tablets (*tabellae*). The tablet representing a positive vote was inscribed with the letter *V*, which stood for the phrase *uti rogas* ('as you propose', 'as you ask')[35]; the other tablet bore the letter *A*, which stood for the word *antiquo* ('I maintain things as they are'), and indicated a vote against the proposed measure. After the vote of each group (*centuria* or *tribus*) became known, it was reported to the presiding magistrate who made a formal announcement. When the votes of all the groups had thus been reported and counted the magistrate notified the final result to the assembly.

[31] The *leges rogatae* were distinguished from the *leges datae*: laws that were introduced by magistrates on special occasions after obtaining the permission of the senate. In the category of *leges datae* belonged, for example, the various *leges coloniae* and *leges provinciae* by which new colonies and provinces were created.

[32] What are today referred to as 'private members bills' were not permitted, for the magistrate alone decided what motions should be put to vote.

[33] The number of citizens needed to be present for holding a lawful meeting was not fixed by law. It appears, however, that if the number of the citizens in attendance was very low the presiding magistrate could postpone the meeting.

[34] The *lex Gabinia* of 139 BC introduced the secret ballot in elections of magistrates. This was followed by the *lex Cassia* in 137 BC, which provided that the secret ballot should be used in all cases heard before the assemblies when these operated as courts of justice (*iudicia populi*), except in those involving treason (*perduellio*). In 131 BC the *lex Papiria* introduced the use of the ballot in voting on legislative matters. Finally, the *lex Caelia* of 107 BC extended the use of the ballot to trials for treason, thus removing the exception provided for by the *lex Cassia*.

[35] See, e.g., Cicero, *ad Att.* 1. 14; *de leg.* 3. 17. In judicial assemblies (*iudicia populi*) the tablet with the letter *L* (*libero*: 'I absolve') was used to indicate a vote for acquittal; the tablet with the letter *D* (*damno*: 'I condemn') expressed a vote for condemnation.

According to tradition, a law passed by the people could not come into force until it received the senate's approval (*patrum auctoritas*).[36] This rule was reversed by the *lex Publilia Philonis* of 339 BC that stipulated that the *patrum auctoritas* must be issued before, not after, a legislative proposal was submitted to the people. Thereafter, laws usually had immediate effect following the formal announcement of the assembly's decision endorsing the magistrate's proposal. After their passing, laws were inscribed on tablets of wood, copper or stone and retained in the state treasury (*aerarium populi romani*) under the supervision of the quaestors.

A statute was composed of three parts: (1) the preamble (*praescriptio legis*) that embodied the name of the magistrate who had proposed it (and after whom it was named), the place and time of its enactment, and the name of the group (*centuria* or *tribus*) that had cast the first vote in the proceedings[37]; (2) the text of the law (*rogatio*) that was usually divided into sections; and (3) the ratification of the law (*sanctio*). The *sanctio* specified the penalties that would be imposed if the law was violated, and stated the rules governing the relation between the new statute and earlier and future legislation.[38] A distinction was drawn between 'perfect laws' (*leges perfectae*), 'imperfect laws' or laws without any sanction at all (*leges imperfectae*) and 'less than perfect laws' (*leges minus quam perfectae*). Acts performed in violation of a perfect law were deemed null and void.[39] The infringement of an imperfect law, on the other hand, did not affect the validity of the relevant act.[40] Similarly, when a less than perfect law was violated the relevant act itself remained valid, but the transgressor was liable to punishment. Laws containing unrelated or superfluous provisions were designated *leges saturae* or *per saturam* and were forbidden under early law.[41]

[36] The period between the formal enactment of a law and its coming into force was termed *vacatio legis*.

[37] Sometimes the preamble also included certain words indicating the subject-matter of the statute; examples include the *lex Hortensia de plebiscitis* (287 BC), providing that the resolutions of the plebeian assembly were binding on all citizens; the *lex Sempronia agraria* (133 BC), concerning the distribution of public lands (*ager publicus*); and the *lex Sempronia de provocatione* (123 BC), confirming the right of citizens convicted of capital offences to appeal to the people's assembly (*ius provocationis*).

[38] For example, the *sanctio* could state that a previously enacted statute remained fully or partially in force despite the introduction of the new law.

[39] An illustration is the *lex Falcidia delegatis* (40 BC), mentioned by Gaius (2. 227), according to which legacies (*legata*) should not exceed three-quarters of the testator's estate. The part of the legacy exceeding three-quarters was deemed void.

[40] An example is the *lex Cincia* of 204 BC. This plebiscite prohibited the issue of gifts for the performance of tasks when such performance was regarded as a sacred duty. Gifts promised in violation of this law were not void, but the donor could raise a defence (*exceptio legis Cinciae*) if he was sued for payment. The category of *leges imperfectae* was abolished in the post-classical period (AD 439) by an enactment of Emperors Theodosius II and Valentinian III.

[41] The *lex Caecilia Didia* of 98 BC renewed this prohibition.

2.2.3 The Pontiffs and the Beginnings of Jurisprudence

The central role of the pontiffs in the interpretation and application of customary law shows the interconnection of religion and law in the archaic age. During this period all legal knowledge was confined to their college and was handed down to new members by tradition and instruction. As guardians of ancestral tradition, the pontiffs alone knew all the laws, the forms of actions and ritual techniques, the court calendar and the authoritative opinions their predecessors had rendered in the past. Thus, it was to them that private citizens had to go to obtain advice on whether specific rules of law applied to their particular case and the correct procedure in litigation.[42]

In the period following the enactment of the Law of the Twelve Tables, the population mass and intricacy of Roman society proliferated. Thus, the old rules proved increasingly inadequate for fulfilling the requirements of social and commercial life. But the Romans did not respond to the need for legal change by replacing the Law of the Twelve Tables with fresh legislation. As noted, the Romans were conservative and extremely careful in their approach to legal matters. They were attached with great tenacity to the Law of the Twelve Tables, which they considered as the foundation of their legal system. Although legislation introduced some new rules, interpretation was the chief means of changing the law (especially in the field of private law). Because a close connection still prevailed between the legal and religious spheres, it is unsurprising that the interpretation of the law and its deriving actions lay in the hands of the pontiffs. Through skilful interpretation of the provisions of the Twelve Tables and later statutes, the early jurists filled the gaps in the law and also succeeded in infusing the old rigid rules with new substance, thus adapting them to changed conditions.

The influence of the pontiffs on legal development was also connected with their role in the administration of justice. The Romans construed the term *lex* as a formal act of the people that required or permitted a magistrate to enforce a right (*ius*), which was demanded in a particular way by a particular procedure. In the archaic period the principal method for obtaining a *ius* was the *legis actio* (literally, an action based on the law)—a ritual procedure that was conducted orally and divided

[42] According to Roman tradition, the college of pontiffs was created by the priest-king Numa Pompilius in the late eighth century BC. Originally, this religious body was made up of five members drawn exclusively from the patrician class (four ordinary *pontifices* headed by a *pontifex maximus*). The pontiffs were, in effect, state officials who, in addition to their duties as senators or magistrates, were responsible for the religious branch of public administration. As guardians and interpreters of the divine law (*ius divinum*), these priests exercised general supervision over a wide range of matters associated with public religion and set the rules governing the conduct of religious ceremonies and rituals (*ius sacrum*). They gave instructions to state officials on the performance of public acts of a religious nature and punished wrongdoings regarded as disrupting the *pax deorum* – the harmony between the community and its gods. Moreover, the *pontifex maximus* was entrusted with the regulation of the calendar, the fixing of the dates of public ceremonies and festivals (*dies festi*), and the setting of the days of each month on which alone legal transactions, litigation and other business could take place (*dies fasti*).

into two distinct phases. The first phase (*in iure*) originally proceeded before a pontiff or, according to some scholars, a consul. This official determined on the basis of the applicable law whether the plaintiff could initiate legal action and, if so, its required form.[43] In the second phase (*apud iudicem*) a private judge (*iudex*), appointed by both the pontiff or magistrate and the relevant parties, considered the evidence and decided the case within the frame set by the pontiff or magistrate. In the *in iure* phase of the proceedings the plaintiff had to couch his claim in set words, and the defendant also replied in set words—this formed the actual *legis actio*. If a party used the wrong *legis actio* or departed from the set form, his claim was rejected. The pontiffs possessed knowledge of the word forms that could be admitted as efficacious. They could expand or restrict the scope of a *legis actio* by construing it broadly or narrowly as required by the needs of the relevant case. This was rendered possible by the fact that, despite the emphasis that archaic law attached to the letter of the law and the forms of action based on it, there was a tendency to permit a slightly greater degree of freedom in legal proceedings than was allowed in purely religious ceremonies—at least in the era when the *legis actio* emerged as a definite form of procedure.[44]

A well-known illustration of law-making through interpretation is the method devised for releasing a son (*filiusfamilias*) from his father's control (*patria potestas*). As Roman society developed in complexity, cases emerged where a son's absolute dependence on the father regarding his legal position had to be overcome so as to sustain the healthy functioning of economic life. Originally, the power of the *paterfamilias* over his children (and also over his grandchildren and more remote descendants) entailed complete control over them. Only the father had any rights in private law—he alone was entitled to own property, including all the acquisitions of the subordinate family members. As economic conditions changed, this rigid system could not be absolutely sustained in practice. The problem was resolved by the constructive interpretation of a certain clause of the Twelve Tables that was apparently designed to protect a son against a father who misused his power. A father could consign a son to another person for money on the

[43] After the enactment of the *leges Liciniae Sextiae* in 367 BC, this task was entrusted to the praetor.

[44] D. 1. 2. 2. 5–7 (Pomponius): "When these statutes (the Twelve Tables) were enacted discussion in the forum became necessary – as naturally is wont to happen, that interpretation requires the guidance of those learned in the law. This discussion and this law, which without writing was developed by the learned, is not specifically named – as the other parts of the law have been designated by names, since special names have been given to other parts – but is referred to by the general term *ius civile*. Then from these statutes, at about the same time, actions were devised by which men might litigate, and lest these actions be indiscriminately brought by the people, they were required to be in certain and solemn form; and this part of the law is called *legis actiones*, that is, statutory actions. Accordingly, these three branches of law appeared at about the same time: the law of the Twelve Tables, from these came the *ius civile*, and from the same the *legis actiones* were devised. Moreover all of these, both the science of interpretation and the (conduct of) actions were vested in the college of pontiffs, from among whom one was appointed each year to preside over private causes. And for nearly a hundred years the people conformed to this custom."

understanding that the son obtained manumission upon completion of work for that person. Following the manumission, the son returned automatically into the *potestas* of his father and the sale process could be repeated. Table 4.2 limited this right of the father by stating that if a father sold his son three times, the latter acquired freedom. The pontiffs seized on this provision and engaged the pretence of interpretation to introduce the rule that if a father completed a fictional threefold sale of his son to another person, the son after the third alienation and manumission gained release from the *partia potestas* and became *sui iuris* (in control of his own affairs).[45] This example displays how a legal provision was utilized to achieve a purpose quite different from that originally contemplated by the legislator and how, through interpretation, a new norm was created as required by altered conditions.[46] While the pontiffs retained their monopoly in legal matters, it was mainly through their interpretations that innovations in the field of private law could be effected. At the same time, the pontiffs' activities as interpreters of the law forged the groundwork for the subsequent development of Roman legal science.

According to Roman tradition, the pontifical monopoly of legal knowledge came to an end after the publication in 304 BC by a certain Gnaeus Flavius, clerk of Appius Claudius (a prominent patrician who was appointed censor in 312 BC), of a collection of formulas and ritual words that were recited in court when litigation took place (*ius civile Flavianum*). Although any alert citizen must have known a great deal of the information embodied in the *ius Flavianum*, it was now rendered official and the jurisdictional magistrates could no longer refuse what all the people would know to be the law. From the late third century BC, an increasing number of leading Roman citizens adopted the practice of proffering legal advice without being members of the pontifical college. Around 200 BC one of these jurists, Sextus Aelius Paetus Catus, consul in 198 BC, published a book containing the text of the Twelve Tables, the interpretations of its rules by the pontiffs and secular jurists and a list of the legal forms employed in civil procedure. This work, known as *ius Aelianum*, marks the beginning of Roman legal literature and the transition from the unsystematic approach of the earlier priest-jurists to a new approach that may be termed scientific.[47]

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[45] However, usually after the third manumission the 'buyer' sold the son back to his father, who at once manumitted him. In this way, the father acquired the status of patron over his son and thus retained rights of succession with regard to him.

[46] Another example of a rule developed through juristic interpretation is the rule relating to the guardianship of freed persons. According to Gaius: "The same law of the Twelve Tables assigns the guardianship of freed men and freed women under puberty to the patrons and their children. This form of guardianship is called statutory, not because it was expressly stated in that body of law, but because it has been accepted by interpretation as if it had been introduced by the words of the statute. For, by reason that the statute ordered that the estates of freed men and freed women who died intestate should go to the patrons and their children, the early jurists deemed that the statute willed that tutories also should go to them, because it had provided that agnates who were heirs should also be tutors." See G. 1. 165.

[47] D. 1. 2. 2. 6–7 (Pomponius): "Both the science of interpretation and the [conduct] of actions were vested in the college of pontiffs, from among whom one was appointed each year to preside

2.3 Sources of Law in the Late Republic

2.3.1 Legislation

As previously noted, in the period following the enactment of the *lex Hortensia* (287 BC) the term *lex* in a broad sense denoted not only a statute voted in the *comitia* on the proposal of a higher magistrate but also a *plebiscitum* passed in the *concilum plebis*. This period is rich in statutory enactments, but the *leges* that were passed encroached on the field of private law only with hesitation and within narrowly defined limits. As it was not easy to frame statutes in such a way as to avoid infringing long-established legal principles and customs (especially those embodied in the Law of the Twelve Tables), changes in this field were effected indirectly, primarily by means of praetorian action and juristic interpretation. Changes in the field of public law, on the other hand, were difficult to effect indirectly, since these were largely dictated by new situations or socio-political developments. It is thus unsurprising that the great majority of the statutes enacted during the later republican epoch fell in this field. Some statutes had a hybrid character, having a political basis but at the same time affecting the private relations of citizens. To this category belonged, for example, statutory enactments concerned with the distribution of land, release from debt, testamentary benefits and court procedure. As a whole, legislation was employed to deal with specific problems rather than to establish rules and principles governing social policy or constitutional arrangements in a comprehensive and permanent manner. Statutes were enacted, for example, to create new magistracies or to define the nature of public crimes and the procedures for dealing with them. In the field of private law statutes were relied on as a means of supplementing or limiting private rights, or instigating changes in civil procedure when juristic interpretation or magisterial action were deemed unable to produce the desired effect.

Among the statutes relating to private law of special importance were: the *lex Aquilia* (286 BC), which set general rules of liability for damage caused to another person's property; the *lex Atinia* (second century BC), which excluded stolen property (*res furtivae*) from *usucapio* (the acquisition of ownership through possession of a thing for a prescribed period of time); the *lex Laetoria de minoribus* (passed early in the second century BC), which aspired to protect persons under 25 years of age from fraud; the *lex Cincia de donis* (204 BC), which prohibited gifts in excess of a certain (unknown) amount with the exception of those in favour of

over private causes. Afterwards, when Appius Claudius had pronounced and fixed the form of these actions, Gnaeus Flavius, his secretary, the son of a freedman, stole the book and delivered it over to the people, and this service was so gratifying to the people that he was made tribune of the plebs, as well as senator and curule aedile. This book, which contains the actions, is called *ius Flavianum*, as that other, the *ius civile Papirianum*; nor did Gnaeus Flavius add anything of his own to the book. Since, with the expansion of the state, certain forms of action were lacking, not long afterwards Sextus Aelius compiled additional actions and gave the book to the people which is called the *ius Aelianum*."

near relatives and certain privileged persons; the *lex Voconia* (*c*. 169 BC), which imposed limitations upon the testamentary capacity of women; and the *lex Falcidia* (40 BC), which specified the amount of legacies that could be bequeathed.

2.3.1.1 The Role of the Senate in the Legislative Process

As previously observed, during the later republican period the senate became the centre of government and the most important stabilizing factor in the republican constitution. In domestic administration it was consulted by the magistrates on all important matters of the state; in foreign policy it directed negotiations with foreign powers, concluded treaties and appointed commissioners to oversee the organization of conquered territories; in finance it determined the use of public revenues and authorized public works; and in military affairs it prescribed the sphere of operations of the military commanders and their supplies of men and funds.

Even though under the constitution the senate had no direct power to enact laws, it played an increasingly active role in the legislative process, largely by virtue of its influence over the magistrates. As was previously noted, it was customary for the higher magistrates of the state to seek the senate's opinion on legislative proposals before submitting them to the assembly. Although the magistrates had the liberty to ignore such opinion, so great was the senate's power and prestige that they would normally defer to its authority and follow its lead. Ordinarily, the senate thoroughly discussed the drafts of legislative proposals and, if necessary, amended these drafts in accordance with the views of the senate's majority. A finally approved draft would then be incorporated in a resolution (*senatus consultum*) advising the magistrate concerned to submit it to the assembly, whose subsequent action virtually amounted to nothing more than a formal ratification of the terms of the *senatus consultum*. In this way, it was possible for the senate to bring about what amounted to indirect legislation as a result of which changes in the law could be effected, even though a *senatus consultum* could not be put into effect until it was adopted by a magistrate and had technically become part of a statutory enactment. Furthermore, in circumstances of emergency the senate could encroach on the power of the assemblies by claiming the right of suspending the constitution and of overriding the law by issuing a special resolution (*senatus consultum ultimum*)[48] that authorized the consuls to apply any extraordinary measures deemed necessary to avert the danger.

Besides playing a part in the formulation of legislative proposals, the senate exercised a lawmaking influence by advising the praetors and other jurisdictional magistrates to implement certain lines of policy. In such cases its recommendations would normally be incorporated in the edict (*edictum perpetuum*) issued by each magistrate at the commencement of his year of office. In this way, the senate

[48] Also referred to as *senatus consultum de re publica defendenda*: decree of the Senate on defending the Republic.

contributed to the development of magisterial law (*ius honorarium*), i.e. the law that derived its formal force from the authority of magistrates, as opposed to the *ius civile* construed as the law that derived its formal force from statute (*lex*) and juristic interpretation (*interpretatio*).

In the last century of the Republic, when the Roman state was embroiled in a political and administrative crisis and the influence of the assemblies declined, it sometimes happened that a legislative proposal sanctioned by the senate was not presented to the people, but immediately entered into force. Moreover the senate at times assumed the power to declare statutes null and void based on some alleged irregularity or violation of an established constitutional principle.[49] As the government transformed into the bureaucratic administration of a world empire during the early Principate era and the mode of creating law by vote of the people gradually withered away, the legislative function passed to the senate, whose enactments thus acquired the full force of laws.

2.3.2 The Rise of Magisterial Law

The Roman law of the archaic period was built around a relatively simple system of rules for a community of farmers and large landowners and its scope of application did not extend beyond the boundaries of the city-state of Rome. Like other primitive systems of law, it was closely bound up with religion and custom and was characterized by its formalism, rigidity and limited field of application. As a result of Rome's transformation from a small agrarian community into a vast transnational empire during the later republican era, the Romans faced the problem of how to adjust their law so that it might meet the challenges imposed upon it in this new era. In response to this problem, Roman law broke through the barrier of archaic formalism and formed a highly flexible system that could constantly adapt to the changing demands of social and commercial life. Important factors in this development encompassed the nascent contacts with other cultures and the increasingly intricate economic relations between Roman citizens and foreigners (*peregrini*). The transition to a more flexible system was made possible by the practice of granting wide powers to the jurisdictional magistrates who declared and applied the law, thus enabling them to mould the law in its application.

We observed earlier that the praetor was the official who supervised the administration of justice. In civil cases his role was to conduct a preliminary investigation where he determined the admissibility of the plaintiff's claim, i.e. whether the plaintiff had an action at law. If he was satisfied on this point, the praetor appointed the judge (*iudex*) before whom the case would be heard; in the opposite scenario, the plaintiff could not proceed to enforce his rights. In archaic Roman law, legal

[49] It is thus not surprising that both the *senatus consulta* and the *leges* are mentioned as sources of law by Cicero. See *Topica* 5. 28.

suits had to fit into certain set actions and comply with certain strict formalities. If the correct form of action was identified and the requisite formalities were adhered to, the magistrate had little choice but to grant the action and appoint a judge. However, in the later republican period there emerged a far more flexible procedure for initiating legal actions that allowed the magistrate greater discretion and freedom of action. Under this system, litigants could raise claims and concomitant defences that were not provided in the recognized actions. The admissibility of these claims and defences was determined in an informal procedure before the magistrate. The main reason behind this development was that as social and economic life grew in complexity there increasingly emerged cases where a right should clearly have been recognized, but this right and an appropriate legal action were not accommodated by the traditional *ius civile*. The magistrate was thus empowered to proceed beyond the strict letter of the law and admit or reject an action when he considered this right or equitable, even where this was not in accordance with the *ius civile*. He did not accomplish this step by introducing fresh legal rights (magistrates had no formal law-making authority), but by promising the applicant a remedy. He would inform the plaintiff that he now had an action on which to proceed in the subsequent hearing before the judge, and that success at that hearing meant his claim would be enforced by a remedy the magistrate granted. Ultimately, the end result was largely the same: though no civil law right existed, there was a praetorian remedy and hence a praetorian right. At the end of the proceedings before the magistrate, the latter composed a written document (*formula*) that prescribed the direction for the investigation and determination of the case by the judge appointed to try the case. In this document, he authorized the judge to condemn the defendant if certain facts were proven or to absolve the defendant if they were not proven. It must be assumed that the innovations in substantive law introduced through this system were gradual and organic. Whenever possible, the new *formula* was fitted into the system of actions recognized by the *ius civile*; in other cases the magistrate emancipated himself entirely from the established law by instructing the judge to decide the case on the basis of the factual situation, thus in essence functioning as a law-maker.

Every magistrate at Rome was in the habit of notifying to the public the manner in which he intended to exercise his authority, or any change which he contemplated in existing regulations, by means of a public notice (*edictum*).[50] With respect to magistrates who were merely concerned with administrative work, such notices were often occasional (*edicta repentina*). With respect to magistrates concerned with judicial business, they were of necessity valid for the whole period during which the magistrates held their office (*edicta perpetua*). The edicts of the praetors were necessarily of this latter type.[51] Although a newly elected magistrate was in

[50] Initially, an edict consisted in a verbal announcement before a public meeting (*contio*); in later times edicts were written on wooden tablets and were set up in the Forum (the market-place).

[51] D. 1. 2. 2. 10 (Pomponius): "During the same period magistrates also administered the laws and published edicts in order that the citizens might know what rule each magistrate would pronounce on each question, and take corresponding precaution."

theory free to introduce any measures he saw fit, over time it was expected that he would absorb the bulk of his predecessor's edict and make only limited alterations (that part of the *edictum perpetuum* adopted from year to year was referred to as *edictum tralaticium*). No legal obligation was imposed on the magistrate to adhere to the directions set out in his edict, for that was taken for granted. However, the breakdown of good government in the closing years of the Republic prompted the enactment of the *lex Cornelia* (67 BC) that forbade the praetors departing from their *edictum perpetuum*.[52]

The *edictum* of the praetor, in the sense in which this word is commonly used, is really a colloquial expression for the *album*, or great notice board exhibited by that magistrate, which contained other elements besides the *edicta* in their true and proper sense. It contained the *legis actiones* (actions provided by statute) and the *formulae* of the traditional *ius civile*, probably preceded by certain explanatory headings, but by no ruling in law (for the praetor did not create the rulings on which these civil actions and *formulae* were based). But the edict contained also model *formulae* for each promised remedy created by a praetor and his predecessors. Each of these *formulae* must have been preceded, at least eventually, by the ruling in law, which might have grown out of the *formula*, but finally served as its basis and justification.[53] Thus the edictal part of the *album* was really a series of separate *edicta*, each edict being followed by its own *formula*; it was regarded as being a supplement to that portion which specified the actions of the *ius civile*; and it really had this character of being a mere supplement in so far as praetorian actions were rarely granted where a civil action would have sufficed. But its supplementary role had far-reaching implications for the development of the law. This is because the edicts might take cognizance of cases not provided for by the *ius civile* at all; they might replace the mechanism provided by the civil law for attaining a legal end; and they might alter the character of the end itself. The edict of the peregrine praetor (*praetor peregrinus*)[54] was necessarily still more of a substitute for the *ius civile*

[52] Dio Cassius, *Historia Romana* 36. 40. 1–2: "The praetors were accustomed to compile and publish the edicts according to which they would grant actions, for those concerning agreements had not yet been fully set forth. Since they were not accustomed to do this once for all and did not observe the written rules but often made changes, many of which were introduced in order to favour or in order to defeat some person, he (C. Cornelius) moved that they should announce at the beginning of office the rules they would follow and not depart from them."

[53] In the course of time, the *formulae* used in specific types of cases became relatively fixed and the collection of established *formulae* was constantly augmented by new *formulae*. The number of established *formulae* had become so great by the end of the Republic that there appeared to be a *formula* for every possible occasion. According to Cicero: "There are laws, there are *formulae* established for every type of case, so that no one can be mistaken as to the kind of injury or the mode of action. Based on the loss, on the distress, on the inconvenience, on the ruin, or on the wrong suffered by anyone, public *formulae* have been set forth by the praetor, to which private controversy may be adapted." (*Pro Roscio comoedo oratio* 8. 24)

[54] As previously noted, this praetor exercised civil jurisdiction in disputes between foreigners (*peregrini*) and between foreigners and Roman citizens.

than that of his urban colleague (*praetor urbanus*).[55] For, as the actions of the civil law could not (at least in many cases) be employed by foreigners, the peregrine praetor was obliged to devise equivalents for these actions and the forms by which they were accompanied.[56]

The various rules and remedies by which the magistrates were actually transforming the old *ius civile* furnished the basis for the development of a new body of law that was ultimately designated honorary or magisterial law (*ius honorarium*)—because it proceeded from the holders of offices (*honores*)—and that existed in contradistinction with the narrowly defined *ius civile*. The magisterial law served a vitally important function in the Roman legal system in various ways. Firstly, it aided the *ius civile* as the magistrate introduced remedies in addition to those that the civil law provided for the person who possessed a civil law right. For instance, the edict would state that an individual recognized as the owner of property under the civil law might be granted, in addition to the normal action, a speedier magisterial remedy. Secondly, it supplemented the *ius civile* as the magistrate granted remedies to persons who had no rights or remedies under the civil law. For instance, the wife of a deceased person who died intestate without leaving children or relatives had no rights to his estate. However, the edict would grant the widow a remedy to acquire possession of the estate. Thirdly, it amended or corrected the civil law as persons who had no rights or remedies under the civil law were granted remedies by the magistrate at the detriment of those who did have such rights. For instance, the edict might provide that the magistrate would uphold certain wills that did not meet the requirements of the civil law and he would grant a remedy to the person nominated as heir in such a will at the detriment of the intestate heir who would have succeeded under the civil law.[57] Through these means, the magisterial law became the living voice of the law of the Romans. Alongside the rigid and formalistic *ius civile* there emerged a body of law that was

[55] The original praetor who had jurisdiction over disputes involving only Roman citizens (*iurisdictio urbana*).

[56] Another perpetual edict valid in Rome was that of the curule aediles. As pertaining to the limited civil jurisdiction these magistrates exercised in the market place, this edict played a part in the development of the Roman law of sale. By far more important, however, was the edict issued by the provincial governors (proconsuls or propraetors). These officials issued notices of their intentions with respect to jurisdiction, similar to those of the praetors at Rome as regards their permanent character and the possibility of their transmission, but peculiarly applicable to the particular governor's domain. One important point in which the governor of a province differed from the praetor at Rome was that he was an administrative as well as a judicial official. Hence the provincial edict had to contain a good many rules of administrative law not to be found in its counterpart at Rome. The rest of the edict covered the procedure the governor promised to apply for the recovery of certain rights by individuals such as, for example, those entailed in inheritance or the seizure of a debtor's goods. Although these rules were based on Roman law, they were mere outlines capable of adaptation to the local customs of the subject communities.

[57] D. 1. 1. 7. 1 (Papinianus): "*Ius praetorium* is that which the praetors have introduced from the purpose of aiding, supplementing or correcting the *ius civile* to the public advantage. It is also called *ius honorarium* after the office (*honos*) of the praetors."

progressive and free, and subject to continual change and development.[58] It is germane to note at this point that the magistrates were not solely responsible for the creation of the *ius honorarium*. Since magistrates very often possessed little knowledge of the law, most of the techniques they engaged to produce the required legal innovations were demonstrated to them by expert jurists (*iurisconsulti* or *iurisprudentes*). The jurists explained the law to magistrates and offered guidance in framing their edicts and drafting the *formulae* used in legal proceedings. Thus, the legal norms incorporated in the *edictum perpetuum* at any given time represented the consensus of opinion of the best-qualified legal minds of the day.

But how did the praetor choose which rights to protect? The main basis for this choice appears to have been the social and ethical values generated by the conditions of the times. These values materialized in appropriate guidelines that emphasized the importance of fairness and honesty in business practices, accorded preference to substance over form in transactions and refused to uphold obligations arising from promises elicited by fraudulent means. An important factor was the growing role of contractual good faith (*bona fides*) as a legal concept relating to the enforcement by legal means of what had been previously viewed as merely social or moral obligations.[59] The classical jurists used the term *aequitas* (equity) when referring to the basis or the qualifying feature of praetorian measures granted on a case-by-case basis and promised in the edict.[60] There are two ways to understand

[58] According to the classical jurist Marcianus, "the *ius honorarium* is of itself the living voice of the *ius civile*." (D. 1. 1. 8) A parallel may be drawn between the Roman *ius honorarium* and English equity. Unlike the English common law and equity, however, the *ius civile* and *ius honorarium* did not operate as two separate systems administered by different courts but were regarded as two sides of the same legal system.

[59] The concept of good faith (*bona fides*) probably had a Roman origin and initially appeared to be linked with the notion of *fas*, or divine law. However, a Greek influence cannot be ruled out. In the sphere of private law *bona fides* was perceived in two ways: a) from an objective point of view, *bona fides* was associated with the general expectation that persons should behave honestly and fairly in legal transactions; b) from a subjective point of view, *bona fides* pertained to a person's belief that his actions were just and lawful and did not violate another person's legitimate interest. Several general rules based upon the concept of *bona fides* are included in the sources, e.g. '*bona fides* requires that what has been agreed upon must be done' (D. 19. 2. 21. – Iavolenus), '*bona fides* demands equity in contracts' (D. 16. 3. 31. pr. – Tryphoninus).

[60] Aristotle defines equity (*epieikeia*) as a principle of justice designed to correct the positive law where the latter is defective owing to its universality (*Nic. Ethics*, 5. 10). As constituting a 'mean', or 'intermediate', i.e. a kind of compromise, the law must be expressed simply and in general terms. But while framing the law generally and simply, the lawmaker exposes it to deficiencies that produce injustice. A general rule is considered deficient and lacunary because it cannot precisely cover every potential case as the human condition is imbued with complexities. Thus, a case may arise where one acted against the rule but no injustice was committed. To exclude such a case from the field of application of a broadly framed law, a new norm must be formulated to govern a determination of the case. The judge then has to allow equity to guide his discovery of the most appropriate solution, i.e. the one that best conforms to the justice that inspires the law. Furthermore, the law has a decisive form and can only evolve from sporadic attempts that are often too late. Once more, the judge assumes the task of correcting and completing the law. In contrast to positive law that is only a rough or incomplete reflection of justice, equity is the precise reflection

the connection of equity with positive law: first, *aequitas* may be construed as the substance and intrinsic justification of the existing legal norms; secondly, it may be conceived as an objective ideal the law aims to effectuate and which determines the creation of new legal norms and the modification of those that do not conform with society's sense of justice nor accomplish the requisite balance in human relations. This second understanding of *aequitas* served as the basis of the innovations produced by jurisdictional magistrates and jurists. However, according to classical jurists, what has positive force is not *aequitas* as such, but *ius*, or law in a broad sense. Thus, until *aequitas* is transfused into a positive norm it remains confined to a pre-legal sphere. Once this transfusion has occurred, *ius* has notable significance while *aequitas* exists as the matrix.[61] The incorporation of equity into the administration of the law is attributable to the praetorian edict and the interpretations of the jurists. This redressed the formalism and rigidity of the traditional *ius civile*, and enabled the creation of new law that could fulfill the needs of a changing society.

The following two examples provide good illustrations of the techniques engaged by the praetor for surmounting the difficulties arising from the rigidity of the *ius civile*.

The idea that legal obligations could materialize from anything other than a strict form was strange to the original structure of Roman law established in the Law of the Twelve Tables. Such obligations could only arise from transactions executed in a few solemn forms and rites that had a predominantly public and partly sacred character. Consider *stipulatio*, for example. This formal transaction consisted of a solemn question posed by one party to the other as to whether the latter would

of justice. Therefore, the judge must constantly correct the errors or fill the gaps in the positive law by appealing to equity as a form of justice that extends beyond positive law.

[61] Cicero's definition of the *ius civile* as 'the equity constituted for those who belong to the same state so that each may secure his own' (*Top*. 2. 9.), and the renowned aphorism of the jurist Celsius '*ius est ars boni et aequi*': 'the *ius* is the art of the good and just' (D. 1. 1. 1. pr.), are obviously inspired by the concept of equity as an abstract ideal of justice and as a touchstone of the norms of positive law. Linked with this perception of equity is the distinction between *ius strictum* and *ius aequum*. The distinction was created on a philosophical-moral basis in order to differentiate the rigorous and inflexible rules of the operative law from the flexible norms inspired by the superior criteria of *aequitas*. In the early imperial epoch Roman jurisprudence, drawing upon the philosophical conception of *aequitas* as true justice, started to speak in some cases of superior equity, from which the jurisdictional magistrates drew inspiration and which, in turn, led to the development of *ius honorarium*. Thus, Roman jurisprudence laid the basis for the distinction between legal institutions conforming with or diverging from the principles of ideal justice. After the Christianization of the Roman Empire in the fourth century AD, the concept of *aequitas* was interpreted in light of Christian ethical principles. This new approach to the meaning of *aequitas* is reflected in the Justinianic codification where *aequitas* is connected with values such as piety (*pietas*), affection (*caritas*), humanity (*humanitas*), kindness (*benignitas*) and clemency (*clementia*). This entailed the tendency of the notion of *ius aequum* to coincide with the Christian conception of *ius naturale*. In this respect, the abatement or derogation of laws in force was justified by reference to an *aequitas* construed as an expression of a law superior to the law in force because it was inspired by God – a law whose principal interpreter was deemed to be the emperor. Thus, for the first time, equity was perceived as a benign rectification of strict law rather than as an objective equation between conflicting interests.

render specific performance, followed by a solemn affirmative answer from the other party. This exchange of question and answer created an actionable obligation of the answering party under the *ius civile*. Circumstances could exist that made it unfair for the creditor to enforce the transaction. However, no remedy was provided by the *ius civile* in such a case. If the parties had observed all the prescribed formalities, the validity of the contract could not be questioned. To rectify the situation, the praetor could use his own authority to include an additional clause (*exceptio*) in the relevant *formula* that enabled the defendant to render the plaintiff's claim ineffective by showing grounds for denying judgment in the plaintiff's favour. When the *exceptio* was based on the allegation that the plaintiff had acted fraudulently (*dolo*), it was designated *exceptio doli*.[62] Granting exceptions was an ingenious device that enabled the praetor to deliver appropriate relief in individual cases without questioning the validity of the relevant legal rule. Thus the *exceptio doli* left the principle of the *stipulatio* intact, i.e. the obligation to act as one had promised by responding in a particular way to a specific question posed. The *form* of the transaction still created the legal obligation, although the recognition that intention had priority over form was implicit in accepting the *exceptio doli*.

An important distinction in the early Roman law of property existed between *res mancipi* and *res nec mancipi*. *Res mancipi* included land and buildings situated in Italy, slaves and draft animals, such as oxen and horses. All other objects were *res nec mancipi*. The ownership of *res mancipi* could be transferred only by means of a highly formal procedure called *mancipatio*. The ownership of *res nec mancipi*, on the other hand, could be passed informally, e.g. by simple delivery (*traditio*).[63] If a *res mancipi* was transferred to someone in an informal manner, the transferee did not acquire title under the *ius civile*.[64] In such a case, if the transferee lost possession of the property he could not recover it from the person with the current holding. While retaining possession of the property he could be challenged by the transferor who remained the lawful owner (*dominus*). As economic relations grew more complex, the strictness of the law proved detrimental to many legitimate interests. To rectify the situation, the praetor intervened and placed the transferee in the factual possession of a civil law owner. The property was then regarded as *in bonis* (hence the concept of 'bonitary' ownership) and such a 'bonitary' owner could acquire true ownership by *usucapio* (i.e. through lapse of a certain period of time).[65] If the bonitary owner lost possession of the property, he could recover it by

[62] The *bona fides* requirement that existed as the basis of the system of consensual contracts was virtually incorporated into the Roman *ius civile* by the *exceptio doli* and the *actio doli*.

[63] The origin of the distinction between *res mancipi* and *res nec mancipi* remains obscure, although it may be related to the fact that the *res mancipi* were extremely valuable in the archaic period when agriculture formed the basis of Roman economic life. In later times, the formal methods for transferring ownership diminished in importance and, by Justinian's era, the distinction between *res mancipi* and *res nec mancipi* no longer existed.

[64] Only Roman citizens or persons vested with the *ius commercii* could acquire ownership under the *ius civile* (*dominium ex iure Quiritium*).

[65] G. 2. 41.

means of the *actio Publiciana*.[66] This action was granted to all *bona fide* possessors in the process of acquiring ownership by *usucapio*, and was based on the fiction that the period required for obtaining the property by *usucapio* was completed. If the original owner endeavoured to claim the property, the bonitary owner could raise the defence of *exceptio rei venditae et traditae* (defence of a property sold and delivered by *traditio*),[67] or the *exceptio doli*. The praetor engaged these devices to create a new type of property right that supplemented those recognized under the traditional *ius civile* and this generated a considerable improvement in the Roman law of property.[68]

The above examples present a sketch of the techniques the praetor used to invent not merely supplementary but often superseding rights that galvanized the development of the *ius honorarium*. The descriptions expose two interrelated characteristics of the Roman legal system: a pervasive dualism, perhaps even a dialectic relationship between old and new; and a tendency towards gradual adaptation. There is the dualism between *ius civile* and *ius honorarium*, between an adherence to past forms and an admirable ingenuity in designing ways to address new situations and problems. This system is even more remarkable as both the aspects of respecting the past and adapting to the new were combined in the praetor. The praetor used all his creativity to construct devices that tackled the problems arising from novel socio-economic circumstances, and also acted as a guarantor of the basic forms and principles of the old law. Such a system seemed to satisfy the people's desire to believe that things remained the same as long as they were ascribed the same labels. It created the comfortable illusion that nothing really had changed. The reluctance to abandon the fundamental principles of the traditional legal system is aptly illustrated by the institution of the *patria potestas*, which was recognized by the Romans as a characteristic element of their system. Despite the enormous inconveniences generated by this institution, it survived until as late as the fourth century AD. Devices were designed to mitigate its unwanted consequences in a new era that no longer required a family structure based on the traditional *patia potestas*; yet, these devices did not affect the essence of that institution. Although several aspects were modified, like the power to prevent the marriage of a daughter, it had a longevity that virtually resembled that of Roman law. The practice of the praetor to grant exceptions to defendants illuminates the same tendency for observing the old rules. Granting exceptions was a cautious device that retained the essence of the rules, while providing relief in a particular case or type of case. Indeed, classifying a particular case as exceptional would appear to confirm the validity of the relevant rule. Similarly, the use of fiction

[66] Introduced by Publicius, a *praetor urbanus*, probably in the first century BC. See G. 4. 36.

[67] D. 21. 3. 3.

[68] Fictions were not an exclusively praetorian device used to adapt the legal system to changing socio-economic conditions. They were also embodied in statutes, such as, for example, the *lex Cornelia* (first century BC). According to this law, a citizen who died in captivity should be deemed to have died at the moment he was taken prisoner, i.e., as a free Roman citizen, so that his will made prior to captivity could be regarded as valid (*fictio legis Corneliae*).

helped the victim of bad faith or error in cases where the requirements of strict law were not fulfilled. However, it did not diminish the validity of the legal principles that applied under the old *ius civile*. For example, the fiction of a completed *usucapio* in the *actio Publiciana* did not affect the basic principles of the *ius civile* relating to the acquisition of ownership over *res mancipi*. Fictions and other praetorian devices facilitated the cautious and gradual adaptation of the rules insofar as this was deemed necessary, but did not appear to change any elements on the normative level. On closer observation, it is not difficult to discern that these devices produced important changes to the law. This evokes the Hegelian idea that a change in quantity may lead to a change in quality. Although the form of this change suggested that only a minor detail of a rule was affected, a major principle of the Roman *ius civile* was actually rendered ineffectual or set aside. The relationship between the *ius civile* and the *ius honorarium* (or between law and equity) clearly exhibits the Romans' commitment to the two notions of stability and change, of preservation of the past and efficient adaptation to new needs.

2.3.2.1 Relationship with Non-Roman Communities and the Concept of *Ius Gentium*

The development of the *ius honorarium* in the later republican era was closely connected with the dramatic increase in contacts between the Romans and non-Roman communities, and the growth in economic relations between Roman citizens and foreigners (*peregrini*). As the granting of Roman citizenship had not kept pace with Rome's expansion, a growing mass of foreigners residing in Roman territory had no access to the Roman *ius civile*.[69] However, the development of foreign trade and the proliferation of foreigners living in Rome prompted the need to formulate rules applicable to disputes between foreigners, and between foreigners and Romans. The Romans responded to this need by appointing (from *c.* 242 BC) a special praetor, the *praetor peregrinus*, to handle cases involving foreigners. The peregrine praetor enjoyed greater liberty than his urban colleague did as no law limited his operations. Thus, when formulating remedies he could consider the new needs created by the ever-changing social and economic conditions. Governors in the provinces were also granted jurisdiction over disputes concerning Roman citizens settled there and provincials; and, occasionally, over cases involving foreigners. The edicts of the *praetor peregrinus* and, to a lesser extent, those of the provincial governors engendered a new system of rules governing relations between free men without reference to their nationality.

[69] As already noted, according to the principle of the personality of laws, the Roman *ius civile* was only for Roman citizens and non-citizens were unable to share therein. Thus, a foreigner could not easily engage in legal transactions and, if aggrieved by another person, could not defend himself or prosecute a claim before the authorities of the city unless he secured personal protection from a Roman citizen.

Although this body of law was Roman in origin, it became known as *ius gentium*: the law of nations.[70]

From an early period the Romans realised that certain institutions of their own *ius civile* also existed in the legal systems of other nations. As contracts of sale, service and loan, for example, were recognised by many systems, it was assumed that the principles governing these were everywhere in force in the same way. These institutions which the Roman law had in common with other legal systems were thought of by the Romans as belonging to the law of nations (*ius gentium*) in a broad sense. But this understanding of the *ius gentium* was of little practical value for the Roman lawyer, for the specific rules governing the operation of such generally recognised institutions differed from one legal system to another. When the Romans began to trade with foreigners they must have realised that their own *ius civile* was an impossible basis for developing trading relations. Foreigner traders too had little inclination to conform to the tedious formalities of domestic Roman law. Some common ground had to be discovered as the basis for a common court, which might adjudicate on claims of private international law, and this common ground was found in the *ius gentium*, or the law of nations in a narrow, practical sense.

Although little information exists on the methods employed by the peregrine praetor in performing his functions, we may surmise that he adopted the *ius civile* when applicable to the relevant case. Moreover, the customary norms common to many nations must have been relevant to determining whether or not a claim was acceptable. For example, a magistrate could easily fathom that many nations transferred titles to land and property by mere delivery and payment, and not by the formal methods familiar to Rome. This entailed an increasing recognition by jurisdictional magistrates of the validity of informal agreements or consensual contracts based on good faith (*bona fides*) in commercial transactions—contracts where Romans and foreigners alike could engage.[71] However, an important note is that when a magistrate addressed a dispute involving foreigners he had to recall that his solutions must accord with what was considered proper and reasonable from a Roman citizen's viewpoint. Thus the *ius gentium* might be described as a complex

[70] According to Gaius: "Every people that is governed by statutes and by customs observed partly its own particular law and partly the common law of all mankind. That law which any people established for itself is peculiar to it and is called *ius civile* as being the law of its own citizenry, while the law that natural reason establishes among all mankind is observed by all peoples alike and is called *ius gentium*. So the laws of the people of Rome are partly peculiar to itself, partly common to all nations. . ." (G. 1. 1.).

[71] Where *bona fides* was accepted as the basis of a legal obligation, the intention of the parties to the contract rather than the form observed was decisive for the generation of legal consequences. However, the recognition of the role of *bona fides* as a basis of liability did not entail abandonment of the *stipulatio* that existed as the principal formal contract of the *ius civile*. Instead, both consensual contracts and *stipulatio* existed for a long time alongside each other. Neither did this mean that consensual contracts were only relevant to transactions involving foreigners. Roman citizens among themselves increasingly used informal agreements as the role of ritual in concluding agreements decreased.

system of generally observed customs and rules that embodied elements the Romans regarded as reflecting the substance of *ius*, or law in a broad normative sense; in other words, 'that which was good and fair' (*bonum et aequum*).[72]

Attending to disputes involving people of diverse national backgrounds would have been difficult without employing rules based on common sense, expediency and fairness that were confirmed by general and prevalent usage among many communities. In contrast to the *ius civile*, the *ius gentium* was thus characterized by its simplicity, adaptability and emphasis on substance rather than form. The absence of any rigid rules in the procedure implemented by the peregrine praetor created sufficient elasticity for its adjustment to the demands of the relevant case. For that reason, not only foreigners but also Roman citizens increasingly resorted to the procedure as a means of resolving legal disputes. The elastic technique of the *praetor peregrinus* was gradually adopted by the *praetor urbanus*, the magistrate in charge of the administration of the Roman domestic law (*ius proprium Romanorum*), when deciding cases between citizens that fell outside the scope of the traditional *ius civile*. As a result of this development, the urban praetor was no longer bound by the old statutory forms of action (*legis actiones*) and had freedom to devise new remedies and corresponding procedural formulae to tackle *ad hoc* controversies engendered by novel socio-economic circumstances. Such measures were not restricted to the application of the laws in force, but could be used to modify or replace existing law. Although in principle neither praetor had legislative authority, they actually created new law by extensively engaging their right to regulate the forms of proceedings accepted in court. A new body of law thus emerged that incorporated the norms of private law derived from the edicts of the praetors and other magistrates: the *ius honorarium*.

2.3.3 The Jurists of the Late Republic

As previously noted, during the archaic era knowledge of the law and the rules governing legal procedure was confined to the priestly college of the pontiffs. After the enactment of the Law of the Twelve Tables and the introduction of the system of *legis actiones* the authoritative interpretation of statutory law and the conduct of the actions at law remained within the province of these priests.[73] According to Roman tradition, the pontiffs' monopoly of legal knowledge ended in 304 BC when Gnaeus Flavius published a manuscript containing the procedural formulas and ritual words employed in litigation. In *c*. 253 BC Tiberius Coruncanius, the first plebeian *pontifex*

[72] One might declare that the *ius gentium* was not entirely a technical name for a body of legally recognized rights, but a means of justifying the introduction of new ones. The fact that an institution was discovered to exist in many nations was *prima facie* evidence that it was equitable and hence could be invoked in the praetor's court.

[73] D. 1. 2. 2. 6.

maximus, began to discuss cases and to give legal advice in public (*publice profiteri*) in such a way that the knowledge he imparted became common to all.[74] Thereafter, an increasing number of secular jurists (*jurisprudentes* or *iurisconsulti*)[75] engaged in furnishing legal advice and by the end of the second century BC they had supplanted the original interpreters of the law. These jurists were members of the Roman aristocracy and were actively involved in politics. Like the pontiffs before them, they received no remuneration for their services for they considered it their civic duty to assist citizens who sought their legal advice. Although jurisprudence did not become a profession through which one could earn a living, it provided an important outlet for members of the nobility who sought to distinguish themselves in social and political life. Because of the respect and honour they gained through their activities, these individuals were able to increase their influence among their fellow citizens and, by widening the circle of their friends and dependants, to win their way to high office.

Cicero declares that jurists had to be skilled in three respects in matters of law: *agere*, *cavere* and *respondere*.[76]

Agere (literally, to act) meant managing a legal cause or suit. The jurists gave help on matters of procedure and prepared the forms that had to be used by the parties to lawsuits. As noted previously, in the archaic era a person initiating a lawsuit was required to fit his claim within one of the set forms of action prescribed by the law. The rigidity of this system considerably limited the scope of juristic intervention. However, a new flexible system of procedure for initiating legal actions emerged in the second century BC. Under this system, the final settling of the plaintiff's statement of claim was an extremely technical process and this provided broad scope for the intervention of the jurists in litigation. It is important to note, however, that the jurists very rarely argued cases in the courts—this task was left to the *oratores*.[77]

Cavere (literally, to take precautions) meant the drafting of legal documents, such as contracts and wills, designed to preserve a person's interests by protecting them against certain eventualities. This cultivation of forms was one of the most important contributions of the jurists to the development of legal thinking and

[74] D. 1. 2. 2. 35 and 38.

[75] *Jurisprudentes*: those possessing the knowledge of the law; *iurisconsulti*: those who were consulted on legal matters.

[76] *De oratore* 1. 48. 212.

[77] Although trained in law, advocates often relied on the help of jurists in difficult cases to ensure that their clients' claims were properly stated according to the prescribed *formulae*. Moreover, an advocate might seek a jurist's advice when he intended to request the granting of a new form of action from a magistrate (at the *in iure* stage of the proceedings), and when he pleaded the case before the judge (*apud iudicem*). See, e.g., Cicero, *Topica* 17. 65: "For private actions involving important issues, indeed, seem to me to depend on the wisdom of the jurisconsults. For they frequently attend [trials] and are turned to in council and furnish the weapons to advocates who choose them seeking their knowledge. In all suits, then, . . . they are bound to be ready [with their advice]."

language. It was mainly through this work of form development over the centuries that Roman legal speech attained its perfection.

Respondere (literally, to answer) meant giving advice or opinions on questions of law. A practice applicable to every field of Roman life was that an individual would elicit the advice of competent and impartial persons when contemplating a serious decision. Thus, the jurists gave *responsa* or replies to private citizens involved in lawsuits or other legal business that required attention, and to jurisdictional magistrates and the judges (*iudices*) appointed to decide particular cases.[78] The *responsa* were expressed in a casuistic form: the jurist restated the factual aspects of the case in such a way to illuminate the legal question presented to him. By drawing on the wealth of legal principles applied in the past or encountered within his own experience, he rendered a decision that only obliquely referred to the principle or rule that supported it. It should be noted that the casuistic form in which the *responsa* were expressed entailed considerable differences of opinion among individual jurists with respect to certain matters.[79] In many cases, opposing points of view were adopted by contemporary or later jurists. Many of these controversies persisted for decades or even centuries.[80]

Besides the practical activities outlined above, the jurists were occupied by two further tasks that were instrumental in the development of Roman law: the education of those aspiring to enter the practice of law, and the composition of legal works.

Legal education in republican Rome had a largely practical orientation; there was neither theoretical nor academic legal training or educational institutions where law was formally taught.[81] Upon completion of their basic education, young men would enter the household of a jurist to live with the family. They would attend consultations when clients sought legal advice, and accompany the jurist to the marketplace where they observed him imparting legal advice, drafting legal documents and assisting parties in legal proceedings. In this way, students acquired knowledge of the law through contact with legal practice and professional tradition.[82] Sometimes, the jurists gave opinions when their students raised purely

[78] The jurists presented their replies verbally or in writing and the audience which received them was by no means confined to those who sought the jurists' advice.

[79] According to Cicero, "as for that law which is unsettled among the most learned [jurists], it is not difficult for the orator to find some authority for whichever side he is defending, and having obtained a supply of thronged spears from him [the jurist], he himself will hurl these with the vigor and strength of an orator." (*De oratore* 1. 57. 242)

[80] The only proof of the validity of a juristic opinion was its acceptance by a court. But even this was but a slender proof, for different jurisdictional magistrates or judges might be under the sway of different jurists.

[81] Systematic instruction by professional law teachers was not introduced until the later imperial age.

[82] Cicero, *Orator* 42. 143: "It was sufficient for the [law students] to listen to those responding, as those [jurists] who taught set aside no special time for that purpose, but at the same time satisfied both the students and the consultants."

hypothetical cases for discussion. These opinions were almost equal in influence to those given on real facts, and possibly helped to develop Roman law in new and unique directions.

From the second century BC, prominent jurists began to compile books of *responsa* that they had issued and were applied in practice (especially those ratified by virtue of a judicial decision). The need to create such collections derived from the fact that in Rome the administration of private law was not closely regulated by the state and hence judicial decisions were not formally collected on behalf of the state. In their collections the jurists sometimes included summaries of important cases, and recorded the relevant court decisions and the opinions rendered to the parties concerned. The jurists also composed various commentaries or treatises on different branches of the law and, over time, a large body of legal literature materialized. The emergence of legal literature is associated with the influence of the Greek culture and science on the Roman aristocracy that encompassed the jurists. It is important to note that the contributions of the jurists are not evenly distributed over the whole field of law; private law and civil procedure patently dominate, whereas many areas of public law were never the object of the same intensive analysis and constructive development.

As the foregoing discussion suggests, Roman jurisprudence evolved largely from legal practice with a notable contribution from the discussion of individual cases. A distinction is usually made between two types of juristic method: the *empirical* or *casuistic* and the *deductive*. The Roman jurists were typical representatives of the former method. When dealing with legal problems, they resorted primarily to topical rather than axiomatic argument. If a legal rule or concept is formed by logical reasoning from basic principles or axioms, it invokes axiomatic argument. Topical or problem reasoning, on the other hand, occurs when one proceeds from the case to identify the premises that would support a solution, and then formulates guiding principles and concepts as a basis for attaining a solution. The rules and concepts devised in this manner are not rigid and inviolable but are subject to change, depending on the circumstances of the relevant case. Moreover, it is generally believed that the Roman jurists reached their conclusions intuitively. This intuitive grasp of the law is attributed to the Romans' innate sense for legal matters, and to the jurists' experience with the everyday practice of the law. However, one should not construe Roman jurisprudence as a merely pragmatic, unprincipled case law or believe that Roman decision-making was based solely on free and creative intuition. The greatest achievement of the Roman jurists was their ability to extend beyond the accidental elements of the relevant case to illuminate the essential legal problem as a *quaestio iuris*. As the jurists gradually acquired familiarity with Greek philosophy and the intellectual methods and tools the Greeks had created, they developed a systematic approach to legal knowledge and to handling legal problems. Thus, acquaintance with the logical syllogism (or reasoned conclusions) enabled them to construct legal concepts in a deductive manner. The jurists engaged the dialectical method: a form of logical analysis that both distinguished between various concepts and subsumed those sharing the same essential characteristics under common heads. This fostered their learning to divide

(into *genera* and *species*) and define juridically relevant facts, and thereby distinguish and categorize juridical concepts. Moreover, awareness of the sociological function of law led the jurists to attach more emphasis on equity (*aequitas*), good faith (*bona fides*) and other general guiding principles.[83] The jurists' tendency towards systematization not only allowed them to present their casuistic approach in a more simple and elegant manner, but also helped to improve their decision-propositions. This improvement in decisions was closely connected with the requirement for integration in the growing empire and the need to adapt the legal system to its deriving socio-structural changes.

A celebrated jurist of the later republican period was Quintus Mucius Scaevola, *pontifex maximus* and consul in 95 BC. Scaevola is declared to have been the first jurist who endeavoured to systematize the existing law in a scientific fashion. Unlike earlier jurists, he did not confine himself to the discussion of isolated cases or questions of law. Rather, he made great efforts towards a higher level of generalization and ventured to introduce more definition and division. In his comprehensive treatise on the *ius civile*, he assembled related legal phenomena and principles under common headings. He also distinguished the various forms of appearance of these broader categories. For instance, he first defined the general features of possession, tutorship and so on, and then described their various individual forms (*genera*) existing in the legal system. He also seems to have written a book that featured brief definitory statements (*horoi*) indicating the decisive factual moment (*horos*) of a certain legal consequence or decision.[84] Scaevola is also attributed with formulating certain standard legal clauses and presumptions, such as the *cautio Muciana* (a promise by a legatee that he would return the legacy if he acted against the attached condition) and the *praesumptio Muciana* (the presumption that all the property a married woman possessed was furnished by her husband, until the contrary was proved). As governor of the province of Asia, Scaevola also composed a provincial edict (*edictum provinciale*) that was used as a model by other provincial governors. Scaevola's work was an

[83] Quintilianus, *Institutio oratoria* 12. 3. 7: "Those laws which are written or established by the custom of the state present no difficulty, since they call for knowledge, not reasoning. But those matters which are explained in the responses of the jurists are founded either upon the interpretation of words or on the distinction between right and wrong."

[84] The scheme appeared in the following style: X is the essential characteristic when the choice between D or non-D must be determined; X is present in the combination of facts A; X is not present in the combination of facts B; X is the *differentia specifica* between the classes A and B, which leads to the conclusion that A→D, whilst B→non-D. This scheme was elaborated further by the great Augustan jurist M. Antistius Labeo. Labeo had adopted the Stoic mode of expressing Aristotelian definitions in the form of implicative statements. His 'hypotheses' (*pithana*) very much resembled legal norms: if F then D; if non-F, then non-D and so on. Such statements were later conceived as and called norms: *regulae iuris*. They were also often designated *definitiones* or *differentia* – terms that reflect their origin in Aristotelian philosophy.

important step forward as it introduced a scheme of law conceived as a logically connected whole alongside the collections of precedents and isolated legal rules. It had enduring influence and commentaries on it were still written as late as the second century AD.[85]

Other distinguished jurists of the later republican period included: Manius Manilius, consul in 149 BC, whose work *venalium vendendorum leges* ('conditions of sale for things capable of being sold'), mainly elaborated model *formulae* relating to contracts of sale[86]; M. Porcius Cato Censorius, consul in 195 BC and censor in 184 BC, whose work *de agricultura* ('on agriculture') comprised forms and precedents for drafting agrarian contracts; the latter's son, M. Porcius Cato Licinianus, who authored a celebrated treatise on the *ius civile* (*de iuris disciplina*)[87]; M. Junius Brutus, praetor in 142 BC, who wrote books on the *ius civile*[88]; Gaius Aquilius Gallus, praetor in 66 BC, who introduced the action and exception of *dolus* (a term that merges the ideas of fraud, abuse of right, and the general concept of tort)[89]; C. Trebatius Testa, a friend of Cicero's, whose work on the *ius civile* was highly regarded by the classical jurists[90]; P. Alfenus Varus, consul in 39 BC, who produced an extensive work (*Digesta*) in 40 books[91]; Servius Sulpicius Rufus, consul in 51 BC, whose writings included an important commentary on the praetorian edict[92]; and P. Rutilius Rufus, consul in 105 BC, who devised the bankruptcy procedure described by Gaius (*actio Rutiliana*).[93] Only a few

[85] Cicero, *Brutus* 39. 145–46: "Scaevola was considered the most eloquent of those learned in the law. He was an exceedingly acute legal thinker; his language very terse and admirably suited to legal discussion. An incomparable interpreter of the law, but in the matters of emotional appeal, oratorical embellishment and debate a formidable critic rather than a marvellous orator." And see D. 1. 2. 2. 41–42 (Pomponius): "Quintus Mucius, pontifex maximus, son of Publius, was the first to compile the *ius civile*, which he arranged according to *genera*, in eighteen books. (42) The pupils of Mucius were many, but those of the greatest authority were Aquilius Gallus, Balbus Lucilius, Sextus Papirius, Gaius Iuventius . . .".

[86] Cicero, *de orat*. 1. 246; D. 1. 2. 2. 39.

[87] D. 1. 2. 2. 38.

[88] Cicero, *pro Cluent*. 141; *de orat*. 2. 142. 224; D. 1. 2. 2. 39.

[89] D. 4. 3. 1. 1. This had far-reaching implications, as it introduced equitable considerations into determining the validity of transactions. In practice, it enabled equitable defences to be pleaded in almost any action.

[90] D. 1. 2. 2. 45; *Inst*. 2. 25. pr.

[91] D. 1. 2. 2. 44.

[92] According to Cicero, Servius was the first jurist to apply the dialectic method in the study of legal problems (*Brut*. 152 ff.). And see D. 1. 2. 2. 43.

[93] G. 4. 35.

scattered and fragmentary traces of these jurists' works survive through the writings of jurists from the classical period embodied in the Digest of Justinian.[94]

2.3.4 The Role of Custom

In the later republican era, custom (*consuetudo*) no longer operated as a direct source of law. However, it prevailed as a component in the formulation of the norms of positive law as found in statutory enactments, the edicts of the magistrates and the interpretations of the jurists.[95] Thus, many forms of action devised by the praetors to address situations not covered by the existing *ius civile* reflected customary norms endorsed by public opinion and actually observed by the people (*opinio necessitatis*).[96] As previously explained, the principal duty of the praetor when faced with a legal dispute was to determine whether the plaintiff's claim was admissible and, in doing do, the magistrate was to a large extent guided by current public opinion and the general sentiment as to what was right and proper in the circumstances. Similar considerations informed the jurists when formulating their *responsa*.

2.4 Sources of Law in the Principate Era

2.4.1 The Decline of Popular Law-Making

After the establishment of the Principate, the assemblies of the people continued to operate. However, their significance as constitutional organs was greatly diminished as the laws they enacted were all part of imperial policy and expressed the emperor's will. Abiding by a tradition that accepted comitial enactment as the exclusive source of legislation, Augustus used the assemblies to procure the enactment of several important laws. Some of these laws were passed directly on the emperor's motion while others were passed on the motion of higher magistrates, though obviously the emperor was their real promoter. In this way, statutes were passed concerning legal procedure (*leges Iuliae iudiciorum publicorum et*

[94] For a reconstruction of works of the late republican jurists see O. Lenel, *Palingenesia iuris civilis*, 2 vols (Leipzig 1889, repr. Graz 1960). See also F. Bremer, *Iurisprudentiae ante-hadrianae quae supersunt*, I (Leipzig 1896).

[95] According to the classical jurist Paulus, "custom is the best interpreter of statutes." See D. 1.3. 37.

[96] Consider Cicero, *de invent*. 2. 22. 67; D. 1. 3. 32. 1; D. 1. 3. 35.

privatorum)[97]; marriage and divorce (*lex Iulia de maritandis ordinibus*, *lex Papia Poppaea*)[98]; adultery (*lex Iulia de adulteriis coercendis*)[99]; the repression of electoral corruption (*lex Iulia de ambitu*)[100]; and the operation of the senate (*lex Iulia de senato habendo*).[101] Other noteworthy enactments of this period were the *lex Fufia Caninia* (2 BC) and the *lex Aelia Sentia* (AD 4) that introduced restrictions on the testamentary manumission of slaves; and the *lex Claudia de tutela mulierum*, a law passed under Emperor Claudius, that abolished agnatic tutelage over women.[102]

However, almost since the emergence of the new order, popular legislation was destined to wither away. It succumbed to the necessities of a community transformed from a city-state into a world empire, and a political system where the leadership shifted from short-term magistracies to the supremacy of a single ruler. As the political functions of the assemblies declined rapidly, this form of legislation soon became obsolete and ceased to exist at the end of the first century AD—the last known *lex* was an agrarian law passed in the time of Emperor Nerva (AD 96–98).[103]

[97] These laws were enacted in 17 BC and completed the transition from the *legis actiones* to the formulary procedure.

[98] The *lex Iulia de maritandis ordinibus* was passed in 18 BC and was supplemented by the *lex Papia Poppaea* in 9 AD. Both laws aspired to promote marriage and the procreation of children, and to check the decline of traditional family values. The earlier statute introduced several prohibitions on marriage (it prohibited marriages between members of the senatorial class and their former slaves, and between free-born men and women convicted of adultery). At the same time, various privileges were granted to married people who had children whereas severe social and economic disadvantages were imposed on unmarried and childless persons. The later law excluded unmarried men aged between twenty-five and sixty, and unmarried women aged between twenty and fifty from succession under a will. Both laws were referred to as *leges Iulia et Papia Poppaea*.

[99] Under this law enacted in 18 BC, adultery (*adulterium*) was classified as a public crime (but only when it was committed by a married woman). The father of the adulteress was permitted to kill her and her partner if he caught them in his or her husband's house. A husband whose wife had committed adultery had to divorce her, otherwise he could be found guilty of match-making (*lenocidium*). He (or the woman's father) could also launch an accusation against her before a court of law within two months after the divorce. Thereafter and for four months, any citizen could initiate a criminal charge. The punishment for a woman declared guilty of adultery was banishment, accompanied by confiscation of one-third of her property and loss of part of her dowry. Under the same enactment, the illicit intercourse with an unmarried woman or a widow (*stuprum*) was also made subject to criminal prosecution. See D. 48. 5. 13–14; D. 48. 5. 30. 1; D. 23. 2. 44.

[100] Enacted in 18 BC.

[101] This law was enacted in 10 BC and contained provisions regulating the voting procedure in the senate.

[102] G. 1. 157.

[103] D 47. 21. 3. 1.

2.4.2 The Consolidation of Magisterial Law

After the establishment of the Principate, Roman law still comprised the *ius civile* and the *ius honorarium*: the original core of the civil law and the law derived from the edicts of the jurisdictional magistrates (especially the praetors). However, since the inception of this period the productive strength of the magisterial edict started to weaken. As the republican magistrates' authority faded away and their cardinal functions were increasingly assumed by the emperor and his officials, magisterial initiatives became increasingly rare and the magistrates' right to alter the edicts on their own authority eroded. Any changes made in the edicts largely embraced measures introduced by other law-making agencies (*leges* or *senatus consulta*). Finally, pursuant to Emperor Hadrian's orders in the early second century AD the permanent edict of the praetors and the aediles was recast, unified and updated by the jurist Salvius Iulianus (probably during the latter's praetorship). The codified edict was ratified by a *senatus consultum* in AD 130 and thereafter magistrates were bound to administer justice in individual cases exclusively on the basis of the reformulated edict.[104] Although edicts were still annually issued by magistrates, the latter had no control over their content. For all practical purposes, the *edictum perpetuum* thus evolved as established law; any further necessary changes had to be initiated by imperial enactment.[105]

Although the magisterial edict was no longer a source of new law, for a long period it was still regarded as an important source of law for legal practice. Moreover, the distinction between *ius civile* and *ius honorarium* persevered as long as the judicial system allied to these bodies of law still operated. As new forms of dispensing justice gradually replaced the republican system of legal procedure, the distinction between the two bodies of law (existing as one of form rather than substance) was obliterated. The fusion of *ius civile* and *ius honorarium* was also precipitated by the Roman jurists who gradually removed the boundaries by developing both masses of law in common. In the later imperial era the resultant combination of these two sources of law was designated *ius*, in contradistinction to the body of rules derived from imperial legislation known as *lex*.

[104] The text of the codified edict has not been preserved in its original form. Modern reconstructions are based on commentaries and interpretations of later jurists, especially those of Pomponius, Gaius, Ulpianus and Paulus. See O. Lenel, *Das Edictum perpetuum*, 3rd ed. (Leipzig 1927, repr. Aalen 1956).

[105] Emperor Hadrian declared that any new point not contemplated in the codified edict should be decided by analogy with it. It is probable that such new points were still drawn attention to in successive edicts, for there is no doubt that the edict still continued to be published annually. Iulianus' work could, therefore, never have been intended to be unchangeable in an absolute sense. Such invariability would have been inconceivable, for although changes in law were now made primarily by means of imperial enactment, yet these very changes would entail related changes in the details of the edict. The fixity of Iulianus' edict was to be found mainly in its structure and in its guiding principles – in the way in which the various legal norms were ordered and in the general import of these norms.

2.4.3 The Senatorial Resolutions as a Source of Law

As previously noted, during the republican epoch the senate had, in theory, no law-making powers. Its resolutions (*senatus consulta*) were largely advisory in nature and had no legal effect unless they were incorporated into a statute or magisterial edict. The last century of the Republic featured a decline in the political role of the assemblies and occasionally a magistrate's proposal approved by the senate came into effect immediately without popular ratification. After the establishment of the Principate, an increasing number of laws originated in this way and, in time, the *senatus consultum* rather than the *lex* became the chief means of legislation.[106] Resembling the pattern followed under the Republic, the *senatus consulta* were couched in the form of instructions addressed to magistrates and were assigned the name of the magistrate who proposed them rather than the reigning emperor. However, from the start, the senate was virtually a tool of the emperor and had no free hand in the matter of legislation any more than it had in other matters. Indeed, most senatorial decrees were passed on the initiative of the emperor or at least with his acquiescence. From the time of Emperor Claudius (AD 41–54), senatorial decrees were increasingly composed by imperial officials and the relevant proposal was presented in the senate by or in the name of the emperor (*oratio principis*). The senators were then invited to express their views and a vote was conducted. However, the emperor's influence on the senate entailed the latter never failing to agree with the main premises of the proposal. As the movement towards absolute monarchy advanced, the terms of the emperor's proposal were increasingly adopted as a matter of course by the senate without even the pretence of a discussion. By the end of the second century AD, this practice was so routine that it was customary to label a *senatus consultum* as an *oratio* of the emperor on whose initiative the *senatus consultum* was passed. In the third century, emperors no longer submitted their proposals to the senate for approval and thus the senatorial resolutions formally ceased to exist as a source of law.

In the first two centuries of the Principate numerous *senatus consulta* were issued that effectuated important changes in the areas of both public and private law. An early senatorial decree of this period was the *senatus consultum Silanianum* of AD 10 that aspired to repress the frequent killing of masters by their slaves.[107] Other important senatorial resolutions of this period embraced: the *senatus consultum Vellaeanum* (AD 46) that forbade women from assuming liability for

[106] According to Gaius: "A *senatus consultum* is that which the Senate orders and establishes, and this is assimilated in force to a statute, although this was formerly disputed." (G. 1. 4.) And see D. 1. 3. 9. (Ulpianus): "There is no doubt but that the senate can make law."

[107] It provided that when a master of slaves was killed and the identity of the murderer or murderers remained unknown, all slaves who lived with him had to be tortured and eventually killed. A slave who revealed the identity of the killer was declared free by the praetor's order. See Tacitus, *Ann*. 14. 42–45.

debts of others, including those of their husbands[108]; the *senatus consultum Libonianum* (AD 16) that imposed the penalties of the *lex Cornelia de falsis* for the forging of testaments[109]; the *senatus consultum Trebellianum* (*c*. AD 56) and the *senatus consultum Pegasianum* (AD 73) that concerned the acceptance of inheritances subject to *fideicommissa*[110]; the *senatus consultum Iuventianum* (AD 129) that addressed matters such as claims of the Roman public treasury (*aerarium populi Romani*) against private individuals for the recovery of vacant inheritances; the *senatus consultum Macedonianum* (second half of the first century AD) that prohibited loans to sons who remained subject to *partia potestas*[111]; and the *senatus consultum Tertullianum*, passed in the time of Hadrian, that granted mothers the legal right of succession to their children's inheritance.[112]

2.4.4 The Princeps *as a Lawmaker*

As previously observed, Augustus exhibited deference to the traditional republican institutions he claimed to have restored by consistently refusing to accept direct law-making powers that could supplant those of the established organs of legislation. So long as the principles of the Augustan system of government retained their vitality, the emperor achieved his legislative goals indirectly by regularly using the popular assemblies and then the senate. However, the emperor not only controlled legislation but since the start of the Principate period had diverse methods for creating new legal norms directly without appearing to legislate. The emperor's law-making authority was initially based on his magisterial powers, especially the *imperium proconsulare maius*, and his tribunician *potestas*. As the imperial power increased over time at the expense of the old republican institutions, the enactments of the emperors (*consitutiones principum*) were recognized as possessing full statutory force (*legis vigorem*) and functioning as a direct source of law alongside the *leges* and the *senatus consulta*.

The direct law-making power of the *princeps*-emperor was justified on the ground that the law that conferred *imperium* on the emperor (*lex de imperio*) transferred to him the authority to legislate in the name of the Roman people. According to the jurist Gaius, "a constitution of a *princeps* . . . has the force of law, since the emperor himself receives his *imperium* by a law".[113] This statement

[108] D. 16. 1. 2. 1. The relevant transaction remained valid unless the woman sued by the creditor raised the *exceptio senatus consulti Valleiani*. She could also demand the return of the sum she had paid in fulfillment of her obligation.

[109] D. 48. 10.

[110] On the first of these see G. 2. 253; on the second see G. 2. 254.

[111] Such transactions were not invalid but the son could raise against the lender's claim an *exceptio senatus consulti Macedoniani*. See D. 14. 6. 1; C. 4. 28.

[112] However, priority was accorded to the children's progeny and their father. See D. 38. 17.

[113] G. 1. 5; see also *Inst*. 1. 2. 6; D. 1. 4. 1 pr.

implies nothing less than whatever the emperor decreed as law possessed the validity of a formal statute (*lex*), i.e. a statute like those that were formally enacted by a popular assembly and sanctioned by the senate.[114] But the true foundation of the emperor's legislative authority is not discovered in legal rationales but in political reality: the emperor's socio-political power evolved so that his assumption of a direct legislative role could not be challenged. It should be noted that the growth of imperial legislative authority was gradual. The imperial office in the late Principate age displayed a far more autocratic nature than in the Augustan period, operating as the ultimate source of all administrative, legislative and judicial activity.

Imperial law-making, like the magisterial law-making of the later Republican age, formed a new source of equitable rules that unravelled the rigidity of the Roman legal system, thereby adjusting it to the socio-economic conditions of an evolving society. However, the multiplicity of the emperor's law-making functions precluded the formation of a homogenous body of law until the later imperial era when attempts were made to introduce order into the mass of imperial constitutions claiming validity in the empire.

Imperial legislation was designated the common name of imperial constitutions (*constitutiones principis*) and assumed diverse forms: *edicta*, *decreta*, *rescripta* and *mandata*.[115]

2.4.4.1 *Edicta*

As holder of the magisterial *imperium*, the *princeps*-emperor had the right to issue edicts (*edicta*) that publicized his orders and intentions. But as the emperor surpassed all other magistrates in authority and his sphere of competence was virtually unlimited, his edicts embraced the whole business of the state, dealing with such divergent matters as criminal law and procedure, private law, the constitution of the courts, and the bestowal of citizenship.[116]

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[114] D. 1. 2. 2. 11–12 (Pomponius): "Therefore, a first citizen (*princeps*) was established, and the power was given to him that whatever he laid down was binding. Hence, in our state a rule depends upon law, that is, upon a statute (*lex*) . . . or the imperial constitution, that is, what the emperor himself decrees and is observed as a statute (*pro lege*)."

[115] According to Ulpianus: "whatever the emperor determines by *epistula* or by *subscriptio*, or has decided after hearing or has pronounced without hearing or has prescribed by *edictum*, is clearly law. These are what we commonly term *constitutiones*." (D. 1. 4. 1 pr.-1) See also G. 1. 5.

[116] See, e.g., the edict of Augustus in D. 48. 18. 8 pr. (Paulus): "The edict of divus Augustus, which he posted during the consulate of Vibius Habitus and Lucius Apronianus (AD 8), is extant as follows: 'I do not think that torture should be inflicted in every case and upon every [slave] person [of the family]; but when capital and atrocious crimes cannot be detected and proved except by the torture of slaves, I believe that it is most effective for ascertaining the truth, and I hold it is to be employed'." Probably the best-known example of an imperial edict is the *constitutio Antoniniana de Civitate* (AD 212) whereby Emperor Caracalla granted the Roman citizenship to all the free inhabitants of the empire: "Imperator Caesar Marcus Aurelius Severus Antoninus

The edicts of the *princeps* were, like those of the praetor and other jurisdictional magistrates of the Republic, technically interpretations of law; but, like the praetor, the *princeps* could alter or supplement the law under the guise of interpretation and his creative power, as exercised by his edictal authority, was very extensive. An emperor's edict did not necessarily bind his successors; but if it had been recognized as valid by a succession of emperors, it was deemed to be part of the law, and its subsequent abandonment had apparently to be provided by some definite act of repudiation. It should be noted that Augustus and his immediate successors used their power of issuing edicts sparingly. Only during the late Principate age when the imperial system moved closer to an absolute monarchy did the emperors regularly employ edicts to achieve aims that, according to the spirit of the Augustan constitution, called for the enactment of legislation by a popular assembly or by the senate. By that time, both comitial and senatorial legislation had disappeared and the capacity of the emperor to create law directly had been recognized as an essential attribute of his office.

2.4.4.2 *Decreta*

The *decreta* (decrees) were decisions issued by the emperor in exercise of his judicial powers on appeal and, on occasions, as judge of first instance.[117] Under normal circumstances, the *princeps*-emperor rarely interfered with the course of ordinary judicial proceedings. Yet from the start, an extraordinary jurisdiction was bestowed to him and those officials to whom he delegated his powers. Over time, the extraordinary jurisdiction of the emperor and his delegates assumed greater significance until it ultimately superseded the jurisdiction of the regular magistrates and courts.[118]

Cases referred to the emperor's tribunal were decided in accordance with the existing law. However, as the highest authority in the state, the emperor granted himself considerable freedom in interpreting the applicable legal rules. He could even venture to defy some hitherto accepted rule if he felt that it failed to produce an equitable outcome. Although theoretically the emperor's decision on the point at issue was only binding in the particular case, in practice it was treated as an authentic statement of the law and binding for all future cases. In this way, the

proclaims: . . .Therefore I believe that magnificently and reverently I can render proper service to their [the gods'] majesty if I bring to the worship of the gods as many foreigners as have entered into the number of my people. Therefore I now grant Roman citizenship to all the foreigners who are residents of the Empire, there remaining [the rights of the city-states], except the *dediticii*." See FIRA I No. 88. Consider also D. 1. 5. 17.

[117] The emperor's appellate jurisdiction was justified on the following ground: as the emperor received his powers from the people and hence acted in their name, an appeal to him was the exercise of the age-old citizen's right of appeal from a magistrate's decision to the judgment of the people in the assembly.

[118] I.e. the *praetor urbanus* and the *praetor peregrinus* with respect to civil matters, and the *quaestiones perpetuae* regarding to criminal matters.

emperor in his judicial capacity contributed to the development of fresh legal principles and rules, and a doctrine of judicial precedent evolved. It should be noted in this context that as the emperor lacked expertise in legal issues, an important point of law invoked in a case before the emperor's tribunal would usually be debated at a meeting of the *consilium principis*. From the second century AD, this council embodied the most eminent jurists and thus the relevant decision represented the best legal opinion of the day.[119]

2.4.4.3 *Rescripta*

The *rescripta* were written answers given by the emperor to petitions raised by state officials and private citizens. Such petitions might relate to all sorts of matters, but the present context focuses on those that invoked questions of law. There were two types of imperial rescripts: *epistulae* and *subscriptiones*. The former were embodied in a separate document and were addressed to state officials in Rome or in the provinces. The latter were responses to petitions from private citizens written on the margin or at the end of the application itself.

Rescripts were particularly important for the development of private law in the second century AD, when it became customary for judges and private citizens to petition the emperors for decisions on difficult questions of law. The emperor would articulate the legal position that applied to a certain stated factual situation and if the judge confirmed the veracity of these facts as stated, he was bound by the imperial decision. Moreover, the emperor's ruling on a point of law contained in a rescript was treated in practice as a binding statement of law for all future cases. In this way, a new body of legal rules developed that had assumed voluminous proportions by the end of the second century AD.[120] Jurists of this period formed private collections of imperial rescripts, large parts of which have come down to us

[119] The following is an example of an imperial *decretum* from the Digest of Justinian. D. 48. 7. 7 (Callistratus): "Creditors who proceed against their debtors should demand back through a judge what they allege is owed to them. Otherwise, if they enter upon the property of the debtor without permission having been given them, divus Marcus decreed that they no longer had the rights of creditors. The words of the *decretum* are these: 'It is best, if you think you have certain claims, that you seek them judicially by actions; in the mean time the other party ought to remain in possession, for you are but a claimant.' And when Marcianus declared: 'No force had been employed', the emperor replied: 'Do you think there is force only if men are wounded? Force exists as often as anyone thinks he can take what is owing him without demanding it though a judge. Moreover, I do not think it conformable to your character or dignity or respect to permit something illegal. Therefore, when it shall have been proved to me that any property of the debtor, not delivered by him to the creditor, has been unauthorizedly possessed without any trial, and it is alleged that he [the creditor] has a right to that property, he shall not have the right [to sue] as a creditor'."

[120] It should be noted that the authors of the imperial rescripts were, in most cases, the jurists who served as members of the imperial chancery.

through the codification of Justinian and other post-classical compilations of law.[121]

2.4.4.4 *Mandata*

The *mandata* (instructions) were internal administrative directions given by the emperor to officials in his service. The most important *mandata* were addressed to provincial governors and concerned provincial administration (especially its financial side), while others dealt with matters of private and criminal law and the administration of justice.[122] Based on the emperor's *imperium proconsulare*, a *mandatum* was originally strictly personal and remained in force only as long as both the emperor who issued it and the official to whom it was addressed remained in office. When the emperor died or the official was replaced, the *mandatum* had to be renewed. Gradually, the successive renewals established a body of standing instructions (*corpus mandatorum*) that acquired general validity for not only state officials but also with respect to the contacts of private citizens with the administrative authorities.[123] As officials were virtually bound to implement all the received instructions from the emperor, and citizens could invoke these instructions

[121] The following are examples of imperial rescripts.

C. 4. 44. 1: "'The Emperor Alexander to Aurelius Maro, soldier: if your father sold the house under compulsion, the transaction will not be upheld as valid, since it was not carried out in good faith; for a purchase in bad faith is invalid. If therefore you bring an action in your own name, the provincial governor will intervene, especially since you declare that you are ready to refund the buyer the price that was paid."

D. 1. 15. 4 (Ulpianus): "The Emperors Severus and Antoninus rescripted to Iunius Rufinus, praefect of the watch, as follows: 'You can also order to be beaten with sticks or flogged those occupants of apartments who have kept their house-fires carelessly. But those who have been found guilty of wilful arson, you shall remit to our friend Fabius Cilo, praefect of the city. You ought to hunt down fugitive slaves and return them to their masters'."

D. 19. 2. 19. 9 (Ulpianus): "When a scribe leased out his labour and his employer then died, the Emperor Antoninus together with the deified Severus replied by rescript to the scribe's petition in these words: 'Since you allege that you are not responsible for your not providing the labour you leased to Antonius Aquila, it is fair that the promise of wages in the contract be fulfilled if during the year in question you received no wages from anyone else'."

[122] According to Dio Cassius, "the emperor gives certain instructions to the procurators, the proconsuls and the propraetors, in order that they may proceed to their offices with fixed conditions. Both this practice and that of giving salary to them and to the remaining officials of the government became customary at this period." (*Historia Romana* 53. 15. 4) And see D. 29. 1. 1; D. 1. 18. 3; D. 48. 3. 6. 1.

[123] In the course of time, various compilations of imperial *mandata* were produced that were referred to as *libri mandatorum*. An important collection of imperial mandates is the *Gnomon* of the *Idios Logos*, a work dating from the second half of the second century AD. This work is partially preserved in a papyrus and contains instructions pertaining to the financial administration of Egypt; it also includes several provisions that deal with matters of private law. See FIRA I, no. 99.

in their favour, the imperial *mandata* operated in practice as a distinct source of law.[124]

2.4.5 The Culmination of Roman Jurisprudence

As previously elaborated, the legal history of the late republican era is marked by the emergence of the first secular jurists (*iurisprudentes*, *iurisconsulti*). The work of the jurists attained great heights of achievement by the end of the republican age and formed the most productive element of Roman legal life during the Principate, as evidenced by the volume and quality of the juridical literature of this period. The jurists' authority in legal matters derived from their highly specialized knowledge, technical expertise and primarily the esteem the general populace held towards them. In a deeply conservative and traditionalistic society (like that of the Romans), the public actions of private citizens and state organs required the support of religious, political and legal authority. In legal matters, private parties and public authorities (including jurisdictional magistrates) thus relied upon the advice from the 'oracles of the law'—the jurists. Both legislation and magisterial law were stimulated and moulded by the jurists, who provided guidance to magistrates in the composition of their legislative proposals and edicts. Furthermore, the jurists contributed to the development of the law through their activities in the day-to-day practice of law, the education of students and the writing of legal works.

The administrative and judicial authorities in the Principate age faced new demands generated by the empire's ever-increasing administrative complexity, the expansion of the Roman citizenship in the provinces and the proliferation of legal transactions prompted by the growth of trade and commerce. These new demands could not be adequately addressed without the active assistance of learned jurists. It is thus unsurprising that not only did the jurists' advisory role increase in importance, but they also commenced a direct involvement in governmental tasks. The emperors employed jurists to assist them in executing the multiplying tasks of administration from as early as Augustus' era with increasing regularity in the later Principate period. Many leading jurists occupied important state posts, from various magisterial positions right up to the prefecture of the praetorian guard. Moreover, distinguished jurists were among the members of the emperor's *consilium* that evolved under Hadrian (AD 117–138) to resemble a supreme council of the state. In this way, the Roman jurist was gradually transformed from a member of the ruling class in an aristocratic republic into a servant of the imperial government. But the jurists' increased participation in governmental affairs did not entail that the

[124] It is germane to mention that Gaius and other classical jurists do not include the *mandata* among the imperial constitutions but mention them as a special category of imperial enactments. See G. 1. 5. and C. 1. 15. Modern writers almost invariably treat the mandates as a form of imperial law-making, because they sometimes contained new rules of law.

primary focus of their interests shifted away from private law. In this field, the jurisprudence of the Empire absorbed all the legal questions that had arisen in the republican age. These questions, enriched by the emergence of new issues, were categorized and often adequately answered for the first time.

Continuing the role of their republican predecessors, the jurists of the Empire were engaged in diverse activities in the legal field: they presented opinions on questions of law to private citizens, magistrates and judges (*respondere*); helped litigants on points of procedure, interpreting laws and formulas in their pleas and occasionally arguing cases as advocates themselves (*agere*); and drafted legal documents, such as contracts and wills (*cavere*). However, composing new *formulae* for use in the formulary procedure was no longer a regular task of the jurists. The reason is that by the beginning of the Principate era the contents of the praetorian and aedilician edicts were largely fixed and adequate legal remedies existed. The jurists were also engaged in the systematic exposition and teaching of law. In performing this task, they composed opinions when their students raised questions for discussion based on hypothetical cases. These opinions were almost equal in terms of influence to those formulated for questions arising from actual cases and indirectly helped to develop Roman law in new directions.

In the Principate age, the giving of opinions on legal questions (*respondere*) evolved as the most important aspect of the jurists' work. An important change regarding this task occurred in the early years of this period, when the *princeps*-emperor began to grant certain jurists the right to present opinions and deliver them by the emperor's authority (*ius publice respondendi ex auctoritate principis*). During the Republic, the jurists' *responsa* had not been legally binding but the judge trying a case would normally accept the opinion of a jurist. By the end of this period, the number of jurists practicing in Rome had greatly increased and it was difficult to ascertain precisely which opinions should be relied upon when they all carried the same weight. As a result, the practice of law was thrown into a state of confusion. Partly to resolve this problem and partly to establish some imperial control over the jurists, Augustus is said to have issued an ordinance investing the opinions of certain pre-eminent jurists with increased authority.[125] The granting of this privilege did not curtail the activity of the unpatented lawyers, although it

[125] Amongst the earliest of the patented jurists was Masurius Sabinus, who lived in the time of the Emperor Tiberius. D. 1. 2. 2. 48–49 (Pomponius): "Massurius Sabinus was in the equestrian order and was the first to respond publicly; afterwards, this privilege began to be given, which, however, had been granted to him by Tiberius Caesar. (49) And we may observe in passing, before the time of Augustus the right of responding publicly (*ius publice respondendi*) was not given by the emperor, but he who had confidence in his studies responded to his consultants; nor were *responsa* always given under seal, but often they themselves wrote to the judges or were testified to by those who consulted them. The deified Augustus was the first to decree, in order to ensure greater authority of the law, that they might respond upon his authority; and from that time on this began to be sought as a favour. And therefore the excellent Emperor Hadrian, when praetorian men sought leave to respond, rescripted that this was not to be sought but was wont to be earned, and accordingly, if anyone had faith in his own ability he himself decided if he was qualified to give *responsa* to the people."

doubtlessly diminished their influence. However, it gave the response of its possessor as authoritative a character as though it had proceeded from the emperor himself. Although judges were not in principle obliged to accept the opinions of the jurists with the *ius respondendi*, in practice it was very difficult for a judge to ignore the advice of a jurist whose *responsa* were reinforced by the emperor's authority.[126] It may have been understood that the opinion of only one patented jurist was to be sought in any single case, for in the early Principate there seems to have been no provision determining the conduct of a judge when the opinions of his advisers differed. Later it must have been possible to elicit the opinion of several patented jurists on a single legal question. In the early second century AD, Emperor Hadrian issued a rescript ordaining that if the opinions of the jurists possessing the *ius respondendi* were unanimous they had the same force as a statute. If there was no unanimity among the jurists, the judge was free to adopt any opinion he thought fit.[127] The emperor devised this rescript to establish clearly and definitely that if a uniform agreement existed between the authorized jurists their unanimous opinion must be followed as binding. However, Hadrian concurrently abandoned the practice of granting the *ius respondendi* to individual jurists. Thereafter, opinions were presented in the form of imperial rescripts prepared, with supervision from distinguished jurists, by the two imperial chanceries: the *scrinium ab epistulis* that attended to the correspondence with state officials and persons of high social status; and the *scrinium a libellis* that dealt with petitions from private citizens.

From a historical perspective, probably the most important of the jurists' activities was the writing of legal works. The great majority of juristic works had a casuistic and practical nature: they were developed from legal practice and written primarily for legal practitioners. Only their expository works, such as elementary textbooks and manuals, exhibited the jurists' adoption of a more theoretical approach to law. Depending upon their subject-matter and structure, the literary works of the classical jurists may be classified as follows:

(a) *Responsa*, *quaestiones*, *disputationes*, *epistulae*—collections of opinions or replies delivered by jurists with the *ius respondendi*. Works of this kind were generally written for practitioners and usually embodied two parts: the first part contained juristic opinions arranged according to the rubrics of the praetorian edict (*ad edictum*), while the second part linked the opinions with the *leges*, *senatus consulta* and *constitutiones principum* that they addressed.

[126] The jurists who had been granted the *ius publice respondendi* were referred to as *iurisconsulti* or *iurisprudentes*, although the same terms were sometimes also used to describe any prominent jurist irrespective of whether or not he enjoyed this privilege. The term *iurisperiti*, on the other hand, was used to denote less important jurists, especially jurists practicing in the provinces. Such lesser jurists were particularly active in Egypt and other Roman provinces in the East.

[127] In the words of Gaius: "The *responsa* of the learned in the law are the decisions and opinions of those to whom it has been permitted to lay down the law. If the decisions of all of these are in accord, that which they so hold has the force of statute. If, however, they differ, the judge is permitted to follow the decision he pleases; and this is expressed in a rescript of divus Hadrianus." (G. 1. 7.)

The responses in these collections were set forth in a casuistic form and dealt with an immense number of problems, sometimes in connection with the opinions of other jurists. The adaptation of the original *responsa* for publication occasionally necessitated the further elaboration of the adopted views, especially when the opinions of other jurists were challenged.[128] Some works in this category, especially the *quaestiones* and the *disputationes*, explored the real or fictitious cases discussed by the jurists in their capacity as law teachers. The juristic works known as *epistulae* contained legal opinions delivered in writing by jurists to judicial magistrates, judges, private citizens or other jurists. The *responsa*, the *quaestiones*, the *disputationes* and the *epistulae* (collectively designated 'problematic literature') are among the most instructive juristic works that reveal the acumen of the authors' legal thinking and the strength of their criticism towards divergent opinions.

(b) *Regulae*, *definitiones*, *sententiae*—short statements of the law that originally related to specific cases, but were later reformulated in the form of legal principles with a more general nature. Couched in terms easily recalled, these works were 'rules of thumb' manuals intended for use by legal practitioners and probably also students.

(c) General works on the *ius civile*. Some of these works were known as *libri ad Sabinum* or *ex Sabino* as they were modelled on the systematic treatise on the *ius civile* (*Libri* III *iuris civilis*) written by Massurius Sabinus, a famous jurist of the early first century AD and head of the school of the Sabinians. Others drew upon the earlier work of the jurist Q. Mucius Scaevola, who lived in the first century BC. Essentially, these works were based on the jurists' interpretation of the provisions of the Law of the Twelve Tables together with the later development of the institutions of the civil law.

(d) Commentaries on the *ius praetorium* (or *ius honorarium*), referred to as *libri ad edictum*. These works examined the edicts of the magistrates and offered commentaries pertaining to those aspects of the *ius civile* they were intended to supplement or correct.[129]

(e) *Digesta*—comprehensive treatises on the law dealing with both the *ius civile* and the *ius honorarium*.

(f) *Institutiones* or *enchiridia*—introductory or expository textbooks written primarily for students at the beginning of their formal legal education.[130]

The jurists also wrote treatises on individual *leges* or *senatus consulta*, handbooks describing the functions of various imperial officials, and commentaries on the works of earlier jurists. Among the juristic literature of the classical period, the

[128] Sometimes responses relating to one theme were collected in one volume. Examples include the *liber singularis* of Modestinus that addressed the institution of *manumissio*, and the book of Paulus on the office of the proconsul (both these works were published in the early third century AD).

[129] A renowned illustration is Ulpian's commentary on the edict (*libri ad edictum*) in eighty-three books.

[130] An illustration of this type of work is the Institutes of Gaius that dates from around AD 160.

Institutes of Gaius is the only work that survives in its original form. The remaining literature is discoverable chiefly in the citations that appear in the Digest of Justinian and other later compilations of law.[131]

As previously noted, a distinctive feature of Roman jurisprudence was its strictly legal and predominantly casuistic nature. The jurists did not consider it part of their tasks to critique the law from sociological, ethical, historical or other broader points of view. Nor were they interested in the laws and customs of other nations, save insofar as these could be incorporated into the conceptual framework of their own legal system. In general, their attitude towards the law was conservative: they endeavoured to preserve the system in which they worked while at the same time developing it by exploring new ways to put its institutions to satisfactory, practical use. In the Principate era, the need arose to further systematize the casuistic method adopted by the republican jurists. In response to this need, the jurists of this period created a system and a science that enabled them to develop the law in new directions in line with changing socio-economic circumstances. The starting-point of a systematic statement of law was often a settled case that was then compared with other real or fictitious cases. Other elements contributing to the process were norms (e.g. statutes and juristic *regulae*) as well as various standards used in the normative discourse (e.g. *bona fides*). The function of such elements was mainly explanatory, pedagogical or informative rather than persuasive (especially in juridical treatises): the jurists sought to illustrate the relevant norm or principle through cases demonstrating its actual operation, without immersion in theoretical argument. But Roman jurisprudence did not stop at the level of a purely pragmatic casuistry. As already noted, a remarkable quality of the jurists was their ability to look beyond the accidental elements of the individual case, the *species facti*, and to define the relevant legal problem as a *quaestio iuris*. Their legal genius was exhibited in their ability to render their decisions or decision-propositions in concrete cases sufficiently flexible for future synthesis into new principles when subsequent experience showed that change was desirable. Although they kept strictly to the doctrines of their law, they understood the sociological import of its rules. The combination of a sure instinct for the necessities of life with the conscious application of firm principles imparted eternal value to the accomplishments of the jurists.

Like their republican predecessors, the jurists of the Empire attached particular importance to the concept of *aequitas* and its role in correcting or expanding the existing body of law so it could meet the demands of social and commercial life. This is reflected in the definition of *ius*, or law in a broad sense, attributed to the jurist Celsus as the art of doing equity (*ius est ars boni et aequi*) or, in other words, a

[131] In the Digest each extract is preceded by an *inscriptio*, which includes the name of the jurist from whose work the extract is taken. These extracts, as well as references by one jurist to another, have made it possible for modern scholars to obtain a good idea of the nature and structure of the original works. The date of the individual works is deduced largely on the basis of information in the surviving fragments, such as references to emperors, legislative enactments or events whose dates are verified by other sources. For a reconstruction of the juristic literature of the classical period see O. Lenel, *Palingenesia iuris civilis*, 2 vols (Leipzig 1889, repr. Graz 1960).

technical device for obtaining that which a good man's conscience will endorse.[132] The test of the *bonum et aequum* in this era was still the *ius gentium*, the norms governing civilized society as construed by the Romans. But the Roman *ius gentium* was now declared binding because it was also natural law (*ius naturale*), based on natural reason.[133] The 'law of nature' was a familiar concept to many philosophical systems of antiquity but acquired a more concrete form with the Stoic school of philosophy. The Stoics' starting-point was the idea that the world is an organic whole, an intimate combination of form and matter and an order of interdependent tendencies, governed by a divine, rational principle (*Nous*, *Logos*) and moving towards a pre-determined end (*telos*).[134] The word 'nature' (*physis*) is used to refer to this cosmic order and to the structures of its component parts. Natural law, as founded in the natural order of things, exists as a reflection of right reason (*recta ratio*) and is universally valid, immutable and has the force of law *per se*, i.e. independently of human positivization.[135] Compliance with its rules is a prerequisite for attaining justice (*iustitia*), as the essence of law (*ius*) in its broadest sense. Although the Stoics' philosophical views on the ideal law or the ultimate nature of justice apparently had no profound effect on the way the Roman jurists executed their traditional tasks, the concept of *natura* provided an important device for the articulation and systematization of the law. However, the jurists did not

[132] D. 1. 1. 1 pr.; D. 4. 1. 7; D. 50. 17. 183.

[133] However, the assumed connection between *ius gentium* and *ius naturale* is far from clear as no generally accepted definition of natural law is revealed in juridical literature. According to the jurist Ulpian: "Private law is threefold: it can be gathered from the precepts of nature, or from those of the nations, or from those of the city. Natural law is that which nature has taught all animals; for this is not peculiar to the human race but belongs to all animals . . . From this law comes the union of male and female, which we call marriage, and the begetting and education of children . . . The law of nations is that law which mankind observes. It is easy to understand that this law should differ from the natural, inasmuch as the latter pertains to all animals, while the former is peculiar to men." (D. 1. 1. 1.) A few paragraphs below this quotation from Ulpianus we find the following statement of the jurist Gaius: "All peoples who are governed by law and by custom observe laws which in part are their own and in part are common to all mankind. For those laws which each people has given itself are peculiar to each city and are called the civil law . . . But what natural reason dictates to all men and is most equally observed among them is called the law of nations, as that law which is practiced by all mankind." (D. 1. 1. 9; and see G. 1. 1 and *Inst*. 1. 2. 11.) In the next few paragraphs appears this definition of law attributed to Paulus: "We can speak of law in different senses; in one sense, when we call law what is always equitable and good, as is natural law; in another sense, what in each state is profitable to all or to many, as is civil law." (D. 1. 1. 11.) The divergences between these three accounts are evident: Ulpianus asserts that there is a clear difference between natural law and other human laws, the former being regarded as pertaining to the natural drives that men and animals have in common; Gaius and Paulus, on the other hand, perceive the reason for the universal validity of certain principles in their rational character and their recognition by all mankind, as well as in their inherent utility and goodness.

[134] The Stoics sought to effect a reconciliation between the seemingly conflicting principles of form and matter by dialectically linking them under one principle: *Nous* or cosmic *Logos*. They perceived meaning to exist in the material world, not in a realm beyond it.

[135] If all men, irrespective of race, nationality, social standing and such like, share in the divine reason in the same way, then in principle all are equal and together form one grand universal community, a *cosmopolis*, governed by natural law.

juxtapose the law governing social relations in everyday life to a code of ideal natural law functioning as a master model. They developed the content of *natura* in close connection with the practical aspects of legal life and always in response to concrete needs and problems emerging from actual cases. From their viewpoint, discovering the appropriate legal rule or devising an acceptable solution to a legal problem presupposed a reasonable familiarity with both the nature of practical reality and the ordinary expectations that social and legal relations entailed. In this respect, the postulates of nature did not emanate from metaphysical speculation but from the findings of common sense and the need for order in human relations. Thus, in the eyes of the jurists, certain methods of acquiring ownership were 'natural' or derived from natural law as they appeared to follow inevitably from the facts of life such as *traditio* (the most usual form for transferring ownership, involving the informal transfer of actual control over an object on the basis of some lawful cause, e.g. a contract of purchase and sale); and *occupatio* (the acquisition of the actual control of a *res nullius*, an object belonging to no one). Of course, such methods of acquisition were regarded as universal and therefore as facets of the *ius gentium*: the law actually observed by all humankind. The fact that the Roman jurists regarded natural law, in the manner described above, as juridically valid is implied by their identification of *ius naturale* with *ius gentium*. This prevailed even though the former term referred to the supposed origin of a rule or institution and the latter to its universal application. If natural law is interpreted as law that ought to be observed, the identification of *ius naturale* and *ius gentium* is untenable as certain institutions of the law of nations clearly conflicted with natural law precepts. Thus while according to natural law all people were born free, slavery was widely recognized in antiquity as an institution of the law of nations. In view of this detail, the most one can say from a moral-philosophical perspective is that the universal recognition of an institution as part of the law of nations could be regarded to constitute *prima facie* evidence that such an institution originates from natural reason. The Roman jurists, however, never drew a clear distinction between positive law and law as it ought to exist, nor did they adopt the philosophical conception of natural law as a higher law capable of nullifying positive law. They were not social reformers and their conception of natural law does not embrace anything resembling a revolutionary principle to support those rights that are termed in the modern era as 'inalienable human rights'. Thus, no matter how such institutions as slavery or the division of property appeared contrary to natural law they were still perceived as perfectly justified and legal. *Ius naturale* significantly contributed to Roman legal thought, but as a professional construction for lawyers it had little relevance to moral philosophy. It was not viewed as a complete and ready-made system of rules but primarily as a means of interpretation existing in conjunction with the *ius gentium* to enable the Roman jurists to test the equity of the rules they applied.[136] In this way, *ius naturale* played a key part in the process of adapting positive law to changing socio-economic conditions and shaping the legal system of an international empire.

[136] See, e.g., D. 50. 17. 206 (Pomponius): "It is just (*aequum*) by the law of nature (*lex naturae*) that no one, by the commission of a wrong, can be enriched at the expense of another."

The group of jurists responsible for the development of Roman legal science in the early imperial epoch was always small in scale at any particular time. Nevertheless, over the course of nearly three centuries their total attained a considerable scale. Today we are aware of many jurists from fragments of their works incorporated in post-classical compilations of law and from references located in various historical sources. Important sources of our knowledge on the lives of the classical jurists are Pomponius' *Enchiridium*, embodied in the Digest of Justinian and containing a survey of jurisprudence until the time of Hadrian; various literary works by authors such as Tacitus, Aulus Gellius, Pliny the Younger and Cassius Dio; and a number of inscriptions. At this point, it is important to identify the most important jurists and the period of their activity. The examination may be divided into three time periods: the early period (27 BC to *c*. AD 80), the high classical period (*c*. AD 80 to *c*. AD 180) and the late period (*c*. AD 180 to *c*. AD 235).

The jurists of the early Principate period hailed from urban Roman families or from the Italian municipal aristocracy, and so they possessed a thoroughly Roman background. According to Pomponius, the jurists of this period divided themselves into two schools (*sectae*) that formed around two political rivals: Marcus Antistius Labeo and Gaius Ateius Capito.[137] An opponent of the Augustan regime, Labeo never progressed further in his public career than the office of *praetor* and the traditional account holds that he declined an offer of the consulship from Augustus because of his republican convictions.[138] Reputedly an innovator and an exceptionally gifted jurist, he composed numerous highly influential works that included commentaries on the Law of the Twelve Tables and the praetorian edict, a treatise on pontifical law and collections of *responsa* and *epistulae*. At the time of his death, his written works amounted to 400 volumes. The school established by Labeo was named after the jurist Proculus, and so was designated the School of the Proculians (*Proculiani*). Capito, elevated to the position of consul by Augustus who he supported, was known for his adherence to traditional juristic sources.[139] He produced relatively few works that included a book *de officio senatorio*; collections of *epistulae*; and treatises on pontifical and public law. The school founded by Capito was named after his successor Marcus Massurius Sabinus and so was known as the Sabinian School. However, the meaning of the term '*sectae*' used by Pomponius is not clear as very little is known about the organization and functions of the two schools. It appears that these schools were not places of instruction in law, although it is very probable that young lawyers were mainly educated within the framework of the 'school' community. In all likelihood, the schools were in the nature of aristocratic clubs with their own techniques and courses of training, and each centered around a succession of distinguished jurists. In this respect, they

[137] See D. 1. 2. 2. 47 and D. 1. 2. 2. 52; Pliny, *Ep*. 7. 24; Tacitus, *Ann*. 3. 75.

[138] D. 1. 2. 2. 47. Compare with Tacitus, *Ann*. 3. 75; Aulus Gellius, *N. A*. 13. 12.

[139] Tacitus, *Ann*. 3. 75.

resembled the Greek philosophical schools that had existed since the republican era as organized quasi corporations whose direction and management were transferred by one master to his successor. Information reveals that the two schools differed on a great array of individual questions of law. However, the surviving examples do not display the alleged conservatism of the Sabinians or the reformatory spirit attributed to the Proculians. In contrast to the Greek philosophical schools, there were apparently no deep-rooted theoretical differences that separated the two schools.[140] This induces the conclusion that the schools differed only with respect to the techniques they adopted for dealing with concrete questions of law rather than in their general attitudes or principles. From the little we know, it appears that the Sabinians tended to adhere to the letter of the law while the Proculians emphasised the importance of considering the purpose or spirit of the relevant law in the interpretive process. The doctrines of each school must have derived from the accumulated opinions of their successive heads on different questions of law, perpetuated by tradition and adopted on account of conservatism and a sense of loyalty.[141] The Sabinian and Proculian schools seem to have disappeared by the end of the second century AD, as no evidence indicates that the leading jurists of the third century were members of either school.

Massurius Sabinus, whose name is attached to the earlier school of Capito, occupies an exceptional position amongst the jurists. He was not a member of the senate nor did he make his career in politics, and he only gained admittance to the equestrian class later in life. Nevertheless, Emperor Tiberius granted him the *ius publice respondendi* in recognition of his outstanding ability as a lawyer.[142] His chief work was a comprehensive treatise on the *ius civile* in three books that exercised a strong influence on Roman legal thought and was subjected to extensive commentary by later jurists in works known as '*ad Sabinum*'.[143] Other works attributed to Sabinus included a commentary on the edict of the *praetor urbanus*; a collection of *responsa*; a monograph on theft (*de furtis*); and a commentary on the *lex Iulia de iudiciis privatis*.[144] Another leading jurist of this period was C. Cassius Longinus, a student of Sabinus whom he succeeded as head of the Sabinian

[140] Some scholars expressed the view that the two schools espoused different philosophical theories: the Sabinians were adherents of Stoicism, while the Proculians adopted the principles of Aristotelian (peripatetic) philosophy.

[141] In the words of W. Kunkel, "Roman traditionalism and the inclination to form relationships of loyalty of the most diverse kinds – or in other words, the *pietas* of the pupil towards the person and opinions of his master – were probably the principal motives which bound together many generations of jurists in consciously cultivated school traditions." *An Introduction to Roman Legal and Constitutional History*, 2nd ed. (Oxford 1973), 115.

[142] D. 1. 2. 2. 48; 1. 2. 2. 49–50.

[143] Although no direct reference to Sabinus' work exists in the Digest, its structure and general nature is known to us from the works of other jurists who used it as a framework for their own work, such as Pomponius, Paulus and Ulpianus.

[144] Aulus Gellius, *N. A.* 14. 2. 1.

School.[145] He attained the urban praetorship and the consulship (AD 30), and served as governor of Asia and Syria several times between the years AD 40–49. His chief work, an extensive treatise on the *ius civile*, is known to us mainly from references and fragments integrated in the writings of later jurists.

The jurists of the high and late Principate periods (AD 90–180 and AD 180–235 respectively) were predominantly natives of the provinces and descendants of Roman and Italian families who had settled outside Italy. A notable feature of this age was the increasingly close connection between the jurists and the imperial government. This link, originally established through the *ius respondendi*, was strengthened under Hadrian's reign (AD 117–138) and an increasing number of jurists joined the imperial administration as holders of high state offices. The first major jurist of the high classical period was Iavolenus Priscus, who was born about AD 55 and still alive during Hadrian's age. He had an illustrious military and political career: he was consul in AD 86, served as governor of Upper Germany, Syria and Africa and was a member of the imperial council from the time of Nerva (AD 96–98) to the early years of Hadrian's reign. Iavolenus is best known for his *Epistulae*, a collection of opinions in 16 books. He also published commentaries on the works of earlier jurists (*libri ex Cassio*, *ex Plautio*) and a collection of texts from Labeo's posthumous work *posteriora*. Fragments of these works were included in the Digest of Justinian. Another leading jurist was Publius Iuventius Celsus (*filius*) who succeeded his father, a little known jurist of the same name, as head of the Proculian School. He held the praetorship (AD 106) and consulship (AD 129), served as governor of Thrace and Asia Minor, and was a member of the *consilium principis* under Hadrian. His works include a set of 39 books of *Digesta* as well as collections of *epistulae* and *quaestiones*. He was held in high esteem by his contemporaries and was frequently cited by later jurists. Probably the most important jurist of the second century was Salvius Iulianus, believed to have been born in Hadrumentum in the province of Africa. Like other distinguished jurists, he held a rich succession of offices (tribune, praetor, consul, pontifex, governor of Germany, Spain and Africa) under the emperors Hadrian, Antoninus Pius and Marcus Aurelius. He also served as a member of the imperial councils of Hadrian and Antoninus Pius. The most important works he composed were the consolidation of the praetorian Edict (*c.* AD 130) and his *Digesta*, a collection of *responsa* in 90 books. The *Digesta* exercised a potent influence on the legal thinking of the imperial period, as exhibited by the numerous references to this work by later jurists and the mass of fragments embodied in the Digest of Justinian.

Two more jurists of this period deserve mention with a focus on their activities as writers and teachers rather than their innovative contribution to Roman legal thinking: Sextus Pomponius and Gaius.

[145] D. 4. 8. 19. 2. Thus this school is sometimes referred to as *schola Cassiana*.

Pomponius lived in the time of Hadrian and Antoninus Pius and was a man of great knowledge and an enormously prolific writer. Yet, his work is characterized by clarity rather than by originality or depth. He appears to have acquired notoriety as an antiquarian rather than as a lawyer, even though some of his doctrinal writings are mentioned by later jurists and numerous fragments were included in the Digest of Justinian. No evidence indicates that he ever held public office and it is unknown whether he was granted the *ius publice respondendi* as no *responsa* of his are mentioned. His works included three treatises on the *ius civile* written in the form of commentaries on earlier juristic writings (*ad Quintum Mucium*, *ad Plautium*, *ad Sabinum*); an extensive commentary on the praetorian edict (discoverable in citations by later jurists); two comprehensive collections of casuistic material (*epistulae* and *variae lectiones*); and a series of monographs on various subjects (*stipulationes*, *fideicommissa*, *senatusconsulta* and such like). Pomponius' best-known work is the *Enchiridium* that embodies a short outline of Roman legal and constitutional history that spans the period from the kings through to his own day. The relevant fragment has been preserved in its entirety in Justinian's Digest, under the title '*de origine iuris*' ('on the origin of law') and, despite its gaps, constitutes an important source of information on the historical development of Roman law.[146]

Although Gaius is one of the most renowned jurists of the Principate period, there is scant information on his life except for the material emerging from his writings.[147] Internal evidence suggests that he lived during the reigns of Hadrian (AD 117–138), Antoninus Pius (AD 138–161) and Marcus Aurelius (AD 161–180), and that he was a Roman citizen.[148] His style of writing and his knowledge of Eastern laws and customs have been construed to suggest that he was a teacher of law in a province within the eastern half of the empire, probably Asia. However, presently no convincing evidence exists to support this hypothesis. Since he refers to the leaders of the Sabinian school as 'our teachers', it is very likely that he studied law in Rome, and was thoroughly familiar with Roman law as practiced and taught by the leading lawyers of the capital. In contrast to his contemporary Pomponius, who was held in great respect and frequently cited by classical writers, Gaius is not mentioned by any of them. This suggests that he was not accepted as a member of the select group of jurists who possessed the *ius respondendi*. He was probably one of the many lesser jurists outside this select group, rescued from oblivion by the later recognition of his elementary treatise, the Institutes, as a major document of classical Roman law.[149] The Institutes (*Institutiones*), was designed as an introductory textbook for students and was written about AD 160. Until the 1816

[146] D. 1. 2. 2.

[147] Even his family name is unknown – Gaius is only a *praenomen*, or first name.

[148] See D. 34. 5. 7. pr; G. 1. 7; 1. 193; 1. 55; 3. 134; 4. 37.

[149] His works only started to be treated as authoritative in the later imperial period many years after his death. Thus Gaius is one of the five jurists whose authority was recognized by the Law of Citations of AD 426. In the Institutes of Justinian he is affectionately referred to as '*Gaius noster*' ('our Gaius'). See *const. Omnem* 1, *Inst.* 4. 18. 5.

discovery of the Institutes text in Verona,[150] only fragments of the juristic literature from this period survived through later compilations of law such as the Digest of Justinian. Although the manuscript unearthed at Verona dates from the fifth or early sixth century AD (more than three centuries after Gaius' time), it is now generally perceived as a faithful reproduction of Gaius' original work. The importance of the Institutes is twofold. In the first place, it is the only juristic work from the Principate era that we have inherited nearly in its original length and form. Therefore, the work is an important source of classical Roman law. Secondly, the relative simplicity and lucidity of Gaius' style made the Institutes ideal for the ordinary lawyer and the student; thus it was heavily relied upon in later Roman law. Gaius' textbook was used as a model by the compilers of Justinian's Institutes, which played an important part in the reception of Roman law in Western Europe since the High Middle Ages.[151] Gaius also published commentaries on the Law of the Twelve Tables, the provincial edict (*edictum provinciale*) and the edict of the *praetor urbanus*; monographs on various legal institutions; and collections of opinions.

The most highly esteemed jurists of the late Principate period (AD 180–235) were Aemilius Papinianus, Iulius Paulus and Domitius Ulpianus.

Generally regarded as the greatest of the late classical jurists, Papinianus was a lifelong friend of Emperor Septimius Severus (AD 193–211).[152] In AD 203, the emperor elevated him to the position of prefect of the praetorian guard (*praefectus praetorio*)—the emperor's chief of staff, principal adviser and executive officer in civil and military matters.[153] Emperor Caracalla ordered the murder of Papinianus in AD 212 because, it was rumoured, he had refused to devise a justification for Caracalla's murder of his own brother and co-regent Geta. Papinianus did not compose general treatises and his works were mainly collections of opinions and discussions of special topics. These works included 37 books of *quaestiones* and 19 books of *responsa* that also contained references to opinions of other jurists and to judicial decisions adopted by the emperor and the prefects. He also composed a collection of *definitiones* (in two books) and a monograph on adultery. In keenness,

[150] The German historian B. G. Niebuhr discovered in the cathedral library of Verona a manuscript containing the epistles of St Jerome, dating from the seventh or eighth century AD. This manuscript was identified as a palimpsest, i.e. a manuscript where two or more texts are written on top of each other. Suspecting that the manuscript had some writing of special interest, Niebuhr presented his discovery to Friedrich Karl von Savigny, one of the most eminent legal historians of the time. The latter detected the text of Gaius' Institutes underneath that of St Jerome. Although about one tenth of the Gaius' text was lost or proved impossible to decipher some of the missing parts were reconstructed after the discovery of more fragments from Gaius' Institutes in Egypt in 1927 and 1933.

[151] On the later influence of Gaius' work see P. H. Birks and G. MacLeod B. (trs), *The Institutes of Justinian* (London 1987), Introduction. Recent translations of Gaius's Institutes include: Francis de Zulueta, *The Institutes of Gaius* (New York 1946, Oxford 1985); W. M. Gordon and O. F. Robinson, *The Institutes of Gaius* (London 1988).

[152] See *Hist. Aug.*, *Carac.* 8. 2.

[153] He also held the office of head of the chancery *a libellis* and was a member of the *consilium principis* by virtue of his important role in the imperial administration.

breadth of reasoning and clarity of presentation his works were unsurpassed, and his authority settled the law for centuries on many controversial issues.[154] Numerous fragments of Papinianus' works were preserved in the Digest of Justinian and other post-classical compilations of law.

Like other leading jurists of this period Iulius Paulus, a contemporary of Papinianus, had a brilliant career in the imperial civil service: he was head of the chancery *a memoria*, member of the *consilium principis* during the reigns of Septimius Severus and Caracalla, and *praefectus praetorio* under Alexander Severus. He was an enormously prolific writer and presented great commentaries on earlier legal works. His best-known work is a comprehensive commentary on the praetorian edict in 80 books (*ad edictum*). Among his writings are also a treatise on the *ius civile* in 16 books (*ad Sabinum*); commentaries on various *leges*, *senatus consulta* and the works of other jurists (Iulianus, Scaevola, Papinianus); two collections of *decreta*; and numerous monographs on various subjects in public and private law. An extensive collection of extracts from Paulus' works, known as *Pauli sententiae*, was widely used during the later imperial period.[155] The authority of Paulus' writings was confirmed in the Law of Citations (AD 426) where he is listed as one of the 'important five' jurists of the Principate period.

Domitius Ulpianus, a pupil of Papinianus, held various imperial offices during his lifetime that included head of the chancery *a libellis, praefectus annonae*, *praefectus urbi* and (from AD 222) *praefectus praetorio*. However, his political influence made him unpopular among the members of the powerful praetorian guard and this led to his assassination in AD 223. Ulpianus is probably the most industrious of all the Roman jurists. His contribution to juristic literature includes 51 books on the *ius civile* (*ad Sabinum libri LI*); 83 books on the edict (*ad edictum libri LXXXIII*); 2 books of *responsa*; a legal manual for beginners in two books (*institutiones*); collections of *regulae* and *definitions*; and numerous monographs on individual statutes, various state offices and matters of legal procedure. A thorough assessment of Ulpianus' ability as a jurist is difficult as only fragments of his many works exist. Yet, modern scholars regard him as one of the most learned and elegant writers on the law, if not the most brilliantly original. The extent of his influence can be judged by the fact that almost half of Justinian's Digest (about 42 %) is comprised of fragments extracted from his writings.

In the later half of the third century, Roman jurisprudence lost its vitality and rapidly approached its end. The chief reasons were the collapse of the *Pax Romana*, the demise of the political system of the Principate and the accompanying swift move towards absolutism. As long as private jurists were members of a senate that retained some authority, their *responsa* carried sufficient weight and played a part

[154] Scholars of late antiquity, including the compilers of Justinian's codification, attribute special importance to Papinianus' works and often refer with admiration to his exceptional qualities as a lawyer. C. 6. 42. 30; 7. 45. 14; *Const. Omnem* 1.

[155] Consider E. Levy, *Pauli Sententiae: A Palingenesia of the Opening Titles*, (Ithaca, New York 1945).

in the administration of justice alongside the emperor's rescripts. However, the jurists' *responsa* ceased to be regarded as authoritative when the senate lost all its power and authority in the third century AD to the emperor and his bureaucracy, and the senators no longer had any influence in the *consilium principis*. In the third century AD, as imperial government increasingly assumed the characteristics of an absolute monarchy, the *responsa prudentium* ceased to function as a living source of law, having been superseded by the emperors' rescripts on legal and judicial matters.[156]

2.4.6 The Influence of Customary Law

Although the classical jurists did not count custom (*usus*, *consuetudo*) among the sources of law,[157] custom continued to play a part as an important basis of the law that applied in the provinces. The local systems of law, both written and customary, that prevailed in the provinces prior to the Roman conquest remained in force and continued to govern the social and economic life of the provincial communities save insofar as they might prove embarrassing to Roman rule. References to customary law can thus be found in imperial constitutions, as well as in the juridical literature of this period.[158] As far as Roman law proper was concerned, custom continued to exert an influence on both lawmaking and the application of the law through the interpretations of the jurists, who regarded certain long-established norms as so traditional as not to need any specific legal authority.[159] After Roman law became the common law of the empire, following the enactment of the *constitutio Antoniniana* in AD 212, many of the earlier local laws continued to apply in the form of custom if sanctioned by imperial legislation.

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[156] The last of the great jurists are considered to include Herennius Modestinus and Aelius Marcianus. Modestinus, a student of Ulpianus, authored many works that embraced an extensive collection of *responsa* in nineteen books; a work on *differentiae* (controversial questions) in nine books; a collection of *regulae* (rules of law); and a treatise, written in Greek, on the exceptions from guardianship. The authority of his works is confirmed in the Law of Citations where he is listed as one of the 'important five' jurists of the early imperial age. Marcianus' most renowned work is the *Institutiones*, an elementary treatise on law in sixteen books that is frequently cited in the Digest of Justinian.

[157] Consider, e.g., G. 1. 2; D. 1. 1. 7; D. 1. 2. 3. 12.

[158] See, e.g., the *rescriptum* of Emperors Septimius Severus and Caracalla of AD 199 in FIRA I, 84 & 85. The jurist Ulpianus speaks of custom as a direct source of law in the provinces in those cases involving disputes that cannot be resolved on the basis of an existing written law. See D. 1. 3. 33.

[159] According to the jurist Iulianus, rules derived from custom ought to be relied upon in those cases not covered by written law, or where the relevant statute has been repealed by salient agreement of the people through desuetude (D. 1. 3. 32.). It is not clear, however, if this view reflects the classical approach, as the relevant passage might have been inserted by post-classical writers.

2.5 Sources of Law in the Later Imperial Era

2.5.1 The Development of Imperial Law-Making

During the later imperial age, the 'pluriformity' that characterized legislative activity during the Republic and the Principate no longer existed. With the transformation of the Roman government into an absolute monarchy, the emperor emerged as the sole source of laws and also their final interpreter. The unchallengeable legislative supremacy of the emperor conformed to the essence of the new regime, whose absolutist nature barred constitutional or any other legal limitations.[160] Nevertheless, the emperor actually exercised his governmental functions and powers with guidance from established substantive and procedural norms. Though he might change these norms at his discretion, he was bound to observe them to ensure that his decisions produced the intended practical results. In the final analysis, it may be declared that the observance of these norms constituted a kind of intra-organ control over an authoritarian regime.

The imperial enactments (*constitutiones*) with their diverse appellations of *edicta*, *rescripta*, *decreta* and *mandata* were now collectively designated *leges*—this signified legal norms with the highest validity. These enactments furnished the basis for the formation of a new body of law (*ius novum*) distinct from the old law (*ius vetus*) as traditionally interpreted by the classical jurists. The principal fields of operation of the imperial laws were public administration and socio-economic policy, but they also introduced numerous changes in other areas, such as family and criminal law. Many imperial laws were not strictly Roman in character but exhibited the influence of foreign (especially Greek) institutions. Moreover, since the era of Constantine the Great, imperial legislation was also moulded by ideas derived from Christian ethics. Generally, the legislation of this period displays elements of so-called the 'vulgar law': statutes are composed in an inflated, grandiose style while their provisions have an ill-arranged, vague and unrefined form; and these laws are often deficient in affording an exhaustive and unambiguous determination of the relevant issues. While the quality of the imperial laws declined, their quantity rapidly increased as often conflicting enactments were produced in great profusion entailing a chaotic mass that had little practical use. Since the late third century AD, the Roman government endeavoured to install some order to the mass of laws claiming validity in the empire.

Depending on their form and scope of application, the majority of imperial enactments fell into two categories: *edicta* or *leges generales* and *rescripta* or *leges speciales*.[161]

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[160] The theoretical assumption that the emperor was also bound by the laws was nullified by the fact that he was above the law (*princeps legibus solutus*) and equally so by his legislative omnipotence (*quod principi placuit legis habet vigorem*).

[161] As regards the *mandata* and the *decreta*, these essentially fell into disuse during this period (the former were superseded by the edicts while the latter were replaced by the rescripts).

An edict was usually issued in the form of a letter addressed to a high official (generally a praetorian praefect), who had a duty to publicise its contents; it could also be addressed to the people or some section thereof (e.g. to the inhabitants of a particular city), or to the senate (either of Rome or of Constantinople, depending on the circumstances).[162] When an edict was addressed to the senate, no *senatus consultum* was passed to confer formal validity to the emperor's wishes that now existed as law *per se*. Simply, the terms of the statute were recited in the senate, recorded and retained in the archives of that body. Edicts were usually prepared by the minister of justice (*quaestor sacri palatii*) with the assistance of legal experts and discussed in the imperial council (*sacrum consistorium*). After the division of the empire, they were almost invariably issued in the name of both *Augusti* even when they emanated from only one of them (obviously they had no effect within the realm of the other *Augustus* without the latter's consent).[163] This type of imperial enactment is illustrated by the famous Edict of Prices (*edictum de pretiis*) promulgated by Emperor Diocletian in AD 301 that set maximum prices for a wide range of goods and services, and prescribed penalties for profiteering.[164]

The rescripts (i.e. the emperor's answers to legal questions invoked by actual cases and submitted to him by private citizens or state officials) remained an important source of law until the time of Diocletian.[165] In AD 315, Emperor Constantine decreed that a rescript must be deemed invalid if it deviated from a *lex generalis*.[166] Moreover, a law issued by Arcadius and Honorius in AD 398 stipulated that a rescript was only binding in the individual case that it concerned.[167] However, Emperors Theodosius II and Valentinian III in AD 426 sought once more to confer imperial rescripts an indirect law-making force. Thus they decreed that as

[162] It should be noted that a *lex generalis* always operated in the same way irrespective of to whom it was formally addressed.

[163] This served to emphasize that the empire remained politically united, despite its administrative partition.

[164] See M. Giacchero, *Edictum Diocletiani et Collegarum de pretiis rerum venalium* (Genoa 1974); H. Blümner, *Der Maximaltarif des Diokletian* (Berlin 1958); S. Lauffer, *Diokletians Preisedikt* (Berlin 1971); A. C. Johnson, P. R. Coleman-Norton, F. C. Bourne, *Ancient Roman Statutes* (Austin 1961, repr. 2004), 235–237.

[165] During Diocletian's reign, when elements of classical legal science still survived, the imperial chancery *a libellis* issued, in the emperor's name, a large number of individual case decisions in the form of rescripts that addressed diverse legal points.

[166] C. Th. 1. 2. 2. & 3: "Rescripts that are contrary to law shall not be valid, in whatsoever manner they may have been impetrated. For the judges must rather follow what the public laws prescribe. (3) When We are persuaded by entreaty to temper or to mitigate the rigor of the law in a special case, the regulation shall be observed that rescripts that were impetrated before the posting of the edict shall have their own validity, and a prior rescript shall not be derogated by a later one. But rescripts which were elicited thereafter shall have no force unless they are in conformity with the public laws, especially since it is necessary and permitted that We alone shall investigate an interpretation that has been interposed between equity and the law."

[167] C. Th. 1. 2. 11: "Rescripts which have been issued or which will in the future be issued in reply to references of cases to the Emperor shall assist only those lawsuits for which they shall be proved to have been issued."

a rescript constituted a declaration of a general principle in an individual case, it could be considered generally binding. This view seems to have prevailed during the late fifth and sixth centuries.[168]

In the later imperial period two new kinds of imperial constitution emerged, namely the *sanctio pragmatica* and the *adnotatio*. The former generally consisted of a reply by the emperor to a petition, but it apparently ranked as a more formal manifestation of the emperor's will than an ordinary rescript and practically had the same effect as a *lex generalis*. Accordingly, it was commonly used in replying to petitions that requested the settlement of matters of general public interest or the issuing of decisions with a scope of application that extended well beyond the interests of the parties involved. A *sanctio pragmatica* might be employed, for example, to effect administrative reform; regulate the operation of government bodies or corporations; or confer important privileges to certain groups.[169] The term *adnotatio* was probably used to denote a decision of the emperor in response to a petition or any other communication directly addressed to him and written in the margin of the petition.[170] Finally, a form of subordinate legislation that originated from the late Principate period was embodied in the edicts of the praetorian prefects (*edicta praefectorum praetorio*).[171] The provisions of such edicts mainly addressed administrative matters and were binding within the prefecture of their author, provided that they did not conflict with the general law of the empire.

2.5.2 *The Law of the Jurists*

As previously observed, by the middle of the third century jurisprudence entered a period of rapid decline and the *responsa prudentium* soon ceased to be a living source of law. This development was generated by a combination of factors: the social and economic decay precipitated by the catastrophes of the third century AD; the crisis of the political system of the Principate and the growing absolutism of the emperor who sought to make himself the sole source of legal progress; the growing influence of Christian thinking that had an ethical orientation with little use for the subtleties of the secular jurisprudential techniques; and the gradual abandonment of the Roman tradition of distilling legal norms from the body of individual cases in favour of a system where decisions in individual cases were controlled by

[168] C. 1. 14. 3.

[169] A good example of such an enactment is the *sanctio pragmatica pro petitione Vigilii* (AD 554) that embodies the response of Emperor Justinian to a petition from Vigilius, a bishop of Rome. It addressed problems concerning the legal order in Italy, which Justinian had recently recaptured from the Goths. By the same enactment, the Emperor ordered that his legislation should be in force in Italy. And see C. 1. 23. 7. 2.

[170] Originally, the *adnotatio* seems to have been a written instruction from the emperor for the drafting of a rescript by the imperial chancery *a libellis*.

[171] These were also known as *formae*, *programmata*, *praecepta* or *commonitoria*.

previously formulated general rules. However, it cannot be asserted that the decline of classical jurisprudence was tantamount to a collapse of legal culture in general. Lawyers were still essential in the imperial court, the various government departments, and those agencies in Rome and in the provinces charged with the administration of justice. In the late third and early fourth centuries AD, many state officials in Rome were men steeped in the classical tradition and they sought to defend this tradition against the inroads of eastern and vulgar legal influences.[172] However, it is clear that in the late imperial era the social position of the lawyers and the character of their work had radically changed. The new lawyers no longer worked as individuals who, as members of the senatorial aristocracy, experts in law and representatives of a great and living tradition, presented opinions on legal problems and recorded them in writing. These lawyers were mere state officials, anonymous members of a vast bureaucratic organization, who simply prepared the resolutions for issue in the name of the emperor.

As already noted, during the Dominate epoch imperial legislation became the principal source of law and the sole means for modifying the current body of law. The old law (embodied in *leges*, *senatus consulta*, *edicta magistratuum*), created and developed by the former agencies of legislation, remained valid. However, it was customary to cite this law not by reference to the original sources, but by reference to the classical jurists' commentaries on them. Moreover, the past emphasis on the development of new law through interpretation of extant legal materials evaporated. The focus now attached to the study and elucidation of the jurists' writings from the Principate era. As jurisprudence ceased to exist as a living source of law, annihilated at its source by the absolutism of the imperial system, literary production in the legal field sank to the level of merely compiling, editing and abridging earlier juristic works. The latter were now treated as a body of finally settled doctrine that could be applied in a case at any time. This body of law was designated *ius* or 'jurists' law' in contradistinction to the body of law derived from the enactments of the emperors, known as *lex*.

However, serious problems beset the application of *ius*—problems that were intensified by the general passivity of the judges in an age of absolutism, who shied away from seeking original solutions and preferred to rely essentially on established authority. But the sheer vastness of the classical juridical literature made it virtually impossible for the average lawyer to familiarize himself with the material. Furthermore, the classical works contained an extensive range of opinions that often reflected incompatible or contradictory viewpoints. Judges, who were expected to base their decisions upon established authority, often faced the problem of choosing between two or more conflicting sources that in principle were deemed equally authoritative. The problem was exacerbated by the fact that at a time when legal texts circulated only in manuscript copies, many works attributed to classical jurists were actually not written by them. This situation generated a

[172] A last effort to preserve the fruits of the classical jurisprudence is reflected in the imperial rescripts that were transmitted to us from the reign of Diocletian (AD 284–305).

great deal of confusion as to the state of the law and also opened the door to abuse, as advocates often sought to deceive judges by producing captious quotations from allegedly classical texts. This prompted the urgent need to discover a way for identifying those works that formed part of the authoritative juridical literature and the appropriate solution to adopt if the classical authorities displayed conflicting opinions. The government's response was a series of legislative enactments prescribing the juristic works that should be relied upon by the courts and fixing the degree of authority accorded to different sources. Thus, in AD 321, Emperor Constantine decreed that the critical comments (*notae*) that the jurists Paulus and Ulpianus had made in connection with the *responsa* collection of Papinianus were no longer to be used.[173] However, a year later Constantine issued another enactment confirming the authority of Paulus' other works (especially the *Sententiae*).[174] In the end, such measures proved inadequate. Theodosius II (Eastern emperor, AD 408–450) and Valentinian III (Western emperor, AD 423–455) thus formulated a new law on the subject in AD 426. The effect of this so-called Law of Citations was that the works of Gaius, Papinianus, Paulus, Ulpianus and Modestinus were made the primary authorities and the only ones that could be cited in a lawsuit. Gaius was the only jurist of the middle Principate period to be chosen, probably because his work was popular and well known. The other jurists belonged to the later Principate period and so manuscript copies of their works must have been readily available. If the authorities adduced on a particular issue disagreed, then the majority view prevailed; if numbers were equal, then the view of Papinianus had to be followed and only if Papinianus was silent was the judge free to make a choice himself.[175] Although the Law of Citations did not provide a

[173] C. Th. 1. 4. 1: "Since We desire to eradicate the interminable controversies of the jurisconsults, We order the destruction of the notes of Ulpianus and Paulus upon Papinianus, for, while they were eagerly pursuing praise for their genius, they preferred not so much to correct him as to distort him."

[174] C. Th. 1. 4. 2: "All opinions which are contained in the writings of Paulus, since they have been accepted by duly constituted authority, shall be confirmed and shall be given effect with all veneration. Therefore, there is not the least doubt that his Books of Sentences, characterized by the fullest lucidity, a most finished style of expression, and a most reasonable theory of law, are valid when cited in court."

[175] C. Th. 1. 4. 3: "We confirm all the writings of Papinianus, Paulus, Gaius, Ulpianus and Modestinus, so that the same authority shall attend Gaius as Paulus, Ulpianus and the others, and passages from the whole body of his writings may be cited. We also decree to be valid the learning of those persons whose treatises and opinions all the aforesaid jurisconsults have incorporated in their own works, such as Scaevola, Sabinus, Iulianus, and Marcellus, and all others whom they cite, provided that, on account of the uncertainty of antiquity, their books shall be confirmed by a collation of the codices. Moreover, when conflicting opinions are cited, the greater number of the authors shall prevail, or if the numbers should be equal, the authority of that group shall take precedence in which the man of superior genius, Papinianus, shall tower above the rest, and as he defeats a single opponent, so he yields to two. As was formerly decreed, We also order to be invalidated the notes which Paulus and Ulpianus made upon the collected writings of Papinianus. Furthermore, when their opinions as cited are equally divided and their authority is rated as equal, the regulation of the judge shall choose whose opinion he shall follow. . .".

definite solution, it imparted a measure of certainty to the administration of justice and remained in force until the time of Justinian.

In the fifth century, legal scholarship experienced a period of revival centred around the law schools of the empire. The first law school was probably founded in Rome in the late second century and a second such school was later established in Beirut during the third century. As the administrative needs of the empire grew (especially after Diocletian's reorganisation of the administration), new law schools were established in places such as Alexandria, Caesaria, Athens and Constantinople in the East; and Carthage and Augustodunum in the West. Initially, tuition at the law schools was delivered in Latin but from the early fifth century Greek replaced Latin as the language of instruction. The teaching was conducted by professional law-teachers (*antecessores*), and the courses offered were components of a fixed curriculum that focused entirely on the systematic study of classical juristic works and imperial constitutions. First, the Institutes of Gaius were discussed and then followed the study of the classical jurists' opinions *ad ius civile* and *ad edictum* embodied in collections (with special attention to the works of Papinianus and Paulus). In the final year, the focus converged on the study of current law and this involved an examination of imperial constitutions dating from the middle of the second century AD. The method of instruction was similar to that used in the schools of rhetoric: a classical work was discussed and clarified step by step and, when possible, compared or contrasted with other relevant works. In this way, general legal principles were formulated and applied to resolve specific problems of law arising from actual or hypothetical cases. At the end of their studies that spanned a maximum of 5 years, students were awarded a certificate that entitled them to serve as advocates in the courts or to join the imperial civil service. Over time, the professional lawyers educated in the law schools (*causidici*, *advocati*) replaced the earlier orators (*oratores*) whose training in law was usually only elementary.[176]

Besides training people for functions in the civil service, the law schools cultivated a scholarly approach to law with a focus on the study and elucidation of the juristic works from the classical period that had evolved into a unitary and peculiar body of law (*ius*). The extent to which the ideal of a full education in classical law was realized naturally varied in different periods and places. In the early years of the Dominate period (late third and early fourth centuries AD), a substantial scholarly interest in law apparently existed in the West, with most of this interest probably revolving around the law school in Rome. Since Constantine's era and especially after Constantinople became the seat of government, the empire's intellectual centre and thereby the centre of legal culture gradually shifted to the East.[177] In the fifth century AD the study of the classical authorities particularly at

[176] An edict of Emperor Leo I, issued in AD 460, ordained that postulants for the bar of the Eastern praetorian prefecture had to produce certificates of proficiency from the law professors who instructed them. This requirement was soon extended to the inferior bars, including those of the provinces. See C. 2. 7. 11.

[177] From the middle of the fourth century AD legal culture in the West exhibited a sharp downward trend – a decline precipitated by the deteriorating socio-economic conditions, political instability and the constant threat of barbarian invasions.

the law schools of Beirut and Constantinople engendered a new type of theoretical jurisprudence (as opposed to the largely practical and casuistic jurisprudence familiar to the classical and earlier periods). The East-Roman law professors were admiringly termed the 'teachers of the universe', and the most celebrated encompassed Cyrillus, Patricius, Eudoxius, Leontius, Amblichus and Demosthenes. It is established that these men composed a diversity of works: commentaries on imperial constitutions and texts of classical jurists; summaries (*indices*); annotations; and collections of rules on particular legal questions. These works were concerned not so much with developing new legal ideas but with helping novices and practitioners acquire a sound knowledge and understanding of the material imparted by the classical Roman jurists. They were also concerned with adapting the classical materials to the demands and conditions of their own times.[178] Despite its lack of originality and its tendency towards simplification, post-classical legal science did succeed in resurrecting genuine familiarity with the entire classical inheritance and facilitating its adaptation to the conditions of the times. The new insight into the essence of the classical law enabled court lawyers trained at the law schools to enhance the technique of imperial legislation and successfully tackle the task of legal codification. The improvement of legal technique is manifested by the fact that the imperial laws of the late fifth and sixth centuries were superior in clarity and style to those of the early post-classical period. It was largely through the work of the late imperial jurists that the spirit of classical legal science was preserved and found its way into the codification of Justinian and thereby into modern law.

As previously elaborated, in the later imperial epoch the problems surrounding the application of *ius* were magnified by the fact that the manuscripts containing the works of the classical jurists were few and scarce. Thus these materials were not easily accessible to legal practitioners, especially those working in the provinces. Moreover, as a result of the general decline of legal culture, especially in the West, lawyers encountered increasing difficulties with handling and comprehending the language of the classical texts. Connected to these problems was the appearance of legal works that mainly embodied compilations of assorted extracts from the works of the classical jurists and intended primarily for use by students and legal practitioners. The authors of these works (whose names remain largely unknown) selected parts from the original texts that would appear interesting to contemporary readers, whilst other parts were reproduced in a summary form or altogether omitted if they were deemed useless or superfluous. Occasionally passages were replaced with those composed by the authors or entirely new passages were added to render the material more intelligible or adapt the classical texts to transformed conditions. From the point of view of a modern scholar, this tampering distorted rather than improved the texts. However, it must be acknowledged that from the

[178] After the *constitutio Antoniniana* (AD 212) granted Roman citizenship to all the free inhabitants of the empire, knowledge of Roman law was requisite for those engaged in the practice of law, especially in the provinces where the newly admitted citizens had to conduct their affairs according to an unfamiliar system of law.

perspective of the post-classical lawyers the classical works were largely outdated and in need of 'modernization'. Irrespective of its form, the juridical literature of the later imperial period patently reveals one aspect: the extent to which legal thinking remained under the spell of classical jurisprudence. The legal science that existed at that time was concerned exclusively with the classical jurists, whose works were regarded with an almost religious awe by legal practitioners and judges.

Probably the most important post-classical collection of juristic writings is the so-called 'Vatican Fragments' (*Fragmenta Vaticana*) discovered in 1821 in the Vatican library. This work contains extracts from the writings of the jurists Papinianus, Paulus and Ulpianus who lived in the late second and early third centuries. It also includes imperial rescripts dating from the period AD 205–372 that were reproduced from the Gregorian and Hermogenian Codes. The texts are arranged in titles according to the subject-matter, with each title preceded by a note indicating the name of the jurist from whose work the materials were extracted or, if the text is a rescript, the name of the emperor who issued it.[179] Another work, dating from the early fourth century, is known under the title of *Collatio Legum Mosaicarum et Romanarum* or *Comparison between Mosaic and Roman Laws* (sometimes abbreviated to *Collatio*). This work closely resembles the Vatican Fragments with respect to its content and composition but differs from that text as sentences from the first five books of the Old Testament (especially the sayings of Moses) are embodied at the beginning of every title. In addition, it includes texts not only by Paulus, Ulpianus, Papinianus, but also by Gaius and Modestinus. Ostensibly, the purpose of this work was to compare some selected Roman norms with related norms of Mosaic law to show that basic principles of Roman law corresponded with or possibly derived from Mosaic law.[180] Two other works originating from the same period must also be mentioned: the *Pauli Sententiae* and the *Ulpiani Epitome*. The first mainly consists of brief pronouncements and rules attributed to the third century jurist Paulus. It covers a broad range of topics relating to both private and criminal law, and was probably used as a handbook by legal practitioners. As it is not certain whether Paulus himself ever wrote a book called *Sententiae*, this work is now generally assumed to be a brief presentation of Roman law extracted from the writings of Paulus by an unknown author from the latter part of the third century. We have not discovered this work directly; it exists only through citations in the Digest of Justinian and other post-classical compilations of law.[181] The *Ulpiani Epitome* was probably an abridgment of Ulpianus' work *liber singularis regularum* (Rules of Law in One Book). It was composed in the late third or early fourth century and, like the *Pauli Sententiae*, was probably

[179] For the text, see FIRA II, pp. 461–540. A critical edition of this work was produced by Th. Mommsen in (1860) – see P. Krüger, Th. Mommsen & G. Studemund, *Collectio librorum iuris anteiustiniani* III (Berlin 1927).

[180] The standard modern edition of the *Collatio* is that of Th. Mommsen included in his *Collectio librorum iuris anteiustiniani* III (Berlin 1927). And see FIRA II, pp. 541–89.

[181] See FIRA II, pp. 317–417, 419–432.

used by practitioners. This work has reached us in an incomplete form through a manuscript dating from the tenth or eleventh century.[182] Two important works from the East have survived: the Syrio-Roman book of law and the *Scholia Sinaitica*. The first was composed in Greek by an unknown author in the late fifth century and used as a textbook for students in the law school of Beirut.[183] The second was a collection of fragments from a commentary in Greek on the work of Ulpianus' *libri ad Sabinum* that was probably composed at the law school of Beirut where it was used for instructional purposes.[184]

2.5.3 Custom and the Growth of 'Vulgar Law'

After the enactment of the *constitutio Antoniniana* (AD 212) that extended Roman citizenship to all the inhabitants of the empire, the old distinction between *ius civile* and *ius gentium* dissolved as the distinction between *civis* and *peregrinus* vanished: every free man within the empire was now a citizen, subject to the same Roman law. In fact, however, the imposition of a uniform legal system did not entail the adoption of Roman law pure and simple by the peoples of the empire nor did it result in the disappearance of local systems of law that continued to apply as customary law. In the eastern Mediterranean, in particular, the common Greek culture and language had produced a distinct body of law, whose origins are located in the Greek city-states as well as the Hellenistic monarchies of Syria and Egypt. This body of law operated alongside Roman law and was enforced by officials like the latter law. It did not merely sustain itself in a half-submerged condition, but it contributed distinct elements to the Roman system through a process of cross-fertilization. This process had been operative for centuries but accelerated after the intellectual centre of the empire shifted from Rome to Constantinople in the fourth century AD. This entailed the 'orientalization' or 'Hellenization' of Roman law, and the 'Romanization' of Greek-Hellenistic and other local bodies of law. Similar processes featured in the Western provinces of the empire, but also in Italy and Rome itself. This precipitated a phenomenon that is generally labelled the 'vulgarization' of Roman law.

The term 'vulgar' law refers to the legal views and practices of lay people—a body of 'popular' or 'folkish' law untouched by the artifices of the legal experts. This genuine customary law was initially regarded as supplementary and unofficial.

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[182] See FIRA II, pp. 261–301.

[183] FIRA II, pp. 751–98. See also K.G. Bruns & E. Sachau, *Syrisch-Römisches Rechtsbuch* (Leipzig 1880, repr. Aalen 1961); P. E. Pieler, *Byzantinische Rechtsliteratur* in H. Hunger, *Die hochsprachliche profane Literatur der Byzantiner*, Bd. 2 (Munich 1978), 393 ff.

[184] FIRA II, pp. 635–52; P. E. Pieler, *Byzantinische Rechtsliteratur* in H. Hunger, *Die hochsprachliche profane Literatur der Byzantiner*, Bd. 2 (Munich 1978), 391 ff. N. van der Wal & J. H. A. Lokin, *Historiae iuris graeco-romani delineatio. Les sources du droit byzantin de* 300 *a 1453* (Groningen 1985), 20–24.

Finally, in the fifth century AD it attained recognition as an authentic source of legal norms on a par with imperial legislation.[185] The increasing ascendancy of customary or 'vulgar' law, that is, legal solutions adopted by practitioners at a local or regional level, may partly be attributed to the fact that imperial legislative enactments reached local magistrates and courts, if at all, with great delay and in a piecemeal fashion due to the uncertainty of communications. Moreover, at a time when printed books did not exist, local courts and practitioners had no access to the bulk of the classical legal sources. The enhanced role of custom as a source of law was also reinforced by the fact that while the emperor and his bureaucracy created all law, they were often unfamiliar with the prevailing conditions in the provinces. Thus, many imperial enactments were at variance with local practices and conceptions of justice. Setting aside long-established local customs was not easy and thus the actual implementation of imperial legislation in the provinces sometimes proved an impossible task.[186] But vulgar law did not pertain only to customary law. An important source of vulgar law was also the imperial enactments, which were often influenced by foreign legal ideas and practices. Another factor emerged after the recognition of Christianity in the fourth century AD, when Christian ethics started to exercise considerable influence on certain branches of Roman law, such as family and criminal law.

The body of law that evolved from the interaction between Roman and foreign elements was markedly inferior to the classical system in terms of logic and abstract refinement. Yet, it was closer to the prevailing conditions of life and thus had some practical advantages. Non-Roman influences are detected at many points of the legal system. For example, the importance of the written document (a heritage of the Hellenistic tradition) as a prerequisite for a binding agreement was now generally recognized. At the same time, freedom of contract was promoted by the abandonment of the cumbrous formalism that existed previously. Under the influence of Greek-Hellenistic law, which adopted a narrower conception of paternal authority than Roman law, Emperor Constantine introduced restrictions to the traditional Roman institution of *patria potestas* by conceding that persons *in potestate* could have proprietary rights in certain circumstances. Thus, it was recognized that a child was entitled to the property a mother bequeathed to them, even if the child remained under the *potestas* of their father.[187] The influence of

[185] According to the jurist Hermogenian, an established customary norm had the same force as written law because it was based upon the tacit consent of the citizens ('*tacita civium conventio*'). D. 1. 3. 35; see also D. 1. 3. 32. 1. This view was endorsed by imperial legislation, under the condition that a customary norm did not contradict a written law and had a logical basis. C. 8. 52. (53.) 2 (Constantine): "The Emperor Constantine to Proculus. The authority of custom and long-continued usage should not be treated lightly, but it should not of its own weight prevail to the extent of overcoming either reason or statute."

[186] For example, the institution of *abdicatio* (pertaining to the right of the head of a family to renounce a child) was still implemented during the later imperial period, despite the fact that it was abolished by a *rescriptum* of Emperor Diocletian. See C. 8. 46. (47.) 6.

[187] C. 6. 60. 1. Justinian finally adopted the position that a child *in potestate* could claim ownership over everything he acquired, except when he acquired property from his father. C. 6. 61. 1.

certain Greek customs is also reflected in Justinian's decision to replace the quite complicated *adoptio* procedure of the *ius civile*[188] with a simpler procedure that merely required the father, child and intending adoptor to appear before an official and have the *adoptio* inserted in the court roll.[189] A feature alien to old Roman law that was adopted from the customs of the near East was the *donatio propter nuptias*: a donation by the husband to the wife before the marriage to provide for the wife's domestic needs and to ensure that she had an estate should the marriage be dissolved by divorce or by the husband's death. In the course of time, the tendency developed to regard the *donatio propter nuptias* as existing in the interests of the children rather than the wife. The influence of Christian principles concerning the sanctity of marriage is exhibited in legislative enactments of Constantine and some of his successors that sought to curtail, by imposing severe penalties, the freedom of spouses to declare a divorce without proper justification.[190] Moreover, the prevalence of Christian ethical principles during the fourth century AD entailed disrepute for the institution of concubinate (*concubinatus*), a permanent union between a man and a woman not legally married. Concubinate was discouraged through the introduction of various restrictions on the rights of children born out of such a union (*liberi naturales*). To avert such restrictions, the parents or in some cases the children resorted to some form of legitimation such as legitimation by the subsequent marriage between the parents of such children.[191] In the field of criminal law, the influence of Christian ethics is displayed in the abolition of certain cruel forms of punishment such as crucifixion and gladiatorial combat. This influence is also evident in the introduction of new criminal offences pertaining to the suppression of heretical cults and practices. The list of pertinent illustrations could be easily enlarged.

[188] This procedure entailed the transfer of a person governed by the paternal power of the head of his family to the *patria potestas* of another (*pater adoptans*).

[189] *Inst* 1. 12. 8.

[190] According to a law of Constantine, a wife who divorced her husband without good reason was punished by deportation and loss of her dowry. A husband who did the same was not allowed to remarry. If he did remarry, his former wife could seize the new wife's dowry. However, these penalties did not affect the validity of the divorce. See C. Th. 3. 16. 1.

[191] C. 5. 27. 10.